

Research Essay

Sifting through documents ranging from the highest court in the land to district court decisions, *amicus* briefs, congressional testimony, presidential statements, and current news articles was crucial to the writing of my thesis. The development of my critical analytical skills became essential as I endeavored to evaluate my findings from these various sources and examine how they fit into the bigger question that my research examined. However, these skills were further developed as I began to retain a wide array of material and situate it within a larger context, one which looked at information from a range of perspectives and attempted to point to a cohesive explanation. My thesis examined whether the Supreme Court's post 9/11 "Terror Case" decisions curbed unilateral Executive policy making and helped safeguard the civil liberties of detainees at Guantánamo Bay. The broader question to be answered was whether the United States' constitutional democracy can work in times of crisis. I analyzed public opinion, congressional, judicial, and executive policy making and dialogue, as well as scholarly assessments from a variety of source types, access to which made the library invaluable.

The use of print books as a source of first hand, insider accounts from the Bush Administration formed the foundation of my research and allowed me to begin to frame a question at the earliest stage of the process. The most important were two books written by Jack Goldsmith who served in the Office of Legal Counsel in the Bush Administration from 2003-2004. Goldsmith's firsthand accounts of Executive ideology during the period in which the Administration was crafting Guantánamo Bay detainee policy demonstrated the competing viewpoints and the basis underlying many of the Administration's policies leading up to the "Terror Decisions." His account was an important starting point because ideologically, he shared the Administration's viewpoint. I recognized that allowing this perspective to form the foundation of my research question would serve as a vital check against which I could evaluate future sources that were critical of the Administration,

of which I was certain to encounter. This basis led me to further books, peer-reviewed journals, and law review articles that explored the relationship between the expansion of prerogative powers during times of war in U.S. history and the historical role taken by the Court when these policies have been challenged. For this research I discovered the immense reach of the library by requesting books through Summit and ILLiad when the books were not physically present in the Oregon Knight or Jaqua Law libraries. I also made extensive use of the academic journal databases to which the university subscribes, such as JSTOR and Academic Search Premier.

As I began my historical look at wartime courts books by Louis Fisher and Richard Ellis, helped provide me with another benchmark to which I could compare the post 9/11 decisions of the Bush Administration. At this point in my research I went through a period where I struggled with how much emphasis I desired to place on internal Administration and public dissatisfaction, as a way to show the relief that the Court provided, versus a more historical perspective that analyzed the workings of the Court. This became a turning point at which the various structural ideas for my thesis became cohesive and I recognized a way to blend my two research paths. My research using scholarly journals transformed into a mining operation for specific tidbits of information and my process of reading Court opinions became a purposeful endeavor to synthesize the relevant information. In the end, creating an outline for the structure of my thesis upon a foundation of secondary sources enabled me to more critically analyze the myriad of other sources I would use to write a targeted, focused thesis.

After this development I began to organize my sources by juxtaposing viewpoints and analyzed the research in light of my question to weave the history and multiple perspectives into a succinct story. Law review articles and scholarly journals began to form the bulk of my research and I recognized names in the field and discovered the value of reading footnotes and following the leads and clues that authors gave through their citations. Not only was this important in helping me find

relevant sources, but it demonstrated to me the value that I needed to place on perfecting my footnotes. I utilized JSTOR and Academic Search Premier primarily to find the law review and scholarly articles that I sought. However, Victoria Mitchell helped me discover ProQuest and CQ Weekly which I relied upon along with the Library of Congress and government printing office websites for presidential and congressional documents. This suggestion helped provide the extensive congressional and Executive research which formed the bulk of my primary research, in addition to court opinions.

My research journey culminated with a qualitative analysis which led to my conclusion that the Court did place checks on Executive power and somewhat improved civil liberties for detainees at Guantánamo Bay after 9/11, a rare role for the court in a time of national crisis. This is not to say the Court stopped injustices and curbed the dramatic lack of oversight. Simply, the Court proved to be an unlikely vehicle which provided some oversight and restored limited basic rights to the men being detained. My final thesis compiled a thorough analysis of my research which I explored through the wealth of library resources. This access to a plethora of sources also helped me develop a personal writing style and tone that came with writing multiple drafts and critically analyzing them in order to find my own voice among the research. The entire process of targeted reading, writing succinct case analysis, and compiling sources can hopefully lay the groundwork for other related research, and it has drastically improved the way I now read, research, and edit, skills which have been vital in my current study of the law.

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Assistant Professor of Political Science, Priscilla Yamin. Professor Yamin led the Political Science thesis prospectus class which served as an initiation to the thesis writing process. She demonstrated research methodologies used in answering questions in political science and provided a space in which I was able to shape and adjust aspects of my question, hypothesis and findings in order to complete a thoughtful thesis.

Associate Librarian Social Sciences Data Services and Government Documents Librarian, Victoria Mitchell. Victoria Mitchell was an immense help, particularly when I became stuck in my primary source document and archived newspaper search. Not only did Victoria meet with me to discuss tips for researching and to suggest databases which would be useful for my thesis

and another paper I was working on at the time, she also constructed a document with suggestions. The document included helpful library databases, such as ProQuest, and she suggested visiting the document center in the Knight Library to access presidential documents, which I was also able to access through the Government Printing Office online. This assistance as I struggled to find primary sources, particularly Congressional committee testimony, helped me move forward and discover documents and access databases that opened even more doors.

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Abstract

During the post 9/11 era the President made claims to expansive Commander-in-Chief Powers, yet the United States' functioning as a constitutional democracy necessitates a sharing of power among all three branches. Executive claims to prerogative powers were scrutinized by the Court for disregarding the civil liberties of detainees at Guantánamo Bay, an unprecedented step which led to this inquiry of whether the Court's post 9/11 decisions curtailed unilateral Executive policy making and safeguarded the civil liberties afforded to detainees at Guantánamo? This study analyzed the Court's decisions in the terror cases and their effect on Executive policies, as well as Congress' activeness in shaping detainee policy and placing checks on the Bush Administration's prerogative powers. The Court's decisions were effective in restraining Executive power, but they only somewhat protected and restored the detainees' civil liberties. This study provides a framework which outlines how civil liberties can begin to be restored.

*Freedom from Guantánamo: How the Court Curtailed Prerogative
Powers and increased Civil Liberties for Detainees*

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by

Lindsay M. Thane

to

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Department of Political Science

University of Oregon

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Thesis Advisor: Professor Daniel Tichenor

Second Reader: Professor Jane Cramer

***Freedom from Guantánamo: How the Court Curtailed Prerogative
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By Lindsay Thane*

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"We must scrupulously guard the civil rights and civil liberties of all our citizens, whatever their background. We must remember that any oppression, any injustice, any hatred, is a wedge designed to attack our civilization." –*Franklin Delano Roosevelt, January 9, 1940*

“I just hope that because of the pain we are suffering, the eyes of the world will once again look to Guantánamo before it is too late.” –*Samir Naji al Hasan Moqbel, imprisoned at Guantánamo since 2002, April 15, 2013.*

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I. “I do not want to die here”¹

Horrendous accounts of the treatment of detainees and the conditions at the Guantánamo Bay detention facility have continued to be exposed since its opening over eleven years ago, in January 2002. There has been extensive documentation of techniques, commonly considered torture, which were used against the detainees; however, it is also important to consider the necessity of balancing national security imperatives.² The detainees’ civil liberties were curtailed as they waited years in the abhorrent prison conditions for the facts of their detentions to be reviewed by military courts, yet even a finding that a detainee presented no threat did not entail a return to his home nation, his family, or to his life. The Bush Administration unilaterally constructed many of the detainment policies and their legal rationale remained undisclosed. The Supreme Court became remarkably involved in checking unilateral Executive policies and there was a period of decline in this type of policy making; however, this practice seems to have become resurgent in the past two years under the Obama Administration. Therefore, this thesis attempts to answer: did the Supreme Court decisions in the post 9/11 terror cases curb unilateral Executive policy making and safeguard the civil liberties afforded to detainees at Guantánamo Bay? In order to unpack this question, this thesis will address the implications of the Supreme Court’s decisions in the cases pertaining to Guantánamo Bay detainees. This will entail looking at the effects of the decisions on Executive policies and on Congress’ willingness to shape detainee policy and place checks on Commander-in-Chief Powers. The above inquiries should

¹ Samir Naji al Hasan Moqbel wrote an op-ed in the New York Times, “Gitmo is Killing me,” on April 14, 2013 which ended with this quote as his plea to the world not to forget about the men who continue to be detained at Guantánamo Bay. Moqbel’s piece gives his account of the hunger strike which a quarter of the detainees have been taking part in since about February 2013.

² Mayer, Jane. *The Dark Side*. New York: Anchor Books: (2009). This book elaborates on the techniques used by against detainees at Guantánamo and the dynamics within the Bush Administration in support of the employment of harsh interrogation tactics.

direct this study to find whether interaction from all three branches shaped policies that better protected or restored individual civil liberties.

Traditionally, during times of war when the perception of a threat from international enemies was acute and real in the minds of most Americans the U.S. Supreme Court has deferred to the president when making decisions which pertain to national security.³ The response of the Court to the Bush Administration's exercise of emergency powers as they shaped counter-terrorism policy after 9/11 broke from the deferential position it has taken in the past. While there is much evidence that many in the Bush Administration came into office with an ideological disposition toward expanding presidential power, the 9/11 terrorist attacks afforded them the opportunity to expand the prerogative powers of the presidency by unilaterally crafting counterterrorism policy specifically pertaining to "illegal enemy combatants" and Guantánamo Bay detainees. However, the Supreme Court asserted in the terror cases that the President did not in fact have a "blank check" to decide the due process afforded to detainees.⁴ This is most evident in the cases of *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush* in which the Court struck down the Executive's creation of military commissions and stipulated that the role of shaping policy is fundamentally one reserved to Congress with whom the President must consult in order to craft policy. These decisions are in sharp contrast to the historical role of the Court in times of

³ This thesis will refer to the post 9/11 era as a "time of war" because this is how it was defined by President Bush, as a "war on terror," in a speech to a joint session of Congress on September 20, 2001. The Administration continued to use this terminology to refer to U.S. actions in the Middle East and it was not rejected officially until President Obama took office in 2008, although it is still used in the media and in common parlance when referring to U.S. military actions overseas. The time frame during which the cases used in this thesis were decided is clearly one of war, even if it is a new type of unlimited, open ended war. Moreover, the cases used in this study were decided between 2003-2008 at which time the U.S. was involved in a war in Iraq and had substantial numbers of troops who continue to be deployed to date in Afghanistan. Establishing that these cases were made in a time of war is important because the decisions with which they are contrasted with were all made during times of war and the difference in those opinions compared to the post 9/11 decisions establishes the Court's historic involvement.

⁴ Justice Sandra Day O'Connor authored the Supreme Court's decision in *Hamdi v. Rumsfeld* (2004) and wrote in her opinion that the President did not have a "blank check," a line that continued to exemplify the Court's position in the terror cases.

war, highlighted by their decisions in cases such as the 1863 Civil War *Prize Cases*, *Korematsu v. United States* (1944), *Ex Parte Quirin* (1942), and *Johnson v. Eisentrager* (1950).⁵ The apparent imbalance of power between the branches with the Executive office wielding a disproportionate amount of influence raises the question: can our constitutional democracy work in times of war?

In order to adequately assess whether our constitutional democracy can function a time of war such as after 9/11, this thesis will look to find whether civil liberties were protected or restored to detainees after the Court's decisions in the terror cases by considering a number of indicators. One indicator is whether there was increased involvement by Congress after the Court's decisions, shown by their holding of extended periods of discussion about Executive policy proposals when compared with congressional inquiries about detainee policy prior to the Court's rulings. Another indicator is whether Congress addressed the specific demands that the Supreme Court decisions mandated, as seen by their restructuring of detainee policies, rather than allowing the Administration to unilaterally change the legal footing upon which the policies stood. A third indicator of constitutionally constructed policies is whether, for every government action, there were two branches involved in crafting the policy.⁶ It is a legitimate function of the Executive to drive policies through Congress and to propose legislation, but the democratic system constructed in the United States does not function constitutionally when the Executive claims the right to unilateral decision making without congressional consent.⁷ It is also cause for concern when Congress assumes a role of acquiescence to Executive policy making because this leads to a lack of oversight and meaningful deliberation. The way in which laws are formed

⁵ These cases will be discussed later in the paper.

⁶ Chemerinsky, Erwin. "The Assault on the Constitution: Executive Power and the War on Terrorism." 4.

⁷ Owens, John E. *Congressional Acquiescence to Presidentialism in the US 'War on Terror': From Bush to Obama*. 34.

provides important avenues through which the public can become more aware of policies and check whether their representative's are advocating for their interests. This ensures that the public can exercise their constitutional role of extending or terminating their representatives time in office and it provides yet another check to the policies.

Keeping this framework in mind, this thesis will proceed to show that the Bush Administration's ideological persuasion was devoted to the expansion of unilateral Executive powers. This will be followed by a discussion of the Supreme Court decisions which struck down the Executive's Guantánamo Bay detainee policies and the ways in which these Court decisions injected more deliberation between the branches and acted as a check to claims of Commander-in-Chief Powers. This study finds that the Court's intervention spurred Congress to reshape detainee policies, a process that inherently provided more transparency and oversight. However, there is continuing uncertainty as to whether the new policies better protected the detainees' individual liberties. Two thirds of the 779 men who have been held overtime at Guantánamo have been released or transferred. The releases correspond to Court decisions after which greater numbers of detainees were released. Therefore, it is clear that the rule of law was enforceable during a time of war and that the infringement of individual liberties was curtailed, albeit further progress is necessary. In the last two years, with the increase in the use of unmanned drones and the continued holding of 166 men at Guantánamo Bay, half of whom have been cleared for release yet remain incarcerated, the President's policies, this time under Obama, have been scrutinized for infringing on civil liberties.⁸ This thesis provides evidence that the Supreme Court may be the best vehicle to spur action in order to limit Obama's ability to set policies unilaterally and to force him to disclose the legal rationale behind his policies, especially

⁸ Greenwald, Glenn. "Obama, Guantánamo, and the Enduring National Shame."

when Congress appears unwilling to act. Although there has been a partial restoration of civil liberties, the continued holding of 88 men even though the government has determined that they pose no threat, demonstrates that progress still needs to be made. Forty of the men have begun a hunger strike; some have not eaten under their own volition since early February with the hope that, as detainee Samir Naji al Hasan Moqbel said, “The eyes of the world will once again look to Guantánamo before it is too late.”⁹

II. History: A “Foundation for later apologies”¹⁰

The Supreme Court has established a precedent throughout history of not opposing or limiting Executive policies in a time of war. What is so unique about the post 9/11 Court decisions is that they break with this trend and provide a meaningful check as to the merits of Executive detainee policy and they admonish Congress to become involved in the decision making process. A prominent example of Executive claims to vast prerogative powers was made by President Lincoln in April 1861 at the beginning of the Civil War when he employed military tribunals, unilaterally decided to blockade the South, and suspended *habeas corpus*, a decision he made while Congress was not even in session. However, Louis Fisher points out the differences between Lincoln’s suspension of *habeas* and the effectual suspension by President Bush in his denial of the writ for detainees at Guantánamo. Fisher explains that Lincoln’s suspension was not done in secrecy and that it occurred in reaction to a direct national emergency after the

⁹ Moqbel, Samir Naji al Hasan. “Gitmo is Killing Me.”

¹⁰ Fred Korematsu, was the plaintiff whom the Supreme Court ruled against in *Korematsu v. United States* when he argued that the exclusion of Japanese citizens from the West Coast and interning them was constitutionally suspect. Years later, this decision has been disregarded and looked upon as a gross curtailment of civil liberties and Korematsu was awarded the Presidential Medal of Freedom in 1998. This quote is from the amicus brief which Fred Korematsu submitted on behalf of the petitioner, Shafiq Rasul, in *Rasul v. Bush*.

