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THE BUSH ADMINISTRATION: THE "WAR ON TERROR" AND THE LAW

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THE BUSH ADMINISTRATION: THE "WAR ON TERROR" AND THE LAW

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Abstract

In the rush to take action following the terrorist attacks against the United States on September 11, 2001, the U.S. at times ignored or violated international and domestic laws. The Bush Administration's modus operandi was the invocation of the laws of war to claim sweeping executive power while simultaneously disregarding the limits that the laws of war impose on such power. This thesis argues that it is counterproductive and inefficient to operate outside of, and/or shortcut, existing legal structures such as international law (specifically International Humanitarian Law / the Law of Armed Conflict) and domestic law in the name of national security in the face of terrorism. This thesis will examine the efficacy of a mixture of historical and contemporary experiences with a focus on the Bush Administration's Guantanamo Naval Base detention issues, the attempt to set up Military Commissions, and expanded interrogation techniques where legal challenges ensued. In order to explore the efficacy and consequences of the President either by-passing or applying a broad interpretation of international and domestic law, a case study approach in comparing decisions made by Lincoln, FDR, and Bush will be utilized initially. This paper will focus on Presidential orders and the subsequent judicial involvement including how much deference the courts show to executive decisions in time of national security emergencies. In particular, those actions involving the detention of U.S. citizens within the United States, the detention of non-U.S. citizens outside of the United States, the use of military commissions to try individuals and the use of expanded interrogation techniques and torture. Ultimately this paper will demonstrate that it is counterproductive and inefficient to cast aside existing laws, treaties, and legal structures.

"We believe in democracy and rule of law and the Constitution. But we're under attack." President Bush.[1]

"Quite simply, a country cannot be free if the Executive retains the power, on its own determination that certain conditions are met, to detain citizens for an indefinite period." Former Deputy Attorney General Philip B. Heymann.[2]

"This is a very highly classified area, but I have to say that all you need to know: There was a before 9/11, and there was an after 9/11. After 9/11 the gloves come off." Cofer Black, Head of the CIA Counterterrorist Center during the Bush Administration.[3]

"What sets us apart from our enemies in this fight… is how we behave. In everything we do, we must observe the standards and values that dictate that we treat noncombatants and detainees with dignity and respect. While we are warriors, we are also all human beings" General David Patraeus.[4]

I. Introduction

A. Thesis

The broad interpretation and assertion of United States (U.S.) Presidential authority during times of national security crises usually results in multiple legal challenges. Such exertion of power under the Bush Administration resulted in inefficiency (i.e. few military commission prosecutions), enormous expenditures, diminished U.S. global credibility and the withdrawal of complete cooperation from allies. Therefore, the thesis of this paper is that it is counterproductive and inefficient to

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[1] Jules Lobel, "Rounding Up the Unusual Suspects: Human Rights in the Wake of 9/11: Preventive Detention: Prisoners, Suspected Terrorists and Permanent Emergency," 25 *San Diego Justice J*. 389 (Spring, 2003): 406.
[2] Philip B. Heymann, *Terrorism, Freedom and Security: Winning Without War* (Cambridge: MIT Press, 2003), 91.
[3] Marjorie Cohn, "An American Policy of Torture," in *The United States and Torture* (New York: New York University Press, 2011), 1.
[4] Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody, November 20, 2008, available online at http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf. Internet; accessed 25 February 2011.

operate outside of, and/or shortcut, existing legal structures such as international law (specifically International Humanitarian Law / the Law of Armed Conflict) and domestic law in the name of national security in the face of terrorism.

In the rush to take action following the terrorist attacks against the United States on September 11, 2001, the U.S. at times ignored or violated international and domestic laws. As a result, the U.S. acted less efficiently, and often times counterproductive to its core values. This thesis will examine the efficacy of a mixture of historical and contemporary experiences with a focus on the Bush Administration's Guantanamo Naval Base detention issues, the attempt to set up Military Commissions, and expanded interrogation techniques where legal challenges ensued.

B. Background

In times of crisis throughout U.S. history, the President of the United States has attempted to exert greater executive authority with varying degrees of success. Sometimes this exercise of power is in conjunction with congressional approval and support. Yet at other times it is the raw and seemingly unchecked power of the presidency that takes some unprecedented steps in the name of national security. The President has always had to balance protecting individual civil liberties while ensuring the safety of citizens. From Abraham Lincoln's suspension of the *Writ of Habeas Corpus*, to Franklin Delano Roosevelt's internment of Japanese-Americans, to George W. Bush's indefinite detention of "enemy combatants" – each President acted in accordance with what he believed was necessary given the facts and circumstances of his time.

Central to this paper's thesis is the interpretation by the courts of whether actions taken by the President to prevent terrorism violate both domestic and international law including civil rights guaranteed by the United States Constitution. After the September 11th attacks Supreme Court Justice Sandra Day O'Connor stated that, "we're likely to experience more restrictions on personal freedom than has ever been the case in our country."[5] Justice O'Connor then posed two stark questions that she believes will "likely take years to resolve."[6] She asked: "1. Can a society that prides itself on equality before the law treat terrorists differently than ordinary criminals? [and] 2. At what point does the cost to civil liberties from legislation designed to prevent terrorism outweigh the added security that that legislation provides?"[7]

In order to explore the efficacy and consequences of the President either by-passing or applying a broad interpretation of international and domestic law, a case study approach in comparing decisions made by Lincoln, FDR, and Bush will be utilized initially. This paper will focus on Presidential orders and the subsequent judicial involvement including how much deference the courts show to executive decisions in time of national security emergencies. In particular, those actions involving the detention of U.S. citizens within the United States, the detention of non-U.S. citizens outside of the United States, the use of military commissions to try individuals and the use of expanded interrogation techniques and torture. Ultimately this paper will demonstrate that it is counterproductive and inefficient to cast aside existing laws, treaties, and legal structures.

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[5] Frederic Block, "Civil Liberties During National Emergencies: The Interactions Between The Three Branches of Government In Coping With Past and Current Threats to the Nation's Security," 29 *N.Y.U. Rev. L. & Soc. Change* 459 (2005): 459.
[6] Block, *Civil Liberties During National Emergencies…*, 459.
[7] *Ibid*., 459.

This paper will not include an analysis of the President Bush's role in the passage and enforcement of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. The USA PATRIOT Act added over three hundred pages to the United States' federal statutes. Any discussion of the Act here would not be sufficient. This paper will neither provide an analysis of President Bush's decisions regarding the round up and detention of over a thousand resident aliens in the United States, nor will it discuss the highly controversial issues of rendition.[8]

II. Power in National Emergencies

The President's power to act during national emergencies is derived from his inherent powers as delineated in the United States Constitution as well as authority vested in him primarily by Congress and at times by the United States Supreme Court. The Constitution provides that the President and Congress both play a role in the defense of the nation. Congress has the power to "declare war" and they must "provide for the common Defence and general Welfare of the United States" as well as "to raise and support Armies [and] "to provide and maintain a Navy."[9] On the other hand the President is the "Commander in Chief of the Army and Navy of the United States" as well as tasked with the responsibility to "preserve, protect and defend the Constitution of the United States."[10]

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[8] Kim Lane Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11," 6 *U. Pa. J. Const. L.* 1001 (May, 2004): 1031-1032.
[9] United States Constitution. Article I, 8, clauses 11, 1, 12 and 13 respectively.
[10] United States Constitution. Article II, 2, clause 1 and Article II, 1, clause 8 respectively.

Despite its critically important role in defense of the nation as spelled out in the Constitution, over the course of history it appears that Congress has been willing to give the difficult task of leading during national emergencies to the President with minimal checks. It is true that in 1976 Congress enacted the National Emergencies Act as a result of Congress's view that, "Presidents were slow to declare the end of national emergencies, resulting in lingering executive branch authority."[11] However, it is arguable that the National Emergencies Act (NEA) has more of a "housekeeping" effect than that of an exertion of legislative authority. The NEA (along with the International Emergency Economic Powers Act – "IEEPA" – of 1977) has been used by each President since its passage when declaring national emergencies. Presently, there are "sixteen declarations of national emergency in force," and the NEA has had the effect of terminating twenty others that dated back to President Woodrow Wilson.[12] The NEA authorizes the President to declare national emergencies, and requires that the President renew such declarations each year or they will expire.[13] Conversely it requires the Congress to review such declarations within six months after implementation, yet despite such an affirmative responsibility, Congress has *never* met to discuss *any* President's national

[11] Frederic Block, "Civil Liberties During National Emergencies: The Interactions Between The Three Branches of Government In Coping With Past and Current Threats to the Nation's Security," 29 *N.Y.U. Rev. L. & Soc. Change* 459 (2005): 462.
[12] NEA section 1601(a); see also Frederic Block, "Civil Liberties During National Emergencies: The Interactions Between The Three Branches of Government In Coping With Past and Current Threats to the Nation's Security," 29 *N.Y.U. Rev. L. & Soc. Change* 459 (2005): 463.
[13] United States. National Emergencies Act, Pub L. No 94-412, 90 Stat. 1255 (1976). Codified at 50 U.S.C. 1601, 1621, 1622, 1631, 1641, 1651 (2000), section 1622(d).

emergency declaration nor have they ever exercised their power to pass the required joint resolution terminating a national emergency.[14]

This leaves the U.S. Supreme Court as the final potential check on the decisions of the chief executive during such troubling episodes. One view, according to the late Supreme Court Justice William J. Brennan, is that the courts must weigh in when civil liberties are infringed upon during national emergencies in order to "help guarantee that a nation fighting for its survival does not sacrifice those national values that make the fight worthwhile."[15] Another view is that there cannot be a "suicide pact" between the Constitution and civil liberties because ultimately without the nation's very survival neither will matter.[16] As Lincoln once opined in a July 4th message to a special session of the United States Congress in 1861 when referring to the suspension of the great *writ of habeas corpus* and its impact on the survival of the Union during this difficult period in history – were "all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated."[17]

[14] United States. National Emergencies Act, Pub L. No 94-412, 90 Stat. 1255 (1976). Codified at 50 U.S.C. 1601, 1621, 1622, 1631, 1641, 1651 (2000), sections 1622(b) and 1622(a)(1).
[15] Frederic Block, "Civil Liberties During National Emergencies: The Interactions Between The Three Branches of Government In Coping With Past and Current Threats to the Nation's Security," 29 *N.Y.U. Rev. L. & Soc. Change* 459 (2005): 481.
[16] William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Vintage Books, 1998), 218-223.
[17] Rehnquist, *All the Laws But One…,* 38.

III. Historical Precedence

Benjamin Franklin noted, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."[18] Despite Franklin's opinion, the balancing of national security with individual civil liberties during wartime has a long and somewhat controversial history in the United States. Notwithstanding the stated purpose to live as free people in a new nation, the first infringement of civil liberties came quite early in history.

In 1798, before the "ink had barely dried on the First Amendment," Congress passed the Alien Act authorizing expulsion of aliens considered a risk to national security, and the Sedition Act prohibiting "malicious writing" against the government and its officers of the United States – with the noted exception of the vice President – Thomas Jefferson.[19] President John Adams supported such a measure because of fears caused by the undeclared war with France.[20] The Supreme Court upheld Sedition Act convictions, whereas the Alien Act was never challenged.[21] Over a century later, the Espionage Act was passed by Congress in 1917 in order to criminalize any false statements with the

[18] Nathan Watanabe, "Internment, Civil Liberties, and a Nation in Crisis," 13 *S. Cal. Interdis. L.J.* 167 (Fall, 2003): 167.
[19] Frederic Block, "Civil Liberties During National Emergencies: The Interactions Between The Three Branches of Government In Coping With Past and Current Threats to the Nation's Security," 29 *N.Y.U. Rev. L. & Soc. Change* 459 (2005): 482.
[20] Steven R. Shapiro, "Defending Civil Liberties in the War on Terror: The Role of the Courts in the War Against Terrorism: A Preliminary Assessment," 29 *Fletcher F. World Aff.* 103 (Winter, 2005): 104.
[21] Frederic Block, "Civil Liberties During National Emergencies: The Interactions Between The Three Branches of Government In Coping With Past and Current Threats to the Nation's Security," 29 *N.Y.U. Rev. L. & Soc. Change* 459 (2005): 481.

intent of undermining the war effort.[22] Over two thousand people were prosecuted under this Act and over one thousand of them were convicted.[23] The result was the Supreme Court upholding convictions based upon this act that severely curtailed First Amendment freedoms. Massive round-ups, the "Palmer Raids," and the detention and deportation of suspected Communist litter the landscape of the American Twentieth Century.[24]

But the trilogy of major civil liberties events in U.S. history is clearly highlighted by Lincoln's decisions during the Civil War, FDR's decisions during World War II, and Bush's decisions at the onset of the Global War on Terrorism (GWOT). The suspension of habeas corpus and the internment of the Japanese-Americans are commonly cited as the most criticized decisions in each man's presidency. Whether history will treat Bush in the same manner is subject to debate.

