

# **Illegal Detentions: How Roosevelt and Bush Expanded Presidential Power**

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*The office of the presidency has, in recent history, expanded in scope, offering the temptation of abuse of power. There are many instances through the history of the office of when the President has overstepped his bounds and acted against the basic tenets of the Constitution, one of the most notorious being the Japanese internment during World War II allowed by the revered Franklin Delano Roosevelt. Today, the office of the presidency is once again faced with the question of how much power can be claimed. President Bush has assumed startling rights, which have resulted in the detentions at Guantanamo Bay, Cuba. Examining the similarities between the modern detentions by George W. Bush and the historical example of Franklin Roosevelt offers insight into the potentially disastrous consequences and results of such expansions of power.*

The events of September 11, 2001 shocked and terrified the American people. In the wake of the terrorist attacks, the country joined together in a rare rejection of partisanship in favor of patriotism. These tragic events not only transformed the shape of American politics, but also served as a catalyst for one of the most troubling series of governmental actions in the country's modern history, as the President used the moment of harmony to assert extraordinary claims for executive power. President George W. Bush and his administration, under the banner of protecting the nation, proceeded with the detention of so-called terrorists and the consequential expansion of executive power. The administration's actions around its seemingly unending detentions of "enemy combatants" at the Guantanamo Bay naval base most fully highlight its vision of how far-reaching the president's authority should be. President Bush's unilateral actions are shocking to many and may seem unprecedented and discordant with the nation's character: men are imprisoned indefinitely without access to the outside world, including lawyers, and hindered from proving their innocence. Yet, this over-reaching of executive power, while extreme, is not historically unique. Even history's most popular presidents pushed the bounds of what is acceptable action. Expansion of presidential power is not reserved for either Republicans or Democrats, but does seem to have the commonality of occurring during times of war. One of the most famous cases is that of revered liberal president, Franklin Delano Roosevelt. Like Bush, Roosevelt authorized detention during wartime, though Roosevelt's policy was more widespread and blatantly unconstitutional because it involved the

internment of all residents of Japanese descent, including citizens, on United States soil. On the surface, the current president's actions pale in comparison to the detentions that have gone before. However, the complex details of both cases show that Roosevelt's actions were a hasty and unthinking reaction to a perceived threat, a mistake later corrected, whereas Bush's actions are in accordance with and intended to further a greater desire to radically change the office of the presidency.

These two cases have glaring differences that at first suggest they may be ill suited for comparison. Japanese internment involved over 100,000 men, women, and children (Irons 2005, 132), whereas Guantanamo Bay has only housed seven hundred and seventy-three detainees, though the most held at one time was six hundred and eighty (Washington Post 2008). President Roosevelt's orders imprisoned both citizens and non-citizens, but Guantanamo Bay detainees are all non-citizens.<sup>1</sup> The Japanese interns were held in the continental United States; Guantanamo Bay is located in Cuba. Additionally, Japanese residents were imprisoned based upon their national origins, regardless of whether they were personally suspected of illegal activity. Guantanamo detainees are all labeled as "enemy combatants" in the War on Terror, though the evidence for this labeling is disputed and will be discussed later. Yet, despite these significant differences between the instances that occurred during World War II and those occurring today, the comparison is important because Roosevelt is an example of a president who exerted unparalleled authority with disastrous results, an example against which the contemporary circumstances can be evaluated.

On Dec 7, 1941, the Japanese Empire bombed Pearl Harbor, the reaction to which was pervasive anti-Japanese sentiment across the United States and fear that Pacific coast residents of Japanese ancestry would aid the enemy through espionage and sabotage (Robinson 2001, 87). The Japanese community had long been the victims of racial discrimination. From 1890 to 1940, the Japanese-American population grew from 2,000 generally well-educated shopkeepers and farmers to over 100,000, two-thirds of whom were native-born Americans. The other third were legal residents after Congress in 1924 barred them from citizenship, along with halting immigration from Asian countries (Irons 2005, 133-4). The first group was called Nisei and the second Issei (Zinn 1980, 407). Greg Robinson writes:

Their community was small but racially and easily noticeable, economically powerful, politically powerless, concentrated in 'Japantowns' ... which had their own language newspapers, schools, and institutions. Their segregation increased their visibility and their vulnerability (Robinson 2001, 90).

