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Director’s Note

Four years have passed since the events of September 11. As evident by our daily news accounts, the events of and our response to September 11 continue to be part of our cultural, political, and legal landscape. These daily news accounts highlight counter-terrorism surveillance programs, terrorism trials, and congressional efforts to curtail the jurisdiction of the U.S. Courts to hear habeas petitions from enemy combatants.

The three feature essays in this issue of *Insights* highlight questions about many of the debates that are being played out in the news every day. Mary L. Dudziak places our legal and political response to September 11 in historical context and asks us to consider the consequences of our legal, cultural, and political frames of reference. Kim Lane Scheppele explains the United Nation’s role in creating a global plan to fight terrorism, resulting in laws across the world that look very much like the USA PATRIOT Act. Anita Ramasastry describes the controversies surrounding one section of the USA PATRIOT Act. In the Perspectives section, two legal scholars, Douglas Kmiec and John Finn, and a legal activist, Colleen Connell, consider the questions: do current anti-terrorism efforts in the United States compromise civil liberties? Are the compromises necessary? Law Review describes a case to be heard before the U.S. Supreme Court that will decide whether the President has the authority to establish military commissions to try detainees in the war on terror for war crimes and whether the Geneva Convention Relative to the Treatment of Prisoners of War is enforceable in U.S. Courts.

You will also find lessons and classroom resources. Take a look at a lesson examining individual rights in times of war and the interplay amongst the three branches of government during three specific conflicts: the Civil War, World War II, and the War on Terror. Use an article and discussion questions reprinted from *The Washington Post* about the National Security Agency wiretapping program, and find additional research and classroom activities to further explore the issues raised in the article. Learn about the Youth for Justice National Teach-In, a peer-to-peer program that involved students in teaching other students about the USA PATRIOT Act and other national security-related legal issues.

We hope that these essays and curriculum resources will help you to examine our laws in an age of terror and to explore the legal, political, and cultural landscape in a balanced manner.

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“September 11 continues to be part of our cultural, political, and legal landscape.”
In the aftermath of September 11, American leaders used the metaphor of war to frame a response to terrorism. In this article, Mary L. Dudziak explores whether we have conceptualized September 11 as a break from the past, places the American response in a historical context, and asks us to consider the potential consequences of policies that emanate from our post-September 11 frame of reference.

In the closing weeks of 2005, a debate raged in Washington, D.C. Parts of the PATRIOT Act were about to expire, and efforts in Congress to enact an extension came to an abrupt halt when the New York Times reported that the Bush Administration had engaged in spying on U.S. citizens within the United States since September 11, 2001. The surveillance was beyond the broad authority Congress had given the President to combat terrorism under the original PATRIOT Act of 2001, and pre-existing federal law. Critics charged the administration with lawlessness; the President responded that the domestic spying was crucial to U.S. national security and was within his powers as President to protect the nation from terrorism.

While the debate, on its surface, focused on the more technical questions of the national security need for domestic surveillance and the constitutional scope of presidential power, underneath these issues is a more fundamental question that has defined American policy since September 11: did the attacks of September 11 usher in a new era, requiring fundamental change in American policies at home and abroad?

The question of whether September 11 changed the American political and cultural landscape became an issue even as the terrible events of that day unfolded. Media commentators, shocked at the destruction before them, grasped for analogies, looking for some way to make sense of the experience. Was it like Pearl Harbor, many wondered? Perhaps finding a foothold in the past, historicizing the moment, would help the nation see that these unimaginable horrors would be survivable.

But the way we understand September 11 as a moment in history is of broader importance. September 11’s historical pedigree informs our understanding of

“Thinking of September 11 as a break from the past would have important consequences.”

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what we should do about it—what laws we should pass and what powers the people must entrust to our government.

**Did September 11 “Change Everything?” Was it a War?**

The immediate reaction to September 11 was to think of it as a historic break, a moment of transformation. “Nothing Will Ever Be the Same,” read a September 11-related special edition of the *Philadelphia City Paper*. The one year anniversary was marked as “The Day We Changed” in a banner headline on America-on-Line, and Neil Conan of National Public Radio began his anniversary coverage by reflecting on the moment when “we were all about to change, together.” American teenagers had their own response to the widespread idea that everything had changed. In teen “terror slang,” the new put-down was “That’s so September 10.”

Thinking of September 11 as a break from the past would have important consequences. If we had entered a new era, then the policies of the past were suddenly outdated. The new world those events had created required new tools. What would they be? To understand that, we will have to look more deeply at the sort of shift September 11 is understood to have wrought.

In 2006, we are so far into the “war on terror” that it may be hard to imagine that there were once other ways than “war” to think about what happened. On September 12, 2001, President George W. Bush told the nation that the attacks “were more than acts of terror. They were acts of war,” and from that point on, war talk came to swallow up alternative conceptualizations. While this move was understandable—there was a terrorist attack on the United States after all—it had consequences. The world had come together in sympathy and solidarity with the United States at the time of the attacks, but as U.S. policy unfolded, many found it increasingly difficult to fall in line behind U.S. military initiatives that seemed of questionable connection to September 11. For American leaders, there were many advantages to framing September 11 in militaristic terms. One consequence, however, was that it fractured the global solidarity with the United States. Nations were asked to choose sides. “You’re either with us or you’re with the terrorists,” President Bush announced. In the days after September 11, people around the world had brought American flags and flowers to the doors of American embassies. Once the United States went to war with Iraq in March 2003, global solidarity fractured, and the American flag became a symbol of derision defaced in anti-war protests.

If not a war, were there other ways to think about 9/11, and what to do about it? Perhaps September 11 was a horrific crime. The response to a crime would be to find the persons responsible—including Osama bin Laden, his followers, and those who support his terrorist network—and prosecute them. Governments might also take steps to deter and prevent future criminal acts like this. While some argued that law-enforcement models provided the government with adequate safeguards to fight a global criminal network of terrorists, critics charged that those pressing a criminal law model were naive. They were operating within a pre-September 11 framework and did not understand that the nation was in a new security environment, requiring new tools and broader government power.

The greatest consequence of the ideas that September 11 “changed everything” and that the attacks had launched a war was that these ideas legitimated the use of the war powers of government. If the nation is at war, then the powers of Congress and especially the executive are expanded to meet the threat, and traditionally the courts have stepped back, playing a more deferential role in the face of executive arguments about wartime national security.

**The War Metaphor and the War Power**

Having settled on the idea that September 11 was the opening salvo of a “war,” what sort of war was it? Difficulties abound, for traditional ideas of war and wartime are bounded in time and space. We think of a war as happening between two nations. We have a way of knowing where the war zone is. And the war would be over when one warring nation had defeated the other, or when the two nations agreed to stop fighting. There seems to be no way to end a war on terror against a faceless enemy.

President Bush took up this idea in a December 18, 2005, address on Iraq. He argued that the terrorists viewed “the world as a giant battlefield—and they seek to attack us wherever they
can” by waging “a perpetual war against America and our friends.”

But perhaps this war—not against a nation, but against a force in the world, terrorism—is not without models. Diplomatic historian Marilyn Young has compared the war on terror to the Cold War, in which the United States fought a different “ism,” communism. During the Korean War in the early 1950s, “the United States did not fight Koreans on that devastated peninsula, but Communists,” she writes. “The enemy then, as now, was an amoebic ‘ism’ that could take up residence in any number of surprising places, instantly deterritorializing them,” (Dudziak, 2003, p. 14).

If the new war on terror has no boundaries in time or space, then it leads to the question of whether the presidential war powers are also without the boundaries that traditionally attend the war powers. Debates about war and civil liberties tend to assume that if the government encroaches on civil liberties during wartime, the pendulum eventually swings back when war is over. If the war on terror is endless, then are terrorism-related restrictions on civil liberties endless as well?

One important argument about the scope and limits of the war power has been the question of where limits to the executive’s powers apply. To maximize its power over persons in U.S. custody, the U.S. government has attempted to hold terrorism suspects in geographic spaces outside the protection of U.S. law. The detention center at Guantánamo, Cuba, was used to house “enemy combatants” seized in Afghanistan, Iraq, and other nations. These individuals were defined as outside the protection of the Geneva Convention, which would usually protect enemy troops in wartime. The Bush Administration also argued that the space of Guantánamo, based on a long-term lease from Cuba, was outside the protection of American courts, and so detainees could not seek review of their detentions. While the scope and nature of judicial review remains to be determined, the United States Supreme Court rejected the argument that no judicial review of Guantánamo detention was permissible in Rasul v. Bush (2005).

Strategies to place American actions outside the regulation of law would seem to be at odds with American efforts to promote the rule of law in other nations, and with the basic American self-concept of the United States as a nation that embodies a rule of law. But as Ruti Teitel has argued, there is a law-related logic to American efforts to exempt the nation from legal regulation. She argues that the post-9/11 legal model adopted by the United States is that of the sovereign police. In reaction to September 11, she argues, American leaders viewed the United States as holding the position of the law enforcer, the world police, and therefore not a body that could subject itself to the power of others. This model would raise great concerns over the long term, so Teitel argues that it should not be used beyond time-limited exceptional moments (Dudziak, 2003, p. 198–199).

