Korematsu v. U.S. (1944)

Document Based Question for Advanced Placement
U.S. History Classes and U.S. Government Classes

ADVANCED PLACEMENT U.S. GOVERNMENT AND POLITICS TOPICS

The enclosed activities for the Korematsu v. U.S. (1944) lesson will help students address the following parts of the AP U.S. Government and Politics Course Outline:

I Constitutional Underpinnings of United States Government
   A Considerations that influenced the formulation and adoption of the Constitution
   B Separation of powers
   C Checks and balances
   D Federalism

IV Institutions of National Government

V Public Policy...implementation and interpretation of policies

VI Civil Rights and Civil Liberties

ADVANCED PLACEMENT U.S. HISTORY THEMES/LEARNING OBJECTIVES

The enclosed activities for the Korematsu v. U.S. (1944) lesson will help students address the following themes and learning objectives of the AP U.S. History Course:

- **Politics and Power 5**: Analyze how arguments over the meaning and interpretation of the Constitution have affected U.S. politics since 1787.

- **Politics and Power 7**: Analyze how debates over civil rights and civil liberties have influenced political life from the early 20th century through the early 21st century.

- **Identity 3**: Analyze how involvement in international crises influenced public debate about American identity in the 20th century.

In addition, this lesson will help students develop the following historical thinking skills:

- Patterns of continuity and change over time
- Periodization
- Comparison and contextualization
- Crafting historical arguments from historical evidence
- Historical argumentation
- Historical interpretation and synthesis
**Case Background**

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

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

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

ACTIVITIES

1. To prepare students for this lesson, have them read the background essay, Handout A: Korematsu v. U.S., and answer the questions.

2. Lead students to develop a timeline on the board to show the significant events described in the background essay.

3. Ask students: “If your family had 48 hours to dispose of your home, car, and all other property before being forced to move into distant temporary housing, which of your inalienable rights might be in jeopardy?” Discuss: Internees lost liberty AND property. Internees were forced to sell their businesses for terrible losses. For example, Representative Robert Matsui of California was 6 months old when his family was interned. His family had just 48 hours to relocate. His father was forced to sell their house in Sacramento for $50 and simply abandon his small produce business.

4. Assign appropriate documents for student analysis. Divide the class into five groups. Assign each group to study and report on documents as follows: (1) Documents A, B, C; (2) Documents D, E; (3) Documents F, H; (4) Documents G, I; (5) Documents J, K. Conduct a Moot Court according to directions in Appendix, p. 235.

5. After moot court activity, in which students have presented oral arguments and determined how they would decide the case, then guide the class to consider Documents L, M, and N. Compare students’ decisions to Supreme Court’s majority and dissenting opinions.


8. Wrap up by returning to the last question accompanying the Introductory Essay: Should the Constitution’s meaning change during times of crisis?

See Appendix for additional Graphic Organizers.
EXTENSIONS

Have students discuss the following:

- The late Supreme Court Chief Justice, William H. Rehnquist, explored the wartime powers of government in his 1998 book *All the Laws But One: Civil Liberties in Wartime*. He noted the pattern throughout our history, that in times of crisis the government’s powers are magnified regardless of constitutional limits. In his conclusion he wrote, “An entirely separate and important philosophical question is whether occasional presidential excesses and judicial restraint in wartime are desirable or undesirable. In one sense, this question is very largely academic. There is no reason to think that future wartime presidents will act differently from Lincoln, Wilson, or Roosevelt, or that future Justices of the Supreme Court will decide questions differently than their predecessors."

