The Post-9/11 Detainee Policy: Popular President Meets Unified Government

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Zusammensetzung: Die vorliegende Dissertation untersucht welche Faktoren die Einführung neuer Menschenrechtsstandards in Bezug auf Gefangene im Kampf gegen den Terrorismus durch die Bush-Administration begünstigt haben. Die Arbeit erweitert den bestehenden Forschungsstand zu US-Präsidenten, die in Kriegs- oder Krisenzeiten ihre Macht ausbauen. Dabei wird eine Theorie entwickelt, die die Zusammensetzung des Kongresses und die Popularitätswerte des Präsidenten als Prädiktoren für den Erfolg von Kriegspräsidenten berücksichtigt.

Abstract: This dissertation seeks to trace the circumstances that led to the development of the new human rights standards used on post-9/11 detainees held by U.S. forces during the years of the Bush administration. It fills the gap in literature on U.S. presidents who expand their power during war or national security crisis by developing a theory on how Congressional composition and presidential approval ratings can be predictors for whether the presidents are successful.

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INTRODUCTION

Torture, indefinite detention without charges, and prisoners deprived of the right to representation, medical attention or outside contact: This was the face of the new detainee policy developed during the Bush administration from 2001 to 2008. Now that the Bush administration is gone, the pictures of detainees stripped naked, beaten bloody, and subjected to waterboarding or electrocution is written off by many Americans as yesterday's story … or as still justified. In a June 2009 Associated Press poll, some 52 percent of Americans said that torture is sometimes justified to obtain information from terrorists and the country was evenly divided as to whether to close the detention center at Guantanamo Bay.[1]

Yet for up to 80,000 men, women, and children from all over the world who were subjected in some fashion to the new detainee treatment policies during the Bush administration, there remains the question of why the U.S. government allowed treatment standards that had been forbidden by U.S. and international law.[2] In the Senate Armed Services Report of November 2008, the Senate reported that its investigation had determined that the new detainee interrogation techniques were founded on training "based on illegal exploitation … of prisoners over the last 50 years." According to the report, the methods are "based, in part, on Chinese Communist techniques used during the Korean War to elicit false confessions".[3]

How did it come about that a powerful president - who had in his 2004 Inaugural address "proclaimed that every man and woman on this earth has rights, and dignity, and matchless value," and whose paramount goal was to "end tyranny" - allowed such methods to be used?[4]

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[1] Sidoti, Liz: "Poll: US Divided Over Torture, Closing Guantanamo". In: Associated Press, June 3, 2009.
[2] Michael Shear, Peter Finn and Dan Eggan: "Obama to Meet with Terrorism Victims and Families". In: Washington Post, Feb. 5, 2009. As of June 2008, according to Legal Director Clive Stafford Smith of the Human Rights Organization Reprieve, "By its own admission, the US government is currently detaining at least 26,000 people without trial in secret prisons, and information suggests up to 80,000 have been 'through the system' since 2001."
[3] Sen. Levin, Carl et al: "Inquiry into the Treatment of Detainees in U.S. Custody". In: Report of the Committee on Armed Services, United States Senate, November 30, 2008, xiii.
[4] President Bush, George W., Second Inaugural Address, NPR, Jan. 20, 2005. URL: http://www.npr.org/templates/story/story.php?storyId=4460172, last accessed March 6, 2013.

This dissertation seeks to trace the circumstances that led to the development and implementation of the new human rights standards used on post-9/11 detainees held by U.S. forces during the years of the Bush administration. It seeks to answer questions such as these: Which constitutional interpretation of presidential powers best describes how President George W. Bush exerted his authority in the making of detainee policy? What were the potential causes for the weakening of constitutional checks and balances? What factors made President Bush successful in pushing through his post-9/11 detainee policy?

It would be easy to end the study with a simple critique of former administration personalities President Bush, Vice President Cheney and Defense Secretary Rumsfeld. This would ignore the unique set of threats that this executive faced. It would likewise ignore the role other executive employees, the judiciary, the military and intelligence community and even the American people played in enabling this policy, and how their actions impact the future of a functioning democratic society.

This dissertation therefore argues that though the president overstepped his constitutional authority in the crafting of the new detainee policy, the attacks of 9/11 provided unique threats that enabled a strengthening of the executive unparalleled in history. It also shows that the executive alone was not responsible for this policy, but that the judiciary, Congress and the American people helped enable the new policy to be enacted. Specifically, it tests whether Congressional composition and the presidential approval ratings can serve as predictors for whether the judiciary and legislative are able to successfully keep the president accountable during national security crisis. In the case of the Bush administration, it finds that if the sequence of events is such that both the popularity ratings and composition of Congress is in the president's favor *at the time* of the court's decision on the president's policy and Congress' consideration of a bill on the policy, then checks are less likely to occur, thus making the president's detainee policy push successful.[5] Finally, it argues that the decisions made during the Bush administration have the potential to have lasting impact on the limits of executive powers and the fate of future detainees, unless strong accountability measures are put in place.

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[5] For more on how these intervening variables play a role, see chapter one, pgs. 36-39.

RESEARCH METHODS AND PROCEDURES: TESTING A THEORY THROUGH CASE STUDIES

To understand how human rights standards in the treatment of post-9/11 detainees changed under the Bush administration, this dissertation first examines how the administration used its executive power to create new standards of treatments for detainees. I first seek to answer the question: "What model best describes President Bush's method of decision making, his constitutional interpretation of presidential powers, and the influences that helped to shape it?"

The model I look at most intensely is the unitary executive theory. President Bush cited the theory 95 times between 2001 and 2005 alone when signing legislation or issuing an executive order.[6] Thus in a case study examining which method of governing led to a new policy, the theory named most by the president being studied is a good place to start. [7] Louis Fischer sums up the theory of U.S. constitutional law this way: "All executive powers are centered in the president and thus subject to that executive's direct command and control. The model not only concentrates power in the presidency but attempts to insulate the president from checks and constraints from other branches." [8]

It is the president's insulation from checks and balances within this model that is the focus in the case study of how detainee policy came to be made. While the unitary executive theory (uet) can in hindsight help point to patterns where the separation of powers was not upheld and thus accountability measures were quashed, it ultimately is unable to predict under what circumstances checks and balances function, thus allowing or preventing the president from success in his attempted policy change.[9]

This dissertation therefore develops a theory to explain under which circumstances the president is able to push through his policy, and when checks are held at bay. By proposing conditions and variables up front which could be indicators for the

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[6] Kelley, Christopher, "Rethinking Presidential Power – The Unitary Executive and the George W. Bush Presidency." Paper presented at the 63rd Annual Meeting of the Midwest Political Science Association, April 7-10, 2005, Chicago, IL.

[7] For the reasons why this theory was chosen and a more in depth explanation, see chapter one, pgs. 19-25.

[8] Fisher, Louis: "The Unitary Executive" in: Barilleaux, Ryan J. and Kelley, Christopher S. 2010: The Unitary Executive and the Modern Presidency. College Station: Texas A &M University Press.

[9] For more on the reasons why the uet falls short, see chapter one, pgs. 34-35.

president's success, or lack thereof, it tests whether the theory played out in reality in the case of the Bush administration through tracing the circumstances that led to the creation of the new detainee policy.

By using process tracing, it tests whether the intervening variables proposed in the next chapter - specifically, presidential popularity and the make-up of Congress - can serve as predictors for when the legislature and judiciary are more willing to cede their checking power, thus allowing the president to push through his policy preference.

While van Evera claims that "a thorough process-trace of a single case can provide a strong test of a theory," he acknowledges that only further case studies will confirm "what antecedent conditions the theory may require to operate."[10]

To confirm that both my intervening variables (composition of Congress and presidential popularity) and my second antecedent condition (inability of judicial and legislative branches to check the president) operate according to the predictions of the theory, I test the theory in three additional case studies.

FURTHER CASE STUDIES

Three additional cases – those of President Roosevelt, President Nixon, and President Reagan – will be discussed at the end of the dissertation to provide additional tests for whether the intervening variables of presidential popularity and Congressional support can be used to explain when a unitary executive president is successful in pushing through his policy. These presidencies were chosen because all three met the criteria for a uet presidency: All three were confronted in their administrations with an international security crisis. All three presidencies are credited with playing pivotal roles in the expansion of the president's power using Article II arguments to expand their war powers. All three are named in the leading uet literature as breaking ground for the expansion of executive power.

For example, Steven Calabresi calls President Roosevelt a "major champion of the unitary executive."[11] Roosevelt, the only president to serve four terms, used the

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[10] Van Evera, Stephen 1997: Guide to Methods for Students of Political Science. New York: Cornell University Press, 65.

[11] Horton, Scott, "Six Questions for Steven Calibrisi, Author of the Unitary Executive". In: Harper's Magazine, Sep. 30, 2008. URL: http://harpers.org/archive/2008/09/hbc-90003611, last accessed June 25, 2012.

executive's wartime powers during peace and war, blurred the line between the duties of the president and Congress with his New Deal, and through issuing an emergency proclamation, controlled the banks as well.[12]

Christopher Kelley writes that President Nixon "deserves credit as the first presidency to attempt to systematically gain control over the executive branch agencies," but due to the checks occurring after Watergate, that President Reagan was the first to actually successfully do it.[13] While the term "unitary executive theory" was first coined during the Reagan administration and its accompanying tools – including a less rhetorical and more aggressive use of the signing statement, and wiretapping – President George W. Bush is credited with living out the theory in a more extreme way than ever before.[14]

Two Republicans and a Democrat were chosen to ensure that party lines did not play a role in deciding the success or failure of the attempt to expand the presidency. All three pushed the boundaries of constitutional precedent in the use of their executive power. The case studies will examine how they did this through their reliance on their authority vested from Article II of the Constitution, and their reliance on their powers as Commander in Chief, when traditional interpretations of their actions would otherwise call such policy moves unconstitutional based on precedent. Because all three had to respond to the challenges of "war," whether congressionally declared or not, they were given tools to expand presidential power that many of their colleagues in peacetime were rarely afforded.

It should be noted that though the three additional cases share similarities with the Bush administration, they are not meant to be presented as controlled comparisons or as defined by congruence procedures. Despite their similarities, there are too many differences (in media used by the president to expand his power, in the extent to which the war was recognized as a true threat or not, etc.) for a controlled comparison to be a

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[12] Yoo, John 2009: Crisis and Command. New York: Kaplan Publishing, 262-263.
[13] Kelley, Christopher S., "Rethinking Presidential Power – The Unitary Executive and the George W. Bush Presidency." Paper presented at the 63rd Annual Meeting of the Midwest Political Science Association, April 7-10, 2005, Chicago, IL, 15.
[14] Ibid. See also: Savage, Charlie 2007: Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy. New York: Back Bay Books, 124-25; Waterman, Richard W.: "The Administrative Presidency, Unilateral Power, and the Unitary Executive Theory". In: Presidential Studies Quarterly 39, No. 1, March 2009, among others.

strong test.[15] Likewise, measurement error is more likely to occur with congruence procedures where values can be normative, as would be the case when looking at how uet presidents exert their power.[16] As such, process tracing offers the best test for a theory that creates a causal link between the president's decision-making process and the successful implementation. [17]

OUTLINE

This dissertation is divided into four sections: the initial development of my theory of the successful expansion of presidential power in chapter one, the testing of the theory in the main study of the Bush administration in chapters two through four, further testing the theory on other presidencies in chapter five, and final analysis and recommendations in chapter six.

Chapter one briefly examines the premises of three models which could describe President Bush's decision making leading to the new detainee policy: Graham Allison's political government model, Janis Allison's group think, and the unitary executive theory. It argues that the unitary executive theory is better placed than the other two to show how presidential decisions can be made in the wake of a security crisis. However, the chapter argues that the uet cannot predict when a president who pushes the boundaries of his executive powers is successful in implementing a policy change. It proposes that the intervening variables of presidential popularity and congressional composition could be predictors for the success or failure of the president to implement his policy change.

Chapter two takes a more in-depth look at the question of what role Congress and the judiciary plays in allowing the president to push constitutional boundaries to expand the executive as described in the unitary executive theory. Through examining the constitutional mandate of each branch and precedent set by case history, it looks at the legacy that was left for the Bush administration as it considered a new detainee policy. It then briefly lays out how the legislative and judiciary branches responded to Bush's

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[15] Van Evera, Stephen 1997: Guide to Methods for Students of Political Science. New York: Cornell University Press, 56-58.
[16] Ibid, 59
[17] Ibid, 64

challenges. This chapter specifically covers the model's second antecedent condition, the ability (or lack thereof) of both branches to check the president.

Chapter three lays out the timeline of the major changes that the Bush administration made to the standing detainee policy as encapsulated in military, international and domestic law. It lists the progressive change in interrogation techniques, detainee rights in detention and in the courtroom, place of detention and length of detention, wiretapping and intelligence activities, and in detainee policy pertaining to U.S. citizens.

Chapter four presents the main case study, testing the model developed in chapter one. It shows how President Bush expanded the executive, and challenged the legislature and the judiciary through signing statements, executive orders, and in judicial defense. In addition to describing the crisis after 9/11, and the presidential execution of power as described by the uet, it tests the composition of Congress and presidential approval ratings as intervening variables.

Chapter five tests the theoretical model introduced in chapter one on three additional case studies (albeit in less in-depth form than the main case study) to verify whether the results from the Bush case study can be used to understand when other presidents faced with national security crisis are successful with their expansion of power in a specific policy area. It outlines the threats faced by Presidents Roosevelt, Nixon and Reagan, and identifies the patterns of presidential execution of power as described by the unitary executive theory. It then looks at one specific policy change each president attempted to make, and whether the composition of Congress and presidential approval ratings were signifiers for whether the judiciary or the legislative were able to check the president.

Chapter six presents concluding analysis on what the four case studies reveal about when a uet president is successful during wartime, and what helped President Bush in particular to be so successful with pushing through his detainee policy until 2006. It presents potential solutions to the challenges faced by the judiciary and legislature today in upholding separation of powers and making the president accountable to the Constitution. It also presents questions for further research for the future of policy regulating the treatment of foreign detainees arrested and held by U.S. forces around the world.

GAP IN LITERATURE

Journalist Charlie Savage made America aware of the Bush administration's frequent mention of the unitary executive theory in the president's signing statements and executive orders through his articles for The Boston Globe, TV appearances, and book on the topic.[18] While he focused on how an "imperial president" robs Congress of power, his work provides a chronicle of events leading to the new detainee policy which can be helpful in understanding what was going on in the executive behind the scenes. His book belongs to a category of literature on detainee policy which builds the argument for the imperial president based on a selection of press reports and interviews, but doesn't empirically answer why the president was successful.[19]

A challenge of this category is that it focuses on personalities responsible, but it never answers the question of why checks and balances didn't function as they ought in a democratic society. Nor does it adequately examine what motives the president and other major players in the government would have for being willing to give the executive carte blanche power in detainee policy. In so oversimplifying, it writes off as irrelevant the external factors that created a new environment for decision making during those eight years, such as the political challenge from Democrats and the nebulous continuous source of terrorist threats after 9/11.[20]

At the same time that journalists like Savage were reporting on President Bush's use of the unitary executive theory, the academic community was having a debate about the extent to which the Bush administration's exertion of power could even be described by the theory. Steven Calabresi was considered the "author" of the unitary executive theory since he is the one who wrote the paper in which the term was coined for the Reagan administration.[21] Expanding thereafter on what the unitary executive debate means for checks and balances and separation of powers, Calabresi concluded that only

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[18] See texts such as: Savage, Charlie, "Bush could bypass new torture ban: Waiver right is reserved," Boston Globe, January 4, 2006; Savage, Charlie 2007: Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy. New York: Back Bay Books.

[19] See: Goldsmith, Jack 2007: The Torture Presidency. New York, London: W. W. Norton & Company; Mayer, Jane 2009, The Dark Side. New York: First Anchor Books.

[20] See: Savage, Charlie 2007: Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy. New York: Back Bay Books. See also Lindley, Robin: "The Return of the Imperial Presidency: An Interview with Charlie Savage". In: George Mason University's History News Network, January 7, 2008.

[21] See chapter one, p. 26 for a detailed explanation of how the theory was created in the Reagan administration.

a holistic view of Articles I and II can help ensure the maintenance of the Framers' vision of three "co-equal" departments, with none of them dictating how this constitutional division was to occur.[22] His more recent book, co-authored with John Yoo, traces the practice of the unitary executive from George Washington to the present.[23]

Christopher S. Kelley is of worthy mention in this section as an expert on the constitutional and legal limitations of the president, especially as applied to changing or executing detainee policy. His work provides a foundation helpful for examining the legal and judicial developments which led to the Bush administration's detainee policy.[24] Kelley's research illuminates the patterns of expansion of executive power carried out in a new way in the Bush administration, including a more aggressive use of the signing statement to challenge legislation. In his latest book edited together with Ryan Barilleaux, he even examines President Bush's development of the detainee policy as a case study, albeit less empirically in depth than the study I perform in this dissertation.

Yet their analysis answered a different question. Barilleaux and Kelley asked: Did the George W. Bush administration embrace the theory according to its principles or did the administration use the theory as a disguise for the execution of a different kind of presidential power? Barilleaux and Kelley answered that the Bush administration "used the language" of the theory to disguise what they call "executive unilateralism," which went beyond the tenets of the theory as practiced by his predecessors, because it was "fully unilateral in both the foreign and domestic spheres."[25]

Their well-thought out book is focused on a labeling exercise. They look at the case of the Bush administration, and many other presidents as well, and ask whether they can be correctly labeled as uet presidencies. This work they have done in such a

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[22] Calabresi, Steven G. and Rhodes, Kevin H. 1992: "The Structural Constitution: Unitary Executive, Plural Judiciary." In: Harvard Law Review, Vol. 105: 1153, 1216.

[23] Calabresi, Steven G. and Yoo, John 2008: The Unitary Executive: Presidential Power from Washington to Bush. New Haven: Yale University Press.

[24] His works provide fundamental insights for this dissertation. See: Barilleaux, Ryan J. in Kelley, Christopher S. 2010: Executing the Constitution. Albany: State University of New York Press;Barilleaux, Ryan J. and Kelley, Christopher S. (eds.) 2010: The Unitary Executive and the Modern Presidency. Texas A & M University Press; Kelley, Christopher S. 2003. The Unitary Executive and the Presidential Signing Statement. Oxford, Ohio: Miami University. Published dissertation can be found at URL: http://etd.ohiolink.edu/send-pdf.cgi/Kelley%20Christopher%20S.pdf?miami1057716977, last accessed March 24, 2013.

[25] Ibid, 221-222

sufficient manner that the labeling test does not need to be repeated in such an in-depth form in this dissertation. Rather, I choose case studies where the literature has already made a strong case for the president to be a uet president, identify the patterns in brief, and then perform the test on what intervening variables cause the president to fail or succeed in exerting his power as defined by the unitary executive theory.

While I have yet to find any literature on what makes uet presidents successful, a journal article on how public opinion can shape Supreme Court decisions during war helped me to start thinking about how public opinion could also be a predictor for uet presidential success. The article mentioned job approval ratings of the presidents mentioned in this dissertation (among others) as they corresponded with specific Supreme Court rulings and topics of the day during those presidencies.[26] While my dissertation also looks at congressional composition during uet presidencies, and the article limited itself to analysis of popularity ratings during war presidencies and its outcome on the judiciary only, the correlations created and polling numbers cited were helpful for my research on how presidential popularity can influence the judiciary in uet presidencies.

On the opposite side of the political spectrum from Christopher Kelley, John Yoo, the creator of the torture memos, gives his defense of how the Bush administration pushed the constitutional limits of executive power in the creation of detainee policy in his book Crisis and Command.[27] Yoo asked whether the broadening of executive power under the Chief Executive and Commander-in-Chief constitutional clauses could be legally justified, including in the case of the Bush administration as it enacted new policies in the war on terror. He answered that Bush's expansion of the presidency did not make him a dictator, and could be justified by the fact that presidents since Washington had used these clauses to expand their power during wartime.[28]

Yet his work is also a chronicle and defense of the expansion of presidential power, from the perspective of the person responsible for creating the legal defense of the detainee policy. While he mentions a Wall Street Journal poll of 130 scholars that

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[26] Silverstein, Gordon and Hanley, John 2010: "The Supreme Court and Public Opinion in Times of War and Crisis." In: Hastings Law Journal, Vol. 61: 1453.
[27] Yoo, John 2009: Crisis and Command, New York: Kaplan Publishing.
[28] See his book: Yoo, John 2009: Crisis and Command. New York: Kaplan Publishing, 410-413, viii-xx.

rates the "best" presidents, he also does not mention any variables or empirical way of measuring what causes a uet president to be successful.[29]

It is this gap in literature – what causes uet presidents to be successful during wartime – which I seek to fill. The answer to this question helps us not only to explain when President Bush was successful and when he wasn't in pushing through the new human rights standards to be used on detainees, but helps us predict when uet presidents will be successful with pushing through their policy reforms in the future.

In conclusion, it is my hope that this dissertation will provide new research and thus be able to fill the gap existing in literature on detainee policy under the Bush administration in two ways. First, the dissertation uses the newly declassified government memos, including Executive, DOD, CIA and Department of Justice memos, and high court rulings in the cases of detainees to trace the causes and players involved in creating a new detainee policy under the Bush administration. [30] Second, the dissertation creates a theory-based formula which can be applied to other presidencies to predict success in changing policy and in curbing checks on the president's power. It is the author's hope that this data could prove helpful in strengthening accountability structures against unconstitutional expansion of presidential power and for preventing future violation of human rights standards in the treatment of detainees in U.S. custody.

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[29] Ibid, xvi

[30] The paper will also use the first source documents already made public during the Bush administration, such as: Taguba, Maj. Gen. Antonio: "Article 15-6 Investigation of the 800th Military Police Brigade", 2004; Schlesinger, James R., et. al.: "Final Report of the Independent Panel to Review the Department of Defense Detention Operations", August 2004.

CHAPTER ONE
THE MODEL: WHEN ARE WAR PRESIDENTS SUCCESSFUL?

Abstract: This chapter briefly examines the premises of three models which could describe President Bush's decision making leading to the new policy. While it argues that Bush's decision making process can be explained by elements of all three models, it explains that the unitary executive theory (uet) has more explanatory power than the government political model and group think in showing how presidential decisions can be made in the wake of a national security crisis.

However, the chapter argues that the uet cannot predict when a president who pushes the boundaries of his executive powers is successful in implementing a policy change. This chapter develops a theory which can be used to determine when war presidents are successful in pushing through a new policy without being hindered by the checks and balances from the judiciary and the legislature.

The Bush administration's detainee policy is described by some as the result of "an imperial presidency" and by others as a practice of *Realpolitik* to deal with the new challenges faced by the United States following the attacks of 9/11.[1] Yet rather than take sides in this dead-end debate, this dissertation seeks to identify the factors that led to the new detainee standards. Specifically, it examines President George W. Bush's method of policy making, and the influences that helped to shape it. It then explores the potential causes for the weakening of constitutional checks and balances when a president uses his Commander-in-Chief power during a national crisis.

In his examination of how presidents make decisions, Patrick Haney concludes: "While a range of theories exists to explain foreign-policy cases of a variety of types, and may do so in discrete ways, we are less able to come to terms with how the foreign-

[1] Compare the perspectives in texts such as: Savage, Charlie 2007: Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy. New York: Back Bay Books; Mayer, Jane 2008: The Dark Side: The Inside Look of How the War on Terror Turned into a War on American Ideals. New York: Anchor Books; Kassop, Nancy: "The Post-Nixon Imperial Presidency: 1980-2004". Paper presented in: 2005 Annual Meeting of the American Political Science Association, September 1-4, 2005, Washington, DC; Konyers, John C. 2009: Reining in the Imperial Presidency: Lessons and Recommendations Relating to the Presidency of George W. Bush. New York: Skyhorse Publishing; to perspectives in texts such as Yoo, John 2009: Crisis and Command. New York: Kaplan Publishing; Bush, George W. 2010: Decision Points. New York: Crown Books; and Cheney, Richard B. 2011: In My Time: A Personal and Political Memoir. New York: Threshold Editions.

policy process can be both open to a vast range of forces from inside and outside the White House and dominated by the president using unilateral mechanisms of power all at the same time."[2] He then asks a question that is of utmost importance for this dissertation: "How can the president be so weak, so embedded in a range of powerful actors, and yet still also act – in the same policy domain – with striking unilateral power with few if any checks?"[3]

Haney correctly identified the problem: No single model presented by the leading scholars up to this time is able to fully explain when checks on the president's power sometimes break down, despite the "powerful actors" whose constitutional duty it is to keep him in check. Why do unconstitutional decisions sometimes become the law of the land? When are powerful actors able to intervene, and when do they fail?

In his book, Haney argues further that when looking at decision making models used during foreign-policy crises, "presidents constructed hybrids of the ideal types to suit their needs."[4] As he looks at how presidents manage decision-making groups during crisis and the results, however, he is unable to create a link between the "type of presidential advisory system and the crisis decision making performance".[5]

Where Haney's work leaves off, this study starts. My work does not focus on the advisory system only in the decision making process, however. It goes ones step further and seeks to create an argument creating a link between the type of presidential decision making and the outcome, with a specific view to the effect of constitutional checks and balances on the process.

1. Comparing Models of Presidential Decision Making During Crisis

This chapter briefly examines the premises of three models which could describe President Bush's decision making leading to the new detainee policy. While it argues that Bush's decision making process can be explained by elements of all three models, it

[2] Haney, Patrick J.: "Foreign Policy Advising: Models and Mysteries from the Bush Administration". In: Presidential Studies Quarterly, June 2005, Vol. 35, Issue 2, 289.
[3] Ibid, 300
[4] Ibid, 291. In his article in Presidential Studies (above), Haney describes the premise of his book: Haney, Patrick 2002: Organizing for Foreign Policy: Presidents, advisers, and the management of decision making. Ann Arbor: University of Michigan Press.
[5] Verbeek, Bertjan: "Book Reviews: A Mini Symposium on Organizing for Foreign Policy Crises," in: Journal of Contingencies and Crisis Management, Vol. 8, Issue 3, 173. Reviewer Bertjan Verbeek determines that this is because the inherent nature of the U.S. system is formalism, where the president is at the top of a hierarchical pyramid, and information is filtered through a structured decision-making process.

argues that the unitary executive theory can more aptly explain how the detainee policy evolved than Allison's government political model and Janis' group think, but states that even the unitary executive theory has shortcomings.

Why were these three models chosen as a starting point to understand President Bush's decision making process? First, President Bush's detainee policy was created in the wake of an attack on U.S. soil, and thus a national security crisis. All three models explain presidential decision-making during a national security crisis.

Second, while there have been countless texts written exploring the connection between presidential decision making during crisis, the interactive process between the president and his advisers, and the outcomes this produces, most are in part a critique, support, or expansion of what are considered the ground-breaking works of Graham Allison's Essence of Decision, originally published in 1971 or Irving Janis' Victims of Groupthink, originally published in 1972.[6] Written to explain how decisions were made during the Cuban Missile crisis, Allison's book explains the process as a dance between multiple players, where there are winners and losers. Janis' book also describes how presidents make decisions during crisis together with a group during the Cuban Missile Crisis, as well as during other armed conflicts, such as the Bay of Pigs invasion and the wars with Vietnam, Korea, and during World War II.

Third, not all presidencies experiencing a national security crisis perform decision making and implement policy in the same way. The Allison model presents the president as the clerk "president in sneakers",[7] and Janis' groupthink president's policies are only as good as his circle of advisors. While the first two focus on the president's power as being helped or hindered by those players within the Cabinet, the unitary executive president focuses on the single executive actor whose position of power is defined beyond the executive by his relationship with the legislative and judicial branches.

While all three models help us understand how strong presidents make decisions during crisis in foreign policy, they have very different ways of explaining which actors from within or outside of the executive determine the outcome. We will therefore start with an examination of their explanatory power, and analyze which could most aptly be suited to the case study of the Bush administration.

[6] For the purposes of this paper, the most recent editions of the books will be used (1999 and 1982).
[7] Allison, Graham and Zelkow, Philip 1999: Essence of Decision. New York: Addison-Wesley Educational Publishers Inc., 259.

1.1 GRAHAM ALLISON'S GOVERNMENT POLITICAL MODEL

In identifying many factors that mark the presidential decision making process, Allison helps us understand the political games that produce certain outcomes.[8] In his book, Essence of Decision, Allison first lays out three models to explain motivations for decision making by government actors. In analyzing why government officials made certain decisions during the Cuban Missile crisis, he provides three explanations: government action is the result of rational choice; is based on prescribed organizational processes; or is the result of bargaining by different players with different objectives.[9]

The latter method, called the government politics model, "sees no unitary actor but rather many actors as players."[10] These players create government policy, "not by a single, rational choice," but by bargaining within the government hierarchy.[11] In this bargaining game, the role one plays, the institution one represents, the power one shares, the relationship one has with the president, the extent of groupthink that exists, the deadlines faced, and the number of different actors from which the president must win consent all play a role in determining the final decision.[12] The end result is the sum of all the actions taken by all the players, and power determines each player's impact on results.[13] Players have bargaining advantages when they have 1.) official "authority and responsibility" 2.) "control over resources" needed 3.) information control 4.) ability to determine players' goals in other political games 5.) "personal persuasiveness" and 6.) access to other players with power.[14]

Interestingly, Allison predicts that the likelihood that the U.S. government uses military force during a crisis increases as the number of "chiefs" - including the president, National Security adviser, secretaries of Defense and State, chairman of the Joint Chiefs of Staff, and director of the CIA - preferring this option increase.[15]

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[8] Presidential Studies Quarterly, Introduction, Vol. 35, No. 2, June 2005, 217-228, URL: http://gunston.gmu.edu/pfiffner/index_files/Page1291.htm. But Richard Neustadt cautions against relying on the advisory system and its political games to determine the endgame. In Neustadt, Richard E. 1960: Presidential Power. New York: John Wiley & Sons, he puts the president's own calculation of power as the determinant of presidential decision making. See also: Haney, Patrick J.: "Foreign Policy Advising: Models and Mysteries from the Bush Administration". In: Presidential Studies Quarterly, June 2005, Vol. 35, Issue 2, 291.

[9] Allison, Graham and Zelkow, Philip 1999: Essence of Decision. New York: Addison-Wesley Educational Publishers Inc.

[10] Ibid, 255

[11] Ibid.

[12] Ibid, 255-313

[13] Ibid, 300

[14] Ibid, 300

[15] Ibid, 311

Graham Allison looked at this "range of powerful actors" and suggested that rational decision making and bargaining could help explain the decision making process. Yet James Pfiffner observes:

> At first glance, the rational approach to decision making – stating objectives, ranking values, analyzing alternatives, examining consequences, and making choices – seems to accord with common sense (who would want to be irrational?) But the reality of making decisions under conditions of complexity (virtually all public policy decisions) is much more problematical.[16]

In analyzing President Bush's decision making methods, Graham Allison himself admitted that President Bush appears to have a highly personal working style, with little emphasis on systematic analysis of major decisions. He is quoted as saying in this context: "There seems to be almost an absence of any analytical or deliberative process for mapping the problem or exploring alternatives or estimating consequences."[17]

This would suggest that it would be ill-advised to use the first two Allison models for this case study, as they rely chiefly on a rational process and set organizational structure in making decisions.

In applying the government political model, Allison outlines the process question that needs to be explored in any case study: "Which results of what kinds of bargaining among which players yielded the critical decisions and actions?"[18] He lists the factors to be considered: "the players whose interests and actions impact the issue in question, the factors that shape players' perceptions and stands, the established procedure or 'action channel' for aggregating competing preferences, and the performance of the players."[19]

But what to do when the factors described by Graham Allison's analysis, such as the level of independence their branch or organization of government had based on precedence, the method of politicking the players used, and the role of influence they had in the Bush team only have a minor impact, if any, on the outcome?

The challenge in using his model for this case study lies therein, that while Allison is helpful in describing factors that can be considered in the decision making process, he does not weight the variables, and as such provides limited if any linkage between

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[16] Pfiffner, James P., "Presidential Decision Making: Rationality, Advisory Systems, and Personality." In: Presidential Studies Quarterly, June 2005, Vol. 35, No. 2, 218.

[17] Reynolds, Maura: "Books Depict Bush as Instinct-Driven Leader". In: LA Times, May 3, 2004. URL: http://webcache.googleusercontent.com/search?q=cache:Cj6bUAbOejsJ:articles.latimes.com/2004/may/03/nation/na-bushbooks3+There+seems+to+be+almost+an+absence+of+any+analytical+or+deliberative+process+for+mapping+the+problem+or+exploring+alternatives+or+estimating+consequences.%22+Allison&cd=1&hl=de&ct=clnk&gl=de, last accessed Oct. 21, 2010.

[18] Allison, Graham and Zelkow, Philip 1999: Essence of Decision. New York, Addison-Wesley Educational Publishers Inc., 6.

[19] Ibid, 6

process and outcome for this case study. While he claims the resultant is reached by "bargaining games among players in the national government," he does not state what occurs when the methods and players involved omit bargaining, and the crisis situation presented does not allow for the contained, logical chess board example he provides to explain it.[20] And while his Model III provides for much more complex decision making in crisis situations than the rational actor model, it still relies on predetermined categories to tame the process.

What if the leader and most of the players do not play by these rules?[21] Here Allison answers that "peculiar preferences and stands of individual players can have a significant effect on governmental action."[22] But how? And in what contexts are these stands tolerated and when are they not? Allison's Model III leaves too many questions unanswered to provide the main model for this study. Thus his model provides a starting point, but is unable to provide determinative power in predicting outcomes or in motivations for new policy.

1.2 Irving Janis' Groupthink

Janis defines groupthink as a "deterioration of mental efficiency, reality testing, and moral judgment that results from in-group pressures."[23] He lists eight symptoms of the "groupthink syndrome," which he divides into three categories: overestimations of the group's power and morality; closed mindedness; and pressures toward uniformity.[24] The consequences, he warns, is "defective decision-making" which shows itself in symptoms such as "failure to examine risks of preferred choice," "failure to work out contingency plans," and "selective bias in processing information at hand."[25]

He hypothesizes that groupthink is most likely to occur when members of the group involved are experiencing "high stress from external threats" and they have a "low hope of finding a better solution than the one favored by the leader."[26]

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[20] Ibid, 6

[21] For example, as will be discussed in more detail in the coming chapters, the government memos pertaining to detainee policy recently declassified by the Obama administration reveal that the new detainee treatment standards were created less as the result of bargaining by different players, and more as the result of their understanding of the constitutional limits of presidential power during a security crisis coupled with their loyalty to a particular political party or person.

[22] Allison, Graham and Zelkow, Philip 1999: Essence of Decision. New York: Addison-Wesley Educational Publishers Inc., 305.

[23] Janis, Irving 1982: Groupthink. Boston: Houghton Mifflin Co., 9.

[24] Ibid, 174-175

[25] Ibid, 175

[26] Ibid, 250

He does a case study of how the theory applies to a number of crisis situations experienced by U.S. policy makers, including the Kennedy administration's Bay of Pigs invasion and the Nixon administration's Watergate cover-up. By identifying certain patterns that evolve during crisis decision making in groups, Janis provides a roadmap of aspects to avoid in preventing groupthink from leading to policy failures.[27]

Janis' model has the potential to go one step beyond Allison's in assisting us with our case study because he provides the insight that an opinion leader such as the president can use groupthink to push through a new policy: "After listening to an opinion leader . . . express his unequivocal acceptance, it becomes more difficult than ever for other members to state a different view. Open straw votes generally put pressure on each individual to agree with the apparent group consensus …"[28]

Yet Janis' model has a limitation. He assumes that the leader is ultimately the one that determines the group dynamics: whether outside and critical voices are allowed, whether alternatives to his favored solution are seriously considered, etc. The question of what causes a president to contribute or not contribute to groupthink remains largely unexplored. So does the question of how the group can get the president to change course if he is unwilling to take any of Janis' suggestions to avoid groupthink, such as assigning the role of devil's advocate to a member for every session, and allowing objections and criticism's of the president's view to be heard.[29] Here the unitary executive theory could provide answers for this case study.

1.3 THE UNITARY EXECUTIVE THEORY

The theory is based on two parts of Article Two: The "Oath" clause which requires the president to "faithfully execute the Office of the President and [to] preserve, protect and defend the Constitution of the United States"; and the "Take Care" clause, which directs the president to ensure that he and his subordinates take care to faithfully execute laws.[30]

Ryan Barilleaux expands on the definition provided by Louis Fischer in the introduction by saying that in the unitary executive theory, the president not only is

[27] Haney, Patrick J.: "Foreign Policy Advising: Models and Mysteries from the Bush Administration". In: Presidential Studies Quarterly, June 2005, Vol. 35, Issue 2, 290.
[28] Janis, Irving 1982: Groupthink. Boston: Houghton Mifflin Co., 43.
[29] Ibid, 262.
[30] Kelley, Christopher S.: "Rethinking Presidential Power – The Unitary Executive and the George W. Bush Presidency". Paper prepared for the 63rd Annual Meeting of the Midwest Political Science Association April 7-10, 2005 Chicago, IL, 6-8.

resistant to accountability from the other estates, but that he pushes his sphere of power into theirs, thus also creating a challenge to the separation of powers: "It assumes hostility in the external political environment and seeks to aggressively push the constitutional boundaries to protect the prerogatives of the office and to advance the president's policy preferences."[31]

This pushing of constitutional boundaries is a practice which Ryan Barilleaux describes as venture constitutionalism. He defines this as "an assertion of constitutional legitimacy for presidential actions that do not conform to settled understandings of the president's constitutional authority."[32] Venture constitutionalism is thus an inherent part of the practice of the unitary executive theory, especially when it is applied in times of crisis.

While there have been countless scholarly articles arguing in favor of or against a strong or weak interpretation of the unitary executive theory, these are irrelevant for this study. [33] Nor is there a focus here on the defense or repudiation of what author Charlie Savage calls the Bush administration's new unitary executive theory, which in his mind has little to do with the Article II definition of a unitary executive.[34] Because such arguments would on the one hand involve judgments of the version of the theory which may seem the most "moral" for presidents to use, and on the other could lead to an unscholarly debate involving partisan judgments of the president's intent, the author has refrained from choosing one of them to defend and will focus in the upcoming analysis on the more neutral definitions described by Fischer and Barilleaux.

[31] Kelley, Christopher S.: "Rethinking Presidential Power – The Unitary Executive and the George W. Bush Presidency". Paper presented in: 63rd Annual Meeting of the Midwest Political Science Association, April 7-10, 2005, Chicago, IL, 11, 12.
[32] Barilleaux, Ryan J. in Kelley, Christopher S. 2010: Executing the Constitution. Albany: State University of New York Press, 42.
[33] In the "strong unitary" version of the theory the President has greater ability to check Congress than the weak form. In this form, the President has "unlimited power" over "all tasks of law-implementation." In the weak form, Congress has broader authority in structuring government, and "unitariness," or the president's power to have unitary control over all that occurs in the executive branch and the administration of all laws "is a significant constitutional value," but it is not a trumping constitutional value. Other values may at times override unitariness, and it is Congress that is to choose among these competing values." See Lessing, Lawrence and Sunstein, Cass R.: "The President and the Administration". In: Columbia Law Review, Vol. 94, No. 1, January, 1994, 8.
[34] Sloane, Robert D. 2008: "The Scope of Executive Power in the Twenty-First Century: An Introduction." In: Boston University Law Review, Vol. 88:34, 343.

2. UNITARY EXECUTIVE THEORY MODEL UP CLOSE
2.1 HISTORY

The theory was not named as such until the Reagan administration, but the powers of the "unitary executive" were mentioned during the Philadelphia Convention of 1787 to clarify that one person should fulfill the duties of the office, rather than many.[35] Was therefore the current unitary executive theory, with its claims to venture constitutionalism and resistance to checks and balances simply misunderstood by scholars such as Barilleaux, or for that matter by President Bush when he mentioned it in his signing statements and executive orders? This is unlikely. While the founding fathers were clear on the benefits of using only *one* executive in the new republic, those who coined the term "unitary executive theory" were equally clear that their definition went beyond simply describing the benefits of having one president.

The term first started to be used as a legal argument for expanded executive power during the Reagan administration. At that time, Attorney General Meese's staff penned a report at his request which evaluated the president's powers in a new light. It provided recommendations for President Reagan to take back the power lost in the wake of Watergate and the Vietnam War, and said that the traditional interpretation of checks and balances of the last 200 years is false. Instead, the executive, judiciary and legislative should not be able to encroach in each other's areas of responsibility.[36]

"The concept of 'checks and balances' is nothing more than an unconstitutional attempt by Congress to encroach on the rightful power of the executive," according to the report.[37] In the wake of this new vision for the expansion of executive power, Meese's staff (and specifically, Calebresi) dubbed the concept "the unitary executive theory," based on Alexander Hamilton's 1788 document *The Federalist* No. 70.[38]

Hamilton argued for there to be only one executive in the new republic. The office of this one executive, he said, should be defined by energy and safety. Energy is made up of the attributes "unity," "duration," "adequate provision for its support," and

[35] Ketchum, Ralph, ed. 1986: The Anti-Federalist Papers and the Constitutional Convention Debates. New York, Signet Classic, 67. See also: The Founders Constitution, 1787. Records of the Federal Convention, Article 2, Section 1, Clause 1.
[36] Savage, Charlie 2007: Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy. New York, Back Bay Books, 47-48.
[37] History Commons: Creative Commons. "Profile: Ronald Reagan." URL: www.historycommons.org/entity.jsp?entity=ronald_reagan&startpos=100, last accessed March 14, 2012.
[38] Savage, Charlie 2007: Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy. New York: Back Bay Books, 48.

"competent powers."[39] The "unity" of which he spoke is defined by the phrase "one man" when he writes: "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."[40]

He put this unitary executive, with its accompanying decision-making and secrecy, in context. Such a unitary president must also be marked by "safety," made up of "a due dependence on the people," and "a due responsibility."[41] Thus a president must listen to the demands of those he represents, and act responsibly towards them. Hamilton argues for public opinion to act as a restraint to the executive, as well as for there to be "the opportunity of discovering with facility and clearness the misconduct" of such a leader, and his punishment or removal, if necessary.[42]

2.2 The Unitary Executive Debate

Yet the current debate on the unitary executive does not just ask whether the president can be called to account, but whether the president has the power to make rules regarding war and foreign policy in the first place. Scholars typically fall in two camps. On one side fall those, like John Yoo, President Bush's main legal defender for the new detainee policy. They focus on phrases in Article II of the Constitution which mention the President's Commander in Chief powers. Yoo places what he calls the "open-ended 'executive power' in the President, in contrast to Article I, which says that Congress is to have only those 'legislative powers herein granted.'" [43] Such scholars also point to the president's Article II, Section 3 powers to make treaties and appoint ambassadors as proof that that he has the power to dictate foreign affairs.[44]

Those in the other camp are scholars who focus their arguments on Article I, Section 8, which states that Congress is responsible to "provide for the common defense"

[39] Hamilton, Alexander: The Federalist No. 70, "The Executive Department Further Considered." As published in: Independent Journal, March 15, 1788. URL: http://www.constitution.org/fed/federa70.htm, 1.
[40] Ibid, 2
[41] Ibid, 1
[42] Ibid, 4
[43] Yoo, John 2009: Crisis and Command. New York: Kaplan Publishing, 35.
[44] Ibid, 28

of the United States and "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[45]

The Article II group focuses accordingly on the president's final word in interpreting and carrying out the law, and directing the military, while the Article I group focuses on the split powers between the courts, the legislature, and the executive to do so.

The debate is not new. Richard Neustadt argued in 1960 that the president had powers that went beyond the Constitution.[46] But after the abuses of presidential power occurring during the Nixon administration, Arthur Schlessinger attacked the expansion of presidential power that was no longer Constitution-based. Schlessinger argued that presidents have been steadily increasing their own powers, and decreasing Congress', as they have strengthened their own war power.[47] This led to the "imperial presidency" the nation experienced with Nixon, an executive with few, if any, checks.

Arthur Schlesinger argued that:

> A constitutional Presidency, as the great Presidents had shown, could be a very strong Presidency indeed. But what kept a strong President constitutional, in addition to checks and balances incorporated within his own breast, was the vigilance of the nation. Neither impeachment nor repentance would make much difference if the people themselves had come to an unconscious acceptance of the imperial Presidency. The Constitution could not hold the nation to ideals it was determined to betray.[48]

While Schlesinger argued against a presidency whose powers go beyond the Constitution, he left the door open for today's unitary executive theorists to argue for a strong presidency as long as the people check him.[49] But while Schlessinger argued for a strong president guarded by the Constitution and the nation, today's unitary executive theorists argue that the Constitution does not guard or limit the presidency. Instead Article II "expands it indefinitely through the use of the Vesting, Take Care, Oath, and Commander in Chief clauses."[50]

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[45] U.S. Constitution, Article I, Section 8, Clause I and II. See also: Diehl, Paul F. and Ginsburg, Tom, "Irrational War and Constitutional Design: A Reply to Professors Nzelibe and Yoo," Michigan Journal of International Law, Vol. 39, Dec. 18, 2006.
[46] Thurber, James A. 2009: Rivals for Power: Presidential-Congressional Relations. Lanham: Rowman & Littlefield Publishers, 213.
[47] Ibid, 43-44
[48] Schlesinger, Arthur M., Jr. 1973: The Imperial Presidency. Boston: Houghton Mifflin Company, 418.
[49] Thurber, James A. 2009: Rivals for Power: Presidential-Congressional Relations. Lanham: Rowman & Littlefield Publishers, 213.
[50] Ibid

Yoo argues that the framers had an executive in mind whose power should not be limited by an inefficient Congress. He argues that the initial constitution, called the Articles of the Confederation and Perpetual Union, drafted in 1776 and 1777, was the "product of excessive revolutionary fervor" ignited by the colonies' distaste for a dictatorial monarch.[51] The final constitution displayed a "constitutional counterrevolution" designed to check the legislature - which had, in the decade since the drafting of the Articles, "passed legislation infringing property rights, canceling debts, and oppressing minorities."[52] Yoo's understanding of the Founders' intention in the wording of the final Constitution was that they sought to create a presidency with much more unchecked power than was initially considered at the beginning of the drafting process. This would create a pattern for presidencies from George Washington to George Bush to continue to expand that power.[53]

He focuses on phrases from Hamilton's Federalist 70, such as "energy in the executive," which was "essential to the protection of the community from foreign attacks" and "the steady administration of laws," to argue that Hamilton argued for a strong executive unhampered by the legislative.[54] Yoo also focuses on the president's Article II powers to "take Care that the Laws be faithfully executed" to argue that "an executive must determine their meaning," thus making the president, not Congress or the courts, the final authority on the law of the land.[55]

Critics of Yoo fail to find his arguments convincing. "Yoo fails to embed his unitary executive in a general theory of coordinated constitutional functions like that articulated by Hamilton in The Federalist," write Sotirios Barber and James Fleming. Barber and Fleming define the difference between using phrases from The Federalist or the Constitution, to looking at their entire context:

> The Executive exists in an institutional context that includes Congress and the courts. The President is not up there in some detached posture. Even when emergencies force the President to act extraconstitutionally, he or she must return to Congress and the courts for post-hoc approval, as Lincoln did … By assuming that the 'war on terror' would be more or less permanent, Yoo depreciated the institutions and principles of public responsibility represented by Congress and the courts. This transformed Hamilton's unitary-but-attached

[51] Yoo, John 2009: Crisis and Command. New York: Kaplan Publishing, 17.
[52] Ibid, 17
[53] Ibid, 32-51
[54] Ibid, 40
[55] Ibid, 44

> and checked executive into Bush's unitary-but detached-and-elevated executive.[56]

The critics argue then that the founding wisdom for strengthened executive authority in nebulous or crisis situations can easily be taken out of context to argue for the extraction of checks and balances. This is exactly the situation that the founders, who wanted reprieve from dictatorial monarchs of Western Europe of the time, wanted to avoid. James Wilson further expounded at the Pennsylvania Ratifying Convention of 1787 for the necessity for the accountability of the executive when it practices it unitariness:

> The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality; no appointment can take place without his nomination; and he is responsible for every nomination he makes.[57]

Thus, the founders advocated for a unitary executive in a context that provides for the president's transparency, accountability to the people, and punishment.[58]

2.3 Mapping the Unitary Executive Theory Model

2.3.1 Description of Independent Variable: International Threat

To find out whether the unitary executive theory has the greatest explanatory power for this case study, we must first clarify: 1.) whether the conditions for the uet exist in the case study, and if so 2) under which conditions the president's practice of his power based on the unitary executive theory is *successful* in changing a policy.

First, do the conditions for the uet exist in the case study? One independent variable is described throughout uet literature as being present when presidents exert their presidential power as described by the unitary executive theory: a crisis. In times

[56] Barber, Sotirios A., and Fleming, James E. 2009: "Constitutional Theory and the Future of the Unitary Executive". In: Emory Law Journal, Vol. 59, 465-466.
[57] Wilson, James: Pennsylvania Ratifying Convention, Dec. 4, 1787.
[58] See Johnsen, Dawn E.: "What's a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses." In: Boston University Law Review, Vol. 88:395, 399: "… [Justice Scalia's] observations here convey the importance of distinguishing between the legitimacy of an executive authority and specific abuses of that authority… When properly exercised, however, presidential constitutional interpretation can be legitimate and valuable. Commentators should not confuse their objections to a particular President's substantive constitutional views and practices with objections to the legitimacy of the underlying presidential authority."

of war, emergency or a greater threat to the nation's security, the practice of the unitary executive theory can be most clearly observed.

Hamilton and Yoo are helpful in underscoring the role this condition plays in aiding the president in pushing through an expansion of presidential power. Hamilton writes the characteristics of a unitary executive, which include "decision, activity, secrecy and dispatch,"[59] are of importance during war time, when "energy in the executive … is essential to the protection of the community against foreign attacks."[60]

Immediately following the attacks of September 11, 2001, Yoo wrote a Memorandum underscoring why the president has absolute power during an armed conflict or war, thus laying out the preconditions of war or military hostilities (Variable A on p. 17) for a unitary executive presidency: "The power of the President is at its zenith under the Constitution when the President is directing military operations of the armed forces, because the power of Commander in Chief is assigned solely to the President," he writes. "The centralization of authority in the President alone is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch."[61]

He then goes on to explain why in cases of foreign affairs, particularly in military hostilities and *not* in domestic affairs, presidential power is at a maximum:

> Second, the Constitution makes clear that the process used for conducting military hostilities is different from other government decisionmaking. In the area of domestic legislation, the Constitution creates a detailed, finely wrought procedure in which Congress plays the central role. In foreign affairs, however, the Constitution does not establish a mandatory, detailed, Congress-driven procedure for taking action.[62]

He further explains that in foreign relations, the president, not the Congress has the final word: "From the very beginnings of the Republic, the vesting of the executive, Commander-in-Chief, and treaty powers in the executive branch has been understood to grant the President plenary control over the conduct of foreign relations."[63]

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[59] Hamilton, Alexander: The Federalist No. 70, "The Executive Department Further Considered". As published in: Independent Journal, March 15, 1788. URL: http://www.constitution.org/fed/federa70.htm, last accessed March 14, 2012.
[60] Ibid
[61] Department of Justice, Office of Legal Counsel, Memorandum Opinion for the Deputy Counsel to the President: "The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them," Sep. 25, 2001. URL: http://www.justice.gov/olc/warpowers925.htm, last viewed June 9, 2012, 2,3.
[62] Ibid, 3
[63] Ibid, 4

Since the powers of the unitary executive are most clearly seen during military hostilities as described above, the case studies in this dissertation will be limited to those cases in which the nation is involved in military hostilities or conflicts in which the president can use his Article II Commander-in-Chief powers. These need not be declared wars, according to Yoo's memo: "The Framing generation well understood that declarations of war were obsolete."[64]

Such powers,Yoo writes, are part and parcel of the president's duty to defend the nation when national security emergencies arise:

> As originally conceived, the need for the executive arose to respond to unforeseen dangers, unpredictable circumstances, and emergencies. It was given the virtues of speed, secrecy, vigor, and decisiveness to most effectively marshal society's resources in a time of crisis … If the circumstances demand, the executive can even go beyond standing laws in order to meet a greater threat to the nation's security.[65]

The conditions created by the crisis, according to Yoo, create an environment where the executive pushing of legal or constitutional boundaries becomes acceptable. Once such a threat has been defined, one must look for patterns in which the executive is pushing the boundaries to the law or constitution to exert his power as described by the uet. [66]

2.3.2 Description of Ant. Condition: Presidential Execution of Power According to the UET

What do these patterns of "pushing" behavior look like? According to Waterman, a president acting on the premises of the theory believes he can control all of the executive, and expand it as well.[67] This means that "any law passed by Congress that seeks to limit the president's ability to communicate or control executive branch

[64] Ibid, 3: As explained in the introduction, in the four case studies explored in this dissertation, the threat will always be a clearly defined threat in the form of a war (declared or undeclared) or a direct attack on U.S. soil. In the case of Roosevelt, Nixon, and Bush, the wars involved direct attacks or combat, as in WWII, the Vietnam War, and the 9/11 attacks. In the case of Reagan, the Cold War represented a military rivalry that stopped short of a full-scale war. See: The American Heritage® Dictionary of the English Language, Fourth Edition, 2000. New York: Houghton Mifflin Company. Updated in 2009.

[65] Yoo, John 2009: Crisis and Command. New York: Kaplan Publishing, 424.

[66] A president acting on this theory assumes "hostility in the external political environment and seeks to aggressively push the constitutional boundaries to protect the prerogatives of the office and to advance the president's policy preferences." Kelley puts this hostility in a domestic context, such as the threats to the president's power provided by Congress or the Comptroller General See: Kelley, Christopher S.: "Rethinking Presidential Power – The Unitary Executive and the George W. Bush Presidency". Paper presented in: 63rd Annual Meeting of the Midwest Political Science Association, April 7-10, 2005, Chicago, IL, 11-13.

[67] Waterman, Richard W.: "The Administrative Presidency, Unilateral Power, and the Unitary Executive Theory". In: Presidential Studies Quarterly 39, No. 1, March 2009, 6.

relations is unconstitutional and need not be enforced" and that he "has the same authority as the courts to interpret laws that relate to the executive branch,"[68] thus trumping both Congress and the courts in such issues.

A president thus makes such a constitutional understanding of his powers operable by 1.) expanding the executive 2.) violating separation of powers between the executive and the legislative branches and 3.) violating the separation of powers between the executive and judicial branches. One must therefore look for repeated attempts by the president to bring new or more departments under executive control, and to push his power into the judicial and legislative spheres in a manner that ventures beyond traditional interpretation of his constitutional authority. This takes the form of reinterpreting legislation through signing statements or executive orders, for example, and interpreting laws in a manner that the Constitution only delegates to the judiciary.

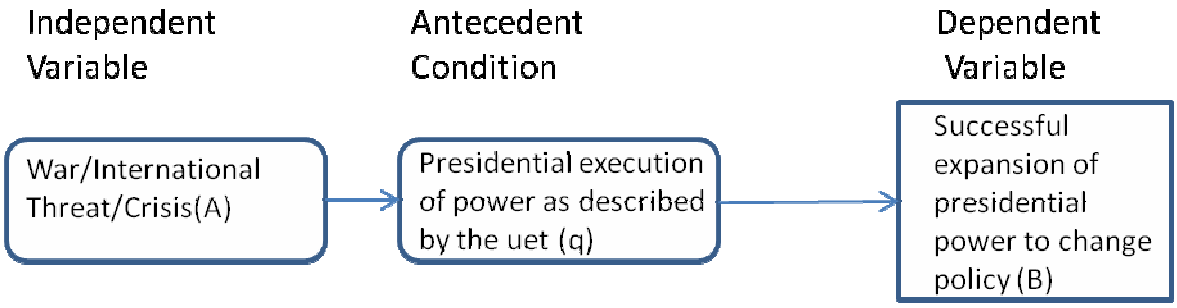
When challenging the legislature or judiciary this way, he will use Article II-based arguments in memos, judicial defense or signing statements. These arguments cite his war time powers, his authority as Commander in Chief, his authority to keep confidential information relating to the nation security, Congress' limited power to intervene, and his constitutional authority to "supervise the unitary executive branch" to expand the president's power beyond the confines of the law.

