

A Debate Decided: Civil Liberties for Guantanamo Bay Detainees

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As of January 2025, the infamous detention camp at the Guantanamo Bay Naval Base remains open and operational. This article provides a historical overview of how “Gitmo” and its unique jurisdictional standing came to be. Particular attention is paid to statutory and judicial developments following the 9/11 attacks during George W. Bush’s presidency and the launching of the Administration’s War on Terror. These measures sanctioned the detention of individuals at Guantanamo Bay, with few opportunities to pursue legal recourse for the potentially extralegal circumstances of their imprisonment.

Introduction

The legal tug-of-war between ensuring national security and the free exercise of civil liberties in the United States is as old as American jurisprudence itself. This debate reached a degree of unparalleled vigor in light of the September 11th attacks, when the promise of domestic safety seemed especially uncertain. In response to this uncertainty and fear, a military prison in Guantanamo Bay, Cuba, opened for the purpose of detaining suspected terrorists. The prison would ultimately cause the three branches of the federal government to confront the quintessential American debate over national security and civil liberties time and again throughout the 2000s.

The Guantanamo Bay detention camp was, and remains, an embodiment of the forceful stance the United States government takes to combat perceived international threats in the prolonged “War on Terror.”² It is the very

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² The “Global War on Terrorism” is an international military campaign by the United States against militant Islamist groups, primarily from 2001 to 2021, with the U.S. withdrawal from Afghanistan. This article will focus on



foundations of the Guantanamo Bay Naval Base and subsequent military prison that engorge the executive branch with expansive powers over national security. The 1934 Cuban-American Relations Treaty and the Authorization for Use of Military Force Resolution blur the lines of both Guantanamo's sovereignty and the limitations on executive power respectively. The Supreme Court heard multiple cases concerning detainee rights during the administration of President George W. Bush. Though the Supreme Court generally ruled in favor of protected legal rights for Guantanamo detainees, the response from Congress tended to assert vigorous security measures, even if such actions countered the views of the Supreme Court. The disagreements between the executive and legislative branch against the judicial branch represents limited effectual justice for Guantanamo detainees. Post-9/11 America's proclivity for fervent executive action devalued the civil liberties of detainees, which I argue allowed for abuses of justice.

Cuba-United States Relations in the Early 20th Century

The origins of Guantanamo Bay precede 9/11, dating back to the era of early American imperialism. Following the Spanish-American War in 1898, Cuba was subject to American military occupation. Under these colonial pressures, the Cuban government incorporated the Platt Amendment into the Cuban constitution in 1901.³ The Platt Amendment functioned as an exchange between the United States and Cuba, with the United States affording Cuba a greater degree of sovereignty in exchange for provisions that would permit continued American presence. Section VII of Platt mandated that the Cuban government "sell or lease to the United States lands necessary for coaling or naval stations...to be agreed upon with the

the War on Terror as it unfolded during the presidency of George W. Bush (2001-2009).

³ Jana K. Lipman, *Guantanamo: A Working-Class History Between Empire & Revolution*, 23 (2008).



President of the United States,” giving the United States President oversight over a portion of Cuban territory, to be used at their discretion.⁴ This stipulation was fortified by a 1903 treaty, which was accompanied by a lease agreement between the two countries. Article III of the 1903 lease states that the, “United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba,” yet, “the United States shall exercise complete jurisdiction and control” over the naval base.⁵ The idea of what “ultimate sovereignty” means for Cuba is unclear, as it seems to stand in direct contradiction to the United States exerting complete control over the same portion of land. The “legal invention” of ultimate sovereignty illustrates that actual Cuban authority over Guantanamo Bay was weak in comparison to the robust power of the United States in the region.⁶ Effectively, Platt and the 1903 agreements fundamentally entangled the two states thenceforth.

The Platt Amendment was repealed by President Franklin Delano Roosevelt in 1934 as part of Roosevelt’s “Good Neighbor” international policies, framed as a departure from colonialism in Latin America.⁷ Platt, as well as the 1903 treaty, were replaced with the Cuban-American Treaty of Relations in 1934. While other provisions of Platt were nullified, the new treaty fortified the guarantee of a naval base through a lease agreement which remains the governing language regarding the status of Guantanamo Bay.⁸ The treaty prohibited Cuba from interfering with the base, stating “[s]o long as the United States of America shall not abandon the said naval station of Guantanamo...the station shall continue to have the territorial area that it now has.”⁹ In effect, the treaty

⁴ Platt Amendment, 31 Stat. 895 (1901) § VII; Lipman, *supra* note 3 at 23.

