

The War on Terror from Bush to Obama: On Power and Path Dependency

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1. Introduction

James Madison famously stated in 1793: “War is in fact the true nurse of executive aggrandizement.” By this, Madison meant that, when confronted with a grave threat to national security, the instinct of a state is to concentrate power at the very top. This can lead – and *has* led – to abuse of power. For instance, President Franklin D. Roosevelt’s signing of *Executive Order 9066* on February 19, 1942 resulted in the forcible internment of Japanese Americans (two thirds of whom were U.S. citizens), an episode widely seen as regrettable later, after history had removed Americans from the anxiety of war. But by no means do we have to look as far back as to World War II. We can note Cold War incidents such as the Iran-Contra scandal (1985–87), when the Reagan administration took it upon itself to bypass Congress – and specific laws – in order to support the controversial Nicaraguan Contras with money acquired by selling arms to Iran.

Indeed, not only the executive branch, but also the US Congress has – especially since World War II – tended to react to threats to national security by granting broad powers to the Chief Executive. The Gulf of Tonkin Resolution, passed by Congress in 1964 as a result of biased intelligence given to Congress by the executive branch, gave President Lyndon B. Johnson the authority he had sought to conduct an all-out war in South East Asia (Prados 2004). The joint resolution came about because Congress had been led to believe that US warships had been attacked without cause by North Vietnam in August 1964 – a “fact” later proven incorrect (*ibid.*).

On September 11, 2001, however, there was no uncertainty about the facts: the United States had been attacked. On September 14, 2001, Congress passed “The Authorization for Use of Military Force Against Terrorists” (AUMF),¹ a joint resolution authorizing the use of force against those responsible for the attacks. It granted the president the authority to use all “necessary and appropriate force” against those who had “planned, authorized, committed or aided” the September 11th attacks, or who harbored these persons or groups. Throughout his two terms of office, George W. Bush argued that the AUMF granted him wide and high-unlimited powers in fighting the Global War on Terror (GWOT). His successor, Barack H. Obama, originally cam-

¹ The other being “Authorization for Use of Military Force Against Iraq Resolution of 2002”. When used in this report, AUMF refers to the 2001 congressional authorization.

paigned against such a broad interpretation of presidential war powers, but, as we shall see, has since modified his stance.

This NUPI report examines the latest example of executive aggrandizement in US history: the recent and ongoing executive efforts associated with fighting international terrorism.² The *policy* focus of the report is on changes to US foreign policy as pertaining to established *international law*, specifically the Geneva Conventions of 1949 and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. It does not deal with changes in *domestic* law and politics (as seen with the PATRIOT Act and the expansion of warrant-less surveillance). The specific policies examined are the classification and detention of the enemy (classifying the enemy as being an “unlawful enemy combatant,” and detaining individuals in this category at the Guantánamo Bay military facility) and the subsequent treatment of the enemy (torture and “enhanced interrogation techniques”).³

In terms of *theory*, the focus is on power and path dependency: Is a concentration of power in the executive in a time of national crisis reversible? Or will the policies have entrenched themselves so that succeeding administrations will have no choice but to continue them? The case of two presidencies – George W. Bush and Barack H. Obama – is highly informative in this regard. *Candidate* Obama was very clear on these two issues: the power amassed by the Bush administration should be ratcheted back, and the path on which the United States had embarked in the “war on terror” was to be redirected, if not reversed, because it clearly conflicted with established domestic *and* international law. In contrast, the concentration of executive power (to the detriment of the other two branches) had been a clear priority of the outgoing George W. Bush administration (Goldsmith 2007). In a time of crisis, the Bush administration said, it was vital to give the Chief Executive the power he needed to keep America safe. The Bush administration then proceeded to pursue policies that were regarded by the international community as contravening established international law (Council of Europe 2007). In 2008, presidential candidate Obama presented clear policy alternatives to the path on which the United States then found itself, especially as regards the paramount issues of torture and detainees. The United States would *not* practice torture (a label he extended to waterboarding), and the controversial prisons at Guantánamo Bay in Cuba were to be closed. Indeed, the two admin-

² It should be borne in mind that this report has been written by a political scientist, not an expert in international law.

³ Because of the ongoing nature of the research topic, a range of literature and sources have been used, including primary sources such as official government documents and memoirs from former administration officials, and secondary literature such as investigative reporting and scholarly articles.

istrations would seem to – *prima facie* – differ fundamentally in their relative commitment to international law as a meaningful restraint on national – and executive – power. The United States would continue to fight terrorism, Obama said, but the way this would be done was not to jeopardize American values. Obama’s message to American voters and indeed the world watching the presidential campaign was unequivocal: Whereas the Bush administration had privileged security over ideals, Obama vowed to recalibrate the balance between the two and regain international respect for the manner in which the United States fought its battles.

It may indeed have been Obama’s intention to change US policy fundamentally in this area. However, this report concludes, he has thus far fallen far short of his campaign promises. Although taking an unequivocal stance against torture (banning waterboarding), he has not managed to close Guantánamo, end military commissions, or solve the problem of detainees being held indefinitely. Indeed, as 2011 came to an end, President Obama signed into law the National Defense Authorization bill, which makes *indefinite* detention of terror suspects *explicitly lawful*. The NDAA stands in stark contrast with what Candidate Obama had said while campaigning in 2008. Finally – and not surprising to students of American history – as Chief Executive, Obama seems quite comfortable with the prerogatives inherited from his predecessor.

George W. Bush 2001–2004: Rights-Free Territory and Rights-Free People

A study in contrasts, George W. Bush’s rhetorical defense of “freedom” and “liberty” in the wake of the attacks of 9/11 came with a “Global War on Terror” (GWOT) that entailed a series of violations of international (and US) legal standards: laws against torture, the indefinite detention of alleged terrorists, and subjecting alleged terrorists to inhumane and degrading treatment. Moreover, the Bush administration set up secret CIA-run prisons abroad that acquired prisoners through the unlawful practice of extraordinary rendition (Cutler 2010). The authority to do so was found in the AUMF. The administration also argued (in contrast to the later Obama administration) that inherent in Article II of the US Constitution (stipulating that the President is the Commander-in-Chief of the armed forces) is the authority of the president to conduct the GWOT as he saw fit, without congressional constraints. Nor was George W. Bush the first US president to demand and declare sweeping powers in a time of national security crisis. Indeed, this has been the norm rather than the exception (Schlesinger 1973).

And a time of national crisis it certainly was. A deeply worried and rattled Bush administration found itself facing two sharply conflicting imperatives in the wake of the 9/11 attacks. According to Jack Goldsmith, then legal adviser in the Department of Defense and later head of the influential Office of Legal Counsel (OLC) of the Department of Justice, the first of these two was fear of another attack. Such fears “permeated the administration” and led to the controversial doctrine of prevention (termed “preemption” by the Bush administration) (Murphy and Purdum, 2009). Says Goldsmith,

[T]hey were really scared...And they had this extraordinary sense of responsibility—that they would be responsible for the next attack. They really thought of it as having blood on their hands, and that they’d be forgiven once but not twice (Murphy and Purdum, 2009: 5).

The doctrine of prevention and the Iraq War will not be discussed in this report. Here we focus on the second imperative: the *legal* restrictions on presidential power and presidential *war power* that had been put in place since the Watergate and intelligence scandals of the 1970s (Restad 2005). “There was enormous legal uncertainty about

how far we could go,” according to Goldsmith (quoted in Murphy and Purdum, 2009: 5).

I. “Unlawful Enemy Combatants”: The Geneva Conventions vs. GWOT

Classification of the Enemy

On February 7, 2002 President George W. Bush determined that members of al-Qaeda, the Taliban, and associated forces were to be classified as “unlawful enemy combatants” (Fleischer 2002). Such a classification entailed that members of these groups would not be afforded the protections provided by the Third Geneva Convention to prisoners of war (POWs). The Taliban had waived their right to Third Geneva Convention POW status because they did not pass the four-pronged test that forms one of the definitions of a POW in an international conflict, the Bush administration concluded (Fleischer 2002; Goldsmith 2007: 110). The order, which was crafted by David Addington, chief of staff to Vice President Cheney and approved by the Office of Legal Council (OLC) (Wilkinson 2009), came after a reportedly intense behind-the-scenes battle between the State Department on the one hand, and the Justice Department, the Defense Department, and the Office of the Vice President on the other. The Legal Advisor of the Department of State, William Howard Taft IV, has argued that the analysis underlying the defining criteria as to enemy combatants was flawed, and that it did not take into account several other categories of persons entitled to Third Geneva Convention POW status (Murphy and Purdum, 2009). Indeed, the United States had previously afforded POW status to non-conventional groups, one prominent example being the Viet Cong in Vietnam (Prugh 1975). As Goldsmith writes in his *The Terror Presidency*, whereas one can disagree about the merit of the decision, the analysis as such was not new. Rather, the Bush administration’s decision was based on the Reagan administration’s opposition in the 1980s to amendments to the Geneva Conventions, known as Protocol 1, which would include non-uniformed fighters who did not follow the laws of war as protected by the Conventions if captured (2007: 112). The Senate never ratified Protocol 1. As such, this legal analysis was a continuation of policies from the Reagan era, not a new idea in the GWOT.

