

# Lessons on the American Constitution

## Constitutional Conversations: Scripted Debates on the Executive Branch

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## Presidential War Powers—The *Hamdi*, *Rasul*, and *Hamdan* Cases

### Introduction

The growth of presidential power has been consistently bolstered whenever the United States has entered into war or a military action. From President Washington's actions ending the Whiskey Rebellion to President Obama's use of drones around the globe, executive war-making power has been relatively unchecked by Congress. Legislators are not likely to interfere with the president's role in maintaining national security. Franklin Delano Roosevelt's Attorney General Francis Biddle famously declared, no wartime president is too concerned about constitutional limitations. Therefore, the check on unbridled executive power has fallen to the federal judiciary, primarily the Supreme Court.

This judicial check has been prevalent recently during the "war on terror," which began after the terrorist attacks on 11 September 2001. Starting with the congressional resolution commonly referred to as the AUMF (Authorization for the Use of Military Force), legislative support was given to the executive to pursue those responsible for the attacks. It also authorized the president to prosecute war against those who had harbored or supported the attackers. This new asymmetrical war against non-state actors has ushered in a new era in executive power. When battle lines are not confined to specific countries, areas, or fronts, and when the enemy doesn't follow a flag, wear a uniform, or align itself with a government; some have argued the president needs broader powers to confront such threats. In addition to the AUMF, Congress has passed legislation that has bolstered executive power. The Detainee Treatment Act of 2005 contains provisions relating to treatment of persons in custody of the Department of Defense, and administration of detainees held in Guantanamo Bay, Cuba. Additionally, the Military Commissions Act of 2006 authorizes the "trial by military commission for violations of the law of war, and for other purposes."

Issues of habeas corpus, due process and limited government predate the U.S. Constitution itself and have reemerged in a series of Supreme Court cases collectively known as the "terror cases." At the core of each of these cases is the line that separates security from liberty and to what extent is executive power permitted to go unchecked to provide that security. James Madison wrote in a 17 October 1788 letter to Thomas Jefferson that "It is a melancholy reflection that liberty should be equally exposed to danger whether the government has too much or too little power; and that the line which divides these extremes should be so inaccurately defined by experience."

These contentious issues have in fact been repeatedly addressed by the United States Supreme Court. President Abraham Lincoln suspended habeas corpus during the Civil War. As a consequence, the Court addressed his actions in the *Merryman* and *Milligan* cases. President Franklin D. Roosevelt issued executive orders addressing the classification of military combatants and the use of military tribunals. These actions led to *Ex Parte Quirin*. Even with these and other precedents, the relevance of this ongoing struggle against terrorists and their global actions has provided new judicial interpretations for these protections. Madison's warnings are prophetic. In his letter to Thomas Jefferson he noted that when the public's fears become too great, he speculated that written protections would be not strong enough to preserve liberty. An examination of three Supreme Court cases places Madison's warnings under scrutiny.

Several questions are paramount in the cases highlighted in this script. In the *Hamdi* case two questions are central; the legitimacy of *Hamdi's* due process rights under the Fifth and Sixth amendments and whether the separation of powers requires federal courts to defer to executive branch determinations that an American citizen is an "enemy combatant." In *Rasul v. Bush* the Court considered jurisdictional issues of legal appeals from citizens in Guantanamo Bay Naval Base. The *Hamdan* case addressed whether the rights protected by the Geneva Convention could be enforced

in federal court through habeas corpus petitions. It also considered the legitimacy of military commissions *if authorized by Congress or whether they are inherent presidential powers.*

## Supreme Court Cases Used in Script

*Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)

*Rasul v. Bush*, 542 U.S. 466 (2004)

*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)

## Central Constitutional Issues in Cases Used in Script

*Hamdi v. Rumsfeld*, 2004

Can the government suspend the Fifth Amendment right to Due Process by holding detainees indefinitely, without access to an attorney? Does the separation of powers doctrine require federal courts to defer to executive branch determinations that an American citizen is an "enemy combatant"?

*Rasul v. Bush*, 2004

Do federal courts have jurisdiction to consider legal appeals filed on behalf of foreign citizens held by the United States military in Guantanamo Bay Naval Base, Cuba?

*Hamdan v. Rumsfeld*, 2006

May the rights protected by the Geneva Convention be enforced in federal courts through habeas corpus petitions? Was the military commission established to try Hamdan and others for alleged war crimes in the war on terror authorized by Congress or the inherent powers of the president?