Confederacy fired on Ft. Sumter on April 12, 1861. Lincoln was aware that he could not claim legal or constitutional authority to suspend the writ and needed to go to Congress for authorization, which he was granted July 13, 1861.¹¹ This demonstrates the fundamental difference in assumptions about prerogative powers between Lincoln and Bush, stemming from their different constitutional interpretations. The Bush administration believed that the use of wartime powers were “inherent” to the presidency and necessary for him to address threats, where as Lincoln’s Attorney General Edward Bates said that these powers were to be “temporary and exceptional.”¹²

The Supreme Court addressed Lincoln’s use of military tribunals for the trial of citizens in the case of *Ex parte Miligan* and actually ruled that the government could not convene such tribunals to try civilians during war if the courts were still open and functioning. However, it is of note that this decision was not truly a check on Executive power because the decision came in April 1866, a year after the end of the Civil War in June 1865 and it is not clear that the Court would have acted in a similar manner had it heard the case during the War.¹³ Even though Lincoln employed unilateral Commander-in-Chief Powers to make these war time decisions, it is clear that he did not think that their accrual should be a norm. Bates cautioned that military tribunals were subject to bias because the people running them, “are selected by the military commander from his own subordinates, who are bound to obey him, and...commonly find the case as required or desired by the commander who selected them.”¹⁴ Bates quote demonstrates one way in which executive policy making can be detrimental to the protection of individual

¹¹ “The Prize Cases.” The Oyez Project at IIT Chicago-Kent College of Law.

¹² Fisher, Louis. *The Constitution and 9/11: Recurring Threats to America’s Freedoms*. Lawrence, Kansas: University of Kansas Press. 2008. 89-90.

¹³ Stone, Geoffrey R. *War and Liberty: An American Dilemma: 1790 to the Present*. New York: W.W. Norton & Company, 2007. 39.

¹⁴ Rehnquist, William. *All the Laws but One: Civil Liberties in Wartime*. New York: Alfred A. Knopf, 1998. 176.

liberties; however, in times of war the Executive has continued to employ similar restrictions. During WWI President Wilson appealed to Congress for passage of the Espionage and Seditions Acts in 1917 and 1918 which authorized a gross curtailment of individual liberties, yet the Court ruled in March of 1919 that the convictions in *Schneck v. United States*, *Frohwerk v. United States*, and *Debs v. United States* could be upheld under these abhorrent acts. The War concluded with the signing of the Treaty of Versailles on June 28, 1919 and these decisions were eventually overruled, yet they demonstrated the willingness of the Court to shy away from checking Executive policies pertaining to the conduct of the war while it was being fought.¹⁵ Shortly after WWI under Wilson, Franklin Roosevelt was forced to address a threat to the American home front following the bombing of Pearl Harbor.

President Roosevelt followed in the footsteps of his predecessors by exercising expansive prerogative powers during WWII when he ordered the internment of all Japanese people living in the U.S. through Executive Order No. 9066 on Feb. 19, 1942. The Court upheld the internment and this bold assertion of power in December 1942 when it held in *Korematsu v. United States* that an entire racial group could be classified as suspect without needing to discern individual characteristics if the president said it was necessary in order to carry out the war effort.¹⁶ The exclusion order, barring Japanese-Americans from residing on the West Coast and placing them in internment camps, was revoked January 2, 1945, seven months before the atomic bombs were dropped on Hiroshima and Nagasaki. However, by that time it was clear that the Germans were in retreat and the war was coming to a close. Attorney General Francis Biddle's statement that,

¹⁵ Geoffrey Stone's book *War and Liberty* gives a nice chapter by chapter summation of the curtailment of civil liberties throughout US history in times of war. His discussion of this curtailment during WWI is found in chapter 3, pages 57-63, which he entitles, "Disloyalty must be crushed out of existence."

¹⁶ *Id.* 76. The internment of Japanese-Americans ended with the announcement by U.S. Major General Henry C. Pratt that beginning on Jan. 2, 1945 the exclusion order would no longer be enforced.

“The Constitution has not greatly bothered any wartime President” enunciated the trend that President’s have been given wide discretion to craft policies in times of war.¹⁷

The claims to wartime prerogative powers and particularly the establishment of a military tribunal system after 9/11 was founded upon the Bush Administration’s interpretation of Franklin Roosevelt’s establishment of tribunals in the case of the German saboteurs. In this case the saboteurs were fundamentally different from the Guantánamo terror detainees because they were privy to the Geneva Conventions and knew the charges against them, yet the Bush Administration used the WWII construction as much of the basis for their commissions.¹⁸ Furthermore, when the Court wrote the *Quirin* opinion it was three months after exacting their July 31, 1942 verdict and they began to realize the gravity of their decision in authorizing the military commissions, but realized that they could not reverse course because six of the eight saboteurs had already been executed. Justice Stone struggled writing the majority opinion authorizing the commissions because they were created unilaterally and had no means to check the procedures for detention, an aspect the Court neglected to look into more deeply when they initially decided the case during the time of heightened fear which clouded their vision.¹⁹

One of the few instances in which the Court did reign in executive power during a time of war was in *Youngstown Sheet and Tube Co. v. Sawyer* in June 1952. The Court determined in this Korean War era case which was decided two years into the war and more than a year before both sides withdrew, that President Truman could not order the government to take control of steel production while the workers were on strike because it was not necessary to the war effort

¹⁷ Rehnquist, 191.

¹⁸ Fisher, Louis. *The Constitution and 9/11*, 183-189. Fisher writes that in addition to the precedent set by *Quirin*, the Administration justified the use of tribunals through Article II of the Constitution, the AUMF as providing congressional authorization, and that Bush had the power to override the Non-Detention Act of 1971.

¹⁹ *Id.* 177-180.

as Truman claimed. Most importantly, the Court found that Congress had already considered the worth of averting the strike, but chose not to authorize this takeover in legislation. Justice Jackson's concurring opinion in the *Youngstown* case imparted a lasting judicial test by which presidential actions can be judged based on the amount of deliberation and authorization that has occurred between Congress and the President. Jackson stated that when the President was acting in accordance with an explicit authorization from Congress, his authority to set policy was at a maximum and should be afforded "the widest latitude of judicial interpretation." The second rung of review Justice Jackson termed the, "zone of twilight." This level of review was to apply when the President and Congress had concurrent authority and there was "congressional inertia, indifference or quiescence," at which time he said that presidential power must be assessed based on the circumstances of the situation in which he was asserting his prerogative powers. Finally, the President's power was at its lowest ebb when he was acting in contrast to Congress' will, and thus had to rely only upon his own constitutional powers for authorization.²⁰ This description of presidential power fluctuating along a spectrum based on the degree of authorization the President had received was relied upon in the *Hamdan* decision when the Court decided that Congress had in fact put limits on the President's war powers.²¹

The history above provides only a brief overview of some of the cases in which the Court has ruled against Executive claims to broad unilateral power in wartime, but these cases outline an important trend of judicial silence. One would assume that this trend of a deferential Court during wartime would continue and, when combined with the Bush Administration's ideological persuasion toward strengthening the unitary executive, that it would lead to a vast expansion of executive powers in the post-9/11 era. Thus, when looking more thoroughly at the Bush

²⁰ *Youngstown Sheet & Tube Co. v. Sawyer*. 343 U.S. 579 (1952) at 635-638.

²¹ Stone, 150.

Administration's policies after 9/11 it is evident that the Court was once again confronted with expansive claims to prerogative powers and had the option to keep with its historical role and allow powers to accumulate to the Presidency during this time of war, or to decisively break with hundreds of years of wartime precedent.

III. A Unilateral Executive

When a time of crisis has arisen and a war begun, history has shown that power often has become centralized within the Executive as Congress cedes some of its power to the President, and the history above demonstrated that the courts have not jumped to scrutinize wartime policies either. However, at its founding, the government of the United States was designed as a government of "separated institutions sharing powers," according to James Madison.²² Joseph Cooper of John Hopkins University has identified the shift in power to the President as something which has accumulated with each crisis and has led to the gradual accrual of an unimagined amount of power within the presidency.²³ Keeping this trend in mind, upon their entrance into the White House, the Bush Administration made a conscious effort to further expand these powers in order to strengthen the "Unilateral Executive." This ideology was described by John Yoo, Assistant Attorney General from 2002-2003 as the ability to freely exercise presidential powers in order to have the "flexibility and energy" to address a crisis.²⁴ A small group within the administration held this idea of a strong unilateral Executive upon

²² Owens, 35.

²³ *Id.*, 6-7.

²⁴ Yoo, John. *Crisis and Command: the History of Executive Power from George Washington to George W. Bush*. New York: Kaplan Publishing, 2009, 423.

entrance into office and it is clear that they controlled many of the decisions made by the Bush Administration, often without adequate deliberation among a larger group.²⁵

Much has been written and disclosed in interviews about the atmosphere toward deliberation within the Bush administration following 9/11, and there is growing consensus that many of the legal determinations which were made were done so in large part due to the influence of David Addington, Vice President Richard Cheney's legal counsel. Addington is important because he played a central role in shaping many of the counterterrorism and detainee policies that the Administration employed, and his basis for these policies was reflective of the prevailing mindset within the Administration. Addington is said to follow the "New Paradigm" interpretation of the Constitution which holds that the, "President has the authority to disregard virtually all previously known legal boundaries if national security demands it."²⁶ Jack Goldsmith, who served as Assistant Attorney General, Office of Legal Counsel (OLC) from 2003-2004, shared a similar perspective about Addington and the decision making process following 9/11. In his book, The Terror Presidency, Goldsmith states that the Administration believed that the President's power would be limited if he consulted with Congress, so he took a "stance of non-accommodation."²⁷

Not only was there a pervasive attitude that consultation with Congress would be detrimental to the President's authority, but a similar sentiment was held in regards to sharing decision making within the various offices of the Executive as well. At times, the OLC did not

²⁵ Jack Goldsmith served as Assistant Attorney General, Office of Legal Counsel 2003-2004 at which time he resigned due to the conflicts he faced in the Administration when he did not agree with the legal basis for which he was supposed to justify policies and because he believed that the routes to which legal footing was established was shaky. In his books *The Terror Presidency* and *Power and Constraint* he describes the relationship among the members of the administration whom emphasized one track of thinking and an unwillingness to accept disagreement.

²⁶ Mayer, Jane. "The Hidden Power." *The New Yorker*. 3 July 2006.

²⁷ Goldsmith. *The Terror Presidency*. 124.

show the State Department the legal basis upon which it was grounding some of the Administration's policies pertaining to enemy combatants because, as Goldsmith states, the State Department would have objected. This shows the extent to which the Administration became engulfed in a mentality desirous of little oversight. At times they even failed to run legal documentation and ideas past Secretary of State Colin Powell and head of the National Security Council Condoleezza Rice for fear that they would stall the decision making process and object to some of the harsher detainment practices that the Administration chose to pursue.²⁸ Goldsmith also discusses the unwillingness within the Administration to listen to alternate ideas and the inability to posit challenges because central players wanted nothing to stymie or delay the accumulation of further Commander-in-Chief Powers to the President.

The assertion by the Bush Administration that Command-in-Chief Powers allowed the President to take whatever steps he deemed necessary in the realm of national security setup what was to be a constitutional imbalance between the branches. After 9/11 the Bush Administration took measures to protect U.S. national security, but many of their policies regarding the capture and detainment of terrorists at Guantánamo Bay soon appeared before the Supreme Court. To address whether the Court challenges made a difference in terms of safeguarding civil liberties, as has not historically been the case in times of crises, it is necessary to see whether the Court decisions resituated the balance of power between the three branches within the sphere of policy making. Therefore, it is necessary to address the indicators laid out earlier and analyze congressional action or inaction prior to the Court decisions and whether these decisions initiated a different course of action afterward.

²⁸ *Id.*, 167.

In the wake of 9/11 Congress had difficulty establishing its role in safeguarding civil liberties and shaping terrorism policies with many detainee policies being made through Executive Orders while Congress stayed largely silent. The National Public Radio conducted a poll in the months after 9/11 to gauge support for some of these policies and found that there was “broad support” for “get-tough tactics.” Both ABC News and the Washington Post found that there was similar public support for a military tribunal system.²⁹ As explained above, the President believed in the unilateral exertion of Commander-in-Chief Powers, powers which he and others in the Administration believed had dwindled and needed to be allocated back to the President so that he had more authority.

One way the Bush Administration did this was through issuing numerous signing statements, vastly more than had been issued by previous presidents. Signing statements are significant because they are taken into consideration when laws are interpreted, so while the President does not have a line item veto like state governors, signing statements have become the way in which President’s typically show what portions of a statute they will or will not enforce. However, according to John Yoo, the Courts typically do not give much weight to signing statements and the number issued by President Bush do in fact fit within the norms of modern presidents.³⁰

Signing statements were just one of the ways in which the Bush Administration attempted to expand prerogative power, but they did so through Executive Orders and unilaterally crafting policy as well. The policy framework that they molded served as the basis for the Court when they addressed the legality of the President’s power to detain combatants at

²⁹ Palmer, Elizabeth A. and Adriel Bettelheim. “War and Civil Liberties: Congress Gropes for a Role.” *CQ Weekly*, (2001): 2820-2827.

³⁰ Yoo. *Crisis and Command*, 415.

Guantánamo Bay. A crucial element upon which their decisions hinged was whether President Bush had an express authorization from Congress to detain such individuals in the first place. In the terror cases, the Court looked to gauge the degree to which the Administration received Congress' approval through the Authorization for the Use of Force which was passed by Congress in the days after 9/11.

The Authorization for the Use of Force (AUMF) was the first and one of the only instances of congressional involvement until the Supreme Court demanded their participation three years after 9/11 and over a year into the Iraq war. This joint resolution was sponsored by Tom Daschle (D-SD) and passed unanimously in both chambers, with only one abstention in the House. The AUMF was written by the White House and sent to Congress on September 12, 2001, at which time the Democrat controlled Senate made some changes to the Resolution in order to limit the duration of detainment and the instances in which the President had sole discretion in decision making.³¹

While this may seem like the Senate somewhat limited the President's wartime authority, they did not follow through in subsequent years to check the President's actions during the war on terror, nor did they have him report back to them every 60 days as Rep. John Tierney (D-MA) initially proposed to add as a provision of the AUMF.³² The AUMF, in short, gave the President the authority to, "take action to deter and prevent acts of international terrorism against the United States." Furthermore, Section 2 has become a sticking point because it is vague and susceptible to broad interpretation, stating that, "The President is authorized to use all necessary

³¹ The AUMF is codified as 107 S.J. Res. 23. See Grimmett, Richard F. "Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L 107-40): Legislative History." *CRS Report for Congress*. (2007): 2 fn 3. The CRS Report cites various mainstream news sources which delve further into the discussions between the White House and Congress.

³² *Id.*, 3.

and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.”³³ This section became the focus of the later Supreme Court terror decisions when they looked to determine whether Congress authorized the President to take action against suspected terrorists. Specifically, it is at the center of the decision in *Hamdi v. Rumsfeld*, a case which will be analyzed in the following pages. As will be shown, the Court was split in its determination of whether the AUMF authorized the President’s detention of enemy combatants and the Court continued to struggle in subsequent cases as to whether the AUMF gave the President explicit authorization to conduct the war.

