DETENTION AND INTERROGATION IN THE POST-9/11 WORLD

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I. Executive Action: The Road to Guantanamo

On September 11, terrorists pilot hijacked airliners into the World Trade Center and the Pentagon. Over 3000 Americans are killed. The nation—indeed the world—is stunned. The French paper *Le Monde* runs a headline: We are all Americans.[1] There are candlelight vigils outside the US embassy in Tehran.[2]

The American government responds immediately. On September 18, Congress passes a joint resolution authorizing the president

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

The lawyers of the Executive branch are also at work. A September 25 memorandum from Deputy Assistant General John Yoo of the Office of Legal Counsel ("OLC") asserts that the President can "deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11."[3] The Framing generation, the memo explains, "well understood that declarations of war were obsolete."[4] No statute, it concludes, "can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response."[5]

Pursuant to either the limited grant of power in the congressional authorization for the use of military force or the boundless one suggested by the OLC, the Executive begins military action. On October 7, American and British forces launch a bombing campaign against the Taliban and Al Qaeda in Afghanistan. Land offensives follow. On November 13, President Bush issues an Executive order authorizing the Secretary of Defense to detain any individual who is not a U.S. citizen and whom the President

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[1] See Hendrik Hertzberg, Lost Love, The New Yorker, September 11, 2006, available at http://www.newyorker.com/archive/2006/09/11/060911ta_talk_hertzberg

[2] Id.

[3] Karen J. Greenberg & Joshua L. Dratel, eds, The Torture Papers 3 (2005).

[4] Id. at 7.

[5] Id. at 24.

determines to be a terrorist. Prisoners come into the hands of U.S. forces by various means. Some are battlefield captures; some are turned over by the Northern Alliance or Pakistani authorities. To swell this number, the U.S. offers cash bounties for members of the Taliban and Al Qaeda. In November 2001, Donald Rumsfeld tells us that the leaflets are "dropping like snowflakes in December in Chicago."[6] They promise "wealth and power beyond your dreams … enough money to take care of your family, your village, your tribe for the rest of your life."[7] Other prisoners are apprehended in places far removed from Afghanistan, including Gambia and Bosnia.[8]

Where to hold these people is a question Executive lawyers have been mulling over. On December 28, 2001, John Yoo and Patrick Philbin complete a memo addressing "the question whether a federal district court would properly have jurisdiction to entertain a petition for a writ of habeas corpus filed on behalf of an alien detained at the U.S. naval base at Guantanamo Bay, Cuba."[9] The answer, the memo concludes, is no. For this reason, the memo suggests, Guantanamo is superior to other locations considered as possible detention sites, such as Wake or Midway Islands.[10]

The public statements of Executive officials at this time suggest that the Guantanamo detainees are a select group, "among the most dangerous, best trained, vicious killers on the face of the earth."[11] They are "the worst of a very bad lot," "very dangerous people who would gnaw through the hydraulic lines in the back of a C-17 to bring it down."[12] Within the government, the information is more equivocal. In January 2002, then White House Counsel Alberto Gonzales asks the military to provide him with a one-page form for each prisoner so that prosecutors can start selecting those who will be charged with war crimes. Intelligence officers respond that they don't have enough evidence on most prisoners to complete the forms. Their intelligence gathering efforts are handicapped by the fact that they can't understand Afghan culture; they can't sort valuable tips from attempts to use Americans as retaliation in inter-clan feuds; they can't even tell if their interpreters are loyal.[13] Classified intelligence reports describe detainees as farmers, cab drivers, cobblers, and laborers.[14] In February 2002, Major General Michael Dunlavey concludes that as many as half have "little or no intelligence value."[15]

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[6] Joseph Margulies, Guantanamo and the Abuse of Presidential Power 69 (2006).

[7] Margulies, supra note [], at 69. See also David Rose, Guantanamo: The War on Human Rights 36 (2004) (describing cases of non-terrorist Guantanamo prisoners turned over for bounties).

[8] See Mark Denbeaux & Josh Denbeaux, Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data 28, available at http://law.shu.edu/aaafinal.pdf.

[9] Memo for William J.Haynes, II, in Greenberg & Dratel, supra note [], at 29.

[10] Id. at 33. David Rose quotes a "top-level official" at the Pentagon as explaining that Guantanamo was chosen "[b]ecause the legal advice was we could do what we wanted to them there. They were going to be outside any court's jurisdiction. David Rose, Guantanamo: The War on Human Rights 22 (2004). Interestingly, the memo also includes a section opining that if jurisdiction were found to exist, a detainee (the memo uses the phrase "enemy alien") would be able to assert the same constitutional rights as an American citizen. See Haynes Memo, supra note [] at 36.

[11] See Gerry J. Gilmore, Rumsfeld Visits, Thanks U.S. Troops at Camp X-Ray, Cuba, American Forces Press Service, January 27, 2002, available at http://www.defenselink.mil/news/Jan2002/n01272002_200201271.html

[12] See Margulies, supra note [], at 65.

[13] Id. at 69

[14] Id. at 66.

[15] Id. at 65. Subsequent assessments reaffirm this determination. In August, intelligence officials conclude there are "no big fish" among the 600 or so prisoners. In April 2004, a former CIA worker who spent a

The Executive has also been making plans about what to do with the detainees. As Guantanamo is intended to be outside the jurisdiction of courts, the detainees are intended to be outside the bounds of law. The Executive Order of November 13 authorizes the creation of military tribunals to try terror suspects. And it provides that no individual subject to the order shall be "be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal."[16]

A January 2002 memo from Yoo argues that neither al Qaeda nor Taliban members are protected by the Geneva Conventions or the War Crimes Act.[17] A February 7 memo from the President endorses this reasoning: al Qaeda detainees are unprotected because al Qaeda is not party to the Geneva Convention. As for the Taliban, all Taliban detainees are summarily determined to be unlawful combatants and therefore disqualified from claiming prisoner of war status under the Third Geneva Convention.[18]

On February 26, 2002, Jay Bybee submits a memo to William Haynes, the General Counsel of the Department of Defense. The subject of the memo is "potential legal constraints applicable to interrogations of persons captured by U.S. armed forces in Afghanistan." The memo is focused on the effect that failure to provide Miranda warnings and legal representation might have on subsequent criminal prosecution in federal court, and it concludes that the effects will be minor.

On August 1, Bybee, with the assistance of Yoo, submits a memo asking some different questions. What interrogation techniques might violate the federal law prohibiting torture? Not many, they conclude. To qualify as torture, a technique must inflict pain "equivalent in intensity to the pain accompanying serious physical injury such as organ failure." Mental pain or suffering "must result in significant psychological harm of significant duration, e.g., lasting for months or even years."[19] The technique must be used with the specific intent to inflict such pain—possibly, the memo suggests, an interrogation technique is not torture if it is being used to extract information rather than to inflict pain.

Even conduct meeting these requirements may be excused in some circumstances on the grounds of necessity or self defense. Last, the Commander-in-Chief override offers a safe harbor. "Any effort to apply" the torture ban "in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants … would be unconstitutional."[20] As Yoo later tells a New Yorker reporter, interrogation is "the core of the commander-in-chief function." Congress "can't prevent the president from ordering torture."[21]

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year at Guantanamo tells Frontline that only ten percent of the Guantanamo detainees belong there. Id. at 65, 209.

[16] See The White House, President Issues Military Order, November 13, 2001, available at http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html.

[17] Id. at 78.

[18] Nothing is said about the Fourth Geneva Convention, which is supposed to cover those who are not entitled to POW status.

[19] See memo from Jay Bybee to Alberto Gonzales, reprinted in Greenberg & Dratel, supra note [], at 172.

[20] Id. at 200.

[21] Jane Mayer, Outsourcing Torture, The New Yorker, February 14, 2005, available at http://www.newyorker.com/archive/2005/02/14/050214fa_fact6.

This legal analysis of the range of possible techniques does not answer the policy question of which should be used. The Army Field Manual on Interrogations cautions "Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear."[22] In October 2002, however, General James Hill reports that "some detainees have tenaciously resisted our interrogation methods."[23] Hill asks for review of proposed "counter-resistant techniques."

The proposed techniques are divided into three categories. Category I includes basic questioning, yelling, the use of multiple interrogators, and deception including "false flag," the representation that an interrogator is from "a country with a reputation for harsh treatment of detainees."[24] Category II techniques require approval from the officer in charge. They include the use of stress positions, falsified documents, isolation, sensory deprivation, hooding, forced shaving and nudity, and the use of 20-hour interrogations. Standing is given as an example of a stress position.[25]

Category III techniques require approval from the commanding general at Guantanamo and legal review by the commander of the US Southern command. They include mock executions, threatened killings of family members, exposure to cold weather or water, waterboarding, and mild physical contact. An accompanying memo from military attorney Diane Beaver asserts that none of the proposed techniques violates the Constitution or the federal torture statute as long as the intent is to secure information. Beaver's analysis relies heavily on the argument that an interrogator using these techniques would lack the specific intent to inflict suffering.[26] The Army Field Manual, by contrast, lists stress positions as an example of physical torture and mock executions as an example of mental torture.[27] Indeed, the federal torture statute lists mock executions as an example of torture through the infliction of severe mental pain or suffering.[28] Given that specificity, Beaver warns that "[c]aution should be used with this technique."

On November 27, Department of Defense general counsel William Haynes recommends that Rumsfeld approve all of Categories I and II and the mild contact from Category III. Rumsfeld does so, and adds a hand-written note: "I stand for 8-10 hours a day. Why is standing limited to 4?"[29]

Between November 2002 and January 2003, Mohammed Al Qahtani is interrogated 18 to 20 hours a day. He is woken with showers of water when he falls

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[22] 1991 Field Manual 34-52, 1-8, available at http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/FM34-52IntelInterrogation.pdf

[23] Memorandum from James T. Hill to Chairman of the Joint Chiefs of Staff, October 25, 2002, reprinted in Greenberg & Dratel, supra note [], at 223.

[24] Memorandum from Jerald Phifer to Commander, Joint Task Force 170, October 11, 2002, reprinted in Greenberg & Dratel, supra note [], at 227.

[25] And it is. See Human Rights First & Physicians for Human Rights, Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality 9-12 (2007).

[26] Memorandum from Diane Beaver to Commander, Joint Task Force 170, October 11, 2002, reprinted in Greenberg, supra note [], at 234.

[27] See 1991 Field Manual, supra note [], at 1-8.

[28] See 18 U.S.C. § 2340(2)(c).

