

**WHY THE COURT SAID NO: THE SUPREME COURT'S CONTINUED
OPPOSITION TO BUSH ADMINISTRATION GUANTANAMO BAY POLICY**

by

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A thesis submitted to the Faculty of the University of Delaware in partial fulfillment of the requirements for the Degree of Bachelor of Arts in Political Science with Distinction.

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Thank you to the nearly 63 million Americans who helped defeat the Republican Party on November 4, 2009.

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ABSTRACT

In the wake of the terrorist attacks of September 11, 2001, actions taken by the presidential administration of George W. Bush fundamentally undermined the rule of law. This thesis examines a selection of these illegal actions within the context of the detention facility at the United States Military Base of Guantanamo Bay, Cuba. It was through the treatment of alleged terrorists held at the base that the Bush administration flaunted both the spirit and text of the law. By acting unilaterally, without the support of Congress, the President increased the authority of the presidency while attempting to undercut the traditional checks on power that have defined the United States federal government. Eventually, it was only the United States Supreme Court, in *Rasul v. Bush* (2004), *Hamdan v. Rumsfeld* (2006), and *Boumediene v. Bush* (2008) that was willing to defy its traditional deference towards a wartime president and restore the rule of law.

Chapter 1

INTRODUCTION

Following the terrorist attacks of September 11, 2001, the United States government embarked upon a War on Terror. Unlike previous wars with clearly defined enemies and territorial boundaries, the United States felt that it had entered a new paradigm of asymmetrical warfare. As early as September 18, 2001, Congress passed the Authorization for Use of Military Force (AUMF) that allowed President Bush 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.”¹ The entire AUMF consists of only two sections and four clauses. Yet it was on this authority that the Bush administration wielded its war powers to invade sovereign states, detain thousands of individuals, imprison hundreds, render others across the world to secret prisons and commit unrepentant acts of torture. In short, the President, acting under his powers as Commander in Chief and the AUMF, undertook an unprecedented expansion of executive authority, eventually claiming it to be nearly unlimited in a time of war. In examining this expanded executive power, this thesis analyzes the status of detainees at the Guantanamo Bay Military Base in Cuba. More specifically, the thesis focuses on three cases arising from Guantanamo Bay decided

¹ Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

during the War on Terror by the United States Supreme Court: *Rasul v. Bush* (2004)²; *Hamdan v. Rumsfeld* (2006)³; and *Boumediene v. Bush* (2008).⁴ These cases are truly landmarks because they show the Supreme Court actively resisting a President whose construction of executive power was unchecked. In ruling against President Bush, the Court ended the abuses of power of the Presidency and restored the proper rule of law.

² *Rasul v. Bush*, 542 U.S. 466 (2004).

³ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁴ *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

Chapter 2

HABEAS CORPUS

One of the most powerful weapons at the disposal of any government is the power of detention.⁵ If a government does not approve of a person's criticisms, if a person's ideas are dangerous, then the government can detain that person indefinitely without charge or trial. Short of execution, there is no better way to silence dissent than to lock away the dissenters. The tool of detention is not merely used, though, for political prisoners. Most often in the United States, it is exercised to hold those who are deemed to be dangerous criminals; when utilized for such legitimate purposes, there is nothing inherently wrong with the government's detention power. In the United States, the Constitution provides procedural guarantees to ensure that the innocent are not arbitrarily held. Fifth Amendment rights to Due Process are generally the procedural safeguards most familiar to Americans.⁶ Such protections are certainly not perfect, as some innocent people still are held, and some guilty people are able to escape conviction and punishment. However, the detention of these individuals is, in theory, and usually in practice, predicated upon the rule of law.

Governments, though, are certainly not immune to the desire to increase their power, especially regarding the power to detain undesirables. When coupled with

⁵ David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York: New Press, 2003), 46.

⁶ United States Constitution, Amendment 5.

public fear of a possible impending menace, the power of the government, especially to arrest, can grow exponentially. In the War on Terror, public fear and the governmental desire for power, especially within the Executive, resulted in the detention of thousands of supposed terrorist suspects. By holding individuals without charge, or on a false pretext, the government “effectively precluded [these people] from obtaining their release.”⁷ Most notoriously, this detention occurred at the Guantanamo Bay military base in Cuba. Despite a promise from the newly elected President Obama to close the base, over 200 prisoners remain in custody. Some detainees have been held since 2001 without charge and without any meaningful trial. They have, in effect, been held in a legal black hole, and the procedural guarantees that should protect them from a fate of indefinite detention have been denied. *Rasul v. Bush* (2004), *Hamdan v. Rumsfeld* (2006) and *Boumediene v. Bush* (2008) have focused not on creating special rights for terrorists or undermining the protections and safeguards of the United States, but instead on restoring the basic legal rights and protections that the United States Constitution extends to all people under its jurisdiction, regardless of citizenship.

What exists at the heart of these three Supreme Court cases is the Great Writ of Liberty: Habeas Corpus.⁸ Derived from English common law, the writ allows a court to order the release of a person “if an individual is found to have been imprisoned unlawfully.”⁹ It is a tool to protect against the abuses of governmental detention, regardless of whether the detention was for an actual criminal act. Under

⁷ Cole, *Enemy Aliens*, 46.

⁸ Eric M Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* (New York: New York University Press, 2001), 1.

⁹ *Ibid.*

habeas corpus, no person can be held without the basic procedural Due Process guarantees of the Constitution included in the Fifth and Fourteenth Amendments. As one of the chief protections against gross abuses of power by the government, habeas corpus was written directly into the text of the Constitution. It was not saved for an Amendment, nor was it considered a new constitutional right; instead, the protection existed prior to the creation of the new Constitution. Article 1, Section 9 states that “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.” Congress alone has the power to suspend habeas corpus, and it cannot do so arbitrarily: a rebellion or an invasion must occur to justify its suspension. Famously, habeas corpus was unilaterally, and illegally, suspended by President Abraham Lincoln during the Civil War; Congress later authorized the suspension and legalized the action, although the Court never ruled on the issue. Since its introduction into Common Law, beginning with the Magna Carta, habeas corpus has never been a right taken lightly.¹⁰

What is truly powerful about habeas corpus is that it is not a legal tool restricted to United States citizens.¹¹ Instead, it “applies generally ‘to a prisoner’” being held by the government.¹² At least in theory, the writ covers any foreign nationals who are detained by the United States, provided they are held on territory under the complete jurisdiction and control of the United States. In the three Guantanamo cases, the plaintiffs, who had either received no trial at all or a

¹⁰ Louis Fisher, *The Constitution and 9/11: Recurring Threats to America's Freedoms* (Lawrence, Kan: University Press of Kansas, 2008), 15.

¹¹ Cole, *Enemy Aliens*, 213.

¹² Fisher, *The Constitution and 9/11*, 15.

fundamentally flawed hearing by a military commission, sought to test the limit of this Constitutional protection and find refuge from indefinite detention. For a court to deny habeas relief for an individual who has received no formal charges or trial is truly disturbing, as habeas corpus is a tool of last resort. Boumediene and his fellow plaintiffs were not in any way attempting to abuse their constitutional protections. There was literally no other option for them, other than to remain indefinitely incarcerated by the United States government. Even the traditionally conservative Justice Antonin Scalia believes that “the very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.”¹³ In such an instance, the writ of habeas corpus is all that remains.

¹³ *Hamdi v. Rumsfeld*, 542 U.S. 507, 555 (2004) (Scalia, J. dissenting, joined by Justice Stevens).

Chapte 3

GUANTANAMO BAY

The U.S. Naval Station Guantanamo Bay occupies a unique position among United States military bases. Following the successful Spanish American War, the United States forced the newly formed Cuban government to accept various terms of independence. The subsequent Platt Amendment in 1903 outlined the future of United States-Cuban relations, with Article VII requiring the Cuban government to give the United States various “coaling or naval stations.”¹⁴ In the actual lease for Guantanamo Bay, though, the issue of control over the new naval station was given direct attention:

The United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba . . . [and] the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.¹⁵

A 1934 treaty, which further defined relations with Cuba, cemented the lease of Guantanamo Bay indefinitely, “[s]o long as the United States of America shall not abandon the . . . naval station of Guantanamo.”¹⁶ These treaties created a rather

¹⁴ Gary L. Maris, “International Law and Guantanamo,” *The Journal of Politics* 29, no. 2 (May 1967): 261.

¹⁵ Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418.

¹⁶ Treaty Defining Relations with Cuba, May 29, 1934, U. S.-Cuba, Art. III, 48 Stat. 1683, T. S. No. 866.

peculiar piece of land that has been used by the United States as a naval base but has also remained in an unclear legal position.

Of particular interest with Guantanamo Bay is what constitutes the nature of United States jurisdiction. Although Cuba, under the 1903 Lease of Lands for Coaling and Naval Stations, officially retains sovereignty, the United States nevertheless has “complete jurisdiction and control,” which suggests de facto sovereignty.¹⁷ However, this was not accepted by the Bush administration. By the beginning of 2002, the Bush administration was desperate to find a location to house prisoners; makeshift prisons in Afghanistan were, due to poor security, not sufficing.¹⁸ Guantanamo Bay seemed to be the ideal place to house the detainees, as it was not only isolated and easily defended, but, under the Administration’s interpretation of the aforementioned treaty, also not clearly United States territory. For an administration looking to minimize judicial oversight, this made the location nearly perfect.¹⁹ Using the precedent of *Johnson v. Eistentrager* (1950) the administration believed that no domestic legal protections existed for the prisoners.²⁰ Because of this legal black hole, detainees were left with no recourse, including no access to habeas corpus. If any of the Guantanamo cases were to succeed in the civilian courts, it would first have to prove that the specifics of the Guantanamo lease actually ceded authority to the United States and thus allowed the application of constitutional protections. To the Bush

¹⁷ Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418.

¹⁸ Jack L Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration*, 1st ed. (New York: W.W. Norton, 2007), 108.

¹⁹ Ibid.

²⁰ *Johnson v. Eistentrager*, 339 U.S. 763 (1950).

administration, such a position was untenable: the Office of Legal Counsel (OLC) concluded that a United States court “cannot properly entertain an application for a writ of habeas corpus by an enemy alien detained...[but] because the issue has not yet been definitively resolved by the courts...we caution that there is some possibility that a district court would entertain such an application.”²¹ Secretary of Defense Donald Rumsfeld eloquently summarized the President’s position when he said that “Its disadvantages, however, seem to be modest relative to the alternatives.”²²

²¹ Goldsmith, *The Terror Presidency*, 108.

²² *Ibid.*

Chapter 4

THE NATURE OF THE DETAINEES

Donald Rumsfeld, in 2002, famously referred to the detainees at Guantanamo Bay as “the worst of the worst.”²³ He characterized those held at the base as being international terrorists bent on the destruction of the United States. If they were not such, they would not be held by the government in the first place. Rumsfeld commented in 2005 that “all of the Guantanamo prisoners were ‘captured on the battlefield,’” presumably by United States troops.²⁴ The obvious implication of this, and other, statements was that the United States was fully justified in holding prisoners at Guantanamo Bay. Rumsfeld blatantly stated that detainees could be held indefinitely, and there was little public outcry, most Americans took the government at its word that it was lawfully detaining individuals who wished to do harm to the United States.²⁵ More importantly, it seemed that these people were actively fighting when arrested. This is certainly true about at least some of the detainees, including Khalid Sheikh Mohammed and four others who have pled guilty to committing terrorist acts

²³ Katharine Seelye, “THREATS AND RESPONSES: THE DETAINEES; Some Guantánamo Prisoners Will Be Freed, Rumsfeld Says - New York Times,” *The New York Times*, October 23, 2002, sec. U.S. / Politics, <http://query.nytimes.com/gst/fullpage.html?res=9800EFD7143CF930A15753C1A9649C8B63&sec=&spon=>.

²⁴ David Cole, *Less Safe, Less Free: Why America Is Losing the War on Terror* (New York: New Press, 2007), 103.

