LIBERTY AND SECURITY IN MODERN TIMES

NCSS Conference, November, 2015

Introductory Essay by Stuart Leibiger, Ph.D.
Security, Liberty, and The USA PATRIOT Act
Due Process and Fair Trials in the War on Terror

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The United States has always experienced tremendous tension in trying to balance the protection of liberty with the protection of national security. This tension became especially acute in times of war. On the one hand, wartime hysteria often unfortunately led to the violation of the constitutionally-protected rights of dissenters and of ethnic and racial minorities. But on the other hand, the U.S. during the twentieth century gradually expanded and breathed new life into the Bill of Rights, especially the First Amendment. Thus the pressures of wartime have brought out both the best and the worst in Americans grappling to achieve both liberty and security.

In 1940, after the outbreak of World War II in Europe, fear of domestic subversion led to the passage of the Alien Registration Act, better known as the Smith Act. This law made it a crime “to knowingly or willfully advocate, abet, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence.” In slightly modified form, this provision of the Smith Act still remains in effect today.

The Smith Act also required—for the first time ever in American history—that all resident aliens register with the federal government. In compliance with this law, five million aliens reported their status at local post offices. Once the U.S. entered World War II, all 900,000 German, Italian, and Japanese registrants became classified as “Enemy Aliens,” subject to possible deportation under the Alien Enemies Act. Nine thousand of these Enemy Aliens suffered arrest, only half of whom won release in legal hearings.

Many U.S. citizens were also tragically affected by the outbreak of World War II. In February 1942, President Franklin Roosevelt issued Executive Order 9066, leading to the three-year detention of 90,000 Japanese-Americans. Roosevelt did not act out of military necessity because the detainees posed no threat to national security. Instead, the president caved in to racism and political pressure from people demanding government action after the attack on Pearl Harbor. In 1944, in the case of Korematsu v. United States, the Supreme Court upheld the internment, falsely claiming that the Japanese posed a domestic threat. Not until 1988 did the U.S. formally apologize and provide reparations to the detainees and their descendants.

With the onset of the Cold War came renewed public anxiety over subversion, and a setback for free speech. Instead of standing up for First Amendment freedoms, most politicians, judges, lawyers, educators, and news people either acquiesced or joined in the repression of nonconformists.

Unwilling to appear soft on communism, President Harry Truman in 1947 issued Executive Order 9835 to root out disloyalty in the federal government. Every applicant or employee now faced an investigation to verify his or her allegiance to the U.S. The FBI gathered unsubstantiated accusations of disloyalty from anonymous witnesses. The accused faced inquisition-like hearings, in which past membership in supposedly subversive organizations or association with communists became grounds for dismissal. Under President Dwight Eisenhower, witnesses who pled the Fifth Amendment before a loyalty board lost their employment. From 1947 to 1956, 2,700 federal workers received pink slips, 12,000 resigned under a cloud of suspicion, and many more became intimidated. Yet none were convicted of conspiring against the government.

Congress went even further than the executive branch, investigating not only federal employees, but other Americans as well. In 1947, the House Un-American Activities Committee (HUAC) began a probe of communist influence in Hollywood’s motion picture industry. Despite bullying witnesses
and holding in contempt of Congress those who affirmed their constitutional rights, HUAC only achieved two convictions, both for perjury. One of those convicted—in a highly publicized case that made anti-communist Congressman Richard Nixon famous—was former State Department official Alger Hiss.

In 1950, Wisconsin Senator Joseph McCarthy claimed to have compiled a list of 205 communists in the Truman Administration. The list was utterly phony, but his accusations persuaded a nervous public, and won support from Republicans seeking partisan advantage over the Democrats. McCarthy secured the electoral defeat of senators who opposed his witch hunt, and intimidated the rest of his Congressional colleagues into silence. His targets ranged from State Department employees to members of the U.S. Army to President Eisenhower himself. Not before a four-year innuendo campaign had ruined countless lives did the Senate finally vote to condemn McCarthy’s behavior.

Even the Supreme Court gave in to the Red Scare hysteria. In 1951, in *Dennis v. United States*, the Court upheld the conviction of Eugene Dennis, general secretary of the Communist Party, for violating the Smith Act by advocating the overthrow of the government. The Court reasoned that merely to advocate the overthrow of the government poses a clear and present danger. Seven years later, however, in *Yates v. United States*, the Court reversed itself, ruling that one may legally support overthrowing the government as long as one does not take steps that could realistically achieve that goal. A big victory for freedom of speech, *Yates* finally put an end to prosecutions of communists under the Smith Act.

The Vietnam War, perhaps the most unpopular conflict in American history, aroused tremendous protest from a vocal minority of Americans. One extreme form of resistance was draft card burning, which Congress outlawed in 1965. The following year, David Paul O’Brien was convicted for publically burning his draft card. The Supreme Court in 1968 rejected O’Brien’s defense that his act of resistance was a form of free speech protected by the First Amendment. The Court reasoned that had Congress passed the law solely to halt a controversial method of antiwar protest (many thought it had), then the statute would indeed have been unconstitutional. But the Court instead gave Congress the benefit of the doubt, arguing that since draft cards are a reasonable means to implement conscription, the law was neither a restriction of free speech nor a violation of the First Amendment.

Prior to Vietnam, the federal government successfully punished wartime dissent though criminal prosecutions for sedition. By the 1960s, however, the Supreme Court had sufficiently expanded First Amendment freedoms to make it impossible for the government to convict opponents for practicing free speech. Instead, the government targeted antiwar activists by resorting to much the more dubious and less effective technique of government harassment. Presidents Lyndon B. Johnson and especially Richard M. Nixon employed the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), the Internal Revenue Service (IRS), and the U.S. Army to engage in illegal searches, wiretaps, mail openings, and financial audits of dissenters. Not until after Nixon’s downfall in the Watergate scandal did the government stop harassing citizens for exercising their First Amendment freedoms.

The *Pentagon Papers* case marked a milestone in the liberty-security debate. In 1967, Defense Secretary Robert McNamara ordered a top secret report that detailed U.S. involvement in the Vietnam War. The report illustrated that the government had lied to the American people about the conflict. Daniel Ellsberg, a State Department official who turned against the war when he witnessed first-hand the tragic situation in Vietnam, illegally gave the report to the New York *Times* for publication. When the Nixon Administration claimed a breach
of national security, a federal court—for the first time in U.S. history—issued a temporary restraining order against the *Times*. With the *Times* silenced, the Washington *Post* picked up publication. Both newspapers soon faced injunctions while the Supreme Court ruled on the matter. The Court ultimately sided with the newspapers, arguing that the federal government had not demonstrated that damage to national security caused by publication would outweigh the public’s need to know the truth about the war. Geoffrey Stone has shown that during the Vietnam War, the Court firmly established the principle that antiwar expression could only be punished criminally if it advocated immediate, express illegality that might actually take place.

Not only has the Supreme Court come a long way in defending First Amendment freedoms, the American public has also developed a tremendous appreciation for civil liberties. U.S. citizens have learned that free speech is especially crucial in wartime. Yet even in the twenty-first century, civil liberties may become jeopardized in a crisis. In the aftermath of the September 11, 2001 terror attacks, for example, Congress rushed the Patriot Act into law even though many legislators had not even read the bill. In the name of being tough on terrorism, this law increased the federal government’s power to engage in secret electronic surveillance. Subsequent government activity sparked a public debate over privacy rights, and even inspired Edward Snowden, a former National Security Agency official, to illegally publish secret government files in an effort to call attention to the situation.