[29] Action Memo from William Haynes to Donald Rumsfeld, November 27, 2002, reprinted in Greenberg, supra note [], at 237.

asleep. He is made to stand at attention or sit immobile for hours at a time and to stand naked in the presence of jeering female interrogators. He is led around on a leash, and forced to bark like a dog, and to come and stay in response to commands. He is threatened by military dogs, shaved, dressed in women's underwear, forced to urinate in his pants, told that he is being sent to Egypt, flown around in a plane for several hours, and then questioned by interrogators who pose as Egyptians. During this time he confesses to being the 20th September 11 hijacker. He implicates 30 other detainees as associates of Bin Laden, identifying their photos.[30] He also reports hearing voices and spends hours talking to himself or to invisible people, cowering under a sheet in the corner of his cell.[31] When Time Magazine reveals the details of his interrogation in a story that runs on June 12, 2005, the Pentagon responds that his handling is consistent with its "unequivocal standard of humane treatment for all detainees."[32]

Neither the Hill memo nor the Beaver analysis mentions the existence of Category IV. But an FBI agent on the base sends a memo to his superiors describing it: "Detainee will be sent off GTMO, either temporarily or permanently, to Jordan, Egypt, or another third country to allow those countries to employ interrogation techniques that will allow them to get the required information."[33] As former CIA agent Robert Baer puts it, "If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear -- never to see them again -- you send them to Egypt."[34]

On September 26, 2002, Maher Arar, a Canadian born in Syria, is arrested at J.F.K. airport on his way back to Canada from Tunisia. He is questioned for thirteen days by Americans, then flown to Jordan and driven to Syria, where he is beaten with electrical cables. His interrogators ask him the same questions as the Americans, and under their treatment he confesses to everything they suggest. In October 2003 he is released without charges. The Syrian ambassador to the United States says his country has found nothing linking Arar to terrorism.[35]

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[30] See Adam Zagorin & Michael Duffy, Inside the Interrogation of Detainee 063, Time Magazine, June 12, 2005, available at http://www.time.com/time/magazine/article/0,9171,1071284-1,00.html.

[31] Id.

[32] M126. DOD news release June 12, 2005. An internal investigation reaches the conclusion that the treatment of Qahtani was "abusive and degrading" but still humane. See Final Report, Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba, Detention Facility, available at http://balkin.blogspot.com/Schmidt%20Furlow%20report.pdf. The judge advocates general, by contrast, testify to Congress that the treatment violated the Army Field Manual guidelines. See Josh White, Military Lawyers Say Tactics Broke Rules, The Washington Post, March 16, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/03/15/AR2006031502299.html.

[33] See Michael Isikoff, Secret Memo: Send to be Tortured, Newsweek, August 8, 2005, available at http://www.msnbc.msn.com/id/8769416/site/newsweek/rf/technorati/. The FBI memo also concludes that several of the interrogation techniques in categories II and III violate the Constitution and the Torture Statute. See memo, available at http://balkin.blogspot.com/rendition.fbi.memo.pdf.

[34] One Huge U.S. Jail, The Guardian/U.K., March 19, 2005, available at http://www.guardian.co.uk/afghanistan/story/0,1284,1440836,00.html.

[35] See Cole & Lobel, supra note [], at 24-25. Other examples of mistaken extraordinary rendition include those of a German citizen, Khaled El-Masri, apparently because his name was similar to that of an associate of a 9/11 hijacker, and a college professor implicated by an al-Qaeda operative during interrogation, apparently because the professor "had given the al-Qaeda member a bad grade." Id. at 27. Both Arar and el-Masri have filed civil suits based on their renditions, which the Executive defeated on the grounds that allowing the suits to proceed might reveal information damaging to national security. Id. at 42-43.

Support for these approaches is not uniform within the Executive branch. In December 2002, Navy General Counsel Alberto Mora learns of the interrogation techniques being used. He believes they are "unlawful and unworthy of the military services" and that Beaver's supporting memo is "wholly inadequate."[36] Mora worries that "[b]ecause the American public would not tolerate such abuse, … the political fallout was likely to be severe."[37] In January 2003, Mora presents his concerns to the Department of Defense, arguing that the interrogation practices are "illegal and contrary to American values" and that in any case the difficult policy and ethical issues raised by interrogation should not be decided within the Pentagon but rather through "national debate."[38]

On January 15, Rumsfeld rescinds the order approving the use of selected Category II and III techniques. He creates a Working Group consisting of experts from the Department of Defense and the Military Departments, and instructs it to review interrogation issues and report in fifteen days. Mora, overseeing the Navy's participation, asks naval intelligence officers to contribute memoranda reflecting the expert consensus that torture is an ineffective interrogation technique.[39] The Working Group also receives a memo from OLC that largely replicates the analysis of the Beaver memo and includes an expansive statement of the Commander-in-Chief override. Based on the OLC memo, the Working Group leadership rejects Mora's attempts to insert an analysis of 8th Amendment limitations on interrogation techniques.[40] In February, Mora tells Department of Defense General Counsel William Haynes that the Working Group draft report is a deeply flawed document that should never see the light of day.[41] Neither he nor anyone else in Department of the Navy ever sees a completed version and Mora assumes that it has never been finalized.[42]

Unbeknownst to Mora, the Working Group submits a final report to Haynes on April 4, 2003.[43] The report observes that Guantanamo is within the United States for the purposes of the Torture Statute, and therefore outside the statute's coverage.[44] But it is outside the "sovereign territory" of the United States, and therefore the Constitution gives no rights to aliens detained there.[45] In its analysis of the statute, the report agrees with Yoo and Bybee that interrogation techniques cannot constitute torture as long as the intent is to obtain information and suggests that self-defense and necessity may be available defenses. It also agrees that "any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the

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[36] See http://www.newyorker.com/archive/2006/02/27/060227fa_fact; Memorandum from Alberto Mora to Inspector General, Department of Navy, June 18, 2004, at 5, 6 available at http://www.aclu.org/pdfs/safefree/mora_memo_july_2004.pdf.
[37] Id. at 6.
[38] Id. at 10-11.
[39] Id. at 16.
[40] Id. at 17.
[41] Id. at 19.
[42] Id. at 20.
[43] Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, April 4, 2003, reprinted in Greenberg, supra note [], at 286.
[44] Id. at 291.
[45] See id. at 316.

Commander-in-Chief authority in the President."[46] The report endorses, with proper safeguards, the use of 35 techniques, including isolation, sleep deprivation, prolonged interrogations, environmental manipulation such as prolonged exposure to heat or cold, nudity, the use of dogs, threats to transfer prisoners to countries that engage in torture, and the impersonation of interrogators from such countries.

On April 16, 2003, Donald Rumsfeld approves the use of 24 of these techniques at Guantanamo, including sleep adjustment, environmental manipulation, false flag, and isolation. Other techniques are not forbidden, but they require his prior approval.

In late 2003 and early 2004, FBI agents repeatedly complain about the interrogation techniques being used at Guantanamo. FBI interrogators report finding detainees chained to the floor for 18 or 24 hours at a time, lying in their own feces and urine. They are left in extreme heat or extreme cold; one detainee is found lying on the floor next to a pile of his own hair, which he has pulled out during the night.[47] Detainees are wrapped in Israeli flags, touched by female interrogators, and smeared with fake menstrual blood. The FBI memos complain that these techniques are ineffective in producing reliable information.[48]

The international reaction to the Guantanamo program of detention and interrogation is generally very negative. English law lord Johan Steyn deplores the "monstrous failure of justice" that denies detainees judicial process.[49] Some foreign political figures approve. In Liberia, Charles Taylor expresses strong support for the American war on terrorism. He announces that opposition to his rule is part of global terrorism; he designates an opposition journalist an enemy combatant and has him arrested and tortured. When the United States objects, Taylor responds that he is simply acting "in the same manner in which the US treats terrorists." Zimbabwe President Robert Mugabe describes foreign journalists as terrorist sympathizers. "We agree with President Bush," he says. "Anyone who in any way finances, harbors, or defends terrorists is himself a terrorist." Eritrea arrests dissident politicians on the grounds that they are agents of Osama bin Laden.[50]

In June 2004, under new head Jack Goldsmith, the Office of Legal Counsel withdraws the Yoo/Bybee torture memo. Goldmsith will later characterize the earlier memo as "deeply flawed: sloppily reasoned, overbroad, and incautious," and marked by "an unusual lack of care and sobriety."[51] On December 30, 2004, the administration issues a new interpretation of the torture statute. The new interpretation abandons the specific intent argument but retains the commander-in-chief override argument. It declares torture "abhorrent." However, its authors state that they have reviewed the earlier memos and that none of the earlier conclusions would be different under the new analysis. In early 2005, following the appointment of Alberto Gonzales as Attorney General, the Justice Department issues another memo, this time in secret. The memo provides "explicit authorization to barrage terror suspects with a combination of painful

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[46] See id. at 306.
[47] Margulies, supra note [], at 132.
[48] See id. at 134 ("The futility of these techniques is a recurring theme of the FBI memos.").
[49] See Joshua Rozenberg, "Monstrous US Justice" Attacked by Law Lord, The Telegraph/UK, November 26, 2003, available at http://www.commondreams.org/headlines03/1126-06.htm.
[50] M143.
[51] Jack Goldsmith, The Terror Presidency 10, 148 (2007). Jay Bybee is not available to review the new memo as he has been appointed to a federal judgeship on the U.S. Court of Appeals for the Ninth Circuit.

physical and psychological tactics, including head-slapping, simulated drowning and frigid temperatures."[52] It is issued over the protest of Deputy Attorney General James Comey, who tells colleagues that they will all be ashamed when the memo becomes public.[53]

II. Judicial Response: *Hamdi*, *Padilla*, and *Rasul*

During this time, the federal courts have not been idle. But for years all of the skirmishing occurs in lower courts, and all of the decisions against the government are stayed pending appeal. Finally, in the summer of 2004, the Supreme Court decides three cases.

Yasser Hamdi is an American citizen born in Louisiana. He is captured by the Northern Alliance in Afghanistan in late 2001 and transferred to US custody. In January 2002 he is brought to Guantanamo. When the government realizes he's a citizen, they send him to a naval brig in Norfolk.[54] In June 2002 his father files a habeas petition on Hamdi's behalf and requests that he be allowed to see a lawyer. The government opposes on the grounds that enemy combatants have no right to counsel and access to a lawyer will compromise national security.[55] It offers a declaration from Michael Mobbs, a special advisor to the undersecretary of defense for policy. The declaration states that Hamdi entered Afghanistan in the summer of 2001, joined the Taliban, and was captured by the Northern Alliance in late 2001, carrying a Kalashnikov. The information originates with an unknown person in the Northern Alliance; it is transmitted to someone in the US military, who puts it in a record, which Mobbs reviews.

The Executive argues that this declaration by itself is conclusive justification for detention: Hamdi cannot challenge it in court; in fact, he cannot even see it. The 4th circuit pronounces it undisputed that Hamdi was arrested in a zone of combat operations and concludes that those facts suffice to justify detention.[56] (It is undisputed in the sense that Hamdi has not been given an opportunity to dispute it.) The Supreme Court grants certiorari on January 9, 2004.[57]

Jose Padilla is another American citizen, born in Brooklyn. On May 8, 2002, he is arrested in Chicago's O'Hare airport on a material witness warrant. His appointed lawyer, Donna Newman, files a motion challenging the warrant and seeking his release. Rather than attempt to defend the warrant, the President designates Padilla an enemy combatant, and he is taken into military custody. Newman files a habeas petition asking the government to justify his detention. The government offers another declaration from Michael Mobbs, which says that Padilla had conspired with members of Al-Qaeda to

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[52] Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, The New York Times, October 4, 2007, available at http://www.nytimes.com/2007/10/04/washington/04interrogate.html.

[53] Ibid.

[54] See Hamdi v. Rumsfeld, 243 F.Supp. 2d 527, 529 (E.D. Va. 2002). Later Hamdi is transferred to a different brig in South Carolina, which he shares with Jose Padilla and Ali al-Marri. See Respondent's Brief in Hamdi v. Rumsfeld, 524 U.S. 507 (2004), 2004 WL 724020, at *5.

[55] See Hamdi v. Rumsfeld, 296 F.3d 278, 282 (4th Cir. 2002).

[56] See Hamdi v. Rumsfeld, 316 F.3d 450, 458 (4th Cir. 2003).

