

# Lessons on the American Constitution

## Constitutional Conversations: Scripted Debates on the Executive Branch

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## General Introduction

Throughout the early years of the American experiment in republican government, the Founding Generation, justices, and the public at large have pondered and intensely disputed the nature of man, power, and good governance. Perhaps the most thorough consideration of these issues took place during the debate over the ratification of the Constitution when Federalists and Antifederalists launched and sustained what the late Pauline Maier described as the “greatest and most probing public debates in American history.” Polemics were pronounced from pulpits and newspapers, debates raged in taverns, around dinner tables, and in ratifying conventions. The range and quality of rhetoric varied widely. From the high-toned prose of Publius’ eighty-five essays titled *The Federalist* to the ad hominem attacks of Antifederalist writer Cincinnatus, the American public was privy to essays, poems, songs, parades and even a few riots as this debate unfolded from 1787-1790.

Since we cannot fully divine the intentions of the Framers in the context of modern events, Americans continue to discuss the nature and extent of powers distributed among the three branches of government under the Constitution. Many of the original concerns of the Federalists and Antifederalists regarding the nature of executive power resurface as new circumstances unimagined by the Framers arise. If one wanted to read the entirety of the primary source material on the original debates over the executive branch between the Federalists and Antifederalists, the twenty-six volumes of *The Documentary History of the Ratification of the Constitution* would be where one would find the complete written record. Few have the luxury to attempt such an endeavor. Likewise, it would be an equally daunting task if one wanted to read the entire *U.S. Records* containing decisions made by the Supreme Court on a specific issue. It would be uncommon for any student to venture such an undertaking. This present volume is an attempt to distill some of the most important discussions occurring throughout American history. The original discussions occurred in ratification debates. Subsequent deliberations occur in many venues including Supreme Court decisions.

In this offering we address three issues related to the nature of executive power under the Constitution. The first is a conversation between Federalists and Antifederalists using their words as they debated the nature of executive power. This serves as the backdrop to many ideas that reappear in cases subsequently brought before the Supreme Court. A second set of materials address the issue of the President and the use of powers in time of war. This section features excerpts from the *Merryman*, *Milligan* and *Quirin* cases. The *Hamdi*, *Hamdan*, and *Rasul*, cases are featured in the second selection in this section addressing the nature of presidential powers in the context of the war on terror. The third set of materials focus on the relationship between the executive and legislative branches. This last set addresses the conflicts arising when Presidents asserts executive privilege as well as the issue of Congressional delegations of power to the executive branch.

## Note about Scripted Conversations

Much of the original debate over the Constitution occurred in newspapers, pamphlets and broadsides. Since the supporters and opponents of the Constitution expressed their views in writing, and often in different locations they could not appear together as they debated the merits of the Constitution. Decisions of the Supreme Court, although accessible via the internet, prove challenging for most readers seeking to winnow through pages of dense legal writing. To solve this difficulty, we have edited and arranged these primary sources into “scripted conversations.” These conversations are intended for use as a pedagogical tool and are attempts to create the feel of a roundtable discussion. We think the result is both engaging and informative.

Individuals unfamiliar with the history and operation of the Supreme Court often view their decisions with an attitude of finality. Thus, many assume the Court engages in only two types of conversations. Justices do discuss the issues of cases face to face at weekly conference. Additionally, interactions between Justices and attorneys during oral arguments are conversational. Our approach in this volume is to frame decisions of the Court, separated by time, as another type conversation. The reality is that many decisions are simply rulings at a particular point in history. When an issue comes back before the Court, requiring further rulings, the result is either a clarification or an entirely new decision. Among the most vivid example of the latter is the reversal of the *Plessey* decision sixty years later in *Brown v. Board of Education*. Equally important, are occasions where the Court refines previous decisions by clarifying or modifying the parameters of previous rulings. When Justice Vinson rendered his decision in the Steel Seizure case, it was not necessarily a reversal of Justice Sutherland’s opinion in the *Curtiss-Wright* decision so much as a modification based on different circumstances. Viewed this way, the opinions and dissents of the Justices serve as a continuous discussion as to the meaning and interpretation of the U.S. Constitution.

In this present volume, we are less interested in the Supreme Court’s specific decisions at a certain juncture as we are the discussions of the issues surrounding their decisions. With this in mind, we do request a certain amount of forbearance. Chief Justice Roger B. Taney wrote the *Merryman* decision in the mid-19th century. Taney was long deceased by the time Justice Harlan Fiske Stone authored the 1942 decision in *Ex Parte Quirin*, but both addressed similar issues of presidential power. As such we consider them through their decisions in dialog with each other. As a result, the discourse in these scripts is speculative. We have simply appropriated their words and created a hypothetical conversation were they able to meet face to face. Our hope is that the reader and the listener can accept the anachronism and enjoy the “conversation.”

## Note about the Editing

We have used square brackets and ellipses when it serves to render as clear a reading as possible. For example, Justice Sutherland in *Curtiss-Wright* decision wrote:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,*  
That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict.

Since this would certainly be difficult for most students to understand. Square brackets and ellipses render it:

[Congress said] that if the President finds that the prohibition of the sale of arms and munitions of war . . . may contribute to the reestablishment of peace between those countries . . . it shall be unlawful to sell . . . any arms or munitions . . . to the countries now engaged in that armed conflict.

Words that appear in <angle brackets><sup>1</sup> with superscripted footnotes are synonyms we have inserted because, in our estimation, the original was overly difficult or obscure.

Example: But experience assures us, that the <effectiveness><sup>1</sup> of the provision has been greatly over-rated.

In this specific case above, the original word was “efficacy” which is seldom used in modern conversations. For those wanting to see the original wording we have provided them and they can be found in the endnotes at the end of each script.

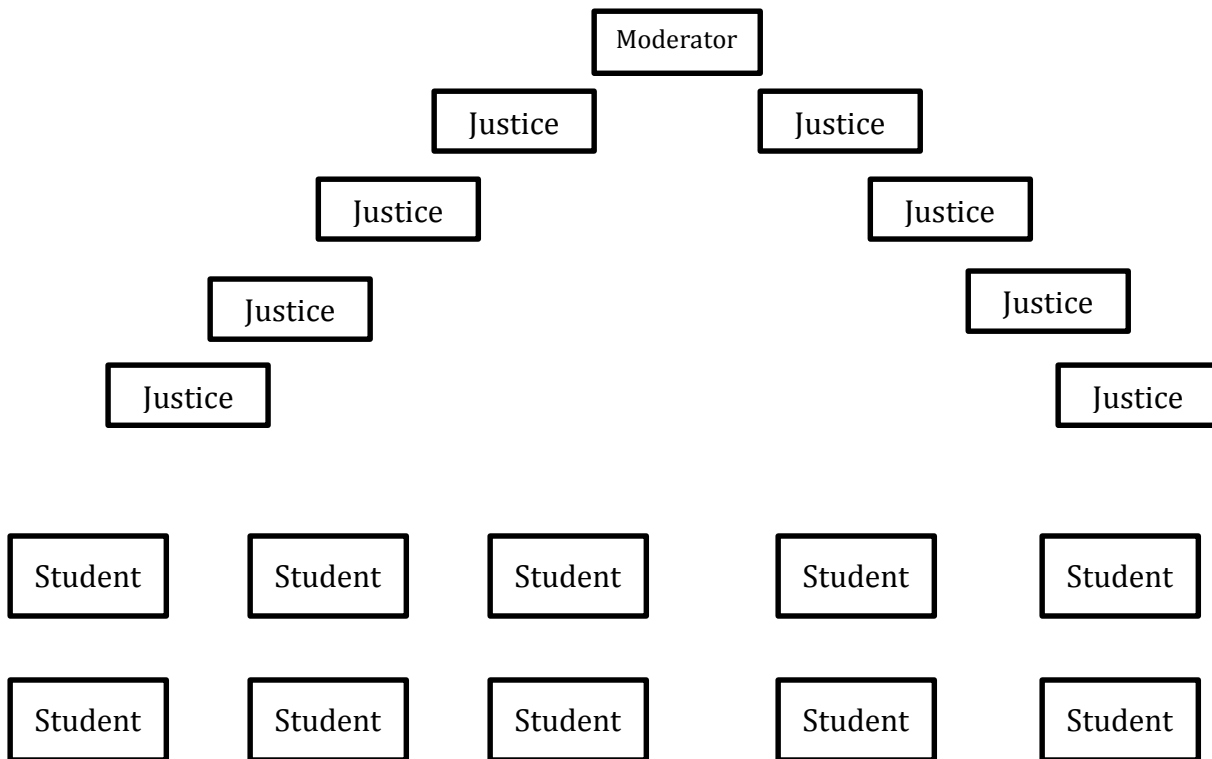
## Using this Volume

We have designed each of these scripted conversations and follow-up discussions to be used in a single class session. The scripts themselves are generally 20-25 minutes leaving another 20 minutes for discussion. However, teachers may want to modify this to suit their individual needs. For any script to work well, it is advisable to have students read through the script prior to using it in class. This serves to reduce errors in pronunciation as well as facilitate a smooth presentation. Teachers also may want to consider briefing students on the general constitutional concepts of separation of powers, check and balances, enumerated and implied powers before using these scripts.

Each script requires students to play a role. Scripts have a listing of the names and number of participants needed for each presentation. Each script has moderator, Founders, and justices as participants. When assigning the roles teachers should keep in mind that an “L” designates larger roles, medium sized roles have an “M”, and smaller parts have an “S.” Following each script there are pedagogical materials that can be used by all of the students even those not assigned reading roles.

These scripts can be used in a variety of ways. Most often they can be used in U.S. History and U.S. Government courses. They can also be used in courses that explore the formation and interpreting of the American Constitution. Other uses might include cooperative school projects and presentations integrating the literature, theater, and history curriculums. Librarians and civic groups desiring to host local Constitution Day events have used these scripts as the basis for educational outreach programming in their communities.

## Suggested Classroom Layout for Scripted Conversations



# The Executive Branch—The Federalist/Antifederalist Debates

## Introduction

Americans had considerable experience with executives—they had lived under the British king, who had power to veto colonial acts of legislation before they went into effect. The Articles of Confederation provided for no separate executive, but the Confederation Congress did elect its own president who served more or less as the Speaker of Congress. Congress also created outside executive departments in charge of foreign affairs, finance, war and the post office. The secretaries of these departments and their small staffs were not delegates to Congress. The states under the Articles each had a governor or president. Most were relatively weak in comparison to their state assemblies. The governors of New York and Massachusetts served as the best models for the Constitutional Convention in shaping the image of the new American President. Given this legacy, it is not surprising the Constitutional Convention had more difficulty drafting provisions for the election and responsibilities of the President than for any other part of the Constitution.

Soon after it convened, the Constitutional Convention agreed to have a single executive as opposed to the plural executive favored by a handful of delegates who feared the reinstatement of the monarchy. Greater disagreement persisted on the manner of electing the President. Some delegates wanted a President elected by Congress for a long term and ineligible for reelection. Others favored direct election by the people for short terms and with no restrictions on the number of consecutive terms. A compromise eventually provided that the President would have a four-year term and would be elected by electors chosen in a manner prescribed by the state legislatures. No restrictions were placed on the President's eligibility to be reelected.

During the debate over the ratification of the Constitution, Antifederalists charged that the President would become a king—in fact, he would be the worst kind of a king—an elected one. Cabals and intrigues would surely develop over the reelection of the incumbent. Some even charged that the orderly transfer of power from a defeated incumbent was too much to expect, especially since the President had complete control over the country's military and the states' militia when called up for federal service.

Antifederalists also charged that the Constitution was defective in that it violated the commonly held belief that the three branches of government ought to be separate. The mixture of power and responsibility over appointments to office and treaty-making bothered many Americans. Would the Senate really exercise authority in the appointment of officers or would the President's power to nominate be tantamount to the power to appoint? Who would be responsible if corrupt individuals were appointed—the President, the Senate or both? And could it be expected that Senators who had confirmed officeholders would convict those same individuals on impeachment?

Similar fears were expressed over the treaty-making power. The Constitution declared that treaties were the supreme law of the land. Yet, the House of Representatives, elected directly by the people, played no role in the drafting or ratification of treaties. Only the President and the Senate had responsibility in this important area that could affect the lives of every American.

Several critics of the Constitution suggested that the dangerous connection between the President and the Senate could be eliminated by creating a privy council that would advise the President on both appointments and treaty-making. If privy councillors gave faulty advice, they could be held accountable. This council, had precedents in both the British and American state governments.

Antifederalists charged that the President would have too much influence over legislation through his veto power over acts of Congress and that the President's pardoning power was

dangerous. He could conspire with others in treasonable activities and guarantee his co-conspirators pardons if their activities were discovered.

Federalists praised the Presidency. They pointed to the weakness of the Confederation and state governments with their nearly powerless executives. America needed a separate President with executive powers to enforce federal laws and conduct foreign policy. Federalists contrasted the President with the British monarch. The former had limited power checked by two other branches of government, while the latter had almost limitless power. Some state executives even had greater power in certain areas than the President.

The President, it was argued, would be accountable to both the people and Congress. If he failed to satisfy the people, he would not be reelected; if he committed crimes, he could be impeached by Congress. Furthermore, everyone realized that George Washington would be elected the first President. This great man had already once voluntarily given up total power in 1783, preferring a rural retirement; he could be expected to follow a similar course of action after he set the new government under the Constitution in motion. Washington's example would be followed by his successors.



