

4-1-2008

The "War On Terror" Slippery Slope Policy: Guantanamo Bay And The Abuse Of Executive Power

Marcia Pereira

Follow this and additional works at: <https://repository.law.miami.edu/umicl>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Marcia Pereira, *The "War On Terror" Slippery Slope Policy: Guantanamo Bay And The Abuse Of Executive Power*, 15 U. Miami Int'l & Comp. L. Rev. 389 (2008)

Available at: <https://repository.law.miami.edu/umicl/vol15/iss3/5>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

THE “WAR ON TERROR” SLIPPERY SLOPE POLICY: GUANTANAMO BAY AND THE ABUSE OF EXECUTIVE POWER

*Marcia Pereira**

Introduction	390
I. The Executive Power To Detain	394
A. The Constitutional Text and Structure.....	395
1. The Framers’ Intent.....	396
2. The Constitutional Text.....	398
B. The President’s Executive Order.....	400
II. Congressional Authorization.....	405
A. Strike One: The War Power Resolution (“WPR”) & Joint Resolution 23 (AUMF)	406
B. Strike Two: Detainee Treatment Act of 2005 (“DTA”).....	413
C. Strike Three: Military Commissions Act of 2006 (MCA).....	417
III. The Role of the Judiciary: A Historical Judicial Review	421
A. Judicial Rulings Prior 9/11.....	422
B. Judicial Rulings Post 9/11: The Potential Demise of <i>Marbury v. Madison</i>	425
1. Non-U.S. Citizens Category: Rasul, Al-Odah Qassim and Hamdan	426
2. Youngstown Revisited: Hamdan v. Rumsfeld	429
3. U.S. Citizen’s Category: Hamdi.....	432
IV. Attempts to “Fix” Unbounded Detention	435
V. Conclusion.....	442

* Civil Litigation & Transactional Attorney and University of Miami School of Law Graduate. Special acknowledgements to Professor Mario Barnes, Associate Professor at the University of Miami School of Law, my mentor, who recommended impressive improvements to this Article.

“Mankind censure injustice fearing that they may be the victims of it, and not because they shrink from committing it.”

Plato, *The Republic*

Greek author & philosopher in Athens (427 BC–347 BC)

INTRODUCTION

On September 11, 2001, the United States, the most powerful democracy in the world, was struck by a horrible event: aircraft hijackers' attacks to the heart of the City of New York put an end to the lives of 2,973 innocent civilians. An international terrorist organization, Al Qaeda, took responsibility for the act.¹ In response to the attacks, the U.S. Government Executive branch put in place a series of highly controversial procedures. Amongst these procedures, the Executive branch claimed authority to detain indefinitely individuals who were arbitrarily labeled as enemy-combatants.² As a consequence, many individuals were detained pursuant to Executive action in Guantanamo Bay, Cuba, including two Uighurs—Turkic Muslims that mainly live in a far northwest region of China, Xinjiang.

During the course of their detention, the Uighurs were evaluated by the Combatant Status Review Tribunal (CSRT) and were declared non-enemy combatants. In theory, this determination should have precipitated their release from their Guantanamo Bay incarceration.³ Initially, however, Abu Bakker Qassim and A'del Adbu Al-Hakim (hereinafter the “Uighurs”) were not able to leave Cuba for two reasons. First, the Bush Administration refused to send them back to China fearing persecution, possible execution or, at least imprisonment since the Uighurs have

¹ See NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 311 (2004), <http://www.gpoaccess.gov/911/pdf/fullreport.pdf>.

² See *Detainee Treatment Act of 2005*, § 1005 and *Hamdi v. Rumsfeld*, 542 U.S. 507 (U.S. 2004),

³For unknown reasons, the Combatant Status Review Tribunal (CSRT) has not made public their review of these detainees, but merely published a compiled version with the number of reviews conducted organized by date. See *Combatant Status Review Tribunal Summary*, U.S. Department of Defense, available at <http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf>. See also *Uighurs in Guantanamo*, <http://uhrp.org/categories/Issues/Uyghurs-in-Guantanamo>.

historically been subject to Chinese Authorities’ oppressive treatment.⁴ Second, letting them on to U.S. soil seemed to be out of the question, not only for the fact that they had been detained and may have been influenced in Guantanamo bay, but also because of the stigma associated with Uighurs. They have been labeled as “Turkic Terrorists” by the Chinese Government.⁵

In response to the U.S. Government’s failure to release them, the Uighurs filed a habeas petition challenging their further detention. Before Judge Robertson in the Federal District Court for the D.C. Circuit, the detainees’ writ of habeas corpus was denied.⁶ This order was likely on its way to appeal to determine whether they would be removed from Guantanamo Bay or held there indefinitely. However, before the matter

⁴ Amnesty International has been intimately involved in the Uighurs’ struggle in Guantanamo Bay. This entity has not only explored the legitimacy of U.S. grounds for the detention, but also questioned China’s ongoing political crack-down on what is known as “three evil forces” of “separatists, terrorists and religious extremists.” See *Amnesty International, People’s Republic of China: Uighurs Fleeing Persecution as China Wages its “War on Terror,”* March 2002 (ASA 17/10/2002).

⁵ China has waged on the war on terror to change Uighurs label from “Separatists” to “Terrorists” including changing their statutory criminal law to contain the words “punish terrorist crimes.” See *Uighurs fleeing persecution as China wages its “war on terror,”* ASA 17/021/2004, July 2004, at 10. In face of such transition, most countries have refused to provide asylum to Uighurs probably ignoring the fact that they are actually victims of fundamental human rights violation of Freedom of Speech and Association and no proper evidence was established that they have ever engaged in terrorist activities.

⁶ Judge Robertson’s holding clearly seems to be, for the most part, a byproduct of U.S. Sup. Ct.’s failure to set forth guidelines on what remedies to provide to detainees declared non-enemy-combatants. Accordingly, Judge Robertson states the following in support of his order denying the Uighurs petition for writ of habeas corpus:

In *Rasul v. Bush*, the Supreme Court confirmed the jurisdiction of the federal courts “to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.” It did not decide what relief might be available to Guantanamo detainees by way of habeas corpus, nor, obviously, did it decide what relief might be available to detainees who have been declared “no longer enemy combatants.” Now facing that question, I find that a federal court has no relief to offer. *Qassim v. Bush*, 407 F. Supp.2d 197, 203(D.D.C. 2005).

could be considered, the Uighurs received relief in likely the only way they could—they were offered asylum by third-party countries.⁷ Through this asylum process, the Uighurs became the first detainees to be released from Guantanamo since 2001.

Even though matters worked out for these two individuals, it was only through the kindness of a willing third-party nation that their potentially unbounded detention was ended. With the story of these two innocent detainees as a starting point, the central goal of this Article is to assess the legitimacy of current presidential policies toward the detainees held in Guantanamo. Specifically, I will analyze the dangers of a system that allows equivalent detentions for the following vastly different groups: 1) those detained and yet to be adjudged enemy combatants; 2) those adjudged to be enemy combatants, who may or may not be subject to military commissions; and 3) those adjudicated and found not be enemy combatants at all. The Article, however, will do more than analyze the nature of these detentions. On the one hand, it will question the disparate treatment visited upon non-citizen enemy combatants, as opposed to the constitutional safeguards provided to U.S. citizen enemy-combatants. Additionally, with regard to the authorization of this treatment, this Article will challenge the U.S. Supreme Court to meaningfully accept the burden of ensuring that constitutionally required separation of powers are observed between the branches.

Part I of this Article presents an analysis of the Executive actions which led to the creation of Guantanamo Bay and the use of Military Commissions,⁸ and questions whether the Executive branch holds the

⁷ After over four years of detention, the Uighurs were sent to a center for asylum seekers in Albania which has a majority Muslim population. See Charley Savage, *Chinese Muslims sent from Guantanamo to Albania*, *The Boston Globe*, May 6, 2006 available at http://www.boston.com/news/nation/washington/articles/2006/05/06/chinese_muslims_sent_from_guantanamo_to_albania/. Yet, until recently, other 17 Uighurs are still depending on other countries' generosity to offer them asylum. CRAIG WHITLOCK, *U.S. Faces Obstacles Freeing Detainees*, Oct. 17, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/10/16/AR2006101601339_2.html?nav=rss_nation&g=1.

⁸ The Military Commissions Act (the "MCA") was recently enacted in response to the U.S. Supreme Court holding in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (U.S. 2006), discussed later in this Article. Basically, the MCA endorses the legality of the Military Commissions convened in Guantanamo. 10 U.S.C. §§ 948(a)–950(w) (2006).

power to undertake such actions in light of the principles of separation of powers and checks and balances among the three branches of Government. In developing the analysis of relevant congressional actions, Part II will argue that separation of powers principles are at heart of the organization and function of the U.S. Constitution. This Part will further challenge these congressional actions as part of a discussion about whether certain congressional delegations of legislative power to the President were appropriate.

Part III will develop a discussion on the critical role the Judiciary plays in directing a more active congressional response or “check” on presidential actions. This Article suggests that such a role has not been satisfied to the level the Founders intended. A critical reading of the Federalist Papers evinces that the Founders spelled out the necessity that checks and balances be preserved. By virtue of the U.S. Supreme Court review of the substance of legislation Congress enacted, the Framers’ aimed at fostering a system in which individuals liberties should remain protected as enunciated in the Constitution. This part will then question whether the Executive has confined itself to the constitutional boundaries.⁹ In addition, this Part will briefly discuss the concept of enemy-combatants and what the consequences are of being labeled as such, including what implications can arise from being a U.S. citizen as opposed to a non-U.S. citizen.

Part IV of this Article will develop attempts to provide for alternative solutions to the detainees’ unbounded detention. It will then analyze the impact of current U.S. presidential and congressional choices with respect to Guantanamo Bay on foreign policy, including international treaties to which the U.S. is a signatory. In so doing, this Article suggests that U.S. policies are likely violative of Article Fourth of the Geneva Conventions which provides foreign individuals’ protections from submission to military tribunals prior to having been declared prisoners of war (POW) and having charges properly filed against them.

⁹ In The Federalist Papers no. 80, Hamilton laid down principles pursuant to which the federal judiciary power ought to be prescribed. Specifically, he points out to the federal judiciary role of ensuring uniformity of the laws on the Union. By way of example, he expressly states that the judicial authority extends to cases which “arise out of the law of the United States passed in pursuance of their just and constitutional powers of legislation . . . [cases which] involve the PEACE of the CONFEDERACY whether they relate to the intercourse between the United States and foreign nations...”

Guantanamo Bay Military commissions have proscribed procedural and evidentiary rules, which are distinct from those of military courts-martial, or other U.S. federal courts. This Article will suggest that these rules fall short of what is required for these proceedings to be endorsed as acceptable under our domestic law and treaty obligations.

This Article concludes by suggesting that even though the Uighurs release may mark an initial showing of U.S. Government progress in detainee treatment, it appears that a more active and stricter judicial intervention may be necessary to secure rights for other detainees. Such a posture is necessary to avoid abusive encroachments of power among the branches of Government, and to ensure the effectiveness of checks and balances erected by the Founding Fathers. Furthermore, judicial intervention is critical to persuade the international community that the U.S. still respects due process of law and its obligations to ensure the protection of fundamental human rights under international treaties, even in a 'theater of war.'

I. THE EXECUTIVE POWER TO DETAIN

As Deputy Counsel, John C. Yoo, correctly pointed out in his memorandum¹⁰ to the President, the events of September 11, 2001 raised important questions with regard to the presidential authority to respond with military action. Yoo concluded, without hesitating, that the President has broad authority to use military force.¹¹ In reaching his conclusion, the deputy advanced that the constitutional text and structure give the President unconditional authority to act in such circumstances. Further, he reads the Federalist Papers to endorse broad presidential authority. The Deputy also focused on how congressional action has fully authorized the President's actions abroad as well as in practice and history in the United States. While Deputy Yoo had legitimate grounds for recognizing inherent presidential power in the field of national security, his reasoning presented a narrow, one-sided reading of the

¹⁰ Deputy John C. Yoo is a former Deputy Assistant Attorney General at the Office of Legal Counsel of the United States Department of Justice. In Sept. 25, 2001, Deputy John Yoo drafted a memorandum in reply to the President's inquiry as to the scope of his presidential authority to take military actions in response to the attacks. See John Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, available at <http://www.usdoj.gov/olc/warpowers925.htm>.

¹¹ *Id.*

Constitution. The net result of such a reading is that it places a disproportionate amount of constitutional power in the hands of the Executive Branch vis-à-vis Congress.¹²

In an effort to challenge the choice to favor an unduly strong Executive, a choice most likely driven by the emotional turmoil emanating from the attacks, this Part of the Article will propose an alternative reading of both Constitutional text and structure. This reading suggests that the Federalist Papers provide a basis to accomplish a more balanced proposition vis-à-vis Executive power. In examining the Federalist Papers, this Part will conclude that a different reading of these documents can certainly provide that the Commander-In-Chief designation does not bestow upon the President an unbounded authority to take military actions. Finally, this Part will examine lawfulness of the President’s Executive Orders to detain the individuals seized in the war on terror and to conduct military commissions in Guantanamo Bay. The central question is whether these actions were tantamount to unconstitutional “Executive legislating.”

