CONSTITUTIONAL CHALLENGES IN THE TWENTY-FIRST CENTURY:
Judicial Review and Presidential Power in the Bush Administration

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Throughout the history of the United States, the legislative and executive branches have circumvented individual liberties explicitly granted in the Constitution, especially during times of war or national crisis. The Bush administration in an attempt to protect Americans after 11 September 2001 from further terrorist attacks instituted specific policies, enacted laws that restricted the use of habeas corpus, and sought to deny the Supreme Court the long held principal of judicial review. A series of Supreme Court decisions, which culminated with Boumediene v. Bush, illustrates the Bush Administration's attempt to thwart the judiciary, thus violating the separation of powers doctrine. The Supreme Court's decision in Boumediene v. Bush not only reigned in the power of the chief executive, but also affirmed the liberties granted under United States Constitution and the Geneva Convention.

The Supreme Court ruled that the restriction of habeas corpus to Guantanamo Bay detainees under the Military Commissions Act (2006) was unconstitutional. Both Professor Carlos Manual Vazquez of Georgetown University and Professor David A. Martin of Virginia Law School have provided exceptional scholarship in regards to the Military Commissions Act (2006), however, little if any scholarship addresses an analysis of the Supreme Court's decision in Boumediene v. Bush.

Immediately after the terrorist attacks of September 11, 2001, a debate emerged in America regarding the proper method to protect innocent civilians from a global terrorist network capable of inflicting wartime casualties. The debate centered on sacrificing long held American liberties in order to achieve greater security from future terrorist attacks. Almost immediately, the Bush Administration enacted several policies via executive order. The executive orders along with several acts passed by the United States Congress were to have far-reaching implications for the liberties of American citizens and foreigners as well. As in the past, the United States Constitution would be placed under considerable pressure by the legislative and executive branch during a time of national crisis. The passage of the Military Commissions Act (MCA) of 2006 by Congress and the Chief Executive sought to deny the federal judiciary habeas corpus review, thus eliminating the judicial branch from an imperative check and balance on the power of the executive and legislative branches. The Supreme Court in a five to four decision in Boumediene v. Bush affirmed that it possessed the power to issue writs of habeas corpus and that the suspension of habeas corpus invoked in MCA was invalid and unconstitutional.

The foremost constitutional question in Boumediene v. Bush was the issue whether foreign detainees classified by the Bush administration as "enemy combatants" had a right to seek a writ of habeas corpus and challenge the lawfulness of their imprisonment. Secondary, but just as paramount, if not more so, was the expansion of presidential wartime powers to squash judicial review and curb the separation of powers that the framers of the Constitution intended to be permanent. The uniqueness of the circumstances in Boumediene v. Bush mandated the Supreme Court to explore new legal ground, as no other precedent existed that allowed the justices to form a clear conclusion solely based upon precedent. To comprehend the Supreme Court's decision in Boumediene v. Bush it is compulsory to understand the classification of foreign detainees as enemy combatants as well as three previous Supreme Court cases, which led to the Bush administration's passage of the Military Commissions Act

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in 2006. Further, it is imperative to be cognizant of the fact that the attacks of September 11, 2001 generated enormous fear within American society, and that fear subsequently placed enormous pressure on the United States government, and particularly on the President of the United States to prevent further catastrophic acts of terrorism on American soil.

"Within a week of the attacks of 11 September 2001, the United States Congress authorized the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks…"[1] The Authorization for Use of Military Force (AUMF) enabled President George W. Bush to enact wartime powers to combat terrorism. President Bush utilized this opportunity to assert and expand his powers as Commander in Chief to redefine enemies engaged in unconventional warfare against the United States. President Bush now claimed the authority "to detain enemy combatants, including the Taliban, al Qaeda and other irregular fighters in Afghanistan and elsewhere were entitled neither to the procedural protections of the criminal justice system, nor the humanitarian protections of the Geneva Conventions. The Bush administration asserted an entitlement to hold detainees indefinitely, subject them to harsh methods of interrogation and try them before military commissions."[2] In 2004, the Abu Ghraib prison torture scandal became public knowledge; images, which were circulated globally, detailed the abuse and torture of detainees.[3] The mistreatment of detainees at Abu Ghraib raised the question whether similar maltreatment was occurring at Bagram prison in Afghanistan and the detention center at Guantanamo Bay.

