

THE SUPREME COURT AND INDIVIDUAL RIGHTS:  
AN EXAMINATION OF GOVERNMENTAL SECURITY CASES

by

A. BRUCE JONES  
POLITICAL SCIENCE

Submitted in Partial Fulfillment of the Requirements of the  
University Undergraduate Fellows Program

1977 - 1978

Approved by:

A handwritten signature in black ink, appearing to read "Bonnie E. Browne". The signature is written in a cursive style with a horizontal line underneath the name.

Bonnie E. Browne

April 1978

## ABSTRACT

THE SUPREME COURT AND INDIVIDUAL RIGHTS: AN EXAMINATION  
OF GOVERNMENTAL SECURITY CASES (APRIL 1978)

A. BRUCE JONES TEXAS A&M UNIVERSITY

UNDERGRADUATE FELLOWS ADVISOR: MS. BONNIE E. BROWNE

The purpose of this paper is to help determine how well the Supreme Court has performed its role as the ultimate "guarantor" of individual rights. To do so, a sample of Supreme Court cases involving governmental security was examined for the effect of extraneous factors on the Court's rulings. Governmental security cases were chosen because of their nature of usually involving some limitations on individual rights. Ninety-nine cases were examined for such factors as military influence, existence of a state of war, race, and ideology. These factors were drawn from an actual case of individual rights violation -- "Korematsu v. United States".

It was found that rulings favorable to the government, and against individual rights, were made at a significantly higher rate when military influence or a state of war existed in a case. The tests on the race and ideology factors were inconclusive. It was concluded that although the Supreme Court is generally regarded as the ultimate guarantor of

individual rights, there have been instances when outside factors have contributed to the Court's ruling against individual rights.

DEDICATED TO

all those of Japanese ancestry  
who were forced from their homes  
and into "detention" camps during  
World War II.

## ACKNOWLEDGEMENTS

The author would like to express his gratitude and appreciation to his University Undergraduate Fellows Program advisor, Ms. Bonnie E. Browne, without whose help and guidance the writing of this paper would not have been accomplished.

I would also like to thank Ms. Vi Burke for encouraging me to participate in the program and everyone else who administered and/or participated in the UUF Program.

Finally, I would like to thank my parents for providing an environment which taught me to respect the rights of others.

TABLE OF CONTENTS

	Page
ABSTRACT. . . . .	ii
DEDICATION. . . . .	iv
ACKNOWLEDGEMENTS. . . . .	v
TABLE OF CONTENTS . . . . .	vi
LIST OF TABLES. . . . .	vii
INTRODUCTION. . . . .	1
PART	
I. THE SUPREME COURT. . . . .	3
II. "KOREMATSU v. UNITED STATES". . . . .	7
The Majority Opinion. . . . .	8
Murphy's Dissent. . . . .	9
Hypotheses Derived. . . . .	10
III. RESEARCH DESIGN. . . . .	12
The Data. . . . .	12
Variables. . . . .	13
IV. DATA ANALYSIS. . . . .	18
V. CONCLUSIONS. . . . .	24
FOOTNOTES. . . . .	26
BIBLIOGRAPHY. . . . .	28
VITA. . . . .	30

LIST OF TABLES

TABLE		Page
1	Supreme Court Rulings by Content of Cases. . . .	19
2	Supreme Court Rulings by Military Involvement. .	20
3	Supreme Court Rulings by State of War. . . . .	20
4	Supreme Court Rulings by Military Involvement Controlling for State of War. . . . .	21
5	Supreme Court Rulings by Race. . . . .	22
6	Supreme Court Rulings by Ideology. . . . .	23

## INTRODUCTION

A major aspect of the Carter administration's foreign policy has been its emphasis on human rights. This emphasis has brought angry denunciations of the United States from countries accused by the Carter team of human rights violations. An important part of these denunciations has been accusations that the United States has been guilty of numerous violations of individual rights in its past. Critics cite as examples our treatment of blacks and American Indians, and FBI surveillance violations. Some of these accusations are no doubt true. However, a more important question is whether the United States provides effective channels to insure that violations of individual rights can be prevented from continuing. Primarily because of two factors, the court system has become the channel in which the fight for individual rights has occurred. One of these factors is that judicial review gives the courts the power to interpret a document, the United States Constitution, which contains many of our individual rights. The second factor is the American tendency to resolve conflicts and exert rights through litigation. (Obviously, these two factors reinforce one another.) An overall purpose of this paper will be to examine how effective a channel the court system, specifically the Supreme Court,