[57] See Hamdi v. Rumsfeld, 540 U.S. 1099 (2004).

detonate a dirty bomb in the US.[58] The declaration, the government argues, is conclusive; Padilla cannot challenge it, or see it, or see his lawyer. The district court decides that Padilla has the right to challenge the factual basis for his detention and orders that he be allowed to meet with his lawyers.[59] The government asks for reconsideration, and in support submits a sworn declaration from Vice Admiral Lowell Jacoby, Director of the Defense Intelligence Agency, describing the harm inflicted by allowing detainees to meet with lawyers.

Successful interrogation, Jacoby declares, depends "upon creating an atmosphere of dependency and trust between the subject and the interrogators."[60] Allowing Padilla access to counsel would "create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process."[61] It would, as the district court puts it, delay the Executive's effort to make him "give[] up hope."[62] The district court rejects this argument, and the Supreme Court ultimately grants certiorari on February 20, 2004.[63] (Just before the case is argued the Executive allows Padilla to meet with lawyers.)

Asif Iqbal is a British citizen who, he says, travels to Pakistan in September 2001 to get married. His friend Shafiq Rasul, another British citizen, accompanies him, intending to stay in Pakistan after the wedding to take computer classes, which are cheaper there than in England. In October 2001, anticipating an American attack, they go to Afghanistan to provide humanitarian aid. When the shooting starts, they realize this is a foolish plan and try to flee. They are detained by an Afghan warlord and end up in his prison. In December he hands them over to Americans. In January 2002 they are brought to Guantanamo.

There, they allege, they are interrogated with temperature manipulation, sleep deprivation, stress positions, disorientation, and isolation. They are told that they could be killed at any time, and that no one will know what has happened to them. The Executive denies these allegations.

Civil rights lawyers file habeas petitions on their behalf. In the D.C. Circuit, the Executive prevails on the theory that Guantanamo is outside the sovereign territory of the United States. Aliens detained there, the court agrees, have no constitutional rights a habeas petition could vindicate, and therefore no right to file a habeas petition at all.[64] The Supreme Court grants certiorari on November 10, 2003.[65]

All these cases are argued in April 2004—Rasul on the 20th and Hamdi and Padilla on the 28th. (In March, just before the arguments, the government releases Rasul and Iqbal. They fly home to England, where they are not charged with any wrongdoing. Their civil suit seeking damages for alleged beatings and other abuse is pending before the D.C. Circuit.)

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[58] See Padilla ex rel. Newman v. Bush, 233 F.Supp.2d 564, 572-73 (S.D.N.Y. 2002).
[59] See id. at 604.
[60] Padilla ex rel. Newman v. Rumsfeld, 243 F.Supp.2d 42, 49 (S.D.N.Y. 2002).
[61] Id. at 50.
[62] Ibid.
[63] Rumsfeld v. Padilla, 542 U.S. 426 (2004).
[64] See al Odah v. United States, 321 F.3d 1134, 1141 (2003), re'v sub nom. Rasul v. Bush, 540 U.S. 1003 (2003).
[65] Rasul v. Bush, 540 U.S. 1003 (2003).

The Executive's position is simple. The United States is at war—this is the first sentence of Solicitor General Ted Olsen's argument in Rasul[66]—and alien enemies held outside the United States have no rights. As Executive lawyers assert in related litigation before the Ninth Circuit Court of Appeals, it is free to imprison these people indefinitely, and do with them what it wills. Even if it tortures or summarily executes them, courts cannot interfere.[67]

With respect to citizens, the matter is a little more complicated. Citizens do have constitutional rights, no matter where they are held.[68] But citizens can still be enemies, and the Executive has the power to detain and interrogate them. The only question is what sort of review courts can engage in. Here utmost deference is demanded, and courts can ask at most whether some evidence, such as the declaration of a government official, supports detention.[69]

The Justices appear concerned that this is a one-sided procedure. Should detainees not be entitled to some opportunity to show that their detention is a mistake, they ask in the *Hamdi* argument.

Indeed they should, says Deputy Solicitor General Paul Clement. "[I]t may not seem what you think of as traditional due process in an Article III sense, but the interrogation process itself provides an opportunity for an individual to explain that this has all been a mistake."[70] Clement does not go on to adduce the example of Shafiq Rasul, who is shown a photograph of four people sitting together and asked to confirm that they include himself and Mohammed Atta, one of the 9-11 masterminds. The photograph is from a video taken in Afghanistan in the year 2000. Rasul explains to his interrogators that he was in England in 2000, that he worked at an electronics store, and that this can be verified. Interrogation continues, and after five or six weeks he confesses that he is indeed the person in the photograph. He is not; British intelligence later confirms that, as he said, he was in England at the time.[71]

The Justices appear skeptical that interrogation provides an adequate opportunity to demonstrate innocence. And though they do not have access to the full menu of interrogation techniques available at Guantanamo—the memos on those techniques will not be declassified until June 2004—they seem concerned about the conditions of interrogation. In the *Padilla* argument, Justice Ginsburg puts it directly. "Suppose the

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[66] See transcript of oral argument in Rasul v. Bush, 2004 WL 943637. Like the order creating military commissions, this opening statement is borrowed from the World War Two context, specifically the oral argument in ex parte Quirin, which likewise began with the simple statement "The United States and the German Reich are at war." See transcript of oral argument in Ex Parte Quirin, reprinted in Philip Kurland & Gerhard Casper, ed., 39 Landmark Briefs and Arguments of the Supreme Court of the United States (1975).

[67] See Gherebi v. Bush, 352 F.3d 1278, 1299-1300 (9th Cir. 2003). Again, support for this position appears not be unanimous within the Department of Justice. Later news reports will disclose that almost a quarter of DOJ appellate attorneys have opted out of Guantanamo litigation, something the Department allows them to do for reasons of conscience. See Emma Schwartz, *Justice Department Lawyers Refuse Detainee Cases*, U.S. News and World Report, August 30, 2007, available at http://www.usnews.com/articles/news/national/2007/08/30/justice-department-lawyers-refuse-detainee-cases.html.

[68] See Reid v. Covert, 354 U.S. 1 (1957).

[69] See Hamdi v. Rumsfeld, 542 U.S. 507, 527-28 (2003)

[70] Transcript of oral argument in Hamdi v. Rumsfeld, 2004 WL 1066082, at *40.

[71] See Margulies, supra note [], at 40-42.

Executive says, 'Mild torture, we think, will help get this information.' It's not a soldier who does something against the Code of Military Justice, but it's an Executive command. Some systems do that to get information."[72]

Paul Clement's response is equally direct. "Well, our Executive doesn't."[73]

That evening, the first photos from Abu Ghraib appear on CBS. They show prisoners stripped naked and chained to the bars of their cells or stacked in piles, hooded or with women's underwear on their heads, threatened by dogs, and standing on blocks with wires attached to their hands.[74]

Decisions in the three cases come down together on June 28, 2004. The Executive loses all three. The Court agrees that the Executive has the power to detain as enemy combatants anyone who "was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there."[75] But it cannot detain citizens without more process than it has afforded them. Yaser Hamdi, the Court announces, is entitled to some kind of hearing before a neutral decisionmaker, at which he can rebut the Executive's allegations. "A state of war," Justice O'Connor writes, "is not a blank check for the president when it comes to the rights of this nation's citizens. … Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. "[76] Padilla's challenge is turned aside on jurisdictional grounds, but his rights have been established by the *Hamdi* decision—perhaps more so, since he does not fit the *Hamdi* definition of enemy combatant.

As for the aliens detained at Guantanamo, the Court says that they have the right to file a habeas petition.[77] This is a decision about the scope of the habeas statute. It does not say that detainees have any constitutional rights to vindicate by means of habeas, but it seems unlikely that the Court intends to give them a vehicle to obtain relief if relief is categorically unavailable. And indeed, a footnote in *Rasul* more or less explicitly says that they have the same rights as Hamdi: their allegations, the court says, "unquestionably describe custody in violation of the Constitution or laws or treaties of the United States."[78]

III. Executive Reaction: Retreat and CSRTs

The aftermath of these three cases is somewhat different from what most people anticipate. Hamdi, the Court said, is entitled to a day in court when the Executive will be required to show its hand and justify his detention. But this doesn't happen; instead the Executive releases him to Saudi Arabia on the condition that he renounce his citizenship and promise not to sue.[79] Padilla, likewise, never gets a hearing on the grounds for his detention. Instead, he is transferred to the civil justice system. Talk of a dirty bomb is

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[72] Transcript of oral argument in Padilla v. Rumsfeld, 2004 WL 1066129, at *19.
[73] Ibid.
[74] See Mark Danner, Torture and Truth: America, Abu Ghraib, and the War on Terror 217-224 (2004)
[75] Hamdi v. Rumsfeld, 542 U.S. at 516.
[76] Id. at 536, 521.
[77] Rasul v. Bush, 542 U.S. at 484.
[78] Id. at 483 n.15
[79] See, e.g., Joel Brinkley & Eric Lichtblau, U.S. Releases Saudi American It Had Captured in Afghanistan, N.Y. Times, Oct. 12, 2004, at A15.

dropped, and wrangling begins over whether he is fit to stand trial or has been rendered incompetent to assist in his own defense by the interrogation tactics. The creation of a relationship of trust and dependency, Padilla's lawyers allege, was accomplished, or attempted, through isolation, sleep deprivation, environmental manipulation, threats of execution or transfer to third countries, hooding, sensory deprivation, stress positions, and mind-altering drugs.[80] The Executive denies the allegations. It reports that it has lost the videotape made of Padilla's last interrogation.[81]

Psychologists testify that Padilla is mentally impaired.[82] The court agrees with that assessment, though it makes no ruling as to the cause. It orders the trial to go forward. Padilla's lawyers argue that information implicating him has been obtained through torture, notably during the interrogation of Abu Zubaydeh. The Administration responds that the claim is "meritless," on the grounds that no evidence exists to suggest that Zubaydeh was tortured. In fact, the CIA made videotapes of Zubaydeh undergoing aggressive interrogation but destroyed those tapes in November 2005.[83] On August 16, 2007, Padilla is convicted. A White House spokesman comments that Padilla "received a fair trial and a just verdict."[84] Padilla's civil suit for abuse suffered during detention is pending.

In *Rasul*, the Executive continues to argue on remand that the detainees have no constitutional rights. But it does something else, too. On July 7, 2004, it announces that it has created Combatant Status Review Tribunals, or CSRTs, to review the status of the detainees. These are supposed to meet the hearing requirements of *Hamdi*.[85]

A CSRT has a tribunal of three commissioned officers who review information presented by a reporter. The detainee, if he wishes, can testify. He is not allowed a lawyer. He is allowed to present evidence that the tribunal decides is reasonably available. There is a presumption in favor of the evidence supporting detention, and that evidence may be considered even if obtained by torture or coercive interrogation.[86] The evidence need not be shown to the detainee if it is classified. The tribunal's decision is reviewed by a superior officer.

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[80] See Motion to Dismiss, United States v. Padilla, 04-60001-CR (S.D.Fla.).

[81] See Michael Isikoff & Mark Hosenball, Terror Watch: The Missing Padilla Video, Newsweek, February 28, 2007, available at http://www.msnbc.msn.com/id/17389175/site/newsweek/print/1/displaymode/1098/.

[82] See Warren Richey, US Terror Interrogation Went Too Far, Experts Say, Christian Science Monitor, August 13, 2007, available at http://www.csmonitor.com/2007/0813/p01s03-usju.htm.