The political backdrop to this legal decision was that the President – and Congress – had decided that the attacks of 9/11 meant that the United States found itself *at war*. The traditional war powers of the Chief Executive had thus been triggered, and Bush interpreted these powers broadly. He decided to try the enemy of this war in military commissions (as per his September 13, 2001 Executive Order), used

throughout US history in time of war, and to detain enemy soldiers for as long as the conflict lasted so as to prevent them from re-entering the battlefield – as the AUMF authorizes.

George Harris, who represented John Walker Lindh (known as the “American Taliban”), argues that the Bush administration employed three strategic options to deal with suspected terrorists in the early years: (1) detain the suspected terrorist in military custody as an “enemy combatant,” indefinitely and without judicial review; (2) bring charges and try non-citizen suspects in military tribunals; (3) charge the suspect in federal court and treat the suspect as an “*unlawful* enemy combatant” not entitled to the normal protection granted by international law (Harris 2003, 32). Indeed, the administration’s anti-terrorism effort seemed to dismiss the criminal justice model of fighting terrorism in favor of a war model, emphasizing prevention rather than conviction or punishment (Harris 2003). One aspect of this approach was to assert executive discretion to detain terrorism suspects without criminal charges, under the President’s war powers.

In deciding to deny those captured in the GWOT the status of POWs, Bush might have been maintaining the previous Reagan-era US position, but this was a position not shared by many allied countries, most of whom had ratified Protocol 1 by 2001 (Goldsmith 2007: 117). Later interviews with Bush administration officials also offer a more complex picture of events. Lawrence Wilkerson, top aide and later chief of staff to Secretary of State Colin Powell, said in 2008 to an investigative piece by *Vanity Fair* magazine that he thought that Legal Advisor Will Taft and Secretary of State Colin Powell were both convinced that “they had managed to get the president’s attention with regard to what they thought was the governing document, the Geneva Conventions” and that “I really think it came as a surprise when the February memo was put out” – the memo written by Cheney’s Chief of Staff David Addington (Murphy and Purdum 2009: 5). Goldsmith writes that Taft indeed had argued that whereas POW status should not be conferred on the detainees, they should still be afforded the “Common Article 3” protections found in the Geneva Conventions, which contains minimal wartime protections originally designated for civil wars (2007: 119).

Whatever the internal debate of the Bush administration, the result was, in Goldsmith’s words, “a giant hole, a legal hole of minimal protections, minimal law.”⁴

⁴ Whereas Goldsmith agrees with the legal decision not to extend POW status to detainees, he did not agree with the total rejection of domestic and international law that accompanied the decision: “To conclude that the Geneva Conventions don’t apply – it doesn’t follow from that, or at least it shouldn’t, that detainees don’t get certain rights and certain protections. There are all sorts of very, very good policy reasons why they should have

Detention and Trial of the Enemy

Behind the choice of Guantánamo Bay as the location for detaining terror suspects lay a clear strategy. Ever since the United States had acquired jurisdictional treaty rights to Guantánamo Bay in 1903, all US presidents had taken the position that aliens held there were without either statutory or constitutional habeas corpus rights, since Cuba still maintained territorial sovereignty over the island (Cutler 2010: 65). Thus, the US government felt no obligation to provide traditional due process rights to detained prisoners held there. Furthermore, as noted above, the Bush administration concluded that, because al-Qaeda did not observe the rule of law or generally accepted principles of the laws of war, the Geneva Conventions on treatment of prisoners of war did not apply (ibid: 66). But, whereas Goldsmith agrees with the administration's decision to withhold POW status for captured members of al-Qaeda or the Taliban, he argues this should *not* have led to the refusal to assess whether those captured and held at Guantánamo were, in fact, to be considered enemy fighters. The Geneva Conventions mandates that a "competent tribunal" be set up to assess whether individual prisoners receive POW status or not. In 2002, the Inter-American Commission on Human Rights found that detention at Guantánamo was illegal, and urged the United States to have the legal status of the detainees determined by such a competent tribunal (IACHR 2011). The Bush administration refused to do so on the grounds that the president had made a "group status determination" that provided a "level and degree of attention [that] exceeds the type of attention envisaged by the drafters" of Geneva (Taft, cited in Goldsmith 2007: 118).

In November 2001, President Bush issued a Military Order declaring that accused terrorists were to be tried by secret military commissions (Elsea 2010: 1).⁵ This order specified that persons subject to it would have no recourse to the US court system to appeal a verdict or obtain any other sort of relief. According to John Bellinger III, legal adviser to the National Security Council in the Bush administration (and later to Secretary of State Colin Powell), "A small group of administration lawyers drafted the president's military order establishing the military commissions, but without the knowledge of the rest of the government, including the national-security adviser, me, the secretary of state, or even the C.I.A. director" (Murphy and Purdum 2009: 4).

In other words, detained prisoners were not to have their status reviewed by a competent tribunal, nor to be granted access to the US judicial system. Pursuant to the Congress' AUMF, they could be le-

been given a rigorous legal regime whereby we could legitimize their detention" (Murphy and Purdum 2008: 5; Goldsmith 2007).

⁵ *Military Order of November 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism*, 66 Federal Register 57833.

gally detained at Guantánamo for as long as the conflict lasted. And of course, no one knew how long that would be.

II. “Enhanced Interrogation Methods”: Torture and the United States

On October 7, 2001, US and British forces commenced the aerial campaign against Taliban-controlled Afghanistan, “host” to al-Qaeda. This was followed some weeks later by a ground invasion. The Taliban government fell and al-Qaeda was disrupted, albeit not defeated. The Defense Department’s general counsel, Jim Haynes, had authorized military intelligence to “take the gloves off” when interrogating captured terror suspects (Murphy and Purdum 2009). One of the first to receive this treatment was John Walker Lindh, the “American Taliban.” According to Jesselyn Radack, ethics adviser at the Department of Justice, several laws were broken in connection with the treatment and detention of Lindh. Radack was called with the specific question of whether or not the FBI on the ground could interrogate Lindh without counsel. Because she had been told unambiguously that Lindh’s parents had retained counsel for him, Radack answered “no.” He was interrogated anyway. “Well, this is an unethical interrogation,” Radack stated, “so you should seal it off and use it only for intelligence-gathering purposes or national security, but not for criminal prosecution” (Murphy and Purdum 2009: 4). A few weeks later, Attorney General John Ashcroft held a press conference in which he announced a complaint being filed against Lindh. Asked whether Lindh had been permitted counsel, Ashcroft replied that Lindh had not requested counsel – which was “completely false,” according to Radack. In a later press conference, Ashcroft said that Lindh’s rights had been scrupulously guarded, a statement not in harmony with the picture that had been circulated worldwide, showing Lindh blindfolded, gagged, naked, and bound to a board (ibid).

Suspected terrorists were snatched up and disappeared into what journalist Mark Danner calls the “hidden global internment network” intended for secret detention and interrogation, set up by the Central Intelligence Agency under authority granted directly by President Bush in a memorandum of understanding signed on September 17, 2001 (Danner 2009). The secret internment network of “black sites” had its own air force and its own distinctive “transfer procedures,” which were, according to the International Committee of the Red Cross (ICRC) report, “fairly standardised in most cases.”⁶

⁶ From the report: “The detainee would be photographed, both clothed and naked prior to and again after transfer. A body cavity check (rectal examination) would be carried out and some detainees alleged that a suppository (the type and the effect of such suppositories was unknown by the detainees) was also administered at that moment.

Knowing, or at least suspecting, that the detainment and treatment of suspected terrorists in the GWOT might be illegal, the administration in 2002 sought legal safeguards. According to Danner, this was referred to as a “golden shield” from the Justice Department. This golden shield was the legal rationale embodied in several infamous “torture memoranda.” One memorandum written by John Yoo, Deputy Director of the Office of Legal Council (OCL) and signed by Assistant Attorney General Jay Bybee in August 2002 claimed that for an “alternative [interrogation] procedure” to be considered torture, and thus illegal, it would have to cause pain of the sort “that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result” (quoted in Danner 2009: 3; Bybee 2002). Bybee and Yoo’s memorandum set out the limits to coercive interrogation by US government officials of those captured in the war on terror. The “golden shield” would presumably protect CIA officers from prosecution. The result was to raise the threshold of what constituted “torture.” Drawing on the August 2002 memo, the March 2003 memorandum written by Yoo concluded that the Fifth and Eighth Amendments⁷ did “not extend to alien enemy combatants held abroad” and that “federal criminal laws of general applicability do not apply to properly authorized interrogations of enemy combatants, undertaken by military personnel in the course of an armed conflict.” The reasoning was that such criminal statutes would “conflict with the Constitution’s grant of the Commander in Chief power solely to the President” (Yoo 2003).

Despite the “golden shield,” Director of Central Intelligence George Tenet would still bring to the attention of the highest officials of the government specific techniques used – “whether they would be slapped, pushed, deprived of sleep or subject to simulated drowning” – to make sure they were legal (quoted in Danner 2009). According to an ABC News report, the briefings of principals were so detailed and frequent that “some of the interrogation sessions were almost choreographed.” At one such meeting, Attorney General Ashcroft reportedly asked, “Why are we talking about this in the White House? History

The detainee would be made to wear a diaper and dressed in a tracksuit. Earphones would be placed over his ears, through which music would sometimes be played. He would be blindfolded with at least a cloth tied around the head and black goggles. In addition, some detainees alleged that cotton wool was also taped over their eyes prior to the blindfold and goggles being applied....