Along with the Joint Resolution which gave the Administration congressional approval to pursue terrorists, on November 13, 2001 President Bush issued a Military Order, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.” This Military Order allowed the President to establish military commissions in order to try those who perpetrated crimes against the U.S. by aiding or participating in terrorist activities. The November 13th Military Order relied much upon the precedent for military tribunals established in *Quirin*, yet this justification was struck down by the Court in *Hamdi v. Rumsfeld* in which they noted that *Quirin* was, “not this Court’s finest hour.”³⁴

I will discuss the Court’s decision in *Hamdi* in more detail later, but it is important to note that the Military Order promulgated what was to be a military commissions system set up unilaterally by the Executive whom determined who would be detained and if the detainee could seek review of their case. As Louis Fisher states, a system of review established solely within

³³ *Id.*, 6.

³⁴ This quote is from Justice Scalia in his dissent in *Hamdi v. Bush*. Louis Fisher cites this to place the decision in context and to look at the history behind the Military Order, as well as to show how the various branches tailored their actions according to its provisions. See, “Detention and Military Trial of Suspected Terrorists: Stretching Presidential Power.” *Journal of National Security Law & Policy*. (2006).

the executive branch, with no access to external review, does not foster the necessary “neutrality, detachment, independence, and impartiality” that accompanies a fair review.³⁵ Some members of Congress realized, as Sen. Arlen Specter (R-PA) articulated in December of 2001, that, “even in war, Congress and the courts have critical roles in establishing the appropriate balance between national security and civil rights.”³⁶ Yet, as Sen. Byron Dorgan (D-ND) pointed out, Congress did not fulfill this role and challenge the President but instead was supportive in an extreme sense. Sen. Leahy noted in 2001 that the system of military tribunals that the President set up violated separation of powers and the distinct role of each branch, which he posited may entail that the tribunals could be found unconstitutional.³⁷ Sen. Leahy was one the few members of Congress who challenged the President’s policies from their onset and he and Senate Judiciary Chairman Arlen Specter advised the Executive to work in conjunction with Congress rather than by constructing policies unilaterally. However, Sen. Russ Feingold (D-WI) noted that despite these warnings, Congress did nothing to back them up with meaningful enforcement checks.³⁸

Congressional acquiescence appears pervasive in the wake of 9/11 and the switch in Congress’ rhetoric and skepticism about the Executive’s policies did not occur until around 2006, yet it does not seem that this switch may be attributable to an increasingly unpopular president associated with unpopular wars. Gallup Polls has asked since the beginning of the Iraq War in 2003 whether the War was a mistake or not. In March 2003 only 23% of the public believed it to be a mistake, but by June 2004 that percentage had risen to 54% and since October 2005 it has consistently been above 50%, with the highest disapproval mark coming in April 2008 at 63%. The significance of this disapproval is noted in comparison to the Vietnam and

³⁵ Fisher, “Detention and Military Trial of Suspected Terrorists.” 3.

³⁶ Palmer and Bettelheim.

³⁷ *Id.*

³⁸ Cutler, Leonard. *Developments in the National Security Policy of the United States Since 9/11: The Separate Roles of the President, the Congress, and the Supreme Court*. Lewiston, NY: Edwin Mellen Press (2008): 23.

Korean wars because it occurred quickly; it only took over about a year and a half for a majority of Americans to disapprove of the war.³⁹

Public dissatisfaction with the war began around 2004, but Congress continued to allow the President to unilaterally shape policy up until around 2006 when they passed the Military Commissions Act which will be discussed further below. The public opinion polls also show a decrease in job approval ratings for the President beginning around 2004, much earlier than the 2006 mark at which Congress began to actively craft detainee policy in conjunction with the Administration.⁴⁰ The Supreme Court decisions clearly played a strong role in persuading Congress to become involved in the shaping of detainee policies as their decisions in this area came out beginning in June 2004 and were increasingly condemning of the Executive's policies as subsequent cases were heard, the most pronounced being the *Hamdan* decision in June 2006. With these decisions the Supreme Court took an unprecedented role and intervened to hedge the Administration's vast claims to unilateral executive power in a time of national crisis. The Court decisions described below will exemplify the ways in which the Supreme Court nullified the Bush Administration's ideas of Commander-in-Chief Powers and urged Congress, through its decisions, to craft detainee policies alongside the Administration in order to put the policies on more constitutionally sound footing. Most importantly, the Supreme Court decisions reinstated Congress as an oversight body that had the ability and responsibility to protect civil liberties.

³⁹ Newport, Frank. "American Public Opinion and Iraq." *Gallup*. Polling Matters Editorial. 19 Dec. 2011.

⁴⁰ When following the trends of a bi-weekly survey of job approval rating for President Bush conducted by Gallup his approval rating fell below 50% for the first time in his presidency in January 2004 despite many peaks and troughs in which the lowest he had dropped to was around 55% approval and the fluctuations seem to closely correlate to military buildups. "George W. Bush's Job Approval Ratings Trend." *Gallup*.

IV. Securing the Right to *Habeas Corpus*: *Rasul v. Bush*

One of the first impactful decisions that the Court decided regarding Guantánamo detainees was the decision of *Rasul v. Bush* in June 2004.⁴¹ This was decided by the Supreme Court on narrow grounds, focusing on whether U.S. courts had the jurisdiction to hear detention challenges brought by detainees who were captured abroad and brought to the Guantánamo Bay detention facility, as was the case for Shafiq Rasul who is a British citizen that was captured in Afghanistan.⁴² The Court also looked at whether the right to *habeas corpus* entailed the right to judicial review of the legality of executive detention on territory in which the U.S. does not have, “ultimate sovereignty.”⁴³ Justice Stevens wrote for the majority that detainees of the United States, as long as they were in U.S. custody, no matter the location of incarceration, were entitled under 28 USC § 2241 to *habeas corpus* review by U.S. Federal Courts.⁴⁴ Even though the detainees were not U.S. citizens, the Court ruled that it was not necessary that they be citizens with access to rights derived from the Constitution because the statute provided them with the necessary means to seek *habeas* since they were detained in *de jure* U.S. territory. This decision

⁴¹ It is important to note that the case of *Padilla v. Rumsfeld* was decided by the Court during the same session as *Rasul* and *Hamdi*, however I do not discuss this case in length in this paper because the Court decided that it was to be remanded to District Court because the defendant did not file his writ of habeas against the proper authority. This discrepancy occurred after the government was transferred and indicted in Florida, rather than South Carolina because the District Court. It is plausible that the government chose to transfer him upon the District Court’s ruling that he be released based on insufficient grounds to hold him any longer. While the Court does not reach the merits of this case, the justices hint that it brings up Separation-of-Powers questions and that the question of whether the President has the authority to indefinitely detain a citizen must be addressed soon. Leonard Cutler, in his book Developments in the National Security Policy of the United States Since 9/11 provides a nice synopsis of the *Padilla* case on pages 5-9.

⁴² *Rasul v. Bush*. 542 U.S. 507, 470. (2004).

⁴³ *Id.* at 475.

⁴⁴ 28 U.S.C. § 2241 is codified as the “Power to grant writ” and outlines how Courts can grant the writ and who is entitled to the writ. US House Code, 28 USC Chapter 153-Habeas Corpus.

left it up to later decisions to carve out exactly what type of procedures the detainees could access.⁴⁵

The vagueness in *Rasul* as to what type of review prisoners had access to led to the establishment of Criminal Status Review Tribunals (CSRTs) by the Bush Administration a month after the Court's decision was announced. The CSRT's were set up to determine whether enemy combatants detained at Guantánamo Bay were correctly classified as such, and to allow the detainees a means to challenge that designation.⁴⁶ Presidential establishment of a system of military commissions in times of war is legal and based upon the precedent President Roosevelt set by establishing a tribunal system during WWII that was legitimated by the Supreme Court in *Quirin*, although the construction in this instance has been criticized.⁴⁷

Establishing tribunals and a limited judicial review process that did not provide for oversight caused concern due to the lack of discussion around their creation and the uncertainty of their reliability to protect individual liberties. This concern centered on the possible presence of "command influence" because the tribunals did not provide for any oversight and in this setup there were strong incentives to follow the chain of command and not question the process of determining who would be detained.⁴⁸ The CSRT's were established through an order issued by the Deputy Secretary of Defense, Paul Wolfowitz on July 7, 2004 as a way to review the status

⁴⁵ Cutler, 10.

⁴⁶ An enemy combatant was defined as "an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. See, Department of Defense Memo "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba." 14 July, 2006: 1.

⁴⁷ Louis Fisher dedicates an entire chapter in *The Constitution and 9/11* to the use of Military Tribunals in times of threat. He cites precedent for tribunals established by the president, but shows that they had been grounded with legislative support, citing George Washington's statement that the military code could only be changed as "defined or fixed by Congress." For a historical overview see Fisher, *The Constitution and 9/11*, chapter 6 "Military Tribunals and Detention." Pg. 172-210.

⁴⁸ Thompson, Gary. "Guantanamo and the Struggle for Due Process of Law." *Rutgers Law Review*. 63.4, (2011): 1202

of enemy combatants.⁴⁹ The Court decided in *Rasul* that the way in which the tribunals were set up: not allowing detainees to access counsel, including coerced statements or hearsay at trial, and most importantly, allowing all decisions to be made within a limited hierarchy where the decision makers were influenced by those above them, knowing that their personal ambitions were at stake, did not afford the detainees proper review.⁵⁰

The CSRT's were further compromised due to their procedural guidelines, primarily the provision that the government's evidence was favored and they only needed to prove a preponderance of evidence in order to determine the detainee's status as an enemy combatant. As established by the President's November 13th Military Order, the tribunals would decide the detainee's combatant status which in turn determined the legal processes he could access and the ways in which he could be detained.⁵¹ The suspect legality of the CSRTs is emphasized by the problems associated with unilateral executive decision making and the concerns this poses in maintaining a balance among the decision making institutions, an issue which the Supreme Court addressed with their decision in *Rasul*.

The case of *Rasul v. Bush* was decided by a 6-3 decision in which Justice Stevens penned the opinion for the majority. The case involved the *habeas* petitions of two Australians and eleven Kuwaitis who filed for their release from Guantánamo, to know the charges against them, to have access to counsel, freedom from coercive interrogations, and to have access to a court or tribunal system.⁵² In its decision, the Court decided that the writ of *habeas corpus* should be

⁴⁹ The CSRTs were tailored after passage of the Detainee Treatment Act in 2005. To see the memo establishing the CSRT's and the process used as well as the new provisions in order to meet the restrictions outlined in the DTA see DOD Memo from July 14, 2006 "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba."

⁵⁰ Thompson, 1202-1203.

⁵¹ Cutler, 16-17.

⁵² *Rasul* at 472.

read to extend to all cases in which the United States was holding a person. This included extension to aliens detained outside the U.S. if the ground on which they were being held was considered U.S. sovereign territory, a stark break from the precedent that the Court set in *Eisentrager* in which it held that aliens could not invoke the writ.⁵³ The new stance of the Court to extend *habeas* access to aliens held outside the U.S., particularly in a time of war, is unprecedented and a direct break from the *Eisentrager* precedent, but also from the posture of the Court surrounding the detention and trial of military combatants throughout history. In his opinion, Justice Stevens provided an elaborate explanation as to the circumstances of the *Eisentrager* petitioners and how they differ from the Guantánamo detainees so as to show that the court was not completely breaking with precedent. Foremost, in *Eisentrager* the detainees were German war criminals held in Germany which was never at any point U.S. territory, but he said that Guantánamo was unique because it is essentially U.S. territory, it is removed from the realm of any hostilities, and in *Eisentrager* the commission procedures were quicker and the prisoner's detention status was clear. This led Stevens to write that the federal courts should have the ability to review the "indefinite pretrial detention" period of detainees.⁵⁴

The Court provided insight into the basis for their finding of judicial review of indefinite executive detention and their break from historical precedent, although they make a point of stating that *Rasul* did not in fact break with precedent because *Eisentrager* was not applicable. Justice Stevens cited *INS v. St. Cyr* that access to *habeas corpus* had always been preserved as "a means of reviewing the legality of Executive detention." The opinion continued to explain that

⁵³ *Id.* at 473. While the decision in *Eisentrager* follows typical Court ideology of non-intervention during times of crises, it is of note that the Court reached this after overturning the district decision, *Eisentrager v. Forrestal*, 174F, 2d 961 (D.C. Circuit 1949). The district court found that the suspension clause did in fact give those being detained the right to *habeas* because since they were found to have standing, they could not be denied that right. The majority cited this in their opinion in *Rasul* at 478.

⁵⁴ *Id.* at 487-488.

in these instances when the writ had most strongly been protected it was due to the recognized need that access to a means to challenge ones detention must be provided.⁵⁵ The Court heard this case because they desired to take a proactive approach and look at whether the President had the legal authority to indefinitely detain enemy combatants.⁵⁶

It is of note that while this decision allowed for Federal Court review of *habeas* claims by detainees contrary to Executive statements that no such rights existed, the Court did not go so far as to outline the specific rights that detainees were entitled to. Because the scope of the decision was ultimately fairly narrow, it gave the Executive room to maneuver and adapt the way in which it would handle detainees. This led to the Administration's creation of the aforementioned CSRTs which were ultimately ruled inoperable in *Hamdan v. Rumsfeld* because they did not provide proper due process to the combatant. Even as the Court dictated that *habeas* review needed to be provided to detainees as well as the opportunity for them to appeal their status, the Executive took measures to attempt to limit that access which necessitated congressional involvement. Congress' role was particularly important because they are the body that is supposed to best represent the people and can be held most accountable to protect their constituent's fundamental rights. They are also designed to provide a setting for more open dialogue and the openness of this dialogue and length of the process inherently brings oversight and public awareness.

However, in Justice Scalia's dissent, he purported that the Court overstepped its bounds and unnecessarily infringed on executive decision making, stating that the majority was creating, "a monstrous scheme in (a) time of war."⁵⁷ Scalia believed that the Court had harshly and

⁵⁵ *INS v. St. Cyr* 533 U.S. 289, 301 (2001). Cited in *Rasul* at 474.

⁵⁶ *Rasul* at 485.

⁵⁷ Fallon and Meltzer. "Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror." *Harvard Law Review*. 120.8 (2007): 2032. Cites Scalia in *Rasul v. Bush* at 506.

unnecessarily broken from precedent and that a conflict would ensue between judicial, military, and executive measures in establishing spheres for litigation, and that furthermore, this would be, “highly comforting to enemies of the United States.”⁵⁸ Clearly animated and faulting the Court for harming the capacity of the Executive to adjudicate and manage the war on terror and the detainees involved, Scalia lent substantial support to the argument put forth in this thesis, that Congress should be involved in the process of deciding enemy detention. Specifically, Scalia wrote that if statutes needed to be revised to change the detention system and detainee procedures, Congress had been in session and could have made the necessary changes to determine appropriate due process and judicial review.⁵⁹

This sentiment espoused by Scalia clearly shows that he believed that the Administration’s policies would stand on stronger footing when they had congressional approval. Whether the policies would be shaped with greater oversight or would be constitutionally stronger by fitting within Justice Jackson’s “zone of twilight,” he was clearly vesting faith in the power of deliberation. It is important to realize that Justice Scalia, who typically sides with the “conservatives” of the Court, was a proponent of congressional involvement similar to the “liberals” of the Court, albeit by different reasoning. This demonstrated that not only was the Court assertive in overruling unilateral executive decision making, but it was unanimous in calling out to Congress for involvement and action. It determined that Congress must no longer be the acquiescent and silent branch on the issue of enemy combatant detainment because Congress had the greatest opportunity to provide oversight and legitimate the detainment procedures.

⁵⁸ Rasul.at 499.

⁵⁹ *Id.*, at 506.