[83] See Emily Bazelon & Dahlia Lithwick, Ifs and Buts, Slate December 10, 2007, available at http://www.slate.com/id/2179607/pagenum/all/#page_start. During the trial of Zacarias Moussaoui, in May 2003, Judge Leonie Brinkema ordered prosecutors to determine whether any audio or video recordings of interrogations, specifically including that of Zubaydeh, existed. According to Executive filings, the CIA reported at the time that it had no such tapes. Brinkema repeated the order in November 2005, and received the same response. See Warren Richey, Destroyed CIA Tapes Spark Probes, Christian Science Monitor, December 10, 2007, available at http://www.csmonitor.com/2007/1210/p03s03-usju.html. The Executive later characterized the "errors" in the CIA declaration as "unfortunate." Id.

[84] See Richard A. Serrano, Padilla Convicted of All Charges, Los Angeles Times, August 17, 2007, available at http://www.latimes.com/news/printedition/front/la-na-padilla17aug17,1,6197477.story?coll=la-headlines-frontpage.

[85] See David L. Franklin, Enemy Combatants and the Jurisdictional Fact Doctrine, 29 Cardozo L. Rev. 1001 (2008); Thomas R. Johnson, Combatant Status Review Tribunals: An Ordeal Through the Eyes of One "Enemy Combatant," 11 Lewis & Clark L. Rev. 943 (2007).

[86] See The Associated Press, Government: Evidence Gained by Torture Allowed, December 8, 2004, available at http://www.cnn.com/2004/LAW/12/02/guantanamo.detainees/index.html.

The question for the tribunal is whether the detainee is an enemy combatant, which is defined as "an individual who was part of or supporting Taliban or al Qaeda forces. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy forces."[87]

In litigation in the D.C. district court, the Executive says the category of enemy combatant includes the following people:

> a little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans but is really a front for Al Qaeda. … A resident of London who collects money from worshipers at mosques to support a hospital in Syria but entrusts the money for that purpose to someone who is an Al Qaeda member. … a resident of Dublin who teaches English to the son of a person who the CIA knows to be a member of Al Qaeda.[88]

The evidentiary rules under which the CSRTs operate create their own problems. Mustafa Ait Idir is one of six Bosnians arrested in Sarajevo in October 2001 by Bosnian authorities on suspicion of planning to bomb the U.S. Embassy. After a three-month investigation turns up no supporting evidence, the Bosnian Supreme Court orders their release. The Human Rights Chamber for Bosnia and Herzegovina issues an order prohibiting their removal from Bosnia. Nonetheless, U.S. military personnel transport them to Guantanamo.[89] In his CSRT, Idir is told that he has been detained because he "associated with a known Al Qaida operative."

"Give me his name," says Idir.

The tribunal president answers, "I do not know."

"How can I respond to this?" Idir asks.

"Did you know of anyone that was a member of Al Qaeda?"

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

"We are asking the questions," the tribunal president says, "and we need you to respond to what is on the unclassified summary."

"If I was in your place," Idir says eventually, "and I apologize in advance for these words—but if a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that."[90] Everyone present laughs. Idir is determined to be an enemy combatant. He remains at Guantanamo.

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[87] See, e.g., Thomas R. Johnson, Combatant Status Review Tribunals: an Ordeal Through the Eyes of One "Enemy Combatant," 11 Lewis & Clark L. Rev. 943, 948 (2007).

[88] In re Guantanamo Detainee Cases, 355 F.Supp. 2d 443, 474-75 (D.D.C. 2005).

[89] See Brief for the petitioners in Boumediene v. Bush, at 2, available at http://www.mayerbrown.com/public_docs/probono_Boumediene_Petitioners_Merits.pdf.

[90] See CSRT Transcript, Summarized Detainee Statement 12-14, available at http://wid.ap.org/documents/detainees/idr.pdf.

Another of the Bosnians detained with Idir asks the CSRT to consider as evidence the decision of the Bosnian Supreme Court ordering his release. The CSRT deems this decision not readily available, even though it has been filed with the district court in Washington D.C. and served on Executive lawyers in the heabeas litigation.[91]

Murat Kurnaz is detained on the grounds that a friend of his, Selcuk Bilgin, committed a suicide bombing. Some evidence casts doubt on this theory, among it the fact that Bilgin is alive and well in Germany. The investigative arm of the American Southern Command reports that it is "not aware of evidence that Kurnaz was or is a member of Al Qaeda." German intelligence confirms that Kurnaz has no connection to any Al Qaeda cell they know of. Kurnaz's CSRT pronounces him an enemy combatant.[92]

In all, 558 CSRTs are held. 38 individuals are determined to be no longer enemy combatants. A Seton Hall professor and his son review the 516 written determinations prepared after the hearings that explain why individuals were found to be enemy combatants. They find that only 5% of the detainees were captured by U.S. forces. 55% are not alleged to have committed any hostile act against the U.S. or its allies. Fleeing U.S. bombing is considered a hostile act.[93]

The Denbeaux go on to analyze the 393 available CSRT records and 102 available full transcripts of hearings.[94] They find that detainees were never allowed to call witnesses not already detained at Guantanamo, and that 50% of the requests for testimony by witnesses detained there were denied. The only documentary evidence detainees were allowed to submit came from family and friends. Detainees were not allowed to see the evidence against them. Three times a tribunal initially found the detainee to be no longer an enemy combatant. In each case, a second CSRT was conducted without the detainee's participation or any notice to the detainee. Twice the second CSRT determined that the detainee was an enemy combatant. Once the second CSRT found the detainee no longer an enemy combatant. A third CSRT was convened, which made an enemy combatant finding.[95]

In the habeas cases filed in the D.C. federal district court, the government continues to argue that the detainees have no constitutional rights, but also claims that if such rights exist, the CSRTs are sufficient to meet the requirements set out by *Hamdi*.

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[91] See Brief for the petitioners in Boumediene v. Bush, 5, available at http://www.mayerbrown.com/public_docs/probono_Boumediene_Petitioners_Merits.pdf.

[92] See Carol Leonnig, Panel Ignored Evidence on Detainee, Washington Post, March 27, 2005, A01, available at http://www.washingtonpost.com/wp-dyn/articles/A3868-2005Mar26.html. Kurnaz is released in 2006 after diplomatic intercession by the German government. The US government says it still considers him an enemy combatant. See Shannon Smiley & Craig Whitlock, Turk Was Abused at Guantanamo, Lawyers Say, Washington Post, August 26, 2006 A11, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/08/25/AR2006082501270.html

[93] See Mark Denbeaux & Josh Denbeaux, Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data 2, 12, available at http://law.shu.edu/aaafinal.pdf. The Denbeaux study is criticized in a report by the Combating Terrorism Center, An Assessment of 516 Combatant Status Review Tribunal (CSRT) Unclassified Summaries, available at http://www.ctc.usma.edu/csrt/CTC-CSRT-Report-072407.pdf. The CTC study disputes some elements of the Denbeaux study not mentioned in the text and one statistic that is: CTC's review found that only 45% of detainees were not alleged to have committed a hostile act. I have not attempted to resolve this discrepancy.

[94] See Mark Denbeaux & Joshua W. Denbeaux, No-Hearing Hearings, Seton Hall Public Law and Legal Research Paper Series , available at http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

[95] Id. at 3.

One judge rejects both arguments.[96] Another accepts the claim that aliens detained at Guantanamo have no constitutional rights.[97] The decisions are appealed. It is now the fall of 2005. Mustafa Idir has been at Guantanamo for three and a half years. During this time, he alleges, guards have jumped on his head, causing a stroke that paralyzed half his face, broken his fingers, and held his head under water.[98] The only court to hear the charges against him, the Bosnian Supreme Court, has found no evidence to support his detention.

IV. Congress Acts: The Detainee Treatment Act of 2005

In contrast to the courts, Congress is slow to take official action. Some members have visited Guantanamo, where, according to a former interrogator, fake interrogations are staged for their benefit.[99] In June 2005, Congress starts holding hearings on detention policy. Members express outrage at the Time magazine report on the Al Qahtani interrogation, and also at the Pentagon's insistence that his treatment was professional and humane. "Dangerous, and very dumb, and very shortsighted," says Nebraska Senator Chuck Hagel. "This is not how you win the people of the world over to our side, especially the Muslim world."[100] A public opinion poll conducted June 20 and 21 finds that 20% of Americans believe Guantanamo detainees have been treated unfairly. A 36% plurality think the treatment is "better than they deserve," and 34% think it "about right."[101]

On July 25, Arizona Senator John McCain offers two amendments to a defense appropriations bill. The first protects individuals in the custody of the Department of Defense from interrogation techniques not listed in the Army Field Manual. The second protects individuals in the custody of the United States government—this extending to the CIA—from "cruel, inhuman, or degrading treatment." The President threatens to veto any bill that includes these amendments.[102] Congress takes no action before the summer recess.

In October, McCain brings the amendments back, and the White House responds by reiterating its veto threat. Senator Lindsay Graham of South Carolina introduces different amendments stripping federal courts of jurisdiction over habeas petitions filed by Guantanamo detainees. The legislation that emerges, the Detainee Treatment Act of

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[96] See In re Guantanamo Detainee Cases, 355 F.Supp.2d 443 (D.D.C. 2005).
[97] See Khalid v. Bush, 355 F. Supp.2d 311 (D.D.C. 2005).
[98] See Charlie Savage, Guantanamo Detainee is Alleging He Was Brutalized, Boston Globe, April 13, 2005, available at http://www.boston.com/news/world/latinamerica/articles/2005/04/13/guantanamo_detainee_is_alleging_he_was_brutalized/. The government refuses to comment on specific allegations but notes that Al Qaeda "emphasizes the tactic of making false accusations if captured." Id. Idr's CSRT transcript reveals that his fingers were indeed broken. See Idr CSRT Transcript, supra note [], at 7.
[99] See Carol D. Leonnig, *Detainee Questioning was Faked, Book Says*, Washington Post A21, April 29, 2005.
[100] See CNN, *Time Report Fuels Guantanamo Criticism*, June 13, 2005, available at http://www.cnn.com/2005/US/06/13/gitmo.time/index.html.
[101] Rasmussen Reports, June 22, 2005, available at http://legacy.rasmussenreports.com/2005/Gitmo.htm.
[102] See Josh White & R. Jeffrey Smith, White House Aims to Block Legislation on Detainees, Washington Post A1, July 23, 2005, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/07/22/AR2005072201727.html.

2005, includes the McCain amendments and provides for D.C. Circuit review of the CSRTs. Apart from that, it eliminates habeas review of Guantanamo detentions.[103]

There are two public Executive responses. First, faced with a prohibition on techniques not listed in the Army Field Manual, the Executive revises the Manual to include new aggressive interrogation techniques. The precise nature of the techniques approved remains unknown, as the addendum in which they are included is classified.[104] Second, in signing the bill, the President includes a signing statement asserting that his administration will construe the bill "in a manner consistent with the constitutional authority of the president … as commander in chief and consistent with the constitutional limitations on the judicial power."[105] According to the OLC memos, this means that the limitations do not apply to any interrogation authorized by the President in connection with anti-terrorism efforts.[106]

There is also one non-public response. The Office of Legal Counsel issues a classified opinion asserting that the prohibition on cruel, inhuman, and degrading treatment does not bar waterboarding or any other of the techniques used by the CIA.[107]

V. Military Commissions: The Executive, The Court, and Congress

In addition to interrogation, some of the Guantanamo detainees are intended for trial. The President's Military Order of November 13, 2001, authorized the trial of noncitizen terrorism suspects before military commissions.[108] The commissions do not get started immediately, and they prove controversial even within the prosecution. In March 2004, two Air Force prosecutors quit on the grounds that the process is "rigged." They accuse other prosecutors of failing to preserve exculpatory evidence, ignoring allegations of torture, and other conduct that, they say, might "constitute dereliction of duty, false official statements, or other criminal conduct."[109] But in July 2004, Salim Ahmed Hamdan, a Guantanamo detainee who had served as a driver for Osama Bin Laden, is charged with one count of conspiracy to commit offenses triable by a military commission.