The detainee would be shackled by [the] hands and feet and transported to the airport by road and loaded onto a plane. He would usually be transported in a reclined sitting position with his hands shackled in front. The journey times...ranged from one hour to over twenty-four to thirty hours. The detainee was not allowed to go to the toilet and if necessary was obliged to urinate and defecate into the diaper.”

⁷ Amendment V: “Provisions concerning prosecution and due process of law” (also double jeopardy restriction and private property); Amendment VIII: “Excessive bail or fines; cruel and unusual punishment”.

will not judge this kindly.” (Danner 2009; Greenburg et al. 2008; Cutler 2010: 66–67)

On December 2, 2002, Rumsfeld signed off on a memo from the Defense Department’s legal counsel, Jim Haynes, permitting the use of aggressive interrogation techniques at Guantánamo, including stress positions, isolation, and sleep deprivation. Rumsfeld wrote on the memo, “I stand for 8–10 hours a day. Why is standing limited to 4 hours?” Alberto Mora, General Counsel to the Navy at the time, has stated in an interview that he thought the memo Rumsfeld humorously commented on must have been a mistake and that once these mistakes were pointed out “the authorization would be instantaneously reversed” (Murphy and Purdum 2009: 7). Mora had a meeting with the author of the memo, Haynes, “in which I indicated that I felt the document authorized abusive treatment that included torture.” Haynes disagreed, prompting Mora to walk Haynes through how this could be torture, engendering the possibility of legal liability for individuals associated with this process. Mora thought the problem had been solved, but later received a phone call informing him that the reports of abuse were continuing. “That’s when I realized that this was not a simple mistake,” Mora said, “but that, in fact, people had adopted this course of action consciously.” In yet another meeting with Haynes, Mora pointed out Secretary Rumsfeld’s handwritten note at the bottom of the authorization page, arguing that “This may be a joke, but it would not be regarded as a joke potentially by a prosecuting attorney or a plaintiff’s attorney.” (All material above referred to in Murphy and Purdum 2009: 7.)

Abu Ghraib

In January 2004, prompted by photos of abuse at Abu Ghraib prison in Iraq, Lt. Gen. Ricardo Sanchez asked Maj. Gen. Antonio M. Taguba to conduct a secret investigation into allegations of detainee abuse at Abu Ghraib and “lapses in accountability” among the 800th Military Police (MP) Brigade (PBS 2005). The report was finished in March 2004 (Taguba Report 2004), and its classified content leaked to *The New Yorker*. Journalist Seymour Hersh published a story on the report, along with photos, in April 2004. On April 28, the TV program *60 Minutes II* aired the story of widespread abuse and humiliation of detainees at Abu Ghraib, reporting that these practices dated back to October 2003. Abu Ghraib was described as a place where US Army regulations and the Geneva Conventions were routinely violated, and where the priority was on interrogating prisoners and getting intelligence, also by intimidation and torture (Hersh 2004). Maj. Gen. Taguba said Secretary Rumsfeld could have avoided the confusion down in the ranks if he had a wider range of legal advice (Schlesinger 2004). The Taguba report confirmed that “systemic and illegal” abuse

occurred under the watch of the 372nd Military Police Company in Tier 1-A of Abu Ghraib. The evidence consisted of photographs, videos, and detainee and witness testimony. Taguba argued that Brig. Gen. Janis Karpinski, commander of the 800th Military Police Brigade, was to be blamed for poor leadership, and recommended that she be relieved of command and be issued a letter of reprimand. He also recommended Col. Thomas Pappas, commander of the 205th Military Intelligence Brigade, be given a reprimand for failing to ensure that his soldiers were trained and were following the interrogation rules of engagement.

According to Lawrence Wilkerson, Secretary Rumsfeld should have taken responsibility for his role in this travesty of justice. “The twin pressures were from Rumsfeld, and they were: Produce intelligence, and the gloves are off,” in the words of Wilkerson, “That’s the communication that went down to the field” (Murphy and Purdum 2009: 10). Alberto Mora has even stronger words about Rumsfeld, arguing that Maj. Gen. Taguba “feels now that the proximate causes of Abu Ghraib were the O.L.C. memoranda that authorized abusive treatment.” Speaking to journalist Seymour Hersh in 2007, Taguba said,

I know that my peers in the Army will be mad at me for speaking out, but the fact is that we violated the laws of land warfare in Abu Ghraib. We violated the tenets of the Geneva Convention. We violated our own principles and we violated the core of our military values. The stress of combat is not an excuse, and I believe, even today, that those civilian and military leaders responsible should be held accountable (9).

Secretary Rumsfeld subsequently asked former Secretary of Defense James Schlesinger to chair an independent panel to review allegations of detainee abuse, and to determine the root causes. The committee’s report was released in August 2004. Schlesinger told the press that Abu Ghraib “was a kind of animal house on the night shift.” According to the report, MI and MP personnel at Abu Ghraib were “directly responsible” for the abuse. The panel also criticized the civilian leadership at the Pentagon, including the Secretary of Defense, as well as Gen. Sanchez and his superiors at CENTCOM (U.S. Central Command), indicating that an atmosphere was created in which “the existence of confusing and inconsistent interrogation technique policies contributed to the belief that additional interrogation techniques were condoned” (Schlesinger 2004).

The spring and summer of 2004 saw a series of events that challenged the Bush administration, capped by the two court decisions *Hamdi v. Rumsfeld* and *Rasul v. Bush* (June 28, 2004). Neither went in the President’s favor as regards war powers. In *Hamdi v. Rumsfeld*, the Supreme Court decided that whereas Yaser Hamdi (a US citizen cap-

tured by the Northern Alliance in Afghanistan and held in a military prison in Virginia) could be detained until the end of the Afghanistan conflict, it was doubtful that such traditional war powers could be extended indefinitely in a war against al-Qaeda. In fact, once the verdict had been pronounced, Hamdi was released to his family in Saudi Arabia, on condition he renounce his US citizenship. The opinion in *Hamdi* construed the AUMF in light of “longstanding law-of-war principles,” pushing back against the idea that presidential prerogative cancelled out laws of war (Pearlstein 2010). That same day, in *Rasul v. Bush* the Supreme Court also decided that it did have the authority to scrutinize the legality of the government’s actions at Guantánamo Bay (Goldsmith 2007: 134). It ruled that the detainees’ habeas cases could go forward under the federal habeas statute, thereby disagreeing with the Bush administration’s claim that these detainees did not have right of access to the federal courts to challenge whether they were being held lawfully (as Bush’s original Military Order of November 2001 had stated). Although these opinions were signals that Guantánamo was not a “law-free zone,” they had few immediate practical consequences for the administration’s policies (ibid: 135).

One of the few immediate results of these decisions was that Secretary Rumsfeld on 7 July 2004 established a Combatant Status Review Tribunal (*CSRT*) process to determine, “in a fact-based proceeding, whether individuals detained by the Department of Defense at the US Naval Base Guantánamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation” (Center for the Study of Human Rights in the Americas). It also prompted Congress, in its Detainee Treatment Act (2005) to revoke from the Supreme Court its jurisdiction over habeas claims by persons detained as “enemy combatants.” Instead a single jurisdiction was created in the Court of Appeals for the District of Columbia Circuit to hear appeals of final decisions of military commissions.

The next year, in 2005, Deputy Secretary of Defense Gordon England and John Bellinger, then Legal Advisor to National Security Advisor Condoleezza Rice, were calling for the facilities at Guantánamo Bay to be shut down (Wilkinson 2009).

George W. Bush 2005–2009: Courts and Congress Respond

By 2005, the courts had begun challenging the legality of the Bush administration's broad claims to presidential prerogative in the war on terror. By 2006, the Bush administration was also struggling politically, and Democrats were on their way to winning majorities in both Houses of Congress. Bush decided to make changes – though arguably not because of the controversial GWOT, but because of the administration's heavily criticized response to Hurricane Katrina in 2005. Among those dismissed, over Cheney's strong objections, was Secretary of Defense Rumsfeld. Cheney himself could not be fired as vice president, an elective office, but he had become a very toxic figure in the White House (Brinkley 2011).

The second administration of George W. Bush came to represent an adjustment in the legal approach to the GWOT as a response to legal challenges from the Supreme Court.

I. “Unlawful Enemy Combatants”

In June 2006, the Supreme Court, in a 5–3 decision,⁸ handed down what National Public Radio reported as being “the most important ruling on executive power in decades, or perhaps ever” (Totenberg 2006). Salim Ahmed Hamdan, a Yemeni national who was a driver and guard for Osama Bin Laden, had been captured in Afghanistan during the hostilities in 2001. After President George W. Bush ordered that Hamdan be tried by a military commission in 2004, Hamdan filed a petition for habeas corpus, claiming that the military commission lacked authority to try him since there was no congressional act that authorized these commissions.