V. Initial Judicial Checks: *Hamdi v. Rumsfeld*

The decision in *Hamdi v. Rumsfeld* was passed down in conjunction with *Padilla* and *Rasul* as a bundle of three decisions by the Court in June 2004. The question that the Court addressed in *Hamdi* was whether or not Congress had authorized the detention of enemy combatants, specifically looking at the Uniform Code of Military Justice (UCMJ) and the AUMF. The majority decided that the detainees were entitled to due process and the opportunity to present their case before a type of tribunal or court system.⁶⁰ This case concerned Yaser Hamdi, a U.S. citizen captured in Afghanistan who filed that his 5th and 14th Amendment rights were being violated and that he was entitled to an attorney, a cessation of interrogations, that he be allowed to contest the allegations against him and offer his own evidence, and he petitioned for his release.⁶¹ Justice O'Connor wrote the plurality opinion and was accompanied by Justices Rehnquist, and Breyer, with whom Justices Souter and Ginsburg concurred in part and dissented in part. O'Connor and the plurality ruled that the AUMF authorized the President to handle detainees as he deemed necessary. Therefore, while Hamdi is a U.S. citizen, born in Louisiana and held in territory which was determined to be under U.S. sovereignty, because he was determined to be an enemy combatant the Executive argued that he could be held indefinitely without charges filed against him or access to a hearings process.⁶² This argument by the Executive is critical because it attempts to establish that despite citizenship, if a person is labeled an enemy combatant the Executive may detain them without access to their full rights and, as in the case of José Padilla, this was used to justify extended incarceration.⁶³

⁶⁰ *Hamdi v. Rumsfeld*, 542 U.S. 705 (2004). at 509.

⁶¹ *Id.* at 511.

⁶² *Id.* at 510.

⁶³ *Rumsfeld v. Padilla* 542 U.S. 426 (2004).

The Court determined that it would not decide whether Article 2 of the Constitution gave the President the ability to detain in this scenario as a decision along these grounds would have had a broad reach and would have provided President Bush with a vast expansion of implied powers inherent to his capacity as Commander-in-Chief.⁶⁴ Therefore, the Court constructed a narrow ruling which stated that the President did have congressional authorization from the AUMF to convene the tribunals which tried Hamdi. While the Court believed that the AUMF gave the President explicit enough authority to detain Hamdi, the Court used the test from *Mathews v. Eldridge* which weighed the importance of the government interest against that of the private interest and the burdens that affording more due process or a false incarceration would pose for each party.⁶⁵ In using this test the Court decided that while the AUMF did provide congressional authorization for detainment, the potential that indefinite detention in a system with little oversight had to become oppressive was not justifiable.⁶⁶ Throughout his appeals process, Hamdi's lawyers made the case that power had been "ceded" to the Executive during this time of war in order for the President to establish the procedures for detainment and its duration, thus this limited the individual liberty interests of the detainees because they lacked adequate access to due process. Hamdi's case revolved around circumstantial evidence presented against him in the Mobbs Declaration,⁶⁷ the only evidence that the government presented against him. It is clear that the evidence could have been hearsay, but since there was

⁶⁴ Hamdi at 517.

⁶⁵ *Mathews v. Eldridge*, 424 U.S. 319 (1976). This case was decided in 1975 and the majority ruled that termination of a disabled man's Social Security benefits prior to his evidentiary hearing did not violate his Due Process.

⁶⁶ Hamdi at 529-530.

⁶⁷ The Mobbs Declaration is an account of the facts against Hamdi from the war zone. These were the sole facts upon which the government founded its case against Hamdi. The facts in the Declaration were unknown to Hamdi, however the vagueness with which it was written, that "when seized by the United States Government, Mr. Hamdi resided in Afghanistan," warranted Court intervention because the Court decided that the AUMF said that combatants had to be "engaged in an armed conflict" or "part of or supporting forces hostile to the U.S." Hamdi at 526-527.

no means to challenge any inaccuracies because it was produced by the government, it was taken as truth.

While the plurality made a point to not overreach in their *Hamdi* ruling, their intervention is notable for striking down provisions of executive detainment, but the decision also laid the ground work for their continued check on the Executive during the war on terror. The Court upheld the legality of the Bush Administration's detainment of Hamdi and other enemy combatants in a time of war because it was similar to the system of tribunals that President Roosevelt used during WWII as was upheld in *Quirin*. However, the Court also realized that when an individual was held for an extended period of time they needed access to some type of due process so as to ensure that their individual liberties were protected.⁶⁸

This sentiment about the importance of ensuring detainee access to due process was echoed by Jack Goldsmith in his memoir of his time as leadership in Office of Legal Counsel (OLC) from 2003-2004 after he visited the Norfolk Brigade and saw where Hamdi was being held. Similar to the Court, he acknowledged the fact that the Executive could not be concerned with over litigating on the battlefield, yet he saw the necessity of providing for judicial review and that in the end, the President's policies were often wrong because they were too legalistic and determined to expand his Commander-in-Chief Powers.⁶⁹ Accordingly, the Court disagreed with the argument made by Solicitor General Ted Olson that the Court should stay out of the realm of enemy combatant detainment because, as O'Connor stated, "we have long since made clear that a state of war is not a blank check for the President."⁷⁰

As evidenced by Justice O'Connor's opinion, the Supreme Court decision in *Hamdi*, was not as expansive as it could have been because it did not rule entirely that the military tribunal

⁶⁸ Hamdi at 534.

⁶⁹ Goldsmith, *The Terror Presidency*, 102.

⁷⁰ Hamdi at 536.

system, as established by the President, violated detainee rights and that the procedures were not justifiable. However, the Court did take the important step, which is most relevant for this thesis, of stating that the President did not have unlimited unilateral power, even in a time of conflict. Furthermore, while the Court took the unprecedented role of intervening to ensure that the Executive could not make broad claims to vast expanses of power; it is of note that they also were fundamental in attempting to place detainee procedures on sound legal footing. Rather than determining that the Administration needed to make changes to the tribunal system, the Court recognized and acknowledged the need for congressional involvement in the decision making process and sighted their absence up to this point. In Justice Souter's partial concurrence, in which Justice Ginsburg joined, they stated that before a detainee was incarcerated for an extended period and during the time in which they were detained, the methods employed needed an, "assessment by Congress."⁷¹ Justice Souter also emphasized the role of Congress and the separation of branches fundamental to the constitutional democracy of the United States.

Justice O'Connor made further note of her dislike for the government's argument in this case and she believed that the court should not rule on this matter because this approach would serve to, "*condense* power into a single branch of government."⁷² Justices Souter and Ginsburg continued this line of reasoning but desired to see an even more expansive Court decision than what O'Connor proposed. They stated that the Non-Detention Act of 1971 applied to these detainment circumstances and that it forbade the President from his current detention of enemy combatants at Guantánamo Bay because neither the AUMF nor any other authority had given the President explicit authorization to detain.⁷³ It is engaging to look at the Court's intervention in

⁷¹ Hamdi at 545. (Justice Souter concurring in part and dissenting).

⁷² Cutler, 120. (Citing Justice O'Connor's majority opinion in *Hamdi* at 536.)

⁷³ The Non-Detention Act of 1971, codified as 18 U.S.C. §4001(a), stated that, "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Hamdi at 542, 547.

acting as a check on the Administration's claims to vast unilateral powers because it was a break from precedent, but also because the Court called for congressional involvement in the decision making process. This call attempted to reestablish a balance in power among the branches, an important indicator to ensure that the United States' constitutional system functions in a more democratic and open way. Souter referenced this sentiment when he wrote that:

The defining character of American constitutional government is its constant tension between security and liberty...In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government.”⁷⁴

Justice Souter's statement highlights an indicator specified in this thesis that to protect civil liberties it is necessary to have policy deliberation from multiple branches.

The dissenting opinions, such as Justice Thomas', stated that Congress was not privy to all the information that the President had and therefore, should not legislate about those issues because the President was to be trusted with some degree of unilateral war making powers. He was echoed by Justice Scalia, both of whom did not wish to see judicial interference in executive war making.⁷⁵ The sentiment espoused in the dissents, that they did not see an oversight function for Congress or the Court, would have had the potential to create an atmosphere in which additional Commander-in-Chief Powers were accumulated to the presidency, even though in times of war the executive already wields increased powers. The dissenting opinions are helpful in exposing the Court's break with the precedent of deference to the Executive's accumulation of prerogative powers during wartime because this historical trend was often cited in the dissents as a reason for minimal interference by the Court.

⁷⁴ *Id.* at 545.

⁷⁵ *Id.* at 583. (Justice Souter dissent) and Justice Scalia dissent at 577-578.

The wave of Court cases in the 2004 session stymied the growth of presidential power and not only limited the Executive's claims to broad power but had further implications for the roles of each branch. These cases begin to help address the question of whether our constitutional democracy can function in a time of war and do so while still safeguarding individual liberties. So far, we have seen that throughout history the Court has deferred to the President and given him the discretion to craft unilateral policy measures during a time of war. Such policies have, at times, curtailed individual liberties or targeted a specific class of persons. Then, with the cessation of hostilities or the subsiding of danger, the Court has recognized its fault in too easily affirming executive actions and the damages that this has incurred on a specific group. Despite the shortcomings of the Court and the Executive during previous crises, there is a well established history of the employment of military tribunal systems being used to try enemies during hostilities which stands on a perfectly legal basis and can be utilized without infringing on civil liberties. However, beginning with the 2004 terror decisions, the Court began to affirm that the Bush Administration was over extending the powers which Congress had given it to conduct the war on terror. This broke with the Court's historical trend of deference in times of crisis, but most importantly, the Court decisions began to recognize the presence of certain rights for detainees, an initial step in assuring the protection of individual liberties for all citizens. While the decisions were not expansive rulings which dictated detainment procedures, they laid the ground work for the future cases that the Court would decide, including determining which branch had the responsibility to establish tribunals that would protect the newly found detainee rights. The sections below begin to address this, and will show how the 2004 terror decisions were directly responsible for spurring congressional action and an end to Congress' acquiescence to vast claims of Commander-in-Chief Powers by the Bush Administration.

VI. Executive Resistance to the Detainee Treatment Act

The flurry of activity and increased attention surrounding the treatment of detainees at Guantánamo Bay began shortly before the passage of the Detainee Treatment Act of 2005 (DTA). It is critical to note the activity of the Supreme Court in the 2004 term as they reached decisions in *Padilla v. Rumsfeld*, *Rasul v. Bush*, and *Hamdi v. Rumsfeld*. These decisions underline the unique break from precedent that the Court took in a time of crisis and are what spurred Congress to ultimately pass the DTA. The literature is mostly in agreement that, when looking at the post 9/11 Court, it dramatically broke from its historical role in times war by challenging Executive action, and at this time the United States was only a year and a half into the “war on terror” in Iraq and Afghanistan. The DTA shows the influence that the Court had in reestablishing the balance of power between the branches because prior to its intervention in the terror cases, Congress had not engaged in meaningful debate about the policies set by the Executive regarding detainee detention. As I showed through Congress’ acquiescence to pass the AUMF, they often rubber stamped legislation as it was passed down by the President, opening the door to allow for unilateral decision making. The challenge laid forth by the Supreme Court decisions nullifying the Administration’s detainee policies seemed to have awakened Congress and the decisions spurred them to action.

The Detainee Treatment Act was the first major piece of legislation passed in response to the wave of court cases concerning Guantánamo Bay detainees. It was also one of the first challenges set forth by Congress to Executive power in the post 9/11 era. The uniqueness of the DTA is that it was actually proposed by Senator John McCain, a member of the President’s own Republican Party. While it has been documented that Senator McCain and President Bush did not have the strongest relationship, it is particularly of note that it was a member of the

President's own party that leveled one of the first challenges to his broad claims to Commander-in-Chief Powers.⁷⁶ Aside from the fact that the Senator and President had feelings of animosity for one another at times, the power of the DTA as a rebuff of the President's unilateral authority can be evidenced in its vast bipartisan support which negates any personal tensions that may have been brewing below the surface. The DTA was adjusted and altered as Sen. McCain negotiated with the Bush Administration to get the highly popular amendment passed as part of the 2006 Department of Defense Appropriations bill, a bill which the President did not want to entirely veto due to the presence of one unfavorable amendment.

Sen. McCain, with his knowledge of the importance to the Bush Administration of passing the appropriations bill, used this leverage when he proposed the DTA as Senate Amendment S.1977 to the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006 so that the President would be forced to either accept the amendment or reject the entire appropriations bill. The amendment reached the floor in October 2005 and was co-sponsored by Sen. Graham (R-SC), Sen. Hagel (R-NE), Sen. Smith (R-OR), Sen. Collins (R-ME), Sen. Lamar (R-TN), Sen. Durbin (D-IL), Sen. Levin (D-MI), Sen. Warner (R-VA), Sen. Chafee (R-RI), Sen. Sununu (R-NH), and Sen. Salazar (D-CO).⁷⁷ The amendment is particularly pertinent for this study because not only does it show the point at which Congress became less acquiescent and more involved in shaping detainee policy, but it was also proposed as a direct response to the three Supreme Court decisions which were passed a little over a year prior.

⁷⁶ Leonard Cutler mentions the tension between Senator McCain and George W. Bush in *Developments in the National Security Policy of the United States Since 9/11*. Cutler cites McCain's defeat to Bush for the Republican Presidential nomination in 2000 as a contributing factor to their strained relationship.

⁷⁷ United States. Cong. Senate. S. AMDT. 1977. *Detainee Treatment Act of 2005*.

Another point of interest when looking at this amendment is that it was not proposed in an election or a midterm election year; therefore, public opinion may not have been as much in the forefront of the minds of elected officials as it would be during an election year when public perception heavily sways congressional decision making. 2005 was also the year prior to the midterm election reorganization in which the Democrats won control of both the House and the Senate, despite a Republican President holding office, and it was the year after George W. Bush's reelection, a signal that the majority of Americans still approved of his policies at that time.

The DTA protected any person under the control of the U.S. government from cruel interrogation practices as listed in the Army Field Manual,⁷⁸ and it prohibited "cruel, inhuman, or degrading treatment."⁷⁹ Furthermore, it required that the CSRTs and Administrative Review Boards established by the Department of Defense undergo annual review of the status of each enemy combatant being held at Guantánamo. The review was to include an inquiry as to whether statements received from detainees were coerced and if the coerced statements redeemed any value because of the circumstances under which they were obtained. Thirdly, it stated that the U.S. Court of Appeals for the D.C. Circuit had "exclusive jurisdiction" to determine the validity of CSRT rulings about an enemy combatant's status.⁸⁰ It is the last part of the DTA, Section 1005, which encompassed these three provisions that caused much debate at the time of its proposal, frustrating the Administration. This is also the section which addressed the statutory and jurisdictional questions that the Supreme Court raised in its decision in *Hamdan v. Rumsfeld*, a case which will be discussed in further detail below.

⁷⁸ *Id.* § 1002.

⁷⁹ *Id.* § 1003.

⁸⁰ *Id.* § 1005.

The debate surrounding the judicial and statutory means to review the determination of a detainee's enemy combatant status intensified the struggle between the three branches. However, it is this type of productive power struggle that defines the proper functioning of our democracy. If there is a power struggle between the branches it typically sheds more light on policies and brings them to the public's attention due to the increased media attention that the policies receive. The basis of our constitutional system is one in which the three separate branches each control policy in their own sphere with some overlap. Richard Neustadt provides a helpful description of this system as "a government of separated institutions sharing powers."⁸¹ When there is a breach in a branch's sphere due to one of the other branches overstepping its limits, or when one branch does not fully fulfill its designated role, then our constitutional system does not work properly. Therefore, Congress addressed the negligence that the Court pinpointed in its 2004 decisions by passing the DTA and they initiated debate surrounding proposals pertaining to Guantánamo and detainee policy. This led to an increased awareness of the need to place checks on Executive power and illuminated the vast assertion of inherent powers and restriction of civil liberties that had begun shortly after 9/11. The events of 9/11 served as an easy explanation as to the need for the President to have expanded Commander-in-Chief Powers, but this notion of vast prerogative powers was also part of a bigger set of preconceived notions held by the President and his advisors based on the "new paradigm" ideology as explained above.