## Role in Script—9 (L—large role; M—medium role; S—small role)

Moderator (L)

Justice Samuel Alito (S)

Justice Steven Breyer (S)

Justice Anthony Kennedy (L)

Justice Sandra Day O'Connor (M)

Justice Antonin Scalia (L)

Justice David Souter (M)

Justice John Paul Stevens (M)

Justice Clarence Thomas (S)

## Script

**Moderator:** Welcome everyone. We have with us a number of current and former Supreme Court Justices to discuss Supreme Court rulings in what many have called the “terror cases.” Joining us are Justices Samuel Alito, Steven Breyer, Anthony Kennedy, Antonin Scalia, and Clarence Thomas. Former Justices with us include John Paul Stevens, Sandra Day O’Connor, and David Souter.

**Panel:** Good afternoon. Thanks for having us. It’s a pleasure to be here. Etc. (Thomas says nothing.)

**Moderator:** The constitutional principles presented in these “terror” cases are not new. The basic principles at issue include the separation of powers, the writ of habeas corpus, and due process. The Supreme Court has in fact debated and decided these issues during previous American conflicts. However, discussions and debates during the “war on terror” have caused them to resurface as a part of our national conversation. And, as in the past, certain constitutional provisions will be analyzed once more.

**Scalia:** [But, I would like to remind us that our Constitution need not be reinterpreted simply because we think new circumstances warrant it.]

**Moderator:** Fundamental issues in these cases involve Article 1 of the Constitution which grants Congress the authority to declare war. But, Article 2 stipulates the President is Commander-in-Chief. Article 1 also provides stipulations for habeas rights suspension, but are those stipulations particularly clear in these cases? Basic rights are also issues; specifically do the 5<sup>th</sup> and 14<sup>th</sup> Amendments’ due process provisions apply in these circumstances.

**Scalia:** [Don’t get me started on the wacko interpretations of the 14<sup>th</sup> Amendment.]

**Moderator:** As I was saying, do the 5<sup>th</sup> and 14<sup>th</sup> Amendments’ due process provisions cover those apprehended in various conflicts as enemy combatants? Additionally, do the provisions of the 5<sup>th</sup> and 14<sup>th</sup> Amendments apply to non-citizens being detained?

**Scalia:** The writ of habeas corpus was preserved in the Constitution—the only common-law writ to be explicitly mentioned. [Alexander] Hamilton lauded the writ of *habeas corpus* as a means to protect against the practice of arbitrary imprisonments . . . in all ages.

**Moderator:** Before we get sidetracked, Justice O’Connor could you give us some background to the *Hamdi* case.

**O’Connor:** [Yes, certainly. Congress passed the Authorization for the Use of Military Force following the terrorist attacks on September 11, 2001.]

**Moderator:** And why is this law so important to our discussion today?

**O’Connor:** [It] authorized the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the

terrorist attacks” 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.”

Moderator: So, it was the president using powers authorized by Congress?

O'Connor: [Yes.]

Moderator: So what actually happened that led to this case being considered by the Supreme Court?

O'Connor: The president ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and <subdue><sup>1</sup> the Taliban regime that was known to support it.

Moderator: So does this become an issue involving Mr. Hamdi because he was apprehended as a result of the Afghanistan invasion?

O'Connor: [Yes.] This case arises out of the detention of [Yaser Hamdi] whom the Government alleges took up arms with the Taliban during this conflict.

Moderator: And if I am not mistaken, Mr. Hamdi's was a U.S. citizen. Was that the reason for the Court to hear this case?

O'Connor: [Yes.] We held that although Congress authorized the detention of combatants in the narrow circumstances, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest . . . that detention before a neutral decision maker.

Moderator: So, are you suggesting that there are different categories here: citizen and non-citizen?

O'Connor: The Government contends that [Mr.] Hamdi is an “enemy combatant,” and that this status justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted.

Moderator: But, I thought Hamdi was a U.S. citizen and that would make a difference as to how he was treated?

O'Connor: [Yes.] Hamdi was born an American citizen in Louisiana in 1980. . . . By 2001, he resided in Afghanistan.

Souter: It is undisputed that the Government has not charged him with espionage, treason, or any other crime under domestic law. It is likewise undisputed that for one year and nine months, on the basis of an executive designation of Hamdi as an “enemy combatant,” the Government denied him the right to send or receive any communication beyond the prison where he was held and . . . denied him access to counsel to represent him.

