

Preparatory Materials for Teachers



For most groups of students, this lesson will take two 50–55 minute class sessions and one night of homework before the first day. Some students might benefit from doing the “homework” together as a class prior to Day 1.

Preparing to Teach

Before Day 1

- Decide if you want to assign **Handouts #1, #2, and #3** as homework or if you will complete them together as a class prior to Day 1.
- Reproduce copies of **Handouts #1–#3** for each student and assign as homework or complete as a class.
- Post lesson outcomes.

Day 1

- See Teacher Note on page 10.
- Cue DVD for showing the first segment of *e Response*.
- Reproduce copies of **Handout #4** for each student.
- Reproduce copies of **Handout #5** for each small group.

Day 2

- Cue DVD for showing the second segment of *e Response*.
- Reproduce copies of **Handouts #6 and #7** for each student.

Lesson Overview

In this lesson, students will learn about the Combatant Status Review Tribunals (CSRTs) that were held at the U.S. Naval Base at Guantánamo Bay. Students will view and discuss the movie, *e Response*—a courtroom drama based on actual transcripts of the military tribunals. They will compare and contrast the military tribunal process with the process used in U.S. federal courtrooms in criminal trials. Finally, students will write an opinion piece about the combatant status review tribunals. ★

Outcomes

As a result of this lesson students will be able to achieve the following:

- ▶ Define legal terms used in the military tribunal process
- ▶ Identify the legal issues presented by the hearing in *e Response*
- ▶ Summarize the military tribunal procedures and compare to the procedures used in U.S. federal criminal trials
- ▶ Write an opinion essay or op-ed article expressing their thoughts about the Combatant Status Review Tribunals (CSRTs)
- ▶ Formulate and explain their opinions about the proper balance between national security on the one hand and the ideas of due process and individual rights on the other
- ▶ Develop opinions supported by reasons on separation of powers issues such as the proper scope and limits of the President's power as Commander-In-Chief during a time of war
- ▶ Evaluate whether a process like CSRTs should be used in the future for detainees held by the U.S. in other places

Handouts

Day 1

- ▶ Handout #1 Background
- ▶ Handout #2 Vocabulary
- ▶ Handout #3 Summaries of Recent Supreme Court Cases Dealing with Detainee Treatment
- ▶ Handout #4 *e Hearing* Viewing Guide
- ▶ Handout #5 Small Group Discussion

Day 2

- ▶ Handout # 6 *e Deliberation* Viewing Guide
- ▶ Handout #7 Point of View

Community Resource People

You might want to invite a Judge Advocate General (“JAG officer”) or a lawyer specializing in international law, homeland security, and/or military tribunals into your classroom as a resource person for this lesson. If there is a law school nearby, consider inviting a law student who has taken a course in national security law to visit your classroom for this lesson. If you have advanced students, you might want to invite a law professor who teaches national security law to participate. Send a copy of the lesson when confirming the date and location of the class and discuss how you will co-teach the lesson. ★

Web Resources

e Response web site (“**Guantánamo: Learn More**”):

- ▶ <http://www.theresponsemovie.com/guantanamo/home.html>

Department of Defense web sites:

- ▶ Combatant Status Review Tribunal (CSRT) Information:
http://www.defense.gov/news/Combatant_Tribunals.html
- ▶ Combatant Status Review Tribunal (CSRT) Documents:
http://www.dod.mil/pubs/foi/detainees/csrt_arb/index.html
- ▶ List of detainees who went through complete CSRT process:
http://www.dod.mil/pubs/foi/detainees/detainee_list.pdf
- ▶ Commission cases: <http://www.defense.gov/news/commissions.html>

New York Times Topics (“Military Commissions”):

- ▶ http://topics.nytimes.com/topics/reference/timestopics/subjects/d/detainees/military_commissions/index.html

New York Times article (“Common Article 3 of the Geneva Conventions”):

- ▶ <http://www.nytimes.com/ref/us/AP-Guantanamo-Geneva-Conventions.html?scp=1&sq=geneva%20convention&st=cse>

New York Times (“The Guantánamo Docket”):

- ▶ <http://projects.nytimes.com/guantanamo>

The Constitution Project (“Beyond Guantánamo”):

- ▶ <http://www.constitutionproject.org/detail.asp?id=75>

Council on Foreign Relations (“Judging Guantánamo” backgrounder):

- ▶ http://www.cfr.org/publication/11025/judging_Guantanamo.html

BBC video clip (“Military tribunals set to restart”):

- ▶ <http://news.bbc.co.uk/2/hi/americas/8051250.stm> ★

About The Response

In this lesson, students will watch a courtroom drama based on actual transcripts of the Guantánamo Bay military tribunals (officially known as Combatant Status Review Tribunals or CSRTs). In the movie, a panel of three military officers must decide the fate of a suspected enemy combatant. Is he an enemy combatant who provided material support to Al Qaeda and other terrorist groups? Is he responsible for the deaths of several American soldiers? Or is he an innocent victim of circumstances as he claims?

