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Indefinite Detention: Lessons on Presidential Power from Obama's Effort to Close Guantanamo Bay

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Submitted to the Department of Political Science of Allegheny College in partial fulfillment of the requirements for the degree of Bachelor of Arts.

I hereby recognize and pledge to fulfill my responsibilities as defined in the Honor Code and to maintain the integrity of both myself and the College community as a whole.

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Table of Contents

Table of Contents **1**

Chapter One: Introduction and Theories of Executive Power **3**

Executive Power **6**

The Prerogative Model of Presidential Power **7**

The Literalist Model of Presidential Power **8**

The Stewardship Model of Presidential Power **9**

Justice Jackson and Categories of Executive Power **10**

Creating the Prison at Guantanamo Bay **11**

The Bush Administration and Executive Power **13**

Obama and Guantanamo Bay **14**

Chapter Two: *Ex Parte Milligan & Ex Parte Quirin* **19**

Lincoln, the Civil War, and Presidential Power **19**

The Detention, Trial, Sentencing, and Appeal of Lambdin Milligan **22**

Ex Parte Milligan **25**

Franklin Delano Roosevelt and Presidential Power **29**

Operation Pastorius **30**

Civil Trial or Military Tribunal? **31**

Creating the Commission **34**

Ex Parte Quirin **37**

Impact of *Quirin* **42**

Chapter Three: Bush-era Case Law and Executive Power **43**

The Bybee Memo and the Unitary Executive Theory **44**

Rasul v. Bush: Facts and Oral Arguments **46**

Rasul v. Bush: The Opinion of Justice Stevens **49**

Response to *Rasul* **52**

Hamdi v. Rumsfeld **53**

Hamdi v. Rumsfeld: Justice O'Connor's Decision for the Court **57**

Post-*Hamdi* Effect **62**

Hamdan v. Rumsfeld **62**

Boumediene v. Bush **63**

Effect of *Boumediene* for the Future **64**

Chapter Four: Analysis of Obama's Effort to Close Guantanamo **65**

Executive Order 13492 **66**

Presidential Power and Persuasion **69**

Executive Orders: Command or Suggestion? **69**

Executive Branch Politics: The Personal Presidency **70**

Congressional Politics and the Personal Presidency **73**

The Institutional Presidency and Guantanamo Bay: Unilateralism **76**

The Institutional Presidency, Congress, and Guantanamo Bay **78**

Obama's Second Term and Guantanamo **78**

Chapter Five: The Future of Guantanamo and Conclusions **80**

Donald Trump and Guantanamo Bay: The Campaign Trail **80**

Donald Trump and Guantanamo Bay: In Office **83**

Executive Order 13823 **85**

Guantanamo's Future Under Trump and Beyond **87**

Conclusions **89**

Bibliography **93**

Chapter One
Introduction and Theories of Executive Power

On President Barack Obama's second day in office in 2009, he authored an executive order stating that the detention facilities at Guantanamo Bay shall be closed in one year from the date of its enactment. Over ten years later, the detention camp at Guantanamo remains open (Bruck 2016). The goal of this senior project is to tell the story of the emergency powers of the U.S. President, with a particular emphasis on the executive's power to detain and prosecute (via military tribunal or commission) individuals deemed to be war criminals and/or enemy combatants.

At focus will be Guantanamo Bay and President Obama's failed promise to close the detention facility within a year of his first inauguration. Instead of a fully successful effort, Obama saw his executive power constrained in multiple meaningful ways. Popular history to this point blames congressional politics for obstructing Obama's closure efforts. Although the influence of Congress played a significant role in doing so, there were also a multitude of judicial and executive branch actions that paved the way for a far more difficult path than Obama seemingly anticipated on the campaign trail and in the early days of his presidency.

The story of executive power is usually told in terms of its historical expansion and plenary nature, especially in regards to matters of national security. Many constitutional scholars bemoan the instances in which they believe presidents have superseded what the Constitution allows them, and this project will focus on such instances in detail. However, President Obama's executive order to close Guantanamo Bay took on the appearance of a suggestion rather than an order, and the reasons for why that is true provide lessons about executive power left unexplored by the current literature on this topic.

This project will seek to answer the broader question as to why Obama couldn't close Guantanamo by focusing on several smaller questions that define the legal and political environment surrounding his order. Predominantly, this project will tell the story of habeas corpus protections and their relationship to executive power during wartime. The right to a writ of habeas corpus is fundamental to American constitutionalism, as demonstrated by its enumeration by the framers in Article I, Section 9 of the Constitution (Ball 2007, 2). However, contentions have arisen as to who is entitled to such protections and what kinds of circumstances restrict the right to a writ of habeas corpus.

Therefore, I will explore the trajectory of habeas protection through examining how three wartime presidents understood and applied them: Abraham Lincoln during the Civil War, Franklin Roosevelt during World War II, and George W. Bush during the post-9/11 War on Terror. Additionally, this project will explore the ability and legality of presidents to try detained enemy combatants (or other individuals deemed to be injurious to a war effort) in military tribunals or commissions (a question that ties in nicely to the events shaped by the aforementioned three presidents). In exploring the question of habeas protections and the ability of presidents to try detained individuals in military commissions, it will also be explored as to whether it matters that an individual set for trial is an American citizen or a foreign alien. Furthermore, it will be determined what defines a person as an "enemy combatant" and what such a status conveys.

The arc of presidential power, especially in regards to the emergency powers (also known as the prerogative powers) has followed a trajectory of expansion. In perhaps one of the most dramatic manifestations of this power, President Bush established the detention camp at

Guantanamo Bay. This action came in the wake of 9/11 and was aimed towards containing individuals who posed the gravest threats to American national security. However, in light of past actions taken by executives during periods of crisis, President Bush's establishment of a detention facility at Guantanamo and subsequent attempts to try detainees by military commission was aided by historical precedent. In two particularly salient incidences, Presidents Abraham Lincoln and Franklin Roosevelt laid the foundation for the Bush Administration to establish the Guantanamo Bay detention facility and subsequent military commissions.

In particular, the groundwork for these actions was laid by the events surrounding *Ex Parte Milligan* and *Ex Parte Quirin*. In both cases, the President suspended habeas corpus through his executive office to try individuals accused of violating the "laws of war". These cases will form the "premodern" groundwork of case law that preludes the Bush-era detention policies, and they prelude Congress' treatment of the Guantanamo detainees in cases like *Rasul v. Bush*, *Boumediene v. Bush*, *Hamdi v. Rumsfeld*, and *Hamdan v. Rumsfeld*. The story of habeas protection and military commissions dates back to at least the Civil War, and helps to illustrate the tensions that have always existed between a president's emergency powers and congressional objectives/agendas. The goal of this project is to tell that story through relevant case law, examination of key events, and analysis of the dynamics that played out between pivotal figures of these moments in American constitutional history. In doing so, I hope to provide a comprehensive and satisfactory conclusion as to why President Obama failed to close the detention facilities at Guantanamo Bay as intended, while providing broader lessons about executive power and its limits.

Executive Power

The role of the President of the United States as Commander-in-Chief of the nation's military is central to America's republican government. According to Scott Matheson, the framers bestowed upon the President "enormous power and responsibility… to protect the nation's security and safeguard the people's liberty" (Matheson 2009, 1). Therefore, as a civilian possessing primacy over the nation's national security prerogatives, the President must both ensure the safety of the people while ensuring that the fundamental liberties of a constitutional republic are not impugned. Inherent in that responsibility is a natural tension made difficult by the realities that surround national security decision making. This is especially true in modern times, where the post-9/11 world has created a uniquely asymmetrical environment where the lines of war and peace are frequently blurred. Such an environment has significant ramifications for the separation of powers, and the way in which the political branches navigate this environment and how the courts adjudicate it has a significant impact on both the security and the liberty of the American people.

The power of the president over national security, as well as military affairs in general, is often cited as established by Article II of the Constitution, which states that "The executive power shall be vested in a President" and that "The President shall be Commander in Chief of the Army and Navy of the United States". Scholars argue that the "Vesting Clause" delegates broad authority to the President in various spheres, national security among them. This view asserts that the Vesting Clause carries with it a "residuum" of power for the President to draw upon when necessary, such as when exercised pursuant to the "prerogative powers".

The Prerogative Model of Presidential Power

The determination that an emergency exists is a highly discretionary affair. Presidents find themselves able to declare emergencies and call upon their emergency powers so as to make the presence of an ongoing emergency a chronic state of affairs in American life. Such a condition has perilous implications for the practice of executive constitutionalism, as congressional acquiescence and judicial tolerance lends a president a wide berth to exercise emergency powers.

For example, it was clear that the framers viewed a detained individual's right to a writ of habeas corpus as a substantial protection necessary in a constitutional order. Article I, Section IX states that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it". The framers clearly vested the ability to suspend habeas protections in Congress, with the president having no explicit unilateral power to do so. Nevertheless, the contention that a state of extraordinary emergency exists has been given as presidential justification for such action during the Lincoln, Roosevelt, and Bush administrations. By the time Congress and the Court had caught up and either provided retroactive authorization or removed the president's ability to take such action, the "damage had already been done" in terms of liberty and constitutionalism.

Advocates of strong presidential powers in times of crisis view unilateralism as a key component of the president's ability to ensure national security. Such a belief in unilateralism implies that the president shall be the "first mover" or "sole organ" when it comes to national security prerogatives, with Congress playing "catch-up" and either issuing retroactive authorizations or certifying executive action with silence or inaction.

When President Lincoln took actions according to the prerogative (or emergency, or inherent) powers, he acknowledged that he had used powers from both Article I and II of the Constitution (the former reserved to Congress, the latter reserved to the president). He never claimed to possess full authority to act as he did and indeed sought retroactive authorization from Congress to provide assent (Fisher 48, 2004). However, the Bush Administration's post-9/11 interpretation of the presidency rejected that notion, instead espousing a vision of the "unitary executive" that argued the presidency was a font of nearly unlimited power to exercise unilateral authority in the name of security (Genovese 2011, 5).

Although Bush faced an exigency as Lincoln did, he was unwilling to place himself within the law in the same fashion. The Bush Administration furthered the unitary executive theory more than any presidency in history, claiming that its actions were simply "non-reviewable" (Genovese 2011, 158). Although members of the Bush Administration argued that their view of the presidency was in line with the vision of the framers, some scholars argue that it was closer to the views on executive power held by the British model the framers rose against. John Yoo, who helped craft the legal rationale for indefinite detention and torture while serving in Bush's Office of Legal Counsel, even cited the constitution of imperial Britain as inspiration for his legal reasoning (Genovese 2011, 159).

The Literalist Model of Presidential Power

Critics of the Prerogative Theory find it indefensible and illegitimate, arguing that the role of the President as Commander-in-Chief does not and cannot provide supreme authority in a constitutional republic. As is stated in Article II, the president only assumes the role of

Commander in Chief when the Army, Navy, and Militia of the several states is called into the service of the United States by Congress (Fisher 2004, 12). Such an idea seems quaint in the modern context, where the president is casually referred to as Commander in Chief in regards to actions and duties that may or may not have a relationship to national security and/or defense.

The Literalist Theory is also known as the Strict Constructionist Theory or the Taftian Theory, named for President William Howard Taft. Taft is the most oft-cited example of a literalist president, as he stated that "the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise" (O'Brien 2020). Taft believed that the president only derived power from express grants in Article II or those given by Congress. Other than those, he believed it was inappropriate and extralegal for a president to exercise powers he believed implied or inherent within his office.

The Stewardship Model of Presidential Power

Taft's predecessor Theodore Roosevelt held a significantly opposite view of presidential power. Roosevelt embodied what many call the "stewardship presidency", as he viewed it as the president's duty to "do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws" (O'Brien 2020). While Taft believed the president could only do what the Constitution or Congress had granted him expressed authority to do, Roosevelt's expansionist view held that the president had the power to do everything except what the Constitution or Congress explicitly forbade (O'Brien 2020).

Roosevelt's view of the stewardship presidency was novel and in line with his progressive tendencies, as he viewed it as his responsibility to directly serve the people. Roosevelt expanded federal power, and particularly the power of the executive branch, into many areas previously untouched by the presidency. He often made significant decisions unilaterally, such as his famous "trust-busting" efforts to break up monopolies. Contrasted with Taft and literalis, Roosevelt's presidency (and the stewardship model) is more personal than institutional (O'Brien 2020).

Justice Jackson and Categories of Executive Power

Justice Robert H. Jackson remarked that although Commander in Chief is not an "empty title", the authority it concretely confers has been indeterminable among executive advisers. Jackson continues to say that this is especially true since the Commander in Chief clause has been used to justify a plethora of presidential actions (internal and external) that involve the use of force, and he finds the prospect that a President can "enlarge his mastery over the internal affairs of the country by his own commitment… to some foreign venture" sinister and alarming (Fisher 2004, 13).

In other guidance on executive power, Justice Jackson provided a useful method for evaluating it in *Youngstown Sheet & Tube Co. v. Sawyer*, a 1952 case regarding President Truman's efforts to nationalize the steel industry during the Korean War so as to avoid the injurious effects of a labor strike upon the war effort. In his concurrence in that case, Jackson lays out three categories of executive action as it relates to Congress. First, Jackson writes that a President's power is strongest when acting pursuant to an express or implied delegation of

authority by Congress. The second category of presidential action, which is an intermediate level, is when the President acts in the face of congressional silence on an action (thus creating a "zone of twilight or uncertainty". Third and finally, presidential power is at its "lowest ebb" when an action is taken against an express or implied congressional prohibition (Tushnet 2005, 23).

Bush Administration officials claimed to be acting in Jackson's first category, citing the broadly-written Authorization for Use of Military Force as a justification for their detention policies. However, the Bush Administration was actually acting in a constitutional twilight zone, taking actions that were not expressly or implicitly prohibited by Congress but controversial given certain judicial and historical precedents (but, given other precedents, potentially legal given the context).

Creating the Prison at Guantanamo Bay

The detention facilities at Guantanamo Bay were created in January 2002 in order to house detainees captured in the post-9/11 War on Terror. Guantanamo Bay's history dates back to 1898, when nearly 700 Marines who landed there protected the charge of Teddy Roosevelt and his Roughriders up San Juan Hill. Five years later, President Teddy Roosevelt signed a treaty with the Cuban government to allow the United States to lease the land on which Guantanamo Bay Naval Base sits. The 1903 Treaty gave the United States "complete jurisdiction over and within said areas", and a 1934 Treaty established what serves to be a perpetual lease for the United States over the land that houses the naval base at Guantanamo Bay. Although the

post-revolutionary Cuban Castro Administrations deny the legality of these treaty agreements, they stand nonetheless.

Guantanamo Bay was selected as the site to hold detainees captured in Afghanistan for its offshore location that provided both security and freedom from legal review. Early on, Bush Administration officials articulated their view that their prosecution of the War on Terror must be removed from the traditional conventions of war that had bound past executives and administrations. The Bush Administration presented their case that a no-holds barred approach is the only way that the threat of global terrorism could be destroyed, and this attitude was applied in good measure to the Administration's treatment of detainees. Key architects of the Administration's detainee policy, particularly Secretary of Defense Donald Rumsfeld and Vice President Dick Cheney, referred to the individuals to be detained at Guantanamo as the "worst of the worst" and implied that torture would be necessary for use in extracting the intelligence the Administration sought.

However, many of the individuals held at Guantanamo Bay were hardly guaranteed to be hardened terrorists bent on murdering Americans. For as many of the detainees such as Khalid Sheikh Mohammed (the architect of the 9/11 attacks and a member of the "irreconcilable minimum", a term used for the Guantanamo detainees determined to be virtually non-transferrable) at Guantanamo, reports seemed to uncover prisoners like Shafiq Rasul. Unlike Mohammed, overwhelming evidence existed that Rasul had been innocent, having been sold to the U.S. for a bounty by an Afghan warlord while claiming to have been in-country for an aid mission.