²⁵ Seelye, “THREATS AND RESPONSES: THE DETAINEES; Some Guantánamo Prisoners Will Be Freed, Rumsfeld Says - New York Times.”

and referred to the September 11 attacks as “blessed” and “great.”²⁶ That, though, is not the entire picture.

The truth about these detainees was far from the convenient lie propagated by the government. Only five percent were actually captured by United States forces.²⁷ To help bolster cooperation from the local Afghani populace, the United States offered bounties for information about foreign fighters. In exchange for rewards of \$5000, Pakistanis and Afghans were given a veritable fortune for simply naming someone as a Taliban or al-Qaeda fighter.²⁸ There was great incentive for locals to turn in innocent neighbors; the military appeared to do little to investigate claims before delivering the bounty and arresting the accused.

From this policy came the reality that the majority of people imprisoned at Guantanamo Bay were not Taliban or al-Qaeda members bent on the destruction of the United States. Former head of the CIA’s al-Qaeda unit, Michael Scheuer, who resigned in 2004, indicated that “fewer than 10 percent of the detainees Guantanamo were high-value prisoners,” and that others “knew ‘absolutely nothing about terrorism.’”²⁹ Even the military’s own Combatant Status Review Tribunals, which were created to determine whether they were indeed enemy combatants, determined that 90% of those at Guantanamo were not “fighters for the enemy.”³⁰ At most, they

²⁶ “Gitmo Prisoners Defend ‘Blessed’ 9/11 Attack,” *CNN*, March 10, 2009, <http://edition.cnn.com/2009/CRIME/03/10/gitmo.terror.prisoners/index.html#cnnSTCText>.

²⁷ Cole, *Less Safe, Less Free*, 105.

²⁸ *Ibid.*, 106.

²⁹ *Ibid.*, 104.

³⁰ *Ibid.*

were “associated with” either al-Qaeda or the Taliban.³¹ As of June 2008, only 270 detainees remained at Guantanamo Bay, down from a height of around 750. Nearly all of these 480 detainees were, after years of imprisonment, released without ever facing any charges; these releases indicate that they had not engaged in any illegal activity against the United States.³²

³¹ Ibid.

³² Linda Greenhouse, “Justices, 5-4, Back Detainee Appeals for Guantánamo,” *The New York Times*, June 13, 2008, sec. Washington, <http://www.nytimes.com/2008/06/13/washington/13scotus.html>.

Chapter 5

THE UNITARY EXECUTIVE THEORY

5.1

The basis for the rapid expansion of power under the Bush administration, including the mistreatment of the detainees at Guantanamo Bay, is a theory of executive power called the Unitary Executive Theory (UET). Supporters of UET believe the President to have, under the auspices of his title and accompanying authority as Commander in Chief, effectively unlimited executive power under Article 2 of the United States Constitution. This expansive construction of executive power tends to be limited to those duties that are actually given to the executive, such as detention and war powers. To a degree, the UET is an extreme belief in separation of powers that “isolates the Executive Branch from any type of congressional or judicial oversight.”³³ Under the Bush administration, the President adopted such a radical construction by rebuking any congressional or judicial interference and determining that the Executive could act completely unilaterally. This usage of the UET, though, relies on the false assumption that the Constitution prescribes a complete air-tight separation

³³ Karl M. Manheim and Allan Ides, “The Unitary Executive,” *SSRN eLibrary*: 4, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=943046.

between branches.³⁴ Clearly, this was not the case: to even utilize his Commander in Chief powers, the President was forced to rely upon the AUMF as passed by Congress.

Although not a new concept, such an exaggerated notion of presidential power remains controversial. The roots for the theory lie with the political philosophizing of John Locke and Thomas Jefferson.³⁵ As related by Jack Goldsmith, author of *The Terror Presidency* and former head of the White House Office of Legal Counsel, the British political philosopher Locke believed that “a leader’s first duty was to protect the country, not follow the law,” emphasizing the need for the ultimate survival of the people at all costs.³⁶ In his view, the ruler should do whatever is necessary to provide security for all of his subjects. Jefferson based many of his own theories on those of Locke, and he reflected in 1810:

A strict observance of the written laws is doubtless *one* of the high virtues of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself . . . thus absurdly sacrificing the ends to the means.³⁷

In his own words, Goldsmith notes in his book that Jefferson’s political pragmatism does have one serious condition: “the leader who disregards the law should do so publicly, throwing himself on the mercy of Congress and the people so that they could decide whether the emergency was severe enough to warrant extralegal

³⁴ Ibid., 3.

³⁵ Goldsmith, *The Terror Presidency*, 80.

³⁶ Ibid., 81.

³⁷ Ibid., 80.

action.”³⁸ It is this last, critical piece of advice, though, that the Bush administration’s conception of the UET ignored.

In the discussions about the limits of presidential power during times of war and crises that occurred in the Bush administration, allusions to Lincoln and his unprecedented expansion of executive power were often cited. Among his many Constitutional transgressions, Lincoln suspended the writ of habeas corpus, raised armies, borrowed money and imprisoned “thousands of southern sympathizers and war agitators without any charge or due process;³⁹ he even defied an order from Chief Justice Roger B. Taney of the United States Supreme Court to release an imprisoned officer.⁴⁰ In the context of the Civil War, Lincoln’s actions may have been justified, though they remain highly controversial. And no president, even George W. Bush, has dared approach Lincoln’s bravado of expanding presidential authority through the seizure of other branch’s powers. Although the Bush administration used Lincoln as an example of how the executive should act during a time of war, it effectively, and conveniently, neglected one important concession that Lincoln did make: Lincoln took Congressional powers only until Congress could resume its session, and he deferred to the will of Congress, risking that the legislature would not have approved of his actions.⁴¹

³⁸ Ibid., 81.

³⁹ Ibid., 82.

⁴⁰ *Ex Parte Merryman*, 17 F. Cas. 144 (1861).

⁴¹ Goldsmith, *The Terror Presidency*, 85.

5.2

John Yoo, a staffer in the Office of Legal Counsel, and David Addington, the chief of staff to Vice President Dick Cheney, became the chief architects and advocates of the UET. According to Goldsmith, the pair forged a policy that ignored Jefferson's prescription that the President should be "throwing himself on the mercy of Congress and the people," not only because they genuinely felt the President had unlimited power, but also because it was not feasible for the President to confess acting in a blatantly illegal manner.⁴² As an alternative, the entire Bush administration became obsessed with justifying the President's actions under the letter of the law, even if such a justification violated the law's spirit. The motivation was fear of the "hyper-legalization of warfare, and the attendant proliferation of criminal investigations."⁴³ Such trepidation is understandable: by the time of the September 11th attacks, less than three years had passed since the impeachment of President William J. Clinton for the comparatively minor charges of perjury and obstruction of justice involving personal matters of Clinton's sexual infidelity. Clinton's impeachment was only the second in United States history. In such an atmosphere, it is hardly surprising that the executive branch was wary of admitting any legal wrongdoing.

The Bush administration was genuinely afraid that seeking the approval of Congress or the courts would cede the power they believed was necessary to protect the United States from future attacks; to ask permission of another branch of government would admit that the President's power was indeed limited. The struggle

⁴² Ibid., 81.

⁴³ Ibid.

the administration faced with creating the military commissions and procedures through which to try detainees proved a telling example. After 2002, Congress was again controlled by a Republican majority that, had the President sought its support, almost certainly would have approved any of the President's initiatives. When, after *Hamdan*, congressional authorization for tribunals was forced upon the President, the subsequent Military Commissions Act was a hollow victory. Goldsmith writes that "measured against the baseline of what it could have gotten from a more cooperative Congress in 2002-2003, the administration lost a lot."⁴⁴ It is likely that the Bush administration, by working with Congress in 2002 rather than acting extralegally, could have avoided the judicial actions that ultimately unwound its initiatives.

The 2005 Department of Defense *National Defense Strategy of the United States* expressed fear that "our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial process and terrorism."⁴⁵ To this administration, the ordinary rule of law represented a threat, one that had to be controlled and manipulated. What made the application of the UET such an expansive abuse of presidential power was the manner in which the Bush administration used the force of law, and loopholes therein, to achieve its endgame. Rather than following the spirit or traditional applications and understanding of the law, the OLC issued new interpretations, including Yoo's infamous 2002 Torture Memo. The system of laws upon which the United States operates has been formed to protect citizens from the government, and ensure that powerful, elected officials must serve the interest of the people. It is meant to ensure the people are free

⁴⁴ Ibid., 139.

⁴⁵ Ibid., 53.

from tyranny. Yet under the UET, the law became merely a tool with which the executive branch protected itself.

5.3

One of the major tools used by Yoo and Addington to undermine the authority of Congress and assert presidential power was through the use of signing statements. Although a signing statement is, ostensibly, merely a written addendum to a law made by a president to indicate the way in which a president will choose to interpret and enforce the law, the Bush administration made extensive use of the statements to substantially modify the intent and purview of legislation. By 2006, over 800 signing statements had been attached by Bush, while only 600 had ever been used collectively by all presidents prior to his term.⁴⁶

A prominent example is the 2005 Detainee Treatment Act (DTA), authored by Republican Senator John McCain, which attempted to ban the “enhanced interrogation” techniques used by the Bush administration. These techniques, including waterboarding, frequent beatings, prolonged isolation and sexual humiliation, were clearly torture. Regardless, Bush issued a signing statement on the DTA, stating that he would interpret the statute “in a manner consistent with the Constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief . . . of protecting the American people from further terrorist attacks.”⁴⁷ This statement

⁴⁶ American Bar Association, “Blue-Ribbon Task Force Finds President Bush’s Signing Statements Undermine Separation of Powers - news release,” *American Bar Association*, July 24, 2006, <http://www.abanet.org/media/releases/news072406.html>.

⁴⁷ Goldsmith, *The Terror Presidency*, 86.

was designed to give the Bush administration authority to continue its interrogation techniques under its expansive definition of executive power; it also undermined the entire point of the bill.

Such usage of signing statements prompted the American Bar Association (ABA) to analyze the President's continued manipulation of new legislation. Finding that "the president's practice does grave harm to the separation of powers doctrine, and the system of checks and balances that have sustained our democracy for more than two centuries," the ABA recommended that "immediate action is required to address this threat to the Constitution and to the rule of law in our country."⁴⁸ Although the opinion of the ABA obviously holds no legal authority, it is nevertheless an important gauge of the manner in which the Bush administration has used signing statements to expand its own power to eviscerate the rule of law.

5.4

Treaties provided a unique challenge to the Bush administration, and Yoo took an active role in attempting to lawfully justify complete executive control over the interpretation and domestic implementation of treaties entered into by the United States. One task was to determine whether or not the protections of the Geneva Conventions applied to the prisoners captured and detained by the government in its War on Terror. It is the Third Geneva Convention on "Treatment of Prisoners of War" that would be applicable in such an instance, and Article Four of this Convention defines those who fall into the category of "prisoners of war, in the sense of the present

⁴⁸ American Bar Association, "Blue-Ribbon Task Force Finds President Bush's Signing Statements Undermine Separation of Powers - news release."

Convention.”⁴⁹ Because terrorists do not wear regular uniforms and follow the laws of war, Yoo and the Office of Legal Counsel advised the President that the Convention did not apply to persons the Bush administration began to define as “unlawful enemy combatants.”

In practical terms, there is nothing wrong with the President’s, supported by the OLC, issuing of such an interpretation. However, when the issue of the Geneva Conventions arose in *Hamdan*, the government’s argument was that the President’s interpretation was absolute. As Georgetown Law Professor David Cole writes, the President was declaring that his interpretation was binding on the other branches of the government, including the judiciary: “In declaring that the Geneva Conventions did not apply to al-Qaeda Bush had exercised his Constitutional war powers, and his decision was therefore ‘binding on the courts.’”⁵⁰ Attempting to limit the Court to a particular Executive interpretation was the same failed argument that the President utilized in an unrelated case, *Medellin v. Texas* (2008).⁵¹ In both instances, though, the Supreme Court rejected this argument, as its power of judicial review gives it purview over interpretation of all law, including treaties.