A specific example of the tension between liberty and security is the question of whether terror suspects are entitled to jury trials under the Sixth Amendment. After the Civil War, in the 1866 case of *Ex Parte Milligan*, the Supreme Court ruled that civilians must be tried in civilian courts, not military courts. But constitutional scholar Mark Neeley has argued that the *Milligan* ruling is “irrelevant,” because the federal government will simply ignore it in the midst of a wartime crisis. In the War on Terror the three branches of the federal government have been at odds with each other over the Sixth Amendment. In a series of cases from 2004 to 2006, the Supreme Court reined in the George W. Bush administration’s treatment of 9/11 suspects held at the Guantanamo Bay, Cuba detention facility. The Court ruled that federal courts have *habeas corpus* jurisdiction over Guantanamo detainees, that U.S. citizens cannot be held indefinitely as enemy combatants without a hearing, and that military trials must not violate the 1949 Geneva Conventions.

The Obama administration has clashed with Congress over the treatment of terror suspects. Khalid Sheikh Mohammed (KSM), one of the Al Qaeda leaders charged with planning the 9/11 attacks, along with four alleged co-conspirators, originally faced trial before a military commission at Guantanamo. Constitutional scholars and human rights advocates criticized the decision to hold the trial in a military court, as well as the use of evidence obtained by torture. In 2009, U.S. Attorney General Eric Holder announced that the KSM case would be transferred to a federal district court in New York City, and that no evidence obtained by torture would be used. This decision, in turn, provoked condemnation by individuals including William Shawcross and from organizations like Keep America Safe, who advocate treating terror suspects as enemy combatants rather than as civilians protected by the Bill of Rights. Others, including Senator Diane Feinstein, warned that holding the trial in New York could be an invitation for further attacks. Responding to the outcry, Congress in 2011 passed the National Defense Authorization Act, denying federal funding either to transport terror suspects from Guantanamo to the U.S., or to build secure facilities in which to try them. The legislation forced a reluctant
Holder to transfer KSM and his co-suspects back to Guantanamo for a military trial. Protesting against Congress’s restrictions, Holder asserted that justice should be served in a civilian court, not a military court.

In our constitutional republic, Americans aspire to maintain both liberty and security. During wartime, all three branches of government, as well as the people themselves, have tended to prioritize security. With the return of peace, all three branches have restored previously threatened liberties. Trying to balance liberty and security poses a continuing challenge in modern America’s battle against terrorism.

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For Further Reading:
Kutler, Stanley I., American Inquisition: Justice and Injustice in the Cold War, 1983.
Following the terrorist attacks on New York City and the Pentagon on September 11, 2001, Congress enacted and President George W. Bush signed an intelligence gathering bill. Introduced as the Anti-Terrorism bill on September 19, 2001, it was signed into law on October 26, 2001 as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, or USA PATRIOT Act. It passed by margins of 357-66 in the House of Representatives and 98-1 in the Senate. Through amending older laws and creating new provisions, this bill has given the United States government unprecedented power to gather intelligence. Controversy over some of the provisions of the Act prompted Congress to implement a sunset clause regarding certain parts of it. These provisions would expire in 2011 unless Congress and the president reinstated them. Even though the Patriot Act has prompted vigorous debate, for the most part it remains in place today in its original form. Has the government found an adequate balance between liberty and security in its enforcement of the PATRIOT Act? What constitutional principles and liberties are at stake?

CONSTITUTIONAL PRINCIPLES
- rule of law
- limited government
- natural rights
- liberty
- executive power
- due process, including searches and seizures
Objectives

- Students evaluate contradictory viewpoints of liberty and security.
- Students evaluate the constitutionality of the Patriot Act.
- Students evaluate whether the Constitution takes on different meanings during wartime.
- Students evaluate the significance of the fact that the Patriot Act’s changes in criminal procedure would apply to every federal criminal prosecution, rather than applying only to terrorism investigations.
- Students evaluate the significance of protections against unreasonable search and seizure.

Recommended Time

120-180 minutes
Lesson Plan

Materials

(Some readings are edited for length in the Handouts, but the full documents are available at the websites listed.)

- Handout A: Department of Justice Summary of USA Patriot Act
  http://www.justice.gov/archive/ll/what_is_the_patriot_act.pdf
- Handout B: Preamble and Fourth Amendment
- Handout C: U.S. Senator Rand Paul Opposition to USA PATRIOT Act, 2011
  http://www.paul.senate.gov/record.cfm?id=331164
- Handout D: President Barack Obama Press Conference – August 9, 2013
  http://wh.gov/lg4h2
- Handout E: Twitter Feed Template

Background

A. Have students read Handout A: Department of Justice Summary of USA Patriot Act. As they read, students should annotate the document, listing constitutional principles and the Preamble’s goals for government suggested by the summary of the PATRIOT Act. Note: You might assign the reading and annotation of Handout A as homework in order to maximize class time for discussion.

Activity

A. Have students work in pairs or small groups. Using available technology, project the text of the Preamble of the United States Constitution and the Fourth Amendment side-by-side, or provide each small group with a copy of Handout B: Preamble and Fourth Amendment. After students have discussed the questions at the bottom of the page for a few minutes, have groups report their responses and make a list of those responses on the board.

B. To provide students with historical background, provide the following context information for the lesson:

a. 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 three of the planes into the twin towers of Manhattan’s World Trade Center and the Pentagon. Passengers on the fourth plane attempted to regain control of the flight before it crashed into a field near Shanksville, Pennsylvania. Fatalities included the airline passengers and crews, individuals inside the buildings hit, firefighters and other first responders. Altogether, about 3,000 people were killed in that morning’s terrorist attacks.
b. In response to the worst terrorist attack in U.S. history, 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. Operation Enduring Freedom, launched the next month, was an international military effort led by the United States to remove the Taliban government in Afghanistan which had harbored the Al Qaeda network and its training facilities there. In addition to the USA Patriot Act, Congress enacted more than a dozen laws addressing related issues, including victims’ relief, air transportation, national defense, and the use of military force.

C. Review the USA PATRIOT Act and reaction to it.
   a. Have students take out Handout A: Department of Justice Summary of USA Patriot Act. As a class, review main ideas, purposes of the law, and constitutional principles identified by students.
   b. Have students work in pairs. One student in each pair will read Handout C: U.S. Senator Rand Paul Opposition to USA Patriot Act, 2011. The other student will read Handout D: President Barack Obama Press Conference – August 9, 2013. They will each answer the comprehension and critical thinking questions on their respective handouts. Have students share their documents within their pairs, and keep a running list of Constitutional provisions/principles used to support the PATRIOT Act and those used to dispute the law.

Wrap-Up
A. Conduct a full-class discussion summarizing the constitutional implications of the PATRIOT Act. Wrap up with one or more of the following:
   a. Students create political cartoons representing either the position of Senator Paul or the position of President Obama.
   b. Create a text message or Twitter feed (including hashtags or #) dialogue between President Obama (@Obama) and Senator Paul (@Paul) which illustrates their positions. Provide at least 3 comments each that depict each position. Use Handout E: Twitter Feed Template.

