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In response to the terrorist attacks of 9/11, in October of 2001, the Bush Administration launched the “War on Terror,” an attempt to eliminate all terrorist threats to the United States. As part of this war, the Bush Administration began detaining individuals it believed were linked to terrorism. Instead of capturing these individuals giving them a trial to determine whether they were guilty or innocent, and either sentencing them or releasing them, the Bush Administration detained these individuals at Guantanamo. They were held without due process and without access to federal courts. The Bush Administration repeatedly claimed that it was within the rights of the President, as the Chief Commander during times of war, to dispose of due process rights and detain individuals for undetermined periods of time.

This study, funded by an ATP summer grant, examined the legal, political and policy questions raised by the “War on Terror”.

Methodology
This research was conducted using an exploratory and qualitative approach. The study looked primarily at the expansion of the Bush Administration’s power during the “War on Terror,” and how this impacted the constitutional rights of accused suspects. A set of case studies were used as a way to understand the real-life implications of the Bush policies. The case study approach “involves identification of one or more exemplary instances of the phenomenon under study and an in-depth analysis of the phenomenon and related factors” (Travis, 1983).

The selected case studies included the detentions of Murat Kurnaz, Moazzam Begg, and Omar Khadr. Each case study examined the detainee’s personal history, their arrest and detention, government claims of their terrorism activities, and when possible, independent assessments of the detainee’s guilt or innocence. Official government records were also used to clarify the status and detention history of the detainee case studies. The case study approach was utilized as it provided a way to include all relevant factors while also providing enough information to explore the legal, emotional, and psychological effects of detention. The case study approach is also useful as it allows one to view the links between certain factors, such as public opinion and government decisions, over time (Yin, 2008).

Michelle is a senior double majoring in Criminal Justice and History. Her research was conducted with the aid of the Adrian Tinsley Program Summer Grant, under the guidance of her mentor Dr. Richard Wright. She presented this research at the 2009 meeting of the American Society of Criminology in Philadelphia. In the fall of 2010 she plans to attend law school.
The study also reviewed major Supreme Court cases in assessing the constitutional rights of detainees. The research also reviewed how the Bush Administration adjusted to the constitutional constraints placed on it by the Supreme Court.

While this research did not include any quantitative data, a qualitative approach offered the most useful and insightful way to answer the question as to whether Guantanamo Bay served as a just form of preventative detention or was a violation of the due process rights of suspected terrorists. The limitations of this study include the subjective selection of the specific case studies, the lack of access to classified intelligence on detainees, as well as an underdeveloped examination of the unintended consequences.

Military Commissions
On November 13, 2001, President Bush issued an executive order directing Secretary of Defense Donald Rumsfeld to create and use military commissions to try suspected terrorists (Katyal & Tribe, 2002). This order allowed anyone to be arrested based on the belief of the President that the person aided, abetted, or committed an act of terrorism, or that the person is or was a member of a known terrorist group (Katyal & Tribe, 2002). With the creation of these military commissions, numerous historical and constitutional questions were raised about their legality. These procedures suspended the prisoners' habeas corpus rights, or the right to challenge the legality of their confinement in court.

The order establishing military commissions allowed them to be conducted at any time or place (Katyal & Tribe, 2002). Only unlawful enemy combatants could be tried in these proceedings, a class of defendants that relies wholly on the discretion of the President. There is no mens rea requirement, or knowledge that one was aiding and abetting a terrorist organization, in order to be classified as an enemy combatant. This created a situation where those deemed to be enemy combatants could simply be innocent bystanders.

For example, under President Bush’s order, a person who donated to a charitable organization not knowing that it was a front for providing assistance to a terrorist organization could be detained at Guantanamo Bay and tried in a military commission as an unlawful enemy combatant. This vagueness in determining who qualifies as an unlawful enemy combatant can lead to arbitrary and potentially discriminatory detentions (Katyal & Tribe, 2002).

Supreme Court Decisions
In 2002, with the creation of military commissions by the Bush Administration, came the question of whether or not this method of trying detainees held at Guantanamo Bay was constitutional. Since the creation of these commissions, the Supreme Court has ruled on their constitutionality several times. The following four cases, Rasul v. Bush (2004), Hamdi v. Rumsfeld (2004), Hamdan v. Rumsfeld (2006), and Boumediene v. Bush (2008), illustrated the Supreme Court’s view that the actions taken by both President Bush and Congress violated the Constitution and the Geneva Conventions. In all four cases the Supreme Court affirmed the due process rights of prisoners held at Guantanamo Bay.