## Sources Used in Script

### Antifederalist Sources

- An Old Whig V, Philadelphia *Independent Gazetteer*, 1 November 1787  
Cato (George Clinton?) IV, *New York Journal*, 8 November 1787  
Luther Martin: Genuine Information IX, Baltimore *Maryland Gazette*,  
29 January 1788  
Philadelphiensis (Benjamin Workman?) IX, Philadelphia *Freeman's Journal*,  
6 February 1788  
A Columbian Patriot (Mercy Otis Warren): *Observations on the Constitution*, Boston,  
February 1788  
George Mason: Speech in the Virginia Convention, 18 June 1788  
James Monroe: Speech in the Virginia Convention, 18 June 1788

### Federalist Sources

- An American Citizen (Tench Coxe) I, On the Federal Government, Philadelphia  
*Independent Gazetteer*, 26 September 1787  
Americanus (John Stevens) II, New York *Daily Advertiser*, 23 November 1787  
Marcus (James Iredell) III, *Norfolk and Portsmouth Journal*, 5 March 1788  
Publius (Alexander Hamilton): The Federalist 67, *New York Packet*, 11 March 1788  
Publius (Alexander Hamilton): The Federalist 69, *New York Packet*, 14 March 1788  
Publius (Alexander Hamilton): The Federalist 73, *New York Packet*, 21 March 1788  
Publius (Alexander Hamilton): The Federalist 74, *New York Packet*, 25 March 1788  
Fabius (John Dickinson) II, *Pennsylvania Mercury*, 15 April 1788  
Fabius (John Dickinson) IX, *Pennsylvania Mercury*, 1 May 1788  
James Madison: Speech in the Virginia Convention, 18 June 1788

## Roles in Script–13 (L–large role; M–medium role; S–small role)

Moderator (L)

Antifederalist Panelists

- Cato (M)
- A Columbian Patriot (S)
- Luther Martin (M)
- George Mason (M)
- James Monroe (S)
- An Old Whig (M)
- Philadelphiensis (S)

Federalist Panelists

- An American Citizen (M)
- Fabius (L)
- James Madison (L)
- Marcus (S)
- Publius (L)

## The Script

**Moderator:** Welcome and good evening. Tonight we have with us a group of individuals who have been involved in the debate over the Constitution. Antifederalists contend that the Constitution should not be adopted without amendments; while Federalists maintain that it is in the best interest of the nation to ratify the Constitution. Today we will address Article II, the section that outlines the executive branch. Gentlemen, welcome.

**All Panelists:** Hello, Thank you, It's good to be here, etc.

**Moderator:** Let's begin with An Old Whig. You contend that the executive as designed in the Constitution is nothing less than a monarch. Is this correct?

**An Old Whig:** [Yes.] In the first place the office of President of the United States appears to me to be clothed with such powers as are dangerous. [He is the] <source><sup>1</sup> of all honors in the United States, commander in chief of the army, navy and militia, with the power of making treaties and of granting pardons, and to be vested with an authority to <veto><sup>2</sup> all laws. . . . [He] is in reality to be a king as much a King as the King of Great Britain, and a King too of the worst kind;—an elective King.

**Moderator:** And Cato, you have suggested that there are additional dangers associated with this provision?

**Cato:** [Absolutely. When you consider that the Constitution also provides for a] ten miles square, which [will] become the seat of government. [This] will of course be the place of residence for the president and the great officers of state; the court of a president possessing the powers of a monarch, ambition with idleness—baseness with pride—the thirst of riches without labour—aversion to truth—flattery—treason—<treachery><sup>3</sup>—violation of engagements—<dislike><sup>4</sup> of civil duties—hope from the magistrates weakness; but above all, the <continual><sup>5</sup> ridicule of virtue—these . . . are the characteristics by which the [royal] courts in all ages have been distinguished.

**Moderator:** I presume that Federalists maintain this is hyperbole?

**An American Citizen:** [Most certainly.] In Britain their king is for life—In America our president will always be one of the people at the end of four years. In that country the king is hereditary and may be an idiot, a knave, or a tyrant by nature, or ignorant from neglect of his education, yet cannot be removed, for [in theory] “he can do no wrong.” In America, as the president is to be one of the people at the end of his short term, so will he and his fellow citizens remember, that he was originally one of the people; and that he is created by their breath.

**Moderator:** So, is it your argument that Antifederalists fears about the Executive are exaggerated?

**Publius:** [The Executive] has been shown to us with the <jeweled head band><sup>6</sup> sparkling on his brow, and the imperial purple flowing in his train. He has been seated on a throne surrounded with <servants><sup>7</sup> and mistresses; giving audience to the <ambassadors><sup>8</sup> of foreign <rulers><sup>9</sup>, in all the <arrogant display><sup>10</sup> of majesty. The images of Asiatic despotism and <sensual pleasure><sup>11</sup> have . . .

been . . . the exaggerated scene. We have been taught to tremble at these terrific <pictures of murdering fanatics>.<sup>12</sup>

**Moderator:** Mr. Martin, you were at the Philadelphia Convention when the Executive was being discussed. Was there any talk of creating an American monarch?

**Luther Martin:** There was a party who attempted to have the president appointed during good behaviour, without any limitation as to time, and not being able to succeed in that attempt, they then endeavoured to have him re-eligible without any <limits>.<sup>13</sup>

**Moderator:** But, when we look at the Constitution now, is it your view that those individuals got what they wanted?

**Luther Martin:** [When looking at Article II as a whole] these circumstances, combined together, will enable him, when he pleases, to become a king in name, as well as in substance, and . . . have that authority perpetuated to his family.

**Cato:** [We must remember that Montesquieu said] the deposit of vast trusts in the hands of a single magistrate, enables him . . . to create a numerous train of dependants—this tempts his ambition . . . he therefore fancies that he may be great and glorious by oppressing his fellow citizens, and raising himself to permanent grandeur on the ruins of his country.

**Moderator:** I think this is a good transition point in our discussion to consider a related issue; the term of office of the Executive. It seems to me that this is fundamental to the question of whether Article II creates a monarchy?

**Publius:** [The President] is to be elected for four years; and is to be re-eligible as often as the People of the United States shall think him worthy of their confidence. In these circumstances, there is a <complete difference><sup>14</sup> between him and a King of Great-Britain; who is an hereditary monarch, possessing the crown as <an inheritance><sup>15</sup> to his heirs forever.

**Moderator:** But, aren't Antifederalists correct in viewing the possibility of re-eligibility as the problem here? Mr. Mason, your thoughts?

**George Mason:** Nothing so strongly impels a man to regard the interest of his constituents, as the certainty of returning to the general mass of the people, from whence he was taken; where he must participate [in] their burdens.

**Cato:** [And again Montesquieu said] that in all magistracies, the greatness of the power must be compensated by the brevity of the duration; and that a longer time than a year, would be dangerous. It is therefore obvious to the least intelligent mind . . . great power in the hands of a magistrate . . . with a considerable duration, may be dangerous to the liberties of a republic.

**Fabius:** If any person . . . shall say, there will be more danger to our freedom under the proposed plan, than to that of Britons under their constitution, he must mean, that Americans are . . . inferior to Britons in understanding and virtue. [We have] a constitution and government, [where] every branch is <elective>.<sup>16</sup> [We can] certainly guard rights, at least as well, as Britons can guard their rights.

**Moderator:** Let's turn to perhaps the most critical part of our discussion. For many, the powers of the Executive branch are more important than the term of office. Central to this issue is the vagueness of the text in Article II, which leads many to conclude that the Presidency is dangerous. I know that Publius has insisted that the Executive cannot be compared to the British monarchy. Is this the case?

**Publius:** [To begin with,] the President of the United States would be liable to be impeached, tried, and upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the King of Great-Britain is sacred and <secure from being checked>.<sup>17</sup>

**Moderator:** True. What are some other limits?

**Publius:** The King of Great Britain has an absolute <veto><sup>18</sup> upon the acts of the two houses of Parliament. The President of the United States is to have power to return a bill, which shall have passed the two branches of the Legislature, for re-consideration; but the bill so returned is to become a law, if upon that re-consideration it be approved by two thirds of both houses.

**Philadelphiensis:** [However,] the two branches of the legislature, will be at his service. . . . As a body, and as individuals, they will be his <cronies><sup>19</sup> and flatterers.

**Publius:** The President is to have power with the advice and consent of the Senate to make treaties; provided two thirds of the Senators present concur. The King of Great-Britain is the sole and absolute representative of the nation in all foreign transactions.

**Moderator:** Another concern of Antifederalists are the military powers of the Executive. According to An Old Whig, this should be scrutinized carefully.

**An Old Whig:** [That's an understatement.] Let us suppose this man to be a favorite with his army, and that they are unwilling to part with their beloved commander in chief; or . . . let us suppose, a future President and commander in chief adored by his army and the militia to as great a degree as our late illustrious commander in chief; and . . . that this man is without the virtue, the moderation and love of liberty which possessed the mind of our late general . . . this country will be involved at once in war and tyranny.

**Luther Martin:** [Additionally,] the officers . . . from the highest to the lowest, are all to be appointed by him and dependent on his will and pleasure, and commanded by him in person, will, of course, be <submissive><sup>20</sup> to his wishes, and ready to execute his commands; in addition to which, the militia also are entirely subjected to his orders.

**Publius:** [Again, let me point out that Antifederalists are overstating the case.] The President will have only the **occasional** command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union—The King of Great-Britain and the Governor of New-York have at **all times** the entire command of **all** the militia within their several jurisdictions.

**Fabius:** Is there more danger to our liberty, from such a president as we are to have, than to that of Britons, from an hereditary monarch, with a vast revenue; in the command of the militia, fleets, and armies, and the direction of their operations; . . . who can call parliaments with a breath, and dissolve them with a nod; who can at his will, make war, peace, and treaties <unbreakably><sup>21</sup> binding the nation . . . as it pleases him?

**Moderator:** But, Fabius, doesn't this assume that future Presidents will possess <discretion><sup>22</sup> and virtue that would prevent the abuse of these military powers?

**An Old Whig:** [Exactly.] So far is it from its being improbable that the man who shall hereafter be in a situation to make the attempt to <continue><sup>23</sup> his own power, should <lack><sup>24</sup> the virtues of General Washington; that it is perhaps a chance of one hundred millions to one that the next age will not furnish an example of so disinterested a use of great power.

**Marcus:** [Let's look at it this way. Let's consider] the improbability of a man honored [by being elected the President] . . . by his country . . . [risking,] like General [Benedict] Arnold, the damnation of his fame to all future ages.

**Moderator:** But, isn't this the point Antifederalists are making? No one has a crystal ball. How are we to reasonably assume that future presidents will not abuse these military powers? Or to put it a different way, can historical precedents guide us as to the actions of future presidents?

**Marcus:** The probability of the President of the United States committing an act of treason against his country is very slight; he is so well guarded by the other powers of government, and the natural strength of the people at large must be so weighty, that in my opinion it is the most <unrealistic fantasy><sup>25</sup> that can be entertained.

**Fabius:** [It is crucial to remember that the sovereignty, will, and great generosity of the people matter. Even in England,] this taught Charles the first, that he was but a royal servant; and this caused James the second's army, raised, paid and kept up by himself, to confound him with <shouts><sup>26</sup> for liberty.

**An American Citizen:** [Another consideration is that] in all royal governments an helpless infant or an inexperienced youth, may wear the crown. Our president must be matured by the experience of years, and being born among us, his character at thirty-five must be fully understood. Wisdom, virtue, and active qualities of mind and body can alone make him the first servant of a free and <open-minded><sup>27</sup> people.

**Fabius:** Americans, who have the same blood in their veins [as Britons,] have, it seems, very different heads and hearts. We shall be enslaved by a president . . . chosen by ourselves, and continually rotating? [Again, this is ridiculous.] Tis strange.

**Moderator:** Philadelphiensis, are you willing to accept this line of reasoning?

**Philadelphiensis:** Who can [in their right mind] deny but the president general will be a king to all intents and purposes, and one of the most dangerous kind too; a king elected to command a standing army?

**Cato:** [These powers are clearly dangerous. Let's face it,] he is the <supreme commander><sup>28</sup> of the nation, and of course, has the command & controul of the army, navy and militia; he is the general <protector><sup>29</sup> of the peace of the union. . . . Will not the exercise of these powers therefore tend either to the establishment of a vile and arbitrary aristocracy, or monarchy?

**Philadelphiensis:** His officers can wantonly inflict the most disgraceful punishment on a peaceable citizen, under pretence of disobedience, or the smallest neglect of militia duty [even during peacetime].

**Moderator:** I suppose this leads us to another issue that divides this panel. It has been said that this Executive will control a vast network of government officials. Mr. Martin, why is this patronage such a problem for you?

**Luther Martin:** Though . . . chosen for a limited time . . . his having the appointment of all officers in every part of the civil department for the union, who will be very numerous—in them and their connexions, relations, friends and dependants, he will have a formidable host devoted to his interest, and ready to support his ambitious views.

**Moderator:** What assurances do the American people have that this patronage doesn't become a reality? Can we be confident that we'll not have the equivalent of the British Monarchy?

**An American Citizen:** The British King is the great Bishop or Supreme Head of an established church, with an immense patronage annexed. In this capacity he commands a number of votes in the House of Lords, by creating Bishops, who, besides their great incomes, have votes in that assembly.

**Moderator:** But, what about the American context? I presume you are aware that we are **not** British.

**All Antifederalist Panelists:** Raucous laughter!

**An American Citizen:** In America . . . all religious funds, honors and powers, are in the gift of numberless, unconnected, disunited, and contending corporations, wherein the principle of perfect equality universally prevails. In short, danger from ecclesiastical tyranny . . . that <profane><sup>30</sup> engine of royal power in some countries, can be feared by no man in the United States.

**Moderator:** Let's turn our attention to the last issue that divides our panelists. The manner in which the Executive is elected has generated a substantial amount of debate. Again, in Article II, the Constitution stipulates that "Each State shall appoint . . . a Number of Electors, equal to the whole Number of Senators and Representatives . . . in Congress. These electors are to meet in their respective States, and vote by Ballot for two Persons." And as I understand it, one of those votes cannot be for a candidate from their state. The candidate receiving the highest number of votes is to be President and the person receiving the next highest number of votes becomes Vice-President. If no candidate receives a majority of the votes the decision then goes into the House of Representatives. This is a pretty complicated method, but Mr. Monroe, what other objections do you have with this system?

**James Monroe:** [Well first of all,] he is to be elected by **Electors**, in a manner perfectly dissatisfactory to my mind. I believe that he will owe his election, in fact, to the State Governments, and not to the people at large.

**A Columbian Patriot:** If the <ultimate authority><sup>31</sup> of America is designed to be elective, the <limiting of><sup>32</sup> the votes to only ten electors in my state [of Massachusetts], and the same proportion in all the others, is <equivalent><sup>33</sup> to the exclusion of the voice of the people in the choice of their first magistrate.