⁴⁹ “International Humanitarian Law - Third 1949 Geneva Convention,” *International Committee of the Red Cross*, 2005, <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e63bb/6fef854a3517b75ac125641e004a9e68>.

⁵⁰ David Cole, *Justice at War: The Men and Ideas That Shaped America's War on Terror* (New York: New York Review Books, 2008), 53.

⁵¹ *Medellin v. Texas* 552 U.S. ____ (2008).

5.5

Most relevant to the topic at hand is the unilateral creation of detention facilities and special procedures for those detained at Guantanamo Bay. By 2004, three years after the first prisoners were taken to the prison, not a single detainee had received any type of hearing to determine guilt or innocence. This was despite a November 2001 order from President Bush “authorizing a military commission to try those who had provided assistance for the terrorist attacks of September 11.”⁵² While the administration slowly laid the groundwork for the commissions, no lawyers were permitted to see clients at the base. *Rasul*, the first of the Guantanamo cases, reached the Supreme Court only because of the use of next friend standing, as there was no way for the defendant to file a petition in person.⁵³ A holdover from British common law, next friend standing “allows a third person to file a claim in court on behalf of someone who is unable to file on his or her own. For decades, litigants have predominantly asserted next friend standing to bring habeas corpus petitions on behalf of state criminal inmates,” and it became an important tactic used by the Guantanamo detainees.⁵⁴ Even with successful efforts by next friends to argue in court on behalf of the detainees, it should not be forgotten that three years had passed before the government moved to try any of the prisoners.

⁵² Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law*, 2nd ed., Landmark law cases & American society (Lawrence, Kan: University Press of Kansas, 2005), 135.

⁵³ Caroline Belk, “Next Friend Standing and the War on Terror,” *Duke Law Journal* 53, no. 6 (April 2004): 1747.

⁵⁴ *Ibid.*

When next friends were successful in winning the *Rasul* suit, the Supreme Court ruled that either habeas corpus had to be available to the detainees through the federal court system or an equivalent alternative must be utilized, such as the court martial procedure. New legal courts can only be created by Congress; Article 3, Section 1 of the United States Constitution specifies that “the judicial power of the United States, shall be vested...in such inferior courts as the Congress may from time to time ordain and establish.”⁵⁵ Only the Supreme Court’s existence is explicitly mandated in the Constitution.⁵⁶ Both the District Courts and Circuit Courts of Appeal, created by Congress, currently comprise the civilian federal court system. Congress, in Article 1, Section 8 of the Constitution, is also given the responsibility to “constitute tribunals inferior to the Supreme Court”; it is with this clause, as well as several others, that Congress has created the Uniform Code of Military Justice (UCMJ) and the accompanying military courts.⁵⁷ Under the UCMJ, procedures such as the court martial exist. Therefore, even if existing civilian and military courts were incapable of trying the detainees, and it is unlikely that they were, it would be the duty of Congress to create a new federal court.

Following the boundless authority of the President under the UET, the Bush administration believed that any new court system for the detainees was solely an extension of the President’s unlimited war powers; Congress should have no input. Thus, in the wake of *Rasul*, the President utilized the military commissions he had unilaterally created in 2001 to begin hearings for the detainees. Fearing possible

⁵⁵ United States Constitution, Article 3, Section 1, Clause 1.

⁵⁶ Id.

⁵⁷ United States Constitution, Article 1, Section 8, Clauses 9-11.

interference from Congress, Yoo and the OLC released a memorandum in January of 2002 that affirmed the ultimate authority of the President over the detainees. He stated that the Commander in Chief power “precludes Congress from enacting any legislation concerning the detention, interrogation, prosecution and transfer of enemy combatants.”⁵⁸ This memo was simply another example of the President, and his legal team, overstepping his executive authority and using the UET to prevent oversight from the other branches of government. Such a position is contrary to the text of the Constitution; Article 1, Section 8 allows Congress “To define and punish piracies and felonies committed on the high seas, and offense against the law of nations.”⁵⁹ The Constitution is clear that Congress is vested with the very power Bush asserted for himself. Nevertheless, Yoo’s position illustrates why the commissions were utilized: to avoid Congressional oversight into the proceedings. Without Congress’ interference, the President could do as he pleased.

Within the civil and military court systems, there are certain procedural protections that are guaranteed to all individuals. Inherently unfair components of a trial, such as hearsay and the presentation of evidence kept secret from the defense are contrary to the United States’ system of justice and the common law principles from which it was derived. Even previous military tribunals, such as ones established by Presidents Abraham Lincoln, William McKinley, and Franklin Roosevelt, contained procedural protections for the accused that were in accordance with the United States’

⁵⁸ Neil A. Lewis, “Memos Reveal Scope of the Power Bush Sought,” *The New York Times*, March 3, 2009, sec. U.S. / Politics, <http://www.nytimes.com/2009/03/03/us/politics/03legal.html?hp>.

⁵⁹ United States Constitution, Article 1, Section 8, Clause 10.

legal tradition.⁶⁰ However, the military commissions created by President Bush were deficient because they did not, even in a military context, accord the defendants fundamental guarantees essential to a fair trial. The troubling features of these commissions included: secret evidence that was not revealed to the defendant and could thus not be rebutted, hearsay, information obtained by “enhanced interrogation methods,” which have since been acknowledged as torture, and the restriction that the defendant was not always allowed to be present for the trial.⁶¹ Ultimately, the Department of Defense was allowed to directly influence the outcome of the trial.⁶² Worse still, if a defendant, against all odds, were to be found innocent, the military retained the power to continue detention of the individual indefinitely and without charge, which is contrary to basic concepts of due process of law.

The President was eventually forced to find a legal justification for the commissions when their constitutionality came before the Supreme Court. In *Hamdan*, the government argued that the AUMF gave the President the necessary authority to detain any enemy combatants indefinitely, despite the lack of such language in the bill.⁶³ The Court rejected the government’s position, and Congress soon reacted to pressure from Bush by passing the Military Commissions Act of 2006. With the new law, Congress, and not the President, was exercising its proper authority over the judicial process at the base. Such sanctioning was hollow, though: the substance of

⁶⁰ Fisher, *Nazi Saboteurs on Trial*, 165.

⁶¹ William Glaberson, “Torture Acknowledgment Highlights Detainee Issue,” *The New York Times*, January 15, 2009, sec. US, <http://www.nytimes.com/2009/01/15/us/15detain.html?ref=us>.

⁶² Cole, *Justice at War*, 51.

⁶³ Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

the commissions was still not equivalent to due process in military proceedings. But in effect, this Congressional oversight, later paired with powerful judicial review in *Boumediene* and *Medellin*, helped to end the viability of the Unitary Executive Theory and force the Presidency back under the purview of the law.

Chapter 6

PRECEDENTS

6.1

Asserting broad presidential powers during times of war is certainly not without precedent, and not without reason. Lincoln was neither the only, nor the most recent, president to use sweeping and broad authority in a manner uncharacteristic of the executive branch. During World War II, President Roosevelt, like Lincoln, took extraordinary actions to protect the United States; in so doing, he pushed the constitutional limits of his office. The comparison most relevant to the Bush administration is that of Roosevelt's creation of a military tribunal to try eight German saboteurs who were captured in 1942 after infiltrating the United States with explosives and plans to disrupt the domestic infrastructure.⁶⁴ What makes the subsequent Supreme Court case, *Ex Parte Quirin* (1942), of particular importance is that it was the only case since the Civil War to address military tribunals. Furthermore, as a critique of Roosevelt's efforts, it helped form the basis for the military commissions created by President Bush.⁶⁵

⁶⁴ Louis Fisher, *Military Tribunals* (Hauppauge, N.Y: Novinka Books, 2003), 3.

⁶⁵ *Ex Parte Quirin*, 317 U.S. 1 (1942).

Two days after arriving by submarine with a group of fellow espionage agents, George Dasch called the FBI to expose the plot and surrender.⁶⁶ Despite initial assumptions by the FBI that the trial for the saboteurs would be conducted within the fully capable civil courts, Roosevelt formed a military tribunal for two main reasons: the government wished to maintain the illusion that the FBI was capable of unraveling such a plot without any assistance from the plotters, and the nature of the crimes did not warrant the death penalty in the civil courts.⁶⁷ Proclamation 2561, issued by Roosevelt to establish the military tribunal that would try the men, was entitled “Denying Certain Enemies Access to the Courts of the United States.”⁶⁸ The order did just that, stating that “such persons shall not be privileged to seek any remedy . . . in the courts of the United States.”⁶⁹ Judicial review was completely eliminated from the tribunal, unless approved explicitly by the Attorney General and Secretary of War.⁷⁰

In creating the military tribunal, the executive branch did face two serious problems. First, even if Roosevelt had been determined to keep the saboteurs outside the reach of the civil courts, there already was a military option in existence: the court martial procedure, as outlined in the *Manual for Courts Martial*.⁷¹ To avoid having this congressionally mandated system interfere with his plans for the tribunal,

⁶⁶ Fisher, *Military Tribunals*, 2.

⁶⁷ *Ibid.*, 4.

⁶⁸ *Ibid.*, 6.

⁶⁹ 7 Fed. Reg. 5103 (1942).

⁷⁰ Fisher, *Military Tribunals*, 24.

⁷¹ *Ibid.*, 8.

Roosevelt did not state that the Germans had violated, and should therefore be tried under, the Articles of War; instead, they had violated and should be tried by the “law of war.”⁷² The “law of war” was “undefined by statute, [and] represents a more diffuse collection of principles and customs developed in the field of international law.”⁷³ In contrast, the Articles of War had been passed by Congress specifically to deal with the conflict. Using the “law of war” gave the President broad authority to “pick and choose among the principles and procedures it found [attractive],” while avoiding the due process requirements of the court martial procedure.⁷⁴ The second hurdle was how to handle the Civil War era precedent of *Ex Parte Milligan*, in which a citizen of the state of Indiana, who had not been actively involved in the Civil War and had lived in a state with functioning civil courts, was tried and sentenced to death by a military tribunal.⁷⁵ In the case, the Supreme Court determined that “military courts could not function in states where federal courts were open and operating.”⁷⁶ To avoid this sticky issue, the Justice Department took the position that “the reach of *Milligan* could be limited to U.S. citizens.”⁷⁷ It was also argued that the mere status of the defendants as “enemies of the United States” was sufficient to justify the tribunal, despite

⁷² 7 Fed. Reg. 5101 (1942).

⁷³ Fisher, *Nazi Saboteurs on Trial*, 43.

⁷⁴ *Ibid.*

⁷⁵ *Ex Parte Milligan*, 71 U.S. 2 (1866).

⁷⁶ Fisher, *Nazi Saboteurs on Trial*, 38.

⁷⁷ *Ibid.*, 86.

Milligan.⁷⁸ With broad presidential authority, including the authority to create the tribunal's rules of procedure without any outside input or oversight, the tribunal was ready to begin on July 8, 1942.

On the twelfth day of the trial, defense counsel Colonel Kenneth Royall informed the tribunal that, having been in communication with Roosevelt, and having not been ordered to do otherwise, he would file a petition in federal court for a writ of habeas corpus.⁷⁹ On July 28, the D.C. District Judge James Morris denied the request for habeas relief. Nine hours of oral arguments before a special session of the Supreme Court were heard over the next two days, culminating in a *per curiam* opinion that allowed the continuation of the tribunal.⁸⁰ The full decision in *Ex Parte Quirin* was not given until October 29. Six of the men were executed, with another receiving life imprisonment. Dasch, who had originally turned in the conspirators, received thirty years in prison.⁸¹

There are a number of aspects in *Quirin* that are relevant to the Bush administration's position regarding Guantanamo Bay. Royall argued that the Articles of War did not give Roosevelt authority to create the military tribunals, and Congress had to vest that power in the President before he could do so.⁸² The Court, though, held that "the Articles also recognize the 'military commission' appointed by military

⁷⁸ *Ibid.*

⁷⁹ Fisher, *Military Tribunals*, 15.