- Use *Document P: Duty of Absolute Candor: Katyal Blog Post (2011)* to discuss the discovery in the early 1980s of documents proving that the government’s attorneys had failed to present in the Supreme Court evidence that might have influenced their ruling in the case. The Supreme Court majority referred to the necessity that judges defer to the recommendations of the Executive Branch and the military during wartime. However, memos from the FBI and the Office of Naval Intelligence explicitly refuting claims of espionage and sabotage by Japanese Americans not shared with the Court. The discovery of this evidence suggests that the policy of internment may have been largely motivated by racial prejudice, as the dissenters in the Court’s opinion maintained. If we discover in the future some evidence of a well-concealed Japanese-American spy ring, how would that affect your opinion of this case?
Assess the Supreme Court’s decision in *Korematsu v. U.S.*

A  The United States Constitution (1789)
B  The Fifth Amendment (1791)
C  *Ex Parte Milligan* (1866)
D  *A Date Which Will Live in Infamy* (1941)
E  Franklin D. Roosevelt’s Infamy Speech (1941)
F  Information Bulletin Number 6 (1942)
G  Executive Order 9066, February 19, 1942
H  Executive Order 9102, March 18, 1942
I  Instructions to Japanese, April 1, 1942
J  *Hirabayashi v. United States* (1943), Majority Opinion
K  Memorandum, Biddle to FDR, December 30, 1943
L  *Korematsu v. United States* (1944), Majority Opinion
M  *Korematsu v. U.S.* (1944), Dissenting Opinion
N  *Ex parte Mitsuye Endo*, December 18, 1944
**DOCUMENT A**

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

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

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

**DOCUMENT B**

The Fifth Amendment (1791)

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

1. **What types of rights does this amendment to the Constitution protect? What is the relationship between them?**

2. **What must the government provide when it tries to deprive someone of these rights?**

**DOCUMENT C**

*Ex Parte Milligan* (1866)

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

1. **This ruling, following the suspension of habeas corpus during the Civil War, held that civilians could not be tried in military tribunals as long as civil courts were operational. How might this reasoning apply to the *Korematsu* case?**
A Date Which Will Live in Infamy (1941)

1. What impression do these images portray? How is that impression related to public reaction to the decision to remove Japanese Americans from their homes along the west coast?
Franklin D. Roosevelt’s Infamy Speech (1941)

December 8, 1941

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

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

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

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

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

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

1. What is infamy?

2. Note the descriptive terms that President Roosevelt used in this speech on the day after the Japanese attack on Pearl Harbor. What is the overall effect of this speech?

3. Why did the President maintain that a state of war “has [already] existed”?

4. According to the Constitution, which branch of government has the power to declare war? (See the Constitution, Article 1, Section 8, Clause 11.)
Information Bulletin Number 6 (1942, emphasis original)

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

JAPANESE ESPIONAGE

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

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

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

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

(signed)

P. M. ROBINETT,
Lieut. Colonel, G.S.C.,
Ass’t Chief of Staff, G-2.

1. Of what dangers does this confidential memo warn?

2. How long after the Pearl Harbor attack was this memo written?
**DOCUMENT G**

**Executive Order 9066, February 19, 1942**

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

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

**DOCUMENT H**

**Executive Order 9102, March 18, 1942**

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

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

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

1. How is Executive Order 9102 different from Executive Order 9066?
DOCUMENT I

Instructions to Japanese, April 1, 1942

1. To whom are these instructions directed? On what date was the announcement posted?

2. What are they instructed to do?

3. What assistance is promised to them?

4. What part(s) of these instructions would be most frightening/unpleasant to you? Why? To what extent would you trust the Wartime Civil Control Administration to safeguard any property left behind in their care?

Image courtesy the National Archives and Records Administration (Records of the War Relocation Authority, 1941 - 1989, ARC Identifier: 537).
Hirabayashi v. United States (1943)

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

Held:

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

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

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

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

1. Of what act was Hirabayashi convicted?

2. Why did the Court hold that the curfew was reasonable?

3. In your opinion, to what extent did persons of Japanese ancestry receive due process?
Memorandum, Biddle to FDR, December 30, 1943

Attorney General Francis Biddle, Letter to President Roosevelt:

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

1. What practice did Biddle describe as “dangerous and repugnant to the principles of our Government”?

2. To what principles do you think he was referring in this warning?

3. Why did he write that it was important to act immediately “to secure the reabsorption [of loyal Japanese people] into normal American life”?
**DOCUMENT L**

**MAJORITY OPINION**

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

In the light of the principles we announced in the Hirabayashi case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did....