The movie places students, the audience, inside the tribunal process to decide if the evidence presented is convincing and credible and if the detainee should continue to be detained as an enemy combatant. The lesson and film prompt students to consider what they would do if they sat on this tribunal. What would be their response?

While the detainee and the three tribunal members are composite characters, the dramatic situation of the legal process is accurate. The first two-thirds of the film (the tribunal itself) are, for the most part, based on a composite designed from actual transcripts. The final third of the film (the private deliberation sequence amongst the three tribunal members) is original, fictionalized material. However, the content of this deliberation sequence comes from several interviews with members of the military, JAG officers and legal scholars, as well as from attending seminars and reading published materials.

The CSRTs and the Annual Review Boards (“ARBs”) that accompanied them ran from 2004 to 2007. As of 2010 they are not in use on Guantánamo, however, the Obama administration has stated its intent to use a procedure similar to the CSRTs for detainees held at Bagram Air Force Base, Afghanistan.

At screenings of the film at the Pentagon, West Point, and elsewhere across the country officers who were present at proceedings in Guantánamo, Iraq, and Afghanistan have confirmed that the film offers a fair representation of the debate that occurred, and is occurring, in the military. They say the officers sitting in judgment face these difficult choices.

The movie and lesson plan invite students and the audience to consider the proper balance between national security on one hand and American ideas of due process and individual human rights on the other. ★

Background Information (Teacher Version)

is is a longer and more detailed version of Handout #1, which provides background for students.

e Response is a courtroom drama based on the actual transcripts of the Guantánamo Bay military tribunals (officially known as the Combatant Status Review Tribunals or CSRTs).

After the September 11, 2001 terrorist attacks on New York City, the Pentagon and over the skies of Pennsylvania, then President George W. Bush responded with the “war on terror.” On September 18, 2001, Congress quickly passed the *Authorization for the Use of Military Force (“AUMF”)*, a brief directive 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 that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States . . .*”

The Bush administration decided that terrorism suspects would be considered “unlawful enemy combatants,” and thousands were rounded up. While some were captured on the battlefield, most were not. The administration argued that this was a new type of war where the battlefield was everywhere and that the Geneva Conventions, which had governed the laws of war, did not apply.

Since the “war on terror” started, close to 800 “enemy combatants” have been blind-folded, bound and taken by plane to the Guantánamo Bay Naval Base in Cuba. From 2002 to 2004 the Bush administration’s position was that it was not required under international law to provide any legal process to the detainees. The administration asserted that the President, as Commander-in-Chief, could hold these “detainees” until the “war on terror” was over.

Many people disagreed with the administration’s view and actions relating to “enemy combatants” and their rights, and commentators raised separation of powers concerns. Given that detainees were being held at Guantánamo – a location that is neither on the battlefield nor within the U.S. – critics began to question whether the executive could place detainees at the base and cut off their access to the courts.

In June, 2004, the U.S. Supreme Court considered an appeal from detainees who claimed that they were entitled to *habeas corpus* protections. These types of *habeas* petitions enable an individual to challenge his or her detention or imprisonment before a neutral judge. In the case, *Rasul v. Bush*, the Court decided 6-3 that U.S. courts do have jurisdiction to hear the detainees’ *habeas corpus* petitions because the U.S. maintains, and has maintained, complete jurisdiction and physical control over the Guantánamo Bay Naval Base for more than 100 years.

On the same day, a plurality of the U.S. Supreme Court concluded in *Hamdi v. Rumsfeld* that the government could hold even a U.S. citizen as an “enemy combatant,” but that the alleged

combatant was entitled to some process to challenge his designation as an “enemy combatant.” Justice O’Connor, who authored the plurality decision, wrote that due process required this result for Hamdi (an American citizen who had been born in Louisiana). According to the plurality, a U.S. citizen detainee seeking to challenge his classification as an “enemy combatant” must receive notice of the factual basis for that classification and a fair opportunity to rebut the government’s factual assertions before a neutral decisionmaker.

Less than two weeks after the Court’s decisions in *Rasul* and *Hamdi*, the Combatant Status Review Tribunals (“CSRTs”) were established on July 7, 2004 by order of the U.S. Department of Defense. The first CSRT hearings began later that month. These were not judicial hearings to determine whether the detainee was guilty of terrorist acts, but administrative panels to determine solely whether a detainee had been properly classified as an “enemy combatant.” Within six months, over 550 CSRTS were held.