Their separation into ethnically homogeneous communities, combined with the attack from Japan, made them easy targets for the country to direct their fear and

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<sup>1</sup> Yaser Esam Hamdi, a United States citizen of Saudi descent, was held at Guantanamo Bay from January until April 2002 when authorities discovered that he was a citizen and transferred him to South Carolina (*Hamdi* 2004, 2).

anger toward, and they came to be widely called an enemy race that could not be trusted. There was fear in the government that their position on the West coast made Japanese-Americans a security threat because they could aid the Japanese in the Pacific. The result was a desire for total relocation into the interior of the country. On February 14, 1942, General DeWitt released his "Final Recommendation," requesting relocation of both the Nisei and the Issei based upon a belief that they all, even those who had never been to Japan, clearly held loyalties to the nation of their ancestry and therefore posed a threat, although there was no evidence of any sabotage by a Japanese-American (Irons 2005, 134). Further, all Japanese aliens suspected of subversion had already been identified and held by the FBI (Stone 2004, 295).

Within Roosevelt's administration, many believed the army's assertions of a probable threat, so the argument was not *if* Japanese-Americans should be relocated, but how such a plan would be implemented and if the Nisei should or could be included. Proposals for voluntary evacuation, restriction from specified military zones, and required forfeiture of land to the government were all presented. The decision would ultimately have to come from the President, but those within his Cabinet disagreed as to the proper action. Henry Stimson, the head of the War Department, truly believed that Japan would attempt to invade by way of the Pacific coast, and therefore, by February 9, 1942 had already made up his mind that evacuation of *all* Japanese-Americans was necessary (Robinson 2001, 105). Attorney General Francis Biddle, however, originally believed that the removal of citizens from their homes was impossible, or illegal, without the suspension of the writ of habeas corpus, which Congress, and not the President, has authority to order (Robinson 2001, 92). With increasing pressure from the public and politicians, President Roosevelt issued Executive Order 9066 on February 19, 1942, which stated:

I hereby authorize and direct the Secretary of War, and the Military Commanders...to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion (President of the United States 1942).

Nowhere in the order were either the Pacific coast or the Japanese mentioned, but it was read as approval of evacuation not only of Issei, but of Nisei as well. Despite the vague wording of this order, it was not applied to other ethnic groups. Initial curfews had also applied to those of German and Italian descent, but these restrictions were lifted in a matter of weeks (Irons 2005, 135). Additionally, when General DeWitt requested to relocate these two ethnic groups in addition to the Japanese under Executive Order 9066, President Roosevelt refused (Robinson 2001, 111). Therefore, after being granted just one week during which to sell their

belongings, only those of Japanese descent, totaling around 110,000 individuals, were dispersed among ten quickly built camps. Families lived surrounded by barbed wire and armed guards with little privacy in makeshift settlements with sheets for interior walls (Irons 2005, 135).

It does not appear, however, that the original intention of Roosevelt and his advisors was to leave the Japanese-Americans in these camps. Instead, they hoped to resettle them in neighborhoods across the United States so that they would no longer be segregated but would also not be in the potentially dangerous military zone of the West coast. Milton Eisenhower, the head of the War Relocation Authority, a body created to deal with the “Japanese problem,” continually pushed for relocation but met with resistance from Governors who had no desire to allow into their states those whom the government had labeled as dangerous (Robinson 2001, 131). The unintentional result was effective incarceration. Eisenhower and his successor Dillon Myer continually searched for ways to release those who were not suspected of any wrongdoing, particularly citizens. A loyalty test was written, and many of those who passed were given “leave clearance” and thus released from the camps. Additionally, some loyal Nisei were recruited into the military, a sign to the public that they could be trusted (Robinson 2001, 169).

In 1943, many factors converged to make the cessation of internment desirable and feasible for the government. If the Nisei were trustworthy enough to be allowed into the military, there could no longer be any justification for holding them. Also, three court cases challenging the legality of the government’s actions were working their way through the court system, and government officials were sure they would lose. They were aware that incarceration of citizens without charges or the right to due process would not pass constitutional muster, and so some wanted to close the camps before they were discredited in court (Robinson 2001, 179). One of Roosevelt’s advisors, lawyer Morris Ernst, believed the administration would lose in court and that if it was desired that internment continue, a new, legally justifiable system had to be established for “the day when the Supreme Court declares unconstitutional—as it will and should—our treatment of Japanese citizens” (Robinson 2001, 190). Many wished to right the wrongs that had been committed, though the general desire was still for resettlement, which would mean that citizens would continue to be deprived of the right to decide where they lived.

