

DUE PROCESS AND FAIR TRIALS

After the September 11, 2001 terrorist attacks on the United States, the U.S. led an international effort against al Qaeda and other terrorist organizations, resulting in deployment of America's armed forces to Afghanistan, Iraq, and other areas. Military operations led to the battlefield capture of enemy combatants and suspected terrorists, most of whom were detained in a prison facility at the U.S. naval base in Guantanamo, Cuba. To what extent are these individuals protected by the U.S. Constitution's due process and fair trial guarantees? What branch of government does the Constitution designate to decide how it applies in such questions?

Objectives

- Students evaluate contradictory viewpoints concerning liberty and security.
- Students evaluate Supreme Court decisions regarding fair trial, due process, and the war on terror.
- Students analyze components of a fair trial.
- Students evaluate whether the Constitution takes on different meanings during wartime.

Recommended Time

180 – 240 minutes

CONSTITUTIONAL PRINCIPLES

- Rule of Law
- Limited Government
- Natural Rights
- Liberty
- Due Process, including fair trials
- Separation of Powers

Lesson Plan

Materials

- Handout A: Constitutional Provisions Related to Due Process and Fair Trial
- Handout B: Background Essay—Due Process and Military Justice
- Handout C: Glossary
- Handout D: Case # 1—*Hamdi v. Rumsfeld* (2004) Background and Facts
- Handout E: Case # 2—*Rasul v. Bush* (2004) Background and Facts
- Handout F: Case # 3—*Hamdan v. Rumsfeld* (2006) Background and Facts
- Handout G: Case # 4—*Boumediene v. Bush* (2008) Background and Facts
- Handout H: Case # 1—*Hamdi v. Rumsfeld* (2004) Supreme Court Decision
- Handout I: Case # 2—*Rasul v. Bush*, (2004) Supreme Court Decision
- Handout J: Case # 3—*Hamdan v. Rumsfeld* (2006) Supreme Court Decision

Background

- A. Provide students with **Handout B: Background Essay—Due Process and Military Justice** and **Handout C: Glossary** and have them read the background essay, using the glossary as needed. Conduct a whole-class discussion to ensure student familiarity with the historical background.
- B. Have students work in pairs or small groups. Provide each small group with a copy of **Handout A: Constitutional Provisions Related to Due Process and Fair Trial**. Students should paraphrase each constitutional provision and answer the questions at the bottom of the page. Then conduct a whole-class discussion of student responses.

Activity I

- A. Divide the class into four groups. Give each group one of the Case Background and Facts Handouts:
 - a. **Handout D: Case # 1—*Hamdi v. Rumsfeld*, June 28, 2004 Background and Facts**
 - b. **Handout E: Case # 2—*Rasul v. Bush*, June 28, 2004 Background and Facts**
 - c. **Handout F: Case # 3—*Hamdan v. Rumsfeld*, June 29, 2006 Background and Facts**
 - d. **Handout G: Case # 4—*Boumediene v. Bush*, June 12, 2008 Background and Facts**

Each group should analyze the case assigned and decide how the Supreme Court should rule on the constitutional questions.

- B. Have each group report to the whole class how it would have decided the assigned case, including the reasoning it used. If the group's decision was not unanimous, be sure to have dissenters report their reasoning as well.
- C. Provide each group with its respective Supreme Court Decision Handout, and give students time to read the decision excerpts.

Lesson Plan *(continued)*

Materials *(continued)*

- Handout K: Case # 4—*Boumediene v. Bush* (2008) Supreme Court Decision
 - Handout L: Case # 5—*U.S. v. Khalid Sheikh Mohammad, et al.* Military Commission Proceedings 2011-2015
 - Handout M: Timeline—Military Justice during the War on Terror
 - Handout N: Comparing Supreme Court Decisions
- a. **Handout H: Case # 1—*Hamdi v. Rumsfeld*, June 28, 2004 Supreme Court Decision**
 - b. **Handout I: Case # 2—*Rasul v. Bush*, June 28, 2004 Supreme Court Decision**
 - c. **Handout J: Case # 3—*Hamdan v. Rumsfeld*, June 29, 2006 Supreme Court Decision**
 - d. **Handout K: Case # 4—*Boumediene v. Bush*, June 12, 2008 Supreme Court Decision**
- D. Have each group report/summarize the Court’s majority and dissenting opinions to the class. Encourage discussion after each report by asking the following questions:
- a. How do the Justices’ opinions illustrate differing viewpoints concerning liberty and security?
 - b. After reading the excerpts of the Court’s opinions, did any members in your group change their minds regarding constitutional principles of fair trial and due process?
 - c. What components of a fair trial figured most prominently in the Justices’ reasoning?
 - d. To what extent and in what ways does your group believe the Constitution takes on different meanings during wartime?

Activity II

- A. Distribute **Handout L: Case # 5—*U.S. v. Khalid Sheikh Mohammad, et al.* Military Commission Proceedings 2011-2015**, and have students work with their groups to answer the questions provided.

Lesson Plan *(continued)*

Extensions/Homework

- A. Distribute **Handout M: Timeline—Military Justice during the War on Terror**. Have students work alone or in their groups, depending on which best meets the needs of your class.
 - a. Summarize the historical significance of each event.
 - b. Use color coding to indicate whether they agree with (green) each U.S. action or disagree (red).
 - c. Answer the questions and complete the activities at the end of the timeline.
- B. Distribute **Handout N: Comparing Supreme Court Decisions**. Students will use the table to compare and contrast Supreme Court decisions related to *habeas corpus* and other due process protections. Then, they will evaluate the Hamilton quote from *Federalist No. 8*.

A

Constitutional Provisions Related to Due Process and Fair Trials

Directions: Working with a partner or two, review and paraphrase each of the following passages from the U.S. Constitution. Then answer the questions at the bottom of the page.

Article I, Section 8, Clause 11

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

Article I, Section 8, Clause 14

To make rules for the government and regulation of the land and naval forces;

Article I, Section 9, Clause 2

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.

Article III, Section 2, Clause 3

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Critical Thinking Questions

1. What is the privilege of the writ of *habeas corpus*, and why is it an important part of due process for people who are arrested?
2. According to Article III, Section 2, Clause 3, where should a trial be held if a crime is committed outside of any state?
3. What elements of a fair trial are guaranteed by the Fifth Amendment?
4. What elements of a fair trial are guaranteed by the Sixth Amendment?
5. To what extent should suspected terrorists, unlawful enemy combatants, and non-resident aliens be protected by the due process rights guaranteed in the U.S. Constitution?

B

Background Essay—Due Process and Military Justice

Directions: Read and discuss the following essay and then answer the questions at the end.

The United States Constitution guarantees certain due process rights to people accused of violating the law. To what extent, if at all, do these due process rights extend to suspected terrorists and foreigners captured in wartime? Both U.S. law and international law govern the treatment of such individuals, but questions remain about the application of those laws. For example, what due process rights apply to U.S. citizens who aid the enemy? To civilian citizens of an enemy nation? To terrorists? In the heat of battle, how can military officials differentiate between innocent civilians, spies and other combatants? One way to sort out these cases is to hold hearings before military commissions. A military commission is a form of tribunal used to conduct investigations and administer justice for unlawful conduct during wartime.

History of Military Commissions in U.S. Conflicts

General Winfield Scott, commanding American forces during the Mexican-American War of 1846–48, coined the term, “military commission” as it is commonly understood today. He developed procedures for military tribunals that would try individuals (both Americans and Mexican nationals) charged with offenses not triable by courts-martial. These offenses, according to the U.S. Department of Defense Office of Military Commissions, included “assassination, murder, poisoning, rape, or the attempt to commit either, malicious stabbing or maiming, malicious assault and battery, robbery, theft, the wanton desecration of churches, cemeteries, or other religious edifices and fixtures,

the interruption of religious ceremonies, and the destruction, except by order of a superior officer, of public or private property.”

