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Enemy Combatants and Unitary Executives: Presidential Power in Theory and Practice During the War on Terror

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An Honors Paper for the Department of Government and Legal Studies

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List of Acronyms

ARB	Administrative Review Board
AUMF	Authorization for the Use of Military Force
CIA	Central Intelligence Agency
CSRT	Combatant Status Review Tribunal
DHS	Department of Homeland Security
DTA	Detainee Treatment Act of 2005
FBI	Federal Bureau of Investigation
MCA	Military Commissions Act of 2006
OLC	Office of Legal Counsel
POW	Prisoner of War
UCMJ	Uniform Code of Military Justice

Chapter 1: Introduction

President George W. Bush was visiting an elementary school in Sarasota, Florida on the morning of September 11, 2001, when he learned of the attacks on the World Trade Center. Bush was reading to second graders to promote his education initiative when his chief of staff, Andrew Card, whispered in his ear that a second plane had hit the second tower of the World Trade Center. It was clear then that the first crash had not been an accident and America was under attack. Bush finished reading and posed for photos with students and faculty. After watching the news report in an empty classroom and delivering a brief statement at the school, Bush and his entourage were rushed to Air Force One—their destination still undetermined. He would spend critical hours that morning sequestered in the skies, frustrated by a lack of information and difficult communication, unable to return to Washington.[1]

Meanwhile, in the White House Vice President Dick Cheney was in his West Wing office on the morning of September 11 watching news coverage of the first airplane hitting the North Tower of the World Trade Center when the second plane crashed into the South Tower. After receiving reports that another hijacked plane was headed for Washington, Secret Service rushed Cheney into a bunker below the East Wing of the White House.[2] The Presidential Emergency Operations Center where Cheney and some senior White House staff were moved to had a few days' worth of food and supplies, beds, a conference room, and a secure phone. It was originally

[1] "The Vice President Appears on Meet the Press with Tim Russert," George W. Bush White House Archives, September 16, 2001, https://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20010916.html.
[2] Ibid.

built for President Franklin D. Roosevelt during World War II as protection against air raids, but until September 11, 2001, had never before been used in a crisis.[3]

In Manhattan and at the Pentagon, and soon after in a field in Pennsylvania, smoke and debris filled the air in what would be the deadliest terrorist attack on U.S. soil, killing 2,977 people and leaving many more injured. In the bunker, with Bush under military protection away from Washington, Cheney took charge.[4] After telling Bush not to return to Washington, one of Cheney's first actions was giving a go-ahead order to the Air Force to shoot down a passenger plane headed towards Washington, which would kill the forty-five people on board, to prevent another disastrous strike.[5] The order turned out to be irrelevant—the plane, United Airlines Flight 93, had already crashed into a field in Pennsylvania after passengers and crew attempted to regain control from the hijackers before the shoot-down order could be been passed down to the fighter pilots.[6] Bush and Cheney would later claim that the president made the decision and Cheney relayed the order, as they told the 9/11 Commission, which investigated the attacks, but after looking at call logs, White House Military Office logs, and interviews with other people in the room, the Commission found no confirmation of Cheney's call to Bush to authorize the order.[7] Instead, evidence suggests that Cheney made the decision by himself and later cleared it with the president.[8] While the dispute over the order turned out to be inconsequential to the events of the day, it illustrates Cheney's willingness to take control and exercise executive power and Bush's deference to his Vice President. As the war on terror progressed, Cheney would

[3] Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*, First edition (New York: Little, Brown, 2007), 3.
[4] James Mann, "The World Dick Cheney Built," *The Atlantic*, January 2, 2020, https://www.theatlantic.com/ideas/archive/2020/01/dick-cheney-charted-americas-future-september-11/603313/.
[5] Savage, *Takeover*, 4.
[6] Ibid., 5.
[7] 9/11 Commission, "The 9/11 Commission Report," July 22, 2004, 41.
[8] Mann, "The World Dick Cheney Built."

continue to play a central role in guiding the administration's policies, becoming a leading architect of the war at home and abroad.

Cheney's powerful role was in part a product of his experience in federal government, which far surpassed that of Bush. Before his presidency, Bush had served for just over one term as governor of Texas, though he had closely observed his father's White House a decade earlier. Cheney, meanwhile, had worked in the Richard Nixon administration, served as President Gerald Ford's chief of staff, represented Wyoming in the House of Representatives for a decade, and had been President George H.W. Bush's Secretary of Defense. His experience and understanding of the inner workings of the federal government allowed him to play a powerful role in the administration, making him, as many argue, the most powerful vice president in history.[9] And Cheney brought his allies, who like him were familiar with how the federal government functioned, into many senior positions throughout the administration.[10]

Cheney had long advocated for strong presidential powers, which he believed to have been diminished following the Vietnam War and Watergate scandal. After working in three presidential administrations, he had watched presidential power be challenged and had staunchly defended the authority of the president. During his time in the Ford White House, Cheney saw first-hand how a series of laws passed in the aftermath of Vietnam and Watergate curtailed the president's power, and during his tenure in Congress, Cheney defended executive power and the Reagan administration in the Iran Contra scandal.[11] Bush made clear that he wanted to strengthen executive power; "I'm not going to let Congress erode the power of the executive branch. I have

[9] Jim Kelly, "Figuring Out Who Really Had the Last Word in the Bush White House," *The New York Times*, October 21, 2013, sec. Books, https://www.nytimes.com/2013/10/22/books/days-of-fire-peter-bakers-book-about-bush-and-cheney.html.
[10] Savage, *Takeover*, 7.
[11] Ibid., 9.

a duty to protect the executive branch from legislative encroachment," Bush said in 2002.[12] But Cheney, in particular, made it a central part of his personal mission based on his long-standing interest in enhancing executive power. In 2002, he laid out his vision for the presidency: "In 34 years, I have repeatedly seen an erosion of the powers and the ability of the president of the United States to do his job…One of the things that I feel an obligation—and I know the president does too—is to pass on our offices in better shape than we found them to our successors."[13] The September 11 attacks gave Cheney and his allies the opportunity to advance his enduring views of executive power.

Among those working with Cheney on the project to expand presidential power was first and foremost David Addington, legal counsel and long-time advisor to the Vice President, as well as Timothy Flanigan, Deputy White House Counsel. They found an ally in John Yoo, deputy assistant attorney general in the Justice Department's Office of Legal Counsel (OLC) and former law professor at the University of California, Berkeley. The OLC is a little-known but highly important office in the Justice Department that advises members of the executive branch, including the president, on the lawfulness of their proposed actions. Its significance stems from the fact that an advisory opinion issued by the OLC becomes a binding interpretation of the law that the executive branch must follow. Yoo—an ardent supporter of vast, inherent executive power whose legal opinions drew broad scrutiny from his academic peers—was the senior-most member of the OLC on September 11, 2001, because the head of the office had yet to be confirmed by the Senate. As such, he was called on to craft several of the OLC's first legal

[12] George Bush, "Transcript of Bush Press Conference - March 13, 2002," CNN, March 13, 2002, https://www.cnn.com/2002/ALLPOLITICS/03/13/bush.transcript/index.html.
[13] Caroline Daniel, "Bush's 'Imperial' Presidency," *Financial Times*, July 5, 2006, https://www.ft.com/content/d97b1b48-0c4f-11db-86c7-0000779e2340.

opinions after the attacks and he developed a pipeline between the OLC and the White House that was used time and again to ensure Bush had broad powers to fight the war on terror.

The September 11 attacks ushered in a new chapter of American history and created an atmosphere of fear and emergency. The post-September 11 era has been marked by heightened security, increased government action in combating terrorism, and a seemingly never-ending war on terror. It was in this context that the enemy combatant policies were conceived by the Bush administration. The administration decided that suspected terrorists or those determined to have aided terrorists conspiring against the United States would be detained and classified as "enemy combatants." This was a largely new category of prisoners created by the Bush administration (though they claimed otherwise) who were neither prisoners of war protected under international law nor civilians. They would include noncitizens and citizens—those captured on foreign battlefields and American soil. They would be detained by the United States, held indefinitely without charge or access to a lawyer, and subject to trial by military commission.

The enemy combatant policies, like the administration's other policies in the realm of national security and beyond, were based on a doctrine of expansive presidential power. Not only were these claims of power broad in the scope of what the president was allowed to do, but they were also rooted in the idea that the president was given these powers by the Constitution, and thus claimed that these powers were inherent to the office of the presidency. Most notable were claims that appealed to the president's power as commander in chief. The administration's lawyers repeatedly asserted that by naming the president commander in chief, the Constitution granted the president vast and exclusive authority over the conduct of war, which allowed him to take action without Congressional interference or judicial review.

Throughout American history, presidents have pushed the limits of their constitutional powers during times of war, and the other two branches of government have stepped back, yielding greater power to the president. But at the end of wars, the balance of power often shifted back towards normalcy. During the war on terror, the Bush administration, like wartime administrations before it, claimed executive power to protect the nation. But its claims of power were more drastic than before with no clear end in sight. As *The Washington Post* reporter Bart Gellman explained, "What was new and innovative here, and quite radical, was the notion that the president's interpretation could not be challenged, that because the executive is a separate branch, courts and Congress could not tell the president, in any way, how to exercise his powers as commander in chief."[14] And because a lot of the expansion of power took place in secret, it was particularly difficult for Congress or the judiciary to act. This theory of inherent presidential power served as the foundation for various elements of the enemy combatant policy—from how and where suspected terrorists would be detained, to how they would be treated and tried.

This paper charts the enemy combatant policies in an attempt to understand how the policies were conceived and what their implications are to the American political system. It addresses questions not only about the scope of presidential power but also of the source of presidential authority. It considers the theories of presidential power that were used to support the policies, how they were developed and implemented, the extent to which they were challenged in the courts and by Congress, and their legacies. I argue that the Bush administration's broad theory of inherent executive power allowed for the creation and expansion of a new class of prisoners—the enemy combatants—who were at the center of a larger effort to reorganize political power. In creating this policy, the administration attempted to

[14] Nina Totenberg, "Cheney: A VP With Unprecedented Power," NPR.org, January 15, 2009, https://www.npr.org/templates/story/story.php?storyId=99422633.

subvert traditional checks on presidential power. Ultimately, the dismantling of some of the enemy combatant policies and the gradual return of checks and balances in the national security sphere, largely based on court rulings that challenged the administration's premise of power, signified a reining in of executive authority. Yet, many important aspects of the administration's counterterrorism and national security apparatus remained past Bush's years in the White House, leaving a legacy of expanded presidential power able to be used by future presidents.

Chapter Two considers the theory and history of presidential powers, and particularly of presidential war powers. I analyze how the Framers understood presidential powers and consider competing theoretical claims of presidential power. The chapter then traces a history of presidential war powers to explore how different wartime presidents understood their powers and the claims they made to exert and expand power. I conclude the chapter by looking at the Unitary Executive Theory, a theory of presidential power that many in the Bush administration subscribed to, in order to understand how the Bush administration utilized this theory to make sweeping claims of executive power and to evaluate the extent to which its claims and actions were unprecedented.

The third chapter considers how the enemy combatant policy was conceived and implemented, analyzing the administration's policies for the detention, treatment, and trial of terrorist suspects. I trace the evolution of the policy to understand how it expanded over the course of several years. The chapter pays particular attention to the legal reasoning used by the administration to defend its policies—one based in ideas of inherent executive power.

In the fourth chapter, I examine the challenges to the administration's enemy combatant policy. I consider how changes in the make-up of the administration impacted the policies of the war on terror. I then look at challenges to the policies in the Supreme Court, focusing on five

enemy combatant cases and how they dismantled aspects of the administration's policy. In studying these cases, I pay particular attention to the legal reasoning used by the government in its litigation and its appeals to a theory of broad, inherent presidential power that is discussed in the third chapter. Chapter Four also considers the role of Congress in order to understand the extent to which Congress was either silent or supportive of the administration and where it pushed back.

Finally, I conclude by evaluating the significance of the Bush administration's actions and consider what alternative courses of action the president could have taken in its enemy combatant policy and broader national security policies. I use the Barack Obama administration as a proxy for an administration with a different theory of presidential power to evaluate whether a different theory of power might yield a different policy. This example suggests that even with a supposedly different theory of presidential power, similar policy outcomes were achieved. Lastly, I consider President Donald Trump's claims to executive power and evaluate the current status of enemy combatants. I conclude that presidential power has dramatically increased in the years since the September 11 attacks, and it is imperative to the proper functioning of the American democratic system to restore the balance of power.

Chapter 2: Theories and History of Presidential Power

This chapter begins the exploration of presidential powers. It starts with the creation of the Constitution to understand how the Framers designed the presidency. It then considers different theories of presidential powers as advocated for by presidents and scholars. These theories are traced through a history of presidential wartime powers to analyze how presidents acted during times of war and the claims they made to go beyond their constitutional powers. Finally, this chapter concludes by looking at the Unitary Executive Theory, a theory of executive power that has had enormous consequences in the last several decades. This theory is fundamental to understanding how the Bush administration assumed sweeping powers during the war on terror, and most pertinent to this project, how they developed a justification for designating captured terrorist suspects as enemy combatants. The administration's development of a theory of presidential power that claimed vast inherent powers for the president sets it apart from most of its predecessors and was used time and again in its creation and defense of enemy combatant policies. It is through this exploration of history and political theory that we begin to unravel a story of expanding powers and broad claims of executive authority.

The Constitution and its Precursors

The role of the modern presidency strays far from the original conception of the executive over two centuries ago. As a new nation, the United States of America was the product of a revolt against what many colonists considered a tyrannical king. Wary of a tyrannical executive and an overreaching central state from the period of British rule, the authors of the Articles of Confederation sought to weaken the central government by creating only a legislature with limited powers and no executive branch. This first constitution attempted to place power

primarily with the thirteen independent, sovereign states, but the nation's economic troubles stemming from the inability of the central state to tax and regulate commerce and the absence of a centralized military, among other factors, proved this model to be unsustainable.[15] Concerned about the ineffectiveness of the Articles, delegates from a collection of states at the 1786 Annapolis Convention voted to meet in Philadelphia in the summer of 1787 to address the shortcomings of the document. Though initially called to revise the Articles of Confederation, the Philadelphia Convention—which would later come to be known as the Constitutional Convention—ultimately led to the drafting of an entirely new constitution—the Constitution of the United States.[16]

One of the most pressing issues at the Philadelphia Convention was that of executive power. The Framers were still fearful of creating a monarchy like that of Great Britain, but the weakness of the government under the Articles of Confederation suggested the need for an executive branch. Not everyone agreed on what this would look like. Some of the Framers saw no use for an executive branch, while others thought executive power should be divided among multiple individuals.[17] James Wilson of Pennsylvania was the first to propose that there be a single executive—a statement that was met with silence from the room.[18] Edmund Randolph of Virginia objected to this idea and favored instead a plural executive, fearing a single executive would be the "foetus of monarchy."[19] Wilson countered that the single executive would in fact be the "best safeguard against tyranny."[20] He argued that the American executive would only have

[15] John P. Burke, *Presidential Power: Theories and Dilemmas* (Boulder, CO: Westview Press, 2016), 15.
[16] Savage, *Takeover*, 14.
[17] Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power after Watergate* (Ann Arbor: University of Michigan Press, 2006), 19.
[18] Burke, *Presidential Power*, 19.
[19] Ibid.
[20] James Madison, "Madison Debates: June 1" (The Avalon Project, Yale Lillian Goldman Law Library, June 1, 1787), https://avalon.law.yale.edu/18th_century/debates_601.asp.

the power to execute laws and make appointments, unlike the British monarch whose powers included those legislative in nature.[21] Perhaps the boldest proposal came from Alexander Hamilton, who called for an executive who would be an "elective monarch" and serve for life, in line with the English model. This proposal was received unfavorably by most of the delegates and many historians believe Hamilton deliberately overstated the case for a strong executive to make the Virginia Plan of government appear more favorable.[22] Ultimately, Wilson prevailed; On June 4, seven states voted in favor of the single executive and three (Delaware, Maryland, and New York) voted in opposition.[23]

After the entire Constitution was approved by the Convention at the end of the summer of 1787, it was directed to the states, of which nine state legislatures needed to approve the document for it to be ratified. During these ratifying conventions, the nature of executive power continued to be debated. Two factions soon developed in this process: the Anti-Federalists and the Federalists. Led by Patrick Henry, the Anti-Federalists were opposed to the proposed Constitution and its more centralized plan of government. Henry was particularly concerned about the expansive role of the president, saying that the Constitution had "an awful squinting, it squints towards monarchy."[24] Federalists meanwhile defended the Constitution. To publicly promote the Constitution and convince state legislatures to ratify it, Hamilton, James Madison, and John Jay composed a series of 85 essays under the pseudonym "Publius" that detailed the tenets of the document. In the collection, known as *The Federalist Papers,* Hamilton wrote extensively about the role and restrictions of the president. In *Federalist 69*, he attempted to

[21] Ibid.
[22] Samuel B. Hoff, "A Bicentennial Assessment of Hamilton's Energetic Executive," *Presidential Studies Quarterly* 17, no. 4 (1987): 727–28.
[23] Burke, *Presidential Power*, 7.
[24] Graham G. Dodds, *Take Up Your Pen: Unilateral Presidential Directives in American Politics*, Democracy, Citizenship, and Constitutionalism (Philadelphia: University of Pennsylvania Press, 2013), 47.

assuage fears that a president would become monarchical by emphasizing the constraints on presidents' powers and jokingly comparing his power to that of the governor of New York (a prominent Anti-Federalist). In *Federalist 70*, Hamilton wrote that "energy in the Executive" promotes good government and is essential to the protection and security of the state. He also described the importance of an empowered executive: "A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government."[25] Hamilton's view of an energetic yet constrained president in the *Federalist Papers* was much more restrained than his arguments for a monarchical executive in the Constitutional Convention. The Federalists succeeded in their campaign and by the end of July 1788, the Constitution was ratified by 11 states and the process to form the new government had begun. On April 30, 1789, George Washington was inaugurated as the first president of the United States of America.

The Constitution gave the federal government more power than the Articles of Confederation did. To prevent abuse of powers, the Framers divided control of the government into three branches—the executive, the legislative, and the judiciary—providing each institution with the mechanism to check the others. Barely a thousand words long, Article II of the Constitution details most of the powers of the president. The first half of Article II outlines the process for selecting the president through the electoral college and the second half enumerates the powers of the president. The president is the commander in chief of the military and of state militias. Presidents can grant pardons and negotiate treaties. They can appoint ambassadors, judges, and executive officials, as well as give Congress information about the state of the union.

[25] Alexander Hamilton, "The Federalist Papers: No. 70" (The Avalon Project, Yale Lillian Goldman Law Library, March 18, 1788), https://avalon.law.yale.edu/18th_century/fed70.asp.

In some cases, they can call Congress back into session. And they can be removed from office through impeachment.

Most of the powers of the president enumerated in the Constitution are checked by other branches. The president has the power to veto legislation, for example, but the veto can be overridden by two-thirds of both chambers of the legislature. While the president is commander in chief, the Framers gave Congress the power to declare war and raise armies. And to ensure that the American president did not hold the expansive power that allowed the British king to make and enforce laws, acting as a tyrant, the Framers wrote that the president "shall take care that the laws be faithfully executed."[26] Within this framework, Congress would enact laws, and the president would obey them.

Given the scope of this paper, war powers as the Framers envisioned them deserve special consideration. The British system gave the monarch the power to make war; the Framers rejected this idea, arguing that executives went to war for personal glory and enrichment, not for the nation's interests.[27] At the Constitutional Convention, only Pierce Butler of South Carolina voiced that the President should have the power to make war, saying that the President would not do so unless there was mass support.[28] Elbridge Gerry of Massachusetts responded that he "never expected to hear in a republic a motion to empower the Executive to declare war" and others shared a similar sentiment.[29] War powers, it was decided, would be given to the legislative branch. Charles Pinkney of South Carolina voiced concern that the legislative branch's proceedings would be too slow, imagining that Congress would meet but once a year.[30] Madison

[26] U.S. Constitution, art. 2, sec. 3.
[27] Louis Fisher, "'War Powers for the 21st Century: The Constitutional Perspective,'" Subcommittee on International Organizations, Human Rights, and Oversight, House Foreign Affairs Committee (2008), https://www.loc.gov/law/help/usconlaw/pdf/war-fa-2008.pdf.
[28] Ibid.
[29] Ibid.
[30] Madison, "Madison Debates: June 1."

and Gerry proposed to edit the clause that had initially allowed Congress to "make" war to instead permit Congress to "declare" war, thereby "leaving to the Executive the power to repel sudden attacks" if Congress could not act fast enough. Their motion carried and Article I, Section 8 of the Constitution states "Congress shall have the power to…declare war" and to "make rules concerning captures on land and water."[31] Congress was also given the power to authorize military conflicts and to create armies and make rules on how to regulate them. The Framers understood this formulation of war powers—a radical break from the British model—as protecting the nation against the impulses of a powerful executive. As Wilson said to the Pennsylvania Ratifying Convention,

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our interest can draw us into war.[32]

A few years later Madison wrote to Thomas Jefferson, "The constitution supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl."[33]

Article II, Section 2 of the Constitution makes the president "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[34] Scholars disagree over what this title means in practice. Constitutional scholar Louis Fisher argues that the commander in chief title was not meant to

[31] U.S. Constitution, art. 1, sec. 8, clause 10.
[32] James Wilson, "Pennsylvania Ratifying Convention Address.," McMaster, John Bach, and Stone, Frederick D., eds, Pennsylvania and the Federal Constitution, 1787-1788 (Lancaster, 1888)
[33] James Madison to Thomas Jefferson, April 2, 1798, http://press-pubs.uchicago.edu/founders/documents/a1_8_11s8.html.
[34] U.S. Constitution, art. 2, sec. 2, clause 1.

give presidents sole power to initiate war and determine its scope, but rather to preserve civilian supremacy over the military. Legal scholar and former Deputy Assistant Attorney General in the Office of Legal Counsel John Yoo takes a widely different position. Yoo contends that the commander in chief clause should be understood as a "continuation of the English and colonial tradition in war powers."[35] According to Yoo, commander in chief powers were not simply intended to give the President control over military strategy and operations, but actually to convey the military powers of the British king, including the ability to go to war; he based this conclusion largely in the writings of Hamilton, particularly *Federalist 70*.[36] Regardless, presidents have frequently used their commander in chief power to justify unilateral decisions, and the courts have generally been hesitant to contradict presidents' appeal to this power.[37]

The Constitution leaves several provisions surrounding the president quite vague, allowing for interpretation, especially in Article II. Legal scholar Edward Corwin described Article II in 1957 as "the most loosely drawn chapter of the Constitution."[38] The first sentence of Article II vests "the executive power in a president of the United States." Yet it is not clear what "executive power" is. What does this power let presidents do? And are there inherent executive powers? During debates on the Bill of Rights, Madison rejected the suggestion that the executive be prohibited from exercising powers not "expressly delegated" in the Constitution and said that there "must necessarily be admitted powers by implication."[39] This adds to the argument that the president, among other actors, has powers that are neither granted nor prohibited by Congress. Presidents have interpreted the vague language of Article II strategically to offer implied or

[35] John C. Yoo, "The Continuation of Politics by Other Means: The Original Understanding of War Powers," *California Law Review* 84, no. 2 (1996): 252, https://doi.org/10.2307/3480925.
[36] Ibid.
[37] Dodds, *Take up Your Pen*, 34.
[38] Alan I. Bigel, "Presidential Power and Political Questions," *Presidential Studies Quarterly* 21, no. 4 (1991): 665.
[39] James Madison, "Amendments to the Constitution, 18 August 1789," Founders Online, *National Archives*, https://founders.archives.gov/documents/Madison/01-12-02-0229

inherent powers that have not been explicitly spelled out in the Constitution. In doing so, they have claimed powers that extend beyond the narrow ones granted to them in the Constitution, expanding the presidency into one of the most powerful offices in the world—an institution that today is far from what the Framers had imagined.