has been in protecting individual rights. To achieve this purpose, I will examine some factors which might lead to the defeat of individual rights in the courts. These factors are drawn from a major instance of violation of individual rights (the Japanese exclusion case of World War II--"Korematsu v. United States") and are examined in cases of "lesser" impact. The medium for this examination will be Supreme Court rulings in government security cases. The nature of security cases is that the government feels threatened in some way. The response to this threat often leaves individual rights extremely subject to violation. Thus, governmental security cases provide an excellent area to view the practices of the Court in cases involving individual rights. To accomplish this task, the research was divided into five sections: the Supreme Court, "Korematsu", the research design, data analysis, and conclusions.

# I

## THE SUPREME COURT

The Supreme Court of the United States was established by Article III of the Constitution. Its early history was one of struggle and weakness. The Court was by far the weakest of our three branches of government. During its first three years of existence, it had no cases to decide. A number of capable men, such as Patrick Henry and Alexander Hamilton, turned down justiceships because of the Court's lack of prestige and power. It held sessions in such places as basement apartments and Capitol committee rooms.<sup>1</sup> Gradually though, the Court gained in power and prestige, mainly because of the strong leadership of the fourth Chief Justice, John Marshall. In *Marbury v. Madison*, Marshall wrote an opinion which helped establish the Court's power of judicial review. "Judicial review can be defined as the power possessed by American courts to declare that legislative and executive actions are null and void if they violate the written Constitution."<sup>2</sup> Thus, judicial review puts the Supreme Court in the role of ultimate "guardian" of the Constitution. Since the Constitution contains most of the classic individual rights (mostly those listed in the Bill of Rights such as, freedom of speech and religion,

4

right to due process of law, and freedom from unreasonable search and seizure) and the Supreme Court interprets the Constitution, it is easy to see why the Court has evolved to the extent that it may be considered the foremost guarantor of individual rights and liberties. Court support for these liberties reached a pinnacle with the Warren Court, many of whose members "viewed the Court as the ultimate guardian of constitutional rights."<sup>3</sup> This attitude led to expansions of individual rights in many areas, especially the rights of the criminally accused. All of this is not to say that the Supreme Court is an absolute guarantor. It has shortcomings, as far as the protection of individual rights goes, which limit the amount of protection it can provide. These shortcomings include jurisdictional, procedural, and political difficulties.

Concerning jurisdiction, the Court has no self-starting capacity. It cannot pick out an instance of violation of individual rights and rule upon it unless there is a "case or controversy". The violation has to get into the court system before it can be ruled upon. This ties in closely with procedural problems. A case must go through litigation in the lower courts before the Supreme Court can decide on it. Together, these problems can cause long delays in deciding the constitutionality of various laws. For example, the Smith Act of 1940 was not ruled upon by the Court until 1951.<sup>4</sup> During these delays, individual rights may continue to be violated or an impasse might result which prevents the execution of a

"basic" right.

In addition to jurisdictional and procedural limitations, politics can have a negative impact on the Court's role as ultimate guarantor of individual rights. Congress can either pass another law or start a Constitutional Amendment after the Court has ruled a law unconstitutional. In fact, according to Article III of the Constitution, Congress has the power to limit or expand the appellate jurisdiction of the Court. Thus, it is conceivable that some matters could be put out of reach of the Court's grasp. The President also holds a political force over the Court by virtue of his appointive powers. Since this power means Presidents decide who interprets the Constitution (and thus individual rights), the appointment power is a serious limitation on the Court's role as ultimate guarantor.

While it is true that all these factors present problems for the Court in protecting individual rights, they are limitations of a general, hard-to-test nature. Other factors may exist within the specifics of certain cases, especially if these cases involve instances where the government feels threatened. In such instances, the practices of the Court may contrast with some of the doctrines the Court has used in protecting individual rights. A number of these specific factors are the concern of this paper. They are drawn primarily from what most historians regard as the worst violation of individual rights allowed by the Court since slavery. This was the Japanese exclusion case of World War II, "Korematsu v.

United States". Hopefully, by taking factors from an actual<sup>6</sup> case, some testable hypotheses can be drawn about the practices of the Court, as opposed to its doctrines, in its role as the ultimate guarantor of individual rights.