⁵ Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations (1903) § III.

⁶ Lipman, *supra* note 3 at 24.

⁷ President Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933), transcript available at The Avalon Project.

⁸ *Id.*

⁹ Cuban-American Treaty of Relations, 48 Stat. 1682 (1934) § III.



gave the United States military the power to continue its activities in Guantanamo Bay, irrespective of the desires of the Cuban government. While the United States ostensibly recognized Cuba had “ultimate sovereignty” over Guantanamo Bay, it was evident that the United States could freely use the base for its own purposes.

The Cuban-American Treaty of 1934 carved out a legal loophole for American presidents and the military. Despite the letter of the law holding that Cuba was leasing the land to the United States, America effectively owned Guantanamo Bay.¹⁰ As such, the United States could reasonably deny having sovereignty over the area while simultaneously carrying out any government operations deemed necessary. The lack of a formal “check” on American actions in the Guantanamo Bay Naval Base would thus ensnare the territory in what legal scholars have dubbed a “legal black hole.”¹¹

Cuba-United States Relations in the Early 20th Century

The legal foundation for using the base as a detention camp began with the Authorization of Use of Military Force of 2001 (AUMF), a joint resolution passed by Congress within a week of the September 11th attacks.¹² The resolution conferred upon the President the authority 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” to ensure national security to the utmost degree.¹³ The broad language of the resolution, which vaguely defined “force,” gave President George W. Bush and subsequent presidents an immeasurable arsenal of powers to thwart suspected terrorist threats.

¹⁰ Lipman, *supra* note 3 at 28.

¹¹ Amy Kaplan, *Where Is Guantánamo?*, 57 Am. Q. 831, 831–58 (2005).

¹² Michael C. Dorf, *The Detention and Trial of Enemy Combatants: A Drama in Three Branches*, 122 Pol. Sci. Q. 47 (2007).

¹³ Authorization for Use of Military Force, 115 Stat. 224 (2001) § II.



The AUMF and the Cuban-American Treaty of Relations of 1934 work in synchrony to diminish the boundary between the free exercise of civil liberties and the exertion of government authority. Acting as the launching pad for authoritative government action to fight the War on Terror, the AUMF, is amplified by the 1934 Treaty. As discussed earlier, the sovereignty of Guantanamo Bay outlined in the 1934 Treaty allowed the United States to deny legal responsibility through a supposed lack of jurisdiction over the naval base. This prospect was made all the more perilous by an executive endowed with nearly unchecked wartime powers by the AUMF.¹⁴

The robustness of executive power during the “War on Terror” was further exacerbated by President Bush’s military order, “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism,” issued in November of 2001.¹⁵ President Bush declared that if “there is reason to believe” a captured individual has acted with or aided a terrorist cause, the individual would be detained in a location selected by the Secretary of Defense and tried by a military commission.¹⁶ The order neglects to require a thorough review before an individual is detained, as grounds for detention can be based upon mere suspicion. Moreover, the order begins by stating that the authority to make such an order is found in “the Constitution and...the Authorization for Use of Military Force Joint Resolution.”¹⁷ This military order extended the AUMF to apply to operations in Guantanamo Bay, as “necessary force” meant that government authorities (in their view) did not need to provide a solid rationale for an individual’s detention in the

¹⁴ Lisa Hajjar, *Guantánamo’s Legacy*, 19 Ann. Rev. L. & Soc. Sci. 58 (2023).

¹⁵ A military order, similar to an executive order, is a directive by the President of the United States that dictates actions of armed forces personnel.

¹⁶ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

¹⁷ *Id.*



prison. Thus, the government created an avenue to sweepingly deny the Fifth Amendment right of due process to detainees.

The first prisoners detained at Guantanamo Bay arrived at the base in January 2002. These prisoners were described by General Michael R. Lenhert, the first commandant of the prison, as the “worst of the worst,” perhaps to justify the treatment that was to follow.¹⁸ The Bush administration aimed to treat Guantanamo Bay as a “battle lab”; information would be extracted from these detainees that would inform the American government’s strategy in the War on Terror.¹⁹ Potential obstacles to the process of extracting information from prisoners—such as prohibitions on torture—were rebuffed by President Bush in a confidential memo the following February. The memorandum, titled “Humane Treatment of Taliban and al-Qaeda Detainees,” stated that, “none of the provisions of [The Geneva Conventions] apply to our conflict with al-Qaeda.”²⁰ The Bush administration’s rationale was that the Geneva Conventions of 1949 applied to “high contracting parties,” or countries that agreed to Geneva protocols. Press Secretary Ari Fleischer claimed that as an international organization that is not recognized as a governing authority, al-Qaeda members, “are not covered by the Geneva Convention, and are not entitled to POW [Prisoner of War] status.”²¹ Per the Third Geneva Convention, POW status affords an individual the right to be “treated humanely in all circumstances.”²² By this reasoning, even if a person’s

¹⁸ Hajjar, *supra* note 14 at 58.

