A Critical Examination of President George W. Bush’s Expansion of Executive Authority During the “War on Terror”

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by

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Abstract:

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After the attacks of September 11th, President Bush was faced with a situation that no president before him had faced. He has responded forcefully, waging a “War on Terror” that includes many different fronts. My study included an examination of the President’s decisions to commit troops to combat without congressional approval, to make a wide-sweeping declaration that all al Qaeda and Taliban fighters were “enemy combatants,” and to expand the US definition of torture to procure more information during interrogations. I conducted this study through an extensive review of Bush Administration documents, as well as reviews of his performance by various scholars in the field.

On the argument over whether the President has authority to commit troops, it essentially came down to two viewpoints. The first came from the Executive Power Essentialist, who argued that the President did have the authority to commit these troops, and Congress’s check on his powers came through their “power of the purse.” The second argument came from the pro-Congress theorists who argued that the “Declare War Clause” of the Constitution is meant to leave the ultimate power to commit troops with Congress. I found that the power to commit troops should be held by Congress as it can be inferred that the Framers intended that to be the case when writing the “Declare
War Clause.” However, over the years Congress has been abdicating this power to the executive.

The Bush Administration used the precedents set by the *Ex Parte Quirin* case, as well as the *Johnson v. Eisentrager* case to declare the al Qaeda and Taliban prisoners captured during the “War on Terror” to be outside of the jurisdiction of US courts. Furthermore, the Administration claimed that neither were party to the Geneva Conventions, so they were not deserving of the protections guaranteed by that agreement. However, the Supreme Court found that these prisoners were under the jurisdiction of US courts, and a District Court later held that they should be able to access civilian courts for habeas corpus hearings. I feel like the judiciary did not exceed its powers in these rulings, as the military tribunals proposed by the Administration were nothing more than show trials.

Finally, I examined a series of memos coined “The Torture Memos” by the media, in which the Bush Administration attempted to expand the US definition of torture in order to extract more information from these prisoners during interrogations. I found that these memos were an effort by the Administration to stretch the definition of torture as thin as possible without crossing the line so as to avoid prosecution. I think that the US should be acting as a role model for the rest of the world, and the consequences of Bush’s decisions could come back to haunt US troops abroad in the very near future.
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Introduction

“Power tends to corrupt and absolute power corrupts absolutely.” This statement by Lord Acton in 1887 has been a recurring theme throughout history. The Framers of the Constitution of the United States of America understood this concept, and they created a system of checks and balances and separation of powers within government to prevent its occurrence. However, in order for the system to work effectively, each branch must actively work as a check on the other branches, and no branch should allow any other to usurp its constitutionally assigned powers. Recently, this has not been the case, as President Bush has overstepped his constitutional bounds in the “War on Terror”. He has done this by committing troops to hostilities without congressional approval, holding prisoners without judicial review, and approving interrogation techniques that nearly amount to torture. President Bush has been able to do this because the people most affected by his decisions have not been American citizens at all; they have been citizens of foreign nations. I would argue that it is the responsibility of the President of the most dominant nation of the world to act as a role model, not a tyrant. Furthermore, if the President is not going to do this on his own, I think it is the responsibility of the courts and Congress to ensure that he acts in accordance with democratic values. However, as will be detailed, it has been difficult for anyone to challenge the President’s actions since September 11th.

On September 11th, 2001, terrorists used commercial airplanes as weapons to attack the United States on its own soil. President George W. Bush was immediately
faced with a situation unlike any a president had ever faced before him. His response was unprecedented and highly scrutinized. Seven days after the attack, Congress issued a Joint Resolution authorizing the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons” (Haynes 2002). In the years following this Resolution, President Bush began conducting military campaigns in Afghanistan and Iraq, and on November 13th, 2001, the President authorized the use of military tribunals to determine the guilt of the prisoners being held without access to civilian courts at the US military base in Guantanamo Bay, Cuba (Military War Tribunals 2005). Most of the President’s decisions following the attacks have been unilateral, without congressional approval or judicial review. This list includes several of Bush’s actions in the last four years. First, the President has committed troops to engage in hostilities in both Afghanistan and Iraq without seeking a congressional declaration of war (Fisher 2000). Second, Bush has given himself the sole responsibility for making the broad determination of al Qaeda and Taliban prisoners to be “enemy combatants,” (Bybee 7 Feb. 2002). Third, Bush has, at the advice of his top cabinet members, expanded the US definition of torture so that the US can extract more information during interrogations (Danner 2005). These are all examples of the extensive expansion of presidential authority by the Bush administration during the “War on Terror”.
I will argue in what follows that the expansion of presidential power has come ultimately at the expense of congressional power, but it has also somewhat been due to a lack of judicial intervention. More specifically, the Bush administration has taken great liberties in committing troops abroad without specific congressional approval. The President has worked unilaterally in the declaration of enemy combatants and the determination of how they will be treated. Traditionally, Congress should have a powerful say in whether these actions take place, and if nothing else, these actions should at least require congressional approval.

The judiciary has made some effort to stem the flow of power from Congress to the President, but there is only so much the courts can do if Congress is allowing this to occur. More and more recently, the courts have been able to check some presidential power by forcing the President to allow prisoners civilian court access; however, this problem would have never surfaced in the first place had Congress acted to oversee the President’s broadly encompassing declaration of enemy combatants. On the whole, the Supreme Court has historically been very reluctant to interfere with the president’s conduct involving foreign affairs.

While Bush’s actions in expanding presidential power have been possibly the most extreme we have seen in our history as a nation, he is by far not the first president to ever make this effort. The executive branch has frequently throughout history been defined by a president who tries to expand his own power, but it is the built in system of checks and balances that is intended to keep the separation of powers as it was meant to be by the Constitution. Congress ultimately has the most constitutionally-granted
powers, which is the way it should be because these powers are divided among so many
members, and as a body it is proportional to the US population. However, because there
are so many members and because of the nature of legislation, it is a very cumbersome
body, always slow to act. Because Congress does not often exercise many of these
powers, presidents have taken it upon themselves over the years to siphon off
congressional powers, such as the power to commit troops to hostilities, only to later
argue that they have constitutionally held these powers all along. Presidents have argued
that there are previous standards (noted later) to support their actions and they have
argued that Congress could act as a check if it wanted to. The second of these arguments
is actually true; unfortunately, over the years Congress has been too reluctant to assert its
own power, as will be demonstrated in the next section. As these actions continue from
administration to administration, these presidential powers have become legitimized by
congressional acquiescence, even though the initial precedent the presidents were
building on may have been very ill-conceived. For this reason, many modern members
of Congress seem to be under the impression that the pattern of presidents committing
troops to hostilities without congressional approval was originally constitutionally
authorized, but I will show that there is little basis for this. This executive branch
expansion is very dangerous, because powers that were initially meant by the Framers to
be spread among many people (Congress) are now concentrated in the hands of one man
(the President), and he has been given the liberty to do what he wants with them. Some
may say that the President is an elected official, so he has been given authorization by the
people to take these liberties. However, the alien prisoners being held in Guantanamo
Bay have no vote, but they are still being affected by the decisions of the President. As the system of checks and balances has deteriorated, the decisions in the war have become much more extreme. Moderating voices are needed to speak for the other half of America that did not vote for the President. Additionally, the President’s extreme positions are alienating the international community, which is a very unwise decision for the United States in what is an increasingly globalized world.

Considering these implications, this thesis will first examine the legitimacy of this expansion of Presidential authority in the committal of troops. It will also investigate the arguments for and against detention and harsh treatment of “enemy combatants” in the “War on Terror”. Finally, it will draw conclusions as to what the implications of the Bush administration’s decisions will mean for the future of the United States in foreign and domestic settings.

**Expansion of Presidential Authority under the Bush Administration**

The President is given powers under the Constitution to perform as Commander-in-Chief of the armed forces, but what, exactly, does this entail? The attacks of 9/11 have brought this question to the forefront as President Bush has led troops into Afghanistan and Iraq in the name of the “War on Terror”; whether or not these actions are constitutional can be examined from both a historical and textual perspective.

Over the years, presidents have argued that Article II, Section 2, which reads, “[t]he President shall be Commander in Chief of the Army and Navy of the United States,” gives them the power to engage troops in hostilities in order to protect the safety
of the American people. Those who agree with this theory fall into the “Executive Power Essentialism” group (Bradley and Flaherty 2004). On the other hand, those who believe the power to commit troops lies with Congress (the pro-Congress group) argue that the “Declare War Clause,” Article I, Section 8, which grants Congress the power “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” leaves the ultimate decision up to Congress, not the President.

The Executive Power Essentialists argue that history is an indicator of constitutional meaning, and the previous wars the US has engaged in would lead to the conclusion that presidents do unilaterally hold the power to commit troops. If this were not the case, then Korea, Vietnam, Panama, Grenada, Kosovo and Bosnia would have all been constitutional violations because in none of these incidents did Congress approve the presidents’ decisions to engage US troops (Yoo 2003). Moreover, Korea was by no means the first time the idea of a president asserting this authority came up. Executive Power Essentialists argue that the Framers of the Constitution realized that the assignment of the power to commit troops to the legislature in the original state constitutions was disastrous, so they aimed to return to a more centralized control of war powers when forming the US Constitution (Yoo 2003, pg. 10).

On the other hand, from 1789 to 1945 Congress either declared war or authorized it for all major military actions (Fisher 2000). During this time period, presidents did assert unilateral authority on numerous occasions; however, it was always limited in scope. For example, Jefferson’s use of US ships to repel Barbary pirates is considered the first presidential assertion of unilateral military power, but Jefferson himself
acknowledged that he was limited in this respect. Jefferson was usually eager to assert presidential authority, but even he realized that he was “unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense” (Fisher 2000, pg. 16).