Hamdan's lawyers file a habeas action seeking to bar the trial, arguing that the Executive lacks the power to create military commissions unilaterally. The case reaches

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[103] See Detainee Treatment Act of 2005, available at http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php.

[104] See Eric Schmitt, New Army Rules May Snarl Talks with McCain on Detainee Issues, New York Times, December 14, 2005, available at http://www.nytimes.com/2005/12/14/politics/14detain.html?ex=1186891200&en=180f264c1fb2adcf&ei=5070. The revised manual eventually issues in September 2006.

[105] See George W. Bush, President's Statement on Signing of H.R. 2863 (Dec. 30, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html.

[106] See supra text accompanying notes [].

[107] Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, The New York Times, October 4, 2007, available at http://www.nytimes.com/2007/10/04/washington/04interrogate.html.

[108] Order of November 13, 2001, available at http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html.

[109] Jess Bravin, *Two Prosecutors at Guantanamo Quit in Protest*, The Wall Street Journal, August 1, 2005, available at http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-prosecution-lawyers/two-prosecutors-at-guantanamo-quit-in-protest.

the Supreme Court in 2006, and on June 29, the Court rules in Hamdan's favor.[110] The Executive, the Court says, can create military commissions on its own authority only in compliance with the laws of war, including the Geneva Conventions. All detainees are protected by Common Article 3 of the Conventions. The commissions created by the November 13 order fail to comply in several respects, most notably by preventing a defendant from seeing evidence against him and excluding him from the trial.[111] The Court bars Hamdan's trial from going forward.

On September 6, 2006, the president announces that fourteen "high value" detainees, including Abu Zubaydeh and Khalid Sheikh Mohammed, have been transferred from CIA custody to Guantanamo.[112] Bush declares that these detainees have been subjected to questioning techniques that are "tough, … and safe, and lawful, and necessary." "I want to be absolutely clear with our people, and the world," he continues. "The United States does not torture. It's against our laws and against our values."[113] He asks Congress to authorize military commissions for their trials, and also to "make it clear that captured terrorists cannot use the Geneva Conventions to sue our personnel … The men and women who protect us should not have to fear lawsuits filed by terrorists because they're doing their jobs."

Upon its return in September, Congress swiftly passes the Military Commissions Act of 2006, and the President signs it on October 17. The Act authorizes the President to establish military commissions for the trial of "any alien unlawful enemy combatant."[114] It prohibits courts from entertaining habeas petitions by aliens determined to be enemy combatants or awaiting such determination—that is, it authorizes the Executive to seize such people, including lawful residents of the U.S., and to detain and interrogate them indefinitely without access to courts.[115] It provides that the Geneva Conventions shall not be a source of rights in any proceeding in U.S. courts to which the government is a party[116] and gives retroactive protection to interrogators against civil or criminal liability.[117] And it narrows the War Crimes Act, providing that only certain defined "grave breaches" of Common Article 3 of the Geneva Conventions constitute War Crimes Act violations.[118]

Once again, the commission process begins. The first case up is that of David Hicks, an Australian captured in Afghanistan by Northern Alliance forces. He pleads guilty to one count of providing material support for terrorism and is sentenced to seven years in prison. He is given credit for the time spent in Guantanamo and is released to

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[110] The Court ignores the portion of the order purporting to bar terror suspects from obtaining judicial relief, just as it did with the similar FDR proclamation in Ex Parte Quirin.

[111] See Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2787-88 (2006),

[112] See Gerry J. Gilmore, High-Value Detainees Moved to Gitmo; Bush Proposes Detainee Legislation, American Forces Press Services, September 6, 2006, available at http://www.defenselink.mil/news/NewsArticle.aspx?ID=721.

[113] The White House, President Discusses Creation of Military Commissions to Try Suspected Terrorists, September 6, 2006, available at http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html.

[114] See Military Commissions Act of 2006 ("MCA"), §3, available at http://www.loc.gov/rr/frd/Military_Law/pdf/S-3930_passed.pdf, codified at 10 U.S.C. § 948c.

[115] See MCA § 7, codified at 28 U.S.C. § 2241(e)(1).

[116] See MCA § 3, codified at 10 U.S.C. §§ 948b(g); id. §5 , codified at 10 U.S.C. 948a.

[117] See id. § 6(b)(1)(A), codified at 18 U.S.C. § 2441(c)(3)

[118] See id. § 6(a)(2).

Australia, to serve the remaining nine months. He also agrees not to speak to the media for one year.

The high-value detainees receive CSRT review. All are determined to be enemy combatants. In their hearings, several of them claim that they were tortured to induce false confessions. Their descriptions of alleged torture are redacted from the transcripts.[119] The Executive asserts that they should not be allowed to meet with lawyers because they may have come into possession of classified information "including … conditions of detention and alternative interrogation techniques."[120]

Before any of the high-value detainees can be brought before a military commission, the commissions themselves bring the trials to a halt. Their statutory jurisdiction extends to the trial of people determined to be unlawful enemy combatants. But the CSRT rulings address only enemy combatant status, not lawfulness. In the summer of 2007, two military judges dismiss charges against detainees on the theory that the jurisdiction of the commissions has not been established.[121] In October, the chief prosecutor resigns, having, as he puts it, "concluded that full, fair and open trials were not possible under the current system."[122] Davis is scheduled to testify before a congressional committee examining the treatment of Guantanamo detainees, but is told that the Department of Defense will not permit him to do so.[123] He is the second military lawyer whose testimony the Executive has blocked.[124]

VI. All of the Above, More of the Same

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[119] See, e.g., CSRT transcript for Abd al-Rashim al-Nashiri, May 14, 2007, at 16, available at http://www.defenselink.mil/news/transcript_ISN10015.pdf. ; CSRT transcript for Zubaydeh, March 27, 2007, at 22, available at http://www.defenselink.mil/news/transcript_ISN10016.pdf; CSRT transcript for Khalid Sheikh Muhammed, March 10, 2007, 14-16, available at http://www.defenselink.mil/news/transcript_ISN10024.pdf.

[120] http://www.washingtonpost.com/wp-dyn/content/article/2006/11/03/AR2006110301793.html.

[121] See Sara Wood, Charges Dismissed Against Canadian at Guantanamo, American Forces Press Service, June 4, 2007, available at http://www.defenselink.mil/news/newsarticle.aspx?id=46281 (reporting dismissal of charges against Omar Khadr); Sara Wood, Judge Dismisses Charges Against Second Guantanamo Detainee, American Forces Press Service, June 4, 2007, available at http://www.defenselink.mil/news/newsarticle.aspx?id=46288.

[122] See Morris D. Davis, AWOL Military Justice, The L.A. Times, December 10, 2007, available at http://www.latimes.com/news/opinion/la-oe-davis10dec10,0,2446661.story?coll=la-opinion-rightrail. The last straw for Davis is a reorganization that puts him under the authority of Defense Department General Counsel William Haynes, who apparently disagreed with Davis' refusal to introduce evidence obtained by waterboarding. See id.; see also Morris D. Davis, Unforgivable Behavior, Inadmissible Evidence, The New York Times February 17, 2008, available at http://www.nytimes.com/2008/02/17/opinion/17davis.html (stating that he resigned to call attention to the issue of allowing military commissions to consider evidence derived from torture). Davis goes on to give interviews in which he alleges that the prosecutions are being timed for political gain and that William Haynes told him "we can't have acquittals." He says he expects to testify for the defense in upcoming trials. See The Associated Press, Surprise Witness for Bin Laden Driver, available at http://www.cbsnews.com/stories/2008/02/22/national/main3865269.shtml. On February 25, 2008, Haynes resigns. A Department of Defense statement praises him for serving "with distinction" during "one of America's most trying periods." See Department of Defense, General Counsel Returns to Private Life, available at http://www.defenselink.mil/releases/release.aspx?releaseid=11711.

[123] See Jess Bravin, Guantanamo Testimony is Blocked, The Wall Street Journal, December 8, 2007, A4.

[124] See Jess Bravin, Pentagon Forbids Marine to Testify, The Wall Street Journal, November 8, 2007, A9.

Events continue to unfold, and this article cannot pursue them indefinitely. I have chosen the delivery of this Donahue Lecture as a cut-off date. Briefly, recent events suggest that the three branches will continue to act more or less as they have.

The Executive will continue to attempt to run its interrogation programs more or less unilaterally. On July 20, 2007, in response to *Hamdan*'s ruling that all detainees are protected by Common Article 3 of the Geneva Conventions, the president issues an Executive order construing Common Article 3 "as applied to a program of interrogation and detention operated by the Central Intelligence Agency." The order provides that the program will be in compliance with Common Article 3 as long as it does not employ torture (as defined in the Torture Act), other "comparable" abuses, techniques prohibited by federal law, or "willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency." Detainees are to receive "the basic necessities of life" including "adequate food and water, shelter from the elements, necessary clothing, protections from extremes of heat and cold, and essential medical care. A senior intelligence official refuses to comment when asked if waterboarding is permitted under the order. Another official acknowledges that sleep is not among the protected necessities.[125]

The judiciary will continue to push back. Habeas litigation has continued in the district court for the District of Columbia, on behalf of Mustafa Idr and others. Relying on the jurisdiction-stripping portions of the Military Commissions Act, the Executive asks for dismissal of the pending habeas petitions. This raises a constitutional question, for the Suspension Clause of Article I provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it."[126] The strip is permissible if it does not constitute a suspension or if the CSRTs, with subsequent review in the D.C. Circuit, provide an adequate substitute. The D.C. Circuit reasons that the Suspension Clause protects the writ as it existed in 1789, and decides that in 1789 it did not extend to aliens detained outside the sovereign territory of the United States.[127] It dismisses the habeas petitions. The Supreme Court denies certiorari on April 2, 2007—and then, on the last day of the Term, it reconsiders and grants the petition.[128] Oral argument is held on December 5, 2007.

Congress will continue to do very little. On September 14, 2007, CIA officials inform the media that director Michael Hayden has ordered the agency to discontinue waterboarding.[129] During confirmation hearings for the nomination of Michael Mukasey as Attorney General, Senators repeatedly ask Mukasey whether he considers waterboarding to be torture. Waterboarding has been described as torture by the Supreme

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[125] See Katherine Shrader, Bush Alters Rules for CIA Interrogations, The Washington Post, July 21, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/07/20/AR2007072001581.html.

[126] U.S. Const. Art. I, § 9.

[127] See Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).

[128] There is speculation that the Court's about-face is related to the submission of an affidavit from Stephen Abraham, a military officer who participated in CSRTs. The affidavit raises questions about the efficacy and impartiality of the procedures. See Reply to Opposition to Petition for Rehearing in Al Odah v. United States, no. 06-1196, available at http://www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf. .