Theories of Presidential Power

The vagueness of Article II opens it to interpretation and yields questions about the limits to presidential powers. Here, two central theories about presidential power emerge—one taking a broad view on presidential authority, reading the Constitution loosely, and the other a more strictly constructed interpretation. These theories are exemplified in the early 20th-century debate between Theodore Roosevelt and his successor William Howard Taft.

Roosevelt was an activist president—he took on an expansive reading of presidential powers and argued that he could take any action unless it was explicitly forbidden in the Constitution. In his autobiography, Roosevelt wrote, "I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws."[40] Roosevelt's approach has been labeled the "stewardship theory," because he defined it as grounded in the service of the nation. To Roosevelt, the president was meant to be the "steward" of the people, which is how he understood his own role as president. He took actions outside of the conventional purview of the president such as establishing national parks without regard for state jurisdiction. "I did not usurp power, but I did greatly

[40] Theodore Roosevelt, *Theodore Roosevelt; an Autobiography* (New York: The Macmillan Company, 1913), 388–89, https://lccn.loc.gov/13024840.

broaden the use of executive power. In other words, I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition," Roosevelt said.[41]

Taft was troubled by Roosevelt's conception of the presidency. Unlike Roosevelt, Taft believed that the president could not take actions that were not granted or reasonably implied by the Constitution, even if they were in the public's interest. "There is no undefined residuum of power which [a president] can exercise because it seems to him to be in the public interest," he said. "The President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise."[42] Taft did not argue that the Constitution could not be interpreted, but rather that the president's actions should follow reasonable constitutional interpretation or Congressional approval, or both.[43] It is noteworthy that Taft's actions during his presidency were more activist than his philosophy suggests. He issued more executive orders and presidential proclamations per year than Roosevelt did and created a 2.7-million-acre wildlife refuge in the Aleutian Islands, far larger than any Roosevelt created.[44]

This debate between Roosevelt and Taft establishes a dichotomous understanding of the presidency; the former creates an autonomous president with more expansive powers and the latter a reined-in president, who more closely follows the Constitution. Presidents and scholars both before and after Roosevelt and Taft's time have debated these theories of presidential power. Those who align themselves with Roosevelt's stewardship theory often cite the presidential oath of office in their claim that the Constitution allows for broad powers and a loose

[41] Ibid., 357.
[42] William Howard Taft, *Our Chief Magistrate and His Power* (New York: Columbia University Press, 1916), 140.
[43] Burke, *Presidential Power*, 82.
[44] Richard Ellis, *The Development of the American Presidency* (New York: Routledge, 2012), 301.

interpretation. Found in Article II the oath of office states: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."[45] The oath contains two phrases that many point to as empowering the president. The first is that by requiring the president to execute the office of the president, it might allow for actions not specified in the Constitution in order to do so. Similarly, the clause calling the president to "preserve, protect, and defend the Constitution" might also be interpreted to permit measures not specified in the Constitution in order to ensure the viability of the document.[46]

Scholarship on the presidency often takes on the same questions and theories debated by Roosevelt and Taft. Political scientist Edward Corwin supported Roosevelt's stewardship theory, writing that the president "was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers."[47] Corwin argued that presidents must take action in the public's interest if Congress fails to act: "If and when Congress lacked the constitutional power to do something in the public interest, its deficiency would become a mandate to the 'executive power' to do it; nor, obviously, would executive action taken on this premise be subject to Congressional control."[48]

In line with Roosevelt, some scholars believe that the Framers created a president with broad rights beyond those enumerated in the Constitution in an effort to create a strong executive. Legal scholar Saikrishna Prakash, for example, claims that the office of the president was seen as imperial from its conception. Using historical documentation from the Philadelphia

[45] U.S. Constitution, art. 2, sec. 1, clause 8.
[46] Dodds, *Take up Your Pen*, 34.
[47] Richard Loss, "Edward S. Corwin: The Constitution of the Dominant Presidency," *Presidential Studies Quarterly* 7, no. 1 (1977): 59.
[48] Ibid.

Convention and the ratification conventions, Prakash argues that though the Framers were concerned about excessive executive power, they still created a strong executive due to fears of anarchy and executive sluggishness. It is a misconception, he says, that the founders were so afraid of replicating England's king that they would not create a body that even resembled a monarchy.[49]

Louis Fisher, meanwhile, argues for a more restricted view of presidential powers, aligning with Taft's view of the presidency. He argues that the president does not have inherent powers, as many presidents and scholars would argue, calling it an "illusory claim."[50] Rather, Fisher contends that the Framers created express powers (those written in the Constitution) and allowed for implied powers, which can be drawn from them. Though some view implied and inherent powers as synonymous, Fisher says they are "radically different" as inherent powers are not drawn from express powers and are instead unsubstantiated assertions when claimed by a president. Fisher believes such claims are dangerous: "The Constitution is undermined by claims of open-ended authorities that cannot be located, defined, or circumscribed," he argues.[51] "Whenever the executive branch justifies its actions on the basis of 'inherent' powers, the rule of law is jeopardized. To preserve a constitutional system, executive officers must identify express or implied powers for their actions."[52] Fisher warns against presidents using inherent powers to usurp Congressional war powers. He writes, "Nothing is more destructive to the rule of law than allowing Presidents to claim that the Commander in Chief Clause empowers them to initiate war. With that single step all other rights, freedoms, and procedural safeguards are diminished and

[49] Saikrishna Bangalore Prakash, *Imperial from the Beginning: The Constitution of the Original Executive* (New Haven: Yale University Press, 2015).
[50] Louis Fisher, "Restoring the Rule of Law," Senate Judiciary Committee (2008), 2.
[51] Ibid., 3.
[52] Ibid.

sometimes extinguished."[53] Fisher highlights a central issue of executive power and a fear that the Framers seem to have held: what happens when a president claims expansive powers to initiate war? And what other claims can they make as a result? The following section of this chapter will deal specifically with the issues Fisher warns against, examining claims of presidential authority over war powers.

A History of Presidential War Powers

The Roosevelt-Taft debate sets up a broad framework to understand how presidents have viewed their powers—broadly, they are either constrained by the boundaries of the Constitution or able to take actions as long as those do not overtly conflict with the Constitution. This paradigm is both complemented and complicated by the issue of war powers, as it creates a third piece to the Roosevelt-Taft dichotomy: the idea of a zone of autonomy. In times of war, presidents have claimed greater executive power in the face of an emergency and have even suggested that they have exclusive control over the arena of war. This section explores how select presidents have understood their wartime powers and the claims they have made to push or break the boundaries of constitutionally mandated powers in times of war.

The Federalist Era

In 1793 at the start of Washington's second term, war broke out between England and France, and the United States was pressed to take sides. Washington chose instead to declare the nation neutral in the conflict and his administration issued a Proclamation of Neutrality that April. Many members of Washington's cabinet agreed that neutrality was necessary, fearing that

[53] Ibid., 8.

the military was too small to engage in risky conflict. But controversy arose over whether Washington was constitutionally permitted to declare neutrality; the power to declare war had been given to Congress, so was it within the president's power to declare neutrality?[54]

These questions started a debate through pamphlets between Hamilton, writing as a Federalist, and Madison, writing as a Jeffersonian Democratic-Republican. Under the name "Pacificus," Hamilton wrote a series of essays that defended Washington's proclamation, arguing that while Congress has the power to declare war, it is "the duty of the executive to preserve peace till war is declared."[55] At Jefferson's urging, Madison, writing as "Helvidius," countered that the proclamation was equivalent to a new treaty, and only legislators could make laws or ratify treaties. He argued that presidents could not end states of war or declare peace without Congress's consent.[56] Madison accused Hamilton and anyone else who supported the Neutrality Proclamation of being a monarchist, writing that permitting the president to issue such a proclamation would be to take "royal prerogatives from the British government."[57]

Hamilton's argument took on a broad claim—he seized the ambiguous first words of Article II of the Constitution that "The executive power shall be vested in a President of the United States" and contrasted it with Article I, which begins "All legislative powers herein granted shall be vested in a Congress of the United States" to assert that Article II provided a general grant of powers to the president whereas Congress was constrained to the enumerated powers in Article I.[58] The executive, then, could carry out anything the Constitution did not

[54] Rudalevige, *The New Imperial Presidency*, 27.
[55] "Pacificus No. I, 29 June 1793," Founders Online, National Archives, https://founders.archives.gov/documents/Hamilton/01-15-02-0038. [Original source: The Papers of Alexander Hamilton, vol. 15, June 1793–January 1794, ed. Harold C. Syrett. New York: Columbia University Press, 1969, 33–43.]
[56] Rudalevige, *The New Imperial Presidency*, 27.
[57] Ibid.
[58] Charlie Savage, "Commanding Heights," *The Atlantic*, October 2007, https://www.theatlantic.com/magazine/archive/2007/10/commanding-heights/306176/.

forbid, because, Hamilton asserted, "the executive power of the Union is completely lodged in the President."[59] Madison countered that giving the president powers that were not specifically enumerated would threaten free government.[60] This debate opened up a broader question about executive powers: Are presidents limited to the designated powers in the Constitution? Or can they take any action not explicitly forbidden in the Constitution? Over various administrations throughout history and into the present, these questions continue to be fundamental in understanding the institution of the presidency.

Many wars in American history include stories of presidents who went beyond their constitutional powers, often violating civil liberties in the name of national security. The War of 1812 is not one of them. By 1814, the White House lay in ashes, the Capitol was badly burnt, New England Federalists were contemplating secession, and the country was imperiled. But Madison, who had long argued that presidents' powers were only those enumerated in the Constitution, as he did in the Pacificus-Helvidius debates, did not attempt to stretch his constitutional powers or exert strong executive action.[61] Instead, he showed restraint at a moment when there was room for strong claims of presidential wartime powers. Madison biographer Ralph Ketcham described his behavior during the war:

> Madison's course [during the War of 1812] was consistent with his theory of republican government and especially of the use of executive power. To be imperious, or domineering, or grand was to him simply inappropriate in a president who was the agent of the people, the follower of Congress in matters of policy, and the creature of the Constitution in the definition of his powers. In this sense Madison's conduct of the War of 1812, with all its difficulties, indecisiveness, and failures, was an ultimate triumph in that republican government emerged confirmed and strengthened.[62]

[59] Rudalevige, *The New Imperial Presidency*, 28.
[60] Ibid.
[61] Benjamin Wittes and Ritika Singh, "Executive Power, Civil Liberties, and the War of 1812," Lawfare, March 29, 2012, https://www.lawfareblog.com/executive-power-civil-liberties-and-war-1812.
[62] Ralph Ketcham, "James Madison: The Unimperial President," *The Virginia Quarterly Review* 54, no. 1 (1978): 133.

Not all view Madison's restraint so favorably. In his book *All the Laws but One: Civil Liberties in Wartime,* former Chief Justice William Rehnquist writes that while the capital was burning, "the national government under President James Madison was too weak and inert to abridge anyone's civil liberties."[63] Whether a sign of weakness as Rehnquist claims, or of virtue, Madison's handling of the war illustrates that not every president sought to expand their power in times of war.

Era of Expansion

When James K. Polk ran for president in 1844, he promoted the idea of Manifest Destiny. His predecessors had extended the country westward, and Polk too desired to expand the nation. As president, Polk wanted to lay claim to the lands around newly-claimed Texas, but Mexico held strong. After failing to purchase the land from the Mexican government, Polk sent troops to the disputed border area to provoke Mexico into war.[64] When Mexican troops fought back against American troops who entered Mexican territory, Polk declared that Mexico had invaded U.S. territory and "shed American blood upon American soil;" in turn, he asked Congress to declare war. [65] In May 1846, Congress did just that.

The war quickly became a partisan issue exacerbated by rivalries in the regionally divided nation. Some, like South Carolina senator John C. Calhoun, worried that the war would re-open the contentious issue of slavery in the new territories. Many abolitionists raised issue that the war was simply a power-grab by the President—an unjust use of war powers to gain

[63] William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime*, First edition (New York: Knopf, 1998), 170.
[64] John S. D. Eisenhower, *So Far From God: The U. S. War With Mexico, 1846–1848* (Norman: University of Oklahoma Press, 2000), xvii.
[65] Ibid., xx.

slaveholding land, and many Whigs criticized Polk for exceeding his executive authority.[66] Whig leader Robert Toombs of Georgia said, "This war is nondescript…We charge the President with usurping the war-making power…with seizing a country…which had been for centuries, and was then in the possession of the Mexicans. … Let us put a check upon this lust of dominion. We had territory enough, Heaven knew."[67] Many also found absurd Polk's claim that the war started on U.S. territory. Then-congressman Abraham Lincoln disputed Polk's assertion and introduced the "Spot Resolution" to call for Polk to submit evidence that blood was shed on American land.[68] Though this resolution did not lead to any results, it highlights the Whigs' argument that the war was not just. On January 3, 1848, the House of Representatives voted to censure Polk for "unnecessarily and unconstitutionally" beginning the war.[69] Ulysses Grant who served as Second Lieutenant in the war would later call it "one of the most unjust ever waged by a stronger against a weaker nation."[70]

Victory in the war gave the United States vast territory, but as Calhoun feared, it also intensified divisions between the North and South as questions of slavery in the new territory spurred controversy that set the stage for the Civil War.

The Civil War

On April 12, 1861, secessionist rebels attacked Fort Sumter, starting the Civil War. With Congress out of session, President Lincoln did not wait for members to return to take action. Without Congress's declaration of war, Lincoln expanded the Union's army, spent

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[66] B. H. Gilley, "Tennessee Whigs and the Mexican War," *Tennessee Historical Quarterly* 40, no. 1 (1981): 46.
[67] Sidney Lens and Howard Zinn, *The Forging of the American Empire: From the Revolution to Vietnam: A History of American Imperialism*, First Printing edition (Chicago: Pluto Press, 2003), 129.
[68] G. S. Borit, "Lincoln's Opposition to the Mexican War," *Journal of the Illinois State Historical Society (1908-1984)* 67, no. 1 (1974): 79.
[69] Ibid., 80.
[70] Ulysses Simpson Grant, *Personal memoirs of US Grant* (Courier Corporation, 1995). Quoted from Eisenhower, *So Far from God,* xvii.

unappropriated money on military supplies, and blockaded Southern ports—measures that went beyond his authority under federal law and the Constitution.[71] He also suspended habeas corpus to hold prisoners without charge or trial—the most controversial of his wartime actions. It was unclear whether Lincoln had the authority to do this. The Constitution states, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."[72] The Framers placed the suspension in Article I, which lays out Congressional powers, but did not make clear whether it was Congress or the president that had the right to suspend. Chief Justice Roger Taney sided with Congress, deciding in *Ex parte Merryman* in 1861 that Lincoln did not have the right to suspend the writ of habeas corpus and that only Congress had the power to do so—and even then only in the case of emergency.[73] Lincoln ignored Taney and expanded the suspension as far north as Bangor, Maine. In response to Taney, Lincoln wrote, "are all the laws, but one, to go unexecuted, and the government itself to pieces, lest that one be violated?"[74]

Lincoln did not attempt to justify his actions as lawful based on a claim of inherent powers, but rather on temporary emergency powers. He acknowledged and accepted that he had exceeded the constitutional boundaries of the presidency and when Congress reconvened, he asked for authorization for his emergency actions because their purpose was to preserve the Constitution by preserving the nation.[75] His messages to Congress made clear that he did not believe these war powers were inherent in the presidency, but instead that he acted quickly in the face of emergency. Congress forgave Lincoln's actions and retroactively made them legal in

[71] Savage, *Takeover*, 16.
[72] U.S. Constitution, art. 1, sec. 9.
[73] *Ex Parte Merryman,* 17 Fed. Cas. 9847 (1861).
[74] Rudalevige, *The New Imperial Presidency*, 31.
[75] Burke, *Presidential Power*, 80.

light of the circumstances. For some scholars, these measures, especially the suspension of habeas corpus, are stains on Lincoln's presidency. But for others, like Benjamin Kleinerman, Lincoln's actions demonstrate how the president should act in an emergency because he established no legal precedent and he limited his discretionary executive power.[76]

In 1866, a year after the Civil War ended and Lincoln had been assassinated, the Supreme Court ruled in *Ex parte Milligan* that the use of military tribunals to try citizens when civilian courts were operating was unconstitutional and held that the Constitution could not be suspended out of emergency necessity. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances," Justice David Davis wrote for the majority. "No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism…"[77] In *Milligan,* the Court showed that it was unwilling to permit expansive wartime powers, but the court's ruling came after the war was over and there were no immediate consequences of its decision, after ignoring similar cases while the war was ongoing.

World War I

In 1916, Woodrow Wilson ran for his second term as president on the slogan "He kept us out of war!" but just months after his inauguration, mounting German aggression led Wilson to ask for Congress to declare war on Germany, which it did two days later. Even before the United States entered the war, Wilson was worried about disloyal and subversive actors in the United

[76] Benjamin A. Kleinerman, "Lincoln's Example: Executive Power and the Survival of Constitutionalism," *Perspectives on Politics* 3, no. 4 (2005): 801–16.
[77] *Ex Parte Milligan,*71 U.S. 2 (1866).

States. In his 1915 State of the Union Address he declared, "I am sorry to say that the gravest threats against our national peace and safety have been uttered within our own borders. There are citizens of the United States, I blush to admit, born under other flags but welcomed under our generous naturalization laws to the full freedom and opportunity of America, who have poured the poison of disloyalty into the very arteries of our national life."[78] Wilson urged Congress to allow him to take actions against these perceived domestic threats; Congress obliged and delegated powers to the president through statute. In 1917, Congress passed the Espionage Act, which made "insubordination, disloyalty, mutiny, refusal of Duty, in the military or naval forces" illegal.[79] A year later, Congress passed the Sedition Act that made it illegal to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language" about the U.S. government, the flag, or the military or that viewed these institutions with contempt.[80] These two laws gave Wilson vast powers to curb free speech and control published material in the name of wartime security. Between 1917 and 1920, nearly 2000 people were convicted under these laws.[81] Congress repealed the Sedition Act in 1920 but left intact provisions of the Espionage Act. In 1917, Congress also gave Wilson the power to oversee or restrict trade between the U.S. and enemy countries during times of war and to impose sanctions against foreign nationals and foreign countries.[82] This gave the president broad executive authority over trade as well as the

[78] Woodrow Wilson, "State of the Union 1915," December 7, 1915, http://www.let.rug.nl/usa/presidents/woodrow-wilson/state-of-the-union-1915.php.
[79] "An Act to punish acts of interference with the foreign relations, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes." Public Law No. 65-24, *U.S. Statutes at Large* 217 (1917).
[80] "An Act to amend section three, title one, of the Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June fifteenth, nineteen hundred and seventeen, and for other purposes." Public Law No. 65-150, *U.S. Statutes at Large* 553 (1918).
[81] Michael R. Beschloss, *Presidents of War*, First edition (New York: Crown, 2018), 328.
[82] "An Act to define, regulate, and punish trading with the enemy, and for other purposes." Public Law No. 65-91, *U.S. Statutes at Large* 411 (1917).

ability to wage economic warfare during national emergencies.

World War II

Louis Fisher writes that until the 1930s, conflicts between the executive and the legislative branches were cyclical—a strong president would be followed by a resurgent Congress; the system of checks and balances did their job.[83] After each major military conflict where the presidency expanded, the balance of power was restored and Congress went back to being a co-equal branch of government alongside the presidency. However, according to Fisher, the powers that were transferred to President Franklin D. Roosevelt during the Great Depression and World War II did not swing back to Congress after these crises subsided and his tenure ended.[84] Rather, this period witnessed the permanent increase of presidential powers. It is worth noting that Fisher's analysis might overlook previous lasting expansions of the presidency, particularly those of the World War I era.

Roosevelt was clear from the start of his presidency that he would not hesitate to employ executive power and expand the power of the federal government to meet the nation's challenges. In the face of the Great Depression, Roosevelt used his first inaugural address to encourage hope that the crisis would end. In addition to his famous declaration, "the only thing we have to fear is fear itself," Roosevelt asserted that he would attempt to gain wartime powers to tackle the problems. "I shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe," he stated.[85]

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[83] Louis Fisher, *Constitutional Conflicts Between Congress and the President*, Sixth edition, revised (Lawrence, Kansas: University Press of Kansas, 2014), 296.
[84] Ibid.
[85] Franklin D. Roosevelt, "First Inaugural Address of Franklin D. Roosevelt" (The Avalon Project, Yale Lillian Goldman Law Library, March 4, 1933), https://avalon.law.yale.edu/20th_century/froos1.asp.

Congress worked with Roosevelt to give him these powers. It passed his New Deal legislation, which dramatically expanded the federal bureaucracy to address the nation's economic challenges and gave him wide control over domestic affairs.[86] When the Supreme Court struck down the laws as unconstitutional, Roosevelt threatened to "pack" the Court with additional members to vote as he wanted.[87] Congress rejected the court-packing plan, but political pressure led the Court to start upholding the New Deal legislation.