A. Lincoln's Decisions – U.S. Civil War

President Abraham Lincoln's decision to suspend the *writ of habeas corpus* was in direct response to the riots in Baltimore as well as the destruction of the railroad bridges north of Baltimore.[25] Both events had the effect of interfering with and delaying Union troops from reaching Washington, D.C. to protect the capital. John Merryman was one of those arrested and confined in Fort McHenry by the military for his participation

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[22] Block, *Civil Liberties During National Emergencies…,* 483-484. See also Steven R. Shapiro, "Defending Civil Liberties in the War on Terror: The Role of the Courts in the War Against Terrorism: A Preliminary Assessment," 29 *Fletcher F. World Aff.* 103 (Winter, 2005): 104.
[23] William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Vintage Books, 1998), 183.
[24] Mark Tushnet, "Defending Korematsu?: Reflections on Civil Liberties in Wartime," 2003 *Wis. L. Rev.* 273 (2003): 285-286. William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Vintage Books, 1998), 183.
[25] Rehnquist, *All the Laws But One…,*23 and 48-49.

in the destruction of the railroad bridges. Merryman, through counsel, petitioned for a *writ of habeas corpus*. *Habeas corpus* requires those in custody of an individual to produce the prisoner in court and explain the reason for his detention – it is not a determination of guilt or innocence.[26] Chief Justice of the U.S. Supreme Court Roger Taney heard the petition while attending to his duties in the U.S. District Court in Baltimore and ordered Merryman's custodians to produce him in court.[27] Lincoln ignored Taney's order, subsequently asked Congress to suspend the writ when he called them back for a special session – which they did, and ultimately over 13,000 to 20,000 individuals were placed in military detention.[28]

The U.S. Constitution, article I, 9, clause 2 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." However, "By its placement in Article I, dealing with congressional power, the Suspension Clause strongly suggests that the power to suspend the writ resides in Congress and not in the President alone."[29] Lincoln suspended the writ and then *subsequently* sought permission because Congress was out of session at the time. Arguably, Lincoln exerted this executive power only as a stopgap measure until Congress reconvened.

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[26] Rehnquist, *All the Laws But One…,* 36-37. Henry Campbell Black, *Black's Law Dictionary* (Saint Paul, MN: West Publishing, 1990).
[27] Rehnquist, *All the Laws But One…,* 36-38.
[28] Tara L. Branum, "President or King? The Use and Abuse of Executive Orders in Modern-Day America," 28 J. Legis. 1 (2002):__. Steven R. Shapiro, "Defending Civil Liberties in the War on Terror: The Role of the Courts in the War Against Terrorism: A Preliminary Assessment," 29 *Fletcher F. World Aff.* 103 (Winter, 2005): 104. Frederic Block, "Civil Liberties During National Emergencies: The Interactions Between The Three Branches of Government In Coping With Past and Current Threats to the Nation's Security," 29 *N.Y.U. Rev. L. & Soc. Change* 459 (2005): 482-483.
[29] Mark Tushnet, "Defending Korematsu?: Reflections on Civil Liberties in Wartime," 2003 *Wis. L. Rev.* 273 (2003): 301.

Also, as a consequence of the civil war, the Indianapolis treason trials took place in the fall of 1864 when five men were arrested and brought before a military commission.[30] A lawyer named Lambdin P. Milligan, active in Democratic politics, as well as the recent loser in the 1864 Democratic nomination fight for Governor of Indiana, was one of the five men accused of treason against the Union.[31] The Supreme Court in *Ex parte Milligan* finally rejected the government's position that the Bill of Rights has no application in wartime.[32] However, the court did so after the war was over and President Lincoln was dead. The court determined that *habeas corpus* may be suspended but banned the use of military courts for civilians while civilian courts are open and functioning.[33]

B. FDR's decisions – World War II

Over 100,000 Japanese-Americans, and Japanese living in America were relocated and interned shortly after the United States entered World War II.[34] The United States government also relocated and interned those of Italian and German decent but at a

[30] William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Vintage Books, 1998), 84.
[31] Rehnquist, *All the Laws But One…,* 89.
[32] *Ex parte Milligan*, 1866.
[33] *Ex parte Milligan*, 1866; William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Vintage Books, 1998), 128-129 and 136-137.
[34] Rehnquist, *All the Laws But One…,* 188-189. Nathan Watanabe, "Internment, Civil Liberties, and a Nation in Crisis," 13 *S. Cal. Interdis. L.J.* 167 (Fall, 2003): 168. See also generally: Morton Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation* (Chicago: The University of Chicago Press, 1949). John Christgau, *"Enemies": World War II Alien Internment.* (Ames: Iowa State University Press, 1985). Greg Robinson, *By Order of the President: FDR and the Internment of Japanese Americans*. (Cambridge: Harvard University Press, 2001).

significantly smaller rate.[35] Curiously, General John L. DeWitt, the West Coast military commander, "made his final recommendation in favor of internment on February 14, 1942, more than three months after the attack on Pearl Harbor."[36]

"General DeWitt's Final Report, prepared in 1943 and published a year later, mentioned three episodes of shelling on the western coast by Japanese submarines. Two of the three episodes, though, occurred after the removal of Japanese Americans from the West Coast" and were the only items "in the Final Report which were not identified by date."[37] DeWitt's actions probably did not have much effect on President Franklin Delano Roosevelt. President Roosevelt received dozens of letters from the West Coast and paid very close attention to public opinion there.[38] This coupled with the fact that nearly all of the California politicians at the state level – most notably then California Attorney General Earl Warren (who later went on to become the Chief Justice of the United States Supreme Court) – as well as members of the Congressional delegation and the California media were all calling for the removal of the Japanese-Americans.[39] Lastly, Canada had ordered the removal of all Japanese males from their West Coast – British Columbia.[40]

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[35] Christgau, *"Enemies": World War II Alien Internment…,*___. See also Stephen Fox, *The Unknown Internment* (Boston: Twayne Publishers, 1990).
[36] Mark Tushnet, "Defending Korematsu?: Reflections on Civil Liberties in Wartime," 2003 *Wis. L. Rev.* 273 (2003): 288.
[37] Tushnet, *Defending Korematsu?...,* 288-289.
[38] Greg Robinson, *By Order of the President: FDR and the Internment of Japanese Americans*. (Cambridge: Harvard University Press, 2001),___.
[39]Robinson, *By Order of the President…*, ___. See also Morton Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation* (Chicago: The University of Chicago Press, 1949).
[40] Robinson, *By Order of the President…*, ___.

Gordon Harabayashi and Fred Korematsu were United States citizens born in America to Japanese-American immigrants.[41] Each violated the orders in effect regarding the curfew and relocation.[42] Upon reaching the United States Supreme Court the court ruled in *Hirabayashi v. United States* to uphold the narrow issue of the validity of the curfew requirement but did not rule upon the requirement to report to the "relocation center."[43] Whereas, in *Korematsu v. United States* the court upheld President Roosevelt's relocation order of Japanese-Americans from the West Coast to the internment camps.[44]

Mitsuye Endo was a Japanese-American who reported to the relocation camp and was an internee at Topaz.[45] Endo filed a *habeas corpus* petition claiming that as a loyal citizen the government had no right to prevent her from going home to California.[46] The Supreme Court ruled in *Ex parte Endo* that the government issued orders to evacuate but nothing in the orders spoke of continued detention after evacuation.[47] Endo won her case but the situation had changed. America and her allies were winning the war in the Pacific and in Europe. The public demand for restrictions on Japanese-Americans had abated.[48]

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[41] William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Vintage Books, 1998), 192-193. Robinson, *By Order of the President…*, ___.
[42] Rehnquist, *All the Laws But One…,* 192-193. Robinson, *By Order of the President…*, ___.
[43] *Hirabayashi*, 1943; Rehnquist, *All the Laws But One…,* 198-199. Robinson, *By Order of the President…*, ___.
[44] *Korematsu*, 1944; Rehnquist, *All the Laws But One…,* 200-201. Robinson, *By Order of the President…*, ___.
[45] Robinson, *By Order of the President…*, ___.
[46] Robinson, *By Order of the President…*, ___.
[47] *Ex parte Endo*, 1944; William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Vintage Books, 1998), 201-202.
[48] Rehnquist, *All the Laws But One…,* 202.

Some viewed *Ex parte Endo* as a "hollow victory" due to the fact that the *Korematsu* and *Endo* opinions were not immediately released despite the fact they were completed.[49]

"The War Department was tipped off about the decisions and their timing – most likely by Justice Frankfurter [as a result] Endo was issued on Monday, December 18, 1944 [but] one day before, on a Sunday of all days, the War Department rescinded its orders" and the camps were officially closed.[50]

The internment of U.S. citizens during World War II did not fade away. The "Non-Detention Act of 1971 – enacted to prevent a recurrence of the shameful treatment of American citizens of Japanese ancestry… provides that 'no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[51] In the 1980s, Fred Korematsu and Gordon Hirabayashi went back to federal court, and "relying on suppressed exculpatory evidence discovered in the national archives," they filed writs of error and had their convictions overturned.[52] At about the same time, "a Congressional Commission concluded that the internment was a 'grave injustice' prompted by 'race prejudice, war hysteria and a failure of leadership.'"[53]

While loyal Japanese-Americans were being sent to camps, real German saboteurs were coming ashore to carry out acts designed to hinder the U.S. war effort at home during World War II. In response to this event, as well as later in the war after

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[49] Jerry Kang, "Denying Prejudice: Internment, Redress, and Denial." 51 *UCLA L. Rev*. 933 (April, 2004): 964.
[50] Kang, *Denying Prejudice…,* 964.
[51] Laurence H. Tribe and Patrick O. Gudridge. "The Anti-Emergency Constitution," 113 *Yale L.J.* 1801 (June, 2004): 1833.
[52] Jerry Kang, "Denying Prejudice: Internment, Redress, and Denial." 51 *UCLA L. Rev*. 933 (April, 2004): 975-977.
[53] Frederic Block, "Civil Liberties During National Emergencies: The Interactions Between The Three Branches of Government In Coping With Past and Current Threats to the Nation's Security," 29 *N.Y.U. Rev. L. & Soc. Change* 459 (2005): 485.

Germany surrendered and Germans were caught fighting in China, President Roosevelt ordered the use of military commissions to try these individuals. The Supreme Court ruled in *Ex parte Quirin*, that the eight German saboteurs who came ashore in two four-man teams in New York and Florida could be tried by military commissions.[54] The men had appealed to the Supreme Court after they were convicted and sentenced to death. They appealed on the grounds that the civilian courts were open and functioning and based their argument upon the *Milligan* decision. The court upheld the use of military commissions and distinguished this situation from *Milligan* because Lambdin Milligan was not, "part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war."[55] There is, however, considerable debate as to the real reason why the Roosevelt Administration used a closed military commission vice any other court and it centers on the belief that an open trial would have exposed the FBI and the Coast Guard to be incompetent.[56] This, after the FBI finally "rounded up the saboteurs, heralding the arrests with press releases touting the effectiveness of the FBI in finding and capturing the saboteurs" when the Germans had actually turned themselves in voluntarily.[57]

The other military commission challenge occurred at the tail end of the war when twenty-one German citizens were captured in China while still engaging in combat after

[54] *Quirin*, 1942; William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Vintage Books, 1998), 136-137. Michal R. Belknap, "A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective," 38 *Cal. W. L. Rev*. 433 (Spring 2002): 444.
[55] *Quirin*, 1942; Michal R. Belknap, "A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective," 38 *Cal. W. L. Rev*. 433 (Spring 2002): 444-445.
[56] Belknap, *A Putrid Pedigree…,* 444. Mark Tushnet, "Defending Korematsu?: Reflections on Civil Liberties in Wartime," 2003 *Wis. L. Rev.* 273 (2003): 291.
[57] Tushnet, *Defending Korematsu?...,* 291.

Germany had already surrendered.[58] They were convicted by an American military commission in China for war crimes.[59] In *Johnson v. Eisentrager,* the Supreme Court held that aliens outside of U.S. sovereign territory *cannot* invoke a petition for *writ of habeas corpus*.[60]

There were other civil liberties issues in the 1940's, although none of the same magnitude of the relocation / internment, but important issues nonetheless. The Supreme Court tried to balance the "curtailment of civil liberties" with "perceived threats to national security."[61] In *Minersville v. Gobitis*, the "Court upheld the expulsion of Jehovah's Witness children from school for refusing to salute the flag during the daily recitation of the Pledge of Allegiance, reasoning that the 'flag is the symbol of our national unity'… and that 'national unity is the basis of national security."[62] However, three years later in *West Virginia v. Barnette*, the Court overturned Gobitis, remarking that 'those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.'"[63]

C. Bush's decisions – Global War on Terror

On September 14, 2001, President George W. Bush declared a national emergency, "by virtue of the authority vested in me as President by the Constitution and

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[58] *Johnson v. Eisentrager*, 1950.
[59] *Ibid.*
[60] *Ibid.*
[61] Frederic Block, "Civil Liberties During National Emergencies: The Interactions Between The Three Branches of Government In Coping With Past and Current Threats to the Nation's Security," 29 *N.Y.U. Rev. L. & Soc. Change* 459 (2005): 485-486.
[62] Block, *Civil Liberties During National Emergencies…,* 486.
[63] *Ibid.,* 486.

the laws of the United States, I hereby declare that the national emergency has existed since September 11, 2001, and, pursuant to the National Emergencies Act (50 U.S.C. 1601 et seq.)…"[64]

On September 18, 2001, Congress passed a Joint Resolution for the Authorization of the Use of Military Force (AUMF) which stated in part, "The President is authorized 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 by such nations, organizations or persons."[65] The Joint Resolution also states that its intent is to provide "specific statutory authorization" in accordance with the War Powers Resolution.[66] President Bush signed the Joint Resolution but specifically "cautioned that he was doing so in keeping with 'the longstanding position of the executive branch regarding the President's constitutional authority to use force' and expressed his opinion that to the extent the War Powers Resolution limits this power, it was likely [an] unconstitutional [infringement upon his powers as Commander-in-Chief]" as each President has also professed since the War Powers Resolution came into effect over President Nixon's veto.[67]

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[64] President Bush and President Obama have renewed this declaration in September of successive years and it is currently in effect.
[65] United States. Authorization For Use Of Military Force, Pub L. No 107-40, 115 Stat. 224, 2(a) (2001) [hereinafter AUMF].
[66] AUMF.
[67] Frederic Block, "Civil Liberties During National Emergencies: The Interactions Between The Three Branches of Government In Coping With Past and Current Threats to

IV. Classifying Individuals Under the Law, Definitions of Enemy Combatants and Subsequent Court Decisions

Soon after the United States began Operation Enduring Freedom in Afghanistan in the fall of 2001, U.S. forces began to detain large numbers of persons – some captured during the course of military operations and others picked up in response to intelligence information or turned over by local authorities. The status of these detainees had to be determined. A person's status drives significant determinations regarding detention authority, treatment, trial, transfer and other questions.