The Supreme Court ruled in on this matter as well, when in 1800, Justice Washington noted that war comes in two kinds (Fisher 2000). The first, he said, is war that is “declared in form,” which he said should be seldom in occurrence. The “declared in form” war occurs when “one whole nation is at war with another whole nation.” He found this form to be “of the perfect kind.” He found the second form of war, that which is undeclared and unauthorized, to be “imperfect.” In this form, the nations are not even united within themselves, which not only makes it a war between nations, but a war within nations. Chief Justice Marshall echoed these pro-Congress sentiments when he ruled that the “whole powers of war,” were vested in Congress (Fisher 2000). In *The Prize Cases* of 1863, the Supreme Court clearly stated that the president has authority to act defensively, but not offensively in war without congressional approval. These decisions make clear the position of the judiciary that the executive does not have the unilateral power to commit troops. However, it is up to Congress to assert itself in these matters. More recent cases have come before the Court involving situations of presidents committing troops without prior approval, but the courts have essentially said it is the responsibility of Congress to do something about it first and not just bring matters to the court after the actions have already taken place (Fisher 2000).

Congress did actually control most war powers decisions until just after World War II. Wars have always been characterized by a limited congressional deference of
power to the President, but up until World War II these powers would always flow back following the end of hostilities (Fisher 2000). Korea was the first major war a president engaged in without congressional approval. Truman, who had a very different philosophy on the war powers of the executive, used the UN as a shield for engaging in “police actions,” a policy that many future presidents would later follow (Fisher 2000, pp.35-38). However, Congress made sure in negotiating the UN Charter that the president would still need congressional approval before committing troops to the UN Security Council, so the president should not be able to use the UN as an excuse to engage troops unilaterally. However, Truman did not seem to acknowledge this, and he even went so far as to say that without UN backing, he would have still gone to Korea, “[n]o question about it,” (Fisher 2000). During the entire Korean War, there were some dissenting comments from a few Republican members of Congress, but on the whole most members of Congress were exceedingly supportive of Truman. Truman used this support to keep troops in Korea for the length of the engagement without congressional approval.

After World War II, Truman was still making efforts to expand his authority in different venues. The Supreme Court again took up this issue when it heard the Youngstown Steel Seizure Case in 1952 (Youngstown Co. v. Sawyer 1952). In this case, Justice Jackson distinguished three categories of presidential actions. The first encompasses those that are specifically authorized by Congress. The second are those actions that are without either congressional consent or denial of authority. The final class of presidential actions includes those actions that are incompatible with the intent of
Congress. While the first category is usually considered legal, the legality of the second, involving unilateral presidential decisions, is dependent on the context in which it arises. The third class of actions is unconstitutional in most circumstances. In this case, the Court ruled that Truman’s seizure order could not be upheld because he had no express approval from Congress for the action to take place. The Court’s ruling was significant in itself because it provided a check on Truman’s power that, for whatever reason, Congress had been unwilling to provide. Moreover, this case would provide a more important precedent for future conflicts between the executive and legislative branches. It reasserted the system of checks and balances and assured that the executive branch was no more powerful than the other three.

Eisenhower strongly disagreed with Truman’s unilateral actions, and he insisted on gaining congressional approval for any military actions (Fisher 2000). However, Kennedy went right back to the Truman mindset, seeing no reason to seek congressional approval. Johnson felt some reservations about committing troops without congressional approval, but he ended up committing to Vietnam anyway. Executive Power Essentialists argue that this is only right because the President was elected and should be trusted, and congressional approval only takes up time and creates unnecessary conflict (Yoo 2003). However, it would seem to me that the Framers did not intend for the committing of troops to be a “quick” process. While this argument will be developed more, that was the whole idea of the separation of powers and checks and balances.

The Senate decided to take action to reassert its constitutional powers, and on April 19, 1969, the Senate Foreign Relations Committee issued Senate Report 85,
National Commitments Resolution. This report argued that the failure of Congress to challenge the transfer of war power to the executive, “[was] probably the most important single fact accounting for the speed and virtual completeness of the transfer” (Fisher 2000). This report seemed to set off alarms for many members of Congress, and in 1973 they issued the War Powers Resolution as an effort to reassert their authority. This act limited the time a president could commit troops without congressional approval to 90 days. However, pro-Congress scholars argue that what this act actually did was transfer Congress’s constitutional powers to the executive (Fisher 2000). 90 days, while seemingly an insignificant period of time, is plenty of time for entering into small-scale hostilities, completing the objective, and removing troops. After the War Powers Resolution, this could all be done without any congressional oversight whatsoever. Furthermore, if it becomes clear that the hostilities will last more than 90 days, there is much more pressure on Congress to approve an operation that is already three months in the making than to approve an operation that has not even gotten off the ground yet. Congress would face both of these dilemmas over the coming years.

Continuing with the trend, Reagan used troops unilaterally in Lebanon, the Iran-Contra conflict, Grenada, and Libya (Fisher 2000). President H. W. Bush committed troops to Panama while Congress was in recess in order to avoid confrontation; however, Congress returned while the troops were still there. Bush immediately asserted that this was a defensive action because there were US citizens in Panama. While some members of Congress did not approve of these actions, Congress eventually passed resolutions supporting Bush because the troops were already so heavily committed. Bush later made
clear his beliefs on this matter, saying “even had Congress not passed the resolutions I
would have acted and ordered our troops into combat. I know it would have caused an
outcry, but it was the right thing to do. I was comfortable in my own mind that I had the
constitutional authority. It had to be done.” The only reason he “had the constitutional
authority” in his mind was because he was basing it on other presidents’ similar actions.
However, going back to the first of these examples of unilateral presidential commitment
of troops, it is clear that while Jefferson took this action, he knew he was wrong.

Bush’s statements, combined with the actions of presidents back to Truman, made it
clear that at some point along the way presidents began believing that they had
unilateral constitutional powers to engage in offensive military actions. When President
Clinton first faced a situation in which he attempted to engage in offensive military
operations—confronting civil war in Somalia—Congress took a strong stand and cut out
his legs from underneath him with its “power of the purse” (Fisher 2000). When Clinton
tried to send troops to Bosnia, Congress again attempted to limit his options. However,
Clinton responded with:

All I can tell you is that I think I have a big responsibility to try to
appropriately consult with Members of Congress in both parties—
whenever we are in the process of making a decision that might lead to the
use of force. I believe that. But I think that, clearly, the Constitution
leaves the president, for good and sufficient reasons, the ultimate
decisionmaking authority … [T]he President must make the ultimate
decision, and I think it’s a mistake to cut those decisions off in advance.
(Fisher 2000)

Ultimately though, Congress ended up deferring its authority to the Clinton and created
another standard for future executives to use when asserting this authority. When a
situation arose later in Yugoslavia, Clinton went back to Truman’s idea of using NATO as a shield for engaging in action without congressional approval.

With all of these events leading into 9/11, afterward President Bush had more than enough standards on which to assert his constitutional right to enter Afghanistan and Iraq, even though these standards had been built on false beliefs. On the other hand, there are those that argue the constitutional text alone gives the President this authority. Executive Power Essentialists note that it was not only the intention of the Framers to give the President this power, but the great minds that most strongly influenced the Framers also agreed with this school of thought. Locke, Montesquieu, and Blackstone all felt that the executive (the King in their case) should be given full powers over engaging in war (Yoo 2003). Montesquieu argued that Parliament could check the Crown’s powers through its ability to allocate funds, or the “power of the purse”.

During the debates at a ratification convention in Virginia, strong arguments were made for both sides. Patrick Henry, arguing for the pro-Congress point of view, made the argument that, “If your American chief, be a man of ambition, and abilities, how easy is it for him to render himself absolute! … Away with your President, we shall have a King: … Will not absolute despotism ensue?” (Yoo 2003). Madison countered by suggesting, “The sword is in the hands of the British King. The purse in the hands of the Parliament. It is so in America, as far as any analogy can exist,” (Yoo 2003). Echoing his own sentiments, Madison, in Federalist #51, argued that separation of powers was essential when he said, “Ambition must be made to counter ambition,” (Fisher 2000). It is clear that even the Framers were torn over who had the power to declare war. Therefore, the
arguments over the original intent of the Framers do not settle anything, because they were not all on the same side. The compromise that they reached, which I believe is on the side of Congress, can be gleamed from the actual text.

Much of the debate centers in Article I Section 8, on what is known as the “Declare War Clause”. Executive Power Essentialists argue that if the Framers had meant for this to give Congress ultimate power over engaging in hostilities, it would have said so more specifically as it does in other areas when it uses terms such as “engaging” in war or “levying” war (Yoo 2003). They also argue that Article I, Section 10 supports their position, as it reads “No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay” (emphasis added)” (Yoo 2003). They say that this section lists the congressional powers during wartime, and the ability to engage in hostilities is not one of them. Executive Power Essentialists say this is not a breakdown of checks and balances because Congress still has a check on the President through the “power of the purse,” as was illustrated in Somalia during the Clinton administration (Yoo 2003).

Critics of the Executive Power Essentialist theory claim that this interpretation of the “Declare War Clause” is flawed. They point out that early drafts of the Constitution gave Congress the power to “make war,” and Madison only moved to have this changed to “declare war” because Congress is often too slow moving to adequately defend the country. He wanted the President to have the ability to commit troops in self-defense
(Fisher 2000). The pro-Congress theorists note that several Framers, such as Patrick Henry, worried “that presidents, in their search for fame and personal glory, would have an appetite for war,” (Fisher 2000). Michael Glennon, a prominent pro-Congress theorist, reasserted this idea when he argued that there “is no evidence that the Framers intended to confer upon the President any independent authority to commit the armed forces to combat, except in order to repel sudden attacks” (Fisher 2000). Pro-Congress theorists’ main argument against the Executive Power Essentialists is that they never distinguish between the president’s defensive and offensive powers. This is significant because most of the pro-Congress theorists would agree that the executive has the right to engage troops unilaterally if it is a defensive action. I agree that this is the case as well, because Congress can often be too slow-moving to respond to such an emergency situation. What I do disagree with is when presidents construe events to make their actions seem “defensive,” when in reality all they are doing is looking for any opportunity to charge into a foreign country with the military. Examples of this can be seen in the past with President George H. W. Bush in Panama and more recently with his son, G.W. Bush, in Iraq. One of the Executive Power Essentialists’ harshest critics, Professor Michael Ramsey says international and domestic law at the time the Constitution was written said “declare war” meant to commence or begin war, in which case the President could not commit troops to an offensive engagement unless there was prior congressional approval (Ramsey 2002). I would argue that the term “Declare War,” must have had more significance in the Constitution than the Executive Power Essentialist want it to, because it has become evident over the last fifty years that a war
does not have to be declared to occur. Furthermore, there has been a real change in the way the world works from the 1800’s when wars were fought on horseback, to the year 2000, when wars are fought with the push of a button. Congress obviously felt the same way when it passed the War Powers Resolution, showing that it had realized that if it did not make it a law that the President eventually had to come to the legislature for approval, he never would, he would just fight an undeclared war behind Congress’s back. Over the years, the executive has been by far the most interventionist branch (Flaherty 2004). I believe that the right to go to war should not lie in the hands of a branch that is so likely to take advantage of it.