2.3.3 Successful Expansion of Presidential Power

The goal of such an action by the president, is, ofcourse, a successful policy change. What is meant by "successful"? The policy change must result from the president's exertion of his power as described by the unitary executive theory, challenging both the legislative and the judicial branches and expanding the executive. His policies must be implemented not just in law but in practice. To see a model of the U.S. administration's expansion of presidential power to change policy as described by the unitary executive theory based on the description of the theory to this point by Yoo, Barilleaux, Kelley, Waterman, Cass and others, see below.

[68] Waterman, Richard W.: "The Administrative Presidency, Unilateral Power, and the Unitary Executive Theory". In: Presidential Studies Quarterly 39, No. 1, March 2009, 8.

A U.S. Administration's Expansion of Presidential Power as Described by the Unitary Executive Theory



2.4 Where the Unitary Executive Theory Falls Short

What to do when the checks provided for by the Founding Fathers in the Constitution cease to function as intended and thus allow a less predictable outcome in the presidential decision making process? Here, the unitary executive theory is silent. The Janis and Allison models not only describe group dynamics, leader-staff relations and bargaining games as ways to analyze decision-making processes, but provide proposals for preventing leader-dictated behavior or irrational decision-making. The unitary executive theory limits itself to an Article II-based argument that can be used to explain how the president or his colleagues push through new policies which challenge traditional constitutional interpretation. It does not directly provide lessons on interaction between the leader and the group, and thus a successful change in policy made by a president who uses decision-making processes described by the unitary executive theory must be conditional on other dependent variables.[69] It does, however, have explanatory power in showing how those who are advocates of the theory understand the executive's role in foreign policy and determining power in how those individuals will interpret the president's role when faced with crisis situations.

According to Waterman:

> The theory posits that, by creating a single president, the founders intended for the president to have complete and unfettered control over all aspects of the executive branch. This reasoning ignores the clear constitutional powers that Congress possesses over the executive branch, such as its legislative and appropriation powers, as well as those inferred from the "necessary and proper" clause of Article I of the Constitution. It also threatens the ability of the legislative branch to perform meaningful oversight, as the president can order bureaucrats to refuse to comply with congressional requests for information. Particularly

[69] These are discussed on pgs. 20-23.

> interesting is the theory's central assumption that any law passed by Congress that seeks to limit the president's ability to communicate or control executive branch relations is unconstitutional and therefore need not be enforced. The theory also posits that the president has the same authority as the courts to interpret laws that relate to the executive branch. Thus, the president can interpret the law and unilaterally decide to ignore it, without legal sanction or redress.[70]

The theory, itself, then, could provide the president with what appears to be a constitutional basis to see his role in a different light. If a pattern of presidential decision making emerges which is marked by: constitutional risk taking, resistance to legislative oversight on the grounds that this is unconstitutional, or insistence that the president has the same mandate as the courts, the theory provides determinative power in how the president will respond to his group and outside groups. The theory provides justification for refusing those practices which prevent groupthink, such as outside criticism and evaluation. In so doing, it explains how a president can push through a new policy without concern that the other branches of government must interfere. Indeed, a theory that has as its core the expansion of presidential power through constitutional risk taking during times of crisis has the greatest potential to most accurately explain a case study in which the rational calculated games of the Cold War era as described by Allison no longer apply.

3. A New Model: Filling in the Gaps

Yet a crisis alone does not in every case cause a president to more frequently execute his power in a manner consistent with the unitary executive theory. And once the president has challenged the legislative and judicial branch, there is no guarantee that those estates simply give way to encroachments on their turf. Why are some U.S. presidents successful in creating new policies through executing their power as described by the uet, while others fail? Why is the judiciary and the legislative sometimes able to check the president, and under what conditions do they fail? Here, the unitary executive theory is silent, and this is the gap that my dissertation attempts to fill.

To answer these questions for a specific case study, one must consider what other conditions are helpful in creating an environment *favorable* for the president to execute his power as described by the unitary executive theory and disfavorable for the

[70] Waterman, Richard W.: "The Administrative Presidency, Unilateral Power, and the Unitary Executive Theory". In: Presidential Studies Quarterly 39, No. 1 March 2009, 8.

execution of checks and balances by the legislative and judiciary. The answer to this question forms the basis for my hypothesis.

3.1 Reasons for Choosing Job Approval Ratings and Composition of Congress as Intervening Variables

Schlesinger argues that the only true check to an imperial presidency is the "vigilance of the nation."[71] Richard Pious also looks at whether domestic support is a factor in presidents wanting to "claim vast executive and legislative powers, including the inherent powers of a 'chief executive' based on an expansive reading of specific constitutional clauses."[72] This he calls "prerogative power," akin to the powers practiced by presidents as described by the uet: "Under what circumstances are executive officials most likely to assert prerogative power? One might hypothesize that in domestic affairs they will use their powers to further policy in the aftermath of a realigning election and when they believe they have a mandate to develop new policies."[73]

In this context, then, domestic support for the president can be measured in two ways: by his job approval ratings and the makeup of Congress (ie, whether the president's party dominates).[74] On the first type of domestic support – job approval ratings – Pious concludes that history has shown no linkage, and that U.S. presidents since the Tyler administration have used their prerogative power even "when public opinion runs against them."[75]

Less satisfactory are Pious' claims on the president's success. He claims that "When the policy is successful the president gains authority and questions of legitimacy recede into the background," but he does not provide reasons for the president's successful implementation of "prerogative power."[76]

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[71] See p. 28.
[72] Pious, Richard M.: "Public Law and the 'Executive' Constitution." In: Kelley, Christopher S. (ed) 2006: Executing the Constitution. Albany: State University of New York Press, 14.
[73] Ibid, 14
[74] While the public's response can additionally be calculated according to positive or negative media coverage and the response of NGO's to the president, these are more difficult to measure in a comprehensive manner, and will therefore not be used in this study. For further reading on the correlation between public support for the president and congressional support for him, see: Gronke, Paul, Koch, Jeffrey, and Wilson, Matthew J.: "Follow the Leader? Presidential Approval, Presidential Perceived Support, and Representatives' Electoral Fortunes," Duke University, Oct. 1998. URL: http://people.reed.edu/~gronkep/docs/oct2698.PDF, last accessed March 14, 2012.
[75] Pious, Richard M.: "Public Law and the 'Executive' Constitution." In: Kelley, Christopher S. (ed) 2006: Executing the Constitution. Albany: State University of New York Press, 14.
[76] Ibid, 15

Other scholars point to history and claim that popularity indeed plays a role when a president decides to use his power as described by the uet. Silverstein and Hanley claim a president's popularity matter in launching a policy change, *and* in its success. Because they assume that popularity, or public perception, is a key variable to the president deciding to fight for more executive power, as well as to the success of that power to push through new policy, they ask the questions: "… At what stage in a crisis was the decision made, what was the President's own popularity at that point in the war, what was the public's perception of the credibility of the threat or emergency, and what was the public's attitude about the policies the President was urging or enacting?"[77] They claim that the judiciary often negates a president's policy when the president's popularity is at an ebb. While not insisting on a causal relationship, they say there is at least a mirroring of opinion between the public and the judiciary.[78]

Does domestic support for the U.S. president play a role in the executive testing his constitutional boundaries as described by the uet? I choose not to use domestic support for the U.S. president as an independent variable *causing* the president to execute his power in a manner described by the uet for several reasons. When taking a look at modern U.S. presidents since 1945, popularity, judged by job approval ratings, does not seem to play a role for those who used their Comander-in-Chief power to make a major foreign policy decision. Truman was not even at 40 percent at the time of launching the Korean War in 1946. Johnson launched the Tet Offensive in Vietnam with job approval ratings just over 40 percent. When Carter brokered the Camp David accords in 1978, he was hardly above 40 percent. Reagan hovered around 60 percent as he announced his Cold War policies in his State of the Union in February of 1985, and George H.W. Bush was at just over 60 percent at the time of deciding to invade Kuwait in the Persian Gulf War in August of 1990; as was George W. Bush when he decided to invade Iraq. Even Nixon, despite the Vietnam War, had around 60 percent job approval ratings when he ended deferment of the draft at the height of the war, and 60 percent when the Paris Peace Accords were signed by all parties.[79]

Beyond the ambivalent picture painted by history in the area of job approval ratings, countless variables go into the decision of a president to decide to make a major

[77] Silverstein, Gordon and Hanley, John: "The Supreme Court and Public Opinion in Times of War and Crisis". In: Hastings Law Journal, Vol. 61: 1453, 1456.
[78] Ibid, 1500
[79] "How the Presidents Stack Up." Chart in: The Wall Street Journal. URL: http://online.wsj.com/public/resources/documents/info-presapp0605-31.html, last accessed May 4, 2012.

foreign policy initiative such as launching a war, issuing a military draft, or instituting a new detainee policy. Since such study would involve judgments on a president's motives, which is difficult to do in an objective way even in hindsight, the focus of this dissertation will not be on whether domestic approval ratings and the composition of Congress helps or hinders a president in *launching* a policy change, but whether it plays a factor in the policy's successful implementation.

I also concentrate on the president's popularity ratings as an intervening variable in its own right, regardless of the *cause* of the popularity. Because there can be many different reasons for a president's popularity which are not policy-related (ie, war presidents historically enjoy higher ratings directly after an attack on the U.S. or its interests, but this has little to do with what their policy of the moment) I will test whether popularity as an independent value has an effect on the ability of the legislature and the judicial branch to check the president.

I will ask questions such as: "Does the president's popularity have an impact on the president's success rate with Congress?" Secondly, "Does the president's popularity have an impact on how the courts rule on the policy issue?" The job approval ratings are taken from Gallup Polling. To show the impact of the ratings on the president's success, one must take the rating directly before the legislation or ruling, as well as looking at the overall trend (upwards or downwards) in the months preceding the decision. How success is measured is described in the next section.

We have discussed why job approval ratings can have an effect on the U.S. president's successful policy implementation, so why could the make-up of Congress play a role? For the president to expand his power in a new policy arena, he needs the support of the American people, as well as that of Congress.

"Presidents are more likely to be successful in their relationship with Congress with unified party government than with divided government," says James Thurber, who has done an empirical study of how unified and divided party control of government influences presidential support over the last century.[80]

Wald and Kinkopf argue that partisanship did not play a major role in the expansion of executive power or damage checks and balances until the Bush administration:

[80] Thurber, James A. 2009: Rivals for Power: Presidential-Congressional Relations. Lanham: Rowman & Littlefield Publishers, Inc., 16.

> Nonetheless, the one-party 'capture' of Congress and the Presidency that began when President George W. Bush took office in 2001 – interrupted briefly by Senator James Jeffords's switch in party affiliation in May of that year – has prompted the most forceful outpourings in memory on the precipitous decline of Congress in holding up its part of the constitutional bargain.[81]

They argue that having the president and the Congress of the same party in a time where the country was faced with bitter partisanship was poisonous: "The majority sees itself 'more as a group of foot soldiers in the president's army than as members of an independent branch of government,' and thus has little incentive to foster a truly deliberative legislative process."[82]

Yet Pious argues that historically, having the Congress dominated by a different party than the president did not ultimately matter for expanding executive power: "… Historical evidence seems to indicate that presidents are equally likely to use prerogative power when they are in a commanding political position (Franklin Roosevelt) as when they are in a precarious position (Lincoln) and at any point in the cycle of regime formation, maintenance, decay, or dissolution."[83]

He claims that U.S. presidents will use prerogative power just as often when the party majority matches that of the president, as when it doesn't.[84] Does such partisanship also affect court rulings? This dissertation will show in the next chapter that when Congress is of the same party as the president, the Supreme Court as well as the Congress is more likely to rule in the president's favor. Yet as with the intervening variable "popularity ratings," the main test of this study will not focus on whether the intervening variable "composition of Congress" affects the willingness of the president to exert his power, but on the ability of Congress and the judiciary to check it. I will then seek to verify those results by examining three further case studies of U.S. presidents attempting to make major foreign policy changes during an international conflict.[85]

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[81] Wald, Patricia, and Kinkopf, Neil 2007: "Putting Separation of Powers into Practice: Reflections on Senator Schumer's Essay." In: Harvard Law & Policy Review, Vol. 1, 43-44. URL: http://www.hlpronline.com/Vol1Iss1/wald.pdf, last accessed April 24, 2012.

[82] Wald, Patricia, and Kinkopf, Neil 2007: "Putting Separation of Powers into Practice: Reflections on Senator Schumer's Essay" in: Harvard Law & Policy Review, Vol. 1, 45. URL: http://www.hlpronline.com/Vol1Iss1/wald.pdf, last accessed April 24, 2012.

[83] Pious, Richard M.: "Public Law and the 'Executive' Constitution". In: Kelley, Christopher S. (ed) 2006: Executing the Constitution. Albany: State University of New York Press, 15.

[84] Ibid, 14, 15

[85] As outlined in the introduction, the further case studies are: Roosevelt during WWII, Reagan during the Cold War, and Nixon during the Vietnam War.

3.2 Further Defining Success for Dependent Variable B

As discussed previously, a "successful" policy change is one in which the president's policies are implemented in practice. The ultimate test of success comes when the Supreme Court allows the president's policy to stand and the Congress is unable to block the implementation of the policy through legislative measures, thus paving the way for the policy to continue to be implemented on the ground.[86] If neither the legislative nor the judiciary decides to check him, potentially due to the composition of Congress or approval ratings enjoyed by the president at the time, the constitutional venturing which occurs as a result of a uet-type expansion of presidential power becomes easier, leading to success in changing policy.[87]

Success on the legislative side will be measured by whether Congress votes for or against legislation where the president has clearly stated his position. An analysis of the votes taken on a specific issue during divided and unified government help tie the composition of Congress to the ability of both branches to check the president and the success rate.[88]

"Measuring" the president's success in a court ruling seems to be simpler at first glance. Either the court's decision supports or challenges the president's power and position on the issue. If the court decides not to address the issue directly, but gives the president a "pass" (through not ruling due to lack of jurisdiction or by invoking the political question doctrine, for instance), this is also considered a victory for the president because it places nothing in the way of the president's agenda.[89] The president wins most clearly when the judiciary ruling allows presidential Article II powers to trump separation of power principles. In his defense of the presidential expansion of power into the legislative and judicial realm during crisis and emergency, Yoo writes:

> This is not to say that Presidents can act unilaterally for very long, or that success inevitably follows executive initiative. Emergencies may call upon a President to lead, and robust exercises of presidential power can jolt the political system into recognizing new realities. But resistance and opposition almost always arise in response. Presidents need the help of congressional majorities, well-organized

[86] Initial implementation can happen at the president's command and without the approval of Congress or the judiciary, but is unlikely to continue long term without challenge if it is unlawful or unconstitutional.
[87] While there can be numerous reasons for Congress and the judiciary to decide not to check the president, this dissertation will focus on approval ratings and composition of Congress for the reasons described in the previous pages.
[88] Thurber, James A. 2009: Rivals for Power: Presidential-Congressional Relations. Lanham: Rowman & Littlefield Publishers, Inc. See charts on pgs. 169, 173-175.
[89] See chapter two, p. 66-67 for description of political question doctrine.

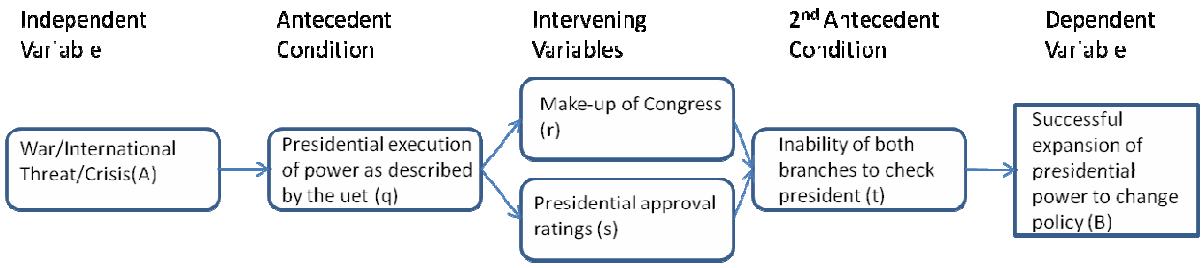
political parties, or a passive judiciary for their policies to stay in place over the long term.[90]

In other words, the willingness of Congress and the judiciary to bend to the president's challenge aids in giving the president greater success in implementing new policies in the wake of an emergency or crisis.

To put the hypothesis discussed in short form, if the external threat leads to a greater presidential execution of his power as described by the unitary executive theory, and there is domestic support (pres. popularity + comp. of Congress) for the president at the time of the legislative or judicial decision on the policy, the legislature and the judiciary are more willing to cede their checking power, thus causing the president's policy to be successful. [91]

Conversely, if there is a lack of domestic support for the president at the time of the legislative or judicial decision on the new policy, the president's attempt to execute his power based on the unitary executive theory will fall flat. Success can only be claimed if both branches are unable to check the president.

Hypothesis Applied to a U.S. President Expanding His Power as Described by the Unitary Executive Theory



4. LIMITATIONS

While the unitary executive theory described in today's literature is able to help us identify patterns where presidents challenge the separation of powers and push their power into the legislative and judicial realm, it is unable to predict when presidents are successful in this effort, and when they aren't. This dissertation therefore develops a theory to explain under which circumstances this can happen. By proposing conditions and variables up front which could be indicators for the president's success, or lack

[90] Yoo, John 2009: Crisis and Command. New York: Kaplan Publishing, xix-xx.
[91] The hypothesis in short mathematical form is: (A →q→r + s→t→B). Stephen van Evera uses a similar generic formula (A x C →q →r →s →t →B) to show how to arrow diagram a generic theory in van Evera, Stephen 1997: Guide to Methods for Students of Political Science. New York: Cornell University, 13.

thereof, it seeks to test whether the hypothesis played out in reality in the case of the Bush administration. It then seeks to confirm the results through testing the theory in three additional case studies.

I recognize that there are challenges to this goal. My model looks at a legal theory which interprets constitutional law and applies it to a political science model. Where that legal theory falls short, it then seeks to develop a causal analytical theory. Since the arguments of unitary executive theory rely on precedence, they are more normative, while the proceeding theory this dissertation develops is deductive. Yet it is exactly this intersection between rights law and political science that is often lacking in the social science arena. Lawmaking transcribes theories of social science into practice, according to Christoph Engel.[92] In fact, the most important responsibility of law is the search to resolve societal problems, and both theoretical social science and law are able to make scholarly arguments about normative questions, says Engel.[93]

Engel claims further that legal science provides the social sciences with societal problem solving. This culminates in his conclusion that legal science is practiced social science: "The proper use of law is much more its constitutional connection to practical experience. The title of this essay describes it well: Law is practiced social science."[94]

The development of detainee policy during the Bush administration lies at the intersection of law and political science with questions such as: "How has human rights law been practiced to this point?" and: "How can the president's power be interpreted in constitutional law?" and: "What theory could explain when presidents successfully implement a new policy?" and: "What theory can explain when checks and balances work and when they don't?" Therefore, the dissertation is enriched when both aspects of law and political science are used. This dissertation shows that theory development is needed in order to move beyond

[92] Engel, Christoph 1998: Methodische Zugänge zu einem Recht der Gemeinschaftsgüter. Common Goods: Law, Politics and Economics, Vol.1. Baden-Baden: Nomos Verlagsgesellschaft, 15. URL: http://www.coll.mpg.de/publications/rechtswissenschaft-als-angewandte-sozialwissenschaft-die-aufgabe-der-rechtswissenschaft, last accessed June 13, 2012.

[93] Ibid, 39, 40. My English summarizes his argument: "Eine Rechtswissenschaft, die sich nicht hermetisch gegen Sozialwissenschaften abgrenzt, ist selbst Sozialwissenschaft. Denn ihre wichtigste Aufgabe deckt sich: Die Suche nach der besten Lösung gesellschaftlicher Probleme. Mit den theoretischen Sozialwissenschaften teilt die Rechtswissenschaft die Überzeugung, daß wissenschaftliche Aussagen über normative Fragen möglich sind."

[94] Ibid, 40. My English summarized the German quote: "Das Proprium der Rechtswissenschaft ist vielmehr ihr konstitutioneller Bezug zur Praxis. Der Titel dieses Aufsatzes bringt das mit der Formulierung zum Ausdruck: Rechtswissenschaft ist angewandte Sozialwissenschaft." Engel further claims on p. 32 that: "Theory without practice describes a legal history, which only poses a historical question. But practice without theory creates a commentator, who simply creates case studies." In German: "Theorie ohne Praxis beschreibt etwa eine Rechtsgeschichte, die nur noch eine historische Fragestellung hat. Praxis ohne Theorie betreibt etwa ein Kommentator, der nur noch Fallgruppen bildet."

merely describing case studies or a historical question, to create a strong, predictive model that can help address when checks and balances fall short during a war presidency.[95]

5. Conclusion

Far from the single presidency described by Hamilton and other founding fathers when they mentioned the "unitary executive," the authors of the controversial "unitary executive theory" during the Reagan administration mapped out a system of executive power that would not be limited by checks from the other two branches. This "unitary executive" can most often be identified in U.S. administrations during crisis and emergencies, and is marked by the president pushing constitutional boundaries in his execution of his foreign affairs duties, including in the area of war powers. Decisions made in administrations marked by the uet are often legally explained through the president's "Commander in Chief" power and by his power to "take Care that the Laws be faithfully executed."[96]

The limitations of the unitary executive theory by itself to explain presidential decision making in crisis come because it is not able to predict when the president is successful with pushing through his policy preferences when he makes decisions to expand his power as described by the uet. Despite its limitations, the unitary executive theory has greater potential than the other models to provide explanatory power about the Bush administration's decision making leading to the new detainee process. While Janis' work could be helpful to explain the group think process occuring within the group of the president's closest advisors on detainee policy, the question of how the group can get the president to change his mind if he doesn't follow Janis' formula remains unanswered. Allison's model could help us understand the main players' bargaining process, but doesn't explain the way forward when the players don't act rationally.

The unitary executive theory, on the other hand, provides Article II-based arguments which can explain how to strengthen the president's executive power and weaken the other branches' attempts to check it during crisis decision making. My hypothesis fills in the gap in the uet's predictive power by testing whether specific variables such as the presidential approval ratings and composition of Congress

[95] Engel further claims on p. 32 that: "Theory without practice describes a legal history, which only poses a historical question. But practice without theory creates a commentator, who simply creates case studies." In German: "Theorie ohne Praxis beschreibt etwa eine Rechtsgeschichte, die nur noch eine historische Fragestellung hat. Praxis ohne Theorie betreibt etwa ein Kommentator, der nur noch Fallgruppen bildet."
[96] See p. 10.

influence the willingness of the legislative and judiciary to cede their checking power, thus leading to successful policy change by the president. In the next section, my hypothesis regarding the uet will be applied to the case study of how the new detainee policy was created during the Bush administration.

CHAPTER TWO
CHECKS AND BALANCES

Abstract: This chapter looks at what role Congress and the judiciary plays in allowing the president to push constitutional boundaries to expand the executive as described in the unitary executive theory. Through examining the constitutional mandate of each branch and precedent set by case history in the area of war powers and detainee policy, it looks at the legacy that was left for the Bush administration. It then briefly discusses how the legislative and judiciary branches responded to this precedent during the Bush presidency.

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[1]

In chapter one, we established that the unitary executive theory has the potential to explain the method of governing used by the Bush administration to create new detainee treatment standards. We then asked the question: "When is the president successful in changing policy as he executes his power in a manner consistant with the unitary executive theory?" We identified several factors that contribute to success: An immediate international threat, a high domestic approval rating, and a unified party government. In this chapter, we look at the second antecedent condition which can lead to the successful expansion of presidential power in determining policy: the ability or failure of the judiciary and the legislative branch to check the president. More specifically, what role does Congress and does the judiciary play in allowing the president to push constitutional boundaries to expand the executive as described in the unitary executive theory?

While Congress and the judiciary have the Constitutional mandate to check the president when he exerts his power to create a policy that violates the Constitution and U.S. law, history and current practice have created obstacles to this mandate. This chapter will first look at the separate powers of the president, the Congress and the

[1] Madison, James: Federalist No. 47, "The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts," New York Packet, Feb. 1, 1788. Made available by: Yale Law School, The Avalon Project. URL: http://avalon.law.yale.edu/18th_century/fed47.asp, last accessed Jan. 17, 2012.

judiciary as defined by the Constitution and through U.S. history by the courts. Specifically, the chapter will examine the constitutional mandate each branch has in the foreign affairs arena and in the powers of war, which is pertinent to the creation of detainee policy. Secondly, it will look at the obstacles to the application of these powers. Finally, it will assess the precedence set by the judiciary and legislature's ability to check the president, or lack thereof, and what kind of legacy this left for the Bush administration as it considered a new chapter in detainee policy.

First, what is the mandate of the Congress and the judiciary? Checks and balances, a term attributed to Charles Montesquieu, refers to the means by which the power of one person or group is limited in order to prevent the abuse of that power.[2] Montesquieu proposed a "separation of powers" between the executive, legislative and judicial branches, which allows each branch to have its own powers, but also the ability to place limits on the power of other branches.[3] While the phrase "checks and balances" does not exist in the U.S. Constitution, it was one of the first documents to create a framework for a government which seeks to apply the concept by balancing power and justice.[4] James Madison quotes from Montesquieu frequently in explaining the concept to his fellow statesmen in the Federalist papers, as he hoped for their ratification of the Constitution.[5] Since the heart of the unitary executive theory assumes a pushing of constitutional boundaries for the expansion of executive power, often encroaching on the mandate of the legislative and judicial branches, it is helpful to examine what the Constitution says about each branch's mandate.

1. CONSTITUTIONAL MANDATE

Where do the Constitutional boundaries fall in terms of the three branches' powers to make detainee policy? In Article I, Section 8, the Congress is given the power to declare war and provide for the common defense of the United States. It is further given the power "To define and punish Piracies and Felonies committed on the high

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[2] "Checks and balances," New World Encyclopedia. URL: http://www.newworldencyclopedia.org/entry/Checks_and_balances, last accessed March 12, 2012.
[3] See: Montesquieu, Charles 1748. The Spirit of the Laws, translated by Thomas Nugent 1752. Batoche Books: Kitchener (2001), Book VI, Chapter 6.
[4] "Checks and balances," New World Encyclopedia. URL: http://www.newworldencyclopedia.org/entry/Checks_and_balances, last accessed March 12, 2012.
[5] Madison, James: Federalist No. 47, "The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts," New York Packet, Feb. 1, 1788. Source: Yale Law School, The Avalon Project. URL: http://avalon.law.yale.edu/18th_century/fed47.asp, last accessed Jan. 17, 2012.

Seas, and Offences against the Law of Nations;" to "make Rules concerning Captures on Land and Water," and to "repel Invasions."[6] This means Congress can make rules regarding detainees, how they are treated in the theater of war, and how they are captured.

Congress can check the president through impeachment, and create tribunals inferior to the Supreme Court. These could also be tribunals to try detainees. But Congress is limited by its short term of service and by the fact that the president has to approve of all laws.[7] Congress can further check the court through making regulations on jurisdiction except in cases involving "Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[8]

According to Article II of the U.S. Constitution, the president is the Commander-in- Chief of the armed forces; he has the power to appoint ambassadors, ministers, consuls and Supreme Court justices, and the power to make treaties.[9] He can check the Congress by his veto, and have influence over the court by his appointments. His appointments, as we saw in chapters three and four, can also have a large influence on detainee policy.

The Constitution spends far fewer words on the judiciary's mandate in foreign affairs. Article III charges the judiciary with "all Cases," concerning law "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." This can include cases "affecting Ambassadors, other public Ministers and Consuls" and cases "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[10]

While the court cannot take the initiative in questions of foreign policy and in matters of war and on detainees in particular, they establish policy by their mediation of the executive and legislative.

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[6] U.S. Constitution, Article I, Section 8.
[7] U.S. Constitution, Article I, Section 7. Here, the Congress has a high standard to reach: "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."
[8] U.S. Constitution, Article III, Section 2.
[9] U.S. Constitution, Article II, Section 2.
[10] U.S. Constitution, Article III, Section 2.

2. MANDATE AS DEFINED BY THE COURTS

In *Ex parte Quirin*, the case that became known as the "Nazi Saboteurs", eight German agents working with the Nazis arrived in New York and Florida in June of 1942 with plans to attack strategic transportation facilities and factories. To deal with them, President Roosevelt wanted a system that would allow no access or review to U.S. courts, partially out of grave concern that the tale of their infiltration would reveal U.S. national security weaknesses during a time in which the United States was still at war. The military counsel for the Nazi saboteurs challenged the constitutionality of their trials in military commissions in *Ex Parte Quirin*, and the Supreme Court made it clear where the separate responsibility for Congress and the President lies when it comes to military courts.[11]

It found that it was legal for the president to set up military courts in times of war to try the eight German Nazi saboteurs *because Congress had authorized those trials by legislation*.[12] After stating which responsibilities the Constitution grants the President and the Congress in Articles I and II, the ruling states where the boundaries lie in the separation of powers (italics mine):

"The Constitution thus invests the President as Commander in Chief with the power to wage war *which Congress has declared*, and to carry into effect *all laws passed by Congress* for the conduct of war and for the government and regulation of the Armed Forces …"[13]

In this case, the justices point out, the president is to faithfully execute, the Congress is to initiate. The Court ruled they have done so constitutionally due to the following actions:

> By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are

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[11] Yoo, John 2009: Crisis and Command. New York: Kaplan Publishing, 311-313.
[12] In this case, the legislation was the Articles of War. See: "*Ex Parte Quirin* - Significance, Supreme Court Holds Special Session As Saboteurs Face Death Penalty." 2011 Law Library – American Law and Legal Information. URL: http://law.jrank.org/pages/13645/Ex-Parte-Quirin.html, last accessed Dec. 7, 2011.
[13] *Ex Parte Quirin*, 317 U.S. 1 (1942). URL: http://law2.umkc.edu/faculty/projects/ftrials/conlaw/quirin.html, last accessed Jan. 16, 2012.

> cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law.[14]

The Supreme Court, then, provided four conditions for a constitutional use of power by the President to create detainee commissions. The military commissions are constitutional when: 1.) Congress has declared war 2.) Congress has provided legislation which give military tribunals jurisdiction over offenders or offenses 3.) The President has issued a Proclamation (ie, signing the declaration of war into law) 4.) the detainees *are charged with* a crime which can only be tried in such a commission (espionage, etc.).

It went on to define who may be subjected to court martial or military commissions as defined by the Congress-legislated Articles of War and of what they are to be charged: "Articles 81 and 82 authorize trial, either by court martial or military commission, of *those charged* with relieving, harboring or corresponding with the enemy and those charged with spying."[15] This is one of the few cases in the period immediately following World War II where the balance of power between Congress and the president is so described by the courts, with Congress as initiator and authorizer of war and commissions related to it.

A look at the significant war powers court cases before and after *Ex Parte Quirin* gives us insight into whether the four conditions for the president's use of power, as set out by *Quirin*, had sticking power. The next section will examine whether their rulings had direct implications for detainee policy.

3. Change in the mandate for Congressional declaration of war and Presidential proclamation

At the turn of the eighteenth century, the Supreme Court issued several rulings which made clear that the power to declare war lies with Congress: *Bas v. Tingy* in 1800, *Talbot v. Seeman* in 1801, *United States v. Smith* in 1806. In every case, the court ruled that it was for Congress alone to start hostilities, while the president may respond only to sudden attacks on the United States.[16]

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[14] Ibid
[15] Ibid
[16] Adler, David Gray, and George, Larry N. (eds.) 1996: The Constitution and the Conduct of American Foreign Policy. Lawrence, Kansas: University Press of Kansas, 23.

In *Prize Cases* in 1863, the Supreme Court left the door open for change when it ruled that Lincoln was justified in blockading a southern port during the Civil War, though Congress only declared it a war after the president ordered the blockade.[17] As will be discussed more in the next chapter, the Supreme Court tightened the interpretation of Congress' constitutional mandate in the 1866 ruling in *Ex Parte Milligan*, where Congress was again named by the courts as needed initiator and authorizer of war powers, specifically related to military commissions.

But this initiator role for Congress changed with the ruling in 1936 on the *United States v. Curtiss-Wright Export Corp*. While the question of the day was whether it was constitutional for Congress to issue a joint resolution forcing the president to stop the sale of weapons to Bolivia and Paraguay, Justice Sutherland created precedent when he declared that the foreign affairs power was the "exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress."[18]

In the wake of this ruling, the president acting as "sole organ" to determine foreign policy, without the authorization of Congress, soon became regular practice. While the 1942 *Quirin* case just described was an exception, the court began to more frequently rule in favor of the president based on this sole-organ doctrine in cases such as *United States v. Pink*.[19]

This 1942 case did not directly rule on war powers, but the legacy of cases riding on *Curtiss-Wright* such as this one saw presidential power expand in the foreign affairs arena, thus providing precedent for our case study. In *United States v. Pink*, the Supreme Court ruled that "The actions of the President regarding foreign relations have supremacy over state law."[20] Even more interesting is what the court ruled in regards to its own power. The exercise of the foreign relations power by the political branches of the government "is not subject to judicial inquiry" according to the ruling, and the "recognition of a foreign state is binding on state and federal courts" and has retroactive

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[17] Linder, Doug 2011: "War and Treaty Powers, The Issue: How have the war and treaty powers in the Constitution been interpreted?" Exploring Constitutional Law. University of Missouri-Kansas City Law School. URL: http://law2.umkc.edu/faculty/projects/ftrials/conlaw/warandtreaty.htm, last accessed Jan. 31, 2012.
[18] Ibid, 25
[19] Ibid, 28-29
[20] *United States v. Pink* – Case Brief Summary. Lawnix. URL: http://www.lawnix.com/cases/us-pink.html, last accessed Jan. 31, 2012.

power.[21] In this case, not only did the court say that the government could bypass the Senate and the state of New York when it demanded $1 million from a New York branch of a Russian bank (after the U.S. president recognized the Soviet Union, receiving as part of the deal the assets of the bank, among other things), but that the courts should have nothing to say about such an action.[22]

The Supreme Court bounced back with its ruling in *Youngstown Sheet and Tube Co. v. Sawyer* in 1952, which strengthened Congressional power when it said the president could not act without congressional approval even in a state of emergency. In this case, President Truman had told the Secretary of the Interior to take over steel mills during the Korean War because they were on strike, and this could hinder the war effort. Like many other uet presidents including President Bush after him, he based his order on "all powers vested in the President by the Constitution and the laws of the United Sates and as President of the United States and Commander in Chief of the Armed Forces."[23]

Yet the court said that the "authority of the President to issue such an order in the circumstances of this case cannot be implied from the aggregate of his powers under Article II of the Constitution" and that the order could also not be carried out "as an exercise of the President's military power as Commander in Chief of the Armed Forces."[24] The president's emergency powers during wartime were not unlimited.

Yet in *Massachusetts* v. *Laird* (1970), Congressional silence was ruled as *de facto* concurrence with the president, and the president once again had the upper hand. The First Circuit ruled that the Vietnam War could continue despite the fact that Congress had not declared war because Congress had taken other actions to support the war, such as continued appropriations of funding for the war, making clear that "the branches are not in opposition."[25] This had become the new standard for separation of power: the president could continue initiating hostilities unless Congress cried foul.

During the Bush administration, soldiers and their parents were not satisfied with the thought that anything short of an official Congressional declaration of war

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[21] *United States v. Pink* – Case Brief Summary. Lawnix. URL: http://www.lawnix.com/cases/us-pink.html, last accessed Jan. 31, 2012.
[22] Ibid
[23] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). URL: http://www.law.cornell.edu/supct/html/historics/USSC_CR_0343_0579_ZS.html, last accessed Jan. 24, 2012.
[24] Ibid, 587-589
[25] *Massachusetts v. Laird*, 400 U.S. 886 (1970).

could be used to send them into combat. In *Doe vs. Bush*, military personnel or their parents argued in 2003 that the President had overstepped his constitutional bounds in planning the offensive in Iraq. They argued that the "October Resolution" which Congress passed to authorize military force against Iraq was not constitutionally sufficient to allow the type of military offensive planned and that "Congress has handed over to the President its exclusive power to declare war."[26]

They called on the judiciary to "police the boundaries of the constitutional mandates given to the other branches: Congress alone has the authority to declare war and the President alone has the authority to make war."[27]

The U.S. Court of Appeals ruled that the case was not fit for judicial review because there was no specific "case or controversy" between the executive and the legislative "that clearly raises the specter of undermining the constitutional structure."[28]

While in this case, Congress had passed a resolution supportive of the war, at the start of the twenty-first century, Congress' power to declare war was at an ebb.[29] While in US history, there have been 11 formal declarations of war against foreign states by Congress (over five wars), the last occurred in World War Two.[30] Since then, U.S. military forces have been sent abroad 165 times through the end of 2009.[31] In only two instances prior to the Bush sr. administration did they invoke the War Powers Resolution reporting requirements.[32]

Worse, although U.S. presidents did send reports at some point during hostilities to Congress, "these episodes do not reveal a pattern of prior consultation and joint decision making that the resolution's authors hoped to achieve."[33] The reports usually happened after the president had committed troops abroad. In every case since Nixon,

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[26] *John Doe v. President Bush*, No. 03-1266 (2003), United States Court of Appeals for the First Circuit, 4. URL: http://www.ca1.uscourts.gov/pdf.opinions/03-1266-01A.pdf, last accessed Dec. 13, 2011.
[27] Ibid
[28] Ibid, 5, 6
[29] In the House, the vote was mostly along party lines, with 61 percent of House Democrats against the Iraq war. Less than 3 percent of House Republicans voted against.
[30] Elsea, Jennifer K. and Grimmett, Richard F., CRS Report for Congress: "Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications," March 8, 2007, CRS-2.
[31] Grimmett, Richard F., CRS Report for Congress: "Instances of Use of United States Armed Forces Abroad, 1798-2009," Jan. 27, 2010. 11-30. URL: http://www.au.af.mil/au/awc/awcgate/crs/rl32170.pdf, last accessed March 6, 2012.
[32] Keynes, Edward: "War Powers Resolution and Persian Gulf War." In: Adler, David Gray and George, Larry N. (eds.) 1996: The Constitution and the Conduct of American Foreign Policy. University Press of Kansas, 244.
[33] Ibid, 245

the presidents have seen the resolution as an unconstitutional attack on their executive privilege.[34]

Far from the war-authorizing Congress of the beginning of the nineteenth century, today's Congress is rarely being asked to declare or authorize war, but merely to not stand in the way when the president commits troops abroad. *Curtiss-Wright* with its "sole organ doctrine" created powerful precedent for presidents to use in expanding their foreign affairs and war powers. By ruling Congressional silence to be de facto approval for the president in *Laird*, the courts gave Congress a greater hurtle to leap over when it wants to check the president from committing the nation to hostilities. While the court has intermittently defended Congress' mandate as authorizer, its lack of consistent support for this aspect of Congress Article II powers has helped to pave the way for greater presidential power in this area.

4. LEGISLATION NEEDED FOR CREATION OF MILITARY TRIBUNALS AND DETAINEES

> It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions.[35]

Throughout U.S. history in times of war, presidents have tried detainees in military commissions. But the courts have consistently ruled that presidents can create and have detainees tried in such courts only when Congress legislates their use.[36] In the above quote from *Ex Parte Quirin*, the Supreme Court underscored the requirement that Congress legislates the use of the commissions. In *Quirin*'s case, this was done through Article of War 15, nearly identical to the Uniform Code of Military Justice (UCMJ), Article 21.[37] Its identical nature stems from the fact that while initially, the rules for such commissions were governed by the "Articles of War" from 1775 through 1950, when

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[34] Dittgen, Herbert: "Präsident und Kongress im außenpolitischen Entscheidungsprozeß" in: Haas, Christoph M. and Welz, Wolfgang 2007: Regierungssystem der USA. Oldenbourg Wissenschaftsverlag, 410.
[35] *Ex Parte Quirin*, 317 U.S. 1 (1942), 4, 5. URL: http: law2.umkc.edu/faculty/projects/ftrials/conlaw/quirin.html, last accessed: Jan. 16, 2012.
[36] Ibid
[37] *Hamdan v. Rumsfeld*, 548, U.S. 557 (2006), 3. URL: http://law2.umkc.edu/faculty/projects/ftrials/conlaw/hamdan.html, last accessed: Jan. 16, 2012.

these were replaced by the UCMJ.[38] This does not mean that the U.S. Congress has to create new legislation every time there is need for a commission. It does mean that commissions, when created, have to comply with the legislation on the books as to when it is created, for whom, for what crimes and with which procedures.

The Supreme Court ruled in 1864 in *Ex Parte Vallandigham* that it has no authority to issue a writ of habeas corpus for such a court, since military commissions are not within its jurisdiction. Still, it can rule on whether the courts were lawfully created and used appropriately.[39]

The first major case to challenge the president's use of military courts not legislated by Congress came in the Supreme Court's 1866 ruling in *Ex Parte Milligan* during the Civil War when President Lincoln wanted civilian lawyer Lambdin Milligan tried by military court for inciting support for the Confederacy. The Supreme Court ruled that the president could not try civilians by military trial if civilian courts were operating. According to the Articles of War passed by Congress, civilians may only be tried in military courts if convicted of spying or aiding the enemy or if they committed other offenses which the law of war requires be tried only by a military trial according to the Constitution.[40]

The *In re Yamashita case* of 1946 presented an interesting case in the aspects of creation and authorization of the courts. While the military commission trying a Japanese Commanding General for atrocities on the tail of World War II was created by an order of military command and by proclamation from the president, as throughout U.S. history they have been, the court ruled that these do not have weight if not in compliance with Congressional legislation of such tribunals. The Supreme Court went on to explain: "The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a

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[38] Chambers, John Whiteclay (ed.) 1999: "Military Justice: Uniform Code of Military Justice (1950-Present)," The Oxford Companion to American Military History. Oxford University Press: New York, 355. The Articles of War were expanded upon for the U.S. military services over time, and were done away with in 1950 when the UCMJ was written to unify for all U.S. military branches what had until then been separate rules of military justice for the Army and Navy (formally adopted 1951).

[39] *Ex Parte Vallandigham*, The Oyez Project at IIT Chicago-Kent College of Law. URL: http://www.oyez.org/cases/1851-1900/1863/1863_2**,** last accessed Feb. 1, 2012.

[40] Linder, Doug 2011: "War and Treaty Powers, The Issue: How have the war and treaty powers in the Constitution been interpreted?" Exploring Constitutional Law: University of Missouri-Kansas City Law School. URL: http://law2.umkc.edu/faculty/projects/ftrials/conlaw/warandtreaty.htm, last accessed Jan. 5, 2012. See also: Elsea, Jennifer K. and Grimmett, Richard F., CRS Report for Congress, "Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications," March 8, 2007, 1. URL: http://fpc.state.gov/documents/organization/82969.pdf, CRS-42.

preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war."

John Yoo, who is credited with being the main legal mind behind the Bush administration's detainee policy, points to *Yamashita*'s ruling on commissions as an example of "presidents and military commanders creating them on their own."[41] But the text of *Yamashita* shows that the Supreme Court ruled that the military court was constitutionally authorized because it was in conformity with Congress' sanction: "It thus appears that the order creating the commission for the trial of petitioner was authorized by military command, and was in complete conformity to the Act of Congress sanctioning the creation of such tribunals for the trial of offenses against the law of war committed by enemy combatants."[42]

This ability of presidents and military commanders to create commissions was tested during the Bush administration. In *Hamdan v. Rumsfeld,* the Bush administration claimed that the Authorization for the Use of Military Force Resolution (AUMF) following the attacks of September 11, 2001 was sufficient to provide a legislative basis for the military commissions to try detainees imprisoned at Guantanamo, and that it was the "inherent authority to convene military commissions to try and punish captured enemy combatants in wartime – even in the absence of any statutory authorization."[43]

In this case, the government said it could not only convene military commissions without Congress legislating their use, but it stated that Congress had inadvertently suspended the writ of habeas corpus through the Detainee Treatment Act, which Congress passed to defend the rights of detainees. [44] In its oral arguments, Justice Souter asked the government defense directly: "Did Congress, when it passed the DTA in December 2005, effectively strip the Supreme Court of the right to hear *habeus* appeals from the GTMO detainees? Can the Congress validly suspend it inadvertently?"[45]

The defense responded in the positive: "My view would be that if Congress sort of stumbles upon a suspension of the Writ, that the preconditions are satisfied …"[46]

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[41] Yoo, John 2006. War By Other Means. New York: Atlantic Monthly Press, 227.
[42] *In re Yamashita* – 327 U.S. 1 (1946) 327, U.S. 11 in: Justia U.S. Supreme Court Center. URL: http://supreme.justia.com/cases/federal/us/327/1/case.html#11, last accessed Feb. 1, 2012.
[43] Ball, Howard 2007: Bush, the Detainees, and the Constitution. Lawrence, Kansas: University Press of Kansas, 153.
[44] Ibid, 159
[45] Ibid
[46] Ibid

At issue was Section 1005 of the act, which stated that "no court, justice, or judge shall have jurisdiction to hear or consider"[47] a request for *habeus corpus* from a Guantanamo detainee other than the U.S. Court of Appeals for the District of Columbia Circuit, despite the fact that Sen. Durbin stated before the final Senate vote that "this amendment does not apply retroactively to revoke the jurisdiction of the courts to consider pending claims invoking the Great Writ of *Habeus Corpus*."[48]

The Supreme Court ruled that because the act did not specifically prohibit the Supreme Court from hearing the case, the government could not argue that the Supreme Court did not have jurisdiction. It also ruled that pending habeas cases could still be heard in federal court.[49]

The bottom line from *Hamdan v. Rumfeld* would have a great impact on the separation of powers and the weight that the unitary executive theory arguments would receive. By ruling that the president did not have inherent authority unconnected from Congress' authorization, and that neither the AUMF nor the DTA authorized the *military commission* that was to try Hamdan, and that President Bush had gone beyond his constitutional powers, the Supreme Court was putting a marker in place for the limits of a unitary executive. Because the trials neither complied with the Uniform Code of Military Justice nor the Geneva Conventions, the president had acted unlawfully, the court said.[50]

In announcing the opinion of the court, Justice Stevens clearly describes how the separation of powers was violated in the case of Hamdan:

> The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President … Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment

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[47] Detainee Treatment Act, Public Law 109-148, 119 Stat. 2739, Sec. 1005.
[48] Ian Wallach: "No *Habeus* at Guantanamo? The Executive and the Dubious Tale of the DTA," in: Forum, Jurist: Legal News and Research, April 4, 2006, 5-6. URL: http://jurist.law.pitt.edu/forumy2006/03/no-habeus-at-guantanamo-executive-and.php, last accessed Jan. 16, 2012.
[49] Ball, Howard 2007: Bush, the Detainees, and the Constitution, University Press of Kansas, 162.
[50] Ibid, 163. See also: Linder, Doug 2011: "War and Treaty Powers, The Issue: How have the war and treaty powers in the Constitution been interpreted?" Exploring Constitutional Law: University of Missouri-Kansas City Law School, 4. URL: http://law2.umkc.edu/faculty/projects/ftrials/conlaw/warandtreaty.htm, last accessed Jan. 5, 2012. See also: *Hamdan v. Rumsfeld*, Brief for Respondents, at Sec. I, 6, 7. URL: http: www.hamdanvrumsfeld.com/petbriefhamdanfinal.pdf, last accessed March 14, 2012.

> of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.[51]

This was a modification of an earlier ruling in the case of *Hamdi v. Rumsfeld*. There, the court ruled that Congress had authorized Hamdi's *detention* through the AUMF. It ruled, however, that Hamdi's right to due process had been violated and he had the right to a fair trial. Especially interesting is Justice O' Connor's defense of the separation of powers in her concluding judgment:

> In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.[52]

The courts were not willing to cede their checking power on the executive in the area of civil liberties during wartime, nor were they willing to let Congress cede its power to the president. In the court's opinion, the separation of powers was tantamount. Indeed, the 2008 *Boumediene* ruling was further proof that the judiciary was willing to protect the separation of powers principle.[53] When it ruled that the detainees had the right to the writ of *habeus corpus*, it justified this with the separation of power principle:

> That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken in the Suspension Clause to specify the limited grounds for its suspension: The writ may be suspended only when public safety requires it in times of rebellion or invasion. The Clause is designed to protect against cyclical abuses of the writ by the Executive and Legislative Branches. It protects detainee rights by a means consistent with the Constitution's essential design, ensuring that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance." *Hamdi*, supra, at 536. Separation-of-powers principles, and the history that influenced their design, inform the Clause's reach and purpose.[54]

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[51] *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006), Sec. IV, 3. URL: http://law2.umkc.edu/faculty/projects/ftrials/conlaw/hamdan.html, last accessed: Jan. 16, 2012.
[52] *Hamdi v. Rumsfeld* 542 U.S. 507 (2004) at D: O'Connor, plurality opinion. URL: http://www.law.cornell.edu/supct/html/03-6696.ZO.html, last accessed Jan. 16, 2012.
[53] See chapter three, pg. 79 for further description of the case.
[54] *Boumediene v. Bush*, 553 U.S. 723 (2008). URL: http://www.law.cornell.edu/supct/html/06-1195.ZS.html, last accessed March 7, 2012.

In so ruling, the Supreme Court addressed head on the core issue at the heart of the detainee abuse case: The Constitution does not allow for "cyclical abuses" of civil liberties by one branch of government during wartime. Far from being an area only touched on by international law or treaties with foreign countries as maintained by the Bush administration, the protection of detainee rights is as basic as the "Constitution's essential design" which protects the separation of powers, they argued. An expansion of power in the manner described by the unitary executive theory – allowing the president to push constitutional boundaries and violate separation of powers principles – could not be defended in this case.

While at the beginning of the twenty-first century, the courts were allowing the president greater power to initiate hostilities, the courts have fairly consistently ruled in favor of Congress' power to legislate in detainee policy, such as the authorization of military commissions and rules for detention. In such cases, the courts have often checked the president when he has sought to squelch the mandate. How has Congress responded? Let us now take a more detailed look at the mandate of Congress to define detainee policy, and how Congress has responded when this mandate when this mandate was compromised.

5. Mandate as defined by Congress

As discussed above, Congress had provided rules for the detention and trial of detainees through the Articles of War, which later were revised to become the Uniform Code of Military Justice. These defined who could be tried for what crimes, how they were to be tried, and the conditions for detention. Because up through World War II Congress was often also called upon to authorize war, determining the detainee policy within the confines of those Congress-declared and limited wars was a matter of correct interpretation of the Articles of War and UCMJ.

But in the undeclared, president-initiated wars following, Congress' mandate in defining detainee policy also became muddled. Following *Laird*, Congress decided an intervention was necessary. After being asked to step aside during the Vietnam War, Congress wanted to ensure that it would not again be forced to standby while the president initiated hostilities and executed secret operations. It thus passed the War Powers Resolution in 1973, with the goal of increasing communication between the executive and the legislative branches and strengthening the legislature's power to

check the executive. Because Congress wanted to ensure that it was informed of hostilities in every eventuality, it opened wide the category of when the president was to report and consult with Congress before the beginning of hostilities.

In the beginning of the legislation, Congress admitted the President had broad powers when it stated:

> 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.[55]

What had been a slowly growing practice by the president to initiate hostilities without a declaration of war now had a legal stamp of approval from Congress. Though Congress' intent was ultimately to check the president through the legislation, this statement, through its introduction of the word "or," accomplished the opposite. The President could cite his Commander-in-Chief power and introduce the military to hostilities without a declaration of war or statutory authorization if there was a national emergency which included an attack on the U.S. or its possessions. While this had been practice, the War Powers Resolution made the exception law.

Congress further weakened its influence by placing vague language in the bill. While Congress' intent was to be informed before the president sent troops to war, by stating that "The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities" Congress left the door open for possible instances in which the president would not do so, thus extending the status quo.[56]

On the other hand, it more explicitly defined how the war powers are to be shared between the executive and the legislative. Now Congress claimed that the intention of the Constitution's framers was to: "insure that 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

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[55] War Powers Resolution, Joint Resolution Concerning the War Powers of Congress and the President, Nov. 7, 1973. URL: http://avalon.law.yale.edu/20th_century/warpower.asp, last accessed Feb. 8, 2012.
[56] Ibid, Sec. 3

hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."[57]

To further such "collective" decision-making even in a century where wars were no longer declared and the president introduces armed forces into hostilities before informing Congress, rather than after getting its authorization, the Congress requires in Section 4 of the bill that the president report on the hostilities within 48 hours. This includes the scope and duration of the involvement, as well as "the constitutional and legislative authority under which such introduction took place."[58]

Here, Congress creates a standard, declaring that even if the president had proceeded with the initiating of hostilities without first informing Congress, he needs the legislature's authorization to do so. This is further underscored by the fact that all hostilities have to cease within 60 days unless, according to Sec. 5, "Congress has declared war or has enacted a specific authorization for such use of United States Armed Forces," and can then only continue for 30 days if the president demonstrates the necessity.[59] On the other hand, if Congress has not provided "a declaration of war or specific statutory authorization" Congress can direct the President to remove the forces.[60] To ensure that the rules regarding presidential war powers are clear, Congress ends the legislation by stating that nothing in the act "shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities."[61]

Yet every president in office since the resolution was passed has also found the legislation unconstitutional because it limits the president's power. The President has argued that he has the authority to use military force under additional circumstances beyond an attack or authorization by Congress in circumstances that would require: "the rescue of U.S. citizens, protect U.S. Embassies and legations, suppress civil insurrection, implement the terms of an armistice or cease-fire involving the United States, and carry out the terms of security commitments contained in treaties."[62] The courts have not directly addressed the constitutionality of the War Powers Resolution, leaving the

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[57] Ibid
[58] Ibid, Sec. 4b
[59] Ibid, Sec. 5b
[60] Ibid, Sec. 5c
[61] Ibid, Sec. 8d2
[62] Grimmett, Richard F., Congressional Research Service, "The War Powers Resolution: After Thirty Years," March 11, 2004. URL: http://www.au.af.mil/au/awc/awcgate/crs/rl32267.htm#_1_12, last accessed March 7, 2012.

burden on Congress of when to invoke it.[63] Indeed, the limitations on Congress' war powers, and therein, its powers to determine detainee policy, are not just created by the executive, but by structures within Congress itself.