In most internal conflicts in which a rebel group is fighting against the state, the government will treat captured fighters as criminals (i.e. traitors) under domestic law. Sometimes, the parties will negotiate a special agreement, to provide for prisoner of war (POW) treatment and status for captured enemy fighters in the course of a non-international armed conflict. States have always rejected claims by terrorist groups and other non-state actors that they are entitled to POW status, and courts have routinely upheld such determinations. In particular, Al Qaeda operatives similarly have not been accorded POW status:

> Even if Article 4, however, were considered somehow to [apply], captured members of al Qaeda still would not receive the protections accorded to POWs. Article (4)(2), for example, further requires that the militia or volunteers fulfill the conditions first established by the Hague Convention IV declares that the 'laws, rights and duties of war' only apply to armies, militia, and volunteer corps when they fulfill four conditions: command by responsible individuals, wearing insignia, carrying arms openly, and obeying the laws of war. . . . Al Qaeda members have clearly

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the Nation's Security," 29 *N.Y.U. Rev. L. & Soc. Change* 459 (2005): 472. *See also* Richard F. Grimmett, United States Congressional Research Service, Issue brief for Cong. No. IB81050, War Powers Resolution: Presidential Compliance 5 (2003), available at http://fpc.state.gov/documents/organization/19134.pdf

> demonstrated that they will not follow these basic requirements of lawful warfare. They have attacked purely civilian targets of no military value; they refused to wear uniform or insignia or carry arms openly, but instead hijacked civilian airliners, took hostages, and killed them; they have deliberately targeted and killed thousands of civilians; and they themselves do not obey the laws of war concerning the protection of the lives of civilians or the means of legitimate combat.[68]

This explanation focuses primarily on the final requirement in Article (4)(2), the obligation to comply with the laws of war. The prevailing view is that the U.S. conflict with Al Qaeda is a non-international armed conflict. Although the Geneva Conventions and their Additional Protocols do not contain specific provisions regarding detention or combatant status in non-international armed conflict, detention authority in non-international armed conflicts stems directly from the principle of military necessity and is a fundamental incident of waging war.

Therefore, since the attacks of September 11th, the U.S. has tried to classify a seeming third category of persons in times of armed conflict. The Bush Administration made an executive decision to designate certain individuals as "enemy combatants." The order defines the term "enemy combatant" as follows:

> ***Military Order Nov 13, 2001***:
>
> (i) is or was a member of the organization known as al Qaida;
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
> (iii) has knowingly harbored one or more individuals described [above]…[69]

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[68] United States. Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*. February 7, 2002.
[69] Military Order of 13 Nov. 2001: "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."

As opposed to staying within the accepted boundaries of international law, the Bush Administration adopted the term "enemy combatant" as the overarching category for all suspected terrorists captured in the course of the so-called "global war on terror," although the term "enemy combatant" does not exist anywhere in the laws of armed conflict. In fact, this decision on the heels of September 11th soon garnered the most attention with regard to the U.S. conflict with al Qaeda and other terrorist groups. This new designation was put to the test almost immediately when to the surprise of the U.S. government some U.S. citizens were discovered in Afghanistan most notably John Walker Lindh and Yaser Hamdi or when U.S. citizens were affiliated with al Qaeda such as Jose Padilla.[70]

V. Indefinite Detentions of U.S. Citizens

In their failure to anticipate that U.S. citizens might be involved / associated with non-state actors that wish to do the U.S. harm the Bush Administration stumbled into their first court battles. The United States Supreme Court eventually heard and ruled on the fates of U.S. citizens Hamdi and Padilla. A discussion of each follows:

***Hamdi v. Rumsfeld*:** Yaser Esam Hamdi was a United States citizen by birth. He was picked up in Afghanistan by members of the Northern Alliance in 2001, and turned over to the US military. The Government asserted that it initially detained and interrogated Hamdi in Afghanistan before transferring him to Guantanamo Bay in January 2002. After learning that he was a U.S. citizen, he was transferred to the naval

[70] Frederic Block, "Civil Liberties During National Emergencies: The Interactions Between The Three Branches of Government In Coping With Past and Current Threats to the Nation's Security," 29 *N.Y.U. Rev. L. & Soc. Change* 459 (2005): 506-507.

brig, Norfolk, and then to the naval brig, Charleston. The Government contended that Hamdi was an "enemy combatant," and that this status justified indefinite detention without formal charges or proceedings. To support this legal conclusion, the Government submitted a declaration by a Defense Department official (the Mobbs Declaration) alleging details of Hamdi's trip to Afghanistan, his affiliation with a Taliban unit while the Taliban was battling U.S. allies, and his subsequent surrender of an assault rifle. Hamdi's father, who filed the habeas corpus petition, alleged that his son was in Afghanistan doing "relief work," and that he had been there for less than two months before the September 11th attacks. The District Court ruled in favor of Hamdi, and ordered extensive pretrial discovery to ascertain the status of Hamdi. The Appellate Court reversed, holding that the Mobbs Declaration was sufficient and that no further inquiry was required.[71]

The issue before the Supreme Court was whether the Executive has the authority to detain citizens who qualify as "enemy combatants," and, if so, what process is constitutionally due to a citizen who disputes his enemy-combatant status? The Supreme Court held that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[72]

As a threshold issue, the Court first decided that the Executive has the authority to detain citizens who qualify as "enemy combatants." The Court noted that there was "some debate as to the proper scope" of the term "enemy combatant," but adopted the

[71] *Hamdi v. Rumsfeld,* 2004.
[72] *Ibid.*

definition "for purposes of this case" as a person who is "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." The authority to detain enemy combatants, as so defined, flows from the Authorization for Use of Military Force (AUMF), empowering the President to "use all necessary and appropriate force" against "nations, organizations, or persons" that he determines "planned, authorized, committed, or aided" in the September 11, 2001, al Qaeda terrorist attacks. The fact that Hamdi was a U.S. citizen is irrelevant to the issue of detention, since he was captured while carrying arms against coalition forces in Afghanistan, not within U.S. territory.[73]

The Court rejected the Government's argument that the doctrine of separation of powers barred the Court from examining the status of Hamdi. The question then became, what process is constitutionally due to a citizen who disputes his enemy-combatant status? Or, put another way, the detention is not the issue, but erroneous detention is. The Court examined the sparse legal precedence, and stated: "Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege of American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."[74]

The Government argued that Hamdi was interrogated on the battlefield, and thus had an opportunity at that point to deny being an enemy combatant. The Court rejected

[73] *Ibid*.
[74] *Ibid*.

this argument. The Government must give a citizen-detainee notice of the basis for classification, plus an opportunity to rebut this classification before a neutral magistrate. To quote the Court: "We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[75]

The Court went on to cite the process included within the U.S. Army Regulation 190-8 (AR 190-8) regarding detention operations as an example of the type of minimum process that would satisfy this requirement. AR 190-8 essentially follows the Third Geneva Convention regarding Prisoners of War to the letter. Therefore, by holding out AR 190-8 as the model, "the Court effectively indicated that had the U.S. complied with the requirements of Article 5 [of the Third Geneva Convention] from the outset of the detention process at Guantanamo, the Court almost certainly would have endorsed that process."[76] In ignoring established international humanitarian law the Bush Administration wasted time and effort trying to create its own legal model (i.e. the enemy combatant category) from scratch. As a result of the Hamdi decision the Bush Administration then created the Combatant Status Review Tribunals (CSRT) which were essentially "identical to the tribunals the United States would have created pursuant to Article 5 of the Third Geneva Convention. However, because the United States continued to refuse to acknowledge that individuals captured in the context of the 'war on terror' fell within the scope of a prisoner of war convention, the solution was to adopt a review

[75] *Ibid*.
[76] Geoffrey Corn and Eric Jensen, "Volume 1: National Security Law," *Emory University School of Law* (2011): 10.

tribunal analogous to those required by Article 5 without characterizing them as Article 5 tribunals."[77]

Hamdi represents the post-September 11th "interplay between the three branches of government" where the "Legislature has decided, by enacting the Joint Resolution, to give the President the authority 'to use all necessary and appropriate force'… the President has railed against the need for such authorization, believing that his constitutional powers suffice, and under either view, has taken whatever actions he has deemed appropriate; and the Judiciary has interceded to assert the sanctity of judicial review to vouchsafe the basic due process rights of each citizen detained by the Government to receive notice of the charges against him and to have a meaningful opportunity to be heard before an impartial decision maker."[78]

Ultimately the Bush Administration's response to this ruling was to strike a deal with Hamdi in exchange for his release. No charges were filed, he was sent home to Saudi Arabia, and he gave up his U.S. citizenship as well as any claims against the U.S. Government.[79] The U.S. government insists he was released solely on the grounds he was no longer a valuable intelligence source.[80]

***Rumsfeld v. Padilla*:** U.S. citizen Jose Padilla arrived in Chicago from Pakistan where he was apprehended by federal agents executing a material witness warrant for an investigation into the September 11th attacks conducted by a grand jury in the

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[77] Corn, *Volume 1: National Security Law…,* 10.
[78] Frederic Block, "Civil Liberties During National Emergencies: The Interactions Between The Three Branches of Government In Coping With Past and Current Threats to the Nation's Security," 29 *N.Y.U. Rev. L. & Soc. Change* 459 (2005): 522-523.
[79] Steven R. Shapiro, "Defending Civil Liberties in the War on Terror: The Role of the Courts in the War Against Terrorism: A Preliminary Assessment," 29 *Fletcher F. World Aff.* 103 (Winter, 2005): 114.
[80] Shapiro, *Defending Civil Liberties in the War on Terror…,* 114.

Southern District of New York. While held in New York in federal criminal custody, and while his motion to vacate the material witness warrant was still pending in the Southern District, the President designated Padilla an enemy combatant based on factual determinations that Padilla was closely associated with Al Qaeda and that he engaged in hostile and warlike acts against the United States. The President directed the Secretary of Defense to detain Padilla in military custody. That same day, June 9, 2002, the Department of Defense took Padilla into custody and transported him to the Naval Brig in Charleston, South Carolina.[81]

The Court, in a 5-4 decision, dismissed the petition against the Secretary of Defense and held that the SDNY had no jurisdiction over the proper respondent in the habeas petition, the commander of the Charleston brig, was the immediate custodian exercising physical control over the petitioner, but he was not within the jurisdiction of the SDNY court. Padilla re-filed in U.S. District Court in South Carolina and that court held that the President has no authority to detain Padilla. The court distinguished Padilla from Hamdi whereby Hamdi was discovered on a battlefield and Padilla was in Chicago.[82] As a result of the loss in court, the Bush Administration's final move in Padilla's saga was to remove him from the military custody entirely and charge him (and convict him) with terrorism related offenses in a civilian federal criminal court.

As a result of these Supreme Court decisions the Bush Administration had to go back to square one and start again with their new classification definition.[83] Whereas, if

[81] *Rumsfeld v. Padilla*, 2004.
[82] *Ibid.*
[83] Order Establishing Combatant Status Review Tribunal, July 7, 2004: An "**enemy combatant**" is an individual who was part of or supporting Taliban or al Qaeda forces, or

the Bush Administration and their domestic political allies simply and rightfully followed existing law from the outset they would not have had to continually modify their definition.

VI. Indefinite Detention of Non-U.S. citizens Abroad and Habeas Corpus

The detainees who were named enemy combatants were taken to Guantanamo Bay, Cuba. It has "been previously determined by a number of American courts to be an area that was explicitly not U.S. sovereign territory even though the United States had effective and sole control there [and] the Bush administration [decided to locate] Taliban and al Qaeda detainees at Guantanamo, a place that they could reasonably have expected would not trigger the jurisdiction of U.S. courts."[84] As a result there were legal challenges to the detention of some of these individuals.

Between 2004 and 2008, the U.S. Supreme Court issued three landmark decisions (as well as some ancillary decisions) upholding the right of detainees at Guantanamo Bay to habeas corpus to challenge their detention. In *Rasul v. Bush*, the Court held that detainees had statutory *habeas* rights to challenge their detention at Guantanamo; two years later, the Court overturned Congress' initial attempt to deny statutory *habeas* in *Hamdan v. Rumsfeld*. Finally, in 2008, the Court set in motion extensive *habeas* litigation when it held that detainees at Guantanamo have a constitutional right to *habeas corpus* in *Boumediene v. Bush*. Since that holding, the D.C. District Court and the D.C. Circuit Court of Appeals have heard scores of cases challenging detention at

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associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

[84] Kim Lane Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11," 6 *U. Pa. J. Const. L.* 1001 (May, 2004): 1057-1058.

Guantanamo, a process that has required further definition and elaboration of the category of persons who can be detained and the parameters of that detention.