The detention of prisoners at Guantanamo eventually challenged presidential assertions that he possessed the legal executive authority to confine enemy combatants indefinitely and raised important questions on the proper forum for detainees to face prosecution. Initially both American citizens and aliens that were deemed enemies of the United States were prosecuted in civilian not military courts. Later, even American citizenship did not prohibit the government of the United States from incarceration by the military. Yaser Esam Hamdi was an American citizen, even though he spent most of his life outside the United States. He was initially detained at Guantanamo Bay after being captured in the Afghanistan conflict, "when his American citizenship came to light, the government transported him from there to the brig at the Norfolk naval station."[4] "According to the [federal] government, Hamdi's citizenship was no bar to military custody."[5] Did the United States government have the authority to confine American citizens in military custody and to detain them until the conclusion of the war in Afghanistan as the government claimed? Furthermore, did Hamdi have a constitutional right to challenge his detention as an enemy combatant and assert his alleged innocence?

Hamdi challenged his detention in the Supreme Court. The court upheld that the Bush administration's contention that the United States Constitution does not exclude United States citizens from military detention. Justice O'Conner delivered the majority opinion of the court ruling: "although Congress authorized the detention of combatants in the narrow circumstances alleged in this case, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful

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[1] Dorf, Micheal C. "The Detention and Trial of Enemy Combatants: A Drama in Three Branches" *Political Science Quarterly;* Spring; Vol. 122, No. 1, p. 47
[2] Ibid.
[3] See what became known as the "John Yoo Torture Memo" U.S. Department of Justice; Office of the Deputy Assistance Attorney General; Memorandum for William J. Haynes II, General Counsel of the Department of Defense, March 14, 2003
[4] Dorf, Micheal C. p. 50
[5] Ibid., p. 50

opportunity to contest the factual basis for that detention before a neutral decision maker."[6] This was the initial step taken by the judiciary to limit the power of the chief executive, which held that they could detain American citizens indefinitely. The ruling in Hamdi v. Rumsfeld allowed future cases to challenge the constitutional claims of the chief executive's wartime powers.

In 2004, the same day the Hamdi decision was handed down, the high court also ruled on the ability of alien enemy combatants to challenge their detention being held at Guantanamo Bay. In Rasul v. Bush, petitioners at Guantanamo sought writs of habeas corpus to dispute their detention. "A divided Supreme court ruled that there was jurisdiction over habeas corpus petitions filed by Guantanamo Bay detainees."[7] The high court majority concluded that for all practical purposes Guantanamo Bay was in fact a United States territory and because of its status as a territory the habeas corpus statue in the Constitution applied to all persons detained at Guantanamo Bay.[8] The ruling and the reasoning behind the court's decision in Rasul would have a direct bearing on the future ruling in Boumediene v. Bush in 2008. Meanwhile, the executive and legislative branches would do everything to subvert the ruling in Rasul with new legislation designed to undermine the Supreme Court's ruling and maintain their unitary authority to detain and prosecute foreign detainees.

After the Supreme Court granted habeas petitions to challenge the detention of aliens confined at Guantanamo Bay the Bush administration established the Combatant Status Review Tribunals (CRST) for detainees at Guantanamo to dispute the lawfulness of their imprisonment.[9] The CRST's were purposefully instituted by the administration to act as a substitute for habeas corpus review. Once the Supreme Court granted review in Hamdan v. Rumsfeld, even before the case was argued before the court, Congress and the Bush administration passed the Detainee Treatment Act (DTA) of 2005. DTA was intended to deny the "federal courts the authority to hear habeas corpus petitions by detainees facing the possibility of trial by military commission…"[10] However, absent in the wording of the Detainee Treatment Act was a valid suspension of the writ of habeas corpus, a guarantee explicitly granted in the Constitution.