6. Barriers to Congress' Checking Power

6.1 Within Congress Itself

The support given Congress to regulate the president is only as strong as its political will. Harold Hongju Koh writes that even if Congress opposes the president by joint resolution or denying appropriated funds, Congress needs a two-thirds vote in both houses to overcome a presidential veto.[64] Koh argues, "For if Congress must muster a two-thirds vote in both houses to override a veto, only thirty-four senators can undercut its efforts. It is a crippled president indeed who cannot muster at least thirty-four votes for something he really wants, especially in foreign affairs."[65] In reality, this meant that in the first 200 years of its history from 1789 to 1989, Congress was only able to muster the political will to overcome the president's vetoes 7 percent of the time.[66]

When Congressmen have to take responsibility for a decision on the foreign affairs front, they face political fallout not only from their colleagues in the legislature within their party (and from the president, if he is of the same party), but they can feel the backlash in their voting district, where the House members have to face reelection every two years.[67] On the other hand, benefits of a domestic decision made by a Congressman are more obvious to voters than those of a foreign policy decision, providing less incentive for a Congressman to take risks in the foreign affairs sphere.[68]

Koh further argues that the president often wins in foreign affairs because of legislative short-sitedness, bad bill drafting and a lack of strong tools to deal with

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[63] Grimmett, Richard F., Congressional Research Service, "War Powers Resolution: Presidential Compliance," June 24, 2011, 2, 4. URL: http://www.fas.org/sgp/crs/natsec/RL33532.pdf, last accessed March 7, 2012.
[64] Koh, Harold Hongju 1996. "Why the President Almost Always Wins." In: Adler, David Gray, and George, Larry N. (eds.) 1996: The Constitution and the Conduct of American Foreign Policy. Lawrence, Kansas: University Press of Kansas, 171.
[65] Ibid
[66] Ibid. More recently, Congress has been more successful. From 1969 to 2004, Congress overrode 1 out of 5 vetoes, or 18.3 %. See: Sollenberger, Mitchel A. 2004: "Congressional Overrides of Presidential Vetoes" in: CRS Report for Congress, CRS-2. URL: http://www.au.af.mil/au/awc/awcgate/crs/98-157.pdf, last accessed March 12, 2012.
[67] Ibid, 172
[68] Marshall, Bryan W. And Haney, Patrick J.: "Aiding and Abetting." In: Barilleaux, Ryan J. and Kelley, Christopher S. (eds.) 2010: The Unitary Executive and the Modern Presidency. College Station: Texas A & M University Press, 194.

executive power. [69] For example, he argues that the War Powers Resolution fails today because it was created to stop a war that starts slowly and has traditional physical boundaries and time frames, unlike the war on terror.[70] Phrasing that leaves the bill open to interpretation usually also has little checking power on the president.[71]

In 1974, Congress was faced with just this problem when it sought to further place a check on the executive's control over intelligence services through the Hughes-Ryan amendment. In the 1960s and 1970s, the CIA was involved in spying on its own citizens during the Nixon administration, organizing a badly-planned Bay of Pigs invasion in 1961 under Kennedy, helping to support the violent ouster of the Allende regime in Chile in 1973, and in plotting the assassination of Fidel Castro and other heads of state with whom we had poor relations. Congress passed the Hughes-Ryan amendment to make the intelligence services report any time they were involved in operations beyond just gathering intelligence. Unfortunately, the lack of specific wording left the amendment without teeth, and the president and the CIA continued with the status quo, reporting only once operations were over.[72]

In 1980 it discontinued the Hughes-Ryan amendment and replaced it with the Accountability for Intelligence Activities Act, which made two congressional committees have direct oversight over intelligence services covert operations. But because the act once again gave the president broad authority in the direction of intelligence activities, the act did not have the needed checking authority.[73]

Even if the wording is strong, the two main tools Congress uses to challenge the president – appropriations and resolutions – are also not fail-proof. Some appropriations have to be reconsidered yearly. The president can also use funds for his pet projects (or wars) with reprogrammed money that was initially not appropriated for that activity or program. Reporting and other legislative requirements are only as tough

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[69] Koh, Harold Hongju 1996. "Why the President Almost Always Wins." In: Adler, David Gray, and George, Larry N. (eds.) 1996: The Constitution and the Conduct of American Foreign Policy. Lawrence, Kansas: University Press of Kansas, 164.
[70] Ibid, 164
[71] Ibid, 166-167
[72] Spitzer, Robert J. "President, Congress, and Foreign Policy," in: Adler, David Gray, and George, Larry N. (eds.) 1996: The Constitution and the Conduct of American Foreign Policy. Lawrence, Kansas: University Press of Kansas, 103.
[73] Ibid, 104

as the courts and institutions willing to support them. And since *INS v. Chadha*, legislative vetoes also have no legal effect.[74]

In *INS v. Chadha*, the Supreme Court made a landmark ruling upholding the separation of powers and checking Congress' power to intrude in the executive sphere. From the 1930s until 1952, Congress had to pass through concurrent resolution a vote to change the Attorney General's decision to not deport an alien. But in June 1952 it passed an act stating that there should be only a one-house vote to overrule the Attorney General's decision. In the case of Chadha, the attorney general had refused to deport the son of Indian parents born in Kenya. He held a British passport. Both Britain and Kenya refused him residence, and the Attorney General decided to suspend his deportation on the grounds that the deportation would cause him extreme hardship.[75]

Congress used a legislative veto to force the deportation. The court said that the one-house vote in the form of the legislative veto used to check the executive was unconstitutional on the grounds that it violates the separation of powers. It also ruled that it violates the principles of bicameralism and the presentment clause, which hold that both houses of Congress must pass the bill and as the latter requires, that it must be presented to the president. The ruling also stated that Congress cannot use its legislative power to deprive an individual outside Congress of their civil rights.[76]

This ruling limited Congress' power because Congress had used its authority to thwart the executive by neither following the Constitution's form to create laws, nor the spirit of the law to protect civil liberties. The result of the ruling was that Congress was no longer allowed one or two-house vetoes, but it has continued to use the same type of mechanism in committee to check executive actions.[77]

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[74] Ibid, 168

[75] Underwood, William C.B. 1997: "Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases," Indiana Law Journal, Vol. 72: Issue 3, Article 9, 892. URL http://www.repository.law.indiana.edu/ilj/vol72/iss3/9, last accessed Jan. 18, 2012. See also: Hall, Kermit L. (ed.)1992, 2005: "Immigration and Naturalization Service v. Chadha," Oxford Companion to the US Supreme Court, Oxford University Press: New York.

[76] Yoo, John 2005: Powers of War and Peace. Chicago: University of Chicago Press, 226. See also: Hall, Kermit L. (ed.) 1992, 2005: "Immigration and Naturalization Service v. Chadha," Oxford Companion to the US Supreme Court. Oxford University Press: New York.

[77] Barilleaux, Ryan J. and Kelley, Christopher S. (eds.) 2010: The Unitary Executive and the Modern Presidency. Texas A & M University Press, 32-33.

6.2 CHALLENGES FROM OUTSIDE

While some limitations to Congress' ability to check the president come from the structure and method of operating of Congress itself, others come from the executive. Yoo argues that the President has the upper hand in war-making and foreign affairs powers due to historical precedent, because he has better intelligence, and because he can do so in a faster, more unified way than Congress.[78]

While Hamilton claimed the same, history –and the legislature's failure to act – strengthened some of these advantages. After Congress did little to help the president stand in the way of the Nazis during World War II, and the public saw that the legislative acted too little too late, the Congress was ready to support a strong executive. This paved the way for President Truman's decision in 1950 to commit 83,000 troops to fight North Korea – without the approval of Congress before or after the fact. The president made the decision based solely on his Commander-in-Chief power and his need to protect American foreign policy.[79]

In the twentieth century, the president's institutional strength as leader of the free world after World War II provided him with support from the outside. This bolstered his institutional strength which was already more unified than a Congress whose many members must be continually reelected (in the House every two years) and which represents two different parties.

His ability to nominate judges and appoint national security staff especially gives him an advantage in foreign policy. And while Congress has attempted to check the president's monopoly on the U.S. intelligence agencies, this has rarely been successful, and has become less so since the attacks of 9/11. This is partially because most intelligence-gathering happens through executive agencies, such as the Central Intelligence Agency, the National Security Agency or the Defense Intelligence Agency.

While Reagan listed 12 federal intelligence agencies in 1981 (5 under the DOD and 7 under the president),[80] now there are 16 publicized federal intelligence

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[78] Nzelibe, Jide and Yoo, John 2006: "Rational War and Constitutional Design". In: The Yale Law Journal, 2512-2523.

[79] Ratner, Michael, and Cole, David 1984: "The Force of Law: Judicial Enforcement of the War Powers Resolution". In: Loyola of Los Angeles Law Review, Vol. 17, June 1, 1984, 724. URL: http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1434&context=llr, last accessed Feb. 20, 2012.

[80] Spitzer, Robert J. 1996, "President, Congress, and Foreign Policy," in: Adler, David Gray, and George, Larry N. (eds.) 1996: The Constitution and the Conduct of American Foreign Policy. Lawrence, Kansas: University Press of Kansas, 102.

organizations. Since 9/11, Congress infused over $100 billion to be used for U.S. defense and the fight against al Qaeda. Since 9/11, 51 federal groups and military commands working in 15 cities across the United States also track money going to and from terrorist organizations.[81] And because the 16 main intelligence agencies report to the executive through the Cabinet (ie the Department of Justice or the Director of National Intelligence), the amount of intelligence the president has at his fingertips cannot be compared with the occasional intelligence reports Congress receives in its committees such as the U.S. Senate Select Committee on Intelligence.

In addition, the president can appoint 1,125 positions that have to be confirmed by the Senate, including positions on the Cabinet and subcabinet level, as well as 185 ambassadors, 94 attorneys, and 94 marshals.[82] In addition to nominating Supreme Court justices, the president can also nominate judges who have to be confirmed by the Senate. The number depends on number of vacancies occurring during the administration. For example, the Bush administration had 322 judicial appointees, 61 of those circuit, and 261 district judges.[83]

However, it is the change in party affiliation that really matters and not the total number of vacancies. While only 25 percent of circuit appeals judges replaced appointees of another political party in the Bush administration, in the Clinton administration, 52 percent of his circuit judges replaced Republicans. In his two terms, Clinton reduced Republican appointees from 64 to 42 percent and increased Democratic appointees from 21 to 42 percent.[84] By contrast, Bush only reduced Democratic appointees from 42 to 36 percent, and increase Republican appointees from 42 to 56 percent.[85] Much of this is left to chance: how many judges die, retire or decide to join the

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[81] Priest, Dana and Arken, William M., "A hidden world, growing beyond control," Washington Post, July 19, 2010. URL: http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/7/, last accessed Feb. 15, 2012.

[82] Pfiffner, James P.: Brookings Institution, "Recruiting Executive Branch Officers: The Office of Presidential Personnel," Spring 2001. URL: http://www.brookings.edu/articles/2001/spring_governance_pfiffner.aspx, last accessed Feb. 15, 2012.

[83] Wheeler, Russell. "Judicial Nominations in the Bush and Obama Administrations' First Nine Months," The Brookings Institution, October 23, 2009. URL: http://www.brookings.edu/papers/2009/1023_courts_wheeler.aspx, last accessed Feb. 15, 2012.

[84] Wheeler, Russell, "How might the Obama Administration Affect the Composition of the U.S. Court of Appeals?" The Brookings Institution, March 18, 2009. URL: http://www.brookings.edu/opinions/2009/0318_courts_wheeler.aspx, last accessed March 12, 2012.

[85] Note that most judges appointed by a Republican president are nominally of the same party, the same applies to those appointed by Democratic presidents, but "differences in their voting have been relatively narrow, in the 10 to 15 percent range for cases that might have some ideological dimension." Wheeler,

senior service.[86] Nevertheless, it is clear that appointing power helps build a president's institutional strength in a way that Congress does not have at its fingertips.

Even if Congress is able to push through legislation that would check the president's power, the president can veto this or add a signing statement which clarifies his understanding of the law, and directs his appointees to not follow it.

Finally, the president often has the upper hand over Congress when the judiciary is concerned that it not be a political player in war-making debates. When there is a separation of powers issue, the courts can invoke the "political-question doctrine" to defer its own judgment in the case where the Constitution has given another branch the authority on the issue.[87] By invoking the political-question doctrine during a number of armed conflicts, the courts gave power to the president and silenced Congress.

For example, in the Vietnam War, in all but one case (*Holtzman v. Schlesinger*) the courts left unilateral executive decisions to expand the military offensive without challenge, frequently citing the political-question doctrine as justification.[88] In the final decision of *Holtzman v. Schlesinger* on August 4, 1973, Supreme Court Justice Marshall followed the trend by allowing the bombing of Cambodia to continue, despite the fact that Congress had not approved this order by Nixon during the Vietnam War, and had actually voted against continuing to fund the Cambodia bombing. Marshall said it was not for the court to decide a political question. However, in the run-up to this final decision, the District Court for the Eastern District of New York and Supreme Court Justice Douglas ruled that the bombing should not continue. Douglas argued that Congress, not the president, has the power to declare war, and the results of the decision would be certain death for either Cambodians or U.S. servicemen.[89] Ultimately, Congress was in some ways successful with the one tool it had left in the box after taking such a

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Russell, "How might the Obama Administration Affect the Composition of the U.S. Court of Appeals?" The Brookings Institution, March 18, 2009. URL: http://www.brookings.edu/opinions/2009/0318_courts_wheeler.aspx, last accessed March 12, 2012.

[86] Ibid

[87] Adler, David Gray: "Court, Constitution, and Foreign Affairs," in: Adler, David Gray, and George, Larry N. (eds.) 1996: The Constitution and the Conduct of American Foreign Policy. Lawrence, Kansas: University Press of Kansas, 34.

[88] Ratner, Michael, and Cole, David 1984: "The Force of Law: Judicial Enforcement of the War Powers Resolution". In: Loyola of Los Angeles Law Review, Vol. 17, June 1, 1984, 727. URL: http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1434&context=llr, last accessed Feb. 20, 2012.

[89] *Schlesinger v. Holtzman*, 414 U.S. 1321 (1973). See also: Supreme Court Justice Douglas, U.S. Supreme Court, *Schlesinger v. Holtzman*, 414 U.S. 1321 (1973). Find Law. URL**:** http://laws.findlaw.com/us/414/1316.html, last accessed Feb. 21, 2012.

beating: cutting funding. Indeed, the bombs stopped dropping on Cambodia when Congress discontinued funding the effort mid-August 1973.[90]

But the series of legal precedents created during the Vietnam War and thereafter giving the president greater war powers and weakening Congress paved the way for continued judicial deference to the executive and powerlessness of the legislative. In response to the Iran hostage crisis, for example, President Carter froze Iranian assets held in U.S. banks. When the hostages were released, the funds had to be returned to the Federal Reserve Bank and law suits by U.S. nationals against Iran had to be dropped. President Reagan ratified President Carter's Executive Orders when he took office despite the fact that Congress did not authorize these acts. The U.S. Supreme Court justification in *Dames & Moore v. Regan* was that Congress' silence was considered approval: "Long continued executive practice, known to and acquiesced in by Congress, raises a presumption that the President's action has been taken pursuant to Congress' consent."[91]

During the Reagan administration, lower courts ruled that the political-question doctrine prevented them from deciding whether it was constitutional for a president to unilaterally: commit to hostilities in El Salvador, to support rebels in Nicaragua, to launch a military mission in Grenada and to use military force in the Persian Gulf in 1987.[92]

Not until 1990 in the Persian Gulf War under President Bush did the court rule that the executive's war-making power must be limited. Although in this case the Federal District Court Judge Harold Greene decided the case was not ripe for review because Congress had not protested the abdication of their powers, this was an improvement over previous rulings, where congressional silence was seen as *de facto* approval of the president's unilateral war-making decisions.[93] Here, Judge Greene attempted to reinstate the court's place in the creation of foreign policy when he stated: "While the Constitution grants to the political branches, and in particular to the Executive, responsibility for conducting the nation's foreign affairs, it does not follow

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[90] Second Supplemental Appropriations Act of 1973, Continuing Appropriations Act of 1974.
[91] *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Find Law. URL: http://laws.findlaw.com/us/453/654.html, last accessed Feb. 21, 2012.
[92] Adler, David Gray: "Court, Constitution, and Foreign Affairs," in: Adler, David Gray, and George, Larry N. (eds.) 1996: The Constitution and the Conduct of American Foreign Policy. Lawrence, Kansas: University Press of Kansas, 39. The political-question doctrine says courts do not have the right to decide political questions if the other two branches have the capability to do.
[93] Ibid, 41

that the judicial power is excluded from the resolution of cases merely because they may touch upon such affairs."[94]

President Clinton continued the trend of informing Congress after committing troops by unilaterally ordering military actions without consulting Congress on a number of occasions. In 1998, he ordered attacks on Iraq after Iraq did not comply with UNSCOM. He informed Congress that their Public Law 102-1 of 1991 authorized President Bush to attack Iraq, in addition to UN Security Council Resolutions 678 and 687.[95] After the U.S. embassies in Kenya and Tanzania were bombed, he ordered missile attacks on Afghanistan and Sudan justified by his "constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive."[96] In each of these cases, President Clinton was not creating new ground. Historical presidential practice, as we have discussed, allows for the president to respond in the case of emergencies when the United States or its properties are attacked. But by continuing the trend of informing Congress after the fact, presidential power was not further limited.

The judiciary continued to give the president the upper hand through the political-question doctrine and rulings on the separation of powers during the Clinton administration as well. While Clinton filed a report with Congress pursuant to the War Powers Resolution within 48 hours of U.S. participation in the NATO attacks on Yugoslavia, the mission continued beyond the 60 day-limit set by the legislation. In *Campbell v. Clinton*, 31 Congressmen wanted the United States Court of Appeals to decide that the U.S. involvement in the military mission was unlawful. The court ruled that the Congress had no standing for such a suit because it could settle the matter in Congress through voting to cut funding for the war effort, voting to end hostilities, etc.[97] Quoting from *Chenoweth v Clinton*, the court once again cited the essence of the political-question doctrine: "Because the parties' dispute is therefore fully susceptible to political

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[94]Ibid, 42

[95] Cairo, Michael: "The 'Imperial Presidency' Triumphant". In: Kelley, Christopher S. 2006: Executing the Constitution: Putting the President Back into the Constitution. Albany, New York: State University of New York Press, 204-205.

[96] Clinton, William: "Letter to Congressional Leaders Reporting on Military Action against Terrorist Sites in Afghanistan and Sudan". In: Public Papers of the President, August 20, 1998, 1460.

[97] *Tom Campbell v. William Jefferson Clinton*, United States Court of Appeals, District of Columbia Circuit, No. 99-5214, Feb. 18, 2000. See also: Damrosch, Lori Fisher, "The Clinton Administration and War Powers," in: Columbia Law School's Law & Contemporary Problems, Vol. 63, Nos. 1 & 2, Winter/ Spring 2000.

resolution, we would, applying *Moore,* dismiss the complaint to avoid 'meddl[ing] in the internal affairs of the legislative branch.'"[98]

In this case, the court relied on a more solid legal footing than in previous cases where it had relied on the political-question doctrine where the war effort had not been put to a vote. In this case, Congress had voted for continuing to fund the effort and against stopping the military campaign.

Yet the legacy of the courts deferring to the president since *Curtiss-Wright* in matters of war left an already weak Congress with little recourse. The damage was done. By ruling through Carter, Nixon, Reagan and Clinton to strengthen the presidential war powers, they relegated themselves and Congress to role of observer.

7. War Powers Legacy for Bush Detainee Policy

With a judiciary often ruling to enlarge presidential war powers, an executive that had consistently expanded presidential war powers since World War II (with a brief pause after the Watergate scandal), and a Congress unwilling to take risks to check the president in matters of war powers, the unitary executive was already gaining momentum before the Bush administration. Congress' limitations to its checking power come from within its own broken system, where weak legislation or a divided legislature do not help to check a president willing to push constitutional boundaries to expand his powers into the legislative sphere. But they also come from outside, when the president uses his appointing and nominating mandate to expand his institutional power in the judiciary and intelligence fields. This makes the matter of checking the president in the foreign affairs arena even more difficult.

Was the expansion of executive war powers since World War II, aided by a weak Congress, detrimental to the protection of detainee rights? Yes and no. Yes, because it placed the president in the position of initiator of war policy, including when hostilities commence, against whom, and for how long. This also creates a starting point in determining who may be taken hostage, in what manner, and for how long. With the president in the position of initiator, the burden is on Congress to make course corrections. This is a task that is logistically more difficult due to the internal challenges

[98] *Helen Chenoweth v. William J. Clinton*, United States Court of Appeals, District of Columbia Circuit, No.98-5095, 733 F.2d at 956, July 2, 1999.

described by Koh, such as legislative short-sitedness and the need to gain a unified political will among 435 Congressmen, at cost to the Congressmen's electability at home.

Yet when Congress fails – either due to internal factors such as lack of unity or poor legislation, or due to external factors, such as presidential meddling in the legislative process, presidential monopoly of the intelligence branch, or institutional strength granted by history and his place on the international stage – the judiciary has the chance to define and uphold the Constitution. When the question has been framed as one of civil liberties and not of who has the upper hand in war powers or a political question, the courts have, with a few exceptions, frequently protected detainee rights.

President Bush thus inherited a system of checks and balances that had already been crippled by legislative malfunction, executive expansion, and occasional judicial passivity. Precedence created the perfect environment for the president to push constitutional boundaries, and thus expand the unitary executive. The next chapters will look in closer detail at how war powers precedence influenced President Bush in his decision making and whether Congress and the courts were able to practice their constitutional mandate.

CHAPTER THREE
FROM 9/11 TO ABU GHRAIB AND BEYOND

Abstract: In order to best examine the evolution of detainee policy, it is necessary to first become familiar with the most significant changes that happened after 9/11 in the rights of detainees during interrogation, detention, and trial. This chapter presents a timeline of the most important developments.

This chapter does not provide an exhaustive review of the changes in detainee policy, but lays out the milestones marking changes in detainee treatment standards, and organizes them according to the medium by which the change occurred: by executive and military memo, by the courts, and by Congress. It also looks at the changes thematically, including application of the Geneva Conventions, use of military commissions, rights during interrogation, in the courtroom and in prison, and rights for citizen versus non-citizen detainees. It is not the goal of this chapter to analyze the causes or repercussions of the events; that information will come in the chapter following.

1. INTERROGATION TECHNIQUES: CHANGE OF DETAINEE POLICY VIA MEMO

1.1 APPLICATION OF THE GENEVA CONVENTIONS

On Oct. 17, 2001, the Commander of Operation Enduring Freedom ordered that all captured persons be treated according to the Geneva Conventions. If there was a doubt as to the person's status, the detainee was to be afforded the protections of a prisoner of war until a Geneva Convention III Article 5 tribunal – which weighs evidence on whether a detainee is a prisoner of war – could decide the status.[1]

However, on November 13, 2001, President Bush used his executive power to issue the military order establishing military commissions to try non-U.S. citizens who

[1] Strasser, Steven 2004: The Abu Ghraib Investigations. New York: Public Affairs, 86. These two sentences appear on p. 11 of the author's unpublished master's thesis: Lohmann, Sarah 2004: "The Way Forward: Policy Recommendations for Congressional Oversight of the U.S. Military, From Guantanamo Bay to Abu Ghraib Prison," American University. Findings from the thesis were published in part in: Lohmann, Sarah 2010. "The Compromise of Faith and Law in the War on Terror". In: Nawrath, T. and Hildmann, P., eds., Interreligiöser Dialog und Menschenrechte, Nordhausen, Verlag Traugott Bautz, 127-140.

are or were members of al-Qaeda. The commissions could also try those who had links to international terrorism, or who knowingly 'harbored' people who did.[2] Unlike Geneva Convention tribunals, the order allowed the president to have a final say over the convictions and sentences made by the commissions, thus broadening his power. It also allowed him the power to decide who to detain. It prohibited appeals to U.S. federal courts or to the U.S. Court of Appeals for the Armed Forces. Execution was permitted as punishment.[3]

In addition, President Bush issued a memo on Feb. 7, 2002 which established a new category of detainee – that of "enemy combatant" for all detainees in Guantanamo Bay, even before a commission had proven the detainee to be such. Enemy combatants did not have to be afforded the protections of the Geneva Conventions, according to the memo.[4] The memo specifically stated that Taliban detainees are not entitled to prisoner of war status or the legal protections afforded by the Third Geneva Conventions. The Third Geneva Convention likewise did not apply to the conflict with al Qaeda.

1.2 Methods of Interrogation

Nevertheless, from January of 2002 to December 2002, the interrogation techniques used at Guantanamo Bay were supposed to comply with the 1992 Army Manual FM-34-52. The techniques used tested psychological approaches such as "We know all" about what the detainee has done or using incentives or their removal to provoke a response. According to these regulations, not even yelling was allowed.

However, in mid-May of 2002, the CIA feared that Abu Zubaydah had been withholding information about an "imminent threat" to the United States, and requested permission to use "alternative interrogation methods" on him, including waterboarding.[5] On July 17, National Security Adviser Condoleezza Rice advised the CIA orally that it could proceed with its planned interrogation of Abu Zubaydah pending OLC

[2] This sentence appears on p. 11 of the author's unpublished master's thesis: Lohmann, Sarah 2004: "The Way Forward: Policy Recommendations for Congressional Oversight of the U.S. Military, From Guantanamo Bay to Abu Ghraib Prison," American University.
[3] Military Order of Nov. 13, 2001: Volume 66, No. 222, 57833-57836 of the Federal Register.
[4] Bush, President George W., The White House, Memorandum for the Vice President, et al: "Humane Treatment of al Qaeda and Taliban Detainees," Feb. 7, 2002. Though the president's memo used the term 'unlawful combatant,' which has long been a military category for detainees, most detainees held in Guantanamo Bay were referred to as 'enemy combatants' thereafter.
[5] Rockefeller, Sen. John D. IV, "OLC Opinions of the Detention and Interrogation Program," April 22, 2009, 3. URL: http://intelligence.senate.gov/pdfs/olcopinion.pdf, last accessed Sep. 9, 2011.

approval.[6] In an Aug. 1, 2002 memo from the OLC to the CIA, the CIA was advised that "alternative interrogation methods" including waterboarding were authorized by the Justice Department as long as those inflicting them did not have the intent to cause severe mental pain or suffering, such as "harm lasting months or even years."[7]

On Dec. 2, 2002, Defense Secretary Rumsfeld approved new techniques, including stress positions, isolation for up to 30 days, hooding, stress positions, removal of all clothing, threatening detainees with aggressive dogs, grabbing, poking and pushing and deprivation of light.[8] The Guantanamo Bay SouthCom leadership divided the new techniques according to three categories depending on the cooperation of the detainee and what the authorities authorized. In Category 1, soft techniques like yelling could be used. Category 2, which required approval of the General in Charge of the Interrogation Section, included hooding, removal of all clothing and use of dogs on the detainees. Category 3 techniques included pushing and poking the detainee.[9] On January 15, 2003, most of the more aggressive interrogation techniques were rescinded, though Defense Secretary Rumsfeld left the door open for special requests to be made to him to use Category II and III methods if interrogators believed this to be necessary.[10]

The CIA wrote a memo to the Office of Legal Counsel on January 28, 2003, in which it recorded that it was using both "standard" and "enhanced" interrogation techniques, and that it was required to document the person and technique used when circumstances called for "enhanced" tactics to be used.[11]

On March 14, 2003, Department of Justice's Office of Legal Counsel John Yoo issued a legal opinion which stated that criminal laws, including the federal torture statute, "would not apply to certain military interrogations, and that interrogators could

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[6] Ibid, 3-4.
[7] U.S. Department of Justice, Office of Legal Counsel, Aug. 1, 2002. URL: http://www.aclu.org/files/pdfs/safefree/cia_3686_001.pdf, last accessed Sep. 30, 2010. Note: Title of memo was deleted by those declassifying the previously Top Secret document.
[8] Strasser, Steven 2004. The Abu Ghraib Investigations: The Official Reports of the Independent Panel and the Pentagon on the Shocking Prisoner Abuse in Iraq. New York: Public Affairs LLC, Appendix C, "Evolution of Interrogation Techniques- Guantanamo."
[9] International Law of War Association, "Interrogation Techniques Revealed by the United States." URL: http://www.lawofwar.org/interrogation_techniques.htm. See also: Strasser, Steven (ed.) 2004: The Abu Ghraib Investigations. New York: Public Affairs, Appendix C.
[10] Secretary of Defense, Memorandum for Commander USSOUTHCOM, "Counter-Resistance Techniques," Jan. 15, 2003. URL: http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/rums11503mem.pdf, last accessed Sep. 15, 2011.
[11] American Civil Liberties Union, "Documents Released by the CIA and Justice Department in Response to the ACLU's Torture FOIA," http://www.aclu.org/national-security/documents-released-cia-and-justice-department-response-aclus-torture-foia, last accessed Sep. 30, 2010.

not be prosecuted by the Justice Department for using interrogation methods that would otherwise violate the law."[12]

After forming a working group to discuss methods of interrogation, Rumsfeld changed the methods to be used again in an April 16, 2003 memo to be applied to Guantanamo Bay detainees only. The memo approved FM 34-52 standards, plus allowed for methods such as the use of isolation, pushing and grabbing, change of diet for the detainees, and interruptions of sleep patterns.[13]

Lacking guidance from Central Command on how to treat their prisoners, interrogators in Iraq moved from using techniques from FM 34-52 to those more aggressive techniques being used on Gitmo detainees. In August 2003, Maj. Gen. Geoffrey Miller brought Rumsfeld's guidelines of April 16, 2003 to Iraq, and recommended that they be used as a model by the whole command there.[14]

Ricardo Sanchez, the commander of the CJTF-7, authorized 12 interrogation techniques on September 14, 2003, that went beyond FM 34-52, including five that were more aggressive than techniques used for Guantanamo. While Miller had cautioned that Rumsfeld's April guidelines were only to be used on unlawful combatants, Sanchez believed there were unlawful combatants mixed in with the prisoners of war in Iraq.[15] Bush's Feb. 7, 2002 Presidential Memorandum, stating that the Taliban detainees were not entitled to prisoner of war status and that the Third Geneva Convention did not apply to al Qaeda detainees, meant that the detainees were prevented from being "afforded minimum standard for humane treatment."[16] The Senate concluded in 2008 that this order, which marked "the decision to replace well established military doctrine, i.e., legal compliance with the Geneva Conventions, with a policy subject to interpretation, impacted the treatment of detainees in U.S. custody."[17]

The new standards, or lack thereof, were quickly implemented.[18] The same day CJTF-7 approved these new techniques, Central Command disapproved them. Sanchez,

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[12] U.S. Senate Committee on Armed Services, "Inquiry into the Treatment of Detainees in U.S. Custody," Nov. 20, 2008.
[13] Strasser, Steven (ed.) 2004: The Abu Ghraib Investigations. New York: Public Affairs, 32-33, Appendix C.
[14] Ibid, 7-8. These two sentences occur in similar form on p. 21 of the author's master's thesis: "The Way Forward: Policy Recommendations for Congressional Oversight of the U.S. Military, From Guantanamo Bay to Abu Ghraib Prison," 2004.
[15] Schlesinger, Hon. James R. (chairman): "Final Report of the Independent Panel to Review DOD Detention Operations," Aug. 2004, 14.
[16] Report of the Committee on Armed Services: "Inquiry into the Treatment of Detainees in U.S. Custody," Nov. 20, 2008, xiii.
[17] Ibid
[18] Ibid

in turn, rescinded his directive on Oct. 12, 2003, allowing for methods only slightly more aggressive than those in the 1992 Field Manual 34-52. But at this point, CENTCOM returned to the 1987 version of FM 34-52, allowing interrogators to control lighting, heating, food, clothing and shelter given to detainees.[19]

An August 4, 2004 memo from the CIA to the OLC, however, records that the CIA had been told by the Justice Department that certain methods, including waterboarding, were not considered torture.[20]

In the meantime, on Dec. 30, 2004, the administration issued a new memo on detainee interrogation techniques, this time repudiating the Aug. 2002 memo, which had allowed all acts in the course of interrogation other than those intentionally causing "excruciating or agonizing pain or pain equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions or even death."[21]

In February 2005, the Justice Department issued a classified memo giving explicit authorization to the CIA to use a combination of physical and psychological abuse during interrogation, including head-slapping, stress positioning, waterboarding and prolonged exposure to the cold.[22]

On May 10, 2005, Acting Head of the Justice Deparment's Office of Legal Counsel Steven Bradbury issued a classified memo to the CIA stating that neither past nor present CIA interrogation methods, including waterboarding, facial slaps, or forced nudity violate the cruel, inhuman, and degrading treatment standards under federal and international law."[23]

On May 30, 2005, Bradbury issued another classified memo stating that the enhanced CIA interrogation techniques are also not in violation of the U.S. commitment

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[19] Schlesinger, Hon. James R. (chairman): "Final Report of the Independent Panel to Review DOD Detention Operations," Aug. 2004, 14. A similar paragraph occurs on p. 22 of the author's unpublished master's thesis: Lohmann, Sarah 2004. "The Way Forward: Policy Recommendations for Congressional Oversight of the U.S. Military, From Guantanamo Bay to Abu Ghraib Prison," American University.

[20] American Civil Liberties Union, "Documents Released by the CIA and Justice Department in Response to the ACLU's Torture FOIA." URL: http://www.aclu.org/files/pdfs/safefree/cia_3685_001.pdf

[21] Department of Justice, Memorandum Opinion for the Deputy Attorney General, Dec. 30, 2004.

[22] Shane, Scott, Johnston, David and Risen, James, "Secret U.S. Endorsement of Severe Interrogations," New *York Times*, Oct. 4, 2007. URL: http://www.nytimes.com/2007/10/04/washington/04interrogate.html?pagewanted=all, last accessed Aug. 23, 2012.

[23] U.S. Department of Justice, Office of Legal Counsel, "Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency," May 10, 2005, as provided to the American Civil Liberties Union on January 28, 2009. See also: http://luxmedia.com.edgesuite.net/aclu/olc_05102005_bradbury46pg.pdf, last accessed October 7, 2010.

to Article 16 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[24]

On Aug. 5, 2005, the U.S. Department of Justice issued another classified memo stating that those captured and detained in Afghanistan do not qualify as protected persons under the Fourth Geneva Convention. Deputy Assistant Attorney General Howard Nielson justified this by saying that despite the fact that the Geneva Convention applies to the conflict with Afghanistan, because no part of Afghanistan is officially "occupied" by the United States, detainees are not eligible to be protected from detention by U.S. forces.[25]

1.3 CONDITIONS OF CONFINEMENT

In an Aug. 31, 2006 U.S. Department of Justice Memo, CIA Acting General Counsel Rizzo was informed that the CIA's secret prison sites operated around the world are allowed by Article 3 of the Geneva Convention because the conditions of confinement meet the minimum requirements for treatment under the Geneva Convention Relative to the Treatment of Prisoners of War.[26] The U.S. Department of Justice further determined in a memo to the CIA of the same date that the CIA black sites conformed to requirements of the Detainee Treatment Act and the Fifth Amendment of the Constitution. The memo reveals that while 98 detainees had been imprisoned and interrogated under the program, 30 of those had been interrogated with the enhanced techniques, and that in 2007, the CIA "expects to detain further high value detainees who meet the requirements for the program." [27]

The CIA was still justified in reintroducing its black site program and in using advanced interrogation techniques despite a new legal framework for handling detainees set forth in the Supreme Court ruling *Hamdan vs. Rumsfeld*, the Detainee

[24] U.S. Department of Justice, Office of Legal Counsel, "Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency," May 30, 2005, as provided to the American Civil Liberties Union on January 28, 2009. URL: http://luxmedia.com.edgesuite.net/aclu/olc_05302005_bradbury.pdf, last accessed Oct. 7, 2010.

[25] U.S. Department of Justice, Office of Legal Counsel, "Whether Persons Captured and Detained in Afghanistan are 'Protected Persons' under the Fourth Geneva Convention," Aug.5, 2005. URL: http://www.justice.gov/olc/docs/aclu-ii-080505.pdf, last accessed Oct. 7, 2010. Note that the 2006 *Hamdan vs. Rumsfeld* Supreme Court decision ruled otherwise.

[26] U.S. Department of Justice, Office of Legal Counsel, "Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency," Aug. 31, 2006.

[27] U.S. Department of Justice, Office of Legal Counsel, "Application of the Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Detention Facility," Aug. 31, 2006, 1, 33. URL: http://www.justice.gov/olc/docs/memo-rizzo2006.pdf, last accessed Aug. 23, 2012.

Treatment Act, and the Military Commissions Act, according to a July 20, 2007 DOJ memo.[28] It also states that while a new Army Field Manual published in 2006 forbids previously used interrogation tactics such as waterboarding, the use of nudity and of working dogs, and that no detainees remained in secret detention sites, the CIA is legally authorized to use interrogation methods outlawed in the previous Army Field Manual, such as sleep deprivation and dietary manipulation.[29]

A significant shift from previous Department of Justice secret memos, including those written by Steven Bradbury, occurred in a memorandum from October 6, 2008. There, the Senior Deputy Assistant General states that he is in effect retracting the October 2001 Yoo memo. That 2001 memo had stated that the Fourth Amendment would not apply to domestic military operations intended to prevent further terrorist attacks, and that First Amendment press and speech rights could be suppressed if military need would so require. It calls the memo a "product of the extraordinary … period in the history of the Nation" and states that the "Memorandum represents a departure, though perhaps for understandable reasons, from the preferred practice of the OLC."[30]

In his final memo written on January 15, 2009, five days before President Obama would take office, Steven Bradbury further rescinded what had become known as the "torture memos" of 2001-2003. In so doing, he specifically pointed out the lack of current legal support for a broad assertion of the President's power as Commander in Chief to deny Congress authority in helping to determine detainee policy.[31]

"The prior opinion of this Office suggesting that Congress has no role to play concerning the prosecution of enemy combatants is incorrect," Bradbury wrote. "…The sweeping assertions in the opinions above that the President's Commander in Chief

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[28] U.S. Department of Justice, Office of Legal Counsel, "Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees," July 20, 2007. URL: http://www.justice.gov/olc/docs/memo-warcrimesact.pdf, last accessed Oct. 7, 2010. The court ruling and DTA are described in detail in chapter four of this dissertation.

[29] Ibid

[30] U.S. Department of Justice, Office of Legal Counsel, "October 23, 2001 OLC Opinion Addressing the Domestic Use of Military Force to Combat Terrorist Activities," Oct. 6, 2008, 1. URL: http://www.justice.gov/olc/docs/memoolcopiniondomesticusemilitaryforce10062008.pdf, last accessed Oct. 7, 2010. This short memo pointedly describes the environment in which the entire detainee policy was created.

[31] U.S. Department of Justice, Office of Legal Counsel, Memorandum for the Files, "Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001," Jan. 15, 2009. URL: http://www.justice.gov/opa/documents/memostatusolcopinions01152009.pdf, last accessed March 11, 2013. For a full chart of all Bush-era detainee memos see: American Civil Liberties Union, "Index of Bush Era OLC-Memoranda Relating to Interrogation, Detention, Rendition, and/or Surveillance." URL: http://www.aclu.org/files/assets/olcmemos_chart.pdf, last accessed March 24, 2012.

authority categorically precludes Congress from enacting any legislation concerning the detention, interrogation, prosecution, and transfer of enemy combatants are not sustainable," he determined.[32]

He further denounced the argument on which the development of detainee policy was based when he wrote: "Two opinions of OLC from 2001 and 2002 asserted that the President, under our domestic law, has unconstrained discretion to suspend treaty obligations of the United States at any time and for any reason as an aspect of the 'executive Power' vested in him by the Constitution … We have previously concluded in a file memorandum that the reasoning supporting these assertions is unconvincing."[33]

The web of presidential memos defending new standards of treatments for detainees, as well as those flowing from the Department of Justice, the Department of Defense, and CIA to support them, was found without legal basis, albeit not fully until days before the new president took office. In the judiciary, however, the failing arguments began to be illumined early in the second term of the Bush administration.

2. THE JUDICIARY RULES

2.1 DETAINEE RIGHTS TO HABEAS CORPUS

Lakhdar Boumediene was a Bosnian charity worker who was arrested in October of 2001 after the U.S. embassy suspected him and five of his associates of plotting to bomb the U.S. Embassy in Sarajevo. After a three-month investigation in which his home, computer and all personal belongings were searched, the Bosnian Supreme Court demanded his release due to lack of evidence for the U.S. claims. Upon their release from Bosnian custody, they were seized by U.S. officials on the night of Jan. 17, 2002, and taken to Guantanamo, where they were held for seven years. Despite the fact that they were formally declared innocent by Bosnian prosecutors in 2004, and despite the fact that there were no formal charges against them, they remained in custody, where they say they were tortured.[34]

In *Boumediene vs. Bush*, they sought *habeas* review of their continued detention and designation as enemy combatants. The case was consolidated with *Al Odah v. the*

[32] U.S. Department of Justice, Office of Legal Counsel, Memorandum for the Files, "Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001," Jan. 15, 2009, 2, 4. URL: http://www.justice.gov/opa/documents/memostatusolcopinions01152009.pdf, last accessed March 11, 2013.
[33] Ibid, 8-9
[34] BBC News, "Profiles: Odah and Boumediene," Dec. 4, 2007. URL: http://news.bbc.co.uk/2/hi/americas/7120713.stm, last accessed Aug. 5, 2010.

United States, a 2002 petition for *habeas corpus* that had been kicked around the courts with ever differing rulings.

Kuwaiti Fawzi Al Odah was a Kuwaiti primary school teacher whose father fought with U.S. forces during the first Gulf War. In August 2001, he said he was on vacation in Afghanistan providing humanitarian aid to families there. Claiming to be in the wrong place at the wrong time just after the September 11 attacks, he was trying to cross the mountains into Pakistan when guards handed him over to U.S. authorities, and he was then sent to Guantanamo.[35]

He and 11 Kuwaitis filed their initial request for *habeas corpus* on May 1, 2002 in the U.S. District Court of the District of Columbia. By July 30, 2002, Judge Kollar-Kotelly of that court had decided in favor of the government's motion to dismiss the case for lack of subject matter and proper jurisdiction.[36]

On March 11, 2003 the D.C. Court of Appeals upheld this decision that the detainees had no right to due process or to have their cases heard in U.S. courts. They cited *Eisentrager vs. Johnson*. That 1950 Supreme Court ruling held that the Germans who were arrested in China for continuing the war against the United States with their Japanese counterparts despite the German surrender had no right to petition U.S. courts to review their ruling because they were given fair military trials.

But the U.S. Court of Appeals for the Ninth Circuit reversed this decision in *Gherebi v. Bush* in December 2003 when it ruled that foreign nationals could not be indefinitely confined at Guantanamo without charge or legal recourse. The majority opinion stated that while it understood the necessity for the Executive to prevent further terrorist attacks, "it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike."

Furthermore, it pointed out that unlike in *Eisentrager vs. Johnson*, the territory in question was under U.S. control:

> Here, we simply cannot accept the government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any

[35] Ibid
[36] Center for Constitutional Rights, *Boumediene v. Bush*, *Al Odah v. United States*. URL: http://ccrjustice.org/ourcases/current-cases/al-odah-v.-united-states, last accessed Aug. 5, 2010.

> judicial forum, or even access to counsel, regardless of the length or manner of their confinement.[37]

"In our view," the justices wrote, "the government's position is inconsistent with fundamental tenets of American jurisprudence and raises most serious concerns under international law."[38]

Detainees were given another win on June 28, 2004, when the Supreme Court ruled in the case *Hamdi v. Rumsfeld* that a U.S. citizen held in the United States as an enemy combatant has a constitutional right to be given an opportunity to contest the factual basis for detention before a neutral decision maker. The court ruled that an enemy combatant might be held without charges or trial as an enemy combatant, but that the detainee can't be held indefinitely without a chance to contest his detention, even in U.S. Courts.

The case involved Yaser Esam Hamdi, an American citizen said to have been detained on the battlefield in Afghanistan. Mr. Hamdi did not have access to lawyers for almost two years, according to those filing the case on his behalf.[39] Ultimately, Mr. Hamdi was deported back to Saudi Arabia on October 9, 2004 without ever having the hearing the Supreme Court had ruled he was entitled to receive.[40]

On the same day in June as it ruled on the *Hamdi* case, the Supreme Court ruled in *Rasul vs. Bush* that the U.S. courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals at Guantanamo Bay. [41] In the *Rasul v. Bush* case, it ruled that *Eisentrager* did not exclude aliens from a writ of *habeas corpus*.

In so doing, the court took one small step toward restoring checks and balances. According to Congressional Research writer Louis Fisher:

> A system of military tribunals that concentrates power in the executive branch and particularly in the presidency … is a form of government that the framers would find repugnant. The ... national security decisions issued by the Supreme

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[37] *Gherebi vs. Bush*, United States Court of Appeals for the Ninth Circuit, No. 03-55785, Dec. 18, 2003. URL: http://vlex.com/vid/gherebi-v-bush-18465165, last accessed Sep. 30, 2010.

[38] Ibid. The justices also wrote: "We hold that no lawful policy or precedent supports such a counter-intuitive and undemocratic procedure, and that, contrary to the government's contention, Johnson neither requires nor authorizes it. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [defining POWs], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

[39] Supreme Court of the United States, No. 03-6696, "Brief of the CATO Institute as amicus curiae in support of petitioners."

[40] Savage, Charlie 2007: Takeover. New York: Back Bay Books, 192-199.

[41] OLR Research Report: "U.S. Supreme Court Rulings: Detention of Enemy Combatants," Aug. 12, 2004.

> Court on June 28, 2004, restored a semblance of judicial supervision, but they represent only a first and halting step in checking presidential power.[42]

Shortly thereafter, the government attempted to gain the privilege to monitor the communications between the detainees and the attorneys. On Oct. 20, 2004, Judge Kollar-Kotelly denied the government the right to monitor the detainee's communications with their attorneys and upheld the prisoners right to counsel and attorney-client privacy.[43]

2.2 DETAINEE RIGHTS IN THE COURTROOM

Because the *Hamdi* and *Rasul* rulings did not comment on the rights the detainees had once they were in the court room, however, the White House decided the detainees had no rights in court, and that detainees' lawsuits could thus be dismissed, or given a cursory hearing before military officers rather than in a civilian court. In response to the ruling, the government, and more specifically U.S. Dep. Secretary of Defense Paul Wolfowitz, set up the Combatant Status Review Tribunals, hearings that decided whether a detainee could be classified as an enemy combatant.

Likewise, due to silence of the *Rasul* ruling on the detainees' specific courtroom rights, detainees – even U.S. citizens – were further deprived of the right to a lawyer or to the evidence against them.

Yemeni Salim Ahmed Hamdan, who had been detained in Afghanistan and sent to Guantanamo in November 2001, was the next to put this right to a test. Having served as Osama bin Laden's driver, Hamdan insisted he was a laborer and not a terrorist. In August 2004, Hamdan's defense lawyer Lietuenant Commander Charles Swift filed a federal lawsuit to have the military commissions established in Nov. 2001 shut down. On November 8, 2004, Washington Federal District Judge James Robertson ruled that the military commission was illegal, and asserted that the Geneva Conventions did apply to Hamdan.[44] This was reversed again on July 15, 2005, when the United States Court of Appeals for the District of Columbia Circuit said the military commission was legal. By the end of 2004, detainees still had no voice in the courtroom.

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[42] Ibid, 253

[43] Center for Constitutional Rights, *Boumediene v.Bush*, *Al Odah v. United States*, http://ccrjustice.org/ourcases/current-cases/al-odah-v.-united-states, last accessed Aug. 5, 2010. These cases are described in more detail in chapter two, pgs. 57-58.

[44] Savage, Charlie 2007: Takeover. New York: Back Bay Books, 194-195.

2.3 DETAINEE POLICY PERTAINING TO U.S. CITIZENS

Jose Padilla was an American suspected of having plotted with al Qaeda members to bomb the United States. He was born in Brooklyn, New York, and grew up in Chicago. President Bush broke all legal precedent in May 2002 by ordering a U.S. citizen arrested at Chicago O-Hare International Airport by civilian law enforcement officials to then be detained by the military at Guantanamo without being charged or convicted of any crime. Initially in December 2003, the Second Circuit Court of Appeals in New York ruled that the Bush administration needed to charge Padilla with a crime or release him. But when the case was subsequently sent to the Supreme Court, it was thrown out due to the case being brought to the wrong court district.[45]

When Padilla's lawyers went to the Supreme Court, the Bush administration said it would be willing to prosecute him in a civilian court. It changed its indictment against Padilla to say that it had evidence that Padilla conspired to provide support to terrorists in Chechnya, not that he had a dirty bomb and had entered the United States with plans to blow up buildings as part of an al Qaeda plot, as the Bush administration had said on oath to the Fourth Circuit.[46] But the Fourth Circuit Court of Appeals had already ruled in September 2005 based on the initial evidence provided by the Bush administration about the dirty bomb that the Commander in Chief could hold an American arrested on U.S. soil. By ensuring that the Supreme Court could not review the case, the Bush administration was able to set precedent that it could arrest anyone, including any U.S. citizen, anywhere in the United States or abroad without proof of connection to a crime.[47]

J. Michael Lutting, who wrote the Fourth Circuit opinion, tried to get the Supreme Court in December 2005 to reevaluate the precedent he had just written due to on his new-found realization that the government's testimony was inaccurate. But it was too late. The Supreme Court threw out Padilla's appeal because the government no longer considered him an enemy combatant, and a precedent based on misleading information was allowed to stand.[48]

On January 4, 2006, the U.S. Supreme Court ordered Padilla to be turned over to civilian custody, and on Aug. 16, 2007, he was convicted of conspiring to provide

[45] Savage, Charlie 2007: Takeover. New York: Back Bay Books, 151-153, 193.
[46] Ibid, 200
[47] Ibid, 200-201
[48] Ibid

material support for al Qaeda and murder and kidnap and maim people abroad. On Jan. 22, 2008, he was sentenced to 17 years in prison.[49]

The same month, he filed a lawsuit against John Yoo for authoring the policies that lead to his unconstitutional confinement and torture.[50] While the U.S. District Judge's ruled in San Francisco in June of 2009 that Padilla could proceed with his lawsuit against a government official in U.S. courts, this avenue is not applicable to most of the rest of the detainees, who are not U.S. citizens.[51] In May 2012, the U.S. Ninth Circuit of Appeals ruled that Yoo could not be punished for Padilla's torture while in detention since the acts weren't clearly defined as torture during Yoo's tenure with the Office of Legal Counsel from 2001-2003.[52] Padilla is currently serving his sentence in Colorado and is due to be released in 2022.[53]

3. Legislative mechanisms

3.1 Torture ban

During the course of his confirmation hearings for the position of Attorney General of the United States, then White House Counsel Alberto Gonzales revealed on Jan. 17, 2005, that the administration legal team believed that the Convention Against Torture was only applicable on domestic soil where the U.S. Constitution applies. For noncitizens held abroad, they believed, torture was allowable. They based this on a different interpretation of a Senate reservation – that the torture described in the CAT was the same form of abuse covered in the Constitution's eighth amendment – expressed during the 1994 ratification of the CAT.[54]

Widely disputed on both legal and practical grounds (torturing foreign soldiers abroad could lead to the same treatment for U.S. soldiers), this led to a Congressional fight to reaffirm that the torture should not be an acceptable form of detainee treatment anywhere. On July 24, 2005, Sen. John McCain introduced the McCain Torture Ban, which stated that military interrogators could not exceed limits set by the Geneva Conventions

[49] "Jose Padilla," *The New York Times*, March 6, 2009. URL: http://topics.nytimes.com/top/reference/timestopics/people/p/jose_padilla/index.html, last accessed Aug. 12, 2010.
[50] Ibid
[51] Eviatar, Daphne, "Decision Allowing Yoo Lawsuit to Continue Carries Narrow Implications," *The Washington Independent*, June 16, 2009.
[52] United States Court of Appeals for the Ninth Circuit, *Padilla and Lebron v. Yoo*, May 2, 2012, 4540-4541.
[53] U.S. Department of Justice, Federal Bureau of Prisons Locator. URL: http://www.bop.gov/iloc2/InmateFinderServlet?Transaction=NameSearch&needingMoreList=false&FirstName=Jose&Middle=&LastName=Padilla&Race=W&Sex=M&Age=&x=71&y=14, last accessed July 31, 2012.
[54] Savage, Charlie 2007: Takeover. New York: Back Bay Books, 213, 387.

and the Army Field Manual, whether or not superiors encouraged them or allowed them to do otherwise. The legislative amendment also stated that all U.S. officials, including CIA agents, should be prohibited from inflicting torture and "cruel, inhuman, and degrading treatment" on anyone in their custody, regardless of the detainee's status (as enemy combatant or prisoner of war) or where he was being held. On Oct. 5, 2005, White House press secretary Scott McClellan announced Bush would use the first veto of his presidency against the torture ban because "it would limit the president's ability as commander in chief to effectively carry out the war on terrorism."[55]

Congress passed the ban anyway, and President Bush decided to sign it, but used two other tools – a signing statement and nebulous legislation – to ensure that detainees would continue to be stripped of rights to humane treatment and a just court hearing. In a Dec. 30, 2005 signing statement which was to instruct CIA and military interrogators how to apply the law, the White House said that "The executive branch shall construe [the torture ban] in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch as Commander in Chief …"[56]
This gave the president leverage to allow CIA and military interrogators to use new interrogation methods which would later be labeled torture.[57]

3.2 WRIT OF *HABEAS CORPUS*

In addition, White House efforts led to the passage of an additional section to the act that states that other than the U.S. Court of Appeals for the District of Columbia, "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 Department of Defense at Guantanamo Bay …"[58]

According to section 1005 of the Act, the detainee would also have little chance to have their case reviewed should the Combatant Status Review Tribunal determine them properly detained as an enemy combatant. In addition to the fact that no court other than the U.S. Court of Appeals for the District of Columbia would be able to review the

[55] Ibid, 220, 221
[56] "President's Statement of Signing of H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006," Dec. 30, 2005.
[57] See p. 96 of chapter four.
[58] Detainee Treatment Act, Public Law 109-148, 119 Stat. 2739, Section 1005.

case, that court could also only rule on whether the CSRT had ruled constitutionally and in accordance with the standards specified by the Secretary of Defense.[59]

Nevertheless, the Supreme Court had agreed on Nov. 7, 2005 to hear Hamdan's case, and ruled on June 29, 2006 that President Bush did not have the authority to create war crimes tribunals and found that the special military commissions violated both the UCMJ and the Geneva Conventions.[60]

The White House continued to push for the broadening of executive power by drafting legislation in 2006 that would challenge the Hamdan ruling. As leaked to *The New York Times* and *Washington Post*, the proposed bill would have allowed: an enemy combatant to be detained indefinitely, without trial or "*habeas corpus* review in federal courts"; all evidence including hearsay to be used, including if obtained by coercion "unless the military judge found it 'unreliable'"; no *habeas corpus* petitions to be allowed, and the "Geneva Conventions would not be 'a source of judicially enforceable individual rights.'"[61]

After a prolonged fight against the legislation led by three senior Republican senators who were military veterans (John Warner, John McCain, and Lindsey Graham) the White House ultimately ended up getting most of what it wanted in the 2006 Military Commissions Act (MCA). The landmark act drastically expanded the president's power by allowing him the power to "interpret the meaning and the application of the Geneva Conventions" and allowed the President or the Secretary of Defense to determine whether someone is an unlawful enemy combatant.[62]

In addition, it barred *habeas corpus* for all detainees in U.S. military prisons (even those previously filed); made inapplicable the UCMJ's requirements for a speedy trial and provisions protecting against forced self-incrimination; and allowed no appeals based on international law or the Geneva Conventions and allowed coerced evidence.[63]

It also limited the cases in which U.S. officials can be tried for rape or sexual assault by changing the criteria to identify rape from the definition accepted by international law. For example, certain Abu Ghraib abuses such as forced oral copulation and forced nakedness could be considered allowable. Likewise, in the MCA, the victim is

[59] Ibid. See also: Ball, Howard 2007. Bush, the Detainees, and the Constitution. Lawrence: University Press of Kansas, 140, 141.
[60] *Hamdan vs. Rumsfeld* (2006), Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
[61] Ball, Howard 2007. Bush, the Detainees, and the Constitution. Lawrence: University Press of Kansas, 179.
[62] Military Commissions Act of 2006, Public Law 109-366, Oct. 17, 2006, Sec. 6a3. See also: Center for Constitutional Rights, Military Commissions Act of 2006: A Summary of the Law.
[63] Ibid.

required to prove that they were forced or coerced. This has led certain law experts to ascertain the MCA could allow for rape in other cases where the victim did not give its consent, such as where a perpetrator may have taken advantage of coercive circumstances such as rape camps, rapes taking place during war, and the rape of detainees by prison guards.[64]

4. COURTS RULE ON DETAINEE LEGISLATION

In the months following the passage of the MCA, the courts and the military commission in Guantanamo were given the opportunity to rule whether the MCA was constitutional and how it was to be applied. On June 5, 2007, U.S. military judges dismissed all charges against Hamdan. This was significant for all detainees because the judges presiding over the military commissions ruled that they did not have jurisdiction to try Hamdan because he had not been proven to be an unlawful enemy combatant, as called for in the Military Commissions Act.[65]

In the case of *Boumediene v. Bush*, the Supreme Court ruled that the MCA unconstitutionally suspended detainees' rights to *habeas corpus* in its decision of June 12, 2008. Though a three-judge panel on the Court of Appeals originally supported Congress' authority to deny detainees their right to *habeas corpus* through the MCA in February of 2007 and the Supreme Court also initially refused to hear a case challenging this assumption in April 2007, by Dec. 5, 2007 the Supreme Court had changed its course and arguments were being heard.[66]

Nevertheless, the government attempted to have the *Al Odah* and *Boumediene* cases thrown out in January of 2006, saying that the newly passed Detainee Treatment Act which barred detainees from having their cases heard in U.S. courts applied retroactively. On June 29, 2006, the court decided in *Hamdan v. Rumsfeld* that the DTA did not prevent detainees from bringing their cases to U.S. courts and ruled that military commissions violated both military law and the Geneva Conventions. On Feb. 20, 2007,

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[64] Ball, Howard 2007. Bush, the Detainees, and the Constitution. Lawrence: University Press of Kansas. See also: Center for Constitutional Rights, Military Commissions Act of 2006: A Summary of the Law. Center on Law & Globalization. "What Counts as Rape in International Crimes? URL: http://clg.portalxm.com/library/keytext.cfm?keytext_id=182

[65] Center for Constitutional Rights, *Hamdan v. Rumsfeld* (amicus). URL: http://ccrjustice.org/ourcases/past-cases/hamdan-v.-rumsfeld-%28amicus%29, last accessed Aug. 12, 2010.

