

Discussion 6: Wartime Constitution, part II

The biggest unanswered question in wartime constitutional law is: do the branches of government have the ability to suspend the constitution in times of emergency or war?

There are many views on this issue:

- Some say that the greater the emergency, the greater the leniency required when interpreting the Constitution
- O'Connor says that the state of war cannot be a blank check for the president to do what he wants. Examples: President Truman seizes the steel mills during the Korean War, imprisonment of citizens, etc. Any time the government does something under its war power that could violate or override other constitutional rights

Continuity vs. rupture: some justices say we need continuity of precedent and war does not and should not interrupt the continuous and consistent application of constitutional principles. Rupture says that war wipes the slate clean and requires a new set of precedents specific to the circumstances of war. The rationale for continuity says that the Constitution underlies our entire system and we must always be vigilant to protect the values of liberty and freedom it supports. Rupture says that when there is a circumstance (such as a war) that threatens the whole constitutional system, we must be able to relax the Constitution to deal with the extenuating circumstances in order to ensure the survival of the overall system.

Discussion of Ex Parte Quirin, 1941

Case Facts:

- Agents of the German government were trained and sent to the US via German subs
- They land in the US wearing German military uniforms and then change into civilian clothes once they get to US shores (they do this so that if caught, they are protected as prisoners of war)

Why does it matter what clothes people are wearing?

This is based in a traditional code of honor associated with military conduct. Guerilla warfare is seen as dishonorable in the traditional view of war. Belligerents are expected to identify themselves as having belligerent intentions to give fair warning to those around them. This idea is based upon the notion that civilians of a nation at war are not a legitimate wartime target.

What is your status if you are not entitled to prisoner of war status and are found in belligerent territory?

Unlawful belligerent, now often called an *enemy combatant*. Enemy Combatants are not protected by international law and thus can lawfully be executed. However, they are protected from torture, though enforcement of such protections is difficult.

[An aside about international law of war: Most of the rules are government by international treaties. Current laws of war are mostly covered by the Geneva Convention (ratified by Senate around 1944).]

One of the combatants was a US citizen and sues for his right to a trial by an impartial jury.

Constitutional arguments at stake:

- US government says Constitution does not apply to enemy combatants
- The enemy combatant says that the Constitution does apply to him because he is a citizen and should be granted the right to a fair trial by an impartial civilian jury.

Conclusions of the opinion:

- This is a matter of US military policy and intelligence leading to the saboteurs' capture should not be exposed, thus military tribunal is an appropriate trial venue. "Military necessity justifies..."
- Congress has authorized a trial by military tribunal for offenses against the law of war
- The 5th and 6th Amendments were intended for citizens, therefore, prisoners are not entitled to bring a writ of habeas corpus.

Class debate of Korematsu vs. United States, 1944

Circumstances:

During WWII, the military claimed to have intelligence indicating that there were disloyal citizens of Japanese descent helping the Japanese military coordinate an attack on US soil. As a result, the Commanding General of the Western command issues Civilian Exclusion Order (Order No. 34) to evacuate people of Japanese descent from zones along the coast to inland camps to prevent communications with the Japanese enemy.

Korematsu was convicted of staying in a prohibited military zone contrary to the Civilian Exclusion Order. Korematsu challenges the Constitutionality of the order.

Arguments of the United States:

- National security concern that potentially disloyal citizens could facilitate a Japanese invasion. It was necessary for the military to prevent this from happening.
- Korematsu has no standing to bring suit against the provisions requiring relocation in the camps because he did not submit to the exclusion and relocation orders.
- Forcing people to vacate the coast to avoid potential spy contact with Japan, which was conspiring to attack the US, is a reasonable exercise of war power

Arguments of Korematsu

- 5th Amendment prohibits deprivation of liberty and property
- 15th Amendment protects right to vote, if removed from home this right is violated
- 5th Amendment requires equal protection of the law. Singling out Japanese citizens violates equal protection

The court holds that there was a military necessity to prevent espionage and sabotage and that the orders were based on constitutionally delegated powers of Congress.

Other notes:

In *ex parte Endo*, the actual internment of concededly loyal American citizens of Japanese descent was found to have exceeded the federal government's authorities.

Bill of attainder: laws passed targeted at specific individuals, prohibited by the Constitution