B. Fishbowl Debate
   a. Conduct a Fishbowl Debate using this proposition: “The federal government has violated constitutional principles with regard to protecting liberty and security through the Patriot Act.” Consider at least the following constitutional principles:
Lesson Plan (continued)

1. rule of law
2. limited government
3. natural rights
4. liberty
5. executive power
6. due process, including searches and seizures

b. Fishbowl Debate Procedure:
   1. Divide class into two groups.
   2. Assign one group to be the affirmative side and the other to be the negative side.
   3. Give students a few minutes prep time and have each side choose the first two or three students who will speak.
   4. Place two “hot seats” in the center of the room, between the two groups.
   5. Have each side’s first speaker take the hot seat.
   6. Using civil discourse, reasoned arguments based on the U.S. Constitution and other relevant texts, these students make each side’s opening argument. Students respond directly to one another, targeting the specific argument being made by one’s opponent in the hot seat.
   7. After a brief designated period of time for Speaker #1 from each side (2–5 minutes), give the signal for the next speaker from each side to take the hot seats. Students extend and build on the initial arguments with relevant new facts and evidence—not simply repeating points previously made. Students may volunteer to speak after the first few speakers have provided the framework of the debate.
   8. Proceed in this manner until all useful arguments for each side have been presented, most students have been speakers, and the following objectives have been addressed:
      - Students evaluate contradictory viewpoints concerning liberty and security.
      - Students evaluate the constitutionality of the Patriot Act.
      - Students evaluate whether the Constitution takes on different meanings during wartime.
• Students evaluate the significance of the fact that the Patriot Act’s changes in criminal procedure would apply to every federal criminal prosecution, rather than applying only to terrorism investigations.

• Students evaluate the significance of protections against unreasonable search and seizure.

**Extensions**

A. Have students read Remarks from Senator Russ Feingold, October 25th, 2001 and answer these questions:


   b. Comprehension and Critical Thinking Questions

      1. Identify at least 3 provisions of the Patriot Act which Senator Feingold supported.

      2. Why is it important that the changes in criminal procedure would apply to every federal criminal prosecution, rather than applying only to terrorism investigations?

      3. Why did Senator Feingold consider the provision allowing law enforcement officers to search homes and offices without notifying the owner prior to the search (“sneak and peek” searches) “a significant infringement on personal liberty”?

      4. Why might law enforcement agencies support a provision such as the one the Senator criticizes?

      5. What was the Senator's fear regarding the monitoring of computer communications? Why did he see this as problematic?

      6. How would law enforcement powers be expanded under the PATRIOT ACT and FISA? In what ways might this expansion of law enforcement powers conflict with the Fourth Amendment?

      7. Underline or highlight 5 or 6 sentences in Senator Feingold’s speech that you think convey his views most powerfully.

B. Have students read Attorney General John Ashcroft – “Paradigm of Prevention” Speech, February 10, 2003 and answer these questions:
Lesson Plan (continued)


b. Comprehension and Critical Thinking Questions

1. What did Attorney General Ashcroft mean by the phrase, “paradigm of prevention”? How is a paradigm of prevention different from the traditional goal of law enforcement - prosecution?

2. Attorney General Ashcroft stated that the targets of the terrorists are “the shared values of free peoples.” What are some of those values?

3. Did Ashcroft omit any “shared values of free peoples”? If so, what are they?

4. Why do you think Attorney General Ashcroft emphasizes international cooperation?

5. Why do you think he views information as the best friend of prevention?

6. Why do you think Attorney General Ashcroft refers to previous generations’ struggle against communism?

7. How many times in the document did Attorney General Ashcroft refer to “rule of law”? Define this term. What is the significance of his emphasis on that concept? In your opinion, how might enhanced law enforcement powers actually endanger the principle of rule of law?

8. Underline or highlight 5 or 6 sentences in Attorney General Ashcroft’s speech that you think most powerfully convey his views.


USA Patriot Act Department of Justice Summary

Congress enacted the Patriot Act by overwhelming, bipartisan margins arming law enforcement with new tools to detect and prevent terrorism: The USA Patriot Act was passed nearly unanimously by the Senate 98-1, and 357-66 in the House, with the support of members from across the political spectrum.

The Act Improves Our Counter-Terrorism Efforts in Several Significant Ways:

The Patriot Act allows investigators to use the tools that were already available to investigate organized crime and drug trafficking.

Many of the tools the Act provides to law enforcement to fight terrorism have been used for decades to fight organized crime and drug dealers, and have been reviewed and approved by the courts. As Sen. Joe Biden (D-DE) explained during the floor debate about the Act, “the FBI could get a wiretap to investigate the mafia, but they could not get one to investigate terrorists. To put it bluntly, that was crazy! What’s good for the mob should be good for terrorists.” (Cong. Rec., 10/25/01)

Allows law enforcement to use surveillance against more crimes of terror. Before the Patriot Act, courts could permit law enforcement to conduct electronic surveillance to investigate many ordinary, non-terrorism crimes, such as drug crimes, mail fraud, and passport fraud. Agents also could obtain wiretaps to investigate some, but not all, of the crimes that terrorists often commit. The Act enabled investigators to gather information when looking into the full range of terrorism-related crimes, including: chemical-weapons offenses, the use of weapons of mass destruction, killing Americans abroad, and terrorism financing.

Allows federal agents to follow sophisticated terrorists trained to evade detection. For years, law enforcement has been able to use “roving wiretaps” to investigate ordinary crimes, including drug offenses and racketeering. A roving wiretap can be authorized by a federal judge to apply to a particular suspect, rather than a particular phone or communications device. Because international terrorists are sophisticated and trained to thwart surveillance by rapidly changing locations and communication devices such as cell phones, the Act authorized agents to seek court permission to use the same techniques in national security investigations to track terrorists.

Allows law enforcement to conduct investigations without tipping off terrorists. In some cases if criminals are tipped off too early to an investigation, they might flee, destroy evidence, intimidate or kill witnesses, cut off contact with associates, or take other action to evade arrest. Therefore, federal courts in narrow circumstances long have allowed law enforcement to delay for a limited time when the subject is told that a judicially-approved search warrant has been executed. Notice is always provided, but the reasonable delay gives
law enforcement time to identify the criminal’s associates, eliminate immediate threats to our communities, and coordinate the arrests of multiple individuals without tipping them off beforehand. These delayed notification search warrants have been used for decades, have proven crucial in drug and organized crime cases, and have been upheld by courts as fully constitutional.

**Allows federal agents to ask a court for an order to obtain business records in national security terrorism cases.** Examining business records often provides the key that investigators are looking for to solve a wide range of crimes. Investigators might seek select records from hardware stores or chemical plants, for example, to find out who bought materials to make a bomb, or bank records to see who's sending money to terrorists. Law enforcement authorities have always been able to obtain business records in criminal cases through grand jury subpoenas, and continue to do so in national security cases where appropriate. These records were sought in criminal cases such as the investigation of the Zodiac gunman, where police suspected the gunman was inspired by a Scottish occult poet, and wanted to learn who had checked the poet’s books out of the library. In national security cases where use of the grand jury process was not appropriate, investigators previously had limited tools at their disposal to obtain certain business records. Under the Patriot Act, the government can now ask a federal court (the Foreign Intelligence Surveillance Court), if needed to aid an investigation, to order production of the same type of records available through grand jury subpoenas. This federal court, however, can issue these orders only after the government demonstrates the records concerned are sought for an authorized investigation to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not conducted solely on the basis of activities protected by the First Amendment.