Hamdan's counsels also asserted that military commissions were unlawful from the procedural and substantive legal points of the Uniform Code of Military Justice (UCMJ) and Common Article III of the Geneva Conventions. The Bush administration countered that Hamdan was not entitled to access to federal courts since he was not a POW but rather an enemy combatant. The government also claimed that the

⁸ Chief Justice John Roberts had ruled in favor of the Bush administration in the appellate court (immediately before being nominated to the Supreme Court) and therefore did not participate in the ruling.

Geneva Conventions did not apply, since the conventions addressed only international wars and not conflicts against terrorists.

The US Supreme Court, in its opinion *Hamdan v. Rumsfeld* – and despite the Detainee Treatment Act's attempt at stripping the Supreme Court of jurisdiction – invalidated the military commission system established by presidential order. The Court held that, although Congress had in general authorized the use of military commissions, such commissions were required to follow procedural rules as similar as possible to court-martial proceedings, as required by the UCMJ (Elsea 2010: 1). *Hamdan* was a serious challenge to the manner in which the administration had conducted the GWOT thus far, specifically with regard to the military commissions, and more generally with regard to the executive power claimed by the Bush administration.

On the military commissions, the Court rejected the manner in which they were currently working, ruling that the government could not proceed with military commissions without the express approval of Congress. The Court held that a small portion of the Geneva Conventions *did* apply to the GWOT, granting detainees legal rights of humane treatment and legal process. Furthermore, the Court's ruling implied that the 1996 War Crimes Act was applicable to many of the administration's dealings with detainees (Goldsmith 2007, 137). The justices argued the commissions violated the Uniform Code of Military Justice, which affords the right to be present at trial, and the Geneva Conventions, which, the Court noted, may give detainees the same rights as US citizens facing military trial (Stohr 2006).

On the issue of presidential war powers, great emphasis was placed on “the powers granted *jointly* to the President and Congress in time of war.” This directly challenged the administration's claim that Congress was without power to limit or regulate the war powers granted by the Constitution to the President. The Court explained:

Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers (Greenwald 2006).

Congress reacted to the Supreme Court's decision by passing the Military Commissions Act (MCA) of 2006. The aim of the act was to devise new procedures whereby the military commissions system could continue working within the confines of the law as defined by the Supreme Court in *Hamdan*. It also contained an amended provision from the Detainee Treatment Act, stripping the Supreme Court of habeas corpus jurisdiction over enemy combatants. According to professor of law Leonard Cutler, the system as laid out in the MCA 2006 lacked

“substantive evidentiary requirements as well as fair trial guarantees” (Cutler 2010: 71).

The law had been sent to Congress on September 6, 2006 and was enacted three weeks later, immediately prior to midterm elections. It authorized many aspects of the military commissions system the Supreme Court had invalidated earlier: giving the president a broadened definition of “unlawful enemy combatant,” implicit approval of aggressive interrogations short of torture, immunity from prosecution for those involved in past interrogations that crossed the prohibited line, narrowed interpretations of the Geneva Conventions and amendments to the War Crimes Act, eliminating habeas corpus review over Guantánamo and prohibiting the use of the Geneva Conventions to gauge the legality of the Guantánamo detentions (Goldsmith 2007: 138). John Bellinger, legal adviser to the National Security Council, stated in an interview in 2008 that whereas many of the substantive problems with the military commissions created by the original order were resolved by Congress in response to the Supreme Court decision in *Hamdan*, the efforts of the executive branch have been suffering from this original process failure ever since.

One senator in particular accused the Bush administration of timing the passage of the MCA to the midterm elections so that no congressional representative would dare vote against it:

Soon, we will adjourn for the fall, and the campaigning will begin in earnest. And there will be 30-second attack ads and negative mail pieces, and we will be criticized as caring more about the rights of terrorists than the protection of Americans. And I know that the vote before us was specifically designed and timed to add more fuel to that fire.

Senator Barack Obama, September 28, 2006.

In 2007, the Council of Europe published its report *Guantanamo: violation of human rights and international law?* which demanded the immediate extension of POW status to detainees there, “or, at least, the United States should allow a ‘competent tribunal’ ... to determine their status” (Council of Europe 2007: 7). It further argued that the United States was in breach of its obligations under the Committee of Ministers’ Statutory Resolution (93) 26 on Observer Status and that the facility should be opened up to observers from states that had nationals in detention there, as well as to observers from the International Committee of the Red Cross (ibid).

It could be argued that the most fundamental challenge to the Bush administration came in 2008, however, with the Supreme Court’s decision in *Boumediene v. Bush* (Wittes et al. 2011). *Boumediene* was a writ of habeas corpus submission on behalf of Guantánamo detainee

Lakhdar Boumediene, a citizen of Bosnia and Herzegovina. As previously noted, Guantánamo Bay is not *formally* part of the United States (under the terms of the 1903 lease) but the United States does exercise complete jurisdiction and control. The case was consolidated with habeas petition *Al Odah v. United States* and challenged the legality of Boumediene's detention as well as the constitutionality of the Military Commissions Act (MCA) of 2006. On June 12, 2008, Justice Anthony M. Kennedy delivered the opinion of the 5–4 majority, which held that the prisoners *had* a right to habeas corpus under the US Constitution and that the MCA represented an unconstitutional suspension of that right. The Court stated that because the United States maintains *de facto* sovereignty over Guantánamo Bay, any *aliens* detained as enemy combatants on that territory were entitled to the writ of habeas corpus protected in Article I, Section 9 of the US Constitution (whereas the *Hamdi* ruling in 2004 had granted this right to *US citizens*). This case precedent recognized that fundamental rights afforded by the US Constitution extend to Guantánamo. Indeed, it repudiated the legality of the MCA and the Detainee Treatment Act of 2005, Congress' attempt at overturning the 2004 decisions *Hamdi* and *Rasul* (where they had eliminated habeas jurisdiction for any "enemy combatant" held in US custody as a specific reaction to the ruling previously described in *Rasul*). As a substitute for habeas review, these laws created a much more limited review proceeding in the Court of Appeals for the District of Columbia for individuals to challenge only the military's classification of them as "enemy combatants." In *Boumediene v. Bush*, the Court held that detainees at Guantánamo had a constitutional right to file petitions for habeas corpus in US federal court challenging the lawfulness of their detention (Center for Constitutional Rights 2008). Again, the Bush administration had to make adjustments in its legal framework.

Morris Davis, GITMO prosecutor from 2005 to 2007, has been highly critical of such adjustments to the military commissions system – because he considers the system too flawed to reform:

I honestly believed we were committed to full, fair and open trials when I became chief prosecutor in 2005, but I lost confidence in that commitment over time as political appointees tried to manipulate the process and make it more like a theatrical production than a judicial proceeding. After more than a decade of futility and failure, the question is no longer whether the U.S. could proceed with "reformed again and again and again military commissions," but whether it should (Davis 2012).

II. "Enhanced Interrogation Methods"

"The United States does not torture. Its against our laws, and it's against our values," Bush asserted on September 6, 2006, when 14 high-value detainees were transferred to Guantánamo from secret CIA

prisons (Danner 2009: 1; Woodward 2009). Bush explained that in addition to Guantánamo, some suspected terrorist leaders and operatives captured during the war had been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency, and using “an alternative set of procedures.” Further: “These procedures were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations.” President Bush added that the Department of Justice had “reviewed the authorized methods extensively and determined them to be lawful,” which is what the previously mentioned Yoo–Bybee memoranda were for (Danner 2009: 1). Later that month, Congress, facing midterm elections, duly passed the President’s Military Commissions Act of 2006, which, among other things, sought to shelter from prosecution those who had applied the “alternative set of procedures” and had done so, said the President, “in a thorough and professional way” (ibid).

From October 6 to 11 and then from December 4 to 14, 2006, officials of the International Committee of the Red Cross – whose official and legally recognized duties include monitoring compliance with the Geneva Conventions and supervising treatment of prisoners of war – traveled to Guantánamo and began interviewing the fourteen “high-value detainees” who had been transferred from the CIA “black sites” to Guantánamo. The report, sent to the CIA’s acting general counsel John Rizzo on February 14, 2007, concluded:

The allegations of ill-treatment of the detainees indicate that, in many cases, the ill-treatment to which they were subjected while held in the CIA program, either singly or in combination, constituted torture. In addition, many other elements of the ill-treatment, either singly or in combination, constituted cruel, inhumane or degrading treatment (ICRC 2007: 26).

This despite the Detainee Treatment Act of 2005, a bill sponsored by famous ex-POW and Senator John McCain (R–Ariz.), clarifying that the international ban on “cruel, inhuman and degrading treatment” applied wherever US officials operate. On December 30, 2005 Bush signed the bill into law, but attached a “signing statement” laying out his own interpretation, which indicated that he was not otherwise bound by the law in any meaningful way. Indeed, when Congress passed the Military Commissions Act of 2006, it authorized the CIA to continue to use harsher interrogation techniques than those permitted the military (as set out in the Army Field Manual) (Cutler 2010: 67). Furthermore, when Congress in 2008 passed a law that would have forced the CIA to comply with the Field Manual’s Humane Treatment Standard, President Bush vetoed it (ibid).