In Rasul v. Bush (2004), the Supreme Court ruled that detainees were protected under the Constitution and were entitled to petition for writs of habeas corpus. In opposition to the President, Justice Stevens outlined the court’s view that the 1903 lease agreement (between the US and Cuba, creating Gitmo) maintained that Cuba had ultimate sovereignty over the area, but that during the time of the lease, the US had “complete jurisdiction and control over and within the said areas” (Rasul v. Bush, 2004). The majority opinion argued that the petitions of writ of habeas corpus did not apply solely to citizens, but instead all “persons” under the sovereign control of the US. Based on this principle, Stevens stated that both aliens and citizens held at Guantanamo Bay were entitled to habeas corpus rights (Rasul v. Bush, 2004). President Bush refused to follow this decision, leading the Supreme Court to again answer the question as to the rights of Gitmo detainees in Hamdi v. Rumsfeld (2004).

In 2001 at the age of 21, Yaser Esam Hamdi, a Louisiana native who moved to Saudi Arabia as a young child, was captured in Afghanistan by the Northern Alliance, a coalition of military groups opposing the Taliban, and turned over to US forces. Hamdi was brought to Guantanamo Bay and then was transferred to the naval brig at Norfolk, Virginia after it was discovered he was a US citizen. In 2004, Hamdi filed a petition with the Supreme Court, questioning whether the Constitution gave the President authority to indefinitely detain prisoners captured during armed conflicts without formally charging them. (O’Connor, 2008). On June 28, 2004, in an eight to one vote, the Supreme Court ruled that US citizens held as enemy combatants could question the legality of their confinement in front of a neutral body (Hamdi v. Rumsfeld, 2004). Yet the Bush Administration did not relent.

The Supreme Court would again rule that the detainees were entitled to due process rights in Hamdan v. Rumsfeld (2006), and would go even further by ruling that the military commissions created by the President and Congress were unconstitutional.

In 2001, Salim Hamdan, a Yemeni national was captured in
Afghanistan. Hamdan served as Osama bin Laden’s driver prior to his capture by Afghan warlords, and was transferred to Guantanamo Bay. On July 3rd, 2003, President Bush issued an executive order declaring that Salim Hamdan would be the first detainee held at GITMO to be tried by a military commission (Mahler, 2008). In Hamdan v. Rumsfeld (2006), the Supreme Court ruled the military commissions created by President Bush were unconstitutional, as these hearings were completely controlled by the Executive branch and failed to uphold the system of checks and balances. Despite this and the previous rulings, the Bush policies were continued.

In Boumediene v. Bush (2008), the Supreme Court was again faced with the question of whether detainees held at Guantanamo were entitled to habeas corpus rights. The decision, authored by Justice Kennedy, answered the question as to whether aliens held at Gitmo had the constitutional privilege of habeas corpus. In a five to four decision, the Supreme Court ruled that the military commissions were an unconstitutional suspension of the writ of habeas corpus.

Despite the Supreme Court ruling four different times on this issue, the Bush Administration disregarded these rulings and continued to hold detainees at Guantanamo Bay without providing them with formal charges or access to the federal courts, until the end of their administration in January 2009.

Case Studies
The cases of three such detainees, Murat Kurnaz, Moazzam Begg, and Omar Khadr, are only a few examples of individuals being detained without due process and sometimes tortured at Guantanamo Bay. These three cases are just a few of the hundreds of instances where the elimination of due process rights led to the incarceration and punishment of innocent individuals.

Case Study #1 – Murat Kurnaz
Murat Kurnaz was a nineteen year old Turkish citizen when he was captured in 2001 in Pakistan by Pakistani Intelligence officials. On October 3, 2001, Kurnaz flew to Pakistan in order to learn more about the Koran and Islamic faith (Kurnaz, Five Years of My Life: An Innocent Man in Guantanamo, 2007). On December 1st, 2001, while attempting to pass through a checkpoint on his way to the airport in Peshawar, Pakistan, he was removed from the bus by Pakistani police. He was questioned by the Pakistani police about his citizenship and his purpose in Pakistan. A few hours later he was shackled, his head was covered with a sack, and driven to a Pakistani prison. He was kept in solitary confinement at the Pakistani prison in a six by nine foot cell that was constantly lit, had no furniture, and no bathroom (Kurnaz, Five Years of My Life: An Innocent Man in Guantanamo; 36-38, 2007).