The Bush Administration and Executive Power

The Bush Administration attempted to make no distinction between the guilty and innocent when detaining individuals, claiming in President Bush's 2002 Memorandum on Detainees that the U.S. was not compelled to comply with the Geneva Conventions in prosecuting the War on Terror, particularly when it comes to the detention and trial of prisoners (Ball 2007, 44). The Bush Administration argued that claim was made true by the fact that Guantanamo detainees were held outside of the sovereign territory of the United States (and thus were not entitled to the legal projections typically provided in criminal trials within the federal court system, especially if a detainee was a non-citizen alien) (Ball 2007, 45).

Under the Geneva Conventions, individuals detained during wartime could be considered either "lawful" or "unlawful" combatants, the former being uniformed soldiers (in the conventional sense) and the latter being spies or saboteurs (Ball 2007, 43). Since the Bush Administration had decided that the Geneva Conventions were inapplicable to individuals captured during the undeclared War on Terror, those prisoners with a suspected link to the Taliban, al-Qaida, or a similar group were given a novel status: "enemy combatants". According to the Bush Administration such a status, in conjunction with the location of their detention, placed these detainees outside the realm of either U.S. or international law. Therefore, as the Administration's logic went, the detainees in question were not entitled to habeas protections or shielded from interrogation practices involving torture (Ball 2007, 44).

The Bush Administration's attitude towards and use of executive power during the War on Terror was dramatically aggressive. It emphasized unilateralism and the view that the Constitution did not prevent the President from detaining and trying captured individuals as he

alone saw fit (Ball 2007, 17). As for judicial processes, the Administration deflected efforts to try detainees in civilian courts, preferring to establish military commissions beyond the view of its co-equal branches and the public. The Bush Administration claimed this authority was established by the Supreme Court's ruling in 1942's *Ex Parte Quirin*, where it was decided that the Roosevelt Administration's trial of eight Nazi saboteurs in a military commission was constitutional (Ball 2007, 50). President Bush claimed authority to establish these commissions through the 2001 Authorization for Use of Military Force, but Congress didn't actually codify the commissions Bush had established until the Military Commissions Act of 2006 (Ball 2007, 53). However, fewer than twelve detainees were tried under a military commission, and such trials were "stopped before they ever started" (Ball 2007, 53).

The Bush Administration eventually ran into legal obstacles to prevent Guantanamo detainees from filing successful habeas petitions, with a series of Supreme Court decisions granting prisoners varying levels of relief. However, for a period of about three years, the Administration succeeded in establishing a constitutional "twilight zone" where broad claims of executive authority were justified without the backing of constitutional precedent, legality, or congressional approval. After his election, President Obama looked to build upon the Supreme Court decisions made between 2004 and 2008 in closing the detention facility for good, making the closure of Guantanamo Bay a key promise on the campaign trail in 2007 and 2008.

Obama and Guantanamo Bay

In 2007, when Barack Obama began his first campaign for President, the idea of closing the prison at Guantanamo was gaining bipartisan political force (Bruck 2016). Along with

Obama endorsing the idea, so did Hillary Clinton (his chief Democratic primary opponent) and John McCain (the eventual Republican nominee for President, who had been tortured as a prisoner of war). Obama painted the indefinite detention of Guantanamo prisoners and their treatment as an abandonment of America's most precious values, and he saw his promise to close the prison as an essential break from the wartime policies of the Bush Administration. Upon his election, prisoners at Guantanamo were reported to cheer in jubilee, exclaiming to their guards that they were finally leaving (Bruck 2016).

Although the Obama Administration was able to transfer a significant majority of the Guantanamo Bay detainees out of the prison, the detention facility there remains open. Congressional politics has been typically blamed as the reason that Guantanamo still holds prisoners, but the reality is that a far more complex series of factors impeded the Obama Administration. Executive branch politics played an outsized role in frustrating Obama's efforts, particularly the influence of the Defense Department (which adamantly sought to keep the prison open) (Bruck 2016). Along with the influence of Defense, the political calculations of Obama and his aides in their pursuit of closing Guantanamo often led to conclusions about the probability of closure and the effort necessary that didn't align with the realities of the situation.

As stated in the first paragraph on page one, closing Guantanamo was an initial priority for the Obama Administration. On January 22nd, 2009, President Barack Obama signed Executive Order 13492, titled "Review and Disposition of Individuals Detained At the Guantanamo Bay Naval Base and Closure of Detention Facilities". This order asserted the belief of the Obama Administration that the proper disposition of the remaining detainees (of which there were 242 at the time) and closure of the detention facilities would promote the national

security and foreign policy interests of the United States. The order acknowledged that recent Supreme Court decisions had granted Guantanamo detainees the constitutional right to a writ of habeas corpus, and that many current prisoners have filed writs since then. Furthermore, Executive Order 13492 established an interagency executive branch taskforce to review the status of every remaining detainee and establish a suggestion for their disposition (the three options being transfer to a home country, third country, or prosecution and/or detention).

Executive Order 13492 mandated that this all take place within one calendar year of the order's enactment, and Executive Order 13493 was signed on the same day to determine the composition of the task force established in Executive Order 13492. Executive Order 13493 appointed the Attorney General and Secretary of Defense as task force co-chairs, while the task force would also include the Secretaries of State and Homeland Security, the Directors of National Intelligence and the Central Intelligence Agency, and the Chairman of the Joint Chiefs of Staff.

After these executive orders were signed, Obama Administration officials were confident that the bipartisan consensus they believed to exist on Guantanamo meant that they did not have to move expediently to resolve it. According to Greg Craig, the Obama Administration's first White House Counsel, perhaps Obama simply should have singularly ordered the Secretary of Defense to close the prison in one year instead of accommodating executive branch jousting to achieve the same goal (Bruck 2016). The event that sparked congressional non-cooperation with Obama's closure efforts was the attempted transfer of seventeen Chinese Uighurs who were captured and sent to Guantanamo after the U.S. had invaded Afghanistan. The Uighurs in

question had no demonstrable link to terrorism, and likely had fled to Afghanistan in the ninties to escpae persecution by the Communist Chinese government.

The Federal District Court in Washington, D.C. had ordered that the Uighurs be released, and an executive branch committee had decided that the releases should begin by resettling two of them in northern Virginia (where one of the largest Uighur communities in the U.S. was located). However, the White House had failed to brief Frank Wolf (the Republican U.S. Representative for that area and a vigorous human rights activist who favored resettling the Uighurs there) on their decision, resulting in Wolf's authoring a letter to Obama strictly opposing the move. Other Republicans joined Wolf, and even Senate Democratic Leader Harry Reid voiced his opposition to resettling the Uighurs stateside. After the events surrounding the Uighurs, Congress passed a bill with overwhelming bipartisan majorities that forbade moving Guantanamo detainees to the U.S. (Bruck 2016). All the momentum that the Obama Administration seemed to be building was dashed, and the Administration quickly turned to other priorities such as healthcare and financial reforms as places to best spend its political capital.

Although the Obama Administration was unable to fully close the detention facilities at Guantanamo Bay, it was able to successfully transfer out 201 of the 242 detainees that he inherited. Of the remaining 40 detainees (one was transferred under the Trump Administration), only two are designated for future transfer. The rest are designated either for prosecution or indefinite detention due to the significant threat they pose to the United States, its allies, and its interests.

This project will draw deeply upon relevant case law to illuminate the legal and political contexts that helped the Bush Administration establish the Guantanamo prison and shaped the Obama Administration's efforts to close it. Specifically, Chapter 1 will explore the ramifications laid out by *Ex Parte Milligan* and *Ex Parte Quirin*, with Chapter 2 focusing on the impacts of *Rasul v. Bush*, *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*. Chapter three will analyze congressional responses to these cases and how Presidents and the judiciary alike have responded to legislative efforts to curb their influence. Finally, Chapter Four will discuss the status of Guantanamo Bay under President Trump and beyond.

Ex Parte Milligan and *Ex Parte Quirin* deal with the right of individuals detained during wartime to a writ of habeas corpus and the legality of trying such individuals under a military tribunal/commission opposed to a civilian court. These cases also provide distinctions between the treatment of detainees based upon their legal status as civilians or lawful/unlawful/enemy combatants. Additionally, these cases provide salient historical examples of executive power during periods of national security crisis and display how Congress and the Court have treated particular executive actions in such periods. These cases, along with the contexts and events that shaped them, provide an ideal starting point for evaluating the trajectory of habeas protections, executive power to try detainees for crimes against the government, and what the historical implications of those lessons have for Bush and Obama's approaches to Guantanamo Bay.

Chapter Two
Ex Parte Milligan & Ex Parte Quirin

The foundation for the creation of Guantanamo Bay and the military tribunals to take place there was established during two pivotal moments in American history: The Civil War and World War II. Particularly, the events surrounding two landmark Supreme Court cases, *Ex Parte Milligan* and *Ex Parte Quirin*, serve as some of the most consequential and dramatic manifestations of presidential crisis power in history. The Bush Administration specifically cited *Ex Parte Quirin* as valid precedent for its establishment of military tribunals at Guantanamo, which many scholars consider to be dubious legal justification. As for *Milligan* and the Court's ruling there, the Roosevelt and Bush Administrations' interpretation and treatment of that ruling is indicative of particular attitudes towards executive power and the Court's willingness (or lack thereof) to check executive power in particular political contexts. An important distinction emerges between *Milligan* and *Quirin*, a distinction not fully established until the administration of George W. Bush.

Lincoln, the Civil War, and Presidential Power

The Civil War presented an existential threat to the survival of the Republic. President Lincoln was confronted with a crisis unlike one that any other president has ever faced. Although a few presidents, FDR and W. Bush chief among them, have faced significant threats to U.S. national security, no president besides Lincoln has faced a crisis wherein the future of the Union was called into serious question. As such, President Lincoln found himself compelled to take extraordinary measures to preserve the Union, even when he personally thought such actions were imprudent and unconstitutional (Fisher 2004, 48).

Lincoln's conception of emergency executive power held that measures "otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation" (Yoo 2009, 201). Accordingly, Lincoln refused to believe that the Constitution withheld the power for its own self-preservation, as it could not be saved unless the nation itself was (Yoo 2009, 202). Such an attitude reflected a Hamiltonian approach of "residuum power" and echoed the sentiment of Justice Robert H. Jackson that the Constitution should not be perceived as a "suicide pact" in times of crisis.

Lincoln's personal approach to executive crisis authority was reflected in his posture towards internal dissent during the Civil War, which he regarded as a grave threat to the northern war effort and sought to eliminate through the suspension of habeas corpus. Unlike other constitutional safeguards on liberty, one can argue that the framers believed there was efficacy in suspending the writ of habeas corpus during "Cases of Rebellion or Invasion…" where "the public Safety may require it" (Epstein and Walker 2020, 291). However, that explicit grant of Constitutional authority comes in Article I, where Congress derives its power. Nevertheless, Lincoln claimed that power for himself with Congress out of session, and Lincoln proclaimed in September 1862 that persons who discouraged volunteer enlistment in the Union Army, resisted militia drafts, provided aid and/or comfort to rebels, and/or engaged in disloyal practices would be liable to detention, trial, and punishment via a court-martial or military commission (Matheson 2009, 36).

Lincoln was reluctant to suspend the writ of habeas corpus, and was highly conscious of the implications of the unilateral actions he undertook. Nevertheless, he suspended habeas protections after the fall of Fort Sumter on April 14th, 1861, doing so unilaterally since Congress

was in recess. Lincoln asserted that his actions were justified since Congress was not in session and thus an emergency demanded them, while also stating that the Constitution is silent as to which branch shall reserve the power to suspend habeas protections (the former an arguably justifiable claim, the latter dubious given the language found in Article I). Irregardless, Lincoln based the legality of his action upon the fact that the nation was facing an exigence and Congress wasn't in session (it's important to note that Lincoln did call an emergency session of Congress, but the members were unable to meet until July 4th).

Some scholars have accused Lincoln of running the country as a dictatorship in the early days of the Civil War, but there is no doubt that Lincoln sought to uphold republican principles of democracy in the actions he took. He regarded his actions as temporary and exceptional, and Lincoln sought the legislature's blessing for his actions once that special session of Congress met, stating that he had acted in Congress' absence on behalf of that body while trusting that it would readily ratify his suspension of habeas corpus. Lincoln contended that the framers would not entertain the idea that the suspension clause was reserved to Congress alone in times of emergency if the legislature was out of session, as its very inclusion in the Constitution signalled the framers' acknowledgement of the utility of suspending the writ (Matheson 2009, 39).

Lincoln received the legislative justification he sought on March 3rd, 1863, wherein Congress passed the Habeas Corpus Act of 1863. This Act retroactively legalized Lincoln's habeas suspension and authorized future actions, but with an important caveat: Congress limited the President's ability to hold detainees who were not prisoners of war in military custody in states where the war had not impaired civil authority (Matheson 2009, 39). That clause would

have significant legal ramifications, and would help to set the trajectory of judicial treatment habeas protections that would extend from the Civil War up through the War on Terror.

The Lincoln Administration typically used military commissions to try civilian violations of the military code in places in direct rebellion towards the Union. However, the Lincoln Administration sometimes used military detentions and commissions against civilians who had committed rebellious acts in locations where the local government was not engaged in insurrection against the Union. These circumstances, with one circumstance in particular, form the foundation for the exploration of habeas protections as pertaining to individuals whose status as combatants or agents of a hostile entity is in question or unclear.

The Detention, Trial, Sentencing, and Appeal of Lambdin Milligan

The Supreme Court jurisprudence regarding habeas protections and military commissions began in earnest with the case of *Ex Parte Milligan*. At issue was the detention and sentence of Lambdin Milligan, an Indiana attorney who was an influential "Copperhead", or a northern Democrat who was a Confederate sympathizer. Milligan organized local rebellion to the Union cause, gave public speeches against the Union, and persuaded men not to join the Union Army (Epstein & Walker 2020, 291). It was even suspected that Milligan and his fellow Copperheads intended to raid midwestern prisoner-of-war camps holding Confederate soldiers to release them so that they could take control of Illinois, Indiana, and Ohio. As such, federal authorities followed Milligan closely and kept a record of his activities and contacts (Epstein and Walker 2020, 291).

Preceding Milligan's day in Court was *Ex Parte Merryman*, a case involving the habeas corpus petition of John Merryman, a Maryland native arrested and detained upon suspicion that he was engaging in secessionist action against Union troop movement. Merryman successfully sought a writ of habeas corpus from Chief Justice Roger Taney, who heard the case while riding as a circuit judge. Taney ruled in favor of Merryman's release upon the grounds that Congress alone can suspend habeas protections. However, despite Taney's ruling, Lincoln proceeded with business as usual, continuing with the suspension of habeas and the detention of civilians suspected of rebellious activity (Matheson 2009, 41). It should be noted that Taney was a known southern sympathizer who despised northern attacks on slavery and provided Merryman with comforting measures such as homecooked meals while he was detained. Additionally, Taney gave his opinion in *Merryman* without hearing arguments from the government, an irregular action outside the typical norms of judicial behavior (Matheson 2009, 41). For those reasons, and his view regarding his contextual constitutional power, President Lincoln did not comply with Taney's ruling.

Although it's important to mention *Merryman* for context, it provided little in the way of precedential value. It was Milligan's habeas petition that established judicially salient precedent in 1866 (over a year after hostilities ceased and Lincoln's assassination), wherein the Court ruled that he was entitled to a reversal of his conviction. Milligan's legal saga began on October 5th, 1864, where he was arrested at his home under orders from General Alvin Hovey, Commander of the Union Army in Indiana. Milligan was placed on trial sixteen days later before a military tribunal, where he was found guilty and sentenced to be hanged on May 19th, 1865 (Epstein and Walker 2020, 292).

At his trial by military commission, Milligan received five formal charges as handed down by Major Burnett, Judge Advocate of the Northwestern Military Department. They included “Conspiracy against the Government of the United States'’, “Affording aid and comfort to rebels against the authority of the United States”, “Inciting insurrection”, “Disloyal practices”, and “Violation of the laws of war” (*Ex Parte Milligan* 1866). The Northwestern Military Department of the United States brought these charges upon evidence that Milligan was a member of the Order of American Knights (also known as the Sons of Liberty) and had engaged in seditious activity through the organization. After Lincoln’s assasination and the end of hostilities, President Andrew Johnson nevertheless sustained Milligan’s hanging sentence, ordering that it should “be carried into execution without delay” (*Ex Parte Milligan* 1866).