Article I, Section 8, Clauses 11 and 14 of the U.S. Constitution grant to Congress the power to govern the conduct of U.S. military forces, which it did in the early days of the republic through laws called the Articles of War. The president, as commander in chief, directs procedures to conduct courts-martial and military commissions. In 1920, Congress required the president, in these proceedings, to apply the rules of evidence used in federal criminal trials, “in so far as [he] deems practicable.”

In 1950, Congress developed the Uniform Code of Military Justice (UCMJ) to replace the Articles of War. UCMJ applies to courts-martial, military commissions, and other military tribunals. The UCMJ requires the president to ensure that rules of evidence and other procedures for these trials are consistent with those applied in U.S. criminal trials and in courts-martial, to the extent that those rules are practicable in the president’s judgment.

Landmark Cases Dealing with Military Justice

Ex parte Milligan (1866)

CONSTITUTIONAL QUESTION

Does a military court have jurisdiction over the criminal trial of a civilian when the civilian courts are available?

Handout B: Page 2

U.S. forces arrested Lambdin P. Milligan, a civilian resident of Indiana, on October 5, 1864. He was charged with joining a secret organization seeking to overthrow the government, communicating with the enemy, “conspiring to seize munitions of war stored in the arsenals; to liberate prisoners of war; [and with] resisting the draft.” He was tried before a military tribunal, convicted on all charges, and sentenced to death. Just a few days before his scheduled execution, he petitioned for a writ of *habeas corpus* in a local federal court. He believed that, since he was an American citizen living in a state that had not seceded, he should have had a criminal trial in a civilian court, rather than a military trial. In a unanimous opinion written by Justice David Davis, the Supreme Court agreed with him. A civilian must be tried in a civil court, as long as civil courts were operational. The Court noted the government’s power to suspend *habeas corpus* in rebellion or invasion, but pointed out that the citizens’ Sixth Amendment right to trial by jury was preserved. The Framers knew that “trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right [*habeas corpus*], and left the rest to remain forever inviolable.”

The ruling also defined conditions for martial law and asserted civilian power over the military. “Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration...As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.”

To rule otherwise, the Court explained, would mean that “republican government is a failure, and there is an end of liberty regulated by law...martial law

[imposed in this manner] destroys every guarantee of the Constitution, and effectually renders the ‘military independent of and superior to the civil power.’”

Ex parte Quirin (1942)

CONSTITUTIONAL QUESTION

Does trial by military commission violate the rights of foreign saboteurs captured in the United States during wartime?

In June 1942, in a mission called Operation Pastorius, eight Nazi agents who reached the United States by submarine planned to sabotage several U.S. targets, including aluminum and magnesium plants, railroads, canals, and others. Richard Quirin, George Dasch, Ernst Burger, and Herbert Haupt landed in Long Island, New York, and four other men landed a few days later in Florida. Two of the saboteurs, Burger and Dasch, surrendered to the Federal Bureau of Investigation, providing information leading to the arrest of the other six men.

President Franklin Roosevelt issued Executive Proclamation 2561 creating a military tribunal to conduct their trial, which took place from July 8 to August 1, 1942. All eight men were found guilty of conspiring to violate the law of war and give intelligence to the enemy, and they were sentenced to death. All of the conspirators, except Dasch, filed petitions for a writ of *habeas corpus*, maintaining that their trial by military commission violated their rights to a trial under the Fifth and Sixth Amendments. After the Federal District Court denied their claim, the U.S. Supreme Court agreed to hear their cases. Did the president exceed his authority by ordering the foreign saboteurs to be tried by military commission rather than by a civilian court?

Handout B: Page 3

On July 31, the Court unanimously ruled that the president had not exceeded his authority in ordering a military trial. The conspirators did not have the right to a civilian trial because they were unlawful enemy combatants.

Chief Justice Harlan Fisk Stone authored the Court's opinion:

“By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals....”

The president commuted the sentences of Burger and Dasch to life in prison because of their confession and cooperation with the FBI, but the other six agents were executed in the electric chair in the District of Columbia jail on August 8, 1942. In 1948, President Truman deported Dasch and Burger to Germany.

Johnson v. Eisentrager (1950)

CONSTITUTIONAL QUESTION

Does the constitutional guarantee of *habeas corpus* apply to non-resident enemy aliens who are arrested and tried outside of the United States?

On V-E Day (May 8, 1945), German officials unconditionally surrendered to the Allied Powers, formally marking the end of World War II in Europe. The war against Japan continued for another three months. Lothar Eisentrager and twenty others working in Germany's propaganda bureau in Shanghai suddenly found themselves stranded and jobless. They went to work for Japan, supplying the Japanese military with intercepted U.S. naval communications and German-made weapons. The United States Army captured the Germans and tried them in China for war crimes as nonresident enemy aliens. Since they had collaborated with the Japanese against the U.S. after Germany's unconditional surrender, they were convicted of violating of the laws of war and were then moved to Landsberg prison in the U.S.-occupied section of Germany. Eisentrager and the other defendants petitioned the District Court for the District of Columbia for a writ of *habeas corpus*, maintaining that their trial, conviction, and imprisonment violated various provisions of the U.S. Constitution and the Geneva Convention. They believed they should have had access to civilian courts rather than being tried by military commission. They asserted that the U.S. Constitution's guarantee of a writ of *habeas corpus* gave them the right to challenge their detention by the United States, wherever that detention occurred.

Justice Robert Jackson wrote for the majority in a 6-3 decision, rejecting the Germans' claims. The Court ruled that *habeas* relief from United States

Handout B: Page 4

courts is not available to enemy aliens detained outside the United States, even though they were held in an area over which the U.S. held jurisdiction. Since they were held in Germany, the U.S. did not hold “ultimate sovereignty”:

“To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy.... Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security. This is in keeping with the practices of the most enlightened of nations, and has resulted in treatment of alien enemies more considerate than that which has prevailed among any of our enemies and some of our allies. This statute was enacted or suffered to continue by men who helped found the Republic and formulate the Bill of Rights, and although it obviously denies enemy aliens the constitutional immunities of citizens, it seems not then to have been supposed that a nation’s obligations to its foes could ever be put on a parity with those to its defenders.”

Justice Hugo Black dissented, joined by Justices William O. Douglas and Harold Burton:

“Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies...Our nation proclaims a belief in the

dignity of human beings as such, no matter what their nationality or where they happen to live. *Habeas corpus*, as an instrument to protect against illegal imprisonment, is written into the Constitution...I would hold that our courts can exercise it whenever any United States official illegally imprisons any person in any land we govern. Courts should not for any reason abdicate this, the loftiest power with which the Constitution has endowed them.”

By 1950, the Truman administration had decided to treat German war criminals differently. John McCloy, the U.S. High Commissioner in Germany, established a clemency commission that reevaluated the cases of all prisoners at Landsberg, reducing many of their sentences. All of the Germans convicted in Shanghai were released in 1950.

In the majority decisions for both *Quirin* and *Eisentrager*, the Court upheld the constitutionality of the action the president and Congress had taken.

War on Terror

On September 11, 2001, al Qaeda, a militant Islamist organization led by Osama bin Laden, carried out a series of violent surprise attacks on the United States. Nineteen al Qaeda operatives hijacked four commercial airliners early that morning in order to carry out suicide attacks. In quick succession the hijackers deliberately crashed two of the planes into the twin towers of Manhattan’s World Trade Center and a third one into the Pentagon. When passengers on the fourth plane attempted to regain control of the flight, it crashed into a field near Shanksville, Pennsylvania. Fatalities from the four crashes included the airline passengers and crews, individuals inside the buildings hit, firefighters, and other first responders. Altogether, almost 3,000 people were killed in that morning’s terrorist assault.

In response to the worst terrorist attack in U.S. history, on September 14 Congress enacted the

Handout B: Page 5

Authorization for Use of Military Force (AUMF). President George W. Bush announced a “War on Terror” in a televised address to a joint session of the U.S. Congress on September 20, 2001. The next month the U.S. launched and led Operation Enduring Freedom, an international military effort to remove the Taliban government in Afghanistan that harbored the al Qaeda network and its training facilities. In addition to the AUMF, Congress enacted more than a dozen other laws addressing related issues, including The USA PATRIOT Act, victims’ relief, air transportation, and national defense.