However, dismantling the camps was a slow, complicated process. Although efforts had begun toward the end of internment in 1943, there were many roadblocks to bypass. There was still general distrust of the Japanese community among the public, and many politicians, including some within the administration, did not want to allow the Japanese to return to the West. At a May 26, 1944 Cabinet meeting, there was discussion as to whether the internees should be allowed to relocate wherever they wanted or just in areas designated by the government, i.e. not on the West coast. It is important to note that now the debate was not whether or not the detainees should be released, but how and when. Roosevelt suggested a gradual, scattered release and issued a memo on June 12 outlining this plan

(Robinson 2001, 215-18, 221). Yet, the largest difficulty in securing release was Roosevelt's impending re-election campaign. Because public opinion was still wary in regards to release from the camps, Roosevelt ultimately decided to shelve the issue until after the election, a purely political decision that did not take into account the citizens waiting in camps for release from their illegal internment. John McCloy, the Assistant Secretary of War, said, "It's just because of public opinion we have them there... We'll open up camps as soon as we're sure that public opinion is not one hundred percent against it" (Robinson 2001, 212). After Roosevelt's re-election for his fourth term on November 7, 1944, there was no longer any reason to continue internment. The army admitted that the Japanese-American community no longer posed a threat, and the West coast since November 1, 1943 was no longer labeled a "theater of military operations" (Robinson 2001, 199). Therefore, on December 12, 1944, Stimson sent Roosevelt a letter outlining reasons for ending internment, which Roosevelt approved (Robinson 2001, 228). On January 2, 1945 the War Department nullified General DeWitt's exclusion orders, and on the same day the defense commander in charge of the West said that the Japanese could return. All camps would be closed by the end of 1945 (Robinson 2001, 230).

What is troubling about the circumstances around the Japanese internment is the blatant and well-understood illegality of the administration's actions. Yet, they truly believed that they were acting in the country's best interest, thus fulfilling their obligation to preserve and protect the United States, because they believed the military's incorrect information, which claimed that instances of sabotage had already occurred and that a Japanese invasion was possible. However, such a departure from the understood limits of presidential behavior could not have only been motivated by fear. The military did not have a clear or legitimate case, but the President chose to believe them. Milton Eisenhower said, "The President's final decision was influenced by a variety of factors—by events over which he had little control, by inaccurate or incomplete information, by bad counsel, by strong political pressures, and by his own training, background, and personality" (Robinson 2001, 112). What is meant by events, counsel, pressure, etc. is clear, but "training, background, and personality" seem to point to two things: Roosevelt's own racially influenced beliefs about the Japanese community and his quickness to assert his authority.

Throughout the debates that swirled around Japanese internment from 1942 to 1945, Roosevelt was not a major player. He refused to speak publicly about the loyalty of Japanese-Americans, even citizens, and largely ignored the problems resulting from his orders until February 1, 1943 during a speech that read, "No loyal citizen of the United States should be denied the democratic right to exercise his citizenship, regardless of his ancestry" (Robinson 2001, 170). Yet, Roosevelt, unlike his wife, never pushed for the release of the internees and continued to believe that even those who had passed the ridiculous and arbitrary loyalty tests were not truly American, but Japanese. He, like many others, believed that Japanese blood meant an inherent tie to the empire of Japan, an idea rooted for Roosevelt in

the belief that peoples of different racial and ethnic backgrounds were also biologically different. Therefore, Japanese ancestry meant a person was Japanese fundamentally and American secondarily (Robinson 2001, 120-2). This racial bias partly, though not at all entirely, explains why he would be so willing to intern those of Japanese descent as opposed to those whose ancestors were from other “enemy nations” and why he was generally uninterested in the plight of the internees.

Of course, Roosevelt’s political beliefs must also be taken into account. He undoubtedly believed that as the president he held tremendous power, and he was not afraid to exercise it. Aside from his attempt to stack the Court, Roosevelt issued more Executive Orders per year than any other president through Clinton (Gazian 2001). Still, Jack Goldsmith, a former lawyer for the Bush administration, wrote of Roosevelt’s willingness to use executive authority, “But he consulted widely before exercising [his power], and he used the powers as a last resort to accomplish what he thought were vital ends, not as part of an aggressive program to expand presidential power for its own sake” (Goldsmith 2007, 89). Although Roosevelt is referred to as an early follower of the theory of a unitary executive, according to which the president alone has power over all departments and operations of the Executive Branch and is thus free from infringement from Congress on the actions of the Executive, and although he expanded Presidential power, he did not believe that the president could act unchecked. He received Congressional backing for Executive Order 9066 on March 21, 1942 in the form of Public Law 503, which made it a crime to disobey the Order (Irons 1983, 68), and he respected the Court’s authority when it ruled on the internments.<sup>2</sup> It is important to note, however, that Roosevelt did not overly concern himself with the legality of his actions. Francis Biddle wrote, “Nor do I think that the constitutional difficulty plagued him... That was a question of law, which ultimately the Supreme Court must decide. And meanwhile—probably a long meanwhile—we must get on with the war” (Stone 2004, 296). He acted the way he thought necessary, despite the fact that his actions were illegal. It is undeniable that Roosevelt abused his power and used it to perpetrate one of the darkest deeds of our government’s history, but he did not do so merely for the purpose of power.

