DETAINEE RIGHTS: THE JUDICIAL VS. CONGRESSIONAL CHECK ON THE PRESIDENT IN WARTIME

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This paper empirically examines the role of the separation of powers in safeguarding detainees' rights within U.S. detainee policies and practices. In the wake of the September 11, 2001, terrorist attacks on the United States, the U.S. government detained terrorism suspects indefinitely and without charge, denied them a right to challenge their detention and subjected them to "enhanced interrogation methods." Relying on the empirical analysis of jurisprudence and legislation passed during the Bush and Obama presidencies, the paper argues that judicial and legislative checks on the Executive played both positive and negative roles in the U.S government's protection of Guantánamo detainees' rights within the U.S. detainee policies and practices, with the Supreme Court exhibiting predominantly a positive role and Congress predominantly a negative role.

Key words: United States; war; detainee rights; Guantánamo Bay; Congress; Supreme Court.

1 WAR POWERS UNDER THE U.S. CONSTITUTION

While government holds a monopoly on the legitimate use of violence, it ought to serve at the pleasure of the people it governs. The Framers of the United States Constitution, drawing upon the notions of individual rights and limited powers in the writings of Aristotle, Cicero, Machiavelli, James Harrington, Samuel von Pufendorf, Montesquieu, David Hume and John Locke, were hoping by way of establishing a strong government to prevent citizens from preying on each other. However, to thwart government from becoming the most injurious force of all, it was delegated powers that were few and defined (Pinker 2011, 160–161). With such a constitutional design, the Framers' mission was to protect the rights and freedoms of the people.

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A prerequisite of a government that safeguards individual rights and limits the danger of tyranny is the rule of law, which provides predictable order and decreases arbitrary conduct by the authorities (Vásquez and Porčnik 2018, 18) – a rule of law that is reinforced by constitutionally defined separation of powers that ordains a system of checks and balances in the structure of the government. While the U.S. Constitution enables the government to face ordinary and extraordinary times, it also strives for the government not to become a threat to individual rights and freedoms, as its mission is to protect those. Particularly during extraordinary times, such as war and emergencies, individual rights and freedoms are at maximum peril.

The Framers, who were significantly influenced by Locke's support for a tripartite system of federal government with dispersed powers (Irons 2005, 13–14), rejected political models that concentrated power in a single branch of government; rather, they favored one of the sharing and balancing of powers among three equal branches—executive, legislative, and judicial. In wartime, the U.S. government is entrusted with a greater scope of powers than in peacetime. Dividing the war powers between the Congress and President, the Constitution entrusts the Congress with controlling and exercising war-making power and the President with executing that power while subject to congressional authorization and oversight. In other words, neither the Executive nor the Legislature is granted exclusive control of war powers, while at the same time each plays a pivotal role in wartime. The Judiciary, the third branch, is in wartime tasked to decide cases involving the first two branches. Such a system of separation of powers addresses the Framers' greatest fear - that of concentrating the powers of war and peace in too few hands.

Looking at more than two hundred years of U.S. history, the executive branch time and again asserted that the President, as Commander in Chief, has an inherent power to act outside constitutional or statutory authority, or even in the face of statutory restrictions. The Framers, who were mindful of the human inclination to overstep boundaries in the pursuit of unlimited power, institutionally limited the President's constitutional authority in order to preclude tyranny over the people. When the President acts beyond his powers, the countervailing branches of government—the Judiciary and the Legislature—are by constitutional design expected to step in to bring the executive power back within its limits. Following Charles de Montesquieu's concept of balanced governmental forces pitted against each other for the purpose of preventing tyranny (Dietze 1960, 327), James Madison's expectation for the Constitution is expressed in *Federalist Paper* No. 51: "Ambition must be made to counteract ambition." Especially in wartime, when the institution of the presidency poses the highest risk to individual rights and freedoms, institutional checks are most needed (Fisher 2006, 51). However, in foreign affairs checks placed on the unilateral president are rare. A look at U.S. history reveals that the Judiciary and Legislature often forfeited their independence and abdicated their check on unilateral foreign affairs measures to the Executive. Due to either the Judiciary's or Legislature's lack of confidence in their own information and judgment or their capitulation to intimidation by the Executive, their proclivity in foreign affairs is to let the president assume all or the majority of responsibility and power (Schlesinger 2005, 46). In their failure to push back against presidential use of prerogative powers, the Judiciary and Legislature abdicate their role of counteracting Executive ambition, which over time can then lead to the government becoming tyrannical.

By delegating its powers to the Executive, Congress has in the last six decades visibly contributed to the emergence of the presidency as the principal actor in responding to emergencies that require the use of force and, thereby, a cause for constraints on individual liberty. As early as 1952, Justice Jackson' concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* (343 U.S. 579, 654) predicted this development: "I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems […] We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent that power from slipping through its fingers." Similarly, Rudalevige (2005, 15) refers to the invisible Congress, which "has not been run over so much as it has lain supine; it has allowed or even encouraged presidents to reassert power." Further, Koh (1988, 1304) opines that often the reason for the fecklessness of Congress is also its lack of political willpower "to take responsibility for setting foreign policy, preferring to leave the decisions—and the blame—with the President."

However, Congress had plenty of political willpower to stand up for their own war powers in the early 1970s. After decades of U.S. soldiers being deployed to Southeast Asia without Congressional declaration of war, Congress passed the War Powers Resolution of 1973 with an intent to clarify the use of force, as well as to mandate that the President consult with Congress about troop deployments and that he limit deployment to 60 days without specific congressional authorization (Lynch and Singh 2008, 71; Brugger 2001, 79). Yet, by authorizing the President to wage war for 90 days without congressional consent, the Resolution conflicts with the U.S Constitution, which delegates war-making power exclusively to Congress. Despite this generous—though not intentional—gift, Presidents have claimed that the Resolution encroaches on the Executive's constitutional authority of Commander in Chief, leading them to ignore it on a several occasions when using force without any congressional authorization (Padmanabhan 2012, 5): President Bill Clinton in Somalia (1993), Haiti (1994), Bosnia and Hercegovina (1995) and Kosovo (1998); President George W. Bush in Haiti (2004); and President Barack Obama in Libya (2011).