President Bush’s administration immediately began to manage individuals captured on the battlefield and suspected of committing or supporting acts of terrorism. U.S. and international law prescribe procedures to hold enemies captured on the battlefield, to interrogate and try them for violations of the laws of war, and to prevent them from returning to battle.

President Bush’s Military Order of November 13, 2001, provided for military commissions to try non-U.S. citizens who supported al Qaeda or other terrorist groups. Finding it impractical to apply the rules of evidence used in U.S. criminal trials, the administration recommended preparing a prison/interrogation facility at the U.S. Naval Base at Guantanamo Bay, Cuba. President Bush’s advisers believed that any proceedings conducted there related to the suspected terrorists would not be bound by the criminal protections of the U.S. Constitution.

Guantanamo Bay

Beginning in 1903, the U.S. leased from Cuba a 45-square-mile naval base on the coast of Guantanamo Bay. According to a 1934 treaty, the

U.S. Navy fully controls the base, but the Cuban government has ultimate sovereignty there. In the latter months of 2001, the U.S. prepared the base to function as a prison and interrogation center, which opened on January 11, 2002. In 2004 prosecutors brought charges against the first groups of suspected terrorists, including Salim Ahmed Hamdan.

Under the president’s direction, the secretary of defense developed military commission rules based on Congress’s Authorization for Use of Military Force. As of January 2004, the procedures implemented regarding detainees captured during conflict included the following:

- The right to be tried by a military commission consisting of a panel of at least three military officers before a presiding officer
- The right to a copy of the charges in English and in the language of the accused
- The presumption of innocence and other rights commonly afforded in courts-martial and civilian courts

Unlike the rules used in courts-martial for members of the U.S. military, however, military commission trials allow the following:

- Use of evidence against an accused which he has never seen
- Testimonial hearsay
- Unsworn testimony
- Evidence obtained through coercion
- Limited rights to appellate review

Over the next few years, the Supreme Court decided several cases concerning whether due process and fair trial guarantees applied to suspected terrorists captured in wartime.

Critical Thinking Questions

1. Compare and contrast the decisions in *Milligan*, *Quirin*, and *Eisentrager*.
2. How did the Roosevelt and Truman administrations treat enemy combatants during World War II?
3. How did the U.S. Supreme Court rule in decisions related to the detainment and military tribunals of enemy combatants by the Roosevelt and Truman administrations?
4. As of January 2004, to what extent were the actions taken by the Bush administration against enemy combatants during the war on terror consistent with precedents established by previous administrations in World War II?
5. Review the excerpts of the decisions written by Justices Jackson and Black, and summarize each in your own words. Explain which of these opinions, if either, you believe was correct. As you read about additional Supreme Court decisions, compare them to the Jackson and Black opinions.

C

Glossary

Authorization of Use of Military Force (AUMF): Law passed by Congress in accordance with the U.S. Constitution Article I, Section 8, Clause 14, outlining the rules that the president must follow in times of conflict. The AUMF of September 14, 2001 states “that the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

Civilian: A person who is not a member of the armed forces of a nation.

Combatant Status Review Tribunal (CSRT): Military panel set up to determine whether individual detainees met the legal definition of “unlawful enemy combatant.”

Court martial: A military trial of a member of the armed forces.

Detainee Treatment Act (DTA): 2005 law passed by Congress in accordance with U.S. Constitution Article I, Section 8, Clause 11 governing the U.S. military’s actions with regard to individuals captured during conflict. The Detainee Treatment Act prohibited torture and gave detainees access to federal appeals courts to challenge their designation as enemy combatants.

Exigency: Urgent situation.

Fair trial: A principle of the rule of law that trials of persons accused of crime must adhere to certain standards that protect the accused against decisions based on error, injustice, and arbitrary rule.

Habeas corpus: Latin for “to have the body;” a centuries-old protection of the accused that guarantees a hearing before a judge who has the power to release a prisoner who is illegally detained.

Habeas statute, 28 U. S. C. §2241: A provision in the United States Code of laws that describes the power of U.S. Supreme Court Justices, appellate judges, and district court judges to grant petitions for writs of *habeas corpus*.

International armed conflict: Declared or undeclared war among two or more countries.

Law of war: National and international rules that govern conduct of people and countries involved in conflict.

Military commissions: A type of military trial in which a military officer is the judge and investigation of the facts of the case is carried out by other military officers.

Military Commissions Act (MCA): Law passed by Congress in 2006, in response to the Supreme Court's ruling in *Hamdi v. Rumsfeld*. The MCA gave the president authority to try unlawful enemy combatants in military commissions, defined as "regularly constituted courts that afford all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions." Guilt had to be proven beyond a reasonable doubt, and convictions required a two-thirds vote. Court procedures were based on courts-martial rules, but could be revised by the secretary of defense. While torture was prohibited, interrogation techniques such as waterboarding and sleep deprivation were not considered torture. Also, under MCA, detainees no longer had access to *habeas corpus* protections in U.S. federal court. In 2009, President Obama halted military commission hearings in order to review all Guantanamo detainee cases. The MCA of 2009 was enacted in response to the Supreme Court decision in *Boumediene v. Bush* (2008), and provided new procedural safeguards to detainees.

Military tribunals: A type of trial in which military officers conduct the proceedings.

Non-international armed conflict: Declared or undeclared war among entities, some of which are not countries.

Prisoner of war: A member of the enemy's armed forces captured during wartime.

Stare decisis: Latin for "let the decision stand"; the standard that cases in court should be decided in a manner consistent with the rule of law, and with the interpretation of constitutional principles for previous similar cases.

Suspension Clause: Article I, Section 9, Clause 2 of the U.S. Constitution "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."

Treason: An act of disloyalty against one's country.

Uniform Code of Military Justice (UCMJ): As of 1951, the foundation of military law in the United States. UCMJ replaced the Articles of War passed by Congress in 1806 and later amended on various occasions.

Unlawful enemy combatant (or Unprivileged enemy belligerent): According to MCA 2006, a person "who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents," and who is not a member of a country's regular military force.

D

Case # 1: *Hamdi v. Rumsfeld* (2004) Background, Facts, and Constitutional Questions

Directions: Using your background knowledge and the information provided about the case, answer the constitutional question as if you were a Supreme Court Justice. Explain your answer using specific constitutional principles and provisions.

CONSTITUTIONAL QUESTIONS

1. Does it violate an enemy combatant's Fifth Amendment due process rights to be held indefinitely and denied access to an attorney?
2. Under the separation of powers doctrine, must federal courts defer to the executive branch decisions that American citizens are "enemy combatants"?

Yaser Esam Hamdi was born in Louisiana in 1980, the son of a Saudi oil company worker. When Hamdi was a toddler, his parents moved to Saudi Arabia, where Hamdi grew up. According to his father, Yaser traveled alone for the first time in the late summer of 2001 when he went to Afghanistan to do humanitarian relief work. According to U.S. military records, Hamdi then joined and received training from a Taliban unit that surrendered to the Afghan Northern Alliance in December of 2001. When Hamdi was taken captive on the battlefield, he was armed and allegedly supporting the Taliban against the United States. Classified an enemy combatant, he was transferred to the special U.S. detention facility at the U.S. Navy base in Guantanamo, Cuba. A few months after his arrival in Guantanamo, Hamdi, discovered to be a U.S. citizen,

was transferred to the U.S. Navy brig at Norfolk, Virginia, and held in solitary confinement. After Hamdi's father filed a petition for a writ of *habeas corpus*, several different courts considered Hamdi's case. The U.S. Justice Department maintained that because Hamdi was captured in an active combat zone in a foreign country while aiding enemies of the U.S., he was an enemy combatant. Prosecutors insisted that the military, rather than a court, has the sole responsibility to wage war; battlefield judgments should not be challenged in courts. Hamdi's father argued that the detention was unconstitutional because the government had violated the prisoner's due process rights by holding him indefinitely, failing to bring charges against him, and denying him access to a lawyer or a trial.