After the passing of DTA and with the precedent of Ex parte Quirin (1942), the Bush administration believed it was on more solid legal ground in the pending Hamdan Supreme Court decision. In yet another 5-4 decision, the Supreme Court ruled in Hamdan v Rumsfeld (2006) that President Bush did not have the unilateral authority to establish tribunals and that he required congressional authorization to legitimize such actions.[11] Justice Breyer wrote, "Nothing prevents the President from returning to Congress to seek the authority he believes necessary. Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine – through democratic means – how best to do so."[12] Further, the Supreme Court also ruled contrary to the Bush administrations assertion that the Geneva Convention does not apply to members of terrorist networks. The Supreme Court declared, "Even al Qaeda detainees hold important rights under Common Article 3 of the Geneva Conventions."[13] Common Article 3 posed a unique and

[6] Hamdi v. Rumsfeld, 542 U.S. 507 (2004)
[7] Dorf, Micheal C. p. 52
[8] Ibid., p. 52
[9] Martin, David A. "Judicial Review and the MCA: Striking the Right Balance", *University of Virginia Law School,* 2007, No. 70, p. 8
[10] Dorf, Micheal C. p. 53
[11] Martin, David A. p. 8
[12] Ibid., Also see Hamden v. Rumsfeld 548 U.S. 557 (2006)
[13] Geneva Convention Article III: Relative to the Treatment of Prisoners of War. 12 August 1949

troubling problem for President Bush and members of his cabinet. Once the Supreme Court ruled that al Qaeda and other terrorist networks had rights under the Geneva conventions it "imperiled the president's program for the interrogation of al Qaeda detainees because that article prohibits cruel and degrading treatment and violating it was a criminal offense under the War Crimes Act."[14]

Immediately the Bush administration initiated new legislation along with congressional authorization to thwart the decision of Hamdan v. Rumsfeld, by attempting to exclude the judiciary from reviewing further cases that involved foreign detainees. Professor Carlos Manuel Vazquez of Georgetown University aptly noted, "Rather than reject the Supreme Court's interpretation of common Article 3, the president sought to ensure that the Court would not again have the occasion to interpret common Article 3, or any of the other articles of the Geneva Conventions."[15] The president's battle with the judiciary persisted with the passage of the Military Commissions Act (MCA) in 2006, which effectively suspended habeas corpus of foreign detainees. President Bush, acting as a Unitarian executive, refused an alternative version of MCA introduced by U.S. Senators within his own party: John W. Warner, John McCain, and Lindsay Graham.[16] The passage of MCA allowed the Bush administration to take "the position that the Due Process Clause does not apply to adjudications taking place outside U.S. borders.[17] Boumediene v. Bush would challenge that assumption along with executive and legislative branch's ability to suspend habeas corpus.

The United States Constitution allows for suspension of habeas corpus: under Article I, section 9, clause 2, "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."[18] Boumediene v. Bush raises several questions. First, is Guantanamo Bay a sovereign territory of the United States and if so, does the writ of habeas corpus extend to Guantanamo Bay? Second, does the defendant as an alien of the United States have a right to habeas corpus? Third, did the President exceed his authority by suspending the writ of habeas corpus? Fourth, in this unique case, what precedents support the defendant's claims to habeas corpus? In a five to four decision, the Supreme Court ruled that the petitioners are entitled to habeas corpus privilege, moreover, the court are also ruled in the affirmative to all of the above questions and cited precedents to explain the ruling of the majority court opinion.