Assessing whether Congress has acquiesced to presidential action, the U.S. Supreme Court considers numerous elements, including the consistency, density, frequency, duration, and normalcy of the practice (Padmanabhan 2012, 7). As an example, in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Frankfurter's concurring opinion (343 U.S. 579, 611), based on the frequency of the practice, rejected President Truman's argument that Congress had acquiesced to presidential authority to seize steel mills.

The Supreme Court is called upon "to say what the law is"[2] by testing whether the President acted within constitutional and statutory authority and, as such, to uphold the constitutional principle of separation of powers. In these cases, the Supreme Court turns to the canonical tripartite framework in Justice Jackson's *Youngstown* concurrence (Ibid. 634–655): 1) Where the President acts pursuant to congressional authorization, he acts with the authority of both branches unless the federal government as a whole lacks authority to act; 2) Where the president acts without relevant congressional authorization, he is in a "zone of twilight" as there may be concurrent authority for the president and Congress to act; and 3) Where the president acts against the will of Congress, he acts illegally unless the congressional restrictions imposed are unconstitutional.

[2] Justice John Marshall in *Marbury v. Madison* (5 U.S. (1 Cranch) 137, 177).

Justice Black in *Duncan v. Kahanamoku* (327 U.S. 304, 322) emphasized that courts and their procedural safeguards are indispensable to the U.S. system of government and that the Framers "were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws." A decade later, the Court in *Reid v. Covert* (354 U.S. 1) warned that if the president "can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials." Yet, the Judiciary is often unwilling to get involved in disputes between the president and Congress on the exercise of wartime authority (Lynch in Singh 2008, 69–71; Rogers 1971, 1203–1207), invoking the political question doctrine,[3] a requirement that plaintiffs ought to have alleged a concrete injury to themselves or other reasons. Furthermore, Adler (1996, 2) argues that the Judiciary has increased "presidential foreign affairs powers well beyond constitutional boundaries," which is the reason the Court has not only supported executive policies, but rather also "has become an arm of the executive branch." In conclusion, as Tribe (2016, 91) argues, with its unwillingness to hear cases involving executive action in the face of congressional silence "the Court shirks its vital role in defining and policing the intricate structure of government established by the Constitution—a structure that must be preserved both to enable effective and politically accountable policymaking and to protect individual liberty." That said, in the last six decades, the Court has joined Congress in contributing to the development of the presidency as the principal actor in responding to emergencies that require the use of force and, as such, also being a cause for individual liberty coming under attack.

2 THE GUANTÁNAMO DETAINEES' RIGHTS: PRESIDENT BUSH VS. PRESIDENT OBAMA

In the wake of the 9/11 terrorist attacks, President George W. Bush was determined to track down terrorists responsible for the attack as also to prevent future attacks. To that end, the President invoked his constitutional authority as Commander in Chief to authorize a system of detention and military trial for suspected terrorists.[4] The Bush administration claimed the right to hold detainees indefinitely without being charged or given counsel and also to have them tried by military commissions instead of U.S. civilian courts (Fisher 2006, 8).

Deeming U.S. criminal courts too cumbersome and insufficient to handle terrorism cases, especially in view of their exacting standards of evidence and the

[3] The political question doctrine argues that an issue that the U.S Constitution assigns to the political branches or that is a purely political dispute should not be decided by federal courts, but instead by the political branches themselves.

[4] Military Order of November 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001) is subject to any individual for whom the President determines there is a "reason to believe […] is or was a member of the organization known as al Qaida, […] has engaged in, aiding or abetted or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy," or has "knowingly harbored one or more individuals."

protection of defendants' rights,[5] the Bush administration established *ad hoc* military commissions as a legal system parallel to Article III courts but with greater restrictions on defendants' rights (Katyal and Tribe 2002, 103–104). As a legal foundation for establishing military commissions, the Bush administration cited the President's power as Commander in Chief along with his oath of office to defend the Constitution as well as the 2001 Authorization for the Use of Military Force (AUMF), while emphasizing that the 1920 Articles of War, the 1950 Uniform Code of Military Justice, and the 1996 War Crimes Act all refer to the establishment of military tribunals by a President (Pious 2015, 259). As a precedent, the Bush administration cited e*x parte Quirin* (317 U.S. 1) in which the U.S. Supreme Court upheld the constitutionality of military tribunals created by President Roosevelt for the trial of German saboteurs. However, the Military Order of November 13, 2001, went further than that of Roosevelt, which only denied access to civilian courts. The Bush's Order was designed in a way to augment executive power at the cost of judicial controls (Supra note 3, § 7[b]), by denying detainees the privilege "to seek remedy or maintain any proceedings, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf in (1) any court of the United States, or any State thereof, (2) any court of any foreign nation, or (3) any international tribunal." Also, the Order (Ibid. § 4[c](8)) provided "for review and final decision" of any conviction by the President or Secretary of Defense.

In late 2001, the administration selected the U.S. Naval Base in Guantánamo Bay, Cuba, for the detention and trial by military commissions of suspected terrorists. The United States does not have ultimate sovereignty (*de jure* sovereignty) over Guantánamo Bay, which is in the hands of Cuba, and thus only exercises plenary and exclusive jurisdiction (*de facto* control). From the beginning, the location of the base has been instrumental in determining the application of the habeas corpus statutes by the captive (Overbey 2013, 410).

Arguing that foreign nationals captured on the battlefield were not lawful combatants, since they violated the laws of war, the Bush administration did not designate the detainees as "prisoners of war" but rather as "illegal enemy combatants" (Schaffer 2002, 1465–1466). Evoking e*x parte Quirin* (317 U.S. 1), which classified German saboteurs as "unlawful combatants" or "enemy belligerents," the detainees were denied protection under the U.S. Constitution and, as such, the right to a writ of habeas corpus to access U.S. civilian courts.[6] Further, this system of detention and military trial was deemed to operate outside the Geneva Conventions–the established international standards for the treatment of prisoners of war–ensuing in detainees being denied POW status under the Conventions.[7] Scott Horton reasons that President Bush's legal team

[5] President Bush's Order (M.O. § 1(g)) reads, "it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally record in the trial of criminal cases in the United States district courts."

[6] Consequently, only the detainees' relatives and friends were eligible to file petitions for habeas corpus in the U.S. courts in their names.