In the wake of the ICRC report one can, writes Mark Danner (2009), argue the following: Beginning in the spring of 2002 the US govern-

ment began to torture prisoners. This torture, approved by the President and monitored daily by senior officials, including the nation's highest law enforcement officer, clearly violated major treaty obligations of the United States, including the Geneva Conventions and the Convention Against Torture, as well as US law (2009: 6; Human Rights Watch 2011a). As for the CIA's "alternative sets of procedures" mentioned above, extensive leaks to the press, from officials supportive of and critical of these "procedures," undermined a highly secret program, writes Danner (2009). As a result, CIA officials destroyed, "apparently out of fear of eventual exposure and possible prosecution," as many as 92 video recordings that had been made of the interrogations. These recordings could have played a critical part in the effort to determine what benefits, if any, the program brought to the security of the United States. Of course, they could also have played a part in criminal proceedings against officials who had engaged in torture.

With the Bush administration on its way out in 2008, various administration officials gave interviews. Vice President Cheney, in an interview to *Washington Times* in December, defended his stance on "enhanced interrogation" by arguing that the administration had spent "a great deal of time and effort getting legal advice... of the Office of Legal Counsel" and that "I don't think it was torture." Cheney said that the CIA had "handled itself very appropriately," and concluded that it was "directly responsible for the fact that we've been able to avoid or defeat further attacks against the homeland for seven and a half years" (Cutler 2010: 67–68; Ward and Solomon, 2008). Indeed, in his memoir *In My Time* (Cheney & Cheney 2011), the former vice president argues that the "enhanced interrogation" that he helped create was not torture. Waterboarding, in his view, was perfectly legal because the Office of Legal Counsel had determined it to be such. Cheney also defends his famous statement that the United States now had to work "the dark side." Also Donald Rumsfeld dismisses charges of torture in his memoir *Known and Unknown* (Rumsfeld 2011). His reasoning is twofold: either the Defense Department did not participate in torture, or the techniques it employed were "legal and humane" (Brinkley 2011).

Another official who gave an interview was Susan Crawford, the top Bush administration official in charge of deciding which criminal charges to bring against the detainees in Guantánamo (and a former US judge on the Court of Appeals for the Armed Forces). Crawford told *Washington Post* journalist Bob Woodward that the United States in fact *was* guilty of torture because the treatment of Mohammed al-Qahtani, the suspected twentieth hijacker, "met the legal definition of torture." Indeed, that was the reason she did not refer the case for

prosecution (Mayer 2009: 342). Crawford also stated that the Bush administration had created a nigh-unsolvable problem for the incoming administration: the Obama administration would “inherit” prisoners who could neither be tried nor released. “And unfortunately what this has done,” said Crawford, is that it “has tainted everything going forward.”

In December 2008, a Senate Armed Services Committee report concluded that “Rumsfeld's authorization of aggressive interrogation techniques for use at Guantánamo Bay was a direct cause of detainee abuse there.” The committee found the interrogation techniques harsh and abusive but stopped short of calling them torture (Woodward 2009). According to *The New York Times* and National Public Radio's “Guantanamo Docket,” five men had died at Guantánamo by the time President Bush left office.

Keep the Change, or Barack H. Obama 2009–2011

As for our common defense, we reject as false the choice between our safety and our ideals.

Barack Obama, Inaugural Address 20 January 2009

In 2008, Jane Mayer, an investigative reporter at *The New Yorker*, published what became a best-seller, *The Dark Side*, chronicling – and criticizing – the Bush administration’s GWOT policies. It was a pessimistic and searing book. In the afterword to the 2009 edition, however, Mayer expresses hopes as to the newly elected president, Barack Obama, because candidate Obama provided a strong rhetorical defense of constitutional rights in the War on Terror on the campaign trail (Mayer 2009). Unlike many Democrats before him, Obama did not try to “out-hawk” his Republican opponent, Arizona Senator John McCain, but rather defended the (potentially controversial) stance that terrorists have a right to habeas corpus when detained by the United States. And indeed, Obama took some remarkable action immediately upon entering the White House. On January 22, 2009, he ordered the military prison camp at Guantánamo Bay to be closed within a year; he suspended military commissions while a task force studied options (the Detainee Policy Task Force created by Executive Order 13493); he prohibited CIA “black sites”; he decreed that the International Committee for the Red Cross should be granted access to all prisoners held by the United States; and he nullified earlier legal memoranda on interrogation policy during the Bush administration, and ordered that all prisoners be afforded the protections of the Geneva Conventions (repealing President Bush’s Executive Order 13440 on the meaning of Common Article 3 as applied to US interrogation operations) (Pearlstein 2010). Obama also categorized waterboarding as torture, thereby banning the practice. He announced that the United States intended to win the fight against terror, but that “we are going to win it on our own terms” (Mayer 2009: 340).

The people he brought with him also signaled a new era. The nominated head of the influential Office of Legal Counsel in the Justice Department was Dawn Johnson, a law professor who had previously criticized the Bush administration for devising “bogus constitutional arguments for outlandishly expansive executive power” (ibid). Her potential boss, Eric Holder, when asked during his confirmation hearings in the Senate whether waterboarding was torture, answered a loud

and clear, “Yes.” Indeed, Harold Hongju Koh, the new Legal Advisor to the State Department, had written an essay titled “America’s Jekyll-and-Hyde-Exceptionalism” where he criticized what he called the “double standard” that the United States had been applying to international human rights law (2005). Koh argued against the double standard exhibited in the post-9/11 environment, “particularly, America’s attitude toward the global justice system, and holding Taliban detainees on Guantánamo without Geneva Convention hearings...” (2005: 117). What Koh found the most troubling about the Bush administration’s response to 9/11 was that it made the double standard (one for the United States and another for the rest of the world) not just the exception, but the rule (128).⁹ Koh argued against what he deemed a “rights-free zone” at Guantánamo and lauded the US Supreme Court’s decision in *Rasul v. Bush* (2004) for affirming the rights of habeas corpus to “enemy combatants” being held there (2005: 138–139). He held that, since these prisoners were being subjected to punishment exclusively under US law, they would also have to be afforded avenues to object to that punishment, arguing eloquently against the idea that it was acceptable to have “rights-free territory” and “rights-free people” (139–140).

As of early spring 2009, there was little reason to doubt the sincerity with which the Obama administration set about making fundamental changes to the policies of the previous administration. In a major national security speech held at the National Archives in May 2009, President Obama criticized his predecessor for pursuing an “ad hoc legal approach for fighting terrorism that was neither effective nor sustainable – a framework that failed to rely on our legal traditions and time-tested institutions, and that failed to use our values as a compass” (Obama 2009c). He pledged to work with Congress to develop an appropriate legal regime for detention of terror suspects who cannot be prosecuted or released. “From Europe to the Pacific, we’ve been the nation that has shut down torture chambers and replaced tyranny with the rule of law,” Obama said. “That is who we are” (ibid). But, in that same speech, he also announced the fate of the various groups of detainees in Guantánamo, an announcement that proved to be a harbinger of future difficulties. President Obama explained that some would be tried in federal courts (for violations of federal law); a second group would be tried by reconstituted military commissions (for violations of laws of war); the third group had been ordered released by the courts; the fourth group were those deemed safe to transfer to other countries; and the fifth group were those who could nei-

⁹ I would argue that this has been the rule for a long time, but that is not the issue here. See Hilde Eliassen Restad, *Identity and Foreign Policy: The Case of American Exceptionalism and Unilateralism* (PhD. diss., University of Virginia, 2010).

ther be tried nor released – in other words, they would have to be subject to “prolonged detention” (2009; Cutler 2010: 70).

Not surprisingly, perhaps, the new path taken by the Obama administration soon encountered significant obstacles, amounting to what currently may best be described as a dead end. Dawn Johnson, for example, withdrew her candidacy after a year-long battle in the Senate. She was never confirmed, nor did the President work very hard to make that happen. As Leonard Cutler argues, as of 2010, several Obama administration detainee policies were closer to Bush administration policies “as modified and impacted by Congress and the Court” than Obama’s voters would have predicted in 2008 (Cutler 2010: 63). Cutler sees primarily two reasons for this: institutional path-dependency – that is, policies that are difficult to reverse – and the “learning process” undergone in the transition from senator to president. By this Cutler seems to mean that Obama came to change his mind after entering the White House.

I. Guantánamo Bay and its Prisoners

On his second day in office, President Obama signed Executive Order 13492, which directed that GITMO military prison be closed “as soon as practicable, and no later than 1 year from the date of the order.” At the time of this Executive Order, some 240 inmates were being held, 150 of whom were eligible for release or transfer to another nation (Cutler 2010: 69). The new administration stopped calling Guantánamo inmates “enemy combatants” on March 13, 2009 instead using the term “unprivileged enemy belligerents.” The Justice Department filed court papers outlining a further legal and linguistic shift from the policies of Bush. “As we work toward developing a new policy to govern detainees, it is essential that we operate in a manner that strengthens our national security, is consistent with our values, and is governed by law,” US Attorney General Holder said in a statement (Mikkelsen 2009). “The government may have eliminated the term enemy combatant but it is still claiming the authority to detain people far beyond the traditional norms of humanitarian law,” countered attorney Devon Chaffee of the group Human Rights First.

The filing stated that the standards of President Barack Obama’s administration for holding terrorism suspects without court review were to be based not on the president’s authority as Commander-in-Chief (as Bush’s had been), but on laws passed by Congress (such as the AUMF) and, by extension, international law including the Geneva Conventions (Mikkelsen 2009).