The same cannot be said for President Bush. After being confronted with one of the worst attacks on American soil, Bush responded with force and

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<sup>2</sup> Three cases were brought before the Supreme Court concerning Japanese internment, *Hirabayashi*, *Korematsu*, and *Endo*, concerning violating curfew, remaining in a military zone, and the government’s ability to imprison a loyal citizen without charges, respectively. The government won the first two, though were warned that they were close to overstepping the bounds of the Constitution, but lost the third. In 1983, District Courts vacated each conviction after the falsity of De Witt’s report was made public, and in 1988 Congress offered a national apology, signed by President Reagan, and awarded the 60,000 remaining survivors \$20,000 (Irons 2005, 136-47; Robinson 2001, 229).

conviction. He touted the line that we must fight terrorists abroad so that we do not have to face them here and claimed that our enemies were the incarnation of evil. His policies matched his rhetoric. In January of 2002, after the successful invasion of Afghanistan, the naval base at Guantanamo Bay, Cuba was opened to house detainees who were accused of being al Qaeda or Taliban fighters. These prisoners came to be labeled “enemy combatants,” a term that’s meaning is key to understanding subsequent arguments. Instead of trying these individuals as criminals as had been done in the past for terrorism suspects, Bush claimed that because they were captured in the War on Terror, they must be treated as actors in a war. While the term enemy combatant has only become well known in recent years, it has been in use since World War II.

On the night of June 17, 1942, four German soldiers entered the United States by way of submarine wearing German marine infantry uniforms and carrying explosives. They landed on Ponte Verda Beach in Florida and buried the uniforms before continuing to Jacksonville. On July 13, 1942, another four German soldiers arrived at the Amagansett Beach on Long Island. They also wore infantry uniforms, had explosives, and buried their uniforms before going to New York City. The FBI apprehended them all, and President Roosevelt ordered them tried by military commissions because they were enemy belligerents, another term for enemy combatants. The soldiers took their case to the Supreme Court, contesting that the President could not legally order such a commission because they were entitled to a trial by jury. One soldier was also a citizen, but the Court decided that this did not make him immune to the status of enemy belligerent, and they ruled against the soldiers (*Quirin* 1942, 21-2).

The status of an “enemy combatant” was next addressed in 1949 in the Third Geneva Convention. It outlined the qualifications necessary to be a lawful combatant, therefore implying that failure to fulfill a requirement results in unlawful status. To be deemed legal, a combatant must meet these conditions:

- a) that of being commanded by a person responsible for his subordinates
- b) that of having a fixed distinctive sign recognizable at a distance
- c) that of carrying arms openly
- d) that of conducting their operations in accordance with the laws and customs of war (Third Geneva Convention 1949).

In the case of the German soldiers, they did not follow the second requirement. Because they hid their uniforms, they were not distinguishable as combatants. If their infraction had come after the Geneva Convention was ratified by the United States in 1949, the grounds for trying them would have been the same as would, most likely, have been the means of trying them, for the Geneva Convention also states that unlawful combatants are subject to military trial for their actions against the law of war (Third Geneva Convention 1949).

Labeling a detainee as an enemy combatant means that he has been denied status as a Prisoner of War, a title which ensures humane treatment and immunity

from criminal prosecution because soldiers are fulfilling a job, not acting of their own accord. Unlike enemy combatants who are tried for their crimes in front of a military commission, POWs are subject to court martial if they are accused of any infraction. The vast majority of military detainees have been traditionally labeled POWs, but President Bush has chosen to use the rare enemy combatant label and has redefined the way the term is used. On July 7, 2004, over two years after enemy combatants started to be held in the War on Terror, the Bush Administration officially defined its use of “enemy combatant” for the first time:

The term “enemy combatant” shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces (*re Guantanamo Detainee Cases* 2005, 10).