Milligan’s attorneys responded by filing for a writ of habeas corpus to challenge the circumstances and procedures surrounding his detention, trial, and sentencing. Milligan’s case was heard in federal circuit court, where judges unsure of the legality of military commissions appealed to the Supreme Court for answers (Epstein and Walker 2020, 292). The Supreme Court heard Milligan’s petition in March 1866 at a time of significant political tension. President Johnson (despite sustaining Milligan’s sentence) supported a moderate position towards reconstruction, whereas his Radical Republican opponents in Congress demanded that traitorous rebels and their states be dealt with more severely. Although a majority of the justices on the Court were personally opposed to the use of military tribunals to try civilians, the Court was concerned about its institutional legitimacy given its decision in *Dred Scott v. Sandford* (1857). Additionally, the Court feared congressional retaliation for a ruling it would find to be unacceptably against military authority. The Court was somewhat insulated from such a concern

due to President Johnson's opposition to military tribunals and the fact that the Radical Republicans didn't command a veto-proof majority in Congress (Epstein and Walker 2020, 292). With these considerations in mind, the Court announced its decision in *Milligan* on April 3rd, 1866.

Ex Parte Milligan

The constitutional importance of habeas protections and the severity of attempts at restricting them was framed at the outset of the majority of *Milligan*. Writing for the Court, Justice Davis stated (in regards to the writ of habeas corpus) "No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people, for it is the birthright of every American citizen when charged with crime to be tried and punished according to law…" (Epstein and Walker 2020, 293). He goes on to write that times of crisis, particularly those of "civil commotion" wherein the "restraints of law are weakened, if not disregarded", the safeguards protecting vital liberties must be cared for and defended vigorously by those "intrusted with the guardianship of the Constitution and the laws" (Epstein and Walker 2020, 293).

Davis goes on to write for the majority that the concept of martial law, where a military commander can subvert civil law with an order subject to only the review of his superior officer or the President, is repugnant to the ideal of republican government that was fought for in the Revolution (Epstein and Walker 2020, 293). He compares presidential authorization of such action akin to the powers exercised by the King of Great Britain, whose power to deploy the military as he saw fit was independent of the civil authority. Such a principle was one of the

primary offenses cited as reason for revolution, and to sanction such powers is to conveniently ignore the republican ideals upon which the country was founded (Epstein and Walker 2020, 293). Although Lincoln was a righteous man exercising power through the military to address a grand and existential crisis, Davis acknowledges one of the framers' greatest fears: that a man possessed with ambition and contempt for liberty would rise to the office of President of the United States. If such a despot became the chief executive, Davis warns that it is "frightful to contemplate" the dangers to human liberty that befall the American people if such a leader would be charged with the caretaking of the Constitution, especially in a time of war or crisis (Epstein and Walker 2020, 293).

However, despite Davis' strong warning about the perils of martial law, the majority refers to one textually included, extraordinary measure that the government can take in times of crisis: the suspension of the writ of habeas corpus. As evidenced by the framers' decision to include it in the Constitution, the ability to suspend the writ of habeas corpus is considered by the Court to be a wise and necessary measure to ensure the public's security in times of insurrection or rebellion (Epstein and Walker 2020, 294). However, the Court draws a distinction between the broad establishment of martial law and the suspension of habeas corpus, claiming the latter to be a temporary and necessary measure and the former only appropriate in an actual theater of military operations where the courts are closed and the local civil authority is disposed (Epstein and Walker 2020, 294).

So, to try Milligan under a military tribunal, in a location where hostile troops were not present, was an unconstitutional exercise of power. No actual invasion of Indiana had been present to prevent the open and operating civilian courts there from trying Milligan, and such

courts, composed of men trained in the profession of law, would have been far more capable of administering due justice than a military commission comprised of men untrained in the law (Epstein and Walker 2020, 294). It is only when a foreign invasion or civil war closes the courts, and active military operations are present in a location, that it is necessary to allow martial rule in place of civil authority there until the hostilities have run their course. It is vital to note that this ought to be a temporary state of affairs, and the civil authorities previously established there must return to government once the laws can be reinstituted. As Davis writes, "as necessity creates the rule, so it limits its duration, for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power (Epstein and Walker 2020, 294). Martial rule is confined to the locality of actual war, and was wholly defensible during the Civil War in a rebellious state such as Virginia where the courts and authority of the national government was driven out by war. However, to exercise it in a loyal state where no combatant operations were ongoing is indefensible, and the writ of habeas corpus should not be suspended there, nor should civilians be tried under military tribunals when civilian courts are open, accessible, and capable of administering justice (Epstein and Walker 2020, 294).

The majority opinion in *Milligan* served as a strong landmark defense of civil liberties, and the Court unanimously ruled that Milligan's military detention and trial was unlawful (Epstein and Walker, 2020 295). However, the Court was split regarding the mechanics of suspending habeas protections. The Court's majority in *Milligan* held that the writ of habeas corpus could be suspended by neither the president or congress (acting separately or in agreement) in a non-combat zone with operating civilian courts. On the other hand, a concurring opinion joined by a minority of four justices argued that congress is constitutionally granted to

suspend the writ of habeas corpus even in areas that has not been invaded by a hostile enemy or otherwise contested ground that is a theater of active military operations (Epstein and Walker 2020, 295).

Politically, the decision handed down by the Court in *Milligan* bucked the popular sentiments of the day. Multiple newspapers compared the decision to the ruling in *Dred Scott*, and critics argued that the Court was against northern efforts towards a serious reconstruction effort. Additionally, the Court was criticized for its 5-4 decision, which was critically characterized as a "political act" rather than a judicial decision. Before deciding *Milligan*, the Court was aware that ruling in line with its conscience would invite congressional scrutiny. Sure enough, Congress passed legislation limiting the Court's jurisdiction to hear cases regarding military law after *Milligan* (Fisher 2005, 59). Additionally, Congress gave indemnity to all officials who implemented presidential proclamations between March 4, 1861 and June 30, 1866 with regard to martial law and military trials (Fisher 2005, 59). In that act, Congress prevented any federal court of the United States from having jurisdiction over cases regarding wartime and postwar acts pursuant to presidential proclamations under martial law. Congress even included language in that act preventing courts from reversing proceedings or acts done under those presidential proclamations, signalling its strict opposition (mainly by Radical Republicans) to the Court's position on habeas protections (Fisher 2005, 59).

Nevertheless, the decision in *Milligan* appeared to end the practice of trying civilians under military tribunals in areas where the civil courts were operating. Additionally, according to statute and precedent, the Court's ruling in *Milligan* did not challenge the ability of the president to suspend the writ of habeas corpus, with Lincoln's expansion of executive crisis power beyond

what was textually committed emerging from the Civil War intact. The *Milligan* decision and its ramifications for presidential power would be next revisited in *Ex Parte Quirin*, a landmark 1942 case heard during World War II that centered around the detention, trial, and sentencing of Nazi saboteurs captured domestically.

Franklin Delano Roosevelt and Presidential Power

President Franklin Delano Roosevelt is often listed by presidential scholars and historians as being among the three "greatest" presidents of all time (with Washington and Lincoln cited as the others) (Yoo 2009, 257). These rankings are attributed to the consideration of those three men as "strong" leaders (Dickinson 1997, 1). Arguably no president has exercised executive power as vigorously as FDR did in his peacetime domestic capacity, but he is also remembered for the mark he left on what Justice Davis in *Milligan* called the gravest constitutional question asked of the Supreme Court: the right of the president to suspend the writ of habeas corpus, detain civilians (or "enemy combatants") via military order, and try wartime detainees via military tribunals. But more broadly, and as Lincoln before him, Roosevelt's approach to the crises he faced was shaped by context and his usage of the prerogative powers. The prerogative powers, also known as the emergency or inherent powers, refer to the president's responsibility as the "sole organ" in charge of foreign affairs and national security. Roosevelt had little doubt that he, assisted by his cabinet-level secretaries and high military brass, was endowed with great power to prosecute the war and pursue victory as he saw fit.

Much like Lincoln in the Civil War, President Roosevelt had little tolerance for subversive measures he thought or knew to be occurring in American society. Although

Roosevelt's claims of authority to suspend habeas corpus were not as broad as Lincoln's since the continental United States lacked a theater of war, he took action similar to Lincoln's in terms of detaining individuals who he feared were potentially or actually injurious to the American and Allied war effort. As with Lincoln, the courts and Congress deferred to Roosevelt's wartime actions to detain, create military tribunals, and conduct surveillance until the war ended (Yoo 2009, 310). Additionally, Congress' decision to delegate a great deal of authority to Roosevelt during the World War II era allowed him to exercise his presidential prerogative as he saw fit (Yoo 2009, 258). Roosevelt's actions as president and commander-in-chief would reshape the landscape of the presidency forever, ushering in a new age of presidential power and claims of authority. Unlike Lincoln before him, FDR had little doubt that his actions were either constitutional or justified by the great exigency he faced. This attitude would manifest itself in his successor Harry Truman and many presidents after him, most notably in George W. Bush (which will be discussed in detail throughout Chapter Three).

Operation Pastorius

The events surrounding *Ex Parte Quirin* have an elaborate backstory befitting the dramatic aura often associated with World War II. What led to the case that would be used as justification for the establishment of Guantanamo Bay's detention facilities and military tribunals was "Operation Pastorius", a top-secret German plan handed down from high command to disrupt productivity in American factories and destroy American infrastructure vital to the war effort.

Operation Pastorius officially began in June 1942, when eight Nazi saboteurs landed in two teams (four men a piece) on the beaches of Long Island, New York (at Amagansett) and Ponte Vedra, Florida (near Jacksonville). The men recruited for the operation had all lived in the United States for a period of time and spoke English. However, despite six of the eight having been members of the Nazi party, their allegiance to the Fatherland was questionable. The operation broke down as soon as group one landed at Amagansett, with the men doing very little to conceal their identities and ignoring the instructions they were given. George Dasch, the leader of the group that landed in New York, turned himself in to the FBI (who originally didn't believe that he was who he claimed to be). Dasch helped the FBI round up the other men participating in the operation and all eight were taken into custody (Fisher 2005, 94).

Civil Trial or Military Tribunal?

Originally, the FBI had planned to try the captured saboteurs in civil court. They promised Dasch a presidential pardon for his cooperation, and it was popularly believed that he would have access to counsel and would be spared from the death penalty for his status as an informer. Dasch was prepared to accept that deal until he realized that the FBI was being championed in the press for exceptional investigative skills (when, in reality, the saboteurs were found because Dasch had provided their locations and identities). Once Dasch rescinded his deal to appear in civil court and plead guilty, the government abandoned their pursuit of a civil trial (Fisher 2005, 95). After receiving heaps of praise, it would have been a political disaster injurious to the war effort if the American public discovered that the FBI had only captured the saboteurs because they were turned in. Additionally, the administration wanted to conceal the

fact that German U-boats were able to reach American shores undetected (Fisher 2005, 95). If word got out that German was able to successfully dispatch saboteurs onto the American mainland, the government feared both a public panic and future attempts by Germany or other hostile nations (Fisher 2005, 95).

Besides avoiding a civil trial for political calculations, Roosevelt and his administration quickly reasoned that a civil trial was an unacceptable option for trying the saboteurs. Unlike a military tribunal, where proceedings can move secretly, swiftly, and under rules that favor the prosecution, a civil trial requires certain standards of evidence and rights for the accused that would frustrate the government's attempt to administer the justice they believed worthy of eight Nazi saboteurs. Even worse for the government, the statute on sabotage carried a maximum penalty of thirty years imprisonment, a charge that Attorney General Francis Biddle doubted could be proven in civil court due to the fact that no sabotage had actually occurred. Furthermore, even if federal prosecutors tacked on the charges of conspiracy and illegal immigration to its case against the saboteurs, the maximum sentence would only increase by three years and a fine of $10,000 (Fisher 2005, 95). Oscar Cox of the Solicitor General's office knew that the Judge Advocate General of the Army, Major General Myron C. Cramer, estimated that a trial in civil court would bring only two years of imprisonment against the saboteurs (Fisher 2005, 96).

For those reasons, both the government and military authorities doubted that a civil court could impose the death sentence that they thought the saboteurs deserved. President Roosevelt saw the death penalty as "almost obligatory" for the saboteurs, and he advised the Attorney General to "avoid splitting hairs" over procedural rules and precedent (Fisher 2005, 96). To

surprise of Secretary of War Henry Stimson and others, Attorney General Biddle displayed a ready willingness to try the saboteurs by military tribunal as opposed to civilian court (where it was imagined Biddle and other Department of Justice lawyers, rather than military officers, would lead the prosecution) (Fisher 2005, 96).

Once it had been decided by interagency consensus (which was surely influenced by the White House) that the saboteurs would be prosecuted by the military, Oscar Cox advised Biddle that they could proceed via either a courts-martial or a military tribunal. Although two of the saboteurs were naturalized U.S. citizens, Cox concluded that enemy aliens (a definition, which under the circumstances present, could apparently include U.S. citizens) were not precluded by the decision in *Milligan* from being tried in military court when they had been captured out of unifor with the intent of causing sabotage (Fisher 2005, 97). According to that logic, Lamdin Milligan was entitled to habeas protections in civil court because he was a civilian captured in an area under civil authority who was engaged in neither combat or subversive activities on behalf of a state actor. That sentiment would later guide the Bush Administration in their decision to establish detention facilities at Guantanamo Bay and subsequent military tribunals there. As for a courts-martial, Cox advised that the trial proceedings would be consistent with the statutory conditions laid out by the Articles of War, an 1806 act of Congress (revised in 1921) that governed the conduct of American army and naval forces in wartime that, among other things, laid out the legally binding procedures for military court-martials. The second option that Cox presented for military trial was a military commission. Although he stated that military commissions typically mirror the proceedings that take place in a court-martial, President

Roosevelt ordered the creation of a highly irregular commission that significantly departed from the typical practices of military justice (Fisher 2005, 97).

Creating the Commission

Before creating the military commission that would try the saboteurs, Attorney General Biddle advised Roosevelt that he should issue a presidential proclamation (which carries the weight of an executive order) denying the eight saboteurs any access to civil courts (Fisher 2005, 98). This was a preemptive action meant to block any petitions for the writ of habeas corpus that the saboteurs could make, and Proclamation 2561 was issued by Roosevelt on July 2, 1942. Although Biddle didn't believe such a proclamation to suspend the writ of habeas corpus, he nevertheless counseled Roosevelt that his proclamation should have the same effect (Fisher 2005, 98). Titled "Denying Certain Enemies Access to the Courts of the United States", the proclamation stated that "the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage, or other hostile or warlike acts, should be promptly tried in accordance with the law of war." The proclamation goes on to state that "all persons who are subjects, citizens, or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any possession or territory thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals."

Through that sweeping proclamation Roosevelt was able to unilaterally establish military jurisdiction to try any individual captured on U.S. territory suspected of committing or having conspired to commit warlike acts on behalf of a hostile foreign nation. Additionally, after establishing the military's jurisdiction to hear the case, the proclamation goes on to state "such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe." As Biddle suggested, that clause effectively served to eliminate a detainee's ability to challenge his detention and gain access to the civil court system while avoiding the political thicket surrounding a suspension of habeas.

Additionally, in referencing the "law of war", rather than the "Articles of War", Roosevelt was able to skirt around the statutorily established procedures for a military court-martial. Unlike the Articles of War, the "law of war" refers to a moving target of international customs and statutes. Thus, invoking the law of war meant that Biddle and Roosevelt were able to establish a military commission utilizing principles and procedures of their own choosing, rather than Congress' (Fisher 2005, 99).