E

Case # 2 *Rasul v. Bush* (2004) Background, Facts, and Constitutional Questions

Directions: Using your background knowledge and the information provided about the case, answer the constitutional question as if you were a Supreme Court Justice. Explain your answer using specific constitutional principles and provisions.

CONSTITUTIONAL QUESTIONS

1. May foreign nationals seek *habeas corpus* relief in United States courts on behalf of foreign citizens held by the United States military in Guantanamo Bay Naval Base, Cuba?
2. Do U.S. courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay?

During the U.S. invasion of Afghanistan in 2001, the U.S. military captured or arrested various individuals believed to be fighting for the Taliban or al Qaeda, and classified them as enemy combatants to be held for interrogation. Without being informed of the charges against them, tried, or given access to lawyers, they were incarcerated indefinitely at the U.S. detention facility at Guantanamo Bay, Cuba. The cases of fourteen foreign nationals who petitioned for a writ of *habeas corpus* were combined under *Rasul v. Bush*. Shafiq Rasul and the other petitioners were citizens of Britain, Australia, or Kuwait, none of which were at war with the U.S.

They denied that they were engaged in acts of aggression against the U.S., and they maintained that the U.S. Constitution's writ of *habeas corpus* protection applied to them because the U.S. had full control over the Guantanamo military base.

The U.S. government, relying on the precedent set in *Johnson v. Eisentrager* (1950), argued that American courts did not have jurisdiction over the Guantanamo detention cases since the individuals were not U.S. citizens and were imprisoned in territory over which the U.S. did not have sovereignty.

F

Case # 3 *Hamdan v. Rumsfeld* (2006) Background, Facts, and Constitutional Questions

Directions: Using your background knowledge and the information provided about the case, answer the constitutional question as if you were a Supreme Court Justice. Explain your answer using specific constitutional principles and provisions.

CONSTITUTIONAL QUESTIONS

1. May the rights protected by the Geneva Conventions be enforced in federal court through *habeas corpus* petitions?
2. Was authority to try Hamdan and others by military commission for alleged war crimes in the War on Terror authorized by the Congress or the inherent in the powers of the president?

According to Pentagon documents, Salim Ahmed Hamdan, a Yemeni citizen, first met Osama bin Laden, al Qaeda's leader, in 1996. The records detail that Hamdan received weapons training and became bin Laden's personal driver and bodyguard, serving in that capacity until Afghan militia forces captured him in Afghanistan after the September 11, 2001 al Qaeda attacks on the United States. He was turned over to the U.S. military and imprisoned at Guantanamo Bay without a trial.

Hamdan was accused of delivering weapons and other supplies to be used against American troops, and held for trial before a military commission. The U.S. government classified him an "unprivileged belligerent." This means that, because he was not a member of a nation's uniformed military, he did not have the right to engage in hostilities or offer aid to America's enemies on the battlefield.

In April 2004, Hamdan petitioned for a writ of *habeas corpus*, maintaining that his imprisonment violated the common law of war and that the

procedures used in his case violated the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions. In *Hamdi v. Rumsfeld*, the Court had recently ruled that detainees at Guantanamo have the right to challenge their classification as enemy combatants and to challenge the government's factual assertions before a neutral decision-maker. But before the federal district court ruled on his April petition, Hamdan received a hearing from a military tribunal, which designated him an enemy combatant. Citing security concerns, the government excluded Hamdan from certain parts of his military tribunal hearing.

The government argued that Congress had authorized the use of military commissions to try offenders who violated the law of war through UCMJ Article of War 15, which stipulates that military commissions have jurisdiction to try offenders or offenses against the law of war in "appropriate cases." The government also argued that Article of War 21 gave the president additional authority

Handout F: Page 2

to “invoke military commissions when he deems them necessary.”

According to UCMJ, the rules governing military commissions are generally the same as those that apply to courts martial. For example:

- Congress defines offenses.
- Parties know the procedures and regulations of the trial in advance.
- The commission uses normal rules of evidence.
- Presiding officers are existing military judges with expertise in the particular offenses involved in each case.
- The final verdict of the commission is subject to review by a specialized court of military justice composed of judges named by the President and confirmed by the Senate.

Military Commission Order No. 1, issued by President Bush on March 21, 2002, however, reflected some important differences from standard court martial rules:

- The commission can exclude the defendant and his civilian attorney from any part of the proceedings. Reasons for the presiding officer to do so include protection of classified information, safety of participants and witnesses, and other national security interests.
- Both the defendant and his attorney can be prevented from knowing what evidence was presented during the closed session.
- Although the defendant’s military attorney can access the information presented during closed sessions, the presiding officer can forbid the defendant’s military attorney from telling the defendant what took place.
- Unlike the rules of evidence in a civilian trial or in a court martial, admissible evidence can include hearsay, unsworn testimony, or information gathered through torture.

G

Case # 4 *Boumediene v. Bush* (2008) Background, Facts, and Constitutional Question

Directions: Using your background knowledge and the information provided about the case, answer the constitutional question as if you were a Supreme Court Justice. Explain your answer using specific constitutional principles and provisions.

CONSTITUTIONAL QUESTIONS

1. Does the Military Commissions Act of 2006 violate the Suspension Clause of the Constitution?
2. Does the Fifth Amendment's due process clause apply to detainees at Guantanamo Bay?

On October 19, 2001, local police arrested Lakhdar Boumediene, a Bosnian citizen, at his Sarajevo office, because United States authorities suspected him of involvement in a plot to bomb the American embassy in Sarajevo. Convinced that the arrest was a mistake by American agents, he cooperated with the police voluntarily because he believed the Americans would soon realize their mistake and let him go. Instead, the U.S. government classified Boumediene and five others arrested in Bosnia as enemy combatants and transported them to the detention facility at the Guantanamo naval base in January, 2002. When he filed a petition for a writ of *habeas corpus*, U.S. courts ruled that, as an alien enemy combatant detained at an overseas military base, Boumediene had no right to a *habeas* petition. The Supreme Court reversed this ruling in *Rasul v. Bush* (2006).

In the Military Commissions Act of 2006 (MCA), Congress abolished the federal courts' jurisdiction to hear *habeas* petitions from enemy combatant detainees, applying the law to "all cases, without exception" that pertained to aspects of detention. Lawyers for the detainees maintained that the MCA violated the Suspension Clause, Article I, Section 9, Clause 2: "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."

The U.S. government argued that the writ of *habeas corpus* does not apply to overseas military bases, and constitutional rights do not apply to aliens outside of the United States.

H

Case # 1: *Hamdi v. Rumsfeld* (2004) Supreme Court Decision

Directions: Review the excerpts of the Supreme Court opinion(s) and then compare each Justice's reasoning with your own.

Background

Justice O'Connor wrote the plurality opinion. In this case, which was decided the same day as *Rasul v. Bush*, (June 28, 2004) she and five other justices agreed that Hamdi had the right to challenge his detention and his status as an enemy combatant in court, having his case heard by a neutral decision-maker. Eight of the nine justices agreed that the executive branch does not have the authority to hold a U.S. citizen indefinitely without meeting certain due process standards, such as access to an attorney, opportunity to challenge his enemy combatant classification and his detention, and an opportunity to rebut the government's case against him.

Justice O'Connor's Plurality Opinion

"We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use...A citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States,'... such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict [as an alien]..."

"We 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. [See *Youngstown Sheet & Tube Co. v. Sawyer*.] ...

"Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of *habeas corpus* allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions... [I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process..."

"[Hamdi also] unquestionably has the right to access to counsel in connection with the proceedings on remand..."

"Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short...Plainly, the 'process' Hamdi has received is not that to which he is entitled under the Due Process Clause."

Justice Thomas's Dissent

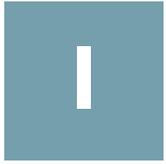
"[The Supreme Court lacks] the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of which is committed to other branches."

Handout H: Page 2

Accordingly, I conclude that the Government's detention of Hamdi as an enemy combatant does not violate the Constitution. By detaining Hamdi, the President, in the prosecution of a war and authorized by Congress, has acted well within his authority. Hamdi thereby received all the process to which he was due under the circumstances. I therefore believe that this is no occasion to balance the competing interests, as the plurality unconvincingly attempts to do."