This definition is vague as to what qualifies as supported, associated, or aided. It also does not acknowledge that Taliban fighters were members of an army, therefore at least qualifying them for consideration as POWs. However, it has been argued that al Qaeda and the Taliban prisoners are enemy combatants by the traditional definition as well because they, according to law professor Ruth Wedgwood, “fail to carry arms openly and deliberately use terror against civilians as an illicit instrument of intimidation” (Wedgwood 2001, 69-73). Regardless of which definition is used, Bush’s or the one outlined by the Geneva Conventions, labeling the detainees thus has allowed the Bush administration to argue, beginning on February 7, 2002, that the men held at Guantanamo Bay have no rights under either the Geneva Conventions or the Constitution (Yoo 2005, 212).

On November 13, 2001, Bush issued a Military Order outlining his policy toward enemy combatants, stating that the detainees do not have the right to counsel or due process. The Defense Department initially claimed that a detainee’s right to a lawyer was subject to its discretion, and they refused to allow detainees access to counsel based on the assertion that lawyers would slow interrogations and prevent the government from extracting all relevant information about al Qaeda (President of the United States 2001; Gonzales 2004, 6-7). The President’s Order also stated that:

The individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf in (i) any court of the United States, or any state thereof, (ii) any court of any foreign nation, or (iii) any international tribunal (President of the United States 2001).

While it is true that wartime prisoners are not usually granted access to federal courts, they are tried by the military. The Guantanamo detainees, however, were not

charged, although Secretary of Defense Donald Rumsfeld established military commissions on March 21, 2002 following Bush's November 13<sup>th</sup> Order (Department of Defense 2002). Bush's Order, therefore, meant that these detainees could be held indefinitely without ever having the opportunity to prove their innocence.

In 2004, three cases that challenged various aspects of the detentions reached the Supreme Court. The first two cases, *Yaser Esam Hamdi v. Donald H. Rumsfeld* and *Rumsfeld v. Padilla*, both involved United States citizens. Padilla's case was remanded based on technicalities.<sup>3</sup> Hamdi, however, was more successful, for the Court ruled 8-1 in his favor. Regarding the right to a lawyer, the Court recognized that the Defense Department had granted him access to one but that "He unquestionably has the right to access to counsel" (*Hamdi* 2004, 22). Hamdi also claimed that he was not being granted his right to due process because he had been given no chance to refute the government's evidence against him or to hear its charges. The Supreme Court ruled in favor of Hamdi, saying that he had to "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker" (*Hamdi* 2004, 12). However, the decision was not straightforward or clear on what qualified as a "neutral decision maker," as the Court attempted to weigh both the government's and Hamdi's concerns and strike a reasonable compromise. This compromise allowed the use of hearsay, shifted the burden of proof from the prosecution to the defendant, and assumed the detainee was in fact an enemy combatant unless proven otherwise, making him therefore guilty until proven innocent. However, these criteria were not stated as absolute rules or even guidelines, but merely as suggestions. To make matters even more vague, the Court did not decide if a federal court or a military tribunal is more appropriate for determining a detainee's status (*Hamdi* 2004, 18, 21).

This case dealt with the very narrow circumstances of a United States citizen held on American soil, not addressing the question of the rights of the non-citizens held at Guantanamo Bay. However, this issue was decided on the same day as the *Hamdi* case, June 28, 2004, in *Rasul v. Bush*. The detainees' contention, like Hamdi's, was that they should be able to contest their status as enemy combatants, and the issue the Supreme Court had to decide was whether or not United States federal courts have jurisdiction over non-citizens held outside of the United States for actions that occurred abroad. The Bush Administration attempted to claim that Constitutional rights did not apply to the prisoners because they were not being held

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<sup>3</sup> Padilla's case was remanded on June 28, 2004. On November 22, 2005 he was indicted on conspiring to kidnap, murder, and injure people abroad. There was no mention of the "dirty bomb" plot that was the basis for his original arrest as a material witness and later detention as an enemy combatant. On January 22, 2008, he was sentenced to seventeen years and four months in prison after being found guilty of all charges (Human Rights First; *Padilla* 2004, 1-2).

within the United States. However, Justice Kennedy wrote in his concurring opinion:

Guantanamo Bay is in every practical respect a United States territory...[The Guantanamo Bay lease] is no ordinary lease... From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the “implied protection” of the United States to it (*Concurring Opinion of Rasul v. Bush* 2004, 2).

Therefore, despite the government’s assertions that Guantanamo Bay is outside of the United States’ jurisdiction, the Court held 6-3 that the Guantanamo prisoners should be able to challenge their detention in court (*Rasul* 2004, 5). The implications of this decision were enormous because the prisoners would finally have the right to hear the evidence and charges against them. The hearings would not be to determine guilt or innocence, but whether or not the prisoners were combatants at all.

