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It Don't GTMO Worse Than This: An Interpretive Examination of Language, Decision-making, and Jurisprudence of Due Process Rights at Guantanamo Bay

A Thesis in Political Science

by

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Table of Contents

Abstract

It has nearly been twenty years since the Guantanamo Bay detention center (GTMO) was established to detain individuals captured in the War on Terror. This thesis enters the ongoing debate as to whether GTMO is an exceptional or administrative hyperlegal space. Rather than conforming to the existing confines of this debate, this thesis asserts that a new concept is needed to understand how due process has unfolded inside GTMO. 'Due process lite,' a concept that captures the erosion of substantial due process while accounting for the introduction of the law as a result of the Supreme Court's involvement, is the main contribution of this study. Due process lite is the result of contestation between the three branches of government facilitating shifts between exceptional and hyperlegal developments. This interpretive study uses a wide breadth of materials to reach this conclusion, ranging from executive memos and orders, Congressional legislation, Supreme Court and lower court cases, and detainee transcripts. This thesis examines the rise of due process lite through the case study of Majid Khan, who has been detained at GTMO since 2006. Majid Khan's case is highly indicative of due process lite's consequences at the individual level, such as implications for how torture is handled in military commissions and how detainees experience access to counsel. Khan's case also reveals wider implications for due process, illustrating how it can become less substantial over time.

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Introduction

This thesis investigates the ways in which due process rights have been transformed inside the U.S. detention facility in Guantanamo Bay, Cuba. Due process, which is characterized by fair and impartial treatment within the judicial system, has been firmly established as a U.S. constitutional right through the fifth and fourteenth amendments. The fifth amendment guarantees that no person will "be deprived of life, liberty, or property without due process of law" and the fourteenth amendment applied this right to all states in the United States. Due process encompasses a variety of rights, such as the right to be free from torture, the right to a fair trial, and the right to an attorney to navigate the legal system. When the U.S. first established the Guantanamo Bay detention center (GTMO) in 2002 as a means to hold terrorist suspects detained in the War on Terror, the Bush administration argued that detainees were not entitled to constitutional rights such as due process or *habeas corpus*[1]. The Supreme Court intervened in four cases from 2004 to 2008, contesting the assertion that no legal rights could enter this space. The legal back and forth between the three branches of government over how GTMO should function resulted in a gradual, case by case implementation of due process rights for detainees. This contestation between the three branches resulted in what I categorize as 'due process lite,' a variant of due process that results in certain legal rights being implemented in ways that detract from their meaningfulness and original intent. This term was inspired by Darius Rejali's concept of

[1] *Habeas corpus* refers to the right an individual has to be physically before the court handling his case. This right allows an individual to challenge the legality of his detention.

'torture lite,' which describes the way that 'clean' torture techniques like forced stress positions or waterboarding are removed from the classification of torture through terminology like "moderate physical pressure" or "enhanced interrogation" (Rejali 2009, 358). Just as 'torture lite' is descriptive of interrogation practices being divorced from a legal definition of torture, 'due process lite' captures the trajectory due process rights have undergone at GTMO that have removed them from our traditional understanding of how due process functions. As GTMO made shifts toward an administrative hyperlegal state[2], due process concerns could be deflected by focusing on questions of jurisdictional authority rather than concerns of "substantive questions of morality and justice" (Hussain 2007a, 742). Due process lite captures the evasion of these concerns while accounting for the implementation of some degree of legal mechanisms, and is therefore the significantly less substantial counterpart to regular due process. Due process lite has the capability of undermining interpretations of constitutional and international laws by giving spaces that violate them a certain amount of legitimacy that other spaces lack.

Terminologies of the Project

In order to properly study how Guantanamo Bay and due process interact with one another, it is important to understand what types of laws and rights are in the scope of this project. The rights at the core of this project are due process rights. In addition to due process rights, the right to challenge one's detention in court, known as *habeas corpus,* is at the center of this study. Habeas corpus translates to "you shall have the body,"

[2] Here I am referring to administrative hyperlegality to emphasize the proliferation of classifications, orders, and other hyperlegal facets. "Administrative state" is being used in the same vein that Hussain uses the term in his work, and is not referring to the extensive literature on administrative states.

meaning that an individual needs to be physically present in the courtroom proceedings against them in order to meaningfully participate in them ("Habeas Corpus," *Merriam-Webster*). A habeas corpus writ also allows a person to challenge the conditions of their detention.