¹⁹ *Id.*

²⁰ Memorandum from President George W. Bush to the Vice Pres., Sec. of State and Def., Att’y Gen., Chief of Staff to the Pres., Dir. of Central Intelligence, Ass’t to the Pres. for Nat. Sec. Aff’s, and Chair of the Joint Chfs of Staff, regarding the Humane Treatment of Taliban and al-Qaeda Detainees, § 2(a) (Feb. 7, 2002).

²¹ *Statement by the Press Secretary on the Geneva Convention* (Feb. 7, 2003) (statement of Ari Fleischer).

²² *Protected Persons: Prisoners of War and Detainees*, Int’l Comm. of the Red Cross,



detention in Guantanamo Bay proves gravely unjust, and therefore inhumane, a detainee was not protected by Geneva and had little standing to challenge their detention. This assertion functions as a way for Guantanamo Bay detainees to have as little legal protection as possible.

The Fight for Due Process for Guantanamo Bay Detainees

The central infractions of this newly applied “law of war” concerned the right of detainees to question their detention, and to assert their rights of due process, rights that could feasibly be overridden based on the Cuban-American Treaty and the AUMF. Changes regarding the legal process of Guantanamo Bay would be primarily derived from a back-and-forth between the Supreme Court and Congress. The first challenges to Guantanamo would come before the Supreme Court in 2004 from *Hamdi v. Rumsfeld* and *Rasul v. Bush*, concerning the plaintiffs’ right to habeas corpus, the right to challenge their imprisonment.²³

Yaser Hamdi, the plaintiff in *Hamdi v. Rumsfeld*, was an American citizen captured in Afghanistan in 2001. Due to his citizenship, Hamdi had the explicit right to question his detention under the Fifth Amendment and thus, the question squarely before the Supreme Court was whether his detention violated his right to due process. The plurality decision authored by Associate Justice Sandra Day O’Connor would hold that despite his status as an “enemy combatant,” the Fifth Amendment gave Hamdi the right to be heard by a neutral decision-maker.²⁴ The provisions of the AUMF, and the subsequent military order that authorized the detention camp, had been the legal basis to deny procedural due process for detainees. Although the plurality disagreed with this reasoning,

<https://www.icrc.org/en/law-and-policy/protected-persons-prisoners-war-and-detainees>.

²³ Jonathan Hafetz, *Habeas Corpus after 9/11: Confronting America’s New Global Detention System*, 4 (2011).

²⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).



the opinion did not challenge the legality of the AUMF; instead, it prescribed additional actions to be taken, with the AUMF's framework remaining in place.

Associate Justice David Souter, however, challenged the ethics of the AUMF in a concurring opinion. Souter claimed that “the World War II internment was thus ordered under the same Presidential power invoked here and the intent to bar a repetition goes to the action taken and authority claimed here.”²⁵ In making the damning comparison of the powers of the AUMF to the military orders that called for the internment of Japanese-Americans during World War II, Souter shed light on the profound scope of presidential power under the resolution. So long as the AUMF remains in place, as the plurality opinion asserted, egregious deprivations of civil liberties, akin to those that occurred during Japanese internment, are enabled at Guantanamo Bay.

While Hamdi concerned constitutional interpretation, in *Rasul v. Bush*, Guantanamo's complex sovereignty and governing documents also played a key role. The case's numerous plaintiffs held citizenship from England, Australia, and Kuwait, and filed federal suits stating that they were not granted a hearing or access to counsel before their detainment. The District Court for the District of Columbia, and the appellate court, held that the plaintiffs were effectively filing writs of habeas corpus.²⁶ The District Court drew upon the 1950 case *Johnson v. Eisentrager* for its reasoning, a case that concerned German war criminals held in an American-operated prison in Germany. The majority in *Eisentrager* held that, “nonresident enemy aliens, captured and imprisoned abroad, have no right to a writ of habeas corpus in a court of the United States.”²⁷ Thus, the District Court's ruling was based on the assumption that Guantanamo Bay is “abroad” relative to the

²⁵ *Id.*, at 600 (Souter, J., concurring in part, dissenting in part, and concurring in judgment).