[66] Garcia, Michael John: "*Boumediene v. Bush*: Guantanamo Detainees' Right to Habeas Corpus." In: Congressional Research Service Report for Congress, Sep. 8, 2008, CRS-2, 3. URL: http://www.fas.org/sgp/crs/natsec/RL34536.pdf, last accessed March 11, 2013. See also: *Boumediene v. Bush*, Wikipedia. URL: http://en.wikipedia.org/wiki/Boumediene_v._Bush, last accessed July 29, 2010.

the Court of Appeals of the D.C. Circuit ruled that non-citizen detainees did not have the right to *habeas corpus* or federal court review following the passage of the MCA. On June 12, 2008, the Supreme Court finally ruled in Boumediene and Al Odah that detainees had the right to *habeas corpus*.[67] By August 6, 2008, a military tribunal had ruled Hamdan should be freed by the end of the year, making him serve only an additional four months for providing material support to terrorism.[68] And on Nov. 20, 2008, five of the six Bosnians of the Boumediene case were ordered released.

The implications of the 2008 Supreme Court decision were vast. All detainees confined in Guantanamo could petition a federal district court to review their status determined by the military commissions. But because the Supreme Court found that *habeas* applies to all Guantanamo inhabitants, there is further judicial authority to provide for the prisoners petitioning U.S. courts to address claims of unlawful treatment during interrogation and incarceration.[69] And once detainees had access to the courts, indefinite detention without charges was no longer an option.

5. Conclusion

In October of 2001, just weeks after the Sept. 11 attacks, the military's policy was to treat detainees according to the Geneva Conventions. In the months that followed, presidential memos prohibited detainees' access to U.S. courts and stated that the Geneva Conventions no longer applied. Thereafter, the Department of Defense and CIA began using new methods of interrogation, sanctioned at the highest levels, including waterboarding, forced nudity, and facial slaps. The Department of Justice wrote the legal justifications for the new standards. Legislative efforts to roll back the new standards allowing torture and wiretapping were stymied by presidential signing statements undercutting the new laws. After the courts initially limited detainees' rights, by June of 2006, detainees started regaining them – including the right to petition their case in U.S. courts.

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[67] Garcia, Michael John: "*Boumediene v. Bush*: Guantanamo Detainees' Right to Habeas Corpus." In: Congressional Research Service Report for Congress, Sep. 8, 2008, Summary Introduction. URL: http://www.fas.org/sgp/crs/natsec/RL34536.pdf, last accessed March 11, 2013.

[68] The New York Times, "Salim Ahmed Hamdan." URL: http://topics.nytimes.com/topics/reference/timestopics/people/h/salim_ahmed_hamdan/index.html, last accessed Aug. 12, 2010.

[69] Garcia, Michael John: "*Boumediene v. Bush*: Guantanamo Detainees' Right to Habeas Corpus." In: Congressional Research Service Report for Congress, Sep. 8, 2008, CRS-9. URL: http://www.fas.org/sgp/crs/natsec/RL34536.pdf, last accessed March 11, 2013.

By the end of the Bush administration, the Department of Justice arguments for the new detainee standards had been retracted. Every major change to detainee policy implemented by the Bush administration, from the new interrogation methods to the denial of applicability of the Geneva Conventions and of the right to *habeas corpus*, had been overturned. What factors allowed Bush to successfully implement the new detainee policy in his first term, and what caused them to be overturned in his second? The next several chapters will identify the variables that could be signifiers for when the president succeeds or fails.

By Sarah Means Lohmann

CHAPTER FOUR
THE POST-9/11 DETAINEE POLICY: POPULAR PRESIDENT MEETS UNIFIED GOVERNMENT

Abstract: This chapter looks at the case study of how President Bush was able to push through a new detainee policy and tests whether popularity ratings and the composition of Congress had an effect on the ability of the judiciary and the legislature to check the president's success. The study shows that coupled with the highest domestic approval rating on record, and the support of Congress at the time of his attempted policy change, the president had the support he needed to push through the detainee policy during his first term. As Bush's popularity plummeted, the Supreme Court was more willing to give him a strong rebuke. When his popularity ratings remained around or above 50 %, the court was more likely to allow the president to get what he wanted. The study also reveals that Congress' partisanship affected its ability to check the President's detainee policy. After the 2006 elections brought a party switch in Congress, Bush's success in pushing his detainee policy declined.

This case study takes the unitary executive theory model described in chapter one and tests whether it applies to the case of the Bush administration's attempt to push through a new detainee policy after the attacks of 9/11. In this chapter, I first establish the conditions for the unitary executive theory that exist in the George W. Bush presidency. This includes a national security threat, in this case an attack on American soil. Second, it identifies a pattern of President Bush exerting his power as described by the unitary executive theory, challenging the separation of powers both in the legislative and judicial branches and expanding his power in the executive.[1]

The chapter then identifies where President Bush was able to implement a new detainee policy and tests whether the variables of popularity ratings and composition of Congress made a difference in President Bush's successes and failures in pushing through a new detainee policy. As discussed previously, the ultimate test of success comes when the Supreme Court allows the president's policy to stand and the Congress is unable to block the implementation of the policy through legislative measures, thus paving the way for the policy to continue to be implemented on the ground. The ultimate measurement of his expansion of presidential power comes when he implements his change in policy for the majority of his

[1] For operability of antecedent condition q (Presidential execution of power as described by the uet), see p. 32-33 of chapter one.

administration despite attempted checks from the judiciary or legislature and his actions set precedent for the enlargement of presidential power in future administrations.

1. DOMESTIC CLIMATE

President Bush inherited a country divided. Despite the fact that Bush's presidential adviser Karl Rove predicted that Bush would win the election by 4 to 7 percentage points, Bush had 540,000 fewer votes than challenger Vice President Gore. When, five weeks later, the Supreme Court settled the matter of who could rightfully be president, much of America doubted the legitimacy of a presidency for a man who had won the Electoral College vote but lost the popular vote. To add insult to injury, exit polls after the 2000 election showed that 44 percent of voters believed that Bush "did not know enough to be president," and 42 thought he "could not handle a foreign policy crisis."[2] More troubling still, half of those who voted for Bush were not sure that they should have chosen him.[3]

This did little to quell deep-seated doubts much of the country had about the institution of the presidency following the scandals of the Clinton administration. The result was a determination that the strengthening of the presidency be a top mission of the new Bush administration. Associate White House Counsel Bradford Berenson commented in an interview: "Well before 9/11, it was a central part of the administration's overall institutional agenda to strengthen the presidency as a whole. In January 2001, the Clinton scandals and the resulting impeachment were very much in the forefront of everybody's mind."[4]

At the same time, President Bush's power base in Congress was in jeopardy. On May 24, 2001, the Republican lead in the Senate was reversed when Sen. Jeffords left the GOP party, and in the House, the number of GOP-held seats declined to just 221 out of 435.

No wonder, then, that President Bush told White House Counsel Gonzales that the White House legal team should have two main missions: to get "as many conservative 'judicial restraint' minded lawyers as there were judgeships to be filled" and "to be vigilant about seizing any opportunity to expand presidential power."[5] The former was urgent because of how the Republican Party was barely clinging to power in the Senate, the latter because the credibility of the institution of the president hung in the balance. In addition, by Labor Day 2001, just days before the September 11 attacks, a bad economy and anger abroad

[2] Daalder, Ivo H. and Lindsay, James M. 2003: America Unbound. Washington, D.C.: Brookings Institution Press, 50.
[3] Ibid
[4] Savage, Charlie 2007: Takeover: The Return of the Imperial Presidency. New York: Back Bay Books, 75.
[5] Ibid, 73

over the Bush administration's unilateralism, among other factors, led to an approval rating of 51 percent. After President Ford's ratings, this was the lowest public approval rating in U.S. history to occur in the first eight months of a president being in office.[6]

2. Variable A: International Threat and Perception of Threat

2.1 Perception of Threat

Following the terrorist attacks a few days later, however, Bush's popularity ratings became the highest ever recorded for a U.S. president at 90 percent.[7] While the Bush administration was already looking for ways to expand the presidency long before the attacks of 9/11, the international threat provided the means to centralize power in the executive.

While before the attacks there had been increasing focuses on differences between Democrats and Republicans and between the Bush administration and America's traditional allies, 9/11 provided the Bush administration with the unified support it needed to begin to play by new rules. On September 18, 2001, Congress passed the White House-drafted Authorization for Use of Military Force (AUMF) Joint Resolution "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001 in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."[8]

On September 12, the United Nations passed a resolution condemning those responsible for the terrorist acts and authorizing "all necessary steps" to respond to the attacks.[9] The North Atlantic Treaty Alliance invoked Article 5 for the first time in its history, saying that an attack against the United States was an attack against all and that the allies

[6] Daalder, Ivo H. and James M. Lindsay 2003: America Unbound. Washington, D.C.: Brookings Institution Press, 78.
[7] According to the Gallup poll conducted Sep. 21, 22, 2001. An ABC poll conducted on Oct. 8, 9, 2001 put his approval rating at 92 percent. Source: "Job Performance Ratings for President Bush," Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20:
Microsoft/Parents/'Socially Responsible': First Roper Center for Public Opinion. Lincoln, NE: Gallup Organization, 2000. Storrs, CT: The Roper Center, University of Connecticut, 2001. URL:
http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Bush#.UB909KC7_0c, last accessed Aug. 6, 2012.
[8] Public Law 107-40.
[9] United Nations Security Council Resolution 1368, Sep. 12, 2001.

pledged "to undertake all efforts to combat the scourge of terrorism."[10] While the article says all NATO members would be willing to provide assistance, including the possibility of military aid, NATO Secretary General Lord Robertson said this did not oblige the United States to act through the alliance.[11]

While many European allies expected the United States to respond through the international institutions, the Bush administration wrote in its 2002 National Security Strategy that the United States would be best defended by "identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country."[12]

President Bush went on to explain in that strategy that the spread of weapons of mass destruction provide "a compelling case for taking anticipatory actions to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack."[13]

2.2 Continued Threat

Indeed, 9/11 had introduced the United States to a new kind of enemy who would not wait for battle lines to be drawn and their actions to be anticipated before they strike. Unlike in previous wars to which the United States has been a party, those who perpetrated the attacks on September 11, 2001 did not wear uniforms, did not fight on behalf of a state, and did not fight to gain territory. They intentionally targeted civilians. They had interconnected cells all over the world but no formal military command structure.

Once they were caught and brought to Guantanamo, they exhibited characteristics of being familiar with counterintelligence techniques. The Department of Defense files on the 779 Guantanamo Bay detainees released by The New York Times show the dilemma that Washington policy makers faced during the time new detainee policy was being considered. After the Bush administration was faulted by the 9/11 commission for not paying attention to the intelligence warnings that were given prior to the 9/11 attacks, there was enormous pressure to ensure that such an event never occur again. By the end of the Bush

[10] NATO Press Release: "NATO Reaffirms Treaty Commitments in Dealing with the Terrorist Attacks against the United States," September 12, 2001.
[11] Daley, Suzanne: "After the Attacks: The Alliance," The New York Times, September 13, 2001.
[12] Bush, President George W., "The National Security Strategy of the United States of America", Chapter Three, Sep. 2002.
[13] Ibid, Chapter Five.

administration, 81 of those released from Guantanamo had been confirmed as taking part in terrorist or insurgent activity after their release, and 69 more suspected of it.[14]

Though 450 of the 600 released were not suspected of terrorist activity thereafter, several of those who did go on to commit further terrorist acts committed them on a grand scale during the Bush administration. They targeted both Americans and their allies in the war on terror. For example, Abdallah Saleh Ali al-Ajmi carried out a suicide bombing in Mosul, Iraq in April 2008, killing Iraqi soldiers. Sa'eed al-Shihri, a Saudi, became the deputy commander of Al Qaeda's Yemen branch after release and was suspected of assisting with the bombing of the U.S. Embassy in Yemen in 2008.[15]

Said Mohammed Alam Shah, who was judged by military analysts to "not pose a future threat to the U.S. or to U.S. interests" when he was released to Afghanistan, organized a Taliban force to fight American troops.[16] He was the mastermind behind an attack on Pakistan's interior minister that killed 31 people (but only injured the minister), and Osama bin Laden praised him for his 2007 suicide bombing death during a raid on his home by the Pakistani Army.[17]

In the wake of attacks by an enemy that the Bush administration could neither predict nor easily define, new rules of engagement developed for dealing with those who could be enemies. The new rules, like the new threat, were ambiguous. Many had their roots in practices of previous presidencies which had never had the opportunity or the support to put them into practice in times of conflict. But these new policies changed the views of many on what was acceptable treatment for enemy prisoners during armed conflict.[18]

Now that we have discussed the international threat, we turn to a discussion of how this threat enabled President Bush to venture constitutionally in the exertion of his power and to challenge the separation of powers in the legislative and judicial branches. Here, it is worthy to note his use of Article II-based arguments in memos, judicial defense or signing statements.

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[14] The New York Times, "The Guantanamo Files: Released from Guantanamo They Took Up Arms," April 24, 2011. URL: http://www.nytimes.com/interactive/2011/04/24/world/middleeast/took-up-arms-graphic.html#nytg-leftcol, last accessed April 27, 2011.

[15] Ibid; Worth, Robert F., "Freed by the U.S., Saudi Becomes a Qaeda Chief," The New York Times, Jan. 22, 2009. URL: http://www.nytimes.com/2009/01/23/world/middleeast/23yemen.html, last accessed April 27, 2011.

[16] Shane, Scott, and Weiser, Benjamin, "Judging Detainee's Risk, Often with Flawed Evidence," International Herald Tribune, April 24, 2011.

[17] Shane, Scott, and Weiser, Benjamin, "Serious Flaws in Evidence Ignored in Assessing Risk," International Herald Tribune, April 25, 2011, 1.

[18] A similar paragraph can be found in the author's master's thesis on pg. 5: Lohmann, Sarah 2004: "The Way Forward: Policy Recommendations for Congressional Oversight of the U.S. Military, From Guantanamo Bay to Abu Ghraib Prison," American University.

3. CHALLENGE TO THE LEGISLATURE

3.1 CHALLENGES TO PREVIOUS OR PENDING LEGISLATION

3.1.1 Wiretapping

The Bush administration put its policy of preemption described later in its new security strategy into practice shortly following the attacks. In October 2001, the president issued an executive order removing the restraints placed on the National Security Agency through the Foreign Intelligence Surveillance Act after the Nixon administration's illegal wiretapping. President Bush ordered the National Security Agency to conduct warrantless wiretaps and Internet intercepts on all appropriate foreign telephone calls to the United States and instructed them to collect information on tens of millions of domestic telephone numbers.[19] President Bush later argued that his wiretapping program "is constitutional and was effectively authorized by Congress when it approved the use of force against al Qaeda after the September 11, 2001 attacks."[20]

3.1.2 Detention

On October 24, 2001, the White House challenged Congress when it provided a 342-page Patriot Act substitute for the bill Congress had prepared and didn't provide it to the House of Representatives until the morning of the vote on the bill. The new law once again turned back the checks provided by the 1978 FISA law, giving broad powers to the executive and its intelligence-gathering agencies to detain, search, and seize suspected terrorists and those connected with them in the United States as well as abroad without search warrant or the requirement to show any probable cause of their guilt. [21]This language stands in contrast to the Constitution's Fourth Amendment which says that no one in the United States may be searched or seized without a warrant and that this warrant has to declare "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[22]

Indeed, the legislation approved a practice instituted just days after the attacks. Thousands of people, mostly of Muslim background or with Arabic last names, were arrested across the United States. At the federal detention center in New York City alone, 1,100 non-

[19] Ball, Howard 2007: Bush, the Detainees, and the Constitution. Lawrence, Kansas: University Press of Kansas, 18.
[20] Ibid, 20.
[21] Ibid, 13
[22] U.S. Constitution, Amendment Four

citizens were held in connection with the attacks. Only one of them was later convicted of supporting terrorism.[23]

But in violation of the language of the Patriot Act, the INS also regularly refused to inform the detainees why they were being held. For example, innocents were held by the INS in Manhattan on average for at least 80 days, without being allowed to be released on bond, and without being accorded their civil rights granted to all persons living in the United States in the Fourth Amendment of the Bill of Rights "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures …"[24]

3.2 SIGNING STATEMENTS

While Bush had already started using signing statements in March of 2001, his scope of using signing statements to challenge Congress far surpassed those of previous presidents after the attacks of 9/11. While President Bush provided 172 signing statements during his presidency**,** it was also the way in which he used the signing statement that caused the most controversy.[25] While presidents starting with James Monroe used the statements for political or rhetorical purposes, President Bush used them to assert that a law is constitutionally defective or to limit the implementation of the law by executive agencies.[26] In 95 cases between 2001 and 2005 alone, President Bush invoked the unitary executive theory to support his arguments, focusing on laws that would limit presidential control over government officials.[27]

Unlike President Reagan, who despite his large number of statements (250) only used 34 percent of his signing statements to object to statutory provisions of the law, the majority of President Bush's signing statements contained legal or constitutional objections.[28] In total, President Bush challenged the law 1168 times in his 172 signing statements.[29]

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[23] Ball, Howard 2007: Bush, the Detainees, and the Constitution. Lawrence, Kansas: University Press of Kansas, 15.
[24] Ibid
[25] Kelley, Christopher: "Signing Statements, Reagan-Obama," Miami University of Ohio. URL: http://www.users.muohio.edu/kelleycs/, last accessed Aug. 6, 2012.
[26] Kelley, Christopher: "Rethinking Presidential Power – The Unitary Executive and the George W. Bush Presidency." Paper presented at the 63rd Annual Meeting of the Midwest Political Science Association, April 7-10, 2005, Chicago, IL, 27, 31-34.
[27] Kelley, Christopher: "Rethinking Presidential Power – The Unitary Executive and the George W. Bush Presidency." Paper presented at the 63rd Annual Meeting of the Midwest Political Science Association, April 7-10, 2005, Chicago, IL, 1.
[28] Halstead, T.J.: "Presidential Signing Statements**:** Constitutional and Institutional Implications". In: CRS Report for Congress, September 17, 2007, 1, CRS-9.
[29] Kelley, Christopher: "Signing Statements, Reagan-Obama." URL: http://www.users.muohio.edu/kelleycs/, last accessed Aug. 6, 2012.

3.2.1 Torture

Most questionable in their constitutional nature were his signing statements associated with the torture, interrogation and detention of detainees in the war on terror. When President Bush signed Sen. McCain's Detainee Treatment Act restricting the use of torture when interrogating detainees, he issued a signing statement asserting that the executive branch would interpret the part of the law having to do with treatment of detainees "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on judicial power."[30] He would also interpret it in a manner consistent with "protecting the American people from further terrorist attacks."[31]

In an interview with Boston Globe reporter Charlie Savage, a senior administration attorney said that the President's signing statement meant that in extreme cases where, for instance, there is a terrorist threat to the United States, the President would reserve the right to waive the torture ban.

''Of course the president has the obligation to follow this law, [but] he also has the obligation to defend and protect the country as the commander in chief, and he will have to square those two responsibilities in each case," the official told Savage in the interview. ''We are not expecting that those two responsibilities will come into conflict, but it's possible that they will."[32]

The signing statement using a unitary executive argument thus created a loophole to justify the use of torture during detainee interrogations.

3.2.2 Intelligence activities

In another of his signing statements, Bush declared legislation requiring him to inform Congress before diverting money from an approved program to a new secret one as something that could be circumvented. In so doing, he paved the way for the CIA to use public funds to support "black sites" around the world, where suspected terrorists were secretly imprisoned, tortured and held indefinitely, often without the knowledge of their family or home country.[33]

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[30] Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, Dec. 30, 2005.
[31] Ibid.
[32] Savage, Charlie, "Bush could bypass new torture ban, Waiver right is reserved," Boston Globe, January 4, 2006.
[33] Savage, Charlie 2007: Takeover. New York: Back Bay Books, 237.

President Bush further challenged Congress when he reinterpreted laws that Congress used to try to check his power in setting new intelligence gathering and detainee policy in 2004. In his August 2004 signing statement which provided funds for the war on terror, he wrote (bold mine):

> Sections 8007, 8011, and 8106 of the Act prohibit the use of funds to initiate a special access program, a new overseas installation, or a new start program, unless the congressional defense committees receive advance notice. The Supreme Court of the United States has stated that **the President's authority to classify and control access to information bearing on the national security flows from the Constitution and does not depend upon a legislative grant of authority**. Although the advance notice contemplated by sections 8007, 8011, and 8106 can be provided in most situations as a matter of comity, **situations may arise, especially in wartime**, in which the President must act promptly under his **constitutional grants of executive power and authority as Commander in Chief of the Armed Forces** while protecting certain extraordinarily sensitive national security information. The executive branch shall construe sections 8007, 8011, and 8106 in a manner consistent with the constitutional authority of the President. [34]

Consistent with the arguments provided by the unitary executive theory, his "executive power" and "Commander in Chief" status allows him to reinterpret legislation when national security is at stake, or during wartime. When it comes to funding programs that had not yet been sanctioned, the President also told Congress he has the last word:

> Section 8005 of the Act relating to requests to congressional committees for reprogramming of funds shall be construed as calling solely for notification, as any other construction would be inconsistent with the principles enunciated by the Supreme Court of the United States in *INS v. Chadha*.[35]

As suggested by the unitary executive theory, his ability "to supervise the unitary executive branch" would allow him to regulate intelligence operations: "Also, the executive branch shall construe section 8124, relating to integration of foreign intelligence information, in a manner consistent with the President's constitutional authority as Commander in Chief, including for the conduct of intelligence operations, and to supervise the unitary executive branch."[36]

In a direct answer to those in Congress who believe that their Article III powers allow them to regulate foreign affairs, President Bush specifically made clear in the same signing statement that here he also has the power to make the final decision:

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[25] Bush, President George W.: Signing Statement for H.R.4613, "The Department of Defense Appropriations Act, 2005," Public Law 108-287, Aug. 5, 2004.
[35] Ibid
[36] Ibid

> Finally, the Executive Branch shall construe section 12001, which purports to assign the Secretary of Defence the duty to negotiate with a foreign country, in a manner consistent with the President's constitutional authority to conduct the Nation's foreign affairs, which includes the authority to determine who shall negotiate for the United States under the President's direction with a foreign country.[37]

Both signing statements which President Bush issued in December of 2004 on intelligence policy maintained the same uet-based arguments. In the first, on intelligence gathering reform, the Congress directly sought additional oversight and power to check what they viewed as expanding executive power in detainee policy and in the overall war on terrorism. At this point, the horrors of Abu Ghraib had been revealed, but Congress was left at arm's length.

In their Bill S. 2845, the Senate wrote: "In conducting the war on terrorism, the Federal Government may need additional powers and may need to enhance the use of its existing powers. This potential shift of power and authority to the Federal Government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life."[38] Congress therefore established a board to control whether civil liberties were being violated by executive branch policies, and calling for information to be submitted to Congress to ensure that neither the president nor the intelligence services were violating civil liberties.

President Bush considered this law negotiable, despite signing it. In his Dec. 17, 2004 signing statement, he stated that his presidential authority gives him the power to not comply with sections such as 1061 mandating a civil liberties board, and that he could decide whether he judges it necessary to provide information to Congress to ensure the protection of civil liberties (bold mine):

> The executive branch shall construe provisions in the Act that mandate submission of information to the Congress, entities within or outside the executive branch, or the public, in a manner consistent with the President's constitutional authority **to supervise the unitary executive branch and to withhold information** that could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. Such provisions include sections 1022, 1061, 3001(f)(4), 5201, 5403(e), and 8403 ...
>
> To the extent that provisions of the Act purport to require or regulate submission by executive branch officials of legislative recommendations to the Congress, the executive branch shall construe such provisions in a manner consistent with the

[37] Ibid
[38] Public Law 108-458, "Intelligence Reform and Terrorism Prevention Act of 2004," Dec. 17, 2004, Subtitle F, Sec. 1061.

> President's constitutional authority to supervise the unitary executive branch and to submit for congressional consideration such measures as the President **judges necessary and expedient** . . .To the extent that provisions of the Act, including section 3001(g) and section 102A(e) of the National Security Act of 1947 as amended by section 1011, purport to **require** consultation with the Congress as a condition to execution of the law, the executive branch shall construe such provision as calling for, **but not mandating**, such consultation.[39]

He also gave himself the "authority to classify and control access to information bearing on national security" even if Congress does not grant this power.[40] While his general statement of his powers as Commander in Chief and unitary executive cannot be interpreted as his intention to break the law, Congress does have the constitutional, judicially and historically-proven right to require that executive officials provide information or reports to Congress. While executive officials were required to provide certain information to the legislature since the first Congress, the Supreme Court also has long history of ruling such requirements constitutional.[41]

Even in the wake of the revelations of the horrors of Abu Ghraib, when Congress passed a series of rules for regulations in military provisions in October of 2004, Bush added a signing statement saying that these "restrictions" on the military which would prevent torture were merely advisory, and that he as Commander in Chief could supervise how they would be carried out.[42] He once again used the uet argument that he has the "constitutional authority to supervise the unitary executive branch" on intelligence operations.[43] He also ordered military lawyers not to contradict his political appointees on what can be defined as

[39] Bush, President George W, Signing statement on Public Law 108-458, "Intelligence Reform and Terrorism Prevention Act of 2004," Dec. 17, 2004.
[40] Ibid
[41] Halstead, TJ, CRS Report for Congress, "Presidential Signing Statements: Constitutional and Institutional Implications," Sep. 17, 2007, CR-19. URL: http://www.fas.org/sgp/crs/natsec/RL33667.pdf.
[42] Savage, Charlie 2007: Takeover. New York: Back Bay Books, 238. See Signing Statement for H.R. 4548, "Intelligence Authorization Act for the Year 2005" (PL 108-487), Dec. 23, 2004. Text reads in part: "The executive branch shall construe provisions in the Act, including sections 105, 107, and 305, that mandate submission of information to the Congress, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information that could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. Section 502 of the Act purports to place restrictions on use of the U.S. Armed Forces and other personnel in certain operations. The executive branch shall construe the restrictions in that section as advisory in nature, so that the provisions are consistent with the President's constitutional authority as Commander in Chief, including for the conduct of intelligence operations, and to supervise the unitary executive branch. To the extent that provisions of the Act, such as sections 614 and 615, purport to require or regulate submission by executive branch officials of legislative recommendations to the Congress, the executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to submit for congressional consideration such measures as the President judges necessary and expedient."
[43] Signing Statement for H.R. 4548, "Intelligence Authorization Act for the Year 2005" (PL 108-487), Dec. 23, 2004.

torture and did away with the requirement to teach military prison guards Geneva Convention standards for the humane treatment for detainees.[44]

He further challenged Congress when it passed a post-Abu Ghraib law to create an inspector general to investigate abuses in Iraq. In his signing statement to the law, Bush forbade the inspector general from investigating any intelligence or national security matter, or any further crime that the Pentagon decided it wants to investigate on its own.[45]

In July 2006, an American Bar Association task force investigating President Bush's use of signing statements to change the meaning of enacted laws said that his use of the signing statement serves to "undermine the rule of law and our constitutional system of separation of powers".[46]

3.3 BLOCKING LEGISLATION

Between February, 2003 and June, 2004, Democratic members of Congress attempted to introduce and pass countless bills calling for accountability and outlawing torture, but most failed. Rep. Adam Schiff (D-CA) introduced on Feb. 27, 2003 the Detention of Enemy Combatants Act, which would have allowed the president to detain a U.S. citizen who is a resident, but would have allowed March 13, 2003 The Military Tribunals Act, which would have congressionally-sanctioned tribunals to try suspected al Qaeda terrorists who were not U.S. citizens, residents, or prisoners of war under the terms of the Geneva Convention. Unlike the presidential tribunals, this proposal called for preserving *habeas corpus*, appeal and due process. The bill failed.[47]

Sen. Jeff Bingamen also introduced an amendment to the Department of Defense Appropriations Act on July 16, 2003 that would require the Secretary of Defense to provide a list of enemy combatants being held, and their status: whether they were to be charged, repatriated, or released. If this was not settled, it would have mandated a list of procedures and a schedule which would have provided resolution of these issues. The amendment was tabled.[48]

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[44] Savage, Charlie 2007: Takeover. New York: Back Bay Books, 238.
[45] Ibid
[46] American Bar Association, July 24, 2006 Press Release, "Blue Ribbon Task Force Finds President Bush's Signing Statements Undermine Separation of Powers."
[47] Congressional Record: March 13, 2003, E453. URL: http://www.fas.org/irp/congress/2003_cr/h031303.html, last accessed Aug. 23, 2013. A list of the legislation proposed and similar summaries can also be found in the author's master's thesis on pgs. 25-26.
[48] Congressional Record, Department of Defense Appropriations Act, 2004, Amendment No. 1268, July 16, 2003, Page S9448-S9484.

Rep. Edward Markey introduced the Anti-Rendition Bill on June 23, 2004 to prevent the United States from returning detainees to countries that torture their prisoners. This failed both in the House in Committee, and later as an amendment.[49] Later called the "Torture Outsourcing Prevention Act," in the House, and the "Convention Against Torture Implementation Act," in the Senate, these bills both failed due to lack of Republican support.

"Unfortunately, both bills have run into a political challenge. Both are supported by cosponsors — eight in the Senate, and 69 cosponsors in the House — but all of the cosponsors of both bills are Democrats," the Friends Committee on National Legislation commented.[50]

With a divided Congress, pushing legislation that defended rights of detainees became nearly impossible. Democratic Representative Rush Holt proposed a bill (HR 4951) to mandate interrogations be videotaped, and calling for the International Committee on the Red Cross, the UN High Commissioner and the UN Special Rapporteur on Torture to allow access to detainees.[51]

After the Abu Ghraib scandal, the Democratic Congress also tried to get access to documents on the prisoners in Guantanamo Bay, Iraq and Afghanistan in order to keep the president accountable for their treatment. All three attempts: HR 689, HR 699, and HR 700 introduced in June 2004 failed.[52]

Interviews I conducted in 2004 with military lawyers representing the detainees and congressional staffers involved in the hearings and in creating the legislation which would give Congress oversight of the U.S. military revealed they thought that there was little hope that their efforts would bring results. They attributed this to the fact that the administration and the congressional majority were of the same party.

"The likelihood that this Congress will do anything is slim," said military law expert Eugene Fidell, president of the National Institute of Military Justice, which filed a brief with the Supreme Court in support of the detainees in the case of *Rasul vs. Bush* in 2008.[53]

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[49] For a list of those opposing and supporting HR 4674, see: Obsidian Wings, "Torture Outsourcing Debate," Oct. 1, 2004. URL: http://obsidianwings.blogs.com/obsidian_wings/2004/10/torture_outsour.html, last accessed Aug. 23, 2012.

[50] Friends Committee on National Legislation, "Anti-Torture Efforts on Capitol Hill," June 2006. URL http://fcnl.org/resources/newsletter/jun06/antitorture_efforts_on_capitol_hill/

[51] American Civil Liberties Union, "ACLU Letter to Rep. Rush Holt on HR 4951," Nov. 9, 2004. URL: http://www.aclu.org/national-security/aclu-letter-rep-rush-holt-hr-4951-requiring-videotaping-interrogations-enemy-priso, last accessed Aug. 23, 2012.

[52] House Report 108-658. URL: http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp108&refer=&r_n=hr658.108&item=&sel=TOC_8589&, last accessed Aug. 23, 2012.

[53] The interview with the author took place in November 2004 as part of research for her master's thesis. Fidell is now a professor of military law at Yale Law School.

Congressional staffers from the House minority, who agreed to be interviewed only if their names and affiliations were withheld, reported that Congress had abdicated its oversight of military commissions to the White House. They complained that the majority had no interest in pursuing oversight over the U.S. military in matters relating to the rights of enemy combatants and prisoners of war. There was concern that as long as the Republicans remained in control of the Congress, the executive had the ability to operate outside the bounds of the law in its policies on military commissions.[54]

Does such a "unified government," that is, a government in which the President and both houses of Congress are of the same party really make a difference in the success of a president's new policy? As shown in this section, President Bush was able to push the legislature to block measures that would censure him. He used Article II-based arguments in his signing statements to provide for U.S. military and intelligence services to ignore or regard as advisory only laws that reiterate the prohibition of torture, wiretapping or the creation of new intelligence programs. In so doing, he expanded the executive, pushing the boundaries of what was constitution, and blurred the separation of powers between the executive and legislative.

4. CHALLENGE TO THE JUDICIARY

While the above examples show how President Bush was willing to push constitutional limits to expand his presidential power and to challenge limits Congress sought to place on his redefining of human rights standards in the treatment of detainees, such a policy could not be implemented without having to challenge the courts. The first such challenge came when President Bush called for the detention of suspects without warrant and ordered them tried by military commission.

4.1 MILITARY COMMISSIONS

Between November 2001 and the spring of 2004 alone, 50,000 people were detained by U.S. forces, mostly in Iraq and Afghanistan.[55] In November 2001, President Bush issued a military order that allowed him the power to detain any individual when "it is in the interest

[54] The interview with the author took place in November 2004 as part of research for her master's thesis.
[55] Strasser, Steven 2004. The Abu Ghraib Investigations: The Official Reports of the Independent Panel and the Pentagon on the Shocking Prisoner Abuse in Iraq. New York: Public Affairs LLC, 10.

of the United States that such individual be subject to this order."[56] The order allowed such individuals to be arrested outside the judicial process and without due process, in violation of the Sixth Amendment that "the accused shall enjoy the right to a speedy and public trial" including "to be informed of the nature and cause of the accusation" and "to have the Assistance of Counsel for his defense."

The order allowed the president to have a final say over the convictions and sentences made by military commissions. It also prohibited appeals to U.S. federal courts or the U.S. Court of Appeals for the Armed Forces, and allowed execution as a punishment. In Iraq alone, it was predicted that there would be a need to create detention facilities for 30,000 to 100,000 prisoners of war.[57]

Though the Army Judge Advocate General, Pentagon lawyers and Attorney General Ashcroft disagreed with the White House's plan for the military commissions, both because they did not conform to military legal standards and because the White House would have sole authority over the commissions, the White House still released the executive order. The advice of Secretary of State Colin Powell, of National Security Advisor Condoleezza Rice, and of the State Department interagency working group to create the military commissions was likewise ignored and they only found out about the details and finalization of the order from a CNN broadcast.[58]

4.2 Interrogation Techniques

As discussed in the previous chapter, the standard operating procedure even in the initial weeks after 9/11 was to treat all captured persons according to the Geneva Conventions, including those whose status as prisoner of war was yet to be determined.[59] But with President Bush's Feb. 7, 2002 memo that operating procedure changed, and neither the Taliban nor those with links to al Qaeda qualified as prisoners of war, and therefore they did not have to be afforded Geneva Convention protections.[60]

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[56] Military Order of Nov. 13, 2001. Federal Register, Volume 66, No. 222, 57833-57836.
[57] Strasser, Steven 2004. The Abu Ghraib Investigations: The Official Reports of the Independent Panel and the Pentagon on the Shocking Prisoner Abuse in Iraq. New York: Public Affairs LLC, 55.
[58] History Commons, "The Loss of US Civil Liberties: Expansion of Presidential Power." URL: http://www.historycommons.org/timeline.jsp?civilliberties_patriot_act=civilliberties_expansion_of_presidential_power&timeline=civilliberties&startpos=100.
[59] See chapter three, p. 71.
[60] Bush, President George W., The White House, Memorandum for the Vice President, et al: "Humane Treatment of al Qaeda and Taliban Detainees," Feb. 7, 2002. URL: http://lawofwar.org/Bush_memo_Genevas.htm, last accessed Aug. 6, 2012.

The Office of the Legal Counsel to the President advised in its August 1, 2002 memo that only those acts intended to inflict pain and torture would violate the Convention against Torture and Other Cruel Inhumane or Degrading Treatment. By Dec. 2, 2002, Secretary of Defense Donald Rumsfeld had approved 16 new interrogation methods, including stress positions, isolation for up to 30 days, hooding, removal of clothing, and the use of dogs.[61]

What started as presidential venturing became standard treatment for detainees in the days that followed. The Senate Armed Services Committee concluded after holding multiple hearings, 70 interviews and reviewing over 200,000 pages of classified and unclassified evidence, that:

> Secretary of Defense Donald Rumsfeld's authorization of aggressive interrogation techniques for use at Guantanamo Bay was a direct cause of detainee abuse there. Secretary Rumsfeld's December 2, 2002 approval of Mr. Haynes' recommendation that most of the techniques contained in GTMO's October 11, 2002 request be authorized, influenced and contributed to the use of abusive techniques, including military working dogs, forced nudity and stress positions, in Afghanistan and Iraq.[62]

Torture and unlimited detention without charges or judicial recourse became frequent in Guantanamo, Afghanistan and Iraq. Between 2003 and 2006, there were over 330 documented cases of abuse involving 600 U.S. personnel and 460 detainees (one case of abuse can involve more than one personnel and/or more than one detainee). Of those, at least 220 took place in Iraq, at least 60 in Afghanistan and 50 in Guantanamo Bay. At least 570 of the 600 personnel implicated were U.S. military, at least 10 were CIA or other intelligence officials, and 20 independent civilian contractors.[63] An act of abuse was only defined as such when it violated the U.S. Uniformed Code of Military Justice, including homicide, assault, cruelty, maltreatment and maiming; or if it violated U.S. federal law, including homicide, assault, sexual abuse and torture.[64]

By issuing orders contravening treaties and conventions to which the United States is a party, the President and the Secretary of Defense were begging the judiciary to intervene. Finally in June 2006, the Supreme Court dealt a blow to the administration policy in its ruling

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[61] Strasser, Steven 2004. The Abu Ghraib Investigations: The Official Reports of the Independent Panel and the Pentagon on the Shocking Prisoner Abuse in Iraq. New York: Public Affairs LLC, Appendix C, "Evolution of Interrogation Techniques- Guantanamo."

[62] Report of the Committee on Armed Services, "Inquiry into the Treatment of Detainees in U.S. Custody," Nov. 20, 2008, xxviii. URL: http://documents.nytimes.com/report-by-the-senate-armed-services-committee-on-detainee-treatment, last accessed Aug. 6, 2012. Note that the "abusive techniques" mentioned were directly authorized by Secretary Rumsfeld.

[63] Human Rights First, "By the Numbers: Findings of the Detainee Abuse and Accountability Project," April 2006, 2, 6. URL: http://www.humanrightsfirst.org/wp-content/uploads/pdf/06425-etn-by-the-numbers.pdf, last accessed Aug. 8, 2012.

[64] Ibid, 5

on *Hamdan vs. Rumsfeld*. It declared the military commissions unconstitutional (upholding a Washington district court ruling from 2004), and ruled that the Geneva Conventions do apply to the Guantanamo detainees and followers of Al Qaeda.[65]

The court's ruling brought to light the combined checking power of Congress and the judiciary on the powers of the executive: "The court's conclusion ultimately rests upon a single ground: Congress has not issued the executive a blank check," wrote Justice Stephen Breyer in his concurring opinion to the majority ruling.[66]

It ruled that Congress' vote after the 9/11 attacks to authorize the use of military force did not provide authorization for military commissions, which had not been sanctioned by Congress and did not comply with the Geneva Conventions or the Uniform Code of Military Justice. It ruled that federal courts do have jurisdiction to hear cases brought by the detainees. The ruling was hailed as historic, with potential to roll back other aspects of the Bush administration's detainee policy such as wiretapping, which relied on similar argumentation that Congress had de facto agreed to the program due to its military authorization vote. [67]

President Bush was quick to respond. With the help of the Justice Department, he drafted new legislation that kept most of the previous aspects of the military commission the same. These included the following provisions:

> Enemy combatants could be detained indefinitely without trial and without the right to seek habeas corpus review in federal courts; hearsay evidence, unless it was deemed "unreliable" would be allowable … there is no provision for a speedy trial; detainees "may be tried and punished at any time without limitations"… evidence obtained during interrogations where "coercion" was employed would be admissible unless the military judge found it "unreliable"… and the Geneva Conventions would not be "a source of judicially enforceable individual rights."[68]

Judge Advocate Generals testified before the Senate Judiciary Committee in August 2006 to criticize the White House draft because it could also set a precedent for U.S. military personnel to not be treated according to the Geneva Conventions if captured. Three Republican senators led an effort to block the White House's draft legislation, and even the Defense Department issued a new directive in September of 2006 which conflicted with the White House's language on the Military Commissions Act by banning aggressive interrogation techniques and creating a uniform standard of treatment for POWs and enemy

[65] Greenhouse, Linda, "Supreme Court Blocks Guantanamo Tribunals," The New York Times, June 29, 2006. URL: http://www.nytimes.com/2006/06/29/washington/29cnd-scotus.html?pagewanted=1, last accessed Nov. 9, 2011.
[66] Greenhouse, Linda, "Supreme Court Blocks Guantanamo Tribunals," The New York Times, June 29, 2006. URL: http://www.nytimes.com/2006/06/29/washington/29cnd-scotus.html?pagewanted=2, last accessed Nov. 9, 2011.
[67] Ibid
[68] Ball, Howard 2007: Bush, the Detainees, and the Constitution. Lawrence, Kansas: University Press of Kansas, 179.

combatants. Yet by mid-October 2006, the Republican Congress gave in to White House pressure and passed the legislation with only minor changes.[69]

4.3 DETENTION POLICIES

As discussed in chapter two, President Bush broke all legal precedent in May 2002 by ordering U.S. citizen Jose Padilla to be arrested far from the battlefield and to be held by the military at Guantanamo without being charged or convicted of any crime. By ensuring that the Supreme Court could not review the case, the Bush administration was able to set precedent that it could arrest anyone, including any U.S. citizen, anywhere in the United States or abroad without proof of connection to a crime.[70]

The Bush administration provided evidence against him to the appeals court where Padilla's lawyers subsequently sent his case in September 2005, and the Fourth Circuit Court of Appeals ruled in September 2005 based on evidence later found faulty that the commander in chief could detain an American arrested on U.S. soil as an enemy combatant.[71]

Precedent set by the Reagan administration assisted the judiciary in expanding Bush's new detainee policy. The state secrets privilege upheld by the Supreme Court during the Reagan administration, which stated that the government did not have to disclose its intelligence-gathering methods due to national security concerns, was used to force the courts to throw out a case brought by German Khaled el-Masri, who had been wrongfully held in Afghanistan for five months after a case of identity confusion.[72] The case of Canadian Maher Arar was thrown out for the same reason after he sued the U.S. government for detaining him in New York, shipping him to Syria, jailing him for 10 months there without charge, and reportedly torturing him.[73]

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[69] Ibid, 178-184
[70] Savage, Charlie 2007: Takeover: The Return of the Imperial Presidency. New York: Back Bay Books, 200.
[71] Ibid
[72] In *Halkin vs. Helms* in September 1982, the district and appellate courts ruled the government does not have to release their records of the wiretapping of the anti-Vietnam war protestors during the Nixon administration. The DC Court of Appeals wrote in its decision that the federal courts: "should accord utmost deference to executive assertions of privilege on grounds of military or diplomatic secrets… courts need only be satisfied that there is a reasonable danger" that military secrets might be exposed (Siegel, Barry 2008: Claim of Privilege. New York City: Harper Collins, 196.) This ruling set precedent for courts to dismiss lawsuits against the Bush administration when it abducted foreign nationals and reinvigorated a warrantless domestic spying program 20 years later (Fisher, William: "Courts, Congress Resist Growing White House Power," InterPress Service News Agency: June 30, 2006). In November of 1984, the D.C. Court broadened the definition of state secrets to include "disclosure of intelligence-gathering methods or capabilities and disruption of diplomatic relations." (Siegel, 197)
[73] Fisher, William: "Courts, Congress Resist Growing White House Power," InterPress Service News Agency: June 30, 2006.

4.4 WIRETAPPING

Seeds planted by the judiciary during the Reagan administration helped on other fronts as well. In 1986, Samuel Alito, who was then a political appointee on the Justice Department's Litigation Strategy Working Group, proposed that signing statements be used to "increase the power of the executive to shape the law."[74] Alito continued to support the expansion of the executive in the years that followed. In a speech to the Federalist Society in November of 2000, he called the unitary executive theory the "gospel according to the OLC [Office of Legal Counsel]" and said this basis for argumentation should still be used to expand the power of the president.[75] Because the theory functions through removing checks and balances on the president's power, the theory "can be used to accomplish things that most probably would not favor," and he approved of such a presidency, he said.[76]

The Bush administration's plans to expand presidential power from the beginning of his term placed those willing to support a unitary executive theory-based view of presidential power in positions of influence in the judiciary.

In his confirmation hearings for the position of Supreme Court justice in 2005, Sen. Durbin questioned Alito on his support of the unitary executive theory:

> The Bush administration has repeatedly cited this theory to justify its most controversial policies in the war on terrorism. Under this theory, the Bush administration has claimed the right to seize American citizens in the United State and imprison them indefinately without charge. They have claimed the right to engage in torture, even though American law makes torture a crime. Less than two weeks ago, the White House claimed the right to set aside the McCain torture amendment that passed the Senate ninety to nine. What was the rationale? The Unitary Executive Theory, which you have supported.[77]

Alito, who defended government officials' use of domestic wiretaps without obtaining a warrant during the Reagan administration, went on after his 2005 confirmation to argue that military commissions for detainees in Guantanamo were legal in the case *Hamdan v. Rumsfeld* in June of 2006.[78] While he had the dissenting view, the case had implications for Bush's warrantless wiretapping program, which Alito supported. The questions of Sen.

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[74] Savage, Charlie 2007: Takeover: The Return of the Imperial Presidency. New York: Back Bay Books, 233.
[75] [75] Savage, Charlie 2007: Takeover: The Return of the Imperial Presidency. New York: Back Bay Books, 271.
[76] Ibid, 271
[77] Ibid, 272
[78] Associated Press, "Alito Defended Government Wiretap rights," MSNBC, Dec. 23, 2005. URL: http://www.msnbc.msn.com/id/10586849/ns/us_news-the_changing_court/t/alito-defended-government-wiretap-rights/#.TrfWznJoV8E, last accessed Nov. 9, 2011.

Schumer before the Senate Judiciary Committee for Alito's confirmation hearings would come back to haunt him:

> In the area of executive power, Judge Alito, you have embraced and endorsed the theory of the unitary executive. …Under this view, in times of war the president would, for instance, seem to have inherent authority to wiretap American citizens without a warrant, to ignore congressional acts at will, or to take any other action he saw fit under his inherent powers. We need to know, when a president goes too far, will you be a check on his power or will you issue him a blank check to exercise whatever power alone he thinks appropriate?[79]

While Alito and many others in the judiciary did issue the president a blank check in the creation of a new detainee policy, it was the sum of both branches' inability to check the president that helped the president to be successful until 2006 in pushing through a new detainee policy. This new detainee policy – which called for aggressive interrogation techniques, no writ of *habeus corpus*, no applicability of the Geneva Conventions, and trial by military commission – was implemented on the ground in Iraq, Afghanistan and Guantanamo Bay. To summarize from chapter two, President Bush implemented this new detainee policy successfully as below.

[79] Savage, Charlie 2007: Takeover: The Return of the Imperial Presidency. New York: Back Bay Books, 272.

Implementation of Bush Detainee Policy

- **Redefined torture**: After Bush's Feb. 22, 2002 said that detainees did not have to be protected by Geneva Conventions, an Aug. 1, 2002 OLC memo stated that only those acts that *intend* to inflict torture are torture. The DOJ approved waterboarding as an interrogation method for the CIA that day.[80]
- **Got new interrogation techniques approved**: On Dec. 2, 2002, Defense Secretary Rumsfeld approved the new interrogation techniques, including stress positions, isolation for up to 30 days, hooding, stress positions, removal of all clothing, threatening detainees with aggressive dogs, grabbing, poking and pushing and deprivation of light.[81]
- **CIA implemented new techniques**: In a January 28, 2003 memo, the CIA recorded that it was using both "standard" and "enhanced" interrogation techniques.[82]
- **Created immunity for those using new techniques**: On March 14, 2003, John Yoo issued a legal opinion which stated that criminal laws, including the federal torture statute, "would not apply to certain military interrogations, and that interrogators could not be prosecuted by the Justice Department for using interrogation methods that would otherwise violate the law."[83]
- **Allowed standards to change, and change again**: An April 16, 2003 memo by Defense Secretary Rumsfeld approved FM 34-52 standards, plus allowed for methods such as isolation, pushing and grabbing, change of diet for the detainees, and interruptions of sleep patterns for Guantanamo detainees.[84]
- **Brought the new interrogation standards to Iraq**: Interrogators in Iraq moved from using FM 34-52 techniques to those more aggressive techniques being used on Gitmo detainees. In August 2003, Maj. Gen. Geoffrey Miller brought Rumsfeld's guidelines of April 16, 2003 to Iraq, recommending they be used by the whole command.[85]
- **Ramping up aggressive techniques**: On September 14, 2003, Ricardo Sanchez, the commander of the CJTF-7, authorized 12 interrogation techniques that went beyond FM 34-52, including five that were more aggressive than techniques used for Guantanamo.
- **New techniques slide to homicide, assault, sexual abuse and torture**: The DOD and CIA reported using the new "enhanced techniques."[86] During the time that President Bush's detainee policy was in place from 2003 to 2006, there were 330 documented abuse cases from 600 U.S. personnel on 460 detainees.[87]

[80] U.S. Department of Justice, Office of Legal Counsel, Aug. 1, 2002. URL: http://www.aclu.org/files/pdfs/safefree/cia_3686_001.pdf, last accessed Sep. 30, 2010. Note: Title of memo was deleted by those declassifying the previously Top Secret document.

[81] Strasser, Steven 2004. The Abu Ghraib Investigations: The Official Reports of the Independent Panel and the Pentagon on the Shocking Prisoner Abuse in Iraq. New York: Public Affairs LLC, Appendix C, "Evolution of Interrogation Techniques- Guantanamo."

[82] American Civil Liberties Union, "Documents Released by the CIA and Justice Department in Response to the ACLU's Torture FOIA." URL: http://www.aclu.org/national-security/documents-released-cia-and-justice-department-response-aclus-torture-foia, last accessed Sep. 30, 2010.

[83] Report of the U.S. Senate Committee on Armed Services. "Inquiry into the Treatment of Detainees in U.S. Custody," Nov. 20, 2008.

[84] Strasser, Steven (ed.) 2004: The Abu Ghraib Investigations. New York: Public Affairs, 32-33, Appendix C.

[85] Ibid, 7-8

[86] Report of the U.S. Senate Committee on Armed Services, "Inquiry into the Treatment of Detainees in U.S. Custody," Nov. 20, 2008, xiii. URL: http://documents.nytimes.com/report-by-the-senate-armed-services-committee-on-detainee-treatment, last accessed Aug. 8, 2012. See pgs. 16-17, 133-143 where Gitmo detainees are exposed to the "common place" use of some methods and the occasional use of others such as sexual aggression, working dogs, sleep deprivation, strobe lights and loud music, death threats and waterboarding.

[87] Human Rights First, "By the Numbers: Findings of the Detainee Abuse and Accountability Project," April 2006, 2, 6. URL: http://www.humanrightsfirst.org/wp-content/uploads/pdf/06425-etn-by-the-numbers.pdf, last accessed Aug. 6, 2012.

5. Testing Intervening Variables: Presidential Popularity and Composition of Congress

Let's look again at the conditions present at the point in time when President Bush's new detainee policies needed to be enforced by the legislature and judiciary. Detainee policy was changed by the Bush administration in several key ways: In the area of warantless detention and intelligence gathering, interrogation standards (ie, application of torture), writ of *habeus corpus*, and use of military commissions. Thus legislation and rulings applied to these major areas were chosen as tests for whether popularity and Congressional make-up at the time of those decisions affected whether the president was successful or not. This section will therefor answer the questions: "Was presidential popularity/composition of Congress an indicator for how the Supreme Court would rule?" "Was presidential popularity/the composition of Congress an indicator for how the Congress would vote?" As discussed in chapter one, the ultimate test of success comes when the highest court allows the president's policy to stand either by ruling in favor of it or not placing barriers to its continued implementation, and when the Congress is unable to block the implementation of the policy through legislative measures or votes directly in favor of the president's policy.

To put the data on presidential popularity in context, the reader should be aware of the unique dramatic shifts in President Bush's popularity during his two terms. President's Bush's popularity rose from 51% after the election to 90 % immediately after 9/11.[88] Thereafter, it slowly decreased, with intermittant smaller increases, until it hit rock bottom at the end of his term at 25 %, the lowest for any U.S. president except President Nixon after Watergate with 24 % and President Truman during the Korean War at 22%.[89] President Bush's average approval rating for both terms was 49.4%, with 62.2 % approval in his first

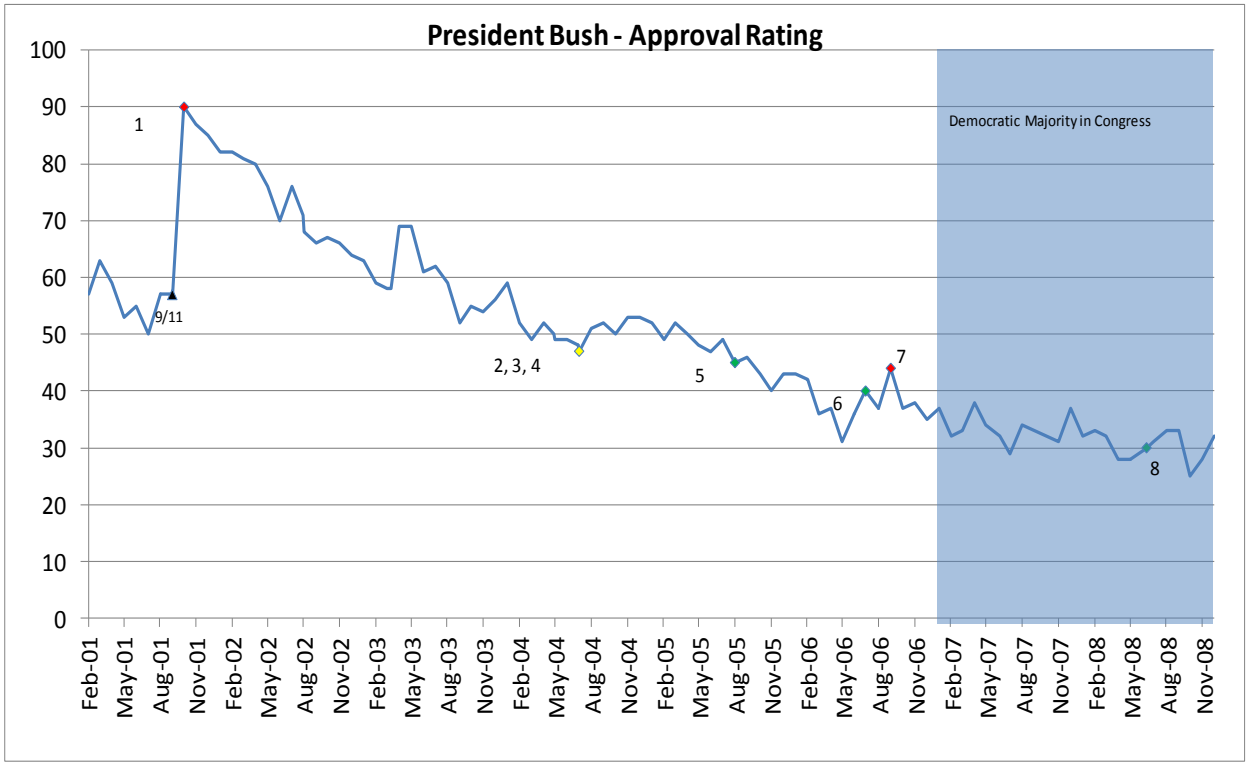
[88] According to the Gallup poll conducted Sep. 21, 22, 2001. An ABC poll conducted on Oct. 8, 9, 2001 put his approval rating at 92 percent. Source: "Job Performance Ratings for President Bush," Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20: Microsoft/Parents/'Socially Responsible': First Roper Center for Public Opinion. Lincoln, NE: Gallup Organization, 2000. Storrs, CT: The Roper Center, University of Connecticut, 2001URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Bush#.UCIouaC7_0d, last accessed Aug. 6, 2012. Please note: All popularity ratings used to test the model, both in this section and in the section testing the three further case studies will be taken from Gallup polling information (unless otherwise noted) to ensure accuracy of comparison and prevent percentage inflation. Where polling information was not conducted on the day of the court decision, the author lists the Gallup ratings on the closest dates before and after the ruling. By popularity ratings, the author means "Job performance ratings" of the designated president. In addition, summaries of the Supreme Court cases were based on the chapter two descriptions and simply shortened for the purposes of this section.