“States of exception should be treated as such,” she argues, “at best, as provisional accommodations, subject to constitutional limitations,” and “ought not become an occasion for lawlessness,” (Dudziak, 2003, p. 208).

The War on Terror and the Torture Debate

The idea that September 11 changed the policy environment has seemed clearest during a rather remarkable debate over torture. The use of torture by the United States was unthinkable before September 11. In the years afterward, scholars and policy makers debated whether torture would be defensible if it would lead to disclosure of information that would prevent another massive terrorist attack. Torture was no longer unthinkable but was instead debatable.

Then stories and photos of mistreatment of detainees in American custody emerged from the Iraqi prison, Abu Ghraib. Torture was no longer simply the stuff of cable news debates, but was something done by American soldiers who brutalized and humiliated their captives. Secretary of Defense Donald Rumsfeld insisted that wrongdoers would be brought to justice, and court martial proceedings were brought...
The International Emergency After 9/11

The United Nations coordinates a global plan to fight terrorism.

by Kim Lane Schepple

On September 28, 2001, while the wreckage of the World Trade Center smoldered, the United Nations Security Council—meeting just uptown—passed a revolutionary resolution. This resolution required all 191 member states of the United Nations (UN) to fight the global war on terrorism, and to do so through specific means. States were required to criminalize acts of terrorism. States were required to crack down on terrorism financing. States were required to take steps to catch terrorists plotting in their territory. In short, there was a global plan to fight terror, coordinated through the UN Security Council. The global plan to fight terror required every country to pass laws that looked like the USA PATRIOT Act.

The UN Security Council had, in the past, levied sanctions, ordered particular rogue states to do specific things, and coordinated embargoes of various sorts. But the Security Council had never before used its power to require every member state of the UN to change its domestic laws, the laws a state uses to govern itself. After Resolution 1373, for the first time in Security Council history, a state could be in noncompliance with international law by failing to have on its books a particular criminal offense, or a particular regime for monitoring financial transactions, or a particularly strict asylum policy. The “global war on terrorism” was going to be fought not just through international law, but through the international coordination of national law. Resolution 1373 signaled a change in the global order.

Of course, this might appear to be a good thing. Terrorism with “global reach” needs to be fought with global means. And what better guarantor is there that the global means will be coordinated and effective than the UN Security Council?

Unfortunately, however, the side effects of the anti-terrorism campaign had worrisome consequences for human rights and constitutionalism around the world both in established democracies and in newer, more fragile democracies.

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Resolution 1373 (the revolutionary resolution) has been perhaps too successful in focusing governments on terrorism, because it has resulted in a global sacrifice of human rights and commitment to separation of powers to the fight against terrorism. How do we know? Resolution 1373 required all UN member states to file frequent reports with the Counter-Terrorism Committee (CTC) of the UN Security Council, a body which was created by Resolution 1373 to monitor implementation of the resolution. The trouble is apparent just from reading these reports to the CTC. Add the states’ reports to what we have found out from the news and from the investigations of international human rights organizations and the trouble indeed looms large. Some countries, such as Pakistan, Colombia, and Russia, have changed their structures of government to concentrate powers in the executive in the name of fighting terrorism. A number of countries have increased the length of time the state may hold a terrorism suspect in detention without charging him with a crime or have increased the frequency of forcible renditions, transferring detainees from country to country without proper legal process.

**Defining Terrorism**

One way in which the state reports in particular reveal a trend toward sacrificing human rights and constitutionalism involves the very definition of terrorism itself. Under Resolution 1373, all states were required to criminalize it. As it turns out, the United Nations General Assembly had been debating a definition of terrorism for years and had failed to reach any agreement. The UN Security Council did no better with Resolution 1373. The sticking points were serious. Some states (for example, those in the Arab League) felt that occupied territories (for example, Palestine) had a right to challenge their occupiers through force. Their freedom fighters were other countries’ terrorists. Other states (the United States, Israel, and many of their allies, for example) thought that terrorism was by definition limited to the actions of nonstate actors, so that no action carried out by a state could ever be labeled terrorism. When Israel launches rockets into populated areas of the Gaza strip or a U.S. predator aircraft fires a hellfire missile at a car driven by suspected terrorist, killing six people who were driving through the desert (as happened in Yemen in 2002), there are those who are inclined to say that these actions, apparently targeting civilians, are terrorism too. Needless to say, excluding state actors from the definition of terrorism was not a universally shared view among those opposed to some actions of the United States, Israel, and their allies. Still other states, particularly those without substantial democratic inclinations, such as Uzbekistan, labeled virtually all political opposition to their regimes as terrorism. That, of course, could not be tolerated by the world’s democracies. And so on. Because terrorism has an inescapably political context, discussions about it runs into inescapably political disagreement about what it entails.

The UN Security Council solved the definitional problem by not solving it. Resolution 1373 required all states to criminalize terrorism, without providing any guidelines about what terrorism might legitimately be considered to be. Not surprisingly, the definitions of terrorism in the current array of country-specific legislation criminalizing terrorism vary greatly, and many of the definitions raise human rights concerns.

Many repressive countries have repressive definitions. For instance, Vietnam reported to the UN Security Council that it was complying with Resolution 1373 because its laws already included a criminal offense called “terrorism” in which “those who intend to oppose the people’s administration and infringe upon the lives of officials, public employees or citizens shall be sentenced to between 12 and 20 years of imprisonment, life imprisonment or capital punishment.” This means that in Vietnam ordinary political opposition would be subject to being prosecuted as terrorist activity. Brunei defines a terrorist as “any person who … by the use of any firearm,
explosive, or ammunition acts in a manner prejudicial to public safety or to the maintenance of public order or incites to violence or counsels disobedience to the law or to any lawful order.” Any ordinary criminal act (for example, a garden-variety murder) could be swept up in this definition, as could civil disobedience. In both Vietnam and Brunei, these policies were adopted by an executive with no meaningful check on its powers. In Vietnam, the Communist Party has a monopoly on state policy, and in Brunei, there is no parliament. Both countries, however, can claim to be following international law by criminalizing terrorism.

Even well-established democracies have created problematic definitions of terrorism. In 2003, France created a new offense in its criminal code called “pimping for terrorism.” Anyone who fails to substantiate the source of income can be charged with this new offense if that person associates with individuals suspected of engaging in terrorist acts. This crime requires no direct proof of terrorist activity—having unexplained income and knowing suspected terrorists is enough. Despite the fact that France has a history dating back to the French Revolution of vigorously defending freedom of association, this new terrorism law creates something very close to guilt by association without proof of actual criminal activity. Great Britain’s current definition of terrorism comes very close to sweeping up any violent dissent in its purview. Under its laws, terrorism in Great Britain can include violence against people or property if the actions are “designed to influence the government or to intimidate the public…” and are “made for the purpose of advancing a political, religious or ideological cause.”

While all countries criminalize violence, adding the label of terrorism to ordinary political violence results in much longer sentences for what may have been common acts. This is of special concern when violence to property is swept up in the same law as violence against persons. Someone who tears down a political poster with which they disagree, for example, would fall under this statute. Even the United States has a dodgy definition of terrorism. In the United States acts “dangerous to human life” that “appear to be intended to intimidate or coerce a civilian population… or to influence the policy of a government by intimidation or coercion” are now considered terrorism. While international terrorism has been defined this way in U.S. federal law since 1992, the USA PATRIOT Act extended this same formulation to domestic terrorism after 9/11.

Usually, American criminal law requires criminal intent to lie in the mind of the criminal. The legal term for this is mens rea—short-hand from the Latin phrase actus non facit reum nisi mens sit rea, which means that “the act will not make a person guilty unless the mind is also guilty.” Currently, federal terrorism law in the United States lodges criminal intent in the eye of the beholder and has the potential to criminalize a wide range of activity. Many things—from marching down the middle of the street to setting off fireworks—are arguably “dangerous to human life” and could be prosecuted as terrorism, if the government chose to see such activity as a criminal attempt to influence its citizens or its policies.

Needless to say, the breadth of definitions of terrorism creates a substantial concern for the maintenance of civil liberties since the laws can be interpreted to cover such a wide range of political activity. In fact, all of the definitions that have been invoked since the UN Security Council passed Resolution 1373 lower the bar for bringing criminal charges against suspected terrorists relative to other sorts of suspected criminals, and they all broaden the range of activities for which individuals may be classified as terrorism suspects, often blurring the lines between terrorism and boisterous dissent. While, of course, any form of violent dissent, such as threatening government officials or defacing government property, is subject to criminal prosecution in most countries, labeling it “terrorist” usually increases the sentences that can be given and may even allow such charges to be brought in a special court or judicial proceeding where defendants’ rights may be truncated.

In mandating states to adopt definitions of terrorism without providing guidance that is careful to protect human rights, the UN Security Council’s anti-terrorism policy has given the green light to states to criminalize a great deal along with terrorism. The definitions that have been adopted, in nondemocracies as well as in established democracies, often skate perilously close to criminalizing political dissent and provide governments with a great deal of discretion to treat as criminal a wide range of political conduct. The criminalization of terrorism, under the UN Security Council Resolution, invites abuses of both international human rights conventions and domestic constitutions that protect civil liberties.