In regards to the Executive Power Essentialists’ “power of the purse” argument, it is sound in principle, but it does not always offer as strong of a check as it should. In the wake of the 9/11 attacks, a sense of patriotism has swept the nation. Congress has been extremely hesitant to reject any of President Bush’s requests for more funding to carry out foreign campaigns for fear of being labeled unpatriotic. Furthermore, even when Congress refuses to appropriate funds for war efforts, the president may still be able to free up the funds from elsewhere. When Clinton was encountering opposition to his Bosnian effort, it became clear that he would not have the support of the Republican Congress necessary to pass his $1.5 billion appropriations bill. However, he was somehow able to “reprogram” funds, and by revising economic assumptions and projections he freed up almost a billion dollars that did not previously even seem to exist (Fisher 2000).
As the situation currently stands, Bush has committed troops abroad in both Afghanistan and Iraq; however, there has been no formal declaration of war. While the Bush administration has coined the phrase, “The War on Terror” to describe the current state of affairs, it has made no effort to push for a declaration of war by Congress because it fears the international implications that declaration would bring about. Additionally, it is important to note that John Yoo, one of the most prominent believers of the Executive Power Essentialist theory, is a top advisor to the Bush administration. This makes it abundantly clear that President Bush is supporting the most extreme view on the argument over the power to commit troops. Bush has, like previous presidents, tried to build on examples of past wars to assert his claims. A top legal adviser in the Justice Department told the White House: “[T]he President enjoys complete discretion in the exercise of his Commander-in-Chief authority.” Additionally, he added, Congress lacks authority “to set the terms and conditions under which the President may exercise his authority as Commander-in-Chief” (Jinks 2004). Bush also claims further authority from the Joint Resolution of Congress, which he argues justifies actions in both Afghanistan and Iraq (although conclusive links between Iraq and al Qaeda have not been established) (Jehl 2004). However, it is clear that Bush believes the Joint Resolution was not necessary for committing troops. DoD General Counsel William Haynes noted in late 2002 that because we are in a state of war with al Qaeda, the US government’s powers exceed those held in peacetime (Haynes 2002). Haynes added that these powers come entirely from Article II of the Constitution, and he said that it did not matter whether
Congress had declared a state of war or not. Interestingly, this is exactly the same position of the Executive Power Essentialists.

It is evident that the Bush administration clearly promotes an extreme view on the matter of committing troops to engage in hostilities. I agree with the Supreme Court that Congress should have oversight as to where troops are committed and when. I believe that the power of the purse is not enough, as it is not an ultimate check on the president’s ability to commit troops. In the current day and age, if Congress refuses to allocate more money for the war effort in Iraq, it will not result in the President withdrawing troops. It will only result in members of Congress being blamed when the troops do not have enough armor to protect themselves. In my mind it becomes so much more difficult to stop a war effort once it has already begun. I am sure that presidents know this, so they are aware that if they can just get troops overseas before Congress does anything to stop them, they are almost ensured either congressional approval or at least congressional apathy. Furthermore, once hostilities begin, that leaves all kinds of other decisions up to the president, which is why Congress should at least have initial approval. As can be seen in the next section, once the hostilities have commenced, it opens a new host of problems involving prisoners and their status.

**Bush’s Decision to Detain “Enemy Combatants” Indefinitely at Guantanamo Bay**

After the attacks of 9/11, there was intense pressure on the Bush administration to punish those responsible. Following the Joint Resolution of Congress, Bush sent troops to Afghanistan to take down the Taliban regime for supporting al Qaeda. During the
hostilities, many prisoners were taken, both from the Taliban and al Qaeda. The question for
the Bush administration then became where these prisoners should be held and what
status they should receive as prisoners. The Administration ultimately chose to imprison
these detainees at the US Naval Base in Guantanamo Bay, Cuba, which has an interesting
status in terms of whose territory it actually falls under. The US entered into an
agreement with Cuba in 1903 that gave the US plenary and exclusive jurisdiction over
Guantanamo Bay (hereafter referred to as Gitmo), but Cuba maintains ultimate
sovereignty over the area (Rasul 2004).

The Bush administration specifically chose Gitmo because the Justice Department
determined the unique status of the island would allow the US certain legal freedoms as
far as length of prisoner detention and access to courts go. Of course, the prisoners did
not believe that this was in their best interest, and when the their case finally came to
court in 2004, there were over 660 detainees being held at Gitmo who had been denied
access to courts or attorneys since their capture in 2002 (Rasul 2004). The two issues
that arise in the detention of these prisoners are the questions of what rights they should
be afforded under international law, and what rights they should be afforded under US
law.

The Geneva Conventions are a series of four treaties concluded 1949 during the
aftermath of World War II (Jinks 2004). The most important of these is Convention III,
dealing with the treatment of POW’s. Under Convention III, prisoners must have the
right to the following: 1) humane treatment while in confinement 2) due process if
subject to sanctions 3) “release and repatriation upon the cessation of active hostilities”
and 4) communication with protective agencies (Jinks 2004). The United States ratified all of the Geneva Conventions in 1955, and only states that are party to the treaty must comply with its terms. However, in a memo dated February 7, 2002, President Bush declared that the Geneva Conventions do not apply to al Qaeda because they are not a high contracting party to the treaty (Bush 2002). He further noted that he has the right suspend the Geneva Conventions in regards to this conflict, but he chose not to. However, he still reserved the right to do this at a later time. Also in this memo, he determined that neither the Taliban nor al Qaeda is privy to the rights of the Geneva Conventions, the Taliban because they are not lawful combatants and al Qaeda because they are not a high contracting party. Finally, Bush said that while the US was under no obligation to award these rights to either party, it would do so for the time being.

Much research by Bush’s legal team went into the determination that neither the Taliban nor al Qaeda should be awarded protections under the Geneva Conventions (Ashcroft, Letter 2002). But was this the correct determination? The Bush administration closely examined the situations of both Taliban and al Qaeda detainees separately in determining that neither fell under the protections of the Geneva Conventions. The Taliban prisoners were the more difficult ones to place outside of the protective bounds of the Conventions. On February 1, 2002, John Ashcroft wrote a letter advising President Bush that there were two arguments that could be made as to why the Taliban falls outside the protective umbrella of the Geneva Conventions (Ashcroft, Letter 2002). Ashcroft advised that while Afghanistan was party to the Conventions, it could be argued that it was a failed state at the time of the US attack. Because the Supreme Court
had supported the President’s authority to make this determination in the case of *Clark v. Allen* (a WWII case in which the Supreme Court decided the US was not obliged to follow through on the terms of a treaty with Germany because it was a failed state), Ashcroft concluded Bush had the authority. Although the power to suspend treaties has not been recognized by the Constitution, the courts and the executive have long recognized it, and no congressional approval is required (Bybee, Memorandum, Jan. 22, 2002). Bybee pointed to the Vienna Convention, which states that “[a] material breach of a multilateral treaty by one of the parties entitles … [a] party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting state” (Memorandum, Jan 22, 2002). He argued that this supports the US decision under international law. Ashcroft further noted that this suspension of the treaty would minimize the risks of prosecution by a foreign court and it would give the best protection to the American troops involved, because no one could make the argument that the US is a failed state (Ashcroft, Letter 2002).

Ashcroft also argued the Geneva Conventions could be determined not to apply to the Taliban because they acted as unlawful combatants (2002). Jay Bybee, Assistant Attorney General, outlined the conditions that the Taliban failed to meet in a memo dated February 7, 2002. He made the argument that the Taliban had no organized command structure, wore no uniforms or insignia, and did not understand or abide by the laws of war. While they did carry arms openly—which fulfills the fourth criteria—this was the
norm in Afghanistan, so there is no indication they did it with the intention of fulfilling the laws of war.

It was much easier for the Bush administration to assert that the Geneva Conventions do not apply to al Qaeda. In a January 22, 2002 memo to Alberto Gonzales, Jay Bybee outlined the reasons why al Qaeda falls outside of the Conventions’ protections. First, and most important, al Qaeda is not a state party to the treaty; therefore, it cannot receive state benefits. Additionally, Bybee argued that the members of al Qaeda fulfill none of the four criteria previously used to determine if the Taliban deserved protections. Finally, Bybee noted that the “nature of the conflict precludes application” to al Qaeda because it is a conflict within sovereign states—an insurgency—instead of a conflict between sovereign states, which is what is usually covered by international law. Based on these assessments of both al Qaeda and the Taliban, Bush has deemed both groups of detainees “unlawful combatants,” meaning that, by his determination, they are not deserving of the protections of the Geneva Conventions.

Supporters of the Bush administration’s position note that the laws of armed conflict derive from customary and international law, and they claim that it does not matter whether or not war has been declared (Wedgewood 2004). They argue that it is the executive’s right to deem someone an “unlawful combatant,” and this tradition dates all the way back to this President Lincoln using this authority based on the Lieber Code during the Civil War. Under the laws of armed conflict, unlawful combatants do not have the right to be released while hostilities are still occurring, as not even lawful combatants have this right.
I would argue that this Civil War example should not be used as a standard, especially under current circumstances, because one situation involves US citizens while the other involves alien combatants. Furthermore, I do not think that the Lieber Code should be used as an argument for a sweeping declaration of a group of people to be enemy combatants because the it was originally meant to be used as an example to make America a role model for other nations in the treatment of POW’s. America is definitely not acting as a role model during this conflict; if anything the government is alienating the international community. Additionally, the Civil War was a battle that had a clear end in sight. The way things are going in the “War on Terror,” it could last for generations, which is clearly too long to hold anyone before even giving them a fair trial.