[89] Gallup, "Presidential Approval Ratings: Gallup Historical Statistics and Trends." URL: http://www.gallup.com/poll/116677/presidential-approval-ratings-gallup-historical-statistics-trends.aspx, last accessed Aug. 14, 2012.

term, compared to 36.5 in his second.[90] His average approval rating puts him just lower than average compared to other presidents' approval ratings post-World War II.[91]

With this in mind, the below provides a quick review of the three major pieces of legislation and the five major Supreme Court rulings related to detainees and where the president's popularity ratings were when the rulings were made or acts were passed. While the lower courts had issued rulings on detainee policy prior to the Supreme Court rulings, these could be appealed, and thus the more conclusive rulings of the highest court were used for this study. A red triangle is placed next to those cases where there was a win for the president, when the court ruled in the president's favor or Congress voted for president's policy, and a green triangle next to those where there was a loss. The presidential popularity cited reflects the Gallup poll presidential approval rating at the time the ruling or act was passed. If there was not a poll on that day, data is cited for the poll conducted closest to the day, both before and after.

Presidential Popularity and President Bush's Wins and Losses on Detainee Policy



[90] Gallup, "Presidential Approval Ratings: Gallup Historical Statistics and Trends." URL: http://www.gallup.com/poll/116677/presidential-approval-ratings-gallup-historical-statistics-trends.aspx, last accessed Aug. 14, 2012.

[91] Pres. Bush was 7th of 11, followed by Nixon, Ford, Carter and Truman. See: Jones, Jeffrey: "Despite Recent Lows, Bush Approval Average is Midrange," in Gallup, Jan. 5, 2009. URL: http://www.gallup.com/poll/113641/despite-recent-lows-bush-approval-average-midrange.aspx/, last accessed Aug. 14, 2012.

Key to Data Points 1-8

1) + president: On Oct. 24, 2001, the Patriot Act turned back the checks provided by the 1978 FISA law, and allowed warrantless detentions. Presidential popularity was at 88/87%.[92]

2) + president: On June 28, 2004, the Supreme Court dismissed the case *Rumsfeld v. Padilla* because it had been filed with the wrong court. Padilla, a U.S. citizen, was seeking *habeus corpus* from where he was being detained in a South Carolina military brig. President Bush's job approval rating was at 47/48 %.[93]

3) +/- president: On the same day, the Supreme Court ruled in the case *Hamdi v. Rumsfeld* that a U.S. citizen held in the United States as an enemy combatant has a constitutional right to contest the factual basis for detention before a neutral decision maker. In the government's favor, the court ruled that an enemy combatant *might be held without charges or trial as an enemy combatant*, but checked it by saying that the detainee *can't be held indefinitely* without a chance to contest his detention, even in U.S. Courts. It also gave the president an advantage by choosing not to address the issue of whether the president had the authority to detain enemy combats without congressional approval by saying that the AUMF inherently allows it, despite the fact that it did not specifically allow it.[94] President Bush's job approval rating was at 47/48 %.[95]

4) - president: On June 28, 2004 the Supreme Court ruled in *Rasul vs. Bush*, that the U.S. courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals at Guantanamo Bay. [96] It ruled that *Eisentrager* did not exclude aliens from a writ of *habeas corpus*. President Bush's job approval rating was at 47/48 %.[97]

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[92] "Job Performance Ratings for President Bush," Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20: Microsoft/Parents/'Socially Responsible': First Roper Center for Public Opinion. Lincoln, NE: Gallup Organization, 2000. Storrs, CT: The Roper Center, University of Connecticut, 2001URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Bush#.UCIouaC7_0d, last accessed Aug. 6, 2012. Polling information from 10/19-21/2001 was 88% and from 11/2-4/2001 was 87%.

[93] Ibid. Polling information from 6/28-23/2004 was 48% and from 7/8-11/2004 was 47%.

[94] Silverstein, Gordon and Hanley, John: "The Supreme Court and Public Opinion in Times of War and Crisis". In: Hastings Law Journal, July 2010, Vol. 61:1453, 1490.

[95] "Job Performance Ratings for President Bush," Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20: Microsoft/Parents/'Socially Responsible': First Roper Center for Public Opinion. Lincoln, NE: Gallup Organization, 2000. Storrs, CT: The Roper Center, University of Connecticut, 2001URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Bush#.UCIouaC7_0d, last accessed Aug. 6, 2012... Polling information from 6/28-23/2004 was 48% and from 7/8-11/2004 was 47%.

[96] OLR Research Report: "U.S. Supreme Court Rulings: Detention of Enemy Combatants," Aug. 12, 2004.

[97] Ibid. Polling information from 6/28-23/2004 was 48% and from 7/8-11/2004 was 47%.

5) - president: On July 24, 2005 Sen. McCain introduced the Torture Ban, which ensured detainees would no longer be subject to torture during interrogation, but eliminated the federal court's jurisdiction over the detainee's *habeas corpus* claims.[98] The government sought to make changes to the bill's stringent anti-torture requirements for almost half a year, including pushing for there to be an exception for the CIA to be able to use the methods on foreign soil.[99] Oct. 5, 2005, President Bush declared he would veto it.[100] Before the announcement, the President's popularity ratings were at 45%. The same day that the president made this announcement, Congress passed the ban. In the next Gallup poll post-announcement, the president's ratings had dropped to 39 %.[101]

6) - president: The Supreme Court had agreed on Nov. 7, 2005 to hear Hamdan's case, and in *Hamdan v. Rumsfeld* ruled on June 29, 2006 that President Bush did not have the authority to create war crimes tribunals and found that the special military commissions violated both the UCMJ and the Geneva Conventions.[102] President Bush's popularity ratings were at 37/40%.[103]

7) + president: In the Military Commissions Act of 2006**,** the president was granted several major expansions of his power, including the power to "interpret the meaning and the application of the Geneva Conventions," to determine whether someone is an unlawful enemy combatant,[104] and barred *habeas corpus* for all detainees in U.S. military prisons.[105]

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[98] Elsea, Jennifer K. and Garcia, Michael John: "Enemy Combatant Detainees: Habeus Corpus Challenges in Federal Court". Congressional Research Service, Feb. 3, 2010, Summary. URL: http://www.fas.org/sgp/crs/natsec/RL33180.pdf, last accessed Aug. 14, 2012.

[99] Schmitt, Eric, "Exception Sought in Detainee Abuse Ban," New York Times, Oct. 25m 2005. URL: http://www.nytimes.com/2005/10/25/politics/25detain.html, last accessed Aug. 15, 2012.

[100] White House, "Press Briefing with Scott McClellan," Oct. 5, 2005. URL: http://www.presidency.ucsb.edu/ws/index.php?pid=73160, last accessed Aug. 15, 2012. See also: Savage, Charlie 2007: Takeover: The Return of the Imperial Presidency. New York: Back Bay Books, 221.

[101] "Job Performance Ratings for President Bush," Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20: Microsoft/Parents/'Socially Responsible': First Roper Center for Public Opinion. Lincoln, NE: Gallup Organization, 2000. Storrs, CT: The Roper Center, University of Connecticut, 2001.URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Bush#.UCIouaC7_0d, last accessed Aug. 15, 2012. Polling was conducted from 9/26-28/2005 for the first rating and from 10/13-16/2005 for the second.

[102] *Hamdan vs. Rumsfeld* (2006), 548 U.S. 557; 126 Supreme Court, Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[103] "Job Performance Ratings for President Bush," Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20: Microsoft/Parents/'Socially Responsible': First Roper Center for Public Opinion. Lincoln, NE: Gallup Organization, 2000. Storrs, CT: The Roper Center, University of Connecticut, 2001URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Bush#.UCIouaC7_0d, last accessed Aug. 6, 2012. Polling was conducted from 6/23-25/2006, with popularity at 37%; and polling from 7/6-9/2006 with popularity at 40%.

[104] Military Commissions Act of 2006, Sec. 6a3. See also: Center for Constitutional Rights, Military Commissions Act of 2006: A Summary of the Law. See chapter three, pg. 85.

[105] Ibid

The law was passed on Sep. 29, 2006 and signed into law on Oct. 17, 2006. The President's popularity ratings at the time the bill passed was at 44% and at 37% when he signed it.[106]

8) - president: In the case of *Boumediene v. Bush*, the Supreme Court ruled that the MCA unconstitutionally suspended detainees' rights to *habeas corpus* in its decision of June 12, 2008. President Bush's job approval ratings had fallen still further to 30%.[107]

5.1 ANALYSIS

5.1.1 Connection between Presidential Popularity and His Detainee Policy "Wins"

A closer look at the rulings and legislation helps us understand when President Bush wins and when he loses, and the connection between presidential popularity and these wins. It should be noted that the discussion in this paper does not focus on the cause of the popularity rises and falls, but on whether there is correlation between presidential popularity and how the Congress and Supreme Court decide.

In the following section, I will outline why the Supreme Court rulings through 2004 were primarily wins for the administration, and those thereafter losses, and how this mirrored the presidential popularity ratings at the time. On the other hand, I will also explain why presidential popularity had less a correlation with pro-government legislation passed than the composition of Congress. I analyze the legislative and judicial decisions in the same section because chronologically, the judicial rulings and bills passed were often directly related to one another.[108]

The first major piece of legislation affecting detainee policy was the Patriot Act. It was passed quickly the month after 9/11, when presidential popularity had just weeks earlier reached its all time high. The new law turned back the checks provided by the 1978 FISA law, giving broad powers to the executive and its intelligence-gathering agencies to detain, search, and seize suspected terrorists and those connected with them in the United States as well as

[106] "Job Performance Ratings for President Bush," Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20: Microsoft/Parents/'Socially Responsible': First Roper Center for Public Opinion. Lincoln, NE: Gallup Organization, 2000. Storrs, CT: The Roper Center, University of Connecticut, 2001.URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Bush#.UCIouaC7_0d, last accessed Aug. 15, 2012. The polls were taken 9/15-17/2006 and 10/9-12/2006.

[107] Ibid, polling was from 6/9-12/2008.

[108] For example, a ruling called for congressional authorization of an act, which Congress would then produce.

abroad without search warrant or the requirement to show any probable cause of their guilt.[109]

In the two years following, detainee policy was developed primarily by memo, and attempts by the judiciary and the legislature to check the president floundered. The lower courts batted around differing rulings without rising to the level of the Supreme Court, and the Republican-led Congress ensured that legislation that would stymie the president's detainee policy would fail.[110]

Finally, following the revelations of Abu Ghraib in 2004, the first cases landed in the Supreme Court. Riding around the median of his approval ratings (47/48%) during his two terms when the first three cases were ruled upon in June 2004, President Bush was not in a strong position, but nor was his popularity in the doldrums. With almost as many approving of his job performance as disapproving (49%), the Court was not yet in a position to strongly censure the president.[111]

Using the uet Article-II based arguments in which the Bush administration had become expert, the U.S. District Court for the Southern District of New York had initially ruled in favor of the government's arguments in *Padilla* that the president had the "constitutional powers as Commander in Chief and the statutory authorization provided by Congress' Authorization for Use of Military Force" to detain Padilla, a U.S. citizen.[112] In so doing, the court enabled these Article II powers to trump Congress' checking authority, as neither had the Congress called for the detention and withdrawal of *habeas corpus* for U.S. citizens in the AUMF, nor did the court have the power to change the definition of the Non-Detention Act of 1971, which states that "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[113] By refusing to rule on the merits of the case, and simply stating that the case needed to be filed elsewhere, the Supreme Court gave the Bush administration a pass, letting it *de facto* continue to detain U.S. citizens.

In the second case of that day, the Supreme Court did not answer the question in *Hamdi* of whether or not the president had the Article II authority to arrest and detain enemy

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[109] Public Law 107-56, Oct. 26, 2001.
[110] See pgs. 100-101 of this chapter for a list.
[111] "Job Performance Ratings for President Bush," Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20: Microsoft/Parents/'Socially Responsible': First Roper Center for Public Opinion. Lincoln, NE: Gallup Organization, 2000. Storrs, CT: The Roper Center, University of Connecticut, 2001URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Bush#.UCIouaC7_0d, last accessed Aug. 6, 2012. Polling was conducted from 6/28-23/2004 was and from 7/8-11/2004.
[112] *Rumsfeld v. Padilla*, The Oyez Project at IIT Chicago-Kent College of Law. URL: http://www.oyez.org/cases/2000-2009/2003/2003_03_1027/, last visited August 14, 2012.
[113] Public Law 92-128, 85 Stat. 347 (1971), 18 U.S.C. § 4001(a).

combatants. By ruling that the post-9/11 legislation (AUMF) could be read to allow such actions, the Supreme Court expanded the presidency and limited Congress' interference power.[114] By saying an enemy combatant could be held without charges and trial, just not indefinitely, it allowed the government to continue implementing its policy, pushing any check until further down the line.

In fact, Justice O' Connor defended the plurality position that the President could hold enemy combatants without charges by saying: "We conclude that detention of individuals falling into that limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[115]

The ruling on *Rasul*, passed down the same day, was a step closer to upholding detainee rights. It argued that since the United States was exercising complete control over the Guantanamo Bay facility, it was within the jurisdiction of the United States.[116] One defender of the government position put it this way: "While it appears that enemy non-citizen detainees held beyond American soil have no constitutional rights, the Court determined they do have statutory rights to petition for *habeas corpus* if they are detained by an agent of the executive branch under the jurisdiction of a federal court."[117]

Nevertheless, President Bush's detainee point man John Yoo saw a silver lining in both the *Hamdi* and *Rasul* rulings for the government: "But these rulings also confirmed as a matter of law that the war against the al Qaeda terrorist network and the Taliban militia was indeed a war, that it was authorized by Congress, and that it was not solely a criminal justice matter."[118]

Make no mistake; these rulings were not a glowing endorsement of the government's position, despite Yoo's hope that the loopholes not addressed would allow the Bush

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[114] Ibid, 1490
[115] *Hamdi v. Rumsfeld*, 542 U.S. 507(2004), 124 Supreme Court at 2640.
[116] *Rasul v. Bush*: Supreme Court Online, Duke Law School. URL: http://web.law.duke.edu/publiclaw/supremecourtonline/commentary/rasvbus.html, last accessed Aug. 13, 2012.
[117] McKaig, Ryan, "Aid and Comfort: *Rasul v. Bush* and the Separation of Powers Doctrine in Wartime". In: Campbell Law Review, Vol.28, Issue 1, Fall 2005. URL: http://scholarship.law.campbell.edu/cgi/viewcontent.cgi?article=1427&context=clr, last accessed Aug. 13, 2012.
[118] Yoo, John 2006: War by Other Means. New York: Atlantic Monthly Press, 130. Gordan and Hanley also argue that the Rasul decision was not overtly against the president's policies. See: Silverstein, Gordon and Hanley, John: "The Supreme Court and Public Opinion in Times of War and Crisis". In: Hastings Law Journal, July 2010, Vol: 61:1453, 1492.

administration to continue implementing its detainee policy. Yoo also called the *Hamdi* decision "an unprecedented insertion of the federal courts into military affairs."[119]

But while the dismissal of the *Padilla* case allowed the government to continue to detain U.S. citizens without *habeas corpus*, and *Hamdi* allowed enemy combatants to continue to be detained without charges or trial (just not indefinitely), *Rasul* said that at least those detained in Guantanamo could apply for *habeas corpus* and challenge the validity of their detention in U.S. courts. With one "rebuke" to the Bush administration, one win, and one case granting a favor to each side, the 2004 Supreme Court rulings could be said to leave government and detainee rights advocates at a tie. This outcome is not unexpected as the country was almost exactly evenly divided on whether it approved or disapproved of President Bush's job performance.

In this vein, Silverstein and Hanley argue that there is indeed a correlation between popularity and Supreme Court decisions during the Bush administration:

> What is particularly striking about the relationship between public opinion and judicial decisions in the Bush years is that with each passing year after 2004, the President's popularity … subsided. Bush's popularity stood at 47 % on the eve of the Court's first major ruling in *Rasul v. Bush*, 37% when the Court handed down the somewhat less cooperative ruling in *Hamdan v. Rumsfeld*, and only 30 % support in 2008 when the Court delivered a stinging rebuke to the President in *Boumediene v. Bush*.[120]

Why this differentiation between "cooperative" rulings and those which offer a rebuke? To answer, one must look at the correlation between the public's approval of the president's performance and the degree to which the Supreme Court dared to correct him.

As such, the Supreme Court's rulings in 2004, when presidential popularity was down around its two-term average, could not be considered a strong rebuke. On the ground, *Rasul* changed little for treatment of detainees. As the only ruling on that June 2004 day that the administration considered a direct loss, *Rasul*'s *habeas corpus* gains for detainees were turned back with the Detainee Treatment Act of 2005.

The Pentagon had responded to *Rasul* by creating Combatant Status Review Tribunals where detainees could contest their status, and they could in addition file cases with the federal court. But after the District Court for the District of Columbia became overburdened with cases and imparted conflicting rulings, the Detainee Treatment Act of 2005 said the

[119] Yoo, John 2006: War by Other Means. New York: Atlantic Monthly Press, 130.
[120] Silverstein, Gordon and Hanley, John: "The Supreme Court and Public Opinion in Times of War and Crisis". In: Hastings Law Journal, July 2010, Vol. 61:1453, 1488.

federal courts should no longer be involved in deciding the detainees' status. The Sen. McCain-sponsored act ensured detainees would no longer be subject to torture during interrogation, but eliminated federal court's jurisdiction over the detainee's *habeas corpus* claims.[121] This bow to the government's position wasn't enough, and the government sought to make changes to the bill's stringent anti-torture requirements for almost half a year, including pushing for there to be an exception for the CIA to be able to use the methods on foreign soil.[122]

By Oct. 5, 2005, White House Press Secretary Scott McClellan declared that President Bush would use the first veto of his presidency on the torture ban because the amendment would "limit the president's ability as Commander-in-Chief to effectively carry out the war on terrorism."[123] Before the announcement, the President's popularity ratings were at 45%. The same day that the president made this announcement, Congress passed the ban.[124]

By the time the Supreme Court ruled on *Hamdan v. Rumsfeld* in 2006, President Bush's approval ratings had dropped to 37%, and the court was even clearer that the government position could no longer be supported. The Supreme Court ruled that President Bush's military commissions to try detainees violated both domestic military law (UCMJ) and international law (Geneva Conventions).

Justice Kennedy, in concurring with the majority in part, said that the military commissions raise "separation-of-powers concerns of the highest order."[125] The Justice argued that the separation of powers was violated because:

> Hamdan's military commission exceeds the bounds Congress has placed on the President's authority in §§836 and 821 of the UCMJ. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the

[121] Elsea, Jennifer K. and Garcia, Michael John: "Enemy Combatant Detainees: Habeus Corpus Challenges in Federal Court". Congressional Research Service, Feb. 3, 2010, Summary. URL: http://www.fas.org/sgp/crs/natsec/RL33180.pdf, last accessed Aug. 14, 2012.

[122] Schmitt, Eric: "Exception Sought in Detainee Abuse Ban," New York Times, Oct. 25m 2005. URL: http://www.nytimes.com/2005/10/25/politics/25detain.html, last accessed Aug. 15, 2012.

[123] White House, "Press Briefing with Scott McClellan," Oct. 5, 2005. URL: http://www.presidency.ucsb.edu/ws/index.php?pid=73160, last accessed Aug. 15, 2012. See also: Savage, Charlie 2007: Takeover: The Return of the Imperial Presidency. New York: Back Bay Books, 221.

[124] "Job Performance Ratings for President Bush," Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20: Microsoft/Parents/'Socially Responsible': First Roper Center for Public Opinion. Lincoln, NE: Gallup Organization, 2000. Storrs, CT: The Roper Center, University of Connecticut, 2001. URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Bush#.UCIouaC7_0d, last accessed Aug. 15, 2012. Polling was conducted from 9/26-28/2005 for the first rating and from 10/13-16/2005 for the second. While some may note that in the next Gallup poll post-announcement that the president would veto the act, the president's ratings had dropped to 39%, Hurricane Katrina, rather than the announcement, is likely the cause. The discussion in this paper does not focus on the cause of the popularity rises and falls, but on whether there is correlation between how the Congress and Supreme Court decide and that popularity.

[125] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); Cornell University Law School, Legal Information Institute Website. URL: http://www.law.cornell.edu/supct/html/05-184.ZC1.html, last accessed Aug. 15, 2012.

> Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided. By those standards the military commission is deficient.[126]

Both Justice Kennedy and Justice Breyer suggested that the President go to Congress to get his military commissions authorized.[127] This the government did in the form of the executive-drafted Military Commissions Act of 2006**.** Though key Republicans including Sen. McCain fought against the act, the president was granted several major expansions of his power, including the power to "interpret the meaning and the application of the Geneva Conventions," to determine whether someone is an unlawful enemy combatant,[128] barring *habeas corpus* for all detainees in U.S. military prisons (even those previously filed); and making inapplicable the UCMJ's trial requirements.[129] The law was passed on Sep. 29, 2006 and signed into law on Oct. 17, 2006. The President's popularity ratings at the time the bill passed was at 44% and at 37% when he signed it, suggesting little link between presidential popularity and that win for the president.[130]

On June 12, 2008, the Supreme Court ruled in *Boumediene v. Bush* that the government-drafted MCA unconstitutionally suspended detainees' rights to *habeas corpus*. The court found that the tribunals set up to review the detainee's cases didn't provide for just trials because they could be convicted based on hearsay, and the D.C. Circuit was only using the evidence forwarded by these tribunals.[131] The government's argument that war time and terrorism should allow for special presidential powers and an exemption from due process for detainees no longer held water.

"The laws and Constitution are designed to survive, and remain in force, in extraordinary times," Justice Jackson wrote for the majority. "Liberty and security can be reconciled; and in our system they are reconciled within the framework of that law."[132]

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[126] Ibid
[127] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); Cornell University Law School, Legal Information Institute Website. URL: http://www.law.cornell.edu/supct/html/05-184.ZC1.html, last accessed Aug. 15, 2012.
[128] Military Commissions Act of 2006, Sec. 6a3. See also: Center for Constitutional Rights, Military Commissions Act of 2006: A Summary of the Law. See chapter three of this dissertation, pg. 85-87.
[129] Ibid
[130] "Job Performance Ratings for President Bush," Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20: Microsoft/Parents/'Socially Responsible': First Roper Center for Public Opinion. Lincoln, NE: Gallup Organization, 2000. Storrs, CT: The Roper Center, University of Connecticut, 2001.URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Bush#.UCIouaC7_0d, last accessed Aug. 15, 2012. The polls were taken 9/15-17/2006 and 10/9-12/2006.
[131] Thurber, James A. 2009: Rivals for Power. Lanham, MD: Rowman & Littlefield Publishers, 345.
[132] *Boumediene v. Bush*, 553 U.S. 723 (2008), 70. URL: http://www.law.cornell.edu/supct/pdf/06-1195P.ZO, last accessed Aug. 27, 2012.

The court had the final say, and detainees were finally able to have their cases heard, or be released for lack of evidence. President Bush's approval ratings at that time were in a free fall, hovering at 32 % during the ruling, and falling to 29% thereafter.[133]

5.1.2 Connection between Composition of Congress and Detainee Policy "Wins"

The Military Commissions Act of 2006, passed just weeks before the Democrats took power in Congress, was the last victory that the Republican-dominated Congress gave the president on detainee policy. On Nov. 9, 2006 the Democrats won control of Congress. It was the first time since 1994 that the Democrats controlled the House and the Senate. It was the first time in U.S. history that no Republican captured a seat held by Democrats. In the Senate, the Democrats boasted 53 % of the popular vote and 52 % in the House. The Republicans had only 42 % of the popular vote in the Senate and 44% in the House. This translated to the House Democrats receiving 233 seats to the Republicans' 202, and each party receiving 49 seats in the Senate, with Independents Sen. Sanders and Sen. Lieberman promising to caucus with the Democrats, making the Senate *de facto* Democrat-led as well.[134]

In the years 2001-2006 when the Bush detainee policy was allowed to stand, he enjoyed a high success rate in Congress of over 80%.[135] After the Democrats took over, President Bush's success rate with Congress of 18 % in 2007 was the lowest for presidential success since Congress began recording the success rate in 1953.[136] No wonder, then, that the Congressional party realignment of 2006 saw the end of the official implementation of Bush's detainee policy, and checks and balances began to function again.

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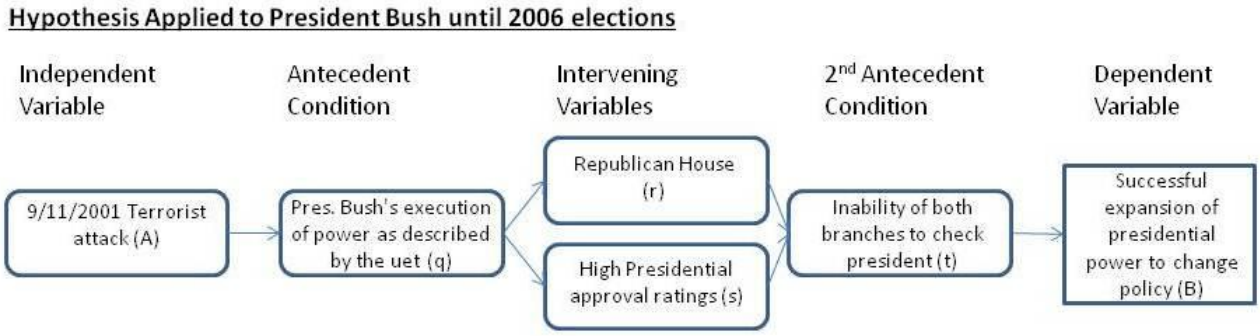
[133] "Job Performance Ratings for President Bush," Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20: Microsoft/Parents/'Socially Responsible': First Roper Center for Public Opinion. Lincoln, NE: Gallup Organization, 2000. Storrs, CT: The Roper Center, University of Connecticut, 2001.URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Bush#.UCIouaC7_0d, last accessed Aug. 15, 2012. Polls were taken 6/1-3/2008 and 6/11-14/2008, where they stayed at 32%. Thereafter they fell to 29% from 7/6-8/2008.

[134] Winger, Richard (ed.), Ballot Access News, Jan. 1, 2007, Vol. 22, No. 9, Jan. 1, 2007. URL: http://www.ballot-access.org/2007/010107.html#10, last accessed March 12, 2013, summarized in: "United States Elections, 2006," Wikipedia. URL: http://en.wikipedia.org/wiki/United_States_elections,_2006, last accessed Aug. 28, 2012.

[135] Conley, Richard S. In: Thurber, James A. (ed.) 2009: Rivals for Power. Lanham: Rowman & Littlefield Publisher, Inc., 168. Presidential success is measured, according to Conley, by the percentage of times the outcome of a vote on a bill corresponds to the president's position (on all issues, not just the detainee issue).

[136] Conley, Richard S. In: Thurber, James A. (ed.) 2009: Rivals for Power. Lanham: Rowman & Littlefield Publisher, Inc., 170.



After the realignment of Congress, there was bipartisan support for a congressional investigation into the destruction of CIA tapes showing the waterboarding of detainees in 2007.[137] More in depth investigations into the detainee abuse implicated Bush administration officials at higher levels, and congressional investigations revealed that the Abu Ghraib abuses were not limited to a few "bad apples," and excuses could no longer be made for torture.[138]

Congress finally made "senior officials" not just junior recruits responsible for the detainee abuse and defined these as 1.) The President himself 2.) Defense Secretary Rumsfeld and 3.) Lieutenant General Ricardo Sanchez, among others. They defined those who provided the specific medium to do so as The Joint Personnel Recovery Agency which provided the training for the new detainee interrogation standards, and the OLC lawyers who provided the legal arguments to justify them.[139]

On the judicial side, the composition of Congress also was an indicator for a judiciary more willing to check the president. The 2006 ruling *Hamdan v. Rumsfeld* resulted in the CIA being forced to close its black sites, and pressure for more detainees to be released because the ruling called for all detainees to be treated according to the Geneva Conventions. While the ruling happened in June before the party switch in Congress, it is interesting to note that there were more detainees released in December after the party switch than in any other month that year. And while there had been more detainees released than detained in

[137] Marshall, Bryan W. and Haney, Patrick J.: "Congressional Complicity". In: Barilleaux, Ryan J. and Kelley, Christopher S. (eds.) 2010: The Unitary Executive and the Modern Presidency. College Station: Texas A &M University Press, 209.

[138] Committee on Armed Services, "Inquiry into the Treatment of Detainees in U.S. Custody," Nov. 20, 2008, xii, reported: "The abuse of detainees in U.S. custody cannot simply be attributed to the actions of 'a few bad apples' acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees. Those efforts damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemies, and compromised our moral authority. "

[139] Committee on Armed Services, "Inquiry into the Treatment of Detainees in U.S. Custody," Nov. 20, 2008, xiii, xxvii, xxviii.

Guantanamo since 2004, there was an increase in number transferred after the ruling and after the party switch, with 111 released or transferred in 2006, and 122 in 2007.[140] Whether the timing was chance can be debated, but it was one of a string of actions that showed the president's detainee policy had been checked by both branches not just in the court room and on Capitol Hill, but on the ground as well.

On June 5, 2007, U.S. military judges dismissed all charges against Hamdan. Because they said they did not have jurisdiction to try Hamdan because he was not proven to be an unlawful enemy combatant, other detainees were able to also gain their freedom. In 2008, the Supreme Court put a definitive end to the government's detainee policy in *Boumediene*.

While scholars Howell and Pevehouse argue that "with a return to divided government, partisanship will permit a reemergence of congressional activism to restrain the president," Marshall and Haney fear that these are "just blips against the long-term secular decline of Congress."[141]

Whether or not these post-party change "blips" were only temporary, they were enough to stall Bush's detainee policy in the last two years. Were the checks placed on the president by the judiciary and Congress after the party change in Congress simply chance? Unlikely. With a lost mandate and a historically low success rate in Congress, President Bush could not continue to push through his detainee policy as he had the first six years.

5.2 Summary of Findings

Yet as has been shown in the previous pages, in the cases where President Bush's popularity ratings remained close to the 50 % mark, the Supreme Court was more likely to give him what he wanted. If they didn't give him a direct ruling in his favor, they found legal arguments to ensure that the *constitutionality* of his policy was not questioned, thus allowing his policies to continue to be implemented.

These "quick fixes" would help as long as the President's party stayed in power. On the legislative side, presidential popularity was not necessarily an indicator for whether the president's policies would be approved or rejected by the Congress. For example, the government-drafted Patriot Act which expanded the president's powers was passed

[140] "The Guantanamo Docket, " New York Times. URL: http://projects.nytimes.com/guantanamo/timeline, last accessed Aug. 28, 2012. A total of 30 detainees were also transferred in 2008.
[141] Marshall, Bryan W. and Haney, Patrick J.: "Congressional Complicity": In: Barilleaux, Ryan J. and Kelley, Christopher S. (eds.) 2010: The Unitary Executive and the Modern Presidency. College Station: Texas A &M University Press, 209.

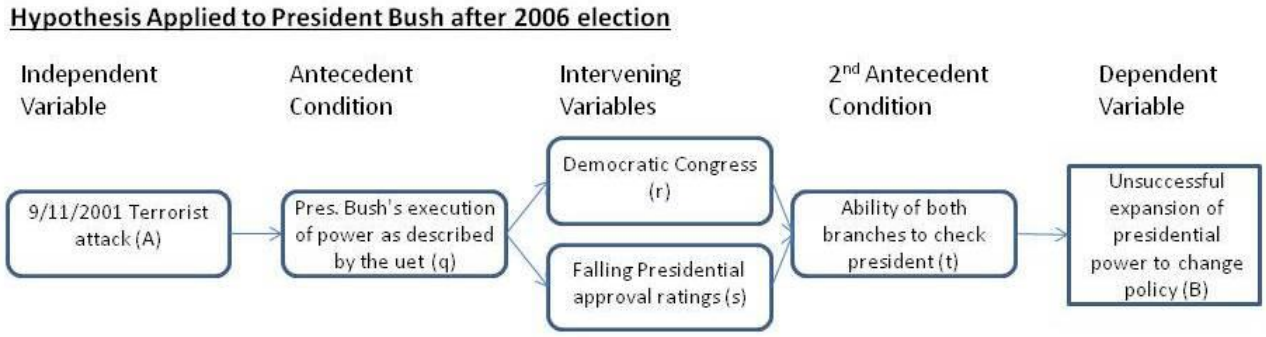
immediately while the president's popularity was high, and the Torture Ban, which limited them, was passed when the president's popularity was declining. But the Military Commissions Act of 2006, which limited detainees' rights, was passed when the president's popularity was even lower than at the time of the Torture Ban. The composition of Congress was much more an indicator for whether the president's policies would be Congressionally approved.

While this section has shown that popularity ratings don't make a difference in pushing through presidential-approved legislation while the president's party is in power (the president's party will push through his legislation regardless of how popular he is with the public) presidential popularity does have a direct correlation to whether the president's party will continue to dominate Congress during mid-term elections. According to Gallup, as long as the president maintains popularity ratings above 50 %, their party will not suffer heavy Congressional losses in mid-term elections. Since 1946, "when presidents are above 50% approval, their party loses an average of 14 seats in the U.S. House in the midterm elections, compared with an average loss of 36 seats when presidents are below that mark," says Jeffrey Jones of Gallup.[142]

President Bush had a popularity rating of 38 % when his party lost 30 seats in the House during the mid-term elections in 2006. The Congressional composition in turn affected whether the Supreme Court and the Congress would check the President on his detainee policy – and as in the case with *Hamdan* – whether Congress would ensure the consequences of a ruling are followed through on months after the fact.

This 50% mark also seemed to provide an indicator for the judiciary decisions, though there was not as clear a correlation as there was with Congressional composition. While the 2004 Supreme Court decisions gave the President and the detainees each a win when the president's popularity was close to the 50 % mark, the president lost in the cases thereafter. While there is no assumption that justices were affected by the president's popularity, the Supreme Court's rulings mirrored the mood of the nation in the extent to which it accepted the president's arguments, or in the end, "rebuked" them.

[142] Jones, Jeffrey, "Average Midterm Seat Loss 36 for Presidents Below 50% Approval," Gallup. URL: http://www.gallup.com/poll/141812/Avg-Midterm-Seat-Loss-Presidents-Below-Approval.aspx, last accessed Aug. 15, 2012.



6. CONCLUSION

An international threat helped President Bush to expand his power in a manner described by the uet. The hostility came in the form of the attacks of 9/11 (Variable A). At home, the country showed their perception of the threat by rallying around the president, and giving him the highest popularity ratings in history. Congress showed its support by quickly passing an act (AUMF) willing to give the president whatever support he needed to fight terrorism; NATO and the United Nations promised likewise.

President Bush operated within the uet belief system outlined by Waterman – that he can control all of the executive, that "any law passed by Congress that seeks to limit the president's ability to communicate or control executive branch relations is unconstitutional and need not be enforced" and that he "has the same authority as the courts to interpret laws that relate to the executive branch."[143] This was shown not only by the statements in the opening days of his administration, but by his Article II-based justifications for the new detainee policies in the months and years after the attacks of 9/11.

In this case study, I confirmed that President Bush executed his power according to the uet in three ways. He expanded the executive by, among other things: Appointing pro-"judicial restraint" lawyers in the opening days of the administration; enlarging the sphere of what could be classified; tightening control in the intelligence arena through turning back FISA; funding black sites, and allowing the Department of Justice to outline new detainee policy to be followed by the Department of Defense.

Secondly, he (and his White House) challenged the legislature through: Curtailing review and drafting legislation that would contradict earlier laws, such as the White House's lengthy Patriot Act which turned back the checks provided by the 1978 FISA law, and

[143] Waterman, Richard W.: "The Administrative Presidency, Unilateral Power, and the Unitary Executive Theory". In: Presidential Studies Quarterly 39, No. 1 March 2009, 8; Bush, President George W.: Signing statement on Public Law 108-458, "Intelligence Reform and Terrorism Prevention Act of 2004," Dec. 17, 2004.

allowing warrantless detentions. President Bush also pushed through the 2006 Military Commissions Act (MCA), which barred *habeas corpus* and allowed him to "interpret the meaning and the application of the Geneva Conventions."[144] He also worked with Republican Congress to block checking legislation. Between March 13, 2003 and June 23, 2004, Democratic members of Congress attempted to introduce and pass countless bills calling for accountability and outlawing torture, but most failed.

He disapproved of the torture ban. In a Dec. 30, 2005 signing statement which was to instruct CIA and military interrogators how to apply the law, President Bush created a loophole to allow torture. He also informed Congress of his authority to conduct warrantless wiretaps, detentions, control intelligence gathering, create blacksites, military commissions, and new interrogation methods, despite the fact that these were against the law. These were usually based on uet-based arguments such as his "constitutional grants of executive power and authority as Commander in Chief of the Armed Forces" or his "constitutional authority to supervise the unitary executive branch" and with that authority to only uphold those mandates which he judges "necessary and expedient."[145]

Thirdly, he challenged the judiciary through, among other things: Ordering U.S. citizen Jose Padilla to be arrested far from the battlefield and to be held by the military at Guantanamo without being charged or convicted of any crime in May 2002,[146] and providing faulty evidence against him to the appeals court where Padilla's lawyers subsequently sent his case in September 2005.[147] He attempted to gain the privilege to monitor the communications between the detainees and the attorneys, and pushed for detainee's rights to *habeas corpus* to be suspended through influencing wording in the MCA. He created military commissions through executive order, rather than allowing them to have access to the U.S. courts. Finally, he interpreted how laws are to be enacted through signing statements which challenge the execution of the law itself (ie, in his signing statement attached to the Torture Ban, allowing for exceptions to be made for certain interrogators).

This implementation of his detainee policy, resulting in the abuse of hundreds of detainees around the world, would not have been possible without the support of a Congress led by his party. Though the Republicans barely clung to a majority at the beginning of the

[144] Military Commissions Act of 2006, Sec. 6a3. See also: Center for Constitutional Rights, Military Commissions Act of 2006: A Summary of the Law.
[145] See signing statements such as: Bush, President George W., Signing Statement for H.R.4613, "The Department of Defense Appropriations Act, 2005," Public Law 108-287, Aug. 5, 2004; Bush, President George W., Signing statement on Public Law 108-458, "Intelligence Reform and Terrorism Prevention Act of 2004," Dec. 17, 2004; and . See Signing Statement for H.R. 4548, "Intelligence Authorization Act for the Year 2005" (PL 108-487), Dec. 23, 2004.
[146] Savage, Charlie 2007: Takeover: The Return of the Imperial Presidency. New York: Back Bay Books, 200.
[147] Ibid

Bush administration, they had a fierce loyalty to the president and a determination to expand his power. Unlike at the beginning of the Bush administration, when the President was worried about losing a majority in Congress, by the time his new detainee policies needed to be enforced, the Republican Party had gained seats in both the Senate and the House, and continued to do so in the 2005 elections.[148] This provided President Bush with a comfortable amount of support from both the House and the Senate.

Coupled with the highest domestic approval rating on record, and the support of Congress at the time of his attempted policy change, the president had the support he needed to "aggressively push the constitutional boundaries to protect the prerogatives of the office and to advance the president's policy preferences."[149]

The questions surrounding the failure of the judiciary and the legislature to check the executive are many, and the answers have an impact on the future fuctioning of the checks and balances in our Republic. Was Congress' partisan make-up detrimental to its checking power? This study has shown that in the case of President Bush's detainee policy, it was true. Had Bush's popularity ratings been different, would the Supreme Court have ruled differently? Perhaps. What is clear is that as Bush's popularity plummeted, the Supreme Court was more willing to give him a strong rebuke. What is also evident is that in a time of national emergency, the public and government agencies were open to provide the president with an unparalleled opportunity to expand executive power, and thus, a new detainee policy. In the comparative case studies following, the dissertation will test whether these factors – a national security threat, presidential popularity, and the composition of Congress – provide indicators for whether other uet presidents were able to successfully push their policies through.

[148] In the 108th Congress from 2003-2005, Republicans had 51 seats in the Senate and 229 in the House, as opposed to 50 in the Senate in the107th Congress, and 221 in the House. By 2005, Republicans had 55 seats in the Senate and 231 in the House.
[149] Kelley, Christopher S.: "Rethinking Presidential Power – The Unitary Executive and the George W. Bush Presidency". Paper presented in: 63rd Annual Meeting of the Midwest Political Science Association, April 7-10, 2005, Chicago, IL, 11, 12.

CHAPTER FIVE
TESTING THE MODEL ON WAR PRESIDENTS ROOSEVELT, NIXON AND REAGAN

Abstract: This chapter tests the theoretical model introduced in chapter one on three war presidents to verify whether popularity and composition of Congress makes a president successful in pushing through a policy, as was seen in the Bush case study. It outlines the threats faced by Presidents Roosevelt, Nixon and Reagan, and identifies the patterns of presidential execution of power practiced by each. It then looks at one specific policy change each president attempted to make, and whether the composition of Congress and presidential approval ratings were signifiers for whether the judiciary or the legislative were able to check the president.

This chapter uses the theoretical model developed in chapter one to examine how war presidents' success in pushing through a new policy can be affected by popularity ratings and the composition of Congress. While the theory was initially tested on the development of the Bush detainee policy, it will now be tested on additional presidencies to demonstrate whether the same independent and intervening variables have an influence on the success or failure of those presidents to push through a new policy.

As described in the introduction, Presidents Roosevelt, Nixon and Reagan have been named by leading unitary executive theory scholars such as Calabresi and Kelley as the main presidents representative of this method of governing.[1] Two Republicans and a Democrat were chosen to ensure that party lines did not play a role in deciding the success or failure of the attempt to expand the presidency. All three practiced a venture constitutionalist understanding of their unitary executive powers. This is evidenced in this chapter by their reliance on their authority vested from Article II of the Constitution, and their reliance on their powers as Commander in Chief to break U.S. law and act above the constitution, when traditional interpretations would otherwise call such actions unconstitutional due to previous judicial rulings, specific pieces of legislation, or treaty obligations, among others.

[1] See pgs. 10-12 of the introduction for a longer explanation of the criteria for choosing the three presidents.

All three were faced with a war. Whether the war was formally declared, as in World War II under Roosevelt, or existed as a state of combat, as in the Vietnam War under Nixon, or as a "state of military rivalry and political tension that stops short of full-scale war" as in the Cold War under Reagan, is of little significance for the purpose of testing the theory.[2] As long as the president and the American people viewed the crisis as a war, the international threat had the potential to provide a causal effect in expanding presidential power.

Secondly, I chose only policies that occurred as the result of executive claims to power after the president had clearly established himself as a "pushing president," an executive who pushes the boundaries of the traditional interpretation of his constitutional powers.

Each president experienced a mix of success or failure along the way in the implementation of his policies. In looking at the factors that lead to a president successfully expanding his power in a particular policy area two questions will be asked in this chapter: 1.) Was presidential popularity/composition of Congress an indicator for how the courts would rule or Congress would vote and whether they were able to check him? 2.) Did his actions set precedent for the enlargement of presidential power in future administrations?

In answering question one, this study will look beyond the "test balloon phase" of the early implementation stages of a new policy which may have no legal or constitutional precedence. A president may, for example, ensure that combat troops are already on the ground without Congressional authorization, have citizens imprisoned without warrant or charge, or conduct illegal weapons trades before Congress or the courts are able to check him. Worse, Congress and the courts may attempt to check him through passing laws or issuing rulings and the president continues implementation. The question thus specifically asked in these case studies is: "Under what circumstances does Congress or the Supreme Court check the president so that he is forced to end his policy and comply with the law?"

In this chapter, answering the second question about precedent assists in understanding how these unitary executive presidents helped build the foundation and tools to use for President Bush to push through his detainee policy. The answer to this

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[2] The American Heritage Dictionary of the English Language, Fourth Edition copyright 2000 by Houghton Mifflin Company. "Cold War." Updated in 2009. Published by Houghton Mifflin Company. URL: http://www.thefreedictionary.com/cold+war.

question can only be answered in light of history. Presidents who failed to successfully push through their new policy during their administration may have nevertheless created a platform for future presidents to do so.

Each case study will present an overview of the domestic climate and international crisis faced by the specific president and identify patterns where he worked as a "pushing president" early in the presidency to challenge the legislature and judiciary. Then it will describe the specific international threat identified with the case study. It will then highlight examples of where the president has sought to expand his power within the executive and into the legislative and judicial spheres, focusing on one particular policy which the president tried to push. For each case study, the main pieces of legislation and court rulings related to the presidential policy are presented. If no Supreme Court ruling occurred during the terms of the presidency itself, or if other courts made statements affecting the enactment of the policy, those lower court rulings will be presented as well. Finally, it will cite the presidential job approval ratings and composition of Congress during the time period in which the legislature responded and the judiciary ruled on the policy.

1. The Roosevelt Presidency

1.1 The Domestic Climate and the Pushing President

Franklin Delano Roosevelt came to office in one of the most challenging times in U.S. history both at home and abroad. While this section will show that President Roosevelt indeed relied on his Article II powers to expand the presidency, the expansion of his office would not have been possible without the dramatic challenges posed on both the domestic and international fronts.

At home, unemployment had risen from 3.2 in 1929 to 24.9 in 1933. The Gross National Product fell by 29 percent and investment by 98 percent.[3] Thousands of banks had failed, limiting the amount of money in circulation.[4]

So on his second day in office, President Roosevelt proclaimed a state of emergency – which had only happened once in the history of the United States. Because large portions of the population had panicked and attempted to withdraw their money from banks in the days before his inauguration, many banks had closed. In response,

[3] McElvaine, Robert S. 1993: The Great Depression: America 1929-1941. Three Rivers Press: New York, 75
[4] Ibid, 27

President Roosevelt ventured constitutionally when he invoked the Trading with the Enemy Act. This act had been passed in 1917 to provide the President with expanded economic powers during wartime, a qualification that was absent when he came to office in 1933. In invoking the act, he required all banks to go on holiday and all trading in gold to temporarily cease, even among individuals. Any individual who had more than $100 in gold coins or other gold, had to turn it over to the government or face up to $10,000 in fines or 10 years in prison.[5]

Subsequently, President Roosevelt used the economic crisis to set precedent for his successors in drafting legislation that would grant him sweeping powers, and then pushing 15 major pieces of legislation to promote economic recovery through Congress in the first 100 days of office. John Yoo, who helped craft the expansion of the unitary executive in the Bush administration, commented that "their enactment witnessed the breakdown of the sharp distinction between the executive and legislative branches."[6] The executive drafted bills, Congress quickly passed them. Roosevelt used wartime powers in peacetime and thus, according to Yoo, "became the father of the modern Presidency by moving the Chief Executive to the center of the American political universe."[7]

From his first day on the job, he showed a penchant for expanding his unitary executive power to deal with these challenges. In his First Inaugural Address, he already paved the way for four terms of an expanded presidency by stating: "our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form." He then proclaimed that he would ask Congress for "broad executive power to wage a war against the emergency, as great as the power that would be given me if we were in fact invaded by a foreign foe."[8]

Using wartime powers in peacetime, President Roosevelt proclaimed a New Deal to promote economic and social reform and recovery which he himself would help to control. On the domestic front, according to the Constitution, Congress should have been the branch to deal with a domestic economic crisis. But with a large Democratic majority

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[5] Andersen, William L., "The New Deal and Roosevelt's Seizure of Gold: A Legacy of Theft and Inflation, Part 2". In: Future of Freedom Foundation, Dec. 8, 2006. URL: http://www.fff.org/freedom/fd0609d.asp, last accessed Jan. 27, 2011.

[6] Yoo, John 2009: Crisis and Command. Kaplan Publishing: New York, 263-264.

[7] Ibid, 262-264

[8] Roosevelt, Franklin D.: First Inaugural Address. March 4, 1933, Lines 19 and 22. URL: http://www.bartleby.com/124/pres49.html, last accessed: Jan. 5, 2013.

to support him in Congress, President Roosevelt performed this massive restructuring of the government which "placed the President in the role of legislative leader" and "gave birth to a President whose influence over domestic affairs would begin to match his role in foreign affairs".[9] Through his New Deal, President Roosevelt made the federal government in charge of regulating the economy, a sharp change from his Republican predecessors who had left decisions of the economy to the market, and who had allowed Congress to help regulate it.[10] This was just the beginning of the expansion of a unitary executive presidency, however. The international threat looming on the horizon provided President Roosevelt with the tools to push the powers of the presidency still further.

1.2 THE WARTIME PRESIDENT

1.2.1 President Roosevelt as "Pushing President" with Congress

As World War II neared, President Roosevelt placed his allies in top posts. Similar to President Bush after him, President Roosevelt practiced a strict interpretation of Article II of the Constitution which states that the president alone has hiring and firing power over the entire executive. He replaced the Secretaries of War and Navy without challenge from Congress.[11]

Congress would not be so complacent with his expansion of executive power once war was indeed knocking on America's doorstep, however. With a public unready to go to war, but with Hitler in control of Europe and Japan occupying large parts of China, Roosevelt pushed the boundaries of his Constitutional power when he claimed a different interpretation of the Neutrality Acts.[12]

For example, he decided not to invoke the acts in the case of the Sino-Japanese War despite the fact that Japan had attacked both Beijing and Nanjing. They had not officially declared war against one another, and the President thus argued in 1937 that he could provide China, who had no other major benefactor to provide for its defense, with arms and money. He did not violate the letter of the law by allowing the British to

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[9] Yoo, John 2009: Crisis and Command. Kaplan Publishing: New York, 258.
[10] Ibid
[11] Ibid, 278
[12] The Neutrality Act was initially passed during his tenure by Congress in 1935 to ensure that the United States not become involved in another costly war by prohibiting the United States from providing arms or munitions to countries at war with one another. The acts were to be invoked by the President as soon as war broke out. Additional, slightly changed versions of the acts were passed in 1936, 1937, and 1939.

deliver the U.S. munitions, but Congress was outraged that he had violated the spirit of the law, and thus thwarted a check on his power.[13]

He also refused to invoke the Neutrality Act but continued to aid allies after Hitler invaded Czechoslovakia and Russia in 1939 and 1941.[14] Congress protested, and the president led a failed effort in Congress to try to change the Neutrality Acts in 1939 and 1940. Becoming "creative" with his constitutional authority, he then ordered $38 million in weapons to be sold through U.S. Steel to the British and French at no profit because the arms were "surplus." [15]

By 1940, President Roosevelt asked his advisor Harry Hopkins to what extent he could ignore the 1939 Neutrality Act, despite the fact that he signed it into law.[16] When Churchill sent an urgent request for American destroyers after consistent attacks by German U-boats against British merchant ships, Roosevelt attempted to send them immediately, and ordered the Navy Judge Advocate General who thought the sale was illegal to go on vacation. His attempt at circumventing Congress to aid the British was thwarted when it then passed a law, often referred to as the Walsh Act of 1940, preventing the sale of any military equipment which could be necessary to defend the United States and reiterating that no war vessel could be provided to a party involved in hostilities.[17]

Eventually, President Roosevelt was able to exclude Congress when Attorney General Jackson argued for an executive agreement with Great Britain which relied on the President's constitutional power as Commander-in-Chief and as Chief Executive. In consideration of this, "the Congress could not by statute limit his authority."[18]

The deal allowed the United States to get around Congressional approval not only by citing his Article II powers, but by not accepting any money from Britain. Rather, the United States leased destroyers in exchange for Britain providing basing rights in its Western Hemisphere territories. This program was blessed by Congress in the Lend-

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[13] Powaski, Ronald E. 1991: Toward an Entangling Alliance: American Isolationism, Internationalism, and Europe, 1901-1950. Westport: Greenwood, 72.
[14] Yoo, John 2009: Crisis and Command. Kaplan Publishing: New York, 296-297.
[15] Ibid, 297. See also Fellmeth, Aaron Xavier: "A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935-1941". In: Buffalo Journal of International Law, 1996-1997, Vol. 3, 463.
[16] Fellmeth, Aaron Xavier: "A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935-1941". In: Buffalo Journal of International Law, 1996-1997, Vol. 3, 463.
[17] Ibid, 467-469.
[18] Casto, William R.: "Attorney General Robert Jackson's Brief Encounter with the Notion of Preclusive Presidential Power". In: Pace Law Review, Pace University School of Law, Rev. 364, Jan. 1, 2010, 366.

Lease Act, though Congress only gave its approval two months after President Roosevelt had started the program.[19]

Venturing still further constitutionally, Roosevelt acting without Congress deployed Marines to Iceland, ordered the navy to extend its security zone all the way to Greenland and the Azores, authorized British purchase of 23,000 airplanes and ordered the U.S. military to purchase munitions factories in the interest of protecting Britain, and with it, America's shores. In the interests of preventing Japan's war success, he banned the export of aviation gasoline, iron and steel to Japan, and sent 100 warplanes and $100 million to the Chinese Nationalist government, all without Congressional approval.[20]

1.2.2 President Roosevelt as "Pushing President" with the Judiciary

In the wake of the infiltration by the eight German Nazi saboteurs in June of 1942, Roosevelt issued an executive order on July 2, 1942. It created a military commission which would be able to try anyone from a country with whom the United States was at war who tried to enter the United States or any of its territories in order to "commit sabotage, espionage, hostile or warlike acts, or violations of the law or war."[21]

The second order set up the rules for the trial, which were similar to those guiding the commissions set up by President Bush, but ventured constitutionally from judicial precedent. The trial was to be full and fair, any evidence could be allowed which would have convincing value to a "reasonable man," and two-thirds of the judges were required to find the person guilty for sentencing. Appeals had to be made to the President. Detainees of this commission had no right to legal counsel, to remain silent, or to appeal.[22]

These rules ventured from constitutional precedent because *Ex parte Milligan* had ruled that civilian courts were mandatory when the defendants were not members of the enemy armed forces. The military counsel for the Nazi saboteurs challenged the constitutionality of the trial, and the case went all the way to the Supreme Court in a case called *Ex Parte Quirin*. Ultimately, President Roosevelt's constitutional venturing was successful during a time in which Congress and the media were pushing for the

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[19] Ibid, 365
[20] Yoo, John 2009: Crisis and Command. Kaplan Publishing: New York, 304-306.
[21] Proclamation No. 2561, 7 Fed. Reg. 5101 (1942). See: Elsea, Jennifer K.: "Detention of American Citizens as Enemy Combatants," Congressional Research Service, March 31, 2005, 8-9. See also: Yoo, John 2009: Crisis and Command. Kaplan Publishing: New York, 311-313.
[22] Yoo, John 2009: Crisis and Command. Kaplan Publishing: New York, 313.

saboteurs' death, despite the fact that there was no domestic statute allowing for capital punishment for non-U.S. citizens. The Supreme Court's 1942 unanimous opinion in *Ex Parte Quirin* stated that *Ex parte Milligan* would have only applied if the saboteurs had not associated with the German armed forces. All were convicted and sentenced to death, though President Roosevelt later commuted the sentences of two of them.[23]

1.3 Main Test Case: The Bombing of Pearl Harbor and the Internment of Japanese-Americans

1.3.1 Reason for Case Selection

While the president did engage in constitutional venturing in the Nazi saboteurs case, the enemies were associated with the armed forces of a country with which the United States was in armed conflict. However, the mass internment of Japanese-Americans following the attacks on Pearl Harbor presents an expansion of his war powers in an even more groundbreaking way. Using Article II arguments, he sequestered and interned a "foreign" enemy, defined by race rather than nationality, residing in the United States with U.S. citizenship. Relying on his war powers to allow the Secretary of War to detain U.S. citizens and forcefully evacuate them from large areas of the United States including all of California, western Oregon, Washington and southern Arizona, the president indeed challenges what was constitutional and lawful to that point.[24]

The Supreme Court cases related to President Roosevelt's internment of Japanese descendants, whether residents or citizens of the United States, commented on the president's war and emergency powers and the role of Congress in approving such actions. These cases, and the way President Roosevelt used his war powers on domestic soil, would also create precedent for President Bush's detention of post-9/11 detainees.