A. The Constitutional Text and Structure

In order to provide an in depth analysis of the constitutional text and structure, this Subpart will be subdivided into the two following parts: the Framers’ intent and the constitutional text.

¹² In citing to the U.S. Supreme Court opinion in *Nixon v. Fitzgerald*, 457 U.S. 800, 812 (1982), Deputy Yoo reasoned that the President’s constitutional primacy “flows from both his unique position in the constitutional structure and from the specific grants of authority in Article II that make the President both the Chief of the Nation and Commander-in-Chief.” Unfortunately, this results in a convoluted proposition in that it wrongfully blends the functions of “Chief of the Nation” with “Commander-in-Chief of the Army” into one single role over expanding the powers of the President. In reasoning that the President is the Commander-in-Chief of the Army not the nation, the U.S. Supreme Court’s opinion in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, reasoned that “[e]ven though ‘theater of war’ be an expanding concept,” the court could not in fairness to the Constitution hold that the “Commander-in-Chief has the ultimate power as such as to take possession of the private property...” The Court went on to say that the Constitution limits the President’s functions in the lawmaking process to the *recommending* of the laws he thinks wise and vetoing those he thinks bad. In other words, mystifying the dual role of the President, as derived from Article II, to grant him legislative power seems to overstep what the constitutional structure seeks to accomplish.

1. The Framers' Intent

Article II, Section 2 of the Constitution vests in the President the role of “Commander-in-Chief of the Army and Navy of the United States” and requires him to “preserve, protect and defend” the Constitution of the United States. He is also required to “faithfully execute” the laws of the United States. Those who favor an expansive approach to the Executive power usually read this section to give the President inherent and independent constitutional authority to use military forces in response to threats to national security and foreign policy of the United States.¹³ Nevertheless, a more careful reading of the Federalist Papers suggests that these powers are not so unbounded.

In the Federalist Papers no. 23, Alexander Hamilton states the following in expressing his concerns about how national security ought to operate:

The authorities essential to the care of the common defense are there—to raise armies—to build and equip fleets—to prescribe for their support. These powers ought to exist *without limitation* ... [t]he circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which care of it is committed ... the *means ought to be proportioned to the end*. [Emphasis added]

In interpreting documents drafted so long ago, we run the risk of oversimplification. Nevertheless, while the plain reading of Hamilton’s statements clearly indicates his utmost concern for national security, it appears that, in seeking proportionality in the federal government, Hamilton also sought to institute a balanced approach to national security. Such an approach would necessarily involve cooperative governance of emergencies.¹⁴ Similarly, he further states:

Whether there ought to be a *Federal Government* entrusted with the care of the common defense, is a

¹³ See Yoo’s propositions in his memorandum to the President, *supra* note 10.

¹⁴ In the Federalist Papers no. 28, Hamilton seems to reinforce this notion of proportionality when he states that “[t]he means must be proportionate to the extent of mischief.” The statement involves his proposition that, in times of emergency, forces would be necessary.

question in the first instance, open to discussion; but the moment it is decided in the affirmative, it will follow, that the *government* ought to be clothed with all powers requisite to the complete execution of its trust. [Emphasis added].¹⁵

It can be argued, that the words “Federal Government” were italicized to evince that Hamilton was referring to the full measure of the national government. Hence, Congress, not just the “President,” would need to be involved in the goal of maintaining national security.

This view of shared governance over emergency seems to be favored in another relevant passage of the Federalist Papers, when Hamilton contrasted the President’s power with those of the king of Great Britain. He explicitly stated that presidential powers are “in substance much inferior to [that of the king].”¹⁶ As such, the Executive does not have the power to legislate by decrees. Moreover, it is important to contextualize the Framers’ debates revolving national security. In his arguments, Hamilton was seeking to promote the view of a federal government taking over national security as opposed to leaving it in the hands of the states. Therefore, Hamilton was articulating a brand of federalism designed to ensure national versus local (state) response to emergency. Only through using the complete federal government, which

¹⁵ Deputy John Yoo seems to ground his theory in the last part of Hamilton’s statement by concluding that “clothed with all powers” demonstrates the Framers’ clear intent that those powers were placed solely with the President to defend the United States. While this might be a fair reading, it fails to consider the text in its entirety to the extent it only extracts one sentence without contextual foundation.

¹⁶ The Federalist Papers No. 69, provides, in pertinent part:

The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.

represents the states through Congress, could the states have any voice in the response.

Hamilton is not the only Founding Father whose view is critical to this discussion. When James Madison proposed a balanced Government by the creation of three separate branches,¹⁷ he was cautious enough to state that these branches are “by no means totally separate and distinct from each other.”¹⁸ He went even further to say that “[t]he Executive magistrate *forms an integral part of the legislative authority*”¹⁹ and “there can be no liberty where legislative and executive powers are united in the *same person*.”²⁰

In reconciling the Hamiltonian and the Madisonian views, one thing is certain: it is not within the province of the Executive to legislate. On one level, Hamilton envisioned an Executive with substantial autonomy and prerogative. In contrast, Madison conceptualized the notion that the Executive derived its powers from the legislature. He had a more narrow view of the Executive, where it had the power to execute the laws, but not to initiate them. His Executive would improve laws and provide for effecting corrections for those laws, but he would not replace legislation. While Hamilton’s view seemed to prevail, judicial imprimatur has sought to limit presidential power to those expressly provided for under the Constitution and those implied powers necessary to carry out the express powers.²¹ Despite Hamilton’s and Madison’s general disagreements with respect to ideas, the overarching language of the Federalist Papers stands for the proposition that the federal government should strive for a balance of power between the branches. The three branches have their powers *proportionally* allocated, subject to the checks exercised upon one another, to ensure those powers are not misused or unduly encroached upon. Had the President been vested *in persona* the inherent power to legislate, Article I would be meaningless and Congress would be a nullity.

2. *The Constitutional Text*

As it can be concluded from the previous discussions in this Section, the desired balance of power can be described in a word: *proportionality*.

¹⁷ The Federalist Papers No. 47.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *Meyers v. United States*, 272 U.S. 52 (1926).

Certainly, in light of history and the Framers’ pronouncements, arriving at the conclusion that the Executive lacks the power to take military actions in light of belligerent attacks to the nation would be somewhat unrealistic. The issue is whether the office of the President can do so without Congress’ explicit collaboration and oversight. On balance, while Article II of the U.S. Constitution’s plain language empowers the President to act as Commander-In-Chief, the concern should be centered in the nature and scope of such powers rather than whether they actually exist. In the context of foreign relations, it has been argued that the President has the ability to legislate. Those who undertake this view, support it under the notion that the President is the head of the nation’s international relations.²² Such a view has been advanced to justify that presidential powers in the foreign arena are broader than on domestic soil.²³ However, it is well settled that the power to legislate lies in the

²² A careful reading of U.S. Sup.Ct. Opinion in *Dames & Moore v. Reagan*, 453 U.S. 654 (1981), may evince a certain struggle on the part of the Court in upholding presidential action without express congressional approval. While the Court seems to give deference to President’s actions in foreign relations, its rationale somewhat reveals attempts to justify such holding. For example, the Court rationalized that, despite lack of congressional express authorization in the President’s issuing of Executive Order withholding Iranian funds until U.S. civilians taken as hostages be released, Congress had acquiesced to by virtue of a longstanding practice. The Court concluded that Congress’ acquiescence amounted to congressional consent to President’s conduct. Thus, it can be argued that this holding is rather of very limited consequences than that of a general rule or pronouncement of President’s inherent power. As Justice Rehnquist stated in the opinion: “We are confined to a resolution of the dispute presented to us” and “we attempt to lay down no general “guidelines” covering other situation not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case.” *Id* at 660–61.

²³ In *U.S. v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 322 (1936), Justice Sutherland acknowledged that the President had considerable discretion in conducting foreign relations. Nonetheless, he was also cautious enough to restrict the scope of the opinion rather than simply holding the President had unfettered inherent powers:

[I]t is evident that this court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power. The principles which justify such legislation find overwhelming support in the unbroken legislative practice which has

hands of the Legislative branch.²⁴ With that in mind, the Executive's ability to legislate, even in foreign relations, should be very limited to avoid consequences arising from undesirable encroachments and potential abuses of power.²⁵ Taken together, the Framers' intent and constitutional text do not support the Executive acting without congressional sanction to detain and try persons captured in furtherance of the "War on Terror." A potential remedy to this problem will be discussed below in Part IV. First, however, we need to look at the explicit provisions of the Orders at issue.

B. The President's Executive Order

On the thirteenth day of November, 2001, President Bush signed the Executive decree titled the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (the "Order").²⁶ The Order authorized the Secretary of Defense to detain and to convene military commissions of any current or former member of the Al-Qaeda organization, as well as anyone who "aids or abets" its work or harbors its members. The order provided for the imposition of death penalty subject to limited review in civilian courts.²⁷ The outcome of the Order was the creation of a military base, Camp X-Ray (now the so-called Camp Delta), located in Guantanamo Bay, Cuba. The camps can be likened to

prevailed almost from the inception of the national government to the present day.

Once again, we are presented with a narrow holding. Justice Sutherland next went to the specifics of the case and examined past congressional legislation authorizing the President to act the way he did. Thus, it is fair to conclude that presidential actions in foreign relations ought to be subject to review as to their scope and nature on a case-by-case basis.

²⁴ In referencing to Justice Jackson's concurrence in *Youngstown Sheet Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952), the U.S. Supreme Court opinion in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 (2006), rationalized that "whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."

²⁵ See *Curtis-Wright Exp. Corp.*, *supra* note 23.

²⁶ 66 Fed. Reg. 57833 (2001).

²⁷ In his letter, the President proclaims "national emergency" and issues the order pursuant to the authority vested in him as the Commander in Chief of the Armed Forces of The United States. *Id.*

“maximum security” prisons.²⁸ In January 2002, the first detainee was taken into custody and placed in Guantanamo brought in wearing shackles and black goggles.²⁹ By February 2003, the U.S. Government had already detained 640 prisoners, including children between the ages of 13 and 16 as well as the elderly. They were placed in these prisons beyond the rule of law and the protection of any courts, and subject to the mercy of their captors.

Upon initial review, the Order seemed to procure the preservation of certain rights for the benefit of the detainees.³⁰ For example, among others, the right to be treated humanely without discrimination based on race, color, religion, gender, birth, wealth, or any similar criteria; and the right to adequate food.³¹ However, the practical effect of this Order was reflected in the U.S. Government’s successful coordinated efforts of federal prosecution and immigration authorities to hide detainees’ names, nationalities and addresses. They also initially obstructed any legal consultation or any other sort of aid for all of them, except for very few diplomatic missions from detainees’ home countries and visits from the

²⁸ See generally *Guantanamo Bay—A Human Rights Scandal*, available at <http://www.amnesty.org/en/counter-terror-with-justice>

²⁹ *Id.*

³⁰ The Order, *supra* note 26, provides for authorization of detention, treatment, and trial of detainees. What would initially seem to be a careful procedural outlining, has clearly been carried out by not only generating an arresting frenzy in the Middle East, but also a shameful inhumane treatment of those individuals. Section 3 of such order purports:

“Detention Authority of the Secretary of Defense. Any individual subject to this order shall be—

- (a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;
- (b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;
- (c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;
- (d) allowed the free exercise of religion consistent with the requirements of such detention; and
- (e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

³¹ *Id.*

International Red Cross.³² Since the Government refused to provide it, all information about whom the U.S. military has detained and the conditions of their confinement, is based upon publicly available data obtained from press reports, both here and abroad. Detainees were only allowed limited correspondence rights with members of their families. Detainees were submitted to extensive interrogations despite several human rights commissions' interventions on their behalf in attempts to provide them decent treatment.³³ Amnesty International has accused China of sending a delegation to take part in those interrogations, which involved submitting the Uighurs to several torture techniques.³⁴

In creating military commissions, the Order failed to provide for procedural and substantive safeguards or guidelines to the commissioners. It simply left these decisions in the hands of the Secretary of the Defense. It failed to assure full, fair, speedy trials upon properly charged individuals. It was not until 2003 that a prosecutor or defense counsel was appointed.³⁵ It took another year until someone was charged. In sum, the Order did not provide for any basic constitutional rights while creating a military commission. In actuality, it had many procedural and structural flaws which have been the target of much criticism within the nation and abroad.

The corollary of this political inertia is the continued detention of vastly different groups: those detained and yet to be adjudged; those adjudged enemy combatants, who may or may not be subject to military commissions; and those adjudicated and found not to be enemy combatants at all. Another corollary that has recently arisen stems from the disparate treatment of citizens, who are now given protection under U.S. constitutional safeguards, and non-citizens, who are deprived of any safeguards, let alone any constitutional rights. Despite these effects, the Bush Administration has not given consistent signals about the future of the

³² See *Uighurs in Guantanamo*, available at <http://www.uhrp.org/categories/Issues/Uyghurs-in-Guantanamo/?articlelive=cd02b979d962f5fe89c63de96ccdfd38>.