There are several reasons why the Bush administration is wrong in asserting that al Qaeda and Taliban detainees are outside of the protections of the Geneva Conventions. The Bush administration has, on several occasions, made the argument that even if the Conventions are binding on the President as a matter of international law, they are not binding as a matter of domestic law because the Constitution gives the President the authority to violate international law in order to preserve national security (Jinks 2004). This would seem to be a nearly an admission by the Bush administration that it knows its treatment of the detainees at Gitmo is outside of the bounds of the Geneva Convention. Critics of the Administration’s position have persuasively argued that the President never has the authority to violate a treaty without congressional consent. These critics claim the Administration has misread the Convention in its determination of what classifies a lawful combatant, and these prisoners must be treated as lawful combatants until a
competent tribunal (not a military commission) determines them to be otherwise. There are several reasons why a military commission does not fulfill this role. First, it is not an impartial, independent body. Second, it does not guarantee the right to counsel. Finally, there is no opportunity for an appeal to a higher court. For all of these reasons, critics argue that the Geneva Conventions should protect the detainees at Gitmo until they are determined to be “unlawful combatants,” (Jinks 2004).

I find that it would be a much better idea to leave the determination of the status of these prisoners to an independent body, not the President. A “competent tribunal” would have no reason or motivation to sabotage the United States, so it would be able to make an objective determination of whether these prisoners deserve POW status without having vested interests influence its decision. The information presented to this tribunal would not be released to the public, so there would be no fear of security threats, but the prisoners would at least get a fair determination of their status. Furthermore, their status would be valid within the international community, which would go a long way in garnering international support for the US in its war effort.

Furthermore, even if these detainees are not determined under the Geneva Conventions to be lawful combatants, they are still “protected persons” under the civilian conventions in Article III, which awards them practically the same rights anyway (Jinks 2004). The only way, under international law, that these Conventions would still not apply to the US would be if there were some domestic law that supercedes them (based on the Supremacy Clause of the US Constitution) or if they never went into effect, neither of which applies to the US. As far as the latter goes, the only way these Conventions
would not apply to the US, which was party to them, would be if they were non self-executing, meaning that further congressional action is required to put them into effect. Three courts have already ruled that the Conventions are self-executing federal law, so there is no reason why the US could argue the Conventions do not apply to the detainees (Padilla v. Bush, 233 F. Supp. 2d 564, 590)( US v. Lindh 212 F. Supp. 2d 541, 553-54)(US V. Noriega, 808 F. Supp 791-794).

The Bush administration has argued that the Joint Resolution of Congress gives the President the authority to go outside the boundaries of the Geneva Conventions in order to ensure the safety of the general public. This judgment is flawed because violating the Geneva Conventions would most likely mean violating US domestic laws (more specifically, the US military guidelines for the treatment of POW’s), and there is no reason why Congress would authorize this (Jinks 2004). Additionally, regardless of the language in the Resolution, there is no indication that Congress would have been agreeing to a violation of the laws of war.

Furthermore, under Section II of the Constitution, the president is given the duty to “take Care that the Laws be faithfully executed,” including the duty to execute treaties that have the status of federal law (Jinks 2004). On the other hand, many presidents have, in the past, taken on the view demonstrated by Richard Nixon in the following exchange:

FROST: So what, in a sense, you’re saying is that there are certain situations, . . . where the President can decide that it’s in the best interests of the nation or something, and do something illegal.
NIXON: Well, when the President does it, that means that it is not illegal.
FROST: By definition.
NIXON: Exactly. Exactly. If the President, for example, approves something because of the national security, or in this case because of a threat to internal peace and order of significant magnitude, then the President’s decision in that instance is one that enables those who carry it out, to carry it out without violating a law. Otherwise, they’re in an impossible position. (Jinks 2004)

However, if the president can exercise these “emergency powers” whenever he sees fit, there is no point in having a Constitution with separation of powers and check and balances.

There is a strong and weak version of this emergency powers theory (Jinks 2004). The strong version, summarized by Nixon above, says that a President can violate laws in emergency situations, but then his actions become legal so that there is no fear of legislative or judicial reprisal. The weak version states that when these situations arise, there should be interbranch cooperation to reach a solution, and then there is no need for any form of prosecutions following the actions. The Bush administration argued the strong version of emergency powers during its brief in the case of Hamdi v. Rumsfeld. This case involved an American citizen, the petitioner Hamdi, who had been classified an “enemy combatant” by the US Government for fighting with the Taliban during the conflict in Afghanistan. This case became significant mainly because it was one of few “enemy combatant” cases involving an American citizen. The Court ultimately rejected the Bush Team’s argument, demonstrating that there must be some sort of check provided, even in emergency situations (Hamdi v. Rumsfeld No. 03-6696). While this case in particular is not the main focus of this section, it is significant because it supports the critics’ view of the Bush administration. These critics argue that while the President does have control over battlefield situations as Commander-in-Chief, Congress is given
the power of oversight in the detention of prisoners under the Define and Punish Clause (Jinks 2004).

I think it is necessary for there to be a check on presidential power even during emergency situations. There is no reason for the president to suddenly gain supreme control over matters, because there is no way of knowing whether he will not make any mistakes or whether he will give power back once the emergency has deescalated. Furthermore, there should be some sort of stigma associated with presidents violating laws. Even if the law is violated for a noble means, there should be a review to ensure this is the case. Even in an emergency, a president should fear that his actions will be scrutinized, and then he will only violate the law if there is an extreme necessity.

Critics argue that it is bad idea for the Bush administration to deny the rights of the Geneva Conventions to the detainees at Gitmo (Adjami 2004). They stress that the US should be acting as a role model in prisoner treatment instead of as an international tyrant. It was the US that actually first codified standards for the treatment of prisoners when Abraham Lincoln commissioned Dr. Francis Lieber to draft these standards for Union treatment of Confederate prisoners. More importantly, the reasons the Senate actually ratified the Geneva Conventions in 1949 was so the US could act as a moral authority and a model for other nations. These officers stress that the denial of protections to the detainees at Gitmo will only encourage reciprocal behavior in the treatment of our troops abroad. The Justice Department has made the argument that there is no way US troops could be determined to be outside of the protections of the Geneva Conventions, so there is no need to fear reciprocation. However, “following the capture
of U.S. Warrant Officer Michael Durant by forces under the control of Somali warlord Mohamed Farah Aideed in 1993, the United States demanded assurances that Durant’s treatment would be consistent with the broad protections afforded under the Conventions, even though, “[u]nder a strict interpretation of the Third Geneva Convention’s applicability, Durant’s captors would not be bound to follow the convention because they were not a ‘state,’” (Adjami 2004). As demonstrated by the beheadings by Iraqi insurgents, the US must avoid situations that would lead to a justification for harmful actions against US troops in the future. These men have no motivation to adhere to the Geneva Conventions because not only are they not party, the US is not adhering to it either.

One District Court judge agreed with the critics of the Bush administration that the determination over whether the detainees should be awarded protections under the Geneva Conventions is not up to the President. In her decision dated January 31, 2005, Judge Joyce Hens Green ruled that the Geneva Conventions are self-executing, and the Taliban detainees are entitled to these protections (In re Guantanamo Detainee Cases 2005). The Judge noted that the Bush could not make such an arbitrary determination for such a large group of people. On the other hand, the Judge agreed that al Qaeda members are not entitled to these protections because the group is not a high contracting party to the treaty. So is there any remedy for these al Qaeda prisoners who have been held for well over two years at Gitmo? Many cases have come up in the courts in the last few years to determine this exact question.
I agreed with Judge Green’s assertion that the determination of all Taliban members to be unlawful combatants is too broad and sweeping. The Bush administration only made that determination for its own purposes, and there is no reason why these prisoners should not be awarded POW protections. Taliban prisoners, while in custody, provide no immediate threat to the American people. While the members may still have some information crucial to the “War on Terror,” there is no reason why this information could not be extracted without taking away the rights they are due under the Geneva Conventions. While the Geneva Conventions do set strict guidelines for interrogations, these guidelines should be present, as no information is worth lowering ourselves to a level where we use torture tactics to obtain it. As far as the status of al Qaeda, I agree that within the wording of the Conventions, they are not entitled to the protections. However, I do not think that this means we should not award them these rights anyway. We are under much international scrutiny now, as we always are acting as a global leader. There is too much at stake with our troops committed in so many different countries overseas for us to not treat the prisoners we are holding as humanely as possible.

The Bill of Rights gives US citizens several inherent rights that protect them during criminal proceedings in the United States. But what if these citizens are not afforded their rights because they have been deemed “enemy combatants” by the Bush administration? Worse yet, what if they are not US citizens at all and are being held outside the jurisdiction of US courts? One US citizen, Jose Padilla, faced the former situation when he was accused of engaging in terrorist acts in May of 2002 and was
detained as an enemy combatant with no charges filed. After many months of hearings, a
district court judge in South Carolina finally ordered that the Bush administration
formally file charges against him (Rumsfeld v. Padilla Case No. 03-1027) (Mariner
2005). The ruling was based on the Non-Detention Act of 1971 (18 USC § 4001(a)) that
stated, “[n]o citizen shall be imprisoned or otherwise detained by the United States except
pursuant to an Act of Congress.” While it seems, pending appeal, that Padilla will be
granted his constitutional rights, this ruling only pertained to US citizens, and the
majority of the prisoners held at Gitmo are of foreign nationality.

While these foreign detainees, both al Qaeda and the Taliban, would most
certainly choose to have a trial to determine their status as combatants, they have had no
official charges filed against them to refute in trial. Even if the Bush administration were
to file charges, these prisoners have been denied access to civil courts. They have been
denied access to non-military attorneys as well, and the Bush administration has no
immediate plans to release any of these prisoners. While they were unable to contact
these detainees, several relatives were able to bring this case before US courts under next
of friend status (Rasul 2004). In 2004, nearly two years after many of these men had
come to Gitmo, the case of Rasul v. Bush came before the Supreme Court of the United
States.