Although he did not know at the time, he had been exchanged to the US forces for $3,000.00. He was taken to a transport plane where he was allegedly beaten by US soldiers. Kurnaz hoped that he was being flown to Turkey, but instead was flown to the military base in Kandahar, Afghanistan (Kurnaz, Five Years of My Life: An Innocent Man in Guantanamo, 2007).

While detained in Afghanistan, Kurnaz was continuously interrogated by US forces, who believed he knew where Osama bin Laden was. US personnel also believed that he knew Mohammed Atta, a key figure in the September 11th attacks (Kurnaz, Five Years of My Life: An Innocent Man in Guantanamo, 2007). In February of 2002, Kurnaz was transferred to Guantanamo Bay. While in Guantanamo Bay, prisoners, among them Kurnaz, were allegedly beaten by the Immediate Reaction Force (IRF), a team of armored soldiers who would brutally beat the prisoners for breaking rules. These rules created by the soldiers, were constantly changing, and were never made clear to the prisoners (Kurnaz, Five Years of My Life: An Innocent Man in Guantanamo, 2007). Despite accounts of detainees like Kurnaz, military lawyers stationed at Guantanamo Bay have claimed that detainees were treated humanely (Rotunda, 2008).

On August 24th, 2006, after five years of detention, Murat Kurnaz was flown to Ramstein Air Base in Germany and reunited with his family. Upon his release, US forces tried to have him sign a document confessing his membership in al Qaeda. Kurnaz refused. He had been arrested in Pakistan at the age of nineteen and was released from Guantanamo in 2006 at the age of twenty-four (Kurnaz, Five Years of My Life: An Innocent Man in Guantanamo, 2007). It wasn’t until after he was released that Kurnaz discovered that in 2002 US forces had determined that he was not an enemy combatant, but had not released him because Germany refused to accept him (Kurnaz, Five Years of My Life: An Innocent Man in Guantanamo, 2007).

During this time, the FBI, US intelligence, and German intelligence had all determined that he was not a terrorist and had no connection to terrorist groups. In a memo released by the US government, military intelligence officials stated that they had “no definite link/evidence of detainee having an association with al Qaeda or making any specific threat toward the US” (Intelligence, 2002).
The case of Murat Kurnaz is just one of many of the innocent detainees held at Guantanamo Bay. Kurnaz was denied his rights to due process, which if had been given to him would have ensured his speedy release. The Bush Administration had no evidence to support their detainment of him, but the President's determination that due process protections did not apply to Gitmo detainees allowed an innocent man to be held at Guantanamo Bay for five years. The case of Murat Kurnaz is an example of the unconstitutional actions taken by the Bush Administration resulting from the elimination of due process rights.

The second case study of Moazzam Begg offers yet another example of the Bush Administration's acceptance and approval of the wrongful incarceration of individuals at Guantanamo Bay.

**Case Study #2- Moazzam Begg**

On January 31, 2002, 34 year old Moazzam Begg, a British citizen, was taken by US and Pakistani intelligence agents from his home in Islamabad, Pakistan. He was removed by the soldiers while his wife and children slept in the next room. He was handcuffed, his feet were bound with plastic zip ties, and his head was covered with a black hood. He was then taken to a Pakistani intelligence facility and held there overnight. What he believed had started off as a misunderstanding would soon turn into a nightmare as he would spend the next three years of his life in US custody as an unlawful enemy combatant (Begg, Enemy Combatant: My Imprisonment at Guantanamo Bay, Bagram, and Kandahar, 2006).

In October of 2001 after the US bombing of Afghanistan began Begg and his family were forced to evacuate to Islamabad, Pakistan. It was during this time, on January 31, 2002, that he was taken into custody by US and Pakistani intelligence (Begg, Enemy Combatant: My Imprisonment at Guantanamo Bay, Bagram, and Kandahar, 2006).