These non-public hearings were conducted by three military officers (not judges) who served as the tribunal. They reviewed the non-classified material with a detainee. Under the rules of the CSRT, the detainee was not permitted to see the classified evidence against him. The U.S. government contended that the classified information was vitally important to national security and must not fall into enemy hands. Additionally though, detainees were also not permitted to question (cross-examine) any witness(es) against him or to have an attorney (whether civilian or military). The U.S. government believed that these procedures were essential to ensuring that the classified information would not fall into enemy hands. When the administrative hearing with the detainee concluded, the three military officers comprising the tribunal would privately deliberate on the hearing. During this deliberation, they would have an opportunity to review portions of the classified material against the detainee.

Before and during the hearings, each detainee was given a translator for the detainee (most detainees did not speak English); and a Personal Representative. This Personal Representative was a military officer who, by law, was not an attorney and whose responsibility was to assist and instruct the detainee with the process of how the CSRTs work. As this person was not a lawyer, there was no confidentiality between the detainee and the Personal Representative. Anything the detainee said to his Personal Representative could be shared with the government.

More Recent Developments

Only a few Guantánamo detainees have ever been charged with any type of crime – whether a war crime, an international crime, or a crime under any U.S. law. Rather, the detainees have been kept in detention at Guantánamo due to their status as “enemy combatants.”

In 2005, in an effort to work around the Supreme Court’s decision in *Rasul*, Congress passed the *Detainee Treatment Act (“DTA”)*. The *DTA* stripped the federal courts of jurisdiction to consider *habeas corpus* petitions filed by prisoners in Guantánamo, or other claims asserted by Guantánamo detainees against the U.S. government. It also limited appellate review of decisions of the CSRTs and Military Commissions. A military commission is a military court convened during a time of war or rebellion to try non-military individuals accused of violating the international laws of war.

In June 2006, the U.S. Supreme Court decided the case of *Hamdan v. Rumsfeld*. Donald Rumsfeld was the Secretary of Defense at this time, and Hamdan was the paid driver of Osama bin Laden while bin Laden was in Afghanistan. The Court decided that the *DTA* did not apply to *habeas* cases already pending in the courts when the *DTA* became law. Additionally, the Court determined that the military commissions established by the Bush administration to try Guantánamo detainees were improper because they were not authorized by an act of Congress and violated the Uniform Code of Military Justice and the Geneva Conventions.

After that decision, Congress passed and President Bush signed the *Military Commissions Act of 2006* (“*MCA*”). This statute authorized the planned military commissions, provided backing for past and future determinations made by the CSRTs, and attempted to strip federal courts (including the U.S. Supreme Court) of jurisdiction to hear any *habeas corpus* cases filed by detainees, including those that were pending at the time Congress enacted the *MCA*.

On June 12, 2008, the U.S. Supreme Court decided the case of *Boumediene v. Bush* and determined in a historic 5-4 ruling. The Court determined that detainees are entitled to the protection of the Constitution’s “Suspension Clause” clause because the U.S. has held physical and real control over the base facilities even if Cuba was ultimately sovereign. (The “Suspension Clause” (Art. I, Sec. 9) states, “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.”) *Although the Military Commissions Act* (“*MCA*”) attempted to strip the courts of jurisdiction over the detainees’ *habeas* petitions, the act did not formally suspend the writ of *habeas corpus*. The detainees were thus entitled to the writ or a proceeding that was at least equivalent. However, the *MCA* did bar detainees’ *habeas* cases and the CSRTs were inadequate substitutes for *habeas* proceedings. As a result, the *MCA* was unconstitutional.

President Obama was elected in 2008. During the presidential campaign he promised to close Guantánamo to “restore the standards of due process and the core constitutional values that have made this country great even in the midst of war, even in dealing with terrorism.” On his second full day in office, January 22, 2009, President Obama promised to return America to the “moral high ground” in the war on terrorism. The president signed an executive order declaring that the detention center at Guantánamo would be closed within one year. (A second executive order signed the same day formally banned torture as an acceptable interrogation technique). President Obama said that Guantánamo “has damaged our national-security interests and become a tremendous recruiting tool for Al Qaeda.” (Newsweek, Jan. 6, 2010)

The year passed and January 22, 2010 has come and gone, but Guantánamo remains open as of the spring of 2010. Congress has refused to provide any money for detainees to be transferred to the U.S. to be held as “enemy combatants.” President Obama has stated that he still intends to close Guantánamo, but no firm date has been set. His administration did complete a case-by-case review of every remaining detainee. As of the spring of 2010 there are fewer than 200 men still being held indefinitely. ★

Summaries of Recent Supreme Court Cases Dealing with Detainee Treatment

***Rasul v. Bush* (2004):** Guantánamo detainees have the right to file a *habeas corpus* petition to contest their imprisonment. U.S. Courts have jurisdiction to hear *habeas corpus* petitions filed by the detainees at Guantánamo because the U.S. maintains, and has maintained, complete jurisdiction and physical control over the base for more than 100 years.