There were several layers of complexity surrounding this case. The first issue
was whether or not US courts even had jurisdiction, as Guantanamo Bay is officially the
sovereign territory of Cuba. The second issue, if the US courts were found to have
jurisdiction, was whether these alien detainees should be granted the writ of habeas
corpus within US federal courts (Rasul 2004). The lower courts stopped the proceedings at the initial stage, ruling that Guantanamo Bay lies outside of the jurisdiction of US courts. However, on appeal the case went before the Supreme Court.

The Bush legal team most heavily relied on the precedent set in the case of *Johnson v. Eisentrager* to support its argument that Gitmo lies outside of the jurisdiction of US courts (Olson, Petition Phase. 2004). This case, arising during WWII, involved six German troops captured by US forces in China. They were subsequently tried and convicted of war crimes, all while being incarcerated in China (Rasul 2004). The Court in this case made the observation that:

> [i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States. (*Johnson v. Eisentrager*, as cited in Olson, Petition Phase. 2004)

For this reason, the Court held that “‘the privilege of litigation’ does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign,’” (Olson, Petition Phase. 2004). Bush’s legal team made the argument that there is essentially no difference between the aliens in *Eisentrager* and the aliens in the “War on Terror”.

Furthermore, the Bush legal team argued that this ruling has only been reinforced in the last fifty years in the courts, and Congress has made no effort to amend the decision, with one notable exception. In February 1951, a bill was introduced in Congress “[p]roviding for the increased jurisdiction of Federal courts in regard to the
power to issue writs of habeas corpus in cases where officers of the United States are detaining persons in foreign countries, regardless of their status as citizens” (Olson, Merits Phase. 2004). This bill would have essentially given US courts jurisdiction over matters involving the legality of detention of aliens irrespective of whether the detention was on US soil. However, as the Bush team pointed out, this bill was never voted out of committee, much less enacted into law, so it was obviously not the preference of Congress that the courts’ jurisdiction extended this far.

The legal team working on behalf of Rasul countered that there was an entirely different set of circumstances involved in the *Eisentrager* case. The Rasul team offered the following six fundamental differences between the detainees at Gitmo and those in *Eisentrager*: 1) *Eisentrager* took place during a declared war, whereas the government refuses to declare war in the current conflict. 2) The prisoners in *Eisentrager* were tried and convicted of war crimes, but the prisoners at Gitmo have yet to have any charges filed against them whatsoever. 3) The prisoners in *Eisentrager* had the right to challenge the lawfulness of their convictions. 4) The executive misread the language in the *Eisentrager* ruling to say that the courts should never have access to review the detention of prisoners outside of the “ultimate sovereignty” of the US. The Rasul team is of the opinion that wartime China is very different than Guantanamo Bay, over which the US exercises complete control. Furthermore, the Court in *Eisentrager* denied habeas hearings to prevent getting in the way of the tribunal hearings, but it never specifically stated that it had no authority to grant habeas hearings. 5) The prisoners in question in the *Rasul* case are not enemy aliens. As a matter of fact, one of them is even a British
citizen. 6) Congress has not authorized a military tribunal to determine the status of these prisoners as it had in the *Eisentrager* case (Margulies, Merits Phase. 2004).

The Rasul legal team warned that there would be several consequences of extending the *Eisentrager* ruling to current situation (Margulies, Petition phase. 2004). First, the decision would violate the Supreme Court’s Due Process jurisprudence. Second, the appeals court issuing the ruling that the courts did not have jurisdiction was in conflict with many other appellate courts that have extended rights to foreign nationals in territories outside the ultimate sovereignty of the US. Finally, but most importantly, if the Supreme Court were to determine that *Eisentrager* holds here, it would be sanctioning the creation of a prison entirely outside of the reach of the judiciary, which is a very dangerous proposition.

Ultimately, the Supreme Court sided with the Petitioners in the matter, dealing a huge blow to the Bush administration’s efforts to single-handedly determine the fate of these detainees. The Court held that while the US does not hold ultimate sovereignty over Guantanamo Bay, it does hold exclusive jurisdiction (Rasul 2004). Furthermore, the Court noted that while these prisoners have not been charged with anything, they deny any allegations, and they have not had access to even a military tribunal to determine their guilt. The Court cited the case of *Braden v. 30th Judicial Circuit Court of KY* (410 U.S. 484 (1973)), which made the rule for habeas review more flexible, thereby overruling the authority of *Eisentrager* in deciding this matter (pg. 25).

In his dissenting opinion, Scalia felt that it was the decision of Congress, not the courts to change the habeas provisions. He essentially disagreed with the majority’s
decision that \textit{Eisentrager} lies on constitutional, not statutory grounds, which he argued is simply not the case. He argued that because it does rest on statutory grounds, it is up to Congress to change the habeas provisions, not the courts. Regardless, the majority ruled that US courts do have jurisdiction over Gitmo; however, it declined to comment on whether the writ of habeas corpus should be granted to the detainees. The case was remanded to the lower courts for that decision to be made.

The Bush administration was furious at this result, stating that if it had known that US courts would have jurisdiction over Gitmo, it would have detained the prisoners in another location. But do we really want the government searching for locations to hide the prisoners outside of the jurisdiction of the courts? It seems as if the Bush administration made the original decision to detain the prisoners at Guantanamo Bay in an effort to circumvent the system of checks and balances. Fortunately for these prisoners, the courts were able to step in where Congress refused.

While the Supreme Court’s ruling in \textit{Rasul} was a huge victory for these prisoners, it was not enough. The prisoners were unaware that their case was even in court, let alone that there was a ruling in their favor. The Bush administration continued to argue that the US courts should not grant habeas relief to these prisoners because the information that would come out in the cases would be a threat to national security. This overlooks the reality that there are ways to have federal court cases proceed without creating a national security crisis. The Administration further argued that these prisoners would all have their day in front of a military tribunal where they would be allowed to plead their case. But would this really be a fair trial?
The Bush administration has made the argument that it is in the best interest of US national security that a military tribunal tries these prisoners, but it also maintains that they will get fair trials. However, many of these prisoners who contend their complete innocence have been held since 2002 with no opportunity to plead their case (Margulies, Merits phase. 2004). The Bush administration maintains that several legal opinions, including *Ex Parte Quirin*, support the Administration’s ability to detain these prisoners until the end of the conflict (Wedgewood 2004). In *Quirin*, several German saboteurs were caught trying to enter the US, and the Supreme Court held that they could be detained for the remainder of the conflict and tried by a military tribunal, because a civil trial could release potentially dangerous information to the public (*Ex Parte Quirin* 1942). The purpose of this detention is twofold (Haynes 2002). First, the US needs to gather information from these detainees to prevent future attacks. Second, the government must ensure that these prisoners will not return to the enemy and take up arms against the US. Department of Defense General Counsel William J. Haynes II stressed that the purpose of this detention is not to punish these prisoners, but to protect US citizens. Haynes further argued that granting these prisoners access to counsel would just disrupt the flow of information and create the security threat of information being leaked to the enemy. As State Department Legal Adviser William Howard Taft IV has noted, “All wars last too long. Releasing captured combatants to return to the fight would make them last longer.”

Furthermore, the Administration adamantly maintains that it has good reason for detaining every one of these prisoners. An extensive screening process takes place before
these prisoners even come to Gitmo to prevent mistaken detention (Wedgewood 2004). First, there is an assessment in the field, which is followed by a military screening team at the holding area. That is followed with a review by a general officer designated by Central Command. Finally, there is an assessment by an internal Department of Defense panel that includes several legal advisors. After the prisoner arrives at Gitmo, there are periodic reviews that are even more extensive to ensure that detention is still necessary. However, these reviews have been found to be a little less than reliable in the past (Hersh 2004). Many of these prisoners turn out to be nothing more than common criminals, who have been detained even after several levels of screening.

Donald Rumsfeld, the Secretary of Defense, has set strict guidelines under which these military commissions, created to determine the level of guilt and punishment of the detainees, should proceed (Wedgewood 2004). Among these guidelines are several procedural protections, including the burden of proof beyond a reasonable doubt resting with the government, the presumption of innocence, the defendant’s right to cross-examine witnesses, the right of the defense to call witnesses, the right to production of exculpatory evidence, the right to choice of military defense counsel, and the right of appeal to an independent appellate panel. To ensure this appellate panel’s judicial competence, the Administration has already appointed a former US attorney general, a former Cabinet officer, a state chief Justice, and a former state attorney general.

Attorneys for Rasul argued that there have only been a limited number or prosecutions to date. Furthermore, these tribunals are not as fair as the government
would like the prisoners to believe. The following is an excerpt from a hearing involving a prisoner accused of associating with an al Qaeda member:

Detainee: Give me his name.
Tribunal President: I do not know
Detainee: How can I respond to this?
Tribunal President: Did you know of anybody that was a member of Al Qaida?
Detainee: No, no.
Tribunal President: I’m sorry, what was your response?
Detainee: No.
Tribunal President: No?
Detainee: No. This is something the interrogators told me a long time ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe it was a person I knew as a friend. Maybe it was a person I worked with. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me his name, then I can respond and defend myself against this accusation.
Tribunal President: We are asking you questions and we need you to respond on what is the unclassified summary. (In re Guantanamo Detainee Cases 2005)

This example makes it abundantly clear that there exist significant differences between civilian courts and military tribunals. The District Court hearing the case on habeas relief for these prisoners seemed to agree (In re Guantanamo Detainee Cases 2005). This case arose in response to Paul Wolfowitz’s creation of the Combatant Status Review Tribunal (CSRT) to examine whether Gitmo detainees should be held until the end of hostilities as enemy combatants. The CRST is meant to give the detainees a factual basis for their detention and give them a chance to testify, but as can be seen above, this factual basis can often be somewhat lacking. This case involved the consolidation of all habeas complaints of the detainees.
The detainees in this case were most concerned with the government’s refusal to grant them 5th Amendment Due Process rights (*In re Guantanamo Detainee Cases* 2005). Because the Supreme Court in *Rasul* only ruled on whether the US courts had jurisdiction, Judge Green examined historical precedent to determine whether these detainees be granted the writ of habeas corpus. The Court noted that there is a long held doctrine that fundamental constitutional rights cannot be denied in a territory under control of the US, even if it is not sovereign US territory. While *Eisentrager* was the significant case so often brought up by the Bush legal team in *Rasul*, the Supreme Court in that case made clear that it was inapplicable, and that the Constitution does apply to the detainees at Gitmo.