**The Patriot Act facilitated information sharing and cooperation among government agencies so that they can better “connect the dots.”**

The Act removed the major legal barriers that prevented the law enforcement, intelligence, and national defense communities from talking and coordinating their work to protect the American people and our national security. The government’s prevention efforts should not be restricted by boxes on an organizational chart. Now police officers, FBI agents, federal prosecutors and intelligence officials can protect our communities by “connecting the dots” to uncover terrorist plots before they are completed. As Sen. John Edwards (D-N.C.) said about the Patriot Act, “we simply cannot prevail in the battle against terrorism if the right hand of our government has no idea what the left hand is doing” (Press release, 10/26/01)

Prosecutors and investigators used information shared pursuant to section 218 in investigating the defendants in the so-called “Virginia Jihad” case. This prosecution involved members of the Dar al-Arqam Islamic Center, who trained for jihad in Northern Virginia by participating in paintball and paramilitary training, including eight individuals who traveled to terrorist training camps in Pakistan or Afghanistan between 1999 and 2001. These individuals are associates of a violent Islamic extremist group known as Lashkar-e-Taiba (LET), which operates in Pakistan and Kashmir, and that has ties to the al Qaeda terrorist network. As the result of an investigation that included the use of information obtained through FISA, prosecutors were able to bring charges against these individuals. Six of the defendants have pleaded guilty, and three were convicted in March 2004 of charges including conspiracy to levy war against the United States and conspiracy to provide material support to the Taliban. These nine defendants received sentences ranging from a prison term of four years to life imprisonment.
The Patriot Act updated the law to reflect new technologies and new threats.

The Act brought the law up to date with current technology, so we no longer have to fight a digital-age battle with antique weapons—legal authorities leftover from the era of rotary telephones. When investigating the murder of Wall Street Journal reporter Daniel Pearl, for example, law enforcement used one of the Act’s new authorities to use high-tech means to identify and locate some of the killers.

Allows law enforcement officials to obtain a search warrant anywhere a terrorist-related activity occurred. Before the Patriot Act, law enforcement personnel were required to obtain a search warrant in the district where they intended to conduct a search. However, modern terrorism investigations often span a number of districts, and officers therefore had to obtain multiple warrants in multiple jurisdictions, creating unnecessary delays. The Act provides that warrants can be obtained in any district in which terrorism-related activities occurred, regardless of where they will be executed. This provision does not change the standards governing the availability of a search warrant, but streamlines the search-warrant process.

Allows victims of computer hacking to request law enforcement assistance in monitoring the “trespassers” on their computers. This change made the law technology-neutral; it placed electronic trespassers on the same footing as physical trespassers. Now, hacking victims can seek law enforcement assistance to combat hackers, just as burglary victims have been able to invite officers into their homes to catch burglars.

The Patriot Act increased the penalties for those who commit terrorist crimes.

Americans are threatened as much by the terrorist who pays for a bomb as by the one who pushes the button. That’s why the Patriot Act imposed tough new penalties on those who commit and support terrorist operations, both at home and abroad. In particular, the Act:

Prohibits the harboring of terrorists. The Act created a new offense that prohibits knowingly harboring persons who have committed or are about to commit a variety of terrorist offenses, such as: destruction of aircraft; use of nuclear, chemical, or biological weapons; use of weapons of mass destruction; bombing of government property; sabotage of nuclear facilities; and aircraft piracy.

Enhanced the inadequate maximum penalties for various crimes likely to be committed by terrorists: including arson, destruction of energy facilities, material support to terrorists and terrorist organizations, and destruction of national-defense materials.

Enhanced a number of conspiracy penalties, including for arson, killings in federal facilities, attacking communications systems, material support to terrorists, sabotage of nuclear facilities, and interference with flight crew members. Under previous law, many terrorism statutes did not specifically prohibit engaging in conspiracies to commit the underlying offenses. In such cases, the government could only bring prosecutions under the general federal conspiracy provision, which carries a maximum penalty of only five years in prison.

Punishes terrorist attacks on mass transit systems.

Punishes bioterrorists.

Eliminates the statutes of limitations for certain terrorism crimes and lengthens them for other terrorist crimes.

The government’s success in preventing another catastrophic attack on the American homeland since September 11, 2001, would have been much more difficult, if not impossible, without the USA Patriot Act. The authorities Congress provided have substantially enhanced our ability to prevent, investigate, and prosecute acts of terror.
Preamble
We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Fourth Amendment
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Critical Thinking Questions
1. What concepts or principles of government do these statements have in common?
2. In what ways might tension develop between the goals expressed in the Preamble and the guarantees contained in the Fourth Amendment?
Passage 1

Dear Colleague:

[Revolutionary era patriot] James Otis argued against general warrants and writs of assistance that were issued by British soldiers without judicial review and that did not name the subject or items to be searched.

He condemned these general warrants as “the worst instrument[s] of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever w[ere] found in an English law book.” Otis objected to these writs of assistance because they “placed the liberty of every man in the hands of every petty officer.” The Fourth Amendment was intended to guarantee that only judges—not soldiers or policemen—would issue warrants. Otis’ battle against warrantless searches led to our Fourth Amendment guarantee against unreasonable government intrusion.

Questions

1. What were writs of assistance? Why did James Otis object to them?
2. What “fundamental principles of law” do you think James Otis and Senator Paul had in mind?

Passage 2

My main objection to the Patriot Act is that searches that should require a judge’s warrant are performed with a letter from an FBI agent—a National Security Letter (“NSL”).

I object to these warrantless searches being performed on United States citizens. I object to the 200,000 NSL searches that have been performed without a judge’s warrant.

I object to over 2 million searches of bank records, called Suspicious Activity Reports, performed on U.S. citizens without a judge’s warrant.

As February 28th approaches, with three provisions of the USA Patriot Act set to expire, it is time to re-consider this question: Do the many provisions of this bill, which were enacted in such haste after 9/11, have an actual basis in our Constitution, and are they even necessary to achieve valid law-enforcement goals?
Questions

1. What are NSLs and why do you think the FBI would want to use them? In what ways are NSLs similar to/different from writs of assistance? What principles/goals of constitutional government might be violated by such tools of the executive branch? What principles/goals of government might be strengthened?

2. In *Carroll v. United States* (1925), the Supreme Court ruled that warrantless searches of cars that might be transporting liquor in violation of the National Prohibition Act (1919) were unconstitutional. The Court explained that it “would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search...” This case established the Carroll doctrine, which allows a police officer to conduct a warrantless search of a vehicle only if he has probable cause to believe that a vehicle is transporting contraband or other items related to a crime, and that the vehicle could be removed from the area before a warrant could be obtained. To what extent, and based on what constitutional principles, is the Carroll doctrine relevant in considering of NSLs?

Passage 3

The USA Patriot Act, passed in the wake of the worst act of terrorism in U.S. history, is no doubt well-intentioned. However, rather than examine what went wrong, and fix the problems, Congress instead hastily passed a long-standing wish list of power grabs like warrantless searches and roving wiretaps. The government greatly expanded its own power, ignoring obvious answers in favor of the permanent expansion of a police state.