Financing Terrorism
Resolution 1373 also required states to crack down on terrorism financing. To enforce the resolution, the UN Security Council directed states to find a way to freeze the assets of any person or group that appeared on the Security Council’s terrorism watch list. And many states
immediately complied. In the United States, for example, the President is permitted to carry out resolutions of the Security Council by executive order, and so the President has been able to order such freezes directly, without requiring approval from either Congress or a court. Belize passed a law in fall 2001 that gave their foreign minister the power to freeze assets if the UN Security Council asks. Bulgaria gave this power after 9/11 to their minister of the interior. Brazil passed a law making all Security Council resolutions automatically domestic law without independent legislative action in the country. In each of these cases, a representative of the executive branch is permitted to freeze the assets of anyone—including citizens—who fall under UN suspicion. But other countries pushed back. Initially, Venezuela and Mexico, for example, told the UN Security Council that their domestic law did not allow the state to freeze assets without an order from a judge, and that no judge would give such an order without evidence that the person or group in question had violated the law. The Security Council refused to provide evidence but kept insisting that these states find a way to freeze assets of anyone—including citizens—who fall under UN suspicion.

For Discussion

**What are the consequences of the UN Security Council’s failure to define terrorism in Resolution 1373? Provide some country-specific examples.**

**How does the author argue that Resolution 1373 affected due process?**

**Given the mandates of Resolution 1373, do you believe that the UN has a responsibility to monitor potential human rights abuses that may result from the implementation of the mandates around the world? Provide a rationale for your position.**

Conclusion

Since 9/11 a new legal framework has developed in which the UN has set mandatory but general legal parameters for a global anti-terrorism campaign. National governments have tailored those mandates to the local situation. We see a global anti-terrorism campaign that is being waged through domestic laws but coordinated through an international mechanism. In many places, the anti-terrorism campaign has concentrated power in the hands of state executives often without legislative approval. In requiring the criminalization of terrorism, significant power has been placed in the executive branch of government, which typically decides whom to prosecute under the criminal laws. In pushing states to freeze assets without legislative or court approval, the anti-terrorism campaign encourages further concentration of power in the executive branch. At the same time, the UN Security Council disavowed any...
Why Are Librarians Mad About the USA PATRIOT Act?

The government can secretly access library or book-purchase records under Section 215.

by Anita Ramasastry

Section 215 of the USA PATRIOT Act, also referred to as the “libraries” provision, allows the government to gain access to patrons’ library records without their knowledge. In this article, Anita Ramasastry describes the controversies surrounding its reauthorization.

Shortly after the terrorist acts of September 11, 2001, Congress approved the USA PATRIOT Act (Act) by an overwhelming majority. Some commentators maintain that it expands government surveillance powers established by the Foreign Intelligence Surveillance Act (FISA). The FISA was passed in 1978 in the wake of Watergate and revelations about systematic government surveillance of citizens, journalists, and perceived political opponents of the government.

Opponents of the Act were concerned about perceived infringements on the privacy rights of American citizens, especially under the Fourth Amendment of the U.S. Constitution. The Fourth Amendment requires law enforcement to obtain a search warrant from a court before searching a person’s home or gaining access to his private effects. Critics of the Act believed that it unnecessarily lowered the legal standards by which the government can gain access to Americans’ private records in the name of fighting terrorism. In general, the standards for obtaining a warrant are relaxed for counter-intelligence purposes, under the FISA, for example, if a subject is suspected of being a foreign spy.

Under Section 215 of the USA PATRIOT Act, the FBI can access library or book-purchase records without a patron’s knowledge or establishing suspicions of terrorist activity. Librarians and booksellers publicly criticized it, arguing that it lowered the standards too much. Their concern was the implications of its broad reach for individual privacy, failure to give prior notice of searches, and potentially chilling effects on protected First Amendment speech.

Section 215—An Overview

Section 215 allowed the FBI secretly to order businesses and other organizations to turn over records. The FBI had to first certify to the secret FISA court, which issues intelligence search orders, that the information was for international terrorism.

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intelligence activities. Recipients of the orders could not tell anyone that they received them. These secret orders, also called “gag orders,” to turn over business records were available from the FISA court before Congress passed the PATRIOT Act under the FISA. However, the PATRIOT Act expanded their scope.

First, it expanded the types of records that could be sought for terrorism investigations beyond travel records (hotels, motels, car and truck rental, and storage rental facilities). The FBI could use a Section 215 order to gain access to “books, records, papers, documents, and other items” held by libraries, booksellers, doctors, universities, Internet service providers, charities, religious organizations, and other public entities and private sector businesses.

Second, although the FISA had already lowered the probable cause standard for foreign intelligence searches, Section 215 lowered the standards for securing an order even further. The FBI no longer needed to show specific and articulable facts that a person was suspected of being a spy or terrorist. Instead, orders could be used to investigate anyone, so long as the FBI certified to the FISA court that the records were for an ongoing terrorism or espionage investigation. The FISA court had to issue the order with one limitation: If the investigation is of a “United States person” (a permanent resident or U.S. citizen), a citizen could not be targeted for investigation because of speaking, writing, or protesting, if such activity is protected under the First Amendment.

**Criticisms of Section 215**

Privacy and Fourth Amendment Concerns: Critics of Section 215 were concerned about the standard required of the government to gain access to the broader class of personal records. The FBI was no longer required to show “specific and articulable facts” of a nexus between a particular person and spying or terrorism. Although less exacting than Fourth Amendment probable cause, the FBI still had to link an individual to suspect activity, before gaining access to his records under the FISA. Section 215 eliminated the need for any particularized showing.

Similarly, by permitting the order to cover records of all persons, a literal reading of Section 215 would permit an entire membership list of a library or religious organization to be the subject of a FISA order. Critics worried that the government could mine an entire database for information, gaining access to personal or sensitive data about many innocent American citizens at once rather than looking at one suspect’s data.

The American Civil Liberties Union and other civil liberties groups also contended that Section 215 violated the privacy of Americans under the Fourth Amendment, even though information and records held by third parties has not automatically been protected by the Fourth Amendment. Information voluntarily given to third parties is no longer “private” because we have shared it with others. Americans do not typically have the same expectations of privacy when it comes to data voluntarily shared with others.

On the other hand, some information that is retained by third parties may still have Fourth Amendment protection because we may have heightened expectations of privacy for it. We expect, for example, that our medical history is confidential even when retained by doctors. They are guardians of sensitive data that we must reveal as a condition of medical treatment.

Critics noted that even if we had no constitutional expectation of privacy in data, sound public policy required Congress to safeguard such data from unwanted government intrusion. Congress has chosen in other cases to provide privacy protections to other records, such as video rentals. Regardless, Section 215 overruled other laws that usually govern the release of records, including sensitive medical records that are generally subject to privacy protections.

**Section 215 and First Amendment Concerns:** The debate over Section 215 also highlighted concerns about chilling our ability to read and associate freely. Many scholars and jurists have noted that increased government surveillance can have a chilling effect on expression and political activity. Librarians and booksellers opposed Section 215 arguing that it would deter Americans from reading, speaking, and engaging in political discourse for fear that the government would monitor such activities and put such information into secret files.

A related issue was Section 215’s gag order. People and organizations that received Section 215 orders cannot speak about them to the public. Section 215 surveillance occurs in secrecy. Civil
liberties advocates emphasized that it is important to allow the recipients of Section 215 orders to speak freely. This promotes transparency in government and open debate on the Act.

**Defense of Section 215**

The U.S. Department of Justice (DOJ) publicly defended Section 215 of the PATRIOT Act and cited it as one of the more effective provisions.

First, the DOJ and executive branch noted that libraries hold potentially useful information that investigators can obtain under Section 215. In the past, terrorists and spies have used libraries to plan and carry out activities that threaten national security (e.g., using public Internet access).

Second, and more generally, the DOJ and other supporters of Section 215 often compared its authority to grand jury subpoenas in criminal proceedings. The Federal Rules of Criminal Procedure, for example, authorize compulsory production of books and records by subpoena. Proponents noted that there is no item obtainable by Section 215 that could not already be compelled by simple subpoena. The Bush administration often compared Section 215 orders to the grand jury subpoenas available in criminal cases. (Critics of Section 215 noted that criminal prosecutions are inherently different from intelligence. For example, intelligence investigations are conducted in secret. When a person receives a grand jury subpoena, he or she can publicly complain about it. Section 215 orders remain secret.)

Third, Section 215 proponents noted that its lowered standard for obtaining a search order was reasonable because the tangible items at issue are primarily activity records voluntarily left in the hands of third parties.

Fourth, the DOJ and advocates of Section 215 stated that the provision was narrow in scope and protected our privacy and First Amendment rights. They emphasized that it is not nearly as dramatic as it appeared. In particular, proponents noted that Section 215 has not been used to gain access to library, bookstore, medical, or gun sale records. In fact, based on the DOJ’s own disclosures, federal judges had reviewed and granted the department’s request for a Section 215 order 35 times as of March 30, 2005. The DOJ pointed out that the FBI cannot obtain records under Section 215 without a court order.

Finally, Section 215 provided for congressional oversight. Every six months, the attorney general was required to “fully inform” Congress on the number of times agents have sought a court order under Section 215, as well as the number of times such requests were granted, modified, or denied.