Scalia: [And, I would add that when] the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other

crime.

**Moderator:** OK. What if Hamdi were not an American citizen? When Congress passed the Authorization for the Use of Military Force Act (AUMF) did it give the president power to determine the “unlawful combatant” status of both citizens and non-citizens?

**O’Connor:** The . . . question before us was whether the Executive had the authority to detain citizens who qualify as “enemy combatants.” The Government . . . never provided any court with the full criteria that it used in classifying individuals as such.

**Moderator:** So, citizenship does matter in this situation?

**O’Connor:** [The government] made clear that, for purposes of this case, the “enemy combatant” that it is seeking to detain is an individual who was hostile to the United States or coalition partners in Afghanistan and who engaged in . . . armed conflict against the United States.

**Moderator:** Justice Souter, you had a different take on this?

**Souter:** [Absolutely. Others on the court] accepted the Government’s position that if Hamdi’s designation as an enemy combatant is correct, his detention [at least some period] is authorized by the Authorization for Use of Military Force Act. Here, I disagreed and respectfully dissented.

**Moderator:** So, why did you disagree with Justice O’Connor on this point?

**Souter:** [Frankly, I believed] the issue was how broadly or narrowly to read the Non-Detention Act, the tone of which is severe.

**Moderator:** Could you please explain why you thought this law was important?

**Souter:** [The Non-Detention Act states] “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” I believe the statute . . . has to be read broadly [for] the statute to impose a burden of justification on the Government.

**Moderator:** And did you believe the government meets that burden to justify detaining Mr. Hamdi?

**Kennedy:** [No.] The Government . . . failed to demonstrate that the Force Resolution authorized the detention complained of here even on the facts the Government claims. If the Government raises nothing further than the record now shows, the Non-Detention Act entitles Hamdi to be released.

**Moderator:** So should the courts and Congress play any role in this? Shouldn’t this really be an executive decision given the circumstances of the 9/11 attacks? I guess my question is this; doesn’t this really fall under the president’s powers as commander in chief?

**Scalia:** [But] the very core of liberty secured by our Anglo-Saxon system of separated powers has

been freedom from indefinite imprisonment at the will of the executive.

Thomas: [I believe that] this detention [of Hamdi] fell squarely within the Federal Government's war powers, and [the Court] lacked the expertise and capacity to second-guess that decision.

O'Connor: The [president] maintained that no explicit congressional authorization was required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We did not reach the question whether Article II provided such authority, however, because we agreed with the Government's alternative position, that Congress had in fact authorized Hamdi's detention, through the AUMF.

Moderator: So in other words, the Court decided that since Congress granted this authority to define and detain enemy combatants, it was a legitimate exercise of presidential power.

O'Connor: [Yes.]

Moderator: And the Court really didn't have to decide whether this type of action was an implied power in Article II of the Constitution.

O'Connor: [That is correct.]

Scalia: [For some context, let me quote Sir William Blackstone here, from his *Commentaries on the Laws of England*, 1765], "To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into [if necessary] upon a *habeas corpus*."

Moderator: And if these conditions are not met?

Scalia: If there be no cause expressed, the <jailer><sup>2</sup> is not bound to detain the prisoner.

O'Connor: [Let's be practical.] There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network . . . are individuals Congress sought to target in passing the AUMF.

Moderator: So based on all this, what did the majority on the Court conclude?

O'Connor: We concluded that detention of individuals falling into the limited category we were considering [was] so fundamental as to be an exercise of the "necessary and appropriate force" Congress has authorized the president to use.

Souter: [And that's exactly what concerned me.] The defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each. In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war [or some situation in between] is not well entrusted to



the executive branch of government, whose particular responsibility is to maintain security.

**Thomas:** [But,] it is crucial to recognize that judicial interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive.

**Scalia:** [I have to disagree with my colleague on our duty here.] The two ideas central to Blackstone's understanding—due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned—found expression in the Constitution's Due Process and Suspension Clauses.

**Moderator:** I am assuming you are referring to the suspension clause in Article I, section 9, which prohibits the suspension of habeas except in cases of rebellion or invasion or situations where the public safety may require it. And you believe it IS the court's role to see these rights protected?

**Scalia:** [Yes on both counts.]

**Moderator:** Justice O'Connor, do you wish to comment on either Justice Scalia's or Justice Souter's comments?

**O'Connor:** [Yes, simply this.] There is no bar to this nation's holding one of its own citizens as an enemy combatant, as this court established in the *Quirin* case.