1.3.2 The International Threat and Perception of Threat

On the morning of Dec. 7, 1941, the Japanese struck Pearl Harbor, killing over 2,400 Americans, destroying 188 U.S. aircraft, and sinking or damaging 21 ships in just

[23] Ibid, 311, 314. See pgs. 48-49 of chapter two of this dissertation for more legal background on this case.
[24] Robinson, Gregory H. 2001: By Order of the President. Harvard University Press: Cambridge, Mass., 128.

less than two hours.[25] As it was the first time since the War of 1812 that the United States had been attacked on its own soil, the American public quickly united behind President Roosevelt when he announced the United States' entrance into World War II and declaration of war against Japan the next day.[26]

Newspapers, California politicians, and military officials started calling for the detention of Japanese-Americans due to concerns about espionage and sabotage. At the same time, officials from the Justice Department, the FBI Director J. Edgar Hoover, Army intelligence and cabinet members disagreed that there was a threat. While these defense officials were therefore initially against the evacuation of Japanese-Americans from their homes, a report on the Pearl Harbor attacks, called the Roberts Commission, caused a distrust of all of those of Japanese ancestry on the west coast because it reported that Japanese in the Hawaiian Islands had sent intelligence on military targets to Japan ahead of the Pearl Harbor attacks. While those were Japanese consular agents, not Japanese Americans, the panic grew, and defense leaders felt pressured to comply with demands to intern all those of Japanese descent.[27]

1.3.3 Challenges to the Legislature

In the wake of the Japanese attack, President Roosevelt ordered mass military detentions. Initially, he used the Alien Enemies Act of 1798 as grounds to call for the detention of "enemy aliens" of Japanese, German or Italian descent.[28] These internments were carried out by the Attorney General, who specified areas where the aliens were not allowed to enter or stay.[29] But in President Roosevelt's Executive Order 9066, he

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[25] Rosenberg, Jennifer, "Attack on Pearl Harbor", About.Com, The New York Times Company, 2012. URL: http://history1900s.about.com/od/worldwarii/a/Attack-Pearl-Harbor.htm, last accessed Jan. 5, 2013.
[26] Ibid
[27] Constitutional Rights Foundation, "Wartime and the Bill of Rights: the *Korematsu* Case," Summer 2002. URL: http://www.crf-usa.org/america-responds-to-terrorism/wartime-and-the-bill-of-rights.html, last accessed Jan. 27, 2011. See also: Rehnquist, William, "When the Laws Were Silent: Japanese American Internment During World War II," In: American Heritage, Oct. 1998, 77-89; and Robinson, Gregory H. 2001: By Order of the President. Harvard University Press: Cambridge, Mass., 95.
[28] See Alien Enemies Act, 50 U.S.C. §§21-24. In 1798, war was considered likely between the United States and France, and the act allowed the United States to expel any resident alien coming from a country with which the United States was at war.
[29] McPhee, Ralph D. (ed.) 2006. The Treatment of Prisoners: Legal, Moral, or Criminal? Nova Science Pub. Inc.: New York, 13. The Proclamations issued under the Alien Enemy Act included Proc. No. 2525, Dec. 7, 1941, 55 Stat. Pt. 2, 1700 (which refered to the Japanese invasion); Proc. No. 2526, Dec. 8, 1941, 55 Stat. Pt.2, 1705 (which referred to Germany's threat to invade); Proc. No. 2527, Dec. 8, 1941, 55 Stat. Pt. 2, 1707 (which referred to Italy's threat to invade). The reference to these proclamations was found in: Elsea, Jennifer, "Detention of U.S. Persons as Enemy Belligerents," Congressional Research Service, Feb.1, 2012, 28. URL: http://fpc.state.gov/documents/organization/183745.pdf, last accessed Sep. 10, 2012.

allowed the Secretary of War and his Military Commanders to make parts of the United States military zones from which *anyone*, including U.S. citizens, could be excluded. This area included all of California, western Oregon and Washington and southern Arizona.[30]

By turning over the authority to the Secretary of War to detain U.S. citizens, the president was relying on war powers to uphold his order, challenging what had been constitutional and lawful to that point. As even the War Department recognized that this was a challenge to Congress' authority, they went to Congress with draft legislation to make the president's order legal post-haste.[31] This legislation was passed with only minor changes, and became Public Law 77-503 on March 21, 1942. The bill had received almost unanimous support (only one speech in opposition) creating penalties of imprisonment or a fee of $5,000 for "whoever" would "commit any act" in the military zones set up by Gen. Dewitt.[32] Thus, without creating language that would violate the Constitution, both the executive order and the law signed by the president paved the way for the U.S. military to declare military zones from which it could remove people of Japanese descent, based solely on their race.[33]

Gen. DeWitt, the Commanding General for the Western Defense Command, carried out the evacuations and internments, deciding who should be evicted from where. Those that Gen. DeWitt ordered evicted from the "military areas" and to later be interned included those suspected of spying and sabotage, Japanese, German or Italian aliens, and American citizens of Japanese descent.[34] The Army was ordered to conduct mandatory evacuations of all those of Japanese descent, and Japanese-Americans were given orders to evacuate on a specific day.[35] They had to leave behind everything except what they could carry, and were forced to give up land, businesses, and most of their possessions. With little demand for descendants of German or Italian Americans to be locked up, the order resulted in 120,313 Japanese-Americans being imprisoned in internment camps in 1942, based merely on their ancestry.[36] In addition, 11,000 of

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[30] Robinson, Gregory H. 2001: By Order of the President. Harvard University Press: Cambridge, Mass., 128.
[31] Elsea, Jennifer, "Detention of U.S. Persons as Enemy Belligerents," Congressional Research Service, Feb. 1, 2012, 29. URL: http://fpc.state.gov/documents/organization/183745.pdf, last accessed Sep. 10, 2012.
[32] Public Law No. 77-503, March 21, 1942. See also: Yoo, John 2009: Crisis and Command. Kaplan Publishing: New York, 318.
[33] Yoo, John 2009: Crisis and Command. Kaplan Publishing: New York, 321.
[34] Ibid, 28
[35] Ibid, 128-129
[36] California Department of Parks and Recreation, Office of Historic Preservation: Five Views, An Ethnic Historic Site Survey of California, December 1988. URL: http://www.nps.gov/history/history/online_books/5views/5views4e.htm, last accessed Jan. 19, 2011.

German ancestry were arrested and 5,000 of them interned and 3,200 of Italian descent arrested and 300 interned.[37]

The camps where the Japanese Americans were sent were made of sheds, surrounded by barbed wire and guard towers with military personnel pointing machine guns at inmates preventing them from leaving. Conditions were overcrowded and unsanitary.[38]

As costs for the concentration camps mounted and news of unrest and inhumane treatment began to circulate, Congress fought back against the president-initiated program. Because all those of Japanese descent were interned, regardless of their threat or loyalty, Senate Resolution 166 of July 6, 1943 called for separating loyal Japanese-Americans from those who were not loyal, and called on the government to report on the conditions within the concentration camps and what plans were being made for the detainees' resettlement.[39] It would take another two years, until October 1945, for all but one of the concentration camps to be closed. Crucial in the development of these closings were the Supreme Court rulings.

1.3.4 Challenge to the Judiciary

A year after the Japanese-Americans were moved into concentration camps, the Supreme Court made its first ruling on these detainees' rights. Hirabayashi was a University of Washington student who had stayed out beyond Gen. DeWitt's evening curfew and who refused to comply with the relocation order. In *Hirabayashi v. United States* on June 21, 1943, the court ruled that a curfew can be imposed "against one group of American citizens based solely on ancestry," especially since Congress had blessed the president's relocation order in Public Law 77-503.[40]

In *Yasui v. United States*, which was passed the same day, the court ruled that a young American lawyer of Japanese descent who had stayed out past curfew could be arrested because even though the curfew law was not constitutional for U.S. citizens, he

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[37] American Social History Productions, Inc., http://historymatters.gmu.edu/d/5154/, last accessed Jan. 19, 2011. See also: Executive Order No. 9066: Feb. 19, 1942.
[38] Ibid. See also: Robinson, Gregory H. 2001: By Order of the President. Harvard University Press: Cambridge, Mass., 242-247
[39] Robinson, Gregory H. 2001: By Order of the President. Harvard University Press: Cambridge, Mass., 195.
[40] IM Diversity.com, "Japanese American Internment Timeline". URL: http://www.imdiversity.com/villages/asian/history_heritage/archives/japanese_american_internment_timeline.asp, last accessed Jan. 6, 2012.

had forfeited his citizenship by virtue of working for a Japanese consulate prior to the war.[41]

Over a year later in the case of *Korematsu vs. the United States*, President Roosevelt won another victory in the expansion of executive power. In this case, which addressed the mass evacuations of Japanese-Americans, the Supreme Court stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[42] In the end, however, they concluded that the "war power" of Congress and the Executive could exclude those of Japanese ancestry from the military zones on the West Coast at the time.[43]

Stating similar reasons as those cited by the Department of Justice memos as justification for the government's actions after 9/11/2001, the majority opinion stated in the case of *Korematsu*: "There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short."[44]

The Court argued that the executive had Constitutional protection during a time of emergency. In that light, the evacuations could not be seen as being based solely on race, because the military was concerned about a West Coast invasion from the Japanese. In so ruling, President Roosevelt's power to push constitutional boundaries was strengthened beyond what it had been in previous administrations. While executive order had previously been used to detain citizens of the United States – Lincoln had ordered the detention of those , who were disloyal during the Civil War – this happened on a much smaller scale and for a different purpose. While President Roosevelt had gotten judicial backing for shutting up over 120,000 in concentration camps based on their ancestry, without providing evidence for each of their disloyalty, President Lincoln had had around 12,600 detained based on evidence of disloyalty and unassociated with race.[45]

Another much less-known Supreme Court decision handed down on the same day, *Ex parte Mitsuye Endo*, stated that the government could not intern a U.S. citizen whom it considered loyal. While the Court did not comment on the constitutionality of the internment program because it was not mentioned in the executive order or the Congressional statute specifically, it found that detaining loyal citizens did not help the

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[41] Robinson, Gregory H. 2001: By Order of the President. Harvard University Press: Cambridge, Mass, 184.
[42] *Korematsu v. United States*, 323 U.S. 214 (1944).
[43] Ibid
[44] Ibid
[45] Yoo, John 2009: Crisis and Command: Kaplan Publishing: New York, 233, 321.

campaign against espionage and sabatoge, and thus could not be authorized by implication.[46]

While this decision ultimately forced the end of the internment program, President Roosevelt had gotten what he needed already before the decision. The internment program was strongly welcomed by activists and politicians on the West Coast, and his order which led to the successful internment of over 120,000 was found to be constitutional in *Korematsu*.[47] This case, which blessed expanded executive power during a time of war, created a legal foundation which future presidents could use to expand their unitary executive powers. Justice Jackson said with prophetic foresight in his dissent that he feared that the: "emergency that justified the classification (in *Korematsu*) would eventually be forgotten, leaving the constitutionality of the classification as the lesson of the case."[48] Bush would use the legal foundation which expanded Roosevelt's powers to try combatants before a military commission in *Ex parte Quirin* to uphold his own detainee policy six decades later.

President Roosevelt was willing to venture constitutionally in the area of intelligence as well, and this likely had an impact on the rights of the Japanese-Americans immediately following the attacks on Pearl Harbor.

Interior Secretary Harold Ickes recorded that at a January 30, 1942 Cabinet meeting wiretapping was discussed in the context of a newspaper report calling for the "removal and sequestration of all the Japanese living on the Pacific Coast."[49] He reported that "The President asked whether the Department of Justice was tapping wires and Francis [Biddle] answered that they were being tapped wherever it was considered necessary."[50]

President Roosevelt went so far as to instruct his attorney general to disobey the Supreme Court with regard to electronic surveillance. The Supreme Court had ruled in 1937 and 1939 in *Nardone v. the United States* that the Communications Act of 1934 barred federal surveillance of telephone lines. Any evidence gathered from these

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[46] Elsea, Jennifer K.: "Detention of American Citizens as Enemy Combatants," Congressional Research Service, March 31, 2005, 23-24.
[47] Robinson, Gregory H. 2001: By Order of the President. Harvard University Press: Cambridge, Mass., 126.
[48] Oxford Guide to the U.S Government, "*Korematsu vs. United States*". URL: http://www.answers.com/topic/korematsu-v-united-states, last accessed Feb. 2, 2011.
[49] Harold Ickes Diary, Feb. 1, 1942, 6302-6303. In: Robinson, Gregory H. 2001: By Order of the President. Harvard University Press: Cambridge, Mass., 98.
[50] Ibid

recorded conversations could not be introduced in any trial. So Attorney General Robert Jackson forced the FBI to end its surveillance of spies.[51]

FBI Director J. Edgar Hoover protested, stating that he feared he would not be able to prevent "a national catastrophe."[52] In response, President Roosevelt relied on his constitutional authority as commander-in-chief of the armed forces to disavow the Supreme Court's ruling on ceasing electronic surveillance when he argued in a memo to Attorney General Jackson: "However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation."[53]

President Roosevelt ventured further in specifically directing him to disobey the ruling when he wrote:

> You are therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigating agents that they are at liberty to secure information by listening devices direct to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies.[54]

Six decades later, President Bush used this order as authority for allowing the National Security Agency to continue wiretapping communications into and out of the United States with those who could have links to al Qaeda or other terrorists.[55]

1.4 Implementation of Roosevelt Detainee Policy and Legacy

In the Supreme Court, in Congress, and among the public, the argument of "military necessity" during wartime won the day and in 1942, the largest group

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[51] White, Adam J., and Gartenstein-Ross, Daveed: "FDR's Domestic Surveillance," The American Spectator, May 9, 2006. URL: http://spectator.org/archives/2006/05/09/fdrs-domestic-surveillance/print, last accessed Feb. 3, 2011. See also: Yoo, John 2009: Crisis and Command. Kaplan Publishing: New York, 322-323.

[52] White, Adam J., and Gartenstein-Ross, Daveed: "FDR's Domestic Surveillance," The American Spectator, May 9, 2006. URL: http://spectator.org/archives/2006/05/09/fdrs-domestic-surveillance/print, last accessed Feb. 3, 2011

[53] Ibid

[54] Gonzales, Alberto, Memorandum to Majority Leader William Frist from the Office of the Attorney General. Jan. 19, 2006. URL: http://www.fas.org/irp/nsa/doj011906.pdf, 7.

[55] Ibid

migration in U.S. history to occur in such a narrow time frame took place.[56] Roosevelt made the internment order based on his constitutional authority as commander-in-chief and chief executive and neither Congress nor the courts stood in his way.[57] A book issued by the California Department of Parks and Recreation and Office of Historic Preservation cited the contradiction in terms of the "military necessity" argued by General DeWitt, Commander General of the Western Defense Command, and enacted by President Roosevelt in his order:

> DeWitt gave the rationale of "military necessity" to protect the West Coast against sabotage in case of invasion, but such a claim was contrary to the actual U.S. Army "estimate of the situation" which concluded that an invasion of the West Coast was extremely unlikely. The claim was also inconsistent with the fact that Japanese Americans in Hawaii were not similarly incarcerated en masse … The "military necessity" excuse was further contradicted by the fact that babies, children, bedridden old people, blind or paralyzed persons — people incapable of committing acts of sabotage or espionage — were also incarcerated. Even orphans in institutions and children adopted by White families were imprisoned if they had any Japanese ancestry at all.[58]

The president ventured constitutionally to create the largest internment program of American citizens in U.S. history, without Congress or the judiciary preventing him. As Professor Gregory Robinson of the University of Quebec at Montreal commented: "The President would not have had the same fears over security and Japanese-American disloyalty if tensions between the United States and Japan had not grown to the point of war, and if there had not been a wartime emergency Roosevelt would have lacked the authority to make such an order."[59]

Thus the arguments of "wartime necessity" and executive power that justified the displacement, imprisonment and confiscation of property of one people group, created precedent that Attorney General Gonzales and DOJ lawyer John Yoo could use to justify the wiretapping and detention of another group of people after 9/11. Bush used the precedent set during Roosevelt's administration in *Ex parte Quirin* to uphold his own

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[56] Robinson, Gregory H. 2001: By Order of the President. Harvard University Press: Cambridge, Mass., 127. Note: The total number of Native Americans displaced was larger, but occurred over a much longer period of time.
[57] Yoo, John 2009: Crisis and Command. Kaplan Publishing: New York, 317.
[58] California Department of Parks and Recreation, Office of Historic Preservation: Five Views, An Ethnic Historic Site Survey of California, December 1988. URL: http://www.nps.gov/history/history/online_books/5views/5views4e.htm, last accessed Jan. 19, 2011.
[59] Robinson, Gregory H. 2001: By Order of the President. Harvard University Press: Cambridge, Mass., 113.

detainee policy six decades later. From wiretapping to mass detentions, President Roosevelt paved the way for the America's detainee policy in the twenty-first century.

1.5 Testing Intervening Variables: Presidential Popularity and Composition of Congress

A look at the conditions present when President Roosevelt needed to push through his Japanese-American internment program help us understand if there is a connection between presidential popularity, the composition of Congress, and the decisions that were made by the Congress and the Supreme Court.

President Roosevelt's Democratic Party controlled the House and the Senate throughout his four terms. In fact, with his election in 1932, a historical realignment of "party systems" occurred after the Republican Party had dominated since the 1860s.[60] This gave him free range to push through his political agenda in the case of Japanese-American citizens. In this particular case study, President Roosevelt broke policy ground because his order initiated the first time an entire group of U.S. citizens of a particular race were forced to be interned in concentration camps with the blessing of Congress and the Supreme Court.

How did his popularity ratings play into this support? Since Gallup first started issuing presidential approval ratings in 1937, which was the beginning of President Roosevelt's second term, accurate average approval rating cannot be cited. However, we know that during the years of his presidency when the polling was collected (1937-1944), his highest popularity occurred on Jan. 8, 1942 at 84% as war president, just after his state of the union speech when the United States was at war with Japan.[61] His lowest approval rating occurred in August of 1939 at 48% with a recession at home, criticism of the New Deal within his own party, and a failing effort to win support for involvement in World War II.[62] His highest disapproval ratings occurred in May and

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[60] Davidson, Roger H. in: Thurber, James A. (ed.) 2009: Rivals for Power. Lanham, MD: Rowman & Littlefield Publishers, Inc.,131.

[61] Roosevelt, President Franklin D.: "State of the Union Address.," January 6, 1942. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. URL: http://www.presidency.ucsb.edu/ws/?pid=16253, last accessed Jan. 6, 2012.

[62] Baum, Matthew A. and Kernell, Samuel: "Economic Class and Popular Support for Franklin Roosevelt in War and Peace", Public Opinion Quarterly, Volume 65, 200. Copyright 2001 American Association for Public Research.

November of 1938 at 46 %.[63] For the years polling was conducted on President Roosevelt, his approval ratings only dropped below 50% once, and his average approval was 67%.[64]

With both Congress and the people on his side, President Roosevelt had the mandate he needed to push through even a controversial program. At the time of the most influential decision made over the internment program, the *Korematsu* decision, his popularity was on an upswing, coming up from 66 % job approval ratings in December 1943 to 69 % in March of 1944, to 70 % in August of 1944 to 72 % on December 1, 1944, before the decision was made on Dec. 18, 1944.[65]

Consider also the climate: In September 1944, 61 % of those polled agreed that when the war ends, white people should be preferred for jobs over Japanese residents of the United States, and only 16 % said that those of Japanese descent should have equal access to job positions.[66]

A general fear of anyone of Japanese descent dominated public opinion, as media reports citing the unsubstantiated reports about Japanese-Americans working with the enemy became more prevalent. In December of 1942, only 35 % of Americans in favor of letting Japanese-Americans return to the West Coast once the war ends.[67]

With this in mind, the below provides a quick review of the two major pieces of legislation and the four major Supreme Court rulings related to the Japanese-American internment policy and where the president's popularity ratings were when the rulings were made or acts were passed. On the graph, red indicates a win for the president, and green a loss. Where there were wins and losses in the same month period, the event is marked as yellow on the graph. Due to the fact that President Roosevelt was in power

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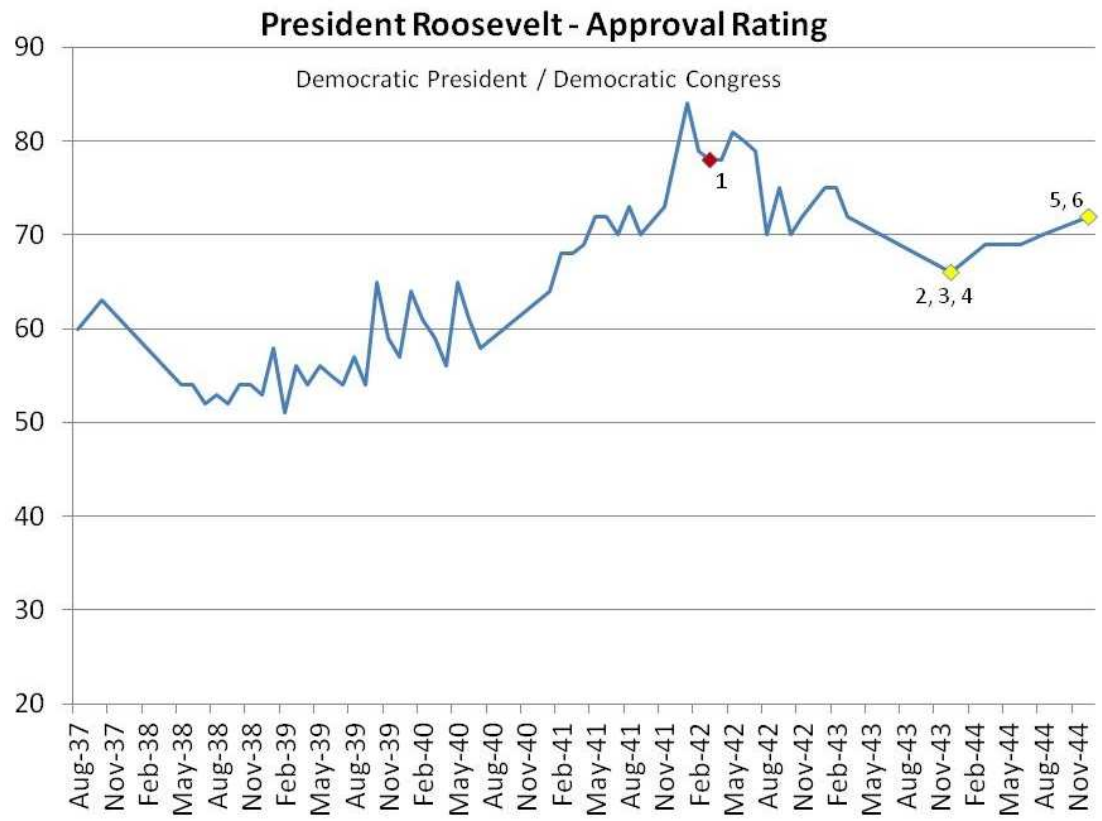
[63] Gallup, "Job Performance Ratings for President Roosevelt," Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20: Microsoft/Parents/'Socially Responsible' [computer file]. 1st Roper Center for Public Opinion Research version. Lincoln, NE: Gallup Organization [producer], 2000. Storrs, CT: The Roper Center, University of Connecticut [distributor], 2001. URL:http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating.cfm#comparison, last accessed: Jan. 5, 2013.
[64] Shannon, Wayne W.: "The Bushpop Thing: Getting the Job Approval Numbers in Perspective,"*The Public Perspective*, The Roper Center, University of Connecticut, Jan./Feb. 1990, 17.
[65] Gallup, "Presidential Approval for President Roosevelt," Roper Center Public Opinion Archives, University of Connecticut, 2012: URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Roosevelt#.T7tWuFKUb0d, last accessed May 22, 2012.
[66] Silverstein, Gordon and Hanley, John: "The Supreme Court and Public Opinion in Times of War and Crisis". In: The Hastings Law Journal, Vol. 61, July 2010, 1466-67.
[67] Silverstein, Gordon and Hanley, John: "The Supreme Court and Public Opinion in Times of War and Crisis". In: The Hastings Law Journal, Vol. 61, July 2010, 1466.

for four terms, monthly popularity values were plotted on the graph so that the entire presidency could be viewed on one page.[68] The numbers correlate to the rulings and legislation described below the graph. In the description, a plus is placed next to those cases where there was a win for the president and a minus next to those where there was a loss. The presidential popularity cited reflects the Gallup poll presidential approval rating at the time the ruling or act was passed. If there was not a poll on that day, data is cited for the poll conducted closest to the day, both before and after.

Presidential Popularity and President Roosevelt's Wins and Losses on Japanese Detainee Policy



Key to Data Points 1-6

1) + president: President Roosevelt signed Public Law 77-503 passed by Congress on March 21, 1942, creating penalties of imprisonment or a fee of $5,000 for

[68] Monthly values were plotted for as many months as Gallup conducted monthly polls, in several months during World War II they did not. All Gallup polling values were taken from: "Presidential Approval for President Roosevelt," Roper Center Public Opinion Archives, University of Connecticut, 2012. URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Roosevelt#.T7tWuFKUb0d, last accessed Jan. 6, 2013.

"whoever" would "commit any act" in the military zones.[69] President Roosevelt's popularity was at 78%.[70]

2) + president: *Hirabayashi v. United States* on June 21, 1943, the court ruled that a curfew can be imposed "against one group of American citizens based solely on ancestry." President Roosevelt's popularity was at 72% in March 1943 and 66% in December 1943.[71]

3) + president: In *Yasui v. United States*, passed the same day, the court ruled that a young American-Japanese who had stayed out past curfew could be arrested because even though the curfew law was not constitutional for U.S. citizens, he had forfeited his citizenship by virtue of working for a Japanese consulate prior to the war. President Roosevelt's popularity was at 72% in March 1943 and 66% in December 1943.[72]

4) -president: Senate Resolution 166 of July 6, 1943 called for separating loyal Japanese-Americans from those who were not loyal, and called on the government to report on the conditions within the concentration camps and what plans were being made for the detainees' resettlement. President Roosevelt's popularity was at 72% in March 1943 and 66% in December 1943.[73]

5) + president: On Dec. 18, 1944, the Supreme Court stated in *Korematsu v. United States* that the "war power" of Congress and the Executive could exclude those of Japanese ancestry from the military zones on the West Coast. President Roosevelt's popularity ratings were at 72%.[74]

6) - president: On the same day, *Ex parte Mitsuye Endo* stated that the government could not intern a U.S. citizen whom it considered loyal. President Roosevelt's popularity ratings were at 72%.[75]

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[69] Public Law No. 77-503, March 21, 1942. See also: Yoo, John 2009: Crisis and Command. Kaplan Publishing: New York, 318.
[70] Polls taken on 3/12-17/1942 and 4/17-23/1942 both put President Roosevelt at 78%. "Job Performance Ratings for President Roosevelt," Source: Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20: Microsoft/Parents/'Socially Responsible': First Roper Center for Public Opinion. Lincoln, NE: Gallup Organization, 2000. Storrs, CT: The Roper Center, University of Connecticut, 2001.URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot /presidential_rating_detail.cfm?allRate=True&presidentName=Roosevelt#.UEXvhsHN9D5, last accessed Sep. 12, 2012.
[71] Ibid. Polls were taken on 3/26-31/1943 and on 12/17-22/1943. No Gallup polls were taken between these dates.
[72] Ibid
[73] Ibid
[74] Ibid, poll was taken December 1944, date was not listed by Roper Center.
[75] Ibid

1.5.1 Analysis

1.5.1.1 Connection between Presidential Popularity and His Internment Policy "Wins"

With an unusually high approval rating throughout the majority of his administration (while Gallup was measuring), it is no wonder that the president enjoyed the expansion of his war and commander in chief powers in all but one major piece of legislation and one Supreme Court ruling.

While the two "losses" he suffered occurred during a period where he had a fairly high approval rating (72% in July 1943 and the same in December 1944), it is worthy to note that almost simultaneous to these "losses" the administration was also granted "wins." Just prior to the check the Congress placed on him in July of 1943 with the Senate Resolution 166, the Supreme Court provided him with two "wins" in *Hirabayashi v. United States* and *Yasui v. United States*. In addition, the Senate Resolution 166 gave a nod to the president by still allowing for the detention of those Japanese-Americans who were considered disloyal. And while the government received a blow in the ruling *Ex parte Mitsuye Endo* even while the president's popularity was high, on the same day in December 1944, the ruling passed down by the Supreme Court which received more attention, *Korematsu v. United States*, allowed the president to expand his "war powers" by forcing those U.S. citizens of a certain ancestry to be removed from their homes.

1.5.1.2 Connection between Composition of Congress and Internment Policy "Wins"

Both President Roosevelt and the Democratic Congress won landslide victories in 1932. His party sweep was considered one of the major "realigning" elections in U.S. history, setting the Democratic Party up to control the House and Senate for the remainder of his time in office.[76] While the Democrats ruled both the House and the Senate for the remainder of his term, in the House, they started to lose seats after six years.

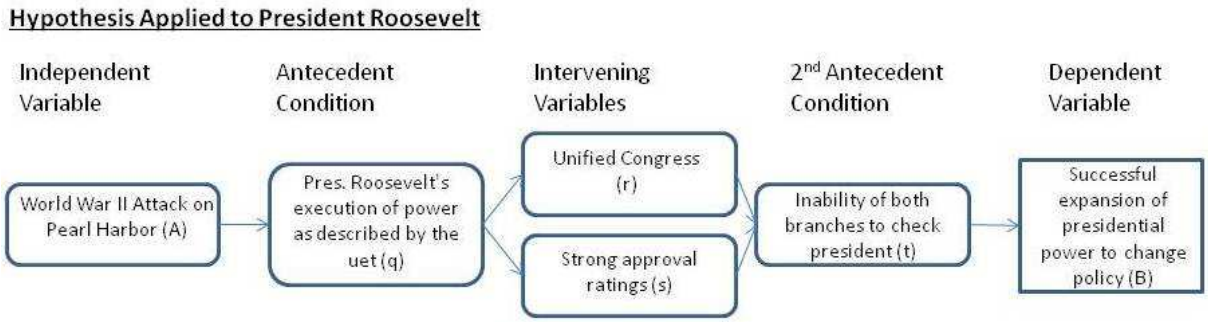
Starting in the 76th Congress, in 1939, the Democrats started losing seats in the House, falling from 333 to 262 that year, while the Republicans almost doubled their number of seats from 89 to 169. By 1942, Democrats only held a thin lead, with 222 seats to the Republicans' 209. While Democrats held a comfortable lead in the Senate

[76] Thurber, James A. 2009: Rivals for Power. Lanham: Rowman & Littlefield Publishers, Inc, 131.

during the entire Roosevelt administration, they also lost seats toward the end of his administration in 1943, falling from 66 to 57, with the Republicans gaining 10 seats, from 28 to 38. Indeed, shortly following his death and the beginning of the Truman administration in 1947, the Republicans regained control over both the Senate and the House, albeit briefly.[77]

During this period where his party was losing seats at the end of his administration, President Roosevelt suffered two "losses." The first was the passage of Senate Resolution 166 in 1943, which would serve notice that Congress was aware of the internee problem, and was willing to hold the president accountable. The second was the "rebuke" he received from the Supreme Court in the 1944 case *Ex parte Mitsuye Endo*, which forced an end to the internee program since the court stated that U.S. citizens considered loyal could not continue to be interned.

Here, it appears that the political losses President Roosevelt was suffering by losing a strong Democratic lead in Congress indeed was a factor in checking the president's internee policy, with greater checking power once the Republicans started gaining seats. Without the landslide lead that he enjoyed at the beginning of his administration, his policy could no longer be continued. Yet the Supreme Court cases that allowed for the expansion of presidential power during wartime in the first six years of his administration helped set precedent for Bush detainee policy in the next century.



Ultimately, President Roosevelt, aided by the international threat factor of World War II, was able to drastically expand presidential war power. In the formula above, the Japanese threat after the attack on Pearl Harbor during World War II, lead President Roosevelt to flex his unitary executive muscle, challenging the legislative branch through

[77] Ibid

relying on war powers to uphold his order to evacuate and detain loyal U.S. citizens in the United States based solely on race, challenging what had been constitutional and lawful to that point. He challenged the courts to look the other way, and they did. His defense argued that his war powers could exclude those of Japanese ancestry from the military zones on the West Coast at the time, and the Supreme Court agreed not only in *Hirabashi* that the president could uphold a curfew based solely on ancestry, but in *Korematsu* that a state of emergency justified his actions. His high popularity and Democrat-led Congress throughout his four terms helped prevent the Courts or Congress from checking him until close to the end of his presidency, when they handed him losses at the same time that they handed him wins. This ultimately led to an overall success by President Roosevelt in pushing through his internee policy, leading to the evacuation and internment of over 120,000 Japanese-Americans.

1.6 Conclusion

At the end of his four terms, he had changed the face of the presidency, creating precedent for future administrations to regulate the economy, provide legislation to Congress, gather intelligence, and use war powers on domestic soil to evacuate and detain an entire people group. The next time America would be attacked on its own soil, the executive would use Roosevelt's actions as precedent.

2. The Nixon Presidency

2.1 The Domestic Climate

At the beginning of his presidency, the Republican President Nixon was faced with a number of domestic "hostilities". The Democrats controlled Congress and had been in control for the last eight years.[78] His mandate was small, as he had won the presidential election by less than one percent of the popular vote (500,000 votes).[79]

His predecessor had also left the new president with budget problems. Inflation was more than 4 %, and would jump to more than 12 % at the end of his presidency in

[78] U.S. Department of State: "Nixon's Accomplishments and Defeats." URL: http://countrystudies.us/united-states/history-126.htm, last accessed Sep. 24, 2012.
[79] Richard Nixon Presidential Library and Museum. "The President." In: The Life. URL: http://www.nixonlibrary.gov/thelife/apolitician/thepresident/, last accessed Sep. 24, 2012.

1974. Unemployment also rose from over 4% when he was elected to 6.6% by the end of 1970.[80] Funding the Vietnam War was straining the domestic economy as well as the U.S. ability to pay down its debt.[81] The United States was faced with its first trade deficit of the twentieth century already in 1970.[82] An oil embargo in the Middle East caused the United States to have oil shortages, and inflation skyrocketed to 12 percent.[83]

At home, the Republican was faced with violent anti-war demonstrations, and his own political support was being challenged by successful Democratic Party fundraising before his 1972 reelection.[84] During his years in office, his party controlled neither the Senate nor the House. With politics, economics, and public opinion against him, he sought to reassert a strong presidency in response to these threats right at the beginning of his presidency.

2.2 The "Imperial Presidency"

2.2.1 President Nixon as "Pushing President" with Congress

In response, Nixon reached for tools used by his predecessors to expand presidential power, including issuing executive orders, proclaiming a state of emergency, and circumventing Congress to conduct war activities.

Through executive order, he created the Office of Management and Budget, which made the federal bureaucracy less accountable to Congressional committees, and more directly accountable to the executive. He filled government departments with Nixon loyalists who would report to Nixon's chief of staff.[85] While this effort was later undermined by the Watergate scandal, it served as a powerful tool to be used by both the Reagan and the George W. Bush administration in expanding presidential power.[86]

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[80] U.S. Department of State: "Nixon's Accomplishments and Defeats." See also: Robertson, Raymond, "U.S. Inflation and Unemployment," Macalester University. URL: http://www.macalester.edu/courses/econ119/robertson/USinfUE.htm, last accessed Sep. 24, 2012.
[81] TIME, "Business: Nixon and the Economy: A Delicate Balancing Act," Nov. 22, 1968.
[82] Burns, Arthur F. "The American Trade Deficit in Perspective". In: Foreign Affairs, Summer 1984.
[83] U.S. Department of State: "Nixon's Accomplishments and Defeats." URL: http://countrystudies.us/united-states/history-126.htm, last accessed Sep. 24, 2012.
[84] Ibid
[85] Savage, Charlie 2007: Takeover. New York: Back Bay Books, 304.
[86] Kelley, Christopher S.: "Rethinking Presidential Power – The Unitary Executive and the George W. Bush Presidency". Paper prepared for the 63rd Annual Meeting of the Midwest Political Science Association April 7-10, 2005 Chicago, IL, 6-8, 15: "It was the Nixon administration that deserves credit as the first presidency to attempt to systematically gain control over the executive branch agencies, a strategy that ended up failing due to Watergate." See also Kassop, Nancy: "The Post-Nixon Imperial Presidency: 1980-2004". Paper presented in: 2005 Annual Meeting of the American Political Science Association, September 1-4, 2005, Washington, DC, 2: "The seeds of the expansive view of presidential power that flourish today

To ensure more presidential control over the economy, in 1970, Nixon pushed the Economic Stabilization Act through Congress, giving himself the authority to control prices, rents, salaries, interest rates and product prices.[87] Pursuant to this act in 1971, he issued Executive Order 11615 which created a wage freeze for 90 days, and ordered the Treasury Secretary to do away with tying the convertibility of the dollar, at that time to gold, as the dollar had so devalued against gold that foreign countries could no longer expect an equal exchange.[88] Proclamation 4074 of the same day declared a state of emergency and allowed a 10 % import tax and terminated previous trade agreements (such as those with Brenton Woods that would have set the gold standard).[89] While Congress initially voted the ESA through Congress, its implementation through his 1971 executive order was challenged by workers in the courts.

In *Jennings v. Connally*, workers challenged the president's right to unilaterally declare that their wages could be frozen at below $1.90 per hour. As workers with substandard pay, they believed they should be exempted from the wage freeze. The U.S. District Court for the District of Columbia agreed with them. It ruled that the president had "overstepped the boundary" of his authority through allowing the Cost of Living Council to cap poor workers' pay because it went against the will of Congress in the Economic Stabilization Act, which called for the protection of the "working poor".[90]

At the same time President Nixon was using executive privilege at home through increasing domestic intelligence activities. His Executive Order 11,605 gave expansive authority for a Subversive Activities Control Board in 1971 to examine U.S. citizens' potential "threat" to national security.[91] Though Congress prohibited the Board from

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in the presidency of George W. Bush were planted in the Nixon presidency of thirty years ago." See also Savage, 89: "It was no accident that the Nixon administration, which went further than any predecessor in centralizing power and eroding democratic checks and balances, made expanding secrecy a major part of its strategy."

[87] Public Law 91-379, 84 Stat. 799, Aug. 15, 1970.

[88] Executive Order No: 1615, Aug. 15, 1971. Proclamation 4074. See also: WTF Finance, "When did the US Get Off the Gold Standard?" Aug 15, 2011. URL: http://www.wtffinance.com/2011/08/when-did-the-us-get-off-the-gold-standard/, last accessed Sep. 24, 2012. See also: Richard Nixon: "Address to the Nation Outlining a New Economic Policy: The Challenge of Peace," August 15, 1971. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. URL: http://www.presidency.ucsb.edu/ws/?pid=3115, last accessed Sep. 24, 2012.

[89] Nixon, President Richard, Proclamation 4074, "Declaring a National Emergency," August 15, 1971.

[90] Ginocchio, Alaine and Doran, Kevin L: "The Boundaries of Executive Authority: Using Executive Orders to Implement Federal Climate Change Policy," Center for Energy and Environmental Security, University of Colorado Law School, Feb. 2008, 28-29.

[91] Barilleaux, Ryan J. In: Kelley, Christopher S. 2010: Executing the Constitution. Albany: State University of New York Press, 55.

carrying out Nixon's order a year later, President George W. Bush used a similar tactic several decades later to spy on, arrest and hold U.S. citizens.

2.2.2 President Nixon as "Pushing President" with the Judiciary

In 1971, the New York Times started to publish a series of stories based on files leaked from the Pentagon, on secret activities of the Vietnam War, most of which had been conducted under the Johnson administration. When the Nixon administration took the case to court, to bar the publishing of what they said were national security secrets, the justices decided against him.[92] Here too, Nixon was challenging the limits of his presidential power. With several pieces of legislation on the books that barred censorship of publishing national security information, even during war, Nixon went to the Courts to get another answer. Chief Justice Marshall wrote in his decision: "It is not for this Court to redecide those issues – to overrule Congress."[93] The papers could publish what they wanted. While only 10% of those interviewed thought Nixon was at fault in the publishing of the papers, there was reason for the ruling to make Nixon nervous.[94] Though the *Pentagon Papers* case published events happening under his predecessor's watch, a judicial position allowing light to be shed on the "national security" activities of the president could be his undoing. And indeed it was.

In *United States vs. Nixon*, often referred to as the Watergate decision, the Supreme Court ruled on July 24, 1974 that President Nixon did not have "an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances" and that he was not above the law.[95]

At issue were illegal president-directed activities including wiretapping. In 1970, he directed White House aide Tom Huston to put together a plan for gathering

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[92] The Wall Street Journal chart: "How the Presidents Stack Up". URL: http://online.wsj.com/public/resources/documents/info-presapp0605-31.html, last accessed Jan. 6, 2013. See also: Gallup, "Job Performance Ratings for President Nixon," Roper Center, Public Opinion Archives: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Nixon#.T7twZ1KUb0d, last accessed Jan. 6, 2013.

[93] *New York Times Co. V. United States* (1971), 403 U.S., 746, 747. The acts cited were a 1917 discussion of the Espionage Act, provision 793, and the 1957 discussion recorded in 103 Congressional Record 10447-10450, which rejected the enactment of a law for the purpose of such censorship.

[94] Silverstein, Gordon and Hanley, John: "The Supreme Court and Public Opinion in Times of War and Crisis" in: The Hastings Law Journal, Vol. 61, July 2010, 1481. Nixon Poll conducted by Opinion Research Corp (June 1971).

[95] *United States v. Nixon*, 418 U.S. 683 (1974). See also: Silverstein, Gordon and Hanley, John: "The Supreme Court and Public Opinion in Times of War and Crisis". In: The Hastings Law Journal, Vol. 61, July 2010, 1481-1482.

intelligence on left-wing radicals and the anti-war movement in the United States. The Huston plan called for such illegal actions as domestic burglary, unlawful electronic surveillance, and the creation of detainee camps to house anti-war protestors.[96]

President Nixon approved the plan on June 23, 1970, but FBI Director Hoover and Attorney General John Mitchell pressured Nixon to revoke it. Despite his official revocation, parts of the plan were implemented. This resulted in: the FBI lowering the age of informants so that student surveillance was expanded; the CIA's illegal opening of mail, NSA followed international communications of Americans, the FBI opened thousands of new cases on U.S. dissenters to the war, and the creation of the White House enemies list, among other things.[97]

Nixon's enemy list, which originally contained directives to punish 20 characters, mostly of highly successful political figures or fundraisers of the Democratic Party, was eventually expanded to include names of "10 Democratic senators, all 12 black House members, more than 50 newspaper and television reporters, prominent businessmen and labor leaders and entertainers."[98]

He excused his actions through claiming absolute, executive privilege. He later told reporter David Frost in an interview in May 1977: "When the president does it, that means that it is not illegal."[99]

President Nixon also claimed executive privilege protected him from providing tapes on his conversations with White House aides about the 1972 burglary of the DNC headquarters in the Watergate. Nixon told the Senate Select Committee which investigated him for his Watergate activities:

> It is quite obvious that there are certain inherently governmental actions which if undertaken by the sovereign … are lawful but which undertaken by the private persons are not … But it is naïve to attempt to characterize activities a President

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[96] Smith, Thomas W. 2003: Encylopedia of the Central Intelligence Agency. Infobase Publishing: Washington, 134. U.S. Senate, Select Committee to Study Governmental Operations with Respect to Intelligence Activites: "National Security, Civil Liberty, and the Collection of Intelligence: A Report on the Huston Plan," Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III, April 23, 1976, Introduction, Summary & Conclusions.

[97] Ibid

[98] Facts on File: List of White House 'Enemies' and Memo Submitted by Dean to the Erwin Committee. In: *Watergate and the Whitehouse*, vol. 1, pgs. 96-97. URL: http://web.archive.org/web/20030621235432/www.artsci.wustl.edu/~polisci/calvert/PolSci3103/watergate/enemy.htm

[99] Nixon, Richard in TV Interview with David Frost, May 20, 1977. Viewable at URL here: http://www.youtube.com/watch?v=ejvyDn1TPr8, last accessed Oct. 8, 2012. While the president made this claim almost three years after the court case, it summarized his view toward presidential power, which also influenced his defense argument in the case, that the "judiciary lacked the authority to review the President's exertion of executive privilege." See: *United States v. Nixon*, 418 U.S. 683 (1974).

might authorize as legal or illegal without reference to the circumstances under which he concludes that the activity is necessary.[100]

In a clear strike to the unitary executive arguments brought by the Nixon presidency, the justices said that the president's need for secrecy could not be supported either by "the doctrine of separation of powers" or the "generalized need for confidentiality of high level communications" because this was a criminal case, and the need for secrecy was not based on "protection of the military, diplomatic or national security secrets."[101]

While they granted that presidential conversations should be treated with utmost confidentiality as far as the public is concerned, they ruled that such confidentiality measures did not prevent criminal investigation. Most interesting was the court's historical argument protecting its Article III powers and the infringement of the executive on its jurisdiction. The "judicial power of the United States" can't be shared with the executive branch, they said.[102] "Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government."[103] In so ruling that it is the "duty of the Court 'to say what the law is'"[104], the court directly rebuffed the president in his claim that the "sovereign" can determine what is "lawful."[105]

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[100] Nixon, Pres. Richard: Church Committee Final Report Book 2. Senate Select Committee Interrogatory 34, March 9, 1976, 16-17. President Clinton made a similar argument and claimed immunity in the case of *Clinton v. Paula Jones*. Jones claimed the president had sexually harassed her while he was governor. In 1997, the Supreme Court ruled unanimously that the office of president does not prevent his conduct from being reviewed by investigation or court. According to the Supreme Court opinion: "[I]t is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States." The ruling continues: "If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct.... We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office." See *Clinton v. Paula Jones*, May 27, 1997. URL: http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/clintonvjones.html, last accessed Oct. 27, 2010

[101] *United States v. Nixon*, 418 U.S. 683 (1974).

[102] Ibid

[103] Ibid

[104] Ibid

[105] Nixon, Pres. Richard: Church Committee Final Report Book 2. Senate Select Committee Interrogatory 34, March 9, 1976, 16-17.

2.3 MAIN TEST CASE: THE SECRET CAMBODIA BOMBINGS

2.3.1 Reason for case selection

While the most famous court case of the Nixon presidency was *United States v. Nixon*, I did not choose this as the main test case. While the Watergate ruling did make a number of strong statements on the separation of powers and the president's Article II function, it was concerned with a criminal law involving domestic spying. Therefore in a dissertation primarily concerned with the excise of and limits to the president's war powers, the case did not fit. The "threat" in the case of Watergate was not an international one, though one could argue that the president generally felt himself on the defense due to the population's lack of support for his foreign policy with regard to the war in Indochina.

The case of Nixon's war powers in Indochina includes both a discussion of separation of powers in the court rulings as well as Congress addressing its own role in war powers. As such, it is an appropriate study for examining the limits of the president's Article II powers, and for discovering when the president can be checked in the execution of his war powers, and when he can't.

2.3.2 International Threat and Perception of Threat

President Nixon's foreign policies were being tested as he faced the reality that the Vietnam War which he had long supported could not be won. One third of all American deaths occurred during Nixon's presidency.[106] Large numbers of casualties, the revelation of the Mai Le massacre and other military abuses did not help his cause. In May of 1969, a Gallup poll showed that 56 percent of the public believed that sending troops to Vietnam was a mistake.[107]

On the other hand, letting the Communists advance after so much American bloodshed was not a favorable alternative. The Communists, backed by the Soviets and Chinese, were controlling Northern Vietnam, and had been using invasion routes through Laos and Cambodia which had been started to be built in 1959 (called the Ho Chi Minh Trail) to supply the communists and launch attacks on Southern Vietnam.[108] The United States was concerned that much of Asia would fall to the Communists,

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[106] Yoo, John 2009: Crisis and Command. Kaplan Publishing: New York, 352.
[107] Todd, Olivier 1990: Cruel April: The Fall of Saigon. W.W. Norton & Company.
[108] The History Place, 1999. "The Vietnam War: Seeds of Conflict 1945-1960". URL: http://www.historyplace.com/unitedstates/vietnam/index-1945.html, last accessed Oct. 10, 2012.

jeopardizing Japan's major trading partners and providing security threats to allies in Australia and the Philippines.

Eisenhower had described the "domino theory" during his presidency, which stated that when the first country falls to communism, the other countries in the region will fall as well.[109] Nixon was also a strong believer in this principle, as had been President Lyndon B. Johnson before him.[110] The fear was that if South Vietnam fell to Communism, then it would be followed by Laos, Cambodia, Thailand, Burma and Malaysia would follow, leaving the Philippines, Australia and New Zealand vulnerable.[111]

If the United States pulled out of Vietnam, State Department policy planner Walt Rostow said in a conversation with Pres. Johnson in 1964, it would "suffer an immediate and profound crisis – 'the worst of the century.'"[112] The result would be that Communist China would have control of Southeast Asia and the U.S. would be weakened, he said, and tensions would continue to rise with the former USSR. [113]

2.3.3 Challenges to Legislature

Firmly believing that this threat of Communist takeover was still threatening US interests, but with large casualties from the Vietnam War mounting, President Nixon led the public to believe that his plan of "Vietnamization" was quickly replacing U.S. soldiers with South Vietnamese soldiers in 1970. But he was clandestinely intensifying the bombing of Northern Vietnam and Cambodia and Marines were secretly invading Laos.[114] With the Communists making gains against Cambodia, Nixon wanted to make sure the Southern Vietnamese were in a strong position to defend themselves before the United States removed itself completely.[115] He kept the actions secret from Congress and

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[109] Excerpt from Eisenhower's press conference of April 7, 1954. In: Bolt, Prof. Ernest C., Special Topics, "The Vietnam Experience: Eisenhower Explains the Domino Theory," Richmond University. URL: https://facultystaff.richmond.edu/~ebolt/history398/DominoTheory.html, last accessed Oct. 10, 2012.
[110] President Nixon said in a speech in December of 1953: "If Indochina falls, Thailand is put in an almost impossible position. The same is true of Malaya with its rubber and tin. The same is true of Indonesia. If this whole part of South East Asia goes under Communist domination or Communist influence, Japan, who trades and must trade with this area in order to exist must inevitably be oriented towards the Communist regime." Welch, David A. 2005. Painful Choices: A Theory of Foreign Policy Change. Princeton University Press: Princeton, 152.
[111] Ninkovich, Frank 1994: Modernity and Power: A History of the Domino Theory in the Twentieth Century. University of Chicago Press: Chicago, 305.
[112] Ibid
[113] Ibid
[114] BBC News, "Nixon ordered Cambodia cover-up", Nov. 17, 2005.
[115] The History Place, 1999. "The Vietnam War: The Bitter End 1969-1975". URL: http://www.historyplace.com/unitedstates/vietnam/index-1945.html, last accessed Oct. 10, 2012.

from the public, but finally went public in April of 1970. His announcement of the secret invasions caused Congress and over 4 million students to protest across the country, closing over 450 universities. But in a secret meeting with top aides on May 31, 1970, he ordered them to continue the Cambodian incursions and to lie about it, according to presidential tapes released in 2005. "Publicly, we say one thing - actually, we do another," the president wrote in a memo after the meeting.[116]

Congress had specifically forbidden both the sending of troops and aid to Cambodia in the Supplemental Foreign Assistance Act of 1970 (Sec. 6), yet as Northern Vietnam continued to achieve victories over Southern Vietnam, Nixon proceeded.[117]

He continued his practice of constitutional venturing in military operations at a signing ceremony for the 1971 Mansfield Amendment calling for U.S. military operations in Indochina to end. President Nixon nullified his own ratification of the law by saying that "it is without force binding of effect" and it was an unconstitutional restriction on his powers as commander in chief.[118]

In 1973, Secretary of Defense Richardson argued that Cambodia's request for U.S. airstrikes gave the President the authority to launch them. Congress was not amused. Sen. McGovern stated that the Cambodian government was "a kind of super-ally, with an active role, superseding that of Congress … in our constitutional process."[119]

Secretary of State Rogers argued that the Paris Agreement of January 1973, which was supposed to end hostilities by the north and south and their allies, "contemplated" a ceasefire in Cambodia and thus U.S. strikes were needed until a ceasefire could be attained. This condition could not be found in the agreement, however.[120]

On the contrary, the United States had agreed that "Foreign countries shall put an end to all military activities in Cambodia and Laos, totally withdraw from and refrain

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[116] BBC News, "Nixon ordered Cambodia cover-up", Nov. 17, 2005.
[117] Schlesinger, Arthur M. 2004: The Imperial Presidency. New York: Houghton Mifflin Co., First Mariner Books edition, 196.
[118] Kassop, Nancy: "The Post-Nixon Imperial Presidency: 1980-2004". Paper presented in: 2005 Annual Meeting of the American Political Science Association, September 1-4, 2005, Washington, DC, 3.
[119] Schlesinger, Arthur M. 2004: The Imperial Presidency. New York: Houghton Mifflin Co., First Mariner Books edition, 196.
[120] Ibid, 197

from reintroducing into these two countries troops, military advisors, and military personnel, armaments munitions and war material."[121]

Congress attempted to check the president by adding an amendment to an appropriation bill that would have immediately cut off funding for the Cambodia operation, but Nixon vetoed this in June 1973, and the House wasn't able to override the veto. Both houses tried again, this time after negotiating a compromise with President Nixon to allow Air Force operations until Aug. 15. This passed in both the House and the Senate on July 1.[122]

2.3.4 Challenges to Judiciary

Meanwhile, Congresswoman Elizabeth Holtzman had already filed suit in April in federal court to have the bombing stopped. As attempts to check the president's military involvement in Cambodia had failed up until that point, the congresswoman joined forces with four Air Force officers, three of whom were pilots who had refused to fly missions over Cambodia in the wake of the peace agreement on Vietnam in January of 1973.[123] In the *Holtzman v. Schlesinger* case, Judge Judd ruled on July 25, 1973 that the President had issued an "unconstitutional order" to keep bombing Cambodia since the Congress had not approved a new military action there after the January Paris peace accords.[124] As of 4 p.m. on July 27, the Air Force was therefore to stop the bombing. But the Court of Appeals for the Second Circuit decided otherwise that day, allowing the bombings to continue.[125]

Justice Marshall of the U.S. Supreme Court agreed on Aug. 1, but the case was appealed to his colleague Justice Douglas, who opined on Aug. 4 that the bombing should stop, arguing that: "It has become popular to think the President has the power to

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[121] Agreement on Ending the War and Restoring Peace in Vietnam, Chapter VII, Art. 20, Paris, Jan. 27, 1973, 10. URL: http://www.cvce.eu/content/publication/2001/10/12/656ccc0d-31ef-42a6-a3e9-ce5ee7d4fc80/publishable_en.pdf, last accessed Oct. 2, 2012.
[122] Ibid, see also: Second Supplemental Appropriations Act of 1973, Continuing Appropriations Act of 1974.
[123] Millett, First Lieutenant Stephen M., "The Air Force, the Courts, and the Controversial Bombing of Cambodia," Air University Review, July-August 1976.
[124] Ibid.
[125] Ibid.

declare war. But there is not a word in the Constitution that grants the power to him. It runs only to Congress."[126]

He argued that the "political" defense, that is that courts cannot decide on cases that are political or for or against war, did not apply here since this is a capital case: "The upshot is that we know someone is about to die. Since that is true, I see no reason to balance the equities and consider the harm to our foreign policy if one or a thousand bombs do not drop."[127]

Ultimately, Justice Douglas' colleagues overruled him the same day, allowing the decision for the bombings to stop for just six hours.[128] But Congress' July 1 check of the president held, and all bombings stopped Aug. 15, 1973.[129]

2.4 Legacy of the Nixon Presidency's Use of War Powers

To ensure that such an end-run around the Congress would not occur again, Congress introduced the War Powers Resolution of 1973, which states that the president may not send U.S. Armed Forces abroad without getting authorization from Congress. In cases where this is not possible, the president must inform Congress within 48 hours and may not remain more than 60 days.[130] President Nixon vetoed it in October of 1973, citing executive privilege, which required the president to make a joint decision with Congress about when the U.S. would use military force. This set a precedent for all presidents since then, who likewise pronounced it unconstitutional.[131] But Congress quickly passed the act again over his veto, starting a series of checks on his presidency that ultimately led to his demise.