Citizenship has its responsibilities, as well as its privileges, and, in time of war, the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when, under conditions of modern warfare, our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger....

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

Affirmed.

1. **According to the majority opinion, why was the exclusion order within the power of Congress?**

2. **What were the “real military dangers” that justified the exclusion order? (See paragraph 3)**

3. **Why do you think this Justice clarified the point regarding racial prejudice?**
Korematsu v. U.S. (1944), Dissenting Opinion

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

1. Why does this dissenting justice object to the majority’s ruling?

2. Put the following phrase in your own words: “The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”
Ex parte Mitsuye Endo, December 18, 1944

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

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

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

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

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

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

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

2. This decision was announced on the same day as Korematsu v. U.S., December 18, 1944. Compare and contrast the two cases. Why do you think the Court’s majority came to such different conclusions in these two related cases?
A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation’s resolve to rectify injustice and to uphold the rights of individuals. We can never fully right the wrongs of the past. But we can take a clear stand for justice and recognize that serious injustices were done to Japanese Americans during World War II.

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

Sincerely,
George Bush

1. Living survivors of internment camps received these letters along with $20,000 as partial restitution for lost property. What constitutional ideals did President Bush mention in his letter?

2. Where did those ideals come from?

3. To what extent do you think the United States lived up to those ideals with respect to the events and aftermath of Korematsu v. U.S.?
Duty of Absolute Candor: Katyal Blog Post (2011)

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

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

Neal Katyal, Acting Solicitor General of the United States.

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

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

The Supreme Court upheld Hirabayashi’s and Korematsu’s convictions. And it took nearly a half century for courts to overturn these decisions. One court decision in the 1980s that did so highlighted the role played by the Solicitor General, emphasizing that the Supreme Court gave “special credence” to the Solicitor General’s representations. The court thought it unlikely that the Supreme Court would have ruled the same way had the Solicitor General exhibited complete candor. Yet those decisions still stand today as a reminder of the mistakes of that era.
Today, our Office takes this history as an important reminder that the “special credence” the Solicitor General enjoys before the Supreme Court requires great responsibility and a duty of absolute candor in our representations to the Court. Only then can we fulfill our responsibility to defend the United States and its Constitution, and to protect the rights of all Americans.


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

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

Subtitle D — Counterrorism

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

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

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

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

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

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

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

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

1. According to this law, who are “covered persons”?

2. What actions against covered persons are authorized by this law?

3. To what extent does this law permit covered persons access to legal representation?
APPENDIX

TEACHER TOOLBOX

Classroom Applications
Case Briefing Sheet
Constitutional Issue Evidence Form
Documents Summary
Attorney Document Analysis
Moot Court Procedures
Tips for Thesis Statements and Essays
Rubric for Evaluating a DBQ Essay on a 9-Point Scale
Key Question Scoring Guidelines for All Essays
CLASSROOM APPLICATIONS

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

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

DBQ Strategies:

- Write the Key Question on the board and give each student a copy of one document. Ask this question: Does this document help you to answer this question? If so, how? If not, what additional information might you need? Allow students 3-4 minutes to answer these questions. Then, have students pair up, sharing their documents and answering the same questions. Have each pair join another and repeat the process. Finally, bring the entire class together and answer the Key Question as a group.

- Write the Key Question on the board and spend one class period having students analyze documents and answer the scaffolding questions, followed by one class period writing their answers to the key question.

- Divide students into pairs or trios and assign one or more documents per group. Then ask groups to report on their documents to the class, being sure that they explain how their specific documents can help to answer the Key Question.

- Go over DBQs as a large group, using scaffolding questions and key questions as discussion prompts.

- Give students the documents from a case and have them craft a key question.

- Have students complete a Case Briefing Sheet (see p. 231) to reinforce key concepts.