⁸⁰ *Ibid.*, 16.

⁸¹ *Ibid.*, 19.

⁸² *Ibid.*, 31.

command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial.”⁸³ Congress, therefore, had given the necessary authority to the President for military tribunals through the Articles of War; Roosevelt did not have any unilateral power to create the tribunal. However, the Court did dodge the important issue of “to what extent the President as Commander in Chief has Constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial,” and the Court did not find it necessary to examine the issue.⁸⁴ The last major point from *Quirin* was that the “law of war draws a distinction between . . . those who are lawful and unlawful combatants.”⁸⁵ An unlawful combatant, also referred to as an enemy combatant, engages in warfare in a way that violates the laws of war, through acts such as secretly passing through lines without a uniform “for the purpose of waging war by destruction of life or property.”⁸⁶ Those individuals, the Court contended, “are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”⁸⁷ This decision left openings through which the Bush administration would later maneuver, as the questions of presidential authority to create tribunals and the actions that classify an enemy as an unlawful combatant were not clearly defined.

⁸³ 317 U.S. at 27.

⁸⁴ *Id.* at 29.

⁸⁵ *Id.* at 30-31.

⁸⁶ *Id.* at 31.

⁸⁷ *Id.*

6.2

There are several striking resemblances between actions taken by Roosevelt in World War II and those of Bush in the current War on Terror regarding the treatment of prisoners. Chief among these are parallels between the executive orders issued by Roosevelt and Bush to create their respective military tribunals. Both stated that conviction and sentencing would require a vote of only two thirds of the members of the tribunal, both allowed “evidence that would have ‘probative value to a reasonable person,’” and both orders removed any possibility for judicial review by “(i) any court of the United States, or any state thereof, (ii) any court of a foreign nation, or (iii) any international tribunal.”⁸⁸ There are numerous other similarities, as well; it is quite obvious that, in drafting his model for tribunals, Bush attempted to emulate Roosevelt in as many ways as were feasible. Of course, Bush’s order was designed to, and did, have a much broader impact than Roosevelt’s. Among those targeted was “any individual ‘not a United States citizen’ that the President determines there is ‘reason to believe’ (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...that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States...’ or (iii) has ‘knowingly harbored one or more individuals described in subparagraphs (i) and (ii).’”⁸⁹ This expansive order could have affected as many as 18 million individuals, although United States citizens were

⁸⁸ Fisher, *Nazi Saboteurs on Trial*, 135.

⁸⁹ *Ibid.*, 136.

exempt.⁹⁰ Although Roosevelt may have provided the framework upon which Bush created the Guantanamo military commissions, Bush, as with his whole executive power, greatly expanded the reach of who qualified for trial by the commissions.

6.3

Quirin is not the only World War II case to influence the legal status of foreign prisoners in a time of war. *Johnson v. Eisentrager* (1950) involved a group of German soldiers who were captured in China for violating the laws of war, found guilty by a military commission, and then transferred to a prison in Germany.⁹¹ After filing a petition for a writ of habeas corpus in the District of Columbia District Court, the prisoners appealed to the Supreme Court, with claims that the detention of the soldiers violated Articles I and III and the Fifth Amendment of the United States Constitution.⁹² In denying the petition, the Supreme Court listed six rationales for denying the writ:

[The petitioner] (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.⁹³

⁹⁰ Ibid.

⁹¹ 339 U.S. at 765-766.

⁹² Id. at 766.

⁹³ Id. at 777.

However, there was another rationale, as well. The Court felt it was “not the function of the Judiciary to entertain private litigation . . . which challenges the legality, the wisdom or the propriety of the Commander-in-Chief.”⁹⁴ Clearly, the Court was, at the least, quite leery of taking any action that could undermine the powers of a president during a time of war. That it would take action against the President sixty years later, and shed this deference, demonstrates the desperate circumstances regarding executive authority.

6.4

Aside from the inspiration provided to the Bush administration, the emergence of a clear pattern of deference shown by the Supreme Court towards the President in a time of war is extremely important. There is a third case that, despite its lack of direct relevance to the treatment of detainees at Guantanamo Bay, nevertheless shows this continuation of this capitulation to the military and its commander-in-chief: *Korematsu v. United States* (1944).⁹⁵ Soon after the Japanese attack on Pearl Harbor, Roosevelt issued Executive Order 9066, which declared that “the successful prosecution of the war requires every possible protection against espionage and sabotage,” and was used by the government as the grounds to imprison Japanese Americans in detention camps as a preventative measure to avoid any possibility of sabotage.⁹⁶ Korematsu himself was ordered to leave San Leandro, California and was

⁹⁴ Id. at 789.

⁹⁵ *Korematsu v. United States*, 324 U.S. 214 (1944).

⁹⁶ 7 Fed. Reg. 1407 (1942).

convicted of not following Civilian Exclusion Order No. 34 issued by the commanding general of the area.⁹⁷ In the opinion of the Court, Justice Hugo L. Black acknowledged immediately that “legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny.”⁹⁸ However, despite the acknowledgement that racial categorization is “immediately suspect,” the Court nevertheless was convinced that this expansive order regarding racial profiling should be left under the purview of the Commander in Chief. Indeed, the issue of race was all but ignored by the main point of the argument:

To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily.⁹⁹

Today, it is clear that the Court was being disingenuous in its assertion that racial profiling was not the primary focus of the order, especially since Korematsu was a natural born United States citizen. As such, *Korematsu* serves as an excellent example of the Court going to an extreme to show deference to the President in a time

⁹⁷ 324 U.S. at 215.

⁹⁸ *Id.* at 216.

⁹⁹ *Id.* at 223.

of war. This fact makes it even more remarkable that the Guantanamo cases have dared challenge the positions of a wartime president.

Chapter 7

THE GENEVA CONVENTIONS

7.1

Due to the Bush administration's unique and expansive view of its own authority, the administration had little patience for international law and the treaties that held the United States, as a signatory, responsible for abiding by this law. Former UN Ambassador John Bolton, who served during the Bush administration, joined John Yoo in writing an op-ed in the *New York Times* warning against the "binding down [of] American power and interests in a dense web of treaties and international bureaucracies."¹⁰⁰ Echoing beliefs widely held among other Bush White House staffers, the pair feared that "international regimes might restrict America's freedom of action to defend itself."¹⁰¹ This was not a Presidency favorable to the rule of international law.

Domestically, though, the Supremacy Clause of the United States Constitution incorporates treaties into the hierarchy of federal law. Article VI, Clause 2 reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority

¹⁰⁰ John R. Bolton and John Yoo, "Restore the Senate's Treaty Power," *The New York Times*, January 5, 2009, sec. Opinion, <http://www.nytimes.com/2009/01/05/opinion/05bolton.html>.

¹⁰¹ *Ibid.*

of the United States, shall be the supreme Law of the Land.”¹⁰² The prominence of the power of treaties in the Constitution makes it clear that these important agreements between nations are not merely formalities. Because of the difficulty in discriminating between self-executing and non-self-executing treaties, Congress usually passes legislation to implement treaties, incorporating the principles of these agreements into domestic law. The crucial treaties pertaining to this thesis are the Geneva Conventions.

The Geneva Conventions are comprised of four treaties, the last of which was completed in 1949 and ratified by the United States in 1955.¹⁰³ Covering the treatment of prisoners of war and civilians, the Conventions were designed to create certain basic rights and standards of treatment for enemies captured in times of war. By 2006, 194 states had ratified the collective Conventions, making them universal.¹⁰⁴ Domestically, the Geneva Conventions were made enforceable through the War Crimes Act, passed in 1996, making any violation of the Geneva Conventions a war crime that the federal government can prosecute.¹⁰⁵

To the Bush administration, the Geneva Conventions threatened the government’s freedom to treat its prisoners in the manner it wanted to, and they threatened the prosecution of the war itself. The true attitudes of the President and his advisors towards the Geneva Conventions were foreshadowed early in the war in Iraq, before the Geneva Conventions became a pressing legal issue at Guantanamo Bay.

¹⁰² United States Constitution, Article VI, Clause 2.

¹⁰³ Fisher, *The Constitution and 9/11*, 216.

¹⁰⁴ “International Humanitarian Law - State Parties / Signatories,” *International Committee of the Red Cross*, August 2, 2006, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>.

¹⁰⁵ Fisher, *The Constitution and 9/11*, 221.

One of Jack Goldsmith's first duties as head of the Office of Legal Counsel was to determine whether the Fourth Geneva Convention, "which governed the duties of an occupying power and the treatment of civilians," applied to the war in Iraq.¹⁰⁶ Ultimately, Goldsmith determined that the protections did extend to "all Iraqis, including those who were members of al Qaeda or any other terrorist group," as the Convention explicitly provides protections for "spies and saboteurs" who are nationals of the occupied country.¹⁰⁷ Goldsmith's legal opinion was not popular. CIA Director George Tenet expressed a desire to use "flexibility" to stop the attacks in Iraq, and Goldsmith's position forbade such action. Other Bush administration officials were openly hostile to application of the Convention to Iraqi nationals: David Addington angrily remarked to Goldsmith that "terrorists do not receive Geneva Convention protections."¹⁰⁸ Although the Bush administration did abide by this legal opinion, the protections afforded by the Fourth Convention were viewed internally as undermining the ability to fight the war. To preserve the ability to do what he felt necessary to succeed against terrorists, the President was determined to prevent those they had detained at Guantanamo Bay, and other bases around the world, from receiving any of the Geneva protections that had been afforded to the Iraqis within their country.

¹⁰⁶ Goldsmith, *The Terror Presidency*, 39.

¹⁰⁷ *Ibid.*, 40.

¹⁰⁸ *Ibid.*, 41.

7.2

While the Fourth Geneva Convention applied to and protected Iraqis in their own land, it is the Third Convention that is “relative to the Treatment of Prisoners of War” and would therefore appear to be applicable to those detained at Guantanamo Bay.¹⁰⁹ In theory, there were two primary ways prisoners arrived at Guantanamo: they were either captured terrorists, conceivably from anywhere in the world, or captured on the battlefield in Afghanistan. For the Bush administration to skirt the Geneva protections guaranteed to these Guantanamo prisoners, there would have to be two separate arguments, one for each group. Article Four of this Third Convention defines those who fall into the category of “prisoners of war, in the sense of the present Convention.”¹¹⁰ However, terrorists and those who carry out activities in violation of the laws of war are not covered under the Convention as falling into one of the protected categories.¹¹¹ Seizing on this caveat, the President stated that those terrorists detained at Guantanamo Bay were unlawful enemy combatants who had violated the laws of war; they were, therefore, not protected under the Third Convention. Thus, any terrorists, specifically members of al-Qaeda, could not enjoy any of the Third Geneva Convention protections.

¹⁰⁹ “International Humanitarian Law - Third 1949 Geneva Convention.”

¹¹⁰ Ibid.

¹¹¹ Goldsmith, *The Terror Presidency*, 110.

John Yoo also constructed the Geneva Conventions to allow the United States to avoid applying the Third Convention against the Taliban and other non-terrorists who were captured on the battlefield in Afghanistan. In January of 2002, Yoo wrote that, not only was al-Qaeda not a party to the treaty, but “Afghanistan was a ‘failed state’ and therefore the President could ignore the fact that it had signed the conventions; and he added that the Taliban had failed to adhere to the requirements of the Geneva Conventions regarding the conduct of war and therefore deserved no protection.”¹¹² It was this interpretation of the Third Convention that allowed President Bush to issue a February 2002 decision declaring al Qaeda and other terrorists would not be afforded the protections given to POWs.¹¹³

What is disturbing about the United States’ attempts to limit the purview of the Geneva Conventions in this conflict is that, regardless of the status of Afghanistan as a failed state or the tactics used by terrorists, the United States has signed, ratified and implemented the Geneva Conventions. It is the responsibility of the United States, as a country that, ostensibly, respects the rule of law and proper treatment of prisoners, to uphold the high standards of the Geneva Conventions. One of the original reasons for the Conventions was to ensure, through treating one’s enemies humanly, that one’s own soldiers would not be tortured or brutalized in the event of capture. Even if al-Qaeda does not follow the rules, the United States still should. Canadian Liberal Party leader Michael Ignatieff writes that “it is the very nature of a democracy that it not only does, but should, fight with one hand tied behind its back. It is also in the nature of democracy that it prevails against its enemies

¹¹² Cole, *Justice at War*, 31.