Roosevelt didn't claim inherent or prerogative powers to accomplish what he laid out in Proclamation 2561. Instead, he relied upon constitutionally-granted authority through the Commander in Chief clause, stating that the orders given in the proclamation were pursuant to his role as President of the United States and Commander in Chief (Fisher 2005, 99). For a challenge to exist to such an assertion in the midst of World War II was unthinkable, and

Roosevelt claimed both his formal powers and statutory authority for what was essentially a suspension of the writ of habeas corpus. Roosevelt felt very strongly about denying habeas protections to the saboteurs, telling Biddle that “I won’t hand them over to any United States marshal armed with a writ of habeas corpus.” (Fisher 2005, 99). Roosevelt was determined to achieve capital punishments for the eight saboteurs, a position held by the key figures in his administration and one they believed to be in the best interests of national security.

After issuing Proclamation 2561, Roosevelt issued another proclamation that officially established the military tribunal. He appointed the members of the commission, prosecutors, and the defense counsel. Acting under Article of War 38, Major General Frank R. McCoy was appointed to serve as president of the tribunal. Three major generals and three brigadier generals rounded out the court, and two colonels, Cassius M. Dowell and Kenneth Royall, were chosen to serve as the defense. Dowell and Royall would defend seven of the saboteurs, while Colonel Carl L. Ristine was appointed to represent George Dasch. Roosevelt directed the tribunal to meet on July 8 “or as soon as thereafter as is practicable" and largely freed the tribunal from any meaningful constraints. He established that the tribunal would have the power to make rules for the proceedings “consistent with the powers of military commissions under the Articles of War”, which furthermore liberated the commission from following the standards of a court-martial. He provided that the standard of evidence shall be what would have, in the opinion of the President of the Commission, “probative value to a reasonable man.” In order to find a man guilty and sentence him to death, only two-thirds of the men present on the commission must vote their concurrence (as opposed to the unanimous vote necessary under a court-martial). Finally, Roosevelt ordered that the record of the trial be directly transmitted to him and vested himself

with “final reviewing authority” over the commission’s findings (Fisher 2005, 100). In doing this, President Roosevelt made himself directly responsbile for deciding whether the eight Nazi Saboteurs would live or die.

Ex Parte Quirin

Emerging out of the trial by military commission is *Ex Parte Quirin*, the landmark case that would cement the fate of eight Nazi saboteurs and justify that of the men detained at Guantanamo Bay nearly 70 years later. Prior to the trial, Royall and Dowell wrote to Roosevelt doubting the constitutionality of his establishment of the tribunal and the order it was established pursuant to. Further complicating the peculiar civil-military trial arrangement was that Royall and Dowell, as military officers, were directly questioning the judgement and legality or an order issued by their Commander in Chief (Fisher 2005, 106). Royall had tried to secure civilian counsel to petition for a writ of habeas corpus on behalf of his seven clients, but after an unsuccessful search he announced his intention to file a petition for a writ at the federal district court for the District of Columbia. However, what happened next was especially peculiar. Royall embarked on a journey to seek out justices of the Supreme Court directly, first being turned down by Justice Black but then getting Justice Roberts to agree (with Dowell, Biddle, and Cramer present) that the Supreme Court should review the matter. Roberts phoned Chief Justice Stone, who agreed to schedule oral arguments for July 29 before nothing had even been filed in a lower federal court (Fisher 2005, 107).

On July 28, Royall took a petition for a writ of habeas corpus to the D.C. district court but was denied his petition by Judge James W. Morris. Judge Morris issued a ruling upholding

Roosevelt's order, stating that the defendants Royall petitioned on behalf of were ineligible for a writ of habeas corpus due to their status as "subjects, citizens, or residents of a nation at war with the United States. Therefore, under Roosevelt's proclamation, they were deemed to be "not privileged to seek any remedy or maintain any proceedings in the courts of the United States." Additionally, Judge Morris held that *Ex Parte Milligan* did not hold in the case of the saboteurs because of their status as foreign belligerents and conspirants to sabotage (Fisher 2005, 107).

Nevertheless, oral arguments were still scheduled for the next day and Royall appeared at the Supreme Court on behalf of his seven defendants. Oral arguments remarkably took nine hours so that the Court could get up to speed on the facts of the case and that the arguments of both the prosecution and the defense could be fully presented (Fisher 2005, 107). The first legal hurdle Royall faced before he could even challenge the trial of the seven saboteurs was justifying the justiciability of the case without an official action by an appellate court (since the case had only been ruled upon in district court, skipping a key rung of the federal appeals ladder). Royall and Dowell asked the Court to hear the case before judgement is given in the D.C. Circuit court, which the Supreme Court sustained due to the urgency of the matter.

The main legal question at issue was whether Roosevelt was within his legal authority to try by military commission individuals accused of offenses committed in an area to be "cognizable in the district or other appropriate courts of the United States at a time when such courts of the United States are open and functioning regularly." In posing that question, Royal and Dowell saw framing the case (known as *Ex Parte Quirin*, so named after Richard Quirin, one of the saboteurs being represented) in the terms of *Ex Parte Milligan* as their best chance for a successful petition. To make this argument, Royall and Dowell insisted that the saboteurs had not

been in a zone of military operations, nor had they committed an act that could be deemed to be of a military nature (Fisher 2005, 108). Furthermore, they asserted that Roosevelt had violated the Constitution by issuing an order with the weight of law "ex post facto", or after the alleged crime had been committed. Since Roosevelt had issued his order while the saboteurs were already in custody, he had illegally increased the penalties for a crime in a fashion repugnant to the Constitution. To that point, Royall and Dowell argued that since it is Congress who is prohibited from passing such a law, why should the president be able to take identical action? Royall and Dowell also argued that Congress had passed laws specifying espionage and sabotage as triable by civil courts, thus making the trial for such crimes by military tribunal illegal in this context (Fisher 2005, 109).

As for the prosecution team of Biddle and Cramer, they insisted that the defendants had no right to access the courts of the United States due to their status of enemies of it. Biddle and Cramer also argued that not only do foreign invaders lack access to the courts of the United States but that the writ of habeas corpus was never intended to apply to such individuals. Additionally, they argued that the Supreme Court had no right to interfere with the trial of captured saboteurs under the separation of powers, for it is the president who acts in the national security interest of the United States. It was argued that that power is absolute, and Biddle stated that President Roosevelt's proclamations were pursuant to acting in the traditional and essential presidential capacity of repelling sudden and dangerous attacks (Fisher 2005, 110).

On July 30, the day after oral arguments ended, the Court upheld the jurisdiction of the military tribunal in a short per curiam ruling. Upon returning to the tribunal, Royall warned the commission that American troops were far more likely to face a foreign tribunal than foreign

enemies were to face another one in the United States. He urged the members of the tribunal to keep this in mind for both the future dignified treatment of American troops and the preservation of American values ("everything we're fighting for", Royall claimed) (Fisher 2005, 114). Nevertheless, and predictably so, the military tribunal ruled on August 1 that all eight men were guilty and sentenced them to death. Acting in his capacity of final review, Roosevelt commuted the sentences of Dasch and Burger to prison sentences but approved the death sentences of the remaining six saboteurs. It was now time for the Supreme Court to draft its full opinion after six of the saboteurs had been executed, placing the Court in an uncomfortable position it was scarcely accustomed to. Chief Justice Stone lamented this in writing to Justice Frankfurter, saying it "seems almost brutal to announce this ground of decision for the first time after six of the petitioners have been executed and it is too late for them to raise the question if in fact the articles as they construe them have been violated" (in reference to the Articles of War) (Fisher 2005, 114).

Stone, like the justices on the Court during *Milligan*, recognized the pitfalls of legitimacy and politics that surrounded the Court's decision in *Quirin*. Stone had struck a section of the per curiam decision that it had not considered Articles of War 46 and 50 ½, two articles upon which the defense had pinned the arguments. He knew, for example, that discussion of those articles could not be included in the full decision and determine that they provided grounds for a writ of habeas corpus now that six men were already dead (Fisher 2005, 115). As such, Stone ensured that the final decision was carefully crafted unanimously so as to avoid harming the reputation of the Court.

In the full opinion, the Court made a concerted effort to avoid issuing a ruling that resembled an "advisory opinion", or a ruling that gives advice as to the legality of an act of government. Instead, the Court asserted that the secrecy surrounding the military tribunal prevented it from making a full determination upon its legality. The Court refrained from deciding upon whether or not the petitioners were guilty, as such a point was both moot and outside of the purview of the Court. In a broad sense, the Court determined that President Roosevelt had acted pursuant to his constitutional authority based on his role as Commander in Chief. More narrowly, the Court also ruled in Roosevelt's favor on a statutory basis, saying that his grounding of the trial in accordance with the Articles of War (passed by Congress) that allow the president to try by military tribunal offenses outside the purview of court-martials. While recognizing broadly the powers of the president and Congress, the Court refrained from ruling upon the legality of presidential action under the inherent or prerogative powers, saying such an inquiry was unnecessary for the decision at hand (Fisher 2005, 117).

The most lasting and significant legacy of *Ex Parte Quirin* was the term it used to define the saboteurs. To do so, the Court distinguished between "lawful" and "unlawful" combatants. Lawful combatants were characterized as uniformed military personnel in the traditional sense, who when captured shall be held and tried as prisoners of war. However, unlawful combatants, who disguise themselves as civilians and are not readily identifiable as acting on behalf of a nation-state, shall be tried under a military tribunal. Furthermore, an individual's status as a U.S. citizen does not preclude him from being treated as an enemy belligerent when he presents himself as one, and he too may be tried under a military tribunal. Finally, the Court ruled that the status of the defendants in *Quirin* was indeed distinct from that of Milligan's. The Court

reaffirmed Milligan as a non-belligerent political actor as U.S. citizen residing in the non-rebellious state of Indiana for twenty years. Although the Court declined to go into detail regarding who military tribunals may and may not try, it determined that the defendants in *Quirin* were plainly within the boundaries of being considered enemy belligerents (Fisher 2005, 118).

Impact of *Quirin*

The ruling in *Ex Parte Quirin* was the primary justification for the detention and trial by military tribunal of prisoners at Guantanamo Bay. The Bush Administration leaned heavily upon the definition of "unlawful" or "enemy" combatant, considering the men they captured and detained at Guantanamo to fit plainly within that definition. As with the events surrounding *Milligan* and *Quirin*, the post-9/11 era of American life created a political and legal landscape that allowed for broad exercises of executive power and threats to civil liberties. In the next chapter, the modern case law defining habeas protections will be explored, with cases such as *Hamdan v. Rumsfeld*, *Rasul v. Bush, Boumedienne v. Bush*, and *Hamdi v. Rumsfeld* setting the stage for an analysis of 21st Century habeas protections and Obama's efforts to close Guantanamo Bay.

Chapter Three
Bush-era Case Law and Executive Power

After the tragic terrorist attacks of September 11, 2001, President Bush quickly moved to place the United States on a war footing. It became clear to the president and his administration that a network of individuals was responsible for planning and executing the attacks, and that bringing them to justice would require a coordinated effort between the military, intelligence, and justice apparatuses of the government. However, upon capturing and detaining individuals found to be responsible for the attacks, it needed to be determined how they would be tried.

Following the precedent of *Quirin*, President Bush made the decision to try individuals (specifically non-U.S. citizens) suspected to be or have been members of al Qaeda, having engaged in, aided, abetted, or conspired to commit terrorism, or having harbored terrorists, by military tribunal (Fisher 2005, 169). As consistent with Roosevelt's order, only a two-thirds of a military tribunal would have to vote to convict and sentence a suspect, and the standard of evidence remained that which has "probative value to a reasonable person" (Fisher 2005, 168).

Departing from the Quirin precedent, however, was the scope of the tribunals that Bush sought to establish. Roosevelt's order regarding tribunals was narrowly applied to a particular group of individuals who had already been captured. On the contrary, Bush's order was constructed with language referencing the future, meant to prosecute crimes that had been both committed and not yet committed (Fisher 2005, 169). Another distinguishing characteristic of Bush's order was its attention to language regarding citizenship. Unlike Roosevelt's order, which considered U.S. citizens as giving up their citizenship if acting as hostile foreign belligerents towards the U.S., Bush's order seemed to defer to *Milligan* precedent in excluding U.S. citizens from tribunals (Fisher 2005, 169).

The crux of Bush's post-9/11 strategy for dealing with captured "enemy combatants" was his administration's detention of individuals deemed worthy of that moniker. Bush's approach towards detainees, with significant influence from the office of the vice president, was to embody the prerogative powers as exercised by Lincoln and Roosevelt. Like his influential predecessors (and with help from the Office of Legal Counsel), Bush and those within his national security decision-making circle determined that the president ought to have broad authority to detain individuals deemed to have engaged or conspired to have engaged in terroristic activity towards the United States (Matheson 2009, 87). Pursuant to this, Bush's actions in the post-9/11 era represent a significant expression of executive unilateralism, and the according reactions of Congress and the Supreme Court to that expression serve to valuably identify the political and legal environment President Obama was called upon to navigate in his efforts to close Guantanamo Bay.

The Bybee Memo and the Unitary Executive Theory

The Bush Administration is noted for its particularly extreme and aggressive assertions of the unitary executive theory, with such manifestations of that theory laying the groundwork for the four cases outlined in this chapter. Specifically, the Bush Administration flaunted both U.S. and international law in the infamous "Torture Memo" (or "Bybee" Memo, named for Jay Bybee, the Assistant Attorney General and its author), wherein the Office of Legal Counsel (at the direction of then-Attorney General Alberto Gonzales) provided legal justifications for the use of detainees captured in the War on Terror (Genovese 2011, 140).

The Bush Administration determined that "cruel, inhuman, or degrading" practices that caused physical and/or mental distress were not to be considered torture because those employed by the United States were not determined to rise to the "requisite intensity" to be prohibited (Genovese 2011, 141). Such a stance is grounded in the fact that Section 2340A of U.S.C. 18, which prohibits the practice of torture (which is defined as acts that cause "severe physical or mental pain and suffering"), does not define the term "severe" (Genovese 2011, 141). However, the acts that the United States would engage in towards Guantanamo and other detainees (such as waterboarding, sleep deprivation, and stress positions) are clearly accepted under international law as acts causing "severe" distress.

The memo goes on to state that "even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign" (Genovese 2011, 142). Furthermore, the memo argued that even if Congress had constructed Section 2340A with full intent to specifically restrict the president's ability to interrogate enemy combatants, the Bush Administration would be absolved from heeding such a directive as it would be unconstitutional interference with the president's constitutional authority to conduct a military campaign (Genovese 2011, 143). Bybee even invokes Hamilton, claiming that the federal government was established "clothed with all the powers requisite to the complete execution of its trust". Citing national security as the president's ultimate prerogative, Bybee asserted that there was virtually no circumstance wherein the president could overstep the bounds of law in the name of keeping the American people safe (Genovese 2011, 143).

Such reasoning is evidence of the Bush Administration's extreme exercise of the unitary executive theory, which purports that the president is simply above the law when taking action he deems vital to the interests of the United States (regardless of violations of U.S. or international law). These assertions are both extraordinary and unprecedented, and the cases to follow are a repudiation of an unfettered unitary executive approach.

***Rasul v. Bush*: Facts and Oral Arguments**

Four landmark Supreme Court cases represent the Court's 21st-Century jurisprudence regarding detainees and military tribunals: *Rasul v. Bush and Hamdi v. Rumsfeld* (decided on the same day in 2004), *Hamdan v. Rumsfeld* (2006), and *Boumediene v. Bush* (2008). This chapter will describe these cases and their ramifications in detail, beginning with *Rasul* and proceeding chronologically.

Rasul v. Bush, along with *Hamdi v. Rumsfeld*, were the Supreme Court's first efforts to answer questions regarding detention and military trials since *Quirin*. The question at hand in *Rasul* was this: do the "United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." (Ball 2007, 92). *Rasul* was consolidated with *Al Odah v. United States*, a case regarding another habeas petition from a Guantanamo detainee. Both Rasul and Odah, along with their co-petitioners, were captured in Afghanistan during U.S. operations there in the post-9/11 invasion. The men seeking habeas relief were of British, Australian, and Kuwaiti descent, and were accused by the U.S. of fighting for the

Taliban (Ball 2007, 90). The petitioners claimed innocence and filed for release based upon the nature of their capture and detention.