- Have students determine for each document which side would be more likely to use it in oral argument of the case. (See graphic organizers, p. 232.)

- Conduct a Moot Court presentation (see p. 235 for directions).

- Lightning Round Moot Court: This strategy might be especially helpful to provide a quick review of a number of cases. Assign two students to each case-one to present the petitioner’s position and one to present the respondent’s. Each student has two minutes to present his/her position to the entire class, which then must vote on this question: Is the law in question a valid exercise of government power under the relevant constitutional principles?

- Have students conduct research to discover more details about the people involved in a case, and then report to the class.

- Develop an illustrated timeline to depict changes and trends in interpretation of a given constitutional principle.

- Develop political cartoons to highlight the important issues in a case.
ONLINE RESOURCES

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

http://billofrightsinstitute.org/resources/educator-resources/landmark-cases/
http://www.oyez.org
http://www.supremecourt.gov/
http://www.law.cornell.edu/supct/cases/name.htm
http://www.scotusblog.com/
CASE BRIEFING SHEET

Case Name and Year: ________________________________

Facts of the Case: __________________________________
________________________________________________________________________
________________________________________________________________________

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

What constitutional principles are indicated in the case? _______________________
________________________________________________________________________

Summary of one side’s arguments: Summary of the other side’s arguments:
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

How would you decide the case and why? _________________________________
________________________________________________________________________
________________________________________________________________________

How did the Supreme Court majority decide the case and why? _______________
________________________________________________________________________
________________________________________________________________________

What were the main points raised in any dissenting opinions? _________________
________________________________________________________________________
________________________________________________________________________

What other Supreme Court cases are related in important ways? _______________
________________________________________________________________________
<table>
<thead>
<tr>
<th>Case Name and Year</th>
<th>Constitutional Issue</th>
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</thead>
</table>

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

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

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

<table>
<thead>
<tr>
<th>Document name &amp; date</th>
<th>Author</th>
<th>Answer to scaffolding question</th>
<th>How each side might use this document to answer the Key Question —OR— What is the main idea of this document?</th>
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<td>Respondent</td>
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<td>Petitioner</td>
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<tr>
<td>Both sides</td>
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Additional notes:

How did majority/dissenting opinions align with each attorney’s position?
MOOT COURT PROCEDURES

Preparation

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

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

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

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

“Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!”

The Chief Justice will begin the oral argument phase by saying, “Petitioner, you may begin.”

The petitioner’s attorney says, “Mr. Chief Justice, and may it please the Court...”

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

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

A good thesis statement—

- Fully addresses all parts of the prompt, while acknowledging the complexity of the issue.

- Clearly takes a side—makes a declarative statement that one thing was more important, more persuasive, etc. than another. Since the verb in the prompt is often something like “assess” or “evaluate,” the thesis statement should show which side the writer takes.

- Suggests a “table of contents” or road map for the essay—shows what elements enter into consideration.

- Begins an essay that is proven by abundant and persuasive facts and evidence.