Justice Kennedy delivered the opinion of the court, Justice Souter delivered a second concurring opinion, which Kennedy did not join and there were two separate dissents issued by Justice Roberts and Justice Scalia, which all dissenters joined. The Supreme Court's judicial decision-making process often lies in interpreting the Framers' intent when they constructed the Constitution and Boumediene v. Bush was no exception. Prior to the ratification of the Constitution Alexander Hamilton addressed habeas corpus in Federalist number 84, explaining that a detainee was entitled to a judicial forum to challenge their detention, and further, that the writ of habeas preserves limited government."[19] "Surviving accounts of the ratification debate provide additional evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme."[20] Justice Kennedy makes the argument that suspension of the writ should be utilized in an extremely limited fashion because the writ is such an imperative tool

[14] Vazquez, Carlos Manuel. "The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide", *The American Journal of International Law,* Vol. 101 No. 1 (Jan., 2007), p. 73
[15] Ibid., p. 74
[16] Ibid.
[17] Ibid., p. 79
[18] The Constitution of the United States; Section 9 Clause 2
[19] Federalist No. 84: *Certain General and Miscellaneous Objections Considered and Answered* (Hamilton, Alexander), 1788
[20] Boumedien v. Bush 533 U.S. (2008) Also see *Three Debates in the Several State Conventions on the Adoption of the Federal Constitution* (J. Elliot 2nd ed. 1876), pp. 460-464

designed to protect unlawful detention as well as a crucial check on the power of the executive and legislative branches.

In the high court's ruling, another issue that the court addressed was the sovereign nature of Guantanamo Bay. Moreover, was Guantanamo Bay a sovereign territory of the United States? To answer this critically important question Justice Kennedy provided a historical background of the naval station at Guantanamo Bay in his opinion. Justice Kennedy wrote, "The United States has maintained complete and uninterrupted control of the bay for over 100 years. At the close of the Spanish-American War, Spain ceded control over the entire island of Cuba to the United States and specifically relinquished all claims of sovereignty… and title."[21] "And although it recognized, by entering into the 1903 Lease Agreement, that Cuba retained "ultimate sovereignty" over Guantanamo, the United States continued to maintain the same plenary control it had enjoyed since 1898. Yet the [federal] Government's view is that the Constitution has no effect there, at least as to non-citizens, because the United States disclaimed sovereignty in the formal sense of the term."[22] Justice Kennedy argued, "We have no reason to believe an order from a federal court would be disobeyed at Guantanamo. No Cuban court has jurisdiction to hear the petitioners' claims, and no law other than the laws of the United States applies at the naval station."[23] Previously, the court had concluded in Rasul v. Bush, as it did in this case...we take notice of the obvious and uncontested fact that the United States, by the virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory.[24]

Both the majority and minority court opinions cite the specific lack of precedent surrounding the issue of sovereignty of Guatanamo Bay supports its own position. However, once the majority established that, the United States had sovereignty over the naval station, it addressed the issue whether the Constitution is applicable to sovereign territories located outside the United States. The United States Congress under an Act in 1789 reaffirmed Article II of the Northwest Ordinance of 1787, which entitled the inhabitants of United States territories to the protection of the writ of habeas corpus.[25] Another Act that established a territorial government in Utah also extended the Constitution and the laws of the United States to said territory.[26] "In a series of opinions later known as the Insular Cases, the court addressed whether the Constitution by its own force applies in any territory that is not a State."[27] "The court held that the Constitution had independent force in these territories, a force not contingent upon acts of legislative grace."[28] Nevertheless, did fundamental rights guaranteed in the Constitution also apply to aliens living in territories of the United States? In Balzac v. Puerto Rico (1922), the high court ruled, that even in unincorporated Territories the Government of the United States was bound to provide to non-citizen inhabitants "guarantees of certain fundamental personal rights declared in the Constitution."[29]

Once the court ruled the Constitution does apply to territories located outside the United States and that even non-citizens have fundamental rights, the next obstacle to grant the petitioners the right to habeas corpus review rested on the status of their detention and their ability to reasonably challenge their