During World War II, the First and Second War Powers Acts gave Roosevelt enormous executive authority in war.[88] It allowed for a reorganization of the executive branch, the issuance of hundreds of executive orders, and the creation of nearly fifty new agencies.[89] But Roosevelt also relied on his own unilateral authority as president. In a 1942 speech, Roosevelt signaled his willingness to use executive authority with or without congressional approval, saying, "The President has the powers, under the Constitution and under Congressional acts, to take measures necessary to avert a disaster."[90] He did just that during the war, using a number of executive orders to assert his presidential power. One of Roosevelt's most notorious executive orders mandated the forced relocation and internment in concentration camps of more than 120,000 Japanese Americans who lived on the West Coast—two-thirds of whom were U.S. citizens—in response to the Pearl Harbor attack.[91] In the executive order, Roosevelt claimed the ability to do so based in part on "the authority vested in [him] as President of the United States, and Commander in Chief of the Army and Navy."[92] By claiming inherent powers as a product of his Commander in Chief title, Roosevelt was able to extend great influence over war-related policy.

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[86] Savage, *Takeover*, 72.
[87] Ibid.
[88] Rudalevige, *The New Imperial Presidency*, 48.
[89] Ibid.
[90] Franklin D. Roosevelt quoted in Rudalevige, *The New Imperial Presidency,* 48.
[91] Exec. Order No. 9066, (February 19, 1942).
[92] Ibid.

In *Korematsu v. United States,* the court ruled that Roosevelt's executive order was constitutional and that it responded to a public safety risk, a view that Congress too supported, thereby affirming Roosevelt's war powers. The World War II period saw a series of similar cases that dealt with presidential war powers where the Court was deferential to the presidency, including *Ex parte Quirin*, and *Johnson v. Eisentrager*. These cases will be further discussed in the next chapter.

The Cold War Era

In 1942 Roosevelt told Congress that he would relinquish his wartime powers after the war: "[When] the war is won, the powers under which I act automatically revert to the people—to whom they belong."[93] This was not the case; after the war ended presidential powers did not revert to the people or to Congress. Rather, Roosevelt's successor Harry S. Truman continued to use emergency and war powers throughout his presidency.[94] Out of World War II emerged the Cold War, and Truman, in the face of this new conflict, retained and expanded his powers as commander in chief.

Truman was the first president in American history to claim that his commander in chief designation enabled him to take the country to war on his own. In 1950, Truman sent American troops to fight North Korea, beginning a war that would last three years and kill thirty-seven thousand American service members. No president before him had launched into a war so serious without Congressional authorization as constitutionally mandated.[95] Not only did Truman act without congressional approval, but he also refused a congressional resolution when offered

[93] 88 Cong. Rec. 7044 (1942).
[94] Fisher, *Constitutional Conflicts Between Congress and the President*, 297.
[95] Savage, *Takeover*, 19.

one.[96] Truman's cited a United Nations Security Council resolution as legal authority for this action, claiming that the United States' treaty obligations required the military action.[97] Still, Fisher denounces these actions as "the single most important precedent for the executive use of military force without congressional authority."[98]

Two years later, Truman made an even more controversial decision in the name of inherent powers. After a labor dispute in 1952, he seized steel mills to prevent a strike that could hurt the Korean War efforts. He claimed that his authority as commander in chief and his "inherent" presidential powers allowed him to do so.[99] In a six to three vote, the Supreme Court struck down Truman's actions as an unconstitutional usurpation of Congress's lawmaking powers. Writing for the majority in the *Youngstown Sheet & Tube Co. v. Sawyer* decision, Justice Hugo Black stated, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[100]

Though the steel mill seizure case is an example of the Court curtailing presidential power, the trajectory towards an increasingly imperial president remained in motion. The climate of permanent emergency during the Cold War meant presidents began to enter large conflicts without Congressional declarations and gave presidents an excuse for expansive powers. And the emergence and growth of nuclear weapons during the Cold War further contributed to centralized executive power as the president could launch a nuclear attack immediately without time to consult Congress. When Richard Nixon assumed the presidency in 1969, he inherited an office with inflated powers far beyond those of its occupants through most of American history.

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[96] Rudalevige, *The New Imperial Presidency*, 50.
[97] Ibid.
[98] Louis Fisher, "The Korean War: On What Legal Basis Did Truman Act?," *The American Journal of International Law* 89, no. 1 (1995): 21, https://doi.org/10.2307/2203888.
[99] Fisher, *Constitutional Conflicts Between Congress and the President*, 283.
[100] *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952).

During his presidency, Nixon grasped for nearly unrestricted presidential powers both in the domestic sphere and in foreign policy based on an expansive view of inherent authority.[101] At home, Nixon attempted to control the bureaucracy, eliminate agencies he opposed, and expand White House staff. He invoked executive privilege far more than his predecessors and, of course, in what came to be known as the Watergate scandal, he authorized warrantless wiretapping, burglaries, and other illegal activities and launched a large (if unsuccessful) cover-up.[102]

Nixon's broad view of his executive authority is also evident in his foreign policy and wartime activity, as he claimed executive authority over national security.[103] Nixon took unilateral actions in Southeast Asia; in 1970 he secretly ordered bombing campaigns in Cambodia to disrupt a North Vietnamese supply route to insurgents in South Vietnam without congressional approval and invaded the country to prevent communist control. His actions sparked widespread domestic unrest that resulted in protesters being shot and killed at Kent State University in Ohio and Jackson State University in Mississippi by National Guard troops and police.[104] Nixon relied on Assistant Attorney General William Rehnquist to defend his actions in Cambodia. Rehnquist claimed that the Commander in Chief clause in Article II was a "grant of substantive authority," which, through history, had allowed presidents to send troops "into conflict with foreign powers in their own initiative."[105]

In 1971, Congress repealed the Tonkin Gulf resolution to restore limits on presidential power, but Nixon continued the war in Vietnam until 1973.[106] Like President Lyndon B. Johnson before him, Nixon expanded his war powers in the wars in Southeast Asia. But unlike Johnson,

[101] Savage, *Takeover*, 21.
[102] Ibid., 22.
[103] Savage, *Takeover*, 22.
[104] Rudalevige, *The New Imperial Presidency*, 81.
[105] Arthur M. Schlesinger, *The Imperial Presidency* (Boston: Houghton Mifflin, 1989), 194.
[106] Savage, *Takeover*, 22.

Nixon did not advise or consult Congress, but rather used only executive actions. "Nixon cited no emergency that denied time for congressional action, expressed no doubt about the perfect legality of his personal extension of war into two new countries, and showed no interest even in retrospective congressional ratification," wrote historian Arthur Schlesinger Jr. on Nixon's actions in Southeast Asia. "The authority claimed by Nixon appeared indefinitely extensive so long as a President could declare American forces anywhere in the world in danger of attack."[107]

Even after the Watergate scandal and his resignation, Nixon held firmly to his expansive view of presidential powers. In 1977, three years after he left office, Nixon declared that the president "does have certain extraordinary powers which would make acts that would otherwise be unlawful, lawful if undertaken for the purpose of preserving the nation and the Constitution."[108] In an infamous interview with journalist David Frost, Nixon claimed that presidents have the inherent powers to "authorize government officials to break laws if the president decides doing so would be in the national interest," which he said gave him the authority to order burglaries, eavesdrop, and carry out other illegal conduct while in office.[109] He cited Lincoln's actions during the first months of the Civil War as precedent to argue that presidents have the power to break the laws for national security interests. "When the president does it, that means that it is not illegal," Nixon famously asserted in his interview with Frost.[110] When questioned if his rationale would permit the President to order murder, for instance, Nixon recoiled and stammered, "There are degrees, there are nuances which are difficult to explain."[111] This paralleled a line of reasoning used by John Ehrlichman, Nixon's counsel, in the Watergate

[107] Schlesinger, *The Imperial Presidency*, 194.
[108] Bigel, "Presidential Power and Political Questions," 666.
[109] Savage, *Takeover*, 21.
[110] James M. Naughton, "Nixon Says a President Can Order Illegal Actions Against Dissidents," *The New York Times*, May 19, 1977.
[111] Ibid.

hearings; Ehrlichman told the Senate Watergate Committee that as president Nixon had the inherent authority to authorize the break-in to Lewis Fielding's office (Fielding was the psychiatrist of Daniel Ellsberg, the leaker of the Pentagon Papers), even if he had not done so.[112]

In his seminal 1973 book *The Imperial Presidency,* Schlesinger wrote about the period of incredible unchecked presidential power that peaked during the Nixon administration. He popularized the term "imperial presidency" to describe the modern president who exceeded constitutional limits and was uncontrollable. Schlesinger wrote in his book that Nixon had "effectively liquidated the constitutional command that the power to authorize war belonged to Congress."[113] By undermining this constitutional check on presidential power, Nixon "has aimed to establish as normal presidential power what previous presidents had regarded as power justified only by extreme emergencies and employable only at their own peril," Schlesinger asserted.[114] The Vietnam and Nixon eras prompted Congress to pass new laws curbing presidential power, including rules that required presidents to consult Congress before deploying armed forces into combat and to bring troops home after 60 days unless explicitly authorized by Congress. But these checks soon started to erode after Watergate and presidents continued to take unilateral decisions using justifications of inherent powers.[115]

Nixon's career in politics ended when he resigned in 1973, but a young Dick Cheney's was just beginning. In 1969 Cheney had worked for Donald Rumsfeld in the Office for Economic Opportunity, where he witnessed first-hand Nixon's efforts to expand presidential power. He followed Rumsfeld to the Cost of Living Council, but when Rumsfeld was appointed Nixon's ambassador to NATO, Cheney left government. He re-entered the political sphere in

[112] Ibid.
[113] Schlesinger, *The Imperial Presidency*, 198.
[114] Ibid.
[115] Savage, "Commanding Heights."

1974 as Deputy White House Chief of Staff to Nixon's successor Gerald Ford before being promoted to White House Chief of Staff the following year. In this role, Cheney worked to protect presidential powers. Twenty-four years later, Cheney would return to the White House, this time as Vice President. In that role, he would work to vastly expand the power of the president and along with lawyers of the Bush-Cheney administration, he would promulgate a theory of the presidency that was not widely known but would have an enormous impact—the Unitary Executive Theory—which would only confirm Schlesinger's fears of the imperial presidency.

The Unitary Executive Theory

The Unitary Executive Theory is a set of views about presidential power. It holds that the Constitution gives the president exclusive control over all powers that are executive in nature, and therefore the president can control everything within the executive branch of the federal government.[116] Although the Constitution's treatment of presidential power is both brief and vague, and does not explain the president's relationship with the rest of the executive branch, proponents of the theory (called unitarians) argue that the Constitution vests all executive power in the president.[117] Unitarians look to the "vesting clause" of Article II, which states, "The executive power shall be vested in a President of the United States of America."[118] Unitarians understand the words "the executive power" and "a president" to mean that all executive power is vested in a single president.[119] According to Fisher, "this places all executive power directly under the control of the president, leaving no room for independent commissions, independent

[116] Graham G. Dodds, *The Unitary Presidency*, 1 edition (New York, NY: Routledge, 2019), 1.
[117] Ibid.
[118] U.S. Constitution, art. 2, sec. 1, clause 1.
[119] Burke, *Presidential Power*, 88.

counsels, congressional involvement in administrative details, or statutory limitations on the president's power to remove executive officials."[120] The theory is not so much a claim about the scope of presidential power, according to scholar Graham Dodds, but rather "a claim that the presidency is the sole repository of executive power."[121]

Unitarians claim that the theory was a product of America's founding; The Framers, dissatisfied with the inadequate executive in the Articles of Confederation came to a consensus in favor of an independent and energetic executive.[122] They cite Hamilton, who argued in *Federalist 70,* "The ingredients which constitute energy in the Executive are, first, unity…."[123] Unitarians often trace the theory back to claims presidents made to exert their power in the early years of the republic. Legal scholars Steven Calabresi and Christopher Yoo, for example, argue that all presidents have advanced the Unitary Executive to some degree.[124] Others propose origins in Lincoln's suspension of habeas corpus or Truman's seizure of steel mills almost a century later.[125]

Two strands of the Unitary Executive Theory exist. The weaker and more traditional strand is represented by those like Calabresi and Yoo, who claim that the president has control over executive branch functions. But the second strand, the more aggressive proponents of the theory, use these claims of early origins to take a sweeping view of presidential authority. Proponents of the second strand argue that the president has exclusive control over all powers executive in nature and that any effort to interfere with the president's decision-making within

[120] Louis Fisher, "Introduction: Invoking Inherent Powers: A Primer," *Presidential Studies Quarterly* 37, no. 1 (2007): 10.
[121] Dodds, *The Unitary Presidency*, 4.
[122] Ibid., 10
[123] Hamilton, "The Federalist Papers: No. 70."
[124] Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (New Haven, CT: Yale University Press, 2008).
[125] Burke, *Presidential Power*, 88.

the executive branch by the other branches of government violates the Constitution. One such advocate is current (as of 2020) Attorney General William Barr who had been an early proponent of the theory during his time in the Reagan White House. In a controversial speech to the Federalist Society in late 2019, Barr embraced the theory while promoting a maximalist view of executive power powers. "This is not 'new' and it is not a 'theory.' It is a description of what the Framers unquestionably did in Article II of the Constitution," Barr claimed.[126]

Critics meanwhile consider this exclusive executive control as more monarchical than democratic and understand the more aggressive strand of the theory as an attempt to rewrite history. Most legal scholars believe this conception of the presidency deviates from the Framers' vision—after all, the Framers feared monarchy and held a pessimistic view of human nature—and cite the system of checks and balances as evidence of an effort to prevent the president from becoming tyrannical.[127] Critics accuse unitarians of cherry-picking statements from the Framers to show consensus behind the unitary executive without accurately portraying the debate and disagreements in shaping the executive. They argue that the unitarians' reading of *Federalist 70* is misleading; Hamilton was writing about why the Framers chose a single executive and not a committee of executives when he wrote about unity, not that the president should hold war powers in place of Congress. Critics also argue that the unitarians' reading entirely ignores *Federalist 69,* which describes the president's limited wartime powers.[128] And they say unitarians ignore the skepticism many voiced in the Constitutional Convention, detailed earlier in the chapter, as well as in the ratifying conventions, over the proposal for a single executive.

[126] William Barr, "19th Annual Barbara K. Olson Memorial Lecture" (Federalist Society's 2019 National Lawyers Convention, Washington, D.C., November 15, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-19th-annual-barbara-k-olson-memorial-lecture.
[127] Savage, "Commanding Heights."
[128] Savage, *Takeover*, 126.

Though proponents claim actions taken by presidents in the first two centuries of U.S. history were in accordance with the Unitary Executive Theory, the theory itself originated only in the 1980s during Ronald Reagan's presidency. Dodds emphasizes that the theory was not developed by academics to explain presidential behavior or constitutional principles, but rather that it was created and utilized for overtly political purposes to promote conservative ideals.[129] He writes, "The theory of the unitary executive came into being in order to provide an ostensibly principled rationale and justification for conservatives to stop and reverse the growth of government; it was rooted in and motivated by politics, not the Constitution."[130] Reagan used the term "unitary executive" a number of times during his two terms in office, mostly as a way to work around a Congress resistant to his policies. The theory was promoted by members of Reagan's legal team and in conservative legal circles—notably, the Federalist Society. While Presidents George H.W. Bush and Bill Clinton invoked the theory to a smaller degree, an aggressive form of the theory of the unitary executive saw a resurgence during the George W. Bush presidency, where it assumed prominence (and controversy) in the administration.[131] The Bush administration merged the Unitary Executive Theory's claim that the president holds all executive power with a broad understanding of the scope of that power to create a strong president. This idea of the "unitary executive" with vast inherent authority, not only to direct executive-branch officials, was used to promote some of the administration's boldest claims.

From the start of Bush's presidency, strengthening executive power was on the agenda. Days after Bush's inauguration, members of the Bush-Cheney legal team gathered in the office of their new boss, White House Counsel Alberto Gonzales, formerly an Associate Justice of the

[129] Dodds, *The Unitary Presidency*, 37.
[130] Ibid.
[131] Ibid, 55.

Texas Supreme Court. Gonzales told the team that Bush had given them two mandates: the first was to quickly push conservative judicial nominations through the confirmation pipeline and the second was to take advantage of openings to expand and protect presidential power. Bush saw the institution of the presidency as weakened by his predecessors, especially Clinton, and wanted at the end of his tenure to leave behind a strong presidency.

The September 11, 2001, terrorist attacks proved to be a pivotal turning point in Bush's presidency and the nation's history. On the morning of September 11, two airplanes bound from Boston to Los Angeles were hijacked and flown into the north and south towers of the World Trade Center. Less than an hour later, a third plane hit the west side of the Pentagon and a fourth heading towards Washington, D.C. crashed into a field in Pennsylvania after passengers attempted to stop the hijackers. A total of 2,977 people were killed in the immediate impact of coordinated attacks, and thousands more injured, in what is the deadliest terrorist attack in world history.[132] The attacks were met with shock and panic as speculations swirled and further attacks were feared. In the following days it became clear that the nineteen hijackers were connected to al Qaeda.

The national fear and despair borne from the attacks gave Bush the leeway to strengthen his office. Concerns over protecting national security allowed for a range of executive claims that otherwise would not have been possible to make. In the aftermath of the attacks, the Bush administration greatly expanded presidential powers that the other branches of government largely failed to constrain. On September 14, Bush proclaimed a state of national emergency. That same day, Congress approved the Authorization for the Use of Military Force (AUMF),

[132] Brian Michael Jenkins, Bruce Hoffman, and Martha Crenshaw, "How Much Really Changed About Terrorism on 9/11," *The Atlantic,* September 11, 2016; Naughton, "Nixon Says a President Can Order Illegal Actions Against Dissidents."

deciding that the country would go to war. With a 98-0 vote in the Senate and a 420-1 vote in the House of Representatives, Congress authorized 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."[133] Though more restrained than the draft the White House presented to Congress, the 60 words of the resolution allowed Bush to launch the war on terror and granted him great discretionary authority and expansive presidential war powers.

Despite this grant of broad powers, the administration's legal team went to work to grasp even more power than Congress had granted. The Office of Legal Counsel (OLC), which is housed in the Justice Department and advises the executive branch on the lawfulness of proposed actions, was the leading architect of the president's legal strategy in the war on terror. The Bush administration, particularly Vice President Dick Cheney, utilized the OLC to give the president legal cover for a broad range of actions; as such, this small but powerful office becomes an important actor in the war on terror and in this study. Led by John Yoo, the OLC crafted a secret memo describing the president's war powers—the document was completed on September 25, 2001, but would remain a secret for over three years. In the memo, Yoo wrote that "the President's powers include inherent executive powers that are unenumerated in the Constitution."[134] Drawing on the theory of the unitary executive, Yoo wrote that Bush did not need Congress's approval, and he could instead use military force as he saw fit because he alone

[133] Authorization for Use of Military Force, S.J. Res. 23, 107th Congress (2001).
[134] John C. Yoo to the Deputy Counsel to the President, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them" (official memorandum: Office of Legal Counsel, U.S. Department of Justice, September 25, 2001).

claimed executive power. "Congress has recognized the President's authority to use force in circumstances such as those created by the September 11 incidents. Neither statute, however, 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. These decisions, under our Constitution, are for the President alone to make," Yoo concluded.[135]

The Bush administration frequently employed rationales like this one based in the Unitary Executive Theory, often in the form of secret memos, to justify its expansive presidential powers. It took the Unitary Executive Theory idea that the president had control over all powers executive in nature and applied it to the idea that as commander in chief, the president had inherent authority over national security issues, to essentially put the president out of the reach of the law. From its signing statements to removal powers, Bush's legal team invoked the unitary executive to assert greater control over politics and policy. And unlike previous presidents, Bush extended the theory from the domestic sphere to foreign policy and national security.[136] Under Bush, the OLC worked to authorize the use of torture, permit warrantless wiretapping, and hold U.S. citizens without trial as "enemy combatants" all in the name of the unitary executive. In doing so, Bush's legal team radically altered the scope of the president, leading journalist Charlie Savage to write, "With a revolutionary one-two-punch, they eliminated nearly all the checks and balances that have been traditionally understood to limit the power of the president."[137]

By the start of the Barack Obama presidency, the theory of the unitary executive had become tied to an unpopular president with expansive powers. During his campaign, Obama criticized Bush's unilateral actions and after the election, Vice President-elect Joe Biden said he

[135] Ibid.
[136] Dodds, *The Unitary Presidency*, 60.
[137] Savage, *Takeover*, 123.

disagreed with Cheney's embrace of the unitary executive saying, "His notion of the unitary executive, meaning that in time of war essentially all power goes to the executive, I think is dead wrong. I think it was mistaken."[138] Though Obama did not advocate for the theory of the unitary executive, he took actions that were unitary in their nature. He issued several signing statements, took major executive actions when Congress failed to act, and invoked executive privilege.[139] So while the Obama administration did not make claims of unitary executive powers, some actions the administration took showed vestiges of the doctrine Bush put forth.

The Donald Trump presidency has seen a resurgence of ideas surrounding the unitary executive. In both directly citing its tenets and employing its principles to promote a view of expansive executive power, the Trump administration has shown an affinity for the unitary executive. Trump has repeatedly cited his inherent power as executive and used similar tactics to Bush, including employing signing statements, to put forth a bold vision of executive power.[140] And as previously mentioned, Trump's Attorney General, William Barr, is a longtime proponent of the theory, after working to develop it during the Reagan and Bush Sr. presidencies. I return to this discussion of the Obama and Trump presidencies in the concluding chapter.

One of the most important claims the Bush administration made using the Unitary Executive Theory was that as commander in chief during a time of war, the president was able to designate terrorist suspects, citizens and noncitizens alike, as enemy combatants. This designation denied suspects captured in the war on terror prisoner-of-war status and legal protections under international law. The administration found justification in *Ex parte Quirin,* a World War II-era case that upheld the president's use of military tribunals rather than civilian

[138] Dodds, *The Unitary Presidency*, 172.
[139] Ibid., 73
[140] Ibid., 74.

courts to try Nazi saboteurs (this case will be covered in more detail in the following chapter). This allowed the administration to justify the indefinite detention of terrorism suspects without due process—a justification that would prove contentious and dangerous. It would open the doors to debates over national security and civil liberties, and it would spur broad, fundamental arguments over detention policy, war powers, constitutional meaning, and the nature of presidential powers.