[7] In a January 25, 2002, memorandum to President Bush, then-White House Counsel Alberto Gonzales dismissed the Geneva Conventions as obsolete, quaint, and irrelevant to the war on terror, arguing that Taliban and al-Qaeda detainees were illegal enemy combatants without "the need for case-by-case determination of P.O.W. status." Gonzales' analysis built on the Office of Legal Counsel's opinion that "transnational terrorist organizations" are not a party to the Geneva Convention, which exempted Taliban and al-Qaeda detainees from Geneva protections as also U.S. soldiers from persecution under the War Crimes Act (Rudalevige 2005, 227). While not all President Bush's counsels and cabinet members agreed with Gonzales, President Bush on February 7, 2002, declared that the provisions of the Geneva Convention did not apply to the U.S. conflict with al-Qaeda.

had attempted to "overturn two centuries of jurisprudence defining the limits of the executive branch. They have made war a matter of dictatorial power" (Mayer 2006).

In practice, U.S. detention policies and practices no longer rested on previous army regulations constraining interrogation methods, which meant that tactics such as sleep deprivation, lengthy placement of the detained in "stress positions," exposure to extremes of cold and heat, sexual humiliation, and the use of dogs in shaming the detainees were authorized by President Bush and implemented by the Department of Defense (Hersh 2004). The Bush administration objected to these "enhanced interrogation methods" being torture, arguing that their officials engaged in acts with an intent to gain information and which resulted in temporary suffering, and not in acts to inflict pain, which could result in permanent injury (Pious 2015, 257). In 2007, President Bush additionally signed an Order denying any person affiliated with terrorist organizations such as al–Qaeda and the Taliban protections provided by the Third Geneva Convention to prisoners of war, while also limiting compliance with the Geneva Conventions in the treatment of detainees held in extrajudicial detention.[8] The Order effectively removed the potential for any civil or criminal action against the government or any of its agents for harsh interrogations, resulting in unsuccessful attempts to seek indictments in other countries such as Germany and France (Slomanson 2011, 538).

A few months after assuming office, in a speech at the National Archives in Washington, D.C., President Obama assured Americans that he would bring the country back on course, after the controversial detainee policy of the Bush presidency, as his government would deal with the terrorism threat "with an abiding confidence in the rule of law and due process; in checks and balances and accountability."[9] In his assurance, President Obama referred to his Executive Orders of January 22, 2009, requiring all remaining detentions at Guantánamo Bay be subject to reviews, that detention facilities at Guantánamo be closed no later than one year from the date of the Order, and that detainee custody be subject to humane standards, defined as conforming with "all applicable laws of governing such confinement, including Common Article 3 of the Geneva Conventions."[10] While affirming that detainees have the constitutional right to habeas corpus, the Orders did not give any indication whether Guantánamo detainees have constitutional rights beyond habeas challenges to unlawful detention, such as due process rights (Hernández–López 2009, 190). Significantly, the review process was to determine whether the detainees at the Guantánamo Bay facilities were to be released or transferred to detention

[8] Executive Order of July 20, 2007, *Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*, 72 Fed. Reg. 40,707 (Jul. 24, 2007).

[9] Remarks by the President on National Security on May 21, 2009, available at https://obamawhitehouse.archives.gov/the-press-office/remarks-president-national-security-5-21-09.

[10] Executive Orders of January 22, 2009, *Ensuring Lawful Interrogations*, 74 Fed. Reg. 4.893 (Jan. 27, 2009) and *Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities*, 74 Fed. Reg. 4.897 (Jan. 27, 2009). The former Order, *Ensuring Lawful Interrogations,* rescinded President Bush's Order of July 20, 2007, denying any person affiliated with terrorist organizations such as al-Qaeda and the Taliban protections provided by the Third Geneva Convention to prisoners of war, while limiting compliance with the Geneva Conventions in the treatment of detainees held in extrajudicial detention by the Central Intelligence Agency. Barack Obama signed these two Orders two days after swearing in as the 44th President of the United States.

facilities in the territory of the United States, their home country, or third countries.

Two years later, however, President Obama backpedaled by signing an Executive Order[11] that rescinded the Order of January 22, 2009, and effectively retained the Bush administration's policies of indefinite detention without accusation or trial, of trial by military commissions rather than civilian courts, and of denying torture victims access to U.S. courts,[12] while also holding no Bush administration official accountable for the "enhanced interrogation methods" employed on enemy combatants. Further, the transfer of detainees to other U.S. detention facilities was no longer on the table. In addition, 50 Guantánamo detainees deemed to pose a serious threat, for which they were denied a repatriation or resettlement in a third country, were denied a trial in military commissions or in federal court due to evidentiary issues, such as evidence having been obtained by torture not being admissible (Finn and Kornblut 2011, A1).

From the Guantánamo facilities opening in 2002 through 2016, 780 prisoners had been detained there (see Table 1). President Obama left office with 41 detainees remaining at Guantánamo Bay. While the Obama administration reduced the Guantánamo Bay prison population from 242 detainees in 2009, it fell short of the promise to close the facility. The 41 remaining detainees included ten men charged at the war court, 26 indefinite detainees, and five cleared individuals (Rosenberg 2017). In a letter to Congress on his last day in office, President Obama argued for the closure of the Guantánamo detention facilities, as it is "contrary to our values and undermines our standing in the world, and it is long past time to end this chapter in our history."[13]

TABLE 1: DETAINEES AT THE U.S. NAVAL BASE GUANTÁNAMO BAY (2002–2016)

	Year	Arrived Detainees at Guantánamo		Transferred or Released Detainees from Guantánamo		Died Detainees at Guantánamo		Detainee Population at the Naval Base Guantánamo Bay
		Annual	Cumulative	Annual	Cumulative	Annual	Cumulative	
The G George W. Bush Presidency	2002	630	630	6	6	0	0	624
	2003	120	750	91	97	0	0	653
	2004	10	760	119	216	0	0	544
	2005	0	760	48	264	0	0	496
	2006	14	774	111	375	3	3	396
	2007	5	779	122	497	2	5	277
	2008	1	780	36	533	0	5	242
The Barack Obama Presidency	2009	0	780	49	582	1	6	192
	2010	0	780	19	601	0	6	173
	2011	0	780	0	601	2	8	171
	2012	0	780	4	605	1	9	166
	2013	0	780	11	616	0	9	155
	2014	0	780	33	649	0	9	122
	2015	0	780	31	680	0	9	91
	2016	0	780	50	730	0	9	41

Source: The Guantánamo Docket, *New York Times*; Author's calculations.