³³ See *Amnesty International, Uighur Detainees Face Danger if Returned, July 13, 2004*, available at http://www.uhrp.org/issues/uyghurs_in_guantanamo/news/1/uyghurs_detainees_face_danger

³⁴ *Id.*

³⁵ *Id.*

Guantanamo detainees.³⁶ On one level, the Administration’s position that detainees will be released when the war on terrorism is over is tantamount, as commentators have charged, to saying that we will hold them there for the rest of their lives.³⁷ By the end of 2004, The Washington Post published statements from the deputy commander of the detention facility who stated that most of the detainees would be either released or transferred to their countries. What seemed to be reason for human rights advocates’ celebration did not last very long. A few months after the deputy’s statement, the Bush Administration promptly repudiated it. The Washington Post then published statements by officials, which contemplated long-term solutions for the detainees.³⁸ These solutions included indefinite detention. Predictably, new building facilities subsequently started to be erected in Guantanamo.³⁹

History backdates President Bush’s Executive Order. Presidents have typically avoided seeking congressional approval for waging war. They have usually invoked their constitutional authority as Commander-in-Chief of the nation, claiming its particular salience in times of emergency. Presidents Johnson and Nixon deployed military forces in

³⁶ In a speech given in Sept. 2006, The President still attempted to persuade his audience that every detainee held in Guantanamo is an enemy-combatant, when in reality, some have already been deemed non-enemy-combatants:

It’s important for Americans and others across the world to understand the kind of people held at Guantanamo. These aren’t common criminals, or bystanders accidentally swept up on the battlefield—we have in place a rigorous process to ensure those held at Guantanamo Bay belong at Guantanamo. Those held at Guantanamo include suspected bomb makers, terrorist trainers, recruiters and facilitators, and potential suicide bombers. They are in our custody so they cannot murder our people. [Emphasis added]. See *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, Sept. 6, 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>

³⁷ See, e.g., Joseph Levyveld, “*The Least Worst Place*,” *Life in Guantanamo*, in *THE WAR OF OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* (2003) (discussing Presidents Bush’s statements as signifying that the detainees will be held until the Islamic terroristic network is completely uprooted.)

³⁸ John Mitz, *Most at Guantanamo to be Freed or Sent Home, Officer Says*, THE WASH. POST, Oct. 6, 2004.

³⁹ Dana Priest, *Long-Term Plan Sought for Terror Suspects*, THE WASH. POST, Jan. 2, 2005.

Vietnam in the 1960s without a declaration of war.⁴⁰ And so did the first President Bush in Iraq and President Clinton in Eastern Europe in the late 1990s. In each of these cases, the Presidents stressed that it was within their role as Commander-in-Chief to deploy military forces in the exercise of their obligations under the Constitution.⁴¹ The common justification for use of force revolved around the need for prompt and decisive action. They further claimed to be acting pursuant to previously enacted congressional legislation which vested them with broad powers.⁴² President Bush seems to abide by this practice in issuing this Executive order giving rise to Guantanamo and to the military commissions without Congress ever having issued a declaration of war.⁴³ The President relied on provisions of the Authorization for Use of Military

⁴⁰ While it has been argued that the Gulf of Tonkin Resolution represented Congress' rubber stamp for President Johnson's military force deployment in Vietnam, one should be cautious with the sweeping effect such conclusion represents. Giving this Resolution an overbroad scope is to allow it to become the standard rather than a deviation to the Declaration of War requirement under the U.S. Constitution. Since the war in Vietnam, a series of controversial assessments have arisen with regards to whether the reasoning supporting the resolution were accurate. See Thomas L. Hughes, *A Retrospective Preface Thirty-five Years Later*, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB121/hughes.htm> (stating that whether the second Tonkin incident triggering the Resolution ever occurred and was deliberate rather than a byproduct of U.S. troops' provocation is still unclear). In other words, if the U.S. Constitution purports a framework to safeguard against encumbrance among the three branches of government so that checks and balances can be maintained, the scope of such exceptions, if any, to the constitutional demand for a congressional Declaration of War must be observed.

⁴¹ "Before [the President] enter[s] on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." U.S. Const., Art II, Sec. 1.

⁴² See *supra* note 37. It appears that the common practice is to make use of congressional action with respect to prior wars as extended authorization to future conflicts. However, as the current "War on Terror" illustrates, the question becomes: How far can the President go in relying on prior statutory authorizations? This question will be addressed in next part of this Article.

⁴³ Even if it is argued that the President relied on past congressional legislation, the question is whether there was legislation delegating him the authority to create Guantanamo Bay and convene military commissions.

Force (AUMF) as conferring him the initial authority to detain individuals immediately.⁴⁴ Whether he in fact acted pursuant to congressional authorization goes not to the question of whether there was legislation directed to national security, but whether the legislation was enacted to allow the President to issue the Order. If so, the next inquiry is whether the underlying congressional delegation is consistent with constitutional principles.

In light of these considerations and in the face of this Article’s proportionality approach to interpret Article II and the Federalist Papers, a singular notion of the President having a broad and independent authority to act without explicit congressional directions and judicial oversight seems incompatible with these documents. The next Part addresses whether Congress, in fact, has empowered the president to issue such order and, if that is the case, whether congressional approval of Executive legislating constituted an unconstitutional delegation of legislative province.

II. CONGRESSIONAL AUTHORIZATION

Despite the absence of a formal declaration of war within the meaning of U.S. Constitution,⁴⁵ Congress has historically delegated its powers to the President in times of war.⁴⁶ Nevertheless, this Article casts doubt as to whether congressional authorizations, embodying the laws of armed conflict and military tribunals, can be constitutionally delegated to the Executive branch. This part of the Article will suggest that the AUMF text actually granted unfettered discretion with respect to current presidential practices and that such a delegation is not consistent with constitutional principles. This Article argues that such an affirmative legislative action was not intended to provide for a rubber stamp of unbounded authority to the President through the examination of the constitutional text and structure and the War Power Resolution (“WPR”). In actuality, explicit provisions in the WPR appear to require constant

⁴⁴ This Executive order states in part: “By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the *Authorization for Use of Military Force Joint Resolution*.” See *supra* note 26.

⁴⁵ U.S. Const., Art. I Sec. 8 (providing that the “Congress shall have Power ... [t]o declare War”).

⁴⁶ See 50 U.S.C.A. § 1541.

reassessment of presidential actions.⁴⁷ Furthermore, this Article proposes that the WPR's provisions represent limitations on the presidential power delegated thereunder and that these limits have been exceeded by virtue of the AUMF enactment.

This Part of the Article will next discuss and examine two other equally controversial pieces of legislation enacted by Congress: the Detainee Treatment Act of 2005 and the Military Commission Act. This Article suggests that the language of these statutes mirrors the inherent difficulties both the Executive and Legislative branch have faced in attempting to create a partisan foreign policy. This Part concludes that, while many members of the House and the Senate vehemently criticize the WPR's failure to reign in the Executive, by ignoring its mandates, Congress fails to take actions to ensure bipartisan supervision of foreign policy. In a sense, all these two statutes seem to do is to expand presidential powers and to codify former Executive orders, rather than foster the collaborative and interdependent relationship between the Executive and the Legislative branches envisioned by the Framers when they drafted the Constitution.

***A. Strike One: The War Power Resolution (“WPR”)⁴⁸ &
Joint Resolution 23 (AUMF)⁴⁹***

The President is expressly empowered in the Constitution to conduct congressionally declared war.⁵⁰ By enacting the WPR in 1973, Congress conferred on the President the power to introduce military forces into hostilities.⁵¹ Since the WPR was enacted, liberals, conservatives, and independents have all criticized the law. Some concluded that the law never worked. Some have argued that the problem with the resolution lies in some ambiguous terms left undefined.⁵² On the other hand, both political branches face a consistent inability to arrive at a proposition which would potentially reduce the atmosphere of uncertainty generated

⁴⁷ *Id.*

⁴⁸ 50 U.S.C. §§ 1541–48.

⁴⁹ AUTHORIZATION TO USE MILITARY FORCE, S. J. Res. 23 Public Law 107-40, 115 Stat. 224) (Sept. 18, 2001) (section 2(b)(1) refers to WPR as the legislation enabling Congress to this joint resolution).

⁵⁰ Article II of the Constitution grants Congress the power to declare war. See. U.S. Const. art. I, § 8, cl. 11.

⁵¹ 50 U.S.C. §§ 1541–48 (1973).

⁵² See *supra* note 62.

by an unstable, or even absent, bipartisan foreign policy. What follows from these two sides is the recognition that the WPR has many shortcomings which have resulted in several grounds for disagreements in both the House and the Senate and have never really been resolved. The paragraphs that follow will analyze some critical parts on the WPR to demonstrate the consequences of this deficient bipartisan policy.

In examining the language in the WPR, the first question that should arise relates to its purpose and application. Section 1541(a) of the WPR provides:

It is the purpose of this chapter to *fulfill the intent* of the framers of the Constitution of the United States and insure the *collective judgment* of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.” (Emphasis added).⁵³

There are, at least, two ways of interpreting the meaning of the word “hostilities” as “clearly indicated by the circumstances.”⁵⁴ One way is to suggest it encompasses a considerably broad coverage, involving essentially every combat troop’s situation. In other words, under an expansive interpretation of section 1541, the meaning of hostilities “clearly indicated by the circumstances,” virtually always would allow the President to deploy Armed Forces to repel against hostilities. The alternative view would suggest that, in reading subsections (a) and (c)⁵⁵ of the above section together, the President could only take action in

⁵³ 50 U.S.C. § 1541(a).

⁵⁴ *Id.*

⁵⁵ Subpart (c) of 50 U.S. § 1541 provides:

“Presidential executive power as Commander-in-Chief; limitation

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”

three situations: (1) under a declaration of war; (2) with specific statutory authorization; or (3) where it necessitated by a national emergency created by an attack upon United States, its territories or possessions, or its armed forces.⁵⁶ Further, subsection (a) expressly alludes to a collaborative undertaking rather than merely granting unilateral power to the President. It endeavors to *fulfill the intent* of the framers⁵⁷ and to ensure the *collective judgment* of both Congress and the President in introducing hostilities here or elsewhere.

Consequently, even though WPR delegates congressional power to the President, there are limits and restraints upon the President in the exercise of such powers. For example, the national emergency exception allows the President to deploy military forces in the absence of congressional authorization.⁵⁸ However, the President's powers under this exception are not unbounded. He must report to Congress immediately and, unless Congress specifically approves further action, the President has 60 days to "terminate any use" of U.S. armed forces.⁵⁹ Once again, this language should be an indicator that the purpose of the resolution was to strive for balance in the decisionmaking which commits the nation to hostilities.⁶⁰

⁵⁶ *Id.*

⁵⁷ In a letter to Thomas Jefferson, James Madison once wrote:

The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war and most prone to it. It has accordingly with studied care, best the question of war in the legislature. *See* Al Gore, *Our Founders & the Unbalance of Power*, available at <http://www.jihadunspun.com/founders-algore-two.htm>.

Unless an overly creative interpretation of Madison's words leads elsewhere, it seems evident that the framers sought to create a collaborative framework amongst the three branches of government.

⁵⁸ 50 U.S.C. §1541(c).

⁵⁹ 50 U.S.C. §1543(a) and 50 U.S.C. §1544(b)

⁶⁰ There are legitimate arguments from the Senate as to potential issues arising from the meaning of the word "hostilities." *See, e.g.*, 134 Cong. Rec. E 423-0, 100th Cong., 2d (March 1, 1988). For the purpose of this Article, however, one should assume that the word "hostilities" does include the events taking place in Sept. 11, 2001 for two basic reasons: first, this paper does not advance lack of presidential power, but abuse thereof; second, reducing the panoply of issues revolving around this resolution to the meaning of hostilities seems to result in a very limited reading of the legislation thereto.

The problematic aspect of such legislation is that it is not solely derived from the Presidents' historical indifference with respect to its mandates, but also emanates from Congress' own inconsistent actions. In effect, Congress has fostered presidential unfettered powers by enacting subsequent legislation that substantially enlarges the powers of the Executive. The AUMF is a clear example of this type of legislation. In this joint resolution, Congress authorizes the President to

[U]se 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.”(Emphasis added).

By virtue of the AUMF, Congress has, in essence, stripped itself of the power to legislate within the international terrorism minefield. The AUMF is silent as to any type of collaborative framework between the two branches. Rather, the AUMF expressly grants the President wide discretion to determine which individuals or organizations have planned, authorized, committed, or aided in terrorist actions against the United States. No substantive or procedural guidelines are provided to the President in making those determinations.⁶¹

⁶¹ The U.S. Supreme Court has addressed the issue of whether Congress can delegate its powers to the Executive Branch. In *Clinton v. City of N.Y.*, the Court held that the President's exercise of power under Line Item Veto Act to cancel items of new direct spending and items of limited tax benefit violated the Presentment Clause. 524 U.S. 417, 447 (1998). The Court reasoned that the Line Item Veto departed from “finely wrought” constitutional procedure for enactment of laws, to the extent the President's actions had both the legal and practical effect of amending acts of Congress by repealing portions thereof, and did not come within his constitutional veto power. Moreover, the Court was wary of the fact that the President had wide discretion to decide whether or not to cut particular spending provisions. In other words, the Court did not seem to favor a congressional delegation of power that results in authorizing the President to create a different law: A law “whose text was not voted on by either House of Congress or presented to the President for signature.” *Id.* at 419. The Court concluded that the Line Item Veto effectuated Executive legislating. In this regard, the AUMF could be compared to the Line Item Veto Act. By

While Congress is likely attempting to center the decisionmaking power in the hands of one individual to expedite the process of responding to hostilities,⁶² the dangers revolving around the AUMF cannot be overstated. It potentially entails an open-ended and inappropriate delegation of Legislative war lawmaking powers. In other words, it is within the province of the legislature to enact statutes providing for the substantive and procedural basis to detain individuals. It follows that, in light of the requirements of intelligible principles mandated under the Constitution,⁶³ Congress has failed to appropriately delegate its powers to the President. The AUMF, in essence, gives the President “carte blanche” to determine who or what organizations framed the attacks on September 11 free of any congressional oversight.