Barely a week after these Supreme Court decisions, on July 7, 2004, the Defense Department created Combatant Status Review Tribunals (CSRT), meant to establish the accuracy of each detainee’s status as an enemy combatant (*re Guantanamo Detainee Cases* 2005, 10). Under the guidelines, however, the detainees are only allowed to see evidence which has been deemed unclassified and are not allowed to have lawyers, but are instead given a “Personal Representative,” a military advisor who explains the process of the commission to the detainee. As the Supreme Court suggested in *Hamdi*, hearsay and other evidence not admissible in courts are allowed, and the detainee is presumed an enemy combatant unless proven otherwise (*re Guantanamo Detainee Cases* 2005, 10-1). By August 2004, sixty detainees in thirteen cases challenged the legality of the hearings. District Judge Joyce Hens Green ruled on January 31, 2005 on the “substantive issues common to” eleven of the cases (*re Guantanamo Detainee Cases* 2005, 12).

Judge Green found several problems with the CSRT proceedings. Although the detainees were supposedly permitted to hear the evidence against them, most of it was classified, which meant that they did not have access to it, nor did they have a lawyer or person filling the function of a lawyer who could review the information (*re Guantanamo Detainee Cases* 2005, 45). Therefore, detainees were still kept in the dark as to the evidence against them, rendering them unable to rebut it. During Mustafa Ait Idr’s hearing, for example, he was accused of associating with a member of al Qaeda. This conversation followed:

Detainee: Give me his name.

Tribunal President: I do not know.

Detainee: How can I respond to this?

Tribunal President: Did you know of anybody that was a member of Al Qaida?

Detainee: No, no.

Tribunal President: I'm sorry, what was your response?

Detainee: No.

Tribunal President: No?

Detainee: No. This is something the interrogators told me a long while ago.

I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.

Tribunal President: We are asking you the questions and we need you to respond to what is on the unclassified summary

(*re Guantanamo Detainee Cases 2005*, 46).

Apart from the absurdity of this interaction, Judge Green objected that evidence used could have been obtained through torture, and that the definition of "enemy combatant" used by the government was too broad, possibly implicating those who are many steps removed from any al Qaeda or Taliban action or who simply have ties to anti-American groups but have neither committed nor attempted to commit a crime (*re Guantanamo Detainee Cases 2005*, 55-61).

The CSRT continued, however, and completed their task on March 29, 2005, when five hundred and fifty-eight detainees had gone through the process with thirty-eight no longer classified as enemy combatants. Those whose classification held were then brought before the Court of Military Commissions (Hawke 2007). Then, on December 30, 2005, Congress passed the Detainee Treatment Act (DTA), stripping Courts of jurisdiction over the Guantanamo detainees, also stating that only the D.C. Circuit Court would be able to review the decisions of the CSRT. (Center for Constitutional Rights; Hawke 2007). As a result, the government attempted to get all pending cases concerning the detainees dismissed. On June 29, 2006, the Supreme Court ruled 5-3 in *Hamdan v. Rumsfeld*, concerning a man who was allegedly Osama Bin Laden's driver, that the DTA does not effect pending cases, that the military commissions are illegitimate under United States and international law, and that the Geneva Conventions apply to detainees (Center for Constitutional Rights; Washington Post 2008; Goldsmith 2007, 136). In response, on September 28, 2006, Congress passed the Military Commissions Act of 2006 (MCA), which was signed into law on October 17. This Act upholds the CSRT's rulings as to who is or is not an enemy combatant, gives Bush Congressional authority to try by military tribunal, asserts that detainees are not protected under the Geneva Convention, and finds that only military commissions have jurisdiction over enemy combatants (United States Congress 2006). This effectively strips the detainees to the right of habeas corpus, which affects "any person who claims to be held in custody in violation of the

Constitution or laws or treaties of the United States” (emphasis added) (Irons 2005, 257). Jack Goldsmith explains that the MCA:

...explicitly authorized many aspects of the military commission regime that the Supreme Court had invalidated three months earlier. And it gave the President much more, including a broadened definition of “unlawful enemy combatant”; implicit approval for aggressive interrogations short of torture; immunity from prosecution for those who participated in past interrogations that crossed the prohibited line; narrowing interpretations of the Geneva Conventions and amendments to the War Crimes Act that minimized the impact of the Supreme Court’s decision; elimination of judicial habeas corpus review over Guantanamo; and a prohibition on the judicial use of the Geneva Conventions to measure the legality of the Guantanamo detentions (Goldsmith 2007, 138).