[11] Executive Order of March 7, 2011, Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, 74 Fed. Reg. 13.277 (Mar. 10, 2011).

[12] While detainees were given access to defense lawyers and were able to file habeas corpus petitions in U.S. federal courts, evidence obtained by "cruel" or "inhuman" means was not admissible (Owens 2013, 10–11).

[13] *A Letter from the President Obama to the Speaker of the House of Representatives and the President Pro Tempore of the Senate*, January 19, 2017, available at https://obamawhitehouse.archives.gov/the-press-office/2017/01/19/letter-president-report-respect-Guantánamo.

3 THE GUANTÁNAMO DETAINEES' RIGHTS: CONGRESS VS. SUPREME COURT

To what extent, if at all, did the Judiciary and the Legislature rise to the occasion when U.S. detainee policies and practices failed to safeguard Guantánamo detainees' rights? In other words, did the Framers' expectation that "ambition would counteract ambition" by way of the countervailing branches of government - in this case bringing the executive power back within its limits - also serve to protect individual liberty?

In the wake of the 9/11 terrorist attacks, Congress rushed to President's side within three days, passing the 2001 AUMF resolution (S.J Res. 23), which yielded broad new discretionary powers to the President, authorizing the use of "necessary and appropriate force" against those "he determines" were involved in the 9/11 attacks and those who would "harbor" those involved (Corn et al. 2016, 1; Mayer 2008, 45). What followed was a series of unilateral actions by the Executive to shape policies of detention, interrogation, and intelligence collection that carried the assertion that in these cases executive power could not be checked by the Congress or the courts (Porčnik 2016, 92–93).

AUMF was only the beginning of Congress' role in increasing the concentration of power in the presidency after 9/11 by way of its lack of engagement in genuine interbranch deliberation or, even more so, lack of push back on the Bush administration claims (Owens 2010, 50). Specifically, Congress was invisible when President Bush asserted the power to authorize military commissions under the "necessary and appropriate force" of AUMF, even though under the U.S. Constitution Congress holds primary responsibility over military courts, tribunals "inferior to the supreme Court," "Offenses against the Law of Nations", and "Rules concerning Captures on Land and Water." Further, Congress did not object to the Executive's claim that during wartime the Commander in Chief has the power not only to authorize the detention of terrorist suspects but also to hold them indefinitely without process. If anything, Congress was a partner of the Executive, coming to President Bush's rescue every time the Supreme Court ruled against the Executive. While Congress often embraced a passive, reactive role in the period 2001–2008, the executive branch gladly seized the initiative that had been ceded to it (Griffin 2013, 239–240).

On another hand, these issues were litigated in several judicial circuits in the United States, moving from district courts to the Supreme Court and back down again, challenging both the system of detention and military trial authorized by the Order of November 13, 2001, and executive's claimed authority to hold terrorist suspects indefinitely without due process. On June 28, 2004, the Supreme Court made the first two decisions concerning Guantánamo detainees. In *Hamdi v. Rumsfeld* (542 U.S. 507) the Supreme Court, while recognizing the power of the government to detain illegal enemy combatants, ruled that Yaser Esam Hamdi,[14] a detained U.S. citizen, had a right under due process to contest

[14] Before the Supreme Court heard Hamdi's case, his habeas corpus appeal was heard by several lower courts. Yaser Esam Hamdi, a U.S. citizen, was captured in Afghanistan and held at Guantánamo Bay, before being transferred to a naval brig in Norfolk, Virginia, and later to a brig in Charleston, South Carolina. The Bush administration argued that since Hamdi was caught in arms fighting for the Taliban against the United States, they could detain him as an unlawful enemy combatant and, as such, deny him access to an attorney and the U.S. civilian court system. Through his father, Hamdi filed a habeas petition in District Court, which in its ruling (243 F.

the evidence underlying his detention before an impartial authority. At the same time, the Court (Ibid. 535) stated that presidential constitutional war powers were neither a blank check nor without the possibility of being checked by the other two branches, particularly "when individual liberties are at stake." Following the Court's ruling, Hamdi did not face a military commission at Guantánamo Bay nor was he charged with a crime. Instead, the U.S. government flew him to Saudi Arabia in 2004, where he was released from custody.

In the second decision, *Rasul v. Bush* (542 U.S. 466), the Court ruled that U.S. federal courts have jurisdiction to decide whether non-US citizens' detention at Guantánamo Bay is in violation of the U.S. Constitution, U.S. laws, or treaties of the U.S.[15] Penning the majority opinion, Justice Stevens emphasized that *Johnson v. Eisentrager* is distinguishable on two accounts: i) while the defendants in *Eisentrager* were accorded a trial in a military commission, those held in Guantánamo were denied any form of trial or due process and b) while the defendants in *Eisentrager* were tried and confined abroad, the Guantánamo Bay Naval Base is functionally under the control and sovereignty of the U.S. government (Chemerinsky 2005, 75). Importantly, while the Court in *Rasul* ruled that Guantánamo detainees held for more than two years may challenge their captivity in U.S. courts, the Court did not specify what type of hearing they should be accorded.

Following the *Hamdi* and *Rasul* judgements on the availability of statutory jurisdiction, Guantánamo detainees' habeas petitions at the U.S. federal courts spiked (Huq 2010, 397) (see Figure 1). The Bush administration not only challenged these petitions, arguing that the Supreme Court did not rule the detainees have rights under the U.S. Constitution but only that they have the right to file a petition challenging their detention, but also established Combatant Status Review Tribunals (CSRTs) on July 7, 2004, with an aim to determine whether the Guantánamo detainees should continue being designated enemy combatants.[16] Only a few months after the creation of CSRTs, District Judge James Robertson concluded that they are an inadequate alternative to habeas corpus proceedings in federal courts. Further, the Judge ordered the halting of the trial of Salim Ahmed Hamdan in a military commission, stating that such commissions are flawed. Consequently, a month later, Guantánamo detainees receive news from the Pentagon that they could turn to U.S. federal courts to challenge their