## II

### "Korematsu v. United States"

"Korematsu" involved such basic individual and constitutionally specified rights as equal protection under the law, right to due process, and right to property. What follows is a brief summary of the facts of the case:

Shortly after America's entrance into World War II, the President issued an executive order that authorized the creation of military areas from which persons might be excluded in order to prevent sabotage and espionage. Military commanders were further authorized to prescribe regulations concerning the right of persons to enter, leave, or remain in these military areas. Penalties for violations of the military regulations were provided by an act of Congress. Acting under this executive and legislative authority, the commanding general of the Western Defense Command divided the entire Pacific Coast region into two military areas. Various restrictions were then imposed on certain classes of persons living in the military districts. The commanding general first imposed a curfew that applied only to aliens and persons of Japanese ancestry. In "Hirabayashi v. United States", the Supreme Court upheld the curfew order as a proper wartime measure.

Later, the commanding general ordered the compulsory removal of all persons of Japanese ancestry to War Relocation Centers. Korematsu, who was one of the American citizens of Japanese ancestry subject to removal to relocation centers, refused to leave his home in California. He was convicted in a federal district court for knowingly violating the exclusion order. A circuit court of appeals affirmed the conviction. Korematsu then brought the case to the Supreme Court on a writ of certiorari.<sup>2</sup>

The Supreme Court was thus presented a case that involved the rights of over 112,000 persons. The exclusion had taken place in 1942. The case was being decided in 1945, a time

when nearly all those whom had been imprisoned were free.

The Court's task was clear. It must decide if it should put its stamp of approval on what had already been done or else state that a large group of Americans had been illegally wronged.

### The Majority Opinion

The majority opinion was delivered by Justice Hugo Black. Justice Black would later become the leader of the judicial activists on the Warren Court,<sup>6</sup> that group which viewed the Court as the ultimate guardian of constitutional rights and felt the Court must play a positive role in protection of individual liberties. In this case, however, Black allowed the violation of the individual rights of thousands of citizens to stand.

Black's opening remarks provide a touch of bitter irony to the case. He states, "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect, but that is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."<sup>7</sup> In this case, the majority's rigid scrutiny was sadly lacking. The Court chose to allow the exclusion order as a proper wartime delegation of power by the President and Congress. The majority refused to apply any "clear and present danger" standard to the military authorities actions. In fact, the majority refused to question the military authority at all. "We cannot -- by availing ourselves of

9  
calm perspective of hindsight -- now say that at that time these actions were unjustified."<sup>8</sup> If the majority had chosen to apply some standard to the military's actions, they would no doubt have reached a different decision. Justice Frank Murphy did, and his dissenting opinion reveals the inadequacy of the majority opinion.

### Murphy's Dissent

"This exclusion . . . goes over 'the very brink of constitutional power' and into the ugly abyss of racism."<sup>9</sup> With those powerful, yet eloquent words, Justice Murphy began a dissent that shattered the majority opinion. Murphy gives the case the "rigid scrutiny" that Black talked about, but which the majority opinion failed to do. Murphy applies the "clear and present danger" standard (or "immediate, imminent, and impending" standard as he phrases it) to the military authorities actions. "Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled."<sup>10</sup> Murphy found that this military action failed miserably when subjected to the "judicial process". Murphy concluded that the exclusion action was taken based on "racial guilt" rather than fear of espionage



and sabotage. He supported this with information from the Final Report on the exclusion by the commanding general of the Western District. "In it he refers to all individuals of Japanese descent as 'subversive', as belonging to 'an enemy race' whose 'racial strains are undiluted', and as constituted 'over 112,000 potential enemies...at large today' along the Pacific Coast."<sup>11</sup> Yet, despite this overwhelming evidence, the majority refused to overturn the exclusion order, thus allowing a massive violation of individual rights to stand.

### Hypotheses Derived

What factors might have caused the Supreme Court to allow such a violation? Three are immediately evident from the majority opinion -- governmental security, military influence, and existence of a state of war. Taking the first as a type of case where governmental will almost always conflicts with individual rights, governmental security cases become logical candidates as units of analysis. The other factors form the basis for the two primary hypotheses this paper concerns.

- H1. In a case involving governmental security, the Supreme Court is more likely to uphold the conviction if military influences are involved.
- H2. In a case involving governmental security, the Supreme Court is more likely to uphold the conviction if it happens during a state of war.

From Justice Murphy's dissent comes another factor -- race.