It is not acceptable to willfully ignore the most basic provisions of our Constitution—in this case—the Fourth and First Amendments—in the name of “security.”

For example, one of the three provisions set to expire on February 28th—the “library provision,” section 215 of the Patriot Act—allows the government to obtain records from a person or entity by making only the minimal showing of “relevance” to an international terrorism or espionage investigation. This provision also imposes a year-long nondisclosure, or “gag” order. “Relevance” is a far cry from the Fourth Amendment’s requirement of probable cause. Likewise, the “roving wiretap” provision, section 206 of the Patriot Act, which is also scheduled to expire on the 28th, does not comply with the Fourth Amendment. This provision makes possible “John Doe roving wiretaps,” which do not require the government to name the target of the wiretap, nor to identify the specific place or facility to be monitored. This bears an uncanny resemblance to the Writs of Assistance fought against by Otis and the American colonists.

Questions

1. What provisions of the Patriot Act were set to expire in 2011 under a sunset provision?
2. What did Senator Paul see as the real reason behind the Patriot Act?
3. Section 215 of the Patriot Act authorizes the government to obtain “any tangible thing” relevant to a
terrorism investigation, even if there is no probable cause to believe that the “thing” actually relates to suspected terrorists or terrorist activities. What constitutional protections may be violated by this, and other aspects of Section 215?

Passage 4

Other provisions of the Patriot Act previously made permanent and not scheduled to expire present even greater concerns. These include the use and abuse by the FBI of so-called National Security Letters. These secret demand letters, which allow the government to obtain financial records and other sensitive information held by Internet Service Providers, banks, credit companies, and telephone carriers—all without appropriate judicial oversight—also impose a gag order on recipients.

NSL abuse has been and likely continues to be rampant. The widely-circulated 2007 report issued by the Inspector General from the Department of Justice documents “widespread and serious misuse of the FBI’s national security letter authorities. In many instances, the FBI’s misuse of national security letters violated NSL statutes, Attorney General Guidelines, or the FBI’s own internal policies.” Another audit released in 2008 revealed similar abuses, including the fact that the FBI had issued inappropriate “blanket NSLs” that did not comply with FBI policy, and which allowed the FBI to obtain data on 3,860 telephone numbers by issuing only eleven “blanket NSLs.” The 2008 audit also confirmed that the FBI increasingly used NSLs to seek information on U.S. citizens. From 2003 to 2006, almost 200,000 NSL requests were issued. In 2006 alone, almost 60% of the 49,425 requests were issued specifically for investigations of U.S. citizens or legal aliens.

In addition, First Amendment advocates should be concerned about an especially troubling aspect of the 2008 audit, which documented a situation in which the FBI applied to the United States Foreign Intelligence Surveillance Court (FISC) to obtain a section 215 order. The Court denied the order on First Amendment grounds. Not to be deterred, the FBI simply used an NSL to obtain the same information.

A recent report released by the Electronic Frontier Foundation (“EFF”) entitled, “Patterns of Misconduct: FBI Intelligence Violations from 2001-2008,” documents further NSL abuse. EFF estimates that, based on the proportion of violations reported to the Intelligence Oversight Board and the FBI’s own statements regarding NSL violations, the actual number of violations that may have occurred since 2001 could approach 40,000 violations of law, Executive Order, and other regulations.

Yet another troublesome (and now permanent) provision of the Patriot Act is the expansion of Suspicious Activity Reports. Sections 356 and 359 expanded the types of financial institutions required to file reports under the Bank Secrecy Act. The personal and account information required by the reports is turned over to the Treasury Department and the FBI. In 2000, there were only 163,184 reports filed. By 2007, this had increased to 1,250,439. Again, as with NSLs, there is a complete lack of judicial oversight for SARs.
Questions

1. Why do you think Senator Paul wrote that these other provisions of the Patriot Act “present even greater concerns”?

2. What did he mean by “NSL abuse,” and what do you think is the most troubling example he gave? What constitutional principles or protections are called into question by these abuses?

3. What role did Senator Paul believe the Patriot Act played in initiating these abuses?

Passage 5

Finally, I wish to remind my colleagues that one of the many ironies of the rush to advance the Patriot Act following 9/11 is the well-documented fact that FBI incompetence caused the failure to search the computer of the alleged 20th hijacker, Zacarias Moussaoui. As FBI agent Coleen Rowley stated, “the FBI headquarters supervisory special agent handling the Moussaoui case ‘seemed to have been consistently almost deliberately thwarting the Minneapolis FBI agents’ efforts” to meet the FISA standard for a search warrant, and therefore no request was ever made for a warrant. Why, then, was the FBI rewarded with such expansive new powers in the aftermath of this institutional failure?

In the words of former Senator Russ Feingold, the only “no” vote against the original version of the Patriot Act,

“[T]here is no doubt that if we lived in a police state, it would be easier to catch terrorists. If we lived in a country that allowed the police to search your home at any time for any reason; if we lived in a country that allowed the government to open your mail, eavesdrop on your phone conversations, or intercept your email communications; if we lived in a country that allowed the government to hold people in jail indefinitely based on what they write or think, or based on mere suspicion that they are up to no good, then the government would no doubt discover and arrest more terrorists. But that probably would not be a country in which we would want to live. And that would not be a country for which we could, in good conscience, ask our young people to fight and die. In short, that would not be America.”

I call upon each of my Senate colleagues to seriously consider whether the time has come to re-evaluate many—if not all—provisions of the Patriot Act. Our oath to uphold the Constitution demands it.

Questions

1. Why do you think he wrote to his fellow Senators that their oath to uphold the Constitution demanded that they re-evaluate the Patriot Act? What constitutional principles do you think he had in mind?

2. Underline or highlight 5 or 6 sentences in Senator Paul’s speech that you think most powerfully convey his views.
Note: On May 26, 2011, Congress voted to extend for four years the following provisions that had been set to expire. The House of Representatives vote was 250–153, and the Senate vote was 72–23. Later that same evening, President Obama signed the legislation.

- Section 206 of the Patriot Act, which provides for roving wiretaps of those who try to avoid Foreign Intelligence Surveillance Act (FISA) monitoring.

- Section 215 of the Patriot Act, which allows the FBI to apply to the FISA court to issue orders granting the government access to any tangible items in foreign intelligence, international terrorism and clandestine intelligence cases.

- Section 6001 of the Intelligence Reform and Terrorist Prevention Act of 2004, which closes a loophole that could allow individual terrorists not affiliated with specific organizations to avoid FISA surveillance (the “lone wolf” provision).
Background: In May and June 2013, Edward Snowden released to journalists information about secret U.S. National Security Agency (NSA) programs. Snowden was a computer systems administrator who had worked for the Central Intelligence Agency, the Defense Intelligence Agency, and as a private contractor inside National Security Administration facilities. He maintained that, through warrantless domestic surveillance, classified NSA programs violated the U.S. Constitution. He saw himself as a whistle-blower to help stop such abuses by making them public. In June, Snowden was charged with theft of government property and violation of the Espionage Act of 1917. He fled the U.S. in order to avoid prosecution, arriving in Moscow, Russia, and receiving temporary asylum to remain there in August. Shortly thereafter, President Obama held a press conference to address some of the concerns raised by Snowden’s activities. Snowden has since been granted approval to live in Russia at least until 2017.