**Moderator:** Is that the 1942 case where the Court decided that enemy prisoners could be tried in military courts?

**O'Connor:** [Yes.]

**Souter:** This is true, however . . . for reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory.

**Moderator:** You mean there is a danger in having the executive branch the sole "decider" of issues relating to national security?

**Souter:** [Yes.] A reasonable balance is more likely to be reached on the judgment of a different branch, just as [James] Madison said [in Federalist 51] "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights."

**O'Connor:** To be clear, our opinion [was limited and] only found legislative authority to detain under the AUMF once it was sufficiently clear that the individual was . . . an enemy combatant. Regardless . . . 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.

**Moderator:** Let's switch to a different case. Justice Stevens, before we get to the decision in *Rasul*,

could you provide us with some background on that case?

Stevens: [Of course.] Since 2002, the U.S. military held [these petitioners]—along with approximately 640 other non-Americans captured abroad—at the Naval Base at Guantanamo Bay, [as a result of Executive action under the AUMF].

Moderator: So this is another case involving the writ of habeas corpus?

Stevens: [Ultimately, yes. The petitioners] through relatives . . . filed various actions . . . challenging the legality of their detention at the Base. All alleged that none [had] ever been a combatant against the United States or has ever engaged in any terrorist acts. They also alleged that none had been charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal.

Moderator: It seems that from the Court's previous decision in *Hamdi* there is some protection for U.S. citizens when they are charged in a terror case. But this case is about non-citizens who are detained in foreign theaters of war. Do they have the right to challenge those detentions as well?

Stevens: The question before us was whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."

Moderator: If I understand this correctly, this is an issue of what territories are under U.S. control. Or to put it another way, does the U.S. have legal authority at the U.S. Naval base at Guantanamo Bay in Cuba; the site of these detentions?

Scalia: [But,] the brevity of our analysis [in this *Rasul* case] signified . . . [the AUMF] did not confer jurisdiction over an alien detained **outside the territorial jurisdiction** of the courts of the United States.

Stevens: By the express terms of its agreements with Cuba [dating back to 1903], 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. In addition . . . considering that the [habeas] 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.

Moderator: So in simple terms, this means what?

Stevens: Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority.

Kennedy: From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it.

Scalia: [This was and is still unbelievable to me!] The consequence of [this decision in *Rasul*], as applied to aliens outside the country, was breathtaking. It permitted an alien captured in a foreign theater of active combat to bring a [habeas] petition against the Secretary of Defense. [The original] lease agreement [in 1903] explicitly recognized “the continuance of the ultimate sovereignty of the Republic of Cuba over the leased areas and the Executive Branch—whose head is “exclusively responsible” for the “conduct of diplomatic and foreign affairs,” affirms that the lease and treaty do not render Guantanamo Bay the sovereign territory of the United States.

Stevens: [However,] the application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus.

Moderator: What are the historical precedents for the writ?

Stevens: [In England] courts exercised habeas jurisdiction over . . . aliens detained within sovereign territory of the realm. . . . As Lord Mansfield wrote in 1759, even if a territory was “no part of the realm,” there was “no doubt” as to the court’s power to issue writs of habeas corpus if the territory was “under the subjection of the Crown.”

Kennedy: In my view [the court was correct] to conclude that federal courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals held at the Guantanamo Bay Naval Base in Cuba.

Moderator: In other words, the Court had the authority to take and hear cases on behalf of prisoners detained in Guantanamo Bay?

Kennedy: [Yes.]

Moderator: This seems to conflict with the President’s war powers.

Kennedy: [Yes.]

Moderator: Are there other statutes or treaties play in how these “terror cases” are tried or as to what rights are conferred on the accused? For example, can the Geneva Convention be enforced in federal court through habeas corpus petitions? What about the military commissions established to try the accused; were these authorized by Congress or part of inherent presidential power?

Stevens: We <decided to review><sup>3</sup> [the *Hamdan* case] to decide whether the military commission convened to try Hamdan has authority to do so, and whether Hamdan may rely on the Geneva Conventions in these proceedings.

Moderator: Justice Stevens, could I once again impose on you for a quick review of the background to the *Hamdan* case?

Stevens: [Of course.] Salim Ahmed Hamdan, [was] a Yemeni national in custody at an American prison in Guantanamo Bay, Cuba. In November 2001, during hostilities between the United States

and the Taliban [in Afghanistan], Hamdan was captured by militia forces and turned over to the U. S. military. He was transported to Guantanamo Bay. Over a year later, the president deemed him eligible for trial by military commission for then-unspecified crimes.

