



## *Korematsu v. United States*

This moot court is based on the Supreme Court case of *Korematsu v. United States* (1944). This case addresses whether it was beyond the war power of Congress and the Executive to exclude people of Japanese ancestry from the West Coast during wartime and whether this exclusion violates the due process clause of the Fifth Amendment.

The lesson should begin with an overview of the federal and state court system and a brief explanation of appellate advocacy and the difference between a trial and an appellate argument. In order to make the event as interactive as possible in the large group, give the students the summary of the facts followed by a brief discussion of the Supreme Court decision. Students should then be asked to take a stand “for or against” the majority decision. If one side lacks enough support, students should be encouraged to challenge themselves to defend the position they disagree with. Being able to understand and represent the other side’s arguments is the sign of a sharp legal mind.

Once students have taken sides, divide them into three groups, Petitioner (Korematsu), Respondent (US Government) or Supreme Court Justices. The groups can then on their own prepare their arguments to the Supreme Court during the mini moot court. A group of 9 students should be selected to serve as the Justices of the Supreme Court.

In the small groups, have the students discuss the fact pattern and the applicable law.

### **Instructions for the students**

Start is with the BRAINSTORMING SHEET & ARGUMENT SHEET. Review the case, then work through the SHEETS which will help the group prepare their arguments. During the discussion period you will need to select representatives (2-4) who will act as the advocates during the moot court. Students (Advocates) from each side will present a brief argument that reflects their group’s strongest points for an affirmative or negative response to

the question posed. Afterwards the mock Supreme Court will decide the outcome of the case. Students will be instructed that all students on each side can raise their hand to answer questions posed by the Justices of the Court if their advocates need assistance or do not have a satisfactory answer. Advocates will only have 15 minutes to present their arguments to the Supreme Court. Korematsu may reserve up to five (5) minutes for rebuttal which must be done at the start of their oral argument (kindly remind Korematsu to reserve time if he or she forgets as a rebuttal is a powerful tool during oral arguments). The rebuttal should focus on responding to issues that the government raised during their oral argument. You will also need to craft responses to any questions the Supreme Court might ask. The ARGUMENT SHEET is an excellent way to organize your group's thoughts.

# BRAINSTORMING SHEET

Which side do you represent?

Your Group's Arguments (Rank from best to worst):

Opposition's Arguments (Rank from best to worst):

Counterarguments To Opposition's Arguments:

Possible Supreme Court Questions:

Responses To Supreme Court Questions:



## FACT PATTERN KOREMATSU V. UNITED STATES

How do you think the Court should decide the matter?

We will argue and decide it today.

### **BACKGROUND:**

On December 7<sup>th</sup> 1941, the United States naval base at Pearl Harbor was attacked by forces of the Empire of Japan. On December 8<sup>th</sup>, President Franklin Roosevelt asked Congress to declare war against Japan. On February 19<sup>th</sup> 1942, Roosevelt issued Executive Order 90966 that empowered military authorities to require persons seen as a threat to national security to be removed to detention camps. On March 21<sup>st</sup> 1942, Congress passed legislation providing for penalties to enforce any such military orders. Acting under this authority, the commander of the Western Defense Command, General John DeWitt, ordered all persons of Japanese descent to report to locations from which, subsequently, they were sent to camps in various parts of the United States. In total a little over 113,000 persons were affected. Two thirds of them were United States citizens.

Fred Korematsu was a Japanese-American citizen who disobeyed the order to relocate. Korematsu, a natural born citizen, did not report and, after having undergone plastic surgery to change his appearance – he would claim to be of mixed Spanish and Hawaiian ancestry - was arrested for refusal to report. He was convicted in the federal district court and his appeal was rejected by the United States Court of Appeals for the Ninth Circuit. The Supreme Court of the United States heard arguments on the case on October 11<sup>th</sup> and 12<sup>th</sup> 1944 and decided the case on December 18<sup>th</sup>. By the time the case was argued and decided, there no longer was any credible threat by the Japanese forces to the West Coast.

Korematsu challenged the constitutionality of President Roosevelt's executive order and enforcement as being beyond the military's scope in District Court. He argued that the order violated the due process clause of the Fifth Amendment: "No person shall ... be deprived of life, liberty, or property, without due process of law". Korematsu argued that being forcibly removed from his home was a deprivation of liberty and that he was not given a chance in court to contest his treatment in violation of due process. He also argued that the order violated the equal protection guarantees of the Fifth Amendment, which require that the federal government treat all citizens equally, because the exclusion orders deprived Americans of Japanese descent of rights enjoyed by other Americans.

The U.S. government argued that safety interests in times of war or in response to the threat of invasion allow it to imprison American citizens of Japanese descent. The District Court and the Ninth Circuit Court of Appeals agreed with the government and Korematsu asked the Supreme Court to hear his case, which it did in 1944.

By a vote of 6-3, the Supreme Court upheld Korematsu’s conviction. Justice Hugo Black wrote the opinion of the Court. Black acknowledged that “[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions, racial antagonism never can.” For Black and the other members of the Court’s majority, however, “when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger. . . .” In other words, race may be used to classify if there is a compelling state interest.