The Executive branch was unsettled by the new provisions in the DTA that reclaimed an oversight role for Congress. The oversight would see that Congress received yearly updates of the status of each enemy combatant, thus stripping away the centralization of power that had

⁸¹ Neustadt, Richard. *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*. As cited by John Owens in the "War on Terror" and the Growth of Executive Power?, 35.

accumulated to the President.⁸² The Administration's diminished ability to control the status of Guantánamo detainees and set policy by Executive orders or through barely deliberated upon legislation which easily passed through Congress ended up being only the beginning of restrictions on the broad prerogative powers that the President had accumulated. A year later, the Supreme Court's decision in *Hamdan* stated that congressional oversight and the opportunity for detainees to bring their case before the U.S. Court of Appeals was still not substantive enough, leading to the passage of the Military Commissions Act of 2006, which will be described in more detail below.⁸³ However, before analyzing the ways in which the Military Commissions Act increased congressional involvement in the determination of detainee status and limited the President's authority, it is necessary to see how the DTA initiated this process and the ways in which it did not go far enough, thereby necessitating the passage of the Military Commissions Act a year later. For the purpose of this thesis question, as to whether the U.S.'s constitutional democracy can function to protect rights in times of war, it is necessary to look at the means of implementing checks on the President and the ways in which oversight can bring to light the suppression of individual liberties. Thus, this leads next to an analysis of congressional debates about actions which limited presidential power, particularly because this was the way in which the Court mandated that policy change occur.

It is clear that the Bush Administration desired to avoid congressional involvement from the initiation of the war on terror, as set forth in a memo sent from John Yoo to the White House on September 25, 2001 entitled, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them." It stated the belief that Congress

⁸² Detainee Treatment Act of 2005. § 1005.

⁸³ *Hamdan v. Rumsfeld*. 548 U.S. 557. (2006). Web. 20 May 2012.

had no means to check the President's power to respond to a terrorist threat.⁸⁴ While initially it seemed apparent that Congress accepted this edict and would not challenge the President, the DTA showed that when Congress was awakened from their acquiescence by the Supreme Court, it was less about partisan battles and rather a true realization of the necessity of reestablishing the power structure in our democracy. This is why it is important to note that the DTA was proposed and co-sponsored by mostly Republican senators, although the co-sponsorship with Democrats nicely shows that this was a bipartisan issue that spoke more to addressing presidential assertions of power than divisive party platform issues.

While the McCain amendment faced tough debate in Congress, there was also much negotiation between Sen. McCain and the White House before it was passed into law. The DTA provides insight because its sponsor and co-sponsors were mostly Republicans who were directly challenging the President, a member of their own party, whose approval rating at this point hovered at around forty percent, by no means a low number.⁸⁵ One account calls the disagreement a “showdown between Bush and a group of Republican senators.”⁸⁶ Vice President Cheney led much of the White House negotiations with Sen. McCain in hopes of winning certain concessions that were more favorable to the President. It can be conjectured that Cheney negotiated based on his ideological leanings, beliefs which he outlined in a 2005 interview, stating that the President must act in a Hamiltonian way, with “decision, activity,

⁸⁴ Goldsmith, Jack. *The Terror Presidency: Law and Judgment inside the Bush Administration*. New York: W.W. Norton & Company, 2009. 98.

⁸⁵ The Gallup Poll of President Bush's approval rating shows the trajectory of his ratings over the course of his two terms and provides the percentage of citizens who approve, disapprove, or give no opinion on a bi-weekly basis. The October 2005 number that I cite is higher than his second term average rating of 37% approval and significantly lower than the first term average of 49%. However, President Bush's lowest ratings came during the end of his second term and at the point in which Republican congressional leaders were challenging the President over the DTA, he had just been reelected to a second term and was not experiencing the low approval that was present at the end of his second term in 2008. Gallup Poll. “Presidential Approval Ratings—George W. Bush Presidential Job Approval.”

⁸⁶ Bettleheim, Adriel. “Executive Authority: A Power Play Challenged.” *CQ Weekly* (2006).

secrecy, and dispatch.” This was the mentality of the Executive’s “new paradigm” ideology, as explained above, that the Executive needed to be able to exercise vast discretion when necessary and that Congress was too slow of a mechanism to address national security challenges as they arose.⁸⁷ In looking at the DTA it is clear that there was disagreement as to what should be the proper standards for trial and what mechanism to use to review of the status of detainees.

However, the comments from members of Congress suggest that they were enlightened by the Supreme Court decisions in 2004 and realized the need to provide checks on the Executive’s power and address the issue of Guantánamo detainees.

It is very revealing to look at the debates relating to the DTA that occurred in the Senate in more detail, as will be done below, because the debate and floor speeches cut across party lines and appear as more of an attack on, or at a minimum, a realization of the need to place limits on Executive power. This fulfills one indicator used to test this thesis because the DTA showed increased congressional involvement and there were clearly extended periods of discussion about detainee policies. Furthermore, because the congressional member’s comments suggest that the Court’s 2004 decisions influenced their DTA inquiries, the DTA also fulfills the indicator that, in order to preserve our constitutional democracy, at least two branches must be involved in shaping policy.

On October 5, 2005 Sen. McCain first introduced the DTA to the floor and with its introduction he read a letter from twenty-eight retired military officials who supported his amendment. The letter stated that, “torture and cruel treatment are ineffective methods, because

⁸⁷ *Id.*

they induce prisoners to say what their interrogators want to hear, even if it is not true.”⁸⁸ These men and women supported the DTA because they were disturbed and unsettled by the legal limbo and lack of clear legal guidelines to support their actions as they attempted to adhere to different interrogation rules and procedures for Guantánamo Bay versus Iraq, for Prisoners of War versus enemy combatants, and for the military versus the CIA. Sen. McCain stated that codifying his proposals should not disturb the White House because these were the policies already employed by the Administration as established in the Army Field Manual. Yet, the need to codify these positions is evident through the numerous men and women serving in the armed forces who supported this amendment, showing that they hoped it would diminish confusion for fellow service members and themselves when interrogating and detaining enemy combatants.⁸⁹

The statement by Sen. McCain that the Administration claimed that they were already adhering to the policies outlined by his amendment should be cause for some hesitation. It is curious that the administration would object so adamantly to Sen. McCain’s amendment based on policies which they were supposedly already abiding by. If the DTA proposed no changes, why was there such objection on behalf of the Administration? The Administration was not objecting to the policy for political reasons, as could have been the case if it was proposed by the Democrats, they were not opposing it because it violated principles of the Republican Party platform, or because it undermined their popularity and support in the build up to an election. This leads to the assumption that the Administration was so adamantly opposed to the codification of detainee treatment policies and oversight procedures because they had been torturing and violating the Geneva Conventions in their treatment of the detainees. Another

⁸⁸ This letter was printed in the Congressional Record and includes the support of former Joints Chiefs of Staff, the top Navy JAGs, and former commander of CENTCOM, among others. US Senate. “DOD Appropriations Act, 2006.” 5 Oct. 2005. Thomas. 25 Jan. 2013. Web. http://www.fas.org/irp/congress/2005_cr/mccain100505.html

⁸⁹ *Id.*

explanation could be that the Administration simply did not want any advances made on the broad expanses of power that they had built up to the Executive office. To believe that the Administration was torturing detainees would be to realize that some of the fundamental principles on which the United States was founded and the ways in which it preserves its standing as a world power would no longer be intact and thus, its relationships throughout the world could be eroded. But, an investigation into the conduct of the military personnel at Guantánamo Bay and their treatment of detainees is beyond the scope of this thesis and has been written about extensively. Time and the declassification of government documents will eventually bring to light any questionable conduct and it will be judged with the acquisition of hindsight. Meanwhile, for this thesis the assumption will be made, and I believe it is grounded in the facts when combining Executive statements and ideology, that the Administration had become obsessed with proactively seeking to corral more and more power to the Office of the Executive and this best explains their opposition to the DTA.

Moving beyond the Administration's desire to control policy making, the McCain DTA provided insight when looking at the larger question of this thesis: whether our Constitutional system can function in a time of war and if it did function more effectively post-9/11, whether that can be partially be attributed to the Supreme Court's rulings in the terror cases. It has been shown above that the Bush Administration desired to unilaterally set policy pertaining to detainees and that when Congress began to also shape detainee policy and take part in the dialogue the Administration saw it as an affront to their unilateral power. However, it is in this instance that our Constitutional democracy works best because the branches are interacting and inherently there is more debate, spurring further deliberation about the proposed policy. The extensive record of debate and discussion surrounding the DTA was an example of the way in

which congressional action around a policy provided more information about said policy, and this typically brings the debate into a more public sphere. Furthermore, the timing and substance of the DTA indicates that Congress felt compelled to action by the Supreme Court decisions in the 2004 term, and this combined with their knowledge that the *Hamdan* case could soon reach the Court's docket. Therefore, it is important to analyze the timing and whether the legislation addressed areas of concern pinpointed in the Supreme Court decisions. In order to answer whether Executive power was curbed due to congressional involvement it is important to look at the Administration's resistance to actions that Congress took. It is also important to try to assess whether Congress attempted to meaningfully provide new ways which ensured the protection of the individual liberties of the prisoners at Guantánamo. Thus, this analysis will begin by looking at the discussion and lively debate around the DTA, in conjunction with the Graham-Levin-Kyl Amendment.

When looking at the Senate floor debate about the Graham-Levin-Kyl Amendment, the statements of Sen. Lindsey Graham (R-SC), who has served in the military as an instructor for the JAGs, helps show the ways in which congressional dialogue can lead to a more thorough discussion of policies. Sen. Graham's statement on the floor when presenting the Amendment acknowledged the fact that Congress had been "AWOL" in regards to looking at interrogation practices, detention, and prosecution at Guantánamo Bay.⁹⁰ The Graham-Kyl-Levin Amendment passed 49-42 on Nov. 10, 2005 and was modified five days later as the Graham-Levin Amendment in order to remove a provision in the first amendment that took away jurisdiction from the federal courts, including the Supreme Court, to review detainee *habeas* petitions. The Graham Amendment was proposed as a direct response to the decision in *Rasul* and was to apply

⁹⁰ *Id.*, S11065-66.

retroactively to pending cases, only allowing the DC Circuit to review CSRT determinations, potentially stripping the Supreme Court of jurisdiction to hear *Hamdan v. Rumsfeld*, which was on the docket at the time of the Amendments passage.⁹¹ The second Graham-Levin Amendment passed 84-14 in the Senate and made clear, because there had been some contradicting interpretations, that the purpose of the amendment was not to strip jurisdiction from the Supreme Court and that pending cases should continue to be heard and reviewed.⁹² It should be noted that the amendment proposed by Sen. Graham was similar to the DTA in that it also sought to put the President's detainee treatment program into law and clarify the language so that the military had more specific legal guidelines.

Yet, once again, a codification of what was said to be the Administration's position on the issue was opposed by senior White House officials, such as Vice President Cheney, who believed that the provisions stifled the President's ability to act quickly. It is unclear, when looking at the components of these amendments, why the Administration maintained such opposition to them, particularly because the amendments came from members of the President's own party. Yet it is specifically of note that the debate on the floor during the proposition of such amendments was fairly united in urging Congress to take a more active role and shed its acquiescent position of the past four years. Sen. Alexander's statement on the floor defines the prevailing attitude that had encompassed Congress that, in the short term after a crisis the

⁹¹ Devins, Neal. "Congress, the Supreme Court, and Enemy Combatants: How Lawmakers Buoyed Judicial Supremacy by Placing Limits on Federal Court Jurisdiction." *Faculty Publications, William & Mary Law School Scholarship Repository*. Paper 345, (2007): 1568.

⁹² On his Senate.gov website Sen. Levin elaborates in a press statement on the reasoning behind his position at various stages during the process of crafting an amendment with Sen. Graham regarding detainees. His statement is his account of how the legislation was crafted, which he published before the case went to the Supreme Court in order to give them insight into congressional sentiment and the way in which he believed that the Amendment should be interpreted. Therefore, it seems like a partisan move and was a means of confirming the Senator's position, but it was helpful in pulling out specific facts about the process. For full statement see: Levin, Carl [Sen.]. "Statement of Senator Carl Levin Regarding Graham-Levin Amendment on Habeas Corpus." 14 Feb. 2006.

President should set policy; however, in the long term this should not be the case. Particularly, he noted that his own party, the Republicans, traditionally disliked when the courts legislated from the bench, but to prevent this from occurring Congress needed to become active in setting policies.⁹³

However, even with the new congressional activism, the Administration believed that broad Commander-in-Chief Powers, reserved to the Executive in times of crises, gave it the authority to determine what provisions and laws it could choose to enforce. It is of interest to note that Colin Powell endorsed the Graham Amendment, a theme of small dissent within the Administration, because his view of Executive authority was not as expansive as some in the Administration, and at times he was castigated for holding a less hard line position.⁹⁴ Sen. Kerry, in a statement on the floor to reiterate the Administration's negligence, quoted Powell as saying that the Yoo/Bybee torture memo and the Administration's sentiment to ignore laws interfering with detention or interrogation would, "reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our [own] troops."⁹⁵

The opposition from the Administration toward codifying detainee procedures was exemplified in President Bush's signing statement accompanying the DTA's passage into law and it demonstrates the extent to which the Administration did not want to cede power.⁹⁶ While the DTA was only the first interjection that Congress made into the debate about the war on

⁹³ *Id.*, S11068.

⁹⁴ Cutler, 25.

⁹⁵ "DOD Appropriations Act, 2006," S11076-S11077.

⁹⁶ President Bush's signing statement accompanying the DTA read that the executive branch could, "construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch as Commander in Chief and consistent with the constitutional limitations on judicial power." See P.L. 109-148, DOD Act of 2006, Statement of President George W. Bush Upon Signing H.R. 2863. 30 Dec. 2005.

terror, it soon led to more congressional action as was mandated by Supreme Court decisions. John Robert's response to Patrick Leahy at his Supreme Court confirmation hearing in 2005 may have foreshadowed the future push by the Court to urge Congress to act. Roberts' dialogue with Leahy about the constitutionality of the President vetoing the DTA led to Robert's statement that, yes, "Congress can make rules that may impinge upon the President's command functions."⁹⁷ Clearly, when the *Hamdan* decision was passed down by the Court in the 2006 term they were validating this function of Congress and they sought to ensure the presence of more checks on the President's prerogative powers.

VII. Striking the Military Commissions: *Hamdan v. Rumsfeld*

Less than a year had passed after the fierce debate between Congress and the Executive over provisions of the DTA and detainee treatment in general when the Court publicized its opinion in *Hamdan v. Rumsfeld*. This case addressed whether the military commissions set up to try Hamdan had the authority to do so and whether he was entitled to certain protections under the Geneva Conventions.⁹⁸ The Court decision was an even more adamant renouncement of unilateral Executive policy making and a call for Congress to become active in setting detainee policies in order to ensure oversight and constitutionality. Harold Koh, a renowned international legal scholar, stated that the *Hamdan* decision and the limitations it placed on Executive power did not signal a particularly activist Court. Instead, he showed that the Court was following the precedent established by the *Youngstown* decision (explained above) because they ruled that President Bush had acted without congressional consent in establishing the military

⁹⁷ "DOD Appropriations Act, 2006," S11071

⁹⁸ *Hamdan v. Rumsfeld*.

commissions. Due to this determination that the action did not have explicit congressional approval, it became subject to the more stringent level of review proposed by Justice Jackson. Koh admonished that Congress had not stepped up since 9/11, thereby forcing the Court to intervene to set limits on Commander-in-Chief Powers and interpret the vague and rushed post 9/11 legislation, particularly the AUMF. He also recognized the presence of a dangerous constitutional imbalance when he wrote that it, “takes all three branches...to create a constitutional crisis.”⁹⁹ Koh’s statement proposing that a constitutional crisis may have been at hand does not seem farfetched when looking at some of the blatantly discriminatory and subversive policies that were implemented after 9/11, policies which violated international legal norms as well.