**Moderator:** And the specific problem with this is?

**George Mason:** This mode of election [is] . . . a mere <deception of><sup>34</sup> the people of America, and thrown out to make them believe they were to choose him.

**A Columbian Patriot:** It is vesting the choice solely in an aristocratic junto, who may easily combine in each State to place at the head of the Union the most convenient instrument for despotic sway.

**Moderator:** It seems that Mr. Madison wants to weigh in on this?

**James Madison:** [Yes.] I would not contend against some of the[se] principles.

**Moderator:** But I assume you will explain where you differ with Antifederalists on this?

**James Madison:** [Certainly. In this country] there is a great diversity of interests.

**Moderator:** Meaning?

**James Madison:** It will be found impracticable to elect [the President] by the immediate suffrages of the people. Difficulties would arise from the extent and population of the States. Instead of this, the people choose the Electors.—This can be done with ease and convenience, and will render the choice <sensible and wise>.<sup>35</sup>

**Moderator:** But doesn't this take us back to the point that your opponents are making; that the Electoral College is a secretive aristocrat plot?

**Fabius:** [No, not at all.] As these electors are to be appointed, as the legislature of each state may direct . . . they will be appointed by the people of the state. Thus, the fairest, freest opening is given, for each state to chuse such electors for this purpose, as shall be most <uniquely><sup>36</sup> qualified to fulfil the trust.

**Moderator:** But doesn't that still leave the process open to the possibility that some sort of chicanery or bribery will enter this procedure of electing the President?

**Fabius:** To guard against undue influence these electors . . . are to meet in their respective states, and vote by ballot; and still further to guard against it, Congress may determine the time of chusing

the electors, and the day on which they shall give their votes—**WHICH DAY SHALL BE THE SAME THROUGHOUT THE UNITED STATES.**

**Moderator:** So if I understand this, you are suggesting that when you consider the size of the country and the improbability of any one being able to influence the votes in all the states on the same day, we don't have to worry?

**James Madison:** [In a nation so large,] there can be no union of interests or sentiments between States so differently situated. I have found no better way of selecting the [President] than that delineated in the plan of the Convention.

**Moderator:** With that, we need to conclude our discussion. I would like to have a representative from each side leave us with a closing thought. Publius, would you like to start?

**Publius:** [Thank you. We need not fear this Executive. The powers are all checked in some manner.] The President of the United States would be an officer elected by the people for four years . . . and would be <subject><sup>37</sup> to personal punishment and disgrace . . . the President would be liable to be impeached, tried, and upon conviction . . . removed from office. . . The President is to nominate with the advice and consent of the Senate. . . [he has] has no particle of spiritual jurisdiction . . . [he has] a concurrent power with a branch of the Legislature in the formation of treaties . . . the [veto] of the President [is checked] by two thirds of each of the component members of the legislative body. [In conclusion I would like to address the tactics of our opposition.] [Antifederalists] so far exceed the usual <over blown rhetoric of mindless hacks><sup>38</sup> that . . . it is impossible <to not accuse them of deliberately deceiving us with their suggestions that there is><sup>39</sup> a similitude between a King of Great-Britain and . . . the President of the United States. It is still more impossible to withhold that imputation from the rash and <obvious tactics><sup>40</sup> which have been employed to give success to the attempted imposition.

**Moderator:** For Antifederalists, An Old Whig.

**An Old Whig:** [Thank you.] When I say that our future President will be as much a king as the king of Great-Britain, I only ask of my readers to look into the constitution of that country, and then tell me what important <powers><sup>41</sup> the King of Great-Britain is entitled to, which does not also belong to the President during his continuance in office. I would therefore advise my countrymen seriously to ask themselves this question;—Whether they are prepared to receive a king? If they are to say at once, and make the kingly office hereditary; to frame a constitution that should set bounds to his power, and, as far as possible secure the liberty of the subject. If we are not prepared to receive a king, let us call another convention to revise the proposed constitution, and form it anew on the principles of a confederacy of free republics; but by no means, under <the disguise><sup>42</sup> of a republic, to lay the foundation for a military government, which is the worst of all tyrannies.

**Moderator:** I hope that our discussion here will prove helpful as Americans continue to debate the ratification of the Constitution in the state conventions. Good night and good luck.



## Endnotes

- <sup>1</sup> fountain
- <sup>2</sup> negative
- <sup>3</sup> perfidy
- <sup>4</sup> contempt
- <sup>5</sup> perpetual
- <sup>6</sup> diadem
- <sup>7</sup> minions
- <sup>8</sup> envoys
- <sup>9</sup> potentates
- <sup>10</sup> supercilious pomp
- <sup>11</sup> voluptuousness
- <sup>12</sup> visages of murdering janizaries
- <sup>13</sup> restraint
- <sup>14</sup> dissimilitude
- <sup>15</sup> patrimony descendible
- <sup>16</sup> popular
- <sup>17</sup> inviolable
- <sup>18</sup> negative
- <sup>19</sup> sycophants
- <sup>20</sup> subservient
- <sup>21</sup> irrevocably
- <sup>22</sup> prudence
- <sup>23</sup> perpetuate
- <sup>24</sup> want
- <sup>25</sup> chimerical apprehension
- <sup>26</sup> huzzas
- <sup>27</sup> enlightened
- <sup>28</sup> generalissimo
- <sup>29</sup> conservator
- <sup>30</sup> sacrilegious
- <sup>31</sup> sovereignty
- <sup>32</sup> circumscribing
- <sup>33</sup> tantamount
- <sup>34</sup> ignus fatuus
- <sup>35</sup> judicious
- <sup>36</sup> signally
- <sup>37</sup> amenable
- <sup>38</sup> licenses of party-artifice
- <sup>39</sup> to bestow the imputation of deliberate imposture and deception upon the gross pretence of
- <sup>40</sup> barefaced
- <sup>41</sup> prerogatives
- <sup>42</sup> pretence

# Pedagogical Materials

## T-Chart for Notes–The Federalist/Antifederalist Debates

**Instructions:** As students listen to the scripted debate, they should take notes using the T-Chart below. Notes should summarize the key ideas from both Federalist and Antifederalist speakers. You may also want to assess the strength of each argument using a numerical ranking system. This chart can also be used when using the discussion questions below.

<u>Federalist Arguments</u>	<u>Antifederalist Arguments</u>

## Discussion Questions– The Federalist/Antifederalist Debates

1. To what extent, do Federalists effectively refute Antifederalist charges that the President was monarchical?
2. In your opinion, are the blended powers between the President and Senate an effective rebuttal to those who made the accusation that the President was a monarchy?
3. In your view, do Federalists effectively make the case for the practicality of the Electoral College? Do Antifederalists effectively make the case that it is an elitist group?
4. Was the re-eligibility of the President a mistake of the framers at the Philadelphia Convention?
5. Which Presidential powers in the Constitution are most alarming to you?

## Extension Activities

1. Create a Political Cartoon. Students can create political cartoons from the following passages from the script that illustrate two individuals and their different points of view:

On page 4, Cato and An American Citizen have very different views about the nature of the Executive.

On page 10-11, Fabius and A Columbian Patriot have very different views on the Electoral College.

2. Create a Graphic Novel. Instead of creating traditional book reports or writing summaries, get "graphic" by creating a comic book adaptation of an important section in the script. Characters in the story could include An Old Whig, Luther Martin, Publius, and James Madison.

3. Converting Speeches into Poetry. Students could take lines from the script and convert them into various types of poems. For example a limerick from An Old Whig's views of the Executive might be:

Old Whig saw a monarchical future  
On the 'stution we needed a suture  
We'd have no relief  
From this commander in chief  
Hark and take heed of this dastardly creature

4. Have student groups do research about the executives of other nations. They could focus on issues of:

- a) mode of election
- b) terms
- c) re-eligibility
- d) removal process
- e) powers

Students could present their findings to the class through simple reports, roundtable discussions, or a debate. If you wanted to have a debate, the resolve could be, "The design of the U.S. Presidency is flawed and should be modified to reflect characteristics of other executives."

# Presidential War Powers—The *Merryman*, *Milligan*, and *Quirin* Cases

## Introduction

The Constitution divides powers among three branches of government. This separation and enumeration of powers occasionally come into conflict when the nation is at war. Article II, Section 2 stipulates that the president is the commander in chief of the armed forces. The authority to declare war and support forces is enumerated as among the powers of Congress in Article I. Over time conflicts between the executive and the legislature have emerged as presidents sought to deploy troops and prosecute wars without formal declarations of war by Congress.

Further complicating these power struggles are issues relating to definitions of war, what constitutes a theater of war, and who is the enemy. Abraham Lincoln, facing the secession crisis of 1861 and the firing on Fort Sumter, stopped short of defining the conflict as a war. This in turn created several constitutional issues relating to the extent of his war powers as events unfolded over the next several years. Lincoln also faced difficulties in many border states and around Washington, D.C. as he sought to exercise his powers under the commander in chief clause in areas that were geographically proximate to but not a part of the Confederacy. Short-term military operations in the 20th century throughout the Caribbean and Central America have factored into how we think about the exercise of executive power and armed conflict. In the wake of the Vietnam War, Congress passed the War Powers Act stipulating the procedures that limited the use of executive powers that could lead to armed conflict. Every president since has consistently taken the position that the War Powers Act is an unconstitutional encroachment on the war powers of the executive.

More recently, the war on terrorism has added another set of circumstances to complicate clear understandings of what constitutes traditional definitions of theaters of operation. Individuals without being in any nation's armed forces have committed terrorist acts on civilian populations. This has led many to suggest that previous definitions of the enemy or being a soldier should be abandoned.

Another constitutional issue often associated with war is the provision in Article I Section 9, which guarantees the writ of habeas corpus. This provision means that a prisoner has the right to ask a judge to issue an order that requires the prisoner to appear before a judge to determine if the prisoner is being lawfully detained. Although the Constitution does allow Congress to suspend the writ in times of rebellion, invasion, or as the public safety may require it, conflicts have occurred as various presidents have in fact suspended the right. In the first two cases that serve as the basis for this script, habeas corpus was an issue since both John Merryman and Lambdin Milligan argued they were being held unlawfully during the Civil War. Merryman was detained in Maryland while Milligan was detained in Indiana. The issue also is central in the *Quirin* case. Both Herbert Haupt and Ernest Burger, prisoners of war captured on American soil during WW II, sought a writ of habeas corpus as U.S. citizens.

Additionally, in all three cases, military tribunals are at issue. Article III, Section 1 of the Constitution serves as the blueprint for the judicial system for the national government. It also provides that Congress can create inferior courts. Congress has in fact passed legislation creating military courts to try members of the U.S. military as well as tribunals designed to try members of enemy forces during wartime. Both systems operate outside the scope of traditional practices of criminal and civil trial procedures. John Merryman and Lambdin Milligan argued that their trials in military courts were unconstitutional since civilian courts were operating and neither were members of the military. What follows is a hypothetical conversation among Supreme Court justices.

## Supreme Court Cases Used in Script

*Ex Parte Merryman*, 17 F. Cas. 144 (1861)

*Ex parte Milligan*, 71 U.S. 2 (1866)

*Ex Parte Quirin*, 317 U.S. 1 (1942)

## Central Constitutional Issues in Cases Used in Script

*Ex Parte Merryman*, 1861

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

*Ex Parte Milligan*, 1866

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

*Ex Parte Quirin*, 1942

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

## Roles in Script-5 (L-large role)

Moderator (L)

Chief Justice Salmon P. Chase (L)

Justice David Davis (L)

Justice Harlan Fiske Stone (L)

Chief Justice Roger B. Taney (L)

## The Script

**Moderator:** Through the miracle of modern science, we are very excited to have with us today four Supreme Court justices. Joining us from the 19th century are justices Roger B. Taney, Salmon P. Chase, and David Davis. Justice Harlan Fiske Stone joins us from the 20th century. Gentlemen, welcome.

**Justices:** Hello, It's good to be here. Thank you for having me. Etc.

**Moderator:** Today our discussion centers on presidential powers and specifically on wartime powers. I do not need to remind our panelists the provisions of the Constitution that are in play when this issue comes to the Court. But for our audience, I would start by noting that the Constitution allocates wartime power to both the executive and legislative branches. Article II stipulates that the President is the commander in chief, while Article I authorizes Congress to declare war and support the armed forces.

**Chase:** [That's right.] Congress has the power not only to raise and support and govern armies, but to declare war. It has therefore the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war . . . and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by <the Constitution><sup>1</sup>. Their extent must be determined by their nature and by the principles of our institutions.

**Moderator:** This sounds fairly simple. What is the problem?

**Chase:** The power to make the necessary laws is in Congress, the power to execute in the President. Both powers imply many <secondary><sup>2</sup> and <supporting><sup>3</sup> powers. Each includes all authorities essential to its due exercise.

**Moderator:** And I take it, a key word so far in our discussion is the word “imply.”

**Taney:** [But,] the Government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the Constitution, and neither of its branches—executive, legislative or judicial—can exercise any of the powers of government beyond those specified and granted.

**Moderator:** So then, there are no implied powers in the Constitution?

**Stone:** [Justice Taney, you know it's not that simple.] The Constitution authorizes Congress “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

**Moderator:** That seems to be an argument for implied powers within the legislative branch. What about implied powers for the executive branch?

**Stone:** [In Article II, Section 1, Clause 1] the Constitution confers on the President the executive Power and in Article II Section 3 imposes on him the duty to "take Care that the Laws be faithfully executed." The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war.

**Moderator:** So, when you add up all these, there is an argument to be made that the executive does possess some implied powers.

**Stone:** [Yes.]

**Moderator:** Well, I presume that we are all in agreement that the text of the Constitution clearly says that a person has a privilege to a writ of habeas corpus.

**Justices:** Yes. Certainly. Absolutely. Etc.

**Moderator:** Let's start there then. In Article I, Section 9 the Constitution reads, "the Privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Section 9 applies to the Congress of the United States.