Follow-up

When the Court announced the decision that Hamdi was entitled to challenge before a neutral decision-maker both his classification as an enemy combatant and his detention, the federal government decided to release him rather than conduct further proceedings. He was released and sent back to Saudi Arabia in October 2004, subject to certain travel restrictions. He was also required to renounce his American citizenship and agree not to sue the U.S. for any injuries sustained while he was imprisoned.



Case # 2: *Rasul v. Bush* June 28, 2004 Supreme Court Decision

Directions: Review the excerpts of the Supreme Court opinion(s) and then compare each Justice’s reasoning with your own.

Background

This decision was announced on the same day as that of *Hamdi v. Rumsfeld*, June 28, 2004. In a 6-3 opinion written by Justice John Paul Stevens, the Court found that the U.S. Constitution’s protection of the privilege of *habeas corpus* extends to prisoners held at the Guantanamo Bay facility because of the degree of control exercised by the United States over the military base.

Stevens, using a list of precedents stretching back to mid-seventeenth century English common law cases, found that the right to *habeas corpus* can be exercised in “all ... dominions under the sovereign’s control.” Because the United States exercised “complete jurisdiction and control” over the Guantanamo naval base, the fact that ultimate sovereignty remained with Cuba was irrelevant. Further, Stevens wrote that the right to *habeas corpus*, which is detailed in Section 2241 of the United States Code (referred to as the “*habeas* statute”) is not dependent on citizenship status. The detainees were therefore free to bring suit challenging their detention as unconstitutional.

Justice Stevens’s Opinion

“By the express terms of its agreements with Cuba, [the 1903 Lease Agreement and the 1934 Treaty] the United States exercises “complete jurisdiction and control” over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. [The U.S. government itself] concedes that the *habeas* statute would

create federal-court jurisdiction over the claims of an American citizen held at the base. Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee’s citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority under Section 2241.

“Application of the *habeas* statute to persons detained at the base is consistent with the historical reach of the writ of *habeas corpus*. At common law, courts exercised *habeas* jurisdiction over the claims of aliens detained within sovereign territory of the realm... and all other dominions under the sovereign’s control...

“In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court’s jurisdiction over petitioners’ custodians. Section 2241, by its terms, requires nothing more. We therefore hold that Section 2241 confers on the District Court jurisdiction to hear petitioners’ *habeas corpus* challenges to the legality of their detention at the Guantanamo Bay Naval Base.”

Justice Scalia’s Dissent (joined by Justices Rehnquist and Thomas)

“The petitioners do not argue that the Constitution independently requires jurisdiction here.

Handout I: Page 2

Accordingly, this case turns on the words of Section 2241, a text the Court today largely ignores. “Even a cursory reading of the *habeas* statute shows that it presupposes a federal district court with territorial jurisdiction over the detainee. Section 2241(a) states:

‘Writs of *habeas corpus* may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*.’ (Emphasis added).

“The reality is this: Today’s opinion, and today’s opinion alone, overrules *Eisentrager*; today’s opinion, and today’s opinion alone, extends the *habeas* statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts. No reasons are given for this result; no acknowledgment of its consequences made... [T]he Court evades explaining why *stare decisis* can be disregarded, and why *Eisentrager* was wrong. Normally, we consider the interests of those who have relied on our decisions. Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal

courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees...

“In sum, the Court’s treatment of Guantanamo Bay, like its treatment of Section 2241, is a wrenching departure from precedent.

“Departure from our rule of *stare decisis* in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect upon the Nation’s conduct of a war. The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs. Congress is in session. If it wished to change federal judges’ *habeas* jurisdiction from what this Court had previously held that to be, it could have done so.... For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders’ reliance upon clearly stated prior law, is judicial adventurism of the worst sort. I dissent.”



Case # 3: *Hamdan v. Rumsfeld* (2006) Supreme Court Decision

Directions: Review the excerpts of the Supreme Court opinion(s) and then compare each Justice's reasoning with your own.

Background

In a 5-3 decision authored by Justice John Paul Stevens, the Supreme Court held the military commission system an unconstitutional violation of U.S. military law and the Geneva Conventions. Because neither an act of Congress nor the inherent powers of the executive authorized the sort of military commission that had heard Hamdan's case, the commission failed to comply with ordinary laws of the United States and the laws of war. The laws of war include the Geneva Conventions and the UCMJ, both of which were violated by Hamdan's exclusion from parts of his own trial. Detainees had the right to appeal their detentions in federal court.

Justice Stevens's Opinion

"For the reasons that follow, we conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions. Four of us also conclude that the offense with which Hamdan has been charged is not an 'offens[e] that by ... the law of war may be tried by military commissions.'

"Exigency [urgent need] alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, Section 8 and Article III, Section 1 of the Constitution unless some other part of that document authorizes a response to the felt need...

"The Government would have us ... find in either the Authorization for Use of Military Force (AUMF) or

the Detainee Treatment Act of 2005 (DTA) specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military commissions...

"The charge against Hamdan alleges a conspiracy extending over a number of years, from 1996 to November 2001...None of the [other] overt acts that Hamdan is alleged to have committed violates the law of war...

"There is no suggestion that Congress has, in exercise of its constitutional authority to 'define and punish Offences against the Law of Nations,' positively identified 'conspiracy' as a war crime...Because the charge does not support the commission's jurisdiction, the commission lacks authority to try Hamdan...

"Chief among [Hamdan's] particular objections [to the trial procedures] are that he may, under the Commission Order, be convicted based on evidence he has not seen or heard, and that any evidence admitted against him need not comply with the admissibility or relevance rules typically applicable in criminal trials and court-martial proceedings...

"The absence of any showing [by the executive branch that a court martial would be impracticable] is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present... the jettisoning

Handout J: Page 2

of so basic a right cannot lightly be excused as ‘practicable.’

“Under the circumstances, then, the rules applicable in courts-martial must apply...

“[P]rocedures governing the tribunal [must] afford ‘all the judicial guarantees which are recognized as indispensable by civilized peoples.’ ...Among the rights set forth in [Geneva Convention] Article 75 is the ‘right to be tried in [one’s] presence...’

“That the Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted. But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him...

“We have assumed, as we must, that the allegations made in the Government’s charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge—that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians...But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”

Justice Scalia’s Dissent (joined by Justices Thomas and Alito)

Chief Justice John Roberts, who had participated in the case while serving on the DC Circuit Court of Appeals, did not take part in the decision.

“On December 30, 2005, Congress enacted the Detainee Treatment Act (DTA). It unambiguously provides that, as of that date, ‘no court, justice, or judge’ shall have jurisdiction to consider the habeas application of a Guantanamo Bay detainee. Notwithstanding this plain directive, the Court today concludes that, on what it calls the statute’s most natural reading, every ‘court, justice, or judge’ before

whom such a habeas application was pending on December 30 has jurisdiction to hear, consider, and render judgment on it. This conclusion is patently erroneous. And even if it were not, the jurisdiction supposedly retained should, in an exercise of sound equitable discretion, not be exercised...

“Here, apparently for the first time in history... a District Court enjoined [prohibited] ongoing military commission proceedings, which had been deemed ‘necessary’ by the President ‘[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks.’ Such an order brings the Judicial Branch into direct conflict with the Executive in an area where the Executive’s competence is maximal and ours is virtually nonexistent. We should exercise our equitable discretion to avoid such conflict. Instead, the Court rushes headlong to meet it...”

Follow-up

The Bush administration requested, and Congress enacted the Military Commissions Act (MCA) of 2006, thus overruling the Supreme Court’s Hamdan decision. Hamdan was then tried again under this new law. In his 2008 trial, he was convicted of material support for terrorism, but acquitted of conspiracy. The military jury sentenced him to 66 months in prison. The military judge gave him credit for the 61 months he had already served in Guantanamo, during which he alleged that he had been held in isolation, and had been punched, kicked, and threatened during interrogation sessions. In November 2008, the U.S. military released him to serve the last month of his sentence in Yemen, where he rejoined his family after his release. In 2012, the D.C. Circuit Court of Appeals overturned the Hamdan conviction, explaining that “material support for terrorism” was not a crime at the time of the events for which he was prosecuted under the 2006 Military Commissions Act.