However, the Court’s decision once again provided an incentive for Congress to act as a check on the President’s prerogative powers and it is clear that the Court was more willing to intervene in the inter-branch dialogue than it had been during previous times of war. Furthermore, it seemed dissimilar to other times of war in our history because members of the Court from all ideological spectrums realized the need for Congress to act in order to try to place detainee policy on firm legal footing. Sen. Graham, in his statement on the floor during debate of the DTA in 2005, said that Justice Scalia had been “screaming” about Congress’ absence from the debate about combatants. While it is not unusual for Justice Scalia to be more vocal than the other justices, ideologically he typically aligns with the more conservative side of the Court and one would assume that he would view the policies of the Executive during this time more

⁹⁹ Koh, Harold Hongju. “Setting the World Right.” *The Yale Law Journal* 115 (2006): 2359.

favorably; however, he realized that the courts needed congressional guidance in order to determine how to conduct detainee procedures at Guantánamo Bay.¹⁰⁰

The case of Salim Hamdan, a Yemeni national, is representative of many of the cases of Guantánamo Bay detainees. Hamdan became stuck in a legal limbo as the military, government, and judicial system attempted to carve out the proper way in which he should be tried or detained according to the laws of war, U.S. laws governing prisoners of war and people captured while engaging in hostilities, and how to apply international legal norms. He was arrested by US forces in Afghanistan shortly after 9/11 and taken to Guantánamo Bay in 2002.¹⁰¹ The question in Hamdan's case was whether the military commission, as convened by the President, had the authority to try him for the crime of "conspiracy." "Conspiracy" has not been recognized as a viable offense under the common law of war, furthermore Hamdan asserted that no congressional act established the commissions by which he was tried. He continued that the commission procedures violated military and international law because he did not have the privilege of being confronted with all the evidence presented against him.¹⁰² Hamdan's case was initially heard by the U.S. District Court for D.C. which ruled that he was entitled to protection under the Geneva Conventions. The court determined that Hamdan's classification as an enemy combatant, not as a prisoner of war, did not exclude him from being confronted with the evidence against him because that would be in violation of the UCMJ and Common Article 3.¹⁰³

However, upon appeal, the D.C. Circuit Court of Appeals ruled that due to the precedent set in *Quirin*, the court could not reject the commissions as established by the Executive. They

¹⁰⁰ "DOD Appropriations Act, 2006," 11067.

¹⁰¹ Hamdan at 555.

¹⁰² *Id.* at 567.

¹⁰³ *Id.* at 571.

based this decision not on violations of separation-of-powers claims but because such commissions were allowed in *Quirin*, and they did not find the current commissions in violation of the UCMJ or the U.S. armed forces regulations.¹⁰⁴ Hamdan then appealed his case to the Supreme Court and on Nov. 7, 2005 the Court granted certiorari. Despite the Court's decision to hear the case only a month after Congress passed the DTA, on Feb. 13, 2006 the Court postponed listening to oral arguments due to questionable jurisdiction stripping provisions in the DTA and Graham-Levin-Kyl Amendment. However, shortly thereafter the Court determined that it would in fact proceed to hear the case because they determined that the DTA could not be read retroactively, as the government purported, because that would entail an unconstitutional suspension of the writ of *habeas corpus*.¹⁰⁵

Upon hearing the case, Justice Stevens wrote for the majority that the military commissions, as established, lacked the power to try detainees because their structure and procedures violated the UCMJ and the Geneva Conventions, and because "conspiracy" was not an offense according to the laws of war.¹⁰⁶ The decision in *Hamdan* served as a very vocal expression by the Court of their displeasure with the construction and procedures of the military commissions. It also followed the trend they established in the post 9/11 terror decisions of exerting their influence and negating the Administration's grabs to power in part, due to a lack of oversight and outside review. To support their position, the government again tried to put forth the argument that Congress did not have a reason to preserve the writ prior to the passage of the DTA and thus, that it should be applied to cases retroactively. However, this was the question

¹⁰⁴ *Id.* at 572.

¹⁰⁵ *Id.* at 575-576.

¹⁰⁶ *Id.* at 567. The Court based their explanation that "conspiracy" was not a law of war from 10 U.S.C. § 821. The Court also gave an extensive explanation as to why the Geneva Conventions did apply to Hamdan, located in section D of the opinion. However, for the purposes of this paper I will not address this part of the determination and instead focus on the domestic legal applications as they are more helpful when looking at the interplay between Congress, as influenced by the President, and the Court.

that the Court looked at in February when it postponed hearing oral arguments, only to decide that the statutes could not be interpreted as applying retroactively, thus allowing the Court judicial review and nullifying the government's position that the Court had no jurisdiction to hear the case. The Court rejected the notion of a retroactive provision by showing that Congress acquiesced to presidential demands after 9/11 as seen through the AUMF, by their failure to pose any challenges to unilateral executive action, and by not conducting meaningful oversight. However, the Court acknowledged that with the passage of the DTA, Congress was awakened to the need for their action to review the military tribunal's determinations and procedures, contrary to Executive claims otherwise.¹⁰⁷

The majority recognized the new role that Congress was beginning to embrace and they found that neither the AUMF nor the DTA authorized expansion of presidential authority to convene commissions because activated war powers did not include this privilege. Thus, without specific authorization from Congress, the Court had to determine the scope of presidential powers.¹⁰⁸ In his concurring opinion, Justice Kennedy determined that Executive powers should be judged according to Justice Jackson's "Zone of Twilight," defined in his *Youngstown* decision. Kennedy came to this determination because there was a record of Congress legislating to place limits on these commissions and he found that the President had exceeded some of these limits. Kennedy stated his concern that there were limited separation-of-powers in the current set up because the commissions had no independent review and no "structural insulation from military influence," as Justice Stevens defined it. Thus, Kennedy concluded that the case fell into Justice Jackson's third category as a conflict between the President and Congress. Due to this categorical placement he believed that it should be judged

¹⁰⁷ *Id.* at 583-584.

¹⁰⁸ *Id.* at 593-595.

with the highest level of scrutiny because, “concentration of power puts personal liberty in peril of arbitrary action by officials,” and it is the Court’s duty to ensure that civil liberties are safeguarded.¹⁰⁹

Justice Breyer wrote a separate concurring opinion in which he penned that Congress needed to play an integral part in forming the commissions and that they needed to act further to check the Executive by constructing constitutionally sound military commissions as the Court was mandating with their decisions. Breyer’s opinion is the most adamant call to Congress to act and he reiterates Sandra Day O’Connor’s opinion in *Hamdi* that Congress has not given the Executive a ‘blank check,’ and that, “Nothing prevents the President from returning to Congress to seek the authority he believes necessary.” Breyer elaborated later that,

No emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the nation’s ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.¹¹⁰

It is clear from Justice Breyer’s statement, as well as the majority and concurring opinions in *Hamdan*, that the Court felt as though it had extensively warned the Administration in its prior decisions that the President needed to obtain congressional authorization for his military commissions. The majority recognized that Congress had acted to some extent, but the opinion was a call for further congressional action and it ultimately thrust Congress into another debate about military detention, this time with a more procedural focus.

¹⁰⁹ *Id.* at 636-639. Stevens comments on the lack of “structural insulation” at 587 in his majority opinion.

¹¹⁰ *Id.* at 636. (Justice Breyer concurring).

Unquestionably, the Court pushed Congress to act and *Hamdan* stands as the Court's most adamant call for the branches to shape policy by working together. What remains most important about the Court's intervention is, as Leonard Cutler emphasizes, and he makes a strong point, that the Court could have gone farther to set the constitutionality of the system, but instead it forced Congress to become involved and determine the acceptable scope of executive policy making when balancing civil liberties with the protection of security.¹¹¹ Justice Kennedy subtly noted this sentiment, that Congress must intervene to allocate the correct distribution of government power because that leads to, "a deliberative and reflective process engaging both of the political branches...Branches give some assurance of stability in time of crisis,"¹¹² and stability and security were the central aim behind all of these policies, yet at times individual liberties were infringed in the name of national security.

VIII. Military Commissions Act

The realization of security and stability balanced with the protection of civil liberties led the Court to seek a sharing of roles amongst the branches, embracing the sentiment of Harold Koh that, "democracy must fight even a shadowy war on terror through balanced institutional participation: led by an energetic executive but guided by an engaged Congress and overseen by a skeptical judicial branch."¹¹³ The Military Commissions Act (MCA) was passed by Congress in 2006 and provides a place to begin when looking at the evolution of the balance of power between the Bush Administration, the Supreme Court, and Congress. This act is demonstrative

¹¹¹ Cutler, 19.

¹¹² *Hamdan* at 636-637.

¹¹³ Koh, 2364.

because its passage came on a wave of sudden action by Congress, beginning with the DTA, to become involved in the decision making process about what privileges should be afforded to “enemy combatants” and what the standards and procedures should be for their detention and trial. As explained above, prior congressional action pertaining to the rights afforded to Guantánamo Bay detainees consisted of merely falling in line with the Executive and not substantially challenging the policies he proposed. It is crucial to note the role of congressional dialogue and interaction with the Executive in particular when making policies because it is a necessary and crucial part to ensuring that there is oversight. As James Madison stated, our political system is one where “ambition counteracts ambition.”¹¹⁴ This necessitates that Congress assert itself as an oversight body, particularly in times of crisis, to not act rash, and to provide measures that ensure national security while acting within a reasonable time frame. As Amy Zegart, professor at UCLA’s School of Public Affairs, explains, legislative oversight is not only important to ensure that policies are compliant with the law, but in instances of national defense Congress provides the intelligence branches with the resources that they need as well.

This type of interaction all culminates in increased public trust because inherently, in dealing with intelligence, much information will not be public, so it is particularly important to ensure that there is some provision for accountability and oversight. Some scholars, like Zegart, believed that Congress had made itself weak due to turf battles,¹¹⁵ yet constitutional scholar Louis Fisher’s arguments seem much more accurate when analyzing the paper trail and records. Zegart claims that Congress must assert itself more and push the intelligence community and the executive to disclose more information. However, she does not adequately account for the

¹¹⁴ Fisher, Louis. “Presidential Power in National Security: A Guide to the President-Elect. *The White House Transition Project Reports*. Library of Congress. (2009): 11.

¹¹⁵ Zegart, Amy. “Congress: A Pre-9/11 State of Mind.” *Defining Ideas*. A Hoover Institution Journal. (2011).

electoral considerations congressmen and women face compared to the President, nor the difficulty of pushing to get this level of disclosure. Fisher cites examples of President Bush seeking authorization from Congress for passage of the AUMF, the USA Patriot Act, and the Iraq Resolution of 2002, all of which Bush then conducted with little disclosure and primarily decisions were made unilaterally. Ostensibly, it would have been difficult for Congress to foresee the future use of these policies, particularly due to their lack of ability to gather information because of the tendency of the Administration to limit decision making to a small group even within the Executive Office.¹¹⁶ Congress indeed passed these three pieces of legislation during the height of post 9/11 acquiescence to Executive power, but President Bush then acted unilaterally and secretly to employ use of his prerogative powers. The Administration conducted policy in this way when it declined to declassify secret legal memos which outlined confidential Executive policies, thereby denying Congress the right to review or raise concerns about these policies.¹¹⁷ Jack Goldsmith wrote that sound legal footing was necessary when crafting policies pertaining to the detention and trial of enemy combatants. The lack of sound legal footing for the Administration's policies was a symptom, Goldsmith believes, of having a small, insulated group of advisors. The problems inherent when there is only a small group of decision makers were magnified because many in the Bush Administration group believed that presidential power would be limited if the President were to consult with Congress, thus, the Administration took a "stance of nonaccomodation to Congress."¹¹⁸

¹¹⁶ See Goldsmith, *The Terror Presidency*, in which he discusses the tendency within the Administration to deliberate amongst a small group with little outside input. Louis Fisher also writes in, *The Constitution and 9/11*, that the Administration, "decided to deceive the American public," rather than build trust through openness. p. 360.

¹¹⁷ Fisher, Louis. "Presidential Power in National Security: A Guide to the President-Elect," 8.

¹¹⁸ Goldsmith. *The Terror Presidency*, 124-125.

The MCA was crafted as a direct response to the Supreme Court's rejection of the Executive's notion of broad commander-in-chief powers. Neal Katyal, a legal scholar and also Salim Hamdan's legal counsel, said that he believed the true legacy of the *Hamdan* decision, as building from the decision in *Rasul*, was the Court's mandate that the Administration could no longer set unilateral policy, but needed to seek congressional approval. Katyal further emphasized that the Court rejected the Administration's fundamental constitutional ideology that, "the President's speed, unity, and dispatch mean he can ignore statutes, or interpret them away, under his inherent power."¹¹⁹ The Court's rejection of the Bush Administration's notion of power in *Hamdan* is labeled as a "defining moment in constitutional law" by Katyal who says that the decision mandated congressional involvement which came to fruition as the MCA. This decision ended the Administration's ability to claim "inherent authority" because the Court found that Congress was in fact ready to provide the President with the processes and the laws he needed to conduct war.¹²⁰ Katyal appears correct in his analysis that *Hamdan* was a landmark decision due to its ability to dictate congressional action and thus limit unilateral Executive policy making. Later on I will look at whether this case set a lasting precedent mandating that Presidents Bush and Obama look to Congress for approval of their policies addressing international terrorism, or if once again, particularly looking at current debate surrounding drones, Congress has failed to provide a check to presidential assertions to make policy unilaterally.

As terror policy continues to be crafted it will be crucial to look at the shift of congressional involvement pertaining to enemy combatants held at Guantánamo. Particularly,

¹¹⁹ Katyal, Neal Kumar. "Hamdan v. Rumsfeld: The Legal Academy Goes to Practice." *Harvard Law Review*, 120.65. (2006): 104-105.