The broad delegation in the AUMF resulted in a myriad of detentions without charge. It further resulted in the President’s refusal to answer to legitimate requests for information from Congress and his indifference to federal courts’ orders. Hence, any notion of a bipartisan foreign policy is further deteriorated by Congress’ own hands.⁶⁴

allowing the President to decide what individuals or organizations are classified as “hostilities,” the AUMF frames the same premise rejected by the Court in *Clinton* in that the President is entitled to enact legislation in contravention of the Presentment Clause. In that sense, it would be same as allowing the President to decide, in terms of domestic laws, the elements of a crime and who should be criminalized thereunder. *Cf. Mistretta v. U.S.*, 488 U.S. 361 (1989) and *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

⁶² Al Gore has recently recognized that the emergence of new weapons in modern warfare may naturally lead to reconsideration of the nature of the Executive’s war making power. However, he cautions that such new considerations should not “render moot the concerns our founders had” in carrying out a balanced, carefully designed process to avoid threatening our liberties. In sum, while complexities of modern warfare may justify faster decisionmaking processes, those should be limited to the extent they do not represent a threat to democracy. *See* Al Gore, *supra* note 57.

⁶³ *See Clinton*, *supra* note 61, at 484 (rationalizing that Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard. The Constitution permits only those delegations where Congress “shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform”).

⁶⁴ Commentators have expressed serious concerns on how the Houses voted for the AUMF: “if we oppose it, we will be damaged politically for years to come, and since it will pass anyway, why not support it and avoid incurring that political damage?” In other words, the legislative branch seemed, at least in part,

Naturally, Guantanamo Bay represents the clear and present danger of this non-bipartisan foreign policy. A study conducted by Seton Hall University scholars provides factual data to support this assertion.⁶⁵ The study revealed that fifty-five (55) percent of the detainees have not committed any hostile act against the United States or its coalition allies; only eight (8) percent of the detainees were characterized as Al-Qaeda fighters. Of the remaining detainees, forty (40) percent have no definite connection with Al Qaeda at all and eighteen (18) percent have no definite affiliation with either Al Qaeda or the Taliban. Thus, without any criteria, the Government has detained innumerable persons based on mere affiliations with a large number of groups that are not even on the Department of Homeland Security’s terrorist watchlist.⁶⁶

to have a political agenda as an underlying motive to pass this joint resolution. Query whether such deference reflects the Framers’ intent in fostering the doctrinal checks and balances across the branches of Government. See Glenn Greenwald, *Giving Democrats a pass on ending the war*, February 12, 2007, available at <http://www.salon.com/opinion/greenwald/2007/02/12/democrats/index.html>.

⁶⁵ These numbers were derived from a study conducted by the law school at Seton Hall University. The study concluded that most prisoners were being turned over to U.S. forces by people who wanted the bounty paid for captives. See Denbeaux & Denbeaux, *Report on Guantanamo Detainees, A Profile of 517 Detainees Through Analysis of Department of Defense Data*, Feb. 08, 2006, available at http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

⁶⁶ On 26 March 2007, David Hicks, an Australian who was formally charged and convicted by the military commissions in Guantanamo, entered a guilty plea to the charge of material support for terrorism. A plea agreement was drawn up on 27 March 2007. On 31 March 2007, a US military tribunal handed down a seven-year jail sentence to David Hicks on charge of supporting terrorism but suspended all jail time but 9 months. A stipulation of the plea bargain ensured that the five years that Hicks remained at Guantanamo Bay would not be subtracted from any sentence handed down by the military tribunal. Further conditions are that Hicks should not speak to the media for one year, Hicks was to not take legal action against the United States and that Hicks was to withdraw allegations that the US military abused him. Why are a few detainees so fortunate? Is there any meaningful distinction? See *Hicks home ‘in months’*, March 27, 2007, available at <http://www.theaustralian.news.com.au/story/0,20867,21454470-601,00.html>; *Hicks plea made ‘to escape hell’*, March 27, 2007, available at <http://www.news.com.au/story/0,23599,21453869-5015421,00.html>; and *Hicks shouldn’t be a hero: PM*, March 31, 2007, available at <http://www.abc.net.au/news/newsitems/200703/s1886515.htm>.

Furthermore, the nexus between such organizations varies considerably. For example: eight (8) percent were detained because they were deemed “fighter for;” thirty (30) percent considered “members of;” and the large majority are detained solely on the basis that they are “associated with” a group or groups the president asserts to be terrorist organizations. A lingering two (2) percent of the prisoners have their nexus unidentified. Finally, prisoners deemed not to be enemy-combatants—mostly Uighurs, are actually accused, but not charged, of more serious allegations than those still deemed enemy combatants.⁶⁷ To aggravate the situation even further, the meaning of each of the above categories is unclear. Hence, the lack of conspicuous and effective criteria in adjudicating these individuals results in their unnecessary and arbitrary detention. Had Congress appropriately provided for intelligible principles in the AUMF for the determination of who should be detained in Guantanamo as well as how they should be adjudicated, this would likely not have occurred.

Conversely, times of emergency have been the common justification for courts to apply lesser scrutiny to the Executive and Legislative branches in the exercise of their constitutional powers. Emergency can, at times, justify curtailing the individual liberties guaranteed by the Constitution.⁶⁸ However, the aftermath set forth above exemplifies the risks of the abuse of expansive Executive power. In other words, to avoid undue encroachment between the two branches, congressional delegations of powers should be limited by congressionally implemented policies setting forth intelligible principles.⁶⁹ Such policies cannot be determined by the Executive branch without running afoul the principles

⁶⁷ *Supra* note 68.

⁶⁸ See Barnes & Bowman, *Entering Unprecedented Terrain: Interdisciplinary Approaches to Exploring Burgeoning Rights Conflicts After September 11, 2001* at 21 (unpublished). In explaining the underlying consequences of lifting constitutional constraints in times of emergency, the Article advances that claiming emergency to enlarge otherwise inexistent executive powers is criticized in two dimensions: (1) executive action is likely to be worse in times of emergency than in normal times; and (2) these powers can potentially pass beyond limitations to noncitizens held outside American soil and hold them off for long time periods. Thus, an expansive, unrestrained executive power prompted by emergency situations can result in irreparable costs to individual liberties. See also Oregon Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003).

⁶⁹ See *supra* note 65.

of separation of powers fostered under the Constitution. The AUMF fails to promote a balanced, limited and guided delegation of legislative power to the Executive branch. To the extent that a state of emergency calls for prompt actions, the AUMF is grounded upon principles incompatible with the notions of individual liberties and the promotion of a democratic society so solidly engraved in our Constitution. As a result, the AUMF simply does not provide for intelligible principles to limit the President’s actions under the statute, thereby violating the Constitution. Because the Constitution does not explicitly deny Congress the necessary resources to enable effective performance of its functions, any delegation of congressional powers to the Executive branch should not be unbounded.

However, the AUMF is not the sole problematic legislation. The next two Subparts of this Section addresses two other equally controversial enactments: the Detainee Treatment Act of 2005 (DTA) and the Military Commissions Act (MCA). These statutes evince the consequences of expansive presidential powers. This Article concludes they also amount to Executive legislating.

B. Strike Two: Detainee Treatment Act of 2005 (“DTA”)⁷⁰

On December 30, 2005, the President signed bill H.R. 2863 approving the DTA. Among other things, the DTA purported to provide for guidelines for the treatment of Detainees in Guantanamo. In his statement, the President asserted that the provisions dictated in the DTA were as follows:

[I]n a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as a Commander-in-Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President... protecting the American people from further terrorist attacks.⁷¹

⁷⁰ 42 U.S.C. § 2000dd, §§ 1001–1006 (2005). Also known as the “McCain Amendment.”

⁷¹ The Statement by the President, 2005 WL 3562509, December 30, 2005.

The quotation above exemplifies the President's broad reading of the DTA.⁷² This Article suggests that this reading seems inconsistent with the roots of the statute.⁷³ From the standpoint of the President's expansive view of the DTA, such legislation in effect fails to take into account that it resulted from the incorporation of "the obedience to orders" defense in the McCain Amendment.⁷⁴ The amendment primarily was intended to send a message to U.S. forces that cruel, inhumane, or degrading treatment or punishment of detainees is *not permissible*. The original purpose of the Amendment was to codify a humane treatment obligation imposed upon U.S. Armed Forces. To the extent that the President has ordered the detainees to be treated humanely, he explicitly curtailed this treatment by creating a "military necessity" exception in

⁷² In his statements, the President has typically engaged in calling upon the emotional aspects and resentment with respect to 9/11 to justify controversial measures toward the detainees. See e.g., *Press Conference of the President*, Rose Garden, September 2006 available at <http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html> ("This week our nation paused to mark the 5th anniversary of the 9/11 attacks. It was a tough day for a lot of our citizens. I was so honored to meet with family members and first responders, workers at the Pentagon, all who still had heaviness in their heart. But they asked me a question, you know, they kept asking me, what do you think the level of determination for this country is in order to protect ourselves, is what they want to know."); *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, September 2006 at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> ("On the morning of September the 11th, 2001, our nation awoke to a nightmare attack. Nineteen men, armed with box cutters, took control of airplanes and turned them into missiles. They used them to kill nearly 3,000 innocent people. We watched the Twin Towers collapse before our eyes—and it became instantly clear that we'd entered a new world, and a dangerous new war.")

⁷³ See, e.g., *A Weak Defense*, The Washington Post, December 6, 2005, at http://www.washingtonpost.com/wp-dyn/content/article/2005/12/05/AR2005120501615_pf.html (stating that the president could accept the real meaning of Sen. John McCain's amendment to the defense appropriations bill, which prohibits "cruel, inhuman and degrading treatment" for all prisoners held by the United States. The legislation has overwhelming support in Congress, as the White House recognizes; already, the administration has shifted from threatening a veto to bargaining with Mr. McCain over granting immunity to CIA personnel involved in abuses).

⁷⁴ 42 U.S.C. 1404(a).

the DTA.⁷⁵ In other words, military necessity could override principles of humane treatment in contravention to the most basic understandings of the laws of war and overarching U.S. policy.⁷⁶ Members of the Senate demanded the detainees to be treated humanely irrespective of military necessity override. Arguably, this demand culminated in a compromise to avoid exceptions to humane treatment.⁷⁷ However, a new provision was added to the statute that allowed Government employees to raise an “obedience to orders defense” to any charges alleging violation to this new statutory prohibition. While such a defense might seem reasonable, it undercuts the initial major objective under the McCain Amendment which was to legislate against inhumane treatment of detainees. Accordingly, with this act, Congress and the President might have collectively set their seal on an American policy of torture.

But these are not the sole problems revolving around the DTA. For example, another problematic aspect is that it expressly ousts subject matter jurisdiction from civilian courts to hear claims brought by the detainees.⁷⁸ It further denies constitutional rights to aliens held as enemy-combatants. Whether the statute constitutes Congress’ attempt to foreclose jurisdiction from federal courts, thus violating separation of powers principles solidified in the Constitution,⁷⁹ is a source for polarized

⁷⁵See Re: Humane Treatment of al Qaeda and Taliban Detainees, President’s Memorandum, Feb 7, 2002 (stating in part “I hereby reaffirm the order previously issued by the Secretary of Defense to the United State. Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of [the] Geneva [Conventions]”).

⁷⁶U.S. Const., VIII Amend. (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

⁷⁷The Executive branch would then be responsible for upholding the nations’ commitments to Geneva, leaving it up to the president to establish any violations for the handling of suspects that falls short of a “grave breach.” Among the several “grave breaches” listed in the agreement is torture, as well as other forms of assault and mental stress. There is no list, however, of specific interrogation techniques that would be prohibited. However, given the innumerable U.S. reservations to Geneva, the practical effect of this agreement was requesting the president to keep the status quo.

⁷⁸Section 1005(e) expressly prohibits aliens detained in Guantanamo from applying to the writ of habeas corpus.

⁷⁹U.S. Const., Art. III, Section 1 (vesting the judicial power to the courts). In accord, Hamilton laid out in Federalist Paper 78:

debates among legal scholars. Many have analyzed whether Congress maintains the power under Art. III to limit federal courts' jurisdiction.⁸⁰ As a practical matter, however, the statute does not appear to entitle alien detainees to bring applications of habeas corpus before U.S. federal courts. The legislative history of the DTA tells us little, if anything, about whether it was the intent of Congress to deprive federal courts of jurisdiction grounded upon citizenship distinctions. Nevertheless, the end result of the statute with respect to habeas is the deprivation of

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. *The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.* If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents. (Emphasis added).