- H3. In a case involving governmental security, the Supreme Court is more likely to uphold the conviction if the defendant is a member of a minority race.

Having explored "Korematsu" for factors which might affect protection of individual rights in specific cases, I decided to test the influence of these factors systematically.

### III RESEARCH DESIGN

The purpose of my research design was to find all Supreme Court cases involving governmental security and individual rights and to code these cases for the presence of the aforementioned factors -- military influence, existence of a state of war, and race -- in order to test my hypotheses.

#### The Data

For the purposes of selection of cases for analysis, governmental security cases were defined as Supreme Court cases where the government (be it state or national) had taken action in order to protect itself from overthrow, espionage, sedition, or some significant loss of power (primarily the power to wage war). These cases were obtained through use of the West Publishing Company's Supreme Court Reporter Digest, including the "Descriptive Word Index". Of the 420 broad topics the West system classifies law into, "Insurrection and Sedition" showed the most promise for the type of cases of interest to this research. A preliminary list of cases was drawn from this classification. This list was supplemented by citations within these cases, and finally, by referring to books containing Supreme Court case excerpts

under such varying topics as civil rights, war powers, and security.<sup>12</sup> A sample of ninety-nine government security cases was obtained. These ninety-nine cases covered the years 1915 to 1973. While the ideal would have been to examine every decision in Supreme Court history for elements of government security and individual rights, this was not done due to time restrictions, the failure of West's classifications to completely correlate with the type of cases I desired, and the limited library resources available for recent cases. Since all cases could not be examined, the years 1915 - 1973 were chosen since they roughly coincide with the United States' first and, hopefully, last wars of this century. Since a systematic search, relying on classification as a starting point, was used, I probably have not missed many cases for the time period specified. However, the group obtained is probably not quite a universe, especially for the more recent years. Still, the adequacy of the sample is confirmed by the fact that in later cases the citations were largely to those cases already in the sample.

#### Variables

Having selected the cases for study, I read each case to determine if any of the hypothesized factors were involved. A preliminary examination of these cases produced a fourth factor --ideology-- which led to another hypothesis.

H4. In a case involving governmental security, the Supreme Court is more likely to uphold the conviction if the defendant has "extremist"<sup>13</sup> ideological beliefs.

The selection and coding of these cases required a number of decisions and produced numerous problems as to criteria applied.

#### Governmental Security

Cases were classified as governmental security cases according to the definition stated earlier. Not all cases under "Insurrection and Sedition" qualified as security cases. For example, "Sterling v. Constantin" was more a power struggle between oil producers and a governor than an instance of sedition.<sup>14</sup> The Court recognized it as such. Many of the cases cited within security cases did not qualify as such cases themselves. They involved points of law or issues which did not concern governmental security, such as racism, obscenity, libel, and "fighting words". One category of cases which was difficult to handle was what I termed "enforced patriotism" cases. The deciding factor was whether the patriotism was enforced for symbolism's sake (such as protecting the flag) or out of fear that people who were not patriotic were seditious (such as loyalty oaths). The former were excluded, the latter included. One case was included which did not actually involve security, but the principle the ruling was based on seemed cause for inclusion.<sup>15</sup>

### Military Involvement

Military involvement was coded according to the primary "influence" behind the law or prosecution involved. The cases were coded either as military or civilian. Usually the military influence was clear, such as in cases involving draft laws or military wartime powers. If the military influence was not evident from the text or nature of the case, no effort was made to "read between the lines".

### Ruling

The ruling was coded in a simplified way as either upheld or overturned. Basically, upheld meant governmental security won and overturned meant individual rights triumphed. In this way, if the government was appealing and the Court upheld the previous court's ruling, this was actually coded as overturned. Reversed and remanded and injunctive relief granted to an individual were similarly classified as overturned when the individual was the appellant. Finally, if the Court claimed no jurisdiction or denied appeal with a major dissent, the ruling was classified as upheld if the individual was the appellant.

### Race

Race was coded as white, non-white, and dark. Whites and non-whites (blacks and Orientals) were obvious. Dark was for those of Latin or Southern European extraction. Where race

was not mentioned, the individual was classified as white. In one instance, a white appellant was classified as non-white because he was representing a black cause.<sup>16</sup>

#### War/Non-war

If the date the case was decided by the Supreme Court was during World Wars I or II, or during the Korean or Vietnam conflicts, the case was coded war. In a few cases where the issue obviously stemmed from wartime, the case was coded war although it might have been decided slightly after the end of hostilities. All other cases were coded non-war.