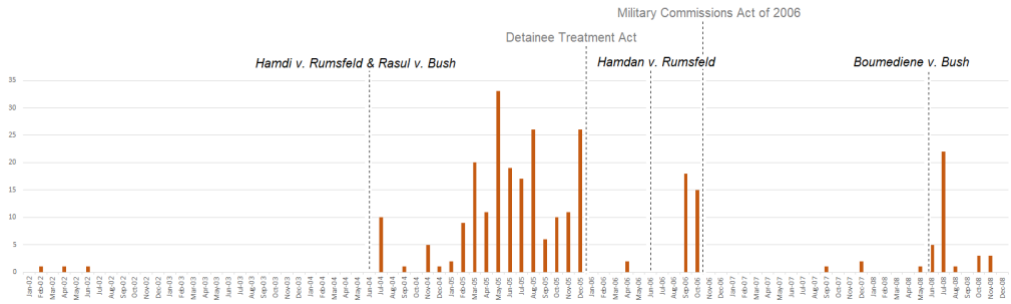
Supp. 2d 527, E.D. Va.) instructed that Hamdi be given access to a federal public defender. The ruling was reversed by the Fourth Circuit Court, which argued that the District Court failed to give deference to the government's "intelligence and security interests." On January 8, 2003, the appeals court (316 F. 3d 450, 4th Cir.) dismissed Hamdi's habeas petition, concluding that the Bush administration adequately demonstrated that Hamdi was an enemy combatant, as he was captured in a zone of active combat. Further, the Court (Ibid. 58) ruled that the broad constitutional presidential war powers under Article II and the principle of separation of powers prevented the courts from probing too deeply into the detention of Hamdi, as such review could interfere with national security. The Court conclusion was that the safeguards U.S. citizens have in criminal prosecutions do not apply in armed conflict cases (Lewis 2003, A1). Hamdi's father appealed to the Supreme Court.

[15] On February 19, 2002, on behalf of Shafiq Rasul, Asif Iqbal, Mamdouh Habib, and David Hicks, two British and two Australia citizens, the Center for Constitutional Rights filed a habeas petition challenging the Bush administration's practice of indefinitely holding non-U.S. citizens at Guantánamo Bay. Citing *Johnson v. Eisentrager*, the District Court (215 F.Supp.2d 55, 62, D.D.C.) dismissed the case and held that U.S. courts have no jurisdiction over cases of non-U.S. citizens held at Guantánamo Bay. Later that year, the Court of Appeals for the District of Columbia Circuit affirmed the lower court's decision. Noteworthy, the Ninth Circuit in *Gherebi v. Bush* (352 F.3d 1278) reached the same decision.

[16] A review of 558 detainees concluded that all but 38 detainees were enemy combatants, which qualified them for a release.

detention (Morrison 2013, 327). Just three days earlier, the Department of Defense established Administrative Review Board hearings on December 14, 2004, to conduct yearly reviews to determine whether the detainees at Guantánamo still posed a danger or had intelligence value, which defined whether they should continue to be held, transferred to the custody of another country, or released (Chambliss 2009, 823).

FIGURE 1: GUANTÁNAMO DETAINEES' HABEAS PETITIONS (MONTHLY, JANUARY 2002–OCTOBER 2008)



Source: Ní Aoláin (2018).

Judge Robertson's order to halt the military commission's trial of Hamdan unwelcomed by both the Bush administration and also members of the legislative and judicial branches. In 2005, many instances of opposition could be observed. On the judicial side, the first such case was a decision by District Judge Richard Leon on January 19, 2005, dismissing seven Guantánamo detainees' habeas petitions on the basis that it was within the president's war powers to hold enemy combatants and to conduct his own reviews of detentions. Only eleven days later, District Judge Joyce Hens Green ruled the opposite - that Guantánamo detainees had a right to challenge their detention in court and that the CSRTs used to determine the status of prisoners were unlawful in that they violate the due process guaranteed by the U.S. Constitutional, for "Guantánamo Bay must be considered the equivalent of a US territory in which fundamental constitutional rights apply" (Sevastopulo 2005). A Court of Appeals decision and likely later review by the Supreme Court were to follow.[17]

First, the appeals court in July 2005, unanimously upheld President Bush's war power to create a military commission to try Guantánamo detainees, invoking presidential authority for establishing military commissions granted by the 2001 AUMF and Uniform Code of Military Justice (UCMJ). Then, on November 7, 2005, the Supreme Court announced that it would hear *Hamdan v Rumsfeld*. Only three days later, the U.S. Senate voted 49 to 42 to approve an amendment, sponsored by Senator Lindsey Graham (R-SC), that would strip Guantánamo detainees of the right to file habeas petitions at federal courts, an amendment in direct conflict with the Supreme Court's decision in *Rasul v Bush*. Five days later, the Senate approved a revised version of the amendment, restricting review by federal courts of the detainee policy, later attaching it to the National Defense Authorization Act for Fiscal Year 2006. Only a month later, Congress passed the Detainee Treatment Act (DTA), which contained provisions requiring Department of Defense personnel to employ U.S. Army Field Manual guidelines

[17] In the meantime, the Supreme Court on January 18, 2005, declined, without comment, a case that asked Justices to decide if the Bush administration is trying to shortcut the rights of non-U.S. citizens facing military trials at Guantánamo Bay. The dismissal was perceived not to be an endorsement of the Bush administration's detainee policy, rather a recognition that the lower courts were in the process of evaluating these issues, after which the Justices would consider ruling on it.

when interrogating detainees and also banning cruel, inhuman, and degrading treatment or punishment of detainees.[18] These provisions were added to the defense appropriations and authorization bills with amendments introduced by Senator John McCain (R-AR) (Garcia 2009, 1). In sum, Congress established standards for interrogation and banned torture; but, at the same time, they severely curtailed detainees' right to challenge their detention by denying them access to U.S. federal courts to file habeas petitions and allowing limited appeals of status determinations and final decisions of military commissions in the D.C. Circuit Court of Appeals. At that point, more than a hundred petitions for habeas corpus were pending in the court (see Figure 1).