[21] Boumediene v. Bush, 533 U.S. (2008) Kennedy Opinion. pp. 34, 35
[22] Ibid., p. 35
[23] Ibid., p. 21
[24] Ibid., pp. 24, 25
[25] Act of August 7, 1789, 1 Stat. 52; also see Article II of the Northwest Ordinance of 1787
[26] Act to establish a Territorial Government for Utah, 9 Stat. 458
[27] Boumediene v. Bush 533 U.S. (2008) Kennedy Opinion. p.26
[28] Ibid., p. 27 Also see a series of decisions known as the Insular Cases that affirms that the United States Constitution applies to territories of the United States
[29] Balzac v. Puerto Rico, 258 U.S. 298, 312 (1922) and Boumediene v. Bush 533 U.S. (2008) p. 28

detention. Justice Kennedy wrote, "…the CRST hearings are far more limited and we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. Although the detainee is assigned a "Personal Representative" to assist him during CRST proceedings, the Secretary of the Navy's memorandum makes clear that person is not the detainee's lawyer or even his "advocate."[30] "If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present evidence to a habeas corpus court."[31] Some detainees at Guantanamo Bay have been detained for over six years without the ability to reasonably challenge their detention, yet the government maintains that they have the authority to detain enemy combatants indefinitely, despite the fact that there is ostensibly no end to the threat of terrorism.

The majority of the court having addressed the impediments of granting habeas corpus review in Boumediene v. Bush ruled that, "Petitioners have met their burden of establishing that the DTA review process is, on its face, an inadequate substitute for habeas corpus. It suffices that the Government has not established that the detainees' access to the statutory review provisions at issues is an adequate substitute for the writ of habeas corpus. MCA thus affects an unconstitutional suspension of the writ."[32] "There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these is freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."[33] "The laws of the Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system, they are reconciled within the framework of the law."[34]

Chief Justice Roberts wrote a dissenting opinion stating, "DTA provides the prisoners held at Guantanamo Bay adequate opportunity to contest the bases of their detentions, which is all habeas corpus need allow."[35] Justice Roberts wrote, "…today the American people, who lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges."[36] Undoubtedly, Alexander Hamilton would have disagreed with Chief Justice Roberts, for he viewed the Supreme Court as the most important guardian of minority rights.[37] Hamilton asserted in the Federalist Papers number 78, that, "no legislative act...contrary to the constitution can be valid,"[38] Thus, Hamilton established the basis for judicial review as an important separation of powers, to be exercised by the Supreme Court prior to Chief Justice John Marshall claiming judicial review in Marbury v. Madison. Professor David G. Barnum concedes that the Supreme Court is countermajoritarian, in the sense that, as Justice Roberts argues; judges are unelected and not accountable to the American people.[39] Nevertheless, Barnum concludes the countermajoritarian nature of the Supreme Court and judicial review are "not hopelessly inconsistent with the fundamental principles of American democracy."[40]

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[30] Boumediene v. Bush 533 U.S. (2008) Kennedy Opinion pp. 37, 38; also see Johnson v. Eisentrager, O. T. 1949, No. 306, pp. 34-60
[31] Ibid., p. 61; Also see Brief for Boumediene petitioners 5.
[32] Ibid., pp. 63, 64
[33] Ibid., pp. 68, 69
[34] Ibid., p. 70
[35] Chief Justice Roberts dissenting opinion; Boumediene v. Bush 533 U.S. (2008), p. 19
[36] Ibid., p. 28
[37] Chernow, Ron. *Alexander Hamilton.* (New York, NY: Penguin Group Inc, 2004) p. 258; also see Federalist No. 78; *The Judiciary Department*, (1788)
[38] Ibid., p. 259
[39] Barnum, D.G. *The Supreme Court and American Democracy*. (New York, NY: St. Martin's Press, 1993) p. 312
[40] Ibid.