Upon appeal from the U.S. Court of Appeals for the District of Columbia Circuit, the Supreme Court was presented with three questions in *Rasul* to answer, the second and third of which have answers holding the most value in terms of precedential impact: Did the lower courts err "in holding categorically that the Constitution gives 'no constitutional rights under the due process clause or otherwise,' to foreign nationals", and did "the Due Process clause of the Fifth Amendment permit the United States to detain foreign nationals indefinitely, in solitary confinement, without charges and without recourse to any legal process, so long as they are held outside the 'ultimate sovereignty' of the United States" (Ball 2007, 92).

On the other hand, the Bush administration argued in its briefs that the federal judiciary ought to stay out of wartime matters reserved to the political branches, specifying that federal judges "must avoid judicial interference with military affairs." (Ball 2007, 92). The administration stressed the importance of its prosecution of a successful war, asserting that allowing "unlawful" enemy combatants access to the federal courts would "directly, and perhaps gravely, [interfere] with the executive's conduct of the war and divert attention of the military from on-going hostilities abroad to courtrooms at home (Ball 2007, 92). The Bush administration further stated, and significantly so, that the rights of aliens detained abroad are determined by the executive and the military, not the courts. Furthermore, the administration argued that the petitioners lacked standing to sue in the forum they sought and that the federal courts lacked jurisdiction over their cases (Ball 2007, 92). This argument was made pursuant to the fact that

the detainees in question were foreign aliens held outside the United States, which the administration argued to preclude them from the constitutional right of due process.

In granting certiorari to the detainees, the Supreme Court decided to only take up the second question they presented: "Whether the United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." (Ball 2007, 92). Mr. John Gibbons (the retired former chief judge of the U.S. Court of Appeals for the Third Circuit) argued on behalf of Rasul et al., and in his opening statement alluded to the expansive view of executive power that the Bush administration held and was arguing in court. Gibbons statement is as follows:

"What is at stake in this case is the authority of the federal courts to uphold the rule of law. Respondents assert that their actions are absolutely immune from judicial examination whenever they elect to detain foreign nationals outside of our borders. Under this theory, neither the length of the detention, the conditions of their confinement, nor the fact that they have been wrongfully detained makes the slightest difference. Respondents would create a lawless enclave insulating the executive branch from any judicial scrutiny now or in the future" (Margulies 2006, 151).

Whereas Gibbons argued on behalf of Rasul et al. that the Bush administration had wielded its prerogative power to create an environment in which the executive had complete ability to capture and detain who it wished, Solicitor General Theodore Olson argued that such actions were realities of wartime. The justices present on the bench found immediate disfavor with that principle, with Justice Stevens (who authored the opinion in *Rasul*) rebuking him,

saying that a state of war was irrelevant when dealing with the detention of foreign aliens of unclear legal status (Margulies 2006, 152). Justice Breyer also responded to Olson, stating that his position had a "virtue of clarity" if followed. However, he argued that doing so would strike at the very idea of the American constitution, creating conditions where the executive would be provided the ability to act unchecked in a context where the United States "has the power to do everything" (Margulies 2006, 152).

***Rasul v. Bush*: The Opinion of Justice Stevens**

In the first few pages of his opinion for the Court in *Rasul*, Justice Stevens invokes the words of Justice Robert H. Jackson regarding the writ of habeas corpus. As Jackson first wrote and Stevens repeats, the writ of habeas corpus was textually committed in Article I of the Constitution, and not Article II, for an intentional and ancient reason. Going back to America's English legal roots, the writ of habeas corpus has been intended and designed to protect individuals from lawless executive detention. It is not detention by a legislative body that the framers were concerned about but detention by a single political actor, who under a myriad of influences and through unchecked power could unilaterally detain persons who would otherwise be free (*Rasul v. Bush* 2004, 6).

Furthermore, Stevens and the Court's majority regard the Bush administration's assertion that federal courts have no role to play in evaluating habeas claims during times of war as inconsistent with salient historical precedent. Stevens points to both *Ex Parte Milligan* and *Ex Parte Quirin* as cases where the federal courts (particularly the Supreme Court) took up review of habeas petitions by individuals the government deemed worthy of executive detention and

even capital punishment (*Rasul v. Bush* 2004, 6). According to logic it seems to follow that if the Court was willing to hear arguments on behalf of Milligan and Quirin et al., it ought also be willing to entertain the petition of Rasul et al. Stevens frames the question at hand in *Rasul* as "whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty" (*Rasul v. Bush* 2004, 6). Therefore, what distinguishes the facts of *Rasul* from those in *Milligan* and *Quirin* is the unclear legal status of the Guantanamo Bay Naval Base as an area where the United States exercises "ultimate sovereignty" (a condition the Bush administration attempted to exploit to justify indefinite detentions without access to counsel).

The precedent cited by the Bush administration for its policy on detainees was *Johnson v. Eisentrager*, wherein the decision of a federal district court to deny 21 Germans captured by U.S. forces in China a writ of habeas corpus was upheld. Those 21 Germans were convicted of war crimes by a U.S. military commission in Nanking and were held at a U.S. Army prison in occupied Germany. Even having been uniformed soldiers engaged in certain hostilities and convicted of war crimes, a U.S. Court of Appeals granted the 21 German prisoners a writ of habeas corpus on the grounds that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ." *Eisentrager v. Forrestal,* (*Rasul v. Bush* 2004, 6). Nevertheless, the Supreme Court denied the habeas relief granted the Germans by the appeals court, setting a precedent that would last until *Rasul*.

Stevens wrote that the facts of *Rasul* were distinct from those in *Eisentrager* because the petitioners in *Rasul* were not nationals of countries at war with the United States (the United Kingdom, Australia, and Kuwait), nor had they been found to have engaged or conspired to engage in hostile acts against the United States. Also, unlike the petitioners in *Eisentrager*, those in *Rasul* had not been afforded access to any tribunal or charged with any wrongdoing. The Court also asserts that, regardless of the claims of the Bush administration, the United States indeed exercises complete control over the territory which houses the Guantanamo Bay detention facility (*Rasul v. Bush* 2004, 8).

Therefore, one could seemingly argue that the petitioners in *Rasul* had an even more significant claim to habeas protection than those in *Eisentrager* did. Additionally, from a purely jurisdictional standpoint, it is important to note that a petition for a writ of habeas corpus acts upon the respondent, rather than the prisoner (*Rasul v. Bush* 2004, 6). Therefore, the lack of physical presence by a petitioner in the area where a petition is filed (for example, the petitioners in *Rasul* being physically located in Cuba rather than Washington, D.C.) does not preclude the submission of a successful petition due to the procedural mechanics obliging a response from the person accused of the wrongful detention. Following that logic, the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit have jurisdiction over habeas petitions arising out of Guantanamo, thus dismissing the Bush administration's assertion that federal courts lack the jurisdiction to hear such cases. Furthermore and notably, Stevens writes that since no statutory distinction exists between citizens and non-citizens in habeas laws, "aliens held at the base, no less than American citizens, are entitled

to invoke the federal courts' authority" (*Rasul v. Bush* 2004, 13). This, Stevens argues, "is consistent with the historical reach of the writ of habeas corpus" (*Rasul v. Bush* 2004, 6).

Finally, Stevens concludes by reaffirming that regardless of citizenship or location of detention, the prisoners at Guantanamo Bay who express innocence of wrongdoing have a right to a writ of habeas corpus to challenge their now unlawful executive detention in federal court. The decision in *Rasul* was celebrated as a victory for civil liberties and human rights, and it triggered both a military and congressional response.

Response to *Rasul*

Nine days after *Rasul* was decided, the military established Combatant Status Review Tribunals (CSRTs) to review the "enemy combatant" status of the Guantanamo detainees. Although the CSRTs were created to allegedly identify innocent prisoners, the military was still using the same evidence which had landed the detainees there in the first place. Furthermore, the detainees still lacked access to counsel and knowledge of the evidence used against them, and the CRSTs were criticized for influences of bias against detainees and the use of incomplete intelligence in evidence (Matheson 2009, 131).

As for Congress, it responded to the decision in *Rasul* by adopting the Detainee Treatment Act of 2005 (DTA). The DTA eliminated habeas corpus review for Guantanamo detainees, stripping the federal courts of jurisdiction over petitions like the one that brought the decision in *Rasul*. In full, the DTA read that no "court, justice, or judge… shall hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba. Furthermore, the DTA stated that the U.S.

Court of Appeals for the District of Columbia shall have exclusive jurisdiction over the findings of CRST determinations, but only to review whether the CRST had complied with the "Standards and procedures specified by the Secretary of Defense" and the legality of those standards and procedures (Matheson 2009, 131).

On the same day *Rasul* was decided, the Court also issued an opinion on *Hamdi v. Rumsfeld*. While *Rasul* recognized the right of Guantanamo detainees to petition for writs of habeas corpus regardless of citizenship, the decision in *Hamdi* established that U.S. citizens detained at Guantanamo are guaranteed the right to due process and the ability to challenge their status as an enemy combatant. However, *Hamdi* also served to recognize the power of the government to detain prisoners at Guantanamo, setting up political and legal battles to come.

***Hamdi v. Rumsfeld*: Case Facts**

As with *Rasul*, *Hamdi* arose out of a habeas petition filed by a detainee captured in Afghanistan. He had been captured by the Northern Alliance, who were a coalition of military groups opposed to the Taliban, and handed over to the United States military (*Hamdi v. Rumsfeld* 2004, 2). However, unlike the petitioners in *Rasul*, *Hamdi* was a U.S. citizen and held within the continental United States. Specifically, Hamdi was first detained and interrogated in Afghanistan and then held at Guantanamo Bay. However, upon discovery that he was a U.S. citizen, he was transferred to Norfolk, Virginia and then Charleston, South Carolina. The government declared him to be an "enemy combatant", and contended that such status permitted his indefinite detention without charges or proceedings. In *Quirin*, it was determined that the U.S. nationality of an enemy combatant was irrelevant if he had committed acts of war against the United States.

However, it was unclear whether Yaser Esam Hamdi had actually taken up arms against the United States or had received training from the Taliban. Hamdi claimed innocence of having been a member of the Taliban, instead citing his reason for being in Afghanistan to be relief work. Furthermore, Hamdi's father claimed that his son had only been in the country for two months and could not have had time to receive Taliban training (*Hamdi v. Rumsfeld* 2004, 3).

Hamdi's case arrived at the court through a habeas petition filed by his father in the federal court for the Eastern District of Virginia. Acting as a "next friend" of his detained son, the elder Hamdi stated that his son had been held at Guantanamo incommunicado with no access to counsel or notification of the charges against him. Hamdi argued that this was a clear violation of his son's rights as a U.S. citizen, wherein he is entitled to enjoy "the full protections of the Constitution" (*Hamdi v. Rumsfeld* 2004, 3). As for the constitutional rights of Hamdi's that the government violated, his father cites the Fifth and Fourteenth Amendments as endowing his son with the protections owed him. Specifically, violations of these rights include detention by the United States in sovereign territory without charges, denial of access to an impartial tribunal, and lack of access to counsel. Consequently, Hamdi's habeas petition asks the federal court for the Eastern District of Virginia to appoint Hamdi counsel, order the cessation of his interrogations, declare his detention to be violative of the 5th and 14th Amendments, schedule an evidentiary hearing if the government disputes the allegations of the petition, and release Hamdi from custody (*Hamdi v. Rumsfeld* 2004, 3).

The district court began the habeas process for Hamdi by appointing counsel for him and ordering that he have access to it. That ruling was reversed by the U.S. Court of Appeals for the Fourth Circuit, who ruled that the district court had failed to provide "appropriate deference" to

the government's security and intelligence interests (*Hamdi v. Rumsfeld* 2004, 4). The circuit court then directed the district court to remand its proceedings through a deferential inquiry into Hamdi's status, stating that "if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one" (*Hamdi v. Rumsfeld* 2004, 4).

The government provided a single document to the lower courts lending support to its declaration of Hamdi as an enemy combatant. That document asserted that Hamdi was captured on the battlefield, surrendered his weapon, and confirmed through an interview that he was a member of the Taliban forces. Although the circuit court found this document as sufficient reason for denying Hamdi's petition, the district court found upon remand that it was vague, based on hearsay, and "fell far short" of the standard necessary to maintain Hamdi's detention (*Hamdi v. Rumsfeld* 2004, 5). The district court then filed for *in camera* review of the materials pertaining to Hamdi's detention, which would include detailed notes from interviews and statements from both U.S. and Northern Alliance military leaders regarding the context and Hamdi's capture and detention (*Hamdi v. Rumsfeld* 2004, 6).

The circuit court denied this action, ruling in deference that the government's reasons for detaining Hamdi, "if accurate", were reasonable and sufficient. The circuit court ruled that the Bush administration had constitutionally detained Hamdi pursuant to the president's war powers, and that the interests expressed in doing so were consistent with the principles of the war powers understood in both Articles I and II of the Constitution (*Hamdi v. Rumsfeld* 2004, 7). Furthermore, the circuit court ruled that the district court's attempt at significant evidentiary findings "went far beyond the acceptable scope of review" (*Hamdi v. Rumsfeld* 2004, 7).

The circuit court ruled that Hamdi's detention was not violative 18 U.S.C. §4001(a), which states that "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress." (*Hamdi v. Rumsfeld* 2004, 7). Instead, that court ruled that Hamdi's detention was congressionally authorized by the post-9/11 Authorization for the Use of Military Force (AUMF), which endowed the president with significant power to conduct war against those deemed responsible for the attacks of September 11, 2001.

Specifically, the circuit court adhered to the *Quirin* precedent, deferring to the executive's determination of Hamdi as an enemy combatant and pointing to Hamdi's detention as reasonable under the "necessary and appropriate force" clause of the AUMF. The circuit court also pointed to the congressional appropriation of funds for holding prisoners of war or persons "similar to prisoners of war" as approval of Hamdi's detention (*Hamdi v. Rumsfeld* 2004, 7). Additionally, the circuit court invoked *Quirin* explicitly in denying Hamdi's claim that he was entitled to habeas protection for being a U.S. citizen detained on American soil, emphasizing that "one who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may be properly designated as an enemy combatant and treated as such." (*Hamdi v. Rumsfeld* 2004, 8). Regardless of Hamdi's reason for being in an active combat zone, the circuit court deferred to the government's evaluation that his presence there was sufficient reason to deny him of an exhaustive habeas review, with Hamdi being owed a limited judicial inquiry into the legality of his detention under the war powers (*Hamdi v. Rumsfeld* 2004, 8).

***Hamdi v. Rumsfeld*: Justice O'Connor's Decision for the Court**

In *Hamdi,* the Court narrowed its decision to evaluating what it saw as the "threshold question" of the case: May the government detain U.S. citizens determined to be "enemy combatants"? The precedent since *Quirin* had been in the affirmative, and *Hamdi* represented the Supreme Court's first attempt at answering that question since. As in *Quirin*, the government defined an enemy combatant as an individual who actively engaged in or supported hostile activities towards the United States and its allies, and in this case such a definition was confined to such individuals who were captured in Afghanistan.

In writing for the Court, O'Connor states that the majority agrees with the government's position that the AUMF provides congressional authorization for Hamdi's detention. However, the court doesn't take up the executive branch's assertion that it has plenary authority to detain via Article II, preferring to limit its scope of inquiry to that provided by the appellate court. (*Hamdi v. Rumsfeld* 2004, 9). In concurring with the circuit court, O'Connor writes that detention of individuals who have taken up arms against the United States or in support of its enemies is inherent to warfighting and thus appropriate under the AUMF's definition of "necessary and appropriate" force (*Hamdi v. Rumsfeld* 2004, 10). O'Connor writes that there is no bar to the government holding one of its own citizens as an enemy combatant, with the *Quirin* decision establishing that citizens who "associate themselves with the military arm of the enemy government… are enemy belligerents within the meaning of… the law of war." Such a legal reasoning is justified for the fact that a citizen and an alien pose the same threat when engaged in military hostilities, regardless of citizenship (*Hamdi v. Rumsfeld* 2004, 11).