In ***Rasul v. Bush***, the petitioners, two British, an Australian and twelve Kuwaiti citizens (the case was combined with *Al Odah*), were captured during the hostilities in Afghanistan. After their capture, they were transferred to the U.S. Naval Base at Guantanamo Bay, Cuba, where they have been held since early 2002. In 2002, Petitioners filed various federal claims in the U.S. District Court for the District of Columbia challenging the legality of their detention. All alleged that; (1) they had never been a combatant or engaged in terrorist acts against the United States, and (2) they have not been charged with any wrongdoing, permitted to consult with counsel or provided access to the courts or any other tribunal. The District Court construed all actions as a petition for *writ of habeas corpus* and dismissed them for want of jurisdiction, relying on the holding in *Johnson v. Eisentrager*, (aliens held outside the sovereign territory of the United States may not invoke a petition for a *writ of habeas corpus*). The Court of Appeals affirmed.[85]

The Supreme Court held that jurisdiction for habeas corpus extends to Guantanamo Bay because the U.S. exercises sovereignty there. Also, the court found jurisdiction because the people authorizing detentions (the President and the Secretary of Defense) are in the U.S. The court reversed and remanded to court of first instance (U.S. District Court) to consider on the merits. Justice Antonin Scalia wrote the dissent and focused on the judicial creation of such a broad statutory right. He stated that the majority's opinion was "a novel holding; it contradicts a half-century-old precedent on

[85] *Rasul v. Bush*, 2004.

which the military undoubtedly relied" and was "an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field." He warned that the majority's decision "boldly extends the scope of the habeas statute to the four corners of the earth."[86]

The courts then received two more cases (discussed below) challenging their detentions which were decided on the merits based upon the *Rasul* decision – whereas, *Rasul* was strictly a procedural decision.

In the wake of the holding of *Rasul*, seven detainees held in Guantanamo Bay brought *writs of habeas corpus* to the United States District Court for the District of Columbia challenging their detentions in ***Khalid v. Bush***. None of the petitioners were U.S. citizens. Five of them were Algerian-Bosnian citizens, one was an Algerian with Bosnian residency. The six were captured in Bosnia. The seventh detainee was French, and was captured in Pakistan. The court ruled that, "These cases pose the novel issue of whether there is any viable legal theory under which a federal court could issue a *writ of habeas corpus* challenging the legality of detention of non-resident aliens captured abroad and detained outside the territorial sovereignty of the United States, pursuant to lawful military orders, during a Congressionally authorized conflict?"[87]

The court ruled that there is no legal authority for a *writ of habeas corpus* for non-resident aliens detained outside US territorial sovereignty. Congress passed the Authorization for Use of Military Force (AUMF), which authorized the President to use military action to prevent future acts of international terrorism. The President subsequently issued an Order on Detention, Treatment, and Trial of Certain Non-Citizens

[86] *Ibid.*
[87] *Khalid v. Bush*, 2005.

in the War Against Terrorism. This Order authorized the Secretary of Defense to detain anyone the President has "reason to believe" is or was a member of Al Qaeda, has engaged in or abetted international terrorism that has caused or threatened to cause adverse effects on the United States, her citizens, or national interests, or anyone who has harbored such individuals.[88]

Petitioners raised two points: First, they challenged the President's authority to issue the Order, either pursuant to the AUMF or the Constitution. If the Order was lawful, Petitioners next asserted that their indefinite detention violates the Constitution, federal law, international treaties, and international common law. First, the court found that the Order was lawful. While Congress has the authority to declare war, the President has the authority to execute congressionally authorized military conflicts. And, the fact that these petitioners were not seized on the battlefield is of no consequence; the intent of Congress in fighting a global war on terror was clear. The court also held that non-resident aliens being held outside of the United States have no viable constitutional basis to seek a *writ of habeas corpus*, as they have no cognizable constitutional rights. The court relied on *Eisentrager*, determining that the *Rasul* case did not overturn *Eisentrager* (this is discussed in depth in the *Rasul* opinion). Instead, the court found that all *Rasul* did was to hold that the petitioners there had a right to file a *writ of habeas corpus*, but left intact *Eisentrager*'s holding that the petitioners had no substantive rights to enforce.[89]

The court went on to say that there was no basis in either domestic or international law to grant the writs of habeas corpus. Moreover, the court noted that, "judicial review is limited to the question of whether Congress has given the military the

[88] *Ibid.*
[89] *Ibid.*

authority to detain or charge the individual as an enemy combatant, rather than whether the military's detention was correct or otherwise supported by the facts."[90]

"In the final analysis, the Court's role in reviewing the military's decision to capture and detain a non-resident alien is, and must be, highly circumscribed."[91] Thus, the court concluded that because this was an ongoing conflict and Congress had given the President authority to wage it, the court had no authority to issue a writ unless Congress or the President so authorized.[92]

The ***In re Guantanamo Detainee Cases*** has the same facts as *Khalid v. Bush* but this three-judge panel of the United States District Court for the District of Columbia reached a different conclusion. This court ruled that the Constitution does apply *outside* of the U.S. and the detainees *do* have substantive rights. The court held that the petitioners have stated a valid claim under the Fifth Amendment to the U.S. Constitution and the Combatant Status Review Tribunal (CSRT) procedures implemented by the government violate petitioner's right to due process of law. Additionally, at least some of the petitioners have stated valid claims under the Third Geneva Convention.[93]

Notwithstanding the government's contention that detainees do not possess any substantive rights despite the *Rasul* ruling, the Court found that based upon the specific language of that ruling, detainees do have substantive rights and at a minimum – due process was a "fundamental" right applicable to the detainees in this case.[94]

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[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*
[93] *In re Guantanamo Detainee Cases*, 2005.
[94] *Ibid.*

After determining that detainees were entitled to due process, the court reviewed the current CSRT procedures in place and found them lacking. It noted that detainees who were not subject to prosecution by military commissions could potentially face the same consequence as those who were – potentially life in prison. Procedural rights granted to those facing prosecution before military commissions were significantly greater than those who faced continued detention under CSRT procedures. Notably, detainees facing military commissions had access to counsel who could review classified material. In an extended review of the records of CSRTs, the court noted the difficulty detainees faced in challenging their enemy combatant status without access to counsel who could review classified material. Additionally, the court also expressed concerns about reliance on information that may have been obtained through the use of torture and the overly broad definition of enemy combatant.[95]

Finally, the court held that detainees who were Taliban fighters and not members of al Qaeda may have a valid claim under the Third Geneva Convention since Afghanistan was a party to the convention. Whereas, al Qaeda is a terrorist organization and therefore they are not entitled to protections under the Geneva Conventions. While the President has declared that no Taliban fighter is a prisoner of war as defined by the convention, the Third Geneva Convention does not permit this determination to be made in such a conclusory fashion. While numerous petitioners were found to be Taliban fighters by the CSRT, the records for many do not reveal specific acts which would deprive them of prisoner of war status. Accordingly, the court did not dismiss the claims

[95] *Ibid.*

of Taliban fighters not specifically determined to be excluded from prisoner of war status by a competent Article 5 tribunal.[96]

In the seminal case ***Boumediene v. Bush***, the petitioner Lakhdar Boumediene, an Algerian citizen, was arrested in Bosnia for plotting to attack the U.S. embassy in 2002.[97] Boumediene and others, also implicated in the planned attack, were sent to Guantanamo Bay Naval Base for detention. After the *Hamdi* decision CSRT's were set up and Boumediene was classified as an enemy combatant. In response to the *Rasul* case that determined statutory *habeas* jurisdiction did reach to detainees held in Guantanamo, the court did not answer the constitutional question in that case, a number of petitions were filed in the U.S. District Court for the District of Columbia.[98] The district court gave differing opinions in two separate hearings of consolidated cases. Judge Richard J Leon dismissed the cases siding with the government's opinion "that the detainees had no rights that could be vindicated in a *habeas corpus* action."[99] Judge Joyce Hens Green's opinion was that, "detainees had rights under the Due Process Clause of the Fifth Amendment."[100] After consolidating these two groups of cases, the Court of Appeals ruled that the Military Commissions Act of 2006 stripped jurisdiction of *habeas* cases from the federal courts. After initially denying Boumediene a petition for a writ of certiorari, the U.S. Supreme Court reversed itself and granted it on June 29, 2007.

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[96] *Ibid.*
[97] *Boumediene v. Bush*, 2008.

[98] Michael John Garcia, United States Congressional Research Service, Issue brief for Boumediene v. Bush (September 8, 2008), http://fpc.state.gov/documents/organization/110754.pdf
[99] *Boumediene v. Bush*, 2008.
[100] *Ibid.*

The government argued that Cuba and not the U.S. had sovereignty over Guantanamo Bay Naval Station. Although the Court did not disagree that Cuba holds legal sovereignty of Guantanamo Bay, Justice Kennedy's decision states that a territory "to be under *de jure* sovereignty of a nation while being under the plenary control of another," is not uncommon.[101] Therefore the Court rejected the government's claim based on the government's *de facto* sovereignty over Guantanamo Bay Naval Base. This decision gives the full effect of the Suspension Clause to the petitioners held there.[102]

The opinion then looked at the Court's history of extraterritorial applications. In 1789 the Congress extended the writ through statutes.[103] When the U.S. obtained the noncontiguous territories of the Philippines, Puerto Rico, Guam, and Hawaii, Congress chose no longer to "extend Constitutional rights to territories by statute."[104] Later, in the *Insular Cases*, the Court dealt further with the issue of the Constitution having force in territories. Incorporated Territories, which would be destined for statehood, would have the full force of the Constitution, while unincorporated Territories would do so only in part.[105] Also what the Court did in the *Insular Cases* was to decide what was practical as to the situation, condition, and requirements at that time in each Territory. Among other things, the Court took into consideration the legal systems in place.[106]

According to the Government, the U.S. relinquished its sovereignty in the 1903 lease with Cuba and the Constitution does not apply, at least to noncitizens. Realistically the U.S. maintains plenary control over Guantanamo. This raises separation of power

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[101] *Ibid.*
[102] *Ibid.*
[103] *Ibid.*
[104] *Ibid.*
[105] *Dorr v. United States*, 1904.
[106] *Boumediene v. Bush*, 2008.

issues in that although the Congress and the executive have control over territories they do not have "absolute and unlimited" powers but are also restrained by the Constitution.[107] This would also leave out the third branch of government and allow Congress and the President to "say what the law is."[108] In this case it would allow the writ of habeas corpus to be manipulated by the two branches it is meant to restrain.[109]

The Court rejected that there is any credible argument that habeas corpus courts would impede the military's mission at Guantanamo Bay. The Government relied upon very narrow language in the *Eisentrager* decision in which the Court said that all parts of the case were beyond any U.S. court's jurisdiction. The Court rejected the Government's argument. The circumstances as compared to *Eisentrager* are different. In post-War Germany the allied forces occupied a 57,000 square mile zone with 18 million inhabitants and had to be concerned about interference from, "enemy elements, guerilla fighters and 'were-wolves."[110] Guantanamo is forty-five square miles with the detainees, "military personnel, their families and a small number of workers" as the only inhabitants.[111] The U.S. has plenary control over the base where the Cuban court system has no jurisdiction over the military personnel or enemy combatants.[112]

The Court held that, "Art. I, §9, cl. 2, of the Constitution has full effect at Guantanamo Bay."[113] In order for the privilege to be denied, the U.S. Congress must be held to the requirements of the Suspension Clause. The Court also said that the MCA is

[107] *Murphy v. Ramsey*, 1885.
[108] *Marbury v. Madison*, 1803.
[109] *Boumediene v. Bush*, 2008.
[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid.*
[113] *Ibid.*

not a suspension of the writ, and the petitioners can argue the "legality of their detention."[114]

When the Court of Appeals decided that the writ did not apply to the petitioners, it did not answer the question of whether there was an adequate substitution for habeas corpus available to the detainees. The Court ruled that due to the "exceptional" circumstances, the separation-of-powers issues, and the time the detainees have been denied access to the judicial system, the Court decided not to remand the case to the lower courts because further delay would be detrimental as opposed to the benefits of remanding it to the lower court.[115] When the detainee is held as a result of executive order the importance of a habeas hearing is greater. In a normal criminal court hearing the disinterested parties conduct proceedings that ensure their impartiality. In executive detention orders or review procedures habeas corpus proceedings are critical. Not only does the habeas court need to be able to review the grounds for detention but also the Executive's authority to hold the prisoner.[116]

The petitioners argued that their proceedings under the CSRT were flawed in that the detainee may not be provided all of the information as to the allegations presented by the government to order his detention, or have the means to present evidence in court. The detainee may not have the opportunity to confront witnesses and hearsay evidence is admissible. There is such a great potential for mistakes in the evidence provided coupled with the possible result being a lengthy detention the Court could not ignore this issue. Because of this the Court ordered that for the *habeas*, or its substitute, to be effective the

[114] *Ibid.*
[115] *Ibid.*
[116] *Ibid.*

court must have the authority to correct any deficiencies and resulting up to and including the detainee's release.[117]

The Court's decision is that the Detainee Treatment Act (DTA) review process is not an adequate *habeas corpus* substitute.[118] It went further to say that an "adequate substitute" did not need to "duplicate §2241, in all respects." Although it did not discuss "unlawful conditions of treatment or confinement," it did rule that section 7 of the MCA unconstitutionally suspends the writ.[119]

On a vote of 5-4 with Justices Stevens, Breyer, Ginsberg, Souter, and Kennedy voting with the majority and Chief Justice Roberts, Justices Alito, Scalia, and Thomas with the minority. The Court reversed the Court of Appeals decision and remanded the cases to the Court of Appeals with instructions to remand these cases back to the District Court for further proceedings and follow the opinions of this Court.[120]

On November 6, 2008, Boumediene along with five other prisoners had their habeas corpus petition hearings commence in the U. S. District Court for the District of Columbia. The Government's case relied on information provided by one unnamed source in a classified document. The District Court did not believe that the Government provided enough information as to the "credibility and reliability" of the single source. Relying on *Parhart v. Gates*, which obligates the fact finder with evaluating the raw evidence to be sure it is "sufficiently reliable and sufficiently probative" with a degree of certainty.[121] The District Court was concerned that it did not know the circumstances or

[117] *Ibid.*
[118] Detainee Treatment Act of 2005.
[119] *Boumediene v. Bush*, 2008.
[120] *Ibid.*
[121] *Parhart v. Gates*, 2008.

the motive of the unnamed source in giving the information and no additional information was provided to corroborate the sole source's information. As a result, the District Court ruled that the Government did not prove its case by a preponderance of the evidence and ordered the release of five detainees.[122] Lakhdar Boumediene was released from U.S. custody and transferred to France on May 15, 2009. President Obama's administration made a request for France to take Boumediene and they obliged, however France said they would not take any more detainees.[123]

VII. The Law of Indefinite Detention

The law of war clearly contemplates detention without charge or trial for both combatants and civilians during conflict. One underlying question, however, is whether characterizing the detention of persons captured in the course of the "global war on terror" as "detention under the laws of war" is truly an accurate label. The previous section discussed the challenges courts and other military and civilian authorities face in categorizing persons during contemporary conflicts and counterterrorism operations. These challenges go beyond the threshold question of who can be detained and include questions such as the nature of the detention and the process due both in the initial authorization of detention and any review of detention over time. Those questions, in

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[122] The one exception was Belkacem Benseyah, who was additionally charged with being a facilitator for, and a member of, al Qaeda, was not ordered released. In this instance the Government did provide additional corroborating evidence that by a preponderance linked him to being a member of al Qaeda and a facilitator, and therefore ruled that he is being lawfully held as an enemy combatant.

