

## Handout D: The War on Terror and Separation of Powers

**Directions:** Read the documents below and answer the questions that follow.

**Background:** On September 11, 2001, radical Islamic terrorists hijacked and crashed four passenger jets in New York, Washington, DC, and Pennsylvania. In all, 2,976 people, mostly civilians, lost their lives on that day. In the days following the attacks, U.S. and British intelligence confirmed that Al-Qaeda, led by Osama bin Laden, had planned and carried out the attacks. On September 20, President George W. Bush addressed Americans—many of whom had never heard of Al-Qaeda—in a televised speech before a joint session of Congress. Bush contrasted the September 11 attacks on civilian targets with December 7, 1941 when the Japanese bombed the naval base at Pearl Harbor. He explained that while Al-Qaeda was linked to more than sixty countries, its base was Afghanistan. He condemned the Taliban regime which controlled Afghanistan, and announced the beginning of a War on Terror. Early in the conflict, President Bush approved the use of military tribunals to try accused terrorists, including many individuals captured in Afghanistan. Bush said that the tribunals were needed to “to protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks.” A detention camp was set up at the US Naval base in Guantanamo Bay, Cuba.

Military tribunals are court proceedings used to try the enemy for violations of the laws of war. Military tribunals differ from criminal trials in some important ways. Military tribunals are not required to preserve many of the rights protected in the Bill of Rights. For example, the Sixth Amendment requires criminal trials to be open to the public, but military tribunals can be secret. Strict rules of evidence in the civilian justice system may not apply in a military tribunal. Decisions of military tribunals cannot be appealed in federal court. Rather, the president, as Commander in Chief, makes the final decision in reviewed cases.

Military tribunals have been a part of every war in U.S. history through World War II. During World War II, the Supreme Court unanimously upheld their use for unlawful combatants, even when the accused were U.S. citizens. At the time Bush was president, no president had ever asserted that the U.S. government should have to extend Bill of Rights protections to people who are not citizens of the United States and who are accused of making war against the U.S.

A little over a month after the first prisoners arrived at Guantanamo Bay, the first habeas corpus petition (a petition challenging detention) was filed. That case was dismissed. More petitions followed and were also dismissed. But in the years that followed, public unease with the indefinite detention of suspected terrorists at Guantanamo Bay grew. Inspectors at Guantanamo Bay reported ill prisoner treatment. The U.S. Supreme Court stopped dismissing habeas corpus petitions and progressively expanded the rights afforded to detainees at the camp.

The U.S. Supreme Court has decided several cases to help answer the question, to what extent, if at all, should suspected foreign terrorists be afforded constitutional due process protections.

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### Excerpts from the Plurality Opinion, *Hamdi v. Rumsfeld* (2004) Justice Sandra Day O'Connor

For purposes of this case, the enemy combatant that [the government] is seeking to detain is an individual who, it alleges, was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there. We therefore answer only the narrow question before us, whether the detention of citizens falling within that definition is authorized.

[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. 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. *Youngstown Sheet & Tube* (1952). Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. ... 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. ... it 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...

### Excerpts from the Majority Opinion, *Hamdan v. Rumsfeld* (2006) Justice John Stevens, (5-3)

The military commission [set up by the Bush administration to try detainees at Guantanamo Bay] lacks the power to proceed because its structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949...

Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. See *Youngstown Sheet & Tube Co. v. Sawyer*, (1952) (Jackson, J., concurring).

**Excerpts from the Majority Opinion, *Boumediene v. Bush* (2008)  
Justice Anthony Kennedy (5-4)**

...[T]he Government's view is that the Constitution had no effect [in Guantanamo]..., at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument 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*, (1885). 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. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit

a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is." *Marbury v. Madison*, (1803).

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...

Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. [Thus, access to the writ for the detainees] is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.

### Critical Thinking Questions

1. State the main idea of each of these decisions: *Hamdi v. Rumsfeld* (2004), *Hamdan v. Rumsfeld* (2006), *Boumediene v. Bush* (2008).
2. How does the Court's action in these cases help illustrate the principle of separation of powers during wartime?