Before ascertaining the merits of the case, the Supreme Court declined to accept the Bush administration's argument that the Court's jurisdiction to hear pending cases, including the case before it, was stripped by the 2005 DTA. On June 29, 2006, the Court in *Hamdan v. Rumsfeld* (548 U.S. 557)[19] held that although the President had the authority to hold enemy combatants for the duration of active hostilities or grave threats to national security, non-U.S. citizens being detained at Guantánamo Bay had a right to challenge the legality of their detention in the federal district court in Washington, D.C. The Court (Ibid. 635) repeatedly emphasized that constitutional war powers are "granted jointly to the President and Congress," and reasoned that the Order of November 13, 2001, exceeded the President's authority to set up military commissions, since "the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction." All eight participating Justices in *Hamdan* followed the canonical tripartite framework set forth by Justice Jackson in his concurrence in *Youngstown* (343 U.S. 579, 634–655). The Court also rejected the Bush administration's argument that through the 2005 DTA Congress authorized military commissions in the creating of federal court review procedures for military commission convictions, explaining that while the DTA recognized commissions, it did not authorize them. The Court (548 U.S. 557, 630) further held that military commissions did not comply with the "law of war" in section 821 of the UCMJ, in particular Common Article 3 of the Geneva Conventions, which prohibited the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." As emphasized in a concurrence by Justice Ginsburg, the Court left open the possibility of the President requesting Congress to grant the necessary authority to create military commissions that depart from the strictures of UCMJ. Moreover, the Court did not provide an opinion on the extent to which the Constitution restricts Congress' authority to establish rules regarding the right of habeas corpus for non-citizen enemy combatants held outside of the U.S. territory.

By enacting the 2006 Military Commissions Act (2006 MCA) on October 17, Congress again rushed to the President's side in authorizing him to convene military commissions to try "unlawful alien combatants" for war crimes and to amend the DTA to further reduce detainees' access to federal courts for all pending and future cases (Elsea and Garcia 2010, 2). In the first military commission trial completed under the authority of the 2006 MCA, on August 6,

[18] While banning U.S. military personnel from engaging in such interrogation measures, Congress failed to extend that prohibition to civilian agencies, in particular, the Central Intelligence Agency (CIA) (Guiora 2008, 7–8).

[19] As is customary, the case includes only the first-named defendant Secretary of Defense Donald Rumsfeld, while the defendants include several U.S. government officials allegedly responsible for Hamdan's detention.

2008, Hamdan was convicted of providing material support to terrorism (Frohock 2013, 12; van Aggelen 2009, 44).

The most recent Supreme Court decision on the Guantánamo detainee policy was announced on June 12, 2008. In *Boumediene v. Bush* (553 U.S. 723), the Court ruled that detainees had the right under the U.S. Constitution to petition federal courts for habeas corpus challenges, which is why Section 7 of the 2006 MCA was an unconstitutional suspension of the habeas right.[20] Justice Kennedy (Ibid. 771) in the opinion of the Court wrote that the military commissions failed to offer detainees the "fundamental procedural protections of habeas corpus."

At that point, some 200 habeas petitions were awaiting action in the District Court, including those filed by the 37 detainees whose appeals were decided by the Supreme Court in *Boumediene* (Greenhouse 2008) (see Figure 1). In one of those cases (*Boumediene, et al. v. Bush*, Civil Case no. 04-1166 (RJL)), five of the six defendants—Lakhdar Boumediene, Hadj Boudella, Mustafa Ait Idir, Saber Lahmar, and Mohammed Nechla—were in November 2008 found to be held unlawfully at Guantánamo Bay and were supposed to be released forthwith.[21]

In the first district court resolution on a Guantánamo habeas petition (Huq 2010, 398), Judge Richard Leon ruled that the case against the petitioners rested "exclusively on the information contained in a classified document from an unnamed source" and that "to allow enemy competency to rest on so thin a reed would be inconsistent with this court's obligation." In December 2008, the Pentagon announced that Mustafa Ait Idir, Mohamed Nechla, and Hadj Boudella would be transferred to Bosnia and Herzegovina, where they had become citizens before being arrested in 2001 (Kommers et al. 2009, 254), to be taken into protective custody (Sutton 2008).

With President Obama in the White House, his promise to bring the United States back on course after the contentious Bush administration detainee policies and practices faced a series of unexpected congressional enactments limiting executive discretion: a) to release or transfer Guantánamo detainees into the United States (22 legislative limitations); b) to assist in the transfer of these detainees into other countries (19 legislative limitations); c) to construct or modify facilities in the United States to house Guantánamo detainees (15 legislative limitations); and d) to close or abandon detention facilities at Guantánamo Bay (4 legislative limitations) (see Table 2). Limitations grew with time: in the period 2009–2010 they applied to the release or transfer of Guantánamo detainees into the United States or other countries; in the period 2011–2014 they also included construction or modification of facilities in the United States to house Guantánamo detainees; and in the period 2015–2016, a limitation to the closure or abandonment of the detention facilities at Guantánamo Bay.

[20] Lakhdar Boumediene, a naturalized citizen of Bosnia and Herzegovina, was held at Guantánamo Bay. The Boumediene case challenged the legality of his detention as well as the constitutionality of the 2006 MCA. In February 2007, the appeals court (476 F.3d 981, D.C. Cir.) upheld Congress' authority to quash habeas petitions by way of passing the 2006 MCA. On June 29, 2007, the Supreme Court granted a writ of certiorari to Boumediene and his co-defendants. The case was consolidated with the habeas petition *Al Odah v. United States* (Elsea and Garcia 2010, 33)

[21] Huq (2017, 559–562) identified 408 Guantánamo detainees who filed habeas petitions. Out of petitioners who litigated their cases to final judgment, 49 percent (33) of them prevailed.

TABLE 2: LEGISLATIVE LIMITATIONS ON RELEASE / TRANSFER OF THE GUANTÁNAMO DETAINEES AND THE CLOSURE / ABANDONMENT OF GUANTÁNAMO FACILITIES DURING THE OBAMA PRESIDENCY (2009–2015)