**Moderator:** Has Congress in fact passed laws limiting the president's authority to establish military commissions?

**Kennedy:** Military Commission Order No. 1, which governs the military commission established to try petitioner Salim Hamdan for war crimes, exceeds limits that certain statutes, duly enacted by Congress.

**Moderator:** Was the Military Commission Order an executive order issued by the president without the approval of Congress?

**Kennedy:** [Yes.]

**Moderator:** And, I take it that you thought that executive order was not legitimate?

**Kennedy:** [Yes, congressional statutes] have placed limits on the President's authority to convene military courts. This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction.

**Scalia:** [But hold on.] On December 30, 2005, Congress enacted the Detainee Treatment Act (DTA). It <clearly><sup>4</sup> provided that, as of that date, "no court, justice, or judge" shall have jurisdiction to consider the habeas application of a Guantanamo Bay detainee.

**Stevens:** However, unlike other intervening changes in the law, a jurisdiction-conferring or jurisdiction-stripping statute usually "takes away no substantive right but simply changes the tribunal that is to hear the case."

**Moderator:** So Justice Stevens, you believe a right still exists even though the court or venue where a person can challenge for that right has changed?

**Stevens:** [Yes.]

**Alito:** [But,] I am not aware of any international law standard regarding the way in which such a court must be appointed, set up, or established. ... Accordingly, "a regularly constituted court" is a court that has been appointed, set up, or established in accordance with the domestic law of the appointing country.

**Moderator:** So for you, if a nation creates a court, it's OK and therefore should be considered a "regularly constituted court."

**Alito:** [Yes.]

**Moderator:** We have a variety of ideas in play in this *Hamdan* case. Let me see if I can clarify a few points for our audience. First, we have a habeas claim from a detainee, Salim Hamdan, who is not a US citizen.

**Alito:** [Yes.]

**Moderator:** Second, Hamdan's argument was that the Detainee Treatment Act, referenced by Justice Scalia, improperly limits his habeas claim and is a violation of international law in the Geneva Conventions, specifically Common Article 3.

**Alito:** [Correct.]

**Moderator:** In addition, the DTA enacted by Congress prohibited the Supreme Court from hearing any current or future case in this area.

**Alito:** [Correct.]

**Moderator:** And finally, Mr. Hamdan claims these special military commissions established by the president to hear such cases exceed the president's power.

**Stevens:** [Yes.] The procedures that the President adopted to try [Hamdan] violated the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.

**Alito:** [But, again] I see no basis for the Court's [deciding] that a military commission cannot be regarded as "a regularly constituted court."

**Moderator:** Why not?

**Alito:** If [the Geneva Convention's] Common Article 3 [was] meant to require trial before a country's military courts or courts that are similar . . . the drafters almost certainly would have used language that expresses that thought more directly.

**Kennedy:** Whatever the substance and content of the term "regularly constituted" as interpreted in this and any later cases, there seems little doubt that it relies upon the importance of standards deliberated upon and chosen in advance of crisis, under a system where . . . the Executive is checked by other constitutional mechanisms.

**Moderator:** So, are we back to the question of how much discretion should be given to the president's power in wartime? What role should Congress and the courts play in the war on terror?

**Thomas:** In these domains, the fact that Congress has provided the President with broad authorities does not imply--and the Judicial Branch should not infer--that Congress intended to deprive him of particular powers not specifically enumerated.

Moderator: Justice Breyer, you disagree?

Breyer: Indeed, Congress has **denied** the President the legislative authority to create military commissions. . . . [However,] nothing prevents the President from returning to Congress to seek the authority he believes necessary.

Thomas: [Now, I must disagree.] Not only is this conclusion . . . inconsistent with the cardinal principle of the law of war, namely protecting non-combatants, but it would sorely hamper the President's ability to confront and defeat a new and deadly enemy. The willingness to second-guess the determination of the political branches that these conspirators must be brought to justice is both unprecedented and dangerous.

Stevens: [Yes, but] the Constitution makes the President the "Commander in Chief" of the Armed Forces, but vests in Congress the powers to "declare War . . . and make Rules concerning Captures on Land and Water," to "raise and support Armies," to "define and punish . . . Offences against the Law of Nations," and "To make Rules for the Government and Regulation of the land and naval Forces."

Moderator: Where have I heard that before?