**Reauthorization**

Section 215 was one of the provisions of the PATRIOT Act due to sunset in December 2005. The reauthorizing legislation, signed into law on March 9, 2006, included some changes. For one, under the new statute, the director of the FBI or his designee must approve orders directing the production of certain categories of records, including library, bookstore, gun sale, tax return, educational, or medical records. For another, the FBI must include a “statement of facts” in the application for an order showing “reasonable grounds” that the records are “relevant to an authorized investigation,” involving “foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine activities,” describing the records with “sufficient particularity” and for recipients of Section 215 orders to challenge the orders through a “petition review panel” in the FISA court. Recipients may also challenge the gag rule after one year. Furthermore, records will be deemed “presumptively relevant” (that is, nothing further will be needed to demonstrate their relevance to an investigation), if the FBI shows that they pertain to a foreign power or its agent, activities of a suspected agent of a foreign power under investigation, suspected agents of foreign powers, or individuals in contact with or known to one. Finally, the new statute enhances unclassified DOJ reporting to the public and Congress on the use of Section 215 authority and requires an annual audit. (For more information about specific changes, see Insights Online).

**Conclusion**

Section 215 still allows for wide-search requests rather than requiring a showing of individualized suspicion. Critics charge continued on page 25
War or Peace Determines the Balance of Security and Civil Liberty

By Douglas W. Kmiec

The conflict between civil liberty and national security has been continually with us since 9/11. The recent disclosure on December 16, 2005, by the New York Times that the President has employed the National Security Agency to monitor the calls and e-mail transmissions of individuals inside the United States without warrants are only the latest entries onto the balance sheet that must be consulted to reweigh the nation’s safety against intrusion into personal privacy. It should be obvious, however, that reports like that in the Times are a credit to responsible reporting and evidence of the resilience of the First Amendment, even in a war on terror.

As to administration arguments that the law gives the president all the power he needs for such surveillance of citizen and noncitizen alike, that is clearly aggressive lawyering in behalf of presidential prerogative. That said, Congress did authorize all “necessary and proper steps” to subdue those who engaged in an unprovoked attack on the United States on 9/11 (Authorization for Use of Military Force, 115 Stat. 224, Public Law No. 107-243, October 16, 2002). By my reckoning, that attack has yet to be fully answered. We know more about our collective intelligence mistakes and oversights in the decade preceding the attack than we do about the ideology, motives, and methods of those associated with the dispersed, non-nation states that attacked us and still threaten and kill our citizens and those of other peaceful nations.

It should go without saying that any presidential action needs to be anchored in law—either the law of the Constitution or statute. It is well settled that presidents have authority to respond to sudden attack. Congress’ go-ahead for military force bolsters and confirms that, and it would seem that the president has kept the intelligence leadership of Congress reasonably informed of even his most assertive steps. If congressional leadership had been left out entirely, that would have been far worse. It is not clear why the president thought that the Foreign Intelligence Surveillance Act (FISA) procedure was inadequate, other than perhaps, the occasional need to promptly track a treasure trove of al Qaeda computers and cell numbers found after a successful battle abroad. Nevertheless, it seems likely that the FISA probable cause standard for a warrant would have been met had it been pursued. It is salutary for the relevant legislative committees to hold hearings to see what can be done to channel most, if not all, of these taps and searches into the established FISA court process. But there will always be a need for a few exceptions by virtue of exigency—that’s why “hot pursuit” is a constitutional exception to the Fourth Amendment warrant requirement even for the local police.

How then is one to more generally apprise the security/liberty balance? Any speculation is naturally colored by the premises that one brings to the argument, the most important of which is whether one believes we are truly at war. This is a perplexing question. We tend to find it perplexing because of the peculiarities of terrorism—which may also be thought of as asymmetrical warfare. Most people, including the 9/11 Commission, contend that there is, after all, no dominant nation-state that has attacked us. There is no territorial dispute or even predominant locus of combat. There is no well-defined origin to the hostility, and while there are ideological and religious differences, there is not even a cogent list of specific ideological complaints that fully explains the breakdown of peace.

Domestically, we should think seriously about the question of whether we are at war because we have not been
Promises necessary?

The uncertainty over whether we are at war or at peace is the analytical thread running through the Supreme Court’s divided opinions on the citizen enemy combatant cases and the Guantánamo Bay alien detainee cases, as well as the related challenges to presidential authority to establish military tribunals. This ambivalence also permeates the debate over whether or not to renew controversial provisions of the PATRIOT Act. There is no escape from discerning whether we are at war or whether we are in some kind of regrettable, unavoidable police action against the equivalent of a new virulent form of organized crime that will always be with us.

If what our nation confronts is merely a variant of organized crime, then many of the arguments made for greater attention to civil liberty make perfect sense. However, if we are at war, then the president’s national security obligations are much clearer, and the justices and judges who would presume to take military command are engaged in behavior most unbecoming. The Constitution allocates the war power to a Commander in Chief who can act with energy and dispatch.

Press vigilance in favor of civil liberty is vital, but it should not lead Americans to assume illegality. Civil liberties are protected by relying upon warrants and judicial oversight, and as the war drags on in its perplexing, asymmetrical way, we should move cautiously to restore as much constitutional normalcy as the nation’s security permits. I am confident that is a sentiment shared by the New York Times’ editors and the President and Vice President.

Hard cases make bad law—and whether we like it or not, this is a hard case. As we assess the cost to civil liberty, we cannot afford to overlook the cost of importing criminal due process limits into contexts where they are ill-suited and constitutionally unwarranted. This may well leave us vulnerable when the enemy returns—assuming, that is, we are at war.

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Yes. The So-called War on Terror Unnecessarily Sacrifices Constitutional Liberties.

By Colleen Connell

My 16-year-old son frequently wears a black T-shirt to school with the inscription, “My buddies went to Iraq to search for weapons of mass destruction and all they found was this lousy T-shirt.” My 14-year-old daughter uses the Internet to research Egypt, including its radical Islamic movement and the Muslim Brotherhood. My husband, also a lawyer, is negotiating a contract with a British firm operating (with U.S. government approval) in Iraq.

Do the day-to-day academic and employment activities of my family expose us to the risk of government spies tapping our phones, listening to our conversations, and monitoring our e-mails and our text messages? Unfortunately, the answer is “Yes.”

Recent press disclosures confirm that Americans who make/receive telephone calls from abroad, especially from mid-eastern countries, and citizens who oppose U.S. war efforts in Iraq have had their speech and conduct spied upon by the Bush Administration, trampling the rights of these citizens and defiling the constitutional protections that are the lifeblood of the democracy that the framers explicitly included in the Constitution to prevent U.S. presidents from abusing citizens with the arbitrary power similar to that held by the English monarchy that George Washington, John and Abigail Adams, Thomas Jefferson, and many others rebelled against.

“GOS—government over shoulder—will curtail your freedom in profound and chilling ways …”

A Bill of Particulars reveals the broad reach of the Administration’s attack on civil liberties, including, first, in late December, it was disclosed that the Administration had been tapping the phones of American citizens, who made or received telephone calls from abroad, without seeking the warrant required by the Fourth Amendment and without complying with the Foreign Intelligence Surveillance Act (FISA). Congress enacted FISA in 1978 after the revelation that President Nixon had wiretapped his political enemies and through this law sought “to prevent any future President from carrying out warrantless eavesdropping on Americans.”

Second, further disclosure revealed that this phone and e-mail surveillance captured and monitored calls/e-mails that were both initiated and received within the boundaries of the United States.

Third, in December of 2005 and in August and September of 2005 we learned that the Administration had been spying on peaceful American citizens who were active in anti-war efforts. The First Amendment to the Constitution protects the rights of Americans to peaceably assemble and to freely express their opposition to government policy and action.

Fourth, the President has claimed that, as Commander in Chief, he has unlimited and unchecked power to wage war as he sees fit, including using torturous interrogation techniques that disregard specific laws enacted by Congress requiring the humane treatment of prisoners and the specific provision of Article I of the Constitution that assigns to Congress, NOT the President, the power to set the terms and conditions for prisoners captured at war.

Fifth, U.S. citizen Jose Padilla has been imprisoned for more than three years, and he has been denied access to his lawyer for much of that time, contrary to the Fifth Amendment. In December 2005 the government finally charged Mr. Padilla with conspiracy (rather than the plot to explode a “dirty” bomb) and backed away from its previous claims that Mr. Padilla was too dangerous and too much of a threat to national security to try in a federal court. This prolonged delay in charging Mr. Padilla with any offense deprived him his Sixth Amendment right to be apprised of the charges against him, to receive a speedy trial on those offenses, and to confront the witnesses against him. When lawyers asked the federal
Many Current Counterterrorism Policies Do Threaten Civil Liberties, but the Question Is Simplistic and Misleading.

By John E. Finn

It is not difficult to find analyses that conclude current anti-terrorism efforts do compromise civil liberties, and hardly any more trouble to find analyses that submit they do not. I incline toward the view that they do. My primary aim here, however, is to suggest a framework for approaching the question by identifying what kinds of information we need to reach a conclusion grounded in analysis instead of partisanship. We must ask a series of focused questions. First, what counts as an anti-terrorism policy? Second, precisely how do these policies implicate civil liberties? Which liberties are at risk, and how? And third, when are such compromises defensible?