K

Case # 4: *Boumediene v. Bush* (2008) Supreme Court Decision

Directions: Review the excerpts of the Supreme Court opinion(s) and then compare each Justice's reasoning with your own.

Background

In a 5-4 decision in favor of Boumediene's access to *habeas corpus* protection, Justice Anthony Kennedy authored the Court's opinion. The Court found that the Military Commissions Act of 2006 was an unconstitutional suspension of *habeas corpus*, and that the Detainee Treatment Act was not an adequate substitute for the *habeas* writ. Enemy combatants detained at the Guantanamo Bay detention facility were entitled to the Fifth Amendment's protection of due process.

Justice Kennedy's Opinion

"The detainees...are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government..."

"We hold that Article I, Section 9, Clause 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of *habeas corpus* is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. ...Petitioners, therefore, are entitled to the privilege of *habeas corpus* to challenge the legality of their detention..."

"The necessary implication of the [government's argument that the protection of *habeas corpus* did not apply because the Guantanamo facility is not on American soil] is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible

for the political branches to govern without legal constraint.

"Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.' *Murphy v. Ramsey*, (1985) Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another..."

"These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of *habeas corpus* is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to "manipulation by those whose power it is designed to restrain..."

We do consider it uncontroversial...that the privilege of *habeas corpus* entitles the prisoner to a meaningful opportunity to demonstrate he is being [unlawfully] held... The *habeas* court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain..."

"[W]e agree with petitioners that, even when all the parties involved in this process act with

Handout K: Page 2

diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is "closed and accusatorial." And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore...

"We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering...The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security..."

"Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for *habeas corpus* relief derives..."

"The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism...The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that *habeas corpus*, a right of first importance, must be a part of that framework..."

Justice Scalia's Dissent (Joined by Chief Justice Roberts and Justices Thomas and Alito)

"Today, for the first time in our Nation's history, the Court confers a constitutional right to *habeas*

corpus on alien enemies detained abroad by our military forces in the course of an ongoing war. The Chief Justice's dissent, which I join, shows that the procedures prescribed by Congress in the Detainee Treatment Act provide the essential protections that *habeas corpus* guarantees; there has thus been no suspension of the writ, and no basis exists for judicial intervention beyond what the Act allows. My problem with today's opinion is more fundamental still: The writ of *habeas corpus* does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely *ultra vires* [beyond the powers of the Court]..."

"The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed...The President relied on our settled precedent in *Johnson v. Eisentrager*, (1950), when he established the prison at Guantanamo Bay for enemy aliens [having been assured by advisers that] a federal district court could not properly exercise habeas jurisdiction over an alien detained [there]... At least 30 ... prisoners hitherto released from Guantanamo Bay have returned to the battlefield. [Justice Scalia provides several examples of this point.]

"...What competence does the Court have to second-guess the judgment of Congress and the President on [the process of identifying enemy combatants]? None whatever. But the Court blunders in nonetheless. Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails..."

"Today the Court warps our Constitution in a way that goes beyond the narrow issue of the reach of the Suspension Clause, invoking judicially brainstormed separation-of-powers principles to [provide] for the extraterritorial reach of *habeas corpus* (and, no doubt, for the extraterritorial

Handout K: Page 3

reach of other constitutional protections as well). It blatantly misdescribes important precedents, most conspicuously Justice Jackson's opinion for the Court in *Johnson v. Eisentrager*. It breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization. And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

"The Nation will live to regret what the Court has done today. I dissent."

Chief Justice Roberts's Dissent

"Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. The Court rejects them today out of hand, without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law's operation. And to what

effect? The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants...

"*Hamdi* concluded that American citizens detained as enemy combatants are entitled to only limited process, and that much of that process could be supplied by a military tribunal, with review to follow in an Article III court. That is precisely the system we have here. It is adequate to vindicate whatever due process rights petitioners may have...

"[The American people] today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges."

Follow-up

On November 20, 2008, a federal judge ruled that Boumediene's detention unlawful and ordered his release. Freed on May 15, 2009, he settled with his family in France.



Case # 5: *U.S. v. Khalid Sheikh Mohammad, et al.* Military Commission Proceedings 2011-2015

Directions: Read the following case summary, and answer the questions that follow.

Khalid Sheikh Mohammad (KSM) was a top-level member of al-Qaeda, planning and carrying out acts of international terrorism for at least ten years prior to the 9/11 attacks on the United States. In early 2003, officers of the U.S. Central Intelligence Agency (CIA) and the Pakistani Inter-Services Intelligence agency captured Mohammad in Pakistan, and held him in CIA custody. During his secret CIA interrogations, which included the use of “enhanced interrogation techniques,” he had also confessed to planning several other acts of international terrorism from 1993 to 2002. The interrogation techniques included such practices as waterboarding (simulated drowning), sleep deprivation, prolonged stress positions, extreme cold, deafening noise, beating, and others. In 2006, the U.S. military took charge of Mohammad, moving him and four other high-level 9/11 co-conspirators to the Guantanamo detention facility. In March 2007, Mohammad admitted in a closed-door hearing, “I was responsible for the 9/11 operation, from A to Z.”

In 2008, Mohammad and the other four high-level terror suspects were formally charged under the Military Commissions Act of 2006 with murder, terrorism and other war crimes related to the 9/11 attacks. The Guantanamo military commission proceedings began in a specially constructed, well-secured courtroom with arraignment of the suspects in June, 2008. On June 12, 2008, the Supreme Court ruled in *Boumediene v. Bush*, that enemy combatants detained at Guantanamo Bay were entitled to the Fifth Amendment’s protection

of due process, and that the Military Commissions Act of 2006 was an unconstitutional suspension of *habeas corpus*. A few days after taking office in 2009, President Barack Obama announced a suspension of all military commission trials, and his administration began a review of all the 9/11 cases, investigating charges that detainees had been tortured, and evaluating the evidence against them. The decision was made to transfer the five high-level cases to federal district court in New York City. Attorney General Eric Holder believed, in keeping with the *Boumediene* decision, that the federal court system provided the best avenue to try the cases of KSM and his co-conspirators, and that the trials could be conducted with sufficient provision of security safeguards. The plan for a New York trial of the five cases met significant obstacles, however. Many people opposed extending Bill of Rights protections to suspected terrorists, and the projected costs of making the New York courtroom meet security standards skyrocketed.

In January 2011, Congress prohibited the use of Defense Department funds to transfer any defendant from Guantanamo to the U.S., effectively barring any possibility of Guantanamo detainees receiving any trial other than by military commission. That April, Attorney General Holder announced that the cases of Mohammad and the other four accused conspirators would be heard by military commissions at Guantanamo, and as of 2015, preparation for those trials is ongoing. In 2014 the U.S. Senate Intelligence Committee reported that its investigation of millions of CIA internal records

Handout L: Page 2

showed extensive use of “enhanced interrogation techniques” in the questioning of terror suspects held in Guantanamo and other prisons. Debates continue about the due process protections to be carried out with terror suspects captured during wartime, whether military commission hearings can be conducted in a way that meets constitutional

requirements, and which branch of government is best qualified to answer those questions. The debates raise questions not only about due process and fair trial issues, but also about the Constitution’s complex system of separation of powers.

Critical Thinking Questions

1. If you were KSM’s attorney, what constitutional passages and case precedents would you use in preparing his defense?
2. If you were the government’s attorney, seeking a conviction of KSM, what constitutional passages and case precedents would you use in his prosecution?
3. Trace the actions of each of the three branches of government in the KSM case. Which branch do you believe is most powerful?



Timeline: Military Justice During the War on Terror

Directions: Summarize the historical significance of each event on the timeline. Color the box in the left-hand column to show whether you agree (green) or disagree (red) with each action taken by the United States government. Then answer the questions at the bottom of the page.