¹¹³ Goldsmith, *The Terror Presidency*, 42.

precisely because it does.”¹¹⁴ By ignoring the basic guarantees of the Geneva Conventions, the Bush administration further validated heinous acts taken by its enemies and undermined the moral authority of the United States to fight terrorism.

7.3

While Attorney General Alberto Gonzales was busy dismissing the Geneva Conventions as “obsolete” and “quaint,” the Bush administration was ignoring the pivotal part of the Geneva Conventions: Common Article Three.¹¹⁵ The Article is so named because it exists in each of the four Geneva Conventions. It is also the only part of the Geneva Conventions that applies “in the case of armed conflict not of an international character.”¹¹⁶ The Article explicitly prohibits:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . (c) outrages upon personal dignity, in particular, humiliating and degrading treatment . . . (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.¹¹⁷

The two main points to be taken from this are that individuals covered under Common Article 3 are to be protected from torture and similar physical assaults,

¹¹⁴ Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*, The Gifford lectures (Princeton: Princeton University Press, 2004), 24.

¹¹⁵ Goldsmith, *The Terror Presidency*, 65.

¹¹⁶ “International Humanitarian Law - Third 1949 Geneva Convention.”

¹¹⁷ Ibid.

and they must also be tried in a fair trial through a regularly constituted judicial process. The Bush administration ignored the relevance of the Article, claiming that it applied only to conflicts that occur internally, such as a civil war.¹¹⁸ Although such an interpretation is perfectly logical, the United States Supreme Court took a different approach. In *Hamdan*, the Court determined that “The term ‘conflict not of an international character’ is used here in contradistinction to a conflict between nations.”¹¹⁹ As such, the Article was designed to “cover all conflicts not between nations, or ‘inter-national’ in character. Since the war with al-Qaeda is a conflict between a nation and a nonstate force,” which is not a conflict between nations, Common Article 3 applies to those captured during the fighting.¹²⁰ By making this determination, the Supreme Court both rejected the assertion from the Solicitor General that the President’s interpretation of the Article was supreme and binding on the judiciary, and it also required that the Geneva protections be instated for all prisoners held in the War on Terror by the United States, both at Guantanamo Bay and abroad.

¹¹⁸ Cole, *Justice at War*, 54.

¹¹⁹ 548 U.S. at 629.

¹²⁰ Cole, *Justice at War*, 54.

Chapter 8

TORTURE

8.1

Torture may not seem to fall directly under the purview of this analysis of the legal status of the detainees at Guantanamo Bay. However, the condition of the prisoners is certainly relevant in evaluating the degree of power and authority that the Bush administration claimed. After all, the President would not have been so anxious to use legal loopholes and interpretations to avoid the oversight of the Geneva Conventions if the treatment of the prisoners was not in opposition to the protections outlined by the treaties. From a less legalistic point of view, a discussion of torture is perhaps even more important. Most Americans recoil at the thought of the United States committing acts of torture, and discussion of the subject tends to conjure mental images of totalitarian regimes such as the North Vietnamese or the Japanese during the Second World War.

Torture and cruelty are so repugnant to the tradition of the United States that General George Washington personally forbade his soldiers from “plundering any person whatsoever, whether Tories or others” and expected that “humanity and tenderness to women and children will distinguish brave Americans, contending for liberty, from infamous mercenary ravagers, whether British or

Hessian.”¹²¹ The soldiers against whom Washington and his troops fought exhibited cruelty towards captured Americans. Washington refused to react in kind. “Humanity,” he said, “and policy forbid the measure. Experience proves, that their wanton cruelty injures rather than benefits their cause.”¹²² Here was a general, a man fighting an asymmetric war against an enemy that, by many accounts, should have, and nearly did, completely destroy any hope for the creation of the United States of America. Yet he was unwilling to engage in any acts of inhumane treatment or torture, acts that may have made his fight easier, because he knew it was immoral. A great deal changes in 225 years.

8.2

There is a hypothetical justification for torture, and it is a slippery slope argument that knows no boundaries. The traditional scenario involves a ticking bomb, and the apprehension of a suspect who knows the location of the bomb.¹²³ To save thousands of lives, torture must be employed on the suspect. This is the sort of justification that the Bush administration used. Its interrogation techniques were, according to the President, necessary to protect American lives. As quoted by Clive Smith, Michael Levin, a leading advocate for the use of torture under such circumstances, is unequivocal that, “when the numbers are big enough” torture is

¹²¹ Fisher, *The Constitution and 9/11*, 214.

¹²² Ibid.

¹²³ Clive Stafford Smith, *Bad Men: Guantanamo Bay and the Secret Prisons* (London: Weidenfeld & Nicolson, 2007), 20.

justified.¹²⁴ The slippery slope arises in determining the minimum justification for using torture; if torture is simply a numbers game, then the issue is where it ends. It is not that the government, as an institution, has sought torture as a method of punishment; instead, it has used torture as part of what David Cole refers to as a “preventative paradigm.”¹²⁵ Such a paradigm is used to prevent future harm from befalling the country. This certainly does not make torture acceptable, but it is at least a rational explanation for the action.

In 2002, while working for the Office of Legal Counsel, John Yoo faced another in a series of perpetual legal problems for the Bush administration: the President and his advisors wanted “to preserve flexibility” to “quickly obtain information from captured terrorists and their sponsors.”¹²⁶ In other words, they wanted to torture suspects. However, they needed to act within the letter of the law, if not the spirit. With Yoo’s help, the President had just declared that the Geneva Conventions did not apply to captured soldiers and terrorists, which opened the door for the use of torture by the government. Interestingly, the CIA was concerned about the legal liability that its operatives would face.¹²⁷ They needed more legal protection. Yoo, in response, drafted the infamous “Torture Memo,” and Assistant Attorney General Jay Bybee signed it for delivery to the Attorney General.¹²⁸ David Cole neatly summarizes the memo in his book *Justice at War*:

¹²⁴ Ibid., 27.

¹²⁵ Cole, *Less Safe, Less Free*.

¹²⁶ Cole, *Justice at War*, 32.

¹²⁷ Ibid.

¹²⁸ Ibid.

Yoo wrote that threats of death are permissible if they do not threaten ‘imminent death,’ and that drugs designed to disrupt the personality may be administered as long as they do not ‘penetrate to the core of an individual’s ability to perceive the world around him.’ He said that the law prohibiting torture did not prevent interrogators from inflicting mental harm so long as it was not ‘prolonged.’ Physical pain could be inflicted so long as it was less severe than the pain associated with ‘serious injury, such as organ failure, impairment of bodily function, or even death.’¹²⁹

By interpreting the torture statutes in the narrowest possible way, Yoo opened the door for outright torture to be committed by the United States government.

In one final action to ensure that the President maintained all of the authority to which Yoo believed him entitled under the UET, Yoo added another line to the memo, in which he specified that the Commander in Chief had the legal authority to order outright torture if necessary.¹³⁰ This position gained a great deal of support within the Bush administration. Nevertheless, Vice President Dick Cheney consistently maintained the party line that actions such as drugging and beatings amounted only to “enhanced interrogation” and not torture.¹³¹ Like King James I of England during the aftermath of the Gunpowder Plot, though, the Bush administration adopted a policy allowing the Chief Executive, without any oversight, to authorize the use of torture.¹³²

¹²⁹ Ibid.

¹³⁰ Ibid., 33.

¹³¹ Glaberson, “Torture Acknowledgment Highlights Detainee Issue.”

¹³² Antonia Fraser, *Faith and Treason: The Story of the Gunpowder Plot* (Anchor, 1997).

8.3

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Punishment defines torture as

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person.¹³³

Semantics aside, acts such as waterboarding, or forced inhalation of water, which had been considered torture before the Bush administration, were still torture in fact. In 1903 United State Army Major Edward Glenn was charged by a military tribunal “for having used torture to get information” from a Filipino insurgent.¹³⁴ The specific form of torture was “‘water cure’ in which excessive amounts of water were forced into the stomach through the mouth.”¹³⁵ Glenn attempted to defend his actions by citing “military necessity,” but he was nevertheless found guilty of his crime.¹³⁶ After 2001, when the Department of Defense (DOD) sought training on “enhanced interrogation” techniques, it utilized instructors from the Survival, Evasion, Resistance

¹³³ “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” *United Nations Office of the High Commissioner for Human Rights*, 2004, http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

¹³⁴ Donald Arthur Wells, *The United Nations* (New York: Agora Publishing, 2005), 104.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

and Escape military training program to train military interrogators.¹³⁷ This program had been created specifically to train Special Forces soldiers on how to resist torture techniques used by North Korea in the Korean War. Decades before the passage of the Geneva Conventions, the United States considered such action torture, and it certainly did during war with the totalitarian North Korean regime in the 1950s. Certainly, waterboarding and other techniques remained torture.

There should be no mincing of words: Yoo and others in the administration were advocating for the lawfulness of torture in urgent circumstances. On January 14, 2009, Susan Crawford, a retired military judge and the convening authority of the military commissions at Guantanamo Bay, spoke of one of the Guantanamo detainees, stating definitively that “his treatment met the legal definition of torture.”¹³⁸ The detainee about whom she was referring was Mohammed al-Qahtani, believed to be the supposed “20th hijacker.”¹³⁹ Qahtani had been “kept in isolation and cold rooms, deprived of sleep, made to do dog tricks and broken by sexual and other humiliations.”¹⁴⁰

Detainees were also under constant threat from the Emergency Reaction Force (ERF). Dressed in protective gear, the ERF was dispatched to literally beat

¹³⁷ Scott Shane and Mark Mazzetti, “In Adopting Harsh Tactics, No Inquiry Into Their Past Use,” *The New York Times*, April 22, 2009, sec. U.S. / Politics, http://www.nytimes.com/2009/04/22/us/politics/22detain.html?_r=1&hp.

¹³⁸ William Glaberson, “Detainee Was Tortured, a Bush Official Confirms,” *The New York Times*, January 14, 2009, sec. US, <http://www.nytimes.com/2009/01/14/us/14gitmo.html>.

¹³⁹ Glaberson, “Torture Acknowledgment Highlights Detainee Issue.”

¹⁴⁰ *Ibid.*

uncooperative detainees into submission.¹⁴¹ When detainee Sami al-Laithi was suffering “fainting spells and worried that he would collapse” in the shower, he refused to go. After Sami was beaten by an ERF team, guards wished to take him to the medical facility. When he refused medical treatment, he was again beaten. At the medical clinic, after being handcuffed and shackled, the doctor “called out the number 264. He didn’t respond because his number was 287.” The doctor had read the wrong number.¹⁴² The ERF team again beat him. By the time he was finished suffering ERF beatings, Sami’s back was literally broken in two places. He spent a month in the hospital and is now confined to a wheelchair for life.¹⁴³

Although the OLC issued a new memorandum in 2004 with a new position on torture, it did not openly condemn Yoo’s controversial stance.¹⁴⁴ The memo begins: “Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law . . . the United Nations Convention Against Torture . . . [and] the longstanding policy of the United States.”¹⁴⁵ Despite this updated policy, the Bush administration, unwilling to either apologize for its previous policies, implicitly condoned the use of torture. Even as late as 2005, the Executive was not truly repentant for its use of

¹⁴¹ Smith, *Bad Men*, 155.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, 156.