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

DBQ Do and Don’t

<table>
<thead>
<tr>
<th>Steps</th>
<th>Do</th>
<th>Don’t</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Analyze the prompt and divide it into its components. A graphic organizer helps with this step.</td>
<td>Fully address the prompt. It is better to address all parts of the prompt, even if you must do some in a way that is less complete, than to spend all your time on just one of two parts or 3 of 4 parts.</td>
<td>Neglect part of the prompt because you spent too much time on the part you know more about.</td>
</tr>
<tr>
<td>2. Plan to prove your point. It is best to begin by planning the overall structure BEFORE even looking at the documents.</td>
<td>Organize your thoughts before writing the thesis statement. What are the logical points your essay needs to include?</td>
<td>Write a “laundry list” that simply summarizes each document.</td>
</tr>
<tr>
<td>Steps</td>
<td>Do</td>
<td>Don’t</td>
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<tr>
<td>3. Check the documents to see how you can use them as tools.</td>
<td>Strive to use all the documents; but be sure you accurately understand their main ideas.</td>
<td>Take quotes or ideas out of context to use them in a manner other than the author intended.</td>
</tr>
<tr>
<td>4. Ask yourself when writing every paragraph: “How does this help to prove my thesis?”</td>
<td>Analyze to prove the position asserted in the thesis statement. Analysis is not the same thing as description or narrative. Merely making a series of true statements is not analysis. Key to analysis—is the essay answering the “So what?” question?</td>
<td>Use 1st-or 2nd-person pronouns “I think the Supreme Court has the authority to use judicial review because…” “Have you ever wondered how the Supreme Court got the authority to overturn federal laws?”</td>
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<tr>
<td>5. Manage time wisely; writing long quotes will eat up thinking time.</td>
<td>Use relevant facts, evidence, proof. A well-chosen brief phrase in quotations and worked into your own sentence is powerful.</td>
<td>Use lengthy quotes. Pad the paper in an attempt to conceal a lack of analysis.</td>
</tr>
<tr>
<td>6. Give credit to sources.</td>
<td>Cite sources using the author’s name and/or document title.</td>
<td>Write “According to Document B,...”</td>
</tr>
<tr>
<td>7. Think as you write!</td>
<td>Let logic and analysis drive the essay.</td>
<td>Let documents drive the essay.</td>
</tr>
<tr>
<td>Score</td>
<td>Thesis</td>
<td>Evidence</td>
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<tr>
<td>8-9</td>
<td>Clear, fully developed thesis; links to essay conclusion.</td>
<td>Cites all relevant documents; supports thesis with substantial, relevant information.</td>
</tr>
<tr>
<td>6-7</td>
<td>Mostly developed thesis.</td>
<td>Supports thesis with some outside information.</td>
</tr>
<tr>
<td>4-5</td>
<td>May contain a thesis that addresses the prompt.</td>
<td>Supports thesis with some outside information.</td>
</tr>
<tr>
<td>2-3</td>
<td>May contain a thesis which does not address the prompt.</td>
<td>Supports thesis with little or no outside information.</td>
</tr>
<tr>
<td>0-1</td>
<td>Contains no thesis or a thesis which does not address the prompt.</td>
<td>Includes inappropriate, off-target, or no outside information.</td>
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</table>

Legend:
- Thesis: presents a clear, well-developed thesis that answers the essay prompt.
- Evidence: presents evidence that supports the thesis, using documents as tools to support the thesis.
- Organization: presents a clearly organized essay with language errors that do not interfere with comprehension and do not indicate misunderstanding of the topic.
- Argumentation: presents an argument that links evidence to the thesis.
- Links: presents links to the essay conclusion.

Note: Adapted from AP US History guidelines.
KEY QUESTION SCORING GUIDELINES FOR ALL ESSAYS

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

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

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

The Poor-Below Average Essay
- Lacks a thesis.
- Exhibits inadequate understanding of the question and the documents.
- Offers no application/critique of the Court’s opinion(s).
- Uses very few documents and incorporates no prior knowledge.
- Contains numerous significant errors and is poorly organized and written.
Document A: The United States Constitution (1789)
1. The writ of habeas corpus is the guarantee that a person who is arrested may insist on being taken before a judge for a hearing. If the arresting authorities cannot demonstrate to the judge that they have good cause for detaining the prisoner, he or she must be promptly released. The privilege of the writ of habeas corpus may be suspended only in cases of rebellion or invasion, when public safety does not allow for prompt individual hearings.

Document B: The Fifth Amendment (1791)
1. This portion of the Fifth Amendment provides that the federal government must not take anyone’s life, liberty, or property without following fair and just procedures according to the law. Life, liberty, and property are inalienable rights belonging by nature to every human being.
2. Due process of law

Document C: Ex Parte Milligan (1866)
1. In Ex Parte Milligan, the Supreme Court ruled that, even in wartime or other emergencies, government must follow the rule of law. If government is allowed to ignore its own rules at these times, the result is “anarchy or despotism”. Applying this reasoning to the Korematsu case leads to the conclusion that the government failed to follow the rule of law by forcing law-abiding Japanese citizens and legal residents into holding camps.