- ▶ available at <http://www.law.cornell.edu/supct/html/03-334.ZS.html>

***Hamdi v. Rumsfeld* (2004):** A United States citizen who takes up arms against the United States on the battlefield may be held as an “enemy combatant,” but “enemy combatants” who are United States citizens are entitled to some process to challenge that designation before a neutral decision maker.

- ▶ available at <http://www.law.cornell.edu/supct/html/03-6696.ZS.html>

***Hamdan v. Rumsfeld* (2006):** The Detainee Treatment Act (“DTA”) does not apply to *habeas corpus* cases that were already pending in the courts when the DTA became law. The military commissions established by the Bush administration to try Guantánamo detainees were improper because they were not authorized by an act of Congress and violated the Uniform Code of Military Justice and the Geneva Conventions.

- ▶ available at <http://www.law.cornell.edu/supct/html/05-184.ZS.html>

***Boumediene v. Bush* (2008):** The provision of the Military Commissions Act that attempted to strip the courts of jurisdiction over the detainees’ *habeas corpus* cases violated the Suspension Clause of the Constitution, and CSRTs were not an adequate substitute for *habeas corpus* proceedings. Guantánamo prisoners have a right to file *habeas corpus* petitions under the Constitution.

- ▶ available at <http://www.law.cornell.edu/supct/html/06-1195.ZS.html> ★

Note to Teacher

This lesson assumes that the students can generate a list of constitutional protections offered in federal court proceedings:

- ▶ **Privilege against self-incrimination** (Fifth Amendment). *Note: This applies to federal criminal trials; specific language in the Fifth Amendment makes clear that these rights do not apply in certain military situations.*
- ▶ **Right to notice of charges** (Sixth Amendment)
- ▶ **Right to a speedy and public trial** (Sixth Amendment)
- ▶ **Right to an impartial jury** (Sixth Amendment)
- ▶ **Right to counsel** (Sixth Amendment)
- ▶ **Right to confront and cross-examine witnesses** (Sixth Amendment)

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. ★

Day 1

Overview of Day 1

- ▶ Introduction
- ▶ Background discussion and review answers to the previously assigned questions to consider on **Handout #1 Background**. (8 minutes)
- ▶ Review **Handout #2 Vocabulary** and **Handout #3 Summaries of Recent Supreme Court Cases Dealing with Detainee Treatment** and check for understanding. (7 minutes)
- ▶ Show the first segment of *The Response* and ask students to complete **Handout #4 Detainee Hearing Viewing Guide**. (20 minutes)
- ▶ Break into small groups and use **Handout #5 Small Group Discussion** (10 minutes)
- ▶ Small groups report back and debrief (7 minutes)
- ▶ Summarize the day (3 minutes)

Introduction

1. Introduce the lesson and go over the outcomes.

A. Use the homework (**Handouts #1–#3**) to guide the discussion. Ask students to share their answers to the following questions from the handout:

1) What is a Combatant Status Review Tribunal (CSRT)?

A Combatant Status Review Tribunal was an administrative hearing. A CSRT was comprised of three military officers, acting as both judge and jury, who would determine whether a detainee had been properly classified as an “enemy combatant.” The military officers did not determine whether a detainee was guilty of terrorist activities.

2) Where have they been held?

CSRTs were held at the U.S. naval base at Guantánamo Bay between 2004 and 2007.

3) Why would the United States conduct a Combatant Status Review Tribunal?

Student answers will vary but will likely include the following:

- ▶ *During a war there is not enough time to conduct full judicial proceedings for suspected “enemy combatants.”*
- ▶ *The United States should make sure it is only holding people who really are “enemy combatants.”*

- ▶ *the United States needs to determine whether our national security is threatened by suspected “enemy combatants.”*
 - ▶ *the United States should give enemy combatants some form of process to challenge their detention.*
- B. Ask students to identify new or difficult words from **Handout #2 Vocabulary** and check for understanding. For more advanced readers, you might select a couple of words from the handout instead to give them a “spot check.”
- C. Then ask students to volunteer to summarize the key Supreme Court decisions relating to this case. Their summaries should be based on **Handout #3 Summaries of Recent Supreme Court Cases Dealing with Detainee Treatment**.