Chapter 3: Creating Enemy Combatants

When José Padilla boarded an airplane in Switzerland bound for Chicago's O'Hare International Airport on May 8, 2002, he did not know that FBI agents had secretly followed him and that more were waiting to immediately arrest him when he landed. The thirty-one-year-old was initially arrested for being a "material witness" to a terrorism investigation but a month later, just two days before his scheduled hearing, President George W. Bush signed an order that designated him an "enemy combatant" and transferred Padilla from civilian authority to a military brig in South Carolina.[141] That day, Attorney General John Ashcroft left meetings during his trip to Moscow in a rush to personally announce that Padilla was an "al-Qaeda operative" whose arrest "disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive dirty bomb."[142] This high-profile announcement turned out to be a blunder. Bush aides were surprised that Ashcroft had attempted to take credit for Padilla's arrest and overstated the role of the low-level al Qaeda scout.[143] The White House soon released a less alarmist statement which explained that Padilla was actually only in the planning stages of a plot.[144]

While Ashcroft's statement gained attention for its ominous tone, less notice was paid to the astounding legal precedent that had been established. Padilla was an American citizen, born and raised in the U.S., and had been captured not on a battlefield but by civilian authorities in the United States. By naming Padilla an enemy combatant, the administration signaled that it had the authority to detain him indefinitely without charge or trial or access to a lawyer. If the president

[141] Savage, *Takeover*, 151.
[142] Benjamin Wittes, "Enemy Americans," *The Atlantic*, August 2004, https://www.theatlantic.com/magazine/archive/2004/07/enemy-americans/303451/.
[143] "Highly Public Ashcroft Adopts Low Profile after Padilla Error," *The Baltimore Sun*, September 12, 2002, https://www.baltimoresun.com/news/bs-xpm-2002-09-12-0209120025-story.html.
[144] Ibid.

had the power to hold Padilla as an enemy combatant, he could do the same to any other American citizen.

How did an American citizen arrested on U.S. soil by civilian law-enforcement become designated an enemy combatant? And on what authority did the president claim he had the power to imprison a U.S. citizen indefinitely without legal process, access to counsel, or judicial review? This chapter looks into these questions to understand how the enemy combatant policy was conceived and implemented. Padilla's story represents the most controversial and extreme use of the enemy combatant designation and the broadest claim to presidential power, but the enemy combatant policy originated in broader claims about how those fighting against the United States in Afghanistan should be treated.

Responding to Crisis

The response to the September 11 attacks was swift and multifaceted. Starting on September 11, Immigration and Naturalization Service agents worked with the FBI to arrest and detain hundreds of noncitizens, mostly Muslims, who were suspected to have ties to the attacks or to terrorist organizations. In the two months following the attacks, over one thousand people were detained in connection to an investigation for immigration offenses.[145] The Justice Department's Inspector General issued a report in 2003 that criticized the roundup of immigrants and said that there was little or no evidence tying those detained to terrorist activity and that little-to-no effort was made to distinguish genuine suspects from those with minor visa violations.[146] Still, the government defended its aggressive response as warranted given the

[145] 9/11 Commission, "The 9/11 Commission Report," 327.
[146] "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks," U.S. Department of Justice Office of the Inspector General, April 2003.

extraordinary circumstances.

As previously mentioned, just three days after the attacks, a nearly unanimous Congress voted to authorize the use of military force against those who had “planned, authorized, committed, or aided the terrorist attacks” or who "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States."[147] This authorization, known as the AUMF, gave the president broad discretionary authority in the fight against terrorism. Bush declared the war on terror in a Joint Session of Congress on September 20, 2001, stating, “Our enemy is a radical network of terrorists, and every government that supports them. Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”[148] Bush warned lawmakers and the public to expect a “lengthy campaign.”[149]

In the same speech, Bush outlined new organizational structures to tighten homeland security. He announced the creation of the Office of Homeland Security, led by former Pennsylvania Governor Tom Ridge in a new cabinet-level position, which would coordinate over 40 federal agencies as part of the executive branch’s national security efforts.[150] The office would be at the center of the new Department of Homeland Security (DHS) created by Congress in November 2002. And within months of the attacks, Congress authorized the creation of the Transportation Security Administration in response to the failings of private airport security operations.[151]

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[147] Authorization for Use of Military Force, S.J. Res. 23, 107th Congress (2001).
[148] George Bush, “Address to the Joint Session of the 107th Congress Transcript,” *The Washington Post*, September 20, 2001, https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html.
[149] Ibid.
[150] Elisabeth Bumiller, “Prepare for Casualties, Bush Says, While Asking Support of Nation,” *The New York Times*, September 21, 2001, sec. World, https://www.nytimes.com/2001/09/21/international/prepare-for-casualties-bush-says-while-asking-support-of.html.
[151] “Defeating Terrorists, Not Terrorism: Assessing U.S. Counterterrorism Policy from 9/11 to ISIS” (Bipartisan Policy Center, September 2017).

In late October, Bush signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act or USA PATRIOT Act (commonly known as the "Patriot Act"). The legislation aided law enforcement in detecting and preventing terrorism by facilitating information sharing between government agencies, lifting restrictions on surveillance, broadening the definition of terrorism, and giving the federal government new powers to track money connected to terrorist organizations, among other measures.[152] The Patriot Act exemplifies the view of broad governmental action that the Bush administration endorsed as its only means to combat terrorism.

Vice President Dick Cheney appeared on NBC's *Meet the Press* a few days after September 11, where he explained that in responding to the attacks, the United States would have to work on the "dark side" to deal with the threat of terrorism. "We're going to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussions, using sources and methods that are available to our intelligence agencies if we're going to be successful. That's the world these folks operate in. And so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective," Cheney explained.[153] This statement captured Cheney's, and much of the administration's, view of the post-9/11 world. In the months following the attacks, the administration adopted many unprecedented, sweeping measures to combat terrorism. It developed an extensive surveillance program, created an offshore prison at Guantánamo Bay, and opened "black sites" overseas to imprison, and in some cases torture, detainees.[154]

Many have argued that the counterterrorism actions taken in response to the September

[152] Andrew Glass, "Bush Signs USA PATRIOT Act into Law, Oct. 26, 2001," *Politico*, October 26, 2015, https://www.politico.com/story/2015/10/bush-signs-usa-patriot-act-into-law-oct-26-2001-215030.
[153] "The Vice President Appears on Meet the Press with Tim Russert."
[154] Mann, "The World Dick Cheney Built."

11 attacks show the Bush administration's broad scope of executive power, one that is exemplified in Cheney's turn to the "dark side"—using any means necessary to fight the terrorist threat. But it was not only the administration's scope of presidential power that was unprecedented in the administration's response to the September 11 attacks, but also the source it claimed for this power. The question of the scope of presidential powers is distinct from the question of authority. It is, after all, possible to believe that the president should have broad powers and leeway to fight terrorism without believing that these powers come from the inherent nature of the presidency. For instance, one could argue that the president should have broad authority to fight al Qaeda, but believe that this authority must be granted by Congress. I argue that the enemy combatant policy, from its conception to its implementation, is a product of both a broad scope of executive power as well as of an administration that frequently bypassed traditional avenues of acquiring presidential power to claim that these powers flow from inherent presidential authority.

A New Kind of War

From the start of the conflict, the White House made clear that the U.S. was engaging in a "new kind of war" and that al Qaeda was "a different kind of enemy."[155] "Our war on terror will be much broader than the battlefields and beachheads of the past," Bush said in a radio address two weeks after the attack. "This war will be fought wherever terrorists hide, or run, or plan. Some victories will be won outside of public view, in tragedies avoided and threats eliminated.

[155] Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror*, Reprint edition (New York: Penguin Books, 2009), 45.

Other victories will be clear to all."[156] A couple of days earlier Secretary of Defense Donald Rumsfeld relayed a similar message in an op-ed in *The New York Times*. "Forget about 'exit strategies,'" Rumsfeld wrote. "We're looking at a sustained engagement that carries no deadlines. We have no fixed rules about how to deploy our troops; we'll instead establish guidelines to determine whether military force is the best way to achieve a given objective."[157] The lack of exit strategy would become a central criticism of Bush's war on terror.

The United States, along with the United Kingdom, began military operations—named Operation Enduring Freedom—in Afghanistan on October 7, 2001, with air strikes against Taliban militia units and al Qaeda training camps.[158] The military action aimed to overthrow the Taliban regime in Afghanistan, after its leader, Mullah Omar, refused to hand over bin Laden. The same day, Bush sent a letter to Congress notifying them of the military action. In it, he does not cite the AUMF as the basis of his power to order troops into combat, but rather his own executive power. "I have taken these actions pursuant to my constitutional authority to conduct U.S. foreign relations as Commander in Chief and Chief Executive," he wrote.[159] This claim to power was established in a secret opinion from the Office of Legal Counsel, detailed in the previous chapter, which determined that the use of military power in response to the September 11 attacks was a decision "for the President alone to make."[160]

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[156] George Bush, "Radio Address of the President to the Nation Transcript," George W. Bush White House Archives, September 29, 2001, https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/text/20010929.html.
[157] Donald H. Rumsfeld, "A New Kind of War," *The New York Times*, September 27, 2001, sec. Opinion, https://www.nytimes.com/2001/09/27/opinion/a-new-kind-of-war.html.
[158] Savage, *Takeover*, 127.
[159] George Bush, "President's Letter to Congress on American Response to Terrorism," George W. Bush White House Archives, October 9, 2001, https://georgewbush-whitehouse.archives.gov/news/releases/2001/10/text/20011009-6.html.
[160] John C. Yoo to the Deputy Counsel to the President, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them" (official memorandum: Office of Legal Counsel, U.S. Department of Justice, September 25, 2001).

A few weeks later, American ground troops arrived in Afghanistan and partnered with the Northern Alliance, non-Pashtun, anti-Taliban forces, to advance on the Taliban.[161] Over the next month, the U.S. and its allies captured Taliban strongholds, and by December, the Taliban was defeated but both Omar and bin Laden escaped capture.[162] Bush announced successful military action in his State of the Union address in January 2002, declaring, "we are winning the war on terror." But he made clear that the war had only just started: "What we have found in Afghanistan confirms that, far from ending there, our war against terror is only beginning."[163]

As war continued in Afghanistan and the military captured suspected terrorists, a host of new questions were raised: How should the captured prisoners be classified? Where should they be held? How should they be treated? And should they be put on trial? The remainder of this chapter details how the administration answered these questions and the ways in which it relied on an expansive view of inherent presidential power to make sweeping decisions.

Designating Enemy Combatants

To determine how to handle terrorist suspects captured in the war, Secretary of State Colin Powell appointed his aide Pierre-Richard Prosper, the State Department's ambassador at large for war crimes, to lead an interagency group tasked with making recommendations on the legal process for dealing with the detainees. The group was comprised of lawyers and staffers across government agencies, and they addressed issues of how to prosecute prisoners, what to prosecute them for, and where they would be detained.[164] Justice Department prosecutors

[161] Rudalevige, *The New Imperial Presidency*, 217.
[162] Ibid.
[163] George Bush, "President Delivers State of the Union Address," George W. Bush White House Archives, January 29, 2002, https://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html.
[164] Karen J. Greenberg, *The Least Worst Place: Guantanamo's First 100 Days* (Oxford ; New York: Oxford University Press, 2009), 3.

favored bringing the suspects to trial at civilian federal courts, as had been done after the 1993 World Trade Center bombing, but this posed a security risk and restricted the kinds of evidence that could be used. The military lawyers wanted to use courts-martial, which could take place anywhere, but that too required high standards of evidence. A third option was to create a military commissions system, but some of the lawyers argued that the president would have to get congressional authorization to do so.[165]

Prosper's group moved slowly and some at the White House grew impatient and wanted to make those decisions on their own. After a group of White House lawyers, unbeknownst to Prosper, decided upon the military commissions route, they drafted an order that argued that the president had the inherent wartime power to create military commissions.[166] Interestingly, it was current Attorney General William Barr, who had led the OLC and served as attorney general during the first Bush presidency, who pushed for the use of military commissions to try the suspects of the September 11 attack. As the then-head of the OLC, Barr had conceived of the idea as a way to try suspects of the 1988 Lockerbie Bombings. Though his plan was unpopular then, Barr suggested the idea again after the 9/11 attacks. This time, it gained support.[167] In the OLC in 2001, Deputy Assistant Attorney General Patrick Philbin helped pave the way for military commissions; in his November 6, 2001 memo, Philbin wrote that Bush did not need approval from the courts or Congress to create military commissions.[168] Cheney deliberately bypassed many in the White House and Cabinet and brought the order written by the group of

[165] Savage, *Takeover*, 135.
[166] Ibid., 138.
[167] Elisabeth Bumiller and Steven Lee Myers, "A Nation Challenged: The Presidential Order; Senior Administration Officials Defend Military Tribunals for Terrorist Suspects," *The New York Times*, November 15, 2001, sec. U.S., https://www.nytimes.com/2001/11/15/us/nation-challenged-presidential-order-senior-administration-officials-defend.html.
[168] Patrick F. Philbin to the Counsel to the President, "Legality of the Use of Military Commissions to Try Terrorists" (official memorandum: Office of Legal Counsel, U.S. Department of Justice, November 6, 2001).

White House lawyers straight to Bush, who signed it despite Attorney General John Ashcroft's dissent and without consulting Congress or informing Prosper, Powell, or National Security Advisor Condoleezza Rice.[169]

Bush's November 13, 2001, Military Order titled "Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism" established that non-US citizens designated by the president as suspected terrorists or aiding terrorists who had conspired against the U.S. would be detained and subject to trial by military commission.[170] While the order gave Bush the sole discretionary authority to determine who is a suspected terrorist, the Department of Defense, led by Donald Rumsfeld, would be responsible for detaining and trying the suspects. According to the order, no court would have jurisdiction to hear an appeal. The plan was not very detailed and the specifics of where suspects would be detained and the conditions of detention were still left to be decided, but it represented a bold sidelining of Congress and agencies within the executive branch and a dramatic appeal to executive authority.

Though the order did not specifically use the term, it created a new category of people—later known as enemy combatants—one that would be broadened piece by piece from noncitizens captured in fighting in Afghanistan to include U.S. citizens and those captured far from the battlefield. Because the captured combatants were not fighting for a state or in uniform, the administration contended that they were not covered by the laws of war. The administration began to use the "enemy combatant" terminology in early 2002 to refer to the detainees designated by the president under the November military order.

The term "enemy combatant" is not defined in a law or treaty, and many have argued that

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[169] Savage, *Takeover*, 138.
[170] George Bush, "Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," George W. Bush White House Archives, November 13, 2001, https://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-27.html.

it mixes multiple legal terms and military concepts to create a nebulous class of persons.[171] Though the phrase combines different terms used to categorize those in war—namely "combatant," "enemy prisoner or war," and "civilian combatant"—it was simply the term the administration used to describe those captured in the war on terror who were not conventional prisoners of war.[172]

A basic understanding of the laws of war is useful to understanding the legal status of enemy combatants. In traditional warfare there is a distinction between civilians and combatants; put simply, combatants belong to armed forces or have a direct part in military action and civilians do not.[173] It should be noted that guerilla or unconventional warfare blurs this distinction, making it harder to determine who qualifies as a civilian and who a combatant. Within the combatant category exist lawful combatants (recognized in international laws of war) and unlawful combatants (not recognized in international laws of war). Lawful combatants meet four criteria set in the 1949 Geneva Convention: they are "commanded by a person responsible for his subordinates," "have a fixed distinctive sign," carry "arms openly," and conduct "operations in accordance with the laws and customs of war."[174] Lawful combatants are authorized to use force in the conflict and are legitimate military targets. They have combatant immunity, which is to say that they cannot be punished for their involvement in the war as long as they followed the laws of war, and they are entitled to enemy prisoner of war status as set forth by the Geneva Conventions and can be imprisoned (non-punitively) until the end of hostilities.[175] Unlawful combatants (also called irregular fighters), on the other hand, are not

[171] Karen J. Greenberg and Joshua L. Dratel, eds., *The Enemy Combatant Papers: American Justice, the Courts, and the War on Terror* (New York: Cambridge University Press, 2008), x.
[172] Ibid.
[173] H. L. Pohlman, *U.S. National Security Law: An International Perspective*, First edition (Lanham, Maryland: Rowman & Littlefield, 2019) 89.
[174] Ibid.
[175] Ibid, 99.

recognized under international law, including the Geneva Conventions, but have historically been recognized in military protocol and case law as being distinct from lawful combatants. Unlawful combatants are not entitled to prisoner of war status nor do they have combatant immunity, and their participation in conflict is considered a violation of the rules of war.[176]

The Bush administration asserted that suspected terrorists with al Qaeda or Taliban connections captured in the war on terror fit into the unlawful combatant category, and called those suspects "enemy combatants." This group fell between the internationally recognized "civilian" and "combatant," into a third legal category of people. And as will be discussed in greater detail, calling them enemy combatants allowed the administration to contend that Geneva Conventions did not apply to the detainees.

In using the nomenclature, the administration's legal team appealed to a little-cited 1942 Supreme Court case, *Ex parte Quirin,* which concluded that eight Nazi spies (including two U.S. citizens) who were captured in the U.S. without uniform and with intent to sabotage were "unlawful enemy combatants" or "enemy belligerents" and could be tried in a military tribunal established by President Roosevelt. In an argument later used during the Bush administration for military tribunals, the prosecutors in *Quirin* contended that the nature of war had changed and that the nation's laws had to adapt to modern circumstances. "Wars today are fought on the total front on the battlefields of joined armies, on the battlefields of production, and on the battlefields of transportation and morale, by bombing, the sinking of ships, sabotage, spying, and propaganda," they argued.[177] For the president to fulfill his oath of office, he has "the clear duty to meet force with force and to exercise his military authority to provide a speedy, certain and

[176] Ibid.
[177] Andrew Buttaro, "Ex Parte Quirin: The Nazi Saboteur Case and the Tribunal Precedent," *American University National Security Law Brief* 6, no. 1 (2016): 48.

adequate answer, long prescribed by the law of war, to this attack on the safety of the United States by invading belligerent enemies."[178] The Court found that the conspirators were unlawful enemy combatants because they violated the law of war and found that Congress had authorized the military commissions under its articles of war, and as such Roosevelt did not exceed his power. The Court declined to consider whether the president's commander in chief powers gave him the ability to create military commissions without Congressional legislation.[179]

Bush largely based his November 2001 military order, which authorized the establishment of military commissions, on the case and later invoked it when litigating several enemy combatant cases in court. The administration's embrace of *Quirin* as justification for their treatment of terrorist suspects was met with criticism. Leading scholars of constitutional law have called *Quirin* "shameful," and an "embarrassing tale."[180] And many dispute the validity of *Quirin* as the basis for the designation and use of tribunals for captured suspects. A report by the American Bar Association concluded that *Quirin* "does not stand for the proposition that detainees may be held incommunicado and denied access to counsel; the defendants in *Quirin* were able to seek review and they were represented by counsel," and as such, it argued that enemy combatants should have a similar right to review and access to counsel.[181] Further, since the *Quirin* decision in 1942, there had been significant changes to the laws of war, both with the creation of the Uniform Code of Military Justice (UCMJ) by Congress, which stipulated that military commissions had to abide by the same defendant rights and procedures as troops receive in courts-martial, and the 1949 Geneva Conventions, which established that wartime prisoners

[178] Ibid.
[179] Ex Parte Quirin, 317 U.S. 1 (1942).
[180] Harold Hongju Koh, "The Case Against Military Commissions," *The American Journal of International Law* 96, no. 2 (2002): 340; Bruce Ackerman, "Terrorism and the Constitutional Order Symposium: A New Constitutional Order: Keynote Address," *Fordham Law Review* 75, no. 2 (2006): 482.
[181] "Task Force of Enemy Combatants Report to the House of Delegates" (American Bar Association, February 2003), https://nader.org/wp-content/uploads/2013/04/ABA-Task-Force-on-Treatment-of-Enemy-Combatants.pdf.

had the right to a fair trial.[182] By relying on *Quirin*, the administration overlooked both the act of Congress and the international treaty.

A Small Legal Office with Immense Power

The role of the Office of Legal Counsel in helping create and defend the enemy combatant policies cannot be overstated. As noted in Chapter One, the OLC is an office in the Department of Justice and serves as a legal advisor to the executive branch, including the president. Advisory opinions by the OLC are binding, and other executive branch agencies are required to follow them. In my interview with Martin Lederman, who worked in the OLC from 1994 to 2002 and then was its deputy from 2009 to 2010, he explained that ordinarily, the OLC is asked to evaluate the legality of a proposed action and offers its advice. "The ordinary course of OLC is, someone—the president, the Attorney General, the agency—comes to you and asks… 'We're planning on doing this. Is this okay? We only have two hours. You have to give us your preliminary advice,'" Lederman said. "But sometimes it ends up being the sort of thing that OLC is going to do quite a bit of work on to figure out what the right answer is, which sometimes results in a formal written opinion, other times might end up in a more informal memo, or the like. This oftentimes results in the question change or OLC pushing on the evidence sufficiently that in the end, the agency says 'if that's what it takes, never mind' or 'we'll do it differently.'"[183]

But the OLC's work is not always so independent from the body asking for a legal opinion. Because OLC opinions are binding, if an executive branch actor wants to take an action with questionable legality, it can ask the OLC for an opinion justifying the action to provide legal cover. Lederman explained, "It's also problem-solving with an eye toward legal limits.

[182] Savage, *Takeover*, 137.
[183] Martin S. Lederman, interview by Rohini Kurup, January 9, 2020.

How do you accomplish what you want to accomplish in a way that the law permits and is safe within the law?"[184]

After September 11, the OLC, and especially its deputy John Yoo, worked with the Bush administration's lawyers to create a legal framework for dealing with the war on terror. This framework gave the president broad powers to fight terrorism and create a system of policies for the captured enemy combatants.

Expanding the Designation

At first, following Bush's November 2001 military order, the enemy combatant designation applied to non-U.S. citizens captured in the war in Afghanistan. From the start, the president claimed the exclusive power to apply this designation. A March 2002 OLC memo written by Yoo and signed by Assistant Attorney General Jay Bybee states, "As the President possess the Commander-in-Chief and Executive powers alone, Congress cannot constitutionally restrict or regulate the President's decision to commence hostilities or to direct the military, once engaged. This would include not just battlefield tactics, but also the disposition of captured enemy combatants."[185] But when two American citizens—John Walker Lindh and Yaser Hamdi—were captured in Afghanistan, the system faced a new challenge and a new question: could U.S. citizens be enemy combatants? Lindh, who became infamous as the "American Taliban," was captured in 2001 after fighting with the Taliban; he was threatened with enemy combatant status and charges of treason but instead was transferred to the civilian criminal justice system.[186] But with Hamdi, the answer was yes. Hamdi was captured in November 2001

[184] Ibid.
[185] Yoo, "Military Interrogation of Alien Unlawful Combatants Held Outside the United States."
[186] Frederick A. O. Schwarz Jr. and Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (New York: The New Press, 2008), 145.

by the Northern Alliance and transferred to U.S. custody. The U.S. believed him to be a Saudi citizen and a member of al Qaeda and detained him at Guantánamo Bay. Interrogators quickly realized that he was actually a U.S. citizen who had moved to Saudi Arabia at a young age; upon discovery of his American citizenship, the administration transferred him to a naval brig, where he was held as an enemy combatant for nearly three years without charge.[187] Hamdi was a "classic battlefield detainee," the administration argued, and "the Executive's determination that an individual is an enemy combatant is a quintessentially military judgment, especially when it comes to an individual, like Hamdi, captured in an active combat zone."[188] The administration thus made the extraordinary claim that the president had the inherent authority as commander in chief to selectively detain U.S. citizens indefinitely without trial by designating them as enemy combatants.