Essentially, this Act overruled the Supreme Court and forgave Bush for all of his past actions. As a result of the MCA, district and appeals courts began to rule against the detainees in the various pending cases. Then, on June 29, 2007, the Supreme Court agreed to hear *Boumediene v. Bush* and *Al Odah v. United States* as a consolidated case after refusing to hear them on April 2, the first time such a change has occurred in sixty years. The cases concern twelve Kuwaiti nationals and a Bosnian who are challenging the Military Commissions Act of 2006 and questioning whether the effective indefinite military imprisonment is unlawful. The Supreme Court agreed to hear the case during the 2007-2008 term, and it was argued on December 5, 2007 (Waxman et al. 2007; Center for Constitutional Rights). While the fate of the detainees is still unclear, President Bush shows no signs of changing his position.

Both Bush and Roosevelt’s actions are hard to align with the United States’ tradition of civil liberties because both presidents acted in ethically and legally questionable manners. Yet, both were successful; both were able to carry out their detentions, and the questions of how this was possible and why these actions were taken are vital to understanding these detentions’ impact upon the American political and legal systems. The years during which the Japanese internment was perpetrated were undeniably Democratic years. In the Senate, there was always a Democratic majority with the lowest ratio of Democrats to Republicans from 1939 through 1945 being fifty-seven to thirty-eight (United States Senate). Roosevelt was in power at a time when his party controlled Congress, therefore making it easier for him to act without extensive challenge, though there was of course some. Additionally, as Jack Goldsmith writes, “This was a time when the press, Congress, and intellectuals had a higher regard for the executive branch” (Goldsmith 2007, 49). Those in Washington respected Roosevelt and believed that he was acting in the country’s best interest. Bush does not have the luxury of such a trusting political climate, but he also enjoyed his party’s rule in Congress for the majority of his term. He did not have the overwhelming majority of Roosevelt, but instead slight

margins from 2001 until 2007 when the Democrats regained control (United States Senate). For the key years when Bush was making policy regarding the detainees, his party controlled the Senate, as it did in 2006 when the Military Commission Act was passed. Both presidents were fortunate enough to have their parties in power when they enforced their controversial policies, a fact which aided them in their pursuits. This highlights the importance of the check built into our system by the presence of multiple parties because if these presidents had faced hostile Congresses over which the opposing party presided, perhaps they would not have acted with quite so much ease.

One result of Congressional control was that both presidents had, or claim to have had, approval for their actions. However, both assertions are questionable. Public Law 503 was passed with hardly any dissent, but an entire month after Roosevelt had issued Executive Order 9066 (Irons 1983, 65-8). Still, this law was used in Court as justification for the President's actions despite the fact that he acted initially without this Congressional backing (*Korematsu* 1944, 3). Bush argues that his Congressional approval came in the form of the Authorization for Use of Military Force (AUMF), passed September 18, 2001, which gave him authority to "use all necessary and appropriate force [against] nations, organizations, or persons [who] planned, authorized, committed, or aided" al Qaeda (qtd. in *Hamdi* 2004). In *Hamdi*, the Supreme Court upheld the President's assertions that this provides him with sufficient authority to carry out detentions. Nevertheless, it is hard to believe that this authorization from Congress, which was designed to affect Iraq specifically, was intended to also include such action as the subsequent Guantanamo detentions. Bush again took advantage of his ability to gain Congressional approval with the passing of the MCA, which directly contradicted the Supreme Court and made legal what it had denounced. He used the fact that Congress was willing to grant him whatever power he deemed appropriate to circumvent the Court's authority. Congressional approval is therefore important in these instances because it gave the Executive necessary legitimacy, but it is important to note that neither president found this authorization necessary initially, or even subsequently, despite the fact that they could gain it.

How these detentions were allowed to occur obviously requires a more complicated explanation than the concentration of power in one party. The powerful force of wartime mentality cannot be ignored. In Justice Frankfurter's concurring opinion in the *Korematsu* case, he wrote that "the validity of action...is not to be stigmatized as lawless because like action in times of peace would be lawless" (*Korematsu* 1944, 3). Sometimes war necessitates actions that are forbidden otherwise, and incarceration of potentially innocent individuals is one such instance. To be sure, Congress would not have approved of the internment of the entire Japanese-American population in a different context, nor would it be willing to give Bush such free-reign over the government during times of peace. The country before and during both Bush and Roosevelt's actions was reeling from an attack, believed another to be both possible and probable, and was led to believe through rhetoric that the President's actions were necessary to victory. These

detentions could not have occurred if the country were not at war because it is only during war that the country is willing to see open violations of civil liberties. The case of Japanese internment serves clearly as a cautionary tale for when such an atmosphere arises. Thousands of United States citizens and residents were denied liberty because hasty military hunches were taken as hard fact, fear and prejudice were allowed to dictate policy, and power was concentrated in one party during wartime. This in no way excuses Roosevelt, his administration, or the military's actions, but it does serve to explain their ability to succeed.