The White House East Room
Office of the Press Secretary
For Immediate Release
August 09, 2013; 3:09 P.M. EDT
Remarks by the President in a Press Conference

Passage 1

THE PRESIDENT: Good afternoon, everybody. Please have a seat.

Over the past few weeks, I’ve been talking about what I believe should be our number-one priority as a country—building a better bargain for the middle class and for Americans who want to work their way into the middle class. At the same time, I’m focused on my number-one responsibility as Commander-in-Chief, and that’s keeping the American people safe. And in recent days, we’ve been reminded once again about the threats to our nation.

As I said at the National Defense University back in May, in meeting those threats we have to strike the right balance between protecting our security and preserving our freedoms. And as part of this rebalancing, I called for a review of our surveillance programs. Unfortunately, rather than an orderly and lawful process to debate these issues and come up with appropriate reforms, repeated leaks of classified information have initiated the debate in a very passionate, but not always fully informed way.

Now, keep in mind that as a senator, I expressed a healthy skepticism about these programs, and
as President, I’ve taken steps to make sure they have strong oversight by all three branches of government and clear safeguards to prevent abuse and protect the rights of the American people. But given the history of abuse by governments, it’s right to ask questions about surveillance—particularly as technology is reshaping every aspect of our lives.

**Question**

1. What specific incidents might the President have had in mind when he noted, “But given the history of abuse by governments, it’s right to ask questions about surveillance—particularly as technology is reshaping every aspect of our lives”?

**Passage 2**

I’m also mindful of how these issues are viewed overseas, because American leadership around the world depends upon the example of American democracy and American openness—because what makes us different from other countries is not simply our ability to secure our nation, it’s the way we do it—with open debate and democratic process.

In other words, it’s not enough for me, as President, to have confidence in these programs. The American people need to have confidence in them as well. And that’s why, over the last few weeks, I’ve consulted members of Congress who come at this issue from many different perspectives. I’ve asked the Privacy and Civil Liberties Oversight Board to review where our counterterrorism efforts and our values come into tension, and I directed my national security team to be more transparent and to pursue reforms of our laws and practices.

And so, today, I’d like to discuss four specific steps—not all inclusive, but some specific steps that we’re going to be taking very shortly to move the debate forward.

First, I will work with Congress to pursue appropriate reforms to Section 215 of the Patriot Act—the program that collects telephone records. As I’ve said, this program is an important tool in our effort to disrupt terrorist plots. And it does not allow the government to listen to any phone calls without a warrant. But given the scale of this program, I understand the concerns of those who would worry that it could be subject to abuse...

For instance, we can take steps to put in place greater oversight, greater transparency, and constraints on the use of this authority. So I look forward to working with Congress to meet those objectives.

Second, I’ll work with Congress to improve the public’s confidence in the oversight conducted by the Foreign Intelligence Surveillance Court, known as the FISC. The FISC was created by Congress to provide judicial review of certain intelligence activities so that a federal judge must find that our actions are consistent with the Constitution. However, to build greater confidence, I think we should consider some additional changes to the FISC.

...while I’ve got confidence in the court and I think they’ve done a fine job, I think we can provide greater assurances that the court is looking at these issues from both perspectives—security and privacy.

So, specifically, we can take steps to make sure civil liberties concerns have an independent...
voice in appropriate cases by ensuring that the government’s position is challenged by an adversary.

Number three, we can, and must, be more transparent. ...So at my direction, the Department of Justice will make public the legal rationale for the government’s collection activities under Section 215 of the Patriot Act. The NSA is taking steps to put in place a full-time civil liberties and privacy officer, and released information that details its mission, authorities, and oversight. And finally, the intelligence community is creating a website that will serve as a hub for further transparency, and this will give Americans and the world the ability to learn more about what our intelligence community does and what it doesn’t do, how it carries out its mission, and why it does so.

Fourth, we’re forming a high-level group of outside experts to review our entire intelligence and communications technologies. We need new thinking for a new era. We now have to unravel terrorist plots by finding a needle in the haystack of global telecommunications. And meanwhile, technology has given governments—including our own—unprecedented capability to monitor communications.

So I am tasking this independent group to step back and review our capabilities—particularly our surveillance technologies. And they’ll consider how we can maintain the trust of the people, how we can make sure that there absolutely is no abuse in terms of how these surveillance technologies are used, ask how surveillance impacts our foreign policy—particularly in an age when more and more information is becoming public. And they will provide an interim report in 60 days and a final report by the end of this year, so that we can move forward with a better understanding of how these programs impact our security, our privacy, and our foreign policy.

Questions
1. What concrete steps did the President describe in order to increase the confidence of the American people with respect to our surveillance programs? What constitutional principles are suggested by each of these steps?
2. To what extent did President Obama agree with Snowden’s views?
3. President Obama listed four concrete steps that his administration would take beginning in 2013. Research these actions to determine what progress has been made with respect to these commitments.

Passage 3

So all these steps are designed to ensure that the American people can trust that our efforts are in line with our interests and our values. And to others around the world, I want to make clear once again that America is not interested in spying on ordinary people. Our intelligence is focused, above all, on finding the information that’s necessary to protect our people, and—in many cases—protect our allies.

It’s true we have significant capabilities. What’s also true is we show a restraint that many governments around the world don’t even think to do, refuse to show—and that includes, by the way, some of America’s most vocal critics. We shouldn’t forget the difference between the ability of our government to collect information online under strict guidelines and for narrow purposes, and the willingness of some other
governments to throw their own citizens in prison for what they say online.

And let me close with one additional thought. The men and women of our intelligence community work every single day to keep us safe because they love this country and believe in our values. They’re patriots. And I believe that those who have lawfully raised their voices on behalf of privacy and civil liberties are also patriots who love our country and want it to live up to our highest ideals. So this is how we’re going to resolve our differences in the United States—through vigorous public debate, guided by our Constitution, with reverence for our history as a nation of laws, and with respect for the facts.

Questions

1. What specific examples might the president have had in mind in referring to “the willingness of some other governments to throw their own citizens in prison for what they say online”?

2. President Obama stated that we resolve our differences in the United States “through vigorous public debate, guided by our Constitution, with reverence for our history as a nation of laws, and with respect for the facts.” What specific constitutional principles and/or virtues are suggested by this manner of resolving disputes?
 Directions: Create a text message or Twitter feed (including hashtags or #) dialogue between President Obama (@Obama) and Senator Paul (@Paul) which illustrates their positions. Provide at least 3 comments each that depict each position.
<table>
<thead>
<tr>
<th>Barack Obama</th>
<th>Rand Paul</th>
</tr>
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<tr>
<td>Barack Obama</td>
<td>Rand Paul</td>
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<tr>
<td>Barack Obama</td>
<td>Rand Paul</td>
</tr>
</tbody>
</table>
Answer Keys

Handout A: Department of Justice Summary of the Patriot Act

As they annotate their copies of this document, students may list constitutional principles and goals of government including republicanism, separation of powers, protection against unreasonable search and seizure, protection of free speech, justice, providing for the common defense, and promoting the general welfare.