¹²⁰ *Id.*, 70.

whether the MCA of 2006 continued their trend of increasing involvement which would fulfill one of the indicators of acting in a more constitutionally democratic way. Up to this point, the Supreme Court had broken from history and past precedent by nullifying the Administration's detainee policies. However, the MCA in 2006, building from the checks imposed by the DTA, was the point at which Congress became an adamant proponent of utilizing its oversight powers and assumed its constitutional role as the Supreme Court had mandated in previous decisions. The MCA is helpful in order to see that our constitutional system can work in times of perceived crisis and that it hinges on the implementation of oversight by Congress and the Court. It is also evident that when the Supreme Court intervened in the post 9/11 terror cases that it produced more constitutional results because there was a role for each branch in the process. Much has been said criticizing the MCA: that it was very similar to what the Bush Administration had proposed and that the procedures did not provide strong enough protections for detainee rights. However, it is important to note the success of the process for the purpose of this thesis. The crafting of the MCA met the second and third indicators set forth at the beginning that in order to function as a constitutional democracy in a time of war, policies must be crafted by two or more branches and that in their legislation Congress needs to address the specific demands set forth in the Court's decisions. If a robust system is in place, this is the first step to ensuring that civil liberties are recognized and safeguarded, and from that point onward it is the responsibility of the citizens to elect representatives that will protect their values and rights.¹²¹

The renewed protection of civil liberties occurred as more Court decisions accumulated which were limiting of the Executive's terror detainee policies. These decisions built upon one

¹²¹ David Cole, professor of law at Georgetown University and an attorney for the Center for Constitutional Rights, is one of the leading voices advocating for the protection of civil liberties. His comments at a Senate Judiciary hearing in October 2001, "Protecting Constitutional Freedoms in the Face of Terrorism" demonstrate his belief in the necessity of preserving fundamental individual rights as the way to hedge against a unilateral executive.

another and urged congressional involvement, eventually leading to the passage of the MCA. The MCA was primarily in response to the *Hamdan* decision which struck down the Administration's set-up of military commissions for Guantánamo Bay detainees and blatantly called Congress to action, as discussed above. Specifically, Section 5 of the MCA, which President Bush proposed to Congress, attempted to respond to the *Hamdan* decision by amending the DTA and the appeals procedures which had been used in CSRTs. These changes ensured that, among other things, access to the writ of *habeas* could not be suspended.¹²² After *Hamdan* filed his writ purporting that the military commissions in which he was tried violated the UCMJ and the Geneva Conventions, his case was reviewed by a CSRT and the courts of the DC circuit until the Supreme Court granted certiorari to hear his case. The verdict was handed down with the Court's acknowledgement that, "trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure."¹²³ The Supreme Court decision in *Hamdan* was the tipping point which prompted Congress to redesign the process of trying enemy combatants. It codified these changes in the MCA which amended the War Crimes Act of 1996 so that together the War Crimes Act and the MCA ensured compliance under Article 129 of the Geneva Conventions encompassing specific and recognized actions which are allowed or prohibited in dealing with terrorists.¹²⁴

It can be seen in the congressional record that in responding to the decisions which most limited unilaterally constructed policies, that Congress held a more lively debate and conducted

¹²² Bush, George W. "Message of the President of the United States. Proposed Legislation: MCA 2006, to the House Armed Services Committee and the House Judiciary Committee, Washington, D.C. Sept. 7, 2006." *House Document No. 109-133*. Library of Congress. (2006): 13.

¹²³ *Hamdan* at 567.

¹²⁴ Dettorre, Thomas R. *Beyond Reproach? The Military Commissions Act of 2006 and the Supreme Court's Inability to Nullify Executive Interpretations of what Constitutes a Nongrave Breach of the Geneva Conventions*. *Boston College Law Review* 48.1009 (2007): 1010. For further information on Article 129 of the Geneva Convention and the provisions that signatories must abide by see <<http://www.icrc.org/ihl.nsf/COM/375-590155>>.

more oversight than they had about other detainee measures previously proposed by the President. The sentiment has been espoused that Congress will only hold substantial debate and criticize the President when public opinion holds it to be popular.¹²⁵ However, although public opinion shows that the electorate was becoming less enamored with the President and his policies, it is also important to acknowledge the passage of time. This is important due to the role it plays in providing hindsight and a better understanding of situations so that policies can be assessed with more clarity.¹²⁶ Public opinion can be seen as a contributing factor to the new role that Congress assumed in beginning to challenge the President's unilateral policy making, but it is important to acknowledge the role that the Court had in urging this action. Particularly of note is the fact that the Court had admonished unilateral policy making since the beginning of the detainment of enemy combatants, getting more and more adamant with each decision. Therefore, while Congress could have been spurred to action by multiple forces, the Court clearly had a role in this push. It is also clear that when Congress became involved, the policies it passed have withstood the test of time much better than those of the unitary Executive.

When looking at congressional action around the MCA to test if it challenged the President's agenda, it is particularly helpful to look at specific members in Congress who were key players in the military commissions debate immediately after 9/11. While it is important to not discount any member's opinion or stance, it is beyond the scope of this paper to provide an in depth look at congressional sentiment toward the post 9/11 bills pertaining to enemy combatants and civil liberties. Therefore, much of the congressional research in this thesis is focused on not only the final votes on bills, but also the votes on controversial amendment and committee votes, on floor and committee debate, and on amendments proposed by key figures in the leadership of

¹²⁵ Bettelheim.

¹²⁶ Gallup Poll. "Presidential Approval Ratings—George W. Bush."

both parties. I particularly looked at leaders in the Senate and House Committees on the Judiciary and Armed Services, or members who took a central role throughout the debate pertaining to enemy combatants, military commissions, and the rights afforded to detainees. Some of these Congressional leaders include Sen. Arlen Specter (R-PA), Sen. Patrick Leahy (D-VT), Sen. John McCain (R-AZ), Sen. Lindsey Graham (R-SC), Rep. Jim Sensenbrenner (R-WI), and Rep. Duncan Hunter (R-CA). Sen. McCain and Sen. Graham are both well respected and tenured members of the Senate who have served extensively in military related affairs and both proposed the amendments related to the treatment of detainees discussed earlier. Sen. Specter and Sen. Leahy both served as Chairman of the Senate Judiciary Committee during the war on terror, Leahy from 2001-2003 and again from 2007-present and Sen. Specter served from 2005-2007, and both actively sought for their committee to hold investigative hearings into detainee policy.

Sen. Leahy helped craft the MCA during the summer of 2006, during which time he said that back in February of 2002, “I invited the Administration to work with Congress on legislative authority for such commissions. Regrettably, when the Administration had the option to work in a constructive way with Congress, it chose its customary path of secrecy and unilateralism.”¹²⁷ This statement proves the necessity of the Court’s decision in *Hamdan* in forcing Congress’ hand into negotiations with the Executive to jointly craft military commissions that were legal under the UCMJ and the Geneva Conventions. It is of value to once again emphasize the vital role that the Court played in spurring congressional action through the *Hamdan* decision. This decision was much more adamant about the need for congressional involvement than were previous

¹²⁷ Leahy, Patrick [Sen.]. “Statement of ranking member Patrick Leahy.” *Senate Judiciary Committee*. “The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18.” 2 Aug. 2006. Library of Congress, 13.

detainee decisions, and the Supreme Court thrust themselves further into the debate by being more critical of the commissions and outlining what it would take to put them on sound legal footing. This was not lost on Sen. Leahy, who, in other statements at the same hearing, illuminated the prevailing working relationship between Congress and the Executive up to this point. He stated that, while *Hamdan* was a “landmark separation-of-powers decision” forcing congressional authorization of further military commissions, the Executive branch attorneys had asked Congress to continue to “rubberstamp” their agenda. This would have given the appearance that the problems highlighted by the Supreme Court were fixed, yet in reality, it simply achieved the congressional authorization that they needed to meet the merits of the decision without imposing any checks on the programs.¹²⁸

However, before looking further at the debate and the conversations that took place surrounding the passage of the MCA, it is important to have a firm understanding of the provisions within the bill and the ways in which it addressed the unconstitutionality of the military commissions that the Supreme Court pinpointed in *Hamdan*. The MCA was introduced in the House by Rep. Hunter (R-CA) as H.R. 6166 and was introduced in the Senate by Sen. Mitch McConnell (R-KY) as S. 3930 which became the final bill that was eventually passed into law.¹²⁹ The MCA addressed the specific concerns outlined by the Supreme Court in *Hamdan* by molding the military commissions to meet the standards for treating prisoners as outlined by the Geneva Conventions. The Act also set out to determine how the commissions should be conducted procedurally, how to confront the issue of access to *habeas corpus*, and it decided which courts would be allowed to hear detainees appeal’s. Specifically, the MCA amended Title

¹²⁸ *Id.*, 14.

¹²⁹ United States. Cong. Senate. S. 3930, *Military Commissions Act of 2006*. 109th Cong., 2nd sess. *Library of Congress*.

10 of the United States Code in order to: establish rules for the conduct of the military commissions, determine how classified evidence was to be used, whether hearsay would be admissible, and what the rights of detainee were.

The Court's *Hamdan* decision was more assertive than the earlier terror decisions in that it explicitly stated what changes in policy it believed that Congress needed to make in order to put the programs on more constitutionally sound footing. Specifically, the Court stated that section 1005 of the DTA, which prohibited the consideration of *habeas* claims and lawsuits by alien detainees, did not apply to pending cases, which is how they made their determination that they would hear the case. Rep. Sensenbrenner (R-WI) argued that allowing these cases to be heard by the federal court, "ignored decades of its own precedents," and he went on to say that the DTA was clear and *Hamdan* should never have been heard by the Supreme Court.¹³⁰ The MCA overruled the Court decision in *Rasul* that Federal District Courts in the DC Circuit could hear *habeas* challenges to detention and it allowed for the provision in the DTA that challenges could only be brought to the Court of Appeals, to stand.¹³¹

It can be seen particularly well in this part of the MCA, but also in other elements of the bill, that while the *Hamdan* decision did spur open dialogue and further debate about the rights afforded to detainees, it did not necessarily entail a full restoration of their civil liberties. Instead, the MCA must be looked at as an example of how our constitutional system can function with collaboration between the branches. This type of inter-branch communication and exertion of constitutionally assigned roles proved that the branches could place checks on one another, and that the open dialogue produced policies that were more in line with U.S. and international

¹³⁰ *Id.*, 4-5.

¹³¹ Cutler, 77.

laws and norms, albeit not the full restoration of individual rights that many civil libertarians would desire to see, but a step in that direction. Sen. Specter saw the necessity of functioning with inter-branch cooperation in order to ensure that policies were constitutional, and he acknowledged the statutory shortcomings of the MCA when he stated that, “the courts will sort out the unconstitutional provisions of the law, and a future Congress, without the pressure of a pending election, will reconsider the issue to create a system consistent with American values.”¹³² Besides legitimating the necessary functions of each branch, this quote also highlights elections and the effect that popular support had in shaping the stances of elected officials who were conscious about the upcoming election. I will tease this sentiment out later, but for now suffice to say that popular sentiment is only one component in changing the discourse around policies, inter-branch communication, and interaction.

As heated as the MCA debate became regarding the right of the Court to adamantly demand policy changes, the MCA passed out of the House Judiciary Committee by a vote of 20-19¹³³ and the House Armed Service favorably passed it with a 52-8 bipartisan vote.¹³⁴ The final bill passed both chambers and was approved by President George W. Bush in the end of September 2006, just three months after the Supreme Court passed down the *Hamdan* ruling. The final vote for the bill was 65-34 in the Senate with one Republican opposed and 12 Democrats voting in support.¹³⁵ In the House the final tally was 250-170 with seven Republicans voting in opposition and thirty-two Democrats crossing party lines to vote in support.¹³⁶

¹³² Cutler, 91 fn 96.

¹³³ “DOD Appropriations Act, 2006.” *Id.*, 5.

¹³⁴ *Id.*, 103.

¹³⁵ “Military Commissions Act of 2006: Senate Roll Vote No. 259.” *Library of Congress*. 28 Sept. 2006.

¹³⁶ “Military Commissions Act of 2006: House Roll Vote No. 491.” *Library of Congress*. 27 Sept. 2006.

While it is important to not only address the success or support for a bill by the final vote tally, it is clear that the MCA spurred some bipartisan support and discussion. The votes show that some representatives broke from their parties to resist the polarization of party persuasion. It is precisely in this way that the Supreme Court intervention in the post 9/11 terror decisions contributed to produce a more constitutional system. The Court's mandate that the commissions be reformed began a debate in Congress that sparked not just partisan battles, but intraparty negotiations as different members grappled with their dislike for their own party's position. It was these types of dialogues that forced the parties to lay more policy options on the table in order to find a satisfactory solution. Inherently, this suggests that when the President sends a bill to Congress it will be better debated, discussed, or changed due to the presence of conflicting ideas.

It is also important to remember that the conflicting ideas were intraparty as well, and thus had to be resolved first within the party and then in the committees and the entire chamber in order to garner the support necessary to pass, especially in these instances because many congressmen and women did not shape their views strictly along party lines. One such example was Sen. Specter, a Republican who became a strong voice criticizing the Executive's heavy-handed policies. He sponsored many bills, often with Democrat colleagues, and they often proposed more rights for detainees, such as the "Unprivileged Combatant Act of 2006." This legislation, while it did not pass, was proposed immediately following the *Hamdan* decision and is notable for the support it had in both chambers, support which did not coincide with party lines.¹³⁷ Specter did end up voting for the MCA after threats that he would oppose it because he believed it to be, "patently unconstitutional." Yet once again, the future involvement of the

¹³⁷ Cutler, 66.

Court was foreshadowed when Specter stated that he eventually decided to back the bill because he believed that, “the court will clean it up.”¹³⁸

While Specter’s sentiment seemed to acknowledge and even welcome the Court into the dialogue about enemy combatants, not all were pleased with the expanded role that the Court took in the terror cases. At this point the Court had intervened multiple times into the debate about the Executive’s detainee policy and the rights and procedures that were to be afforded to those held at Guantánamo Bay as enemy combatants. The Court’s break with historical precedent and gradually increasing interventions to ensure that the detainees were entitled to more rights than the Executive had provided began with their acquisition of access to the writ in *Rasul*. Then, in *Hamdi* the Court went a step further to nullify the basis on which the Executive had formed their policies when they ruled that Executive claims to power rooted in the UCMJ and AUMF were too expansive and therefore, unconstitutional. At this point, it is evident that the Supreme Court was able to draw attention to the need to protect civil liberties and it did so by willing Congress to become more active in the detainee policy debate so that the Executive was not solely responsible for crafting policy in this realm.

Congress entered the debate at the Court’s urging and helped safeguard detainee rights in the DTA and by solidifying enemy combatant status review procedures in the MCA. Yet the Court was not done placing checks on executive power and hearing the cases of detainees who appealed for access to *habeas* and a review of their enemy combatant status. It is important to continue to look at the Court’s role in urging Congress to craft detainee policy not only to continue safeguarding liberties as they had begun, but also to see whether the branches could

¹³⁸ Babington, Charles and Jonathan Weisman. “Senate Approves Detainee Bill Backed by Bush.” *The Washington Post*. 29 Sept. 2006.

share power and ensure their working as a constitutional democracy even during a time of war. *Boumediene v. Bush* reached the Court's docket at the height of congressional involvement in 2008 and Justice Kennedy's decision for the majority was seen to those already displeased with the Court's actions as another overextension by the Court to impose judicial review into the sticky territory of separation of powers between the branches.

IX. *Boumediene v. Bush* and the Assertive Court

John Yoo derided the Kennedy majority opinion in *Boumediene v. Bush* as defying, “the considered judgment of the president and Congress for a third time.”¹³⁹ Others saw the decision as a violation of the separation of powers among the branches and that the Court took an unnecessarily broad approach to determining the logistics of the case and overextended itself. One author even claimed that the decision showed that the Court thought of itself as above the other branches as the sole determiner of rights and of what policy should ensure those rights, leaving the other branches to amuse themselves with the derogatory, “politics.”¹⁴⁰

Justice Kennedy penned the 5-4 majority decision in the case of *Lakhdar Boumediene et al. v. Bush* which was brought by Boumediene, a Citizen of Bosnia and Herzegovina who was seized in Bosnia for an attempted plot to attack the U.S. embassy, and other foreign nationals seized in various countries.¹⁴¹ The case was decided in June 2008 and it considered the reach of the Suspension Clause and U.S. sovereignty over Guantánamo Bay. Because the decision dealt with the Suspension Clause and access to the writ of *habeas corpus*, it rested upon considerations

¹³⁹ Yoo, John. “The Supreme Court Goes to War.” *The Wall Street Journal*. 17 June 2008. *Factiva*.

¹⁴⁰ Scribner, Heather P. “Fundamental Misconception of Separation of Powers: *Boumediene v. Bush*.” 150.

¹⁴¹ *Boumediene v. Bush* 128 U.S. 2229. (2008), 2241.

of separation of powers and addressed whether or not the case was judicially reviewable because it dealt with a political doctrine question.¹⁴² Due to the belief by some that *Boumediene* dealt with a political doctrine question and thus, that the Court overreached in its decision by reaching a decision on these merits, the case can also be seen as a continuation of the Court's post-9/11 checks on the Administration's claims to unilaterally set Guantánamo detainee policy.