Until mid-2002, the enemy combatant designation had only been given to those captured on the battlefield—first to noncitizens then to a handful of citizens, like Hamdi, as well. But when José Padilla was arrested in O'Hare airport on his way back from Pakistan, this too changed. The New York native was detained as a "material witness" to a dirty bomb plot against American targets, far from the battlefields in Afghanistan. Just days before his scheduled hearing in a criminal court, where the government would have to charge or release him, Bush designated Padilla as an enemy combatant and he was transferred to military custody.[189] The administration appealed again to the president's commander in chief power, claiming that it gave him the authority to direct the military to protect the nation against al Qaeda both at home and abroad.[190]

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[187] Ibid.
[188] Theodore Olson, Brief for the Respondents in Opposition, Hamdi v. Rumsfeld (2003), https://www.justice.gov/osg/brief/hamid-v-rumsfeld-response
[189] Schwarz Jr. and Huq, *Unchecked and Unbalanced*, 145.
[190] Jay S. Bybee to the Attorney General, "Determination of Enemy Belligerency and Military Detention" (official memorandum: Office of Legal Counsel, U.S. Department of Justice, June 8, 2002). 8-9.

"Detaining al Qaeda operatives who attempt to enter the United States to attack military or civilian targets is part of our ongoing military operations in this international armed conflict," wrote Assistant Attorney General Jay Bybee in a memo to the Attorney General. [191] By confirming that Padilla (and those in similar circumstances) had to be handled as a military matter, Bybee claimed that the president could unilaterally direct the detention of American citizens working with al Qaeda to harm the United States. Here too the administration made a bold claim to executive power by asserting that Bush had the inherent authority to remove a defendant—in this case a citizen captured within the United States, away from the military conflict—from the judicial process by designating them as an enemy combatant. Both Padilla and Hamdi would bring their cases all the way to the Supreme Court to challenge this use of executive power. These challenges to enemy combatant policy will be covered in the following chapter.

In a 2004 order, Deputy Secretary of Defense Paul Wolfowitz defined enemy combatants for the purpose of detention at Guantánamo as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners" including "any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."[192] Justice Department Lawyer Brian Boyle admitted when questioned in court that this definition was so broad as to give it the power to designate even a "little old lady from Switzerland" as an enemy combatant if she gave money to a charity without knowing that her money would be funneled it

[191] Ibid.
[192] Paul Wolfowitz, "Order Establishing Combatant Status Review Tribunal," July 7, 2004, http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

to al Qaeda.[193] What started as the president's authority to designate and detain noncitizens fighting directly in the battlefields in Afghanistan against the U.S. as enemy combatants thus broadened piece by piece to be wide enough to include citizens and noncitizens alike indirectly related to the war on terror.

Detention and Treatment of Enemy Combatants

"The Least Worst Place"

After the enemy combatant status had been created and Bush's November 2001 military order called for their detention and trial by military commission, the next question the government had to answer was where to keep the captured fighters—a decision that Bush had ultimately left up to the Defense Department led by Rumsfeld. In November 2001, the Northern Alliance had captured around 300 al Qaeda and Taliban fighters in the battle of Mazar-e-Sharif. After a prisoner uprising killed a CIA agent who had been questioning them and led to a firefight to regain control of the prison that left over 200 of the prisoners dead, commander of the U.S. Army forces in Afghanistan General Tommy Frank asked to move the surviving detainees and other prisoners out of the war zone to avoid being a target for insurgent attacks.[194] Finding a place to move the prisoners became the urgent task of Ambassador Prosper's working group, which had originally been created to develop a plan for trying terrorists.

The group decided that placing the detainees in a prison in the territorial United States would pose a security risk and would be politically unpopular.[195] They considered other options

[193] Neil A. Lewis, "Fate of Guantánamo Detainees Is Debated in Federal Court," *The New York Times*, December 2, 2004, sec. U.S., https://www.nytimes.com/2004/12/02/politics/fate-of-guantanamo-detainees-is-debated-in-federal-court.html.
[194] Savage, *Takeover*, 143.
[195] Greenberg, *The Least Worst Place*, 6.

like a U.S. military base in Germany and those in U.S. territories like Guam and the Marshall Islands, but each option had the possibility of interference from the host. During the discussion, someone in the group suggested Guantánamo.[196]

This option was promising. The United States had leased its naval base at Guantánamo Bay from Cuba since 1903, and in the 1990s, it had been used as a refugee camp for Haitians and Cubans seeking asylum in the United States.[197] It was outside of the territorial United States but not under the control of another government.[198] Before Prosper's group could finish considering the pros and cons of detaining captured fighters at Guantánamo, their work was once again cut short; Rumsfeld decided that Guantánamo was the right decision.[199] On December 27, Rumsfeld announced the decision to open a detention center at Guantánamo Bay in a press conference. Defending the administration's choice of Guantánamo, Rumsfeld called it "the least worst place" to send detainees.[200]

There were also several advantages to choosing Guantánamo that the administration made discreet. The day after Rumsfeld's press conference, Philbin and Yoo signed a secret Office of Legal Counsel memo that described the legal benefit of detaining prisoners at Guantánamo. Despite hesitation that the argument might not hold up in court, they argued that although the lease agreement with Cuba gave the United States "complete jurisdiction and control" of Guantánamo, the naval base was outside U.S. territory and under Cuban sovereignty, so U.S. courts had no jurisdiction over what happened there and neither did Cuban courts.[201] This

[196] Ibid.
[197] Savage, *Takeover*, 144.
[198] Greenberg, *The Least Worst Place,* 6
[199] Savage, *Takeover*, 144.
[200] Ibid.
[201] Jennifer K Elsea and Daniel H Else, "Naval Station Guantanamo Bay: History and Legal Issues Regarding Its Lease Agreements" (Congressional Research Service, November 17, 2016).; Patrick F. Philbin and John C. Yoo to William J. Haynes, "Possible Habeas Jurisdiction over Aliens Held at Guantanamo Bay" (official memorandum: Office of Legal Counsel, U.S. Department of Justice, December 28, 2001).

meant that detainees would not be entitled to a writ of habeas corpus to challenge their detention in U.S. courts. Guantánamo was thus, as one administration official remarked, "the legal equivalent of outer space."[202]

On January 11, 2002, the first 20 detainees arrived at Camp X-Ray at Guantánamo, wearing orange jumpsuits and black-out goggles. At its height, the population of the detention facility rose to nearly 800 detainees as young as 13 and as old as 90 from 59 countries.[203] Today 40 detainees remain, many of whom will likely remain there for the rest of their lives.[204] The reasons for this will be discussed in Chapter Five.

Evading the Geneva Conventions

On November 14, 2001, the day after Bush signed the military order calling for the detention and trial by military commission of enemy combatants, Cheney told a U.S. Chamber of Commerce audience that terrorist suspects do not "deserve to be treated as prisoners of war" protected by the Geneva Conventions. But the president had not yet made that decision.[205] This led to major conflict within the executive branch over whether the Geneva Conventions would apply to members of the Taliban and al Qaeda captured on the battlefields. It spurred a series of secret opinions by the OLC, which would only begin to be revealed over two years later, that used arguments of executive power to give the administration cover to evade the Geneva Conventions.

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[202] Michael Isikoff, "The Gitmo Fallout," *Newsweek*, July 16, 2006, https://www.newsweek.com/gitmo-fallout-112933.
[203] Karen J. Greenberg and Joshua L. Dratel, "We're Still Living in Guantánamo's Shadow," *The Nation*, January 22, 2020, https://www.thenation.com/article/politics/guantanamo-legacy/; David Cole and James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, Third edition (New York: New Press, 2006), 184.
[204] Ibid.
[205] Barton Gellman and Jo Becker, "'A Different Understanding With the President,'" *The Washington Post*, June 24, 2007, http://voices.washingtonpost.com/cheney/chapters/chapter_1/.

The Geneva Conventions, which were enacted in 1949, set standards for armed conflict and established laws for the treatment of captured soldiers in war, named "Prisoners of War." Among other measures, the Geneva Conventions call for the humane treatment of all those captured in war, whether they are POWs or not, and give all detainees the right to a hearing to determine their status. President Truman signed onto the treaties in 1949 and the Senate ratified them six years later.

The Bush administration worked to loosen this restriction on presidential power. Days before the first detainees arrived at Guantánamo, Yoo and another OLC lawyer, Robert Delahunty, drafted a secret memo stating that the president had the executive authority to suspend the Geneva Conventions in the war in Afghanistan and that Taliban and al Qaeda soldiers did not qualify as Prisoners of War under the Third Geneva Convention. Those detained as enemy combatants at Guantánamo were thus not protected by the Geneva Conventions. The memo took steps to resist potential congressional checks on the president's national security power. Yoo and Delahunty wrote that the commander in chief power gave the president "plenary control over the conduct of foreign relations," and any effort by Congress to restrict the president's authority to suspend the Geneva Conventions "would represent a possible infringement on presidential discretion to direct the military."[206] On January 25, Gonzales signed a memo to Bush (it was later revealed that the memo had been ghostwritten by David Addington) reaffirming Yoo and Delahunty's memo and told Bush that as president, he had the "constitutional authority" to assert that the Geneva Conventions did not apply to those captured

[206] John Yoo and Robert J. Delahunty to William J. Haynes, "Application of Treaties and Laws to al Qaeda and Taliban Detainees" (official memorandum: Office of Legal Counsel, U.S. Department of Justice, January 9, 2002).

in the war on terror.[207] "As you have said, the war against terrorism is a new kind of war," Gonzales wrote. "In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners."[208] Gonzales advised Bush to declare al Qaeda and the Taliban outside the protection of the Geneva Conventions in order to prevent American officials from being exposed to the 1996 War Crimes Act.

This proposal to break from the tradition of respecting and supporting the Geneva Conventions was met with significant criticism from elsewhere in the administration. Secretary of State Colin Powell and State Department Legal Advisor William Taft IV—great-grandson of the former president who had promoted the theory of a constrained executive—argued strongly against selectively suspending the Conventions. On January 11, Taft drafted a response to Yoo and Delahunty's January 9 memo calling the legal reasoning "seriously flawed" and "fundamentally inaccurate."[209] Neither Powell nor Taft specifically disputed that the president had the executive authority to make such a decision, but they worried that suspending the Geneva Conventions would harm the U.S.'s international credibility, jeopardize support from critical U.S. allies, and undermine the protection of the laws of war for American troops.[210]

The back-and-forth between the Powell-Taft side and the Cheney-Yoo side continued, but Bush ultimately sided against his Secretary of State. On February 7, he signed a memo that declared, "Pursuant to my authority as Commander in Chief…[I] determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout

[207] Savage, *Takeover*, 146.; Alberto Gonzales to The President, "Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban" (official memorandum: White House Counsel, January 25, 2002).
[208] Ibid.
[209] William H. Taft IV to John Yoo, "Your Draft Memorandum of January 9," January 11, 2002.
[210] Colin Powell to Counsel to the President, "Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan," January 26, 2002.

the world."[211] Enemy combatants would be treated, as Donald Rumsfeld put it, in a manner "reasonably consistent" with the Conventions "for the most part."[212] The administration defended its suspension of the Geneva Conventions, calling the detainees "the worst of the worst," according to Cheney, and "among the most dangerous, best-trained, vicious killers on the face of the planet," according to Rumsfeld.[213] But it would later be clear that besides a relatively small population of known terrorists, many of the detainees sent to Guantánamo were not hardened terrorists but rather individuals forcibly conscripted to join the Taliban and handed over to American forces in exchange for a bounty.[214]

Interrogation

In December 2002, *The Washington Post* reported "stress and duress" tactics—such as being held in painful positions and being deprived of sleep—being used by CIA interrogators against enemy combatants. In response to the report and the subsequent outrage over these methods, Department of Defense General Counsel William J. Haynes II stated that "United States policy condemns torture."[215] In April 2004, disturbing pictures from the Abu Ghraib prison in Iraq were released, revealing the torture of prisoners captured in the Iraq war, who *were* being held as prisoners of war under the Geneva Conventions. One picture showed a hooded man standing on a box with electrical wires attached to his body, another showed dogs lunging at prisoners. Further investigation revealed the violent, humiliating, and degrading treatment

[211] George W. Bush to the Vice President at al. "Humane Treatment of al Qaeda and Taliban Detainees," (official memorandum: White House, February 7, 2002).
[212] Katharine Q. Seelye, "A Nation Challenged: The Prisoners; First 'Unlawful Combatants' Seized in Afghanistan Arrive at U.S. Base in Cuba," *The New York Times*, January 12, 2002, sec. World, https://www.nytimes.com/2002/01/12/world/nation-challenged-prisoners-first-unlawful-combatants-seized-afghanistan-arrive.html.
[213] Savage, *Takeover*, 147.
[214] Ibid., 148.
[215] "The Road to Abu Ghraib: I. A Policy to Evade International Law" (Human Rights Watch, June 2004), https://www.hrw.org/reports/2004/usa0604/2.htm.

prisoners endured.[216] The Bush administration was quick to condemn the abuse in Abu Ghraib as the acts of rogue agents and not part of U.S. policy.[217] But memos leaked a few months later showed that the administration had been laying the legal groundwork to allow for brutal interrogation techniques years earlier.

On March 13, 2002, the Office of Legal Counsel sent a secret memo to Defense Department General Counsel William Haynes. The memo, signed by Assistant Attorney General Jay Bybee but written largely by John Yoo, argued that the president had unfettered authority to transfer U.S. detainees to foreign governments whose interrogators used torture, a process called "extraordinary rendition," despite a treaty that forbade the practice.[218] The OLC employed the same logic as it had in many earlier memos, contending that the president's commander in chief powers allowed him to disregard treaties and statutes to effectively do anything with wartime prisoners.

The argument that the president's commander in chief powers gave him the constitutional authority to interrogate enemy combatants for intelligence, and the clever construction of torture by the administration, was employed through a series of secret OLC and CIA memos, later dubbed by critics as the "torture memos," to create a complex and brutal interrogation program. In the memos, the administration developed a narrow definition of torture to permit a broad range of interrogation methods they deemed to legally not be torture—so-called "enhanced interrogation" such as waterboarding, sleep deprivation, and cramped confinement—as well as the dismissal of federal laws, treaties, and international laws against torture.[219] These techniques

[216] Mg Antonio M Taguba, "AR 15-6 Investigation of the 800th Military Police Brigade" (Department of Defense, October 19, 2004).
[217] Cole and Dempsey, *Terrorism and the Constitution*, 191.
[218] Jay S. Bybee to William J. Haynes, "Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan" (official memorandum: Office of Legal Counsel, U.S. Department of Justice, February 26, 2002).
[219] Savage, *Takeover*, 149.

were used in U.S. prisons in Iraq and Afghanistan, at CIA black sites, and at Guantánamo.[220] In an infamous August 2002 OLC memo to Alberto Gonzales, Bybee (though the memo was reportedly drafted by Yoo) asserted that for an act to constitute torture, it would have to inflict extreme pain or suffering resulting in, for example, "such as organ failure, impairment of bodily function, or even death" and even then only if pain was the "precise objective."[221] Anything short of that was not torture. Even with this narrow definition of torture, Yoo argued that Congressional efforts to regulate interrogation would "violate the Constitution's sole vesting of the Commander-in-Chief authority in the President" because "Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield."[222] National security advisor to President George H.W. Bush Donald Gregg wrote in *The New York Times* that the legal memos on the treatment of prisoners "cleared the way for the horrors that have been revealed in Iraq, Afghanistan and Guantánamo and make a mockery of administration assertions that a few misguided enlisted personnel perpetrated the vile abuse of prisoners."[223]

Trials and Tribunals

Bush's November 13, 2001, military order established that if enemy combatants were to be tried, they would be brought before a military tribunal system. The system initially applied only to noncitizens who the president determined to be current or former members of al Qaeda,

[220] Matt Apuzzo, Sheri Fink, and James Risen, "How U.S. Torture Left a Legacy of Damaged Minds," *The New York Times*, October 8, 2016, sec. World, https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html.
[221] Jay S. Bybee to Alberto Gonzales, "Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A," (official memorandum: Office of Legal Counsel, U.S. Department of Justice, August 1, 2002).
[222] John Yoo to William J Haynes II, "Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States " (official memorandum: Office of Legal Counsel, U.S. Department of Justice, March 14, 2003).
[223] Donald P. Gregg, "After Abu Ghraib; Fight Fire With Compassion," *The New York Times*, June 10, 2004, sec. Opinion, https://www.nytimes.com/2004/06/10/opinion/after-abu-ghraib-fight-fire-with-compassion.html.

"engaged in, aided and abetted, or conspired to commit acts of international terrorism or acts in preparation thereof" against "the United States, its citizens, national security, foreign policy, or economy" or had knowingly harbored someone who had.[224] The Order authorized the tribunals to operate in secret and allowed them to impose the death penalty without unanimity. It also allowed Bush to overturn the original verdict of the tribunals.[225] The military commission system Bush laid out in his order was met with immediate criticism for allowing for wide-scale civil rights violations. In an op-ed in *The New York Times,* Gonzales defended Bush against these criticisms, saying "Military commissions do not undermine the constitutional values of civil liberties or separation of powers; they protect them by ensuring that the United States may wage war against external enemies and defeat them."[226] Less than two months after the Order was issued, the administration changed its policies to require a unanimous verdict to impose a death penalty and established that the proof of guilt had to be beyond reasonable doubt.[227]

The military commissions system was also controversial for concentrating power in the hands of the executive. Unlike normal trials where the legislative branch defines the crime and sets the penalty, the executive branch investigates the crime and prosecutes the accused, and the judicial branch tries the accused and determines guilt, in the military commissions system all of those powers were granted to the military, led by its commander in chief—the president.[228] The president's unilateral decision to create the system on his own authority, without Congressional authorization, was met with criticism. In an essay in the Yale Law Journal, legal scholars Neal

[224] Bush, "Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."
[225] Ibid.
[226] Alberto R. Gonzales, "Martial Justice, Full and Fair," *The New York Times*, November 30, 2001, sec. Opinion, https://www.nytimes.com/2001/11/30/opinion/martial-justice-full-and-fair.html.
[227] Neil A. Lewis, "A Nation Challenged: The Military Tribunals; Rules on Tribunal Require Unanimity on Death Penalty," *The New York Times*, December 28, 2001, sec. U.S., https://www.nytimes.com/2001/12/28/us/nation-challenged-military-tribunals-rules-tribunal-require-unanimity-death.html.
[228] Savage, *Takeover*, 134.

Katyal and Laurence Tribe argued that Bush's Order was unconstitutional and called for an authorization of Congress to establish and legitimize the military tribunals. "Throughout its history, there have been times when our nation has proceeded on the premise that civil trials and various other protections ordinarily entailed by due process need not, and in all fairness should not, be demanded. Yet those circumstances have been rare, carefully circumscribed, and virtually never defined by a single person. Unacceptable danger lurks if power to define such extraordinary circumstances is left in the hands of any one individual, however earnestly he may believe the nation is in grave peril. The need for congressional authorization, while always important, is never more so than when the judiciary cannot be relied upon to enforce the Constitution with all due vigor," they wrote.[229]

Casting Aside Checks

The creation and development of the enemy combatant policy by the Bush administration shows a gradual expansion of power based on a theory of inherent executive authority in a time of war. Over and over again, the administration's lawyers justified their national security policy by appealing to the president's power as commander in chief. With this reliance on executive authority came a sidelining of other branches of government and more traditional sources of presidential power. The administration asserted the sole power to designate enemy combatants, argued that no court could question their detention, and that neither international law or Congress could regulate interrogations. This represented a seizing of powers for the president by casting aside restraining forces and the system of checks and balances.

The development of these enemy combatant policies was followed closely by their

[229] Neal K. Katyal and Laurence H. Tribe, "Waging War, Deciding Guilt: Trying the Military Tribunals," *The Yale Law Journal* 111, no. 6 (2002): 1267, https://doi.org/10.2307/797612.

challenges, both in the courts and in Congress. Just as the designation expanded piece by piece, the policies were dismantled in a similar way. The court cases and congressional measures that followed challenged the Bush administration's broad interpretation of executive authority and led to the fall of some of the policies covered in this chapter, indicating a reining in of presidential power.

Chapter 4: Challenges to Enemy Combatant Policy

By early 2003, the steady expansion of presidential power based on a theory of inherent executive authority began to face setbacks. Over the course of just a few months, several key lawyers who helped craft the legal framework for the administration's enemy combatant policies—allies of Vice President Cheney who championed his expansive view of presidential power—left the executive branch. Their replacements turned out to be more moderate on executive authority than the White House had intended and were less eager to undercut legal limits to presidential power. This threatened the expansive structure of executive power that was constructed in response to the September 11 attacks and prompted internal conflict within the executive branch. To make matters worse for the administration, its enemy combatant policies were soon challenged before the Supreme Court, which would rebuke its most extreme claims of executive authority. And Congress, which had largely been deferential to the president and supported his national security initiatives, began to cast a more critical eye on the White House. The dismantling of some of the enemy combatant policies, and the administration's claims to power more broadly, signaled a reintroduction of traditional checks on executive authority and a rejection of some of the administration's most bold theories of presidential power.