Before I take up these questions, however, let’s consider a more fundamental question. Why should we care? When we ask if anti-terrorism policies compromise civil liberties or pose a threat to the Constitution itself, we assume the question matters. If it does, it matters either because it is politically unwise for officials to say it does not, or it matters because we genuinely believe our impulse to self-preservation is also, as President Bush said following 9/11, “a fight for our principles, and our first responsibility is to live by them.”

I would argue that President Bush was wrong. In a serious crisis brought about by terrorist attacks, we might think our primary obligation is to preserve human life. If our other commitments to constitutional principles, such as the protection of civil liberty or the separation of powers, encumber our security, then it is simply a question of rank-ordering values—and in this case, choosing between survival and the First or Fourth Amendment is not so difficult a choice. In the end, it is too easy to forget that terms like “survival” and “public safety” are not mere abstractions.

Sometimes, then, our concern about anti-terrorism efforts and their effect on civil liberties may be misplaced. Public safety, when it is genuinely at risk, must rank higher on the scale than freedom of speech or trial by jury. And it might be better just to say so, instead of arguing that the Constitution authorizes whatever must be done or that the President possesses the “inherent” constitutional authority to do whatever is necessary to protect us or to defend the rule of law. Both of these approaches, I have argued elsewhere, pose a more serious threat to our commitment to the rule of law than occasionally and ruefully admitting there are things that trump even the Constitution.

There is, however, a good reason to ask the original question. Answering it tells us about the value of constitutional principles and hence about the true price of survival. It leads us also to ask, does the current war on terrorism present us with the stark choice between survival and constitutional integrity? Just as importantly, in a constitutional democracy we must ask: who should have the authority to answer the question?

What Is Counterterrorism?

To fully appreciate the effect of counter-terrorism policies on civil liberties, we must identify what those policies are. The USA PATRIOT Act, passed in the immediate aftermath of 9/11, has created perhaps the best-known current policies. The Act enhanced the government’s powers of surveillance by changing some fifteen different federal statutes. For example, it gave law enforcement authorities broad new powers to conduct “sneak and peak” searches, and another section of the Act expanded the FBI’s authority to gain access to personnel records. On the other hand, not every provision of the PATRIOT Act implicates civil liberties, so it would be a mistake to pose the issue as a conflict between the PATRIOT Act itself and civil liberties.

In addition to the policy changes wrought by the USA PATRIOT Act, the Bush administration has made some controversial policy decisions in the war on terrorism. The President authorized the creation of military tribunals to try noncitizen “suspected terrorists.” The President also authorized NSA wiretaps on international communications, bypassing the strictures of the Foreign Intelligence Surveillance Act of 1978 (FISA), apparently after the FISA court began to review wiretap requests with increasing rigor.

In addition to these obvious counterterrorism efforts, other less well-known policies implicate civil liberties. This counterterrorism “regime” includes changes in the rules governing communications between suspected terrorists and their attorneys, in the rules governing the detention and interrogation of suspects, in the rules governing racial and ethnic profiling, as well as new laws attacking the financial structures of suspected terrorist organizations. It includes, too, significant changes in the internal organization of the nation’s intelligence agencies, as well as the establishment of the Department of Homeland Security. And the regime extends to the private sector as well. For example, the FBI and the Defense
Learning Through Leadership: The Youth for Justice National Teach-In

By Nisan Chavkin

There is an old saying that the best way to learn something is to teach it to someone else. The Youth for Justice National Teach-In is one way that middle and high school students are learning about our democracy by teaching other students about important questions of liberty, security, justice, and equality in America.

Now in its third year, the National Teach-In involves up to 100 classes of middle and high school students and takes place in coordination with National Youth Service Day (April 21–23, 2006) and National Law Day (May 1, 2006). Participating classes choose a lesson to teach from those posted on the National Teach-In Web site. Students first master the issue themselves and then teach the lesson to their peers or to younger students. Then they write about what they learned through their teaching and report their experiences to their U.S. representative or senators in Congress. Nearly 20,000 students have participated in the National Teach-In since it began in 2003.

What do students teach other students as part of the Teach-In? Here are some examples.

- In Seneca, South Carolina, a class of 8th graders taught kindergartners about the Bill of Rights using handmade coloring books to help the young students learn about our individual liberties.

- Students in Lake Havasu City, Arizona, wrote and performed a play based on the Supreme Court case *Korematsu v. United States* about an American citizen of Japanese descent who challenged the constitutionality of being sent to an internment camp during World War II. After performing the play for their peers, the students led discussions about whether the internment camps were constitutional and how victims of war should be compensated, if at all.

- In Allentown, Pennsylvania, a class of 7th and 8th graders taught their peers about the preamble to the U.S. Constitution referring to current events to illuminate constitutional values and engaging them in a “preamble scramble” game to make the lesson fun.

- Eleventh and 12th graders in Durant, Oklahoma, taught their peers in a journalism class about the USA PATRIOT Act by snooping in students’ backpacks to demonstrate search and seizure procedures. The journalism students were so engaged by the discussion that they wrote and published articles about the USA PATRIOT Act in both their school and local newspapers.

The National Teach-In is a project of Youth for Justice, the national coordinated law-related education (LRE) program supported by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) of the U.S. Department of Justice. Participating classes each receive a minigrant of $200 to cover supplies, resource materials, and refreshments or to support other service activities in their school community. To see lessons that participating classes present, visit the Teach-In Web site at: www.crfc.org/yfj_teachin2006.htm

An Illinois student advises her peers on teaching religious freedom.
The students involved in the National Teach-In think about important ideas. One Arizona student who discussed the Korematsu case said, “My feelings changed drastically on this subject when I participated in this play. I never knew how awful it was to be any other race than Caucasian in the U.S. until now.” Another student said, “Although I am proud that the U.S. can learn from her mistakes and prevent something like this from happening again, it [the internment] is something that makes me ashamed of my country’s past. However, it is also something that makes me proud of the Constitution and the freedom that I have today.” The students’ work was featured in an article in Arizona’s Today’s News Herald.

The power of learning through teaching is evident in the comments of the “student” teachers. For instance, after high school students in Manchester, Missouri, presented lessons about terrorism and participated in an online discussion afterwards with four classes of younger peers, one student said, “While teaching the 8th graders about terrorism, I got to see real democracy happening. The 8th graders were debating an issue and trying to come to a compromise on what terrorism is and how to define it just like our politicians do.” Another student who participated in the online discussion wrote, “I thought the peers-teaching-peers really allowed young Americans the chance to learn about our [democratic] viewpoints. Kids are more apt to listen and get involved with people closer to their age.”

The power of learning through teaching was also evident to National Teach-In educators. One teacher in Chicago reported that her students demonstrated careful thinking about the differing perspectives on the issue of gun control and that they respected the opinions of others, even if they held extremely divergent views. What made their experience particularly significant was that the students leading this Teach-In were from a special education class, and their “student” peers were from regular classes in their high school. Another high school teacher in San Diego, whose students taught eighth graders about the Declaration of Independence, reported gains in both content and skills. “My students learned organizational skills in implementing a classroom lesson. This furthered their knowledge of the Declaration immensely.”

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**About the Constitutional Rights Foundation Chicago**

The Constitutional Rights Foundation Chicago (CRFC) works with elementary and secondary schools to develop critical thinking skills and engage in responsible civic action. For over 30 years, CRFC has been a national leader in the design and implementation of quality law-related education (LRE) programs for local, national, and international projects. Nonprofit and nonpartisan, CRFC was founded in 1974 as part of the Constitutional Rights Foundation in Los Angeles and became an independent 501(c)(3) organization in 1990. For more information, contact: CRFC, 407 South Dearborn, Suite 1700, Chicago, IL 60605, or visit http://www.crfc.org.
Lesson

1. Ask students to quick-write for 5–7 minutes on the following statement and questions:

“We [Supreme Court] 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. Justice Sandra Day O’Connor, Rumsfeld v. Padilla, 542 U.S. 426 (2004)

Do you agree or disagree, and why?

Do you think noncitizens should have the same rights in times of war as citizens? Why?

2. Ask each student to share his or her response and rationale with the class. Collect each quick-write and keep it so students can refer back to it at the end of the lesson.

3. Referring to the U.S. Constitution, review briefly congressional (Article I, Sec. 8) and executive (Article II, Sec. 2) war-related powers.

4. Explain to the class that students will be examining two episodes in American history and a contemporary example of government war policies to evaluate whether they affected individual rights and whether the three branches of government checked and balanced the powers of the other.

5. Ask what individual rights or civil liberties are? Brainstorm answers. Go over this term and other concepts for the lesson. (A Key Terms and Concepts Handout is available on the Insights Web site in the Learning Gateways section for this issue.)

By Eli Lesser

Individual Rights in Times of War

Overview

The United States Constitution was designed to check and balance the power of each branch of government. The Constitution includes provisions to ensure that this delicate balance is protected in times of both peace and war. The framers understood that when a nation is at war, tyrants can easily arise given the need to provide a quick solution and momentary safety from the enemy. Therefore, they enacted procedures to protect the nation from investing too much power into the hands of the few.