**Taney:** [Thank-you. I appreciate a plain reading of the text.]

**Moderator:** In the Merryman case, Justice Taney, would you explain how habeas corpus was an issue?

**Taney:** A military officer residing in Pennsylvania issue[d] an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears. Under this order his house [was] entered . . . he [was] seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement.

**Moderator:** And I assume he filed for a writ of habeas corpus?

**Taney:** [Yes.] when [the] *habeas corpus* [was] served on the commanding officer, requiring him to produce the prisoner before a Justice of the Supreme Court, in order that he may examine into the legality of the imprisonment, the answer of the officer is that he is authorized by the President to suspend the writ of *habeas corpus* at his discretion, and, in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

**Moderator:** Were there similar circumstances in the Milligan case?

**Davis:** An armed rebellion against the national authority . . . was raging, and the public safety required that the privilege of the writ of habeas corpus should be suspended. The President had practically suspended it, and detained suspected persons in custody without trial but his authority to do this was questioned.

**Moderator:** Wait a minute. I thought only Congress was authorized to suspend the privilege?

**Davis:** [Yes. In the Milligan case,] it was claimed that Congress alone could exercise this power, and that the legislature, and not the President, should judge of the political considerations on which the right to suspend it rested.

**Moderator:** Did President Lincoln have any legitimate reason to take such an action?

**Stone:** We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents.

**Moderator:** Justice Stone, we will get to the 20th century in a bit. For now, let's stick to Lincoln.

**Chase:** The act of Congress of March 3d, 1863, comprises all the legislation which seems to require consideration in this connection.

**Moderator:** What did that law say?

**Chase:** The first section [of the law] authorized the suspension, during the Rebellion, of the writ of habeas corpus throughout the United States by the President.

**Moderator:** And in the Merryman case, did the President have congressional authorization to suspend the writ of habeas corpus?

**Taney:** [None whatsoever.] I [understood] that the President not only claim[ed] the right to suspend the writ of *habeas corpus* himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him.

**Moderator:** Wow! You can't be serious!

**Taney:** No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the President claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there is no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended except by act of Congress.

**Taney:** [Back in 1807] when the conspiracy of . . . Aaron Burr . . . became so <difficult><sup>4</sup> . . . Mr. Jefferson . . . claimed . . . no power to suspend it, but communicated his opinion to Congress, with all the proofs in his possession, in order that Congress might exercise its discretion upon the subject, and determine whether the public safety required it. And . . . no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it.

**Moderator:** But, if I am not mistaken, the events surrounding the arrest of Merryman were in early 1861 and Congress was not in session.

**Taney:** [Yes. That is true.]

**Moderator:** Does that change anything for you?



**Taney:** [No. Again, the Constitution's first] article is devoted to the Legislative Department of the United States, and has not the slightest reference to the Executive Department.

**Moderator:** Perhaps this was a factor influencing Congress to pass the Habeas Corpus Act of March 3, 1863, which did authorize President Lincoln to suspend the privilege at his discretion?

**Davis:** [But, it's more complicated than that.]

**Chase:** The trial and sentence of Milligan were by military commission convened in Indiana during the fall of 1864.

**Moderator:** And am I correct in assuming Milligan was challenging the law passed by Congress that allowed the President to authorize the military to conduct the trial?

**Chase:** [Not exactly. Milligan argued that Congress] did not . . . authorize trials by military commission in Indiana, but . . . prohibited them.

**Moderator:** In other words, his trial was in the wrong type of court.

**Chase:** [Exactly.] The Federal courts were open . . . and undisturbed in the execution of their functions, and [additionally] . . . the judges and officers of the courts were loyal to the government.

**Moderator:** But didn't the circumstances in Southern Indiana at the time justify Milligan being tried in a military court?

**Chase:** It is established by the papers in the record, that the state was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion.

**Moderator:** And, Milligan wasn't exactly a choirboy.

**Chase:** [Yes.] It appears also that a powerful secret association, composed of citizens and others, existed within the state, under military organization, conspiring against the draft and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government.

**Stone:** [Exactly.] Armed prowlers . . . who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the . . .

**Moderator:** Again, Justice Stone, if you could wait a bit longer we will get to you. Justice Taney, could you summarize in a sentence or two the decision in the Merryman case?

**Taney:** Up to that time there had never been the slightest resistance or obstruction to the process of any Court or judicial officer of the United States in Maryland. . . . There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military. . . . And yet . . . a military officer . . . without giving any information

to the District Attorney, and without any application to the judicial authorities, assumes to himself the judicial power . . . [chose] to decide what constitutes the crime of treason or rebellion; what evidence . . . is sufficient to support the accusation . . . without having a hearing.

**Moderator:** It sounds like you are talking about a person's right to due process?

**Taney:** [Yes.] The Constitution provides, as I have before said, that "no person shall be deprived of life, liberty, or property, without due process of law." It declares that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. . . . It provides that the party accused shall be entitled to a speedy trial in a court of justice.

**Moderator:** Justice Davis, can you summarize the Court's finding in the Milligan case?

**Davis:** Milligan insist[ed] that . . . a military commission had no <authority><sup>5</sup> to try him upon the charges preferred, or upon any charges whatever, because he was a citizen of the United States and the State of Indiana, and had not been, since the commencement of the late Rebellion, a resident of any of the States whose citizens were arrayed against the government, and that the right of trial by jury was guaranteed to him by the Constitution of the United States.

**Moderator:** And so you found in favor of Milligan?

**Chase:** [Yes.]

**Moderator:** But, ironically, the Court's decision was after the Civil War in 1866?

**Chase:** [Yes.]

**Moderator:** Well, so far the President has not fared well in the Supreme Court when he exercises his powers during time of war. Justice Stone, in your case, the Court concluded differently.

**Stone:** [Yes.] After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing.

**Moderator:** And they came to the United States, correct?

**Stone:** [Correct.] The four landed [on Long Island, New York] from [a] submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses, and incendiary and timing devices. While landing, they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing, they buried their uniforms and the other articles mentioned and proceeded in civilian dress to New York City.

**Moderator:** There were others as well?

**Stone:** [Yes.] The remaining four . . . boarded another German submarine, which carried them . . . to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness, wearing caps of the German Marine Infantry and carrying with them a supply of

explosives, fuses, and incendiary and timing devices. They immediately . . . proceeded in civilian dress to Jacksonville, Florida, and thence to various points in the United States.

**Moderator:** And these individuals were captured?

**Stone:** All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States.

**Moderator:** So what is the issue that the Court had to decide?

**Stone:** The President, as President and Commander in Chief . . . by Order of July 2, 1942, appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War . . . on the same day, by Proclamation the President declared that all persons who are subjects, citizens or residents of any nation at war with the United States . . . who during time of war enter or attempt to enter the United States . . . charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.

**Moderator:** Ah, military tribunals again. Did Congress authorize any such tribunals?

**Stone:** By the Articles of War . . . Congress has provided rules for the government of the Army. It has provided for the trial and punishment, by courts martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army.

**Moderator:** But these individuals were not members of the U.S. military.

**Stone:** [True, but] our Government has . . . recognized that those who, during time of war, pass . . . from enemy territory into our own . . . for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission.

**Moderator:** Fine, but does any other nation recognize this rationale other than the United States?

**Stone:** This <principle><sup>6</sup> of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.

**Moderator:** So the argument of these individuals was what?

**Stone:** Petitioners' main <argument><sup>7</sup> is that the President is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offenses with which they are charged; that, in consequence, they are entitled to be tried in the civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses.

**Moderator:** And the government responded how?

**Stone:** The Government challenges each of these propositions. But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class of persons defined by the Proclamation, which aptly describes the character and conduct of petitioners. It is urged that, if they are enemy aliens or if the Proclamation has force, no court may afford the petitioners a hearing.

**Moderator:** Is there anything in the past that would support such a view?

**Stone:** [Yes.] Such was the practice of our own military authorities before the adoption of the Constitution and during the Mexican and Civil wars. General Order No. 100 of April 24, 1863, directed that: Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.

**Moderator:** But doesn't the Constitution state that persons are entitled to certain rights and privileges which would include basic due process in regular courts?

**Stone:** [Not exactly.]

**Moderator:** Now that I think about it, there is an exception in the 5th Amendment.

**Stone:** [Exactly.] The fact that "cases arising in the land or naval forces" are excepted from the operation of the Amendments does not militate against this conclusion. Such cases are expressly excepted from the Fifth Amendment.

**Moderator:** And I take it the government attempted to cast the status of these individuals as something other than citizens as well?

**Stone:** Our Government, by . . . defining lawful belligerents . . . has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who, though combatants, do not wear "fixed and distinctive emblems."

**Moderator:** But some might suggest that since Herbert Haupt and Ernest Burger were actually U.S. citizens, they should not be tried in military tribunals.

**Stone:** Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and, with its aid, guidance and direction, enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.

**Davis:** [I am astonished.] No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people, for it is the birthright of every American citizen when charged with crime to be tried and punished according to law.

**Stone:** [These individuals are no] less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.

**Davis:** This question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials.

**Stone:** It is that each individual, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines. . . . [Their] offense was complete when . . . they entered, or . . . remained upon our territory in time of war

**Davis:** The founders of our government were familiar with the history of that struggle, and secured in a written constitution every right which the people had wrested from power during a contest of ages.

**Stone:** [An] Act of Congress of April 10, 1806, derived from the Resolution of the Continental Congress of August 21, 1776 imposed the death penalty on alien spies “according to the law and usage of nations, by sentence of a general court martial.”

**Davis:** So strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that, when the original Constitution was proposed for adoption, it encountered severe opposition, and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

**Stone:** We cannot say that Congress, in preparing the Fifth and Sixth Amendments, intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission . . . with <violations><sup>8</sup> of the Articles of War punishable by death.

**Davis:** Time has proven the discernment of our ancestors. . . . These provisions, expressed in such plain English words that it would seem the <cleverness><sup>9</sup> of man could not evade them, are now . . . sought to be avoided. Those great and good men foresaw that troublous times would arise when rulers and people would become restive under restraint, and seek . . . to accomplish ends deemed just and proper, and that the principles of constitutional liberty would be in peril unless established by irrevocable law.

**Stone:** Accordingly, we conclude that [these individuals] were properly detained for trial by the Military Commission, [for] an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order, and that the Commission was lawfully constituted; that the petitioners were held in lawful custody, and did not show cause for their discharge.

**Davis:** [This] doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence.

**Moderator:** I see we are at a point where we are at loggerheads and out of time. I would like to thank our esteemed justices for being with us today. I suppose it is not an easy task, traveling here from the 1860s and 1940s. Perhaps we could at some future date, discuss the patents of such an invention that would facilitate such a voyage. Until then, we will need to leave it to future generations to sort out the contours of presidential powers and how they might function safely in time of war. Good night and good luck.

## Endnotes

<sup>1</sup> that instrument

<sup>2</sup> subordinate

<sup>3</sup> auxiliary

<sup>4</sup> formidable

<sup>5</sup> jurisdiction

<sup>6</sup> precept

<sup>7</sup> contention

<sup>8</sup> infraction

<sup>9</sup> ingenuity

## Pedagogical Materials

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

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

	<u>Merryman</u>	<u>Milligan</u>	<u>Quirin</u>
Background Information			
Central Issue			
Decision			

### Review Questions—Presidential War Powers

1. What are the arguments made by the Presidents justifying their actions in each of these instances?
2. What is the role of Congress in each of these cases?
3. How does habeas corpus factor into each of these cases?

### Discussion Questions—Presidential War Powers

1. In your opinion, is there a difference between official enemy soldiers and those supporting the enemy? If so, do the Court's decisions in these cases help in making those distinctions?
2. To what extent does the location of war matter in deciding issues of who is an enemy?
3. Would you say Lincoln's and FDR's actions in these cases were similar or different?

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

### Introduction

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

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

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

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

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



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

## Supreme Court Cases Used in Script

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

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

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

## Central Constitutional Issues in Cases Used in Script

*Hamdi v. Rumsfeld*, 2004

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

*Rasul v. Bush*, 2004

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

*Hamdan v. Rumsfeld*, 2006

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

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

Moderator (L)

Justice Samuel Alito (S)

Justice Steven Breyer (S)

Justice Anthony Kennedy (L)

Justice Sandra Day O'Connor (M)

Justice Antonin Scalia (L)

Justice David Souter (M)

Justice John Paul Stevens (M)

Justice Clarence Thomas (S)

## Script

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

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

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

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

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

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

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

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

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

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

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

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

terrorist attacks” or “harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

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

**O’Connor:** [Yes.]

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

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

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

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

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

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

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

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

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

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

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

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

crime.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**O'Connor:** [That is correct.]

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

**Moderator:** And if these conditions are not met?

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

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

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

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

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

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

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

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

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

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

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

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

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

**O’Connor:** [Yes.]

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

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

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

**O’Connor:** To be clear, our opinion [was limited and] only found legislative authority to detain under the AUMF once it was sufficiently clear that the individual was . . . an enemy combatant. Regardless . . . we have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation’s citizens.

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

could you provide us with some background on that case?

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

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

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

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

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

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

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

**Stevens:** By the express terms of its agreements with Cuba [dating back to 1903], the United States exercises “complete jurisdiction and control” over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. In addition . . . considering that the [habeas] statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee’s citizenship.

**Moderator:** So in simple terms, this means what?

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

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



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

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

**Moderator:** What are the historical precedents for the writ?

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

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

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

**Kennedy:** [Yes.]

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

**Kennedy:** [Yes.]

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

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

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

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

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

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

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

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

**Kennedy:** [Yes.]

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

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

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

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

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

**Stevens:** [Yes.]

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

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

**Alito:** [Yes.]

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

**Alito:** [Yes.]

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

**Alito:** [Correct.]

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

**Alito:** [Correct.]

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

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

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

**Moderator:** Why not?

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

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

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

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

**Moderator:** Justice Breyer, you disagree?

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

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

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

**Moderator:** Where have I heard that before?

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

**Moderator:** What did the court say in that case?

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

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

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

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

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

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

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

## Endnotes

<sup>1</sup> quell

<sup>2</sup> gaoler

<sup>3</sup> granted certiorari

<sup>4</sup> unambiguously

<sup>5</sup> exigent

# Pedagogical Materials

## T-Chart for Notes—Presidential War Powers

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

	<u>Hamdi</u>	<u>Hamdan</u>	<u>Rasul</u>
Background Information			
Central Issue			
Decision			

## Review Questions—Presidential War Powers

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

## Discussion Questions—Presidential War Powers

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

# Executive Privilege—The *Reynolds*, *Nixon*, *In Re Sealed*, and *Clinton* Cases

## Introduction

The Constitution divides powers among three branches of government. It also provides for a system of checks and balances where each branch has the ability to ensure that no one branch becomes more powerful than the others. Presidents can veto legislation; the Congress can override the President's veto. Congress alone can declare war; the President is the commander in chief. Congress authorizes and funds executive agencies; these agencies largely are under the President's directives. Congress can pass legislation; the federal courts can use judicial review to declare laws unconstitutional and thus "null and void."

