

By Eli Lesser

## Individual Rights in Times of War

### Overview

The United States Constitution was designed to check and balance the power of each branch of government. The Constitution includes provisions to ensure that this delicate balance is protected in times of both peace and war. The framers understood that when a nation is at war, tyrants can easily arise given the need to provide a quick solution and momentary safety from the enemy. Therefore, they enacted procedures to protect the nation from investing too much power into the hands of the few.

Even with these protections, liberties have been challenged, curtailed, or denied to individuals at a few key moments in American history. In this lesson, students will examine three episodes:

- Formal suspension of the writ of habeas corpus during the Civil War (1861–1865)
- Internment of individuals of Japanese ancestry during World War II (1941–1945)
- President Bush's policy decision to try noncitizen enemy combatants through military tribunals (Military Order of November 16, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism).

A downloadable backgrounder about these episodes may be found on Insights Online.

Students will begin the lesson by reacting to a statement by Justice Sandra Day O'Connor, taken from her opinion in the case of *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). Students will then work in cooperative groups to discuss how the Congress and the U.S. Supreme Court responded to the exercise of executive power in each example. Each group will examine a set of primary and secondary source documents to help them analyze the actions of the President, Congress, and the U.S. Supreme Court.

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### Lesson

1. Ask students to quick-write for 5–7 minutes on the following statement and questions:

*We [Supreme Court] have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Justice Sandra Day O'Connor, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004)*

*Do you agree or disagree, and why?*

*Do you think noncitizens should have the same rights in times of war as citizens? Why?*

2. Ask each student to share his or her response and rationale with the class. Collect each quick-write and keep it so students can refer back to it at the end of the lesson.

3. Referring to the U.S. Constitution, review briefly congressional (Article I, Sec. 8) and executive (Article II, Sec. 2) war-related powers.

4. Explain to the class that students will be examining two episodes in American history and a contemporary example of government war policies to evaluate whether they affected individual rights and whether the three branches of government checked and balanced the powers of the other.

5. Ask what individual rights or civil liberties are? Brainstorm answers. Go over this term and other concepts for the lesson. (A Key Terms and Concepts Handout is available on the *Insights* Web site in the Learning Gateways section for this issue.)

6. Divide the class into three groups, or if size requires, sets of three groups. Assign each group to investigate and piece together one episode that they will then explain to the entire class by examining the primary and secondary source materials. *Please Note: Many of these materials are provided courtesy of Justice Learning, and links to them on the Justice Learning Web site are available on the Insights Web site.* Documents to examine include:

#### *Civil War Suspension of the Writ*

- President Lincoln’s Executive Order Suspending Habeas Corpus—September 24, 1862
- “Highly Important from Washington” *New York Times*—October 22, 1862
- *Ex Parte Milligan*, questions presented and decision summary
- *Ex Parte Merryman*, questions presented and decision summary

#### *World War II Internment*

- President Roosevelt’s Executive Order 9066—February 15, 1942
- “800 West Coast Japanese Go to Enemy Camps As Army Maps Widened ‘Prohibited’ Zone” *New York Times*—February 24, 1942
- *Hirabayashi v. United States*—December 18, 1944
- *Korematsu v. United States*—December 18, 1944
- “Upholds DeWitt Evacuations” *The New York Times*—December 3, 1943
- “High Court Backs Japanese Curfew” *New York Times*—June 22, 1943

#### *The War On Terror*

- Detainee Treatment Act of 2005
- President Military Order—November 13, 2001

- Authorization for Use of Military Force—September 18, 2001
- “Bush Sets option of Military Trials in Terrorist Cases” *New York Times*—November 14, 2001
- *Rasul v. Bush*, questions presented and decision summary
- Law Review, “Can Enemy Combatants Be Tried by Military Commissions?” (See p. 22.)

7. Give each group the handout “Individual Rights/Civil Liberties: Questions to Consider.” Ask each group to prepare a 5–10 minute report. Give the groups plenty of time to analyze the documents. Check in with each group to see what kinds of questions remain unanswered after their examination of the primary source documents (listed above). Point them toward the Justice Learning module “Civil Liberties in War Time”(www.justicelearning.org/) for further investigation.

8. Once each group has completed its investigation, reassemble the class as a whole. Create three columns on the board, one for each episode. Ask a member of the group to present the report. Capture notes on the report in the appropriate column on the board.

9. Once all groups have completed their reports, discuss the similarities and differences of each example. How did each branch of government exercise its power? How did they cooperate? What areas of conflict emerged? How did each branch check and balance the power of the other, or fail to do so? Did government policies in each example affect individual liberties, and if so, how? Be sure to discuss who was affected—citizens and/or noncitizens.

10. Once again, ask students to quick-write in response to Justice O’Connor’s

### Handout, Individual Rights/Civil Liberties: Questions to Consider

1. What happens in your scenario?
2. What policy does the President adopt?
3. What are the President’s rationales?
4. How, if at all, does the policy affect individual rights/liberties?
5. What constitutional authority does he cite in taking the action?
6. How does Congress respond?
7. Under what constitutional authority does Congress respond?
8. How does the Supreme Court become involved?
9. How does the Supreme Court respond? (Give a brief summary of the case(s).)
10. What is the final outcome of the interactions among the three branches of government over the policy?

statement in *Rumsfeld v. Padilla* with which you began the lesson. Return their original quick-writes and ask them to make a few notes to themselves about how, if at all, their responses changed, and what their rationales may be.

11. Reassemble the class. Conclude the lesson by asking (1) Did your responses change, and if so, why (or why not); (2) What roles do you think the President, Congress, and Supreme Court should play in balancing rights and liberties during times of war? Why? Do you think that citizens should have greater protections under the Constitution than noncitizens? Why?