Judge Green noted three factors that should be involved in determining whether the detainees should be granted due process (*In re Guantanamo Detainee Cases* 2005). First, consideration should be given to the private interests of the person asserting that he lacks due process procedures. Second, there should be a cost-benefit analysis weighing the costs of removing due process and using substitutes—i.e. a military tribunal—versus the benefits of extending these rights to the person. Finally, consideration should be given to the competing interests of the government. In this situation, the cost to the detainees of denial of due process is detention by a foreign government and no contact with the outside world. Also, depending upon the length of the “War on Terror,” this detention could carry on for several decades, ultimately depriving these detainees of their lives. On the other hand is the government’s interest, which is primarily the protection of
the public. The Court noted that both sides have a very strong interest in this matter, and the two are difficult to reconcile.

However, the Court ultimately concluded that, “[a]lthough this nation unquestionably must take strong action under the leadership of the Commander in Chief to protect itself against enormous and unprecedented threats, that necessity cannot negate the existence of the most basic fundamental rights for which the people of this country have fought and died for well over two hundred years,” (In re Guantanamo Detainee Cases 2005). Included in these rights are the procedural protections of Due Process rights, which the Court felt were not adequately provided for by the CRST.

The two main problems the Court had with the CRST were its failure to provide detainees with evidence against them and its overbroad definition of an “enemy combatant”. These tribunals do not take into consideration whether confessions that are used against these detainees are a result of coercion or even torture, to which there have been claims. The Court noted that these detainees are at a great disadvantage without access to counsel, and the judge went on to say that the prisoner’s right to counsel should outweigh the threat of an information leak. The ABA remarked that the right to habeas proceedings without counsel is nothing (Sonnet 2003). Furthermore, this threat is not as significant as the government makes it out to be, and if the government fears releasing this classified information to the detainee, the counsel would be able to protect the detainee’s interest without posing the same threat.

However, even though the Judge here granted the prisoners of Gitmo habeas rights, there are still some prisoners who may be out of the reach of this ruling. On
December 17th, 2004, the *Washington Post* reported that the CIA had been maintaining a secret prison within Gitmo for high-level detainees (Priest 2004). The CIA and DoD declined to comment on whether this “secret prison” is still in operation today; however, there are still about a dozen al Qaeda operatives being held in undisclosed locations. The existence of this secret prison essentially makes the District Judge’s ruling worthless, because it enables the CIA to move prisoners from the regular Gitmo prison into these secret prisons to prevent them from bringing their cases into civil courts.

Only a few weeks before Judge Green’s ruling, Judge Leon came to a very different conclusion in the case of *Khalid v. Bush* (Civ. No. 1:04-1142 2005). In this decision, Judge Leon (an appointee of George W. Bush) dismissed the requests of these prisoners for review. He said there was a difference between the right to file for a habeas review, and the right to actually receive the review.

Judge Leon’s ruling was almost ridiculous in that it dangled a carrot in front of the eyes of the petitioners and then yanked it away. I believe that this could not have been in line with what the Supreme Court had in mind when it said that the detainees could file for habeas review. There would have been no point for that ruling if the Supreme Court was of the opinion that it should not be granted. Furthermore, Judge Green makes a more solid legal argument, as she weighs the costs of the government granting these rights versus the benefits to the prisoners. Also, I would argue that Judge Green’s ruling was more valid because the case at hand is very unique, unable to be based on a precedent that is only somewhat similar at best (*Eisentrager*). I also think that Judge Green notes the important problem that arises when the Government tries to create
an area that is beyond the reach of judicial oversight. Again, it is another example of the Bush administration attempting to avoid the system of checks and balances.

As can be seen, the judiciary has taken a crucial step in acting as a check on the executive despite the resistance to these proceedings by the Bush administration. However, there is still a negative international sentiment toward Bush, who has, in essence, rejected international treaties and laws in favor of protecting the American public. There is, of course, nothing wrong with the president looking out for the interests of his constituents, but there is no reason why it should come at the expense of potentially innocent aliens. Unfortunately, as will be shown, the extent of these detainees’ concerns goes far beyond due process rights.

**The Bush Administration’s Approval of Near-Torture Tactics for Detainee Interrogations**

President Bush made the decision in early 2003 to extend the “War on Terror” to Iraq with the help of the “Coalition of the Willing”. Bush made the decision based on the alleged attempts of Saddam Hussein to acquire weapons of mass destruction and because of his supposed terrorist ties. While both of these reasons have yet to be verified, the US quickly defeated Iraqi troops and began to take in suspicious prisoners, making use of converted Iraqi prisons such as the one at Abu Ghraib. It soon became clear that many of these prisoners were of little or no use to the US intelligence-gathering effort. In fact, by October 2003, US military intelligence officers estimated to the Red Cross that 70 to 90 percent of these prisoners had been arrested as a result of mistaken identity (Danner 2005). However, the Department of Defense (DoD) continued to push for greater
interrogation efforts, hoping to both head off future terrorist attacks and prove the links to al Qaeda that had been asserted as a cause for the war. Information was not as free flowing as the DoD preferred though, and in August of 2003, General Geoffrey Miller was brought in to review the prisons in Iraq because of his earlier successes in obtaining information as the commander at Guantanamo Bay (Hersh 2004). His suggestion was that the US prison guards in Iraq “Gitmoize” the prisons, making them more geared toward interrogation. Miller’s recommendation did not take into account that the prisoners in Iraq, mostly common criminals, were fundamentally different than those Taliban and al Qaeda members held at Gitmo, and it could have been these recommendations that led to what happened next.

Mid-2004, Specialist Joseph M. Darby came forward with reports of extensive prisoner abuse at Abu Ghraib after he came across a series of photographs that he found appalling (Hersh 2004). In the wake of this discovery, detailed accounts of the extent of the abuse were shocking and implicated numerous lower-level US military personnel. Among the alleged abuses were accusations of breaking chemical lights and pouring the chemicals on prisoners, pouring cold water on naked bodies, threatening males with rape, sodomizing detainees with chemical lights and broomsticks, and using dogs to frighten the detainees (Hersh 2004). Perhaps the most humiliating treatment came in the form of the homosexual acts these prisoners were forced to commit, as homosexuality is strictly against Islamic law.

However, the military personnel implicated by these pictures and accusations were quick to point their fingers towards their superior officers, saying they were doing
nothing that was not expected of them. One man shown participating in these acts by the photos, Staff Sergeant Ivan Frederick II, pointed to a letter he had written previously to his family that noted, “MI [military intelligence] has also instructed us to place a prisoner in an isolation cell with little or no clothes, no toilet or running water, no ventilation or window, for as much as three days,” (Hersh 2004). In the same letter he added that, “CID [Criminal Investigation Division of the army] has been present when the military working dogs were used to intimidate prisoners at MI’s request.” Another soldier implicated in the abuse scandal, Sergeant Davis, commented that he did not inform his superiors of the abuses, “because I assumed that if they were doing things out of the ordinary, or outside the guidelines, someone would have said something. Also the wing”—where the abuse took place—“belongs to MI and it appeared MI personnel approved of the abuse.” Bush and his administration officials quickly came out with a statement claiming that these soldiers’ actions did not reflect the conduct of the military as a whole. Bush insisted that this behavior was limited to “a few bad apples,” and it was unfortunate that their actions would reflect on the country as a whole (Danner 2004). Were these actions just the result of “a few bad apples,” or were these torture techniques the result of the decisions of people higher in the chain of command, including even the President himself?

On June 22, 2004, the Bush administration released a series of documents that were shortly thereafter coined the “Torture Memos” by the media (http://www.washingtonpost.com/wp-dyn/articles/A62516-2004Jun22.html). While the Bush administration initially maintained that these documents were just the legal
justification for the interrogation techniques used at Gitmo, others began to view them as
the Administration’s condoning of mild torture techniques. The synopsis of what these
documents held is as follows.

On January 22, 2002, Jay S. Bybee wrote a letter to White House counsel Alberto
R. Gonzales, detailed earlier, which basically argued that the Geneva Conventions should
not be considered applicable to al Qaeda or Taliban detainees (2002). In terms of the
conditions of the prisons, Bybee noted that “[w]hile it is conceivable that some might
argue that these facilities are not fully in keeping with the terms of Geneva III
[Convention dealing with POW treatment], we understand that they meet minimal
humanitarian requirements consistent with the need to prevent violence and for force
protection.” This statement is significant because it is characteristic of the attitude
prevalent throughout all of these memos: the Administration’s main priority should be
avoiding prosecution--not doing what is right. Bybee also implied that there should not
be a need to make an argument under international law to support the Bush
administration’s position because domestic law supports it. He went on to make this
argument regardless, as detailed earlier, but it is troubling that international opinion is
nothing more than an afterthought in determining prisoners’ rights.

Ashcroft echoed both the sentiments and the tone of Bybee in his letter to the
President on February 1, 2002. Here Ashcroft argued that the Taliban should be denied
Geneva Convention protections because Afghanistan could be considered a failed state;
however, he only chose this argument over others that could be made because this one
minimized the risk that the decisions of the Bush administration would be questioned in
courts. Again, this is another example of the Bush administration attempting to avoid the system of checks and balances, as well as international interference, when making its decisions.

Bybee made a second argument to the President on February 7, 2002, detailing why the Taliban should not be awarded POW status. He claimed that they fulfill none of the four criteria necessary to be awarded this status. He further stated that there is no doubt that they are not deserving of POW status, because the Geneva Conventions state that if there is any doubt at all, the protections should be awarded. However, the District Court ruling on the case of the Gitmo detainees found significant doubt, and as a matter of fact, the Judge went as far as saying that these Taliban prisoners do meet the criteria necessary to be awarded POW status (In re Guantanamo Detainee Cases 2005). Perhaps the reason the Bush administration wanted to avoid the courts in these matters is because it feared they would not allow the President the leeway to make unilateral decisions on such significant matters.

However, before this case came to the courts, Bush relied on the advice of his top legal analysts and released a memo stating that neither al Qaeda nor Taliban detainees were deserving of Geneva Convention protections (Bush 2002). Nonetheless, he continued to say that the prisoners would be treated humanely. Future documents that would circulate through the Administration would begin to redefine what the definition of “humane” would be.