[123] Edward Cody, "Ex-Detainee Describes Struggle for Exoneration, In France, Algerian Savors Normal Life," *The Washington Post*, 26 May 2009, 1.

turn, depend on the legal framework, which can be less than clear in such conflicts.

The question involves the geography of the battlefield and the temporal parameters of a conflict with terrorist groups. If the parameters of the battlefield – the geographic limits of the armed conflict – are hard, if not impossible, to define, how can it be determined if particular persons are detained within the course of an armed conflict and therefore fit within a paradigm of "law of war" detention? Similarly, how is it determined when a conflict with terrorist groups ends, for the purposes of release and repatriation of detainees?

A. Defining the Battlefield

The lack of conclusive legal framework in this area was exasperated by those who argued that the whole world is the battlefield in this conflict with terrorist groups. As President Bush stated shortly after the September 11th attacks, "Our war on terror will be much broader than the battlefields and beachheads of the past. The war will be fought wherever terrorists hide, or run, or plan."[124] In effect, the whole world is a war zone. Others, in contrast, took a much more limited view of the battlespace, arguing that it is limited to Afghanistan and possibly the border areas of Pakistan.[125]

Traditionally, the law of neutrality provided the guiding framework for the parameters of the battlespace in an international armed conflict. When two or more states are fighting and certain other states remain neutral, the line between the two forms the divider between the application of the laws of war and the law of neutrality. The law of

[124] Kenneth Roth, *The Law of War in the War on Terror*, FOREIGN AFFAIRS, Jan – Feb 2004.
[125] Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L, REV. 101, 114 (2009).

neutrality is based on the fundamental principle that neutral territory is inviolable.[126] It focuses on three main goals: 1) contain the spread of hostilities, particularly by keeping down the number of participants; 2) define the legal rights of parties and nonparties to the conflict; and 3) limit the impact of war on nonparticipants, especially with regard to commerce.[127] In this way, neutrality law leads to a geographic-based framework in which belligerents can fight on belligerent territory or the commons but must refrain from any operations on neutral territory. In essence, the battlespace in a traditional armed conflict between two or more states is anywhere outside the sovereign territory of any of the neutral states. The language of the Geneva Conventions tracks this concept fairly closely. Common Article 2, which sets forth the definition of international armed conflict, states that such conflict occurs in "all cases of declared war or . . . any other armed conflict which may arise between two or more of the High Contracting Parties."[128] In Common Article 3, non-international armed conflicts include conflicts between a state and non-state armed groups that are "occurring in the territory of one of the High Contracting Parties."[129] Both of these formulations tie the location of the armed conflict directly to the territory of one or more belligerent parties.

The neutrality framework as a geographic parameter is left wanting in conflicts with terrorist groups, however, beyond the simple fact that it technically only applies in cases of international armed conflict. Even analogizing to the situations is highly

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[126] Convention Respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land, Oct. 18, 1907, 36 Stat. 2310, art. 1 [Hague V].
[127] John Astley III, & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 A.F. L. REV. 119 (1997).
[128] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), common Article 2.
[129] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (1949), common Article 3.

problematic, because these conflicts not only pit states against non-state actors, but because those actors and groups often do not have any territorial nexus beyond wherever they can find safe haven from government intrusion. Simply locating terrorist groups and operatives does not therefore identify the parameters of the battlefield – the fact that the U.S. and other states use a combination of military operations and law enforcement measures to combat terrorism blurs the lines one might look for in defining the battlefield.

A look at how courts have addressed these questions – albeit obliquely – demonstrates a clear break between the framework applied in past wars and the views courts are taking today. For example, a 1942 decision upholding the lawfulness of an order evacuating Japanese-Americans to a military area stated plainly that "the field of military operation is not confined to the scene of actual physical combat. Our cities and transportation systems, our coastline, our harbors, and even our agricultural areas are all vitally important in the all-out war effort in which our country must engage if our form of government is to survive."[130]

Similarly, the U.S. entrance into World War I brought "the port of New York within the field of active military operations."[131] In each of those cases, the U.S. was a belligerent in an international armed conflict; the law of neutrality mandated that U.S. territory was belligerent territory and therefore part of the battlefield or combat zone. The courts have taken a decidedly different view since September 11th, however, consistently referring to the U.S. as "outside the zone of combat,"[132] "distant from a zone

[130] *Ex Parte Lincoln Seiichi Kanai*, 1942.
[131] *US v. ex rel Wessels v. McDonald*, 1920.
[132] *Padilla v. Rumsfeld*, 2003.

of combat,"[133] or not within any "active [or formal] theater of war,"[134] even while recognizing the novel geographic nature of the conflict. As one court noted, comparing the arrest of Yaser Hamdi – captured after a firefight in Afghanistan – to Jose Padilla – captured upon disembarking a plane at Chicago's O'Hare airport – would be akin to comparing "apples and oranges," clearly showing the court's view of a distinct difference between the characterization of the U.S. and the characterization of Afghanistan.[135] In a traditional belligerency-neutrality framework, one would expect to see U.S. territory viewed as part of the battlefield; the fact that courts consistently trend the other way highlights both the difference in approach and the uncertainty involved in defining post-9/11 conflicts.

B. Defining the Timeframe

The Geneva Conventions reference the end of armed conflict with phrases such as "cessation of active hostilities" or "general close of military operations." At the time the conventions were drafted, the "general close of military operations" was considered to be "when the last shot has been fired."[136] The Commentary to the Fourth Geneva Convention then provides further explanation:

> When the struggle takes place between two States the date of the close of hostilities is fairly easy to decide: it will depend either on an armistice, a capitulation or simply on *deballatio*. On the other hand, when there are several States on one or both of the sides, the question is harder to settle. It

[133] *Padilla v. Hanft*, 2006.
[134] *Boumedienne v. Bush*, 2008.
[135] See *Hamdi v. Rumsfeld* (4th Cir. 2003).
[136] Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A, p. 815.

> must be agreed that in most cases the general close of military operations will be the final end of all fighting between all those concerned.[137]

Both of these temporal frameworks are relevant to the timeframe of detention under the laws of war. The first – "cessation of active hostilities" – marks the endpoint of detention of prisoners of war and the time when such persons must be repatriated under the Third Geneva Convention. The second – "general close of military operations" – denotes the end of application of the Fourth Geneva Convention; when either armed conflict has ended or the law of belligerent occupation has ceased to apply to persons within occupied territory, including civilians detained for security reasons. Thus, internment of civilians under the Fourth Geneva Convention "must cease as soon as possible after the close of hostilities or the end of occupation."[138]

Applying these concepts in practice can be difficult even in traditional armed conflict situations. Article 118 of the Third Geneva Convention sought specifically to eliminate pretexts to delay repatriation used in earlier conflicts, such as the absence of a formal peace treaty or the continued involvement of a co-belligerent. Sporadic fighting may continue after the conclusion of a general armistice or truce that achieves a cessation of hostilities. The rule in Article 133 of the Fourth Geneva Convention has a similar goal of minimizing reasons to delay repatriation and release. "It is as a rule important for civilian internees as for prisoners of war that internment should cease as soon as possible

[137] International Committee of the Red Cross. *Commentary on the Geneva Convention (IV) Relative to the Protection of Civilian Person in Time of War* (Oscar M. Uhler & Henri Coursier eds.,1958): 62.
[138] United Kingdom, Ministry of Defence. *Manual of the Law of Armed Conflict* (2004): para 9.111.

after the close of hostilities."[139] Recognizing that "the disorganization caused by war may quite possibly involve some delay before the return to normal" and the release of internees, the Commentary nonetheless emphasizes that "restrictive measures taken regarding protected persons are to be cancelled as soon as possible after the close of hostilities."[140]

In contrast, the nature of terrorism is that it will not be defeated; but rather, terrorism is something to be managed, minimized, and defended against. At the most basic level, "a war against groups of transnational terrorists, by its very nature, lacks a well-delineated timeline."[141] Not only is it difficult to envision an end to the hostilities, but more problematic, there is absolutely no way of identifying what that end might look like. Terrorist groups morph, splinter and reconfigure, making it difficult to determine if, let alone when, they have been defeated. Although traditional notions of repatriation at the end of hostilities may offer helpful guidance in a geographically confined conflict with a non-state actor or terrorist group, such as the Tamil Tigers in Sri Lanka, the diffuse geographical nature of most conflicts with terrorist groups generally makes traditional temporal concepts unlikely to apply effectively to such conflicts. In a conflict with transnational terrorist groups, there will not be a surrender ceremony on the USS Missouri, or celebrations the equivalent of V-E Day, or any other identifiable moment marking the end of the conflict.

Thus, the U.S. might defeat Al Qaeda in some meaningful way, ending their ability

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[139] International Committee of the Red Cross. *Commentary on the Geneva Convention (IV) Relative to the Protection of Civilian Person in Time of War* (Oscar M. Uhler & Henri Coursier eds.,1958): 514.
[140] ICRC GC IV Commentary…, 515.
[141] Natasha Balendra, *Defining Armed Conflict*, 29 Cardoza L. Rev. 2461, 2467 (2008).

to launch any effective attacks against the U.S. or its allies, but some other terrorist group will take up, or may have already taken up, the same fight and the U.S. will still be engaged in a conflict with terrorist groups. The consequence of this uncertainty and this very nature of terrorism is that detention until the end of hostilities effectively means generational, if not lifetime, detention because applying concepts such as "cessation of active hostilities" or "general close of military operations" can lead to conflicts – and detention – that continue *ad infinitum*. Such detention is on another scale entirely different from law of war detention as traditionally understood or conceived.

VIII. Use of Military Commissions

President Bush relied upon his Constitutional authority as Commander-in-Chief, the Joint Resolution, as well as statutory powers provided to him by Congress in the Uniform Code of Military Justice to support his establishment of military commissions to try "non-United States citizens who have committed acts of terrorism, or who harbor terrorists, may be tried by military tribunals."[142] The rules of evidence have a lower standard than federal courts and military courts-martial in that the standard is "probative value to a reasonable person" as determined by the Commission itself.[143] This standard

[142] Military Order of 13 Nov. 2001. Nancy V. Baker, "The Law: The Impact of Antiterrorism Policies on Separation of Powers: Assessing John Ashcroft's Role," *Presidential Studies Quarterly* 32, no. 4 (December 2002): 767. Frederic Block, "Civil Liberties During National Emergencies: The Interactions Between The Three Branches of Government In Coping With Past and Current Threats to the Nation's Security," 29 *N.Y.U. Rev. L. & Soc. Change* 459 (2005): 514. Juan R. Torruella, "On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power," 4 *U. Pa. J. Const. L.* 648 (May 2002): 653.
[143] Military Order of 13 Nov. 2001.

will allow the tribunal to overcome the traditional hearsay and chain of custody obstacles they may encounter with evidence discovered on the "battlefield."

***Hamdan v. Rumsfeld*:** Hamdan was Osama bin Ladin's chauffeur and was picked up in Afghanistan. His case was referred to a Military Commission but he filed a *habeas corpus* writ challenging his trial by military commission vice court-martial. The district court ordered that Hamdan could not be tried before a military commission because no proper determination had been made that Hamdan is an offender triable by military tribunal under the law of war. Hamdan claimed he was entitled to POW status and unless and until a competent tribunal, as required by Article 5 of the Third Geneva Convention (GPW III), determined that Hamdan is not entitled to POW status, he may be tried for the offenses with which he is charged only by court-martial under the UCMJ.

The U.S. Court of Appeals for the D.C. Circuit on July 15, 2005 reversed the district court's judgment.[144] Hamdan previously was declared to be an enemy combatant before a Combatant Status Review Tribunal (CSRT), a review board setup as a direct result of the decision in the 2004 Supreme Court decision of *Hamdi v. Rumsfeld*.

Ultimately the Supreme Court granted *certiorari* on November 7, 2005. On February 13, 2006 the government filed a motion to dismiss the writ due to the recent passage of the Detainee Treatment Act of 2005 (DTA). The Court denied the government's motion and the case was argued before the U.S. Supreme Court on March 28, 2006 and decided June 29, 2006.[145]

The Supreme Court reversed the decision of the D.C. Circuit Court of Appeals, which had previously reversed the District Court's decision. The reasoning for the

[144] *Hamdan v. Rumsfeld* 2005, U.S. Court of Appeals for the D.C. Circuit.
[145] *Hamdan v. Rumsfeld* 2006.

decision to deny the government's motion to dismiss the writ of certiorari was based on "ordinary rules of statutory construction." The government's interpretation was that §1005(e) (1), and §1005(h), provisions would restrict the court from hearing habeas claims and would be enacted for *current* as well as future claims. The court held that they had jurisdiction over habeas cases because the DTA legislation was silent, according to the court, intentionally, on cases that were already pending.[146] That Congress omitted language from one part of the statute while they included it in another shows it was deliberate. Also, in the instance of the DTA, it was included in a previous draft of the legislation but left out of the final bill.