[129] See http://blogs.abcnews.com/theblotter/2007/09/cia-bans-water-.html.

Court of Mississippi as long ago as 1926[130] and the U.S. State Department at recently as 1994.[131] The United States has prosecuted it as a war crime.[132]

Mukasey refuses to answer what he calls "hypotheticals."[133] The Senate confirms him by a vote of 53 to 40.[134] In later testimony Mukasey suggests that whether waterboarding is torture depends on the importance of the information sought. He comments that he "can't contemplate any situation in which this President would assert Article II authority to do something the law forbids," despite a history of signing statements asserting just that. He also refuses to share with the Judiciary committee, even in closed session, the executive theory as to why CIA enhanced interrogation techniques are not illegal.[135]

On December 13, 2007, the House passes a bill that would require the CIA to adhere to the interrogation standards set out in the Army Field Manual. The White House threatens a veto on the grounds that such a restriction would "prevent the President from taking lawful actions necessary to protect Americans from attack in wartime."[136] Senator Lindsay Graham blocks a Senate vote.[137] On February 12, the Senate approves the bill. "The President will veto that Bill," says a White House spokesman. "The United States needs the ability to interrogate effectively, within the law, captured al Qaeda terrorists."[138]

VI. Analysis

In its most skeletal outlines, this story is a fairly simple tale of action and reaction by the three branches, the sort of interplay that high school civics teaches us to expect. The Executive makes aggressive claims of authority. The Supreme Court pushes back in *Hamdi*, *Rasul*, and *Padilla*. Congress offers a middle ground with the Detainee Treatment Act. The Executive moves forward with military commissions, the Court pushes back in *Hamdan*, and Congress generally supports the Executive in the Military Commissions Act. We are now waiting to see what the Court will do, and whether Congress will change its position now that the Democrats are in control.

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[130] See Fisher v. State, 110 So. 361, 362 (Miss. 1926).

[131] See Human Rights First, Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality 16-19, August 2007, available at http://www.humanrightsfirst.info/pdf/07801-etn-leave-no-marks.pdf.

[132] See id.; see generally Evan Wallach, Drop by Drop: Forgetting the History of Water Torture in U.S. Courts, 45 Columbia Journal of Transnational Law 468 (2007).

[133] See CNN, Mukasey Stays Vague on Waterboarding, October 30, 2007, available at http://www.cnn.com/2007/POLITICS/10/30/senate.mukasey/index.html.

[134] See http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00407.

[135] See Scott Horton, No Comment, Harper's Magazine, January 31, 2008, available at http://www.harpers.org/archive/2008/01/hbc-90002285.

[136] Scott Shane, House Passes Restrictions on Interrogation Methods, The New York Times, December 14, 2007, available at http://www.nytimes.com/2007/12/14/washington/14intel.html.

[137] See CBS News, Republicans Stop Bill to Ban Waterboarding, December 14, 2007, available at http://www.cbsnews.com/stories/2007/12/14/national/main3621016.shtml.

[138] See Press Gaggle by Dana Perino, Feb. 14, 2008, available at http://www.america.gov/st/texttrans-english/2008/February/20080214172153eaifas0.8472406.html.

That is description. Now it is time for evaluation. To get a full view of the interplay between the branches of government in recent years, we would have to look at many other areas—the battle over the Foreign Intelligence Surveillance Act and warrantless surveillance, for instance. I am looking at one area, Executive detention, and not even all of that. (I have not said much about the CIA black sites, or the prisons in Iraq or at Bagram Air Force Base in Afghanistan.) But this one area is enough to support an evaluation of the performances of the different branches, on their own and in comparison to relevant historical precedents.

The Executive

It is relatively common to say that the Bush administration has a radical theory of Executive authority.[139] Some of its assertions are indeed quite radical—the claim, for instance, that the Executive can detain an American inside the United States and hold him indefinitely without charges or access to the courts. Or the claim that the Executive violates no enforceable law if it tortures or arbitrarily executes aliens detained abroad. But a look at history shows that these claims are not as unprecedented as they might seem.

One of the current signature moves of Executive lawyers is the theory I have called the commander-in-chief override—the claim that the president, when acting as commander-in-chief, is immune to congressional regulation. Here is one formulation of it, from argument before the Supreme Court.

Question: "I understood you to say that if [the President] acted in conflict with the Acts of Congress it was still all right."

Answer: "He must have some constitutional power that Congress cannot interfere with, as Commander-in-Chief."[140]

Another is the theory that the nature of this war makes the whole world a battlefield, so that the Commander-in-Chief power can be exercised everywhere. Again, an Executive lawyer before the Supreme Court: The conditions of previous wars "do not today exist, and a bomber may drop a bomb tomorrow on Chicago. Can it be said that there is no area of warfare, no area of military operations, in Chicago under those circumstances? I think not."[141]

But both of those quotes, as you've probably guessed, are not from Bush administration lawyers. They're from Attorney General Francis Biddle, arguing before the Supreme Court in *ex parte Quirin*, a 1942 case about Nazi saboteurs tried before a military commission pursuant to the orders of President Franklin Delano Roosevelt. The Executive strategy with respect to military tribunals this time around clearly relied heavily on the *Quirin* precedent—even the section of Bush's Order proclaiming that

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[139] See, e.g., Jordan J. Paust, Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power, 2007 Utah L. Rev. 345, 346 ("The Bush administration has claimed a radical and seemingly unending commander-in-chief power to violate any inhibiting international law or congressional legislation … .").

[140] Transcript of oral argument in Ex Parte Quirin, 35, reprinted in 39 Landmark Briefs and Arguments of the Supreme Court 636, Philip B. Kurland & Gerhard Casper, eds., 1976.

[141] Id. at 580.

persons subject to it had no right to seek relief in court tracked a similar Proclamation by FDR.[142]

In FDR's defense, that order was aimed narrowly, at eight individuals about whose guilt there was no doubt. But of course the Roosevelt Administration engaged in broader-based detention as well: as we all know, it detained over a hundred thousand American citizens of Japanese descent without any sort of individualized hearings.

So what is distinctive about the current Executive? A few things. First, the commander-in-chief override is pushed to extremes well beyond what prior administrations have asserted. Most constitutional scholars will tell you that there is an area where the powers of congress and the Executive overlap, and that within this zone, if the powers are used in conflicting ways, sometimes Congress wins and sometimes the Executive does. This is what Attorney General Biddle was arguing, and it is basically the import of Justice Jackson's famous concurrence in Youngstown.[143] The Bush OLC lawyers, however, seem to have taken the position that Executive power prevails whenever it exists. That is radical, and quite implausible, and I think undesirable as well.[144]

Second, there is strategic behavior designed to avoid legal constraint. You see this in the analysis of the OLC memos, and most notably in the selection of Guantanamo as a detention site. Guantanamo is chosen because OLC lawyers believe that it is beyond of the jurisdiction of federal courts and that neither the federal torture statute nor the Constitution applies to actions taken there.

There is something bad about that. It treats the Constitution the way aggressive lawyers treat the tax code, as an annoyance to be evaded. It must be followed, if you cannot figure out how to get around it, but it is not of any normative significance. And Guantanamo is in fact much like a tax shelter, something created for no purpose but circumvention of the law. But using clever constructs to avoid tax liability is one thing; using them to evade the Constitution is another. Constitutional prohibitions on brutal or shocking conduct reflect a moral judgment that there are some things our government should not do to people. It does not matter much to this moral judgment where those things are done, and so there is something problematic about eluding the reach of the prohibition in a way that does nothing to make the conduct less offensive. Treating the Constitution like the tax code disrespects it, and to the extent that the Constitution is a charter of American values, it disrespects those values.

Third, there is an insistence on secrecy. To a certain degree, this is understandable—covert operations cannot be conducted in the open. But at some point, the Executive's persistent refusal to produce any evidence in support of its claims damages public confidence. Opting not to defend the detention of Yaser Hamdi in court, for instance, but rather to release him, tends to create the impression that the case against him was weak. So does the transfer of Jose Padilla into the criminal justice system and the abandonment of the dirty bomb allegations. So does the fact that 405 of the people

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[142] See Jack Goldsmith, The Terror Presidency 109 (2007).

[143] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

[144] For discussions, see, e.g., Jack M. Balkin, Youngstown and the President's Power to Torture, http://balkin.blogspot.com/2004/07/youngstown-and-presidents-power-to.html; Marty Lederman, "Inherent Authority" to Violate Federal Law?, http://balkin.blogspot.com/2005/12/inherent-authority-to-violate-federal.html; David J. Barron & Martin S. Lederman, The Commander-In-Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding, 121 Harv. L. Rev. 689 (2008).

detained at Guantanamo—once described as hardened terrorists all—have been released.[145]

And at some point the insistence on secrecy becomes simply grotesque. The administration, I have mentioned, has argued that the fourteen high value detainees transferred to Guantanamo should not be allowed to meet with lawyers. The detainees, the administration says, might have come into possession of classified information they could disclose. What kind of classified information would these people have? "Information," the administration says, "including … conditions of detention and alternative interrogation techniques."[146] You can figure out, I think, how the detainees "came into possession" of information about alternative interrogation techniques. Arguing that people who allege that they have been tortured should not be allowed to meet with lawyers because they might describe the techniques used to torture them does not show the Executive in a very good light.[147] The reliance on the state secrets doctrine to obtain dismissal of other suits alleging mistreatment is not much better.[148]

Last, of course, there is the use of alternative interrogation techniques itself. I will say more about that later.

I give the Executive low marks. They are not unprecedentedly low; the basic pattern in our history is that the Executive responds to crisis with measures that in retrospect seem unnecessary, unwise, and undesirable.[149] But one might hope that we could learn from this history even as we repeat it.[150]

Congress

The most striking feature of Congress's post-9/11 performance is its passivity. Congress has done little except to give the President power and restrict the possibility of judicial oversight. (The notable exception is the enactment of provisions restricting, to some degree, permissible interrogation methods.[151])

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[145] Most of the detainees have been released for what the Executive calls "continued detention" in their home companies. Reporters who follow up on the continued detention find that most of the detainees have been freed by their home countries and either never charged or cleared of all charges. See Andrew O. Selsky, "Vicious Killers" From Guantanamo Bay Routinely Freed by Other Countries, USA Today 12/15/06, available at http://www.usatoday.com/news/world/2006-12-15-gitmo-freed_x.htm.

[146] http://www.washingtonpost.com/wp-dyn/content/article/2006/11/03/AR2006110301793.html.

[147] It also seems close to a confession that the allegations are true. The Executive's argument is that the techniques it uses must be kept secret to prevent terrorists from training to resist them. Based on this rationale, only truthful disclosures are a threat; false ones would mislead terrorists into pointless resistance training.

[148] See Cole & Lobel, supra note [], at 42-43 (describing Executive response to suits by Maher Arar and Khaled el-Masri).

[149] See generally Geoffrey R. Stone, Perilous Times: Free Speech in Wartime (2004). For a contrary view, see, e.g., Eric A. Posner & Adrian Vermeule, Terror in the Balance: Liberty, Security, and the Courts (2006).

[150] Geoffrey Stone does an excellent job of demonstrating the historic pattern and has also contributed to the effort to prevent repetition; he filed an amicus brief on behalf of Fred Korematsu in *Hamdi.*

[151] Most recently, in the Military Commissions Act of 2006, Congress set out a list of conduct that would amount to a "grave breach" of Common Article 3 of the Geneva Conventions and a violation of the War Crimes Act. The MCA also prohibits "cruel, inhuman or degrading treatment" of any individual in the custody of the U.S. Government, "regardless of nationality or physical location."