LEGISLATION	PASSED ON	PASSED BY	Releasing Guantánamo detainees into the United States	Releasing / transferring Guantánamo detainees to other countries	Constructing / modifying facilities in the U.S. to house Guantánamo detainees	Closing / abandoning detention facilities at Guantánamo Bay
Supplemental Appropriations Act, 2009 (H.R.2346)	Jun 24, 2009	111th Congress	•	•		
Legislative Branch Appropriations Act, 2010 (H.R.2918)	Oct 1, 2009	111th Congress	•	•		
National Defense Authorization Act for FY2010 (H.R.2647)	Oct 28, 2009	111th Congress	•	•		
Department of Homeland Security Appropriations Act, 2010 (H.R.2892)	Oct 28, 2009	111th Congress	•	•		
Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (H.R.2996)	Oct 30, 2009	111th Congress	•	•		
Consolidated Appropriations Act, 2010 (H.R.3288)	Dec 16, 2009	111th Congress	•	•		
Department of Defense Appropriations Act, 2010 (H.R.3326)	Dec 19, 2009	111th Congress	•	•		
Ike Skelton National Defense Authorization Act for FY2011 (H.R.6523)	Jan 7, 2011	111th Congress	•	•	•	
Department of Defense and Full-Year Continuing Appropriations Act, 2011 (H.R.1473)	Apr 15, 2011	112th Congress	•	•	•	
Consolidated and Further Continuing Appropriations Act, 2012 (H.R.2112)	Nov 18, 2011	112th Congress	•		•	
Consolidated Appropriations Act, 2012 (H.R.2055)	Dec 23, 2011	112th Congress	•	•	•	
National Defense Authorization Act for FY2012 (H.R.1540)	Dec 31, 2011	112th Congress	•	•	•	
National Defense Authorization Act for FY2013 (H.R.4310)	Jan 2, 2013	112th Congress	•	•	•	
Consolidated and Further Continuing Appropriations Act, 2013 (H.R.933)	Mar 26, 2013	113th Congress	•	•	•	
National Defense Authorization Act for Fiscal Year 2014 (H.R.3304)	Dec 26, 2013	113th Congress	•	•	•	
Consolidated Appropriations Act, 2014 (H.R.3547)	Jan 17, 2014	113th Congress	•	•	•	
Consolidated and Further Continuing Appropriations Act, 2015 (H.R.83)	Dec 16, 2014	113th Congress	•	•	•	
Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (H.R.3979)	Dec 19, 2014	113th Congress	•		•	
Department of Homeland Security Appropriations Act, 2015 (H.R.240)	Mar 04, 2015	114th Congress	•			
National Defense Authorization Act for Fiscal Year 2016 (S.1356)	Nov 25, 2015	114th Congress	•	•	•	•
Consolidated Appropriations Act, 2016 (H.R.2029)	Dec 18, 2015	114th Congress	•	•	•	•
Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act (H.R.5325)	Sep 29, 2016	114th Congress			•	•
National Defense Authorization Act for Fiscal Year 2017 (S.2943)	Dec 23, 2016	114th Congress	•	•	•	•

Source: www.congress.gov.

In this case, legislative exercise of its constitutional check on the Executive did not protect individual liberty with the acts enumerated in Table 2 but rather provided the ground for Guantánamo detainees to remain in indefinite detention or to be detained even though they had been cleared for release, while also keeping the Guantánamo detention facility open. In consequence, military tribunals were the only viable forum available to the U.S. government to try Guantánamo detainees for criminal offenses. Upon signing these measures into law, President Obama issued a signing statement avowing that congressional

detainee-related limitations were unconstitutional as they, in his opinion, violated the separation of powers principles.

A part of the Department of Defense Authorization Act for FY2010 was the 2009 Military Commissions Act (2009 MCA), which Congress enacted in the wake of *Boumediene*, amending the 2006 MCA to include procedural safeguards, among which were (Elsea 2014, 43–55):

- "Cruel or inhuman treatment" defined as treatment that constitutes a grave breach of common Article 3 of the Geneva Conventions, irrespective of where the crime takes place or the nationality of the victim;
- Exclusion of statements elicited through torture as well as cruel, inhuman, or degrading treatment;[22]
- Exclusion of irrelevant, cumulative, or prejudicial evidence now expressly a right of the accused rather than an optional rule subject to the discretion of the Secretary of Defense;
- The accused having the right of appeal of a final decision of the military commission with respect to the U.S. Court of Military Commission Review; and that being exhausted, having the right to appeal the final decision to the U.S. Court of Appeals for the D.C. Circuit;
- No expressed prohibition of reviews by civilian courts, including review of petitions of habeas corpus.

In contrast to taking and ruling on four cases involving Guantánamo detainees during the Bush presidency, the Supreme Court did not take even one of such cases during the Obama presidency. The first case was *Kiyemba v. Obama*. Previously, the District Court granted 17 Uighur detainees a motion for release into the United States. As early as 2003, the U.S. government conceded that the men were improperly detained and eligible for release from Guantánamo Bay. Yet, the government refused to release the men into the U.S., even though a transfer to China was illegal as the men would have been at grave risk of torture and persecution and no other country was ready to offer them refuge. The Court of Appeals for the D.C. Circuit reversed and remanded the District Court's judgment, ruling that the courts lack authority to order the executive branch to release Guantánamo detainees into the U.S. Initially, the Supreme Court granted certiorari to their habeas petitions, but after learning that each of the petitioners had received and rejected at least two resettlement offers and that the U.S. government was willing to resettle the men in those countries, the Court denied certiorari in April 2011, leaving intact the lower-court ruling in favor of the U.S. government. Throughout this legal conflict, the Obama administration argued that the right to habeas corpus does not incorporate a right to be released into the United States, even when the only alternative is continued detention at Guantánamo Bay.

In March 2015, the Supreme Court rejected two appeals involving the treatment of Guantánamo detainees, letting stand lower-court rulings in favor of the U.S. government.[23] In the first case, a former detainee from Syria, Abdul Rahim Abdul Razak al Janko, sought to sue the United States for damages stemming from his

[22] Even before this enactment, the Court in *Brown v. State of Mississippi* (297 U.S. 278) interpreted the Constitution to prohibit the use of physical torture to elicit a confession. In addition, the Court in *Ingraham v. Wright* (430 U.S. 651) stated the Constitution's prohibition of "cruel and unusual punishments" as being applicable to punishments that are corporal in nature, while stating in *in re Kemmler* (136 U.S. 436) that such prohibition applies to methods of execution involving excess brutality upon the body (Lane 2014, 91).