The Hearing

2. Tell students they will be watching the film segment and discussing the CSRT process. Remind students that this tribunal process was not governed by the same rules as criminal proceedings in U. S. courts. The idea here is to think about what is fair for a person in the tribunal setting while understanding the full range of constitutional rights that are available in U.S. Courts.
 - A. Give students a copy of **Handout #4 The Hearing Viewing Guide** for the first part of *the Response*. Go over the viewing guide to make sure that students understand the handout and what to focus on as they watch the film.
 - B. Watch the first segment of the movie which shows the hearing, (approximately 20 minutes). When the hearing portion of the film is finished, give students a few minutes to complete their viewing guides (**Handout #4**). Some students may benefit from working with a partner on completing it.
 - C. Move the students into small groups (3-5 students) and distribute **Handout #5 Small Group Discussion**. Confirm that students understand the instructions on the handout and then tell them how much time they have to work in their groups.

When they have finished their group work, ask the reporters to summarize their groups’ comments on each question.

- 1) What did you see in the movie that was different from what you might expect to see in a U.S. courtroom?

Student responses will vary, but will likely include the following:

- ▶ *No witnesses are called.*
- ▶ *Mr. Al-Aqar cannot see evidence. He does not know who provided evidence. Therefore he cannot really challenge evidence. For stated national security reasons, only the*

tribunal officers can see the classified evidence—and they may not be provided all the classified evidence. As described in the film, the tribunal officers may not be permitted to question the source of the information or be provided much information about that source or how information was received.

- ▶ *Hearsay evidence is allowed.*
- ▶ *Mr. Al-Aqar could not confront witnesses in order to cross-examine them.*
- ▶ *Mr. Al-Aqar does not know the names of his accusers.*
- ▶ *The detainee does not know the names of the judges.*
- ▶ *Mr. Al-Aqar has no attorney. He is provided only a Personal Representative who is not an attorney. Additionally, there is the concern that a detainee would be unwilling to share any real information with his personal representative since there is no attorney-client confidentiality and that representative is bound to report on anything the detainee says.*

2) Discuss and list some of the reasons why a CSRT might have a different process than a criminal trial.

Student responses will vary, but will likely include these ideas:

- ▶ *A CSRT was not actually a judicial proceeding.*
- ▶ *National security was a concern with suspected “enemy combatants.” In particular, the U.S. was worried about releasing sensitive information to detainees.*
- ▶ *If the detainee’s relationship with their Personal Representative was confidential, the United States might not become aware of important national security intelligence.*
- ▶ *The U.S. thought less process was required for detainees because Guantánamo Bay is not actually located in the United States, and many detainees were not U.S. citizens.*

3) You may wish to follow the group reports with some or all of these questions to the large group:

- ▶ Does the hearing reflect what you understand to be “fair” under our system?
- ▶ What is “fair” in this situation?
- ▶ What arguments could you make that these differences should not exist? What arguments could you make that the differences are justified?
- ▶ Is the U.S. trying to be fair to Mr. Al-Aqar?
- ▶ Are we trying to be fair to American service men and women?
- ▶ Are we trying to be fair to the victims of 9/11?

Summary

3. Remind students that Day 2 of this lesson will focus on the officers as they deliberate on the case of Mr. Al-Aqar.

A. Ask students: What is the question that must be decided by the panel?

Is Mr. Al-Aqar properly classified as an “enemy combatant” for providing material support to Al-Qaeda and possibly for the deaths of American soldiers? ★

Day 2

Overview of Day 2

- ▶ Review Day 1 activities *(3 minutes)*
- ▶ Introduce **Handout # 6 e Deliberation Viewing Guide** and check for understanding. *(4 minutes)*
- ▶ Show the second segment of *e Response*. *(10 minutes)*
- ▶ Give students time to fill out the rest of Handout #6. *(5 minutes)*
- ▶ Break into small groups and discuss. *(12 minutes)*
- ▶ Small groups report back and debrief. *(7 minutes)*
- ▶ Summarize the day and give out **Handout #7 Point of View** for homework. *(5 minutes)*

Review

1. Ask students to review yesterday's class.

The Deliberation

2. Go over **Handout #6 e Deliberation Viewing Guide** to make sure that students understand how they are supposed to use the handout.
3. Watch the second segment of the movie. *(approximately 10 minutes)*
4. After the movie is over, give students a little extra time to think about the questions on the handout, as they are the focus of the small group work. *(5–7 minutes)*
5. Move the students into small groups. *(3–5 students)*
 - A. Instruct each group to select three reporters who will report back to the class about the group's decisions on questions C, D, and E, (one for each question).
 - B. Tell students to discuss questions C, D, and E in their groups. Be sure to let them know how much time they have for this task.
 - C. As students are working in their groups, circulate to be sure that they are considering these questions thoughtfully. Students should discuss and listen carefully so they are ready to formulate an opinion and write an op-ed piece about the CSRTs in **Handout #7 Point of View**.