#### Ideology

Cases were coded for this variable as either Socialist, Communist, Pro-German, Pacifist, non-ideological, religious, or Ku Klux Klan. Since the importance of this variable depended on the Court's perception of the individual, if the accusation involved one of these ideologies, the individual was classified accordingly. Therefore, in loyalty oath or contempt of Congress cases, if the date of the case corresponded to Red Scare periods, the individual was classified as Communist, regardless of whether it was actually shown that he held this belief.

#### Content

One additional factor was coded on each case, based on a

brief description that was kept for all coded cases. This was content. The categories were anti-draft/anti-war, contempt, loyalty oaths, subversion/espionage (or threat thereof), deportation of alien, and miscellaneous. No specific hypotheses were made concerning this variable. The coding was done in order to classify the cases and to compare with results obtained on the other variables.

After completion of all the coding, the data were transferred to computer cards to be analyzed by crosstabulations. Each hypothesized factor, plus content, was run against the rulings in the cases. In addition, this was repeated controlling for various categories of each variable.



IV  
DATA ANALYSIS

The results obtained were extremely interesting. One phenomenon was noted from a preliminary, non-systematic examination of the cases. This was the tendency for the cases to go in cycles. In certain types of cases, first the individual is ruled against, then the decisions are divided between upheld and overturned, and gradually the individual's rights win out conclusively. This trend in cases involving constitutional questions has been noted by Edward R. Levi.<sup>17</sup> In this instance, three possible explanations are: 1) the Court becomes more sympathetic to individual rights the more the Court sees cases involving these rights, 2) the Court is more sympathetic to individual rights after the time of stress, such as war, has passed, and 3) the composition of the Court has changed, with Justices more sympathetic to individual rights being appointed. A combination of these three is probably the answer. This is a promising area for future research.

To introduce the data, the content variable will be examined first. Table 1 shows the number of cases according to content and the rulings in each category.

TABLE 1  
SUPREME COURT RULINGS BY  
CONTENT OF CASES

<u>CONTENT</u>	<u>RULING</u>		
	<u>UPHELD</u>	<u>OVERTURNED</u>	<u>TOTAL</u>
Anti-draft/ Anti-war	85.0% N=17	15.0 N=3	100.0 N=20
Loyalty Oaths	32.0 N=8	68.0 N=17	100.0 N=25
Contempt	45.0 N=9	55.0 N=11	100.0 N=20
Subversion/ Espionage	42.3 N=11	57.7 N=15	100.0 N=26
Deportation of Aliens	60.0 N=3	40.0 N=2	100.0 N=5
Miscellaneous	33.3 N=1	66.7 N=2	100.0 N=3

The cases are well distributed in number among the first four categories. Conducive with the military influence hypothesis, anti-draft/anti-war convictions were upheld at a much higher rate (85%) than the other types of cases. Tables 2 and 3 demonstrate further that the two primary hypotheses seem to be correct.

TABLE 2  
 SUPREME COURT RULINGS BY  
 MILITARY INVOLVEMENT

<u>INVOLVEMENT</u>	<u>RULING</u>		
	<u>UPHELD</u>	<u>OVERTURNED</u>	<u>TOTAL</u>
Military	78.6% N=22	21.4 N=6	100.0 N=28
Civilian	38.0 N=27	62.0 N=44	100.0 N=71

CHI SQUARE = 11.63242  
 SIGNIFICANCE = 0.0005  
 ETA = 0.36521

TABLE 3  
 SUPREME COURT RULINGS BY  
 STATE OF WAR

<u>STATE OF WAR</u>	<u>RULING</u>		
	<u>UPHELD</u>	<u>OVERTURNED</u>	<u>TOTAL</u>
War	63.0% N=29	37.0 N=17	100.0 N=46
Nonwar	37.7 N=20	62.3 N=33	100.0 N=53

CHI SQUARE = 5.33786  
 SIGNIFICANCE = 0.0209  
 ETA = 0.25246

Security cases involving military influence were upheld 78.6% of the time, while cases involving only civilian influence were upheld 38% of the time. The war/non-war variable showed 63% of the wartime cases being upheld, while only 37.7% of the non-war cases were similarly decided. The significance figures, .0005 and .0209, respectively, largely negate the possibility that these results were obtained by chance. The Etas (.36521 and .25246, respectively) show there is definitely a positive dependence between the variables.