²⁶ *Rasul v. Bush*, 542 U.S. 466 (2004).

²⁷ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).



United States, and therefore non-American citizens detained at Guantanamo Bay did not have a right to habeas corpus.

As opposed to *Eisentrager*, the Supreme Court's majority opinion in *Rasul* relied on *Braden v. 30th Judicial Circuit Court of Kentucky* (1973). This case extended writs of habeas corpus to individuals, should their legal custodian be under the jurisdiction of the United States.²⁸ The majority reasoned that because the Department of Defense was under United States jurisdiction, claims made by foreign nationals on their detention could be heard, though the Court held that Cuba still retained "ultimate sovereignty" over Guantanamo.²⁹ While the majority simply looked at laws in place surrounding Guantanamo's sovereignty, Justice Antonin Scalia's dissent demonstrated how ideas of sovereignty put forth in the Cuban-American Treaty of 1934 remained up for interpretation.

Justice Scalia was a proponent of originalism, a legal philosophy concerned with understanding the original intention and text of law. Scalia concluded that the 1934 treaty did not "render Guantanamo Bay the sovereign territory of the United States" and that Guantanamo had "never before been thought to be within [American] jurisdiction."³⁰ Despite the United States exercising significant control over the territory in the 2000s, on the basis of the Cuban-American Treaty, Scalia adamantly denied American jurisdiction over Cuba. Scalia seemed to recognize the "legal black hole" the treaty created, suggesting the United States could avoid this predicament by creating a separate district court for Guantanamo Bay, as was done with the Panama Canal Zone.³¹ The government's avoidance of confronting the treaty's loophole indicates that the treaty was perceived as a tool for enabling more aggressive

²⁸ *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973).

²⁹ *Rasul v. Bush*, *supra* note 26.

³⁰ *Id.*, at 502 (Scalia, J., dissenting).

³¹ *Id.*



security measures by denying jurisdiction, and thus detainee rights.

Scalia's reasoning would lend legal credence for Congress to pass the Detainee Treatment Act in 2005.³² The original text of the Detainee Treatment Act (DTA) stated that except in certain circumstances (left undefined), "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."³³ The DTA appeared to circumvent the *Rasul* ruling, reflecting on the question of jurisdiction for Guantanamo Bay, which in part relied on the interpretation of the Cuban-American Treaty. As the passage of the AUMF illuminated, increasing executive authority was viewed as a reliable countermeasure against terror in the 2000s. The DTA's passage illustrates how ambiguity over Guantanamo's sovereignty was leveraged to deny habeas corpus and strengthen executive power, even amid calls for individual rights, as seen in *Rasul*.

Congressional and Judicial Disagreements over Guantanamo Continue

The Supreme Court would hear two more high-profile cases, *Hamdan v. Rumsfeld* (2006) and *Boumediene v. Bush* (2008), both concerning the right to question one's detention status at Guantanamo Bay. Both cases further exemplified the battle between the Supreme Court and the executive and legislative branches, first demonstrated by *Rasul* and the subsequent passage of the DTA. A pattern emerged wherein Congress would pass a law regarding the legal processes of Guantanamo Bay, the President would support and sign the bill into law, and the Supreme Court would partially reject the law.

³² Hajjar, *supra* note 14 at 60.

³³ Detainee Treatment Act, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-44 (2005) (codified in scattered sections of 10, 28, & 42 U.S.C.).



This would then cause Congress to respond with a different bill, thereby perpetuating a cycle in the name of national security.

In *Hamdan*, the Supreme Court reviewed the Detainee Treatment Act and addressed the military commissions being used to try suspected terrorists.³⁴ These commissions were first discussed in President Bush's military order in November of 2001 before being more concretely defined by Military Commission Order No. 1 in March of 2002.³⁵ These commissions differed from ordinary courts of law in the United States, as they permitted hearsay testimony and evidence obtained through coercion; all in the effort to gather higher volumes of evidence.³⁶ Salim Ahmed Hamdan's legal team argued that his military commission violated both the Uniform Code of Military Justice, an American code, and the Geneva Conventions.³⁷

Hamdan split the court, with Justice Stevens' majority opinion joined only by the liberal wing of the court, and only in part. The majority rejected the government's argument that Guantanamo Bay existed outside of the scope of Geneva, preventing further legal insulation of the territory. Crucially, the majority also held that "neither the AUMF nor the DTA can be read to provide specific, overriding authorization for the commission convened to try Hamdan."³⁸ In doing so, the majority defined a clear limit on the AUMF, something that had not been done in their earlier decisions. While this limit applies to the trials of detainees, it did not include a limitation on the circumstances or grounds of a detainee's detention. In this area, the AUMF continued to provide room for exploitation. Additionally, Stevens' opinion stated that the

³⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

³⁵ Ida L. Bostian, *One Step Forward, Two Steps Back: Hamdan v. Rumsfeld and the Military Commissions Act of 2006*, 5 Santa Clara J. Int'l L. 219 (2006).