Trial and Error

In March 2009, the Obama administration filed a brief in the *Hamdi* habeas litigation that departed only in three relatively minor ways from the earlier approach of the Bush administration: First, the new administration asserted that henceforth its claim to detention authority would rest on the AUMF, rather than on any claim of inherent Article II power, and that its AUMF-based authority was to be construed in accordance with the laws of war. Second, the Obama administration dropped the label “enemy combatant” in favor of the less provocative practice of referring simply to “persons detainable pursuant to the AUMF” (Wittes et al. 2011: 23–24). The first two claims were relatively uncontroversial as seen by the courts. But in its third move, the administration asserted that its detention authority extended both to members of AUMF-covered groups and to non-members who provide *substantial* support to such groups. The administration’s filing said only those who provided “substantial” support to al-Qaeda, the Taliban or similar groups – or who were “part” of those groups – would be considered candidates for detention. Human rights groups were beginning to show skepticism, however. Some argued the policies would still allow the United States to detain prisoners seized far from a battlefield and that key definitions were left out, such as what constitutes “substantial” support for a militant group. “In key elements they are a continuation of the Bush administration,” argued attorney Hina Shamsi of the American Civil Liberties Union. “This is really a case of old wine in new bottles,” said the Center for Constitutional Rights in New York, which represents several Guantánamo prisoners (Mikkelsen 2009).

In May that year, despite having voted against the Military Commissions Act in 2006 as senator, President Obama announced that his administration was considering restarting the military commission system, with some changes to the procedural rules. Congress subsequently enacted the Military Commissions Act of 2009 in October as part of the Department of Defense’s Authorization Act (NDAA). The Act was a clear improvement upon the original MCA of 2006, passed by Congress in an attempt at modifying the parts of the military commissions system the Supreme Court had struck down in its decision in *Hamdan* in 2006. The MCA 2009 removed a provision in the 2006 law that had limited the ability of defendants to invoke the Geneva Conventions (“No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights”). The reforms further rendered inadmissible any statements taken as a result of cruel, inhuman or degrading treatment; required the government to disclose more potentially exculpatory information; restricted hearsay evidence; and generally required that statements of the accused be admitted only if they were

provided voluntarily (Crooks 2010: 278). The new law also defined cruel or inhuman treatment as treatment that violates Common Article 3 of the Geneva Conventions (whereas MCA 2006 defined it as an act “intended to inflict severe or serious physical or mental pain or suffering, including serious physical abuse”) (Cutler 2010: 75). Finally, MCA 2009 changed the categorization of detainees from “unlawful enemy combatants” to “unprivileged enemy belligerent,” defining such a person as someone who either engaged in hostilities against the United States or its coalition partners; or someone who purposefully and materially supported hostilities against the United States or its coalition partners (ibid).

Within the confines of the commissions system, the new MCA was in many respects an improvement upon the first version. It attempted to ensure a greater degree of fairness for detainees (Cutler 2010: 76). Harold Koh actually went as far as to argue that military commissions are an “appropriate venue” for trying persons for violations of laws of war (Koh, in Crooks 2010: 278). Unsurprisingly, human rights organizations disagreed fundamentally. “Tinkering with the discredited military commissions system is not enough,” declared Joanne Mariner, Terrorism and Counterterrorism Program director at Human Rights Watch, in 2009. “Although the pending military commissions legislation makes important improvements on the Bush administration’s system, the commissions remain a substandard system of justice” (Human Rights Watch 2009). Former GITMO prosecutor Morris Davis has agreed, arguing that the Bush administration’s initial notion that military commissions would be more swift, more secret and more severe than federal courts has been proven wrong (Davis 2012). He notes that only six military commission trials have been completed in the decade from 2001 to 2012. Two of those six – what the Bush administration called the “worst of the worst” war criminals – David Hicks and Salim Hamdan – have already served their short military commission sentences and are free men back in their home countries. Over the same period, hundreds of terrorism-related cases were tried with success and without incident in federal courts, typically resulting in sentences that exceeded those of military commissions by a wide margin.

The Obama administration thus aimed at allowing the federal justice system try certain detainees. In November 2009, Attorney General Eric Holder announced that Khalid Sheikh Mohammed (the self-described mastermind of 9/11) and four others accused of the same crime were to be tried in federal court in New York. This was a major policy reversal from the Bush administration, and clearly a bold move on the part of the Obama administration. Immediately, Republicans in Congress (and many local politicians in New York on both sides of

the aisle) expressed public outrage at the decision. President Obama argued that any discomfort with this civilian process would disappear once Mohammed was sentenced to the death penalty (Cutler 2010: 77). But the political pressure was kept up; Attorney General Holder soon bowed to pressure from New York politicians, moving the trial out of Manhattan. No other location was secured, however, and in the subsequent congressional lame-duck session that followed the Republican victories in the November 2010 elections, Congress voted to bar the transfer of any prisoners from Guantánamo to the mainland United States (*New York Times* 2011a). This meant that the Obama administration was unable to transfer Mohammed and the other four detainees for trial anywhere in the United States for the fiscal year 2010. On April 4, 2011, Holder announced that Mohammed and the other four detainees were to be tried by a military commission at Guantánamo Bay.

Guantánamo and Indefinite Detention

By February 2010, there were reportedly 192 detainees still being held at Guantánamo (Porges 2010) and by January 2012, 171 detainees (Warren 2012). An “indefinite detainee” was categorized by the Obama administration’s 2009 Guantánamo Review Task Force as someone against whom the United States had no evidence to convict of a war crime but had concluded was too dangerous to let go (Guantánamo Review Task Force Final Report 2010). The “indefinite detainee” group makes up 46 of those 171 detainees.

A question closely related to the formal scope of the president’s detention authority concerns whether prisoners may be detained indefinitely. The current legal regime for capture and detention “seems unstable and a recipe for confusion as long as it lasts” (Wittes et al.,: 38). Until the fall of 2011, the consensus among federal judges seemed to be that the government’s detention authority lasts until the end of the relevant conflict. As Justice O’Connor wrote for the *Hamdi* plurality, the Court understood Congress’ grant of authority in the AUMF “to include the authority to detain for the duration of the relevant conflict” (Wittes et al. 2011: 39). The Court acknowledged that the conflict with the Taliban was somewhat atypical, and noted that its understanding of Congress’s authority to detain might be altered if “the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war.” Nevertheless, the Court emphasized, that was not yet the reality: “Active combat operations against Taliban fighters apparently are ongoing in Afghanistan . . . [I]f the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are . . . authorized.” (ibid).

But how long will the practical circumstances remain sufficiently close to those of prior wars, and how long will active combat operations against a relevant group continue? The lower courts have been faced with detainees' arguments that the "relevant conflict" has now ended. As yet, these courts do not believe that the government's detention power is ending (Wittes et al. 2011). At the same time, the government has acknowledged in public statements that the AUMF as an instrument might not have indefinite vitality. This issue is thus likely to arise more frequently, and with greater power, in the future than it has so far (ibid: 40). The D.C. Circuit seems content with the view that detention may be justified as long as the political branches confirm that hostilities have not yet ended. But the non-traditional nature of the conflict presents grave challenges to such a political decision. Covert operations may continue even long after the United States has officially ended its war in Afghanistan. As former Assistant Attorney General for National Security David Kris put it, "as circumstances change, if combat operations are concluded someday, it's not totally clear . . . how long into the future that detention authority will endure." (Kris 2010; Wittes et al. 2011: 48).

The answer to question, "How long can the US government detain someone?" came on December 31, 2011. On that day, President Obama signed the National Defense Authorization Act of 2012 (NDAA) into law. Having first threatened to veto the bill, Obama agreed to sign the NDAA after Congress removed a part that sought to *prevent* civilian law enforcement – like the FBI – from capturing and prosecuting al-Qaeda suspects within the United States (giving this authority instead to the military). This would of course have been a controversial militarization of domestic law enforcement. That is not why President Obama threatened to veto the bill, however. The threat came because the provision was seen as an unacceptable encroachment on executive power (Sullivan 2011). The bill engendered strong criticism from Obama's supporters on the left, including a harshly worded editorial from *The New York Times*, because, as they wrote, the bill included "terrible new measures that will make indefinite detention and military trials a permanent part of American law" (*New York Times* 2011b). This is puzzling, noted the editorial, as civilian law enforcement and the domestic justice system has been much more effective in trying terror suspects than have the military (ibid.). The most troubling aspect of the bill is perhaps that it *makes explicit and legal* the previously only *alleged* executive power of indefinite detention without trial of terror suspects (Sullivan 2011). Finally, the bill makes it impossible to close Guantánamo Bay (*New York Times* 2011b). "President Obama's action today is a blight on his legacy because he will forever be known as the president who signed indefinite detention without charge or trial into law," stated Anthony D.

Romero, executive director of the American Civil Liberties Union (ACLU 2011).

