

# 9/11 versus the U.S. Constitution

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## Constitutional cases resulting from the 9/11 attacks

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SOURCE: <https://constitutioncenter.org/interactive-constitution/blog/constitutional-cases-resulting-from-the-9-11-attacks>

On September 11, 2001, terrorist attacks carried out against the United States would become the catalyst for at least two wars, dozens of new pieces of legislation, the creation of the Department of Homeland Security, and a slew of court cases that would test the boundaries of the Constitution as the nation struggled to find a sense of safety in the post-9/11 world.

Here's a look at some of the most impactful constitutional cases decided and questions that were posed as a result of 9/11 and the War on Terror.

### *Hamdi v. Rumsfeld* (2004)

This Supreme Court case arose from the detainment of Yaser Hamdi, a U.S. citizen captured in Afghanistan by the U.S. military in 2001. He was declared to be an “enemy combatant” fighting for the Taliban and was sent to the military prison at Guantanamo Bay for indefinite detainment. When it was discovered that he was a U.S. citizen, he was transferred to a military prison in Virginia and his father petitioned the court for his release.

The petition asserted that because Hamdi was a U.S. citizen he was guaranteed the protection of the Fifth Amendment's Due Process Clause and thus should be granted access to an attorney and a trial. The government countered that it was a separation of powers issue in which the judicial branch should defer to the executive's ability to declare and detain “enemy combatants” in times of war.

In the plurality opinion, Justice Sandra Day O'Connor wrote that, although Hamdi's detention was authorized by Congress, due process demanded that a citizen held in the

United States as an enemy combatant must be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker. After the decision, Hamdi was released after agreeing to renounce his U.S. citizenship.

*Rasul v. Bush* (2004)

This Supreme Court decision was issued on the same day as the *Hamdi* decision and also dealt with the rights of Guantanamo Bay detainees. The specific legal question at issue here was whether or not U.S. courts had jurisdiction, under the habeas corpus statute, to hear suits filed by non-U.S. citizen detainees at Guantanamo Bay for violation of their Fifth Amendment Due Process rights.

In a 6-3 decision authored by Justice John Paul Stevens, the court ruled that the statutory right to habeas corpus was not dependent on citizenship status and that, according to precedent reaching back to at least the mid-seventeenth century in the English Common Law, the right to habeas corpus can be exercised in “all...dominions under the sovereign’s control.” In this case, that included the U.S. naval base at Guantanamo Bay. The court found that U.S. courts did have jurisdiction to hear the detainees’ cases.

*Hamdan v. Rumsfeld* (2006)

This Supreme Court case arose from the capture of Salim Ahmed Hamdan, a bodyguard and chauffeur for Osama bin Laden. Hamdan was sent to Guantanamo Bay after being tried and convicted in a military tribunal that was established by the Department of Defense. Hamdan petitioned a U.S. court for a habeas writ, asserting that the military tribunal violated the Constitution and international law.

In a 5-3 decision authored by Justice John Paul Stevens, the Court found that the President had no inherent constitutional authority to establish these military tribunals. It then held that Congress had at most authorized military commissions that complied with the Uniform Code of Military Justice and the law of war. Because Hamdan’s trial had violated the UCMJ and the Geneva Conventions, it, therefore, exceeded the President’s authority and was illegal.

*ACLU v. NSA* (2007)

After 9/11 the National Security Agency of the United States implemented an electronic surveillance program called the Terrorist Surveillance Program which enabled the agency to secretly track the phone calls and emails of millions of Americans without first obtaining a warrant.

In 2006, the American Civil Liberties Union sued the U.S. government, alleging that the program was an overreach of executive power that violated, among other provisions, the First and Fourth Amendments. The trial court ruled in favor of the ACLU, agreeing that the program violated Americans' constitutional rights. After this decision, President Bush announced that wiretapping warrants would be subject to approval by Foreign Intelligence Surveillance (FISA) courts but that it remained within the executive's power to continue the program without warrants if they so desired.

In 2007, the trial court ruling was reviewed by the United States Court of Appeals for the Sixth Circuit, who overturned it on the basis that the ACLU and other plaintiffs did not have legal standing to sue because they could not say with certainty that they were surveilled as a result of the program. In 2008 the Supreme Court denied the request to review the decision without comment.

### *Boumediene v. Bush* (2008)

Congress responded to the Court's decision in *Hamdan* by passing the Military Commissions Act of 2006, which re-established the military commissions President Bush had created—and kept most of the features the Court held in *Hamdan* had violated military and international law. The law also barred foreign nationals labeled as “enemy combatants” from challenging their detention in the Article III courts. Lakhdar Boumediene, a Guantanamo Bay detainee, challenged the law, claiming that it unconstitutionally suspended the writ of habeas corpus in violation of Article I, Section 9 of the Constitution.

