

Law School Materials for *The Response*

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THE RESPONSE



www.StreetLaw.org/TheResponseMovie

Possible Uses

This 30-minute even-handed, open-ended film will be of interest to law professors who teach constitutional law, criminal procedure and, particularly, national security/terrorism law courses. The film can help introduce the concept of due process rights for criminal defendants and also the idea of balancing those rights against a nation's legitimate national security needs. **Additionally, *The Response* provides an opportunity for introducing students to separation of powers issues.** They can consider, for example, whether the President's power as Commander-In-Chief during a time of war can limit access to the courts.

Be sure to screen the film before using it. The first two-thirds of the film (about 20 minutes) show the combatant status review tribunal (CSRT) of a suspected enemy combatant held at the U.S. Naval Base at Guantanamo Bay. The final 10 minutes depict the deliberation of the three military officers charged with determining whether the suspected enemy combatant has been properly classified as an "enemy combatant." You may want to use the film over two class periods.

The open-ended nature of the film invites student engagement. **There are a variety of ways to use the film interactively.** You can screen the first part of the film (the tribunal) and then ask students to identify procedural differences between the tribunal and criminal cases and to present the strongest arguments both in favor of and against using such proceedings for suspected enemy combatants. After screening the second part of the film (the deliberation), students can be asked to address evidentiary issues concerning suspected enemy combatants. For example, how much weight should be given to possibly coerced intelligence and confessions, and what evidence should be sufficient to continue detention?

As a broader public policy activity, students can be asked to consider whether or not Congress should take steps to close the Guantanamo Bay detention facility, provide trials for detainees in our federal court system, transfer the detainees to a facility in the U.S., or take other actions related to the detainees.

In addition to classroom use, this film could be the focus of a special event on campus for the larger law school community. When used in this way, the film is usually screened and then followed by a panel comprised of subject matter experts (JAG lawyers, lawyers who have been involved in the key U.S. Supreme Court cases, law professors who teach national security law, etc.). Many national organizations that may have local or campus affiliates have shown great interest in *The Response*. These organizations include (but are not limited to) Amnesty International, Human Rights First, The Constitution Project, The American Constitution Society and The Federalist Society. Student organizations with an interest in law and national security are also a natural host for such a screening. ★

What Law Professors are Saying About the Film

“*The Response* is a superb film that dramatically illustrates many of the complex dilemmas of U.S. government detention operations. At a time when many important legal and policy issues of counter-terrorism and detention are still being worked through by all three branches of government, and when overheated rhetoric dominates the airwaves, this film stands out for its careful nuance and thoughtfully provocative presentation. I intend to use it with my law students, and I urge other educators to consider using it as well. The filmmakers and cast do a masterful job in portraying this difficult subject matter.”

– **Matthew C. Waxman, Esq.**, Associate Professor, Columbia Law School, Former Deputy Assistant Secretary of Defense for Detainee Affairs (2002-04)

“In creating *The Response*, Sig Libowitz has advanced the discussion of national security and the law by leaps and bounds and made the important issues involved approachable and understandable to lawyers and non-lawyers alike. This short, focused and superbly presented film should make everyone think about their own values and the country they want the United States to be. All of our public officials and military leaders should see this film before another decision on dealing with the legal side of the war on terrorism is made.”

– **Abbe Lowell, Esq.**, Former Special Counselor to the United Nations High Commissioner for Human Rights (Rwanda and the former Yugoslavia), Former Special Assistant to the Attorney General of the United States

“The great virtue of *The Response* is its fair engagement with the moral complexity of military detention. Against the backdrop of a national debate on the issue that is mired in partisan rhetoric and the methods of caricature, this is no small achievement. Indeed, the film is a compelling teaching tool both for specialists and the public at large, compelling us to confront at a granular level the competing considerations that make the detention issue so difficult to resolve.”

– **Robert Chesney**, Professor, University of Texas School of Law, Distinguished Scholar, Robert S. Strauss Center for International Security & Law

“The film is provocative, in the best sense of the word.”