¹⁴⁴ Fisher, *The Constitution and 9/11*, 230.

¹⁴⁵ *Ibid.*

torture: in November the CIA destroyed 92 tapes that documented practices such as waterboarding on terror suspects abroad.¹⁴⁶

¹⁴⁶ Mark Mazzetti, "U.S. Says C.I.A. Destroyed 92 Tapes of Interrogations," *The New York Times*, March 3, 2009, sec. Washington, <http://www.nytimes.com/2009/03/03/washington/03web-intel.html>.

Chapter 9
RASUL V. BUSH

9.1

Against this backdrop of unchecked executive power and a blatant twisting of the law, two important Supreme Court cases regarding the President’s powers in a time of war were heard; both were decided on June 28, 2004. *Rasul v. Bush* (2004) was the first of the three Guantanamo cases to deal directly with the detainees. But another important case that began the repudiation of the Bush administration’s conceptualization of the UET was *Hamdi v. Rumsfeld* (2004).¹⁴⁷ Yaser Hamdi was an American citizen who was captured on the battlefield in Afghanistan and initially held at Guantanamo Bay; after his citizenship was revealed he was moved to a Naval brig in Charleston, South Carolina.¹⁴⁸ What separates this case from the Guantanamo cases is that Hamdi was a United States citizen held on land that was unequivocally United States territory. The details of the Court’s opinion are quite complex, as the decision was “fragmented among a plurality of four (Sandra Day O’Connor, William Rehnquist, Anthony Kennedy, Stephen Breyer), joined at times by a concurrence/dissent from David Souter and Ruth Bader Ginsburg, and at other times a

¹⁴⁷ *Hamdi v. Rumsfeld* 542 U.S. 507 (2004).

¹⁴⁸ Fisher, *The Constitution and 9/11*, 191.

dissent from Antonin Scalia and John Paul Stevens;” only Justice Thomas gave full support to the position of the government.¹⁴⁹

The main holding, agreed to by a plurality of eight justices, was directly in response to the President’s use of the UET. Like with his interpretation of the Geneva Conventions, the Bush administration argued that the treatment of detainees, and related policies adopted by the executive, were binding on the courts. The Supreme Court disagreed:

In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances . . . We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.¹⁵⁰

The Court made two important announcements. First, it rejected part of the UET, which claimed Courts should automatically defer to decisions of the President, even during times of war. Secondly, the opinion gave protections to United States citizens who were being detained as part of the War on Terror. However, the Court was careful to announce that its decision was applicable only to United States citizens. As such, its main legacy was to repudiation of the UET and a demonstration that the Court would not allow itself to be bound by the President.

¹⁴⁹ Ibid., 194.

¹⁵⁰ 542 U.S. at 535-536.

9.2

Meanwhile, though, the problem of Guantanamo Bay still loomed in *Rasul*. By 2004, despite the President's 2001 executive order creating military commissions at Guantanamo Bay, not a single detainee had actually been tried.¹⁵¹ The detainees existed in a legal black hole, without any ability to challenge their detention. Although a next friend was bringing *Rasul* through the courts and to the Supreme Court, the Bush administration maintained that Guantanamo Bay was not United States territory, that *Eisenrager* was the controlling precedent, and that habeas corpus therefore did not apply. Both of the lower courts, the D.C. District Court and the D.C. Circuit Court of Appeals, agreed with the President's stance.¹⁵²

However, the Supreme Court, though divided 6-3, ultimately found in favor of the detainees. In differentiating this case from *Eisenrager*, the Court majority made several distinctions:

They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.¹⁵³

This last point is key, as it points to the issue of sovereignty and the answer to who ultimately exercises sovereignty over Guantanamo Bay. The government

¹⁵¹ Fisher, *Nazi Saboteurs on Trial*, 135.

¹⁵² *Rasul v. Bush*, 215 F.Supp.2d 55 (D.D.C. 2002); *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

¹⁵³ 542 U.S. at 476.

argued that the “question of sovereignty is a political decision. It would be remarkable for the judiciary to start deciding where the United States is sovereign and where the United States has control.”¹⁵⁴ Analyzing common law, Justice Stevens, writing for the majority, determined that habeas jurisdiction existed “even if a territory was ‘no part of the realm’; there was ‘no doubt’ as to the court’s power to issue writs of habeas corpus if the territory was ‘under the subjection of the crown.’”¹⁵⁵ This meant that “application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus.”¹⁵⁶ As such, petitions of habeas corpus could be heard on behalf of those held at Guantanamo Bay.

Justice Scalia, in what would become a characteristic role in the Guantanamo cases, wrote a passionate and vigorous dissent in which he strongly favored the power of the President. Although he had opposed the UET in *Hamdi*, he reversed his position when dealing with a non-citizen. Under the application of habeas corpus by the majority, Scalia feared that “parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws.”¹⁵⁷ To Scalia, this represented a major threat to the ability of the government to carry out a war, as constitutional protections would give an unprecedented, and unwarranted, amount of protections to enemies captured abroad. Steven’s decision, though, did not imply this overly broad view. But Scalia saw little difference between the special nature of Guantanamo

¹⁵⁴ Fisher, *The Constitution and 9/11*, 233.

¹⁵⁵ 542 U.S. at 482.

¹⁵⁶ *Id.* at 476.

¹⁵⁷ 542 U.S. at 501 (Scalia, J., dissenting).

Bay, as described by the Court majority, and other military bases holding prisoners outside the United States. He further argued that *Eisentrager* should have been the controlling precedent, and that the majority opinion represented “an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field.”¹⁵⁸

Despite these objections, the majority’s ruling was narrowly tailored and did not stray from simply allowing habeas hearings on behalf of those detained at Guantanamo Bay. Nevertheless, it represented a major shift in the treatment of the President by the Court during a time of war. Traditionally, as in *Korematsu*, there had been a great level of deference given to a wartime president. *Rasul*, though, undermined the autonomy of the President to freely make wartime policy on how to treat detainees. The Court repeated these actions in *Hamdan* and *Boumediene*.

¹⁵⁸ Id. at 489.

Chapter X

MILITARY COMMISSIONS

10.1

The President responded by finally beginning the process of trials under the military commissions. Two simultaneous processes were undertaken. The first was a combination of the Combat Status Review Tribunal (CSRT) and Annual Review Board (ARB).¹⁵⁹ Given only a military representative who was not a lawyer, access to only basic and unclassified information from the DOD justifying the detainee's imprisonment, and the ability to call witnesses if "reasonably available," the CSRT offered little in the way of a fair hearing.¹⁶⁰ Unlike the military commissions, however, the CSRTs were not designed to determine guilt or innocence for individual crimes. Instead, the three officer panel was designed simply to ascertain if there was sufficient evidence to reasonably believe that the defendant could be classified as an enemy combatant.¹⁶¹ This standard fell far short of the "beyond a reasonable doubt" used in civil courts. To further confuse matters, there was no clear definition of what

¹⁵⁹ Smith, *Bad Men*, 152.

¹⁶⁰ Fisher, *The Constitution and 9/11*, 235.

¹⁶¹ *Ibid.*

constituted an enemy combatant, leaving it to each tribunal to decide for itself.¹⁶² The CSRTs were such vacuous entities that the DOD announced it “had finished with the CSRTs for everyone in the Guantanamo facility” by March 2005.¹⁶³ Given the hollow, rubber-stamping nature of the CSRTs, such a quick timetable is hardly surprising. The ARBs that followed were merely annual hearings that provided even fewer rights and constituted even more of a mere formality than the CSRT.¹⁶⁴

Initially, individuals who “miraculously won their CSRTs” were classified as Not an Enemy Combatant (NEC).¹⁶⁵ In theory, this designation authorized them for release from Guantanamo Bay. By 2005, though, the military changed the designation from NEC to NLEC: No Longer Enemy Combatant. “In other words President Bush had been correct to designate” people found innocent in CSRTs “as an enemy combatant, but the US had generously decided that he had changed his wicked ways.”¹⁶⁶ As a NLEC, there was “no right to release, as an enemy combatant could still be held for the duration of the conflict, even if he were no longer dangerous.”¹⁶⁷

¹⁶² Smith, *Bad Men*, 152.

¹⁶³ *Ibid.*, 153.

¹⁶⁴ *Ibid.*, 152.

¹⁶⁵ *Ibid.*, 156.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*, 157.

10.2

While the CSRTs were intended to be formalities to ensure that the correct person was being held and that the charges presented were not utterly baseless, the military commissions were styled after Roosevelt's military tribunals. They were to be substantive war crimes trials, but it was evident from the start that they were lacking in the substance aspect of "substantive." In March of 2002, Bush administration lawyer William Haynes was directly asked, regarding the commissions, if "there is a chance that you will not be set free" if acquitted.¹⁶⁸ His long winded reply stated that:

Well, it's...we're talking about hypothetical two or three times removed. If we had a trial right this minute, it is conceivable that somebody could be tried and acquitted of the charge, but may not necessarily automatically be released. The people that we are detaining, for example, in Guantanamo Bay, Cuba are enemy combatants that we captured on the battlefield seeking to harm US soldiers or allies, and they're dangerous people. At the moment we're not about to release any of them unless we find that they don't meet those criteria.¹⁶⁹

Although Haynes implied that anyone found not to meet the criteria would be released, it was evident from his wording that he did not believe such a situation to exist. Other Pentagon officials went further and "raised the possibility of indefinite detention of the prisoners . . . even if they were acquitted in a military tribunal."¹⁷⁰

¹⁶⁸ Ibid., 91.

¹⁶⁹ Ibid.

¹⁷⁰ Seelye, "THREATS AND RESPONSES: THE DETAINEES; Some Guantánamo Prisoners Will Be Freed, Rumsfeld Says - New York Times."

Statements from the military officers directly involved with the proceedings supported the position that the military never had the intention to release any detainees, regardless of guilt. US Air Force Captain John Carr “resigned rather than take part in a process” that he “could not stomach.”¹⁷¹ According to Carr’s resignation letter, his superior had:

repeatedly said to the office that the military panel will be hand-picked and will not acquit these detainees, and we only needed to worry about building a record for the review panel . . . [the commissions are] a halfhearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged.¹⁷²

Air Force Major Robert Preston also resigned, citing the tribunals as “a severe threat to the reputation of the military justice system and a fraud on the American people.”¹⁷³

Even apart from the outright rigging of the military commissions, the procedural rules of the commissions were fundamentally unfair. Hearsay and the introduction of classified material, “both of which are likely to deprive the defendant of an opportunity to cross-examine his accuser,” were permissible.¹⁷⁴ Evidence obtained through outright torture was not permissible; however, any information gained through “enhanced interrogation” techniques, which remained a euphemism for government

¹⁷¹ Smith, *Bad Men*, 92.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ Cole, *Less Safe, Less Free*, 53.

sanctioned torture, was allowable.¹⁷⁵ The defendant himself was not even permitted to attend all aspects of the trial.¹⁷⁶ Although a military lawyer was allowed to serve on behalf of a defendant, the lawyer was also lower in rank than the presiding officer, which caused an immediate conflict; a lawyer had an ethical obligation to defend the client, even if it meant attacking the validity of the commission or the impartiality of the presiding judge. However, the military rank system stipulates that a voracious defense involving the questioning of orders not in the interest of the client may lead to criminal charges for dereliction of duty, creating an untenable situation for such attorneys.¹⁷⁷ Finally, and most tellingly, the rules “empowered the Secretary of Defense or his subordinate to intervene in the trial and decide central issues in the case instead of the presiding judge.”¹⁷⁸ All of these factors created a system whereby the rule of law and basic protections to ensure a fair hearing were impossible to obtain.

10.3

In Clive Stafford Smith’s *Bad Men: Guantanamo Bay and the Secret Prisons*, twenty-seven pages are dedicated to outlining the preposterous military commission that Binyam Ahmed Muhammad faced; he has recently been released and is currently residing in the United Kingdom. Given the impracticality of including all twenty-seven pages in this thesis, David Cole and Jules Lobel offer a manageable

¹⁷⁵ Ibid.