Even with these protections, liberties have been challenged, curtailed, or denied to individuals at a few key moments in American history. In this lesson, students will examine three episodes:

- Formal suspension of the writ of habeas corpus during the Civil War (1861–1865)
- Internment of individuals of Japanese ancestry during World War II (1941–1945)
- President Bush’s policy decision to try noncitizen enemy combatants through military tribunals (Military Order of November 16, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism).

A downloadable backgrounder about these episodes may be found on Insights Online.

Students will begin the lesson by reacting to a statement by Justice Sandra Day O’Connor, taken from her opinion in the case of Rumsfeld v. Padilla, 542 U.S. 426 (2004). Students will then work in cooperative groups to discuss how the Congress and the U.S. Supreme Court responded to the exercise of executive power in each example. Each group will examine a set of primary and secondary source documents to help them analyze the actions of the President, Congress, and the U.S. Supreme Court.

Eli Lesser (elesser@constitutioncenter.org) is former educational development coordinator for Justice Learning. He is currently director of Teacher Education for the National Constitution Center. Justice Learning is an issue-based Web site that uses audio from the Justice Talking radio show and articles from the New York Times to engage students in issue-based political discourse. The site includes curricular materials, articles, editorials, and oral debate from the nation’s finest journalists and advocates, as well as resources from the New York Times Learning Network. Many of the documents for this lesson are hosted on the Justice Learning site.
6. Divide the class into three groups, or if size requires, sets of three groups. Assign each group to investigate and piece together one episode that they will then explain to the entire class by examining the primary and secondary source materials. Please Note: Many of these materials are provided courtesy of Justice Learning, and links to them on the Justice Learning Web site are available on the Insights Web site. Documents to examine include:

Civil War Suspension of the Writ
- President Lincoln’s Executive Order Suspending Habeas Corpus—September 24, 1862
- “Highly Important from Washington” New York Times—October 22, 1862
- Ex Parte Milligan, questions presented and decision summary
- Ex Parte Merryman, questions presented and decision summary

World War II Interment
- President Roosevelt’s Executive Order 9066—February 15, 1942
- “800 West Coast Japanese Go to Enemy Camps As Army Maps Widened ‘Prohibited’ Zone” New York Times—February 24, 1942
- Hirabayashi v. United States—December 18, 1944
- Korematsu v. United States—December 18, 1944

The War On Terror
- Detainee Treatment Act of 2005
- President Military Order—November 13, 2001
- Authorization for Use of Military Force—September 18, 2001
- Rasul v. Bush, questions presented and decision summary
- Law Review, “Can Enemy Combatants Be Tried by Military Commissions?” (See p. 22.)

7. Give each group the handout “Individual Rights/Civil Liberties: Questions to Consider.” Ask each group to prepare a 5–10 minute report. Give the groups plenty of time to analyze the documents. Check in with each group to see what kinds of questions remain unanswered after their examination of the primary source documents (listed above). Point them toward the Justice Learning module “Civil Liberties in War Time” (www.justicelearning.org/) for further investigation.

8. Once each group has completed its investigation, reassemble the class as a whole. Create three columns on the board, one for each episode. Ask a member of the group to present the report. Capture notes on the report in the appropriate column on the board.

9. Once all groups have completed their reports, discuss the similarities and differences of each example. How did each branch of government exercise its power? How did they cooperate? What areas of conflict emerged? How did each branch check and balance the power of the other, or fail to do so? Did government policies in each example affect individual liberties, and if so, how? Be sure to discuss who was affected—citizens and/or noncitizens.

10. Once again, ask students to quick-write in response to Justice O’Connor’s statement in Rumsfeld v. Padilla with which you began the lesson. Return their original quick-writes and ask them to make a few notes to themselves about how, if at all, their responses changed, and what their rationales may be.

11. Reassemble the class. Conclude the lesson by asking (1) Did your responses change, and if so, why (or why not); (2) What roles do you think the President, Congress, and Supreme Court should play in balancing rights and liberties during times of war? Why? Do you think that citizens should have greater protections under the Constitution than noncitizens? Why?
Can Enemy Combatants Be Tried by Military Commissions?

This spring, the Supreme Court is expected to hear arguments in Hamdan v. Rumsfeld (Docket No. 05-184). The case asks the Court to consider the limits of executive power in trying enemy combatants captured in the war on terror. It also seeks clarification of the rights of enemy combatants under the Geneva Convention Relative to the Treatment of Prisoners of War, an international treaty that the United States ratified in 1955.

In Hamdan v. Rumsfeld, the Supreme Court will review a decision by the U.S. Court of Appeals for the District of Columbia Circuit. There, a panel of judges that included new Supreme Court Chief Justice John Roberts ruled that the President has the power to try enemy combatants before the military commissions, which were created pursuant to the President’s Military Order of November 13, 2001. The panel also ruled that the Geneva Convention Relative to the Treatment of Prisoners of War is not enforceable in United States courts. Even if it were, two of the three panel members decided that the Convention does not apply to al Qaeda and its members. The Supreme Court has granted certiorari to review both the questions of whether the President has the authority to establish military commissions to try enemy combatants in the war on terror and whether rights protected under the Geneva Convention can be enforced in a federal court.

In November 2001, Salim Ahmed Hamdan was captured in Afghanistan and turned over to the American military. Hamdan, a citizen of Yemen, has admitted that he served as Osama bin Laden’s personal driver in Afghanistan from 1996 to 2001. Following his capture, he was transported to Guantánamo Bay, Cuba, where he was initially kept in the general detention facility known as Camp Delta. In July 2003, President Bush determined “that there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States.” Later that year, he was placed in solitary confinement in Guantánamo’s Camp Echo.

Following his transfer to Camp Echo, Hamdan was appointed legal counsel. He filed a petition for a writ of habeas corpus, which asks a court to consider whether an individual has been wrongfully detained. While his petition was pending, the government formally charged Hamdan with conspiracy to commit attacks on civilians and civilian objects, murder and destruction of property by an unprivileged belligerent, and terrorism. Hamdan was set to be tried before a military commission created pursuant to President Bush’s Military Order of November 13, 2001.

Hamdan’s petition for a writ habeas corpus was first heard in the U.S. District Court for the District of Columbia. The district court ruled mostly in Hamdan’s favor. It questioned the President’s authority to establish the military commission that would try Hamdan. It also found that under the Geneva Convention, Hamdan must be tried by court-martial, the same trial that would be afforded members of the U.S. military charged with a crime, as long as his status as a “prisoner of war” under the Geneva Convention was in doubt. The U.S. government has argued that detainees such as Hamdan are “enemy combatants” who do not fall within the Geneva Convention’s definition of “prisoner of war.” But the district court found that the Combatant Status Review Tribunal, which was established to comply with the Supreme Court’s requirement in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), that detainees have an opportunity to challenge their classification as enemy combatants, was not competent to determine Hamdan’s status under the Geneva Convention. The district court also rejected the government’s argument that an individual’s rights under the Geneva Convention are not enforceable in a United States court.

Separation of Powers and Executive Authority

A three-member panel of the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court’s rulings in Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005). On the separation of powers issue involving the executive’s authority to establish military commissions to try enemy combatants, the court of appeals relied on both Congress’s Authorization for Use of Military Force (AUMF) (2001), S.J. 23, Public Law No. 107-40, passed in response to the September 11 attacks, and two federal statutes, 10 U.S.C. § 821 and 10 U.S.C. § 836, regulating the use of military commissions. (The President’s
Military Order of November 13, 2001, had also cited these sources of authority, as well as the President’s constitutional powers as Commander in Chief of the Armed Forces.)

The court of appeals noted that the AUMF “recognized the President’s ‘authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.’” It then turned to a Supreme Court precedent from World War II, In re Yamashita, 327 U.S. 1 (1946), which had also dealt with the validity of military commissions. That case held that an “important incident to the conduct of war is the adoption of measures by the military commander … to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war.” Although Congress had formally declared war in World War II, the court argued that the AUMF went as far, or farther than, Congress had gone in such key conflicts as the Civil War, the Korean War, the Vietnam War, and the Gulf War. It also noted that the Supreme Court, in Ex parte Quirin, 317 U.S. 1 (1942), which had also dealt with the use of military commissions. That case held that an American citizen was an enemy combatant in the current war on terror, giving further support to the use of military commissions to try alien enemy combatants.

A World War II precedent also supported the court of appeals’ reading of the two federal statutes regulating the establishment of military commissions. Ex parte Quirin, 317 U.S. 1 (1942), involved the case of German saboteurs captured and tried by military commission in the early years of World War II. The Articles of War passed by Congress had provided for the use of military commissions for crimes against the laws of war not ordinarily tried by court-martial. These articles supported the Supreme Court’s finding that President Roosevelt had been authorized in the use of military commission to try the saboteurs. The court of appeals found that the contemporary versions of the Articles of War, 10 U.S.C. §§ 821 and 836, which also provide for the use of military commissions to try offenders “that by statute or by the law of war may be tried by military commissions,” similarly authorize the use of a military commission in Hamdan’s case.

### Enemy Combatants and the Geneva Convention

Having found that the President has authority to establish military commissions for enemy combatants, the court of appeals turned to the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. The district court had found that the treaty confers individual rights that are enforceable in a United States federal court. The court of appeals disagreed.

