

Lesson: Article II – The Executive Branch

1. Introduction

Begin the lesson by explaining that in this session, students will be learning about the executive branch of government as delineated (described) in Article II of the Constitution. Ask students the following questions:

- **What is the main function of the executive branch?** (executing /enforcing the law. The executive branch makes sure the law is carried out.)
- **Who makes up the executive branch?** (The President, Vice President, cabinet, executive agencies, etc.)

2. Share one or more of the following quotes with the group:

Quote 1 -- Patrick Henry

“The Constitution is not an instrument for the government to restrain the people, it is an instrument for the people to restrain the government – lest it come to dominate our lives.”

Quote 2 -- James Madison, Federalist No. 47, p. 324.

“The accumulation of all powers legislative, executive and judicial in the same hands. . . may justly be pronounced the very definition of tyranny.”

Ask students the following questions:

- **What were Henry’s concerns?**
- **What were Madison’s concerns?**
- **Why do you think Henry and Madison had these concerns?**
- **Do you think these statements are true today?**

3. Historical Context – Constitutional Convention connection

Explain to students that you are going to share some historical background on the Constitution and some thoughts on the executive branch. Share the following with the group:

Understanding the Patriot attitude toward the British monarch is helpful in understanding why the Framers were leery of a strong executive in fashioning the Articles of Confederation. It also reflected their desire to build in a system of checks to executive power under the Constitution.

Refer students to the chart on the student handout. Explain that Alexander Hamilton compared the presidency under the Constitution and the King of Great Britain in an essay (Federalist #69). Hamilton explained that the president would be elected by the people for four year terms, while the king was a perpetual and hereditary prince. The president would be subject to personal punishment while the king is considered sacred and inviolable. Through the system of checks and balances, the president would only have a qualified negative upon the acts of the legislature (veto power but this can be overridden by Congress), but the king has an absolute negative. The right to command the military and naval forces of the nation would belong to the president, but the king would have not only the right to command the armed forces, but could also declare war, raise and regulate fleets and armies by his own authority. The president or executive

would have concurrent powers with the legislature in forming treaties while the king is the sole possessor of power to make treaties.

Ask students the following questions:

- **What point was Hamilton trying to make?**
- **How may the colonists' experiences under the king have influenced what constitutes Article II and the powers given to the executive branch in the Constitution?**
- **Why were the Founders concerned with a system of checks and balances?**

4. Powers of the Executive Branch

Using the student handout of the powers of the executive branch, review with students some of the powers of the executive branch under Article II, Sections 2 and 3. Then ask students, **“Which of these powers are those related to national security?”** Guide students to recognize that several powers of the executive branch are related to national security.

- *The President serves as Commander-in-Chief of the armed forces. This means he can authorize the use of troops overseas without declaring war.*
- *The President has the power to make treaties with other nations.*
- *The President also nominates ambassadors.*
- *Finally, the president receives ambassadors of other nations, thus recognizing those lands as official countries.*

5. Separation of Powers/Checks and Balances/Limited Government

Ask students how the powers relating to national security (from Step 4) are “checked” or limited by another branch of government. Guide students to recognize that while the President is the Commander-in-Chief of the armed forces, Congress has the power to declare war. The Senate also has the power to approve any treaty before it becomes official and a majority of the Senate must agree with the nominations of ambassadors.

Explain to students that the Constitution divides the war powers between the Congress and the President. The Founders created this division to ensure that wars would not be entered into lightly; both branches must take action to initiate the war machinery of the government. As Commander-in-Chief, the president has the exclusive power to make decisions in the field of battle. Congress has exclusive powers such as the ability to declare war and to give money to support the war effort.

Even though the Constitution spells out specific powers and responsibilities for the president, presidents often take on powers that are not stated in the Constitution, especially during times when national security is at stake. And, while the power to determine foreign policy then is arguably a shared power, the executive branch has become dominant in recent years. The executive branch has an advantage because it has control of the information (intelligence) and can respond quickly (as opposed to Congress).

6. Supreme Court Case – *Hamdan v. Rumsfeld*

Explain to students that the Supreme Court has recently weighed in on the scope of presidential power in the case, *Hamdan v. Rumsfeld*. Have students follow along on the student hand out as you review the following facts with the class:

- Hamdan, a Yemeni citizen, was Osama bin Laden’s driver.
- Hamdan was captured in 2001 and moved to Guantanamo Bay naval base in Cuba. Hamdan was set to be tried by a military commission as an enemy combatant.
- The military commission did not allow the prisoner (Hamdan) to be present at the proceeding or to confront evidence against him.
- After the attacks of September 11th, Congress adopted a Joint Resolution authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks. . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”
- Under this authority, the President then issued a military order which stated that any noncitizen for whom the President determines there is reason to believe they are or were members of al Qaeda or has participated or engaged in terrorist activities aimed at or harmful to the US to be tried by a military commission.
- Hamdan was charged with conspiracy in that he willingly and knowingly joined a group who engaged in terrorist activities, although there were no allegations that Hamdan played any leadership role or participated in the planning of any activity. Rather, the charge speaks to the fact that Hamdan was bin Laden’s driver.
- Hamdan challenged the executive branch’s method of prosecuting the charge against him (writs of habeas corpus and mandamus). He alleged that his due process rights were being violated by the president.
- The violations Hamdan claimed included that
 - He was denied access to the evidence against him;
 - He was not allowed to be present at portions of his trial;
 - The prosecution could use evidence even if it was obtained by coercion
 - Final appeals from the commission stayed within the executive branch and were not subject to an independent magistrate.
- The executive branch claimed it had been given the constitutional authority to hold military tribunals and that it is complying with both the Constitution and international treaties.

After sharing the facts with the students, ask them the following question:

Do you think the executive branch has the authority to create military tribunals for Guantanamo Bay detainees? Why or why not? (Encourage students to use their knowledge of the powers of the executive and legislative branches.) *Potential student responses may include:*

- *Yes, Congress gave this authority to the administration when they authorized the use of military power by the White House after the September 11, 2001 terrorist attacks. However, the President - as Commander in Chief - has this power regardless of congressional authorization.*
- *No, the executive branch doesn't have the authority to create military tribunals without the consent of the Congress. Congressional authority and judicial oversight is required under the Constitution.*

7. The issue before the court:

Explain to students that two major issues faced the court. Share these with the class:

- **Does the president have the constitutional authority to create military tribunals?**
- **Are the current tribunals acting in accordance with constitutional principles?**

Have students review the rights of the accused listed on the handout. Use the following question to engage students in a discussion:

- a. What rights, if any, were at issue in this case?** (*the right to know what they are being accused of; the right to confront witnesses against them, and to secure witnesses for themselves*).
- b. Do you think Detainees should have these rights? Why or why not?**

Explain to students that military commissions have been used in the past in certain situations. Direct students to the student handout and read aloud these situations with the group. Military commissions/tribunal have substituted for civilian courts in times and places where martial law has been declared. Military commissions have also been used to try civilians as part of a temporary military government over occupied enemy territory or where the civilian government does not function. Finally, they have been used on the battlefield itself as incident to the conduct of war.

8. The Decision

Explain to students that in this case, the Court determined that the military commission in this case violated both federal law (Congressional legislation regarding US military law) and the Geneva Conventions (a treaty).

The Court explained that the Constitution does not authorize military commissions of the type at issue here, and if the power exists, it is a joint power of Congress and the President.

The reason the Court found that the military commissions unlawful under federal law included the following:

- There was no specific congressional authorization for establishing military commissions.
- They lacked the minimum procedural guarantees required under federal law:
 - There was no way for the accused to appeal his conviction to civilian judges (only military judges and members of the executive branch).
 - Under the commission, the accused could be convicted based on evidence he did not see or hear.
 - Evidence could be admitted against the accused that did not comply with the admissibility or relevance rules typically applicable in criminal trials and court-martial proceedings.
 - There was not automatic review of the commission's final decision.
 - The accused could be and was excluded from his own trial.

According to the Court, any departures from court-martials must be tailored to the exigency that necessitates it. Here, the Court concluded that the President made no

showing of necessity to justify variances of procedures governing courts-martial. The only reason offered for the denial of procedures was danger of international terrorism.

The Court held that the commissions violated Common Article 3 of the Geneva Conventions of 1949 that had established minimal safeguards for the treatment of prisoners during wartime.

- Common Article 3 requires that Hamdan be tried by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.”

9. Closing:

Ask students the following questions:

- Some commentators have viewed the decision as a victory for the rule of law. **How does this decision reflect the principle of the rule of law?** (In essence, threats to the nation do not justify abandoning the Constitution’s checks and balances).
- **How might trial by military commission violate the principle of separation of powers?** (The military commission and all appeals were solely in the hands of the executive branch. Thus, the roles of defining the offense, prosecuting and judging the trial were given to the executive branch officials without independent review.)
- **How does this case demonstrate that checks and balances continue to be a necessary and vibrant principle, even in the war on terror?**
- **How much power should a president have within the federal government?**
- **Should the president’s power be increased in times of war?**
- **What does the Hamdan case mean?**
- Reaction to the Hamdan case has been varied. One professor explained, “Here the court is playing the role the founding fathers intended it to play – both checking executive power and also reminding the president of the role of Congress.” **What does she mean? Do you agree?**
- Another commentator suggested that this decision demonstrates that the Supreme Court has overstepped its bounds. He stated, “It shows that the imperial judiciary thinks that, in addition to abortion, affirmative action and religion, war should be within its grasp.” **Do you agree?**
- **How does this case reflect the principle of separation of powers?** (*The executive branch was trying the accused without constitutional protections;*
- **How does this case reflect the principle of checks and balances?**

Additional notes regarding the decision

Breyer – concurring

- Congress has not issued the President a “blank check”
- Congress has denied the President the legislative authority to create military commissions of the kind at issue here.
- Nothing prevents the President from returning to Congress to seek the authority he believes necessary
- The judicial insistence that the president consult with Congress does not weaken our Nation’s ability to deal with danger; rather it strengthens, through democratic means – how best to do so.