Unfortunately, the case of President Bush and the Guantanamo detentions is more troubling because it is even less straightforward. It was always understood that the Japanese internees would be released at the end of the war if not before, the same claim that is made about the detainees today. However, the War on Terror is a very different kind of war than World War II or any other military war the nation has engaged in. There is no clear enemy and therefore no clear end. Judge Green wrote:

Indeed, the government cannot even articulate at this moment how it will determine when the war on terrorism has ended. At a minimum, the government has conceded that the war could last several generations, thereby making it possible, if not likely, that "enemy combatants" will be subject to terms of life imprisonment at Guantanamo Bay (*re Guantanamo Detainee Cases* 2005, 40).

It is therefore neither acceptable nor sufficient to assure critics that the detainees will be released when the war is over in an attempt to free the administration from responsibility over their fates until this occurs. By labeling this current effort the *War on Terror*, Bush has allowed himself to use military law and expanded authority. Yet, this endeavor is more of an exercise in international crime prevention, making it more accurately comparable to the War on Drugs than World War II. Calling it a military war was a political move that has allowed Bush to steadily expand presidential power.

The mere fact that Bush has expanded executive power is not inherently problematic because this is a necessary symptom of war. However, this time it is not an isolated instance, and the detrimental policies are not due to the president losing his "moral compass" as Joseph Margulies puts it (Margulies 2006, 223-4), but instead to conscious policy decisions. Although over two hundred and fifty prisoners have been released from Guantanamo Bay without ever having been charged, the chief interrogator admits that seventy-five percent of those remaining are no longer being questioned and therefore not offering the government any new insight into al Qaeda's operations, and the camp commander asserts that many of the prisoners could be released without any risk to the country's safety, Bush refuses to give an inch and admit that perhaps the time for such detentions is over (Margulies 2006, 226). He argued fiercely on many different fronts, thus entrenching himself in his position of authority and making it now impossible for

him to recant even if he wished to, which does not appear to be the case. Jack Goldsmith, the former Assistant Attorney General, discusses both Bush and Cheney's views on presidential power, saying that they "always made it clear that a central administration priority was to maintain and expand the President's formal legal powers" (Goldsmith 2007, 132). They believe that past presidents have eroded the power of the office and wish to restore it (Goldsmith 2007, 89). This mindset is key to understanding the difference between the effects of Roosevelt and Bush's detentions. Roosevelt acted out of fear and racism, but his mistake was later remedied when the fear was proved to be unfounded and internment thus illegitimate. His administration accepted this inevitable outcome and so ceased the detention. Bush's administration, however, has continually refused to accept any sort of criticism or curtailment of policy. While the original intentions behind the detentions were likely justified, even more so than Roosevelt's, the issue has been hijacked and used as a vehicle for fulfilling their belief in the unitary executive and expanding the power of the presidency. The intention to bypass Congress and the Judiciary, the refusal to admit any mistakes, and the avid belief that the President alone should have the power to decide potentially innocent men's fates is terribly detrimental to the American idea of civil liberties and is corrosive to the legal process.

The country is currently experiencing political and legal actions that could mold its future. History has already judged Roosevelt and found him guilty of misjudgment and poor leadership surrounding the Japanese internment. It would be difficult to find any outspoken modern-day supporters of that action. Bush has not yet been subjected to history's harsh examination. Maybe he will be hailed as a great president who led this country through a difficult time, thus allowing us to excuse his indiscretions as is the case with Roosevelt. Yet this seems unlikely because of the far-reaching ramifications that will undoubtedly be the result of his actions and policies surrounding the Guantanamo Bay detainees. While the Japanese internments are seen as a blot on Roosevelt's record<sup>4</sup>, the Guantanamo issue almost defines the record of the current administration. If Roosevelt's detentions can be used as precedent for Bush's, then someday Bush himself will be seen as a precedent. Expansion of presidential power is a dangerous notion because too much authority resting in one man's hands can lead to abuse, a circumstance this country's founders were trying to avoid. Therefore, it is important to examine current actions in light of past ones and to learn from the errors in judgment this examination reveals. Individual, extenuating circumstances cannot be allowed to set the future standard for the exercise of presidential power.

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<sup>4</sup> Many involved in the Administration's policies as well as Supreme Court Justices who ruled in related cases later lamented their involvement in Japanese internment and their failure to protect the Constitution and civil liberties (Stone 2004, 304-7).

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