The question the Court had to answer was if the President had the authority to convene the military commissions, such as the one trying Hamdan. The AUMF, Article 21 of the UCMJ, or the DTA had not expressly, but just generally has given the President the authority to convene military commissions.[147]

Justice Stevens then outlined the three types of military commissions that have been used. One is where martial law has been instituted and the courts are replacements for the civilian courts. The second is when a temporary court has been established to try civilians while there is an occupation and there is not a functioning government court in place. The third example is when a commission is established to try an enemy who has violated the law of war on the battlefield during a time of war. This last example is important to the case brought by the government because it is the example they use in

[146] *Lindh v. Murphy*, 1997, and *Russello v. United States*, 1983.
[147] *Hamdan v. Rumsfeld*, 2006.

citing *Quirin*, and can be the only one relevant because it does not involve martial law, or enemy occupation at Guantanamo Bay.[148]

In order for the tribunal to have jurisdiction preconditions have to be met. According to UCMJ Article 21 and the earlier Article of War 15 the offense would have had to be committed "within the theater of war" "of the convening commander." Also the offense had to take place during the time of war. If it happened before or after that time the military commission would not have jurisdiction. Hamdan's actions were allegedly mostly committed before September 11, 2001. The crime he was being charged with took place over five years until November 2001. There were not any overt acts he was being charged with that violate the law of war.[149]

The Court also concluded that Hamdan was not charged with a law of war offense that may be tried by a military commission and that the commission did not have the authority to try Hamdan. As for the charge of conspiracy the Court again cited *Quirin*. The Court in *Quirin* omitted any discussion of conspiracy and stressed the importance of "the completion of offense." No violation of the law of war could have occurred without the actual or attempted commission of an act. Justice Thomas in his dissenting opinion stated that the offense of conspiracy was chargeable as a violation of the laws of war. He referenced the Civil War case of Henry Wirz who was charged with "conspiring" and a number of other offenses which he personally carried out.[150]

The Court also ruled on the legitimacy of the military commission to try Hamdan. The Court found that the structure and procedures were not valid as per the Geneva

[148] *Ibid.*
[149] *Ibid.*
[150] *Ibid.*

Conventions of 1949 and the UCMJ.[151] The Commission Order No.1 which outlines the procedures used in military commissions was amended August 31, 2005.[152] This was effective while Hamdan's trial was already underway. Some of the provisions stated that the "Appointing Authority or the presiding officer" could bar the accused and his civilian counsel from attending the proceedings.[153] Also testimony could be entered into the proceedings by witnesses that were not sworn, hearsay, or "obtained by coercion" and would be admissible.[154] The accused's appointed military counsel would be able to attend the hearings but would be restricted from sharing that information with the accused.[155] Once the proceedings have concluded the decision of the military commission would have to be a two-thirds majority.[156] This would only be reviewable by a three-member panel designated by the Secretary of Defense.[157] The Secretary would then remand the case for further proceedings or send it to the President for his ultimate decision.[158] The President can then only change the decision if it is favorable to the accused, if he hasn't already delegated that decision to the Secretary of Defense.[159]

Hamdan's objections were upheld by the Court in that he did not have automatic right of appeal under the DTA, because of the sentencing guidelines, and there was

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[151] *Ibid.*
[152] Department of Defense. *Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism,* August 31, 2005, available online at: http://www.defense.gov/news/Sep2005/d20050902order.pdf. Internet; accessed 31 March 2011
[153] *Military Commission Order No. 1…,* August 31, 2005.
[154] *Ibid.*
[155] *Ibid.*
[156] *Ibid.*
[157] *Ibid.*
[158] *Ibid.*
[159] *Hamdan v. Rumsfeld*, 2006.

reason to believe that procedurally his trial was flawed because was barred from attending his own trial.[160]

The Court then ruled that the President had exceeded his scope of power and the military commissions trying Hamdan were unconstitutional because they did not follow UCMJ Article 36. Under Article 36(b), the procedures the President declares must be "uniform insofar as practicable" as military commissions and courts-martial are concerned. Even though the President made the comparison as to the rules of the district courts of the United States he did not make the same comparison to the courts-martial. The issues of not being present during proceedings and not having duly sworn testimony, although it related to a sensitive matter such as terrorism, was not sufficient enough to try Hamdan under the rules for military commissions and not under the rules for courts-martial. The Court found that the procedures also violate the Geneva Conventions and reversed the Circuit Court of Appeals decision.[161]

In response to the decision of *Hamdan v. Rumsfeld* (2006), and in an effort to correct the constitutional failings of the military commissions Congress passed the Military Commissions Act of 2006, which was signed into law by President Bush on October 17, 2006.[162]

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[160] *Ibid.*
[161] *Ibid.*
[162] The Military Commissions Act of 2006. The MCA of 2006 has subsequently been amended by the Military Commissions Act of 2009. As part of H.R. 2647: National Defense Authorization Act for Fiscal Year 2010, the 111th Congress passed the Military Commissions Act of 2009 and it was signed into law by President Barack Obama on October 28, 2009, to become Public Law 111-84. The MCA of 2009 made changes to the Bush-era MCA of 2006. The changes were made to coincide with the new Obama administration guidelines and future policies. One of the changes in the act is the term of "Unprivileged Enemy Belligerent," which replaces, and modifies the previous term of "enemy combatant" and most strikingly removes the name of the Taliban from the

IX. Interrogation and Torture of Detainees

An area that has generated significant controversy both in the domestic and international legal communities has been the treatment and interrogation methods employed on detainees at Guantanamo Bay, Cuba. The prohibition against torture is well established in U.S. and international law.[163] However, given what information has been made public to date the question is not *whether* both domestic and international laws were bypassed or circumvented by the Bush administration in the name of national security to torture detainees, but to *what extent* were U.S. and international laws violated.

The now infamous "Torture Memos" issued by members of the United States Department of Justice's prestigious Office of Legal Counsel (OLC) offer chilling interpretations of the relevant international laws. Interpretations so grossly distorted and one-sided that even some of the highest-ranking Bush officials, most notably Secretary of

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definition. (MCA §984a. (7)). The new law also gives the defendant other rights such as: the right to present evidence, cross-examine witnesses, and "to respond to all evidence admitted against the accused." (MCA §949a (2) (a)). Also to be present at all times during the trial, unless removed for being disruptive. (MCA §949a (2) (b)). The accused shall have any information admitted as evidence available to him. (MCA§ 949p–1 (b)). The accused may appeal convictions to the United States Court of Military Commission Review, (MCA **§** 950c), and the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to review the Military Commission, but only after all other appeals have been exhausted. (MCA § 950g). The Supreme Court of the United States may grant a writ of certiorari upon final judgment of the Court of Appeals. (MCA 950g (e)). President Obama on March 7, 2011 issued an Executive Order 13567 regarding the *Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the AUMF*. Along with addressing a number of issues pertaining to the review of detainees at Guantanamo Bay Naval Base detention facility the president ordered the resumption of Military Commissions. *See* The White House. Executive Order – Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force. March 7, 2011, available online at: http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava. Internet; accessed 4 March 2011.

[163] Jeanne Mirer, "The Law of Torture and Accountability of Lawyers Who Sanction It," in *The United States and Torture* (New York: New York University Press, 2011), 241-245.

State Colin Powell, recognized them as dangerous and urged their revision. Undeterred by warnings, however, the authors submitted the Torture Memos to President Bush intact.

In sum, the memos: (1) declare the Geneva Conventions and other international treaties inapplicable to the treatment of al Qaeda detainees; (2) assure the President that legal liability would not arise for conduct perpetrated against al Qaeda suspects at Guantanamo Bay; and (3) suggest that Guantanamo Bay interrogators could "inflict pain and suffering on detainees, up to the level caused by 'organ failure' without violating the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment." [164]

After September 11, President Bush began to receive numerous memoranda (not just the now infamous "Torture Memos") from officials within his administration – specifically OLC – stating, among other things, that the 1949 Geneva Conventions did not apply to individuals captured by the U.S. and suspected of involvement with the Taliban and/or al Qaeda.[165] On September 25, 2001, John Yoo, Deputy Assistant Attorney General at the OLC issued a memo to Timothy Flanagan, the Deputy Counsel to the President in response to a request from that office. The subject of the memo was the President's constitutional authority to act militarily after the September 11, 2001 attack. Yoo cites in the memo the President's inherent power in the 1973 War Powers Resolution and the AUMF, however, Yoo's central assertion is that the President's power as Commander in Chief and his "duty to execute the laws," specifically Article II § 2, cl. 1,

[164] Memorandum from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to William J. Haynes II, General Counsel, Department of Defense, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*. January 9, 2002.
[165] Yoo Memo *Application of Treaties and Laws to al Qaeda and Taliban Detainees*. January 9, 2002.

and Art. II § 1 of the U.S. Constitution, rests "exclusively" within the presidency and any decisions are "unreviewable."[166]

The December 28, 2001 memo argued that the enemy combatants detained at Guantanamo Bay presumably did not fall under federal district court jurisdiction pertaining to habeas corpus petitions.[167] Next, Yoo authored the January 9, 2002 memo to William J. Haynes II, General Counsel for the Department of Defense, (DOD), titled *Application of Treaties and Laws to al Qaeda and Taliban Detainees*.[168] This memo laid out the reasoning as to why neither the 1949 Geneva Conventions nor the U.S. War Crimes Act applied to al Qaeda or the Taliban. According to the memo "al Qaeda… as a non-state actor cannot be a party to the international agreements governing war."[169] The Taliban in Afghanistan are viewed as a "failed state" and therefore are not covered under Third Geneva Convention that regulates the treatment of POWs.[170] The memo also states that the President is not bound by, "any customary rules of international law that apply to armed conflicts," and servicemen, at the President's discretion could be exempted from

[166] Memorandum from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to Timothy Flanigan, Deputy Counsel to the President, *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*. September 25, 2001.
[167] Memorandum from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, and John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to William J. Haynes II, General Counsel, Department of Defense, *Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba*. December 28, 2001.
[168] Memorandum from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to William J. Haynes II, General Counsel, Department of Defense, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*. January 9, 2002
[169] John Yoo, *War by Other Means: An Insider's Account of the War on Terror* (New York: Atlantic Monthly Press, 2006), 1.
[170] Yoo, *War by Other Means…,* 2-6.

prosecution of war crimes.[171] Finally, the memo also states that al Qaeda and the Taliban could be held to the laws of war by Presidential constitutional authority.[172]

On January 19, 2002 the Secretary of Defense, Donald Rumsfeld, issued a memo to the Chairman of the Joint Chiefs of Staff. It advised that members of al Qaida and the Taliban although not entitled to POW status, but should be treated "humanely, and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the 1949 Geneva Conventions."[173]

On January 25, 2002, a memo from Alberto Gonzales to the President supported the OLC position, as well as the President's earlier decision, that the Third Geneva Convention regarding the Treatment of Prisoners of War (GC III), does not apply to al Qaeda and the Taliban and therefore these detainees would not be classified as POWs.[174] Gonzales also formally notified President Bush that Secretary of State Powell requested the President "reconsider that decision."[175] Gonzales provided the legal background and arguments as to why or why not the President should remain with his prior decision. A key component of his argument in favor of the President maintaining his decision was that it would protect U.S. officials from being prosecuted domestically for violations of

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[171] *Ibid.*, 39 and 41-42.
[172] *Ibid.*, 39.
[173] Memorandum from Donald Rumsfeld, Secretary of Defense, to the Chairman of the Joint Chiefs of Staff, *Status of Taliban and al Qaida*. January 19, 2002, available online at http://www.lawofwar.org/Rumsfeld%20Torture%20memo_0001.jpg. Internet; accessed 5 February 2011.
[174] Memorandum from Alberto Gonzales, Counsel to the President, to President George W. Bush, *Decision Re Application of the Geneva Conventions on Prisoners of War to the Conflict with al Qaeda and the Taliban.* January 19, 2002, available online at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf. Internet; accessed 5 February 2011.
[175] Gonzales Memo, *Decision Re Application of the Geneva Conventions on Prisoners of War to the Conflict with al Qaeda and the Taliban.* January 19, 2002.

the War Crimes Act. In the end, Gonzales maintained that the, "arguments for reconsideration and reversal are unpersuasive."[176]

Secretary of State Colin Powell commented on the preceding January 25, 2002 memo and stated that, in declaring the Geneva Conventions inapplicable to the conflict with al Qaeda, the government would "reverse over a century of U.S. policy and practice in supporting the Geneva conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general."[177]

Powell asserted that the detainees should be treated according to the principles of the Third Geneva Convention and the President should publically so state.[178] Secretary Powell proceeded to discuss all of the pros and cons of the January 25, 2002 Gonzales memo. A key item that Powell stressed was that by not applying the Geneva Conventions to the conflict it would put our forces in danger, currently and in potential future conflicts, of not having the protections of the laws of war. Also it may have negative consequences in conducting foreign policy, result in negative public support, and subject our personnel to investigations and prosecutions by foreign entities.[179]

In a memo dated February 1, 2002 from the Office of the Attorney General, John Ashcroft laid out the choices for the President in determining whether Afghanistan is a "failed state" or not. If the President were to announce that Afghanistan was a failed state then they would not be a party to the Geneva Convention and would not benefit

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[176] *Ibid*.
[177] Memorandum from Colin Powell, Secretary of State, to Alberto R. Gonzales, Counsel to the President, *Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan.* January 26, 2002.
[178] Powell Memo *Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan.* January 26, 2002.
[179] *Ibid.*

from the treaty's protections. This classification would then provide protection to military personnel, among others, as it relates to prosecution under the War Crimes Act of 1996 for violations that include interrogation.[180]

On February 7, 2002, President Bush issued the, "Humane Treatment of al Qaeda and Taliban Detainees," memo relying on his authority as Commander-in-Chief and Chief Executive, the OLC memo of January 22, 2002, and the Attorney General opinion of February 1, 2002.[181] He adopted some provisions in the previous memos such as: the Geneva Conventions do not apply to al Qaeda as they are "not a High Contracting party to Geneva"; he stated that as President he has the authority (but at that time chose not to) to suspend the Geneva Conventions Treaty between the U.S. and Afghanistan; the Geneva Conventions do apply to the Taliban but "common Article 3 does not apply to al Qaeda or Taliban detainees."[182] The President also stated that the U.S. will treat detainees as outlined in the Rumsfeld memo on January 19, 2002, and the U.S. will also hold responsible those who detain United States personnel in accordance "with applicable law."[183]

The creative legal analysis (with the notable exception of Secretary Colin Powell) started the Bush Administration down a path that pulled them further away from

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[180] Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody, November 20, 2008, available online at http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf. Internet; accessed 25 February 2011.
[181] Presidential Order Memorandum from President George W. Bush, *Humane Treatment of with al Qaeda and the Taliban Detainees.* February 7, 2002, available online at http://www.lawofwar.org/Bush_memo_Genevas.htm. Internet; accessed 5 February 2011.
[182] Presidential Order *Humane Treatment of with al Qaeda and the Taliban Detainees.* February 7, 2002.
[183] *Ibid*.

established law. The previous memos seemed to have opened the door for each successive opinion from the OLC and others within the government to define and pick apart what is, and what is not, the law. In particular, what does and what does not constitute torture during interrogations.