D. When group work time is up, ask all the group reporters to summarize their group's answer for question C. Then have the next group of reporters summarize for question D. Follow the same pattern for reporting out about question E.

1) **Question C:** What are the larger issues raised about the CSRTs during the panel deliberation? What is the role of morality and American values in the tribunals?

2) **Question D:** What should the panel decide in the case of Mr. Al-Aqar?

3) **Question E:** What do you think the point of view of the filmmaker is? Why?

For each of these questions, student answer will vary and should be supported with reasons.

6. Invite students to discuss additional issues as they emerge. For example:

A. How should the U.S. government properly balance between honoring rights and liberties and protecting our national security?

B. Why did they call this movie *The Response*?

*Here is a quote about this from Colonel Jefferson during the deliberation part of the movie:
“ The response matters. Our response defines us.”*

Point of View

7. Distribute **Handout #7 Point of View**. Go over the handout to ensure that students understand the assignment. If time permits, ask students to complete the handout (individually) in class. Alternatively, ask students to complete it for homework. Later, collect the handout and use it to assess student understanding of the outcomes for the lesson or unit of study. ★

Credits

This lesson was a collaborative effort involving the following people: Writing and editorial assistance at Street Law was provided by staff members Judy Zimmer, Allison Hawkins, Lena Morreale Scott and Lee Arbetman and by our 2010 summer law student in residence, Annie Brinkmann. Two high school teachers in the DC area helped us think through this approach and we'd like to thank them here: Stacy Farrar and Debbie Delavan. These lessons are also based on ideas provided by Professor Jeremy Stoddard at William and Mary's school of education. Sig Libowitz, Esquire, the producer and writer of *The Response* also provided significant materials for these lessons. Mayer Brown appellate lawyer Gary Isaacs also provided a careful legal review of these materials. While we appreciate the assistance of all those who provided help, any shortcomings remaining are ours.

– Street Law, Inc.
summer 2010

Filmmaker's Dedication

This film is dedicated to the men and women of the Judge Advocate General (JAG) Corps of the various branches of the U.S. military. These are our military lawyers who serve throughout our armed forces and throughout the world. These are dedicated, patriotic officers who have sworn an oath to protect the Constitution of the United States.

Making the film and taking the movie across the country have only increased the filmmakers' respect and admiration for our JAG officers and the work they do, often under difficult circumstances and enormous pressure, to always put the Constitution and the rule of law first. To bastardize a line from a great writer, our JAGs stand on the walls of the Constitution every day and defend it.

We are incredibly pleased and moved that so many JAGs support *The Response*, have sat on post-screening panels, and have invited us to show the film across the country. It is with gratitude for the work you do and the principles you bear so valiantly that we dedicate this film to you. Thank you.

– Sig Libowitz, writer and producer of *The Response*

The Story Behind the Film

To learn how this film was conceptualized and then made, please visit the filmmaker's web site.

► www.theresponsemovie.com



Handout #1 Background

Name _____

Date _____

Read this background information and answer the Questions to Consider in preparation for viewing the Response.

The Response is a courtroom drama based on the actual transcripts of the Guantánamo Bay military tribunals (officially known as the **Combatant Status Review Tribunals** or **CSRTs**). After the September 11, 2001 terrorist attacks, then President George W. Bush responded with the “war on terror.” On September 18, 2001, Congress quickly passed the *Authorization for the Use of Military Force (“AUMF”)*, a brief directive 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 that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States”

The Bush administration decided that terrorism suspects would be considered “unlawful enemy combatants.” Close to 800 “**enemy combatants**” were blind-folded, bound and taken by plane to the **Guantánamo Bay** Naval Base in Cuba. The administration asserted that the President, as Commander-in-Chief, could hold these “**detainees**” until the “war on terror” was over.

From 2002 to 2004 the Bush administration’s position was that it was not required under international law to provide any legal process to the detainees. Beginning in June, 2004, the U.S. Supreme Court considered a series of appeals from detainees who claimed that they were entitled to ***habeas corpus*** protections. *Habeas corpus* petitions enable an individual to challenge his or her detention or imprisonment before a neutral judge. The initial Supreme Court cases concluded that:

- ▶ U.S. courts can hear the detainees’ habeas corpus petitions because the U.S. maintains, and has maintained, complete jurisdiction and physical control over the Guantánamo Bay Naval Base for more than 100 years, and
- ▶ The government could hold even a U.S. citizen as an “enemy combatant,” but the alleged combatant was entitled to some process to challenge his designation as an “enemy combatant.” He should receive the factual basis for his classification and a fair opportunity to rebut the government’s assertions before a neutral decisionmaker.