⁸⁰ The "Exceptions and Regulations Clause" of Art. III, Sec. 2 of the Constitution provides in pertinent part: "(i)n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." In interpreting this provision, scholars have advanced two alternative views. One view reads the "Exceptions and Regulations Clause" to provide Congress with broad powers to limit the jurisdiction of federal courts. The competing view reads the same clause as a modifier to the word "Fact" but not the word "Law." The net result is to interpret this clause to actually limit Congress' ability to confine jurisdiction of the federal courts.

constitutional rights to aliens, whereas American citizens-detainees enjoy full measure of habeas constitutional protections.⁸¹

In any event, six years have passed since the attacks took place and the President’s Administrative Memoranda seem to be the sole source of legislation aimed at national security. If one compares the DTA language with the President’s Executive Order issued in November 2001, one might conclude that they are part of an integrated policy toward the detainees. Apart from further legislative “touches” with respect to the procedural guidelines, they appear to be the same in scope and nature.⁸² This Article claims that this is not the balance intended by our Framers. In other words, merely rephrasing past presidential Executive orders does not constitute effective performance of the congressional legislative function. Rather, it may give rise to a parliamentary Government where the power to create laws is centered in the President. The following analysis of the Military Commissions Act of 2006 (the “MCA”) provides further support to the notion of improper Executive legislating bolstered throughout this Article.

C. Strike Three: Military Commissions Act of 2006 (MCA)

Amnesty International has recently characterized the MCA as a congressional stamp of approval of human rights violations throughout the “war on terror.”⁸³ Basically, the MCA was enacted in response to the U.S. Supreme Court’s most recent ruling on the detainees’ cases, holding the military commissions convened in Guantanamo unconstitutional.⁸⁴ The MCA’s purpose was to establish procedures governing the use of military commissions to try alien enemy combatants engaged in hostilities against the United States. In many aspects, the MCA reaffirms the DTA.

⁸¹ This issue could be held moot after the U.S. Supreme Court’s recent decisions which held, in part, that federal courts do have jurisdiction to hear these claims. In light of the MCA to be detailed next in this Article, it is interesting to observe how overreaching legislation can become in times of emergency. See *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan*, *supra* note 8.

⁸² The DTA provides for subject-matter jurisdiction guidelines, among some other di minimis additions to the President’s Executive order.

⁸³ Amnesty International, UNITED STATES OF AMERICA, MILITARY COMMISSIONS ACT OF 2006, TURNING BAD POLICY INTO BAD LAW. AI Index: AMR 51/154/2006 (September 29, 2006).

⁸⁴ See *Hamdan*, *supra* note 8.

Most importantly, despite the U.S. Supreme Court's pronouncement to the contrary in striking down the DTA,⁸⁵ the MCA strips federal courts of jurisdiction to hear habeas corpus appeals challenging the legality of the detention of aliens held as enemy-combatants or awaiting determination of their status.⁸⁶ The MCA further takes away any possibility of bringing substantive claims invoking any rights under the Geneva Conventions.⁸⁷ In addition, the MCA provides a broad definition of alien enemy-combatant to determine who is subject to the MCA's jurisdiction;⁸⁸ it broadens the scope of capture to include civilians far from the battlefield⁸⁹ and it permits introduction of evidence obtained

⁸⁵ *Id.*

⁸⁶ The "habeas provisions" under the MCA provides in pertinent part:

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

⁸⁷ 10 U.S.C. 47A, Sec. 948b(g) ("Geneva Conventions Not Establishing Source of Rights—No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Convention as source of rights").

⁸⁸ The MCA basically reinstates the definition of unlawful enemy-combatant under the DTA.

The term "unlawful enemy-combatant" means—(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (ii) a person who, *before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.*

The last part of the definition gives little guidance as to the scope of who can be deemed an enemy-combatant which rather left to the discretion of the President or the Secretary of Defense. In short, anyone can be deemed an unlawful enemy-combatant under this vague standard. See 10 U.S.C. s. 948(a):

⁸⁹ As a result of the broad scope under 10 U.S.C. § 948(a) referred *supra* note 88.

through potentially inhumane treatment.⁹⁰ Moreover, it allows the use of classified evidence against detainees⁹¹ and the military commissions to hand down death sentences without instituting safeguards to ensure a fair trial.⁹² It also restricts the detainees to solely rely on the attorneys of the commissions’ choice;⁹³ and among other provisions, does not prescribe when trials are to be conducted.⁹⁴

These MCA provisions indicate that Congress should strive for conspicuous and substantively fair measures in instituting proceedings in military commissions. Nevertheless, the critical problematic aspects of the MCA lie not only on disparate indifference to international principles, but also on its failure to provide for expedited adjudication of these detainees. Rather, the MCA promotes unbounded detention without charge or trial despite instituting rules for trial. As a result, for many of these detainees trial may never take place.

Furthermore, because the MCA fails to provide for a specific definition of the term “enemy-combatant,” it maximizes the threat of unbounded detention to those awaiting status determinations. While the U.S. has pronounced its disappointment at the international outcry in response to the enactment of the MCA, such an outcry should not come as a surprise in the face of the plethora of fundamental constitutional issues raised by this piece of legislation. The MCA net result will likely be prolonged legal challenges to this expansive suspension of habeas

⁹⁰ 10 U.S.C. 949(a) (C). The provision permits admissibility of evidence obtained by coercion or compulsory self-incrimination subject to a “totality of circumstances” test to determine whether evidence is reliable and if the interest of justice would be best served if evidence is admitted. Introduction should be limited to evidence obtained not in a manner inconsistent with section 2003 of DTA, providing for prohibition of interrogation methods that amount to cruel, inhuman, or degrading treatment. Because the standard for determining what torture means is of vague nature and the Secretary of Defense has the discretion to prescribe the rules under the MCA, the question what the boundaries are under the statute remains unanswered. Further, there might be a fine line distinction between coercion and torture.

⁹¹ 10 U.S.C. 949j.

⁹² Trial under the MCA means trial within the meaning of its provisions, not fair trial under the meaning of the Constitution of the United States.

⁹³ 10 U.S.C. 949k.

⁹⁴ Remember that trials in Guantanamo are to be contingent upon the determination of the detainees’ status by Secretary of Defense, CSRT or the President under section 948(a).

corpus.⁹⁵ In this battle among branches, hopefully another case will soon be before the U.S. Supreme Court to set the boundaries of the MCA's sweeping powers.⁹⁶

Once this matter is within the domain of the Supreme Court, it should emphatically reject the argument that the MCA implicitly grants authority to the Government to detain those who fall within the boundaries of a rather overbroad statute. The Court should take a stand and demand Congress to make a clear statement of intent to authorize the indefinite detention of such a broad category of individuals because when restrictions of basic rights are imposed, Congress is required to make a clear unequivocal statement. As it currently stands, the MCA falls short in doing so. By reaffirming the DTA, the MCA codified the

⁹⁵ U.S. Mission in Geneva has stated:

The United States is disappointed by recent criticisms of the newly enacted Military Commission Act from various European officials and media outlets. Contrary to these criticisms, the rules governing military commissions prescribed in this Act are fully consistent with all U.S. international legal obligations, including Common Article 3 of the Geneva Conventions. These commissions may only be used to try those designated as unlawful enemy combatants, a category of persons long recognized in international law including by European scholars, and accused of a defined set of crimes. These commissions include all fundamental due process guarantees, including a presumption of innocence, the right to be present throughout the trial and to see all evidence admitted at trial, an absolute bar on the admission of statements obtained through torture, and strict limits on the admission of coerced evidence. Military commission convictions are also subject to review in the U.S. federal courts.

Some critics have also inaccurately asserted that the Military Commission Act strips detainees at Guantanamo of the right to contest the legal basis for their detention, which is the heart of habeas corpus relief. In fact, Military Commission Act reaffirms the Detainee Treatment Act of 2005, which vests in a federal appellate court the authority to review enemy combatant determinations, which comprise the legal basis for detention at Guantanamo. *Spokesperson, Common Misconceptions Regarding the Military Commission Act*, Oct. 30, 2006 at <http://www.usmission.ch/Press2006/1030MilitaryCommissionAct.htm>.

⁹⁶ In voting in favor of the MCA, Senator Arlen Specter, stated his wish that the "court will clean it up." See Charles Babington & Jonatham Weisman, *Senate Approves Detainee Bill Backed by Bush*, Sept. 29, 2006 at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/28/AR2006092800824.html>.

structure for military commissions that the Court specifically struck down in its latest ruling.⁹⁷ As this Article will discuss in the next section that the Judiciary branch may itself be the cause of legislation such as the MCA. By its continuous failure to enunciate a clear standard to be implemented by the military commissions, the Court has likely set Congress in motion to enact a version of the very scheme the Court had rejected. In other words, Congress has avoided the application of the Geneva Conventions and the UCMJ to the military commissions even though the Court discussed that these standards should set boundaries for *any* commissions Congress decides to create in the first place.

Due to the crucial role the U.S. Supreme Court’s plays in implementing the checks and balances required under the Constitution, the next section of this Article will explore the Court’s past decisions to emphasize how it has avoided to meaningfully accept its constitutional duty to oversee the use of expansive Executive powers in ruling on the detainees cases.

III. THE ROLE OF THE JUDICIARY: A HISTORICAL JUDICIAL REVIEW

To complete the analysis on the roles served by the three branches of Government in the realm of the indefinite and overbroad detentions in Guantanamo, an assessment of past and current U.S. Supreme Court decisions needs to be conducted. In light of the Congressional action in response to *Hamdan*, this Article challenges that the U.S. Supreme Court must meaningfully accept the burden of ensuring that the constitutional separation of powers mandates are observed between the branches. To accomplish this challenge, Part III provides a brief synopsis of the facts and dispositions of the line of relevant cases addressing detainees. In so doing, this Part will attempt to contextualize the Court’s pronouncements with respect to the scope and nature of the President’s power as Commander-in-Chief of the Armed Forces throughout history. This Article further suggests that the Judiciary has set forth a series of amorphous legal standards to determine the scope of the Executive power in “wartime,” and that these standards have produced the confusion that now surrounds the cases arising out of the “War on Terror.” As they are partially responsible for the confusion they must now be part of a solution, which is to clearly re-establish the line

⁹⁷ *Hamdan*, *supra* note 8.

between Congressional and Executive powers in the arena of war-making. In order to contextualize how the judicial branch has contributed to this confusion, the Subparts that follow will analyze the Court's opinions prior to and post-September 11.

A. Judicial Rulings Prior 9/11

Since one of the major issues underlying the MCA revolves around Congress stripping federal courts of habeas corpus jurisdiction over the detainees, it is important to discuss the U.S. Supreme Court ruling in *Johnson v. Eisentrager*.⁹⁸ This case involved 21 German nationals convicted in a post-World War II U.S. military tribunal. They were charged for violating the laws of war by continuing to fight against the U.S. after Germany had already unconditionally surrendered. The German nationals petitioned for a writ of habeas corpus alleging that their trial, convictions, and imprisonment were in violation of the Constitution, federal law, and the Geneva Conventions. Relying on *Ex parte Quirin*,⁹⁹ the Government argued that these non-resident enemy aliens, captured and imprisoned abroad, had no right to a writ of habeas corpus in a court of the United States.¹⁰⁰

In ruling in favor of the U.S. Government, the Supreme Court articulated a detailed theory denying non-resident aliens outside the U.S. access to U.S. federal courts. In essence, the Court held that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in hostile service of a Government at war with the U.S. To support its assertion, the Court reasoned that modern American law had significantly evolved so that enemies would not be "subject to public or private slaughter, cruelty and plunder."¹⁰¹ However, the court recognized that "inherent distinctions" between citizens and aliens existed. The Court next concluded that extending constitutional protections beyond citizenry for aliens held abroad would be incompatible with the scope of its judicial power.¹⁰² Hence, the decision was premised upon the idea that it

⁹⁸ 339 U.S. 763 (1950).

⁹⁹ 317 U.S. 1 (1942).

¹⁰⁰ In this part of its argument, the Government cited to the Geneva Conventions, perhaps implicitly recognizing that the prisoners had rights and obligations thereunder.

¹⁰¹ *Eisentrager*, *supra* note 98, at 769.

¹⁰² *Id.*

was the aliens' presence in the territorial jurisdiction that gave the Judiciary power to act in such cases as opposed to citizenship status. Justice Black dissented advancing that federal courts should be able to exercise jurisdiction to hear habeas petition whenever any United States official illegally imprisons any person in any land subject to U.S. Government.¹⁰³

With respect to cases challenging detention of detainees, in *Korematsu v. United States*,¹⁰⁴ American citizens of Japanese descent were detained for violating laws that required them to remain in certain areas of the United States. The Supreme Court upheld the conviction under the grounds that the order was properly issued pursuant to congressional and presidential authority to act in the wake of World War II to protect national security. Likewise, in *Hirabayashi v. United States*,¹⁰⁵ the Court also upheld the order issued by the President that created curfew restrictions against Japanese-Americans.

The very conscientious dissent in *Korematsu*¹⁰⁶ is worth commenting upon. Justice Murphy made explicit his concern on the Court's deference to the Executive branch. He suggested that, instead of the Court's deference to the military, the judicial review would have to entertain a balancing test on whether the deprivation of rights to the individuals was so reasonably related to a public danger that was as immediate, imminent, and impending as to not allow proper constitutional procedures to obviate the danger.¹⁰⁷ When the principles of Justice Murphy's dissent are applied to the conditions of detainees' detention, major issues may arise. Just as the individual's of Japanese ancestry during the World War II, the Uighurs were detained in Guantanamo on

¹⁰³ *Id.* at 798.