Changes Within the Administration

A wave of departures within the administration began in December 2002 when Deputy White House Legal Counsel Timothy Flanigan, who worked closely with Cheney's legal counsel David Addington, left the White House for the private sector.[230] Just a few months later, Jay Bybee left his position as head of the OLC, where he had signed off on several of John Yoo's

[230] Savage, *Takeover*, 182.

secret memos, including the so-called torture memos, to be a judge for the Court of Appeals for the Ninth Circuit.[231] With Bybee's position now open, Addington and White House Counsel Alberto Gonzales wanted Yoo to take his place; he was a trusted ally who had worked closely with them to expand the president's power since September 11.[232] But Attorney General John Ashcroft resented Yoo for going over his head to create a private channel between the OLC and White House and blocked his promotion. With no chance of ascending beyond the number two spot, Yoo resigned from the OLC in the summer of 2003 and returned to teaching law at Berkeley.[233]

At Yoo's suggestion, the administration chose Jack Goldsmith to be the new head of the OLC. Goldsmith had been a law professor at the University of Chicago School of Law, but since 2002 he had worked as a legal advisor to the Pentagon's general counsel, where he advised the Defense Department on detainee treatment at Guantánamo and military commissions.[234] On paper, Goldsmith looked like an apt replacement for Yoo. The two were friends and academics in conservative legal circles and they had co-written articles advocating for presidential power.[235] Goldsmith had been an early advocate for the president's authority to detain enemy combatants and to try them by a military commissions system, and he supported the administration's decision to deny Taliban and al Qaeda fighters prisoner-of-war status.[236]

Almost immediately after Goldsmith was confirmed as Assistant Attorney General for the OLC by the Senate in October 2003, he proved to be different from Yoo. Soon after he

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[231] Ibid., 183.
[232] Karen J. Greenberg, *Rogue Justice: The Making of the Security State*, Reprint edition (New York: Broadway Books, 2017), 102.
[233] Savage, *Takeover,* 182
[234] Greenberg, *Rogue Justice*, 101.
[235] Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration*, Reprint edition (New York: W. W. Norton & Company, 2009), 21; Savage, *Takeover*, 183.
[236] Goldsmith, *The Terror Presidency*, 28.

started at the OLC, a dispute among lawyers within the executive branch over whether detained Iraqi insurgents were protected by the Geneva Conventions created two factions within the legal team.[237] On one side, Addington and others argued that like the insurgents in Afghanistan, those in Iraq were not protected by the Conventions, while on the other side, a group led by OLC deputy Patrick Philbin disagreed. In a bold move, Goldsmith sided against Addington and argued that the Geneva Conventions did apply to captured insurgents in Iraq and the president could not work around that protection.[238]

Goldsmith's biggest challenge to the president's national security strategy and claim to executive power came through rescinding critical OLC memos regarding interrogation. When he assumed his position in the OLC, Goldsmith did not know that the office had created a legal framework for torture and that his friend John Yoo was its lead architect. A few weeks into the job, Goldsmith was alerted by Philbin about a worrying OLC opinion. He considered Philbin's concern as serious and credible because, according to Goldsmith, Philbin "was not squeamish about pushing the President's power to its limits."[239] Goldsmith proceeded to read several OLC memos concerning interrogation, including the infamous "torture memo." As he investigated the interrogation memos and other OLC opinions that backed some of the government's most sensitive counterterrorism opinions, Goldsmith concluded that "some were deeply flawed: sloppily reasoned, overbroad, and inaccurate in asserting extraordinary constitutional authorities on behalf of the President."[240] He was particularly concerned about the OLC's "unusual lack of care and sobriety" regarding the president's commander-in-chief powers in the interrogation

[237] Savage, *Takeover*, 183.
[238] Ibid.
[239] Goldsmith, *The Terror Presidency*, 142.
[240] Ibid., 10.

opinions.[241] He wrote in his memoir, "When one concludes that Congress is disabled from controlling the President, and especially when one concludes this in secret, respect for separation of powers demands a full consideration of competing congressional and judicial prerogatives, which was lacking in the interrogation opinions."[242]

Goldsmith did not know about the government's torture program and feared that the memos could be used to greenlight harsh interrogations. He believed withdrawing the interrogation memos would be the best course of action.[243] He started with the most recent interrogation memo: Yoo's March 13 memo which gave the Pentagon sweeping authority—similar to that authorized by the 2002 "torture memo" to the CIA—to interrogate enemy combatants held at Guantánamo Bay.[244] The CIA interrogation memos posed a bigger challenge, and Goldsmith was not willing to withdraw them before creating a replacement opinion, and he turned his attention to other pressing legal matters.

In April 2004, before Goldsmith returned to the question of interrogation, the Abu Ghraib scandal broke, revealing the CIA's mistreatment and humiliation of prisoners in Iraqi prisons, and that June, the existence of the interrogation opinions leaked to the press. As public outcry mounted, Goldsmith withdrew the interrogation opinions on June 14, an extraordinary step of publically rejecting the government's own legal analysis.[245] Two days later, Goldsmith handed Ashcroft his letter of resignation.[246] Withdrawing the OLC's interrogation memos was Goldsmith's last move in an effort to reinstate a balance of powers.

Yet, even after Goldsmith officially withdrew the interrogation memos, the

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[241] Ibid., 148.
[242] Ibid., 149.
[243] Ibid., 151.
[244] John C. Yoo to William J. Haynes II, "Military Interrogation of Alien Unlawful Combatants Held Outside the United States" (official memorandum: Office of Legal Counsel, U.S. Department of Justice, March 14, 2003).
[245] Goldsmith, *The Terror Presidency*, 158.
[246] Ibid., 160.

administration did not retreat on its claims that presidential power allowed for harsh interrogation techniques. In his confirmation hearings for his appointment to Attorney General later in 2004, White House Counsel Alberto Gonzales argued that while claims to presidential power over torture were unnecessary because the president had no intention of authorizing torture, they were not flat out wrong. Gonzales also claimed that the CIA was not bound by the same rules of humane treatment as were military personnel.[247]

Challenges in the Courts: The Enemy Combatant Cases

The U.S. government's initial position on enemy combatants held at Guantánamo Bay was that they were subject to military detention, but were not given combatant immunity or protected as prisoners-of-war under the Geneva Conventions. This created what many critics called a "legal black hole" at Guantánamo where detainees were held under conditions determined by the U.S. government without the protection of international law. In practice. this meant that the president could detain citizens and noncitizens he deemed as enemy combatant indefinitely without charge or trial. In the years after the first prisoners were brought to Guantánamo, human rights groups challenged the government's policies and pushed for the habeas corpus rights of enemy combatants by filing lawsuits on their behalf. Starting in 2004, a series of enemy combatant cases reached the Supreme Court to define the role of the branches of government in the war on terror and judge the administration's claim of unfettered presidential authority. The cases reveal the logic of the administration's defense of its post-September 11 policies; the claims made by the administration were based on the premise that Article II of the Constitution gives the president inherent authority to act impervious to congressional oversight

[247] Eric Lichtblau, "Gonzales Says '02 Policy on Detainees Doesn't Bind C.I.A.," *The New York Times*, January 19, 2005, sec. U.S., https://www.nytimes.com/2005/01/19/politics/gonzales-says-02-policy-on-detainees-doesnt-bind-cia.html.

and judicial review. The decisions in these Supreme Court cases created a body of law that altered enemy combatant policy to give detainees more rights and scaled back some of the administration's boldest claims of executive authority.

Rasul v. Bush

Rasul v. Bush, the first Supreme Court case that considered whether enemy combatants should have access to the legal system, laid the foundation for enemy combatant litigation. The case involved 14 foreign national petitioners who had been captured in Afghanistan and Pakistan in the U.S. campaign against al Qaeda and the Taliban and were being held at Guantánamo. The detainees' families filed a writ of habeas corpus to challenge the legality of their detentions and accused the government of violating their due process rights by denying the men access to attorneys and detaining them indefinitely. The government argued that the courts had no jurisdiction to hear the case because the detainees were not U.S. citizens and were being held in a territory (Guantánamo Bay, Cuba) outside of the sovereignty of the United States (the United States had leased its naval base at Guantánamo Bay from Cuba since 1903, but Cuba holds "ultimate sovereignty"). The detainees' lawyer refuted that the prison was under Cuban control. He pointed out that the Cuban iguana was protected under the U.S. Endangered Species Act; iguanas thus had greater legal protection than humans at Guantánamo.[248] The government argued that the questions raised by the petitioners about the conduct of the war on terror were ones "the Constitution leaves to the President as Commander in Chief," and thus the courts had no jurisdiction to "evaluate or second-guess the conduct of the President and the military."[249] Both the district court and Court of Appeals sided with the government.

[248] Rudalevige, *The New Imperial Presidency*, 232.
[249] Government's Motion to Dismiss, Rasul v. Bush (2002) in Greenberg and Dratel, *The Enemy Combatant Papers*, 24.

In its Supreme Court brief, the administration cited *Johnson v. Eisentrager,* a 1950 Supreme Court case that ruled that U.S. courts had no jurisdiction over German unlawful enemy combatants held in U.S.-controlled prisons in Germany. The government claimed that like the detainees in *Eisentrager,* enemy combatants held at Guantánamo could not file habeas petitions in U.S. courts because they too were being held by the military outside the sovereign territory of the United States.[250] The government argued that if the Court were to break from this precedent, it would "raise grave constitutional concerns" by infringing on the president's power. It stated in the brief:

> The Constitution commits to the political branches and, in particular, the President, the responsibility for conducting the Nation's foreign affairs and military operations. Exercising jurisdiction over claims filed on behalf of aliens held at Guantanamo would place the federal courts in the unprecedented position of micro-managing the Executive's handling of captured enemy combatants from a distant combat zone where American troops are still fighting; require U.S. soldiers to divert their attention from the combat operations overseas; and strike a serious blow to the military's intelligence-gathering operations at Guantanamo.[251]

This line of reasoning that warned the courts from overstepping their role and asserted the president's inherent right in times of war would become common in the enemy combatant cases to support the administration's claim of unilateral power in the arena of national security.

On June 28, 2004, the Supreme Court handed down its ruling in *Rasul v. Bush*—its first evaluation of the legal rights of enemy combatants captured in the war on terror. In a six to three decision written by Justice John Paul Stevens, the Court ruled that federal courts had jurisdiction to consider habeas petitions of foreign nationals held at Guantánamo. Although Cuba retained "ultimate sovereignty" over Guantánamo, the Court found, the United States exercised "plenary

[250] Theodore Olson, Solicitor General, Government's Motion to Dismiss, Rasul v. Bush (2004) in Greenberg and Dratel, 80.
[251] Ibid.

and exclusive jurisdiction" over the base, making Cuba's sovereignty irrelevant to the matter.[252] The Court used this to distinguish Guantánamo from the military base in Germany used in the *Eisentrager case,* in addition to the fact that none of the detainees were nationals of a country at war with the United States, unlike in *Eisentrager.* Stevens wrote that the right to habeas corpus was not dependent on citizenship and so the enemy combatants held at Guantánamo were "entitled to invoke the federal courts."[253]

Hamdi v. Rumsfeld

On the same day that the Court ruled in the *Rasul* case, it also handed down its ruling in a similar case on the rights of enemy combatants but this time involving a U.S. citizen. As mentioned in Chapter Three, in the fall of 2001, the U.S. military detained 21-year-old American citizen Yaser Hamdi in Afghanistan. Hamdi was accused of fighting for the Taliban and was labeled an enemy combatant and held at Guantánamo Bay. When interrogators realized that Hamdi was a U.S. citizen, he was transferred to naval brigs in Virginia and South Carolina, where he continued to be held incommunicado as an enemy combatant without being charged with a crime or given an opportunity to contest his enemy combatant status. In June 2002, Hamdi's father filed a petition for a writ of habeas corpus on his son's behalf to challenge the legality of his detention.

The Fourth Circuit Court of Appeals agreed with the government's argument that the power to detain those captured in armed struggle rests with the president and that efforts by the judicial branch to intervene violated the separation of powers.[254] It therefore deferred to the executive's determination of enemy combatant status in the case. This decision was appealed to

[252] Rasul v. Bush, 542 U.S. 466 (U.S. Supreme Court 2004).
[253] Ibid.
[254] Hamdi v. Rumsfeld, 337 F.3d 335 (4th Circuit Court 2003).

the Supreme Court. In their Supreme Court brief, the petitioners argued that the government violated Hamdi's Fifth Amendment right to due process by holding him indefinitely based on his enemy combatant designation. Further, they asserted, "Judicial review of executive decision is demanded by, not contrary to, the separation of powers" and once a citizen is removed from an area of fighting, the executive does not have the authority to detain the citizen indefinitely without authorization by Congress.[255]

The government, meanwhile, argued in its Supreme Court brief that by labeling Hamdi as an enemy combatant, he could be held and was not entitled to meet with counsel or challenge his detention. They claimed that as commander in chief, the president has the authority to detain enemy combatants in wartime, including U.S. citizens, and that the president's authority to do so was supported by (but not reliant on) Congress's 2001 AUMF. Throughout its brief, the government focused on the idea of inherent presidential authority to detain Hamdi, whom they classified as an "archetypal battlefield combatant."[256] "A commander's wartime determination that an individual is an enemy combatant is a quintessentially military judgment, representing a core exercise of the Commander-in-Chief authority," the government asserted in its brief.[257]

In an opinion backed by a plurality of the Court, Justice Sandra Day O'Connor wrote that American citizens held in the United States as enemy combatants must be given due process rights and have the ability to contest their enemy combatant status.[258] The Court ruled that absent a Congressional suspension of habeas corpus, citizens detained as enemy combatants are entitled to some form of due process. In O'Connor's opinion, she recognized that Congress had

[255] Hamdi's Supreme Court Brief, Hamdi v. Rumsfeld (2004) in Greenberg and Dratel, *The Enemy Combatant Papers*. 303.
[256] Theodore Olson, Solicitor General, Government's Supreme Court Brief, Hamdi v. Rumsfeld (2004) in Greenberg and Dratel. 324.
[257] Ibid. 326
[258] Hamdi v. Rumsfeld, 542 U.S. 507 (U.S. Supreme Court 2004).

authorized the detention of enemy combatants in the 2001 AUMF, and because of this, the ruling did not address the question of whether Article II of the Constitution gives the president the authority to detain citizens as enemy combatants.[259] But the Court did contest the administration's claim that the separation of powers required the court to defer to the Executive branch's enemy combatant determinations. The plurality rejected the administration's "highly circumscribed role" for the courts and famously stated that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[260] "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake," O'Connor wrote in the opinion.[261] In October 2004, Hamdi was deported to Saudi Arabia instead of being given the hearing the Supreme Court ruled he was entitled to receive.[262]

In response to the rulings in *Rasul* and *Hamdi* that allowed for due process challenges from enemy combatants, the Defense Department created two new systems to determine the status of enemy combatants. The first were Combatant Status Review Tribunals (CSRTs), created by Deputy Secretary of Defense Paul Wolfowitz nine days after the Court issued its rulings, which were one-time proceedings to determine if detainees held at Guantánamo Bay had been correctly classified as enemy combatants.[263] If the CSRTs found that a detainee had not been correctly classified, they could recommend release or repatriation. When the hearings began in July 2004, over 580 detainees were being held as enemy combatants at Guantánamo. The

[259] Ibid.
[260] Ibid.
[261] Ibid.
[262] Savage, *Takeover*, 200.
[263] Greenberg, *Rogue Justice*, 141.

hearings were held privately, with redacted transcripts for hearings of high-value detainees released to the public. The legitimacy of this process would come into question in *Boumediene v. Bush* four years later. The second system created by the Defense Department was the Administrative Review Boards (ARBs), which were created to follow up on CSRT hearings annually to determine if an enemy combatant continued to pose a threat to the United States. Both CSRTs and ARBs were overseen by the new Office for the Administrative Review of the Detention of Enemy Combatants within the Defense Department.

Congress also responded to the rulings in *Rasul* and *Hamdi* by passing the Detainee Treatment Act (DTA) in 2005. Among other measures, the DTA sought to strip all U.S. courts of jurisdiction to hear habeas petitions by enemy combatants, as established by *Rasul,* and instead funneled a more limited judicial review of CSRT decisions exclusively to D.C. Court of Appeals.[264] The law did not make clear whether this restriction on habeas petitions would include those already pending in the judicial system—an issue that would be taken up by the Supreme Court in *Hamdan v. Rumsfeld.*

Rumsfeld v. Padilla and Padilla v. Hanft

As detailed in Chapter Three, José Padilla, a U.S. citizen, was arrested at O'Hare Airport for being a "material witness" to a terrorism investigation. Two days before his scheduled hearing in a civilian court, Bush signed an order that designated him an enemy combatant and transferred him from civilian custody to a military brig in South Carolina where he was held incommunicado.[265] Attorney General John Ashcroft announced in a televised address that Padilla

[264] "Guantanamo Litigation - History," Lawfare, January 21, 2013, https://www.lawfareblog.com/guantanamo-litigation-history.
[265] Savage, *Takeover*, 151.

was an "al-Qaeda operative" involved in a radiological bomb plot, a claim the administration would later walk back.[266]

Much like in the *Hamdi* case, Padilla's lawyer filed a petition for a writ of habeas corpus on behalf of Padilla to contest his detention. In December 2003, the Second Circuit Court of Appeals ruled that Padilla had to be charged with a crime or released and that the president did not have the power to hold Padilla without trial.[267] "The President, acting alone, possesses no inherent constitutional authority to detain American citizens seized within the United States away from the zone of combat, as enemy combatants," the court stated.[268] The case was then brought to the Supreme Court, which did not make a decision but rather dismissed that case on a technicality that it was filed in the wrong district—in New York instead of South Carolina where Padilla was being held.[269]

After the case was refiled in South Carolina as *Padilla v. Hanft*, it went directly to the U.S. Court of Appeals for the Fourth Circuit. In September 2005, the three-judge panel ruled that like U.S. citizens captured on a foreign battlefield, citizens arrested in the United States could also be designated by the president as enemy combatants.[270] Padilla's lawyers appealed this ruling to the Supreme Court, but before the justices could decide to grant certiorari, the administration announced that Padilla would no longer be held as an enemy combatant and that they intended to prosecute him in a civilian court instead.[271] In the criminal indictment against Padilla, there was no mention about the dirty bomb plot or his intent to carry out domestic terrorism attacks, as the administration had previously claimed to the Court of Appeals—

[266] Wittes, "Enemy Americans."
[267] Savage, *Takeover*, 153.
[268] Padilla v. Rumsfeld, 352 F.3rd 695 (2nd Circuit Court 2003).
[269] Rumsfeld v. Padilla, 542 U.S. 426 (U.S. Supreme Court 2004).
[270] Padilla v. Hanft, 423 F.3d 386 (4th Circuit Court 2005).
[271] Savage, *Takeover*, 200.

allegations that the administration used to detain Padilla in military custody. Rather, the administration reverted to its original argument that Padilla had conspired to provide material support to terrorists connected to al Qaeda and the Taliban.[272]

This move was received critically by Padilla's lawyer as well as Judge J. Michael Luttig, who had written the ruling for the Fourth Circuit Court of Appeals. In a bold December 2005 opinion, Luttig—one of the most conservative judges in the federal judiciary who favored broad executive power—accused the administration of manipulating the judicial system to avoid giving the Supreme Court the opportunity to review his own opinion, one that had been made based on an earlier set of facts about Padilla's attempt to plot an attack on U.S. soil.[273] In an attempt to get the case to the Supreme Court for it to review the faulty precedent it had unknowingly set, the Fourth Circuit Court of Appeals refused to authorize Padilla's transfer from the military brig to civilian custody, despite the fact that this transfer was supported by Padilla's lawyer as well as the government. This measure was overruled by the Supreme Court. In April 2006, the Supreme Court declined to hear Padilla's case contesting his enemy combatant designation, considering it moot since he was no longer being held as an enemy combatant. This left the Fourth Circuit Court's ruling that the president had the authority to designate as enemy combatants American citizens captured in the U.S. as precedent, just as Luttig had feared.[274]

Hamdan v. Rumsfeld

The 2006 *Hamdan v. Rumsfeld* case concerned the administration's use of military commissions to try terrorist suspects. Salim Ahmed Hamdan, who had been Osama bin Laden's driver, was captured by Afghan forces in November 2001 and eventually detained at

[272] Ibid.
[273] Ibid.
[274] Ibid., 201.

Guantánamo Bay. Though Hamdan maintained he had only worked for bin Laden and was not a terrorist, the administration accused him of being a member of al Qaeda and decided he would be one of the first prisoners to be tried by the new military commission system for conspiring to commit terrorist acts.[275] Before the commission could begin, Hamdan's lawyers filed a lawsuit against the government claiming that Bush did not have the power to establish a military commission system without Congressional approval nor did he have the power to disregard the Geneva Conventions in the conflict in Afghanistan.[276]

In its Supreme Court brief, the government argued that Congress authorized the use of military commissions in the conflict with al Qaeda in both the Detainee Treatment Act as well as the AUMF.[277] Even if Congress had not made these authorizations, the government argued, the president still held the inherent authority to establish military commissions. "When the Constitution was written and ratified, it was well recognized that one of the powers inherent in military command was the authority to institute tribunals for punishing enemy violations of the law of war," the government claimed.[278]

In June 2006, the Court ruled that Bush had neither the constitutional authority nor the authorization by Congress to establish the military commissions to try cases in the war on terror, and therefore the military commission system could not be used to try detainees.[279] The Court settled the question of jurisdiction by establishing that the 2005 Detainee Treatment Act, which stripped federal courts of habeas jurisdiction over cases filed by Guantánamo detainees, did not apply to pending cases including the Hamdan case. In a five-three decision (newly-appointed

[275] Ibid., 195.
[276] Petition for Writ of Mandamus (Western District of Washington), 2004 in Greenberg and Dratel, *The Enemy Combatant Papers*, 401.
[277] Government's Brief to the Supreme Court, Hamdan v. Rumsfeld (2006) in Greenberg and Dratel, 530.
[278] Ibid., 533
[279] Hamdan v. Rumsfeld, 548 U.S. 557 (U.S. Supreme Court 2006).

Chief Justice John Roberts abstained because he had heard the case when he was on the appellate bench) written by Justice John Paul Stevens, the Court held that because the commissions were not authorized by Congress, they had to comply with U.S. law and the laws of war. Therefore, the Uniform Code of Military Justice and the Geneva Conventions (both of which the Court said were violated by the administration's commissions) were to be enforced. The court thus rejected the claims made by the administration's legal team that the Constitution gave the president some inherent power that allowed him to create the military commission. It also rejected the argument that the president is not bound by laws or international treaties in the fight against terrorism, and it established that the United States continued to be bound by Article Three of the Geneva Convention which guarantees fair trials to those captured in armed conflict and outlaws cruel treatment and torture of detainees.