One of the ways the President has sought to establish its independence is through asserting executive privilege. Throughout American history Presidents have claimed executive privilege when Congress requested information or subpoenaed documents from the executive branch. The roots of executive privilege can be seen as early as the 1790s. When Congress requested information from the President relating to the disastrous St. Clair military expedition (1791) and the negotiation process of the controversial Jay Treaty (1796), George Washington refused to comply with their requests. When faced with a subpoena from Chief Justice John Marshall in the trial of Aaron Burr, President Thomas Jefferson asserted he reserved the right to decide what papers were of public interest. Consequently, he refused to release the information or attend and testify against Burr. President Andrew Jackson invoked executive privilege refusing to supply certain documents when Congress sought information related to the withdrawal of government funds from the Second Bank of the United States. Although not explicitly mentioned in the Constitution, the Supreme Court has repeatedly affirmed executive privilege as a critical feature of the separation of powers system.

The bulk of precedents determining the extent of executive privilege have been generated by modern presidents asserting the independence of the executive branch. After WW II President Harry S Truman enacted policies that blocked congressional investigations into national security problems within the federal government. Executive employees were also barred from testifying before congressional committees. Truman's efforts effectively ended the confrontation and the matter was not definitely resolved. In 1954, President Dwight D. Eisenhower invoked executive privilege maintaining that his staff should not provide any information without exception regarding internal meetings, conversations, or written communications within the White House. Additionally, as the Army-McCarthy Hearings unfolded, Eisenhower ordered employees at the Department of Defense to refuse to testify before congressional committees, reasoning that in doing so, he was ensuring the candid and honest exchange of ideas and advice that executives need to make informed decisions. Perhaps the most important precedent for the formal, legal legitimacy for executive privilege comes from this time period, *United States v. Reynolds* (1953). In a case involving the request of documents associated with a request to produce accident reports of a top secret air force experiment, Chief Justice Fred M. Vinson wrote "the essential question is whether there was a valid claim of privilege. . . . We hold that there was."

The reality of most scenarios where executive privilege is invoked is somewhat like a game of cat and mouse. The first steps are often political maneuvers by Congress and the President. Congress requests certain information and the President makes a calculated decision and often sidesteps the issue or offers some of the requested information with some limits. George Washington eventually released the requested information to Congress, but only to the Senate reasoning that the House was not privy to the documents since it had no treaty-making power. If presidents refuse to cooperate with requests from the legislature, Congress often makes a calculated

decision as to whether it wants to issue subpoenas or take the matter to the courts. If it does so, presidents then often formally invoke executive privilege. The issue then becomes a legal issue and can ultimately become a constitutional matter, as was the case in *United States v. Nixon* (1974). Congress had requested information from President Richard Nixon. He refused the requests. Congress eventually subpoenaed tapes that would shed light on the Watergate break-in and cover-up. Nixon again refused, but eventually complied after the Supreme Court reached a unanimous decision authored by Chief Justice Warren Burger. The Court ordered Nixon to release the tapes to Congress. Nixon did so and later resigned when faced with impeachment.

As the size and scope of the executive branch has expanded, presidents have thousands of individuals that are their employees. Consequently, recent considerations of executive privilege have evolved to include questions of the extent of the privilege; specifically, whether it applies to those who work for the President. Presidents Bill Clinton, George W. Bush, and Barak Obama have all claimed executive privilege for themselves and their advisors. Clinton's claims involved a congressional request for information about the dealings of his Secretary of Agriculture Mike Espy culminating in *In Re Sealed Case*. In 1997, while facing a civil suit stemming from his conduct while governor of Arkansas, President Clinton invoked executive immunity from prosecution while serving as President. Justice John Paul Stevens' opinion in *Clinton v. Jones* is used extensively in this script. In 2004, President Bush invoked executive privilege and refused to disclose the details of Vice President Dick Cheney's meetings with energy executives. The Obama administration invoked executive privilege when Congress sought information from Attorney General Eric Holder concerning a failed gun policy which purposely allowed licensed firearms dealers to sell weapons to illegal buyers, hoping to track the guns to drug dealers and arrest them in Mexico.



## Supreme Court Cases Used in Script

*United States v. Reynolds*, 345 US 1 (1953)

*United States v. Nixon*, 418 US 683 (1974)

*Clinton v. Jones*, 520 US 681 (1997)

*In re Sealed Case*. No. 96-3124. 121 F.3d 729, 326 U.S. App. D.C. 276 (1997)

## Central Constitutional Issues in Cases Used in Script

*United States v. Reynolds*, 1953

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

*United States v. Nixon*, 1974

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

*Clinton v. Jones*, 1997

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

*In Re Sealed Case*, 1997

How far does executive privilege extend to advisors of the President? What types of communications within the executive branch are considered privileged?

## Roles in Script—6 (L—large role; M—medium role)

Moderator (L)

Chief Justice Warren E. Burger (L)

Justice Steven G. Breyer (M)

Justice John Paul Stevens (M)

Chief Justice Fred M. Vinson (L)

Judge Patricia Wald (D.C. Circuit Court) (M)

## The Script

**Moderator:** Greetings to all our guests. We are privileged to have with us today several members from the federal judiciary who have written decisions relating to a topic of considerable debate throughout our history. We welcome Chief Justice Fred M. Vinson, Chief Justice Warren Burger, Justice John Paul Stevens, Justice Steven Breyer, and Judge Patricia Wald.

**The Justices:** [Hello. Thank you. It's a pleasure to be here. Etc.]

**Moderator:** Let's begin our discussion with a simple question. What exactly is executive privilege?

**Wald:** [Simply put,] executive officials have claimed a variety of privileges to resist disclosure of information . . . they felt was crucial to fulfillment of the unique role and responsibilities of the executive branch of our government.

**Moderator:** Has this always been the case that the executive branch withholds information from Congress?

**Wald:** Debate over the President's ability to withhold confidential information from Congress has occurred since the early years of our nation, when President George Washington discussed with his cabinet in 1792 how to respond to a congressional inquiry into the military misfortunes that <plagued><sup>1</sup> General St. Clair's expedition.

**Moderator:** I see. So, there are precedents from the very first administration for this practice.

**Wald:** [Yes. Another] early instance . . . came in the course of the House's investigation into why Alexander Hamilton had deposited into the Bank of the United States certain funds intended to pay off the foreign debt.

**Moderator:** What specifically did Congress want?

**Wald:** The House sought to know Hamilton's authority for this act, to which Hamilton replied that he would not provide any instructions President Washington had given him, because "[t]hat question must, then, be a matter purely between the President and the agent, not examinable by the Legislature."

**Moderator:** It sounds like he was invoking the separation of powers principle.

**Wald:** [Yes.]

**Moderator:** It would seem that Congress and the President are at a stalemate.

**Burger:** In the performance of assigned constitutional duties, each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.

**Moderator:** But, this is an impasse. Can these conflicts be resolved? Doesn't Marshall's famous statement about the role of the courts apply here?

**Burger:** [Yes.] Many decisions of [the] Court . . . have <explicitly><sup>2</sup> reaffirmed the holding of *Marbury v. Madison*, that "it is emphatically the province and duty of the judicial department to say what the law is."

**Moderator:** Is this judicial supremacy?

**Burger:** Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.

**Moderator:** Does the Constitution **require** that courts function in this way or is it more a matter of convenience?

**Burger:** Deciding [these issues] is a delicate exercise in constitutional interpretation.

**Moderator:** And I presume that makes it the job of the courts?

**Burger:** [Yes. It] is a responsibility of [the Supreme] Court as ultimate interpreter of the Constitution.

**Moderator:** We have been discussing some basic principles up to this point. Let's turn to specific cases. Chief Justice Vinson can you briefly give some background on the *Reynolds* case of 1953?

**Vinson:** [An] aircraft had taken flight for the purpose of testing secret electronic equipment, with four civilian observers aboard. While aloft, fire broke out in one of the bomber's engines. Six of the nine crew members and three of the four civilian observers were killed in the crash.

**Moderator:** How are these events related to our discussion of executive privilege?

**Vinson:** The widows of the three deceased civilian observers brought . . . suits against the United States.

**Moderator:** What were these widows seeking in these suits?

**Vinson:** The [widows] moved, under Rule 34 of the Federal Rules of Civil Procedure, for production of the Air Force accident investigation report and the statements . . . taken in connection with the investigation.

**Moderator:** I can see how the executive branch might be a bit nervous about revealing military information since the Air Force is under the authority of the Executive.

**Vinson:** [Yes.] The Government moved to <suppress><sup>3</sup> the request, claiming that these matters were privileged against disclosure.

**Moderator:** What was the basis for the Air Force refusing to release the accident report?

**Vinson:** [The Air Force said the Federal Rule of Civil Procedure] compels production only of matters “not privileged.”

**Moderator:** So in essence they said this information was protected information and the Rules of Civil Procedure did not apply.

**Vinson:** [Exactly.]

**Moderator:** So, what was the Court’s decision?

**Vinson:** When the Secretary of the Air Force lodged his formal “Claim of Privilege,” he invoke[d] the privilege against revealing military secrets . . . [and] asserted that the material could not be furnished without seriously hampering national security, flying safety, and secret military equipment.

**Moderator:** Is there precedent for such an action?

**Vinson:** [Yes. This] privilege . . . is well established in the law of evidence.

**Moderator:** OK. But, is it well-established in regards to this situation? There is no trial here just a simple request for information from a government agency.

**Vinson:** Judicial experience with the privilege which protects military and state secrets has been limited in this country.

**Moderator:** Then how does a justice decide this issue if there isn’t a lot of precedent?

**Vinson:** Judicial control over the evidence in a case cannot be <abandoned><sup>4</sup> to the <whim><sup>5</sup> of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure. . . . It may be possible . . . that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.

**Moderator:** So, some sort of balancing test is needed.

**Vinson:** [It was] a time of vigorous preparation for national defense; air power is one of the most potent weapons in our defense. Newly developing electronic devices [had] greatly enhanced the effective use of air power.

**Moderator:** But, aren’t there compelling reasons motivating these requests for information about the accident?

**Vinson:** When the formal claim of privilege was filed by the Secretary of the Air Force, [and the] possibility that military secrets were involved, there was certainly a sufficient showing of privilege to cut off further demand for the documents.

**Moderator:** So there should be an automatic deference to the Executive Branch?

**Vinson:** Even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.

**Moderator:** So I take it that in the *Reynolds* case, the Court decided to accept this claim of privilege?

**Vinson:** [Yes. The] formal claim of privilege, made [by the Secretary of the Air Force] under the circumstances of this case, [had] to prevail.

**Burger:** However, . . . the need for confidentiality of high-level communications . . . cannot sustain an absolute, unqualified Presidential privilege of immunity . . . under all circumstances.

**Moderator:** I think this is a good point to have Chief Justice Burger join our discussion. The Watergate Tapes case were in large part a controversy involving materials President Nixon sought to keep from congressional investigators.

**Burger:** [Thank-you.]

**Moderator:** Before we get into the nitty-gritty, we need a little background on the events leading up to this case.

**Burger:** On March 1, 1974, a grand jury of the United States District Court . . . returned an indictment charging seven named individuals with various offenses, including conspiracy to defraud the United States and to obstruct justice. . . . The grand jury [also] named the President as an unindicted coconspirator.

**Moderator:** And these indictments were the result of congressional and special prosecutor investigations into the cover up activities of the White House in regards to the break in of the Democratic National Headquarters at the Watergate Complex.

**Burger:** [That's right.]

**Moderator:** And in the midst of all this, there was a tussle between Congress and President Nixon over tape recordings made in the oval office.

**Burger:** [Correct]

**Moderator:** This seems pretty simple. Having access to these tapes would shed light on the extent of the President's knowledge about the cover up activities of his advisors.

**Burger:** [Correct]

**Moderator:** And I remember, the special prosecutor issued a subpoena forcing the President to release these tapes?

**Burger:** [That's right.] This subpoena required the production . . . of certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others.

**Moderator:** And the President resisted?

**Burger:** [Yes, partially.] The President publicly released edited transcripts of 43 conversations; portions of 20 conversations.

**Moderator:** And . . . ?

**Burger:** [One day later] the President's counsel filed . . . a motion to quash the subpoena accompanied by a formal claim of privilege.

**Moderator:** So in other words, President Nixon was saying he had complied with the requests and additional information was privileged and he would not release it?

**Burger:** [Yes. A U.S. District Court then ordered] the President . . . or employee with custody or control of the documents or objects subpoenaed to deliver to the District Court the originals of all subpoenaed items.

**Moderator:** And I take it that on appeal it went to the Supreme Court?

**Burger:** In support of his claim of absolute privilege, the President's counsel [argued there] is the valid need for protection of communications between high Government officials and those who advise and assist them; the importance of this confidentiality is too plain to require further discussion.

**Moderator:** I suppose that makes sense.

**Burger:** Those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the <damage><sup>6</sup> of the decision-making process. Candid, objective, blunt or even harsh opinions [are often necessary] in Presidential decision-making.

**Moderator:** True. But isn't this case different? There were criminal investigations going on. Does this make President Nixon's claim of executive privilege a bit of a stretch?

**Burger:** [Exactly.] The <obstacle><sup>7</sup> an absolute, unqualified privilege . . . plainly conflicts with the function of the courts.