On February 26, 2002, Bybee sent another memo to William Haynes, General Counsel for the DoD, examining which confessions made during interrogations could be
used in court. Bybee quickly pointed out that Miranda warnings are not necessary for statements to be admissible in military tribunals, but he felt it necessary to examine whether these warnings would be necessary in Article III (Geneva Convention regarding POW status) courts. Bybee outlined four categories of statements that the government could use for criminal prosecutions at a later date (Bybee 26 Feb 2002). The first category encompasses statements that are made while a military officer is trying to solicit intelligence from a prisoner. Bybee argued that these statements would be admissible because the deterrent effect intended by Miranda would not be present. Furthermore, he stated that the public safety exception that the Supreme Court has allowed for in *New York v. Quarles* would apply here because the American public could be at immediate risk of a future terrorist attack. The second category of statements is those that are obtained for criminal law enforcement purposes. Bybee conceded that these statements would probably not be admissible, even if the alien’s only connection to the US was that he had been brought here to be tried. The third category of statements includes those that are made during a war crimes investigation. Bybee argued that while he believes that these should be admissible, the courts probably would not if the case came before them. The final category comprises those statements that come from a mix of the first three categories. Bybee said that these would probably be decided on a case-by-case basis, but he added it would be best to play it safe and issue Miranda warnings at the start of any interrogation.

While it seems that Bybee was interested in respecting the rights of these prisoners by advising the issuance of Miranda warnings to guarantee admissibility of
statements, the only category that truly matters here is the first category: those statements that Bybee argued do not require a Miranda warning. The US government would make the argument that most or all interrogations made at Gitmo are of this nature; therefore, Miranda warnings are not necessary. Bybee even implied this when he noted that the Supreme Court has emphasized that the sole purpose of the self-incrimination clause is, “insur[ing] that testimony cannot lead to the infliction of criminal penalties on the witness.” After this he went on to say that the constitutional violation only occurs at trial, so the government can interrogate prisoners as much as necessary without Miranda warnings, as long as the information is not presented at trial (Bybee 26 Feb. 2002). However, these statements obtained without warning can be used during military tribunals, which can hand out an equally harsh, if not worse, penalty to that of a criminal court.

The Bush administration began exploring how far it could go with these interrogations in two memos sent by Bybee to Alberto Gonzalez on August 1, 2002. Gonzalez had requested the Justice Department’s views on this matter to find out, first, whether certain acts would violate the Torture Conventions, and then, if there would be any danger of prosecution under the ICC if the Bush administration were to approve of these actions. Bybee initially noted that the ruling international convention on this matter is the UN Convention against Torture and other Cruel Inhumane or Degrading Treatment or Punishment (CAT); however, the US Senate ratified the CAT with the understanding that it would follow the same guidelines as the US law on torture, Sections 2340-2340a of Section 18 of the US title guidelines (Bybee, Memo, 1 Aug 2002). For this reason,
Bybee recommended that the Bush administration primarily make its determination of whether certain acts constituted torture based on the guidelines of Sec. 2340, not CAT. Bybee argued that this would protect the Bush administration because it is bound by the CAT only as modified by the President’s understanding of this Convention (Bybee, Letter, 1 Aug 2002).

Under Section 2340, an act only constitutes torture if it is intended to “inflict severe physical or mental pain or suffering” (Bybee, Letter, 1 Aug 2002). Bybee noted that for a prosecutor to prove that an act constituted torture based on this law, he or she would have to prove several different things. Most importantly, the prosecutor would have to prove that the defendant was acting “under the color of the law,” it was his intention to inflict severe physical or mental pain, and he actually did accomplish this.

Furthermore, Bybee noted that a defendant could also be found to be guilty of torture if he threatens to inflict severe physical or mental pain on the prisoner, or on someone else, if the information that is desired is not procured. Bybee then began to search for several loopholes to the law that could be argued. For example, he noted that while the threat of “imminent death” is prohibited, the threat of death alone, as long as it is not imminent, is not specifically prohibited (Bybee, Memo, 1 Aug 2002). Furthermore, he added that if a defendant acts in good faith that his actions will not constitute torture, then he cannot be held accountable.

Bybee noted that international standards of what constitutes torture are slightly higher than US standards. He pointed to the European Court of Human Rights, which distinguishes between torture and cruel inhumane and degrading acts or treatment.
This Court found that techniques such as sleep deprivation, hooding, food deprivation and loud noises were inhumane but did not constitute torture. Bybee then suggested that the President could actually approve of these milder treatments and still avoid prosecution, both in the US and abroad. He argued that if Congress were to try to interfere with these interrogation efforts, it would get in the way of the President’s constitutional war powers as Commander-in-Chief. Bybee also added that because the US has rejected the Rome Statute, the ICC has no jurisdiction to prosecute, anyhow (Bybee, Letter, 1 Aug 2002). However, in the event that any rogue prosecutors were to attempt to bring charges against the President for approval of these techniques, Bybee insisted that Bush would still have a defensible argument based on two fronts (Bybee, Memo, 1 Aug 2002). First, the President could make the “necessity” argument, claiming that these interrogation methods constitute the lesser of two evils. If the choice comes down to protecting the rights of one prisoner versus the protection the American public from another attack like that of 9/11, the President has no choice but to protect the public. According to the LeFave & Scott Model Penal Code, “[t]he law ought to sometimes promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of criminal law” (Bybee, Memo, 1 Aug 2002). However, as David Cole points out, “[s]acrificing foreign citizens’ liberties is always tempting as a political matter. It allows those of us who are citizens to trade someone else's liberties for our security. But doing so is wrong, unlikely to make us more secure and virtually certain to come back to haunt us,” (Cole 2002). What if these prisoners have no information, or are not guilty of
any crime at all for that matter? This defense assumes that these prisoners are in some way deserving of these punishments, when they have not actually been proven to be guilty of anything.

Second, Bybee noted that it was the opinion of the Justice Department that, “self-defense can be an appropriate defense to an allegation of torture.” Bybee argued that the amount of force to be used in response should be proportionate to the threat of the information the prisoner possesses, and considering the attacks of 9/11, he found this threat to be significant. Once again, however, the magnitude of information that these prisoners possess is only known by the Administration because it refuses to allow these prisoners to defend their cases.

In response to these Justice Department recommendations, William Haynes released a memo on December 2, 2002 listing the approved counter-resistance techniques to be used during interrogations. This memo divided various techniques into three categories, each more severe in intensity than the previous category (Haynes 2 Dec. 2002). Haynes stressed that only the techniques in Category I and II were approved for use, and some of the techniques involving light physical contact from Category III could be used with discretion. Among those actions approved from Categories I and II were yelling at the detainee, mild deception, use of stress positions for a maximum of four hours, deprivation of light and auditory stimuli, removal of clothing, forced grooming (i.e. shaving), inducing stress by using detainees’ fears (i.e. dogs barking), and the use of interrogations up to twenty hours in length. Some of these approved techniques, including shaving and removal of clothing, were specifically chosen because they were
known to be particularly degrading to Muslim men (Hersh 2004). However, Haynes argued that these methods are legal, as they do not cause harm, so he approved of their use. Haynes went on to argue that in all of these cases, the prisoner’s circumstances and physical health should be considered first so as to avoid later prosecution. Finally, he noted that Category III techniques involving physical contact should only be used after filing a special request. In essence, he made the determination that interrogators could strike prisoners as long as they asked permission first.

Just one month later, Rumsfeld sent a memorandum rescinding authorization for all Category II and III techniques that were previously approved (Rumsfeld, Counter-Resistance, 2003). On the same day, Rumsfeld assembled a working group within the DoD to examine the “legal, policy, and operational issues” related to the interrogations of the detainees in the “War on Terror,” (Rumsfeld, Detainee Interrogations, 2003). Apparently the Administration had begun to fear there would be repercussions for the tactics it had earlier approved.

This working group first reasserted the claims that the Geneva Conventions should not protect these prisoners (Working Group Report 2003). It also echoed earlier White House sentiments that the Torture Conventions were only valid to the extent that they were in agreement with US Statute Section 2340. In addition to the necessity and self defense arguments offered earlier by Bybee in defense of torture accusations, the working group offered three more defenses to these charges, should they arise. First, the group argued that if the President, acting as Commander-in-Chief, had to worry about prosecution for every single action, it would significantly impair his ability to carry out
his constitutional duties. For this reason the working group felt the President could not be held accountable. Second, these actions during interrogation are often necessary in military law enforcement to prevent or stop someone from committing a serious crime. Finally, the group noted that while the argument that a soldier is following superior orders may not relieve him of responsibilities, it might be a mitigating factor. Furthermore, the group was confident that the *Eisentrager* precedent would prevent these prisoners from gaining access to civil courts—a point of view that was later proven to be incorrect by the courts.

The group went on to note that exceptional interrogation techniques could be used as long as there is prior approval. For example, the group recommended that for those detainees who are extremely resistant, the interrogator should try a combination of sleep deprivation, prolonged interrogation, face slap/stomach slap, the removal of all clothing, and the presence of a dog. Interestingly enough, the DoD distanced itself from many of the soldiers who were seen in photos to be applying similar treatment to prisoners at Abu Ghraib. The most important thing to note is that the group found that no one in either the Justice Department or the DoD felt that the US was in any way bound by customary international law. This blatant disregard for the international community has been a recurring characteristic of the Bush administration. As can be seen, this group by no means gave Rumsfeld an objective report, seeing as large portions of this report were copied from earlier Bybee memos.

The only real change that came from these recommendations was Rumsfeld’s rescinding of the approval to use mild physical contact. In a memo dated April 16, 2003,
Rumsfeld basically approved of anything up to that point, with prior authorization required for the most severe techniques.