Shortly after these initial decisions concerning the detainees, the U.S. Department of Defense established the Combatant Status Review Tribunals (“CSRTs”) on July 7, 2004. The first CSRT hearings began later that month. These were not judicial proceedings to determine whether a detainee was guilty of terrorist acts.

They were **administrative hearings** to determine solely whether a detainee had been properly classified as an “enemy combatant.” Within six months, over 550 CSRTs were held.

These non-public hearings were conducted by three military officers (not judges) who served as the tribunal. They reviewed the non-classified material with the detainee. The detainee was not permitted to see the classified evidence against him because the classified information was vitally important to national security. Additionally, detainees were also not permitted to question (cross-examine) any witness(es) against him or to have an attorney (whether civilian or military). The U.S. government believed that these procedures were essential to ensuring that the classified information would not fall into enemy hands. After the administrative

hearing concluded, the three military officers would deliberate on the hearing. During this deliberation, they would have an opportunity to review portions of the classified material against the detainee.

Before and during the hearings, each detainee was given a translator (most detainees did not speak English) and a **Personal Representative**. This Personal Representative was a military officer who, by law, was not an attorney and whose responsibility was to assist and instruct the detainee with the process of how the CSRTs work. As this person was not a lawyer, there was no confidentiality between the detainee and the Personal Representative. Anything the detainee said to his Personal Representative could be shared with the government.

Where are we today?

Only a few Guantánamo detainees have ever been charged with any type of crime – whether a war crime, an international crime, or a crime under any U.S. law. Rather, detainees have been kept at Guantánamo due to their status as “enemy combatants.”

Although Congress passed laws designed to prohibit detainees from filing habeas corpus petitions by law in 2005 and 2006, the U.S. Supreme Court made several decisions that reaffirmed the right of detainees to file their cases and ultimately discredited the CSRTs as inadequate procedures. (See the separate summary of U.S. Supreme Court cases in Handout 3.)

President Obama was elected in 2008. During the presidential campaign he promised to close Guantánamo to “restore the standards of due process and the core constitutional values that have made this country great even in the midst of war, even in dealing with terrorism.” On his second full day in office, January 22, 2009, President Obama promised to return America to the “moral high ground” in the war on terrorism.

The president signed an executive order declaring that the detention center at Guantánamo would be closed within one year. (A second executive order signed the same day formally banned torture as an acceptable interrogation technique). President Obama said that Guantánamo “has damaged our national-security interests and become a tremendous recruiting tool for Al Qaeda.” (Newsweek, Jan. 6, 2010)

The year passed and January 22, 2010 has come and gone, but Guantánamo remains open as of the spring of 2010. Congress has refused to provide any money for detainees to be transferred to the U.S. to be held as “enemy combatants.” President Obama has stated that he still intends to close Guantánamo, but no firm date has been set. His administration did complete a case-by-case review of every remaining detainee. As of the spring of 2010 there are fewer than 200 men still being held indefinitely. ★

Questions to Consider

1. What is a Combatant Status Review Tribunal?
2. Where have they been held?
3. Why would the United States conduct a Combatant Status Review Tribunal?

Handout #2 Vocabulary

Review the vocabulary in preparation for viewing the Response.

1. **Administrative hearing:** a judicial process that does not determine guilt or innocence, but serves an administrative purpose (such as classifying a person as an “enemy combatant”).
2. **Combatant Status Review Tribunals (CSRTs):** tribunals comprised of three military officers, acting as both judge and jury, which determined whether detainees at Guantánamo Bay were properly classified as “enemy combatants.”
3. **Detainee:** a person who is held in custody by the government and/or military. These detainees are not prisoners of war or suspects in criminal cases. Rather, they are individuals who are held by the government for interrogation, punishment, or as a precautionary measure.
4. **Detention:** the holding of anyone in jail, prior to being charged with a crime.
5. **Enemy combatant:** historically, this term refers to persons involved in armed conflict who could be detained under the laws and customs of war. In the context of the U.S. and the “war on terror,” the Bush Administration defined an “enemy combatant” as a person who was a part of or supported the Taliban, Al-Qaeda, or other hostile forces. The Obama administration has abandoned this term. As of May 2010, the U.S. military holds approximately 175 detainees at Guantánamo Bay.
6. **Guantánamo Bay:** a U.S.-run military prison established in Cuba in 2002 to hold and interrogate prisoners allegedly suspected of some connection to the Taliban, Al-Qaeda, or other alleged terrorist groups hostile to the United States. The Bush Administration argued that the prison at Guantánamo was outside the jurisdiction of the U.S. courts.
7. **Habeas corpus:** Latin term, meaning literally “produce the body.” A fundamental U.S. Constitutional guarantee that an individual has a right to question his or her detention before a neutral judge. In other words, a king (or the president/executive) can not just grab someone off the street and toss him or her in jail indefinitely. The person must be given the opportunity to have an impartial judge review the facts to determine if the accused has been properly imprisoned/detained. Article 1, Section 9 of 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.”
8. **Material support:** any form of money, training or knowledge that benefits another. In *the Response*, Al-Aqar is accused of providing material support to terrorists.
9. **Military commission:** A military court convened during a time of war or rebellion to try non-military individuals accused of violating the international laws of war.
10. **Personal Representative:** a military officer, not an attorney, assigned to provide some assistance to an accused “enemy combatant.” Anything a detainee said to his Personal Representative could be shared with the Government.
11. **Uniform Code of Military Justice (UCMJ):** this Congressional code of laws governs the military’s judicial process, which is separate from the judicial process that civilians receive. However, the UCMJ tracks civilian due process for the most part and, in some instances, provides additional protections. ★