The intersections of U.S. constitutional and international law are also important to note in this work. For example, discussions on GTMO will involve discussions on the Geneva Conventions, which were ratified by the vast majority of countries in the aftermath of World War II to avoid another conflict with such mass casualties and suffering. The Geneva Conventions were designed to govern warfare with the laws of war, including the handling of those captured in conflict. In addition to the Geneva Conventions, various other United Nations conventions have been ratified to safeguard human rights. Conventions related to Guantanamo matters include the U.N. Convention against Torture (UNCAT) and the International Convention on Civil and Political Rights (ICCPR). Since Guantanamo Bay is part of Cuban territory but under U.S. control, noting the constitutional *and* international laws governing conflict are necessary.

The term 'enemy combatant' will be used throughout this project to denote GTMO detainees. This term was created by the Bush administration when GTMO was established as a detention center. An *enemy combatant* is a type of classification that explicitly differs from a *prisoner of war*, the latter is unquestionably entitled to the rights of the Geneva Conventions. Enemy combatants, on the other hand, have had an unstable, back and forth legal battle as to whether they are entitled to the rights under the Geneva Conventions, as Chapter 2 will illustrate.

The phrase ‘due process lite’ will be used throughout this thesis to describe the phenomena of legal rights being experienced in particular ways that are the result of the particular environment and circumstances they are exercised in the Guantanamo Bay detention center. This is a concept I have coined to expand the vocabulary used in discussions on the detention center. As previously stated, the term was inspired by Darius Rejali’s ‘torture lite’ concept. Like torture lite, due process lite is a phrase meant to capture a concept that is put into practice but divorced from its definition. Due process lite differs from due process in the sense that it contains due process’s language and mechanisms but without the necessary degrees of substantial-ness indicative of due process. Due process lite better captures what is going on at GTMO rather than a rigid dichotomy regarding the exceptional and administrative frameworks. This concept pushes the academic discussions on GTMO in a new direction, and captures the complex reality of the situation at GTMO.

Existing Debate

Within political theory, there is an ongoing debate as to whether Guantanamo Bay is best characterized by an exception or if it is a space operating under an excess of classifications and laws, known as a hyperlegal administrative space. Exceptional practices are behaviors/practices outside of standard operating procedure that are permitted by the sovereign power. Examples of this include martial law and states of emergency. Some theorists classify GTMO as an exception due to repeated efforts to separate the facility from routine constitutional processes. Evidence for the exceptional lens include assertions that the War on Terror is a different kind of war that requires a

different set of legal proceedings and that GTMO has a history of being a zone free of law's influence, as will be discussed in Chapter 1. Hyperlegality, on the other hand, is characterized as the layering of multiple spheres of laws and regulations to achieve a certain end goal. Theorists who classify GTMO as a hyperlegal space point to the creation of terms like "enemy combatant" and "unlawful belligerent" and the attachment of different mechanisms to follow determined by one's classification. Chapter 1 will provide an account on the history of Guantanamo Bay leading up to the U.S. acquiring the space, as well as a review on the literature for exceptional and hyperlegal administrative spaces. Chapter 2 will examine due process rights such as habeas corpus and access to counsel to address the question of which framework fits GTMO. Chapter 3 focuses on the GTMO detainee Majid Khan and his experiences in U.S. custody, as well as how these experiences are indicative of due process lite in action.

Research Question

Is Guantanamo Bay an exceptional space in which there are no ports of entry for the law, or is it an administrative space operating under multiple spheres of law? This question will be explored through studying due process rights inside Guantanamo Bay. The resolution to this question has significance consequences for our understanding of due process and interpretations of constitutional and international law.

Methodology and Case Study

This thesis utilizes key concepts from political theory to conduct an interpretive methods analysis of specific case studies. These theoretical concepts include sovereignty, exception, and hyperlegality. These concepts will be employed to illustrate two different

ways of understanding GTMO: as an exception and as a space operating under certain administrative practices. This project examines a breadth of materials from the executive, legislative, and judiciary branches as well as work from academics and the Center for Constitutional Rights to determine how we should understand this space. This interpretive study will utilize a significant number of primary sources, including the Senate Select Committee of Intelligence's 2014 report about CIA abuses and use of torture on detainees, transcripts of detainee hearings at GTMO, and court rulings regarding the issue of access to counsel. Supreme Court jurisprudence will also be discussed extensively in this light. By examining how one particular detainee's case– Majid Khan–has transformed in parallel to how GTMO has changed over time, conclusions can be drawn about how to best understand GTMO and what this new understanding means for due process more generally.