Handout B: Preamble and Fourth Amendment

1. Answers will vary, but may include the following points:
   
   Protection against unreasonable searches and seizures was clearly one of the “blessings of liberty” that the Framers of the Constitution and Bill of Rights had in mind.
   
   The requirement of specific warrants issued by judges supports the goal of establishing justice.
   
   Complaint against the British crown’s use of writs of assistance and general warrants was a well-known colonial grievance, perhaps most famously highlighted by James Otis. Protection against such procedures was essential to form a more perfect union, insure domestic tranquility, and promote the general welfare of the people
   
   Additional constitutional principles suggested by both documents are liberty, limited government, rule of law, natural rights, due process, and representative government.
   
2. It may seem easier to provide for the common defense if authorities are not bound by due process. However, can the government provide for the common defense if it alienates the very people whose support it needs?

Handout C: Senator Rand Paul’s Letter of Opposition to the Patriot Act

February 15, 2011

Passage 1

1. Writs of assistance were general warrants that were issued by British soldiers in colonial America without judicial review and that did not name the subject or items to be searched. Otis objected to these writs of assistance because they “placed the liberty of every man in the hands of every petty officer.”

2. “Fundamental principles” might include liberty, natural rights, limited government, due process (including freedom from unreasonable search and seizure), separation of powers, rule of law, justice, freedom of speech, and others

Passage 2

1. National Security Letters, or NSLs, from FBI agents took the place of warrants issued by judges. The FBI might use them in order to save time in urgent situations, or they might represent a pretext for abuse of power in some other situations. NSLs are very similar to writs of assistance because they remove any check on the officer conducting the search. They allow “fishing expeditions” where
officers can make up their own rules for the search, and violate the principles of liberty, limited government, separation of powers, rule of law and due process. It would seem that NSLs are simply a modern version of general warrants.

2. The Court’s (7-2) decision in *Carroll v. United States* (1925) upholding the requirement of probable cause for a search of a vehicle repudiates the reasoning behind modern NSLs. Principles of government include limited government, rule of law, due process, freedom from unreasonable search and seizure, and others.

**Passage 3**

1. Under a sunset provision, the following provisions of the Patriot Act were to expire unless reauthorized by Congress and the President.
   - Section 215 allowing the government to obtain records, “any tangible thing,” from a person or entity by making only the minimal showing of “relevance” to an international terrorism or espionage investigation.
   - Section 206, the “roving wiretap” provision of the Patriot Act
   - Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004, or the so-called “Lone Wolf” provision (Note—this one is not mentioned in the passage, but this is the third provision to which Senator Paul refers.)

2. Senator Paul suggested that the real reason behind the Patriot Act was to carry out a “long-standing wish list of power grabs like warrantless searches and roving wiretaps.”

3. Constitutional principles that may be threatened by Section 215 are freedom from unreasonable search and seizure, freedom of speech (gag rule), due process, and others.

**Passage 4**

1. Senator Paul explained that other provisions (National Security Letters and Suspicious Activity Reports) allow the government to gather a great deal of sensitive personal information without judicial oversight, leading to abuse. He described several reports documenting examples of abuse, for example, situations in which the FBI did not follow its own rules.

2. NSL abuse involves violating the NSL statutes, Attorney General guidelines, or FBI internal policies, as well as the collection of data on U.S. citizens or legal aliens. The Electronic Frontier Foundation (“EFF”) estimates that, “based on the proportion of violations reported to the Intelligence Oversight Board and the FBI’s own statements regarding NSL violations, the actual number of violations that may have occurred [from 2001 – 2008] could approach 40,000 violations of law, executive order, and other regulations.” Students should be able to explain which example of abuse they consider the most troubling, and why. They may list constitutional principles such as freedom from unreasonable search and seizure, rule of law, due process, limited government, liberty, free speech, and others.

3. Senator Paul noted that the Patriot Act makes abuses like NSLs and SARs permanent. Students may note additional issues.
Passage 5

1. Senator Paul wrote that legislators are bound by their oath to the Constitution to re-evaluate the Patriot Act because he believes that many of its provisions, and the bureaucracy that developed to administer them, violate constitutional principles. Examples may include principles of liberty, limited government, separation of powers, rule of law, justice, due process, freedom of speech, and freedom from unreasonable search and seizure.

2. Students should be prepared to share and justify their assessment of the most important or most powerful portions of the entire document.

Handout D: Remarks from President Barack Obama, August 9, 2013

Passage 1

1. Student responses will reflect their background knowledge, which may include the following examples. Specific incidents in which government use of surveillance has abused the rights of citizens might include writs of assistance in colonial America, the U.S. Sedition Acts of 1798 and 1918, use of Stasi informants in Nazi Germany; law enforcement use of informants in the former Soviet Union; U.S. use of illegal surveillance of Vietnam War protesters during the Johnson and Nixon administrations, and North Korea’s web of political informants.

Passage 2

1. President Obama describes the following steps:

   First, Have Congress pursue appropriate reforms to Section 215 of the Patriot Act—the program that collects telephone records. Reforms might include greater oversight, greater transparency, and constraints on the use of this authority.

   Second, additional changes to the FISC taking steps to make sure civil liberties are protected by ensuring that the government’s position is challenged by an adversary.

   Third, we can, and must, be more transparent: The Department of Justice will make public the legal rationale for the government’s collection activities under Section 215 of the Patriot Act. The NSA is taking steps to put in place a full-time civil liberties and privacy officer. And finally, the intelligence community is creating a website that will serve as a hub for further transparency.

   Fourth, the federal government is forming a high-level group of outside experts to review our entire intelligence and communications technologies. This independent group will make sure that there is absolutely no abuse in the use of surveillance technologies. Finally, they will provide an interim report in 60 days and a final report by the end of the year (2013), so that we can move forward with a better understanding of how these programs impact security, privacy, and foreign policy.

2. President Obama agreed with Edward Snowden’s position in that safeguards must be imposed to prevent abuses of people’s liberties and hold government to the rule of law even during wartime.

3. Student research would include a review of relevant steps since 2013 and should include current events.
Passage 3

1. Student responses will reflect their background knowledge. Specific examples of other governments throwing their own citizens in prison for what they say online might include the following:
   - In Iran, posting illegal content or accessing blocked Internet content is punishable by long terms in jail.
   - In China, nearly 100 journalists and citizens are in prison because of their Internet activity. For example, cyber dissident Hu Jia was imprisoned for 3½ years and continues under house arrest.
   - Also in China, new users of micro-blogging sites are required to register with their name and telephone number, thus increasing the government’s ability to track and potentially imprison them.
   - In Tibet, Buddhist monks are routinely under surveillance, and government authorities are prepared to raid monasteries at any given time. While no clear information exists regarding the arrest of any of the monks, computers, documents, photographs, and DVDs have been seized.
   - Additional likely countries to research: Turkmenistan, Saudi Arabia, Bahrain
   - Reporters Without Borders report, “Enemies of the Internet” suggests these additional countries and agencies as sources as potential abuse.
     - Belarus - the Operations and Analysis Centre conducts surveillance on its citizens.
     - India - the Centre for Development of Telematics
     - United Kingdom – the Government Communications Headquarters (GCHQ)
     - United States – the National Security Agency (NSA)

2. Specific constitutional principles might include liberty, limited government, separation of powers, rule of law, justice, due process (including freedom from unreasonable search and seizure), and freedom of speech. Virtues might include vigilance by citizens, justice, respect, responsibility, initiative, courage, honor, moderation, perseverance, resourcefulness, etc.

