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17.245 The Supreme Court, Civil Liberties, and Civil Rights  
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### **Discussion 5: Wartime Constitution, part I**

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What is emergency constitutional law?  
How does it differ from "normal" constitutional law?

During wartime, national security needs to be taken into consideration when evaluating constitutional issues. The fact that the nation is at war can require overriding civil liberties. New situations arise that would not occur in the absence of an ongoing war.

Often the rules have to change because there is no applicable precedent to look to when looking at constitutional questions. If prior precedents don't apply, where do legal standards come from during war?

- Some precedent can be drawn from other wartime decisions. Can look to wartime law from WWI, WWII, Civil War, perhaps even cases from English/British wars.
- Courts need to strike a rational balance between civil liberties and national security. This may require the court to take a rational approach rather than relying on precedents that are tied to changing circumstances.

One difficulty of looking at past wartime experiences is the highly varying nature of the different wartime experiences.

Current war (war on terror) is unique because

1. Difficulties in delimiting the enemy/objective
2. There is no clearly defined beginning or end

Congress has the power to declare war, but in the current situation, there has been no war declaration. Without such a declaration, how do we access the body of law surrounding wartime? What does it mean to declare war?

Under the Geneva Convention, an explicit declaration needs to be made to activate international wartime law. The answer to this question is still uncertain.

How is the war on terrorism different?

This is a war on an ideology, not only a war against a group of people, an entity or organization.

Similar in some respects to the Cold War, which was a war against the idea of communism.

#### **Hamdi vs. Rumsfeld Discussion**

Facts of case:

Hamdi was born in the US and is a US citizen. He moved to Saudi Arabia as a child. Shortly before September 11, he moved to Afghanistan. He was captured by the US military in Afghanistan, and subsequently detained and held at Guantanamo Bay by January 2002. His father applied to the federal courts for a writ of habeas corpus.

Sovereign immunity: an individual holding public office is not legally liable for activities related to conducting the legitimate duties of the office. Rumsfeld's office is the responsible party, not himself. This is why he is the defendant.

These notes were taken by an MIT undergraduate student enrolled in 17.245. They have been reviewed but only lightly edited by the instructor. The notes reflect a combination of teacher and student comments and questions, and are not a transcript or verbatim rendering of class discussions.

Treason: acts of war by US citizens against the US, aiding and comforting enemies, etc. Violating the subject/sovereign relationship.

Questions of the case:

1. Does the executive have the authority to detain a citizen of the US?

The 5<sup>th</sup> Amendment says no "person" may be deprived of due process. This term is ambiguous, but certainly citizens must be included in this definition.

O'Connor says the executive has the authority to detain enemy combatants because Congress has authorized the use of force.

Authorization for Use of Military Force: a resolution "authorizing 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' "(Fallon, p23).

The resolution says force can be used against an indefinite enemy, but is not an official declaration of war (which would activate the Geneva Convention's body of law surrounding the international laws of war)

Assume the resolution did declare war, does the constitution's text mandate any changes to domestic constitutional law?

Article II, Section II, Clause 1. This clause makes the president the commander-in-chief. However, there is nothing specifically in the constitution that gives the president expanded authority in time of war. There is an informal doctrine of wartime law that the judicial and legislative branches will defer to the executive branch on military/foreign policy matters.

2. How long can you detain a citizen of the US?

Following the government's logic to its end, Hamdi can legally be detained indefinitely. O'Connor says that he can be detained while the government is in active conflict with the enemy, but if they carry the war on and on, Court will not allow them to hold him indefinitely.

This logic is not atypical for O'Connor. She used a similar argument in the recent affirmative action decisions (saying in 25 years this type of unequal treatment should no longer be necessary).

3. Have Hamdi's due process rights been violated? Has he been given a chance to challenge his designation as an enemy combatant?

5<sup>th</sup> Amendment prohibits the deprivation of life, liberty, or property without due process of law. O'Connor says he has a right to due process, and has not yet been given a chance to evaluate the evidence. She rejects the 4<sup>th</sup> circuit's order of a trial, but says that the government should be required to present some evidence. She requires a hearing before a neutral fact-finder to determine whether there is sufficient evidence to continue holding Hamdi as an enemy combatant. Her standard puts the burden of proof on Hamdi to prove innocence.

### **Notes on Storming the Court**

Takes place in the context of the 1991 military coup in Haiti. Jean-Bertrand Aristide, the first democratically elected president of Haiti, was overthrown by a militant coup. Haitian refugees were the first to be brought to Guantanamo Bay.