¹⁰⁴ 323 U.S. 214 (1944).

¹⁰⁵ 320 U.S. 81 (1943).

¹⁰⁶ “This exclusion of ‘all persons of Japanese ancestry, both alien and non-alien,’ from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over ‘the very brink of constitutional power’ and falls into the ugly abyss of racism.” See *Korematsu*, *supra* note 104, at 233–34. (J. Murphy, dissenting); see also *Ex Parte Endo*, 323 U.S. 283, 308 (1944) (J. Murphy, concurring) (agreeing that the detention in Relocation Centers of persons of Japanese ancestry regardless of loyalty is not only unauthorized by Congress or the Executive but is another example of the unconstitutional resort to racism inherent in the entire evacuation program).

¹⁰⁷ *Korematsu*, *supra* note 104, at 234.

the basis of their ancestry in that, for some, being in Afghanistan was synonymous with being considered a member of Al-Qaeda.

For that matter, it is important to point out another remarkable dissent by Justice Murphy. *In re Yamashita*¹⁰⁸ contains one of the few well-reasoned opinions ever made by a Justice in times when the President cries for emergency. Once again, Justice Murphy dissented with the ruling of an “emergency”-related case and cleverly claimed that the detention of the Japanese General was purely influenced by discriminatory actions. Justice Murphy also sought to warn the Court on the danger stemming from its deference to presidential claims of power.¹⁰⁹ Justice Murphy’s opinion seems to foreshadow that unchecked Government power could result in a situation like the one we now have in Guantanamo Bay. For example, to the extent the Uighurs were determined to have never been a threat to the U.S., it seems that they were detained as an accident birth. They were just born Muslims and resided in a place where terrorists were also operating. That they may have been arrested and detained on the basis of their identity and on where they were located, potentially creates questions of discrimination under our Constitution.¹¹⁰ That they would not have ever been able to challenge that detention with a habeas appeal, however, clearly renders them outside of constitutional protection. That issue will be the basis of the discussion below.

¹⁰⁸ *In re Yamashita*, 327 U.S. 1 (1946).

¹⁰⁹ *In re Yamashita*, *supra* note 108, at 28 (J. Murphy, dissenting) (“The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those [sic] future. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. But even more significant will be the hatred and ill-will growing out of the application of this unprecedented procedure. That has been the inevitable effect of every method of punishment disregarding the element of personal culpability. The effect in this instance, unfortunately, will be magnified infinitely for here we are dealing with the rights of man on an international level. To subject an enemy belligerent to an unfair trial, to charge him with an unrecognized crime, or to vent on him our retributive emotions only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world.”)

¹¹⁰ *See* U.S. Const., XIV Amend. (proscribing discrimination on the basis of race and national origin).

B. Judicial Rulings Post 9/11: The Potential Demise of Marbury v. Madison.

“[I]t is the province of the judiciary to say what the law is”¹¹¹

Chief Justice Marshall, 1803

As the decision in *Eisentrager* indicates, the U.S. Supreme Court explicitly distinguishes rights among U.S. citizens and alien detainees. For this reason, this Article will analyze the various opinions related to the detainees’ based on their citizenship, since that status creates different legal implications. Many cases discussed in this section, *Rasul*, *Al-Odah*, *Qassim* and *Hamdam* belong to the non-U.S. citizen category, whereas *Hamdi* belongs to the U.S. citizen category. The underlying implications revolve around the issue of whether drawing distinctions among detainees premised on their status achieves any goals in preserving national security in times of emergency or, rather, solely constitutes an unwarranted denial of constitutional rights to the non-U.S. citizens. These distinctions will be further analyzed in the three Subparts that follow.

¹¹¹ In *Madison*, J. Marshall makes the historical critical ruling to empower the federal courts with the ability to review actions of both the Executive and Legislative branches. But that does not seem to strike the Court in times of “emergency.” These cases just serve as a “check” to reaffirm the notion of how limited is the Judiciary power over the other branches. *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486 (1969). So much so that the cases involving the “War on Terror” are no different to those cases. The Supreme Court has stood up for the proposition that it has very limited jurisdiction, if any, in cases involving foreign relations, as Chief Justice Rehnquist once said that “certain foreign relations must surely be controlled by political standards.” *See Goldwater v. Carter*, 444 U.S. 996 (1979). But the question remains on how far should the textual interpretation of the Constitution allow the other branches to act without judicial oversight. The danger of confronting the inevitable refrains the Judiciary of assessing the question of whether has the Executive abused of its powers in the name of national security.

*1. Non-U.S. Citizens Category: Rasul*¹¹², *Al-Odah*¹¹³ *Qassim*¹¹⁴ and *Hamdan*¹¹⁵

Rasul and *Al-Odah* represented the first two cases arising out of the “War on Terror” that the United States Supreme Court agreed to entertain. However, they also represent, combined with the decision in *Qassim*, the strength of the limitations the Judiciary imposes upon itself with regard to contravening the acts of the Executive. In effect, these self-imposed limitations expose the tension between the President’s Article II powers as Commander-in-Chief and the Supreme Court’s Article III powers to interpret the law relating to issues arising of the alleged “War on Terror.” Upon consolidation of the cases *Rasul* and *Al-Odah*, the district court dismissed them both for lack of jurisdiction on the grounds that, because the detainees were taken into custody in a territory outside the United States, they were not entitled to the American courts. The court further rationalized that the scope of the detainees’ rights were for the military and political branches to determine.¹¹⁶ The Court of Appeals affirmed the district court’s judgment.¹¹⁷ The sole question before the Supreme Court in this case was whether foreign nationals in Guantanamo Bay may invoke habeas corpus at all. After *Eisentrager*, either U.S. citizenship or court jurisdiction (achieved through one’s contact with the United States) was necessary for this invocation, and, since these detainees were not citizens, U.S. court jurisdiction over Guantanamo Bay detainees was at

¹¹² 542 U.S. 466 (2004).

¹¹³ 542 U.S. 933 (2004).

¹¹⁴ 126 S. Ct. 1771 (U.S. 2006).

¹¹⁵ 126 S. Ct 2749 (U.S. 2006).

¹¹⁶ One of the limitations imposed on the Judiciary lies on issues that are deemed political in nature. In those cases, typically the Court faces questions of the power struggle between the other branches whereupon it most likely refrains from ruling on the grounds that they are “political questions.” See *Goldwater*, *supra* note 111.

¹¹⁷ Interestingly, the Court of Appeals did not give importance of the issue of whether these detainees had cognizable constitutional rights of due process or to the simple fact that United States had control and jurisdiction over the territory by virtue of lease agreement, but went on reasoning that the plain language of the lease provided that the United States recognizes the Republic of Cuba as an independent sovereignty. In doing so, it either used this argument as shorthand to its holding or simply failed to realize however, it was addressing the wrong issue. Whatever the reason was, I leave it to the creative mind and common-sense of thoughtful individuals.

issue.¹¹⁸ According to the U.S. treaty with Cuba over Guantanamo Bay, the U.S. had “complete jurisdiction” over the base, but Cuba has “ultimate sovereignty.” The Government relied on this particular language in the treaty to argue that it implicitly meant U.S. courts had no jurisdiction over those cases. In turn, the detainees countered that, regardless of what the treaty language was, the U.S. had full legal control in the area and should have jurisdiction.

The United States Supreme Court reversed and remanded. The case concluded that the district court had jurisdiction over the cases by virtue of the fact that statutory habeas applied and, for the purposes of this type of habeas, it mattered whether the U.S. was holding the person as a prisoner. The location of the detention facility was deemed irrelevant.¹¹⁹ Naturally, since the parties did not bring the issue of whether there were constitutional rights violations, the Supreme Court was not called upon to decide them. At that point, despite those detainees’ unknown fates, they had at least conquered the right to access the courts.

While the U.S. Government claims times of emergency call for extreme measures,¹²⁰ the manner in which these cases have been adjudicated serve as a portrait of an abusive exercise of power by the Executive, with little substantive response from the Judiciary branch.¹²¹ Legal scholars have proposed many different paths which the courts could rely upon to enable them to reach the merits of these cases without stepping back and alleging procedural bars to review.¹²² In other words, as the

¹¹⁸ *Accord, Eisentrager, supra* note 86.

¹¹⁹ 28 U.S.C. § 2242 (2007).

¹²⁰ The Government advances that times of emergency overrides individual rights.

¹²¹ Justice Stevens ruling in *Rasul* has been viewed as a superficial discussion of territorial jurisdiction whereupon he makes no mention as to whether district courts could be construed to have jurisdiction over the Secretary of Defense. In concurring with the judgment, Justice Kennedy expressed his concerns as to the creation of automatic statutory authority, stating he would rather hold that federal courts would be permitted to have jurisdiction over Guantanamo Detainees’ cases if, he points out, the opinion had rather addressed the statutes of Guantanamo and the indefinite detention of the detainees. *See Rasul, supra* note 81.

¹²² *See Barnes & Bowman, supra* note 68, at 13–18. The Article contrasts the opinions in *Rasul* and *Al-Odah* to the ruling in *Eisentrager* and lays out four alternatives the Judiciary could have relied upon to take upon the merits of these cases). The alternatives entail:

concurring opinion in *Rasul* reinforces, the U.S. Supreme Court could have taken another path and resolved the situation in Guantanamo years ago, by deciding the case in terms of the expansiveness of constitutional protections.

The implications of the U.S. Supreme Court decision in *Rasul* can be recognized in cases later addressed in the D.C. District. For example, *Qassim v. Bush*. In that case, two Uighurs detainees—who were discussed at the beginning of this Article—filed a writ of habeas corpus to be released from U.S. custody. The writ was filed in response to the Combatant Status Review Tribunal (CSRT) determination that neither of them was an enemy-combatant. The Government moved for a stay of proceedings. Due to the Government's excessive secrecy, Qassim and Al-Hakim's counsel was completely ignorant of the CSRT's decision on their status which took place three months before the filing of the writ. In the heat of several motions exchanged by both parties, evidence indicated that the Government sought to hide the Uighurs' status determination from their counsel.

On the one hand, the U.S. Government continuously advanced its longstanding claim¹²³ that releasing these detainees would impair the country's ability to conduct future foreign policy. On the other hand, what could be characterized as a legitimate claim fails to provide a legal basis to justify these detainees' prolonged detention. First, holding individuals declared non-enemy combatants indefinitely does not seem to provide the Government with any information on the "enemy." Second, releasing non-enemy combatants would not defeat any of the country's foreign policy. Rather, it would send a positive message to the international community that this country conducts fair adjudicative

-
- 1) The Eisentrager Rule: the courts would have no judicial role in reviewing the detention of aliens abroad;
 - 2) De Facto sovereignty: the courts would be empowered to determine their own jurisdiction by means of U.S. exercise of control over a particular geographic area;
 - 3) Statutory Jurisdiction: by means of legislative enactment ;
 - 4) Constitutional Jurisdiction: through the Due Process and Suspension Clauses as judicial review mandates regardless of nationality or location of the detention.

¹²³ See, e.g., *Al-Joudi v. Bush*, 2005 WL 774847 (D.D.C. 2005) and *Al-Marri v. Bush*, 2005 WL 774843 (D.D.C. 2005). This has been the basic argument every time the Government is faced with its nonsense arresting frenzy" after 9/11.

proceedings and releases innocent detainees. In any event, the prosecutors' conduct in this case is likely resultant from the U.S. Supreme Court's failure to address the legality of these detentions in the initial detention cases. Since the court did not address this issue, the Government had no mandate to follow. In other words, there had been no pronouncement setting forth court's legal standards for adjudicating the detainees' cases. Hypothetically, the Court could have held that CSRT's decisions on detainee's status had to be promptly communicated to the detainee's counsel as part of the proceedings.

Had the Court in *Rasul* actively come forward in addressing the legality of these detentions, or the rights that attach thereto, perhaps innocent individuals would have been spared from the risk of unbounded detention.¹²⁴ With these judicial opinions' deficiencies in mind, the next Subpart is denominated “*Youngstown Revisited: Hamdan v. Rumsfeld*” for an important reason. As addressed in Part I of this Article, the U.S. Supreme Court in *Youngstown* emphatically placed boundaries on the Executive's ability to legislate.¹²⁵ This Article suggests that the Court's attempt to revisit *Youngstown*'s ruling is not achieved in the Court's opinion in *Hamdan* explored below.

2. *Youngstown Revisited: Hamdan v. Rumsfeld*

Salim Ahmed Hamdan was a citizen of Yemen and a driver formerly employed to work on an agricultural project that Osama bin Laden created to gain the popular support of the people of Afghanistan. Hamdan was captured by bounty hunters during the invasion of Afghanistan and purchased by the United States, then sent to Guantanamo. In July 2004, he was charged with conspiracy to commit terrorism.¹²⁶ The Bush administration then made arrangements to try him before a military commission authorized under Military Commission Order No. 1 of March 21, 2002.¹²⁷ Hamdan filed a petition for a writ of *habeas corpus*, arguing that the military commission convened to try him was illegal and lacked the protections required under the Geneva Conventions and

¹²⁴ Judge Robertson's tone demonstrates indignation towards the U.S. Government's conduct towards these innocent detainees. In any event, he remained with his hands tight due to U.S. Supreme Court inability to set forth guidelines to the lower courts.