The results become even more interesting when the military involvement variable was controlled for war/non-war. See Table 4.

TABLE 4  
SUPREME COURT RULINGS BY  
MILITARY INVOLVEMENT  
CONTROLLING FOR STATE OF WAR

<u>INVOLVEMENT</u>	<u>RULING</u>			
	<u>WAR</u>		<u>NON-WAR</u>	
	<u>UPHELD</u>	<u>OVERTURNED</u>	<u>UPHELD</u>	<u>OVERTURNED</u>
Military	80.0% N=20	20.0 N=5	66.7 N=2	33.3 N=1
Civilian	42.9 N=9	57.1 N=12	36.0 N=18	64.0 N=32

CHI SQUARE = 5.25785  
SIGNIFICANCE = 0.0213  
ETA = 0.38329

CHI SQUARE = 0.20357  
SIGNIFICANCE=0.6519  
ETA = 0.14620

Although the non-war control did not have enough cases under military influence to show any significant results, the war control showed that 80% of the cases involving military influence during wartime were upheld, while only 42.9% of the civilian cases during war had similar results. Once again the significance figure (.0213) largely negates the possibility of chance results and the Eta (.38329) shows a definite dependence between the variables.

The results concerning race were less clear. Since close to 90% of the cases fell within the white classification, no detailed analysis was possible. See Table 5.

TABLE 5  
SUPREME COURT RULINGS BY RACE

<u>RACE</u>	<u>RULING</u>		
	<u>UPHELD</u>	<u>OVERTURNED</u>	<u>TOTAL</u>
White	50.6% N=45	49.4 N=44	100.0 N=89
Non-white	25.0 N=2	75.0 N=6	100.0 N=8
Dark	100.0 N=2	0.0 N=0	100.0 N=2

---

Concerning ideology, the small number of cases in each category, except Communists, made analysis difficult. It was noted that the conviction rate against Socialists and Pacifists

was near 100% for 18 cases, with one overturned. <sup>23</sup> Surprisingly, Communist cases were overturned 58.5% of the time (N=65). A possible explanation for this could lie with the coding. If only those defendants who were plainly Communists had been coded as such, the results might have varied. The addition of those only accused of Communism might have inflated the overturned rulings, if the Court could plainly see the accusations had no basis. See Table 6.

TABLE 6  
SUPREME COURT RULINGS BY IDEOLOGY

<u>IDEOLOGY</u>	<u>RULING</u>		
	<u>UPHELD</u>	<u>OVERTURNED</u>	<u>TOTAL</u>
Socialist	88.9% N=8	11.1 N=1	100.0 N=9
Communist	41.5 N=27	58.5 N=38	100.0 N=65
Non-ideological	40.0 N=4	60.0 N=6	100.0 N=10
Pro-German	33.3 N=1	66.7 N=2	100.0 N=3
Pacifist	100.0 N=9	0.0 N=0	100.0 N=9
Religious	0.0 N=0	100.0 N=2	100.0 N=2
KKK	0.0 N=0	100.0 N=1	100.0 N=1

## V

### CONCLUSIONS

After analysis of the data, what can be concluded about the research? The most obvious is that military influence does make a difference in Supreme Court decisions on governmental security cases. To a lesser extent, so does the existence of a state of war. This raises another question. Should military influence make such a difference? I hold that in and of itself, it should not. It could be argued that military influence usually exists when the country is in a time of great stress and it is necessary to curtail certain individual rights in order to preserve the nation. But as Benjamin Franklin said, "Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety". It is in these times of stress that we most need to protect the rights of individuals from violations. This is not to say that the Supreme Court should have ruled for the individual in every case considered above. It is to say that the forced sacrificing of individual rights should not be made due to military influence or the existence of a state of war.

The legitimacy of a government in a free society depends to a large extent on the way individuals are treated by that government. It is easy to guarantee individual rights when the government is under no threat. But that is true of a

totalitarian state, as well as a democracy. The differentiating factor is the application of stress in the form of some threat to the government. The more stress the government can take and still honor individual rights, the greater the legitimacy of that government. When extraneous influences affect decisions concerning individual rights, legitimacy is lost. This leads to the conclusion that talk of individual rights during times of tranquility is little more than lip service.