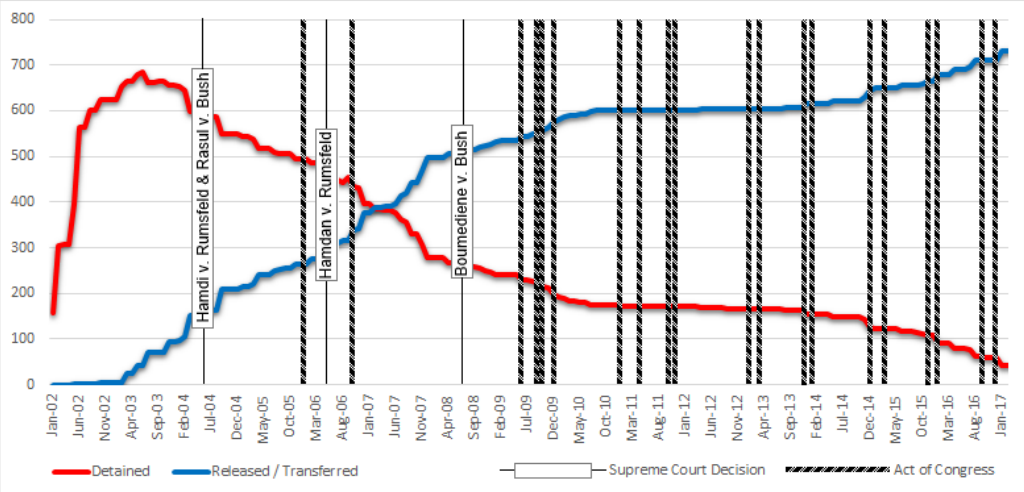
[23] *Janko v. Gates*, U.S. Supreme Court, No. 14-650 and *Center for Constitutional Rights v. CIA*, U.S. Supreme Court, No. 14-658.

alleged mistreatment during seven years at the Guantánamo Bay detention facility. Janko alleged he was tortured and suffered physical and psychological degradation at Guantánamo during the period 2002—2009. The appeals court ruled that based on what Congress had directed, courts do not have the authority to hear lawsuits such as the one filed by Janko. In the second case, the Court declined to take up a case in which the Center for Constitutional Rights was seeking access to videos and photographs of a Saudi detainee, Saudi citizen Mohammed al-Qahtani, allegedly showing his torture. The Court rather left in place a September 2014 decision by the 2nd Circuit Court of Appeals, which ruled the images exempt from disclosure under the Freedom of Information Act, as their release could harm U.S. national security by inciting anti-American sentiment (Hurley 2015).

Finally, in October 2017, the Court refused to hear *Bahlul v. United States*, where the Guantánamo detainee was seeking to challenge the legality of the operations of military commissions at Guantánamo Bay. Ali Hamza Ahmad Suliman al Bahlul was convicted for conspiracy to commit war crimes. Since this is only a U.S. offense but not a violation of international law, Bahlul challenged his conviction with a claim that he should be tried in a U.S. federal court (Stohr 2017).

President Obama left office without a single Supreme Court decision involving Guantánamo detainees. Most importantly, since 41 detainees remained at Guantánamo Bay on January 20, 2017, the President fell short of his January 22, 2009, promise to close the facility after releasing or transferring all detainees (see Figure 2).

FIGURE 2: GUANTÁNAMO BAY POPULATION AND RELEASES / TRANSFERS OF GUANTÁNAMO DETAINEES (BY MONTH, 2002–2018)



Source: The Guantánamo Docket, *New York Times*; Author's calculations.

4 CONCLUSION

"The Constitution of the United States," the U.S. Supreme Court declared in *ex parte Milligan* (71 U.S. 2, 120), "is a law for rulers and people, equally in war and in peace." As such, war does not strip away the Bill of Rights (Schlesinger 2005, 71), which sets the boundaries for the government in its use of violence against the people (Pinker 2011, 161). An individual cannot simply be swept up to be detained and tortured at the whim of the President. The U.S. constitutional system is set to ensure that the government has a good reason to classify

individuals as enemy combatants while also detaining them only during the armed conflict, treating them humanely during the detention and recognizing their right to habeas corpus. As Justice Kennedy wrote in the opinion of the Court in *Boumediene* (553 U.S. 723, 796–798), "liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law."

In the wake of the 9/11 terrorist attacks on the United States, the Bush administration claimed the right to hold detainees indefinitely without being charged, given counsel, or tried, and to authorize the use of military commissions as a legal system parallel to Article III courts but with greater restrictions on defendants' rights. The Guantánamo military commissions have been controversial since their creation, among other things, likely because they challenge the history of military commissions being tribunals of necessity and being used only when traditional tribunals are inappropriate or unavailable. Most importantly, the Guantánamo military commissions do not meet any of William Winthrop's (1920, 836) five criteria for the jurisdiction of military commissions, criteria that have historically been used to determine the suitability of a military commission to try violation of the laws of war. Most worrisome, the creation of the Guantánamo military prison and commissions provided an opportunity for the government to abuse its power to the detriment of the detainees (Mandell 2018, 2). Limiting detainees' rights that are guaranteed by the U.S. Constitution, President Bush exceeded his constitutional authority before calling upon Congress and the federal courts to support his action by resetting constitutional balance.

Traditionally, Congress and the courts have given great deference to the President's wartime decisions. In the case of detention and military trial for suspected terrorists at Guantánamo Bay, analysis shows that Congress lacked concern about the separation of powers when such an issue was raised through executive assertion of unilateral authority in shaping detainee policies and practices. For example, Congress came to President Bush's side on multiple occasions by way of not recognizing Guantánamo detainees' constitutional right to petition U.S. federal courts for habeas corpus challenges. However, Congress did enact statutes that constrain the conduct of U.S. military personnel in interrogating the detainees. Congress' frequent failure to defend its war powers left it to the courts to provide the principal checks on presidential power. With four Supreme Court rulings rejecting the administration's detainee policies and their violation of detainees' rights, judicial check on presidential unilateralism grew increasingly assertive during the Bush presidency. By contrast, during the Obama presidency, the Court did not rule on a single such case but rather denied certiorari in four cases. Congress, on another hand, exercised a constitutional check on the Obama detainee policy 23 times, limiting executive discretion to release or transfer Guantánamo detainees, to construct or modify facilities in the U.S. to house these detainees and to close or abandon detention facilities at Guantánamo Bay.

The role of separation of powers has been indispensable in both recognizing the constitutional right of Guantánamo Bay detainees to petition civilian courts for habeas corpus challenges and in enacting federal statutes that constrain the conduct of U.S. military personnel in interrogating detainees. Conversely, with the legislative action of stripping habeas under the 2005 DTA and 2006 MCA, a system of checks and balances within the separation of powers contributed to

the limiting, if not outright violation, of detainees' rights as part of U.S. detainee policies and practices, all of which points to the failure of the structure of government established by the Constitution to—at all time and in all cases—protect individual liberty.

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