¹²⁵ See *supra* note 25.

¹²⁶ See <http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf>.

¹²⁷ <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (establishing Military Commissions guidelines for the prosecution of detainee).

United States Uniform Code of Military Justice. Following the Supreme Court ruling on another case, *Hamdi v. Rumsfeld*, Hamdan was granted a review before the CSRT, which determined that he was eligible for detention by the United States as an enemy-combatant.¹²⁸

The D.C. District ruled in Hamdan's favor holding military commissions could not be held unless it was first shown that Hamdan was a prisoner of war. The U.S. Court of Appeals for the D.C. District reversed.¹²⁹ The U.S. Supreme Court granted certiorari. The Court considered whether the United States Congress may pass legislation preventing the Supreme Court from hearing the case of an accused combatant before his military commission takes place, whether the special military commissions that had been set up violated the UCMJ and whether courts can enforce the articles of the 1949 Geneva Conventions.

In addressing each issue in order, Justice Stevens denied the U.S. Government's motion to dismiss the case. The Court reasoned that, because Congress did not include language in the DTA that might have precluded Supreme Court jurisdiction, the Government's argument was unpersuasive. The Government's jurisdiction-stripping argument was raised in *Schlesinger v. Councilman*,¹³⁰ and similarly rejected by the Court. *Councilman* applied to a member of the U.S. military who was being tried before a military "court-martial." In contrast, Hamdan is not a member of the U.S. military, and would be tried before a "military commission," not a court-martial. To the court, the more persuasive precedent was *Ex parte Quirin*,¹³¹ in which the court recognized its duty to enforce relevant Constitutional protections by convening a special term and expediting review of a trial by military commission. Since the

¹²⁸ *Hamdan*, *supra* note 8, at 2749.

¹²⁹ *Id.* The panel primarily held that military commissions are legitimate forums to try enemy combatants because they have been approved by Congress; the Geneva Convention is a treaty between nations and as such it does not confer individual rights and remedies; even if the Geneva Convention could be enforced in U.S. courts, it would not be of assistance to Hamdan at the time because, for a conflict such as the war against al-Qaeda that is not between two countries, it guarantees only a certain standard of judicial procedure—a "competent tribunal"—without speaking to the jurisdiction in which the prisoner must be tried; lastly under the terms of the Geneva Convention, al Qaeda and its members are not covered. The court further favored the idea of president's unconditional authority to convene military commissions.

¹³⁰ 420 U.S. 738 (1975).

¹³¹ *Supra* note 105.

DTA did not bar the Court from considering the petition, it was unnecessary to decide whether laws unconditionally barring habeas corpus petitions would unconstitutionally violate the *Suspension Clause*.¹³²

Justice Stevens next reached the substantive issues of the case. The case explicitly did not decide whether the President possessed the constitutional power to convene military commissions like the one created to try *Hamdan*. Rather, it held that, even if he possessed such power, those tribunals would either have to be sanctioned by the “laws of war,” as codified by Congress in Article 21 of the UCMJ, or authorized by statute. As to the statutory authorization, there is nothing in the AUMF “even hinting” at expanding the President’s war powers beyond those enumerated in Art. 21. Instead, the AUMF, the UCMJ, and the DTA “at most acknowledge” the President’s authority to convene military commissions only where justified by the exigencies of war, but still operating within the laws of war.¹³³

As to the laws of war, to the majority these necessarily include the UCMJ and the Geneva Conventions, each of which require more protections than the military commission provides. For example, Art. 36 (b) of the UCMJ requires that rules applied in courts-martial and military commissions be “uniform insofar as practicable.”¹³⁴ Justice Stevens found several substantial deviations, including: defendant’s (and defendant’s attorney) potential deprivation of access to certain evidence; a defendant’s right to discuss such evidence with his attorney; the admissibility of hearsay, unsworn live testimony, and statements obtained through torture; as well as the court’s inability to hear appeals.¹³⁵ The Court concluded that such provisions were in violation of UCMJ.

The Court also found that the military commissions’ proposed procedures violated the applicable Common Article 3 of the Geneva Conventions. The Court found that the D.C. Court of Appeals erred in concluding that the Conventions did not apply because: (1) it erroneously relied on *Eisentrager*, which does not legally control in *Hamdan*’s case because there was then no deviation between the procedures used in the tribunal and those used in courts-martial; (2) It erroneously ruled that the Geneva Conventions do not apply because Article 3 affords minimal

¹³² *Supra* note 119.

¹³³ However, the Court has previously acknowledged that the AUMF vested the power to detain in the President. See *Hamdi* discussed in Part III of this Article.

¹³⁴ *Supra* note 119.

¹³⁵ *Id.*

protection to combatants “in the territory of” a signatory; and (3) Those minimal protections include being tried by a “regularly constituted court,” which the military commission is not. Because the military commission does not meet the requirements of the UCMJ or of the Geneva Conventions, it violates the laws of war and therefore cannot be used to try Hamdan. Ultimately, the Court concluded that the military commissions set up by the Bush Administration to adjudicate the detainees in Guantanamo violated both the UCMJ and the fourth Geneva Convention.¹³⁶

However, the Court left critical questions unanswered in *Hamdan*. First and foremost, the Court clearly avoided addressing the issue of Presidential constitutional power to convene military commissions, leaving the door open to congressional action and potentially expressing deference to the Executive. Second, the Court did not decide whether *Hamdan* would be entitled to a hearing as prescribed by Article 5 of the Geneva Conventions to determine his status as opposed to the CSRT. As a result, what could initially have marked the Court actively stepping up to take on its role to “say what the law is,” the ruling in *Hamdan* did not have much impact and was quickly negated by the MCA statute.

Had the Court more actively curtailed political branch activities as it did in *Youngstown*¹³⁷ years ago, perhaps the MCA would not have been enacted and Guantanamo would come to an end or, at least, would not continue to be a land of indefinite detention as it stands now. Subpart (c) below addresses the Court’s ruling in the citizen’s category to further demonstrate the implications of its amorphous rulings and arbitrary distinctions amongst the detainees.

3. U.S. Citizen’s Category: Hamdi¹³⁸

In light of the decisions addressing non-U.S. citizens’ claims, it is worth considering the U.S. Supreme Court holdings in cases that involved U.S. Citizens detained in Guantanamo. First, as a U.S. citizen, even as an enemy-combatant, a detainee in this category has the right to file a writ of habeas corpus in federal courts. Second, per the executive order that established the camps at Guantanamo Bay, they can be transferred to and tried at U.S. soil. In *Hamdi v. Rumsfeld*, the Supreme Court reversed a

¹³⁶ See *Hamdan*, *supra* note 115.

¹³⁷ *Supra* note 25.

¹³⁸ 542 U.S. 507 (2004).

lower court dismissal of a petition for habeas corpus. The Court recognized the U.S. Government had the power to detain unlawful combatants, but held that U.S. citizen detainees must be entitled to challenge their detention before an impartial judge. The court further suggested that “some” due process has to be offer in the review process of enemy combatants and rejected the Government’s claim that those issues were not within the jurisdiction of the court. In other words, it was clear that the power of the President is not the same when it comes to U.S. citizens’ detention. In *Hamdi*, Justice O’Connor was joined by Chief Justice Rehnquist, Justice Breyer and Justice Kennedy in holding that Hamdi was entitled to due process giving him meaningful opportunity to challenge his enemy-combatant status and his detention.¹³⁹ Strikingly, Justice Scalia went even further to limit the power of the Executive branch to detain. He laid down the two single options the Executive could use to detain Hamdi. First, Congress would be required to suspend the right to habeas corpus—power limited to cases of invasion and rebellion. Neither these cases apply in Hamdi’s case. Second, Hamdi must be tried under normal criminal law.¹⁴⁰ Given the differential access to courts and process, turning on whether or not an individual is an U.S. citizen, the question is whether this disparate treatment makes sense at all. Arguably, irrespective of any racial, ethnicity or citizenship distinction, the detainees are being held under the same

¹³⁹ “[Hamdi] unquestionably has the right to access to counsel in connection with the proceedings on remand.” *Supra* note 138, at 539.

¹⁴⁰ Justice Scalia stated in part:

Where the Executive has not pursued the usual course of charge, committal, and conviction, it has historically secured the Legislature’s explicit approval of a suspension... Our Federal Constitution contains a provision explicitly permitting suspension, but limiting the situations in which it may be invoked: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Art. I, §9, cl. 2. Although this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause’s placement in Article I... The Suspension Clause was by design a safety valve, the Constitution’s only “express provision for exercise of extraordinary authority because of a crisis,” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952).

predicated assumption: they *might* be enemy combatants. To the extent they present the same threats to the nation, stripping alien detainees of the same rights granted to American citizens seems to be rationalized under unpersuasive policy grounds. With that in mind, it is useful to briefly discuss the meaning of the term “enemy-combatant” the paragraphs that follows.

“Enemy-combatants” are defined as those who, in times of war, engage in hostilities against the United States or its coalition partners, including any person who had committed a belligerent act or had directly supported hostilities in aid of enemy armed forces.¹⁴¹ The detainees in Guantanamo would not, theoretically, be entitled to American civilian courts, but only to the military tribunals. The impact of such distinction is that military courts have a different body of rules set forth to deal with the so-called “enemy.”

In light of the above U.S. Supreme Court decisions, the panoply of controversies that can arise from the distinction on the basis of citizenship status lead to the issue of how different of a threat can an U.S. citizen unlawful enemy-combatant be from a non-U.S. citizen?¹⁴² The difference in treatment of the detainees set forth in *Hamdan* and *Hamdi* potentially deteriorates any incentives for the Government to institute principles of equality in prescribing rights to the detainees.¹⁴³ In any event, if any commonality can be found between U.S. citizens and non-citizens cases, it is reflected in the Court’s consistent avoidance of

¹⁴¹ *U.S.C.A. Const. Amend. v. In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005).

¹⁴² See Barnes & Bowman, *supra* note 68, at 34–35. The Article presents two normative categories: “them” and “us” with respect to the War on Terror:

[W]here racialized suspects are clearly not a part of “us. Societal attitudes such as these serve as silent support Government’s policies, which disproportionally impact a social marginalized group. This combination of harmful legal impact and social ostracism also undermines the credibility of the Government’s actions, by discouraging the likelihood that “we” might undertake the role as a mechanism to ensure the fairness for “them.”... [i]f Government regulations disproportionally and severely infringe upon the rights of a small group of individuals, whose interests are deemed neither akin to, nor worth of protecting the majority, can this minority group be treated fairly?

¹⁴³ *Supra* note 61, at 35.

addressing the question of President’s power to convene military commissions. This leaves the door open to bad law, to wit, the MCA.¹⁴⁴ After having provided the consequences of this expansive executive power, the next Part will focus on the attempt to provide solutions to the detainees’ unbounded detention as well as address the impact of current U.S. policies in the international community.

IV. ATTEMPTS TO “FIX” UNBOUNDED DETENTION

Ideally, principles of equality should apply to detainees. Irrespective of their status, race, religion, or the like, they should be entitled to a robust and fair adjudicative process for being “accused” of having potentially committed the same crime against the same sovereignty as the U.S. citizen detainees. In constructing this ideal “world” with an eye toward avoiding a flood of federal habeas petitions by these individuals, it could be possible to provide for an alternate form of legal review. By establishing a doctrinal approach that allows for rational basis review in exchange for jurisdiction, non-U.S. citizens would at least be able to bring the claim before the courts and enable the courts to ensure principles of separations of powers and due process are minimally observed. While it may be plausible that aliens are not entitled to the full panoply of constitutional guarantees under the Constitution, some basic rights should be part of the package in lieu of the U.S. Government’s complete control over their freedom.

For example, one option would be to extend the types of due process rights discussed in *Hamdi* to the whole group of detainees as part of their adjudicative process. This model would entail an “adjusted due process” to the effect that it be similar to those rights afforded to U.S. citizens detained. By reducing the gap between domestic law and international law of armed conflict, this approach would be particularly narrow and solely apply to the detainees in times of war. This model would enable detainees to have access to evidence intended to be used against them, claim rights against self-incrimination, and have evidence obtained by means of coercion stricken from the record. Not in the ambiguous sense provided under the MCA, but in the real sense by means of explicit language.

The Government’s counterargument to allowing any due process rights to alien detainees underlies the notion that it would be deprived of

¹⁴⁴ See Amnesty’s Article, *supra* note 72.

critical enemy information. However, since the detainees are mostly held incommunicado, this argument seems unpersuasive. It is of little surprise that many scholars, after long years of studies of constitutional law and criminal procedure, strongly censure how the Executive and the Judiciary have dealt with these detentions. The Supreme Court seems to struggle with the potential desire to do justice and to simply give deference to the current political branches undertakings under the notion that federal courts should refrain from adjudicating matters considered to involve "political questions."¹⁴⁵ As this Article has previously indicated, foreign relations might be envisioned as a matter fitting within the political question doctrine. However, where the fundamental rights of individuals are in question, an exception to the political question doctrine should be made. While both alternatives might be highly speculative, this will not change how poorly reasoned the rulings of these cases have been.