After a lengthy historical explanation, Justice Kennedy centered his opinion on the fact that the US had *de jure* sovereignty over the base at Guantánamo, but in practice, it was basically *de facto* sovereignty, thus he found a suspension of the writ to be unconstitutional.¹⁴³ The Court found this suspension to be unconstitutional because it determined that the DTA was not an adequate substitute for *habeas* relief. Furthermore, they determined that Section 7 of the MCA was an unconstitutional suspension of the writ because it outlined that the detainees could have their enemy combatant statuses reviewed only by the CSRTs, but that this did not afford the same level of review as access to the writ through federal court review.¹⁴⁴

This case is helpful in order to show that the Court intended to continue to check the Executive's power as hostilities continued in the war on terror and that they believed that "ongoing dialogue between and among the branches of Government is to be respected."¹⁴⁵ However, this case is covered less extensively in this thesis because it does not provide as much insight into the new sentiment of the Court, but it is persuasive in driving home the point that the

¹⁴² The political doctrine question stems from *Marbury v. Madison* and that the courts will decide not to hear a case if it deals with a political question and the separate roles of the political branches. In *Baker v. Carr* 369 U.S. 186 (1962) they define a political question as something in which the issue involves coordinating between political branches and would embarrass, question, or show a lack of respect in resolving a question. See more at Cornell University Law School Legal Information Institute. Heather Scribner adds in her piece for the *Texas Review of Law and Politics* that a political question is one in which discretionary power is given to one branch to decide the limits of the power of the others and thus violates separation of powers.

¹⁴³ *Boumediene* at 2253.

¹⁴⁴ *Id.*, at 2240.

¹⁴⁵ *Id.* at 2243-2244.

Court, through its previous decisions, had urged congressional action. In fact, congressional checks and collaboration with the Bush Administration around detainee policies did increase, and the *Boumediene* decision was more about the Court striking down some of the collaborative provisions between the President and Congress and mandating that they be modified. Thus, this decision addressed inter-branch exertion of powers in wartime, because the Court struck down the MCA which had been crafted by the Administration and Congress. The Court, realizing that the case dealt with separation-of-powers, also confirmed the detainees' access to the writ and means for judicial review.¹⁴⁶

The *Boumediene* case was somewhat unique from the other terror cases due to its separation of powers issues, but ultimately it found that the CSRT review process was a fundamentally inadequate substitute for *habeas* review. The Court made this determination after finding an increased risk of error in the CSRTs findings due to their “closed and accusatorial” nature, as stated by the Court of Appeals.¹⁴⁷ Directly related to this was that when detention was ordered by the Executive, the need for access to the writ was even more urgent because status review was being conducted so narrowly.¹⁴⁸ Therefore, the Court ultimately found that the CSRTs, as established under the DTA, “lack the necessary adversarial character,”¹⁴⁹ and that the decision did not chip away at Commander-in-Chief Powers, but the Court believed that the branches could uphold the Constitution and still, “engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.”¹⁵⁰

¹⁴⁶ Cutler, 102.

¹⁴⁷ *Boumediene*. at 2270.

¹⁴⁸ *Id.* at 2269

¹⁴⁹ *Id.* at 2273.

¹⁵⁰ *Id.* at 2277.

The dissenting opinions, written by Justice Scalia and Chief Justice Roberts were useful to look at in order to gain a perspective about the ideological spread of the Court and the various opinions at play relating to detainee policy. The two dissents in this case scrutinized the Court for its lack of deference and its break from the precedent set in *Eisentrager*, although the WWII decisions in both *Korematsu* and *In re Yamashita* afforded noncitizens access to the writ.¹⁵¹ Scalia was thoroughly upset that the Court attempted to place limits on the Executive and stated that *habeas* was not just meant to check the President, but also to stymie the affronts by any branch to grab power, implying that the Court had overstepped its bounds.¹⁵² The decision to break with precedent, including breaking with the earlier terror cases, disturbed Scalia, particularly because in *Hamdan* the majority said that nothing prevented the President from returning to Congress to seek authorization for his detention policies. That is exactly what occurred in the passage of the MCA, and yet the Court still ruled in *Boumediene* that the new detainee provisions were unconstitutional, “turns out they were just kidding,” Scalia wrote.¹⁵³ Chief Justice Roberts echoed this sentiment that the game of “Constitutional bait and switch” was dangerous to Executive ability to conduct the war.¹⁵⁴

The Court in *Boumediene* did not outline a system through which detainees could petition for *habeas*, presumably they desired one which incorporated access to the writ and modified provisions of the DTA, but they left this up to the lower courts and we have continued to see a multitude of challenges such as in the cases of *Bismullah v. Gates*, *Al-Marri v. Pucciarelli*, and *Latif v. Obama*. All of these cases address the wartime powers that the President has and are an attempt to carve out the proper realm of judicial review after *Boumediene*, even, as Lyle

¹⁵¹ *Id.* at 2297 (Scalia dissent).

¹⁵² *Id.* at 2298-2299.

¹⁵³ *Id.* at 2296.

¹⁵⁴ *Id.* at 2285. (Roberts dissent).

Denniston writes for SCOTUSblog, “to the point of second-guessing presidential actions amid what the government terms wartime.”¹⁵⁵ It is clear that from the decisions in *Rasul*, *Hamdi*, *Hamdan*, and *Boumediene* that the Court refused to defer to the President in times of war. While historical precedent has been that during wartime the President has had wide latitude to navigate and set unilateral policy, the Court broke from this trend in the post 9/11 era.

This thesis has shown that the break from historical precedent provided safeguards to democracy and ensured a better functioning of our constitutional system by seeing that the branches acted as meaningful checks on one another. However, as the Obama Administration continues troop draw downs in Afghanistan and with all substantial forces already out Iraq, it will be telling to see how the Administration decides to conduct the war on terror and address the threat that terrorists pose to the United States. It will be crucial to look at the methods the Administration employs in shaping policies to address terrorism, whether it is an environment of unilateral policy making or if the Administration will seek congressional involvement and thus allow for oversight. Another factor to watch will be whether the Court continues along the unprecedented course that it took in the post-9/11 era to act as a check against unilateral executive policy making in a time of war. This will include whether they will intervene in the current debate about drone warfare or closing Guantánamo Bay, or revert back to their historical trend of acquiescence in times of crisis.

¹⁵⁵ Denniston, Lyle. “Primer on *Boumediene*’s Week of Reckoning” *SCOTUSblog*. 19 Nov. 2008.

X. Restoring our Constitutional Democracy

President Obama took office in 2008 amidst the array of Bush era counterterrorism policies which were being vetted by the courts and Congress. A constitutional attorney by training, President Obama promised to close Guantánamo Bay by 2009; however, this has proved be a politicized task and he has faced criticism from the right and the left about detainee trials and their continued detention. It will be telling to see if his administration has, and will continue, to conduct itself with more transparency than the Bush Administration, to mold a framework of detainment in which the three branches balance the others' power. As of this writing, 789 men have been held prisoner at Guantánamo Bay with a 2003 high point of 680 men incarcerated at one time, yet despite campaign promises, Guantánamo Bay remains open with 166 men currently incarcerated.¹⁵⁶ It appears clear that the decrease in the number of prisoners coincided with the Supreme Court decisions that afforded the detainees more access to judicial review.¹⁵⁷ However, as we look into the future it will be telling to see whether the Bush Administration's expansion of prerogative powers and assertion of the unilateral Executive will be traits that future administration's preserve and what oversight role Congress and the Courts will assume.

Despite the accrual of power to the Executive during the Bush Administration, much of this allocation occurred in the wake of 9/11 when congressional acquiescence was strongest and before the Supreme Court ruled that the Constitution provided an important oversight and

¹⁵⁶ United States. Cong. Senate. Committee on Intelligence. *Guantanamo Bay Detainees: Facilities and Factors for Consideration if Detainees were Brought to the United States*. 112th Cong. 2nd sess.

¹⁵⁷ The New York Times project in conjunction with National Public Radio has an adjusting graphic which shows the number of detainees along a timeline from January 11, 2002 until 2013 entitled, "A History of the Detainee Population." The graphic allows one to see, at every point in time in between these years, how many detainees were being housed at Guantánamo Bay during that time and it can be helpful when viewed with the legislative and court history in mind. Scheinkman, Andrei, Margot Williams, Alan McLean, Jeremy Ashkenas, and Archie Tse. "The History of the Detainee Population." *NYT and National Public Radio*. 11 Dec. 2012.

balancing role for Congress which it could no longer ignore. History has provided plenty of precedents of times of war during which individual liberties have been stifled, usually while Congress and the Court stood as silent bystanders to Executive action. Such curtailment of liberties has included the President's ordering of the suspension of the writ of *habeas corpus* during the Civil War, the imposition of free speech restrictions during WWI, racial profiling by interning Japanese Americans during WWII, and most recently, detaining enemy combatants for years on end with no access to fundamental rights such as counsel or review of their detainment status. In many of these cases, the targeted belligerent faced a military tribunal system established and administered by the President and the military, and when challenges of such systems were brought to the Court, as in the case of *Quirin*, the Court legitimated the functioning of the commissions. However, after the passage of the war and the perception of the threat decreased, the Court's wartime acquiescence has often been judged as detrimental to individual liberties and as failing to safeguard the rule of law.¹⁵⁸

The 2004 decision in *Rasul v. Bush*, which allowed detainees access to *habeas* review, was a shift from the traditional acquiescent posture of the Court and broke with the wartime precedent of deference to the Executive. The Court elevated its stake in the detainee debate with its subsequent decisions in *Hamdi*, *Hamdan*, and *Boumediene*, all of which asserted the need for the Executive to converse with Congress in order to construct a fair military tribunal system and determine the rights to which enemy combatants were entitled. However, Congress did not initiate a role for itself in the construction of detainee policy until the Court pulled them into the debate through its opinions which called for inter-branch dialogue. The willingness of the Court

¹⁵⁸ See discussion above of military tribunals and the German Saboteurs in *Ex Parte Milligan*. Louis Fisher's *The Constitution and 9/11* and Geoffrey Stone's *War and Liberty* provide a nice synopsis instances in which military tribunal systems were used.

to thrust itself into the detainee debate and drag Congress along with it led to more constitutionally balanced results that fulfilled James Madison's theory in Federalist No.51 that in order to safeguard against the accumulation of power in one branch, each must utilize, "the necessary constitutional means and personal motives to resist encroachments of the others."¹⁵⁹

Clearly the Court's landmark decisions in the terror cases, which challenged Executive power in wartime, preserved the constitutional balance among the branches. They also showed that a functioning system of checks and balances in a time of war can at least partially protect or restore civil liberties. Prior to the Supreme Court decisions there were more individuals being detained at Guantánamo and there was no pressure on the Executive to use discretion when deciding who to detain because none of the prisoners were entitled to due process. However, the Court demanded in *Hamdi* that Congress assume an oversight role and enter into a dialogue with the President about detainee procedures, a demand which was emphasized two years later in *Hamdan*. These decisions led to detainees being afforded due process, a means to challenge their detention, and congressional oversight began to uncover instances of mistreatment.¹⁶⁰

While there will always be uncertainty in times of war as to what actions are justifiable against an enemy and how the rule of law must be upheld, the United States' constitutional democracy clearly functions best when all three branches are engaged in shaping policy and actively checking the claims to power made by the other branches. The debate around preserving the rule of law in wartime and the role of Congress and the courts is once again in the public sphere as President Obama expands his use of the unmanned drone program to target possible Al-Qaeda affiliates in various Middle Eastern countries. The drone program has been

¹⁵⁹ Fisher, Louis. *The Constitution and 9/11*.

¹⁶⁰ The Senate Armed Services Committee has been a primary investigator of allegations of detainee mistreatment through their holding of various hearings. Some such hearing were a July 13, 2005 "Hearing on Guantanamo Bay Detainee Treatment" and a Nov. 20, 2008 "Inquiry into the Treatment of Detainees in U.S. Custody."

conducted unilaterally without congressional authorization, set guidelines or limits, and without much oversight until the last couple months, particularly with the leak of a Department of Justice Memo: “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen who is a Senior Operational Leader of Al Qaeda or an Associated Force.”¹⁶¹ The memo has reinvigorated the debate about Executive authority, but according to Jack Goldsmith, by 2008 there had been a restoration of checks and balances which had helped to curtail the worst Bush Administration offenses and legitimated his policies. Therefore he believes that while Obama’s policies are similar to Bush’s, he has gone about crafting them in a more constitutional way, maintaining a role for all three branches. David Cole agrees that President Obama has invoked a legal basis for these policies, rather than simply relying upon his inherent powers, and that this contrasts him with former President Bush who did not accept oversight, nor did he see the need for transparency.¹⁶²

The most adamant proponents of the protection of civil liberties will continue to argue that President Obama’s use of drones is a violation of individual liberties similar to the practice of detainment by the Bush Administration, and more time and further disclosure will be needed to assess what these practices and programs truly entail. However, the restoration of coordination between the branches through a sharing of power showed that the Court was able to take a leading role and urge Congress to action to check unilateral executive policy making. If Congress does not act according to its constitutionally designated functions by conducting oversight on drone policy and the continued detentions at Guantánamo Bay, perhaps the Court will reassume the role it took during the Bush Administration years. This opportunity may come

¹⁶¹ Sen. Ron Wyden (D-OR) and Sen. Dianne Feinstein (D-CA) are two Senators who have advocated for access to the Executive’s legal basis for the use of such technology. Sen. Feinstein, as Chairman of the Senate Judiciary Committee has led the recent push for more disclosure after the release of this memo, first published by NBC News February 5, 2013.

¹⁶² Cole, David. “Obama and Terror: The Hovering Questions.” *New York Review of Books*. 12 July 2012.

soon as the Center for Constitutional Rights and the American Civil Liberties Union filed suit against the government in February 2013 on behalf of Anwar Al-Aulaqi and two other Americans killed in a drone strike in 2011 in Yemen.¹⁶³ The Court was able to intervene and effect change during the Bush Administration to safeguard the ability of detainees to access their constitutionally protected rights due to the Court's preservation of checks and balances. Perhaps it will do the same in the case of the Obama Administration's claims to have the unilateral authority to use drones so that in conjunction with Congress and the President, the United States' fundamental guarantee of individual liberties will be preserved.

While time will tell what the role of Congress and the courts will be in addressing the Obama Administration's use of drones and the continued detentions at Guantánamo, the Supreme Court demonstrated through their decisions in the terror cases that they were able to protect the rule of law, even in a time of war. This study found that the Court's intervention succeeded in reestablishing a role for each branch which in turn led to increased discussion about policies and produced more constitutionally balanced results in a time of war. Acknowledging that progress was made to safeguard individual liberties due to congressional involvement following the Supreme Court's decisions, there has still been a vast curtailment of individual liberties under the Obama Administration in the name of national security. Not only has the unmanned drone program been cited as a grave violation of the target's fundamental liberties, but the continued detainment of men at Guantánamo Bay, who have been cleared for release and determined to pose no threat, demonstrates the great strides that still need to be made. The men

¹⁶³ Al-Aulaqi, his son Abdulrahman, and Samir Khan were all American citizens who were killed in a drone strike in September 30, 2011 in Yemen, outside of the context of armed conflict. The brief brought by Al-Aulaqi's father and the younger Al-Aulaqi's grandfather cites deprivation of life without due process. It is available at <http://www.aclu.org/files/assets/tk2_opposition_filed_plus_declaration.pdf>. The ACLU also published an article about the submission of the brief, see Yachot, Noa, "ACLU Court Filing Argues for Judicial Review of U.S. Targeted Killings of Americans." 6 Feb. 2013.

at Guantánamo are now trying to demonstrate, as they enter the third month of their hunger strike, that this violation of their civil liberties is so unbearable, and that those rights are so fundamental to their being, that they are willing to suffer and die in order to see them restored.

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