– **Martha Rayner**, Professor of Law, Fordham Law School

“It was a privilege for us to be able to host the event. Congratulations on this extraordinary film and on the important discussion it provokes at Fordham and elsewhere!” ★

– **William Treanor**, Dean, Fordham Law

About The Response

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 you, 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. Clearly, there are Islamic fundamentalist groups that wish to harm us and destroy America. On the other hand, some of the detainees had nothing to do with Al-Qaeda or terrorism when they were picked up and shipped to Guantánamo. What would you do if you sat on this tribunal? What is your 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 among the three tribunal members) is original, fictionalized material. However, the content of this deliberation sequence is based on 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. These are difficult choices that face the officers sitting in judgment. What if you were one of them?

The movie invites the audience to consider the proper balance between national security on one hand and American ideals of due process and individual human rights on the other. ★

Background Information

The following information is intended as background for law professors but could be provided to students as a handout. A handout formatted specifically for student use can be found at the end of these educational materials.

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 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 blindfolded, 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.

On June 28, 2004, this view was challenged by the U.S. Supreme Court in a case about *habeas corpus* petitions filed by detainees. These types of 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 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 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 decision maker.

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, 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 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). 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.

Other participants in a CSRT would include the Court Recorder, a military officer whose job it was to keep the audio record (these hearings were never filmed), swear in any witnesses, present the materials and answer any questions the tribunals members might have; a translator for the detainee (most detainees did not speak English); and the detainee’s 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.

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 override 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. The Act 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, gave support to 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 ruled 5-4 that the *Military Commissions Act of 2006* violated the “Suspension Clause” of the Constitution. The “Suspension Clause” of the Constitution (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.” The Court determined that detainees were entitled to the protection of the clause because the U.S. has held physical and real control over the base facilities even if Cuba was ultimately sovereign. Although the 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. The Court concluded, however, that the MCA did bar detainees’ *habeas* cases and that the CSRTs were inadequate substitutes for *habeas* proceedings. The MCA was thus 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 remained 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. In the summer of 2010 there were 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> ★

Vocabulary Used in the Film

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. ★

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 (“*e* Guantánamo Docket”):

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

***e* 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> ★

Additional Reading

Ackerman, Bruce. *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*. New Haven: Yale University Press, 2006.

Denbeaux, Mark P. and Jonathan Hafetz, eds. *The Guantánamo Lawyers: Inside a Prison Outside the Law*. New York: New York University Press, 2009.

Fisher, Louis. *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism*. Lawrence: University Press of Kansas, 2005.

Jenkins, David. "The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence." 45 *American Journal of Legal History* 154-213 (2001).

Posner, Richard. *Not a Suicide Pact: The Constitution in a Time of National Emergency*. New York: Oxford University Press, 2006.

Rehnquist, William H. *All the Laws but One: Civil Liberties in Wartime*. New York: Knopf, 1998.

Stone, Geoffrey R. *Perilous Times: Free Speech in Wartime*. New York: Norton, 2004.

Tepker, Harry F. "The USA Patriot Act." *Extensions* (Fall 2002): 9-13.

Yoo, John. *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*. Chicago: University of Chicago Press, 2005. ★

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. We had brief discussions with George Washington University law school professors Alan Morrison and Peter Raven-Hansen about possible uses of the film in the law school setting. Sig Libowitz, Esquire, the producer and writer of *The Response*, provided significant materials for these lessons. Mayer Brown appellate lawyer Gary Isaac also provided a careful legal review of these materials. While we appreciate the assistance of all those who provided help, any shortcomings remaining are our own.

– **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



Background Information

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 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.

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On June 28, 2004, this view was challenged by the U.S. Supreme Court in a case about *habeas corpus* petitions filed by detainees. These types of 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 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.

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These non-public hearings were conducted by three military officers 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). 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.

Other participants in a CSRT would include the Court Recorder, a military officer whose job it was to keep the audio record (these hearings were never filmed), swear in any witnesses, present the materials and answer any questions the tribunals members might have; a translator for the detainee (most detainees did not speak English); and the detainee’s Personal Representative. This Personal Representative was a military officer who, by law, was not an