After several days in custody, he was met by an FBI agent who informed him that he was being taken into US custody and would be transferred to the US prison in Kandahar, Afghanistan and then Guantanamo Bay, Cuba (Begg, Enemy Combatant: My Imprisonment at Guantanamo Bay, Bagram, and Kandahar, 2006).

In February of 2003, he was transferred to Guantanamo Bay (Gitmo). While in Gitmo, he alleged that he was held in isolation without any natural light for twenty months (Begg, Enemy Combatant: My Imprisonment at Guantanamo Bay, Bagram, and Kandahar, 2006). Prolonged ensory deprivation is a violation of the Geneva Convention.

On October 15, 2004, Begg was transferred to Camp Delta and held with other prisoners. He claims that this was the first time he had seen another prisoner in two years. Here he learned that some other prisoners were allegedly soaked with water and then left in a room with the air conditioner on high. Other detainees described that they had seen other prisoners who had allegedly had their faces smashed into the ground. One prisoner had allegedly had his face smeared with menstrual blood during an interrogation (Begg, Enemy Combatant: My Imprisonment at Guantanamo Bay, Bagram, and Kandahar, 2006).

Then in January of 2005 Begg received some good news. He was informed that he was being transported into British custody and all the charges against him had been dropped. On January 25, 2005 he was flown to Great Britain. Upon his arrival he was immediately placed under arrest according to the U.K.'s Prevention of Terrorism Act. British authorities assured him that this was just a show to appease the US government. He was kept for one night and then reunited with his family (Begg, Enemy Combatant: My Imprisonment at Guantanamo Bay, Bagram, and Kandahar, 2006).

According to available declassified records, Moazzam Begg had no connection to terrorism, but despite this he was held by the Bush Administration for three years without access to legal counsel or the federal court system. While his experience may be different than that of Murat Kurnaz, the outcome of their ordeals is still the same. Begg was taken from his family in the middle of the night, held in prisons without access to legal counsel, and accused of crimes without the ability to challenge the accusations in court. Eventually he was released from his detention because of the negotiations of his government. Most of the detainees held at Guantanamo Bay are not as fortunate.

The final case study examines the youngest alleged terrorist at Gitmo, Omar Ahmed Khadr, a 15 year old Canadian national who was captured in Afghanistan in July of 2002. He is still held there today.

**Case Study #3- Omar Ahmed Khadr**

Omar Ahmed Khadr was a Canadian citizen born in Toronto, and grew up in both Canada and the Middle East. On July 27, 2002 at the age of fifteen, Khadr was taken into U.S. custody after being involved in a firefight between U.S. forces and citizens in Afghanistan. In January of 2006, Michelle Shepard, a Canadian Journalist, met with Khadr to chronicle his story as he had spent more than a quarter of his life in Guantanamo Bay (Human Rights First, 2009).

According to an investigation report by the Department of Defense's Criminal Investigation Task Force, on July 27, 2002,
U.S. Special Operations Forces in Afghanistan engaged in a firefight with individuals hiding in a dwelling. As a result, one soldier entering the house, Sgt. First Class Christopher Speer was killed by the blast. Upon further examination of the dwelling, Khadr was found alive, with two golf ball sized holes in his chest. The U.S. soldiers provided Khadr with medical attention and then transferred him to Bagram Air Force Base in Afghanistan (CITF, 2004).

Upon his capture, the Pentagon claimed that Khadr had received one on one training from al Qaeda in the use of Rocket Propelled Grenades (RPGs), rifles, pistols, explosives (Summary of Evidence for Combatant Status Review Tribunal- Detainee Khadr, Omar Ahmed, 2004). Khadr arrived in Bagram in July of 2002, and was considered a “dangerous detainee” by U.S. officials. Upon entering the base, Khadr was transferred to the hospital wing for treatment of his wounds. During the firefight, he had been shot two times in the chest, had received a head wound, and had been nearly blinded in his left eye (Shepard, 2008). On October 28 2002, Khadr was flown to Guantanamo Bay, Cuba. During the twenty seven hour journey, Khadr was allegedly forced into leg irons and hand cuffs that were then attached to a waist chain (Shepard, 2008).

During his time in U.S. custody, Khadr had just turned sixteen years of age. Khadr was treated like an adult, despite his age, according to post 9/11 policy issued by the Pentagon outlining detainee treatment. The U.S. segregated three other child detainees, who were between the ages of thirteen and fifteen, but refused to treat Khadr like the fellow child detainees (Human Rights Watch, 2007).