Though the Court's ruling shut down the military commission trials, the justices made clear that they were not categorically illegal but rather that Bush did not have the authority to establish them. In his concurring opinion, Justice Stephen Breyer explained that the commissions were not prohibited if authorized by Congress. He wrote, "Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary."[280]

After the decision was handed down, Bush did just that. What resulted was the Military Commissions Act of 2006 (MCA), which authorized the trial of enemy combatants by military commission and stripped federal courts of jurisdiction to hear petitions for writs of habeas corpus (including pending cases) from noncitizen enemy combatant detainees.[281] In eliminating habeas

[280] Ibid.
[281] "Military Commissions Act of 2006," Pub. L. No. 109–366, § 948-949 (2006), https://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf.

corpus rights of enemy combatants, the law virtually reversed the court's ruling in *Rasul* and meant that hundreds of prisoners at Guantánamo would not be able to petition their detention. The MCA also identified enemy combatants as anyone who "engaged in hostilities or who has purposefully and materially supported hostilities against the United States."[282] With this definition, Congress gave the president the broad power to designate citizens as enemy combatants, even if they had no connection to al Qaeda or the Taliban. The MCA radically pared the power of the judiciary to check the president and embedded broad executive powers in statute. But just two years later, the constitutionality of this law would be challenged in *Boumediene v. Bush*.

Boumediene v. Bush

The Supreme Court's last Guantánamo case concerned habeas corpus rights of detainees and the legality of the Military Commissions Act. The Boumediene case consolidated the cases of six Algerian detainees who were legal residents of Bosnia and Herzegovina and captured by Bosnian police in October 2001 for suspicion of plotting to attack the U.S. embassy in Sarajevo.[283] The men were designated enemy combatants by the United States and held at Guantánamo. Lakhdar Boumediene, one of the detainees, petitioned for a writ of habeas corpus in 2004, which the district court denied on the basis that the detention facility was outside U.S. territory and not in the court's jurisdiction. However, after the Supreme Court ruled in *Rasul v. Bush* that habeas rights extend to detainees at Guantánamo, the petitioners gained new grounds. But in 2006, the Military Commissions Act passed by Congress barred federal courts from hearing habeas petitions from enemy combatants. In their second appeal, lawyers for the

[282] Ibid.
[283] Stout, David, "Justices Hear Arguments in Guantánamo Cases," *The New York Times*, accessed March 12, 2020, https://www.nytimes.com/2007/12/05/washington/05cnd-scotus.html.

detainees argued that the MCA did not pertain to their petitions, and in the case that it did, it violated the Suspension Clause of the Constitution. The Suspension Clause states: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[284]

In a five-four decision handed down in June 2008, the Supreme Court ruled that enemy combatants held at Guantánamo, both citizens and noncitizens, held the right to pursue habeas challenges to their detention. The decision states that the MCA violated the Suspension Clause and therefore unconstitutionally suspended the writ of habeas corpus for enemy combatants. The Court also found that the limited system of judicial review under the Detainee Treatment Act of 2005 was not an adequate substitute for a writ of habeas corpus.[285] In the majority opinion, Justice Anthony Kennedy warned that if the executive and legislative branches "have the power to switch the Constitution on or off at will" it would lead to a "regime in which Congress and the President, not this Court, say 'what the law is.'"[286]

The Court's decision in *Boumediene* confirmed combatants' right to challenge their detention in the courts and led to dozens of habeas corpus petitions. While the D.C. district court judges ruled in favor of many detainees, the rulings were overturned by conservative appeals court judges. These measures were described by *New York Times* reporter Linda Greenhouse as, "what at least from the outside looked like a systematic effort to 'clean up the mess' by rendering a potentially powerful rights-protecting decision toothless."[287] Though the Court in *Boumediene* claimed the right to review cases in theory, in practice lower courts ultimately rejected many

[284] U.S. Constitution, art. 1, sec. 9, cl. 2.
[285] Boumediene v. Bush, 553 U.S. 723 (U.S. Supreme Court 2008).
[286] Ibid.
[287] Linda Greenhouse, "An Old Battle Resumes at the Supreme Court," *The New York Times*, January 2, 2020, sec. Opinion, https://www.nytimes.com/2020/01/02/opinion/guantanamo-detention-supreme-court.html.

detainee cases.

The series of Guantánamo cases established a new body of law governing military detention in the war on terror and clarified the rights of enemy combatants detained in the conflict. The aforementioned cases represent the small number of habeas cases that reached the Supreme Court; many more went no further than circuit courts, meaning much of the law regarding detention came from lower courts.[288] Taken together, the cases highlight common arguments made by the government: that as commander in chief the president has vast inherent powers that cannot be hindered by the other branches, that Congress had authorized the president's actions but that he was not dependent on this authorization, and that the Court was overstepping its role by adjudicating these cases. Case after case, the justices pushed back against the administration's claims of exclusive control over enemy combatants and asserted the role of the judiciary in settling issues regarding detainees and maintaining the balance of power. While many of the cases represented only modest setbacks for the administration's policies—after all, in *Hamdi* the government retained the right to detain enemy combatants and in *Padilla* the administration won outright—the rulings signified a rebuke of the administration's claims of exclusive power over the matter. The Court asserted judicial power, establishing that issues surrounding enemy combatants were to be decided by the court and readjusting the balance of power, and in doing so affected the policies themselves.

The Role of Congress

In a concurring opinion in the 1952 Youngstown Steel case that contested the president's conduct during the Korean War, which Congress had not authorized, Justice Robert Jackson

[288] "Guantanamo Litigation - History."

recognized presidential power not to be static, but rather changing in accordance with the other branches of government, and particularly in its relationship with Congress. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress," he wrote.[289] Jackson's message received renewed attention during the Bush era as it offered a framework to understand the relationship between Bush and Congress during the war on terror. In his concurring opinion, Jackson developed a taxonomy for evaluating the constitutionality of a president's actions, which were dependent on congressional support. He wrote that presidents should seek congressional approval whenever possible to keep government under the law and that a president's authority was at the maximum when he or she acts "pursuant to an express of implied authorization of Congress."[290] The second category is "a zone of twilight" where Congress neither grants nor denies authority to an action taken by the president. In this zone of twilight, the president can only rely upon his or her own powers. The third category is where the president's actions are at odds with the will of Congress. In this area, the president's power is "at its lowest ebb," Jackson said, and claims of executive authority "must be scrutinized with caution."[291] In several notable occasions, Bush worked in the second and third categories that Jackson laid out, working without Congressional approval or, later in his administration, working against the will of Congress to advance his enemy combatant policies. Observers at the time were struck by the unyielding powers the administration claimed. In 2006 the *New York Times*

[289] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[290] Ibid.
[291] Ibid.

editorial board wrote, "the system of checks and balances is a safety net that doesn't feel particularly sturdy at present. The administration seems determined to cut off legitimate court scrutiny, and the Republicans who dominate the House and Senate generally intervene only to change the rules so Mr. Bush can do whatever he wants."[292]

The response to the September 11 attacks and the fear and uncertainty it produced allowed for a strong executive and for legislators to grant the executive additional powers to protect the country. After all, in times of crisis, both lawmakers and the general public historically have looked, as they did in 2001, to a strong, central leader.[293] While the crisis that unfolded on September 11 made it evident that a strong president was important, it also made apparent that Congress continued to have a role to play.

The development and implementation of enemy combatant policy, like much of the government's action in the war on terror, was led by the executive branch, which often bypassed Congress to pursue its agenda. Through executive orders and national security directives, Bush unilaterally created agencies like the Office of Homeland Security, froze assets of U.S. banks with possible links to al Qaeda, developed the infrastructure to detain and interrogate combatants, and established military tribunals to try suspected terrorists.[294] The Bush administration not only made sweeping claims of its constitutional powers, but it also claimed that Congress did not have the power to limit the president in matters related to war. In a secret opinion referenced in Chapter Two written weeks after the September 11 attacks that was not made public until years later, Deputy Assistant Attorney General in the OLC John Yoo wrote

[292] "A Stumble a Day ...," *The New York Times*, March 15, 2006, sec. Editorial, https://www.nytimes.com/2006/03/15/opinion/a-stumble-a-day.html.
[293] Savage, *Takeover*, 311.
[294] William G. Howell and Jon C. Pevehouse, *While Dangers Gather: Congressional Checks on Presidential War Powers* (Princeton: Princeton University Press, 2007), 228.

that though Congress had recognized (with the AUMF) that the president could take action against the terrorist threat, it could not "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. These decisions, under our Constitution, are for the President alone to make."[295] In other words, the president did not really need Congressional approval for its war efforts. In a March 2002 memo, Yoo re-emphasized this point, linking the president's inherent authority to its enemy combatant policy: "As the President possess the Commander-in-Chief and Executive powers alone, Congress cannot constitutionally restrict or regulate the President's decision to commence hostilities or to direct the military, once engaged. This would include not just battlefield tactics, but also the disposition of captured enemy combatants."[296] According to Yoo, Congress could not challenge the president's conduct of war or decisions regarding detained enemy combatants.

Observers of the administration, like Benjamin Wittes, found that it considered going to Congress as "implicit acknowledgment that it lacked the inherent power to do what it needed, as an acknowledgment that it had to ask for permission."[297] Much like the argument Truman made in the 1950s to avoid asking Congress for approval to enter into war in Korea, Bush and his legal circle believed that asking Congress for approval for wartime actions was an admission that the president needed Congressional authority in the zone of warfare. In my interview with Wittes, he explained that this was his biggest criticism of the administration. "They confused doing it with doing it on their own. You know, it was not enough for them to have a robust interrogation

[295] John C. Yoo to the Deputy Counsel to the President, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them" (official memorandum: Office of Legal Counsel, U.S. Department of Justice, September 25, 2001).
[296] Yoo, "Military Interrogation of Alien Unlawful Combatants Held Outside the United States."
[297] Wittes, *Law and the Long War*, 52.

capacity, robust intelligence capacity, robust detention capacity, a new trial regime. They had to do all this. It wasn't a win unless they did it without Congress. And that was very foolish," he said.[298] Further, the administration claimed that it could disregard statute, like the Uniform Code of Military Justice, and treaties, like the Geneva Conventions.[299] In their landmark Harvard Law Review article, David Barron and Martin Lederman find that these claims are part of a historical trend in the relationship between Congress and presidents during war. They argue that like other presidents since World War I, Bush "extended his assertion of preclusive powers beyond contexts involving the actual conduct of hostilities to others relating to the organization and use of the armed forces and intelligence agencies."[300] The previously mentioned March 2002 OLC memo exemplifies this claim of preclusive powers extending beyond the conduct of war.

Conversely, Congress did little to monitor and oversee the actions of the Bush administration. Journalist Susan Milligan found that during the 108th Congress, in 2003 to 2004, there were 37 hearings described as "oversight" compared to 135 hearings between 1993 and 1994, the last year of the Clinton administration when the party in both chambers of Congress was the same as the one in the White House.[301] And whereas in the mid-1990s, Congress took 140 hours of sworn testimony on whether Clinton used the White House Christmas card list to find potential donors, between 2004 and 2005 House Republicans took 12 hours of testimony on the Abu Ghraib prison torture scandal.[302]

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[298] Benjamin Wittes, interview by Rohini Kurup, January 9, 2020.
[299] David F. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding," *Harvard Law Review* 121, no. 3 (January 2008): 1095, https://harvardlawreview.org/2008/01/the-commander-in-chief-at-the-lowest-ebb-ae-framing-the-problem-doctrine-and-original-understanding/.
[300] Ibid., 1096.
[301] Susan Milligan, "Congress Reduces Its Oversight Role," *The Boston Globe*, November 20, 2005, http://archive.boston.com/news/nation/washington/articles/2005/11/20/congress_reduces_its_oversight_role/?page=full.
[302] Ibid.

When the president did consult Congress, Congress showed deference to the administration. This was in part because of the partisan composition of Congress.[303] From 2001 to 2007, the president and both chambers of Congress were controlled by the Republican party, except for a brief period when the Senate switched to Democratic control. This allowed them to easily have the votes to support the president's agenda and limit oversight. But this single-party hold does not fully explain the deference of Congress to the presidency. After all, just a decade earlier when Democrats held the White House and Congress, members of Congress pushed back against Clinton's major healthcare agenda.[304] But after September 11, fear and war led legislators to cede power to the president to protect the nation, and in the following years, Congress was largely supportive of the administration's agenda in the war on terror, including Bush's detention and treatment of enemy combatants, and it willingly yielded vast authority to the White House. Its Authorization for the Use of Military Force, passed by every member of Congress but one, gave the president the broad authority to "use all necessary and appropriate force" against those responsible for the September 11 attacks and the Patriot Act, which passed with an overwhelmingly bipartisan vote, significantly enhanced law enforcement and intelligence capabilities. In 2006, at the administration's request, Congress passed the Detainee Treatment Act to effectively reverse the Supreme Court's *Rasul* decision and took a similar measure again the following year when it passed the Military Commissions Act, which essentially eliminated the Supreme Court's ability to check the president's power in its treatment of enemy combatants. Congress was thus largely supportive of the president's agenda when it was asked to get involved. Republican members were both politically and ideologically inclined to support the

[303] Howell and Pevehouse, *While Dangers Gather*, 229.
[304] Savage, *Takeover*, 312.

administration and Democratic members were fearful of being viewed as soft on terror.[305]

One area where Congress challenged the president was on the topic of torture. In July 2005, Senator John McCain introduced an amendment to the annual defense appropriations bill that established that military interrogators could not go beyond the limits of the Army Field Manual (created to comply with the Geneva Conventions) in their treatment and interrogation of detainees regardless of what their superiors tell them.[306] It also banned the use of "cruel, inhuman or degrading treatment or punishment" by anyone, including CIA agents, on anyone in U.S. government custody anywhere in the world.[307] The measure shocked the White House and Cheney personally went to Congress to lobby against the legislation. In October, the White House threatened that Bush would use his first veto against the bill, warning that it would interfere with the president's ability to carry out the war on terror.[308] But in an unusual bipartisan rebuke to the administration, the Senate voted 90 to 9 to approve the amendment. After a 308 to 122 vote in the House, despite persistent efforts to negotiate with McCain, the White House announced in December that it would accept the torture ban.[309] Bush invited McCain and to the oval office to publically acknowledge his victory. “Senator McCain has been a leader to make sure that the United States of America upholds the values of America as we fight and win this war on terror. And we've been happy to work with him to achieve a common objective, and that is to make it clear to the world that this government does not torture and that we adhere to the international Convention of Torture, whether it be here at home or abroad,” Bush told reporters.[310]

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[305] Wittes, *Law and the Long War*, 57.
[306] Savage, *Takeover*, 220.
[307] Ibid.
[308] Ibid., 221.
[309] Ibid.
[310] Ibid.

But hours after Bush signed the law to ban torture and other cruel treatment of prisoners, the White House quietly released a statement entered into the *Federal Register*. This signing statement—a statement issued by the president upon singing a bill to indicate his or her interpretation of the law—instructed military interrogators and the CIA on how to interpret the torture ban: "The executive branch shall construe [the ban] in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief…which will assist in achieving the shared objective of the Congress and the President…of protecting the American people from further terrorist attacks."[311] In issuing this signing statement, Bush tacitly claimed that despite the law, he still had the authority to authorize torture when he saw fit.

This was not the first time Bush, or any president for that matter, had used a signing statement to instruct the executive branch on how to interpret or carry out a law, but what distinguished Bush from his predecessors was the frequency with which he used signing statements. Signing statements date back to the Monroe presidency but were used infrequently until the mid-1980s during the Reagan administration when then-Attorney General Edwin Meese decided that they could be used to increase the president's power.[312] By the fifth year of his presidency, Bush had issued signing statements on over 750 statutes, compared to 140 issued by Clinton over his eight years as president and 232 issued by George H.W. Bush over his four-year term. While signing statements can be used to clarify a president's intent or serve as commentary

[311] George W. Bush, "President's Statement on Signing of H.R. 2863, the 'Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006,'" George W. Bush White House Archives, December 30, 2005, https://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051230-8.html.
[312] Christopher S. Kelley and Bryan W. Marshall, "Going It Alone: The Politics of Signing Statements from Reagan to Bush II," *Social Science Quarterly* 91, no. 1 (2010): 172; Charlie Savage, "Bush Challenges Hundreds of Laws," *Boston.Com*, April 30, 2006, http://archive.boston.com/news/nation/washington/articles/2006/04/30/bush_challenges_hundreds_of_laws/.

on legislation, historian Louis Fisher contends that signing statements, "encourage the belief that the law is not what Congress places in a bill but what Presidents say about the language."[313]

Journalist Charlie Savage, who when working at *The Boston Globe* uncovered Bush's use of signing statements, found that in the statements, "Bush has repeatedly asserted that the Constitution gives him the right to ignore numerous sections of the bills—sometimes including provisions that were the subject of negotiations with Congress in order to get lawmakers to pass the bill. He has appended such statements to more than one of every 10 bills he has signed."[314]

Bush had also effectively abandoned his veto power, not vetoing a single bill until the sixth year of his presidency and instead using signing statements to set aside statues that conflicted with his interpretation of the Constitution, without giving Congress the opportunity to override a veto. Many of the laws Bush issued signing statements for, like the torture ban, involved the conduct of military or intelligence agencies in the war in terror. He cited his role as commander in chief in statements on military matters to declare that he could ignore Congressional legislation and invoked the Unitary Executive Theory to assert control over the executive branch despite Congressional direction.[315]

The 2006 midterm elections were a turning point in the relationship between Bush and Congress. Democrats won control of both the House and the Senate for the first time in 12 years, feeding off a national dissatisfaction with Bush, primarily with the war in Iraq and the mishandling of Hurricane Katrina. Soon after their victory, members of the Democratic Party pledged that Congress would no longer serve as a rubber stamp for the president and announced

[313] Louis Fisher, "Restoring the Rule of Law," Senate Judiciary Committee (2008), 9.
[314] Savage, "Bush Challenges Hundreds of Laws."
[315] Ibid.

their intention to reestablish the legislative branch as a check on the president.[316] With the new Congress came increased oversight of the executive branch and a flurry of bills introduced to regulate the president's conduct in the war on terror, including bills to restore habeas corpus rights for enemy combatants and to tighten the definition of enemy combatants.[317] But the bills had little chance of becoming law. The threat of veto and the slim Democratic majority in the Senate that made overriding a veto unlikely meant that many of the expansions of presidential power that previous Congresses had allowed would remain in statute. Yet, that Bush vetoed bills represented a shift in the administration's approach to presidential power. Instead of issuing a signing statement to be the final word, a veto allowed Congress the possibility to override, working within the system of checks and balances as the Framers intended.

Congress posed few challenges to the administration's enemy combatant policies. It was rarely part of the policy making, as the administration asserted that the president's inherent powers allowed him to take action without the approval or statutory backing of Congress. And its lack of oversight and deference to the president's agenda when it was consulted meant that the administration was able to work with and around Congress to advance its enemy combatant policies. Instead, challenges to the Bush administration came primarily through the courts, which rejected several of the administration's policies in its detention and treatment of enemy combatants. The Supreme Court pushed back against the administration's claims of exclusive authority over enemy combatants and affirmed the rights of enemy combatants and the role of the courts in carrying out judicial review.

Soon, another election was underway—this time for the presidency. After two terms of

[316] David Stout, "Senate Democrats Choose Leaders for Next Congress," *The New York Times*, November 14, 2006, https://www.nytimes.com/2006/11/14/washington/14cnd-dems.html.
[317] Savage, *Takeover*, 324.

the Bush presidency, many were ready for a clearer return to checks and balances and a more reined in president. One person in particular was then-Senator Barack Obama. "The biggest problems we're facing right now have to do with George Bush trying to bring more and more power into the executive branch, and not go through Congress at all," Obama said in early 2008. "That's what I intend to reverse when I'm president of the United States of America."[318] Eight years later, many would criticize Obama for failing to live up to this promise to reverse Bush's extraordinary seizure of executive power and instead making the executive branch as strong as ever by continuing many of his predecessor's national security policies.

[318] Editorial Board, "Perils of Presidential Power," *Chicago Tribune*, August 30, 2016, sec. Opinion, Editorials, https://www.chicagotribune.com/opinion/editorials/ct-presidential-power-obama-bush-clinton-reagan-edit-0831-jm-20160830-story.html.

Chapter 5: Conclusion

In its editorial on September 12, 2001, *The New York Times* described the tragic events of the previous day: "It was, in fact, one of those moments in which history splits, and we define the world as 'before' and 'after.' We look back at sunrise yesterday through pillars of smoke and dust, down streets snowed under with the atomized debris of the skyline, and we understand that everything has changed."[319] The September 11, 2001, attack on the United States did change everything. It shocked and horrified the nation, impacted countless lives, and permanently changed American ideas of security and safety. It also allowed for a shift in the balance of power between the branches of government when the Bush administration appealed to wartime powers and constitutional authority in its response to the crisis.

Reporter Charlie Savage claims that there are two main strands of criticism of the Bush administration's counterterrorism policies.[320] The first is the civil liberties critique—that the policies violated civil liberties and that the government should not have the power to take certain actions such as detaining citizens indefinitely or torturing suspected terrorists. The second is the rule of law critique, which is less about the policies themselves and more the underlying legal framework to criticize the president for unlawfully bypassing statute and treaties to strengthen the executive branch. This paper dealt primarily with the latter to consider the theories of presidential power and legal framework that allowed for the Bush administration's creation of enemy combatant policy.

I have argued that the Bush administration's broad understanding of executive power

[319] "The War Against America; An Unfathomable Attack," *The New York Times*, September 12, 2001, sec. Editorial, https://www.nytimes.com/2001/09/12/opinion/the-war-against-america-an-unfathomable-attack.html.
[320] Charlie Savage, *Power Wars: The Relentless Rise of Presidential Authority and Secrecy*, Revised edition (New York: Back Bay Books, 2017), 47.

founded in claims of inherent presidential power led to the designation of captured terrorist suspects as enemy combatants. It was this claim to inherent power that led the administration to assert that the president had the exclusive constitutional authority to detain citizens and non-citizens indefinitely without trial, to deny these detainees the protections of the Geneva Conventions, and to unilaterally create a military commissions system to try the suspects. And it was this claim to inherent power that led the administration to argue that neither Congress nor the courts had authority over these policies, thereby subverting checks on presidential power. This served to destabilize the separation and balance of powers, and it ultimately undermined the rule of law. Challenges to the enemy combatant policies, primarily through the courts, invalidated some of the administration's claims of inherent power and dismantled some of its policies, and reintroduced a role for Congress and the judiciary in national security policy.