On January 7, 2012, a remarkable op-ed was published in *The New York Times*. Writing of his experience of being designated an “unlawful enemy combatant,” Lakhdar Boumediene, of *Boumediene v. Bush* (2008), argued that his detention had been a mistake from the beginning: he was not, nor had he ever been, a terrorist (Boumediene 2011). Pointing out the necessity of a competent tribunal to determine the legal status of detainees, Boumediene wrote: “Had I been brought before a court when I was seized, my children’s lives would not have been torn apart, and my family would not have been thrown into poverty.” Lakhdar Boumediene exemplifies what the American Civil Liberties Union calls the two false premises on which Guantánamo was predicated: that the men sent there were all terrorists picked up on the battlefield; and that, as “unlawful enemy combatants,” they had no legal rights. In reality, a very small percentage of the prisoners were captured by US forces; the vast majority had been seized by Pakistani and Afghan militias, tribesmen, and officials, and sold to the United States for large bounties (ACLU 2012).

II. “Enhanced Interrogation Methods”: Ending Torture?

On January 22, 2009, Human Rights Watch stated that President Obama’s actions to ban torture would “restore the moral authority and strengthen the national security of the United States.” One year later their executive director Kenneth Roth argued in *Foreign Affairs* that it would not be enough for the government to stop using torture; perpetrators would also have to be punished (Roth 2010). The Obama administration has not been eager to investigate or prosecute anyone who ordered or committed torture in the previous administration. In its campaign to end torture, the administration has succeeded in halting the practice, yet its refusal to pursue accountability for the transgressions of the previous administration means the progress is temporary at best.

Dealing with the CIA

As president-elect, Obama had several meetings with the intelligence community, described in Woodward’s *Obama’s Wars* (2010). On December 9, 2008, Obama met with CIA Director Michael Hayden and Director of National Intelligence Michael McConnell in Chicago. Among other things, he was briefed on the changes made in 2006 to the “enhanced interrogation techniques” used by the CIA. Prior to 2006, there had been thirteen techniques allowed: now there were only six. After the change in 2006, waterboarding was no longer allowed. The new techniques apparently centered around sleep deprivation,

“the lone technique that worked on hard-core terrorists” (Woodward 2010: 54). This marked a line of separation between the CIA and the military, as the military was allowed to use only those interrogation techniques sanctioned by the *Army Field Manual*. It was apparently the opinion of CIA Director Hayden that the existence of the harsher program run by the CIA was important, as it let terrorists know they would be treated differently were they to be picked up the CIA rather than detained by the US military (ibid: 55). When Hayden met with his successor, former White House Chief of Staff under Clinton, Leon Panetta, he told Panetta never to use the words “CIA” and “torture” in the same sentence again (as Panetta had done in writing while out of office). “Torture is a felony, Leon,” Hayden said. And displaying Bush administration logic, since the Bush Justice Department had approved the CIA’s actions in detailed memos, what the CIA had done could *not* be torture (Woodward 2010: 60). The December meeting in Chicago was not the success Hayden had thought it was, however, as Obama was later to abolish the CIA’s post-2006 interrogation program and instruct the company to follow the *Army Field Manual* (ibid: 56).

On Thursday, April 16, 2009 President Barack Obama released four redacted Office of Legal Counsel memoranda from the Bush administration to the CIA justifying torture or cruel, inhuman, or degrading treatment. This he did, not in order to follow through on his campaign promise of transparency, but in response to a lawsuit initiated by the American Civil Liberties Union (Fein 2009). As a candidate in 2008, Obama had stated: “We’ll reject torture — without exception or equivocation” (Lewis 2011). And, as we saw above, during his first month in office, the president honored this campaign pledge, signing an executive order prohibiting torture or inhuman treatment. There is no reason, says Lewis, to doubt that the order has been followed. The problem, however, is that torture still remains an option for a future US administration – because the Obama administration rejected opportunities to “erect a high legal wall against the return of torture” (ibid). President Obama has made it clear that large-scale criminal prosecutions for torture will not happen; he has opposed the creation of a truth commission to examine events comprehensively; and he has intervened to stop civil litigation by detainees against their torturers (ibid).

The Convention against Torture requires criminal investigation where there are credible allegations of torture, but the Obama administration has said the USA needs “to look forward as opposed to looking backwards” (Johnston and Savage 2009). A federal prosecutor did review 101 cases in which agency officers and contractors interrogated suspected terrorists during years of military action after the 9/11 attacks,

but found cause to pursue criminal cases in only two, neither of which included former high-level Bush administration officials. “It is difficult to understand the prosecutor’s conclusion that only those two deaths warrant further investigation,” notes Jameel Jaffer, deputy legal director of the American Civil Liberties Union (Finn and Tate 2011).

Furthermore, the Obama administration still has a program to render terrorist suspects to their countries of origin. Indeed, this should not come as a surprise, as former CIA director Leon Panetta (now Secretary of Defense) told the Senate during his confirmation hearings in February 2009 that this program would continue with “appropriate assurances from the host government that the people would not be mistreated” (Urban 2011).

According to *The New York Times* and National Public Radio’s “Guantánamo Docket,” three men have died at Guantánamo since President Obama took office.

Analysis: Path Dependency versus Hope & Change

In March 2009, the Obama administration sent out a memo to the Pentagon stating that the administration wanted its staff to stop using the term “Global War on Terror.” It preferred, instead, “overseas contingency operations” (Wilson and Kamen 2009). But, aside from the rhetoric, has all that much changed from Bush to Obama?

It seems likely that Obama’s adherents would argue that had he been president in 2001, many things would have been different. The Obama Justice Department has been demonstrably less skeptical toward international law than was the Bush Justice Department. Those who voted for Obama in 2008 might then argue that an Obama Justice Department would not have erected the GWOT legal edifice based on the goal of circumventing the Geneva Conventions, the Convention Against Torture, as well as the federal justice system. This we can never know, of course. We cannot know what parts of the continuation of the Bush administration’s war on terror was a result of path dependency, and what parts were the result of the logic of executive power.

When Obama entered office in 2009, the changes he had promised as a candidate were quickly abandoned. Indeed, any real change in the way the United States fights its war on terror came not from the Obama administration, but from the judicial branch. The role of the courts has been important, challenging the executive – and the legislative – branch in its claims of executive power in time of national security crisis.

The Role of the Courts:

Since the 9/11 attacks, the debate over military detention of terrorist suspects has focused mainly on the question of whether federal judges could exercise habeas corpus jurisdiction over detainees at Guantánamo Bay. In *Boumediene* (2008), the Supreme Court answered that question in the affirmative. The ruling held that detainees at Guantánamo *are* under US jurisdiction and can therefore appeal on the basis of habeas corpus, and that the Military Commissions Act of 2006 unconstitutionally restricted this right. With this decision however, argue Wittes et al., the Supreme Court also “declined to address a number of the critical questions that define the contours of any non-criminal de-

tention system.” (2011: 1) Indeed, Congress could have legislated to define the rules, but as has been tradition since World War II, Congress chose not to do so, in deference to the executive. Thus it has fallen to the judicial and the executive branch to map out this new area of law.

As much as *Boumediene* was lauded by human rights organizations, it did not mark the end. In an editorial in February 2011, *The New York Times* excoriated the United States Court of Appeals for the District of Columbia Circuit, the only circuit where detainees can challenge their detention, for “dramatically restrict[ing] the *Boumediene* ruling” (2011c).

A Sub-Standard System of Justice

Alexander Hamilton once called “arbitrary imprisonments” by the executive “the favorite and most formidable instruments of tyranny.” In *Boumediene*, Justice Anthony M. Kennedy stressed that habeas is less about detainees’ rights, important as they are, than about the vital judicial power to check undue use of executive power. Whereas the federal justice system has challenged important aspects of the Bush era GWOT, it has not overturned it completely. According to John Bellinger III, a former Bush administration official, one of the great tragedies of that administration has been the damage caused by its detainee policies – the decision to set up Guantánamo without the involvement of the international community; the issuance of the president’s executive order creating military commissions, aspects of the CIA interrogation program; renditions; and the decision about the inapplicability of the Geneva Conventions (Murphy & Purdum 2009: 7). The most serious error, according to Bollinger, is not any of these decisions individually or even collectively, but the administration’s inability to change course as the magnitude of the problems caused by these decisions became apparent. Instead, in a move later adopted by the Obama administration, the Bush administration *adapted* its approach so as to conform to the Supreme Court rulings, rather than starting afresh. With the Military Commissions Act of 2009, President Obama placed himself squarely behind this post-9/11 legal edifice.

In July 2011, the Inter-American Commission on Human Rights published a statement noting that it continued to be deeply troubled by the Obama administration’s actions with regard to terror detainees. In many cases, they wrote, “the writ of *habeas corpus* does not appear to constitute an effective remedy for those individuals whose ongoing detention has been found to be unwarranted” (IACHR 2011). With *Hamdan v. Rumsfeld* in 2006, the United States recognized that the “laws of war” govern the detention and treatment of the detainees at Guantánamo Bay. The law of war, however, “provides for a party to

the conflict to deprive combatants of their liberty as a security measure for the duration of hostilities,” a problem complicated even further by the fact that, in contrast to a traditional armed conflict, it seems unlikely that there will be a definitive end to the war on terror (ibid).

This system of military detention and trials has now been codified into law with the 2012 National Defense Authorization Act (NDAA). As Human Rights Watch states, whereas over 400 people have been prosecuted in US federal courts for terrorism-related offenses in the last ten years, only six cases have been prosecuted in the military commissions (2011b). Whereas Bush had poured the foundation and built the house, President Obama has been adding a new wing to it, rather than tearing it down and making a fresh start.

