Answer Keys

Handout A: Constitutional Provisions Related to Due Process and Fair Trials

1. *Habeas corpus* is Latin for “to have the body,” a centuries-old protection of the accused that guarantees a hearing before a judge who has the power to release a prisoner who is illegally detained. It is an important part of due process for people who are arrested because it helps prevent arbitrary, illegal, or mistaken detention.

2. According to Article III, Section 2, Clause 3, Congress designates the place where trial should be held if a crime is committed outside of any state.

3. Elements of a fair trial guaranteed by the Fifth Amendment include the following:
   - Right to indictment by grand jury unless the case arises in land or naval forces or the militia when in service during times of war or public danger
   - Protection against being tried more than once for given offenses (“double jeopardy”)
   - Protection against forced self-incrimination
   - Protection against being deprived of life, liberty, or property without due process
   - Protection against the taking of private property without just compensation

4. Elements of a fair trial guaranteed by the Sixth Amendment include the following:
   - Speedy and public trial by an impartial jury of the state or district where the alleged crime was committed. The district must have been previously ascertained by law.
   - The right to be informed of the charges
   - The right to be confronted by witnesses
   - Compulsory process for compelling testimony by witnesses in one’s favor
   - The right to have a defense attorney

5. Accept reasoned answers that demonstrate an understanding of both what is meant by due process and the complexity of the question.

Handout B: Background Essay—Due Process and Military Justice

1. All three cases arose during wartime; *Milligan* in the Civil War and *Quirin* and *Eisentrager* during WWII.

   The *Milligan* case involved a civilian who sought to overthrow the U.S. government, and who was tried, convicted, and sentenced to death by a military commission. The decision was unanimous that civilians must be tried in civil courts as long as they are open, even during wartime.

   In the *Quirin* case, German saboteurs were caught in the United States during WWII. They were tried, convicted, and sentenced to death by a military tribunal. The Supreme Court ruled unanimously that they had no right to a civilian trial because they were unlawful enemy combatants. President Roosevelt had not exceeded his authority in ordering them to be tried by military commission.
In the *Eisentrager* case, non-resident enemy aliens were tried by military tribunal outside the U.S. for war crimes against the U.S. In a 6-3 decision, the Supreme Court majority ruled that there is no *habeas corpus* protection for enemy aliens captured overseas.

2. The Roosevelt and Truman administrations tried enemy combatants during World War II according to Congress’s power under Article I, Section 8, Clauses 11 and 14 to govern the conduct of military forces. Congress had provided for the president to apply the rules of evidence used in federal criminal trials “in so far as he deems practicable.”

3. In decisions related to the detention and military tribunals of enemy combatants by the Roosevelt and Truman administrations, the U.S. Supreme Court ruled that the president and Congress had acted within the Constitution.

4. Accept reasoned responses. As of January 2004, the Bush administration’s actions against enemy combatants during the war on terror seem to be largely consistent with precedents established by previous administrations in World War II.

5. Accept reasonable responses that do the following:
   - Accurately summarize the excerpts from decisions written by Justices Jackson and Black,
   - Support either opinion.


Accept reasoned answers that demonstrate an understanding of the following:

1. Constitutional passages and case precedents that would aid KSM’s defense.
2. Constitutional passages and case precedents that would aid KSM’s prosecution.
3. Major actions of each branch of the federal government in KSM’s case.
4. Decide which branch acted most powerfully in this context.

**Handout M: Timeline—Military Justice during the War on Terror***

Student responses should demonstrate understanding of the historical significance of each event on the timeline and reveal consistent reasoning regarding whether U.S. government actions were appropriate. Their graphic organizers or political cartoons should demonstrate an understanding of the complexities of applying constitutional principles during wartime.

Students should support their opinions regarding resolution of the remaining Guantanamo cases by citing constitutional principles and precedent.

**Handout N: Comparing Supreme Court Decisions***

Accept reasoned responses. Sample responses are shown below. Student choice of excerpt for each opinion should reveal a grasp of the comparison between each opinion and the opinions written in the Eisentrager case. To indicate the majority opinion in each case, students should highlight the opinions of Justices Jackson, O’Connor, Stevens, and Kennedy.
<table>
<thead>
<tr>
<th>What form of due process applies?</th>
<th>The privilege of the writ of habeas corpus does not apply in this situation; the policy determined by the president and Congress will be carried out.</th>
<th>The privilege of the writ of habeas corpus and/or other due process protections apply in this situation in order to prevent illegal imprisonment.</th>
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<tr>
<td><strong>Johnson v. Eisentrager (1950)</strong></td>
<td><strong>Justice Jackson:</strong> “The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy.... Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security...This statute was enacted or suffered to continue by men who helped found the Republic and formulate the Bill of Rights, and although it obviously denies enemy aliens the constitutional immunities of citizens, it seems not then to have been supposed that a nation’s obligations to its foes could ever be put on a parity with those to its defenders.”</td>
<td><strong>Justice Black:</strong> “Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies...Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live. Habeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution....I would hold that our courts can exercise it whenever any United States official illegally imprisons any person in any land we govern. Courts should not for any reason abdicate this, the loftiest power with which the Constitution has endowed them.”</td>
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<td><strong>Hamdi v. Rumsfeld (2004)</strong></td>
<td><strong>Justice Thomas:</strong> “[The Supreme Court lacks] the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of which is committed to other branches...Hamdi thereby received all the process to which he was due under the circumstances...”</td>
<td><strong>Justice O’Connor:</strong> “The Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions...Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process...”</td>
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<td><em>Rasul v. Bush</em> (2004)</td>
<td><strong>Justice Scalia:</strong> “[T]he Court evades explaining why stare decisis can be disregarded, and why Eisentrager was wrong...Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction...”</td>
<td><strong>Justice Stevens:</strong> “Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority under Section 2241. Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus...”</td>
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<td><em>Hamdan v. Rumsfeld</em> (2006)</td>
<td><strong>Justice Scalia:</strong> “Here, apparently for the first time in history... a District Court enjoined [prohibited] ongoing military commission proceedings, which had been deemed “necessary” by the President “[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks.” Such an order brings the Judicial Branch into direct conflict with the Executive in an area where the Executive’s competence is maximal and ours is virtually nonexistent. We should exercise our equitable discretion to avoid such conflict. Instead, the Court rushes headlong to meet it...”</td>
<td><strong>Justice Stevens:</strong> “Neither of these congressional Acts [AUMF nor DTA 2005], however, expands the President’s authority to convene military commissions... But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”</td>
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<td><em>Boumediene v. Bush</em> (2008)</td>
<td><strong>Justice Scalia:</strong> The writ of <em>habeas corpus</em> does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely ultra vires [beyond the powers of the Court]... <strong>Chief Justice Roberts:</strong> The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants... Hamdi concluded that American citizens detained as enemy combatants are entitled to only limited process, and that much of that process could be supplied by a military tribunal, with review to follow in an Article III court. That is precisely the system we have here. It is adequate to vindicate whatever due process rights petitioners may have...</td>
<td><strong>Justice Kennedy:</strong> “We hold that Article I, Section 9, Clause 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of <em>habeas corpus</em> is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. ...Petitioners, therefore, are entitled to the privilege of <em>habeas corpus</em> to challenge the legality of their detention... [if not] it would be possible for the political branches to govern without legal constraint. Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.”</td>
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Accept reasoned responses that

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