Kennedy – concurring

- Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President’s authority.
- Respect for laws derived from the customary operation of the executive and legislative branches gives some assurance of stability in time of crisis.
- Trial by military commission raises separation of powers issues because they are located within a single branch of government. These courts give the roles of defining the offense, prosecuting and judging the trial to the executive branch officials without independent review. As such it “puts personal liberty in personal liberty in peril of arbitrary action by officials, an incursion the Constitution’s three-part system is designed to avoid.”
- President acted outside his powers. Congress sets governing principles for military courts but here the executive branch did
- The “President’s authority to convene military commissions is limited: It extends only to “offenders or offenses” that “by statute or by the law of war may be tried by” such military commission.”
- The Geneva Conventions (a treaty) to which the US is a party is binding law and must be followed by the President. If President has power to convene military commissions, they must follow procedures required by the treaty. Here the commissions are not independent from the executed and are not “regularly constituted” by the standards of our nation’s justice system. The structure and composition of the military commissions deviates from conventional court-martial standards – there is not a judge with legal training; executive branch has supervisory and adjudicatory powers over proceedings; no right to appeal; and is not insulated from those with an interest in the outcome of the proceedings which means the decision-making may not be neutral.
- As structured, the military commission at issue here exceeds Congressional authority.

Scalia – dissenting

- Even if Congress has not clearly and constitutionally eliminated jurisdiction over the case, our Court should not exercise jurisdiction.
- Considerations of interbranch comity at the federal level weighs against this Court taking jurisdiction.

Thomas – dissenting

- Court lacks jurisdiction
- Majority opinion flouts Court's well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs.
- President has broad constitutional authority to protect the Nation's security in the manner he deems fit.
- Hamdan is an unlawful combatant charged with joining and conspiring with a terrorist network dedicated to flouting the laws of war.

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Article II Student Handout

Quote 1 -- Patrick Henry

“The Constitution is not an instrument for the government to restrain the people, it is an instrument for the people to restrain the government – lest it come to dominate our lives.”

Quote 2 -- James Madison, Federalist No. 47, p. 324.

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Comparing the Presidency under the Constitution to the Great Britain Monarchy

	Presidency under the Constitution	Monarchy in Great Britain
How position is determined	Elected by the people for four year terms	By birth (hereditary) and rules until steps down or death
Punishment	Subject to personal punishment under the laws	Not subject to rules King is considered sacred and above the law
Power over Legislature	Qualified negative – he can veto acts of Congress, but vetoes can be overridden by Congress	Absolute (negative) power over legislative acts. He can negate them completely without recourse by the legislature
Power to Wage War	President has the right to command military and naval forces. Congress (legislature) has the power to declare war, and the power to tax and spend.	King not only has the right to command the armed forces, but also has the power to declare war, raise and regulate fleets and armies by his own authority
Power to Enter into Treaties	President has the power to negotiate treaties, but the legislature (Senate) has the power to approve them.	King possesses sole authority of the power to make treaties.

Hamdan v. Rumsfeld (2006)

Facts of the Case

- Hamdan, a Yemeni citizen, was Osama bin Laden's driver.
- Hamdan was captured in 2001 and moved to Guantanamo Bay naval base in Cuba. Hamdan was set to be tried by a military commission as an enemy combatant.
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Rights of the accused include:

- the right to be secure from unreasonable government searches without warrants issued with probable cause;
- the right to a grand jury indictment for capital offenses except when in service in War or times of public danger;
- freedom from being tried twice for the same crime;
- freedom from being a witness against themselves;
- the right to due process;
- the right to a speedy jury trial in the jurisdiction of where the crime was allegedly committed;
- the right to know what they are being accused of;
- the right to confront witnesses against them, and to secure witnesses for themselves;
- the right to a lawyer;
- freedom from excessive bail or fines;
- and freedom from cruel and unusual punishment.

Previous use of military commissions have included:

- ◇ As a substitute for civilian courts in times and places where martial law has been declared
- ◇ To try civilians as part of a temporary military government over occupied enemy territory or where the civilian government does not function
- ◇ As an incident to the conduct of war – on the battlefield itself where the defendant has violated the law of war.

Powers of the President

(Article II, Sections 2-3)

- Executes and enforces the laws of the land
- Signs or vetoes bills passed by Congress
- In charge of federal departments and agencies
- Chief Diplomat
- Commander in Chief of the Armed Forces
- Makes treaties (with advice and consent of the Senate)
- Nominates and appoints ambassadors, federal judges, and other officers of the United States (with the advice and consent of the Senate)
- Gives Congress information on the State of the Union
- Recommends legislation for consideration by Congress