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[126] *Holtzman v. Schlesinger* – 414 U.S. 1316 (1973). Justia, U.S. Supreme Court Center. URL: http://supreme.justia.com/cases/federal/us/414/1316/case.html, last accessed Oct. 2, 2012. See also discussion of the case on pg. 66 of chapter two of this dissertation.
[127] Ibid.
[128] Millett, First Lieutenant Stephen M., "The Air Force, the Courts, and the Controversial Bombing of Cambodia," Air University Review, July-August 1976.
[129] Ibid. See also: Second Supplemental Appropriations Act of 1973, Continuing Appropriations Act of 1974.
[130] War Powers Resolution, Nov. 7,1973. In: Avalon Project, Yale Law School, and Lillain Goldman Law Library. URL: http://avalon.law.yale.edu/20th_century/warpower.asp, last accessed Oct. 10, 2012.
[131] Kassop, Nancy: "The Post-Nixon Imperial Presidency: 1980-2004". Paper presented in: 2005 Annual Meeting of the American Political Science Association, September 1-4, 2005, Washington, DC, 3.

Nixon was forced to resign his presidency in August 1974 after Congress initiated impeachment proceedings against him in July.[132] In addition to the War Powers Resolution of 1973, in 1975 the Senate established the *United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, commonly called the Church Committee to look into the secret illegal activities of the U.S. executive starting in the 1950s up through the Vietnam War and the Watergate scandal of the Nixon presidency.

"Abuse thrives on secrecy," the Committee warned. "Knowledge is the key to control. Secrecy should no longer be allowed to shield the existence of constitutional, legal and moral problems from the scrutiny of all three branches of government or from the American people themselves."[133]

During the Carter administration, Congress further limited presidential powers. In 1977, it passed a law limiting the president's ability to declare a state of emergency to give him additional powers, and in 1978, Congress' Ethics in Government Act allowed independent-counsel investigations of White House breaches of conduct. The same year, Congress passed the Foreign Intelligence Surveillance Act, which created a secret national security court with lifelong federal judges who had to approve any wiretapping requests. Any executive official who violated this law and monitored calls where at least one line was on U.S. soil would either need to go to prison for five years or pay $10,000. In 1980, it also passed a law requiring presidents to inform Congress about spy activities.[134]

It would seem that Nixon's gains for the presidency in the area of war powers – from conducting secret wars to ordering bombing campaigns without Congressional approval to wiretapping the "enemy" – were short-lived. Yet for scholars of history this summary is too short-sighted. Reagan revived the wiretapping program Nixon began, both Reagan and George W. Bush increased the use of signing statements to skirt Congress' authority in matters of war, and all presidents since Nixon, including Obama, have followed his example in rebuffing the War Powers Resolution.

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[132] Gallup, "Job Performance Ratings for President Nixon." 2012 Roper Center, University of Connecticut. URL:http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Nixon#.T7twZ1KUb0d, last accessed Oct. 17, 2012.

[133] Savage, Charlie 2007: Takeover. New York: Back Bay Books, 89, quoting from the Church Committee Report of 1976.

[134] Savage, Charlie 2007: Takeover. New York: Back Bay Books, 26, 40

2.5 Testing Intervening Variables: Presidential Popularity and Composition of Congress

A look at the conditions present when President Nixon was pushing through his Cambodia war policy help us understand if there is a connection between presidential popularity, the composition of Congress, and the decisions that were made by the Congress and the Supreme Court.

President Nixon did not have majorities from the Republican Party in the Senate or in the House during his terms. Democrats had dominated the two terms previous to his election, making an assertive campaign on behalf of Republican issues difficult. He had a legislative success rate of 67%, starting with 74 % at the beginning of his presidency, but falling to 50.6% by 1973.[135] While Nixon initially didn't dare to frequently challenge the Democratic agenda on popular legislation, by his second term, he was willing to take more risks.[136]

In this particular case study, President Nixon broke policy ground because his actions in Indochina marked the beginning of the "presidential war" which "liquidated the constitutional command that the power to authorize war belonged to the Congress."[137] This thus put an end to the practice of using such presidential war powers only in case of emergency or with some form of Congressional cooperation, albeit post-haste or without a declaration of war. [138]

Yet in the short term, Congress, and to a limited degree, the courts were able to check President Nixon, and put an end to his Cambodia bombings. How did his popularity ratings play into the ability of the legislature and judiciary to check him? His highest popularity occurred in January 1973 and November 1969 at 67% and his lowest approval rating occurred in January 1974 at 23% and July and August of 1974 at 24%, with an average approval rating of 49%.[139] In January of 1973 when his popularity was

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[135] *Congressional Quarterly Almanac*, 1976 (Washington, Congressional Quarterly, Inc. 1977). In: Feigert, Frank B. "Congress and Presidential Vetoes: The Nixon-Ford Years," Institute of European and American Studies, Academia Sinica, 79. URL: http://www.ea.sinica.edu.tw/eu_file/12015910504.pdf, last accessed Oct. 15, 2012.

[136] Conley, Richard S.: "The Legislative Presidency in Political Time". In: Thurber, James A. 2009. Rivals for Power: Presidential-Congressional Relations. Lanham, MD: Rowman & Littlefield Publishers, Inc., 163, 172.

[137] Schlesinger, Arthur M. 2004. The Imperial Presidency. New York: Houghton Mifflin Co., First Mariner Books edition, 198.

[138] Ibid

[139] Gallup, "Presidential Approval Ratings – Gallup Historical Statistics and Trends," 2012 Gallup, Inc. URL: http://www.gallup.com/poll/116677/presidential-approval-ratings-gallup-historical-statistics-

highest, troops had started returning home, and the Paris accords were signed, supposedly putting an end to the Vietnam War. In January of 1974, the battle over the release of the Watergate tapes was in full swing, and in July of 1974, Congress voted to impeach President Nixon and the Supreme Court ruled that Nixon needed to release the Watergate tapes, providing a significant blow to the presidency. In the same month, however, the Supreme Court's final *Holtzman* decision gave Nixon a pass on the Cambodia bombings. In August 1974, he resigned.

When viewing the following data, one must also consider the domestic climate present at the time the decisions were made. For example, on April 10, 1970, a Gallup poll showed that only "48 percent of the public approves of President Nixon's policy in Vietnam."[140] While the poll cites the revelation of the Cambodia incursion as reason for his slipping popularity ratings, the bad economy was also a source for unrest throughout the Nixon administration.[141]

The below data shows a sampling of the major legislative and judicial decisions that were made during the Nixon presidency with regards to Nixon's policy on expanding his war powers to continue U.S. military involvement in Cambodia. On the graph, legislation or rulings which give the president a win for his policy are marked in red, a loss is green, and when a win and a loss occurred the same week, in yellow. Those cases where the legislation or ruling limited the president's war powers are marked with a – in the data below the graph, and where the president won, a +.[142]

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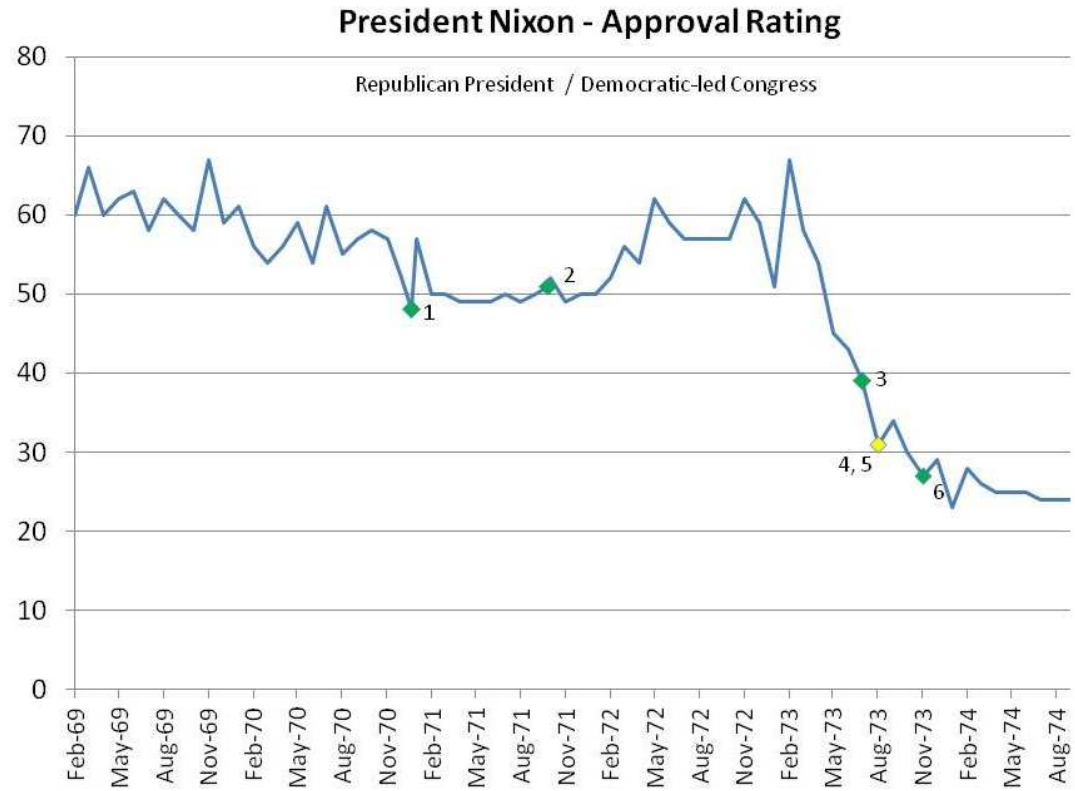
trends.aspx, last accessed Oct. 16, 2012. See also: "Job Performance Ratings for President Nixon," 2012 Roper Center, University of Connecticut. URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/ presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Nixon#.T7twZ1KUb0d, last accessed Oct. 17, 2012. For highs and lows, see: Peters, Gerhard, "Presidential Popularity Over Time," The American Presidency Project 1999-2012. URL: http://www.presidency.ucsb.edu/data/popularity.php?pres=37&sort=time&direct=DESC&Submit=DISPLAY, last accessed Oct. 16, 2012

[140] A & E Television Networks, LLC. "Poll reveals that public approval of Vietnam War is down," April 10, 1970. This Day in History. 2012. URL: http://www.history.com/this-day-in-history/poll-reveals-that-public-approval-of-vietnam-policy-is-down, last accessed Oct. 16, 2012.

[141] Ibid

[142] All Gallup presidential job approval ratings are taken from: "Job Performance Ratings for President Nixon," 2012 Roper Center, University of Connecticut. URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/ presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Nixon#.T7twZ1KUb0d, last accessed Jan. 6, 2013. Values are plotted monthly.



Key to Data Points 1-6

1) -president: Congress specifically forbade both the sending of troops and aid to Cambodia in the Supplemental Foreign Assistance Act of 1970 (Sec. 6).[143] On December 22, 1970, Nixon's popularity was at 48%.[144]

2) -president: The Mansfield Amendment of Sep. 27, 1971 called for U.S. military operations in Indochina to end. President Nixon's popularity was at 49%/52%.[145]

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[143] See Supplemental Foreign Assistance Act of 1970, H.R. 19911, P.L. 91-652, Dec. 22, 1970. See also: Grimmet, Richard F.: "Congressional Use of Funding Cutoffs Since 1970 Involving U.S. Military Forces and Overseas Deployments". In: CRS Report for Congress, Jan. 10, 2001. URL: http://www.fas.org/man/crs/RS20775.pdf, last accessed Oct. 16, 2012.

[144] Gallup Poll was conducted from 12/3-12/8/1970. "Job Performance Ratings for President Nixon." 2012 Roper Center, University of Connecticut. URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Nixon#.T7twZ1KUb0d, last accessed Oct. 17, 2012. Secondary Source: Peters, Gerhard, "Presidential Job Approval: Nixon," The American Presidency Project 1999-2012. URL: http://www.presidency.ucsb.edu/data/popularity.php?pres=37&sort=time&direct=DESC&Submit=DISPLAY, last accessed Oct. 16, 2012.

[145] In Gallup Polls conducted 8/27-8/30/1971, Nixon's popularity was at 49%. In Gallup Polls conducted 10/8-10/11/1971 his popularity was at 52 %. Source: "Job Performance Ratings for President Nixon," 2012 Roper Center, University of Connecticut. URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Nixon#.T7twZ1KUb0d, last accessed Oct. 17, 2012.

3) -president: In June 1973, Congress passed two bills forbidding funding to "directly or indirectly" support combat missions or any further military activity after Aug. 15, 1973 in Cambodia.[146] The Second Supplemental Appropriations Act for FY1973 was passed by Congress on June 29, 1973 and approved by the president on July 1. The Continuing Appropriations Resolution for FY1974 was passed by Congress June 30, 1973 and became law July 1, 1973.[147] President Nixon's popularity was at 44%/39%.[148]

4) -president: In the *Holtzman v. Schlesinger* case, Judge Judd ruled for the District Court for the Eastern District of New York on July 25, 1973 that the President had issued an "unconstitutional order" to keep bombing Cambodia since the Congress had not approved a new military action there after the January Paris peace accords.[149] On July 25, 1973, Nixon's approval ratings were falling from 39 to 31 %.[150]

5) +president: When *Holtzman v. Schlesinger* reached the Supreme Court, the final decision allowed the bombings to continue, sustaining the decision of the United States Court of Appeals for the Second Circuit of July 27, 1973.[151] On Aug. 1 and 4, Justice Marshall allowed the bombing to continue, though on Aug. 4, Justice Douglas had restored the District Court's order, stopping the bombing. Pres. Nixon's popularity was falling from 39 to 31%.[152]

Secondary Source: Peters, Gerhard, "Presidential Job Approval: Nixon," The American Presidency Project 1999-2012. URL: http://www.presidency.ucsb.edu/data/popularity.php?pres=37&sort=time&direct=DESC&Submit=DISPLAY, last accessed Oct. 16, 2012.

[146] Grimmet, Richard F.: "Congressional Use of Funding Cutoffs Since 1970 Involving U.S. Military Forces and Overseas Deployments". In: CRS Report for Congress, Jan. 10, 2001, CRS-2. URL: http://www.fas.org/man/crs/RS20775.pdf, last accessed Oct. 16, 2012.

[147] Ibid. See: Public Law 93-50, 93rd Congress, HR 9055, Title III, Sec. 307, p. 30, July 1, 1973; House Joint Resolution 636, Public Law 93-52, July 1, 1973.

[148] Gallup Polls were conducted from 6/22-25/73 and from 7/6-9/73. Source: "Job Performance Ratings for President Nixon," 2012 Roper Center, University of Connecticut. URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Nixon#.T7twZ1KUb0d, last accessed Oct. 17, 2012.

[149] Millett, First Lieutenant Stephen M.: "The Air Force, the Courts, and the Controversial Bombing of Cambodia" Air University Review, July-August 1976.

[150] Ibid. Gallup polls from 7/6-9/73 put his popularity at 39 % and from 8/3-6/1973 out his popularity at 31%.

[151] Millett, First Lieutenant Stephen M.: "The Air Force, the Courts, and the Controversial Bombing of Cambodia". Air University Review, July-August 1976.

[152] Source: "Job Performance Ratings for President Nixon," 2012 Roper Center, University of Connecticut. URL:http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Nixon#.T7twZ1KUb0d, last accessed Oct. 17, 2012. Gallup polls from 7/6-9/73 put his popularity at 39 % and from 8/3-6/1973 out his popularity at 31%.

6) -president: The War Powers Resolution of 1973 was passed over President Nixon's veto on Nov. 7, 1973. President Nixon's popularity was at 27%/31%.[153]

2.5.1 Analysis

2.5.1.1 Connection between Presidential Popularity and Nixon's Cambodia Policy

With the second lowest approval rating of all presidents since Gallup started polling presidential approval, it is no wonder that the president experienced "losses" as both the Congress and the courts checked his attempt to expand his war and commander in chief powers.[154] While the initial "losses" he suffered from the Congress occurred during a time when his popularity was hovering around his average presidential approval for both terms (49%), the policy changes initially remained on paper. The incursions continued until Congress passed the measures cutting off funding for the Cambodia incursions, at which time the president's popularity ratings had sunk to close to 40%.

The only gains he received were from the courts, and these were accompanied in the same week or day by losses, a sign of the ambivalence of the courts when his popularity was in the doldrums. In less than two weeks, the Supreme Court and two lower courts issued five conflicting rulings, ruling in turn that the President's order for the bombings were unconstitutional, or that the court could not intervene and that the bombings could proceed. This was hardly an overwhelming win for the president.

2.5.1.2 Connection between Composition of Congress and Cambodia Incursion "Wins"

As previously mentioned, President Nixon did not have majorities from the Republican Party in the Senate or in the House during his terms. Democrats had also ruled both houses in the Kennedy and Johnson administrations, and had a steadfast hold on the policy agenda. Nevertheless, while presidential popularity held in the lower 50s

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[153] Ibid. Gallup Polls taken from 11/2-5/73 put his approval at 27% and from 11/30-12/3/73 put his approval at 31%.

[154] President Truman had a lower average approval rating at 45 %. Source: "Presidential Approval Ratings – Gallup Historical Statistics and Trends," 2012 Gallup, Inc. URL: http://www.gallup.com/poll/116677/presidential-approval-ratings-gallup-historical-statistics-trends.aspx, last accessed Oct. 16, 2012.

and upper 40s, Congress was unable to change the policy on the ground with regards to the Cambodia incursion.

The momentum for presidential wins in war power had already started before the Nixon administration, but the first real checks that the Congress was able to levy on presidential war power visa vi the military engagement in Indochina did not happen until the Nixon administration. Between 1966 and July 1973, there were 113 public votes to stop or limit U.S. combat activities in Indochina.[155] Only those four listed above managed to pass Congress, in 1970, 1971 and 1973.[156]

Already during the Johnson administration there was an expansion of the presidential prerogative with regard to war powers. Schlessinger noted: "The role of Congress under the Johnson theory of the warmaking power was not to sanction but to support the war – a role that nearly all of Congress … accepted until 1966."[157]

Yet with Nixon not asking Congress to support the war, but planning and executing military missions without them, he went a step further, using the classic unitary executive theory argument of his "authority as Commander in Chief" to defend the actions.[158]

By 1973 as his popularity had plunged and his legislative success rate had fallen by over 20%, both the courts and the legislature were able to place significant checks on his power. The June 1973 bills that cut off funding for the Cambodia incursions and the initial court rulings calling his orders unconstitutional were signs that the executive would not be able to expand its power into their arenas indefinitely. By the time the War Powers Resolution was passed in November 1973, Congressional investigations into Nixon's abuse of power were in full swing. When he resigned after impeachment proceedings had been initiated less than a year later, he cited Congressional composition

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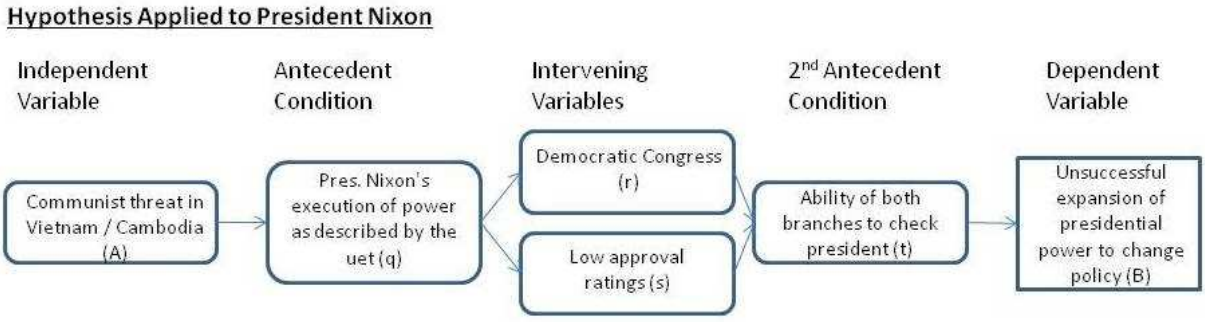
[155] Kassop, Nancy: "The Post-Nixon Imperial Presidency: 1980-2004". Paper presented in: 2005 Annual Meeting of the American Political Science Association. Sep. 1-4, 2005: Washington, DC, 4. Kassop explains that these votes were either "roll call" or "teller" votes, ie, votes where the members had to publicly affiliate their name with their vote for or against the resolution.
[156] Ibid, Kassop bundles the two June 1973 bills into one in her text, but I differentiate here.
[157] Schlesinger, Arthur M. 2004. The Imperial Presidency. New York: Houghton Mifflin Co., First Mariner Books edition, 181.
[158] Ibid, 189. See also Nixon speech defending his incursion into Cambodia without Congressional notification or approval; Nixon, Richard Milhous, and Wilson, Richard 1972: A New Road for America. Doubleday: Garden City, New York, 684.

as the reason: "I no longer have a strong enough political base in the Congress to justify continuing that effort" to continue in the office of president. [159]

The result was a loss of presidential power. In the formula below, the threat of the Communists in Indochina enhanced by the president executing his power in a manner consistent with the unitary executive theory caused Nixon to challenge the legislative branch through ignoring the Supplemental Foreign Assistance Act in 1970, the Mansfield Amendment in 1971 and the Paris Agreement in 1973. He challenged the judicial branch by maintaining the court had no purview to decide the case in *Holtzman v. Schlessinger*. With falling popularity and no party unity to back him, he was forced to stop the bombings.



2.6 CONCLUSION

President Nixon's incursion into Cambodia presents a case study where a president experienced "losses" in the majority of cases where the legislature and the courts placed checks on his expanding power. Influencing these losses was the non-unity factor - his party was not in power in the Senate or the House during his administration. As has been demonstrated in this chapter, as his popularity fell, the ability of the Congress to place real checks on his policy of incursion into Cambodia increased.

Yet the legacy Nixon started with circumventing Congress when initiating U.S. combat and defying of the War Powers Resolution, while checked immediately in the aftermath of Watergate, continued in the 1980s and to the present day. While his constitutional venturing cost him his own presidency, in the view of history, he laid the groundwork for the enlargement of the presidency in the area of war powers for the future. While it took a return to the Republican Party to realize this expansion, the

[159] President Nixon's Resignation Speech, PBS, "Newshour." URL: http://www.pbs.org/newshour/character/links/nixon_speech.html, last accessed Oct. 23, 2012.

precedence he created through his use of unitary executive arguments to defend and pursue his Cambodia campaign and to veto the War Powers Resolution have assisted U.S. presidents for the last three decades in the expansion of executive wartime power.[160]

3. The Reagan Presidency

3.1 The Domestic Climate and the Strong President

The Republican won with landslide victories in both 1980 and 1984 with the aid of "Reagan Democrats" and his "political honeymoon" period was extended through sympathy for the president after John Hinckley, Jr. tried to assassinate him two months after his inauguration. His approval rating rose to 73 percent after the attack, and he was able to use his increased popularity to push through a number of economic reforms, which also improved American optimism.[161]

When he returned to work after recovering from his wounds, he used a medical recovery theme to introduce his proposed tax cuts and received standing ovations from Congress. His controversial economic policies have been credited with causing an increase in GDP by 26 %, tax cuts for the middle class, a decrease in inflation from 13.5 to 4.1 percent in 1988, and the creation of 16 million new jobs.[162] Capitalizing on his strong standing with both the American public and U.S. government institutions, President Reagan was able to more easily expand the powers of the presidential office without the checks Nixon faced.

Unlike President Nixon, who came to power in the middle of an unpopular war and who had to wrestle from day one with political enemies both at home and abroad, President Reagan was elected in an era when U.S. forces were not in combat, Americans were more unified in their opposition to Soviet policies, and were tired of the bad

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[160] Kassop states: "The seeds of the expansive view of presidential power that flourish today in the presidency of George W. Bush were planted in the Nixon presidency of thirty years ago." See: Kassop, Nancy: "The Post-Nixon Imperial Presidency: 1980-2004". Paper presented in: 2005 Annual Meeting of the American Political Science Association, September 1-4, 2005, Washington, DC, 1, 7.

[161] Langer, Gary: "Reagan's Ratings," ABC News, June 7, 2004. URL: http://abcnews.go.com/sections/us/Polls/reagan_ratings_poll_040607.html, last accessed Aug. 15, 2012.

[162] Ronald Reagan Presidential Foundation and Library: "The Second American Revolution: Reaganomics". URL:http://webcache.googleusercontent.com/search?q=cache:2kvM92Bs0rAJ:www.reaganlibrary.com/economicpolicy.aspx+Reagan+creates+16+million+jobs&cd=11&hl=de&ct=clnk&gl=de&source=www.google.de, last accessed Aug. 15, 2012. See also: http://en.wikipedia.org/wiki/Ronald_Reagan.

economy they were having to endure at the end of the Democratic Carter administration.[163]

3.2 The First Named Unitary Executive Presidency

3.2.1 President Reagan as "Pushing President" with Congress

Aware that he would be inheriting a weakened presidency, the Reagan administration outlined a plan at the beginning of the administration which would allow the executive branch to start aggressively taking control of the U.S. policy making process and would roll back the legislative checks implemented after Watergate.[164]

The plan was most clearly spelled out in a report commissioned by Attorney General Edwin Meese and written by the Justice Department. The report, which was the first to use the term, outlined a plan for the execution of the "unitary executive theory," and recommended that the president refuse to uphold laws that "unconstitutionally encroach upon the executive branch," and that he start using more signing statements and vetoes.[165] The report called the War Powers Resolution unconstitutional, and also disregarded the concept of checks and balances as an unconstitutional attempt by Congress to limit executive power.[166] Though the report, called "Separation of Powers: Legislative-Executive Relations" wasn't final until 1986, the following token examples of constitutional venturing show that President Reagan put these suggestions into practice from the beginning of his presidency.[167]

In February 1981, President Reagan exerted his power in a manner described by the unitary executive theory by issuing an executive order reviving Nixon's strategy to use the Office of Management and Budget to review all government agencies' new policies. In 1985, he issued another executive order which required the agencies to send the White House a cost-benefit analysis of their new rules. This allowed the executive oversight in the process so it could make objections if it didn't agree with the policies ideologically. According to the law, the president's objections carried no weight as Congress had given agencies the power to make rules for their agencies on their own

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[163] Gibbs, Nancy, "The All-American President: Ronald Wilson Reagan (1911-2004)," TIME, June 14, 2004. URL: http://www.time.com/time/magazine/article/0,9171,994446-8,00.html, last accessed Jan. 12, 2013.
[164] Savage, Charlie 2007: Takeover. New York: Back Bay Books, 42, 43.
[165] Ibid, 47-48
[166] Ibid, 47-48
[167] Ibid

and the agencies were legally required to submit to congressional oversight committees instead of to the president.[168] But in practice, the executive had the final word.

In 1985, two attorneys encouraged Attorney General Meese to propose that President Reagan start using signing statements as a legislative tool. Meese approved the plan and asked the West Publishing Company to include presidential signing statements – which cite the president's interpretation of a law – with the official publication of the bill's legislative history.[169]

Justice Department lawyer Samuel Alito went a step further and recommended a detailed plan to allow the president to use the signing statement in order to have the last word on questions of constitutional interpretation. In his proposal memo, he admits that "Congress is likely to resent the fact that the president will get in the last word on questions of interpretation."[170]

He therefore suggested that the president should initially only use signing statements attached to bills involving the Department of Justice, and then to increase them over time to include laws that affect the entire government.[171] President Reagan took the idea and ran with it, issuing 250 signing statements, the most of any previous U.S. president. Of those, 86 contained objections to legal statutory provisions.[172]

Steven Calabresi, the young attorney who initially proposed the plan, later wrote: "I've subsequently come to think of [signing statements] as being important vehicles by which presidents can control subordinates in the executive branch. They subsequently came to be important in the Unitary Executive."[173] This provided a foundation for President Bush to later follow, using many of his singing statements to push through the new detainee policy.

In the intelligence area, President Reagan had already started in 1981 to turn back Congressional checks on presidential power established during the Carter administration. He issued an executive order which allowed the 12 agencies in the intelligence community greater authority, but also placed them more directly under the

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[168] Ibid, 304-305
[169] Ibid, 232
[170] Ibid, 233
[171] Ibid, 233, 234
[172] Halstead, T.J.: "Presidential Signing Statements**:** Constitutional and Institutional Implications". Congressional Research Service, Sep. 17, 2007.
[173] Savage, Charlie 2007: Takeover. New York: Back Bay Books, 234.

direction of the president and the National Security Council.[174] In 1982, he further expanded his power by issuing another executive order to weaken the requirements for transparency in classifying information.[175]

Reagan's increased powers in the intelligence area went hand in hand with increased war powers. President Nixon had already laid the groundwork for using executive privilege to ignore the War Powers Resolution. Each subsequent president would do the same, questioning its constitutionality and citing their authority as chief executive and commander in chief. This culminated in President Reagan's 14 encounters with the resolution when he called for use of military force to be used; usually informing Congress only after military orders were given.[176]

For example, in 1983, President Reagan unilaterally invaded Grenada without approval from Congress. White House attorney John Roberts (who was later appointed by President Bush as Chief Supreme Court Justice) argued that President Reagan's decision was legal. He wrote that as president, Reagan had "inherent authority in international affairs to defend American lives and interests and, as commander in chief, to use the military when necessary in discharging these responsibilities."[177] Roberts was responding to former Supreme Court Justice Goldberg's assertion that what Reagan did was likely unconstitutional and could provide grounds for impeachment.[178]

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[174] Executive Order 12333, United States Intelligence Activities, Dec. 4, 1981. See also Kelley, Christopher S. 2010: Executing the Constitution. Albany: State University of New York Press, 59.

[175] Kelley, Christopher S. 2010: Executing the Constitution. Albany: State University of New York Press, 59

[176] Kassop, Nancy: "The Post-Nixon Imperial Presidency: 1980-2004", 2005 Annual Meeting of the American Political Science Association, Sep. 1-4, 2005, 7. The 14 cases are listed in Bowen, Prof. Gordon L.: "The War Powers Resolution in Practice: 21 Interventions 1973-1990, and 42 more 1990-2004." URL: http://www.mbc.edu/faculty/gbowen/warpower2.htm, last accessed: May 28,2012. These include cases reported on the following dates by President Reagan: Sep. 29, 1982, Reagan reported deploying 1200 Marines to Lebanon. Aug. 24, 1982, he reported 800 Marines were dispatched to Beirut to oversee the evacuation of the PLO from Lebanon. On March 19, 1982, he reported U.S. military deployment to Sinai to police the Israel/Egypt border. Aug. 8, 1983 he reported 2 AWACS and eight F-16s being sent to Chad. On Aug. 30, 1983, he reported U.S. Marines were in Beirut. This was the only War Powers Resolution case were he actually received authorizing legislation from Congress, though this happened after the Marines had been involved in hostile fire on the ground. On Oct. 25, 1983 he reported 1900 U.S. forced had invaded and occupied Grenada. On March 26, 1986 he reported that the US had launched missiles at the Libyan forces. On April 16, 1986 an airstrike against Libya was reported. On Sept. 23, 1987, there was a report of firing on an Iranian boat. On Oct. 10, 1987, the president reported an Iranian boat being sunk in response to attacks. On Oct. 20, 1987 the president reported the U.S. destroying an oil platform, and on April 19, 1988 also destroying two Iranian oil platforms and striking a Persian Gulf mine, and on July 4, 1988 sinking Iranian boats and shooting down and Iranian civilian airliner and on July 14, 1988 shooting at Iranian boats.

[177] Savage, Charlie 2007: Takeover. New York: Back Bay Books, 257.

[178] McNeal, Gregory S.: "A Judge for All Seasons". In: National Review Online, Sep. 15, 2005. URL: http://webcache.googleusercontent.com/search?q=cache:y0n-BO2GUKwJ:www.nationalreview.com/articles/215432/judge-all-seasons/gregory-s-mcneal+inherent+authority+in+international+affairs+to+defend+American+lives+and+interests&cd=8&hl=de&ct=clnk&gl=de&source=www.google.de, last accessed Feb.4, 2011. See also: Savage, Charlie 2007: Takeover. New York: Back Bay Books,, 257.

President Reagan's Attorney General Meese, who some scholars credit with inventing the term "unitary executive theory," defended Reagan's actions by claiming that Congress "could not constitutionally deprive the president of his inherent power to conduct the foreign policy and protect the security of the United States."[179]

3.2.2 The Unitary Executive President and the Judiciary

During the Reagan administration, the judiciary greatly increased the power of the executive, allowing the president to take back many of the powers lost following the scandals of the Nixon administration. And no wonder. In addition to three Supreme Court justices, Reagan made 375 judicial appointments at the U.S. District and Circuit Court level, the highest number confirmed for a U.S. president up to that point.[180]

Courts rolled back the checks implemented by Congress on presidential wiretapping after the Nixon scandals by passing a series of rulings allowing the executive to keep state secrets. In 1972, the Supreme Court had ruled that it was unconstitutional to place domestic wiretaps without a warrant, including in national security matters.[181] In *Halkin vs. Helms* in September 1982, the district and appellate courts ruled the government does not have to release their records of the wiretapping of the anti-Vietnam war protestors during the Nixon administration. The DC Court of Appeals wrote in its decision that the federal courts: "should accord utmost deference to executive assertions of privilege on grounds of military or diplomatic secrets… courts need only be satisfied that there is a reasonable danger" that military secrets might be exposed.[182] This ruling set precedent for courts to dismiss lawsuits against the Bush administration when it abducted foreign nationals and reinvigorated a warrantless domestic spying program 20 years later.[183]

The courts also gave the president broadened war powers by not insisting on compliance with the War Powers Resolution. When President Reagan sent military advisors to El Salvador in 1981 to aid the government against supposed Soviet- and

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[179] Ibid.
[180] Rutkus, Denis Stevens, and Sollenberger, Mitchell A.: "Judicial Nomination Statistics U.S. District and Circuit Courts, 1977-2003". In: Congressional Research Service Report for Congress, Feb. 23, 2004, CRS-13, 14. URL: http://www.senate.gov/reference/resources/pdf/RL31635.pdf, last accessed: Oct. 23, 2012. See also: Federal Judicial Register, "History of the Federal Judiciary: Biographical Directory of Federal Judges." The Federal Register puts the number at 364.
[181] Ibid, 268
[182] Siegel, Barry 2008. Claim of Privilege. New York City: HarperCollins, 196.
[183] Fisher, William: "Courts, Congress Resist Growing White House Power". In: InterPress Service News Agency: June 30, 2006.

Cuban-sponsored guerillas, the courts sided with the Reagan administration. The Supreme Court refused to hear the case, called *Crocket v. Reagan*.[184] Judge Joyce Green of the District Court held that "the war powers issue presented a nonjusticiable political question" based on the "equitable discretion doctrine," which means that a court can't settle what should be decided first in Congress.[185]

In another War Powers Resolution case, *Conyers vs. Reagan* was brought by legislators after President Reagan ordered the invasion of Grenada without Congressional approval. It involved the sending of 5,600 troops without Congressional approval, but due to the short duration of the mission, and the fact that at the time of the federal appeals court case, most troops had returned home, the case was thrown out as moot.[186] This set further precedent in allowing the president to initiate military hostilities without Congressional approval.

The Persian Gulf War provided the courts with another opportunity to rule on the president's war powers. By 1987, the U.S. presence involved fighter planes, 11 warships, 6 minesweepers and a dozen patrol ships stationed in the Persian Gulf and in some cases involved in the protection of Kuwaiti oil tankers.[187] Here the United States District Court for the District of Columbia dismissed the case again on "equitable discretion" and the "political question doctrine."[188] The court further stated that if the judiciary decided the United States was involved in hostilities, it would contradict the executive in its declaration that the "United States is neutral in the Iran-Iraq war."[189]

In November of 1984, the D.C. Court broadened the definition of state secrets to include "disclosure of intelligence-gathering methods or capabilities and disruption of

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[184] Grimmit, Richard F. "The War Powers Resolution After Thirty Years". In: Congressional Research Service Report for Congress, March 11, 2004. URL: http://www.fas.org/man/crs/RL32267.html#_1_23, last accessed Nov. 5, 2012.
[185] *Crockett v. Reagan* (1983), No.82-2461, United States Court of Appeals, District of Columbia Circuit. URL: http://scholar.google.de/scholar_case?case=12725576697146205602&q=Crockett+v.+Reagan&hl=en&as_sdt=2,5&as_vis=1, last accessed Nov. 5, 2012.
[186] *Conyers v. Reagan* (1985), No. 84-5171, United States Court of Appeals, District of Columbia Circuit. URL: http://openjurist.org/765/f2d/1124/conyers-v-reagan, last accessed Jan. 12, 2013.
[187] Grimmit, Richard F. "The War Powers Resolution After Thirty Years" Congressional Research Service Report for Congress, March 11, 2004. URL: http://www.fas.org/man/crs/RL32267.html#_1_23, last accessed Nov. 5, 2012.
[188] *Lowry v. Reagan* (1987), No. 87-2196, United States District Court for the District of Columbia. URL: http://scholar.google.de/scholar_case?case=12748736362385861115&hl=en&as_sdt=2&as_vis=1&oi=scholarr&sa=X&ei=F9bxULPbAZHLsgacpIAI&ved=0CCsQgAMoADAA, last accessed Nov. 5, 2012.
[189] *Lowry v. Reagan* (1987), United States District Court for the District of Columbia, No. 87-2196. URL: http://dc.findacase.com/research/wfrmDocViewer.aspx/xq/fac.19871218_0000272.DDC.htm/qx, last accessed Nov. 5,2012.

diplomatic relations."[190] This built precedence for intelligence gathering in future presidencies to be expanded.

The Reagan administration further rolled back judicial checks on presidential power established post-Nixon when he found a loophole in the 1978 FISA law. The law only covered wiretapping, not physical searches. The Reagan legal team challenged the FISA court's authority to grant warrants for its secret break-ins, the court agreed, and Reagan gained the power to authorize break-ins without warrants, as long as it was for "national security purposes" and approved by the attorney general.[191]

In 1984, the Supreme Court gave the executive further broadened powers when it issued an opinion that an executive branch administrator, rather than Congress, could make the final interpretation of legislation as long as the legislative history of the bill does not clearly state the law's intent.[192]

3.3 Main Test Case: Iran-contra

3.3.1 Reason for case selection

President Reagan provides the political scientist with more fodder for study in the presidential use of war powers than any other president in U.S. history. With 14 encounters with the War Powers Resolution, he was also the first president to be sued by members of Congress for not complying with the War Powers Resolution.[193] Making case selection even more difficult, Reagan's form of "venture constitutionalism" expressed itself in less flagrant ways – when more prolific – than his predecessors. When President Reagan initiated military action against another country without approval from Congress, he often quickly "made good" by initiating consultations with Congress, belatedly invoking the War Powers Resolution, or citing the right to self-defense and his Commander in Chief powers to be executed in the case of attack on U.S. interests.

Take, for example, the first War Powers Resolution case to go before the courts, *Crocket v. Reagan*. Though President Reagan acted without congressional approval, this does not provide the perfect test case as it involved the sending of military advisors to El

[190] Siegel, Barry 2008: Claim of Privilege. New York City: HarperCollins, 197.
[191] Savage, Charlie 2007: Takeover. New York: Back Bay Books, 41.
[192] Kelley, Christopher S. 2010: Executing the Constitution, Albany: State University of New York Press, 79.
[193] See list of WPR cases on pg. 37. See also: Kassop, Nancy: "The Post-Nixon Imperial Presidency: 1980-2004", 2005 Annual Meeting of the American Political Science Association, Sep. 1-4, 2005, 8.

Salvador, not combat troops. The case was also only supported by 29 Congressmen. There was no imminent threat to U.S. territory, and while there was a potential threat to the advisors who were stationed in an area marked by hostilities, their assignment was not a combat mission.[194]

In *Conyers v. Reagan*, President Reagan cited the War Powers Resolution after invading Grenada, but failed to cite paragraph 4 (a)(1), which means the clock on the 60-90 day time limitation had never been started.[195] Because Congress was ultimately involved in consultations with the president and in curtailing the mission, this case also does not present an ideal example of a unitary executive determined to circumvent Congress.

In *Lowry v. Reagan*, 110 Congressmen challenged the constitutionality of the President sending the navy to the Persian Gulf during the Iran-Iraq war under the War Powers Resolution.[196] Here, President Reagan submitted six reports consistent with the War Powers Resolution, but again never cited paragraph 4 (a)(1), though he did consult Congress prior to some military actions.[197] With arguments even within Congress that the War Powers Resolution needed to be changed and with the president involved in consultations with Congress,[198] this also did not provide the flagrant constitutional venturism typical of unitary executive presidencies.

So while it was more difficult to find a case fitting the unitary executive model for this presidency than for the others, there were a number of elements within the Iran-contra affair that made it most appropriate. In this case, the President not only circumvented Congress in initiating military hostilities, but violated laws that he himself had signed. And, typical to the unitary executive presidents before him, his initial

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[194] Center for Constitutional Rights, *Crocket v. Reagan*. URL: http://ccrjustice.org/ourcases/past-cases/crockett-v.-reagan last accessed Oct. 29, 2012.
[195] Grimmit, Richard F.: "The War Powers Resolution After Thirty Years," Congressional Research Service, March 11, 2004. URL: http://www.fas.org/man/crs/RL32267.html#_1_23, last accessed Nov. 5, 2012. Note: While the combat portion of the mission lasted only one week, U.S. military forces remained in Grenada from Oct. 25, 1983 to Sep. 30, 1985. See: *Conyers v. Reagan* (1985). No. 84-5171. United States Court of Appeals, District of Columbia Circuit.
[196] New American Nation Encyclopedia. "Judiciary Power and Practice: The War Powers Resolution" 2012 Advameg, Inc. URL: http://www.americanforeignrelations.com/E-N/Judiciary-Power-and-Practice-The-war-powers-resolution.html#b, last accessed Oct. 29, 2012.
[197] Grimmit, Richard F.: "The War Powers Resolution After Thirty Years". Congressional Research Service, March 11, 2004. URL: http://www.fas.org/man/crs/RL32267.html#_1_23, last accessed Nov. 5, 2012.
[198] Ibid.

success was a result of: "executive initiative, congressional acquiescence, and judicial tolerance."[199]

While the Iran contra case stands out as the one in which the President most flagrantly circumvented the law, even here there were limitations in the suitability of the case study. Neither the Independent Counsel nor the courts nor the presidential Tower Commission could prove that the President had direct knowledge of the illegal activities.[200] Nevertheless, the investigation by the Democratic-dominated Congress in 1987 charged the president with "failing to execute his constitutional duty to uphold the law," and the president himself took responsibility for mismanaging his staff when funds were illegally diverted from arms sales to Iran (which was arms embargoed at the time) to the Nicaraguan contras, who were fighting the Communists there.[201]

3.3.2 International Threat and Perception of Threat

Reagan is credited with using "covert actions to advance his foreign policy around the globe" more than any other president during the Cold War.[202] Reagan focused on Third World countries supporting Communism, with his most famous and controversial covert action being his support for the Nicaraguan Contras to combat Communist influence in Central America. By this stage in the Cold War, the Soviets' influence across the globe was increasing, threatening U.S. economic and security interests.

There were three main threats in the Iran-contra scandal. First, there was the threat of Soviet influence in Central America. In March 1980, the Sandinistas, which

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[199] Koh, Harold Hongju, "Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair" (1988). *The Yale Law Journal. Faculty Scholarship Series.* Paper 2071. URL: http://digitalcommons.law.yale.edu/fss_papers/2071, last accessed Dec. 20, 2012.
[200] The Free Dictionary, "Iran-Contra Affair," Farlex Inc. URL: http://legal-dictionary.thefreedictionary.com/Iran-Contra+Affair, last accessed May 28, 2012.
[201] Reagan claimed: "As angry as I may be about activities taken without my knowledge, I am still accountable for those activities. " Source: Reagan, President Ronald: "Iran Arms and Contra Aid Controversy," Speech from the Oval Office, carried by Public Broadcasting Service, March 4, 1987. URL: http://www.pbs.org/wgbh/americanexperience/features/primary-resources/reagan-iran-contra/, last accessed Dec. 20, 2012.
[202] Redfield, Micah R.: "The Quiet Option: Presidential Use of Covert Operations in American History," United States Air Force Academy. URL:http://www.thepresidency.org/storage/documents/Fellows2008/Redfield.pdf, last accessed Jan. 13, 2013.

were controlling Nicaragua, signed "economic, cultural, technological, and scientific agreements with the USSR.[203]

Second, there was the threat of a U.S.-hostile and Soviet-backed Iran. While the United States had initially remained neutral in the Iran-Iraq war, when Iran was able to invade Iraq, the war turned from a defensive to an offensive war. The United States was concerned that Iraqi oil supplies would be threatened. It was also concerned that its allies Jordan and Israel would be threatened.[204] In addition, in 1979 Iran had cut ties with the U.S., declared Israel illegitimate, and taken control of the U.S. Embassy in Iran.[205] Worse, the Iranians were also "pushing for an alliance with the Soviet Union."[206]

Third, in March of 1984, the CIA chief in Beirut, Lebanon was kidnapped, the first of 96 hostages.[207] President Reagan hoped that sending Iran weapons during a time when Iran was suffering from arms-sanctions (albeit U.S.-imposed) would help win back the hostages. He thought Iran could place pressure on the kidnappers for release. Though eventually three were released, another three were captured, and the plan failed.[208]

3.3.3 Challenges to Legislature

On Dec. 1, 1981, President Reagan authorized the CIA to use $19.95 million to support the Nicaraguan rebels. While Congress attempted to check the President through prohibiting funds providing military support of the rebels with the Boland amendment on Dec. 8, 1982, (and Reagan himself signed the amendment) he continued the support, even going so far as to authorize the CIA placing mines in three Nicaraguan harbors in 1984.[209] The Reagan administration tried to work its way around the congressional ban on aid to the Contras and for using U.S. funds for the purpose of

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[203] Cheit, Prof. Ross (supervisor), "Understanding the Iran-Contra Affairs," Brown University. URL: http://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/timeline-nicaragua.php, last accessed Nov. 6, 2012.
[204] Kemp, Geoffrey: "The Reagan Administration". In: Wright, Robin (ed) 2010. The Iran Primer: Power Politics, and U.S. Policy. Washington: United States Institute of Peace Press Books.
[205] Cheit, Prof. Ross (supervisor), "Understanding the Iran-Contra Affairs," Brown University. URL: http://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/timeline-iran, last accessed Nov. 6, 2012.
[206] Kemp, Geoffrey: "The Reagan Administration". In: Wright, Robin (ed) 2010. The Iran Primer: Power Politics, and U.S. Policy. Washington: United States Institute of Peace Press Books. URL: http://iranprimer.usip.org/resource/reagan-administration, last accessed Nov. 6, 2012.
[207] Ibid
[208] Ibid
[209] Savage, Charlie 2007: Takeover. New York: Back Bay Books, 6-7.

overthrowing the Nicaraguan government by saying that it was trying to force the Sandinistas to reach a peace agreement with the Contras.[210]

Congress passed another amendment, Boland II, on May 24, 1984, prohibiting direct and indirect funding of any kind to military or paramilitary organizations in Nicaragua, and President Reagan also signed this into law. The National Security Advisor then sought new secret sources for funding for the Contras, believing that the president wanted him and his colleagues to "do all that we could to make sure that the … freedom fighters survived …"[211]

The most controversial aspect of this exercise in executive venture constitutionalism came when (as described above) the U.S. tried to make a secret deal with Iran for U.S. hostages, and sent Iran-bought weapons to the rebels in Nicaragua. While Reagan was never directly implicated by the courts for this part of the scandal, the mere fact that the president was able to act unilaterally so often tells a tale of success for his founding work in the unitary executive theory.

The President was aided in the arms-sales by the *INS v. Chadha* ruling in 1983, which made the legislative veto illegal. Prior to that, and in the wake of Nixon's misuse of power during the Vietnam War, Congress had passed legislation that allowed it to "veto, by concurrent resolution, all government-sponsored arms sales above certain dollar amounts."[212] However, after the 1983 Supreme Court ruling Congress could only stop planned arms sales by a joint resolution which can be vetoed by the president, and even here, executive branch lawyers helped negotiate language into the new arms sales law that allowed the president to keep the sales secret in the event of "exceptional circumstances" or "in the national interest."[213]

President Reagan continued to use this power to venture beyond constitutional norms when he unilaterally withdrew from the 1956 Friendship, Commerce, and Navigation Treaty with Nicaragua in 1985 and when he ended the International Court of Justice's jurisdiction over the United States after it ruled that when the CIA had placed

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[210] Ibid, 53
[211] Ibid, 8
[212] Koh, Harold Hongju: "Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair" (1988). The Yale Law Journal. *Faculty Scholarship Series.* Paper 2071, 1266. URL: http://digitalcommons.law.yale.edu/fss_papers/2071, last accessed Dec. 20, 2012. See pg. 17 of chapter two for background on *INS v. Chadha.*
[213] Ibid

mines in three separate Nicaraguan harbors in 1984, the United States had broken international law.[214]

3.3.4 Challenges to Judiciary

The absence of any Supreme Court case around the Iran-contra affair during the Reagan presidency is a statement in and of itself on the role the judiciary played. While President Reagan testified before the Federal District Court for the District of Columbia in 1990 after he was no longer president, and his subordinates were brought before lower courts even while he was still president, the investigation into the president's wrongdoing was mostly conducted by the legislature and through a president-appointed investigation called the Tower Commission.[215] Even in the two Iran-contra cases where there were appeals made to the Supreme Court – in the case of National Security staffer Oliver North and Deputy National Security Advisor John Poindexter – the Supreme Court declined to hear them, and these declinations came after President Reagan was no longer in power.[216] The Court did not issue comment as to why it refused to hear the cases and let stand the lower court rulings.

In the Poindexter case, the United States Court for the District of Columbia Circuit ruled that his conviction should be thrown out because his testimony had been unfairly used against him and that he couldn't be prosecuted for corruptly obstructing a Congressional investigation because the law applying to that obstruction was too vague.[217] Independent Counsel Lawrence Walsh argued that the law regulating the obstruction had been widely used for 160 years and that the court called such a law vague was "astonishing."[218] In addition, the ruling was confusing because the District court had ruled in a pre-trial hearing that there was "no direct use of immunized

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[214] Savage, Charlie 2007: Takeover. New York: Back Bay Books, 53.
[215] The New York Times, "Excerpts from Reagan's Testimony on the Iran-Contra Affair," Feb. 23, 1990. URL: http://www.nytimes.com/1990/02/23/us/excerpts-from-reagan-s-testimony-on-the-iran-contra-affair.html?pagewanted=all&src=pm, last accessed Dec. 12, 2012.
[216] Tristam, Pierre, "Prosecutions Resulting from Iran-contra Affair: The Reagan Administration Rogue's Gallery," 2012 About.com. URL: http://middleeast.about.com/od/usmideastpolicy/a/me081109f.htm, last accessed Dec. 12, 2012.
[217] Greenhouse, Linda, "Supreme Court Round-Up: Iran-Contra Appeal Refused by Court," New York Times, Dec. 8, 1992. URL: http://www.nytimes.com/1992/12/08/us/supreme-court-roundup-iran-contra-appeal-refused-by-court.html, last accessed Dec. 12, 2012.
[218] Ibid.

testimony in the Grand Jury" and the "Independent Counsel's instructions to the grand jurors and Grand Jury witnesses to avoid using immunized testimony were effective."[219]

In the North case, the Supreme Court declined both in 1991 and in 1998 to hear the case, letting stand the 1990 federal appellate court ruling which suspended all three of North's felony convictions, also based on the fact that his immunized testimony may have influenced witnesses in the trial.[220]

The Tower Commission was even more lenient on the president and the main actors in the Iran-contra case. The Commission was unable to verify if the president had approved the arms transfers from Israel to Iran in advance, and while it concluded that Oliver North and Pointdexter were trying to hide something, the consequences of the report for the president were few. The report chided the president for a lax "management style" with the National Security Council but gave the impression that the president was unaware of the details of the illegal activities, and for those where he was aware, "it was this intense compassion that appeared to motivate his steadfast support for the Iran initiative."[221]

Commenting on how the Iran contra case shows that in foreign affairs, the president always wins, Koh laments that: "Congress cannot legislate judicial courage, any more than it can legislate executive self-restraint or congressional will power."[222]

He calls this "judicial tolerance" of "broad claims of inherent presidential authority"[223] a legacy of the *Curtiss-Wright* case, which named the president as "the sole organ of the nation in its external affairs."[224]

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[219] *United States v. Poindexter*, 698 F. Supp. 300, 305-09, 314-16 (D.D.C. 1988). Referenced in: Walsh, Independent Counsel Lawrence E.,"Final Report of the Independent Counsel for Iran/Contra Matters," Vol. I, Chapter Two and Summary of Prosecutions, Aug. 4, 1993, Washington D.C, URL: http://www.fas.org/irp/offdocs/walsh/, last accessed Dec. 13, 2012.

[220] Walsh, Independent Counsel Lawrence E., "Final Report of the Independent Counsel for Iran/Contra Matters," Vol. I, Chapter Two and Summary of Prosecutions, Aug. 4, 1993, Washington D.C, URL: http://www.fas.org/irp/offdocs/walsh/, last accessed Dec. 13, 2012. See also: "Status of the Main Iran-Contra Cases, " *New York Times*, Sep. 7, 1991. URL: http://www.nytimes.com/1991/09/07/us/status-of-the-main-iran-contra-cases.html?src=pm, last accessed Dec. 13, 2012.

[221] Tower, John (chairman), Excerpts from the Tower Commission Report, 1987, The American Presidency Project, University of California, Santa Barbara, Presidential Documents Archive. URL: http://www.presidency.ucsb.edu/PS157/assignment%20files%20public/TOWER%20EXCERPTS.htm, last accessed Dec. 13, 2012.

[222] Koh, Harold Hongju, "Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair" (1988). The Yale Law Journal, Vol. 97, 1335.

[223] Ibid, 1317

[224] *United States v. Curtiss-Wright Export Corp*. as cited in: Koh, Harold Hongju, "Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair" (1988). The Yale Law Journal, Vol. 97, 1306. For a more lengthy discussion of the Curtiss-Wright precedent, see the chapter on checks and balances.

Though the president and his men were briefly taken to task, ultimately, the accountability mechanisms failed. Neither the Tower Commission nor the courts succeeded in placing sustainable checks on presidential prerogative.