The court of appeals began its analysis with the statement of the principle that “this country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights.” Treaties are primarily compacts between independent nations, the court reasoned, and violations of those treaties are subjects for international negotiation, not individual lawsuits. And again, precedent from World War II supported the court of appeals’ reasoning. In Johnson v. Eisentrager, 339 U.S. 763 (1950), the Supreme Court had considered the provisions of the 1929 Geneva Convention in a case involving the trial of German nationals by an American-controlled military commission in China. The Court found that the 1929 Geneva Convention had not created judicially enforceable rights; instead, it created rights that the political and military authorities of the parties to the treaty were responsible for enforcing. Although the court of appeals noted some differences between the 1929 Geneva Convention and the 1949 Convention, none of those differences altered the Eisentrager Court’s analysis of the judicial enforceability of the rights specified in the 1949 treaty.

The court of appeals also found that even if the Convention had created judicially enforceable rights, Hamdan would not be protected by those rights. First, he would not meet the definition of “prisoner of war” in the treaty: a member of a group wearing a “fixed distinctive sign recognizable at a distance” and who conducted “their operations in accordance with the laws and customs of war.” Moreover, the court held that the Convention does not apply to al Qaeda and its members. The court reasoned that the Convention protects only two kinds of combat: international conflict between “High Contracting Parties” (nations that signed the treaty) or civil war (“armed conflict not of an international character occurring in the territory of one of the High Contracting Parties … .”).

The Convention does provide an exception to the case of international conflicts if one of the “powers” in the conflict is a signatory nation to the treaty but the other is not. In this case, however, the signatory nation is bound to observe the provisions of the Geneva Convention only if the other “power” accepts and applies the provisions of the treaty. “Even if al Qaeda could be considered a Power, which we doubt,” the court stated, “no one claims that al Qaeda has accepted and applied the provisions of the Convention.”

More controversial was the court of appeals’ decision that “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties” is limited to civil
The district court had noted that the capture of Hamdan had occurred in the midst of an internal conflict within Afghanistan, a “High Contracting Party” to the Convention. This conflict was between the governing Taliban and its al Qaeda allies, on one side, and the United States and its Afghan allies, on the other, and fit within the Convention’s language. In making this decision, the district court rejected the President’s view that the fighting in Afghanistan involved two separate conflicts. The first, a conflict against the Taliban for control of Afghanistan, was a conflict that would fit within the Convention’s definition of “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” Captured Taliban members would thus be entitled to the protections of the Convention. The second conflict was a broader struggle against al Qaeda, which transcends the territorial limitations of the Convention’s language and leaves captured al Qaeda members outside the Convention’s protections.

The court of appeals overruled the district court and adopted the President’s view that the Convention does not apply to the conflict against al Qaeda and its members. The conflict against al Qaeda began well before Hamdan’s capture in November 2001, the court of appeals noted, and in other nations besides Afghanistan, including the United States on September 11, 2001. Moreover, “the President’s decision to treat our conflict with the Taliban separately from our conflict with al Qaeda is the sort of political-military decision constitutionally committed to him…. To the extent there is ambiguity about the meaning of [the Convention] as applied to al Qaeda and its members, the President’s reasonable view of the provision must therefore prevail.”

One member of the panel, Senior Circuit Judge Williams, disagreed with this reasoning. Judge Williams argued that the Convention’s description of conflicts “not of an international character” should be understood to include conflicts between nations that have signed the Convention and nonstate actors such as al Qaeda. Members of al Qaeda would thus be entitled to the most modest protections of the Convention, which include humane treatment and “the judicial guarantees which are recognized as indispensable by civilized peoples.” But Judge Williams agreed with his colleagues that the Convention is not enforceable in United States courts. Any claims that the trial Hamdan receives by military commission does not conform to the Convention’s minimal requirements cannot be raised until the trial is finished. Judge Williams thus concurred in the court of appeals’ judgment.

Hamdan v. Rumsfeld arrives at the Supreme Court in a time of transition. Chief Justice Roberts, who was a member of the panel on the court of appeals, recused himself from the Court’s decision, leaving eight justices to decide the case. The case was heard in March, by which time retiring Justice Sandra Day O’Connor had left the Court and been replaced by Samuel Alito. His views on the extent of the President’s authority are likely to have a significant impact on the Court’s decision. If the eight members of the Court who decide the case split 4-4, the decision of the court of appeals will be upheld, even though constitutional and international issues involved in the case will not be fully resolved. If the court of appeals’ decision is upheld, whether by a split or majority decision of the Court, the trial of Hamdan by military commission is expected to go forward.

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against some of the soldiers involved. But the damage of Abu Ghraib seeped far beyond the walls of the prison, and it could not be undone within American military courtrooms.

The harm from torture at the hands of Americans was not only the pain inflicted on the body and soul of the persons who were tortured, Abu Ghraib damaged the image of the United States around the world. As images of naked prisoners laced with electrical wires and threatened by dogs found their way into the world’s press, the nation had come far from the days when the world had grieved together with America the losses of September 11.

During the Cold War years, the United States faced a similar lesson. Then as well as now, the United States thought of itself as promoting democratization in other lands. The country argued that democracy was a superior form of government than the dominant alternative—communism—in part because democracies protected individual rights. But when peaceful civil rights demonstrators were brutalized in Southern communities, when civil rights activists were slain, when churches were bombed, peoples of other nations wondered why they should follow the United States, when the United States did not live up to its own principles. If American democracy accommodated the segregation of African American school-children, then many wondered why American democracy was a model that the world should emulate. The United States learned during the Cold War that if the country did not live up to its own ideals, then its civil rights failings would undermine the nation’s efforts in foreign relations. American leaders came to believe that spreading democracy required that the nation had to first practice democracy at home.

Conclusion
A vital question for our current generation is whether the United States can lead the world through a war on terror while engaging in a strategy to exempt the nation from the rule of law. Has September 11 and the war on terror so changed the world that the rules of the game require an unbounded, law-free American power? Or is it the case, as it was during the Cold War years, that abiding the law, in the end, enhances U.S. standing in the world, thereby empowering the nation?

For Further Reading

End Notes
1 The name of the act was conceived as an acronym: USA PATRIOT stands for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.
In *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the Supreme Court ruled that Jose Padilla had filed his habeas petition in the wrong district court. He refiled his case and the trial court judge granted his habeas petition and ordered the government to release or try him. The Fourth U.S. Circuit Court of Appeals reversed that lower court decision in September 2005. Padilla again petitioned the U.S. Supreme Court to review his case. Meanwhile, in November 2005, the government charged Padilla in federal court with conspiracy to commit terrorist acts. The U.S. Supreme Court granted a request to transfer him to civilian from military custody on January 4, 2006. On April 3, Padilla received only three of the four votes necessary to receive a Supreme Court hearing. Justice Kennedy filed a statement explaining the decision denying Padilla’s petition, joined by Chief Justice Roberts and Justice Stevens. In the statement, the justices expressed concerns about how the government had handled the case and also affirmed Padilla’s constitutional rights as a criminal defendant.

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Department have paid private contractors for access to records databases that include detailed personal information on citizens and noncitizens.6

The first challenge, then, in assessing whether counterterrorism policies compromise our commitment to civil liberties is one of definition. What is a counterterrorism policy? A narrow definition, centering on the PATRIOT Act, for example, might lead us to conclude that threats to our civil liberties, although important, are nonetheless exceptional, localized, and primarily a function of statutory changes in the administration of justice. A more expansive definition might lead us to conclude that threats to liberty transcend temporary changes in criminal procedure and extend to systemic and structural changes to government, arguably a more serious challenge to civil liberty, the Constitution, and the rule of law.

Do Counterterrorism Policies Compromise Civil Liberties?

Parts of the current counterterrorism regime are unobjectionable or only modestly change preexisting law. No great harm is done, for example, by criminalizing the possession of sizeable quantities of chemicals that are easily converted into chemical or biological weapons.

Other policies, however, should give us all pause, such as statutory provisions that substantially expand the government’s authority to engage in electronic surveillance, and executive orders that permit intelligence agencies to secure wiretaps without a warrant. Just as troubling are policies that allow the government to detain foreigners indefinitely and without charge during a “national emergency” or which permit deporta-

tion of suspected terrorists without presenting evidence in a court of law. These policies implicate basic precepts of due process, privacy, and the First, Fourth, and Fifth Amendments, as well as other constitutional principles, such as constitutional review and democratic accountability. When we strike a balance between liberty and security, we should understand that the changes identified as problematic pose more than potential threats to our civil liberty. These changes strike at the very heart of the rule of law. They allow the government to act without explanation or reason. They do not “compromise” basic constitutional principles. They violate them because they challenge the most fundamental constitutional value—our tradition of transparency and accountability in government. Our commitment to the Constitution sometimes permits compromises to constitutional values, including the protection of civil liberties, but it never allows such restrictions to be made arbitrarily, secretly, and without public scrutiny. Insofar as the current counterterrorism regime compromises those values—and in some places it does—it represents a failure to abide, as President Bush said, by “first principles.”