Chapter 1: The Conceptual Debate over Detention Sites

The Conceptual Debate

The predominant way of viewing GTMO is that it is a sovereign exception that occurred as a result of a set of unique and horrific circumstances after the September 11th terrorist attacks. Since laws are suspended in exceptional spaces, there would be no access to habeas corpus or due process of law because there is no place for law to function. But as time has progressed, the executive's preferred way of viewing GTMO—as an exception—has been challenged by the judicial system. As detainees gained the right to habeas corpus petitions and certain levels of access to lawyers, GTMO developed hearings and then military commissions as a means to handle their cases. These elements are not indicative of law's total suspension. GTMO became more administrative as the Supreme Court mandated that detainees have access to a neutral decision-maker to make their cases to. However, the intervention of the courts was met with contestation from the executive and legislative branches. This contestation has resulted in GTMO shifting back and forth the exceptional-administrative continuum, facilitating conditions for a watered down version of due process or what I term due process lite.

History

The United States acquired the 45 square mile territory of Guantanamo Bay, Cuba as a result of the Spanish-American War. This war stemmed from the Cuban struggle for independence from Spanish control. The U.S. had economic ties in Cuba during this period, and it was also invested in limiting Spanish influence in its hemisphere as per the

Monroe Doctrine. The U.S. increased its involvement in the conflict starting in January 1898, and the U.S. officially declared war against Spain on April 25, 1898.

Guantanamo Bay played a role in the Spanish-American war in the Cuban theater. The U.S. Marines landed at the bay in June 1898 and the area served as a strategic base for land and naval campaigns in the war (Elsea 2016, 2). When Spain ceded control of their territories to American forces as per the Treaty of Paris of 1898, the United States was the new administrative power over the Spanish territories, including Cuba. After several years of U.S. occupation, the U.S. agreed to give Cuba independence on the condition of maintaining a naval base and "the right to intervene for the preservation of Cuban independence" (Elsea 2016, 2). This condition resulted in the Platt Amendment in both the Army appropriations bill of 1902 and in the Cuban constitution of 1901. In 1903, President Theodore Roosevelt and the Cuban government signed the lease for Guantanamo Bay. Article III of the lease asserts that while the U.S. recognizes Cuba's "ultimate sovereignty" over the area, Cuba "consents that during the period of the occupation by the United States… the United States shall exercise complete jurisdiction and control over and within said areas" (Elsea 2016, 3). Essentially, Cuba will remain the legal sovereign over the bay on paper, but during American occupation over the bay the U.S. will have all the tailorings of what sovereignty entails over this space. The Platt Amendment was cited for U.S. intervention in Cuban matters in 1906, 1912, 1917, and 1920. In 1934, President Franklin D. Roosevelt initiated a new treaty. This new treaty asserted that "[u]ntil the two contracting parties agree to the modification or abrogation of the stipulations of the agreement in regard to the lease to the United States of America

of lands in Cuba for coaling and naval station …, the stipulations of that agreement with regard to the naval station of Guantanamo shall continue in effect" (Elsea 2016, 3). Put simply, unless both the United States and Cuba agree to end the lease, the bay will remain in control of the U.S. indefinitely. The 1903 and 1934 leases' legal language would be employed in 21st century legal battles surrounding the detention center at GTMO, so understanding their meaning is significant. The 1903 lease created two distinct types of sovereignty, *ultimate sovereignty* versus *complete jurisdiction and control*. The 1934 lease allowed for indefinite occupation over GTMO even after U.S.-Cuban relations deteriorated during the Cold War.

How did the United States maintain control over a Cuban bay when U.S.-Cuban relations had been so unstable during the Cold War? While relations between the naval bay and the outside Cuban areas "remained stable from the time of its establishment through both world wars and well into the 1950s," the Cuban revolution and rise of Fidel Castro resulted in a total breakdown of Guantanamo Bay Naval base-Cuban relations (Elsea 2016, 1). In 1964 the Cuban government cut off the water and electricity to the naval base, and to date the base remains self-sufficient for these matters (Elsea 2016, 1). GTMO remains the only U.S. military base held in socialist country, and the unique circumstances stemming from the Spanish American war explain how the U.S. ended up in possession of it.