The OLC issued three memos on August 1, 2002. One of those memos was entitled *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A* and was authored by Assistant Attorney General Jay Bybee and addressed to Gonzales.[184] In the forty-six page memo, Bybee concluded that for an act to be torture it has to be "specifically intended" and done to the *extreme* so that it causes organ failure or death. The standard for the infliction of mental pain would be prolonged suffering akin to post-traumatic stress disorder (PTSD). Finally, Bybee also stated that acts that are, "cruel, inhuman, or degrading" may not be torture.[185]

Yoo also authored a memo to Gonzales where he asserted that the interrogation techniques that meet the terms of 18 U.S.C. §§ 2340-2340A would not violate the Convention Against Torture.[186] The interrogation of an al Qaeda member would also not be subject to Articles 7 or 8 of the Rome Statute and the underlying jurisdiction of the

[184] Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation Under 18 U.S.C. sec 2340-2340A.* August 1, 2002.
[185] Bybee Memo *Standards of Conduct for Interrogation Under 18 U.S.C. sec 2340-2340A.* August 1, 2002.
[186] The federal criminal prohibition against torture is codified at 18 U.S.C. §§ 2340-2340A. That statute prohibits conduct "specifically intended to inflict severe physical or mental pain or suffering." See http://www.law.cornell.edu/uscode/18/usc_sup_01_18_10_I_20_113C.html

ICC because under Yoo's circular logic the President had determined al Qaeda detainees are not POWs and therefore do not receive the protection afforded to POWs.[187]

At the same time the third memo was signed by Bybee for John Rizzo, Acting General Counsel for the Central Intelligence Agency and entitled *Interrogation of al Qaeda Operative*. This memo details the OLC's legal advice to the CIA pertaining to the interrogation techniques they want to use specifically on al Qaeda operative Abu Zubaydah.[188] These include ten techniques some of which are; attention grasp, walling, cramped confinement, stress positions, and "the waterboard."[189] Each of the ten techniques is examined in the memo and the conclusion is that the techniques "would not violate Section 2340."[190]

Secretary of Defense, Donald Rumsfeld approved a request from the Commander of Joint Task Force 170 (later known as JTF GTMO), through the Commander of US Southern Command (USSOUTHCOM) to use counter-resistance interrogation techniques on detainees at Guantanamo Bay. Secretary Rumsfeld signed the November 27, 2002 memo from William J. Haynes II, General Counsel for the DOD, and hand wrote on the

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[187] Memorandum from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Letter regarding "the views of our Office concerning the legality, under international law, of interrogation methods to be used on captured al Qaeda operatives."* August 1, 2002.
[188] Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, General Counsel to the CIA, *Interrogation of al Qaeda Operative.* August 1, 2002. It should be noted that FBI supervisory special agent Ali Soufan who interrogated Abu Zubaydah stated that "Zubaydah produced" the information that lead to the capture of KSM and Padilla "under traditional interrogation methods, before the harsh techniques were ever used." Marjorie Cohn, "An American Policy of Torture," in *The United States and Torture* (New York: New York University Press, 2011), 7.
[189] Bybee Memo *Interrogation of al Qaeda Operative.* August 1, 2002.
[190] *Ibid.*

bottom of the memo, "However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?"[191]

The Secretary of Defense issued another memo on April 16, 2003. In this memo Counter-Resistance Techniques were specifically listed and safeguards were also provided to the Commander of USSOUTHCOM. Of the twenty-two techniques listed, there were four that required military necessity and the Secretary of Defense's prior advanced notification. All of these techniques were restricted to unlawful combatants detained at Guantanamo Bay. The memo also referenced seven techniques, which included dietary and environmental manipulation, sleep adjustment, and isolation, which are not covered in the Army Field Manual 34-52.[192]

The U.S. Department of Justice's Office of Legal Counsel issued three memos to John A. Rizzo, Senior Deputy Counsel, Central Intelligence Agency in May of 2005. These three memos, coupled with the August 1, 2002 Bybee Memo to Rizzo, comprise the core "torture memos." Two of the memos were dated May 10, 2005, and addressed the "*Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques (Combined Use of Certain Techniques) in the Interrogation of High Value al Qaeda Detainees*."[193] The first

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[191] Memorandum from William J. Haynes II, General Counsel for the Department of Defense, to Donald Rumsfeld, Secretary of Defense, *Counter-Resistance Techniques.* November 27, 2002, available online at http://www.torturingdemocracy.org/documents/20021127-1.pdf. Internet; accessed 6 February 2011.

[192] Memorandum from Donald Rumsfeld, Secretary of Defense to the Commander, US Southern Command, *Approved Interrogation Techniques.* April 16, 2003.

[193] Memorandum from Stephen G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel to the CIA, *Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May be Used in the Interrogation of High Value al Qaeda Detainees*. May 10, 2005. Memorandum from Stephen G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel to the CIA,

memo addressed the individual techniques and concluded that none of the techniques, which included extended sleep deprivation and "the waterboard," violated 18 U.S.C. §§ 2340-2340A and also required close supervision of medical and psychological personnel. The CIA, when they requested the legal opinion, gave three conditions under which "the waterboard" would be used;

> 1) the CIA has credible intelligence that a terrorist attack is imminent;
> 2) there are "substantial and credible indicators the subject has actionable intelligence that can prevent, disrupt, or delay this attack", and;
> 3) other interrogation methods have failed or are unlikely to yield actionable intelligence in time to prevent the attack.[194]

Also both memos included in the conclusion the following line, "Finally, we emphasize that these are issues about which reasonable persons may disagree."[195]

The third memo, *Re: Application of United States Obligation Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees* dated May 30, 2005 was also signed by Bradbury, and concluded that because the interrogations were conducted outside of U.S. territories or, "territory under [United States] jurisdiction" it could not violate Article 16

Application of 18 U.S.C. §§ 2340-2340A to Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees. May 10, 2005.

[194] Memorandum from Stephen G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel to the CIA, *Application of 18 U.S.C. §§ 2340-2340A to Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees*. May 10, 2005.

[195] Memorandum from Stephen G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel to the CIA, *Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May be Used in the Interrogation of High Value al Qaeda Detainees*. May 10, 2005. Memorandum from Stephen G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel to the CIA, *Application of 18 U.S.C. §§ 2340-2340A to Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees*. May 10, 2005.

of the CAT. The memo cites instances of the CIA using enhanced techniques on detainees and states that it was used on twenty-eight detainees, including three detainees (Khalid Sheikh Mohammed – KSM – among them) who were subjected to "the waterboard."[196]

In July 2006, the Center for Constitutional Rights issued a "Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantanamo Bay, Cuba."[197] The report included a compilation of the experiences of numerous Guantanamo detainees, both past and present, as relayed by the prisoners themselves, the attorneys who visited them, and the military personnel who witnessed and/or perpetrated the acts described.[198] The report also detailed the interrogation techniques used by U.S. military officials, and concluded by urging the U.S. government to appoint a special, independent committee to investigate allegations of grave injustice occurring inside Guantanamo's walls. [199] Despite overwhelming domestic and international legislation which leaves no doubt as to the universal ban on torture and cruel, inhuman, and degrading treatment, members of the Bush Administration regularly insisted that neither international treaties nor customary international law applied to the United States in its detention and interrogation of

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[196] Bradbury Memorandum from Stephen G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel to the CIA, *Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees*. May 30, 2005.
[197] Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman and Degrading Treatment of Prisoners at Guantanamo Bay, Cuba,* July 2006, available online at http://www.ccrjustice.org/learn-more/reports/report/report%3A-torture-and-cruel%2Cinhuman%'-and-degrading-treatment-prisoners-guantanamo. Internet; accessed 10 May 2011.
[198] Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman and Degrading Treatment of Prisoners at Guantanamo Bay, Cuba.*
[199] *Ibid.*

suspected members of al Qaeda.[200] Even after the Supreme Court of the United States declined to uphold the law and policy enacted at Guantanamo, members of the Bush Administration continued to deny any wrongdoing and persisted in their efforts to circumvent the law.[201] After the Abu Ghraib debacle – generally agreed upon as "the worst moment in the war on terror"[202] – and the resulting pictures "were linked to the legal memos prepared by Deputy Assistant Attorney General John Yoo… Americans' (and foreign spectators') widespread and deeply held expectation that the United States would not be involved in the mistreatment of prisoners could no longer be preserved[.]"[203]

The lawyers involved in the torture / interrogation issue were trying to achieve the policy objective by reinterpreting the Geneva Conventions and the Convention Against Torture (both very well established and fundamental international law) and as a result they provided a very narrow definition of torture by taking an extreme view of the meaning "severe." The art of reinterpretation of treaties must include the view and interpretation of the rest of one's own government, the international community, international bodies dealing with torture, and the academic community.[204] In each of

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[200] Michael P. Scharf, "International Law and the Torture Memos," 42 *Case W. Res. J. Int'l L.* 321 (2009).
[201] *Guantanamo Bay Timeline*, Washington Post, 2010; *see also* Jordan J. Paust, "Civil Liability of Bush, Cheney, Et Al. for Torture, Cruel, Inhuman, and Degrading Treatment and Forced Disappearance," 42 Case W. Res. J. Int'l L. 359 (2009).
[202] Gabriella Blum and Philip B. Heymann. *Laws, Outlaws, and Terrorists: Lessons from the War on Terrorism.* (Cambridge: MIT Press, 2010), 38.
[203] Blum and Heymann. *Laws, Outlaws, and Terrorists…,* 15.
[204] After World War II, a U.S. military tribunal heard the case Josef Altstoetter and fifteen other German lawyers who were charged with war crimes and crimes against humanity "based upon the legal advice they had provided" to the Nazi regime. *See* Jeanne Mirer, "The Law of Torture and Accountability of Lawyers Who Sanction It," in *The United States and Torture* (New York: New York University Press, 2011), 250.

these entities all alternative interpretations should have been sought and understood. It has become clearer with time that "the purpose of the memos was not to give the President a full understanding of the legal issues, but to provide legal cover for a premeditated illegal policy."[205] It is equally clear that the "drafters did not present all possible conclusions and consequences, and thus failed to meet the requisite professional standard of care" and committed "legal malpractice."[206]

An indication of the American public's rejection of Bush era policies in this regard could be seen in President Obama's announcement ordering the closing of Guantanamo a mere two days after he took the oath of office.[207] Not only did President Obama order the closing of Guantanamo two days after his inauguration, but also his Executive Order on Interrogations "specifically prohibits U.S. government personnel or agents from relying on the [Office of Legal Counsel] Memos in interpreting Federal criminal laws, the Convention against Torture, or the requirements of Common Article 3 of the Geneva Conventions."[208] In expressing his support for the President's decision, Dennis C. Blair, President Obama's newly appointed director of national intelligence, stated, "I believe strongly that torture is not moral, legal, or effective…[a]ny program of detention and interrogation must comply with the Geneva Conventions, the Conventions on Torture, and the Constitution. There must be clear standards for humane treatment that apply to all agencies of U.S. Government…[Guantanamo is] a damaging symbol to the

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[205] Jeanne Mirer, "The Law of Torture and Accountability of Lawyers Who Sanction It," in *The United States and Torture* (New York: New York University Press, 2011), 249.
[206] Mirer, *The Law of Torture and Accountability of Lawyers…,* 249.
[207] Memorandum from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to William J. Haynes II, General Counsel, Department of Defense, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*. January 9, 2002.
[208] Michael P. Scharf, "International Law and the Torture Memos," 42 *Case W. Res. J. Int'l L.* 321 (2009).

world."[209] Such strong condemnations by the U.S. government of the legal policy surrounding the Bush Administration's actions at Guantanamo Bay was intended to send a message to the rest of the world that the United States does not endorse such practices.

X. The Record

The Bush Administration record for Guantanamo Bay is unimpressive. Only two contested military commissions were accomplished in seven plus years.[210] Al Bahlul was convicted of conspiracy on November 3, 2008 and sentenced to life. *United States v. Al Bahlul* is currently on appeal to the United States Court of Military Commissions Review.[211] Salim Ahmed Hamdan, of *Hamdan v. Rumsfeld*, was also convicted in 2008 and received a sentence of sixty-six months – nearly time served – and he was subsequently transferred to Yemen to serve out the few months remainder of his sentence.[212] The island prison has held 779 prisoners since 2002.[213] As of July 2011, over six hundred have been transferred to their home countries or a third country, one

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[209] Mark Mazzetti and William Glaberson. "Obama Issues Directive to Shut Down Guantanamo," *N.Y. Times*, Jan. 21, 2009.