3.4 Legacy of the Reagan Presidency's Use of War Powers

While the Supreme Court gave the president a pass in the Iran-contra affair, and the Tower Report simply recommended that the president be more in control of his National Security staff, President Reagan's actions as a whole enlarged the presidency. His new use of signing statements would pave the way for future presidents, including Bush, to overwrite the meaning of laws they had signed with their own interpretation, allowing intelligence and war operations to continue where Congress would forbid them. He centralized control over intelligence in the presidency, and gave the intelligence agencies greater authority. The state secrets privilege strengthened under the Reagan administration was used to force the courts to throw out two cases brought by post-9/11 detainees two decades later.[225]

President Reagan challenged the war powers resolution more frequently than any of his predecessors, paving the way for future presidencies to do the same. He expanded presidential power over judicial appointments in an unprecedented manner, a practice that President Bush would follow. The *Halkins vs. Helms* ruling set precedent for courts to dismiss lawsuits against the Bush administration when it abducted foreign nationals and reinvigorated a warrantless domestic spying program 20 years later.[226]

The Supreme Court giving President Reagan a pass over noncompliance with the War Powers Resolution as well as in convictions with the Iran-contra case set precedent for the court to be a bystander at best. With both Boland Amendments ignored, and little recourse for their implementation with a silent court, Congress was also successfully neutered. The Supreme Court's refusal to hear the cases of the president's closest advisors and to let their convictions be dismissed gave the office of the president a wink

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[225] The first case thrown out based on the Reagan-era precedent was German Khaled el-Masri, who had been wrongfully held in Afghanistan by the United States for five months after a case of identity confusion. The other case was that of Canadian Maher Arar, which was thrown out for the same reason after he sued the U.S. government for detaining him in New York, shipping him to Syria, jailing him for 10 months there without charge, and supposedly torturing him. See: Fisher, William, "Courts, Congress Resist Growing White House Power," InterPress Service News Agency, June 30, 2006.

[226] Fisher, William, "Courts, Congress Resist Growing White House Power," InterPress Service News Agency, June 30, 2006.

and a nod for future war power escapades. While the president was contrite in his television address following the revelation of the Iran-contra scandal, neither judicial nor legislative mechanisms were strengthened as a result of the Tower Commission Report and the court hearings. To the contrary, President Reagan had already created a vast toolbox for President George W. Bush to use after September 11, 2001.

3.5 Testing Intervening Variables: Presidential Popularity and Composition of Congress

A look at the conditions present when President Reagan was involved in the Iran-contra affair help us understand if there is a connection between presidential popularity, the composition of Congress, and the decisions that were made by the Congress and the committees or courts investigating his actions and those of his aides.

President Reagan did not have majorities from the Republican Party in the House during his terms. Republicans had control of the Senate 6 out of 8 years, and Democrats had control of the House the entire time. He had a legislative success rate of 55.89%, starting with 82.35% in 1981 but falling to 47.40% by 1988.[227] While Reagan had historic success in pushing through sweeping changes to domestic spending, defense expenditures and tax levels in his first two years, the Democratic leadership responded strongly to a bipartisan conservative coalition that gave the president early success by a backlash that cut short further legislative success for the President.[228]

In this particular case study, President Reagan vastly expanded presidential power through new executive tools. Not only did he load the justice system with like-minded judges, he used signing statements in a new way, and was able to win a victory when the legislative veto was done away with in the *INS v. Chadha* decision.[229] He vastly expanded the power of the CIA and other intelligence operations during the Iran-contra affair, circumventing the Boland Amendments. On his watch, FISA was successfully challenged and state secrets redefined. He flaunted the War Powers Resolution more than any president had up until that point.

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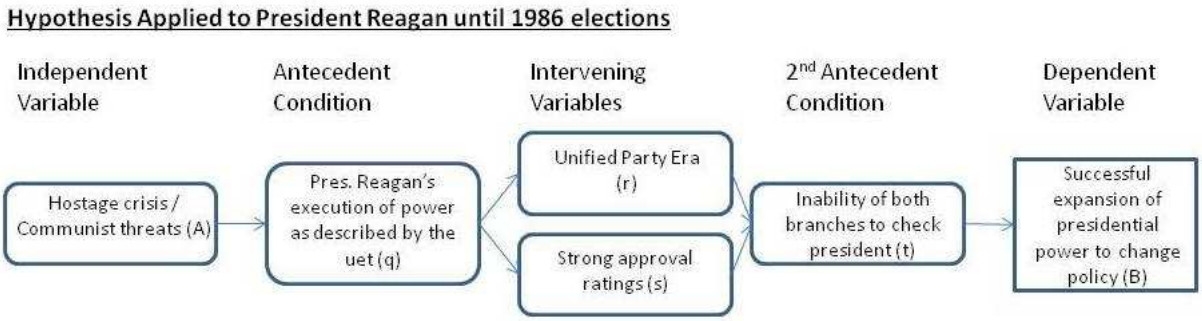
[227] *Congressional QuarterlyData, 2008,* as quoted in Thurber, James A: "An Introduction to Presidential-Congressional Rivalry". In: Thurber, James A. (ed) 2009: Rivals for Power: Presidential-Congressional Relations. Lanham, MD: Rowman & Littlefield Publishers, Inc., 8.

[228] Conley, Richard S. "The Legislative Presidency in Political Time". In: Thurber, James A. 2009: Rivals for Power: Presidential-Congressional Relations. Lanham, MD: Rowman & Littlefield Publishers, Inc., 165.

[229] Schlesinger, Arthur M. 2004. The Imperial Presidency. New York: Houghton Mifflin Co., First Mariner Books edition, 198.

In the below graph, the hostage crisis and Communist threat in Iran and Nicaragua lead to President Reagan's execution of power as described by the unitary executive theory. This causes the president to challenge the legislature through circumventing the Boland amendments and making the legislative veto illegal. President Reagan successfully pushed his power into the judicial sphere through loading the courts with like-minded judges. The Unified Party Era at the beginning of his administration, in which both Democrats and Republicans voted together to support a conservative agenda, coupled with strong approval ratings, helped prevent both branches from checking the president, thus expanding his war powers in the Iran-contra case.



Though the Congressional hearings and Tower investigations appeared to place a check on his power in 1986-1988 by stating he had shirked his Art. II (Clause 5) duties, and by indicting those who executed the Iran-contra affair, these served as only a minor check on the presidential timeline. Shortly after President Reagan's term ended, the main architects of the affair, North and Poindexter, had their convictions overturned, and President Bush pardoned six others. In hearings with President Reagan himself, the courts were unable to demonstrate that he orchestrated events. Even more telling, the key tools that President Reagan introduced to expand presidential power went unchallenged, creating precedent.[230]

How did his popularity ratings play into the ability of the legislature and judiciary to check him? His highest popularity occurred in May 1981 and 1986 at 68% and his lowest approval rating occurred in January 1983 at 35%, with an average approval

[230] These include: the new use of signing statements to change the meaning of the act, loading the justice system with same-party judges, eliminating the legislative veto, creating expanding state secrets definition, giving the NSC and CIA expanded power, and challenging FISA.

rating of 55.3%.[231] In May 1981, he had just issued his well-received address on economic recovery, his first speech after the assassination attempt. During this period, he had high legislative success. In May of 1986, despite the fact that investigations into Iran-contra were ongoing, he had just had a successful Libya bombing after the killing and wounding of U.S. servicemen in the Berlin disco bombing, for which Col. Qadhafi was made responsible.[232]

In this bombing mission, the courts did not chide him for circumventing the War Powers Resolution. In January of 1983 when his popularity was lowest, the economy was doing poorly, social security was virtually bankrupt, and he announced a federal spending freeze.[233] This was the beginning of greater attempts by the legislature, and specifically the Democratic leadership, to check him.

Though his popularity dropped from 63% just prior to when the White House confirmed the sale of arms to Iran in November 1986 to 43% when he accepted responsibility for the Iran-contra affair in March 1987, he left office with 63%, one of the highest popularity ratings for someone leaving office.[234] This is significant considering his consistent record of constitutional venturing on anything from sending troops around the globe without Congressional authorization to his covert intelligence operations.

The following data shows a sampling of the major legislative and judicial decisions made during the Reagan presidency with regards to the Iran/contra affair. On the graph, legislation or rulings which give the president a win for his policy are marked in red, and a loss is green. Those cases where the legislation or ruling limited the

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[231] Gallup, "Presidential Approval Ratings – Gallup Historical Statistics and Trends," 2012 Gallup, Inc. URL: http://www.gallup.com/poll/116677/presidential-approval-ratings-gallup-historical-statistics-trends.aspx, last accessed Oct. 16, 2012. See also: "Job Performance Ratings for President Nixon," 2012 Roper Center, University of Connecticut. URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Nixon#.T7twZ1KUb0d, last accessed Oct. 17, 2012. For highs and lows, see: Peters, Gerhard, "Presidential Popularity Over Time," The American Presidency Project 1999-2012. URL: http://www.presidency.ucsb.edu/data/popularity.php?pres=37&sort=time&direct=DESC&Submit=DISPLAY, last accessed Oct. 16, 2012

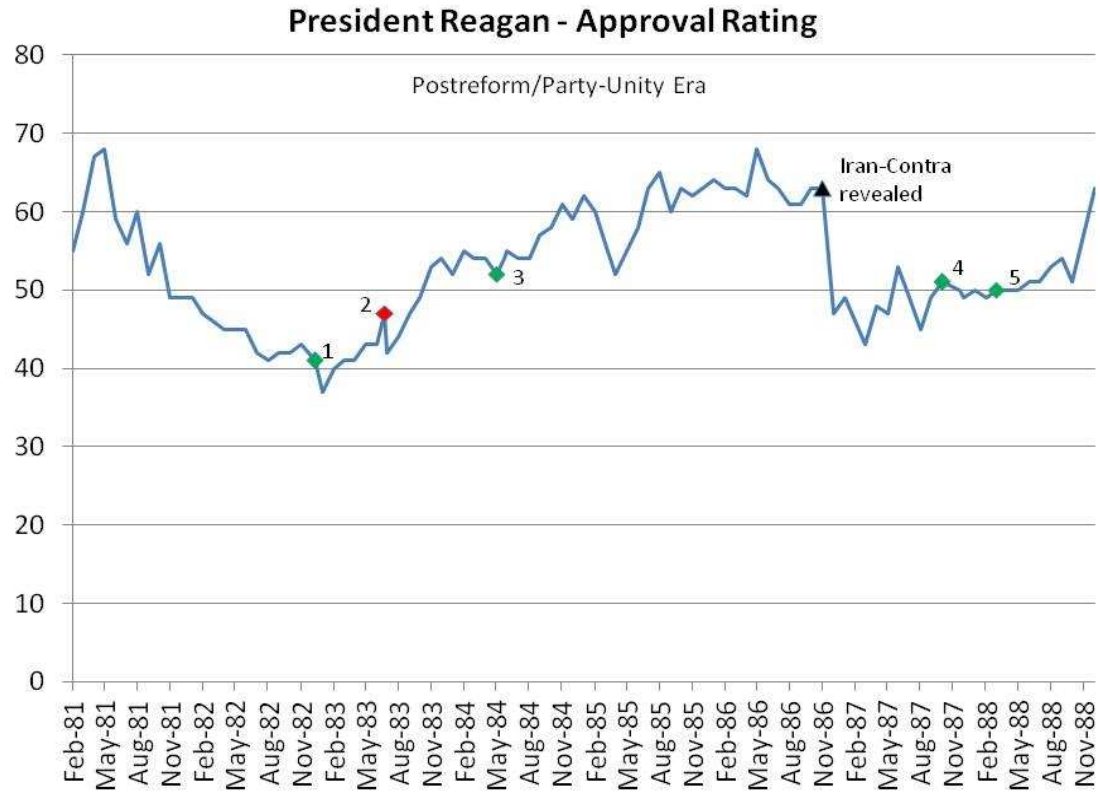
[232] Reagan, President Ronald: "Address to the Nation on the United States Air Strike Against Libya," April 14, 1986, Oval Office. Ronald Reagan Presidential Library. URL: http://www.reagan.utexas.edu/archives/speeches/1986/41486g.htm, last accessed Jan. 1, 2013.

[233] Reagan, President Ronald: "State of the Union Address," (Federal Spending Freeze), Joint Session of Congress, Jan. 25, 1983. Ronald Reagan Presidential Library. URL: http://www.reagan.utexas.edu/archives/speeches/major.html, last accessed Jan. 1, 2013.

[234] The Wall Street Journal chart: "How the Presidents Stack Up." URL: http://online.wsj.com/public/resources/documents/info-presapp0605-31.html, last accessed May 28, 2012.

president's war powers are marked with a – in the data below the graph, and where the president won, a +.[235]

President Reagan's Popularity and Wins and Losses on the Iran-Contra Policy



Key to Data Points 1-5

1) -president: While Congress attempted to check the President through prohibiting funds providing military support of the rebels with the Boland amendment on Dec. 8, 1982, (and Reagan himself signed the amendment) he continued the support, even going so far as to authorize the CIA placing mines in three Nicaraguan harbors in 1984. President Reagan's popularity rating on Dec. 8, 1982 was on the decline, sinking to 41 % by Dec. 10 from 43% Nov. 22, 1982.[236]

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[235] All Gallup presidential job approval ratings are taken from: Gallup, "Job Performance Ratings for President Reagan," 2012 Roper Center, University of Connecticut. URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Reagan#.UPMo1h03hQg, last accessed Jan. 6, 2013. Values are plotted monthly.

[236] Gallup, "Job Performance Ratings for President Reagan," Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20: Microsoft/Parents/'Socially Responsible' [computer file]. 1st Roper Center for Public Opinion Research version. Lincoln, NE: Gallup Organization [producer], 2000. Storrs, CT: The Roper Center, University of Connecticut [distributor], 2001. URL: http://webapps.ropercenter.uconn.edu/

2) +president: *INS v. Chadha* ruling decided June 23, 1983, which made the legislative veto illegal. However, after the 1983 Supreme Court ruling Congress could only stop planned arms sales by a joint resolution which can be vetoed by the president. Immediately following the ruling, from June 24-27, President Reagan's popularity rose to 47 % from 43% June 10-13; thereafter it dropped back down to 42% during the next polling conducted July 22-25, 1983.[237]

3) -president: Congress passed another amendment, Boland II, on May 24, 1984, prohibiting direct and indirect funding of any kind to military or paramilitary organizations in Nicaragua, and President Reagan also signed this into law. President Reagan's popularity rating was holding around 54/55 %.[238]

4) -president: In November of 1987, Congress concluded its investigations, charging the president with failing to "take care that the laws be faithfully executed."[239] Reagan's popularity on Nov. 18, the day the report was released, was around 50%.[240]

5) -president: On March 16, 1988, a grand jury indicted North and Poindexter on multiple counts of "conspiracy, lying to Congress, obstruction of justice, and destroying documents."[241] Richard Secord and Albert Hakim were also indicted on conspiracy to

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CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Reagan#.UOLYpeQ3hQg, last accessed Jan. 1, 2012.

[237] Gallup, "Job Performance Ratings for President Reagan," Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20: Microsoft/Parents/'Socially Responsible' [computer file]. 1st Roper Center for Public Opinion Research version. Lincoln, NE: Gallup Organization [producer], 2000. Storrs, CT: The Roper Center, University of Connecticut [distributor], 2001. URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Reagan#.UOLYpeQ3hQg, last accessed Jan. 1, 2012.

[238] Ibid. Polls conducted 5/18-5/21/84 showed his popularity at 54%, and at 55% in the next polling done from 6/6 to 6/8/84.

[239] *Report of the Congressional Committees Investigating the Iran-Contra Affair* (S. Rep. No. 216, H.R. Rep. No. 433, 100th Cong., 1st Sess. 423) as quoted in Rosenbaum, David E., "Iran-Contra Report Says President Bears 'Ultimate Responsibility' for Wrongdoing; 'Cabal of Zealots,'" New York Times, Nov. 19, 1987.

[240] Reagans popularity was at 51% 10/23-10/26 and 49% the next time a poll was conducted 12/4-12/7/1987. See: "Job Performance Ratings for President Reagan," Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20: Microsoft/Parents/'Socially Responsible' [computer file]. 1st Roper Center for Public Opinion Research version. Lincoln, NE: Gallup Organization [producer], 2000. Storrs, CT: The Roper Center, University of Connecticut [distributor], 2001. URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Reagan#.UOLYpeQ3hQg, last accessed Jan. 1, 2012.

[241] Glass, Andrew, "John Poindexter is Indicted". In: *Politico*, March 16, 2012. URL: http://www.politico.com/news/stories/0312/74074.html, last accessed Jan. 1, 2012; Walsh, Independent Counsel Lawrence E., "Final Report of the Independent Counsel for Iran/Contra Matters," Vol. I, Chapter Two and Chapter Three, Aug. 4, 1993, Washington D.C. URL: http://www.fas.org/irp/offdocs/walsh/chap_02.htm, last accessed Jan. 1, 2013.

defraud the United States.[242] Reagan's popularity ratings on March 16, 1988 were hovering around 50 %.[243]

3.5.1 Analysis

3.5.1.1 Connection Between Presidential Popularity and Policy Wins or Losses

As shown above, there was little direct connection between President's popularity and the wins or losses he experienced at the hand of the courts. Nicknamed the "Teflon president" because bad news did not tend to stick to him, he still left office with high popularity ratings despite the publicity of the Iran-contra affair. While he did experience a massive drop in popularity of 20 percent in the wake of the revelation of the Iran-contra affair, he was able to recover his high popularity shortly thereafter. While he did have more legislative success in general during the period when his popularity was high at the beginning of his administration, his popularity level did not seem to have a direct influence on whether Congress was able to push through checking legislation particularly related to the Iran-contra affair (ie, the first Boland amendment passed when popularity was at 41% and the second when it was at 54/55%). And while the Tower Commission, the Congressional committees investigating the Iran-contra affair and the courts succeeded in checking him through indictments and convictions of those involved, this happened while President Reagan's popularity was holding around 50 %.

3.5.1.2 Connection Between Composition of Congress and Wins

President Reagan's high popularity during most of his term until the Iran-contra scandal, as well as leaving office, was significant considering that his party did not control the House during either of his terms, though the Republicans were in the majority in the Senate 75 % of the time. In addition, Koh points out that critics claim that

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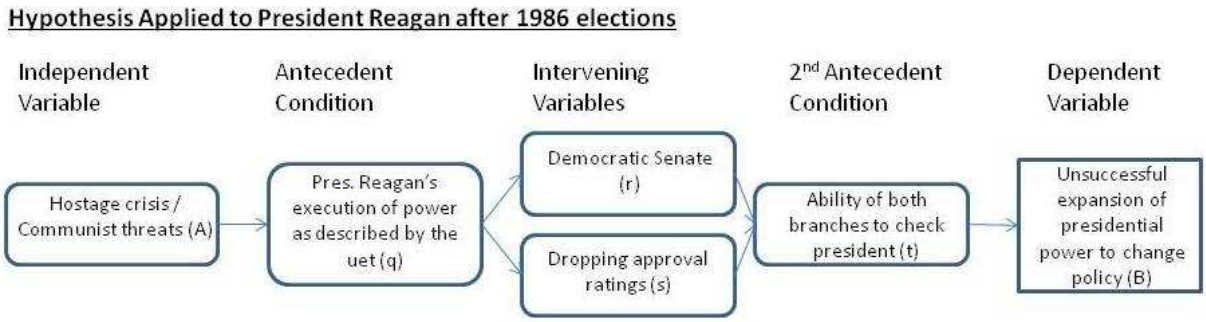
[242] Walsh, Independent Counsel Lawrence E., "Final Report of the Independent Counsel for Iran/Contra Matters," Vol. I, Chapter Two, Aug. 4, 1993, Washington D.C. URL: http://www.fas.org/irp/offdocs/walsh/chap_02.htm, last accessed Jan. 1, 2013.

[243] Reagan's popularity was at 51% 3/8-3/12 and 50 % 4/8-4/11/88. See: "Job Performance Ratings for President Reagan," Cable News Network, USA Today. CNN/USA Today/Gallup Poll # 2000-20: Microsoft/Parents/'Socially Responsible' [computer file]. 1st Roper Center for Public Opinion Research version. Lincoln, NE: Gallup Organization [producer], 2000. Storrs, CT: The Roper Center, University of Connecticut [distributor], 2001. URL: http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Reagan#.UOLYpeQ3hQg, last accessed Jan. 1, 2012.

President Reagan "lost" the Iran-Contra affair not due to popularity on Nov. 4, 1986, but because that was the day that Democrats took over control of the United States Senate.[244] Others hold that he had already "lost" the day before, when *Al-Shiraa* reported the illegal sale of arms to Iran.[245]

Either way, it can be argued that it wasn't until 1986, when there was no Republican stronghold in either house of Congress, that the courts and the Congress were able to put a stop to Reagan's Iran-contra policy. Though the Boland amendments had been passed earlier, the White House had continued to circumvent the law. In 1986, the game was up. After Independent Counsel Walsh was appointed in December 1986 to investigate those involved in the affair, 14 people were charged with criminal offenses, of which 11 were convicted.[246]Investigations by Congress were also not able to get seriously under way until 1987, and in the end, the findings called for new laws to be passed to ensure that presidential power to act outside the law was more restricted and that Congress would have oversight of covert actions.[247]



In the above graph, one can observe the difference made when the values of the intervening variables change. In this case, with an end to Party Unity, to the Republicans leading the Senate, and a drop in President's Reagan's popularity ratings, the Congress and the courts were once again able to check the president, making the expansion of his power less successful.

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[244] Koh, Harold Hongju: "Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair" (1988). The Yale Law Journal, Vol. 97, 1320.
[245] Ibid
[246] Tristam, Pierre, "Prosecutions Resulting from Iran-contra Affair: The Reagan Administration Rogue's Gallery." 2012 About.com. URL: http://middleeast.about.com/od/usmideastpolicy/a/me081109f.htm, last accessed Jan. 2, 2013.
[247] Congressional Committee Investigating Iran Contra Majority Report, Executive Summary and Committee Key Findings, Nov. 18, 1987. URL: http://www.presidency.ucsb.edu/PS157/assignment%20files%20public/congressional%20report%20key%20sections.htm, last accessed Jan. 2, 2012.

3.6 CONCLUSION

President Reagan's involvement in the Iran-contra affair presents a case study where a president experienced "losses" in the majority of cases where the legislature and the courts placed checks on his expanding power after the composition of Congress changed. Influencing these losses was the non-unity factor - his party was not in power in the Senate or the House when the courts finally became involved in checking the executive's involvement in the Iran-contra affair. His party was also not in the majority in the House when Congress began placing checks on the White House's activities through the Boland amendments. While the ability of Congress and the courts to place real checks on his Iran-contra policy increased while his popularity fell at the end of 1986 and into 1987, popularity was not a factor in Congress passing the Boland amendments. While the courts checked President Reagan's staff by doling out convictions while his popularity was low, they also handed President Reagan a victory in *INS v. Chadha*, when his popularity was below his average at that time. Thus popularity could not be said to be the main determinative factor of expanding the executive power in Reagan's case.

Yet the legacy President Reagan and his administration left by creating new tools for the expansion of executive power through: the use of signing statements to change the meaning of the act, loading the justice system with same-party judges, eliminating the legislative veto, expanding the state secrets definition, giving the NSC and CIA expanded power, and challenging FISA would create a foundation for presidents to dominate foreign policy for years to come. President Bush would use every one of the tools to aid in his new detainee policy.

While it took a return to party unity by the Republican Party under President George W. Bush to aid in the maximum use of these tools, President Reagan created a precedence platform from which any of his successors could expand power in the foreign policy arena for years to come. Thus President Reagan built on the foundation set by President Nixon and President Roosevelt for a unitary executive way of governing, and paved the way for President Bush to simply fine tune these tools.

4. Final Concluding Analysis

At the beginning of the chapter we asked: 1.) Was the president able to implement his change in policy with success for the majority of his administration despite checks from the judiciary or legislature? 2.) Did his actions set precedent for the enlargement of presidential power in future administrations?

To answer the first question, this study has shown that President Roosevelt was able to successfully implement his internment policy until a period where his party started losing seats at the end of his administration. Then, following this change, the Congress and the courts were able to check him. Senate Resolution 166 in 1943 called the president to account for interning loyal citizens and the Supreme Courts' 1944 ruling in the case *Ex parte Mitsuye Endo* forced an end to the internee program. While high presidential approval ratings may have helped him expand his presidential war powers throughout his administration, even the two times he was checked, his ratings were above 70%. Secondly, President Roosevelt's actions set precedent for the enlargement of presidential power in future administrations in a number of ways. Militarily, he forced a military community which was mostly skeptical of his internment program to carry it out, helping set judicial precedent for the Bush administration's detainee program in the process. He relied on his Article II and Commander in Chief powers to justify his orders. At the end of his four terms, he had drastically expanded the role of war powers for the president, creating precedent for future administrations to gather intelligence and find "foreign" enemies on U.S. soil and embodied by U.S. citizens.

In the case of President Nixon, the executive suffered a series of checks by the legislature and the courts that ultimately ended in his resignation. While he was able to clandestinely carry out his Cambodia policy from 1970-1973 despite pushback from Congress, the courts and the public, it did not bring about victory in the Vietnam War and resulted in a high number of casualties. By 1973 his popularity had plunged and his legislative success rate had fallen by over 20%. The checks put forth by the other estates finally had their sting. Despite this failure, his use of his Commander in Chief power in defying the War Powers Resolution, while checked immediately in the aftermath of Watergate, created precedent for his successors to use to expand war powers in the future. While his own presidency and policy goals were cut short by a "divided liberal

activist era"[248] in Congressional politics, the precedence he created through his use of unitary executive arguments to defend and pursue his Cambodia campaign and to veto the War Powers Resolution have assisted U.S. presidents for the last three decades in the expansion of executive wartime power.

The Reagan administration funded the contras and sold arms to Iran for hostages despite checks from the legislature, until late 1986. During this time, the courts mostly looked the other way. Once the Republicans also lost control of the Senate, the courts finally started to check the executive's involvement in the Iran-contra affair through convicting his aides. Popularity did not appear to play a role in the ability of the other estates to check the president. Despite the courts and the Congress checking the President at the end of his two terms, he set precedent in the expansion of presidential war powers through giving the NSC and Intelligence services expanded power and expanding state secrets purview. He further helped insulate the presidency from some legislative checks through the elimination of the legislative veto and from greater judicial accountability through infusing the justice system with like-minded judges. These tools became highly useful for President Bush as he pushed through his detainee policy.

In all three case studies, the presidents were faced with an international threat: the bombing of Pearl Harbor, the Communists making advances in Vietnam and Cambodia, the kidnapping of U.S. citizens in Lebanon and the threat of Soviet influence in Iran and Central America. In all three cases, the presidents responded with pushing the limits of their war powers to commit acts that were unlawful (or to allow their aides to do so) while relying on their Article II powers as Commander in Chief. All three were initially able to push their new policy through on the ground, despite rebuffs from Congress or other cabinet members.

Roosevelt, serving during a war of classic nature, with high popularity ratings and a unified party government, had the fewest checks placed on his policy. The legislation and Supreme Court ruling checking him came after over 120,000 Japanese-Americans had already been interned and the costs of keeping them housed were causing those running the program to want it discontinued. While President Roosevelt's high popularity was certainly not a hindrance to his success, the only checks on his

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[248] Conley, Richard S. "The Legislative Presidency in Political Time". In: Thurber, James A. 2009: Rivals for Power: Presidential-Congressional Relations. Lanham, MD: Rowman & Littlefield Publishers, Inc., 169.

internment policy also came at a time of high popularity. They also came after the Republicans started to gain seats in the Senate in 1943 and after the Democrats also only had a thin lead in the House. However, as Democrats had already started losing seats in 1939, and in the year when the most Japanese-Americans were interned in 1942, they also had only 222 seats to the Republican's 209, this alone cannot be seen as the variable contributing to his success.

Nixon - serving during a war partly of his own making, with low popularity ratings and his party serving in neither the Senate nor the House - had the most checks placed on his policy. While he was able to circumvent Congress' checks in the short-term through keeping his Cambodian missions secret, the more they became public, the more was the public outcry. While he was able to continue the bombings from 1970 until August of 1973, even after the Paris accord was signed, his secrecy led to a Congressional effort to prune back the ballooning presidency. While the legacy of his constitutional venturing led to such measures as the War Powers Resolution, FISA, and more Congressional oversight of war and intelligence missions, President Reagan would revive his wiretapping program and follow the precedent he set in disregarding the War Powers Resolution and expanding the purview of the country's intelligence services.

Reagan quickly rallied the public against the enemy, the "Evil Empire," and while his party only had leadership of the Senate the first six years, and was in the minority in the House, President Reagan and his aides were still able to push through their Iran-contra policy despite checks from Congress. When the Republicans lost control of the Senate, President Reagan also began suffering losses both at the hands of Congress and the courts, resulting in an end to the affair. While his popularity dropped after revelation of the affair, his ratings did not seem to have a direct connection in allowing the Congress or the courts to successfully check him. Yet Reagan's story cannot be considered a complete failure. Though most of the hostages were not released, and the Iran policy was shown to be ill-advised, he set precedent in expanding the presidency's war powers, many of his aide's convictions were overturned, and he himself escaped conviction, ending his presidency with one of the highest popularity ratings in history.

In short, popularity alone or party unity alone cannot prevent checks on an expanding presidency. These cases show that party unity was the stronger variable. Where the president's party had neither a majority in the Senate or the House, he was left the most vulnerable to checks by Congress and the courts. While the courts were hesitant to chide a popular president, they did occasionally dare, as was the case with

Roosevelt in *Ex parte Mitsuye Endo* and with Reagan when his aides North and Poindexter were indicted for conspiracy in 1988, though they weren't convicted until he left office.

Where there was a strong independent variable, the president also had fewer checks. For example, presidents governing during an attack on U.S. soil had fewer limitations placed on them from the other estates, as was the case with President Roosevelt, and later President Bush. The concluding chapter will discuss these results further, how they reflect on the detainee policy case study, and make recommendations for strengthened checks on the executive even when strong independent or intervening variables are present.

CONCLUDING ANALYSIS AND PROPOSALS

Abstract: In summarizing the findings of this dissertation, the conclusion uses words from the main legal defender of the detainee policy, the Office of Legal Council's John Yoo, to confirm that President Bush embodies the unitary executive president, and that an attack on U.S. soil helped expand the U.S. executive. The findings from the Bush case study, and the additional three presidential case studies, confirmed this dissertation's hypothesis that it becomes more difficult to place checks on a war president when he is highly popular, and especially when there is a unified party government.

> A number of OLC opinions issued in 2002-2003 advanced a broad assertion of the President's Commander in Chief power that would deny Congress any role in regulating the detention, interrogation, prosecution, and transfer of enemy combatants captured in the global War on Terror. The President certainly has significant constitutional powers in this area, but the assertion in these opinions that Congress has no authority under the Constitution to address these matters by statute does not reflect the current views of the OLC and has been overtaken by subsequent decisions ….[1]

In this memo written just days before President Obama's first inauguration, the office that wrote the justifications for the new detainee policy during the Bush administration concluded that the Office of Legal Council relied on an interpretation of the President's power which unconstitutionally limited Congress' role in determining detainee policy. In so doing, the office described a unitary executive president's constitutional interpretation of his powers: broad, based on the Commander in Chief clause of Article II, but denying Congress their Article I mandate. As such, the office addressed the root of the problem examined in this dissertation: an expanded executive unwilling to be held accountable.

CONCLUSION I: PRESIDENT BUSH EMBODIES THE UNITARY EXECUTIVE PRESIDENT

At the beginning of this dissertation, we looked at Kelley's argument that Bush did not practice a uet presidency, but only used references to the theory to accomplish his own ends. In this case study, it was shown that unlike the founding fathers who made

[1] U.S. Department of Justice, Office of Legal Counsel, Memorandum for the Files, Jan. 15, 2009, "Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001". URL: http://www.justice.gov/opa/documents/memostatusolcopinions01152009.pdf, last accessed Oct. 7, 2010.

references to the "unitary executive", but insisted on an executive who practiced a separation of powers, those who invented the term during the Reagan administration intended for it to be used to: expand presidential power, limit Congressional interference, and place the judiciary under increased executive control.

In this vein, President Bush went beyond giving lip service to the theory; he showed through his execution of power that he believed it provided a valid constitutional argument for the expansion of his office without the rigorous checks and balances called for by the Constitution and intended by the founders of the United States of America. Indeed, the Bush case study has shown that the unitary executive theory is the model that best describes President Bush's method of decision making, his constitutional interpretation of presidential powers, and the influences that helped to shape it. As such, the president believed that he could control the executive branch in its entirety, and that neither Congress could limit this nor could the courts take away his power to interpret laws that relate to the executive.[2] His subscription to this belief was shown not only by his 95 references to the theory to support his arguments for expanded power between 2001 and 2005 alone, but by his actions challenging the judiciary and the legislature in the area of detainee policy in the months and years after the attacks of September 11, 2001.

He expanded the executive into the judicial sphere by: Appointing pro-"judicial restraint" lawyers; allowing more material to be classified; and more directly overseeing intelligence activities (and preventing other branches from doing so), among other things. He ordered detainees to be arrested far from the battlefield and to be held at Guantanamo without being charged or convicted of any crime,[3] skewed evidence submitted in the courts, attempted to gain access to communications between the detainees and their attorneys, pushed for the suspension of *habeas corpus*, and created military commissions through executive order, thus initially blocking their access to the U.S. courts.[4]

Secondly, he and his administration challenged the legislature through: Allowing detentions without warrant, preventing in-depth legislative review, and drafting laws that would contradict the sense of Congress in earlier legislation. Examples of these are

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[2] Waterman, Richard W.: "The Administrative Presidency, Unilateral Power, and the Unitary Executive Theory". In: Presidential Studies Quarterly 39, No. 1 March 2009, 8; Bush, President George W., Signing Statement on Public Law 108-458, "Intelligence Reform and Terrorism Prevention Act of 2004," Dec. 17, 2004.

[3] Savage, Charlie 2007: Takeover: The Return of the Imperial Presidency. New York: Back Bay Books, 200.

[4] See pg. 84, 85 of chapter three.

the White House's lengthy Patriot Act which turned back the checks against warrantless detentions and wiretapping provided by the 1978 FISA law, or the 2006 Military Commissions Act (MCA), which barred *habeas corpus* and allowed executive interpretation of the Geneva Conventions.[5] President Bush also worked with the Republican Congress to prevent legislative accountability. Most bills introduced by Democratic members of Congress calling for accountability on detainee policy and outlawing torture failed.[6]

Through signing statements which challenged the meaning of the law itself, President Bush also informed Congress of his authority to conduct warrantless wiretaps, detentions, and to control intelligence gathering, to create blacksites, military commissions, and new interrogation methods, despite the fact that these were against the law. These actions were usually based on uet-based arguments such as his "constitutional grants of executive power and authority as Commander in Chief of the Armed Forces" or his "constitutional authority to supervise the unitary executive branch" and with that authority to only uphold those mandates which he judges "necessary and expedient."[7] This dissertation has thus shown that contrary to Kelley's argument, President Bush indeed practiced a uet presidency, and that this is difficult to do without violating the separation of powers.

CONCLUSION II: AN ATTACK ON U.S. SOIL HELPED EXPAND THE UNITARY EXECUTIVE

In a September 25, 2001 advisory legal opinion for the White House, John Yoo, the architect of the legal arguments for the detainee policy, wrote: "The centralization of authority in the president alone is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy

[5] Military Commissions Act of 2006, Sec. 6a3. See also: Center for Constitutional Rights, Military Commissions Act of 2006: A Summary of the Law.
[6] See pg. 100-102 of chapter four of this dissertation.
[7] See signing statements such as: Bush, President George W., Signing Statement for H.R.4613, "The Department of Defense Appropriations Act, 2005," Public Law 108-287, Aug. 5, 2004; Bush, President George W., Signing statement on Public Law 108-458, "Intelligence Reform and Terrorism Prevention Act of 2004," Dec. 17, 2004; Signing Statement for H.R. 4548, "Intelligence Authorization Act for the Year 2005" (PL 108-487), Dec. 23, 2004. See previous reference on pg. 125 of chapter four of this dissertation.

choices, and mobilize national resources with a speed and energy that is far superior to any other branch."[8]

A decade after he wrote these words, John Yoo stated that decision was defensible if the attacks were just the beginning of a national security threat. "If the September 11, 2001 attacks marked the emergence of a serious foreign threat to the nation's security, the invocation of broad presidential powers will have been appropriate," he wrote in his 2009 book Crisis and Command.[9] In arguing for a Hamiltonian understanding of the executive's powers, he argued for a "President with open-ended powers in time of emergency."[10]

A state of emergency, and the purpose of the executive in responding to it, would justify breaking the law, in his opinion: "If the circumstances demand, the executive can even go beyond the standing laws in order to meet a great threat to the nation's security."[11]

For those formulating the legal arguments for the detainee policy of the Bush administration, the attacks of 9/11 were enough to justify that the president could use military force against whomever he wishes because:

> [W]e do not think that the difficulty or impossibility of establishing proof to a criminal law standard (or of making evidence public) bars the president from taking such military measures as, in his best judgment, he thinks necessary or appropriate to defend the United States from terrorist attacks. In the exercise of plenary power to use military force, the president's decisions are for him alone and are unreviewable.[12]

In other words, when the president is administering military power in order to prevent further attacks, the president does not have to be held accountable by anyone, according to the Office of Legal Council. With a nation in shock and in support of their Commander in Chief in the wake of 9/11, the president was able to successfully push through his new detainee treatment standards quickly and without much pushback initially. His executive order establishing military commissions to try the detainees outside the U.S. justice system and his memo stating that enemy combatants did not

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[8] U.S. Department of Justice, Memorandum Opinion for the Deputy Counsel to the President, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them," September 25, 2001.
[9] Yoo, John 2009: Crisis and Command. New York: Kaplan Publishing, 424.
[10] Ibid, 425
[11] Ibid, 424
[12] U.S. Department of Justice, Memorandum Opinion for the Deputy Counsel to the President, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them," September 25, 2001.

have to be afforded the protections of the Geneva Conventions left the door open for widespread abuse. In the wake of his staff pushing a White House version of the Patriot Act which turned back FISA giving the executive broad detention power, 80,000 people were detained worldwide.[13] Secretary of Defense Donald Rumsfeld ended up approving 16 new interrogation methods, including stress positions, isolation for up to 30 days, hooding, removal of clothing, and the use of dogs.[14]

What started as presidential venturing became standard treatment for detainees in the days that followed. The Senate Armed Services Committee concluded that: "Secretary of Defense Donald Rumsfeld's authorization of aggressive interrogation techniques for use at Guantanamo Bay was a direct cause of detainee abuse there."[15] Between 2003 and 2006 alone, there were over 330 documented cases of abuse involving 600 U.S. personnel and 460 detainees.[16]

Did a national security threat also have an impact on the president's policy success in all case studies? In two of the four cases, there was an attack on U.S. soil. In both of these cases, during the administrations of Roosevelt and of Bush, the presidents had the least checks placed on their attempts to push through a new policy. While the threat faced by the Nixon administration – the Communist advances in Indochina during the Vietnam War – did not help the president's policy success, it helped him expand the unitary executive. While this expansion did not help him reach his own policy goals, it created precedent for other wartime presidents to follow. In the case of Reagan, the national security threat in the form of the hostage crisis and the Communist threats not only helped him execute his power according to the uet, but helped him initially execute his desired Iran-contra policy without significant debilitating checks until the composition of Congress changed.

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[13] Shear, Michael Peter Finn and Dan Eggan: "Obama to Meet with Terrorism Victims and Families". In: Washington Post, Feb. 5, 2009.
[14] Strasser, Steven 2004. The Abu Ghraib Investigations: The Official Reports of the Independent Panel and the Pentagon on the Shocking Prisoner Abuse in Iraq. New York: Public Affairs LLC, Appendix C, "Evolution of Interrogation Techniques- Guantanamo."
[15] Report of the Committee on Armed Services, "Inquiry into the Treatment of Detainees in U.S. Custody," Nov. 20, 2008, xxviii. URL: http://documents.nytimes.com/report-by-the-senate-armed-services-committee-on-detainee-treatment, last accessed Aug. 6, 2012. Note that the "abusive techniques" mentioned were directly authorized by Secretary Rumsfeld.
[16] Human Rights First, "By the Numbers: Findings of the Detainee Abuse and Accountability Project," April 2006, 2, 6. URL: http://www.humanrightsfirst.org/wp-content/uploads/pdf/06425-etn-by-the-numbers.pdf, last accessed Aug. 8, 2012.

Further Potential Indicators Affecting the Impact of a National Security Threat

Influencing the impact of Variable A, the national security threat, on the president's policy success are potentially countless other factors, including the domestic climate at the time of the threat as well as how his circle of closest advisors interpret the security threat. A chapter written on the president's closest advisors' influence on the policy, and how they came to these positions, was not included for three reasons. It did not contribute to a deeper understanding of how the president executed his power according the unitary executive theory, and a study of motivations and the weight of one person's influence on a president are too normative as to provide empirical evidence useful for this study. In addition, countless books have been written focusing on President Bush's circle of advisors, so such a chapter would not have filled a gap in the literature.[17]

Secondly, any number of factors in the domestic climate at the time of a national security threat can affect the impact of that variable on the president's success. While factors such as the economy and the public's response to the threat could have played a role in increasing or decreasing the president's success, this study sought to focus solely on the events which directly affected a president's war powers as described in Article II, as focused on in the unitary executive theory. Such indirect domestic factors are harder to quantify, but would provide a fascinating study for another dissertation.

Conclusion III: Popularity and a Unified Party Government Made President Bush Successful with His Detainee Policy and are Predictors for Success for Other War Presidents' Policies

The four case studies examined showed that these factors – an international threat, and especially an attack on U.S. soil, coupled with a unified party government and a popular president – create conditions where checks and balances are more likely to be weak. Should these events align again, a successor OLC, or another mouthpiece of the

[17] See: Savage, Charlie 2007: Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy. New York: Back Bay Books; Goldsmith, Jack 2007: The Torture Presidency. New York, London: W. W. Norton & Company; Mayer, Jane 2009, The Dark Side. New York: First Anchor Books; Cole, David 2008. Justice at War: The Men and Ideas that Shaped America's War on Terror. New York: NYREV, Inc.

executive, could well use the same Article II arguments to promote unconstitutional actions unless checks and balances are strengthened. By demonstrating what variables are present when checks and balances are compromised, this dissertation can contribute information useful for finding solutions that enable the separation of powers to be reinforced.

As previously mentioned, the war presidents Roosevelt and Bush had the least checks placed on their attempts to push through a new policy. Yet both also had party unity governments for the majority of their administration: Roosevelt for all, Bush until the last two years. Both also had high popularity ratings, yet these did not prove as strong of an indicator for the ability of the judiciary or legislature to check them as did the composition of Congress.

Once the Bush administration lost the majority party in Congress, his detainee policies also began to be rolled back. What is clear is that as Bush's popularity plummeted, the Supreme Court was more willing to give him a strong rebuke. In the case of President Bush, when his popularity ratings remained around or above 50 %, the court was more likely to allow him to get what he wants. This statistic did not play out consistently in the other three case studies, however.

With an unusually high approval rating throughout the majority of his administration, President Roosevelt experienced wins for his internment policy in all but one major piece of legislation and one Supreme Court ruling. Just prior to the check the Congress placed on him in July of 1943 with the Senate Resolution 166, the Supreme Court provided him with two "wins" in *Hirabayashi v. United States* and *Yasui v. United States*. During this period where Roosevelt's party was losing seats at the end of his administration, he had high popularity ratings.

In all four cases, the presidents were also able, at least on a limited scale for around three years, to take steps to implement their policy. This initial implementation does not mean the policy was successful. In no case did the presidents go completely unchecked. Yet in two out of four cases, a successful expansion of presidential power was declared. The president's desired policy was implemented, and during that time the legislature and judiciary were unable to stop it. President Roosevelt successfully interned and evacuated over 120,000 Japanese-Americans despite pushback from his Cabinet, thereby removing what he saw as a "threat" to the West Coast. President Bush successfully had 80,000 detained world wide and achieved the implementation of new

interrogation tactics which he found necessary for preventing further terrorist attacks despite pushback from some in Congress and the international community.

In the case of Nixon, who had neither high approval ratings nor a unified party government to help him push through his vision for Indochina, checks placed by the legislature resulted in an end to the Cambodia bombings, and in an end to his presidency. For Reagan, who had high popularity ratings until he took responsibility for the Iran-contra affair, his weapons for hostages deal neither significantly pushed back the Soviets nor got hostages released. Once Congressional composition changed, both the legislature and judiciary checked him, ensuring that those who assisted in carrying out his policy were investigated or brought to justice. Nixon's policy resulted in investigations and resignation, Reagan's in investigations and convictions.

All four cases confirmed the hypothesis that it becomes more difficult to place checks on a war president when he is highly popular, but especially when there is a unified party government. The model can therefore be used in two ways: to show under what circumstances former uet presidents were successful in pushing through their desired policy, or to predict when current or future presidents are more likely to be successful in achieving a policy change during times of war or national security crisis.

Further Potential Indicator Affecting Presidential Success

Not shown on the model but discussed in detail in chapter two is the power of precedence to influence the outcome for the executive. Because precedence is more difficult to weight empirically and objectively than the two intervening variables (composition of Congress and popularity) used in the model, it was not directly tested as an intervening variable. In addition, while precedence has the *potential* to assist a president's success, if the president's approval ratings are low or there is not a unified government, the precedence may make little difference in the outcome. For example, the Commander in Chief arguments that won the day for President Roosevelt and President Bush (at least initially) in court did not assist President Nixon.

As the government official in charge of the legal defense for Bush's detainee policy, John Yoo built his case for an expanded unitary executive on precedence, but did not provide an adequate explanation for why this should take priority over the law, nor

an empirical argument for which indicator(s) could be responsible for some presidents being more successful than others in using the precedent.[18]

Nevertheless, it was important to include a chapter on the role of precedence in this study in order to understand what tools it could have potentially provided President Bush in the creation of his detainee policy. With each president following *Curtiss-Wright* there was the potential to strengthen the presidency and weaken the Congress. Presidents functioning before the 1936 *Curtiss-Wright* ruling did not have the "sole author of foreign affairs" clause to aid them in their court battles. In *Massachusetts* v. *Laird* (1970), Congressional silence was ruled as *de facto* concurrence with the president, making it easier for a similar ruling to occur in 1981 in *Dames & Moore v. Regan*.[19] As much as President Nixon suffered at the hand of the legislature at the end of his presidency, the 1973 *Holtzman v. Schlesinger* ruling, which allowed the Cambodia bombings to continue because the courts should not interfere in political matters that are for the president or Congress to decide, strengthened the hand of future presidents during wartime. In *INS v. Chadha*, the Supreme Court made a landmark ruling in 1983 upholding the separation of powers and checking Congress' power to intrude in the executive sphere, ensuring that Congress would not be allowed to make one or two-house vetoes.[20]

Roosevelt's use of wartime powers in peacetime helped set the stage for President Bush's expanded presidency. The elder president provided President Bush with legal precedent – even if falsely applied – to help bolster the president's new detainee treatment standards. President Roosevelt's order to the Attorney General to wiretap in violation of the law was used by President Bush to justify wiretapping.[21] The Supreme Court cases related to President Roosevelt's internment of Japanese descendants, and the way President Roosevelt used his war powers on domestic soil also created precedent for President Bush's detention of post-9/11 detainees. Bush used the legal foundation which expanded Roosevelt's powers to try combatants before a military commission in *Ex parte Quirin* to do the same with his post-9/11 detainees. Nixon's declaration of the War Powers Resolution as unconstitutional, and Reagan's

[18] Yoo, John 2009: Crisis and Command. New York: Kaplan Publishing.
[19] *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Find Law. URL: http://laws.findlaw.com/us/453/654.html, last accessed Feb. 21, 2012.
[20] Barilleaux, Ryan J. and Kelley, Christopher S. (eds.) 2010: The Unitary Executive and the Modern Presidency. Texas A & M University Press, 32-33.
[21] Gonzales, Alberto, Memorandum to Majority Leader William Frist from the Office of the Attorney General. Jan. 19, 2006. URL: http://www.fas.org/irp/nsa/doj011906.pdf, 7. Original source: *United States v. United States District Court,* 444 F.2d 651, 669-71.

revival of wiretapping and his expansion of the use of signing statements to limit Congress' influence also strengthened President Bush's hand in the expansion of his detainee policy.

The challenge is that precedence set by court cases to be applicable only in cases of emergency or in war-time can then be used as a basis for expanded executive powers even in peace and create an extra-constitutional basis on which to rule. Because judicial precedence and unitary executive arguments have usurped holistic constitutionalism, every president can bend the Constitution as he pleases. As long as the judiciary is unwilling to check the president, and the legislature does not provide course correction, the Republic is at the mercy of the president, and whether he is willing to uphold a separation of powers.

GOING FORWARD: QUESTIONS FOR FURTHER STUDY AND RECOMMENDATIONS

The forecast for the future is not bright. The formula for a wartime president's success included an attack on U.S. soil, coupled with a popular president backed by a unified party government. Should the same factors repeat themselves as those found in these case studies, there is a high likelihood that the president will have the freedom to act above the Constitution and U.S. law without consequences until there is a shift in party power. Whether this would once again be in the area of detainee policy, as it was in the Roosevelt and Bush administrations, or in another area of civil liberties, remains to be seen. Below are a few general recommendations and questions for further research related to strengthening accountability when the three indicators for the weakening of checks and balances during a uet presidency occur.

THE PROBLEM WHEN A NATIONAL SECURITY CRISIS HITS DURING A UET PRESIDENCY

Presidents are able to more easily expand their war powers and the mandate of the executive when the nation is facing a national security crisis. To address this, the War Powers Resolution needs to be rewritten. The War Powers Resolution has been violated by every president and considered unconstitutional since it was passed. Congress must muster support to tighten the language so that no confusion occurs over its mandate and the president has no choice but to come to Congress with decisions

about including the United States military forces in war or combat. The challenge is, of course, that any language that makes more specific than the Constitution the division of labor between Congress and the president, runs the danger of being vetoed by the president or being challenged by the judiciary. Without a legislative veto, such a compromise between Congress and the president will be difficult to achieve. Congress should research and prioritize finding language that will work, before the next security threat, and not in reaction to it.

Second, giving judicial precedent created during war time more weight than the Constitution or U.S. law itself makes the separation of powers more likely to be violated. The *Curtiss-Wright* Supreme Court ruling was written to apply to a specific case in war time. Making the president the "sole author of foreign affairs'' runs directly against Congress' Article I foreign affairs powers provisions. This conflict with the separation of powers needs to be addressed by the courts and judicial precedent no longer used out of context to give the president carte blanche power beyond his constitutional mandate. Further research could provide answers to questions about why this occurs in the U.S. judicial system, and how to prevent precedent from being used by the executive to break the law.

THE PROBLEM OF UNIFIED PARTY GOVERNMENT

This study showed that unified party government was the greatest inhibitor to checks and balances for wartime presidents. This problem will likely continue as long as a two-party system dominates U.S. politics. A multi-party system could prevent the domination of one party in the Congress and the White House. Greater competition among political parties leads to greater party values accountability and greater checks on party power politics coming from the executive.

However, it has been over 150 years since a multiple party system had a chance in the United States: every president since 1852 has either been Republican or Democrat.[22] While 52 percent of Americans polled were unsatisfied with the two parties and were supportive of a third party according to a Gallup Poll in May of 2011, it could be a long time before a third party receives enough support to make this an option, due

[22] Conger, Cristen, "Top 10 Most Successful Third-Party Presidential Candidates,'' June 25, 2012. HowStuffWorks.com. URL: http://people.howstuffworks.com/10-third-party-presidential-candidates.htm, last accessed 23 March 2013.

to the U.S. voting system, in which candidates are chosen according to the number of electoral votes in a district or state.[23]

To directly address potential human rights or civil liberties issues during a national security crisis, then, a solution is needed that rises above party line divisions. The National Commission on Terrorist Attacks Upon the United States (9/11 Commission) recommended a nonpartisan committee to monitor civil liberties within the executive. This is a good start. This Privacy and Civil Liberties Oversight Board (PCLOB), newly constituted under the Obama administration to be an independent agency within the executive is commissioned with reviewing the executive's actions protecting the nation from terrorism to ensure that civil liberties are upheld.[24] This mandate should be expanded to include monitoring the maintenance of human rights standards, including for non-U.S. citizens held in U.S. custody. The board should also be given the power to subpoena information necessary to carry out these duties, and not have to rely on the Attorney General to do so.[25]

THE RISK FOR DETAINEE POLICY UNDER A POPULAR PRESIDENT DURING WARTIME

This study has shown that the public is often willing to give a popular wartime president a pass when he has overstepped his constitutional grounds. As long as the executive can operate without checks, there remains the risk of future Abu Ghraibs. While Bush detainee policy began to be turned back by the Courts and Congress in 2006, the Supreme Court has once again ruled in 2013 to allow wiretapping of Americans in order to fight terrorism, Guantanamo remains open, and Obama has put forward and Congress confirmed John Brennan as CIA chief. Brennan was the very man who publicly defended the enhanced interrogation tactics be used on detainees, and was CIA chief of staff when the most aggressive detainee interrogation tactics were being used.[26]

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[23] Jones, Jeffrey M. "Support for Third U.S. Party Dips, but is Still Majority View,'' Gallup, May 9, 2011. URL: http://www.gallup.com/poll/147461/support-third-party-dips-majority-view.aspx, last accessed March 23, 2013.
[24] Hatch, Garrett, "Privacy and Civil Liberties Oversight Board: New Independent Agency Status,'' Congressional Research Service, August 27, 2012. URL: http://www.fas.org/sgp/crs/misc/RL34385.pdf, last accessed March 24, 2013, 1-6.
[25] Ibid, 3.
[26] Mayer, Jane, "Obama's Transparency Test,'' The New Yorker, March 5, 2013. URL: http://www.newyorker.com/online/blogs/newsdesk/2013/03/obamas-transparency-test.html, last accessed March 24, 2013.

While the PCLOB is a good place to start in keeping the president accountable for the methods used to fight terrorism, there must be an accounting for the abuses that have been committed to date at the hands of U.S. military and intelligence officials. Standards must be transparent, and higher ups punished, not rewarded. A military equivalent of the PCLOB could be established as a standing independent agency within the Department of Defense to ensure military and intelligence officials adhere to the law while treating detainees in their custody. However, further research is needed to comprehensively consider what concrete measures could ensure a coordinated effort by the executive, the military, and the CIA to comply with international and military law in the treatment of detainees. The answers to this question could fill several books, and could include but not be limited to the strengthening of the independence of the judicial system, specific legislative measures, more coordinated NGO activism, military training on interrogation methods and detainee treatment, and the requirements for the U.S. military to further define human rights standards for the new classification of detainees.

While such research goes beyond the scope of this dissertation, this study has hopefully provided data that could prove helpful in preventing the future violation of human rights standards in the treatment of detainees in U.S. custody. By creating a theory-based formula which can be applied to other war presidents, it can assist in predicting whether a uet president will be successful in pushing through his policy during a national security crisis, and more importantly, when checks and balances are at risk.

In the introduction, Calabresi's argument was presented, in which he claimed that the unitary executive theory was a valid constitutional basis for a government as long as the executive took a holistic view of the way the duties of Article I and Article II were practiced.[27] The Bush case study has shown that it is extremely hard for a wartime president to have such a view. Calabresi's argument is, in short, impractical. In an ideal world, every commander in chief would respect the constitutional mandates of the legislative and judiciary branches. In an imperfect one, a national security crisis increases the impetus for him to focus all his energies on the protection of the nation and the peace and to make checks and balances optional. Indeed, this is the challenge of the unitary executive presidency's unfettered power: that it has the freedom to act above and beyond the Constitution.

[27] See introduction, pg. 15.

In the end, the terrorist attacks of 9/11 and the expanded unitary executive presidency that they enabled in the Bush administration provided insight about the constitutional quandary faced by all wartime presidents, who need to respond to new threats quickly without all the facts, especially in the wake of an attack on their own soil. While Bush used the tools left by his predecessors to expand his office, the legal arguments on which he built his detainee policy were shown to have little constitutional ground.

For the OLC to come to the conclusion that its own arguments regarding post-9/11 detainee policy had an unconstitutional basis, time had to pass. The Congressional composition had to change. And a popular president had to fall from public graces. For the sake of U.S. detainee policy in the future, and for the sake of preserving a separation of powers in this Republic, one can hope that that pattern does not provide precedent.

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