This would have surprised James Madison, who believed that the separation of powers between Executive, legislative, and judicial branches of government would protect liberty.[152] But it should not surprise us. Madison's belief that separated powers would prevent abuse rested on the premise that officeholders would feel loyalty to their offices. Members of Congress, on this view, would seek to protect and expand the power of Congress, and they would naturally resist power grabs by the Executive. As Madison put it, "ambition [will] counteract ambition."[153]

Madison never gave any reason why this institutional loyalty would exist, but it might have seemed plausible in the Framers' world, a world without political parties. Bring political parties into the picture, however, and things change dramatically. Members of Congress who are of the same political party as the president do not see him as a rival. They see him as the captain of their team. What that means is that the high school civics model of separation of powers is false. If the President's party controls Congress, Congress is unlikely to be much of a check on Executive ambition.

That, of course, is what we have seen: one-party rule produces very little in the way of congressional oversight or resistance. Divided rule produces something more—though not, perhaps, as much as one might hope for. Even a minority of the President's party in the Senate can filibuster or prevent the override of a presidential veto. The short lesson is that Congress is simply no match for the Executive.

Again, however, history shows that our times are not exceptional. The World War II internment was accomplished in a system of one-party rule, and Congress showed no inclination to restrain Executive power. Justice Robert Jackson, in fact, warned of the effects of the party system in his celebrated *Youngstown* concurrence over fifty years ago, writing that the party system "has made a significant extraconstitutional supplement to real Executive power. … Party loyalties and interests, sometimes more binding than law, extend his power into branches other than his own … ."[154] Congress, I would say, is not performing especially well, but a Congress controlled by the President's party cannot be expected to do much other than follow the Executive's lead. More can be demanded of the new Democratic Congress, which thus far it has not produced.[155] The confirmation of an attorney general who refuses to state for the record whether waterboarding is torture is an embarrassment to the party and the nation.

The Judiciary

In the absence of congressional pushback, the responsibility for restraining Executive claims of authority has fallen almost entirely to the courts. I think the courts have done a good job. At the least, they have refused to accede to the most dramatic

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[152] See The Federalist 51.

[153] Id.

[154] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J. concurring). Jackson's insight, surprisingly, went little-discussed in the academic literature until recently, when Daryl Levinson and Richard Pildes made it the basis of an article. See Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers 119 Harv. L. Rev. 2311 (2006).

[155] See Jack M. Balkin, The Party of Fear, the Party Without a Spine, and the National Surveillance State, http://balkin.blogspot.com/#2032062968616652621.

claims of Executive authority—the unreviewable authority to arrest, detain, and psychologically break American citizens for the purpose of interrogation.[156]

The Court's performance also stacks up well against the historical record. In times of crisis, courts tend to defer. (Chief Justice Taney's issuance of the writ of habeas corpus that Lincoln defied is a notable counterexample.) The World War II Court, for instance, was clearly uncomfortable with the internment of Japanese Americans. It did not want to endorse the race-based detention of citizens, and indeed in the three internment decisions it never did. *Hirabayashi*[157] upheld a curfew, and *Korematsu*[158] upheld exclusion orders. The Court refused to consider detention in *Korematsu*, and when it did get around to detention in *Endo*[159] it said that this exceeded the power granted the War Relocation Authority.

But the World War II Court never interfered with any Executive programs, and when it pronounced the camps unauthorized, it did so the day after the Executive had declared that they would be closed. This Court, in contrast, has rejected some Executive claims on constitutional grounds, and ruled in other cases that the Executive cannot proceed without congressional authorization. It has slowed down the most aggressive Executive programs and for others required wider political backing in the form of congressional support. That is probably all we can realistically ask.

The People

The Executive is performing badly, Congress not much better, and the judiciary fairly well. But the evaluation is not over. The Executive's detention and interrogation program is clearly not, as was once suggested, the work of a few bad apples. Rather, responsibility goes right to the top. That is, to us.

The great innovation of the Framers of our Constitution was to create a government that is not our master but our servant. We the people are the ultimate sovereign. The government acts for us; what it does, it does in our name and with the power we have given it. And its acts, as hornbook agency law will tell you, are attributable to us, for good or for ill. If it spreads liberty and relieves suffering, we can take pride in those acts as our own. If it tortures, we are torturers.

Of course, we cannot control what we do not know. And certainly the Executive has done the best it could to prevent the American people from reaching an informed decision about these policies. It has gone to great lengths to prevent facts from coming out in court—it has released alleged terrorists rather than explain why it was holding them. It has tried in other ways to undermine or derail the legal process that could bring truth to light. It has put pressure on the detainees' military lawyers;[160] it has harassed

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[156] The defense psychiatrist who examined Padilla reports that "[i]t is clear that the intent of this isolation was to break Padilla for the interrogations that were to follow." Warren Richey, U.S. Gov't Broke Padilla Through Intense Isolation, Say Experts, The Christian Science Monitor, August 14, 2007, available at http://www.csmonitor.com/2007/0814/p11s01-usju.htm.

[157] Hirabayashi v. United States, 320 U.S. 81 (1943).

[158] Korematsu v. United States, 323 U.S. 214 (1944).

[159] Ex Parte Endo, 323 U.S. 283 (1944).

[160] In March 2007, the chief military commission prosecutor, Colonel Morris Davis, suggests that the efforts of David Hicks' military defense lawyer, Major Michael Mori, to stir up political support for Hicks in Australia might subject him to prosecution for using "contemptuous words" about administration

their civilian counsel;[161] it has invited economic sanctions against law firms providing pro bono representation.[162] It has tried keep lawyers from seeing detainees on the grounds that subjection to enhanced interrogation makes their bodies, in effect, state secrets. It has ordered military lawyers not to testify before Congress about the effect of interrogation techniques on their ability to prosecute suspects.[163] It has destroyed tapes that might clarify the question of whether those interrogation techniques constitute torture, in defiance of at least one judicial order.[164] And it has been, perhaps, less than candid in court, as when Paul Clement answered Justice Ginsburg's question about "mild torture" with the flat statement "our Executive doesn't." [165]

But Clement was right about one thing. It is our Executive. And after a certain point, one can only conclude that we have ratified its actions. Everything I have discussed here is public; every example and anecdote comes from the pages of major papers. If the American people let these programs continue, it is because, in some sense, we want them. Or at least, we are too frightened, too passive, or too preoccupied with Britney Spears to stop them.

And so now I want to explain why I think they should stop, why the policies we have been pursuing are not just shameful but disastrous. For those of you who are categorically opposed to torture, I probably don't need to say anything more. I had you at "waterboarding." But what about those who think that in times of crisis it is appropriate to defer to the expertise and energy of the Executive?[166]

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officials. See Raymond Bonner, Prosecutor Criticizes Guantanamo Bay Detainee's Lawyer, The International Herald Tribune, March 4, 2007, available at http://www.iht.com/articles/2007/03/04/news/hicks.php.

[161] See generally, Scott Horton, State of Exception: Bush's War on the Rule of Law, Harper's Magazine, July 2007, available at http://www.harpers.org/archive/2007/07/0081595 (describing how detainees have been told that their lawyers are Jews and homosexuals who cannot be trusted).

[162] In March 2006, the chief military commission prosecutor, Colonel Morris Davis, said at a Guantanamo press conference that it was "ironic" that law firms who represented defense contractors would also represent detainees. See Tony Mauro, Top Law Firms Join Forces in Landmark Detainee Case, Legal Times, March 28, 2006, available at http://www.law.com/jsp/article.jsp?id=1143207019627. More notoriously, on January 11, 2007, deputy assistant secretary of defense for detainee affairs Cully Stimson recited the names of major law firms providing pro bono representation to detainees, pronounced their involvement "shocking" and predicted that "when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists and representing reputable firms … . And we want to watch that play out." Stimson also characterized Guantanamo as "the most transparent and open location in the world." See Unveiled Threats, The Washington Post A18, January 12, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/01/11/AR2007011101698.html. On January 12, 2007, the Wall Street Journal ran an editorial quoting an unnamed "senior U.S. official" who says "Corporate CEOs … should ask firms to choose between lucrative retainers and representing terrorists." See Neil A. Lewis, Official Attacks Top Law Firms Over Detainees, The New York Times, January 13, 2007, available at http://www.nytimes.com/2007/01/13/washington/13gitmo.html?ex=1326344400&en=119d62dae944d2ea&ei=5088.

[163] See Bravin, supra note [].

[164] See Bazelon & Lithwick, supra note [] (noting orders from Judges Brinkema and Kennedy).

[165] This is not to suggest that Clement deliberately misled the Court. We do not know how much he knew of the Executive's interrogation practices at the time, and perhaps he thought his observation so obvious a truth that it needed no investigation.

[166] See Posner & Vermeule, supra note [], ; John Yoo, War By Other Means: An Insider's Account of the War on Terror (2006).

The Executive has certainly displayed energy. But it has not been an inspiring example of expertise. If we think about torture in terms of its costs and benefits, it is reasonably clear that this is bad policy.

The benefit of torture is that it makes people talk. But this is not an unalloyed benefit, because talking and providing truthful information are very different things. In the Korean war, captured American aviators gave lengthy confessions about their plans to bomb civilian targets with bacteriological weapons. These confessions, it turned out, were coerced by various interrogation tactics like sleep deprivation, stress positions, isolation, and extended interrogation. In light of this experience, the armed forces began training individuals at risk of capture to resist these tactics in the SERE program—Survival, Evasion, Resistance, and Escape. The regulations governing the SERE program explain that these techniques are illegal, but that other nations have not adhered to the Geneva Conventions.

When Guantanamo interrogators started looking for what General James Hill called "counter-resistant techniques," they turned to the SERE instructors. The list of techniques approved by Rumsfeld in December 2002 "resulted from a close collaboration between experts from the Army SERE school at Fort Bragg, North Carolina, and interrogation teams at Guantanamo."[167] The significance of the fact that these techniques were originally used by the North Koreans not to extract truthful information but to generate false confessions for propaganda purposes seems not to have been considered. But we know beyond a doubt that they have produced false confessions in our hands as well. Shafiq Rasul, for example, admitted to being in Afghanistan and meeting with Mohammed Atta, when we know he was in England.

False confessions are a serious problem. They harm the innocents who confess, when they are used to justify continue detention or punishment. And they can cause harm even when the confessor is guilty, if he implicates innocent people. Mohammed Al Qatani, during the period of his enhanced interrogation, was repeatedly shown photographs of other Guantanamo detainees. Eventually he implicated thirty of them.[168] How trustworthy are those statements? Khalid Sheikh Mohammed, during a CSRT hearing at which he confessed to involvement in a number of plots substantially exceeding what most intelligence experts believe possible, expressly stated that techniques used in prior interrogations had led him to implicate innocent detainees.[169] And the costs go beyond the possible detention of innocents. If the invasion of Iraq was triggered in part by faulty intelligence, it is worth considering the case of Ibn Shaykh al Libi. Al Libi admitted that he and other al Qaeda operatives had traveled to Iraq and received training in the use of chemical and biological weapons—weapons of mass destruction. [170] The confession was elicited through interrogation by CIA operatives, who took al Libi out of the custody of the FBI, and then by Egyptian officials after al Libi was rendered to Egypt.[171] Secretary of State Colin Powell relied on Al Libi's statements

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[167] Margulies, supra note [], at 123

[168] See, e.g., Adam Zagorin, "20th Hijacker" Claims that Torture Made Him Lie, Time Magazine, March 3, 2006, available at http://www.time.com/time/nation/article/0,8599,1169322,00.html.