In the introduction of this paper, I spoke of the effectiveness of the Supreme Court as a channel for protecting individual rights. Often the Court has performed admirably. Unfortunately, on the occasions that factors other than the rule of law, due process, and the Constitution have influenced decisions, the Court has been a narrow channel indeed. And finally, in answer to the accusations made by other nations angered over the Carter administration's policy on human rights --it is true that the United States has had serious violations of individual rights in its past. However, while this detracts from the United States, it does nothing to legitimize other nation's violations. Therefore, the Carter administration should continue to campaign for human rights. However, care should be taken that the campaign apply in the United States, as well as abroad.



## FOOTNOTES

1. Martin Shapiro and Rocco J. Tresolini, American Constitutional Law, (New York: Macmillan Publishing Co., Inc., 1975), p. 15.
2. Shapiro, p. 66.
3. Shapiro, p. 23.
4. Frederick M. Wirt and Willis D. Hawley, New Dimensions of Freedom in America, (San Francisco: Chandler Publishing Co., 1969), pp. 21 - 26.
5. Shapiro, pp. 183 - 184.
6. It is interesting to note that Earl Warren was also involved in the exclusion and relocation. As Attorney General of California, he supported the exclusion order. Martin Grodzins, Americans Betrayed, (Chicago: The University of Chicago Press, 1949), p. 94.
7. "Korematsu v. United States", 65 S. Ct. 193, 194.
8. "Korematsu", p. 197.
9. "Korematsu", p. 202.
10. "Korematsu", p. 202.
11. "Korematsu", p. 203.
12. Three books were used: Shapiro's; William Cohen and John Kaplan, Bill of Rights, (Mineola, New York: The Foundation Press, Inc., 1976); James MacGregor Burns, J. W. Peltason, and Thomas E. Cronin, Government by the people, (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1975).
13. Extremist ideologies were defined as beliefs away from the American "mainstream" of thought, such as Socialism, Communism, Pacifism, and certain religions (for example, Quakers or Jehovah's Witnesses).
14. 53 S. Ct. 190.

15. The principle was that a law making the editing of printed matter advocating disrespect for the law a criminal act was not unconstitutional. "Fox v. State of Washington", 35 S. Ct. 383.
16. "Dombrowski v. Pfister", 85 S. Ct. 1116.
17. Edward R. Levi, An Introduction to Legal Reasoning, (Chicago: The University of Chicago Press, 1948), pp. 59 - 60.

## BIBLIOGRAPHY

- Barnum, David G. "Judicial Review of State Laws and the National Policy-making Role of the Supreme Court in Protecting Fundamental Rights" (not yet published).
- Bickel, Alexander M. The Least Dangerous Branch. Indianapolis: The Bobbs Merrill Company, Inc., 1962.
- Burns, James MacGregor; Peltason, J. W.; and Cronin, Thomas E. Government by the people. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1975.
- Cohen, William, and John Kaplan. Bill of Rights. Mineola, New York: The Foundation Press, Inc. 1976.
- Cortner, Richard G. The Supreme Court and Civil Liberties Policy. Mayfield Publishing Company, 1975.
- Daniels, Roger. The Decision to Relocate the Japanese Americans. Philadelphia: J.B. Lippincott Company, 1975.
- Dembitz, Nanette. "Racial Discrimination and the Military Judgment", Columbia Law Review. March, 1945. 175 - 239.
- Funston, Richard. "The Supreme Court and Critical Elections", American Political Science Review. 69 September, 1975. 795 - 811.
- Grodzins, Morton. Americans Betrayed. Chicago: The University of Chicago Press. 1949.
- Howard, J. Woodford, Jr. Mr. Justice Murphy. Princeton, New Jersey: Princeton University Press, 1968.
- Levi, Edward R. An Introduction to Legal Reasoning. Chicago: The University of Chicago Press, 1948.
- Myer, Dillon S. Uprooted Americans. Tucson, Arizona: The University of Arizona, 1971.
- Rostow, Eugene V. "The Japanese American Cases -- A Disaster", Yale Law Journal. June, 1945. 489 - 533.

Shapiro, Martin, and Rocco J. Tresolini. American Constitutional Law. New York: Macmillan Publishing Co., Inc. 1975.

Supreme Court Reporter. (Digest and casebooks). St. Paul, Minnesota: West Publishing Co.

Wallace, Irving. The R Document. New York: Bantam Books, Inc., 1977.

Wirt, Frederick M., and Willis D. Hawley. New Dimensions of Freedom in America. San Francisco: Chandler Publishing Co., 1969.