Document D: A Date Which Will Live in Infamy (1941)
1. Students may respond that the images portray a sense of shock and panic, and that Japan is responsible for significant death and destruction. In such times people are often willing to take shortcuts in the name of security. Previously existing prejudices against Asian Americans were more likely to come to the surface, so that many people might approve of the decision to round up Japanese Americans and send them to detention camps.

Document E: Franklin D. Roosevelt’s Infamy Speech (1941)
1. Definition of infamy: shameful, criminal, or outrageous act.
2. Descriptive terms include infamy, suddenly, deliberately, obvious, false, uttermost, certain, treachery, grave danger, unprovoked, dastardly. Accept reasoned responses regarding the overall effect of the speech. Students may suggest that the overall effect was to highlight the urgent situation that the Japanese attack created, while conveying a calm and strong sense of resolve in the nation’s response.
3. Beginning from the time that the Japanese attacked, the U.S. was at war, even before Congress could make the official declaration.
4. According to Article 1, Section 8, Clause 11, only Congress has the power to declare war.
Document G: Executive Order 9066, February 19, 1942

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

Document H: Executive Order 9102, March 18, 1942

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

Document I: Instructions to Japanese, April 1, 1942

1. The instructions are directed to all persons of Japanese ancestry within the area indicated in the first paragraph. It was posted April 1.

2. The head of each family is to report to the Civil Control Station on April 2 or 3 for further instructions for the evacuation.

3. Assistance is promised with respect to the following: advice, disposition of property, temporary residence, transportation of people and limited amounts of their belongings to temporary housing.


Document J: Hirabayashi v. United States (1943)

1. Hirabayashi was convicted of violating the curfew order that required all persons of Japanese ancestry to be in their residences between 8 p.m. and 6 a.m.

2. The Court held that the curfew was reasonable because the curfew was a reasonable war measure—“necessary to meet the threat of sabotage and espionage.” The reasoning was that “... in time of war, residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry.” Also, the Court noted that “The Fifth Amendment contains no equal protection clause, and it restrains only such discriminatory legislation by congress as amounts to a denial of due process.”

3. Accept reasoned responses. Students may reply based on Executive Orders 9066 and 9102, that people had very little notice of the various restrictions on their activities.

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

1. According to Biddle, the practice of “keeping loyal American citizens in concentration camps on the basis of race for longer than is absolutely necessary is dangerous and repugnant to the principles of our government.”

2. Accept reasoned responses. The principles to which Biddle seems to be referring may include rule of law, due process, inalienable rights, limited government.

3. Biddle wrote that it was important to act immediately to “to secure the reabsorption [of loyal Japanese people] into normal American life... so that agitation against them would not continue after the war.”
Document L: *Korematsu v. United States* (1944), Majority Opinion

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

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

3. The majority disputed the dissenters’ claim that the exclusion and detention of Japanese Americans was based on racial prejudice. “To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race.” Military leaders determined that it was necessary for the nation’s safety to remove the Japanese from the area, and Congress was correct to trust the military leaders.

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

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

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

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

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

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

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

1. The constitutional ideals mentioned by President Bush were freedom, equality, and justice.

2. The ideals come from our constitutional principles of limited government, equal protection, and due process.

3. Accept reasoned responses with respect to the remaining question.


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

2. Accept reasoned responses.

**The Issue Endures**

1. Covered persons includes anyone who was involved in planning or carrying out the Sept. 11, 2001 attacks on the U.S., as well as anyone connected with Al-Qaeda, the Taliban, or others engaged in hostilities against the U.S.

2. Actions authorized against covered persons include indefinite detention without trial until the end of hostilities.

3. Access by covered persons to legal representation “will be balanced with national security considerations.”

**EISENHOWER AND THE LITTLE ROCK CRISIS DBQ**

**Document A: The United States Constitution (1789)**

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

2. The militia could refer to the National Guard.