In a 5-4 decision authored by Justice Anthony Kennedy, the Court agreed. It first held that the Guantanamo Bay detainees had a constitutional right to the writ of habeas corpus—extending *Rasul*, which had addressed only the statutory question (and the Military Commissions Act had since withdrawn that statutory jurisdiction). The Court then held

that the military commissions created by the Act were not an adequate substitute for habeas corpus, and therefore violated the Suspension Clause.

### **The Torture Memos and Enhanced Interrogation Techniques**

In 2002, a series of memoranda were authored by the Department of Justice's Office of Legal Counsel outlining methods for keeping U.S. officials from being charged with war crimes and also providing rationales for different enhanced interrogation techniques to be used on prisoners from the War in Afghanistan. Many saw the phrase "enhanced interrogation techniques" as a euphemism used to circumvent the use of the word torture and to distance the U.S. government's actions from those proscribed by the Eighth Amendment and the Geneva Conventions.

Although no one was ever prosecuted as a result of the use of these techniques, many of the techniques, most prominently waterboarding, would face intense scrutiny from both government officials and the public. In 2009, President Barack Obama issued an executive order prohibiting the use of waterboarding and several other enhanced interrogation techniques.

### **Authorization for Use of Military Force Against Terrorists (2001 – Present)**

This act was passed by Congress three days after the 9/11 attacks and allowed "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 act was a broad grant of war-making power given to the president by Congress and has no expiration date. By 2017 it had been invoked over 30 times to justify U.S. troop deployments in over 10 countries.

In 2016 President Obama pointed to the AUMF as authorization allowing him to use military force against ISIS in Syria and Iraq without additional congressional authorization. In July 2019, after the Trump administration briefed Congress on possible ties between al-Qaeda and Iran, many questioned whether or not the act could be used to authorize war against Iran 18 years after the 9/11 attacks.

The act also allowed the executive branch to label prisoners captured during these conflicts as “enemy combatants” – a status that would set the stage for the executive and judicial branch conflicts seen in the Guantanamo Bay detainee cases.

Recently, there have been ongoing debates and bills introduced in Congress from a bipartisan group of legislators over repealing or updating the AUMF.

### Moath Hamza Ahmed al Alwi (2019)

On June 10, 2019, the Supreme Court decided not to hear an appeal by Moath Hamza Ahmed al Alwi, a Guantanamo Bay detainee who was captured by the U.S. military in 2001. Al-Awi argued that the 2001 AUMF could no longer serve as the basis for his detention eighteen years after his capture in a conflict that had now ended.

Justice Stephen Breyer wrote in a statement denying the appeal that he would be open to future constitutional challenges to indefinite detainment: “Al-Alwi faces the real prospect that he will spend the rest of his life in detention based on his status as an enemy combatant a generation ago, even though today’s conflict may differ substantially from the one Congress anticipated when it passed the AUMF, as well as those ‘conflicts that informed the development of the law of war.’”

### Al-Aulaqi v. Panetta (2014)

*Al-Aulaqi v. Panetta* was a lawsuit filed in 2012 challenging the targeted drone killings by the United States of three U.S. citizens in Yemen. Although the U.S. government has carried out targeted killings of suspected terrorists overseas since 2002, the Al-Aulaqi case was significant because it was likely the first time that a U.S. citizen was purposefully targeted and killed by U.S. forces outside U.S. borders, without an indictment, a trial, or due process.

Anwar Al-Aulaqi was an American-born Muslim cleric with dual U.S.-Yemeni citizenship. He was a member of al Qaeda in the Arabian Peninsula (AQAP) and was in hiding in Yemen. The U.S. Treasury Department had designated him a “global terrorist” in 2010, and after reports were published that Al-Aulaqi had been placed on a government “kill list,” the Center for Constitutional Rights and the ACLU filed a lawsuit on behalf of his father, Nasser Al-Aulaqi, challenging the government’s authorization for his son’s

killing. A U.S. district court dismissed the case, ruling that the father—a Yemeni national—did not have standing and that the case was a political question which Congress and the President, and not courts, should decide.

In September 2011, U.S. drone strikes in Yemen killed Al-Aulaqi and another American, Samir Khan, as well as several others; a drone strike two weeks later at a restaurant in Yemen killed Al-Aulaqi's 16-year-old son, Abdulrahman. The CCR and the ACLU filed another case charging that these killings violated the rights of the Americans killed in the attacks under the Fourth and Fifth Amendments. Though the court did find this case was justiciable, it held that there was no Fourth Amendment violation, and even if there were a plausible Fifth Amendment claim, there was no remedy under U.S. law available—the government had determined Al-Aulaqi was a threat to U.S. national security and the court would not challenge that assessment. Therefore, the case was dismissed, and it was not appealed.

Target drone strike killings as part of American counter-terrorism operations continue to this day, and they remain open constitutional questions.