Hamdi's objection to this legal reasoning is that, given the realities of the War on Terror and its "broad and malleable" parameters, wartime detention can easily become indefinite detention so long as the U.S. is engaged in military activities against terrorists and/or their supporters. The Court asserts that, in accordance with the law of war, detention of enemy combatants shall last no longer than active hostilities. Therefore, the Court finds Hamdi's contention to be reasonable, stating that it is not unimaginable for the government's detention of Hamdi and similarly situated prisoners to be for life so long as it deems their release as to have potentially injurious effects on military operations and national security (*Hamdi v. Rumsfeld* 2004, 12).

Nevertheless, O'Connor writes that "the United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'" So, for as long as the United States conducts active combat operations in Afghanistan, detentions of combatants captured there shall be legal and considered part of the "necessary and appropriate force" the government claims through the AUMF (*Hamdi v. Rumsfeld* 2004, 14).

While *Quirin* is cited as precedent allowing the government to detain enemy combatants during the War on Terror, the Court takes equal strides to show that *Milligan* does not apply in *Hamdi*, just as it didn't apply in *Quirin*. As in *Quirin*, this is due to the fact that Milligan was a civilian at home during the time of his arrest and not carrying a rifle on the battlefield in support of Confederate troops (*Hamdi v. Rumsfeld* 2004, 14). Therefore, O'Connor asserts that *Quirin* is the controlling precedent for *Hamdi*, since both cases dealt specifically with the question of military detention of U.S. citizens found to be enemy combatants. Furthermore, O'Connor states

that the Court's ruling in *Hamdi* is supported by the precedent of *In re Territo*, wherein a U.S. citizen fighting with the Italian Army was captured during World War II in Sicily and then held in the U.S. until the end of hostilities (*Hamdi v. Rumsfeld* 2004, 16).

After determining that the government was within its rights to detain *Hamdi*, O'Connor moves into deciding what level of process is due a U.S. citizen detained as an enemy combatant who wishes to challenge his status. Hamdi regarded his detention as extrajudicial and argued that he was due a legitimate and timely hearing. To answer this petition, the majority engaged in an analysis of the writ of habeas corpus and the Due Process Clause (*Hamdi v. Rumsfeld* 2004, 17).

In regards to Hamdi's position, the government urged the Supreme Court to hold the circuit court's ruling due to the context of Hamdi's "undisputed" capture in a combat zone. The Court rejected this claim on the basis that Hamdi's capture was hardly "undisputed" since he had no opportunity to challenge the government's assertions. Additionally, the facts used to justify Hamdi's detention were insufficient in the eyes of the Court (*Hamdi v. Rumsfeld* 2004, 19).

More significantly for the Court's jurisprudence was its consideration of the government's argument that the judiciary ought to defer to its determination of Hamdi's status due to the exigency of the moment. Particularly, the government espoused a view of the executive prerogative powers, arguing that "further factual exploration" regarding the circumstances leading to Hamdi's capture would be "unwarranted and inappropriate in light of the extraordinary constitutional interests at stake" (*Hamdi v. Rumsfeld* 2004, 20). According to that logic, the government made a separation of powers claim that the courts should refrain from any decision-making related to national security due to their low institutional capacity for handling military matters related to an ongoing conflict. The only judicial capacity the

government believed appropriate in this situation was an evaluation of Hamdi's status as an enemy combatant, and the government argued that the Court should evaluate his status under significant deference to the executive branch (specifically, "some evidence" that Hamdi had taken hostile activity against the United States) (*Hamdi v. Rumsfeld* 2004, 20).

Hamdi argued that Supreme Court precedent has been to approve challenges to executive detention when detained individuals had been denied the opportunity to challenge their detention in front of a neutral tribunal. He also argued that the circuit court's deference to the executive branch was an inappropriate ceding of power, and that the constitutional due process owed him demands that he be able to challenge his detention (*Hamdi v. Rumsfeld* 2004, 21).

O'Connor writes that the test established in *Mathews v. Eldridge* should control in Hamdi's case, that test asserting that the due process owed a detained individual should weigh the "private interest" of a citizen against the government's asserted interest, the latter which includes the burdens the involved in providing greater process (*Hamdi v. Rumsfeld* 2004, 22).

O'Connor writes for the majority in stating that Hamdi's private interest in being free from physical detention from his own government is the most elemental of interests, one that is at the core of the liberty protected by the Due Process Clause (*Hamdi v. Rumsfeld* 2004, 22). The Court does not substantially entertain the government's claim that the ongoing hostilities in Afghanistan change the due process owed Hamdi, especially since the circumstances regarding his detention are erroneous (*Hamdi v. Rumsfeld* 2004, 23). It also expresses a fear that unjustified detentions set a precedent wherein others are likely to suffer the same fate in the future, creating conditions injurious to civil liberties (*Hamdi v. Rumsfeld* 2004, 23).

The Court acknowledges that "it is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." (*Hamdi v. Rumsfeld* 2004, 25). In engaging in a weighing of concerns between security and liberty, the Court decides that neither the government or the district court has struck an appropriate balance. Rather, a middle course is considered desirable that promotes the government's interest in security while providing due process for detained individuals, and especially those that are citizens. Therefore, the Court holds that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." (*Hamdi v. Rumsfeld* 2004, 26).

On the other hand, the Court also states that proceedings for citizen-detainees who wish to challenge their status may have to be "tailored to alleviate their uncommon potential to burdem the Executive at a time of ongoing military conflict". Examples of possible changes in proceedings under these circumstances would be less strict standards for evidence and a presumption of favorability for the government so long as that presumption could be reasonably rebutted (*Hamdi v. Rumsfeld* 2004, 27). The Court believed that providing these basic process rights, somewhat generously so, would not have a negative effect on warmaking while providing due process to citizen-detainees (*Hamdi v. Rumsfeld* 2004, 27).

Post-*Hamdi* Effect

The Court's decision in *Hamdi* served to provide a guarantee of basic due process rights for U.S. citizens held at Guantanamo, although what kind of process would be justifiable was left for wide executive discretion by the Court. Additionally, the Court construed the AUMF to authorize detentions, bringing the detentions at Guantanamo Bay under congressional approval (Matheson 2009, 131). After *Rasul* and *Hamdi*, it was a given that the Supreme Court believed that habeas petitions arising out of Guantanamo were worthy of review, but Congress fought to strip appellate jurisdiction of cases for that reason through the Detainee Treatment Act of 2005 (DTA). Thus, detainees held at Guantanamo Bay were guaranteed some judicial relief so long as their cases could reach the Court, which Congress tried adamantly to prevent.

Hamdan v. Rumsfeld

In 2006, the Court heard *Hamdan v. Rumsfeld*, which was another habeas petition arising out of Guantanamo. The Court ruled that the DTA did not strip it of jurisdiction in *Hamdan* because Hamdan's petition was already pending when the DTA became law. In *Hamdan*, the Court provided its strongest check on detentions yet, writing that the military commissions established by the Bush administration both failed to comply with the Uniform Code of Military Justice (Congress's replacement of the Articles of War) and the president's war powers. Therefore, Congress was finally compelled to cooperate with the executive branch and establish a method to try Guantanamo detainees.

After the decision in *Hamdan*, Congress passed the Military Commissions Act of 2006 (MCA), which legislatively approved a military commission program similar to what was

already in place and administered by the Department of Defense (Matheson 2009, 132). The MCA set forth rules to try non-citizen enemy combatants detained at Guantanamo by military commission. In keeping with *Hamdi*, it permits evidentiary standards looser than what would be acceptable in civilian court, but added procedural rules meant to ensure due process and fair adjudication (Matheson 2009, 132). As for presidential and executive branch power, the act allows the president to determine the scope and application of Common Article 3 of the Geneva Conventions in evaluating due process and retroactively eliminates appellate jurisdiction over habeas petitions arising out of Guantanamo. Thus, as in *Quirin*, the MCA established that the executive would have final authority over the fate of prisoners making habeas petitions and removed the relief offered by the civil courts.

Boumediene v. Bush

Predictably, the constitutionality of the DTA and MCA was challenged in court. In 2008, the Supreme Court granted cert to *Boumediene v. Bush*, a case wherein a Guantanamo detainee was seeking to challenge both the legality of his detention and the constitutionality of the DTA and the MCA. Specifically, the constitutionality of those two acts was called into question for their violation of the Suspension Clause, which states that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." (Matheson 2009, 132). In *Boumediene,* the Court interpreted the Suspension Clause to not just restrict the suspension of habeas corpus but to also allow for prisoners to challenge their detention under the writ (Matheson 2009, 132).

In *Boumediene,* the Court held that Guantanamo detainees (regardless of citizenship) have a constitutional right to challenge their detention through a writ of habeas corpus. In evaluating the DTA, the Court ruled that the procedures it sets forth for limited review (by circuit court) are not an adequate substitute for habeas corpus. As for the MCA, the Court ruled that the procedures set forth for prosecution by military commission and the prevention of habeas petitions in civilian court shall be considered an unconstitutional suspension of habeas corpus (Matheson 2009, 141). Notably, this was not the Court striking unilateral executive action (as it had done in *Rasul* and *Hamdan*) but a nullification of habeas/detention policies enacted by Congress and the president working together (Matheson 2009, 142).

Effect of *Boumediene* and the Future

After *Boumediene*, it was clear that the aggregate effect of the Bush-era case law on detention and military tribunals was a check on executive branch (and even legislative branch) power. The Court sent a strong signal that due process would be upheld for military detainees, especially as the U.S. continued to engage in military operations in the Middle East. Such a posture seemed to represent the broader (and, at the time, growing bipartisan) sentiment that the detention facilities at Guantanamo Bay were established on dubious legal ground. This was especially true in regards to the prisoners who had been detained under erroneous circumstances, and by this time successful habeas petitions had begun to filter through the federal courts. Now, with President Obama's election to the presidency in 2008, it seemed as if Guantanamo Bay's days were numbered. What would come next was the product of a comingling of the law,

congressional politics, executive branch politics, and management that would see Obama's promise to close Guantanamo Bay look at once promising and impossible.

Chapter Four
Analysis of Obama's Effort to Close Guantanamo

Much has been written about what defines a president as a "good" or "strong" leader. That discussion typically focuses on his ability to deliver upon the agenda that he promised while campaigning for office. Presidents who keep promises and "get things done" are usually treated well by presidential historians, whereas those who fail to leave a lasting legacy or commit significant blunders find themselves near the bottom of presidential rankings.

This project has so far focused upon presidents who vigorously exercised their powers over national security, citing broad authority to detain, try, and even uphold the executions of persons deemed to have committed or planned to commit acts threatening to the safety and security of the American people. Although Lincoln and Bush received pushback for their detention and military tribunal policies from Congress and the Supreme Court (whereas Roosevelt was given somewhat of a free pass), President Obama faced a different scenario. Unlike his aforementioned predecessors, Obama's intention was not to add new prisoners to the detention facility at Guantanamo Bay. Instead, it was his stated goal to transfer prisoners out of it, with the eventual goal of shutting down the detention facility entirely.

The previous cases have concerned the reactions from Congress and the Supreme Court when the president tried to expand his power. However, a different question is at hand: How do those two institutions react when a president tries to reverse an expansion of executive power? What factors are relevant in such a reaction, and what can the president do himself to mold that

outcome? Additionally, Obama's effort to close Guantanamo reveals broader lessons about executive power and how it shall be evaluated in the future, especially in regards to the frameworks that have been established prior to his presidency.

Executive Order 13492

Before evaluating Obama's effort to close Guantanamo Bay, pointing to various reasons why it failed, and drawing lessons from that experience, it's important to revisit the various conceptions of presidential power and how they apply in Obama's case. As for Obama, he signed an executive order on his first full day in office ordering that the detention facilities at Guantanamo be closed. That executive order, Executive Order 13492, acknowledged that detainees held at Guantanamo Bay were constitutionally entitled to the writ of habeas corpus (Executive Order No. 13492, 2009). Therefore, President Obama ordered a review of the "factual and legal basis" for the detention of every Guantanamo prisoner, seeking to differentiate between those held under dubious circumstances and detainees posing a genuine threat to national security (Executive Order No. 13492, 2009).

Obama ordered that such a review be completed by an interagency task force, a coordinated effort between the Attorney General (who would lead the review) and the Secretaries of Defense, State, and Homeland Security. Along with those cabinet-level secretaries, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, and "other officers or full-time or permanent part-time employees of the United States, including employees with intelligence, counterterrorism, military, and legal expertise, as determined by the Attorney

General, with the concurrence of the head of the department or agency concerned" were also members of the task force (Executive Order No. 13492, 2009).

The importance of evaluating the status of every detainee before closing Guantanamo Bay was due to President Obama's desire to empty the detention facilities before closing them. Doing so was a procedural necessity given the significant national security and political factors connected to the disposition of the detainees held there. Obama ordered that the interagency task force's review be completed within one year of the date of Executive Order 13492 so that the prison could be closed within that time frame. In setting such an ambitious goal, Obama charted his executive branch on a course headed for failure.

President Obama underestimated how difficult it would be to coordinate executive branch action towards transferring the Guantanamo detainees. In setting a timeline of one year and including many decision makers (along with their accompanying agencies) in completing the process of evaluation and transfer, Obama made a novice mistake as an executive. Although few would question his sincerity or his idealism, Obama (and his advisers) seemingly did not consider the legal and political complexities that defined their effort to empty Guantanamo before shuttering it in one year. Additionally, Obama left his effort subject to executive branch politics rather than insulating it from the competing policy preferences of cabinet secretaries. What subsequently ensued was an intra-branch power struggle that frustrated one of Obama's key promises on national security while his administration used its political capital on more pressing priorities.

The most significant executive branch obstacle the effort to close Guantanamo faced was posed by the Pentagon, where both Secretaries Gates and Hagel were opposed to Guantanamo's

closure (and Secretary Panetta, who led the Department of Defense between those men, also acknowledged the likelihood and beneficence of Guantanamo staying open). All of those men felt pressure from career staff at the Pentagon who wanted the prison to stay open, and many people there (including Panetta) viewed it as an asset so long as the war was ongoing. Additionally, it is questionable as to whether Gates and Hagel truly wanted to close the prison, given their support for holding military tribunals there (Bruck 2016). It was only when Ash Carter became Secretary of Defense that Obama had a Pentagon chief willing to cooperate on transferring detainees. However, by the time Carter became Secretary of Defense, Obama's political window for closing Guantanamo had already been closed for five years.

Although Attorney General Eric Holder was appointed to lead the effort of moving detainees, it was the Secretary of Defense's signature that was needed to approve each transfer. That significantly frustrated the transfer process because signing off on a transfer was taken as a guarantee that the detainee would not cause terror. After signing a few approved under Panetta's tenure, Hagel in particular was unwilling to sign off on many of these (although Gates refused to sign transfers as well), and the Defense Department clung to the right to detain enemy combatants regardless of the change in administration. Furthermore, the Holder-led Justice Department was home to Bush-era lawyers who saw themselves as clients of the Defense Department (Bruck 2016). Therefore, the Departments of Justice and Defense (who were the two key agencies counted upon to carry out Executive Order 13492) were working against the president's order and wishes. In a very real sense, President Obama's executive order took on the appearance of a wish or a suggestion, rather than an order.

Presidential Power and Persuasion

Richard Neustadt is famous for his highly influential work that asserted "presidential power is the power to persuade" (Neustadt 1990, 33). Neustadt proclaimed that to be true in relation to both Congress and the executive branch, and President Obama began his presidency with Democratic control of both the House of Representatives and the Senate. So, then, why didn't Obama seek a legislative solution? Given his significant political capital, he could have asked Congress to pass an act to close the prison. However, the administration wasn't interested in pursuing that course of action, due to its significant focuses in other areas (the stimulus package, flagging industries, and healthcare) and the fact that the diverse ideological coalition of Democrats Obama was working with (40/20/20 liberals, moderates, and conservatives) made a legislative solution unlikely despite the fact that Democrats held political power (Korb and Conley 2012, 174). Therefore, exercising his power as Commander-in-Chief, Obama sought to take unilateral action on Guantanamo Bay. Although congressional approval would have smoothed the roadblocks Obama ran into in the future, his executive branch would have still been endowed with the task of completing the Guantanamo transfers. Therefore, unilateral action was both expedient and practical.