[210] There were two guilty pleas for a total of four military commissions during the Bush years. See *Guantanamo Bay Timeline*, Washington Post, 2010, available online at http://projects.washingtonpost.com/guantanamo/timeline/.
Internet; accessed 19 April 2011. There has only been one detainee transferred to the U.S. to be tried in civilian federal court. Ahmed Ghailani was tried and convicted in the United States District Court in New York under the Obama Administration. Of the more than 280 charges, Ghailani was only convicted of one charge of conspiracy in November of 2010, and sentenced January 25, 2011 to life imprison. *Ibid.*

[211] *Guantanamo Bay Timeline*, Washington Post, 2010, available online at http://projects.washingtonpost.com/guantanamo/timeline/.
Internet; accessed 19 April 2011.

[212] Worth, Robert F. "Bin Laden Driver to be Sent to Yemen," *N.Y. Times*, Nov. 25, 2008.

[213] *Guantanamo Bay Timeline*, Washington Post, 2010, available online at http://projects.washingtonpost.com/guantanamo/timeline/.
Internet; accessed 19 April 2011.

hundred and seventy one are still detained, and seven have died while in captivity. The Guantanamo Review Task Force, established by President Obama immediately upon taking office, reviewed all remaining detainees and approved 126 detainees for transfer, referred 44 detainees for prosecution (although only 36 are presently slated for prosecution in either a military commission or a civilian federal criminal court) and recommended that 48 detainees be designated for "continued Law of War detention" without transfer or prosecution.[214] Currently there are 171 detainees in detention at Guantanamo.[215]

The March 7, 2011, Executive Order 13567, "Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force" established review procedures for detainees subject to "continued Law of War detention," meaning detention without charge or prosecution, and defines law of war detention as "detention authorized by the Congress under the AUMF, as informed by the laws of war."[216] The executive order called for an initial review of all law of war within one year by a Periodic Review Board (PRB), according to Sec 3 (a). The detainee would then be subject to triennial full reviews thereafter (Sec 3(b)), and file reviews every six months. (Sec 3 (c)). If a detainee is determined by the PRB to be released it is up to the

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[214] Final Report, Guantanamo Review Task Force, January 22, 2010, *available at* http://media.washingtonpost.com/wp-srv/nation/pdf/GTMOtaskforcereport_052810.pdf?sid=ST2010052803890; Internet; accessed 23 May 2011.

[215] *Guantanamo Bay Timeline*, Washington Post, 2010, available online at http://projects.washingtonpost.com/guantanamo/timeline/. Internet; accessed 19 April 2011.

[216] The White House. Executive Order – Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force. March 7, 2011, available online at: http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava. Internet; accessed 4 March 2011.

Secretaries of Defense and State to obtain a secure and humane location for transfer somewhere other than the United States. (Sec 4).[217]

During the Bush Administration countless nations, inter-governmental organizations, non-governmental organizations, and human rights groups criticized the United States due to their policies regarding detention, trial, and torture.[218] All counterproductive if at the end of the day, "America's hope for retaining its international leadership depends on spreading the values it stands for as widely as possible – on making democracy, individual autonomy, human rights, freedom, and pluralism the demands of almost every population around the world."[219] It is difficult to be the shining city on the hill if the landscape is littered with broken laws and diminished values.

XI. Final Analysis

History has demonstrated that in times of crisis the United States government may "overestimate our security needs and discount the value of liberty."[220] Does the government, and for this purpose "the government" means the President and his executive branch, always go too far? Or not far enough? Supreme Court Justice William

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[217] *Ibid*.

[218] For example, the United Nations recommended the closure of Guantanamo Bay and criticized all of the attending judicial and detention processes. *See* United Nations. Commission on Human Rights, Situation of Detainees at Guantanamo Bay. February 15, 2006, available online at: http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_02_06_un_guantanamo.pdf Internet; accessed 9 December 2010. *See also* Amnesty International Report, *USA: Justice Delayed and Justice Denied? Trials Under the Military Commissions Act.* March 22, 2007, available online at: http://www.amnesty.org/en/library/asset/AMR51/044/2007/en/48cca375-d3a8-11dd-a329-2f46302a8cc6/amr510442007en.pdf. Internet; accessed 15 April 2011.

[219] Gabriella Blum and Philip B. Heymann. *Laws, Outlaws, and Terrorists: Lessons from the War on Terrorism.* (Cambridge: MIT Press, 2010), 44.

[220] David Cole, "Enemy Aliens," 54 *Stan. L. Rev*. 953 (2002): 955.

J. Brennan has said, "After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along."[221]

Do the courts keep the President from overstepping his authority, or do they stay on the sidelines until it is safe to step on the playing field? In other words, the historical analysis indicates a persistent trend whereby the executive branch undertakes some action in the name of national security, the courts either endorse the action or are reluctant to second guess the national security decisions of political and military officials.[222] However, once the crisis has passed, the action is then seen as unjustified and it is often the courts that attempt to rectify the situation.[223] The difficulty with accepting this pattern on its face is three-fold. First, what if the courts were not sitting on the sidelines at all but in fact were hard at work "preserving the institutional structures and processes" as well as forging a "broad based political accountability" by requiring the executive and legislative branches to reach accord?[224] Second, it appears that the courts today are less likely than in the past to stay on the sidelines at the mere mention of national security by

[221] Mark Tushnet, "Defending Korematsu?: Reflections on Civil Liberties in Wartime," 2003 *Wis. L. Rev.* 273 (2003): 273-274.
[222] Steven R. Shapiro, "Defending Civil Liberties in the War on Terror: The Role of the Courts in the War Against Terrorism: A Preliminary Assessment," 29 *Fletcher F. World Aff.* 103 (Winter, 2005): 115-116.
[223] Shapiro, *Defending Civil Liberties in the War on Terror…,* 115-116.
[224] Samuel Issacharoff and Richard H. Pildes, "Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime," 5 *Theoretical Inq. L.* 1 (January, 2004): 44.

the government.[225] Lastly, it is the policy makers that must react in real time and are not granted the benefit of future certainty nor the clarity of hindsight.[226] As a result, the President (as the executive branch / government) may make decisions and issue orders that "might be entirely rational at the time" but may otherwise be judged harshly.[227]

Perhaps Presidential power for national security purposes is best summed up in the Supreme Court's landmark decision of *Youngstown Sheet & Tube Co. v. Sawyer* when President Truman ordered a seizure of the nation's steel mills during the Korean War under the auspices of his role as Commander-in-Chief of the Armed Forces in order to avert a steel workers' strike. The Supreme Court ruled against such seizure by noting that "the President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[228] In the well-known and oft-quoted concurrence, Supreme Court Associate Justice Robert Jackson stated: "That comprehensive and undefined Presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety."[229] Jackson went on to state the power of the President is greatest, "when the President acts pursuant to an express or implied authorization of Congress, ... for it includes all that he possesses in his own right plus all that Congress can delegate."[230] Without such a Congressional delegation the President

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[225] Steven R. Shapiro, "Defending Civil Liberties in the War on Terror: The Role of the Courts in the War Against Terrorism: A Preliminary Assessment," 29 *Fletcher F. World Aff.* 103 (Winter, 2005): 114-115.
[226] Mark Tushnet, "Defending Korematsu?: Reflections on Civil Liberties in Wartime," 2003 *Wis. L. Rev.* 273 (2003): 287.
[227] Tushnet, *Defending Korematsu?...,* 287.
[228] *Youngstown Sheet & Tube Co. v. Sawyer*, 1952.
[229] *Ibid.*
[230] *Ibid.*

"can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain [and] any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law [but] when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[231]

Justice Jackson was most critical of the Commander-in-Chief argument stating, "These cryptic words have given rise to some of the most persistent controversies in our constitutional history."[232] In fact, Jackson marveled at the fact that the very person who has the power to send troops abroad could by that very act claim more power at home. But the Constitutional power of the President as Commander-in-Chief, Jackson maintained, did not extend to the "country, its industries and its inhabitants."[233]

Despite Jackson's eloquence, and claims by advocates of congressional authority, the "Burger and Rehnquist courts have subsequently utilized Youngstown to uphold broad assertions of executive power."[234]

So who's job is it to question the authority and decisions of the President of the United States when the nation's security is seemingly at stake? One answer might be – "no one." This is embodied in the testimony of then Attorney General John Ashcroft before Congress three months after September 11th when he offered a preemptory

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[231] *Ibid.*
[232] *Ibid.*
[233] *Ibid.*
[234] Jules Lobel, "The War on Terrorism and Civil Liberties," 63 *U. Pitt. L. Rev.* 767 (Summer, 2002): 775.

warning to any potential critic: "To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists for they erode our national unity and diminish our resolve. They give ammunition to America's enemies."[235] Conversely, another answer is "everyone" – as Ohio Senator Robert Taft, known as "Mr. Republican," had this to say less than two weeks after Pearl Harbor, **"**as a matter of general principle, I believe there can be no doubt that criticism in time of war is essential to the maintenance of any kind of democratic government… Too many people desire to suppress criticism simply because they think it will give some comfort to the enemy… If that comfort makes the enemy feel better for a few moments, they are welcome to it as far as I am concerned, because the maintenance of the right of criticism in the long run will do the country maintaining it a great deal more good than it will do the enemy, and it will prevent mistakes which might otherwise occur."[236]

Ultimately, it is incumbent upon all citizens inside or outside of government to maintain a healthy skepticism of those in power. Especially when that power is being wielded to limit the civil liberties – in the name of national security – of U.S. citizens or when the decisions made by the powerful could have short term gains but long term consequences. With that said, it still appears less likely that the legislative branch is "willing to stand up to the President than are the courts in times of crisis, when the easy political course is to trumpet the necessity for the broad national security measures…

[235] Richard C. Leone and Greg Anrig, Jr. (Eds.), *The War on Our Freedoms: Civil Liberties in an Age of Terrorism* (New York: The Century Foundation, 2003), 50. David Cole, "Enemy Aliens," 54 *Stan. L. Rev*. 953 (2002): 953.
[236] Leone and Anrig, (Eds.), *The War on Our Freedoms…,* 17-18.

[therefore] the courts are generally the only hope..."[237] It appears that, "After two centuries of wrestling with this question, we seem to have reached consensus on two key propositions: the Constitution applies in time of war, but the special demands of war may affect the application of the Constitution."[238] Equally important is the rejection of the "extreme positions – that the Constitution is irrelevant in wartime, and that wartime is irrelevant to the application of the Constitution."[239]

With respect to international law the effects may not seem as significant if one only views international law through an enforcement paradigm. The central criticism of international law is often times its "lack of accountability." However, international law is more than just its "ends" but rather a full complement of its "means" and its "ends." International law impacts each nation, and indeed the entire community of nations, in subtle yet significant ways. From the U.S. perspective, "the language that international law speaks is very close to American; much of the substantive legal rules reflect American – and more broadly, Western – values."[240] Therefore, "the notion that international law places impossible constraints upon U.S. counterterrorism efforts is misguided, and that to disregard international law is ultimately self-defeating. The interests of the United States, which has long been a champion of the values embedded in international norms, are plainly served by widespread compliance. If the U.S. properly broadens the horizons of our cost-benefit analysis, international law operates mostly in

[237] David Cole, "The Priority of Morality: The Emergency Constitution's Blind Spot," 113 Yale L.J. 1753 (June, 2004): 1764-1765.
[238] Geoffrey R. Stone, "War Fever," 69 *Mo. L. Rev.* 1131 (Fall, 2004): 1146.
[239] Stone, *War Fever…,* 1146.
[240] Gabriella Blum and Philip B. Heymann. *Laws, Outlaws, and Terrorists: Lessons from the War on Terrorism.* (Cambridge: MIT Press, 2010), 34.

America's favor."[241] Ultimately those who want to sacrifice international law for the war on terrorism are not "squaring international law with national interests" but are instead "sacrificing the national interest for constricted and erroneous perceptions of security."[242]

The Bush Administration's "modus operandi of invoking the laws of war to claim sweeping executive detention power while disregarding the limits that the laws of war impose on that power."[243] After all, "the real constraint on U.S. war powers does not derive from international law, but instead from the values underlying the law, as they are understood and interpreted by the domestic and international publics. It then follows that the effects of violating the laws of war reach far beyond the legal arena; the violator runs the risk of generating at least four significant strategic problems for a country at war…"[244] The four risks are: 1. "policies that seem overaggressive or unjust make it easier for enemies to garner support for their cause;" 2. weakening of domestic support for the conflict; 3. The "erosion of the laws of war in their entirety" and the subsequent effect on future conflicts; and, 4. "Compliance generates the trust among allies on which cooperation depends."[245]

The end result is that "any short-term American departure from a principled commitment to international law has to be taken with a most careful assessment of enduring costs. In the war on terror, the departure from international law has proved itself largely counterproductive in terms of its effects on domestic support, the 'war of

[241] Blum and Heymann. *Laws, Outlaws, and Terrorists…,* 4-5.
[242] *Ibid.*, 28.
[243] Jonathan Hafetz, *Habeas Corpus after 9/11: Confronting America's New Global Detention System* (New York: New York University Press, 2011), 78.
[244] Gabriella Blum and Philip B. Heymann. *Laws, Outlaws, and Terrorists: Lessons from the War on Terrorism* (Cambridge: MIT Press, 2010), 37.
[245] Blum and Heymann. *Laws, Outlaws, and Terrorists…,* 37-38.

ideas,' international cooperation, and the possible ramifications for future military engagements. By this pragmatic measure alone, the view of international law as a threat to national security has been shown to be profoundly mistaken."[246]

[246] *Ibid.,* 45.

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