¹⁷⁶ Cole, *Justice at War*.

¹⁷⁷ Smith, *Bad Men*, 114.

¹⁷⁸ Cole, *Justice at War*, 51.

transcript from a different CSRT in Cole's book *Less Safe, Less Free*. What follows is a brief section of a CSRT for Mustafa Ait Idir, one of the plaintiffs in *Boumediene* who was originally arrested for conspiring to bomb the US Embassy in Bosnia. Idir was asked if, "while living in Bosnia, the detainee associated with a known al Qaida operative:

Detainee: Give me his name

Tribunal President: I do not know.

Detainee: How can I respond to this?

Tribunal President: Did you know of anybody that was a member of al Qaida?

Detainee: No, no.

Tribunal President: I'm sorry, what was your response?

Detainee: No.

Tribunal President: No?

Detainee: No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.

Tribunal President: We are asking you the question and we need you to respond to what is on the unclassified summary."¹⁷⁹

This exchange precisely highlights the problem with the use of secret evidence and a hearing that is so designed. Without informing a defendant of what evidence exists against him, it is impossible for the individual to refute the evidence. Because he was unable to create an effective defense, and unable to prove his

¹⁷⁹ Cole, *Less Safe, Less Free*, 45.

innocence, Idir was held for over seven years. During one incident in the prison, guards

pinned him down on gravel and jumped on his head, causing stones to cut the right side of his face and leaving a scar near his eye. ‘This incident precipitated an apparent stroke . . . He experiences head pain, and the left side of his face was paralyzed for months. Only one of his eyes blinked . . . He could not eat normally, food and drink leaked from his non-functioning mouth.’¹⁸⁰

Idir and two of the other *Boumediene* plaintiffs were released on December 16, 2008 due to their innocence.¹⁸¹ They had been in custody since October 18, 2001.

¹⁸⁰ Charlie Savage, “Guantanamo detainee is alleging he was brutalized,” *The Boston Globe*, April 13, 2005, sec. World, http://www.boston.com/news/world/latinamerica/articles/2005/04/13/guantanamo_detainee_is_alleging_he_was_brutalized/.

¹⁸¹ From correspondents in Sarajevo, “Guantanamo ‘worst Place on Earth’,” *The Australian*, December 17, 2008, sec. The World, <http://www.theaustralian.news.com.au/story/0,25197,24816310-12335,00.html>.

Chapter XI

THE DETAINEE TREATMENT ACT

By 2005, in the aftermath of *Rasul*, detainees at Guantanamo Bay and their next friends were filing petitions of habeas corpus in United States District Courts, specifically in the D.C. District. Attorneys, who had finally been allowed access to their clients in Guantanamo Bay, were well aware of the sham that constituted both the CSRTs and the military commissions. Attorney Clive Stafford Smith referred to the commissions as “con-missions.”¹⁸² Characteristically, the Bush administration could not allow these detainees to seek any relief from the civil courts. Since *Rasul* had been a rebuke, however small, of the UET, the executive did something out of character: it contracted the Republican Congress to help cement in federal law some of the policies Bush was pursuing. It should be noted that, by the time Congress passed the Detainee Treatment Act of 2005 (DTA), the Supreme Court had already agreed to hear *Hamdan*, the second of the Guantanamo cases; the DTA had no effect on those proceedings.¹⁸³

The DTA contained two main provisions. The first was legislation introduced by Senator John McCain to end the use of torture by the government, while the second stripped more rights away from the detainees regarding the civilian courts. President Bush initially threatened to veto the Act, as McCain’s amendment prohibiting

¹⁸² Smith, *Bad Men*, 81.

¹⁸³ Cole, *Justice at War*, 52.

the government from committing any “cruel, inhuman or degrading” acts towards detainees would, according to Bush, be too limiting.¹⁸⁴ The final draft also applied uniformly to all people held in United States custody, “regardless of nationality or physical location.”¹⁸⁵ Although he did not veto the act, Bush issued a signing statement stating that he would apply the DTA “in a manner consistent with the Constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief . . . of protecting the American people from further terrorist attacks.”¹⁸⁶ As pointed out by Louis Fisher, “the rule of law means that the President will carry out the law as enacted by Congress and not, through a signing statement, convert statutory law into discretionary administration policy.”¹⁸⁷ This was another example of the President ignoring the spirit of the law.

The other provision of the DTA was useful to the President in restricting some of the rights the detainees had won in *Rasul*. Any detainee who wanted to challenge his detention in a federal court now had to first undergo a military commission to determine guilt or innocence.¹⁸⁸ This could be a problem as the government, without any accountability or explanation, could indefinitely postpone or suspend the commissions. Furthermore, the DTA specified that the D.C. Circuit

¹⁸⁴ Fisher, *The Constitution and 9/11*, 236.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*, 237.

¹⁸⁸ Cole, *Justice at War*, 52.

would be “the exclusive forum for such review.”¹⁸⁹ Jurisdiction for all other courts was stripped, including the United States Supreme Court.

¹⁸⁹ Ibid.

Chapter XII

HAMDAN V. RUMSFELD

12.1

Hamdan v. Rumsfeld (2006) was, by far, the most significant victory for the detainees and a major rebuke of the UET and the policies of indefinite detention. The principal issue of the case was the legality of the military commissions, which had been created by the President in November of 2001. Again utilizing the UET, lawyers for the government argued that “presidents have exercised their inherent commander-in-chief authority to establish military commissions without any clear authorization from Congress.”¹⁹⁰ The Supreme Court, splitting 5-3 (Chief Justice Roberts did not participate, as it was his decision from the D.C. District Court of Appeals that was under review), could find no such inherent power, even in a time of war. Congress, not the President, could create such commissions, and the only military trial authorized by Congress had been the court martial system that existed under Article 21 of the UCMJ.¹⁹¹ Although the government claimed that both the AUMF and the DTA provided such authority to the President, the Court again disagreed. Nothing in either the AUMF or the DTA showed “specific, overriding authorization for the very

¹⁹⁰ Fisher, *The Constitution and 9/11*, 237.

¹⁹¹ *Ibid.*

commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military commissions.”¹⁹² Without the implicit approval of Congress, which the Court deemed was lacking, the commissions had no basis in law and were therefore illegal.

After determining that the commissions had no lawful status, the Court continued its criticism of the commissions by attacking their “structure and procedures.”¹⁹³ Under Article 36 of the UCMJ, “any departures from the procedures dictated for use by courts-martial . . . must be tailored to the exigency that necessitates it,” and the President must show that such an exigency exists.¹⁹⁴ Guantanamo Bay was not a battlefield, and there was no practical reason why the court martial procedures could not be followed; the President failed to show the necessary exigency.

The Court also criticized the procedures of these commissions because the defendant could be barred from the proceedings without “ever learning what evidence was presented during, any part of the proceeding.”¹⁹⁵ In short, the procedural deficiencies of the commissions made them untenable in the eyes of the Justices. Moreover, the President was required to show why the processes in the court martial were not being followed, and he had not done so.

¹⁹² 548 U.S. at 593-594.

¹⁹³ Fisher, *The Constitution and 9/11*, 238.

¹⁹⁴ 548 U.S. at 620.

¹⁹⁵ *Id.* at 614.

12.2

Hamdan also took issue with the executive's position that the Geneva Conventions were not applicable in the current conflict. In construing the language of Common Article 3, "not of an international character," to specify that the Article applies to conflicts that are, literally, not between nations, the Court determined that Common Article 3 does protect those captured in the War on Terror.¹⁹⁶ This war is not, after all, a war between the United States and another country, but a war against a non-state actor. Although part of Common Article 3 requires that captured individuals receive no "cruel treatment and torture," it also stipulates that prisoners be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people."¹⁹⁷ The Supreme Court determined that such a requirement was not being met by the military commissions.

The Bush administration had further argued that the Geneva Conventions were not applicable to domestic law and that the Court should defer interpretations of the treaties to the President, but the Court simply ignored these positions. In crafting the UCMJ, which covers both courts martial and the applicable rules for military tribunals, Congress required that the law of war be followed. Seizing on this, the Court reasoned that the Geneva Conventions, which are part of the law of war, therefore must be followed under the UCMJ. In effect, Congress had already

¹⁹⁶ Cole, *Justice at War*, 54.

¹⁹⁷ "International Humanitarian Law - Third 1949 Geneva Convention."

applied the Conventions through domestic law and they were enforceable in this situation.¹⁹⁸

As in *Rasul*, Justice Scalia attacked the majority opinion. His primary argument was that the Court did not have jurisdiction to hear the case, per the DTA. The relevant section of the DTA, which stripped habeas jurisdiction, “took effect on the date of the enactment of this Act...which was December 30, 2005.”¹⁹⁹ Scalia concluded that this unequivocally removed the case from the Court’s purview, although the majority insisted the Act did not address whether it applied to “claims pending on the date of enactment.”²⁰⁰ Aside from issues of jurisdiction, Scalia echoed his arguments from *Rasul* that the “petitioner, an enemy alien detained from abroad, has no rights under the Suspension Clause.”²⁰¹ And, he argued, that even if the Suspension Clause did apply, the statute gave sole authority to the D.C. Circuit court to review the military commissions; this level of judicial oversight should have satisfied the Suspension Clause requirement. Justice Thomas, in a separate dissent, raised the issue of whether the Geneva Conventions actually applied. He determined that they did not and that *Eisentrager* rendered moot any issues of Geneva Convention protections and that nothing “in the Geneva Conventions makes them [the detainees] immune from prosecution or punishment for war crimes.”²⁰²

¹⁹⁸ Cole, *Justice at War*, 54.

¹⁹⁹ 548 U.S. at 656 (Scalia, J., dissenting).

²⁰⁰ 548 U.S. at 574.

²⁰¹ 548 U.S. at 570 (Scalia, J., dissenting).

²⁰² 548 U.S. at 715 (Thomas, J., dissenting).

12.3

There are several remarkable elements to this ruling, foremost of which is that the Court repudiated the Bush administration and Congress for the DTA's withdrawal of established habeas jurisdiction from the courts.²⁰³ The entire case was a greater assault on the UET than *Rasul* had been; the scope of the question presented here allowed more flexibility to examine specific aspects of policies and procedures applied at Guantanamo Bay. Since the absence of Congressional authorization rendered the military commissions unconstitutional, the Executive would be forced to seek Congressional action in order to continue with its detention policies.

However, the case also exposed the Bush administration to a threat it had feared since 2002: prosecution under the War Crimes Act.²⁰⁴ Passed in 1996, the WCA makes it a federal crime punishable by imprisonment or death, to violate the Geneva Conventions.²⁰⁵ Because the Court ruled that Common Article 3 of the Convention does apply to those held by the government at Guantanamo Bay and elsewhere, the illegal trials and use of torture could subject government officials to possible prosecution.²⁰⁶ The potential implications of this determination were staggering: CIA field agents and army interrogators could be held liable for committing a war crime, as defined by the statute. But the ruling went further because the Act was

²⁰³ Cole, *Justice at War*, 54.

²⁰⁴ Goldsmith, *The Terror Presidency*, 136.

²⁰⁵ 18 USCA 2441.

²⁰⁶ Scott Shane, "The Question of Liability Stirs Concern at the C.I.A.," *The New York Times*, September 16, 2006, sec. Washington, <http://www.nytimes.com/2006/09/16/washington/16legal.html>.

also violated by the usage of the illegal Military Commissions. It was entirely possible that “President Bush . . . *already* [had] committed a war crime, by establishing the military tribunals and subjecting detainees to them.”²⁰⁷ The Supreme Court, therefore, effectively ruled that the President had committed a war crime by denying Geneva Convention protections to the Guantanamo detainees. Obviously, such a precarious legal situation could not be allowed to exist. This fallout triggered more action by the Bush administration, this time with Congress in a more active and complicit role.