Shortly after these documents became public, the Bush administration began to distance itself from them slightly; however, Alberto Gonzalez, the man who requested most of these recommendations and pushed for more intense interrogations, was not so quick to do the same. At his confirmation hearings for the position of Attorney General on the Bush cabinet, Gonzalez was asked by Senator Pat Leahy of Vermont if he agreed with the positions on interrogation of prisoners at the time these documents were released. His response was, “I don't recall today whether or not I was in agreement with all of the analysis. But I don't have a disagreement with the conclusions then reached by the department,” (“Gonzalez Faces Tough Questions at Hearings” 2005). This statement was made after the Abu Ghraib scandal and in the wake of allegations of prisoner abuse at Gitmo. But has the President really distanced himself from the conclusions reached in these documents? At a news conference in Georgia during the summer of 2004, President Bush responded to the following question:

James Harding (Financial Times): Mr. President, I want to return to the question of torture. What we've learned from these memos this week is that the Department of Justice lawyers and the Pentagon lawyers have essentially worked out a way that US officials can torture detainees without running afoul of the law. So when you say you want the US to adhere to international and US laws, that's not very comforting. This is a moral question: Is torture ever justified?
President Bush: Look, I'm going to say it one more time. ...Maybe I can be more clear. The instructions went out to our people to adhere to law. That ought to comfort you. We're a nation of law. We adhere to laws. We have laws on the books. You might look at these laws, and that might provide comfort for you. And those were the instructions...from me to the government. (Danner 2004)
So what has been the effect of the Bush administration’s interrogation policy? Major General Antonio Taguba, sent to Abu Ghraib to find out what went wrong, concluded that “personnel assigned to the 372nd MP Company, 800th MP Brigade were directed to change facility procedures to ‘set the conditions’ for MI interrogations.” Superiors “actively requested that MP guards set physical and mental conditions for favorable interrogation of witnesses” (Hersh 2004). So if these actions were based on superior orders, why did someone along the chain of command not stop them earlier? One anonymous general said he took information about the abuses to General Abizaid, of CENTCOM, but he replied, “Move on. I don’t want to touch this” (Hersh 2004). A Pentagon consultant felt that while Rumsfeld may not be personally responsible for the abuses, “he’s responsible for the checks and balances. The issue is that, since 9/11, we’ve changed the rules on how we deal with terrorism and created conditions where the ends justify the means” (Hersh 2004). It would seem that the responsibility for Abu Ghraib might have reached all the way to the upper-level Bush administration. But what of the treatment of prisoners at Guantanamo Bay, where Bush stated that the prisoners would be treated “humanely”? One CIA analyst was flown to Guantanamo to find out why the CIA had not been receiving enough information (Hersh 2004). Apparently, when he returned he was convinced that the US was committing war crimes. He found prisoners “lying in their own feces,” and he felt that half of the prisoners who were there did not even belong. Further reports indicated that on high-level targets at Gitmo, a technique known as “water-boarding” has been used in which a prisoner is “strapped down, forcibly pushed
under water and made to believe he might drown,” (Danner 2004). The International Committee of the Red Cross (ICRC) visited Gitmo in the summer of 2004 and reported that the US was engaging in “cruel, inhumane and degrading” treatment of the prisoners (White 2004). Of course, earlier memos by Bybee practically encouraged “cruel, inhumane and degrading” treatment, as long as it did not fall under the torture category. The ICRC found atrocious tactics being used to “break” these prisoners, including severe temperatures, loud music, the sharing of medical information with the interrogators, and forced nudity. The ICRC felt that these behaviors violated torture standards both within the US and abroad. In response to these allegations, a Pentagon spokesperson said that defense officials “vehemently deny any allegations of torture at Guantanamo, and reject categorically allegations that the treatment of detainees at Guantanamo is improper” (White 2004). It would seem that the Bush administration has different definitions from the rest of the world for both “torture” and “improper”.

While the courts have made some effort to check the Administration’s complete control over the treatment of these prisoners, the same cannot be said for Congress. Senator John Warner, Chairman of the Armed Services Committee, was appointed to head an investigation of prisoner abuse at Abu Ghraib. However, as a former senior intelligence official observed, “[h]e [Warner] knows that the people in the chain of command were culpable, but he’s drifting, and he wants to go down as the guy who doesn’t read other people’s mail. The stakes are too high. He’d rather have some bad guys and perpetrators go free than put national security at risk” (Hersh 2004). Mark
Danner summarizes the role of Congress in checking the President’s authority in the following statement:

“The hearings offered Congress yet another chance to perform a critical duty it has so far scarcely begun—to investigate fully how it came to pass that Americans tortured prisoners; to identify those officials, from the mid-level of the military chain of command up to the highest levels of the American government, who were responsible for approving its use; and to open the way for appropriate punishment. Yet the hearings themselves, before a Republican Senate in what has become essentially a one-party government, accomplished no such thing.” (Danner 2005)

Five prisoners have died to date, presumably from interrogations (Danner 2004). I would argue that this is most likely a direct result from the “limited” approval of the more severe techniques used for interrogations. Furthermore, even if these deaths have resulted from a “few bad apples,” it is definitely true in this instance that the apple does not fall too far from the tree. If high-level Bush officials are ordering these soldiers to “prepare” prisoners for interrogation, and the prisoners see military intelligence taking similar actions, it is only a matter of time before it starts to rub off on other soldiers. How can it not when the Administration is approving “cruel, inhumane and degrading treatment,” as long as it does not constitute torture? In my mind, the problem is that the Bush administration, all along, has tried to do everything possible that is not a violation of the law. What the Administration should be doing is what is the most humane in these circumstances. The US should not be treating its prisoners any differently than it would prefer other nations or groups to treat any of our own prisoners. It does not matter whether there are more severe methods that could be used without violating the law. There is a distinct difference between following the letter of the law and the spirit of the law, and the Bush administration has crossed the line.
Conclusions

The consequences of these actions by the President are widespread and evident. The scandal at Abu Ghraib prison just served to further fuel the increasing hatred in the Muslim world for Americans. These photos just confirmed what many in the Muslim world had already believed (Danner 2004). We as Americans have never been as hated by the international community as we are today (Cole 2002). This comes as a result of the Bush administration pursuing a legitimate end—protecting our nation from future terrorist attacks—through illegitimate means—usurping the constitutional powers of both Congress and the courts and disregarding the sentiments of the international community. While there is some argument to be made that the US should be able to make its own decisions as a sovereign nation, the opinion of the international community should matter. However, it is troubling that no one in either the Justice Department or the Department of the Defense believes that we are bound in any way by customary international law.

There is, of course, much blame to be placed on the Bush administration in this matter. The Administration has been stubborn and unwilling to allow anyone oversight into any matters regarding prisoner treatment because it fears this will create a “security risk.” But at what point do the costs of our security start to outweigh the benefits? There is no reason why the Bush administration should not at least work with Congress to establish standards for trials and detentions. Congress has just as much of an interest in national security as the President, so it would have no reason to sabotage this effort.

It has become abundantly clear that the “War on Terror” will not be over anytime soon. There is a good possibility that if anything, the efforts of Bush to end terrorism are
in reality extending the “War on Terror” because they are fueling the hatred that breeds this terrorism. Most importantly, the Administration needs to accept that there should be some sort of oversight into prisoner detention. First the prisoners were moved to Gitmo to keep them out of the reach of the courts. Then, when the courts ruled that the prisoners should have access to civil courts, it was discovered that there was a secret prison within Gitmo that no one but the highest-level officials even knew about. Now there is even speculation that the United States has been sending prisoners to nations other than their country of origin because these nations are willing to use torture tactics (Herman 2005). This practice, known as rendition, has been taking place since the recent outcry in response to the torture memos. When asked if it is possible that the country these prisoners have been to have been using torture in the interrogation of prisoners, Alberto Gonzalez replied, “[w]e can’t fully control what that country might do.” While this is true, the US can fully control whether or not these prisoners are ever sent to the country. However, the Bush administration seems to be willing to use whatever means possible to gather any shred of information. What the Administration needs to realize is that these actions will eventually come back to haunt us. While it may seem all too easy for us to imprison these aliens now, it will not bode well for our troops and citizens in foreign countries in the future. American citizens may not realize this, but the effects have already begun to materialize abroad. We as citizens need to hold this Administration accountable, because if anything, Bush’s actions are only making the “War on Terror” worse.
Most Americans have not felt the effects of Bush’s actions, so it is hard for them to support these prisoners whose voices cannot even be heard. However, all it takes is one donation to a charity that is secretly supporting a terrorist organization for any one of us to be in a very similar situation to those prisoners being held at Guantanamo Bay.

While the courts have recently made headway into acting as some sort of check on the Bush administration’s anti-terror efforts, Congress has done nothing more than to voice the occasional concern.

Even when Congress has made an effort to confront torture allegations, it has been half-hearted at best. As mentioned earlier, Senator Warner’s investigation into Abu Ghraib was abandoned because “the stakes were too high”. Mark Danner, in a column for the New York Times, noted that this scandal was, in all reality, followed by nothing more than, “condemnations and a few hearings distinguished by their lack of seriousness,” (2005). Furthermore, while the Gonzalez confirmation hearings provided Congress with an opportunity to make a clear indication of where it stood on the matter, Gonzalez ultimately faced nothing more than a few “tough” questions before being confirmed to an even higher position within the Bush administration. In my opinion, this was more of a show of approval than anything. Congress should not look lightly upon these actions by the Bush administration. It should be acting as a watchdog over every decision, and it should take advantage of these committee hearings to penalize those responsible for torture (or worse) with more than just a slap on the wrist.

Furthermore, Congress must reclaim its war powers in whatever way possible, no matter how politically unpopular this move may be. Unfortunately, it seems that most
members of Congress are too politically sensitive to get behind such a bold movement as this. Additionally, with a Republican dominated Congress, many of these members are only thinking about doing what is best for their party, not what is best for the nation. The current state of affairs has resulted from an accumulation of power by the executive branch dating back to Jefferson, so it is understandable why Congress would be afraid of taking on this daunting feat. Also, Congress has not had much motivation for taking action on this matter because none of these prisoners are constituents. However, for the safety of the American people, the integrity of the Constitution, and the American way of life, it is necessary for Congress to take this step. It is also necessary for the American people to support Congress in these actions and not to call these members of Congress “anti-American” and “unpatriotic.” In reality, they are doing something that is quite the opposite—reestablishing the separation of power—which is one of the unique characteristics of our country that defines us as American.
Works Cited