Executive Orders: Command or Suggestion?

Neustadt considers an executive order to be "self-executing" when five factors are present: The president's involvement in the order is unambiguous, his words in the order are unambiguous, the order is widely publicized, the persons ordered to carry out the task "have control of everything they need to carry it out", and the persons receiving the order have no

doubt regarding the president's authority to issue it (Neustadt 1990, 18). When these five conditions are met, Neustadt states that a president's power is at its highest, wherein an order serves as a command accompanied by subsequent action.

From that view, Executive Order 13492 was not "self-executing". Although presidents of the past had acted as commander-in-chief to make decisions regarding national security in a self-executing fashion (with Truman's dismissal of General MacArthur, his seizure of the steel mills during the Korean War, and Eisenhower's federalization of the Arkansas National Guard serving as good examples), Obama's order was different. Out of the five conditions necessary for an executive order to be self-executing, only the first and fifth conditions ("the president's involvement in the order is unambiguous" and "the persons receiving the order have no doubt regarding the president's authority to issue it") were met. As President of the United States, Obama was correct in viewing himself as having the capacity to issue the order he did, and he was unquestionably at the center of the effort to close Guantanamo. However, Executive Order 13492 lacked sufficiently clear procedural guidelines, was not communicated to the public as a significant priority (Obama made multiple public appeals regarding the closure of Guantanamo throughout his presidency, but the public's reaction after the signing of Executive Order 13492 was relatively small and mixed), and those entrusted to carry out the order were given an amount of discretion too wide for the timeframe that Obama set.

Executive Branch Politics: The Personal Presidency

A great misconception among many Americans is that only Congress is politically divided and inefficient. Unlike that body, wherein its members are responsive to a vast array of

constituencies, the executive branch is often seen as a monolithic entity. That is an illusion, as administrative agencies do not comprise a single structure where presidential word is akin to law (Neustadt 1990, 32). Rather, the executive branch contains an incredible number of viewpoints and priorities all on its own, and decision makers there are subject to the same pressures that congressional lawmakers are. Even President Franklin Roosevelt, who is seen by many scholars as an expert manager of the executive branch, ran into significant difficulties during his tenure when trying to set policy against careerists at the State, Treasury, and Navy Departments (among others) (Neustadt 2009, 34).

Therefore, a president's power is realistically just as limited within the executive branch as it is outside of it, and members of the president's cabinet can sometimes serve as his "natural enemies" (Neustadt 2009, 34). That turned out to be especially true in President Obama's cabinet regarding Guantanamo. In assembling his inaugural cabinet, Obama sought to form a team of highly capable individuals whose policy preferences would be conducive to his political success (Warshaw 2012, 35). Although Obama's cabinet was reported to have harmonious relations and lack political discord, it became apparent that the policy preferences of Obama's were different than those of the key members of his interagency task force. Besides the president, cabinet secretaries feel responsible to a host of other individuals (such as bureaucrats within their agencies, members of their political party, and the public) (Neustadt 1990, 35). Such preferences can breed noncompliance when a president gives orders incompatible with the desires of a cabinet secretary, especially if that secretary's power and status in government is derived from sources other than the president (take Robert Gates for example, who was a Bush administration carry-over with a long and prestigious record of public service) (Neustadt 1990, 36).

Cabinet secretaries are often unafraid to exhibit individualistic behavior to pursue their preferred policy outcomes and as one aide to President Franklin Roosevelt stated, "half of a president's suggestions, which theoretically carry the weight of orders, can be safely forgotten" (Neustadt 1990, 36). Although Executive Order 13492 indeed carried the weight of an order, Gates didn't make a significant effort to assist Holder in moving the transfers from Guantanamo along within the one-year time-frame Obama set as a goal for closure. This was especially true since the Pentagon was focused on setting the course for the new administration's policy on the wars in Iraq and Afghanistan, ongoing conflicts that many in the Pentagon (and the Justice Department) saw as reason for keeping Guantanamo open (Bruck 2016).

President Obama received high praise for filling his top cabinet posts with individuals who were willing to challenge him and propose solutions he would not have otherwise considered. However, his effort to close Guantanamo quickly would have been undoubtedly easier if he had nominated a Secretary of Defense like Ash Carter from the beginning. Nevertheless, Gates (and later Leon Panetta and Chuck Hagel) don't deserve all the blame for the failure of Obama's year one strategy. The Justice Department, which was composed of many Bush-era lawyers who worked in near lockstep with the Pentagon to preserve the Bush administration's detention policies, was not ready to relinquish its grasp over Guantanamo. Lawyers from the Justice Department actively litigated cases against the stated position of Obama regarding transfers, viewing their role as independent from his executive order or his rhetoric regarding detainees (Bruck 2016). They were also unencumbered by Attorney General Holder's position that Guantanamo ought to be closed, only ceasing to litigate against the government's position when Holder personally intervened in certain cases (Bruck 2016).

Eventually, Secretary of State Clinton became the strongest ally of Holder's in getting the prison closed, repeatedly clashing with Gates over keeping the prison open and holding tribunals there (Bruck 2016).

In the face of the Justice Department's slow-walking of litigating Guantanamo transfers, the White House did not take action to remove lawyers who didn't carry out the wishes of the administration in the courtroom (which were pursuant to recently established judicial precedent that Guantanamo detainees were entitled to habeas relief). Additionally, President Obama and Attorney General Holder could have provided specific instructions to government litigators but declined to do so (Bruck 2016). In terms of institutional legitimacy, perhaps Obama wished to avoid the image of an overzealous executive who became too politically involved in the activities of mid-level bureaucrats and civil servants. On the other hand, if Executive Order 13492 was meant to be executed in one year according to the terms it laid out, one would think that the president would ensure the success of what he considered a priority during both his campaign and the first one-hundred days of his presidency.

Congressional Politics and the Personal Presidency

When it came to Congress, few members were ready to spend their political capital on Guantanamo when they were elected on platforms that dealt with issues of high concern to their local constituencies. As with the Secretary of Defense, Democratic members of Congress (especially those in districts where they had won by a slim margin) were unwilling to stick their neck out for the president on Guantanamo when doing so wouldn't gain them much in the way of political capital. Even if some members did feel compelled to aid the president in closing the

prison, the key congressional players in his own party were skeptical that Guantanamo should be closed (or simply didn't believe doing so was possible). The Obama administration did reach out to top congressional Democrats in trying to get it done, with then White House Counsel Greg Craig approaching House Armed Services Chairman Ike Skelton about closing Guantanamo within a year. Skelton was incredulous that the prison could be closed in a year or less, expressing disbelief that every transfer could be completed within that time frame. One of Skelton's staffers relayed that his office later called Obama's approach to Guantanamo Bay his "Field of Dreams" approach: If I say it, it will come (Bruck 2016).

In terms of congressional relations, the Obama administration's early emphasis on unilateralism backfired. In 2009, Chief of Staff Rahm Emmanuel held a principals-committee meeting where the key members of the Guantanamo interagency task force were assembled. They decided that two of the Uighurs held at Guantanamo should be moved stateside, based on the fact that they were proven harmless as Chinese nationals of a persecuted group who moved to Afghanistan in the early 1990s for a safer place to practice their religion (Bruck 2016). Nevertheless, they were captured as U.S. forces moved through Afghanistan but were viewed as uncontroversial candidates for transfer.

Congressional resistance for Guantanamo transfers quickly revealed itself as easy to come by. The Obama administration planned to transfer the Uighers to an area in Northern Virginia represented by Frank Wolf, a House Republican who was supportive of the Uighurs and critical of China. However, the White House failed to inform Wolf of its decision to transfer the Uighurs into his district, which was home to one of the highest populations of ethnic Uighurs in the country. Wolf learned of the White House's plan not through official communication but via

a contact he had within the administration. He was outraged that the administration had failed to inform him of its decision and include him in the process, and subsequently penned a letter to Obama calling the Uighurs "terrorists" who would be "released into neighborhoods" (Bruck 2016). Wolf's fellow Republicans joined in, but so did (more surprisingly) Senate Democratic Majority Leader Harry Reid, who publicly denounced the planned transfer of the Uighurs (Bruck 2016).

Congress then began to work on legislation that would prevent the transfer of any detainees from Guantanamo to the U.S. mainland, which would serve to greatly frustrate Obama's Executive Order 13492. Although the execution of that order was planned to rely heavily on diplomacy to transfer detainees to their home countries or "third countries", the administration was also banking on a strategy moving of prisoners stateside to either prisons (for those found guilty and/or dangerous) or locations in the general population where they had relatives or fellow countrymen (for those found innocent, as was the case of the Uighurs) (Bruck 2016). As that bill began to gain support, the Obama administration was preoccupied with other legislative matters, particularly healthcare. While Senator Dianne Feinstein protested to the White House that Guantanamo was slipping through Obama's fingers, his chief of staff Rahm Emmanuel encouraged the president to focus on more pressing policy matters. As one White House staffer put Emmanuel's words, the chief of staff said "why are we going to waste our political capital on detainees when nobody will give you any credit for closing Guantanamo"? (Bruck 2016). Eventually, the act passed with significant bipartisan support, delivering a crushing blow from a caucus that Obama still thought he could count on for political support in closing Guantanamo (Bruck 2016).

As a result of unfocused bureaucratic management and faulty congressional relations on the issue of closing Guantanamo, President Obama failed to close the prison within his first year in office. However, the effort to transfer detainees out of the prison (and eventually close it) continued right up until the inauguration of Donald Trump.

The Institutional Presidency and Guantanamo Bay: Unilateralism

The approach so far outlined for understanding Obama's effort to close Guantanamo via the executive branch is through the lens of the "personal presidency", wherein it is posited that a president's personality and bargaining style explain his successes and failures. It is true that many scholars have criticized Obama's bargaining style on the issue, characterizing him and his administration as either unfocused or naive in regards to what was necessary to close it unilaterally. On the other hand exists the institutional presidency, which evaluates a president not by his personal traits but by how he uses the mechanics of institutions to pursue an agenda. This understanding of executive power stresses the arguments for and the expediency of unilateral action, which will now be at focus.

According to William G. Howell, a president's pursuit of unilateral action to achieve key objectives does not necessarily emerge from a constitutionally-mandated order of action. Rather, presidents take unilateral action because it often presents the most efficient course towards achieving policies that would be politically difficult to shepherd through Congress (Howell 2003, 26). Acting unilaterally compels Congress and/or the courts to respond to the president, allowing the executive to be the "first mover" of a policy initiative. Being the first mover provides a strategic and political advantage, and an executive order well carried-out has the force of law unless checked by another branch (Howell 2003, 27). Additionally, presidents issue executive

orders with knowledge of how Congress and the courts are likely to respond to them (Howell 2003, 27). In Obama's case, the Democratic congressional majority and the favorable rulings handed down to Guantanamo detainees by the Supreme Court seemingly provided him with the latitude to issue a successful order regarding a key campaign strategy at the outset of his presidency. However, from the standpoint of the institutional presidency, a president's ability to manage the executive branch factors into how successful he is as an unilateralist. With regards to Executive Order 13492, Obama does not receive positive marks.

What is particularly perplexing about Obama's struggle to close Guantanamo through unilateral action was his proficiency in acting unilaterally in other areas. Obama has been recognized as having appointed a historically remarkable number of policy "czars" within his administration, which were policy experts accountable to the president alone. Obama's czars supervised policy development and implementation on a government wide basis, with Congress having no grasp on these members of the bureaucratic structure (Kelley, Marlowe, and Barilleaux 2012). The several czars had control over policy development in areas as diverse as financial reform, HIV/AIDS, and ethics. In some cases, some of these policy experts (such as Elizabeth Warren, who was selected to lead the congressionally-mandated Consumer Financial Protection Bureau) were put in congressionally-created positions, whereas others were established by the president himself (Kelley, Marlowe, and Barilleaux 2012). In this sense, President Obama's technocratic approach to government worked efficiently and effectively, indeed serving as an expansion of executive unilateralism. However, a similarly technocratic and inter-agency approach did not bear fruit when it came to Guantanamo.

The Institutional Presidency, Congress, and Guantanamo Bay

President Obama's legislative chances at closing Guantanamo Bay changed dramatically after the midterm elections of 2010. Obama would not enjoy a Democratic majority in both chambers of Congress for the rest of his presidency, effectively closing the door to legislation that would aid him in his efforts to empty the prison. Although Republican efforts against Guantanamo transfers began with prohibiting transfers to the U.S. or its territories, the new Republican-majority Congress began to set its sights on prohibiting any kind of transfer out of Guantanamo by preventing them through spending provisions in the National Defense Authorization Act. Although these provisions, which Obama administration officials considered "devastating", prevented nearly all transfers negotiated by the Obama administration, Obama still signed the bill because it contained both vital defense-related appropriations and the repeal of the "Don't Ask, Don't Tell" policy regarding LGBT individuals serving in the military (Bruck 2016). The Obama administration continued to attempt to negotiate transfers despite the signing of the spending provision restricting transfers into law (Bruck 2016). Those efforts had little success, and Defense Department officials who were against closing Guantanamo were reported to have breathed a sigh of relief for being able to be publicly pro-closure while knowing it wouldn't happen, whereas those at the Pentagon advocating for the closure of the prison saw that possibility all but evaporate (Bruck 2016).

Obama's Second Term and Guantanamo

By 2011 the media had lost interest in Guantanamo, and President Obama's 2011 executive order that ordered another review of the status of every detainee didn't produce a

hearing for two years. By 2013 the transfer process began again, with the eventual transfer of detainees cleared during Obama's first term. After Hagel resigned as Defense Secretary (partly due to increased pressure to sign transfers), Secretary Ash Carter significantly increased the speed of the transfer process (and the number of transfers processed) after making it a Pentagon priority (Bruck 2016).

Guantanamo was filled only with prisoners belonging to the "irreducible minimum" upon President Obama's departure from office, which defines detainees deemed ineligible for transfer due to either their high terror risk, admission of guilt via torture, or both. Although Obama wasn't successful in closing the prison entirely, nearly every Guantanamo prisoner proven innocent was either transferred or won a habeas petition during his administration (Bruck 2016). However, the question of the irreducible minimum remains, with 26 of such detainees still held at Guantanamo. Their fate is highly uncertain, although past precedent and current policy points to their indefinite detention for the foreseeable future. Chapter Five will deal with the fate of these detainees and what ramifications current and future policy will have for them.

Chapter Five
The Future of Guantanamo and Conclusions

Although President Barack Obama did not succeed in fully closing Guantanamo Bay by the time his second term was over, he did succeed in transferring a significant majority of the detainees held there at the beginning of his first. Many of those he wasn't able to transfer were either deemed too threatening to national security to move or weren't candidates for trial due to relevant evidence having been extracted via torture. Nevertheless, only 41 detainees remained at Guantanamo upon Obama's departure from office, and now there are 40 currently held at the prison (one detainee, cleared by the outgoing Obama administration, has been transferred under President Trump) (Savage 2018).

Therefore, Obama's efforts towards Guantanamo Bay cannot be characterized as an abject failure. He still succeeded in achieving most of the progress necessary towards the completion of his ultimate goal of finally closing the prison, although his shortcoming on that goal meant that the Guantanamo Bay question would be handed to his successor. Former president Obama was banking on a victory by Hillary Clinton to preserve and build upon his legacy, including his gains made towards closing Guantanamo. However, Clinton's 2016 Republican opponent Donald Trump won the presidency, raising serious questions regarding Guantanamo's future and the size of its population.