³⁶ *Id.*

³⁷ *Hamdan v. Rumsfeld*, *supra* note 34.

³⁸ *Id.*



AUMF “acknowledge[s] a general Presidential authority to convene military commissions,” acknowledging an inherent legitimacy to military commissions and leaving open the possibility for an altered form of these commissions to continue.³⁹

With the publication of the *Hamdan* decision, a familiar pattern reemerged; Congress passed the Military Commissions Act of 2006 (MCA) as a circumvention of the Supreme Court’s stance.⁴⁰ The MCA both forbid any detainees subject to a military commission from “[invoking] the Geneva Conventions as a source of rights” and precluded legal actors in the United States from asserting jurisdiction “to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States.”⁴¹

The MCA would be challenged in *Boumediene v. Bush*, the last notable Guantanamo case adjudicated under the Bush administration. *Boumediene* had multiple “moving parts”; the constitutionality of the MCA, as well as continued considerations of the application of the Fifth Amendment and the Geneva Conventions in military commissions.⁴² Despite its many legal complexities, *Boumediene* would ultimately boil down to a simple conclusion: the majority held that Section 7 of the MCA, which denied a court’s ability to hear a writ of habeas corpus, was an unconstitutional suspension. The majority unequivocally held that “Petitioners have the constitutional privilege of habeas corpus.”⁴³ *Boumediene* addressed the two-pronged issue of sovereignty and criminal rights by upholding the right of habeas corpus in the face of encroachment by the executive branch, even while

³⁹ *Id.*

⁴⁰ Lisa Hajjar, *The Counterterrorism War Paradigm versus International Humanitarian Law: The Legal Contradictions and Global Consequences of the US ‘War on Terror’*, 44 Law & Soc. Inquiry 935 (2019).

⁴¹ U.S. Congress, House, *Military Commissions Act of 2006*, H.R. 6166, 109th Cong. (2006).

⁴² *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁴³ *Id.*



acknowledging that Guantanamo is “outside sovereign U.S. territory.”⁴⁴ Despite the *Boumediene* holding, habeas corpus cases continued to face challenges. Under the Obama administration, “the DC Circuit Court overturned every [detainee] victory and instructed lower-court judges to accept the reliability and accuracy of government evidence.”⁴⁵ The “debate” over national security measures was firmly decided, as it had been for years. From the passage of the AUMF to the persistent obstacles against habeas corpus cases, the United States government views Guantanamo Bay prisoners as a mere tool for asserting executive and military power, rather than human beings entitled to basic legal rights.

Concluding Thoughts

The continued denial of detainee rights lies in the structural integrity of Guantanamo. The AUMF carved out broad warmaking powers to fight the War on Terror, which the executive and legislative branch was unwilling to relinquish. The story of Guantanamo Bay is not necessarily unique, but an example of how the branches of government may interplay in a battle between civil liberties and national security. The September 11 attacks prompted the legislative and executive branches to create and execute measures to bolster national security, such as the AUMF and the military orders authorizing Guantanamo’s creation. The Supreme Court then “checked” the power of these branches and the powers they exercised, first through *Hamdi* and up to *Boumediene*. There is a clear separation of powers in the reactionary nature of Congress to the decisions of the Supreme Court, but I argue that the tug-of-war surrounding Guantanamo Bay resulted in power that was divided unequally among the branches. The rulings of *Hamdi*, *Rasul*, *Hamdan*, and *Boumediene* all supported a bolstering of detainee rights to a certain extent, but in each instance, Congress was able to usurp, at least in part, these

⁴⁴ *Id.*

⁴⁵ Hajjar, *supra* note 14 at 65.



decisions. The firm commitment to the interest of national security left detainees without justice.

The lesson to be learned from the early years of Guantanamo Bay is that the mechanisms that enable injustice may not be discernible from a surface level viewing. The lack of civil rights for detainees was not just a matter of the presidential administration, as habeas petitions were consistently denied under a Democratic president. The problems that must be addressed is that the framework of Guantanamo itself must be reexamined in today's context, but perhaps even more significant, is the imbalance of power that exists particularly with an engorged executive branch.