Furthermore, Professor Barnum argues that, "countermajoritarian judicial policy making is among the Supreme Court's legitimate; indeed essential responsibilities."[41]

Justice Scalia issued a separate dissent, writing, "The writ of habeas corpus does not, nor and never has run in favor of aliens abroad: the Suspension Clause thus has no application."[42] Justice Scalia argues that the high court's decision in Boumediene v. Bush is a disastrous error in judgment and that the consequence of the court's decision threatens and undermines the internal and external security of the United States. Justice Scalia points out that at least thirty prisoners released from Guantamano Bay have returned to the battlefield.[43] Furthermore, the government had previously concluded that the thirty prisoners who had returned to the battlefield were not even deemed enemy combatants by the United States military.[44] "If they impose a higher standard of proof (from foreign battlefields) than the current procedures require, the number of enemy returned to combat will obviously increase."[45] Justice Scalia reasoned that the courts decision in Boumediene v. Bush "will almost certainly cause more Americans to be killed…that consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional Republic. But it is the courts *abandonment* of such a principle that produces the courts decision."[46] It is the opinion of Justice Scalia that the legislative and executive branch did not exceed their authority; in fact, they should be granted the tools necessary to secure the United States against terrorism and enemy combatants. Scalia also noted that the decision of the court "most tragically, sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner. The Nation will live to regret what the Court has done today."[47]

Justice Kennedy countered Scalia's reasoning, writing, "Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person."[48] Because of rights explicitly provided in the United States Constitution Lakhdar Boumediene was able to challenge his detention via the judicial branch despite the fact that he was not a U.S. citizen. Boumediene is an Algerian citizen and an alleged terrorist (according to the United States government), who resided in Bosnia at the time of his arrest. Boumediene along with five other alleged conspirators were arrested by the Bosnian Government, on the request of the United States Embassy in October 2001. No evidence was found to justify the claims of the United States Government that they conspired to bomb the United States Embassy, so the Supreme Court of Bosnia ordered their release, declaring that they were allowed to remain in Bosnia.[49] Immediately after their release in January 2002, the six men were seized by United States forces and transported to Guantanamo Bay were they have never been tried for any alleged crime.[50]

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[41] Ibid., p. 310
[42] Justice Scalia dissenting opinion. Boumediene v. Bush 533 U.S. (2008), p. 1
[43] See S. Rep. No. 110-90, pt.7, p. 13 (2007) known as the Minority Report and Scalia dissenting opinion, p. 3
[44] Scalia dissenting opinion, p. 4
[45] Ibid., p. 4
[46] Ibid., p. 2; also see Johnson v. Eisentrager, 399 U.S. 763 (1950)
[47] Ibid., p. 25
[48] Kennedy opinion; Boumediene v. Bush, 533 U.S. (2008)
[49] British Broadcasting News Channel. "Profiles Odah and Boumediene." (December 4, 2007), Retrieved November 16, 2008, from http:// news.bbc.co.uk?1/hi/world/Americas/7120713.stm.
[50] Ibid.

Boumediene v. Bush challenges not only the separation of powers doctrine, unambiguously granted in the United States Constitution, but it also challenges the federal government's ability to construct laws to strike the proper balance between individual liberties and national security; an inherent difficultly in democratic nations. Although the primary constitutional issue in Boumediene v. Bush is one of personal liberties, to focus on this point is to miss the important constitutional challenges that Boumediene v. Bush represents to the nation as a whole. During times of warfare or national crisis, does the chief executive possess the legal authority to curtail individual liberties? In the past, during times of national crisis, it is commonplace for the executive branch to exceed their authority, as a result, executive orders issued in the interest of national security have led to the most egregious, and shameful civil right abuses in the history of United States. The first of such abuses took place during the presidency of John Adams when he signed the Alien and the Sedition Acts of 1798. The acts had two essential provisions, one, to prolong the path of naturalization to foreigners and give the President of the United States the power to expel any foreigners he considered "dangerous" and two, make it a criminal offense to publish any "false scandalous and malicious" against the government, Congress or the President.[51] Later, during the presidency a second Sedition Act (1918) took affect which forbade disloyal speech and print against the United States Government during World War I. Similarly, in the next world war, President Franklin D. Roosevelt issued executive order 9066 detaining 112,000 Japanese, 70,000 of which were American citizens.[52] The order confined United States residents and Japanese Americans to interment camps until they could prove their loyalty to the United States. The over-reaction to a perceived threat resulted in the trampling on the constitutional rights of a singular ethnic group, most likely due to the illegal attack by Japanese forces on Pearl Harbor and their ethnic minority status. Although there was a genuine threat of invasion by Japanese military forces to the west coast of the United States, that threat concluded after the battle of Midway. Thus, legislative acts and executive orders have been constructed, during times of national crisis that purposefully ignore the Constitution. Have executive orders by President Bush that classified foreign fighters as enemy combatants, orders stripping them of Geneva Convention rights, and having the ability to confine them indefinitely at Gauntanamo Bay been a departure from the errors and overreaction of previous presidential administrations? In the twenty-first century new and complex challenges such as international terrorism has placed the Constitution under considerable strain.