Donald Trump and Guantanamo Bay: The Campaign Trail

Barack Obama's rhetoric during his first presidential campaign regarding Guantanamo Bay was laden with optimism and idealism aimed towards closing the prison. On the other hand, Donald Trump made a promise on the 2016 campaign trail that "we're gonna load it up

[Guantanamo Bay] up with a bunch of bad dudes" (Welna 2016). Many observers familiar with U.S. defense policy were confused by that statement, as it was not apparent who those "bad dudes" would be or where they would come from.

The U.S. had scaled back its engagements on the battlefield in Afghanistan and Iraq during the Obama years, and the American troop presence left in the Middle East was primarily there to assist Afghan security forces. Although U.S. backed forces in Syria had captured approximately 400 ISIS militants, those fighters were not directly captured or detained by American forces (Browne 2018). Instead, they were detained by Syrian forces engaged in hostilities during the Syrian Civil War. Therefore, the United States was not actively capturing prisoners on the battlefield, making Trump's intention to fill Guantanamo seem either hollow or directed towards the detention of individuals taken from somewhere beyond the battlefield (Welna 2016).

It is remarkable that President George W. Bush, members of his administration, and military leaders such as General David Petraeus regard the prison at Guantanamo Bay as negatively as President Obama and members of his administration. The former group of individuals see the prison from a realist perspective, evaluating its effect as a recruiting tool for terror organizations and its obtrusiveness to diplomacy as the primary reasons for closing it (Draper 2010). On the other hand, the latter group focuses on closing the prison for not only the aforementioned reasons but its offensive nature to human rights and civil liberties. Regardless of reason, Trump's rhetoric regarding Guantanamo was a return to the early days of the war on terror, where prominent Bush Administration officials advocated for an offshore detention facility that could create a "legal vacuum" where neither domestic or international law applied.

Some observers like Marc A. Theissen, a resident fellow at the American Enterprise Institute (and a former speechwriter for President George W. Bush) who wrote that "there is little doubt that a number of the Islamic State fighters now held in Syria would make excellent candidates for detention at Guantanamo Bay", supported Trump's rhetoric towards "loading up Guantanamo Bay". Additionally, four prominent Republican senators (Tom Cotton of Arkansas, John Cornyn and Ted Cruz of Texas and Marco Rubio of Florida) authored a letter supporting the transfer of those captured ISIS fighters to Guantanamo. However, scholars like Charles Stimson and Hugh Danilack of the Heritage Foundation spoke with the memory of *Rasul v. Bush*, *Boumediene v. Bush*, and *Hamdan v. Rumsfeld*, warning that hasty attempts to send fighters captured by Syrian forces to Guantanamo could dismantle the Trump Administration's entire legal basis under the AUMF for both detention of enemy combatants and its use of force against ISIS and its affiliates (Wolfgang 2019).

Along with the detention of persons deemed to be unlawful enemy combatants, Trump also expressed support for military trials of American citizens accused of terrorism (which is illegal according to federal law). He stated that he did not want to see stateside civilian trials of such individuals (which they are constitutionally owed due to their citizenship status) and that he preferred to see them tried at Guantanamo (Welna 2016). Therefore, observers familiar with Guantanamo policy came to believe that such persons were who Trump could potentially attempt to fill Guantanamo with. Therefore, Trump's campaign promises to reverse Obama's posture towards Guantanamo Bay seemed poised to yield little results, although they represented a significant shift in rhetoric towards detainees and how their disposition relates to the national security and foriegn policy interests of the United States.

Donald Trump and Guantanamo Bay: In Office

Trump reintroduced his promise to fill Guantanamo Bay in this first State of the Union address, reusing the "unlawful enemy combatant" language that arose under Roosevelt and was reused under Bush II. He reversed the Obama administration's rhetoric and disposition towards detained individuals, stating that they ought to be treated "like the terrorists they are". He cast Guantanamo Bay as a vital weapon for fighting terrorism for its utility in gathering intelligence and detaining dangerous terrorists. Additionally, he referred to the transfers conducted under Obama as "foolish" and "dangerous". Trump claimed that many of those transferred detainees had returned to the battlefield, imperiling U.S. national security and reversing hard-won gains in the war on terror. However, the president made these claims with little evidential support, as records indicate that the recidivism rate of transferred Guantanamo detainees does not correlate with Trump's statements.

According to the office of the Director of National Intelligence (DNI), 121 out of 714 transferred Guantanamo detainees (since the prison opened in 2002) have returned to militant activity (at a rate of approximately seventeen percent) (Savage 2017). However, of those 121 who did return to militant activity, 113 of them were transferred under George W. Bush. Therefore, only eight of the 197 men transferred under Obama became recidivists (approximately four percent) (Savage 2017). More broadly, the Office of the DNI suspects that 35 percent of Bush-era transfers have gone on to engage in some sort of activity threatening to U.S. national security, while that percentage is 11.5 percent for Obama era-transfers. Therefore, Trump's claim that the Obama administration recklessly transferred large numbers of dangerous

detainees was categorically untrue, and about half of all former detainees deemed to be recidivists are either dead or in custody again (Savage 2017).

However, a key theme of President Trump's 2016 campaign regarding national security was what he considered to be the exorbitantly high costs paid to maintain U.S. defense around the globe. In September of 2019, Trump stated that it was "crazy" for the United States to spend $13 million per prisoner detained at Guantanamo Bay. He pledged to search for alternatives to the prison, citing the operating costs as a "fortune" and far too high to reasonably maintain (Baker 2019).

Although Trump did not fully commit to closing Guantanamo Bay's detention facilities, he did pledge to search for alternatives to the prison in light of the fact that the federal government spent $540 in 2018 alone to maintain the prison. By comparison, it costs taxpayers only $78,000 a year to hold an inmate at Florence ADX, the Colorado "super-maximum" security federal prison that has been cited as an alternative detention place for the members of the "irreducible minimum" currently housed at Guantanamo Bay (Baker 2019).

However, during Obama's term Congress took action to block the president from transferring Guantanamo detainees stateside through the 2010 National Defense Authorization Act, the annual bill that authorizes the appropriation of funds for the U.S. Armed Forces for each fiscal year. The restrictions were attached as an amendment to the vast omnibus bill, and President Obama decided to sign the bill due to his desire to avoid halting defense funds over a fight regarding the restrictions (Bruck 2016). Although transferring the most dangerous Guantanamo detainees to federal supermax facilities after a civilian trial (or military tribunal with reformed post-*Hamdan* procedures) is seen by many as the most desirable outcome in terms

of civil liberties and cost-effectiveness, it is highly unlike such transfers would have occurred under President Trump anyway. Despite that fact, such transfers seem largely in-line with Trump's priorities from a fiscal standpoint.

Rather than fill Guantanamo with ISIS fighters captured in Iraq and Syria, it has been the preferred policy position of the Trump Administration to return those fighters to custody in their home countries, particularly in cases where the alleged militants are nationals of countries who are NATO allies (such as France). In this regard, President Trump and his administration have in practice treated captured militants not as valuable fonts of intelligence (as the Bush Administration had) but as a burden to be dealt with by the country from where they originated (Baker 2019).

Executive Order 13823

President Trump sought to unravel Obama-era policy on Guantanamo Bay by issuing his own executive order regarding the prison, signing Executive Order 13823, titled "Protecting America Through Lawful Detention of Terrorists". Consistent with the "Bybee Memos" (issued by director of the Office of Legal Counsel Jay Bybee under President Bush in 2002), Executive Order 13823 cites the 2001 Authorization for Use of Military Force as wide authorization for the detention of individuals determined to have engaged or conspired to engage in hostilities against the United States (Executive Order 13823 2018). Executive Order 13823 goes on to state that the detention facilities and practices at Guantanamo Bay are "legal, safe, humane, and conducted consistent with United States and international law". This executive order served to explicitly

revoke Executive Order 13492, ending the official policy of moving towards Guantanamo's closure.

Executive Order 13823 stipulated that within 90 days the Secretary of Defense shall provide recommendations to the president regarding the disposition of individuals captured in armed conflict, including recommendations on policies governing the transfer of new detainees to Guantanamo. Although Executive Order 13823 overturned Obama's order closing Guantanamo Bay, it did invoke his Executive Order 13567, titled "Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force". Such language indicated that the Trump Administration was willing to give legal consent for the continued evaluation of the status of current Guantanamo Detainees, and did not state that Executive Order 13823 was intended to halt all future transfers out of the prison. Rather, it reaffirmed President Trump's desire to keep the detention facility open as a place to hold captured enemy combatants/suspected terrorists in the future. Although this was different than providing express consent for continued transfers, it did not shut the legal route out of Guantanamo off (which, it should be noted, that efforts to do so would have directly conflicted with the decisions in *Rasul v. Bush* and *Boumediene v. Bush*).

Then-Secretary of Defense James Mattis delivered the Pentagon's guidelines for an updated policy governing the transfer of individuals to Guantanamo Bay one day after the 90 day deadline ordered by the president. The report was not made public, but Pentagon spokeswoman Commander Sarah Higgins stated that the new recommendation "provides our warfighters guidance on nominating detainees for transfer to Guantánamo detention should that person present a continuing, significant threat to the security of the United States". In his public

statements regarding the policy, Mattis emphasized that the Trump Administration had been working with the "home countries" of the detained militants to sort out transfers and custody. He, nor Trump, gave any indication that those detainees would be headed for Guantanamo Bay, instead reaffirming the position of the administration that the State Department (with support from the Defense Department) would be negotiating agreements towards transferring captured combatants back to their countries of origin (and not U.S. custody) (Browne 2018).

Guantanamo's Future Under Trump and Beyond

Fundamentally, the situation at Guantanamo Bay under Trump is not different than at the end of Obama's second term. The 40 detainees remaining at Guantanamo remain in limbo, and with Trump codifying his intentions to leave the prison open indefinitely, the military has begun preparations to maintain operations there for the foreseeable future. A new dining hall for the military guards was recently built and is expected to last 20 years. Construction on new barracks began in 2019, with those buildings expected to last at least five decades. In 2016, the Pentagon asked Congress to approve money for a new prison facility to hold the remaining detainees, including plans to design the facility with measures allowing the detainees to be held well into old age (such as wide door frames that would allow the passage of wheelchairs and hospice beds) (Fox 2018).

Of the 40 detainees who remain at Guantanamo, 26 have not yet been charged or have been deemed ineligible for transfer. Those prisoners are indisputably held in indefinite detention, whereas five of the 40 have been cleared for transfer but remain at the prison due to bureaucratic and diplomatic hurdles. All of the other nine prisoners have been charged in military commission

proceedings and find themselves at various stages of trial (Fox 2018). It is conceivable and still quite possible that the five detainees cleared for transfer will leave at some point, and the nine charged via the military commission system may remain at Guantanamo or be transferred after sentencing. However, for the 26 detainees who are ineligible for both transfer and trial by military commission, it seems that Guantanamo Bay may very likely be their final destination.

Although it seems unlikely that Guantanamo Bay will gain any new prisoners for the foreseeable future (unlike Trump promised on the campaign trail and in major public addresses), Obama's goal of closing the prison currently seems like a fantasy. Little political appetite exists for doing so in Congress, and the idea has not gained traction with Joe Biden, the presumptive Democratic nominee for president in 2020. Although he was Obama's loyal Vice President, he has not made closing Guantanamo Bay a key issue of his campaign thus far (Britschgi 2019). If President Trump wins reelection in 2020, he certainly won't move to close the prison. Beyond 2024 (or perhaps during a Biden's first term, but still not likely), it's not inconceivable that the issue of cost will cause congressional lawmakers to take a second look at closing the prison at Guantanamo or that a White House with similar motivations to the Obama Administration will have enough political capital, bureaucratic management expertise, and persuasive arguments to get it done. However, for the foreseeable future Guantanamo Bay will remain open, with a good chance of becoming a relic of the war on terror for future generations to grapple with.

Conclusions

President Barack Obama did not fail to close Guantanamo Bay because of a lack of ideological sincerity or optimism. Shuttering the prison was a key priority from the outset of his administration, and President Obama provided every indication that he was personally serious about getting it done. However, he immediately encountered institutional roadblocks that made the path to closure increasingly difficult and eventually impossible.

There are three groups of actors broadly responsible for keeping Guantanamo Bay open, in chronological order: The administration of President George W. Bush (and especially his Office of Legal Counsel), the administration of President Barack Obama (and especially the Department of Defense that he led), and Congress. In Bush's case, Guantanamo Bay was established by individuals working at the very fringes of legality in their support of the war on terror, whereas Obama's Defense Department worked against his policy wishes. As for Congress, they too obstructed Obama's efforts to close Guantanamo, although effective bureaucratic management during Obama's first two years could have prevented a Congress with a Republican majority in either house from stopping Obama's efforts pursuant to Executive Order 13492.

However, before President Obama took office, it was President Bush's Departments of Defense and Justice, as well as the Office of Legal Counsel (OLC, within the Department of Justice), who laid the foundations (literally and figuratively) for the detention facilities at Guantanamo and the practices that would go on there. In creating the prison and transferring high-risk detainees there, the Bush Administration created a situation that would be difficult for future presidential administrations to dismantle. An "irreducible minimum" of prisoners exists

primarily because those detainees are unfit for transfer because they are also unfit for trial. This is due to the fact that the prosecutorial evidence needed to bring charges against those men was extracted via torture, a practice greenlighted by the OLC under Bush. Creating an environment where the laws of the United States purportedly did not apply was key to the Bush Administration's interrogation techniques, and those techniques caused those on the receiving end of them to end up in legal limbo.

The administration of President Barack Obama had the clearest and best chance at closing Guantanamo. Upon Obama's first inauguration day, his party held majorities in both houses of Congress and he was elected with a resounding mandate. It was the political environment any new chief executive dreams of, with a seemingly blank slate to mold the nation in his vision. The closure of Guantanamo was immediately designated as a priority, with the new president signing an executive order pursuant to that goal on his first full day in office. However, President Obama's administration largely got in the way of their chief executive by slow-walking or outright blocking the necessary procedures for closing Guantanamo. According to Executive Order 13492, the road to closing Guantanamo Bay ran through the Secretary of Defense. However, instead of having a Pentagon chief who wholeheartedly shared Obama's vision for closing Guantanamo, he was served by Robert Gates from 2009 to 2011. Although Obama chose to retain Gates from the previous administration for reasons other than Guantanamo Bay, choosing a Secretary of Defense who shared Obama's position on closing the prison would have made it far easier to accomplish that goal within the timeframe the president originally set.

The final actor to blame for obstructing Guantanamo's closure is Congress. Congress, and particularly House Republicans, have often been cited as the thorn in Obama's side when it comes to Guantanamo Bay. Many argue that if it weren't for their efforts after gaining a House majority in 2010, Obama would have been able to proceed with the closure of Guantanamo as planned. However, Obama originally pledged to have Guantanamo closed by January 2010, so Congress should have been a non-factor in obstructing his efforts. Although it's certainly true that the provisions added to the 2011 National Defense Authorization Act prevented the transfer of detainees to facilities within the United States (which Obama indeed signed in order to avoid a political fight over crucial defense funding), better and more prudent bureaucratic management would have had the prison closed before the midterm elections of 2010.

Therefore, Obama's failure to close Guantanamo Bay is best taken as a lesson in executive branch management. The legal environment was certainly favorable to his efforts to close given the Bush-era case law on Guantanamo. He didn't have to exercise any prerogative powers at his "lowest-ebb" to get it done, and he began his presidency with the political support to back him. However, the effort sputtered because many members of Obama's administration were skeptical of the effort, particularly those in the Defense and Justice Departments who were wary of the potential consequences of transferring detainees (as well as having been ideologically opposed to the effort).

From this study, it seems apparent that presidents elected with a favorable congressional majority and a clear mandate are best positioned to execute an ambitious legislative agenda at the outset of their term (so that the memory of campaign promises are fresh and the White House has ample political capital). However, when it comes to the execution of policies via executive order,

and especially those that require interagency cooperation, it seems best for presidents to get their feet under themselves first, get a feel for their executive branch (and its politics), and only begin executing parts of their agenda from their own branch when it becomes assured that members of their administration will cooperate. Otherwise, failure and political fallout is likely assured.

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