For Justice Frank Murphy, one of the three dissenters, “Being an obvious racial discrimination, the order [by General DeWitt] deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment.” Murphy also challenged whether the danger was “so ‘immediate, imminent, and impending’ as not to admit of delay. . . .” Justices Owen Roberts and Robert Jackson argued, in separate dissents, that Korematsu was deprived simply of due process. For Jackson, the Court’s decision violated the “fundamental assumption underl[y]ing our system. . . that guilt is personal and not inheritable. . . . But here is an attempt to make an otherwise innocent act a crime merely because the prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no means to resign.”



## ARGUMENT SHEET

**Look over these arguments below. Note whether they help Korematsu (Appellant or Petitioner) or the United States government (Appellee or Respondent). You can also decide the arguments help both sides (B) or neither side (N).**

1. \_\_\_\_\_ In 1943, a year before our case, the Supreme Court in *Hirabayashi v. United States* upheld a curfew enforced exclusively on people of Japanese descent, arguing that racial discrimination is sometimes justified in war time because “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. Nor can we deny that Congress, and the military authorities acting with its authorization, have constitutional power to appraise the danger in the light of facts of public notoriety.” Therefore, the curfew was a protective measure that served an important national interest. (Precedent is a powerful argument in our judicial system because judges are bound by previous interpretations of the law).

2. \_\_\_\_\_ In the *Hirabayashi* case, the Chief Justice explicitly stated that the only issue they were deciding was the narrow question of the constitutionality of the curfew and nothing more. A curfew is less intrusive than being forcibly removed from your home. (Distinguishing a precedent can be a powerful argument to convince a judge that they are dealing with a new issue that can’t be settled by applying the arguments from a prior case).

3. \_\_\_\_\_ Military leaders determined that an indeterminate number of citizens of Japanese descent were disloyal but it would be impossible to quickly segregate the disloyal from the loyal. Evidence at a congressional hearing showed that five thousand American citizens of Japanese descent refused to swear unqualified allegiance to the United States and renounce allegiance to the Emperor of Japan.

4. \_\_\_\_\_ “Military necessity” sometimes requires suspension of constitutional protections. The United States was just attacked and the temporary relocation orders were reasonably related to the threat of espionage, sabotage, and invasion that was so immediate, imminent, and impending that individual trials guaranteed by the due process clause of the Fifth Amendment would be impractical.

5. \_\_\_\_\_ Relocation orders are not reasonably related to military necessity when they rely on the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage, espionage, and invasion.

6. \_\_\_\_\_ Commanding General DeWitt who issued the exclusion orders and internment orders harbored racist beliefs. In an official report he referred to all individuals of Japanese descent as “subversive” and belonging to “an enemy race.” During congressional testimony he said: “I don’t want any of them here. . . . It makes no difference whether he is an American citizen, he is still a Japanese. . . . [W]e must worry about the Japanese all the time until he is wiped off the map.”

7. \_\_\_\_\_ The government says that the inability to ascertain which Americans of Japanese descent were disloyal and which were not justified discrimination against the entire group. The dictatorial tyrannies of enemy regimes use this same argument to support their horrific treatment of minorities. Our democracy says that individual guilt is the only basis for deprivation of rights.

8. \_\_\_\_\_ The Constitution grants the government the power to wage war successfully. Military necessity must sometimes permit unequal treatment of races and suspension of full due process rights to trial when those very democratic rights face an existential threat from an enemy who would destroy them.

9. \_\_\_\_\_ The “military necessity” argument requires deferring to military judgment, and there is no way to limit what rights we may lose in the future if we grant it. In *Hirabayashi*, we affirmed that wartime made a racist curfew ok, now we are being asked to make racist internment camps ok. This is a slippery slope and we will have no recourse in the future when the military defends an even more shocking constitutional violation under the guise of military necessity.

10. \_\_\_\_\_ Americans of Japanese descent suffered some recorded instances of violence. Wartime detentions of Japanese were necessary to protect them from a general public that according to a congressional report was “ready to take matters into its own hands.”



You are a Supreme Court justice hearing the Korematsu case. Please answer the following questions.

**REMEMBER TO REFERENCE THE FACTS OF THE CASE AND THE CLASSIFYING ARGUMENTS.**

1. Pretend that you are listening to the oral arguments of the attorneys representing Fred Korematsu. What two questions would you ask?
  - A.
  - B.
  
2. Pretend that you are listening to the oral arguments of the attorneys representing the U.S. government. What two questions would you ask?
  - A.
  - B.
  
3. At the conclusion of hearing the case, you have to write a court opinion ruling either in favor of Korematsu or the government. Remember, if you are ruling in favor of Korematsu, then you are arguing that the relocation orders violated his right to equal protection and fair process of the laws. If you are ruling in favor of the government, then you are arguing that relocation was constitutionally permissible under the circumstances.



**Resources**

<https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-korematsu-v-us>

<https://www.oyez.org/cases/1940-1955/323us214>