September 11, 2001: Al Qaeda terror attack.

Significance:

September 14, 2001: Congress issued the Authorization for Use of Military Force giving President Bush broad war powers.

Significance:

November 13, 2001: President Bush issued a Military Order authorizing trial by military commission for suspected terrorists and specifying that they would have no recourse to the U.S. court system for appeals.

Significance:

November 2004: Military commission hearings began; among the first to be tried was Salim Ahmed Hamdan.

Significance:

June 28, 2004: *Rasul v. Bush* decision invalidated the “no appeal” provision of Military Order.

Significance:

December 30, 2005: Detainee Treatment Act revoked all federal district judges’ jurisdiction over *habeas* claims and allowed the Court of Appeals for the District of Columbia Circuit to hear appeals of final decisions of military commissions.

Significance:

June 29, 2006: *Hamdan v. Rumsfeld* decision held the military commission system an unconstitutional violation of U.S. military law and the Geneva Conventions.

Significance:

October 17, 2006: Military Commissions Act established procedural rules based on, but different in important ways from, UCMJ; stripped federal judiciary of all *habeas* jurisdiction in detainee cases, including cases pending at that time. At the president's request, this law invalidated parts of the Hamdan decision.

Significance:

June 12, 2008: *Boumediene v. Bush*: Supreme Court declared that the MCA 2006 *habeas* removal provision was unconstitutional.

Significance:

August 7, 2008: In his retrial based on the 2006 MCA, Salim Hamdan was acquitted of the charge of conspiracy, but found guilty of one count of providing material support for terrorism. He was credited with 5 years' time served.

Significance:

January 20, 2009: President Barack Obama took office and halted military commission hearings to conduct an investigation of the detainee cases. He issued an Executive Order that the detention facility at Guantanamo be shut down within a year. Officials were ordered to assess whether each Guantanamo detainee should continue to be held by the United States, be transferred or released to another country, or be prosecuted in the U.S. for criminal offenses.

Significance:

June 9, 2009: Detainee Ahmed Ghailani was transferred from Guantanamo to New York federal district court for trial on terror charges. He was ultimately convicted and sentenced to life in prison.

Significance:

July 20, 2009: President Obama's Detention Policy Task Force reported that military commissions are appropriate for some detainees. Disposition of each case was assigned to a team including Department of Justice and Department of Defense personnel.

Significance:

October 28, 2009: The Military Commissions Act of 2009 reformed military commission rules to provide more due process protections; military commission hearings resumed.

Significance:

November 13, 2009: Attorney General Eric Holder announced a plan to try five high value detainees (including 9/11 “mastermind” Khalid Sheikh Mohammad) in New York City federal court. This was halted due to objections related to security concerns and debate about what level of due process protection is appropriate for terror suspects captured in wartime.

Significance:

January 2010: Deadline for closure of Guantanamo detention facility was not met. The Obama administration determined that about 50 of the detainees would continue to be held there without trial, 40 would be prosecuted in military commissions or federal court, and the remaining 110 would be released when a receiving country could be identified.

Significance:

January 7, 2011: Congress prohibited the use of Defense Department funds to transfer detainees from Guantanamo Bay to the U.S. or to other countries, effectively eliminating any chance of trial in civilian court for Guantanamo detainees.

Significance:

April 4, 2011: Attorney General Eric Holder announced that plans would move forward to use revised military commission rules to try Khalid Sheikh Mohammad (KSM) and other 9/11 terrorists at Guantanamo.

Significance:

October 16, 2012: D.C. Circuit Court of Appeals overturned the Hamdan conviction, explaining that “material support for terrorism” was not a crime at the time the events for which he was prosecuted under the 2006 Military Commissions Act took place. This decision cast more doubt on the constitutionality of the military commissions trial system for 9/11 terror suspects.

Significance:

December 9, 2014: Senate Intelligence Committee released its report on the Central Intelligence Agency's enhanced interrogation techniques. The report showed, among other facts, that KSM was waterboarded repeatedly. Waterboarding is a procedure in which simulated drowning is used to persuade suspects to provide information. The CIA defended such practices as effective in acquiring important intelligence from suspects. Critics called the practice torture and claimed that it did not produce accurate information.

Significance:

Critical Thinking Questions

1. Develop a graphic organizer or draw a political cartoon for these events that shows one of the following:
 - a. tension between the political branches (executive and legislative) on one hand, and the judicial branch on the other.
 - b. tension between national security and the rights of terror suspects.
 - c. tension between the views of different Supreme Court Justices on the rights of terror suspects.
2. In your opinion, what is the appropriate way to resolve the remaining Guantanamo cases? Explain your position with reference to constitutional principles and precedent.

Comparing Supreme Court Decisions

Directions: In the table below are excerpts from the majority and dissenting opinions in *Johnson v. Eisentrager* (1950). As you evaluate Supreme Court rulings related to the war on terror, decide whether each twenty-first century opinion listed aligns more closely with that of Justice Robert Jackson or that of Justice Hugo Black. Then write an excerpt of each Justice’s opinion in either the Jackson column or the Black column. Finally, use a highlighter in the table to indicate which was the majority opinion in each case and answer the question at the bottom of the table.

What form of due process applies?	The privilege of the writ of <i>habeas corpus</i> does not apply in this situation; the policy determined by the president and Congress will be carried out.	The privilege of the writ of <i>habeas corpus</i> and/or other due process protections apply in this situation in order to prevent illegal imprisonment.
<i>Johnson v. Eisentrager</i> (1950)	<p>Justice Jackson: “The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy.... Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security...This statute was enacted or suffered to continue by men who helped found the Republic and formulate the Bill of Rights, and although it obviously denies enemy aliens the constitutional immunities of citizens, it seems not then to have been supposed that a nation’s obligations to its foes could ever be put on a parity with those to its defenders.”</p>	<p>Justice Black: “Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies...Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live. <i>Habeas corpus</i>, as an instrument to protect against illegal imprisonment, is written into the Constitution. ... I would hold that our courts can exercise it whenever any United States official illegally imprisons any person in any land we govern. Courts should not for any reason abdicate this, the loftiest power with which the Constitution has endowed them.”</p>

<p>What form of due process applies?</p>	<p>The privilege of the writ of <i>habeas corpus</i> does not apply in this situation; the policy determined by the president and Congress will be carried out.</p>	<p>The privilege of the writ of <i>habeas corpus</i> and/or other due process protections apply in this situation in order to prevent illegal imprisonment.</p>
<p>Case #1: <i>Hamdi v. Rumsfeld</i> (2004)</p> <p>Justice O'Connor; Justice Thomas</p>		
<p>Case #2: <i>Rasul v. Bush</i> (2004)</p> <p>Justice Stevens; Justice Scalia</p>		

<p>What form of due process applies?</p>	<p>The privilege of the writ of <i>habeas corpus</i> does not apply in this situation; the policy determined by the president and Congress will be carried out.</p>	<p>The privilege of the writ of <i>habeas corpus</i> and/or other due process protections apply in this situation in order to prevent illegal imprisonment.</p>
<p>Case #3: <i>Hamdan v. Rumsfeld</i> (2006)</p> <p>Justice Stevens; Justice Scalia</p>		
<p>Case #4: <i>Boumediene v. Bush</i> (2008)</p> <p>Justice Kennedy; Justice Scalia; Chief Justice Roberts</p>		

Critical Thinking Question

In his dissent in *Hamdi v. Rumsfeld* (2004), Justice Stevens wrote,

The Founders well understood the difficult tradeoff between safety and freedom. “Safety from external danger,” Hamilton declared [in *Federalist No. 8*] “is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free.” The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it.

Justice Stevens quoted Hamilton’s warning about people’s willingness to trade freedom for security. Assess Hamilton’s warning. To what extent does this warning apply to twenty-first century America? To what extent do you believe fair trial decisions in the war on terror have protected both liberty and security?