**Moderator:** And I presume that courts would potentially need this information as they proceeded with their trials?

**Burger:** [Well said.] We have . . . an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is fundamental.

**Moderator:** And by that you mean the system by which there are two sides operating within pre-established rules in a court of law?

**Burger:** [Yes.] The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

**Moderator:** So for you, in this instance, it was more than a simple claim of executive privilege. It was about evidence and criminal procedure.

**Burger:** [Yes.] In this case, the President challenge[d] the . . . production of materials for use in a criminal prosecution; he [did] so on the claim that he [had] a privilege against <revealing><sup>8</sup> confidential communications. He [did] not place his claim of privilege on the ground they are military or diplomatic secrets.

**Moderator:** And then your decision ruled against President Nixon?

**Burger:** [Yes.] We conclude[d] that, when . . . asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality; it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. [The claim of privilege] must yield to the demonstrated, specific need for evidence in a pending criminal trial.

**Moderator:** Let's turn our attention to *Clinton v. Jones*. Justice Stevens wrote the majority opinion and Justice Breyer submitted a concurring opinion in that case.

**Stevens:** [Paula Jones], a private citizen, [sought] to recover damages from the [President] based on actions allegedly taken before his term began.

**Moderator:** When he was the governor of Arkansas?

**Stevens:** [Yes.] The President submitted that in all but the most exceptional cases the Constitution requires federal courts to defer such litigation until his term ends and that, in any event, respect for the office warrants such a stay.

**Moderator:** A stay means in this instance a delay in the legal proceedings.

**Stevens:** [Correct.]

**Moderator:** And what was the basis of Ms. Jones' suit?

**Stevens:** She allege[d] that a [state trooper] persuaded her to . . . visit the Governor in a hotel, where he made sexual advances that she <strongly><sup>9</sup> rejected. She further claimed that her superiors . . . subsequently dealt with her in a hostile and rude manner, and changed her duties to punish her for rejecting those advances.

**Moderator:** And President Clinton's response was to ask for a stay?

**Stevens:** He . . . filed a motion to dismiss on grounds of Presidential immunity, and requested the court to defer all other pleadings and motions.

**Moderator:** I take it that he argued immunity meant he could not be bothered with a legal proceeding?

**Breyer:** [Yes.]

**Moderator:** So, at this point of the story we aren't at the Supreme Court level yet.

**Stevens:** [Yes.] The District Judge denied the motion to dismiss on immunity grounds and ruled that . . . the case could go forward, but ordered any trial stayed until the end of petitioner's Presidency. Although she . . . held that "the President has absolute immunity from civil damage actions arising out of the execution of official duties of office," she was not convinced that a President has absolute immunity from civil causes of action arising **prior** to assuming the office.

**Moderator:** So the President filed an appeal?

**Stevens:** [Yes. The President's counsel] argued that this . . . created serious risks for the institution of the Presidency.

**Moderator:** What were these alleged "serious risks" for the institution of the Presidency?

**Stevens:** As a starting premise, [the President] occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties.

**Moderator:** OK. I think we would all agree on that point.

**Stevens:** [And] given the nature of the office—the doctrine of separation of powers—places limits on the authority of the Federal Judiciary to interfere with the Executive Branch that would be transgressed by allowing this action to proceed.

**Breyer:** [But,] distraction and distortion are . . . important ingredients of that potential public harm. Indeed, a lawsuit that significantly distracts an official from his public duties . . . as can a threat of potential future liability. . . . It may well be that the trial of this case cannot take place without significantly interfering with the President's ability to carry out his official duties.

**Moderator:** So his job is too important to be distracted with a legal proceeding therefore, he gets immunity?

**Stevens:** [Well . . . yes and no.]

**Moderator:** OK. Give us the "yes" answer.

**Stevens:** Public servants represent the interest of society as a whole. . . . The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity.



**Moderator:** So a proceeding like a trial may have impact on the public if the government official can't fully and effectively do his job.

**Breyer:** [Yes. Jefferson noted that the Executive would be powerless] “if he were subject to the commands of the [Court] & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?”

**Stevens:** The point of immunity for such officials is to <prevent><sup>10</sup> an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion.

**Moderator:** And the “no” answer?

**Stevens:** The principal rationale for affording certain public servants immunity from suits arising out of their official acts is inapplicable to **unofficial** conduct.

**Moderator:** So, it does apply if the actions in question are connected to the functions of the job. Whereas, immunity does not apply if the actions are private; or as you say “unofficial” conduct not directly connected to the office.

**Stevens:** [Yes.]

**Moderator:** Is there any precedent for presidents being subject to legal action while in office?

**Stevens:** Sitting Presidents have responded to court orders . . . with sufficient frequency that such interactions . . . can scarcely be thought a novelty.

**Moderator:** So, for instance?

**Stevens:** President Monroe responded to written interrogatories. President Nixon—as noted above—produced tapes in response to a subpoena. . . . President Ford complied with an order to give a deposition in a criminal trial, and President Clinton [himself] has twice given videotaped testimony in criminal proceedings. . . . Moreover, sitting Presidents have also voluntarily complied with judicial requests for testimony. President Grant gave a lengthy deposition in a criminal case . . . and President Carter similarly gave videotaped testimony for use at a criminal trial.

**Breyer:** [However,] since 1960 . . . the number of civil lawsuits filed annually in Federal District Courts has increased from under 60,000 to about 240,000. . . . An increasingly complex economy has led to increasingly complex sets of statutes, rules and regulations that often create potential liability with or without fault.

**Moderator:** So, if the President does not have immunity he is a “sitting duck” so to speak?

**Breyer:** [If] such lawsuits may proceed against a sitting President, the consequence . . . is that a sitting President, given the visibility of his office, could well become “an easily identifiable target for suits for civil damages.”

**Moderator:** But, we still have not adequately addressed the issue of immunity for personal actions not specifically associated with the performance of their office.

**Stevens:** [But, if] the Framers of the Constitution had thought it necessary to protect the President from the burdens of private litigation; we think it far more likely that they would have adopted a categorical rule.

**Moderator:** So, in this case, the Court decided against President Clinton's request for immunity?

**Stevens:** [Yes.] Other than the fact that a trial may consume some of the President's time and attention . . . we decided the District Court may have given undue weight to the concern that a trial might generate unrelated civil actions that could conceivably <hinder><sup>11</sup> the President in conducting the duties of his office. . . . But no such impingement upon the President's conduct of his office was shown here.

**Moderator:** So in other words, it's a tough job and presidents should be able to handle it?

**Stevens:** Although scheduling problems may arise, there is no reason to assume that the . . . Courts [would not be able] to accommodate the President's needs . . . of giving the utmost deference to Presidential responsibilities.

**Moderator:** Judge Wald, you have been patiently waiting. Could you quickly brief us on the Espy case involving President Clinton's secretary of agriculture?

**Wald:** [Yes. There were] allegations that Espy . . . improperly accepted gifts from individuals and organizations with business before the U.S. Department of Agriculture. . . . These allegations led to the appointment of an Independent Counsel . . . to investigate.

**Moderator:** And as I recall President Clinton took some sort of action in this matter.

**Wald:** [Yes. He] . . . directed the White House Counsel to . . . advise [him] on whether he should take executive action against Espy. On October 3, 1994, Espy announced his resignation.

**Moderator:** Well, it sounds like this should be the end of the matter.

**Wald:** [Well, not exactly. Later] a grand jury issued a subpoena [seeking] all documents on Espy and other subjects of the [initial] investigation.

**Moderator:** So the courts wanted a lot more documentation?

**Wald:** [Yes.]

**Moderator:** Did the White House comply?

**Wald:** [Yes and no.] The White House produced a log . . . that indicated that 84 documents were withheld on grounds of the deliberative process privilege.

**Moderator:** What exactly is deliberative process privilege?

**Wald:** Materials [that reveal] the President's deliberations—as, for example, when the President decides to pursue a particular course of action, but asks his advisers to submit follow-up reports so that he can monitor whether this course of action is likely to be successful.

**Moderator:** But, the number of individuals giving advice to the President could number in the hundreds or perhaps even thousands.

**Wald:** [Exactly. The issue then is whether] the privilege only extends to direct communications with the President, or does it extend further to include communications that involve his chief advisers? And if [so] how far down into his circle of advisers does it extend?

**Moderator:** Well what did your court decide?

**Wald:** A . . . case can . . . be made for extending the presidential communications privilege beyond those materials with which the President is personally familiar.

**Moderator:** So deliberation privilege is justifiable?

**Wald:** [Yes.] The need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources, the privilege must apply both to communications which these advisers <asked for><sup>12</sup> and received from others as well as those they authored themselves.

**Moderator:** I see we are nearly out of time. I cannot help but conclude that the courts have not consistently decided this issue?

**Stevens:** The lines between the powers of the three branches are not always neatly defined. As Madison explained, separation of powers does not mean that the branches ought to have no <interest><sup>13</sup> in, or no controul over the acts of each other.

**Breyer:** [And, as Joseph Story] wrote in his *Commentaries*: “There are . . . incidental powers, belonging to the executive department, which are necessarily implied [and] must necessarily be included the power to perform them, without any obstruction or impediment whatsoever.

**Wald:** [And,] the President himself must make decisions relying substantially . . . on the information and analysis supplied by advisers. . . . Without protection . . . advisors may . . . forego obtaining comprehensive [information] for fear of losing deniability.

**Burger:** [Yes, indeed.] The President's need for complete <honesty><sup>14</sup> and objectivity from advisers calls for great deference from the courts. . . . But this presumptive privilege must be considered in light of our historic commitment to the rule of law.

**Moderator:** And with that we conclude our discussion. I think all of us would agree that this issue is sure to surface again. As we can see it is far from a settled issue. Hopefully some of the ideas expressed here can be used for future controversies involving this idea of executive privilege. On behalf of our panel, good night and good luck.

## Endnotes

<sup>1</sup> beset

<sup>2</sup> unequivocally

<sup>3</sup> quash

<sup>4</sup> abdicated

<sup>5</sup> caprice

<sup>6</sup> detriment

<sup>7</sup> impediment

<sup>8</sup> disclosure

<sup>9</sup> vehemently

<sup>10</sup> forestall

<sup>11</sup> hamper

<sup>12</sup> solicited

<sup>13</sup> agency

<sup>14</sup> candor

# Pedagogical Materials

## T-Chart for Notes– Executive Privilege

**Instructions:** As students listen to the scripted conversation, they should take notes using the T-Chart below to organize and summarize the key ideas from the *Reynolds*, *Nixon*, *Clinton* and *In Re Sealed* cases.

	<b>Reynolds</b>	<b>Nixon</b>	<b>Clinton</b>	<b>In Re Sealed</b>
Background Information				
Central Issue				
Decision				

## Review Questions–Executive Privilege

1. In each case, what does the President want considered privileged information?
2. What are the arguments made by individuals or Congress in these cases that justify their request to have access to information from the Executive Branch?
3. In each case, how does the idea of separation of powers apply?

## Discussion Questions–Executive Privilege

1. In your view, does it matter what type of information being requested matter as to whether it should be considered privileged?
2. Do you think if advisors knew their communication with the President can be accessed by Congress it would have an impact on their advice to the President?
3. Should executive privilege apply to advisors to the President’s advisors and not just the President?
4. To what extent, is the *Nixon* case different than the other cases?

# Enumerated Powers and the Delegation Doctrine—The *Curtiss-Wright* and *Youngstown* Cases

## Introduction

Perhaps among the most important features embedded in the U.S. Constitution, are the principles of separation of powers and the check and balance system. However, these often result in conflicts pitting the executive branch against the legislative branch.

This problem was discussed before the Constitution was operable. In the ratification debate Antifederalists argued the blending of powers between the executive and legislature, most notably in the Senate, would cause problems. Federalists countered that the enumeration, checking and separation of powers in the Constitution were adequate so as to prevent the encroachment of one branch on another.

Central in many disputes involving any constitution are debates over methods of interpretation. The U.S. Constitution is not immune from these disputes. Among the shortest of constitutional texts, the U.S. Constitution has been framed as either a definitive text that needs minimal clarification or as a set of guidelines that needs continuous interpretation. Central to this debate is the nature of enumerated powers, as well as the dispute over the legitimacy of deriving implied powers from the text. Constitutional textualists submit that the powers enumerated in the text can be simply applied when various branches have contesting claims of authority. On the other hand, proponents of a living Constitution argue there is an inherent vagueness in the wording of the Constitution. Consequently, principles should be employed when deciphering the nature, limits and extent of powers found in the text.

Scholars have noted that the delegation doctrine is among the troublesome issues to emerge in the relationship between the executive and legislative branches. In practice, the delegation doctrine means that one branch of government can delegate its powers to another branch. It is explicitly stated in many constitutions throughout the world and American scholars who support the practice suggest it is implicit within the U.S. Constitution. In *J.W. Hampton, Jr., & Co. v. United States* (1928) the Supreme Court gave judicial sanction to the delegation doctrine stating that so long as there was an “intelligible principle” guiding Congress when it sought the assistance of another branch of government, “the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination.”

The theory behind these legislative delegations is can be seen within the activities of administrative agencies. These agencies are created by Congress through legislation that grants the President authority to fill in details of Congressional statutes. Many suggest that officers of these agencies can expertly and objectively enact legislation without facing the pressures of electoral politics. Critics argue that this type of delegation is incompatible with fundamental ideas undergirding the American constitutional system. John Locke, in his *Second Treatise of Government*, noted “The Legislative cannot transfer the Power of Making Laws to any other hands. . . . nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen, and Authorised to make Laws for them.” Secondly, critics point to the text of Article I of the Constitution that states “All legislative Powers herein granted shall be vested in a Congress of the United States.” Thus, when critics look at the realities of the day-to-day workings of government, they see the myriad of executive agencies that have been given the authority to write and enforce administrative rules as an example of government running “rough shod” over the plain text of the Constitution.