From the outset, after the terrorist attacks of 2001, the Bush Administration purposely sought to exclude the federal judiciary from providing a forum to hear cases that would arise from the detention of foreign fighters. First, the Bush administration classified foreign fighters as "enemy combatants," claiming that they had no rights under the Geneva Conventions. Second, the administration purposefully selected Guantanamo Bay, located outside the United States to deny federal courts jurisdiction over potential cases and claims of wrongful imprisonment. When detainees from Guantanamo sought relief in federal courts, the Bush administration acted quickly to secure new legislation to prohibit further access to the federal courts. In Hamdi v. Rumsfeld, the Supreme Court ruled that the Bush Administration did not have the unilateral power to establish the military tribunals (CRST's). Therefore, the administration passed DTA, securing congressional authorization to establish military tribunals. The next challenge to presidential power arose from Rasul v. Bush. The petitioner sought and was subsequently granted a writ of habeas corpus challenging the executive's ability to unlawfully detain prisoners. Even before the

[51] McCullough, David. *John Adams* (New York, NY: Simon and Schuster, 2001), pp. 504-506
[52] Urofsky, Melvin L. & Finkleman. *A March of Liberty*. Vol. II (New York, NY: Oxford university Press, 2002), p. 740

Supreme Court heard arguments from the next case (Hamdan v. Rumsfeld), the Bush administration drafted new legislation to limit the courts ability to address detainee confinement at Guantanamo.

In Hamdan v. Rumsfeld, the Supreme Court ruled that even members of al Qaeda had rights under Article III of the Geneva Convention, thus decreeing another presidential claim to be invalid. Immediately, the Bush administration and with the assistance of the United States Congress, who were afraid to appear weak on the issue of national security and terrorism, quickly passed MCA. MCA had two purposes, one, to prohibit the ability of United States officials from being tried for war crimes, that was specifically granted under Article III of the Geneva Convention; and two, to strip detainees from seeking writs of habeas corpus. Thus, the enactment of MCA sought to insulate the executive branch from violating the Geneva Convention and to exclude the Supreme Court from judicial review as well as inhibit the separation of powers doctrine.

The Bush Administration consistently and systematically acted as a Unitarian executive utilizing the politics of fear to maintain public opinion, which assisted in persuading a timid congress to pass legislation to secure the executive branch's objectives to unilaterally maintain jurisdiction over terrorism suspects. Thus, President Bush and his administration sought to circumvent the separation of powers doctrine and deny the judicial branch judicial review. It seems peculiar and contradictory for a neo-conservative president to limit the liberties of foreign detainees when he also espoused his desire to bring democracy and liberty to the Iraqi people. Nevertheless, as in past history, the president viewed the Constitution as a document that could be ignored in times of national crisis. How can the United States, as a constitutional government restrict due process or the suspension of habeas corpus without judicial oversight? To act in this manner is to forget the egregious constitutional and civil rights abuses of the past. Instead, and especially as globalization continues to shrink time and space, the United States Government must recognize that the truths "we hold to be self evident," do not stop at the borders of the United States, and that individual liberty is universal, and applies to all persons, whether foreign or domestic.

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