While Canada and numerous other nations had ratified the UN Convention on the Rights of the Child, the U.S. never ratified it and refused to recognize Khadr as a minor (Human Rights Watch, 2007). The Conventions on the Rights of the Child, decided upon at the 1989 United Nations General Assembly, ensures that all children under the age of eighteen are to be protected from discrimination and punishment. It set out a list of guarantees to children who were believed to have broken penal law including the protection of being assumed innocent until proven guilty, to be informed of the charges against them, and to have the matter determined without delay (Convention on the Rights of the Child, 1989). None of these protections were given to Khadr.

Khadr was granted two military commissions, the second of which was scheduled for June 4, 2007. The second military commission has yet to commence. As of April 2009, Omar Khadr’s next hearing was rescheduled for June 1, 2009 to resolve any outstanding issues before beginning the trial (Parish, 2009).

Upon taking office in January of 2009, President Obama issued an executive order which called for the close of Guantanamo Bay by January 2010. Along with the closure of Gitmo, President Obama suspended the military commission process and ordered the review of the cases against the 241 men held at Gitmo, including Khadr, in 120 days. The review was supposed to be concluded by May 20th, but the Obama Administration requested a three month extension to continue reviewing the detainee cases (Associated Press, 2009).

Since then, Omar Khadr, and all other detainees continue to be held at Guantanamo Bay. Much of the evidence in Khadr’s case is still classified. Given this difficulty it is unclear whether or not he is factually guilty of the crime of murder and terrorism. What is supported by the publicly available evidence is that Khadr was denied federal due process rights and the international protections of the Geneva Conventions and the UN Charter on the Rights of the Child. As serious as these charges are, it is incumbent on the Obama Administration to either provide Khadr access to federal courts or release him.

The constitutional rights of these detainees were violated by the Bush Administration. It is unclear how the Obama Administration will proceed. As a result, these individuals have been held, some as long as nine years, without being given the opportunity to refute the evidence the government believes proves their guilt. The basic principle of our criminal justice system, innocent until proven guilty, has instead been replaced by guilty without a fair opportunity to prove innocence. The question now remains, when, if ever, these detainees will finally be given their constitutional rights, and in many cases their freedom.

Conclusion
In 2001, the United States was attacked by terrorists, resulting in President Bush’s “War on Terror”. As part of this effort, President Bush decided that those individuals suspected of terrorism should be held by the U.S. without access to federal courts or the due process rights guaranteed to them by the Constitution. These actions were supported by Congress, as they had given the President unlimited power through the Authorization for the Use of Military Force passed on September 18 2001. Using this legislation as justification, the Bush Administration pursued a course of action which detained anyone the President determined posed a threat to the United States.

President Bush stated it was against the interests of national security to try these individuals in federal courts, and instead created military commissions to try them. These proceedings have been used by the U.S. during times of war in foreign nations...
where the court system was not open or functioning properly. By creating these proceedings, the Bush Administration eliminated the writ of habeas corpus, the right of prisoners to challenge the legality of their confinement, an action that had not been taken since WWII.

These military commissions were not designed to provide detainees with a fair and impartial trial, but were offered as silk screen behind which the Bush Administration could claim they were providing the detainees with due process rights.

In response to the claims of detainees that they were entitled to access to federal courts and claims that the military commissions were unconstitutional, the Supreme Court ruled in four different cases, Rasul v. Bush (2004), Hamdi v. Rumsfeld (2004), Hamdan v. Rumsfeld (2006), and Boumediene v. Bush (2008), that detainees were entitled to access to federal courts and that the military commissions created by the Bush Administration and later authorized by Congress were unconstitutional. President Bush ignored these rulings, continuing to deny detainees access to federal courts and using military commissions to try them.

With the election of President Obama in 2009, the question of how to deal with these detainees has been renewed. While President Obama ordered the closure of Guantanamo Bay by January 2010 upon taking office, little more has been done to provide the detainees with access to trials or release them. The Obama Administration still supports preventative detention, a policy under the Bush Administration that has been shown to be a fundamental violation of due process. The question now remains as to how these individuals will be dealt with under the new administration.

References


Rasul v. Bush, 03-334 & 03-343 (United States Supreme Court June 28, 2004).