Handout #3 Summaries of Recent Supreme Court Cases Dealing with Detainee Treatment

Review the following case summaries in preparation for viewing the Response.

***Rasul v. Bush* (2004):** Guantánamo detainees have the right to file a *habeas corpus* petition to contest their imprisonment. U.S. Courts have jurisdiction to hear *habeas corpus* petitions filed by the detainees at Guantánamo because the U.S. maintains, and has maintained, complete jurisdiction and physical control over the base for more than 100 years.

***Hamdi v. Rumsfeld* (2004):** A United States citizen who takes up arms against the United States on the battlefield may be held as an “enemy combatant,” but “enemy combatants” who are United States citizens are entitled to some process to challenge that designation before a neutral decision maker.

***Hamdan v. Rumsfeld* (2006):** The Detainee Treatment Act (“DTA”) does not apply to *habeas corpus* cases that were already pending in the courts when the DTA became law. The military commissions established by the Bush administration to try Guantánamo detainees were improper because they were not authorized by an act of Congress and violated the Uniform Code of Military Justice and the Geneva Conventions.

***Boumediene v. Bush* (2008):** The provision of the Military Commissions Act that attempted to strip the courts of jurisdiction over the detainees’ *habeas corpus* cases violated the Suspension Clause of the Constitution, and CSRTs were not an adequate substitute for *habeas corpus* proceedings. Guantánamo prisoners have a right to file *habeas corpus* petitions under the Constitution. ★

Handout #4 The Hearing Viewing Guide

Name _____

Date _____

Directions

As you watch the first segment of *e Response*, write down what questions Mr. Al-Aqar raises about his continued detention. Also write down what questions the three members of the tribunal raise about Mr. Al-Aqar's continued detention.

Below the chart, write down any vocabulary words you do not understand and want to review.

<i>The Detainee's Questions About His Continued Detention</i>	<i>The Tribunal Panel's Questions About Mr. Al-Aqar's Involvement in the Alleged Activities</i>

Vocabulary to review: ★

Handout #5 Small Group Discussion

Names of Group Members:

Directions

Look over the questions below and take a few minutes to record your thoughts. Then, work together with your group to fill out your answers. All group members should record notes from the conversation. Select one group member who will summarize your group's discussion for the rest of the class.

- A. What did you see in the movie that was different from what you might expect to see in a U.S. courtroom?

- B. Discuss and list some of the reasons why a Combatant Status Review Tribunal might have had a different process than a criminal trial. ★

Handout #6 The Deliberation Viewing Guide

Name _____

Date _____

Directions

Read the questions below. Then, as you watch the second segment of the film— **e Deliberation**—take notes that will help you discuss the questions. *(You will also have a few minutes after the film to think about and to record your ideas.)*

A. What is the evidence discussed in the deliberation? How reliable is this evidence?

B. What are the main arguments FOR and AGAINST ruling that this detainee is properly classified as an enemy combatant?

For	Against

C. What are the larger issues raised about the Combatant Status Review Tribunals during the panel deliberation? What is the role of morality and American values in the tribunals?

D. What should the panel decide in the case of Mr. Al-Aqar? Explain your reasons.

E. What do you think was the filmmaker's point of view in making the film? Provide some evidence for your opinion. ★

Handout #7 Point of View

Name _____

Date _____

Directions

Draft an opinion article or an op-ed piece (*3-5 paragraphs*) expressing your opinion about the process for handling detainees at Guantánamo and whether a similar process should be used in the future.

Your op-ed should reflect your thinking about “big picture questions” such as:

- ▶ How should the U.S. government properly balance between honoring rights and liberties and protecting our national security?
- ▶ What is fair in this situation?
- ▶ What is the role of morality and American values in these types of hearings?
- ▶ What are the larger issues raised about the hearings during the panel deliberation? ★