End Notes

1 Among the best is David Cole and James X. Dempsey, Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security (New York: The New Press, 2002).
3 See, for example, John Schmidt, “President had legal authority to OK taps,” Chicago Tribune, (December 21, 2005).
5 See “Bush was denied wiretaps, bypassed them,” UPI, (December 26, 2005), http://www.upi.com/NewsTrack/view.php?StoryID=20051226-122526-7310r

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The Bush Administration is at a legal crossroads on surveillance: Will it seek to embed the National Security Agency’s hunt for potential terrorists more firmly within the law? Or will the White House continue to tough it out—and try to maintain the NSA program under an expansive theory of presidential power that many experts reject?

A month ago, when the story of the NSA’s warrantless wiretapping broke, the White House seemed determined to tough it out—and try to maintain the NSA program under an expansive theory of presidential power that many experts reject. But thanks in part to a quiet revolt among administration lawyers and intelligence officers—who believe that the surveillance program can’t be sustained without a stronger legal and political base—that unyielding stance may be easing.

President Bush said Wednesday, for example, that he would welcome a congressional investigation of his authority to order the NSA program, saying it would be “good for democracy.” That was a sharp change in tone from the initial White House response, which was to demand an investigation into who had leaked the story to the New York Times.

The legal challenge will be to amend the 1978 Foreign Intelligence Surveillance Act, which created a special court to approve surveillance requests—or to obtain a court ruling that FISA, as written, covers the NSA program. A sign that the administration may be seeking this sort of clearer legal mandate came Monday when Gen. Michael V. Hayden spent several hours briefing the FISA court on the program, according to a report that night on Fox News. Hayden, deputy director of national intelligence, who was running NSA when the warrantless surveillance began after Sept. 11, 2001, was accompanied by his successor at the NSA, Lt. Gen. Keith Alexander.

Lawyers and intelligence officers who knew of the super-secret NSA program suspected that its frail legal rationale would eventually collapse despite the administration’s contention that it was sanctioned by the 2001 law authorizing the use of military force in Afghanistan. Indeed, Attorney General Alberto Gonzales said in a Dec. 19 briefing that the White House had talked with “certain members of Congress” about quietly amending FISA to explicitly permit the surveillance “and we were advised that that would be difficult, if not impossible.”

The problem with FISA, experts say, is that it was created for a different world, with different communications technologies and different adversaries. The main enemy in 1978 was the Soviet Union, fixed and implacable. Global communications moved increasingly by satellite, and the transmissions could be overheard by the NSA’s network of “big ear” collection stations. E-mail hadn’t been invented, and the world wasn’t linked by an interdependent network of fiber-optic cables.

Today America’s enemy is al Qaeda, whose operatives move from place to place, phone to phone, e-mail address to e-mail address. And there have been fundamental changes in communications infrastructure: The vast majority of the world’s broadband communications now passes at some point through switches in the United States. That’s a huge boon for the NSA in monitoring potential enemies, but in this new world, it’s much harder to distinguish between what’s “foreign” and “domestic,” between what’s technically “in” but not necessarily “of” the United States.

To firmly set the NSA program within the law, Congress and the courts will have to think carefully about what’s known in the signals intelligence world as “meta-data.” These are the tags that identify the basic facts of a communication—time, date, to, from—but not its content. According to the Times and to other published reports, this routing...
information has been at the core of the NSA's new program. The agency has used sophisticated algorithms to analyze patterns of communication so that it can focus on people who may be linked to al Qaeda and then, where appropriate, target its communications through FISA warrants or other procedures.

The tricky legal question is whether a different privacy standard should apply to the meta-data that overlay the communication itself. The Supreme Court held in 1979, in Smith v. Maryland, that installing a device known as a “pen register,” which records numbers dialed from a phone, was not a “search” within the meaning of the Fourth Amendment, so no warrant was required. Congress later set a higher standard protecting the privacy of these pen registers, including those used in FISA surveillance. These issues would return in any debate about amending FISA.

An abiding theme of American history is the tension between our constitutional freedoms and our national security in wartime. The country is beginning a new chapter in that debate, and the challenge will be the same as always: to use tools that can enhance security, but in a way that does not unduly diminish liberty.


In the Classroom ...

Use these discussion questions to help students understand the article and spur classroom discussion.

Discussion Questions

1. What did you hear or read about the NSA wiretapping program before you read this article?
2. What 2001 law did the Bush Administration give him authority to establish the NSA wiretapping program?
3. What is the Foreign Intelligence Surveillance Act (FISA)? What does it do?
4. What are the two options mentioned in the article for solidifying the legitimacy of NSA wiretapping program? Which do you believe is stronger? Why?
5. What problem do experts see with the FISA framework for fighting today's enemy? Do you agree with them? Why?
6. What distinction will Congress and the courts need to think about to establish the legality of NSA program, according to the author? Thinking about that distinction, what is the legal question that requires resolution in any effort to amend the FISA?
7. Do you think that different privacy standards should exist for meta-data, on the one hand, and communications, such as a telephone call or e-mail, on the other? Why?

Insights Online

Go online to Teaching with the News for this issue of the magazine for additional resources about the NSA and the wiretapping program and additional research activities and classroom ideas for exploring the constitutional issues raised by the program.

Wiretaps and American Society

Wiretaps also dominated the news headlines in the early 1970s. In 1974, the same year in which articles of impeachment were issued against President Nixon, partly for his authorization of the Watergate wiretappings, the film The Conversation, about an electronic surveillance specialist with powerful clients who becomes a surveillance target himself, was released. Brenda Austin-Smith writes in the online journal, Senses of Cinema, “The immediate cultural context of The Conversation was Watergate, the release of the Nixon tapes, and growing social anxiety over surveillance. The film’s release in the wake of the most significant U.S. political scandal of the late 20th century touched a nerve with viewers and critics, who read this densely plotted tale of corporate intrigue, murder, and paranoia as a dissertation on American society in the mid-’70s.”
responsibility to monitor the human rights violations that might come with enforcement of its plan. As the CTC Web site explicitly noted, “Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee’s mandate.”

Much of the world has been caught up in responding to terrorism, the by-products of which have resulted in worrisome incursions on protected rights, the shrinking of the traditional role of the judicial branches as a check on the power of the executive, and the collapse of the principle of separation of powers into executive discretion. Terrorism was not a new phenomenon with 9/11. Many countries already had harsh terrorism laws on the books. But there has been an increase in the number of countries that have potentially abusive terrorism laws since 9/11 and countries that had harsh terrorism laws before 9/11 have often made these laws harsher. And, there has been a decrease in external pressures to uphold human rights norms and adhere to constitutional separation of powers principles since the UN Security Council has been directing the show. When the UN Security Council approves state policies that infringe human rights and separation of powers, it is hard for the rest of the international system to do anything to the contrary. When the most powerful governments in the world are preoccupied with fighting terrorism, and the UN Security Council has been mobilized to ensure that all other governments fight with also implementing a mechanism to monitor human rights issues and uphold the rule of law, we are left with few voices advocating for a more moderate course that would balance effectiveness in fighting terrorism against the crucial maintenance of the rule of law.

I called this article the “international emergency” because the powers that states have been invoking to comply with Resolution 1373 often fall into the realm of a government’s emergency powers. These powers generally lie with a nation’s executive. Special crimes, special procedures, and special surveillance protocols are used when there are special threats and when the government can credibly claim that normal laws do not apply. While fighting international terrorism is serious business and requires tough measures, sacrificing normal constitutional protections can have serious consequences. The UN Security Council’s approach to fighting terrorism appears inattentive to the damage to constitutionalism that it inflicts. But that damage is serious, widespread, and growing.

Recent Anti-Terrorism Legislation in the United Kingdom

On July 7, 2005, London was hit by a terrorist attack when three coordinated bombs detonated in three separate locations in the London Tube (underground) and one went off on a double-decker bus about an hour later near the end of the morning rush hour. The attacks by the four suicide bombers killed 56 individuals and injured several hundred people. Four other attempted bombings failed two weeks later on July 21. In a press conference of July 26, 2005, British Prime Minister Tony Blair discussed terrorism legislation that would be brought before the Parliament later in the year, which would create a series of new terrorism offenses, including indirect encouragement and glorification of terrorism. Parliamentary debates in March 2006 focused on whether the law seeking to outlaw “glorification” was too vague and would chill speech. The bill outlawing glorification of terrorism was passed by the House of Lords in March 2006. Prime Minister Tony Blair has indicted that under the new law, individuals seen carrying placards glorifying the July 7 bombers, such as those placards seen during the London protests against a cartoon depicting the Prophet Muhammad (published in the Danish Press), could be prosecuted. The new law also includes a provision for holding terrorism suspects for up to 28 days without trial or charge, the longest such detention permitted in Western Europe. Previously, individuals suspected of terrorism-related offenses could only be detained in the United Kingdom for up to 48 hours without charge. Earlier versions of the new law proposed extending the period to 90 days.
Here are some of the supplementary materials and additional resources that you'll find on the Web site for Insights on Law & Society at www.insightsmagazine.org.

Send student online to peruse research reports prepared by high school students like themselves about the USA PATRIOT Act, global anti-terrorism laws, and public opinion on the war on terror in the United States and United Kingdom, and more.

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Discover how you can use the merit briefs from the ABAs Preview of U.S. Supreme Court Cases Web site www.supremecourtpreview.org for Hamdan v. Rumsfeld and the Detainee Treatment Act of 2005 in the classroom.

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