The Role of Congress

What role has Congress played in Obama’s opportunities for changing course in the fight against terrorism? Some would argue that the proximate reason for Obama’s failure to close Guantánamo within the year was political opposition from Congress. And certainly, politics played a large role in complicating Obama’s effort at fulfilling that particular campaign promise. The administration’s plan was to acquire an Illinois prison, the Thompson Correction Center, and transfer GITMO detainees there. Whereas this plan had support from Illinois Governor Patrick Quinn and Democratic Senator Richard Durbin (as they believed retrofitting and running the facility would create a significant number of local jobs), it met with fierce opposition in Congress. Indeed, Congress has used its spending oversight authority both to prevent the White House from financing trials of Guantánamo captives on US soil and to block the acquisition of the Illinois prison.

Here it might be pointed out that presidents are not mere captives of congressional preferences. A US president has the ability to put the weight of the executive office behind certain political causes and push for congressional acquiescence. However, that does not seem to have happened in this instance.

Accountability

The question of accountability was largely bracketed by the Obama administration through several statements emphasizing the need to “move forward.” “It would be unfair to prosecute dedicated men and women working to protect America for conduct that was sanctioned in advance by the Justice Department,” Attorney General Eric Holder said in a statement in the spring of 2009 (Johnson and Tate, 2009). In effect, the “golden shield” developed in the early Bush administration seems to have been a success. As Obama nears the completion of his

first term, no one will be held accountable for the practices which he as a candidate condemned. Congress, unsurprisingly, has also stayed away from the issue. As has been tradition since the World War II (with such notable exceptions as the controversial investigation into the intelligence community in the 1970s), Congress has preferred not to exercise its oversight power in the realm of foreign affairs. The strategy of the Obama administration seems to have been to make clear changes in how the country pursues the fight against terrorism, rather than focusing on the legal accountability of previous missteps. As the Inter-American Commission on Human Rights stated in its report, clear information had not been presented to indicate whether the allegations of torture at Guantánamo Bay had been investigated with a view to prosecuting and punishing the responsible parties. Reminding the State Department that the United States is required to conduct such investigations by virtue of its international obligations; the Commission argued that independent and impartial investigations into alleged acts of torture are an indispensable basis to avoid impunity and the repetition of such acts in the future (IACHR 2011).

If the Obama administration fails in making the policy changes promised in the 2008 campaign, then, there will have been neither accountability nor a fundamental change in how the United States wages its post-Bush administration “war on terror.”

Keep the Change?

The Obama administration would undoubtedly argue that it has already made many changes. One area where this seems to be correct is that of “enhanced interrogation methods.” When it comes to the detention of suspected terrorists, however, the picture is much more muddled. President Obama did not really follow through on his pledge in May 2009 to work with Congress to develop a legal regime for the detention of terror suspects, and Congress should have been more responsive to the concerns of counterterrorism officials in the executive branch (Waxman & Bellinger, 2011). Many of the difficult long-term questions Obama inherited – such as who may be detained, where should detainees be held, and according to which legal processes – have remained unresolved.

It seems clear that the main difference between President Bush and President Obama is one of rhetoric. Obama has spoken eloquently about respect for constitutional values and has advocated controversial policies including the closure of Guantánamo Bay and the trial of Khalid Sheikh Mohammed in federal court. From the viewpoint of his own political base, his shortcomings can be viewed as political (not managing to outplay his political opponents) or personal (changing his views upon becoming president). Judging from the early actions taken

by the Obama administration, it seems fairly clear that the intention was to rein in the policies of the Bush era and move closer to international law. It is entirely possible – indeed likely – that candidate Obama meant what he said on the campaign trail in 2008, but that – when confronted not only with the awesome powers afforded the US president, but also with the threat scenarios presented to him from the vast intelligence community – President Obama decided he was wiser than the previous president and would therefore be a better steward of the power of his office. As Pearlstein (2010) has noted, post-Boumediene Bush policies do not differ much from the pre-Guantánamo closure Obama administration – which it appears that the entire duration of the Obama administration will be.

Conclusion: Balancing on the Brink

Being a wise steward of presidential powers is no simple task. Being a wise steward of presidential powers in a time of national security threats is perhaps an impossible demand in a democracy. In its 1866 ruling in *Ex Parte Milligan*, the US Supreme Court set one of the very first precedents on the issue of wartime executive powers. Reacting to President Abraham Lincoln's suspension of the writ of habeas corpus (in certain areas of the North) during the Civil War, the Supreme Court stated:

The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men at all times and in all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

Presidential prerogative, the idea that the executive must sometimes go beyond the written word of the Constitution to act in accordance with what the president feels is the best interest of the nation (Scigliano 1981) – that was the Bush administration's approach to the war on terror. What proponents of Congress call a constitutional partnership, proponents of presidential prerogative call “exercising traditional executive functions.” Prominent among the presidential prerogatives argued for is emergency powers. Whereas the Constitution made no provision for such powers, its framers were heavily influenced by John Locke, who made an exception in his social contract for the prerogative powers of the ruler. Locke argued that if, in times of emergency, the ruler found it necessary to pursue extralegal or illegal actions, the subsequent reaction from the legislature and the people would either vindicate or remove that ruler (Locke 1689). Locke's prerogative power may have been left out of the US Constitution, but the efficiency and superior control one person has, as opposed to hundreds, quickly became clear to the rulers of the new republic: Congress was not in session all year, and as such was *not* amenable to dispatch. Perhaps that is what Henry Kissinger meant when he said that American government inherently centralizes power in the executive. Indeed, John Jay had already noted this in the *Federalist Papers*, No. 64.

According to former Bush administration official Jack Goldsmith, the philosophy of presidential prerogative can be seen in the decisions made by President Bush and Vice President Cheney. Whereas “many people think [Lincoln and FDR] broke the law” Goldsmith states,

“we’ve largely forgiven them for doing so because we think that they acted prudently in crisis” (Murphy and Purdum 2009: 12). Comparing Bush to Lincoln or F.D. R presents some problems, however. Where they coupled their sense of a powerful executive in times of crisis with a “powerful sense of a need to legitimate and justify the power through education, through legislation, through getting Congress on board, through paying attention to what one might call the ‘soft’ values of constitutionalism,” says Goldsmith, there seems to have been little appetite for such acts on the part of the Bush administration (ibid).

What happens to executive power when the national security crisis becomes permanent? It is highly unlikely that the United States can eradicate the threat of future terrorist attacks. Does this mean that the current national security emergency is a permanent one? What president, when presented with awesome powers and a diminished threat, will relinquish that power? Although history provides very few examples, there is the inspiring case of the first American president, George Washington. Not only did Washington immediately resign as Commander-in-Chief of the Continental Army upon victory in the Revolutionary War, he was later to establish the tradition that US presidents serve only two terms, voluntarily relinquishing the chance at a third. (After Franklin D. Roosevelt violated this tradition by seeking election four times – in a time of war – Congress passed the twenty second amendment to the Constitution in 1947 making explicit the earlier tradition.) President Obama’s political supporters rationalize that while executive powers in the war on terror have expanded during his tenure, President Obama will prove to be a wise steward of these powers, ultimately representing an improvement on the Bush era. Sen. Carl Levin (D–Mich.), for instance, has insisted that the National Defense Authorization Act of 2012 is not as bad as it sounds regarding indefinite detention, because of Obama’s signing statement. In this statement that accompanies the NDAA, the president states that he does not intend to use the latest power given to him by Congress to imprison terror suspects indefinitely. On the other hand, Obama might find that he has spoken too soon. And he certainly does not speak for his successor, whoever that might be.

Before they were Americans, the framers of the US Constitution were British subjects, sensitive to the dangers of a powerful monarch. As James Madison warned, “If men were angels, no government would be necessary.” Signing statements as to the good intentions of the president is not enough. The laws themselves must be just and right, or else there will be no guarantees against abuses of power – particularly not in times of national security crises.

Describing the research underlying this report to a former Bush administration official who had worked in the State Department and on the National Security Council, I argued there were two likely explanations why President Obama had come to find the powers of the Executive Branch more attractive than had Candidate Obama. First, the path dependency explanation: it is very hard to reverse previous administration's policies and their calls for power, because of the new realities that such policies create. For instance, Obama's difficulties in closing Guantánamo prison are real. The very establishment of these facilities created not just the only place where alien terror suspects could be held (because of Congressional resistance to their transferal to domestic prisons) – this move also created an entirely new group of people likely to remain the *indefinite* responsibility of the United States. Second, the personal explanation: Perhaps Obama – once president – came to think that he would be able to wield the vast national security powers of the Chief Executive more wisely than his predecessor had done, and could therefore be entrusted with the Bush legacy.

Unsurprisingly, this former Bush administration official replied that there was a third explanation: That President Obama, once in office, found that the policies and accumulated power of Bush were the right answer to a difficult time, and for that reason he decided to follow through on the second Bush administration's strategy. In short, then: Obama simply had a change of heart.

Unless President Obama manages to achieve a more radical break with his predecessor than has been attempted so far, there would seem to be no reason to doubt this third explanation.

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