Extension Activities

Remarks from Senator Feingold on October 25th, 2001

1. Students should refer to any 3 of these:
   - with a warrant the FBI should be able to seize voice mail messages as well as tap a phone.
   - to update the federal criminal offense relating to possession and use of biological weapons.
   - to make sure that phone conversations carried over cables would not have more protection from surveillance than conversations carried over phone lines.
   - to stiffen penalties and lengthen or eliminate statutes of limitation for certain terrorist crimes.
   - to assist the victims of crime,
   - to streamline the application process for public safety officers benefits and increase those benefits,
• to provide more funds to strengthen immigration controls at our borders
• to expedite the hiring of translators at the FBI, and many other such provisions.

2. Note to teachers: This is a key question to understanding the debate over the Patriot Act. Extending the new criminal procedure regulations to any federal criminal prosecution will result in significant reductions in due process protections for anyone accused of a federal crime.

3. The longstanding practice under the Fourth Amendment of serving a warrant prior to executing a search could be easily avoided in virtually every case, because the government would simply have to show that it had “reasonable cause to believe” that providing notice “may” seriously jeopardize an investigation.” Notice is a key element of Fourth Amendment protections. It allows a person to point out mistakes in a warrant and to make sure that a search is limited to the terms of a warrant.

4. Law enforcement agencies might support “sneak and peak” searches because they could make searches more efficient and safer for the officers conducting the searches.

5. Senator Feingold predicted an abuse of power that might result from making it easier for owners of computers, such as employers, to give police permission to monitor communications from those computers. For example, an employer might use procedures aimed at terrorist activity trying to catch an employee violating the workplace rules regarding personal use of the computer. Feingold writes, “With this one provision, fourth amendment protections are potentially eliminated for a broad spectrum of electronic communications.”

6. Law enforcement powers would be expanded because officers could use powers originally intended to conduct surveillance in foreign intelligence investigations in almost any domestic investigation of federal crime. The government would not have to meet the rigorous probable cause standard under the Fourth Amendment—as long as the government shows that intelligence is a “significant purpose” of the investigation—not the primary purpose as under previous law. It seems obvious that with this lower standard, the FBI would try to use FISA as much as it can. (Note Section 215.)

7. Students should be prepared to share and justify their assessment of the most important or most powerful portions of the entire document.

Remarks from Attorney General John Ashcroft, February 10, 2003

1. “Paradigm of prevention” refers to a new focus adopted by the U.S. and other freedom-loving countries. “We are working to bridge the gaps in our domestic law enforcement and security activities with greater cooperation and information sharing. We have broken down some of the artificial barriers separating needlessly our law enforcement and intelligence communities. Federal, state, and local law enforcement agencies have united in unprecedented cooperation, committed to a common goal.” The goal is to stop terrorism before it happens, not just prosecute and punish the guilty after the fact.

2. The shared values include the following
   • rule of law
   • progress and pluralism
   • tolerance and freedom
• freedom of speech
• freedom of religion
• political democracy
• equality and justice

3. Answers will vary; accept reasoned responses.

4. Answers will vary, but may refer to Ashcroft’s desire to demonstrate that the U.S. is not alone in its opposition to terrorism. He emphasized the common ground shared by nations that value freedom and the international threat of terrorism.

5. Answers will vary, but Ashcroft explained that we have a better chance of preventing terrorism if we work with other countries to share information.

6. Answers will vary, but may refer to the international effort to stop the spread of communism during the Cold War as a historical example of successful cooperation among countries.

7. Ashcroft referred to “rule of law” at least 8 times in the document. Rule of law means that the laws of a country apply equally to everyone and are made by an open, fair, and predictable process. No one is above the law and the government must follow its own rules. Answers will vary regarding why Ashcroft emphasized the principle so much and how enhanced law enforcement powers might endanger the principle. Students might suggest that if law enforcement powers are enhanced, it becomes easier for officials to abuse the rights of the people. Accept well-reasoned responses.

8. Students should be prepared to share and justify their assessment of the most important or most powerful portions of the entire document.
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
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 H: Case # 1—Hamdi v. Rumsfeld (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
   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 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.
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.
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?
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?
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?
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 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
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
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.
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.

**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.
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.
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...
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.

Background, Facts, and Constitutional Question

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.
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.
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.
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.
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.”
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 ‘offense[s] 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, Section1 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
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.
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...
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
reach of other constitutional protections as well). It bluntly 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.
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.
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:


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:


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.

<table>
<thead>
<tr>
<th>What form of due process applies?</th>
<th>The privilege of the writ of <em>habeas corpus</em> does not apply in this situation; the policy determined by the president and Congress will be carried out.</th>
<th>The privilege of the writ of <em>habeas corpus</em> and/or other due process protections apply in this situation in order to prevent illegal imprisonment.</th>
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<tr>
<td><em>Johnson v. Eisentrager</em> (1950)</td>
<td><strong>Justice Jackson:</strong> “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.”</td>
<td><strong>Justice Black:</strong> “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. <em>Habeas corpus</em>, 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.”</td>
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<tr>
<td>What form of due process applies?</td>
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<td><strong>Case #1:</strong> <em>Hamdi v. Rumsfeld</em> (2004)</td>
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<td>Justice O’Connor; Justice Thomas</td>
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<td><strong>Case #2:</strong> <em>Rasul v. Bush</em> (2004)</td>
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<td><strong>Case #3:</strong> <em>Hamdan v. Rumsfeld</em> (2006)</td>
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<td>Justice Stevens; Justice Scalia</td>
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<td><strong>Case #4:</strong> <em>Boumediene v. Bush</em> (2008)</td>
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<td>Justice Kennedy; Justice Scalia; Chief Justice Roberts</td>
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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?
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.
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 detention 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.


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.
<table>
<thead>
<tr>
<th>What form of due process applies?</th>
<th>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.</th>
<th>The privilege of the writ of habeas corpus and/or other due process protections apply in this situation in order to prevent illegal imprisonment.</th>
</tr>
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<tbody>
<tr>
<td><em>Johnson v. Eisentrager</em> (1950)</td>
<td><em>Justice Jackson:</em> “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.”</td>
<td><em>Justice Black:</em> “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. <em>Habeas corpus</em>, 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.”</td>
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<td><em>Hamdi v. Rumsfeld</em> (2004)</td>
<td><em>Justice Thomas:</em> “[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...”</td>
<td><em>Justice O’Connor:</em> “The Great Writ of <em>habeas corpus</em> 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...”</td>
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<td><strong>Rasul v. Bush</strong> (2004)</td>
<td><strong>Justice Scalia:</strong> “[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...”</td>
<td><strong>Justice Stevens:</strong> “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...”</td>
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<td><strong>Hamdan v. Rumsfeld</strong> (2006)</td>
<td><strong>Justice Scalia:</strong> “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...”</td>
<td><strong>Justice Stevens:</strong> “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.”</td>
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<td><strong>Boumediene v. Bush (2008)</strong></td>
<td><strong>Justice Scalia:</strong> 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]... <strong>Chief Justice Roberts:</strong> 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...</td>
<td><strong>Justice Kennedy:</strong> “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... [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.”</td>
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Accept reasoned responses that

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