[169] See CSRT Transcript 14-16, available at http://www.defenselink.mil/news/transcript_ISN10024.pdf.

[170] See Michael Isikoff and Mark Hosenball, Al-Libi's Tall Tales, Newsweek, November 10, 2005, available at http://www.msnbc.msn.com/id/9991919/site/newsweek/page/0/.

[171] See Michael Hirsch, et al., Interrogation: A Tortured Debate, Newsweek, June 21, 2006, available at http://www.msnbc.msn.com/id/5197853/site/newsweek/.

in making his case for war to the U.N. Security Council.[172] Once removed from the interrogation context, al Libi recanted, and intelligence experts now consider his confession untrue.[173]

Viewed simply from the perspective of getting the best intelligence, torture is bad policy—as the pre-revision Army Field Manual on Interrogations noted.[174] But of course there are other costs. One is that it makes prosecution more difficult. The criminal charges against Jose Padilla made no mention of the dirty bomb plot, in part no doubt due to the fact that such as evidence as existed would not be admissible in federal court because of the means used to extract it. (When a Marine lawyer was scheduled to testify before Congress about the extent to which enhanced interrogation techniques had interfered with his ability to prosecute terrorism suspects, the Executive ordered him not to appear.[175])

By far the most serious cost, however, is the damage that the use of torture does to our counterterrorism campaign. "By our efforts," said Bush in his second inaugural address, "we have lit a fire in the minds of men." Indeed we have. We have taken the worldwide shock and horror at the events of September 11 and replaced it with shock and horror directed at us. There is almost nothing that would more effectively breed new enemies and squander goodwill than what we have done. Our treatment of those we accuse of terrorism betrays the values and principles of America. It makes us seem hypocrites; it gains us no friends. Worse, our specific methods of interrogation—sexual humiliation and religious denigration—suggest hostility to the values and principles of Islam. That gains us enemies.[176]

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[172] See http://www.whitehouse.gov/news/releases/2003/02/20030205-1.html (statement of Secretary Powell) ("Al Qaida continues to have a deep interest in acquiring weapons of mass destruction…I can trace the story of a senior terrorist operative telling how Iraq provided training in these weapons to Al Qaida. Fortunately, this operative is now detained, and he has told his story. I will relate it to you now as he, himself, described it… The support that (inaudible) describes included Iraq offering chemical or biological weapons training for two Al Qaida associates beginning in December 2000.")

[173] See Isikoff and Hosenball, supra note []. The Executive claims that information obtained through enhanced interrogation has prevented attacks. Without further disclosure, this assertion is impossible to verify. What has been disclosed suggests that even the purported success stories undermine the argument for torture. Abu Zubaydah, for instance, apparently gave large amounts of false information under torture—basically agreeing with everything the interrogators suggested—and provided useful information only when the torture ended and an interrogator managed to establish a bond with him. See Cole & Lobel, supra note [], at 126-127; Ronald Suskind, The One Percent Doctrine: Deep Inside America's Pursuit of its Enemies Since 9/11 100 (2006).

[174] A more recent and comprehensive study undertaken by the Intelligence Science Board, an advisory panel for the U.S. Intelligence community, agrees. A contributor summarized the findings of the their multivolume report "Educing Information" as follows: "1) pain does not elicit intelligence known to prevent greater harm; (2) the use of pain is counterproductive both in a tactical and strategic sense; (3) chemical and biological methods are unreliable; (4) research tends to indicate that 'educing' information without the use of harsh interrogation is more valuable." See Federation of American Scientists Project on Government Secrecy, Secrecy News January 17, 2007, available at http://www.fas.org/sgp/news/secrecy/2007/01/011607.html.

[175] See Jess Bravin, Administration Forbids Marine to Testify, The Wall Street Journal, Nov. 8., 2007.

[176] Perhaps the most striking illustration of this point is the July 2006 al-Qaeda recruitment video featuring an American convert, Adam Gadahn, who builds a case against the United States based in large part on Guantanamo detention and extraordinary rendition. See Jessica Stern, Al-Qaeda—American Style, New York Times, July 15, 2006, A15, available at http://www.nytimes.com/2006/07/15/opinion/15stern.html?_r=1&oref=slogin.

This is a terrible mistake. As Donald Rumsfeld said, we should measure our progress by asking whether we are "capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training, and deploying against us." The answer to this question is no. Terrorist attacks are on the rise. The State Department's annual survey was canceled in 2005, but a State Department terrorism expert says it would have shown 625 significant attacks in 2004, more than triple the number from 2002 and 2003.[177]

There are people we need to kill, and people we need to capture. There are people we need to deter by demonstrating our resolve. But mostly we need to dissuade. One of the many ways in which the war on terror differs from a conventional war is that the enemy is not a conventional standing army that can be defeated once and for all. This enemy can reconstitute itself; it can do so indefinitely if we give it a strong enough rallying cry.

But it can also wither away. Terrorist groups cannot draft new members; every person who joins their ranks makes a choice to do so. The most important thing we can do is reduce the reasons to make that choice. The best to way to fight terrorism is to stop people from becoming terrorists. In that venture, we need the support and cooperation of the rest of the world, particularly the Islamic world. Moderate Islam is the most powerful opponent of radical Islam, and moderate Islam must be our ally.[178]

What we have been doing is counterproductive,[179] and it has gone on far too long. In the span of time since September 11, earlier generations won independence from the British Empire, subdued the Confederate South, and defeated Imperial Japan and Nazi Germany. We have made little appreciable progress, and by many measures things have gotten worse. Deference to Executive expertise is no longer an appropriate response.

I do not think there is anything particularly revelatory about that observation. I think it is rather obvious. The hard question is not whether we are on the right path; it is how we have gone so far down the wrong one. How, people wonder, could Americans do these things? How could other Americans let them be done?

In that wonderment is the answer, and also the seed of these acts. What is behind the tales of abuse and the lack of outrage is a simple cycle of self-reinforcing beliefs.

First, our enemies are bad, and there is little need to worry about how we treat them. As Dick Cheney put it, "[t]he important thing to understand is that the people that are at Guantánamo are bad people. I mean, these are terrorists for the most part."[180] Or in the words of a guard at Bagram Air Force Base, "We were pretty much told that they

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[177] See Margulies, supra note [], at 227.

[178] Of course, it is not just potential Islamic allies we are alienating. Italy and Germany have issued warrants for the arrest of CIA agents who abducted suspects from their territory as part of the extraordinary rendition program. See Cole & Lobel, supra note [], at 15, 25. Cooperation between intelligence agencies is more difficult when our agents are wanted criminals under the law of allied nations.

[179] This appears to be the consensus view among experts. As James Fallows wrote, "[a]mong national-security professionals there is surprisingly little controversy. Except for those in government and in the opinion industries whose job it is to defend the Administration's record, they tend to see America's response to 9/11 as a catastrophe." James Fallows, Bush's Lost Year, Atlantic Monthly, October 2004, 68, 71.

[180] Interview with Sean Hannity, Fox News, June 14, 2005, available at http://www.foxnews.com/story/0,2933,159469,00.html.

were nobodies, that they were just enemy combatants. … We called them hajis, and that psychology was really important."[181]

Second, we are good, and what we do is just. As Senator Jim Talent said, "I don't need an investigation to tell me that there was no comprehensive or systematic use of inhumane tactics by the American military because those guys and gals just wouldn't do it." "America does not torture" is a premise, not a conclusion. That is the only sense that can be given to Bush's repeated assertions. Our character is the measure of our actions, and whatever we have done, it can't have been torture.

Last, the circle closes. When you see the Guantanamo detainee lying next to the pile of hair he's pulled out,[182] when the Iraqi general you have wrapped in electrical cord inside a sleeping bag and jumped on emerges dead,[183] when the Afghan detainee chained naked to the floor overnight is found frozen to death in the morning,[184] when the taxi driver's heart gives out after four days of being beaten and chained to the ceiling,[185] it is hard to deny that something inhumane has been done. A natural reaction follows. If we have treated people inhumanely, and we are good, they must be bad. Like a coerced confession used to justify further interrogation, like a counter-resistant technique come into the possession of those subjected to it, the fact of mistreatment itself implies culpability. Guilt is written on the body, where we have placed it. The alternative is too terrible to contemplate.

What I say now is trite. I apologize for that, but it is our misfortune to live in a time when trite things need saying. The cycle of these beliefs runs backwards. Actions are the measure of character. We are good because our actions are just, and if we do not act justly, we are not good. The belief in our inherent innocence, our unalterable righteousness, is the most dangerous seduction of all.

What we need instead is, for lack of a better word, empathy. We need it not because we should care about terrorists or blame ourselves for being attacked, or any of the things some people would have you think. We need it because we cannot afford the blinding assumption that anything we do is right, that anyone we detain is guilty, that any confession they give is true, that anyone who questions any of the above is unpatriotic. We need to understand ourselves better than that, and we need to understand our enemies better too. Only that understanding will allow us to fight them in ways that do not

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[181] Douglas Jehl & Andrea Elliott, Cuba Base Sent Its Interrogators to Iraqi Prison, New York Times, May 29, 2004, A1, available at http://www.nytimes.com/2004/05/29/international/middleeast/29ABUS.html?ex=1401163200&en=d3608ff1475dc4da&ei=5007&partner=USERLAND. See also Tara McKelvey, Monstering (describing Abu Ghraib psychology). For a further explication of the operation of "us v. them" psychology, as applied to Abu Ghraib, see Philip Zimbardo, The Lucifer Effect: Understanding How Good People Turn Evil (2007).

[182] Margulies, supra note [], at 132.

[183] See Josh White, Documents Tell of Brutal Improvisation By GI's, The Washington Post, August 3, 2005, A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/08/02/AR2005080201941.html

[184] See Dana Priest, CIA Avoids Scrutiny of Detainee Treatment, The Washington Post, March 2, 2005, A1, available at http://www.washingtonpost.com/wp-dyn/articles/A2576-2005Mar2.html

[185] See Tim Golden, In U.S. Report, Brutal Details of 2 Afghan Inmates; Deaths, The New York Times May 20, 2005, available at http://www.nytimes.com/2005/05/20/international/asia/20abuse.html?ex=1274241600&en=4579c146cb14cfd6&ei=5088.

simultaneously increase their numbers; only that will allow us to stop people from becoming enemies in the first place.

Some people, surely, cannot be stopped. There are people who hate us for any number of reasons. There may even be some who hate our freedom. We cannot stop them from hating us, but we can control why. Let us be hated for what is best in us, not what is worst. Let us be hated for being good. If terrorists kill Americans because our government stands for democracy and religious toleration, that is sad, but it is a price we should not shrink to pay. Some things are worth dying for. But if terrorists kill Americans because our government has tortured their coreligionists with little regard for guilt or innocence, that is not just sad. It is sickening. It is a cost this country should never bear.

There will come a time when we will have to ask ourselves, when this was going on, what did I do? While my government pursued this disastrous and shameful course, while it made me complicit in torture, while it sought to uproot two centuries of law in the name of secrecy and fear, while it made me and those I love less safe and less free, what did I do? There will be a time when we must face that question, we lawyers especially.

I say that time is now. I say that time is always. And I say "nothing" is not an answer. To say "I did nothing" is to say "I helped."