Members of the Bush administration likened Bush's use of executive power to that of previous wartime presidents, noting that Lincoln, for example, took unilateral action to preserve the Union.[321] But this comparison is faulty and ignores the most radical aspect of the Bush administration's claims of presidential power, which this study is based on: the claims that the powers were inherent. After Lincoln took executive action at the start of the Civil War when Congress was out of session, he recognized that his actions were outside of the constitutionally prescribed powers of the president and asked Congress to retroactively endorse his actions.[322] Bush and his legal advisors, meanwhile, argued that the president had inherent powers to take actions to protect the nation from the threat of terrorism, such as creating military commissions or

[321] Julie L. Novkov, "The Dangerous Fantasy of Lincoln: Framing Executive Power as Presidential Mastery," *Maryland Law Review*, 2013, 63, https://doi.org/10.2139/ssrn.2221107; Deborah Solomon, "Power of Attorney," *The New York Times*, December 29, 2009, sec. Magazine, https://www.nytimes.com/2010/01/03/magazine/03fob-q4-t.html.
[322] Louis Fisher, "The Unitary Executive and Inherent Executive Power," *U. Pa. J. Const. L.* 12 (2009): 586–87.

designating prisoners as enemy combatants, and relied on an aggressive reading of the Unitary Executive Theory to claim vast executive power that could not be restrained by Congress or the courts, thereby radically shifting the balance of power. As Louis Fisher explained, "Presidents who claim inherent powers move a nation from one of limited powers to boundless and ill-defined authority, undermining the doctrine of separated powers and the system of checks and balances."[323]

It is worth reflecting upon the significance of how the Bush administration's expansive theory of executive power yielded its enemy combatant policies and considering what alternative courses of action the president could, and should, have taken. A primary finding of this paper is that by claiming executive authority over the detention and treatment of enemy combatants, the Bush administration undermined the separation of powers and sidelined the other branches of government. A preferable and realistic alternative course of action after September 11 would be if Bush had received congressional support for the actions he wanted to take. As described in Chapter Four, Congress was very willing to support the administration, particularly in the direct aftermath of the attacks, and would likely have supported these very policies had Bush made an appeal to it. As Benjamin Wittes describes, "Had the administration gone to Congress and asked for its help in writing a long-term architecture for the conflict, it would surely have found a partner for the project."[324] Granted, the Bush administration did work with Congress to get the 2001 AUMF which served as the backing for much of the action taken against enemy combatants, as well as for the Patriot Act, the Intelligence Reform Act, and the creation of the Department of Homeland Security. However, it initially acted unilaterally to create military commissions and develop an interrogation program—two essential aspects of its enemy combatant policy, as well as creating a warrantless surveillance apparatus. If Bush had worked with Congress to get statutory authority

[323] Fisher, 589.
[324] Wittes, *Law and the Long War*, 57–58.

on those issues or others in the realm of enemy combatant policy, he would have been able to place those policies on a more solid legal footing and perhaps face fewer challenges from the courts. In this scenario, it is not necessarily the policies themselves that would change (though perhaps by including Congress in the decision making, the policies would have taken a different shape) but rather the manner in which they were created and the legal backing for them.

But that, of course, ignores the civil liberties implications of the enemy combatant policy, which look beyond whether Bush had the authority to unilaterally make decisions about the detention and treatment of enemy combatants to ask whether the policy outcomes were consistent with constitutional principles and individual liberty. And beyond that, whether the policies were moral. These questions deserve much broader consideration than can be provided here, but a 2004 statement by Anthony Romero, executive director of the American Civil Liberties Union, on executive power after September 11, highlights the continued importance of civil liberties in U.S. national security policy:

> Pursuing security at the expense of freedom is a dangerous and self-defeating proposition for a democracy. This is especially true in time of war when zealous government officials often attempt to accumulate unchecked powers under the guise of national security. The danger is most apparent in the expansive assertion of new executive powers at the expense of individual liberty. The threat is also apparent in the arbitrary, unequal and unconstitutional treatment of hundreds of immigrants detained after 9-11, and in the shameful indefinite detention of hundreds of foreigners at Guantánamo Bay. The debate over the proper balance between liberty and security goes to the heart of who we are as a nation, where we come from, and where we are headed…For the past two and a half years, our country has been struggling with the challenge of protecting us from a new kind of enemy—a loose, far-flung network of terrorist organizations whose threat will extend for the foreseeable future. Precisely because we expect the terrorist threat to be with us for a long time, we must take extra precaution to safeguard our liberties. What are we fighting for if not the values of freedom, liberty, equality, and tolerance?[325]

It is also worth considering what the policies would have looked like with a different theory

[325] Anthony Romero, "Civil Liberties and Human Rights Implication of Government's Post-9/11 Policies" (National Press Club "Newsmaker" Luncheon, Washington, D.C., March 9, 2004), https://www.aclu.org/other/civil-liberties-and-human-rights-implications-governments-post-911-policies.

of presidential power—how, if at all, would the counterterrorism response to the September 11 attacks look with a president who did not ascribe to theories of vast inherent presidential power? The policies and practices of the Obama administration serve as an imperfect but worthwhile proxy for understanding whether a different theory of power would produce a different policy outcome.

As a presidential candidate, Barack Obama positioned himself as starkly different from Bush and campaigned on the promise of change. He was critical of the government's policies in the years after 9/11 and its conduct in the war on terror. But importantly, his critique of Bush largely centered on rule of law concerns and correcting abuses of executive overreach and less so on civil liberties. In a survey of presidential candidates' views on executive power conducted by Savage, then at *The Boston Globe,* Obama criticized Bush's counterterrorism actions but focused on the ways in which he acted outside the legal framework of the Constitution rather than the substance of the policies themselves. He rejected the Bush administration's claim that "the President has plenary authority under the Constitution to detain U.S. citizens without charges as unlawful enemy combatants" and claimed that it would be "illegal and unwise" for a president to disregard international human rights treaties, explaining, "the Commander-in-Chief power does not allow the President to defy those treaties."[326] In doing so, he signaled a different theory of presidential powers, one based not in inherent powers, but rather more firmly in the rule of law.

Less than two months after taking office, the Obama administration announced that it would no longer classify prisoners in the war on terror as enemy combatants. In a press release issued on March 13, 2009, the Justice Department formally withdrew the enemy combatant definition for Guantánamo detainees. Its statement read like a direct rebuke of the Bush administration's policies and theoretical underpinnings: "The Department of Justice submitted a

[326] Charlie Savage, "Barack Obama's Q&A," *The Boston Globe*, December 20, 2007, http://archive.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/.

new standard for the government's authority to hold detainees at the Guantanamo Bay Detention Facility. The definition does not rely on the President's authority as Commander-in-Chief independent of Congress's specific authorization. It draws on the international laws of war to inform the statutory authority conferred by Congress. It provides that individuals who supported al Qaeda or the Taliban are detainable only if the support was substantial. And it does not employ the phrase 'enemy combatant.'"[327] The shift in theory and legal reasoning was evident; in a turn away from the Bush administration, the Obama administration signaled that it would not base its claim of authority to detain suspected terrorists in the president's Article II authority as commander-in-chief. Instead, the statement explained that the administration had the statutory authority to hold detainees at Guantánamo: "In its filing today, the government bases its authority to hold detainees at Guantanamo on the Authorization for the Use of Military Force, which Congress passed in September 2001…the government's new standard relies on the international laws of war to inform the scope of the president's authority under this statute, and makes clear that the government does not claim authority to hold persons based on insignificant or insubstantial support of al Qaeda or the Taliban."[328]

This policy was different from Bush's in a few ways. First, as the statement mentioned, the administration dropped the enemy combatant term, which on its own did not carry legal significance and thus did not change the legal status of the prisoners. Second, again, the administration abandoned the Article II argument that the president had the inherent authority to detain enemy fighters. And third, whereas the Bush legal team interpreted the AUMF to give the president the authority to detain those who "support" terrorist groups, the Obama lawyers required

[327] "Department of Justice Withdraws Enemy Combatant Definition for Guantanamo Detainees," March 13, 2009, https://www.justice.gov/opa/pr/department-justice-withdraws-enemy-combatant-definition-guantanamo-detainees.
[328] Ibid.

that detainees had to "substantially support" al Qaeda, the Taliban, or associated groups. But these changes were not substantively very different from that of the Bush administration. While the terminology was changed, the statement did not rule out indefinite military detentions for suspected terrorists. In other words, the argument was different but the practice was the same. Steven A. Engel, a senior lawyer responsible for detainee issues in the Office of Legal Counsel during the Bush administration, told *The New York Times* that the policy "seems fundamentally consistent with the positions of the prior administration."[329]

This new policy for detainees was instead largely symbolic and was, in many ways, a continuation of Bush's enemy combatant policy. The same could be said of several other shifts Obama made from Bush's counterterrorism policies, which, to the dismay of civil liberties advocates, continued many of the policies from the Bush era. Obama continued Bush's policy of extraordinary rendition and the use of military commissions to try detainees (after temporarily stopping the process). And in other areas, Obama extended beyond Bush; his employment of targeted killing and expansion of the warrantless surveillance program, for example, was met with criticism by many. But perhaps most prominently, Obama failed to close the prison at Guantánamo Bay, which had been a major promise of his campaign. By the time Obama took office, the Bush administration had already transferred or released over 500 detainees out of Guantánamo and 240 remained.[330] On his second day in office, Obama ordered the prison at Guantánamo Bay to be closed within a year in order to "restore the standards of due process and the core constitutional values that have made this country great even in the midst of war, even in dealing with

[329] William Glaberson, "U.S. Won't Label Terror Suspects as 'Combatants,'" *The New York Times*, March 13, 2009, sec. U.S., https://www.nytimes.com/2009/03/14/us/politics/14gitmo.html.
[330] Connie Bruck, "Why Obama Has Failed to Close Guantánamo," *The New Yorker*, July 25, 2016, https://www.newyorker.com/magazine/2016/08/01/why-obama-has-failed-to-close-guantanamo.

terrorism."[331] Despite early bipartisan support for the prison's closing, Obama's efforts soon faced resistance when it became clear that closing Guantánamo would mean moving detainees to the United States, and for years, Congress blocked efforts by the administration to close the facility. In March 2011, realizing that closing Guantánamo would be virtually impossible due to Congressional opposition, Obama issued an executive order that permitted the indefinite detention of Guantánamo detainees and established a periodic review process.[332] While this allowed for more frequent review of detainees' cases, it institutionalized the system for the indefinite detention of prisoners at Guantánamo.[333] When Obama left office, 41 prisoners remained at Guantánamo. As noted in Chapter Three, many of the remaining prisoners will likely stay at Guantánamo for the rest of their lives; these so-called "forever prisoners" are considered too dangerous for release but the government has too little admissible evidence (much of the evidence was obtained through torture in CIA black sites) to bring them to trial.[334] Even those who are to be brought to trial have faced a slow process. The trial of five men accused of having planned the September 11 attacks, for example, has been set for next year, nearly 20 years after the attacks. This delay is due to lengthy pretrial proceedings, infrequent hearings, and additional complexities that arose from the government's decision to seek the death penalty.[335]

Obama's inability to close Guantánamo shows the complexity of the separation of powers issue and exposes an irony of my argument that Bush should have consulted Congress because it

[331] David Wagner, "Obama's Failed Promise to Close Gitmo: A Timeline," *The Atlantic*, January 28, 2013, https://www.theatlantic.com/international/archive/2013/01/obama-closing-guantanamo-timeline/318980/.
[332] Exec. Order 13567, Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, (March 7, 2011).
[333] Peter Finn and Anne E. Kornblut, "Obama Creates Indefinite Detention System for Prisoners at Guantanamo Bay," *The Washington Post*, March 7, 2011, sec. World, https://www.washingtonpost.com/world/obama-creates-indefinite-detention-system-for-prisoners-at-guantanamo-bay/2011/03/07/ABbhqzO_story.html.
[334] Sacha Pfeiffer, "A Legacy of Torture Is Preventing Trials At Guantánamo," NPR, November 14, 2019, https://www.npr.org/2019/11/14/778944195/a-legacy-of-torture-is-preventing-trials-at-guant-namo.
[335] Carol Rosenberg, "The 9/11 Trial: Why Is It Taking So Long?," *The New York Times*, April 17, 2020, sec. U.S., https://www.nytimes.com/2020/04/17/us/politics/911-trial-guantanamo.html.

is precisely congressional inaction that let Guantánamo remain open. For Obama to have closed Guantánamo given the Congress he had, he would have had to use unilateral power. Had Obama taken more executive action on the issue of Guantánamo, the prison may have closed but the rule of law would be threatened. The situation is a reminder that consulting Congress does not necessarily produce a more favorable policy decision or one more in line with civil liberties, but this exceptional case nonetheless indicates the importance of Congress's role in national security policy.

Differences between the Bush and Obama administrations in the classification and treatment of those captured in the war on terror, while often symbolic, are not insignificant. Jack Goldsmith, former head of the Office of Legal Counsel under Bush, claims, "almost all of the Obama changes have been at the level of packaging, argumentation, symbol, and rhetoric."[336] Yet Goldsmith explains that by abandoning the Bush administration's argument that the president had the constitutional authority to detain enemy soldiers without Congressional support (but not rejecting it), the Obama administration gained favorable press coverage for departing from Bush's position. While some see this as a move to save face, Goldsmith suggests that it allowed the policy outcomes—that is, the detention of enemy fighters—to gain legitimacy. "The president simply cannot exercise these powers over an indefinite period unless Congress and the courts support him. And they will not support him unless they think he is exercising his powers responsibly, under law, with real constraints, to address a real threat," Goldsmith wrote. "The Obama strategy can thus be seen as an attempt to make the core Bush approach to terrorism politically and legally more palatable, and thus sustainable."[337] The changes to enemy combatant policy show one of many

[336] Jack Goldsmith, "The Cheney Fallacy," *The New Republic*, May 18, 2009, https://newrepublic.com/article/62742/the-cheney-fallacy.
[337] Ibid.

attempts made by the Obama administration to legalize and normalize what Bush created largely through executive power alone, suggesting a focus of the administration on the rule of law. By legalizing and normalizing these national security tools, Obama legitimized and actually strengthened executive power. In my interview with Martin Lederman, former deputy assistant attorney general in the OLC under Obama, he explained what he saw as the difference between the Obama and Bush administration's approach to executive power: "One really huge contrast between Bush and Obama was…Obama was mostly, although there are a couple of exceptions, committed to idea of: 'first of all, I am going to exercise statutory powers over constitutional powers, but more than that, even when I abide by constitutional powers, I am going to abide by statutory limits.'"[338] The practices of the Obama administration through the lens of enemy combatant policy suggest that a different theory of presidential power may not have changed the substance of the policies of the Bush administration. Yet, this study suggests that a conception of presidential power that did not ascribe to a broad theory of inherent presidential authority could have placed the policies on stronger legal grounds, which in fact would have further entrenched the policies.

Obama also acted like Bush in some of his claims to presidential war power. Obama faced widespread criticism for pursuing U.S. intervention in Libya in 2011 without congressional authorization, which many considered an overreach of executive power and a violation of the 1973 War Powers Act. The Act states that if a president does not get congressional authorization within 60 days of military action, he or she must halt the operations within 30 days. After failing to attain congressional approval, the administration continued its air war against Libyan armed forces by claiming its actions fell outside the War Powers restrictions because no troops were on the ground

[338] Lederman, interview.

and there was no sustained fighting. An OLC memo signed in April 2011 claimed that the president had the constitutional authority as commander in chief to direct military action in Libya because "he could reasonably determine that such use of force was in the national interest"—an argument evocative of Theodore Roosevelt's stewardship theory. [339] It also asserted that congressional approval was not necessary because of the limited nature of the operations.[340] This claim of constitutional authority based on the president's commander in chief powers was strongly reminiscent of those made by the Bush administration.

The Obama administration's war power claims for the Libya conflict were paralleled in the Trump administration's claims for airstrikes against Syria seven years later. An April 2018 OLC memo used the same framework that the OLC under Obama used to conclude the airstrikes in Libya were constitutional. It argued that the president "could lawfully direct airstrikes on facilities associated with Syria's chemical- weapons capability because he had reasonably determined that the use of force would be in the national interest" and because the hostilities were not at the "level of war in the constitutional sense."[341] The Trump administration made a similar argument as the Obama administration that only "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period" constitute wars that warrant congressional authorization.[342] This framework allows for a wide range of military force that would be permitted without congressional approval. As Curtis Bradley and Jack Goldsmith write in *Lawfare,* modern presidents rely largely on tools like drones and manned airstrikes that allow for military action from a distance. For these now-ubiquitous military

[339] Caroline D. Krass. to the Attorney General, "Authority to Use Military Force in Libya**,**" (Official memorandum: Office of Legal Counsel, U.S. Department of Justice, April 1, 2011).
[340] Ibid.
[341] Steven A. Engel. to the Counsel for the President, "April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities," (Official memorandum: Office of Legal Counsel, U.S. Department of Justice, May 31, 2018).
[342] Ibid.

actions, the administration's framework sidelines Congress.

As a candidate for the presidency, Donald Trump promised to reverse Obama's counterterrorism decisions. Whereas Obama had attempted to close the military prison at Guantánamo Bay and worked to decrease its population, Trump promised to keep the prison open and "load it up with some bad dudes," including U.S. citizens. And whereas Obama firmly held an anti-torture principle, Trump vowed to bring back waterboarding and other "enhanced interrogation" techniques from the Bush era.[343] A year into his presidency, Trump signed an executive order to signal his commitment to this shift away from Obama's counterterrorism policies; in January 2018, Trump ordered the prison at Guantánamo Bay to remain open (revoking Obama's executive order) and affirmed that additional enemy combatants could be detained there.[344]

As president, Trump has ascribed to a theory of absolute executive power. "I have an Article II, where I have the right to do whatever I want as president," Trump declared in 2019 in a statement reminiscent of Richard Nixon's interview with David Frost when he infamously said, "When a president does it, it means it's not illegal."[345] In April 2020, Trump declared, "When somebody's the president of the United States, the authority is total," claiming that as president, he, not state governors, had the power to decide when to lift social distancing rules put in place during the COVID-19 crisis.[346] Trump's rhetoric of executive power has shocked many. Even John

[343] Savage, *Power Wars*, xxvi.
[344] "President Donald J. Trump Protects America Through Lawful Detention of Terrorists," The White House, January 30, 2018, https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-protects-america-lawful-detention-terrorists/.
[345] Michael Brice-Saddler, "While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him 'the Right to Do Whatever I Want,'" *The Washington Post*, July 23, 2019, https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/.
[346] Charlie Savage, "Trump's Claim of Total Authority in Crisis Is Rejected Across Ideological Lines," *The New York Times*, April 14, 2020, sec. U.S., https://www.nytimes.com/2020/04/14/us/politics/trump-total-authority-claim.html.

Yoo, who established the legal framework for Bush's most extreme claims of executive power, expressed "grave concerns" with Trump's view of executive power early in his presidency. Yoo cited Trump's campaign promise to appoint justices to the Supreme Court to investigate his opponent Hillary Clinton, his plan to build a wall along the U.S. border with Mexico, and his "Muslim ban" as examples of "executive power run amok."[347]

Despite an apparent eagerness to revert to the national security policies of the years following the September 11 attack, including widespread detention at Guantánamo and the use torture techniques, as well as a penchant for vast executive powers, the Trump administration has not increased the Guantánamo population (it has not substantially decreased it either—only one detainee has been transferred out). One reason for this may be because bringing a new prisoner to Guantánamo could open the floodgates for challenges to the authorization for ongoing military presence in the Middle East. This issue is exemplified by the 2017 case of an unnamed American citizen captured in Syria while fighting for ISIS. The fighter, called John Doe, was being held incommunicado in Iraq without enough evidence to be brought to trial. While similar to the premise of the enemy combatant cases covered in Chapter Four, the Trump administration did not bring the prisoner to the United States or hold him at Guantánamo Bay. Doing so would have allowed the prisoner to bring a habeas petition to the courts, as established in *Rasul,* which could allow for judicial evaluation of whether he is detained legally, and thus whether the 2001 AUMF actually extends to the U.S. conflict with ISIS as the Obama and Trump administrations have claimed.[348] A ruling against the administration would undermine its justification for the use of

[347] John Yoo, "Executive Power Run Amok," *The New York Times*, February 6, 2017, sec. Opinion, https://www.nytimes.com/2017/02/06/opinion/executive-power-run-amok.html.
[348] Dana Priest, Devlin Barrett, and Matt Zapotosky, "Case of Suspected American ISIS Fighter Captured in Syria Vexes U.S.," *The Washington Post*, October 29, 2017, sec. National Security, https://www.washingtonpost.com/world/national-security/case-of-suspected-american-isis-fighter-captured-in-syria-vexes-us/2017/10/29/349c18ce-bca7-11e7-8444-a0d4f04b89eb_story.html.

force in Iraq and Syria.

Many critics have argued that Trump's rhetoric of inherent presidential power outpaces his exercise of power and that he has not followed with concrete action. The impetus for these claims of presidential power is different from most previous presidents. As journalist David Graham explained, "Past presidents have frequently tested the limits of their powers—and of the Constitution—on national security, war powers, and push-pull interactions with the legislature. But Trump seems to be pushing against the limits of his presidential power almost entirely to protect himself."[349] Graham argues that unlike claims of power made by Bush, Trump's claims of power arise not from emergency or necessity for public safety, but rather for personal reasons, such as protecting himself and his campaign from investigation.

Today, there are 40 detainees still held at Guantánamo Bay. The government has not classified any new prisoners as enemy combatants but continues to hold the remaining Guantánamo detainees indefinitely. While a group small in number, the prisoners represent the legacy of the enemy combatant policies nearly two decades after the September 11 attacks. They represent a novel legal system created after the attacks that allowed for citizens and noncitizens to be detained—at first without access to a lawyer or trial. They represent an extraordinary increase in executive power that was premised on the idea that the president is not bounded by statute or treaty, and was therefore effectively above the law. And they represent the challenges of ending the long war on terror. To prevent this period of enlarged presidential power from becoming an enduring fixture of the American system, it is incumbent on a future president or Congress to revise the legal framework established by the Bush administration, and built upon by the Obama and

[349] David A. Graham, "The Strangest Thing About Trump's Approach to Presidential Power," *The Atlantic*, June 7, 2018, https://www.theatlantic.com/politics/archive/2018/06/the-strangest-thing-about-trumps-approach-to-presidential-power/562271/.

Trump administrations, to reduce the powers of the president and swing the pendulum of power away from the presidency. Ultimately, this responsibility falls on voters too, who hold the ability to check presidential power by electing presidents who follow the rule of law and protect democratic systems. The national security policies of the Bush administration suggest, as the Framers understood centuries ago, that presidential power left unchecked poses a great threat to the rule of law and effective governance.

Justice Jackson's words serve as a reminder for this principle: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."[350]

[350] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 655.

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