Answer Keys

Handout A: Constitutional Provisions Related to Due Process and Fair Trials

1. *Habeas corpus* is Latin for “to have the body,” a centuries-old protection of the accused that guarantees a hearing before a judge who has the power to release a prisoner who is illegally detained. It is an important part of due process for people who are arrested because it helps prevent arbitrary, illegal, or mistaken detention.
2. According to Article III, Section 2, Clause 3, Congress designates the place where trial should be held if a crime is committed outside of any state.
3. Elements of a fair trial guaranteed by the Fifth Amendment include the following:
 - Right to indictment by grand jury unless the case arises in land or naval forces or the militia when in service during times of war or public danger
 - Protection against being tried more than once for given offenses (“double jeopardy”)
 - Protection against forced self-incrimination
 - Protection against being deprived of life, liberty, or property without due process
 - Protection against the taking of private property without just compensation
4. Elements of a fair trial guaranteed by the Sixth Amendment include the following:
 - Speedy and public trial by an impartial jury of the state or district where the alleged crime was committed. The district must have been previously ascertained by law.
 - The right to be informed of the charges
 - The right to be confronted by witnesses
 - Compulsory process for compelling testimony by witnesses in one’s favor
 - The right to have a defense attorney
5. Accept reasoned answers that demonstrate an understanding of both what is meant by due process and the complexity of the question.

Handout B: Background Essay—Due Process and Military Justice

1. All three cases arose during wartime; *Milligan* in the Civil War and *Quirin* and *Eisentrager* during WWII.

The *Milligan* case involved a civilian who sought to overthrow the U.S. government, and who was tried, convicted, and sentenced to death by a military commission. The decision was unanimous that civilians must be tried in civil courts as long as they are open, even during wartime.

In the *Quirin* case, German saboteurs were caught in the United States during WWII. They were tried, convicted, and sentenced to death by a military tribunal. The Supreme Court ruled unanimously that they had no right to a civilian trial because they were unlawful enemy combatants. President Roosevelt had not exceeded his authority in ordering them to be tried by military commission.

Answer Keys: Page 2

In the *Eisentrager* case, non-resident enemy aliens were tried by military tribunal outside the U.S. for war crimes against the U.S. In a 6-3 decision, the Supreme Court majority ruled that there is no *habeas corpus* protection for enemy aliens captured overseas.

2. The Roosevelt and Truman administrations tried enemy combatants during World War II according to Congress's power under Article I, Section 8, Clauses 11 and 14 to govern the conduct of military forces. Congress had provided for the president to apply the rules of evidence used in federal criminal trials "in so far as he deems practicable."
3. In decisions related to the detainment and military tribunals of enemy combatants by the Roosevelt and Truman administrations, the U.S. Supreme Court ruled that the president and Congress had acted within the Constitution.
4. Accept reasoned responses. As of January 2004, the Bush administration's actions against enemy combatants during the war on terror seem to be largely consistent with precedents established by previous administrations in World War II.
5. Accept reasonable responses that do the following:
 - Accurately summarize the excerpts from decisions written by Justices Jackson and Black,
 - Support either opinion.

Handout L: Case # 5—*U.S. v. Khalid Sheikh Mohammad, et al.* Military Commission Proceedings 2011-2015

Accept reasoned answers that demonstrate an understanding of the following:

1. Constitutional passages and case precedents that would aid KSM's defense.
2. Constitutional passages and case precedents that would aid KSM's prosecution.
3. Major actions of each branch of the federal government in KSM's case.
4. Decide which branch acted most powerfully in this context.

Handout M: Timeline—Military Justice during the War on Terror

Student responses should demonstrate understanding of the historical significance of each event on the timeline and reveal consistent reasoning regarding whether U.S. government actions were appropriate.

Their graphic organizers or political cartoons should demonstrate an understanding of the complexities of applying constitutional principles during wartime.

Students should support their opinions regarding resolution of the remaining Guantanamo cases by citing constitutional principles and precedent.

Handout N: Comparing Supreme Court Decisions

Accept reasoned responses. Sample responses are shown below. Student choice of excerpt for each opinion should reveal a grasp of the comparison between each opinion and the opinions written in the *Eisentrager* case. To indicate the majority opinion in each case, students should highlight the opinions of Justices Jackson, O'Connor, Stevens, and Kennedy.

<p>What form of due process applies?</p>	<p>The privilege of the writ of habeas corpus does not apply in this situation; the policy determined by the president and Congress will be carried out.</p>	<p>The privilege of the writ of habeas corpus and/or other due process protections apply in this situation in order to prevent illegal imprisonment.</p>
<p><i>Johnson v. Eisentrager</i> (1950)</p>	<p>Justice Jackson: “The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy.... Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security...This statute was enacted or suffered to continue by men who helped found the Republic and formulate the Bill of Rights, and although it obviously denies enemy aliens the constitutional immunities of citizens, it seems not then to have been supposed that a nation’s obligations to its foes could ever be put on a parity with those to its defenders.”</p>	<p>Justice Black: “Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies...Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live. <i>Habeas corpus</i>, as an instrument to protect against illegal imprisonment, is written into the Constitution. ...I would hold that our courts can exercise it whenever any United States official illegally imprisons any person in any land we govern. Courts should not for any reason abdicate this, the loftiest power with which the Constitution has endowed them.”</p>
<p><i>Hamdi v. Rumsfeld</i> (2004)</p>	<p>Justice Thomas: “[The Supreme Court lacks] the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of which is committed to other branches...Hamdi thereby received all the process to which he was due under the circumstances...”</p>	<p>Justice O’Connor: “The Great Writ of <i>habeas corpus</i> allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions...Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process...”</p>

<p>What form of due process applies?</p>	<p>The privilege of the writ of habeas corpus does not apply in this situation; the policy determined by the president and Congress will be carried out.</p>	<p>The privilege of the writ of habeas corpus and/or other due process protections apply in this situation in order to prevent illegal imprisonment.</p>
<p><i>Rasul v. Bush</i> (2004)</p>	<p>Justice Scalia: “[T]he Court evades explaining why stare decisis can be disregarded, and why Eisentrager was wrong...Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction...”</p>	<p>Justice Stevens: “Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority under Section 2241. Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of <i>habeas corpus</i>...”</p>
<p><i>Hamdan v. Rumsfeld</i> (2006)</p>	<p>Justice Scalia: “Here, apparently for the first time in history... a District Court enjoined [prohibited] ongoing military commission proceedings, which had been deemed “necessary” by the President “[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks.” Such an order brings the Judicial Branch into direct conflict with the Executive in an area where the Executive’s competence is maximal and ours is virtually nonexistent. We should exercise our equitable discretion to avoid such conflict. Instead, the Court rushes headlong to meet it...”</p>	<p>Justice Stevens: “Neither of these congressional Acts [AUMF nor DTA 2005], however, expands the President’s authority to convene military commissions... But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”</p>

<p>What form of due process applies?</p>	<p>The privilege of the writ of habeas corpus does not apply in this situation; the policy determined by the president and Congress will be carried out.</p>	<p>The privilege of the writ of habeas corpus and/or other due process protections apply in this situation in order to prevent illegal imprisonment.</p>
<p><i>Boumediene v. Bush</i> (2008)</p>	<p>Justice Scalia: The writ of <i>habeas corpus</i> does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court’s intervention in this military matter is entirely ultra vires [beyond the powers of the Court]...</p> <p>Chief Justice Roberts: The majority merely replaces a review system designed by the people’s representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority’s ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants... Hamdi concluded that American citizens detained as enemy combatants are entitled to only limited process, and that much of that process could be supplied by a military tribunal, with review to follow in an Article III court. That is precisely the system we have here. It is adequate to vindicate whatever due process rights petitioners may have...</p>	<p>Justice Kennedy: “We hold that Article I, Section 9, Clause 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of <i>habeas corpus</i> is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. ...Petitioners, therefore, are entitled to the privilege of <i>habeas corpus</i> to challenge the legality of their detention... [if not] it would be possible for the political branches to govern without legal constraint. Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.”</p>

Accept reasoned responses that

- Thoughtfully assess Hamilton’s warning
- Address to what extent the warning applies to twenty-first century America
- Evaluates to what extent the fair trial decisions have protected both liberty and security