Another issue that arises in the relationship between the executive and the legislative branches is in the implementation and execution of foreign policy. The president is charged with conducting foreign policy although the approval of two-thirds of the Senate is needed to ratify treaties. Two-thirds of the Senate is needed to confirm appointment of ambassadors and Congress has the power to declare war. Additionally, foreign policy conflicts have arisen when presidents have issued executive orders without congressional approval. Presidents have argued that under the Commander in Chief Clause, they have wide latitude in conducting foreign policy. Those willing to grant the executive these broad powers find their support in Alexander Hamilton's *Federalist 69* and, perhaps, more explicitly in a speech on 7 March 1800 by John Marshall in the U.S. House of Representatives. Marshall noted the president was "the sole organ of the nation in its external relations, and its sole representative with foreign nations." This idea would later be detailed in the seminal case of *U.S. v. Curtiss-Wright*.

Critics, in the Whig tradition, have a wary eye on executive prerogative. They insist the design and text of the Constitution suggests that the President is not singularly responsible in foreign policy. Since the president must coordinate when conducting treaties with the Senate and the House funds war efforts, any suggestion that the executive has sole powers in this regard is without merit. Additionally, those critical of the sole organ theory, point to excessive secrecy that may result when presidents conduct foreign policy based on this model. Consequently, they propose that diplomatic proceedings and military intelligence should be shared with Congress since the legislative process offers greater transparency.

The materials used in this script are taken from three 20<sup>th</sup> century cases. In *Curtiss-Wright* (1936), Justice George Sutherland's opinion primarily addressed the delegation doctrine and in doing so, articulated the sole organ theory of the presidency. When FDR, through an executive order, stopped the sale of munitions to Paraguay and Bolivia, the Curtiss-Wright Corporation filed suit maintaining congressional authorization of power over commerce to the executive was unconstitutional. Likewise in the *Youngstown* case (1952), the Court again had to decide if President Harry Truman's powers as commander in chief conflicted with Congressional regulatory powers in a takeover of the steel industry during the Korean War.

## Supreme Court Cases Used in Script

*United States v. Curtiss-Wright Export Corporation et al*, 299 U.S. 304 (1936)

*Youngstown Sheet and Tube Company et al v. Sawyer*, 343 U.S. 579 (1952)

## Central Constitutional Issues in Cases Used in Script

*United States v. Curtiss-Wright Corporation et al*, 1936

Can Congress, through a joint resolution, delegate legislative powers to the President? Can Congress delegate sole responsibility for foreign affairs to the Executive Branch?

*Youngstown Sheet and Tube et al v. Sawyer*, 1952

Did the President overstep the boundaries separating the legislative and executive functions in the Constitution? Did the Constitution grant the President powers to protect the nation in times of national emergency?

## Roles in Script—7 (L—large role; M—medium role; S—small role)

Moderator (L)

Justice Hugo Black (L)

Justice William O. Douglas (M)

Justice Felix Frankfurter (M)

Justice Robert H. Jackson (S)

Justice George Sutherland (L)

Justice Frederick M. Vinson (L)



## The Script

**Moderator:** Hello and welcome. Today we are considering an issue that dates back to the American Revolution. As Americans, we have deep suspicions when executives use power in ways that threaten liberties. The brevity of the Constitution's text complicates our attempts to define and confine the parameters of executive power. We have individuals with us who have offered their views on the matter in the form of Supreme Court decisions. Welcome Justices Sutherland, Black, Jackson, Vinson, Douglas, and Frankfurter.

**Justices:** It's nice to be here. Hello. It's a pleasure to be here. Etc.

**Moderator:** Two basic ideas in our Constitution are the separation of powers into three branches of government and the system of checks and balances. Often these concepts come into play when Congress delegates powers to the executive branch.

**Frankfurter:** President Harding is reported to have said that government . . . is a very simple thing. He must have said that as a fleeting inhabitant of fairyland. The opposite is the truth. A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale.

**Douglas:** [Felix, could we . . .]

**Frankfurter:** The Founders of this Nation . . . acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for effective power if a society is to be at once <consistent><sup>1</sup> and civilized, but also on the need for limitations on the power of governors over the governed.

**Douglas:** [You will have to forgive Felix. He perpetually seeks to lecture and he often taxes all of us.]

**Frankfurter:** [My apologies. I will try to resist the urge to lecture.]

**Moderator:** But, I do want to focus on some specific instances when the powers of the president and Congress were at loggerheads. Since each of you have written Supreme Court decisions relating to this issue, we want to highlight the basic principles used by justices in a few decisions relating to executive powers.

**Jackson:** [The central dilemma is this.] While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate depending upon their <disconnection><sup>2</sup> or <connection><sup>3</sup> with those of Congress.

**Douglas:** Stalemates may occur when emergencies mount and the Nation suffers for lack of harmonious, reciprocal action between the White House and Capitol Hill.

**Vinson:** The Executive may be under a grave constitutional duty to act for the national protection in situations not covered by the acts of Congress.

**Douglas:** [But, Justice Brandeis once said that] the doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency, but to <prevent><sup>4</sup> the exercise of arbitrary power. The purpose was not to avoid friction, but . . . to save the people from autocracy.

**Vinson:** [However,] the Framers knew, as we should know in these times of peril, that there is real danger in Executive weakness.

**Moderator:** But weren't most of the Framers more concerned with the opposite; too much executive power?

**Vinson:** There is no cause to fear Executive tyranny so long as the laws of Congress are being faithfully executed. Certainly there is no basis for fear of dictatorship when the Executive acts . . . only to save the situation until Congress could act.

**Douglas:** Legislative power . . . is slower to exercise. There must be delay while the <slow and inefficient><sup>5</sup> machinery of committees, hearings, and debates is put into motion. That takes time . . . [and an] emergency may take its toll in wages, consumer goods, war production, the standard of living of the people, and perhaps even lives.

**Vinson:** [Precisely. In the past] when the national revenue laws were openly flouted in some sections of Pennsylvania, President Washington, without waiting for a call from the state government, summoned the militia and took decisive steps to secure the faithful execution of the laws.

**Douglas:** [However.] We pay a price for our system of checks and balances, for the distribution of power among the three branches of government.

**Vinson:** It is . . . apparent that the Presidency was deliberately fashioned as an office of power and independence. Of course, the Framers created no autocrat capable of <claiming><sup>6</sup> any power unto himself at any time. But neither did they create a <robot><sup>7</sup> <unable><sup>8</sup> to exercise the powers of Government at a time when the survival of the Republic itself may be at stake.

**Douglas:** Today, a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow, another President might use the same power to prevent a wage increase, to curb trade unionists, [or] to regiment labor.

**Moderator:** I take it that you are referring to when President Harry Truman ordered the military to take over the steel mills in the midst of the Korean War?

**Douglas:** [Yes. it's a pretty simple matter.]

**Moderator:** How so?

**Douglas:** The power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend, and that it is the function of the Congress to legislate.

**Moderator:** This does seem pretty straightforward.

**Frankfurter:** [However,] the judiciary may . . . have to intervene in determining where authority lies as between the democratic forces in our scheme of government. But . . . we should be wary and humble. Such is the teaching of this Court's role in the history of the country.

**Douglas:** [Felix, it's still pretty simple. You always want to complicate things.]

**Moderator:** Let's focus our attention on a few specific cases from the 20th century. Our first case involves the President's actions in a war in South America in the 1930s between Argentina and Bolivia. If my memory is correct, President Franklin Roosevelt sought to limit and end that conflict?

**Sutherland:** [Yes. FDR said in an executive order that he was] acting under and by virtue of the authority conferred . . . by [a] resolution of Congress [that he was] prohibiting the sale of arms and munitions of war . . . to those countries engaged in armed conflict in the Chaco.

**Moderator:** Did FDR have a reason for issuing this executive order?

**Sutherland:** [FDR thought that this could] contribute to the reestablishment of peace between those countries.

**Moderator:** In the past, have other presidents acted in a similar fashion when Congress has delegated authority to the executive branch?

**Sutherland:** [An] Act of June 4, 1794, authorized the President to lay, regulate and revoke embargoes. He was "authorized . . . whenever, in his opinion, the public safety shall so require," to lay the embargo upon all ships and vessels in the ports of the United States, including those of foreign nations "under such regulations as the circumstances of the case may require."

**Moderator:** That would have been George Washington and if I am not mistaken, our foreign policy was complicated by the events unfolding in the French Revolution.

**Jackson:** A judge . . . may be surprised at the poverty of really useful and <clear><sup>9</sup> authority applicable to concrete problems of executive power as they actually present themselves.

**Moderator:** Is this true Justice Sutherland?

**Sutherland:** [Not exactly. Another] Act of March 3, 1795 gave the President authority to permit the exportation of arms . . . the only prescribed guide for his action being that such exports should be in "cases connected with the security of the commercial interest of the United States, and for public purposes only."

**Jackson:** Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as <puzzling><sup>10</sup> as the dreams Joseph was called upon to interpret for Pharaoh.

**Moderator:** So, to get back to Justice Sutherland's point, in essence, Congress granted the president the ability to both prohibit and permit trade with foreign nations?

**Sutherland:** [Yes. And this practice continued.] The Act of March 3, 1805 made it lawful for the President . . . to forbid, by proclamation, all intercourse with such vessel, and with every armed vessel of the same nation, and . . . to prohibit all supplies and aid from being furnished them.

**Moderator:** I am assuming this was connected to the Embargo Acts during the Jefferson administration. Is that correct?

**Sutherland:** [Yes. And furthermore,] Congress passed joint resolutions April 22, 1898, and January 31, to prohibit the export of coal or other war materiel. The resolution of 1898 authorized the President in his discretion, and with such limitations and exceptions as shall seem to him expedient: to prohibit such exportations.

**Moderator:** Those resolutions would have given Presidents McKinley and Harding discretionary executive authority.

**Sutherland:** The resolution of March 14, 1912, provides . . . .

**Jackson:** [Look.] A century and a half of <biased><sup>11</sup> debate and scholarly speculation yields no net result, but only supplies more or less apt quotations from respected sources on each side of any question.

**Moderator:** Justice Jackson, I know you want to get into the discussion. We all know your concurring opinion in the Youngstown case is critical, but for now can we let Justice Sutherland finish his thought?

**Sutherland:** [Thank-you.] A resolution of March 14, 1912, [provided] that whenever the President shall find that, in any American country, conditions of domestic violence exist which are promoted by the use of arms or munitions of war <purchased><sup>12</sup> from the United States . . . it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe.

**Moderator:** And this was directed on behalf of Woodrow Wilson as the United States was dealing with a civil war in Mexico.

**Sutherland:** [Correct.] The uniform, long-continued and undisputed legislative practice rests upon an admissible view of the Constitution which . . . we should not feel at liberty . . . to disturb.

**Moderator:** So, in the 1930s, what exactly did the Curtiss-Wright Company do that got them into trouble?

**Sutherland:** [Well, the Curtiss-Wright corporation] conspired to sell in the United States certain arms of war . . . to Bolivia, a country . . . engaged in armed conflict.

**Moderator:** And, am I right in guessing Congress had given FDR permission to make decisions about trade with nations that were at war?

**Sutherland:** [Yes. Curtiss-Wright was] in violation of the Joint Resolution of Congress approved May 28, 1934, and the provisions of a proclamation issued on the same day by the President of the United States.

**Moderator:** So, I take it FDR had legitimate authority to make his proclamation? What exactly did the congressional resolution say?

**Sutherland:** [Congress said] that if the President finds that the prohibition of the sale of arms and munitions of war . . . may contribute to the reestablishment of peace between those countries . . . it shall be unlawful to sell . . . any arms or munitions . . . to the countries now engaged in that armed conflict.

**Moderator:** It sounds like a simple matter of Congress again delegating their responsibilities to the President.

**Sutherland:** [Yes.]

**Moderator:** I am perplexed though about the conflict between the enumerated the powers of Congress to regulate commerce in Article I in contrast to the power of the President to conduct foreign policy. How do we reconcile this dilemma in this case?

**Sutherland:** First [we need to] consider the differences between the powers . . . of government in respect of foreign or external affairs and those in respect of domestic or internal affairs.

**Moderator:** And in your view, what are the differences?

**Sutherland:** The federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true **only** in respect of our internal affairs.

**Moderator:** So when it comes to the executive branch and external affairs, I take it you believe that the President is not limited in the same way as Congress.

**Sutherland:** The President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."

**Moderator:** But, this seems to be a granting of power to the Executive branch not warranted by the

text of the Constitution.

**Sutherland:** If, in the maintenance of our international relations, embarrassment . . . is to be avoided and success for our aims achieved . . . within the international field [we] must often accord to the President a degree of discretion and freedom from . . . restriction which would not be admissible were domestic affairs alone involved.

**Moderator:** And I suppose there are other practical matters involved here as well?

**Sutherland:** [The President,] not Congress, has the better opportunity of knowing the conditions . . . in foreign countries, and especially . . . in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic . . . officials.

**Moderator:** At this point let's return to the case Justice Douglas referenced earlier; the Steel Seizure Case. Justice Black, you wrote the majority opinion in that case, could you fill us in on some of the details surrounding that case?

**Black:** We [were] asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the nation's steel mills.

**Moderator:** This seems reasonable that the President as commander in chief would want the military well supplied since they were engaged in the Korean War.

**Black:** [However.] the mill owners argued that the President's order amount[ed] to lawmaking, a legislative function which the Constitution has expressly <given><sup>13</sup> to the Congress, and not to the President.

**Moderator:** OK. But, aren't there legitimate reasons for the President to take this course of action in time of war?

**Vinson:** [Yes. The Secretary of Defense said that] a work stoppage in the steel industry will result immediately in serious <reduction><sup>14</sup> of production of essential weapons and munitions of all kinds.

**Moderator:** How much of a "serious reduction?"

**Vinson:** He illustrated by showing that 84% of the national production of certain alloy steel is currently used for production of military-end items and that 35% of total production of another form of steel goes into ammunition, 80% of such ammunition now going to Korea.

**Moderator:** So why exactly was this an issue for the Court? It seems pretty cut and dry.

**Black:** [Not exactly.] The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress . . . which

such a power can fairly be implied.

**Vinson:** Those [were] extraordinary times. A world not yet recovered from the devastation of World War II [was] forced to face the threat of another and more terrifying global conflict. . . . The United States was instrumental in securing adoption of the United Nations Charter and . . . the first purpose of the United Nations is to maintain international peace and security, and . . . to take effective collective measures for the prevention and removal of threats to the peace.