Take for instance the treatment of the Reasonableness Clause¹⁴⁶ of the Fourth Amendment as an example. This clause provides for the protection of individuals against unreasonable searches and seizures. In

¹⁴⁵There have been circumstances in which the Court has rejected jurisdiction over cases that it deemed beyond its expertise. The Court ultimately enunciated a three-part test to determine whether it should review a case. The inquiry entailed: (1) whether there was constitutional textual commitment to coordinated branches of Government; (2) whether the question is beyond judicial expertise; and (3) whether prudential considerations counsel against judicial review. *See Powell v. McCormick*. More specifically, in the area of foreign relations, *see Goldwater v. Carter*, *supra* note 96 at (reasoning whether a President can rescind a treaty with another nation lacks textual commitment from the Constitution, it is beyond the judicial expertise and prudential considerations prevent the court from getting involved in foreign relations). While practical considerations should make limitations on the judicial review advisable in certain cases, the problematic notion that the Court sets a permanent disability with respect to the issues it deems to be a political question should call for caution. In other words, limits on claims' justiciability under the rationale of political question should be sparingly used.

¹⁴⁶ U.S. Const., Amend. IX (providing for the protection of "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.")

that sense, the Fourth Amendment is a restraint on Executive power.¹⁴⁷ While the Executive claims the constitutional shield does not protect alien detainees on the basis that they are not Americans on top of being “enemy-combatants,” nothing in the Amendment creates this distinction. Furthermore, it would certainly serve the interest of equality and fairness to replicate the Fourth Amendment principles to adequately adjudicate how these men captured and detained. Nevertheless, a great number of innocent individuals were arrested as Al-Qaeda members. Does this reflect the reasonableness the Framers were expecting to promote? If they were on U.S. soil or were citizens would we think so? Is there anything in the Constitution that allows the Executive to detain aliens abroad without any evidence against them in such an arbitrary manner? It would obviously take some creativity in interpreting sections of the Constitution to give positive answers to at least some of these questions. Given, however, the current state of affairs in this country, this situation might be required. Perhaps, as Joan Hartman has noticed, there is a “widespread perception that suspension of human rights is practically inevitable during periods of acute crisis.”¹⁴⁸ However, such presumption of fundamental rights derogation, oftentimes, tends to go beyond the necessary, typically resulting in normalcy rather than exigency.¹⁴⁹ This notion of normalcy may be reinforced by consequences which led to the detainees’ indefinite detention. Moreover, the duality between exigency and obligation to abide by international norms is further endangered by instituted principles of balance. On the scale, the balance seems almost inevitably to tilt more to one side than to the other depending on how much power each side holds.¹⁵⁰

¹⁴⁷ *California v. Acevedo*, 500 U.S. 565 (1991) (J. Stevens, dissenting).

¹⁴⁸ Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT’L L.J. 1, 11(1981).

¹⁴⁹ See, e.g., Gross, *supra* note 18, at 1073 (noticing the dialectic of normalcy-rule, emergency-exception and their inherent conflating tendency in terms of emergency where oftentimes they seem to occupy alternate, mutually exclusive time frames when they actually blend in time, space and U.S. relations with the world).

¹⁵⁰ But abuse of power can expose the nation to serious future harm. As U.S. President Harry Truman explained at the conference that founded the United Nations: “[w]e all have recognized—no matter how great our strength—the we must deny ourselves the licence to do always as we please.”

Another potential solution is to provide for an “immigration” fix to the problems of these detainees. The Uighurs case fits within this category. Now that most of Uighurs detainees were deemed to have never been a threat to U.S. and are slated for release, China vehemently claims some sort of “ownership” over them. Nevertheless, profound concerns of retaliation¹⁵¹ by Chinese authorities preclude U.S. authorities from allowing sending them back to China.

In adopting the immigration fix approach, the U.S. Government could consider using the immigration laws that have been applied to individuals in similar situations, i.e., illegal aliens that are kept in custody pursuant to federal immigration regulations that provide for asylum withholding removal¹⁵² created in lieu of the Convention Against Torture (CAT).¹⁵³ In that case, these Uighurs would be detained in Guantanamo until they could find asylum in another country.¹⁵⁴ As to how the “immigration” fix affected the Uighurs turned on the offer of asylum by Albania. Under the “better-than-nothing” approach, they are at least out of Guantanamo.

¹⁵¹ Chinese Foreign Affair spokesman, Liu Jianchao, has recently told the press that China’s authorities are not going to engage in the abuse of human rights as soon as one mentions criminal suspects. He further said that “abusing criminal suspects is not Government policy,” asserting its illegality. However, the majority of press present at this conference has claimed that Chinese authorities have been hiding its unacceptable behavior against the Uighurs under the disguise of the war on terror and the military support of the U.S. and obtaining their Security Council acquiescence to such conduct. See <http://www.running-dog.co.uk/newsasp?newsitem=0032>.

¹⁵² 8 C.F.R. § 208.16 (2005).

¹⁵³ The U.N. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (CAT). See generally Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT’L & COMP. L.REV. 275, 275–96 (1994).

¹⁵⁴ This would not be first case dealing with these types of regulations. For illustrative cases on how the courts have dealt with the matter, see, e.g., *Zewdie v. Ashcroft*, 381 F.3d 804 (2004) and *Yi-Tu Lian v. Ashcroft*, 370 F.3d 457 (2004) (establishing that the test to trigger the code under the Convention Against Torture is whether the individual is likely to be tortured if sent back to the country of removal, a more probably than not inquiry).

Lastly, there are some other creative propositions. For example, legal scholars have suggested a “monetary” fix to wrongfully detained individuals. Basically, the monetary fix advances the notion that imposing monetary sanctions upon the Government would operate as a deterrent against future abuse of Executive power. In other words, a money sanction would provide for a mechanism of “preventive detention.” While comprising a valid brainstorming in the quest for a solution to the unbounded detentions, this creative solution rests on the assumption that money will also restore the dignity and freedom to these individuals.¹⁵⁵

As these examples reveal, many propositions have been advanced to provide for a solution to these detainees with no particular success. Meanwhile, human rights advocates have their eyes centered on our nation. The Human Rights Watch has recently expressed its concerns with respect to the MCA. It advanced that the military commissions “fall far short of international due process standards.”¹⁵⁶ It has been articulated that U.S. “artificial” derogation from the Geneva Conventions by virtue

¹⁵⁵ Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1062–66 (2004).

¹⁵⁶ The military commissions fall far short of international due process standards. They:

- Deprive defendants of independent judicial oversight by a civilian court.
- Restrict the defendant’s right to choose his lawyer.
- Deprive defense counsel of the means to prepare an effective defense.
- Improperly subject criminal suspects to military justice.
- Prosecute prisoners-of-war in a manner that violates the 1949 Geneva Conventions.
- Place review of important interlocutory questions with the charging authority.
- Fail to guarantee that evidence obtained via torture or ill-treatment shall not be used.
- Allow wide latitude to close proceedings and impose a “gag order” on defense counsel.
- Deprive military defense counsel of normal protections afforded military lawyers from improper “command influence.”
- Provide lower due process standards for non-citizens than for U.S. citizens.

See generally Jennifer Daskal, *How to Close Guantanamo*, 24 WORD POLICY JOURNAL 29–37 (Fall 2007).

of the MCA leaves open the door for other States to “opt-out” as well. In other words, any step back from the Geneva Conventions could also provoke mistreatment of captured U.S. military personnel. In addition, scholars of international jurisprudence claim there have been over 50 years since Geneva was entered into force and it has been applied in every conflict.¹⁵⁷ However, U.S. current policies undercut the overarching principles under international law to strive for uniform human rights policies around the World. In the current state of affairs, the Executive branch becomes three branches in one: legislator, executive enforcer, and judge of its own actions. The lack of independent judicial oversight deprives detainees from the opportunity of impartial judicial review of verdicts, regardless of their arbitrariness or lack of legal soundness.

In response to the consequences of this expansive executive power, the U.N. Human Rights Committee stated that the use of military courts could present serious problems as far as the equitable, impartial, independent administration of justice is concerned. As detainees have increasingly been deemed non-enemy-combatants, it is possible to assess how the Executive, now Congressional actions, captures civilians who had no connection to the armed conflict. In other words, as a consequence of the disparate overreaching power of the political branches and a rather weakened Judiciary, the U.S. is substantially regarded by the international community with complete disapproval.

Thus, the impact of U.S. current politics in the International Community is, at the very least, alarming. If entitling the detainees to a unified due process approach seems unrealistic, at minimum, they should be treated in a manner consistent with the principles of the Geneva Conventions. Relevant provisions in the Third Convention provide that detainees are entitled to a presumption of protection thereunder, “until such time as their status has been determined by a competent tribunal.” The detainees must first be designated as civilians, combatant, or criminals rather than lumped into a single composite group of unlawful combatants by presidential fiat. Moreover, the International Covenant on Civil and Political Rights mandates that “[n]o one shall be subjected to arbitrary arrest or detention and those deprived of liberty shall be entitled

¹⁵⁷ See generally United Nations Treaty Collections at <http://untreaty.un.org/English/treaty.asp>.

to take proceedings before a court.”¹⁵⁸ The meaning of “court” within the Covenant was aimed at civilian courts, not military, in the sense that the preoccupation was to provide them with a fair adjudication with respect to the detainees’ status. Yet, the U.S. Government chose to ignore the requirements under international law despite apparently false claims that it would be followed.¹⁵⁹ Instead, as previously discussed in Part II of this Article, Congress made sure that international law does not provide a substantive basis of relief for these detainees’ claims by virtue of the MCA.

The vast cultural, economic and political differences among signatory States were deemed as plausible justification for permitting reservations treaties. By this mechanism, the States are provided the opportunity to somewhat “tailor” multilateral treaties to their realities. It is evident that the U.S. Government has granted itself the right not to be entirely bound by international law. How wise the use of this mechanism was undertaken by U.S. may be reflected by the current the impact of U.S. policies toward international law mandates. As the detainees’ situation develops, however, the U.S. image within the international community is in serious jeopardy. As a result a widespread criticism of the U.S. policies generated an atmosphere of wariness of U.S.’s ability and willingness to preserve individuals’ fundamental rights at any time a situation is categorized as “emergency.”

¹⁵⁸ *International Covenant on Civil and Political Rights*—ICCPR. While U.S. is a signatory State, it has exercised the right of making reservations to the rights provided under the Covenant. For example, by virtue of “U.S. Reservations, Declarations, and Understandings to the International Covenant on Civil and Political Rights, 138 Cong. Rec. S.4783–84 (April 2, 1992), Senate opts out of Article 7 of the Covenant by binding the meaning of “cruel, inhuman or degrading treatment or punishment” to conform to those under the Fifth, Eighth, and/or Fourteenth Amendment to the Constitution of United States. The practical effect of this reservation is to release U.S. Government from any liability that may arise outside of the meaning of the U.S. Constitution with respect to the humane treatment of the detainees.

¹⁵⁹ Regardless of the Government’s promise to treat the Guantanamo detainees accordingly, President Bush has determined that the terms of their detention are not governed by Geneva Convention because of their status of “unlawful combatants.” See White House Press Release at <http://www.whitehouse.gov/news/releases/2002/02/20020207>. Fortunately, U.S. courts’ decisions have indicated that the President is not accurate in his determination. *E.g.*, *Padilla v. Bush*, 2002 WL 31718308 (S.D.N.Y. Dec. 4, 2002).

V. CONCLUSION

All the problems outlined in this Article can be corrected. It would not take more than going back to the Constitution and reconstituting the Framers' intent in promoting the leadership of the country as an integral body composed by the three branches of Government. The U.S. Government should ensure that the wide gap between domestic law and the law of armed conflict is minimized by allowing those tried before military commissions to receive trials up to the level of American justice. If no action is taken, the American justice once internationally admired will give space to a stain in the American history. Congress should be more active in undertaking its role of making the law rather than merely voting on proposals based on their political agenda or the Executive's wishes. The Judiciary should step up and actively "say what the law is" rather than handing down amorphous rulings stigmatizing detainees on the basis of their citizenship status. Under basic constitutional principles, doing justice means equal protections of the laws. Using the claim of times of emergency to justify abusive treatment does not foster a democratic society. If the military is not able to advance legal grounds to hold these detainees, they should be released. The Judiciary should be eager to have a case challenging the MCA sooner rather than later and take the opportunity to lay down a clearly ruling on how these detainees should be accorded equal safeguards regardless of their race, national origin, or status. In other words, the Judiciary should take back what Congress has taken away, through implementing major modifications to the Executive's ill-conceived policies regarding commissions. In terms of meaningful separation of powers mandates, what the Constitution has given, Congress cannot take away.

The U.S. Government should also step back and develop a positive dialogue with the international community by allowing them to voice their concerns and make them participants in the detention policies and mechanisms for adjudication. Rather than relying on its reservations with respect to international norms, U.S. should take the historical step to improve traditional laws of armed conflict and create a more coherent and fair adjudicative model. For example, as this Article proposed, a remodeled international due process model could be instituted. This Article concludes that, in the current state of affairs, the overbroad and abusive scope and nature of the U.S. foreign policies fall short in achieving these ideals.