Stevens: The interplay between these powers was described by Chief Justice [Salmon P.] Chase in the seminal case of *Ex parte Milligan* [in 1866].

Moderator: What did the court say in that case?

Stevens: [The court said that] "The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President."

Thomas: [But, for me the problem is] the Court [stated in the *Hamdan* decision] that it was qualified to pass on the "military necessity," of the Commander in Chief's decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered.

Breyer: Actually . . . the Court's conclusion ultimately rested upon a single [issue]: Congress has not issued the Executive a "blank check." No emergency [would] prevent a [President from consulting] with Congress, [and] judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, [it] strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court simply did the same.

Kennedy: The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate. The ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur.

**Moderator:** So, in other words, you think that there needs to be some constitutional flexibility in these cases.

**Kennedy:** [Yes.] Certain principles are apparent, however. Practical considerations and <immediate><sup>5</sup> circumstances inform the definition and reach of the law... including habeas corpus. The cases and our tradition reflect this precept.

**Moderator:** On that note, we will bring our discussion to a close. I would like to thank our justices for their comments and for our audience's attention to these extremely important debates. Though we are concluding our panel now, these issues will be sure to continue.

## Endnotes

<sup>1</sup> quell

<sup>2</sup> gaoler

<sup>3</sup> granted certiorari

<sup>4</sup> unambiguously

<sup>5</sup> exigent

## Pedagogical Materials

### T-Chart for Notes—Presidential War Powers

**Instructions:** As students listen to the scripted conversation, they should take notes using the T-Chart below to organize and summarize the key ideas from the *Hamdi*, *Hamdan*, and *Rasul* cases.

	Hamdi	Hamdan	Rasul
Background Information			
Central Issue			
Decision			

### Review Questions—Presidential War Powers

1. What role does citizenship play for people labeled “enemy combatants” in the terror cases?
2. What is the importance of granting or denying habeas corpus rights to those held at the U. S. Naval Base at Guantanamo Bay, Cuba, in the war on terror?
3. What are several differences between military commissions established by the President and regular criminal courts in the U.S.?

### Discussion Questions—Presidential War Powers

1. How much should our courts, both military and civilian, be influenced by international law such as the Geneva Conventions? Why?
2. Do you believe that there should be a separate justice system established to try terror cases (such as military commissions) or is our current court system capable of handling these types of cases?
3. To what extent should Congress or the Courts defer to the President in the modern war on terror?



## Overview of Central Constitutional Questions in Cases

### *Ex Parte Merryman, 1861*

What is the legal status of enemy belligerents? Do enemy belligerents have the constitutional rights to habeas corpus, Fifth, and Sixth amendment protections in the civilian courts?

### *Ex Parte Milligan, 1866*

Can the President suspend a citizen's 5th and 6th amendment rights in the case of national emergency? Can a citizen be tried in military tribunals when regular civilian courts are in operation? Can the President suspend the writ of habeas corpus?

### *Ex Parte Quirin, 1942*

Was FDR's executive order creating military commissions a legitimate exercise of his authority under the Congressionally enacted Articles of War? Did prisoners of war have the right to file for a writ of habeas corpus?

### *Hamdi v. Rumsfeld, 2004*

Can the government suspend the Fifth Amendment right to Due Process by holding detainees indefinitely, without access to an attorney? Does the separation of powers doctrine require federal courts to defer to Executive Branch determinations that an American citizen is an "enemy combatant"?

### *Rasul v. Bush, 2004*

Do United States courts have jurisdiction to consider legal appeals filed on behalf of foreign citizens held by the United States military in Guantanamo Bay Naval Base, Cuba?

### *Hamdan v. Rumsfeld, 2006*

May the rights protected by the Geneva Convention be enforced in federal court through habeas corpus petitions? Was the military commission established to try Hamdan and others for alleged war crimes in the War on Terror authorized by the Congress or the inherent powers of the President?

### *United States v. Reynolds, 1953*

Can civilians use a federal statute to assert their right to access a military report? Can the Secretary of the Air Force assert that a military report is privileged information? What constitutes a military secret?

### *United States v. Nixon, 1974*

Did the constitutional principle of powers and the tradition of executive privilege prevent the courts from requiring the President to turn over materials needed in a criminal trial?

### *Clinton v. Jones, 1997*

Can a sitting president assert immunity from prosecution in a civil case stemming from actions before assuming office? What constitutes related and unrelated duties of the office of the President?

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