²⁰⁷ Cole, *Justice at War*, 58.

Chapter XII

THE MILITARY COMMISSIONS ACT

13.1

Within three months of *Hamdan*, Congress enacted the Military Commissions Act of 2006 (MCA) to give legal authority to the President to continue his policies at Guantanamo Bay.²⁰⁸ The MCA restored much of the power to the Executive that the Supreme Court had stripped in *Hamdan*. As the title implied, Congress explicitly authorized the military commissions. The Act added no procedural improvements or protections for the detainees; instead, Congress rubberstamped the program that had previously been in effect. Statements obtained through torture were still acceptable at the commissions, provided that they had been obtained through “enhanced interrogation” methods before the passage of the DTA.²⁰⁹ Hearsay, secret evidence, etc., continued to be the operating procedure for the commissions. Additionally, the definition of “unlawful enemy combatant” was further expanded, applying to people who either “engaged in hostilities” with the United States, or were

²⁰⁸ Goldsmith, *The Terror Presidency*, 138.

²⁰⁹ Fisher, *The Constitution and 9/11*, 243.

found to be such by a CSRT; the definition also made no distinction between United States citizens and aliens.²¹⁰

The Act went even further. The DTA had already limited the review of habeas corpus by the civil courts to only the D.C. District Court, and only after a military commission had already determined guilt. To prevent detainees from continuing to make use of the civilian court system, the MCA completely stripped habeas jurisdiction from the civil courts for Guantanamo detainees.²¹¹ Even the D.C. District Court could not hear cases. Whether or not this was a valid suspension of habeas jurisdiction under the Suspension Clause became the central focus of *Boumediene*.

13.2

The final component of the MCA was retroactive immunity and increased protections for any individuals who may have committed a war crime by violating Common Article 3 of the Geneva Convention. Although much publicity was given to fears from the CIA concerns that their interrogation techniques may have made them vulnerable to prosecution, their agents were certainly not the only ones who may have committed a war crime.²¹² Because one of the requirements of Common Article 3 is trial by a “regularly constituted court affording all the judicial guarantees

²¹⁰ Ibid., 242.

²¹¹ Cole, *Justice at War*, 55.

²¹² Shane, “The Question of Liability Stirs Concern at the C.I.A..”

which are recognized as indispensable by civilized people,”²¹³ the President’s creation of a tribunal that did not meet this requirement was, according to the Supreme Court, a violation of the Convention. Therefore, he and his staff risked possible prosecution for having personally committed a war crime.

Thus, the MCA contained two sections about the Geneva Conventions designed to protect the Executive. The first granted retroactive immunity to any who may have previously violated the War Crimes Act, and the second narrowed the scope of the Act to cover only “grave breaches” of the Conventions.²¹⁴ Actions that constitute such breaches are specifically outlined in the MCA and include a description of torture as “the act of a person who commits, or conspires or attempts to commit an act specifically intended to inflict severe physical or mental pain or suffering upon another person within his custody.”²¹⁵ As Louis Fisher indicates, it is unclear whether a “grave breach” would occur if “the ‘specific intent’ is to obtain information and the physical or mental pain is only incidental and not intended.”²¹⁶ Between this immunity, and Congressional authorization for the actual military commissions, the MCA gave “the president more power over terrorism suspects than he had before the Supreme Court decision” in *Hamdan*.²¹⁷ Interestingly, it was Congress, and not his own

²¹³ “International Humanitarian Law - Third 1949 Geneva Convention.”

²¹⁴ Fisher, *The Constitution and 9/11*, 244.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Scott Shane and Adam Liptak, “Shifting Power to a President,” *The New York Times*, September 30, 2006, sec. U.S., <http://query.nytimes.com/gst/fullpage.html?res=9402E4DA1730F933A0575AC0A9609C8B63>.

interpretation of the UET, that gave the President this expanded power; Congress had, in a sense, helped to undermine the veracity of the UET by showing that only it could act on certain issues, such as immunity from prosecution. And that left the judiciary as the only branch of government not actively supporting the policies of the President.

Chapter XIV
BOUMEDIENE V. BUSH

In the wake of *Hamdan*, but before the passage of the MCA, Lakhdar Boumediene and five other detainees from Guantanamo Bay initiated proceedings in the D.C. Circuit Court seeking habeas corpus relief and challenging “the legitimacy of the CSRTs.” None had yet undergone a military commission.²¹⁸ Both the District Court and the Circuit Court of Appeals denied the petition, and the Supreme Court initially denied the request for certiorari on April 2, 2007. Strangely, on June 29 it altered its position and agreed to hear the case.²¹⁹

Whereas *Rasul* had reasserted habeas rights for the detainees based upon existing statutory language, that statute was superseded by the MCA, which also stripped habeas jurisdiction from the civil courts. Section 7 of the MCA specified that, “No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”²²⁰ For the relevant portion of the MCA to be valid, the Court in *Boumediene* had to determine if it had been an appropriate exercise of the Suspension Clause.

²¹⁸ Fisher, *The Constitution and 9/11*, 245.

²¹⁹ *Ibid.*, 247.

²²⁰ 128 S.Ct. at 2242.

In Justice Kennedy’s historical assessment of the reach of habeas corpus, he also examined the nature of United States control over Guantanamo Bay. Acknowledging that Cuba maintains ultimate sovereignty, he nevertheless determined that “the United States has maintained complete and uninterrupted control of the bay for over 100 years,” and that the protections of the Constitution do extend to Guantanamo Bay, even if formal sovereignty does not exist.²²¹ Therefore, suspension of habeas corpus, the Court argued, could take place only if there were an adequate substitute available to the detainees.

In the context of this case, the only alternative to habeas proceedings were CSRTs. However, the Court concluded that the CSRTs suffered from procedural “defects” that even review from a Court of Appeals could not rectify.²²² More specifically, the CSRTs “fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.”²²³ Furthermore, a habeas review, or an adequate substitute, must have the power to order the “release of an individual unlawfully detained,” which, again, the CSRTs did not have the power to accomplish.²²⁴ In effect, the Court determined that the CSRTs did not meet the requirement for a habeas substitute to satisfy the Suspension Clause. Section 7 of the MCA “thus effects an unconstitutional suspension of the writ.”²²⁵ The Court then

²²¹ Id. at 2258.

²²² Id. at 2260.

²²³ Id.

²²⁴ Id. at 2266.

²²⁵ Id. at 2274.

allowed for immediate habeas corpus petitions by those held at Guantanamo Bay, even if they had not fulfilled the DTA requirement of review by military commissions before appealing to the civilian courts.²²⁶

In this most recent case, Justice Scalia’s dissent focused on two aspects of the majority decision. The first regarded the Suspension Clause. Scalia argued that the protections outlined in the CSRTs “provide the essential protections that habeas corpus guarantees; there has thus been no suspension of the writ, and no basis exists for judicial intervention beyond what the Act allows.”²²⁷ Without a violation of the Suspension Clause, there was no need for the Supreme Court to become involved. The other prong of Scalia’s attack was focused on the extension of habeas corpus relief to Guantanamo Bay, which was similar to the argument he had been making since *Rasul*. Citing *Eisentrager*, Scalia believed that the precedent “thus held—*held* beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign.”²²⁸ Once again, the specific circumstances of Guantanamo Bay that the majority felt denoted de facto sovereignty were unimportant to Scalia; he focused only on the de jure sovereignty guaranteed to Cuba by treaty. He viewed it as a simple case of an enemy combatant being held outside of United States territory, and Scalia did not believe this afforded them any constitutional rights.

The Court admitted that allowing habeas relief for “foreign citizens detained abroad” would be “both an impractical and unpredicted extension of judicial

²²⁶ Id. at 2275.

²²⁷ 128 S.Ct. at 2294 (Scalia, J., dissenting).

²²⁸ Id. at 2298-2299.

power.”²²⁹ But the details of the lease under which Guantanamo Bay operated were unique, and the Court indicated that the decision would not be applicable to other military bases where prisoners were held; no other base has a lease that gives indefinite de facto sovereignty to the United States. Bagram Air Force Base in Afghanistan is a clear example of a United States military base that, like Guantanamo, contains hundreds of prisoners who are detained indefinitely, but would likely be unaffected by this decision. Nevertheless, *Boumediene*, though decided by a closely divided Court, served as the final strike against the Bush administration’s policies. Despite Congressional backing of the President, the Court unquestionably ruled that habeas rights do apply to those at Guantanamo Bay.

²²⁹ 128 S.Ct. at 2275.

Chapter XV

CONCLUSION

In defying its traditional deference towards the executive in a time of war, the Supreme Court, in the Guantanamo cases, has served to restore the rule of law and ensure that no single branch of government accrues too much power. The Bush administration unilaterally claimed an alarming degree of inherent authority. Detaining thousands of individuals on charges relating to the suspicion of terrorism is troubling enough. To hold these individuals indefinitely and submit them to torture is something else entirely. It is clear that the Bush administration, with its exaggerated conception of the Unitary Executive Theory, overstepped its bounds. What is remarkable that the Supreme Court, which is currently a conservative court with a firm tradition of judicial deference to the executive branch in a time of war, was willing to rein in the excesses of executive power to make it more in accord with the due process tradition of the United States.

There is an inherent problem created when operating outside the boundaries of the law: it is nearly impossible to return to a paradigm of legality. There have been only two war crime trials completed at Guantanamo Bay.²³⁰ “The principal reason why” this number is so low is that, according to David Cole, “evidence obtained illegally,” through torture or other means, “cannot be used to hold defendants

²³⁰ Derek Kravitz, “The Trials of Guantanamo Bay,” *Washington Post*, January 29, 2009, http://voices.washingtonpost.com/washingtonpostinvestigations/2009/01/the_closure_of_gitmo.html.

responsible for their crimes.”²³¹ President Bush avoided this problem by simply holding the detainees indefinitely. However, when President Obama eventually has to decide whether Guantanamo detainees should be tried, he will face the issue of not having enough untainted evidence to obtain a conviction. There is no doubt that some of the people held at Guantanamo Bay truly have committed crimes against the United States, crimes for which they should be tried and imprisoned. But because of the illegal actions of the Bush administration, these trials are likely never to occur. Even for those individuals who have been tortured, especially repeatedly, it is unclear what the end result has been. Information obtained through torture is extremely unreliable, and one simply “cannot trust information gathered from a torture situation.”²³² After 48 hours, it is utterly useless, making repeated beatings simply gratuitous.²³³

The other egregious hindrance caused by United States policy has been the effect that detention and torture of prisoners has had on the general public in the Middle East. Fighting Islamic extremism, and the accompanying terrorism, requires that the United States convince potential terrorists that it is not their enemy. The use of soft power is particularly important, as it shows the Islamic world that the United States is not a vicious entity to be hated. But any gains soft power may make are only undermined by torture and attacks against Muslims. “Practically speaking,” writes A.J. Rosmiller, a former DOD staffer and intelligence officer, “the United States is creating

²³¹ Cole, *Justice at War*, 16.

²³² Smith, *Bad Men*, 46.

²³³ *Ibid.*, 41.

more insurgents than it is eliminating when it detains or kills innocents.”²³⁴ Newly elected Vice President Joe Biden echoed this in February 2009 when he said that “the Bush administration’s detention and interrogation policies ‘gave Al Qaeda a powerful recruiting tool.’”²³⁵ Bush’s policies at Guantanamo Bay failed the United States in such a profound way as to force the Supreme Court to intervene and save the country from the unchecked, authoritarian path down which it was headed.

²³⁴ A. J Rossmiller, *Still Broken: A Recruit's Inside Account of Intelligence Failures, from Baghdad to the Pentagon*, 1st ed. (New York: Ballantine Books, 2008), 75.

²³⁵ Scott Shane, “Biden Says Bush Gave Al Qaeda Recruiting Tool,” *The New York Times*, February 20, 2009, sec. U.S. / Politics, <http://www.nytimes.com/2009/02/20/us/politics/20intel.html>.

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