**Moderator:** Are you suggesting our international obligations automatically expand the powers of the President?

**Vinson:** In 1950, when the United Nations called upon member nations “to render every assistance” to repel aggression in Korea, the United States furnished its vigorous support. For almost two full years, our armed forces [were] fighting [and] suffering casualties of over 108,000 men. Congressional support of the action in Korea [was] manifested by provisions for increased military manpower and equipment.

**Moderator:** True, but you still need to constitutionally justify the broad powers granted to Truman in this instance.

**Vinson:** Further efforts to protect the free world from aggression are found in the congressional enactments of the Truman Plan for assistance to Greece and Turkey and the Marshall Plan for economic aid . . . in Western Europe. Our treaties represent not merely legal obligations, but show congressional recognition that mutual security . . . is the best security against the threat of aggression. . . . Constant international tensions . . . demonstrate how precarious is the peace. Even this brief review of our responsibilities in the world community discloses the enormity of our undertaking.

**Moderator:** The Constitution, Justice Vinson?

**Vinson:** Alert to our responsibilities . . . Congress enacted a large body of implementing legislation. As an illustration of the magnitude of the over-all program, Congress appropriated \$130 billion for our own defense and for military assistance to our allies since the June, 1950, attack in Korea.

**Black:** [As you can see, my colleague has failed to recognize that] the Constitution limits [executive] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor <vague><sup>15</sup> about who shall make laws which the President is to execute.

**Moderator:** But isn't it necessary or proper for the President to take this action in time of war?

**Black:** The first section of the [Constitution] says that “All legislative Powers herein granted shall be vested in a Congress of the United States [and] after granting many powers to the Congress, Article I goes on to provide that Congress may make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.

**Moderator:** At this point it may be important for us to hear from Justice Jackson. As I recall, in your opinion in the *Youngstown* case, you set up a framework to analyze the extent of executive powers. Can you explain?

**Jackson:** [Certainly.] When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.

**Moderator:** Is there a situation where the President's power is at a minimum?

**Jackson:** When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers . . . his power is at its lowest ebb.

**Moderator:** And is there something in between?

**Jackson:** [Yes.] There is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or <inactivity><sup>16</sup> may sometimes, at least, as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on events . . . rather than on abstract theories of law.

**Moderator:** So, let's delve deeper into the circumstances.

**Vinson:** In the Mutual Security Act of 1951, Congress authorized . . . assistance to friendly countries to strengthen the mutual security and individual and collective defenses of the free world. . . . In addition to direct shipment of military equipment to nations of the free world, defense production in those countries relies upon shipment of machine tools and allocation of steel tonnage from the United States.

**Moderator:** So we have congressional support for Truman's action?

**Vinson:** [Additionally,] Congress directed the President to build up our defenses . . . recognizing the "grim fact . . . that the United States is now engaged in a struggle for survival" and that "it is imperative that we now take those necessary steps to make our strength equal to the peril of the hour."

**Jackson:** [Not so fast here.] No congressional authorization exists for this seizure.

**Moderator:** So, in this instance, the seizure of the steel mills does not fit into your first scenario. Can it be defended under flexible tests in your second category?

**Jackson:** [No.] The President cannot claim [that the seizure was] necessitated or invited by failure of Congress to legislate upon the occasions . . . for seizure of industrial properties.

**Moderator:** Justice Douglas previously referenced presidential powers and how they might intersect



in labor and management issues. I think this may be relevant here. Am I correct in assuming that the Taft-Hartley Act is an important factor in this case?

**Black:** [Yes, it is.] When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency.

**Moderator:** For those who may not be familiar, the Taft-Hartley Act set standards regulating the negotiation processes when unions and management were attempting to resolve a dispute?

**Black:** [Yes.]

**Moderator:** And specifically, the law provided for a mediation process and the government would be the neutral party in the negotiations.

**Black:** [Yes.]

**Moderator:** And, if there was a time of national crisis, unions could not call for a strike that could endanger national security.

**Black:** [Yes.] Apparently it was thought that the technique of seizure . . . would interfere with the process of collective bargaining. The plan Congress adopted . . . sought to bring about settlements by use of the customary devices of mediation, conciliation, investigation by boards of inquiry, and public reports.

**Moderator:** So, President Truman's order interfered in a labor dispute by seizing the steel mills?

**Black:** [Exactly.] The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.

**Moderator:** Wasn't the President enacting the will of Congress?

**Black:** [Absolutely not.] In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.

**Moderator:** Some might suggest this is a national emergency?

**Douglas:** But the emergency did not create power; it merely marked an occasion when power should be exercised. And the fact that it was necessary that measures be taken to keep steel in production does not mean that the President, rather than the Congress, had the constitutional authority to act. The Congress, as well as the President, is trustee of the national welfare.

**Moderator:** But didn't Truman notify Congress of his actions?

**Vinson:** [Yes. Truman said] WHEREAS a controversy has arisen between certain companies . . .

producing and fabricating steel and . . . and certain of their workers . . . regarding terms and conditions of employment . . . WHEREAS the controversy has not been settled through the processes of collective bargaining . . . WHEREAS a work stoppage would immediately jeopardize and imperil our national defense . . . it is necessary that the United States take possession of and operate the plants, facilities, and other property of the said companies.

**Moderator:** OK, fine. I understand the rationale, but what exactly was Truman's order?

**Vinson:** [He said,] By the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces . . . it is hereby ordered [that] the Secretary of Commerce is authorized . . . to take possession of all or such of the plants, facilities . . . as he may deem necessary in the interests of national defense.

**Moderator:** So, was the President was interfering in domestic commerce policy?

**Black:** [Precisely.] Congress . . . can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.

**Moderator:** So what conclusions can be drawn from our discussion? Are there any solutions to this dilemma?

**Douglas:** [Well,] some future generation may . . . deem it so urgent that the President have legislative authority that the Constitution will be amended.

**Moderator:** So in the absence of an amendment, it was an easy decision in the Steel Seizure case?

**Douglas:** We could not sanction the seizures and condemnations of the steel plants in this case without reading Article II as giving the President not only the power to execute the laws, but to make some. Such a step would most assuredly alter the pattern of the Constitution.

**Moderator:** But, in the Curtiss-Wright case the Court reached a different conclusion?

**Sutherland:** [Yes.] The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations, and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. . . . The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.

**Moderator:** But isn't this dangerous?

**Vinson:** [Not necessarily. It is absurd to insist that] the President must confine himself to sending a message to Congress recommending action. Under this messenger-boy concept of the Office, the

President cannot even act to preserve legislative programs from destruction so that Congress will have something left to act upon.

**Moderator:** And the fact there is a trend of Congress delegating its authority, means what?

**Sutherland:** A legislative practice . . . marked by . . . a steady stream for a century and a half of time, goes a long way in the direction of proving . . . the constitutionality of the practice.

**Moderator:** So for you, some degree of flexibility is needed when determining the powers of the executive branch?

**Vinson:** Perfect flexibility is not to be expected in a Government of divided powers . . . it is the plain duty of those who are called upon to draw the dividing lines to ascertain the essential, recognize the practical, and avoid a <rigid><sup>17</sup> formalism which can only serve to <paralyze><sup>18</sup> the Government and reduce its efficiency without any compensating good. The function of making laws is peculiar to Congress . . . but this is not to say that all of the subjects concerning which laws might be made are perforce removed from the possibility of Executive influence.

**Sutherland:** As a government, the United States is invested with all the attributes of sovereignty. . . . It has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.

**Frankfurter:** [And yet,] a scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. It has not been our tradition to envy such governments. . . . Our government was designed to have such restrictions.

**Black:** The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.

**Jackson:** [I would put it this way.] The example of . . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.

**Moderator:** Well, that brings us to the end of our time. I would like to thank our panelists for sharing with us. It sounds like we will more than likely assemble again at a future date to discuss these issues as we discover new circumstances and yet attempt to live under a written constitution. Good night and good luck.

## Endnotes

- <sup>1</sup> cohesive
- <sup>2</sup> disjunction
- <sup>3</sup> conjunction
- <sup>4</sup> preclude
- <sup>5</sup> ponderous
- <sup>6</sup> arrogating
- <sup>7</sup> automaton
- <sup>8</sup> impotent
- <sup>9</sup> unambiguous
- <sup>10</sup> enigmatic
- <sup>11</sup> partisan
- <sup>12</sup> procured
- <sup>13</sup> confided
- <sup>14</sup> curtailment
- <sup>15</sup> equivocal
- <sup>16</sup> quiescence
- <sup>17</sup> slavish
- <sup>18</sup> ossify

# Pedagogical Materials

## T-Chart for Notes—Enumerated Powers and the Delegation Doctrine

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

	<u>Curtiss-Wright</u>	<u>Youngstown</u>
Background Information		
Central Issue		
Decision		

## Review Questions—Enumerated Powers and the Delegation Doctrine

1. In each case, what did FDR and Truman do to trigger the legal proceedings?
2. What role did Congress play in each of these cases?
3. How did war factor into the decisions made by the President in each of these cases?

## Discussion Questions—Enumerated Powers and the Delegation Doctrine

1. Do you think that Congress can legitimately delegate its powers to the President? If so, does this mean the separation of powers is an unnecessary feature of our Constitution?
2. To what extent would you agree with Justice Sutherland’s opinion that the President is the “sole organ” of American foreign policy?
3. To what extent would you agree that foreign policy was the backdrop in the *Curtiss-Wright* case and domestic policy was the backdrop in the *Youngstown* case?

## Overview of Central Constitutional Questions in Cases

### *Ex Parte Merryman, 1861*

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

### *Ex Parte Milligan, 1866*

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

### *Ex Parte Quirin, 1942*

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

### *Hamdi v. Rumsfeld, 2004*

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

### *Rasul v. Bush, 2004*

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

### *Hamdan v. Rumsfeld, 2006*

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

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

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

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

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

### *Clinton v. Jones, 1997*

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

***In Re Sealed Case, 1997***

How far does executive privilege extend to advisors of the President? What types of communications within the executive branch are considered privileged?

***United States v. Curtiss-Wright Corporation et al, 1936***

Can Congress, through a joint resolution, delegate legislative powers to the President? Can Congress delegate sole responsibility for foreign affairs to the Executive Branch?

***Youngstown Sheet and Tube et al v. Sawyer, 1952***

Did the President overstep the boundaries separating the legislative and executive functions in the Constitution? Did the Constitution grant the President powers to protect the nation in times of national emergency?

## Additional Resources

### General Readings

- Adler, David Gray., George, Larry N., eds., *The Constitution and the Conduct of American Foreign Policy: Essays in Law and History*. University Press of Kansas, 1996.
- Eastland, Terry, *Energy in the Executive: The Case for the Strong Presidency*. Free Press, 1992.
- Fisher, Louis, *Military Tribunals and Presidential Power*. University Press of Kansas, 2005  
—*The Politics of Shared Power*. Congressional Quarterly Press, 1992.  
—*Presidential War Power*. University Press of Kansas, 2013  
—*Constitutional Conflicts Between Congress and the President*. University Press of Kansas, 2007.
- Genovese, Michael A., *The Power of the American Presidency: 1789-2000*. Oxford University Press, 2001.
- Henkin, Louis, *Foreign Affairs and the U.S. Constitution*. Clarendon Press, 1996.
- Mayer, Kenneth R., *With the Stroke of a Pen: Executive Power and Presidential Powers*. Princeton University Press, 2002.
- Nelson, Michael, ed., *The Evolving Presidency: Landmark Documents, 1787-2002*. Congressional Quarterly Press, 2008.
- Neustadt, Richard E., *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*. Free Press, 1991.
- Yoo, John, *Crisis and Command: A History of Executive Power from George Washington to George W. Bush*. Kaplan Publishing, 2009.

### Readings Relating to Specific Scripts/Cases

#### The Federalist/Antifederalist Debate over the Executive Branch

- Kaminski, John P. and Leffler, Richard, eds. *Federalists and Antifederalists: The Debate Over the Ratification of the Constitution*. Rowman and Littlefield, 1998.
- Kaminski, John P. et al., *The Documentary History of the Ratification of the Constitution*, 26 vols., Wisconsin Historical Society Press, 1976–
- Hamilton, Alexander and Madison, James. *The Pacificus-Helvidius Debates of 1793-1794*. Liberty Fund, 2007.

#### Presidential War Powers—The *Merryman*, *Milligan* and *Quirin* Cases

- Farber, Daniel A. *Lincoln's Constitution*. University of Chicago Press, 2003.



Neely, Jr., Mark E., *The Fate of Liberty: Abraham Lincoln and Civil Liberties*. Oxford University Press, 1991.

Simon, James F. *Lincoln and Chief Justice Taney: Slavery, Secession, and the President's War Powers*. University of South Carolina Press, 2006.

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

David Gray Adler, "George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs," 12 *UCLA Journal of International Law and Foreign Affairs* 75-144 (Spring 2007)

Herman, Susan, N., *Taking Liberties: The War on Terrorism and the Erosion of American Democracy*. Oxford University Press, 2014.

Cole, David and Dempsey, James X., *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*. The New Press, 2002

### **Executive Privilege—The *Reynolds*, *Nixon*, *Clinton*, and *In Re Sealed Cases***

Adler, David Gray, Genovese, Michael A., eds., *The Presidency and the Law: The Clinton Legacy*. University Press of Kansas, 2002.

Kutler, Stanley I., *Abuse of Power: The New Nixon Tapes*. The Free Press, 1997  
—*The Wars of Watergate: The Last Crisis of Richard Nixon*. Knopf, 1992

Rosell, Mark J., *Executive Privilege: Presidential Power, Secrecy and Accountability*. University Press of Kansas, 2010.

### **Enumerated Powers and the Delegation Doctrine—The *Curtiss-Wright* and *Youngstown Cases***

David Gray Adler, "The Steel Seizure Case and Inherent Presidential Power," 19 *Constitutional Commentary* 155-214 (2002)

Marcus, Maeva, *Truman and the Steel Seizure Case: The Limits of Presidential Power*. Columbia University Press, 1979.