In the 1990s the naval base took on a new role as a refugee center for Haitians. In 1991 Haitian President Jean-Bertrand Aristide was overthrown, and his supporters "were subject to horrendous treatment" under the military regime (Chavez 2012, 64). This

military coup resulted in 12,500 Haitians fleeing via boats (Crossette 1992). Under international law, if these refugees reached U.S. soil they would be able to file for political asylum. However, Guantanamo Bay as a refugee center was considered outside the realm of U.S. territory. This construction parallels what would happen at Guantanamo a decade later. GTMO would be constructed as a space outside of U.S. soil and this construction would be used to support circumventing obligations of international law, this time related to the Geneva Conventions and various U.N. human rights conventions, such as U.N. Convention against Torture (UNCAT) and U.N. Covenant on Civil and Political Rights (ICCPR).

President George H.W. Bush's administration "began erecting an emergency refugee camp at Guantanamo Bay in order to house and process refugees, and circumvent international law" (Chavez 2012, 64). As more Haitians fled the country, the administration "issued a repatriation policy and ordered the U.S. Coast Guard to deter any ships leaving Haiti and send the people back to Haiti" (Chavez 2012, 64). Invoking both his constitutional powers and the Immigration and Nationality Act, President H.W. Bush issued Executive Order 12807 on May 24, 1992 that authorized the U.S. "to repatriate aliens interdicted beyond the territorial sea of the United States" (Executive Order 12807, 1992). The rationale behind the repatriation order was that Guantanamo Bay was not on U.S. soil and these refugees were constructed to be economic refugees rather than political refugees by the administration (Chavez 2012, 64).

To further complicate matters, about 300 refugees either tested positive for HIV or were related to someone with HIV. These refugees were held in a separate Camp

Bulkely (Chavez 2012, 64). These refugees could not travel to the U.S. due to a ban on HIV-positive travel into the U.S. in 1987. Refugees at Camp Bulkely and in other camps were left in a status of indefinite detention. The situation in these camps deteriorated very quickly, and refugees "lived in deplorable conditions, were subjected to violence and repression by the U.S. military, deprived of proper medical care, and left without any legal recourse or rights" (Chavez 2012, 64). They could not file for asylum as they were not technically in the United States, and they were subject to be repatriated to a hostile Haitian military government without notice. Refugees in this space did not have any recognizable legal rights because of the unique space they found themselves in. GTMO was not legal U.S. soil, so the removal of the rights that come with refugee status was more easily facilitated. This crisis also revealed the executive's position on GTMO. As Michael Ratner explains, the H.W. Bush administration "formulated its legal position that Guantanamo was a law-free zone" and "the Constitution did not apply to Guantanamo" (Ratner 2004, *xv*). Only after a series of hunger strikes from Haitian refugees and protests in the U.S. did a federal judge order the release of the GTMO refugees in June 1993 (Chavez 2012, 65). The construction of GTMO as a law free legal black hole is most prominent during this Haitian refugee crisis. There was a deliberate construction of this space as distinct from U.S. soil, and a deliberate utilization of this construction to avoid obligations of international law related to asylum applications.

After the September 11th attacks Guantanamo was viewed as the perfect space to hold individuals captured in the War on Terror. Both the Authorization for the Use of Military Force (AUMF) and the Military Order of November 13, 2001 paved the way for

the naval station to take on its new role as a site of detention. The AUMF was an act of Congress whereas the military order stemmed from the executive branch. The first individuals to be held at GTMO arrived in January 2002. Contemporary coverage from CNN offers a glimpse of the early days of GTMO. In an article detailing the rebirth of Guantanamo as a site of detention, the news outlet reported that

> [t]he prisoners—the military prefers to call them detainees—will be held at first in outdoor cells with concrete floors and wooden ceilings surrounded by a chain-link fence until a more permanent facility is ready... All the detainees were being treated as if they were prisoners of war, although the Pentagon has not declared them as POWs under the Geneva Convention ("Shackled" 2002).

Here one can observe some similarities between the Haitian refugee crisis in the 1990s and those detained at GTMO post-2002. Just as Haitians at Guantanamo were constructed as a distinct type of refugee that acted as rationale to repatriate them, those renditioned to GTMO were not classified as prisoners or POWs but rather *detainees*, and later (unlawful) enemy combatants. A detainee or enemy combatant under the executive was not covered under the Geneva Conventions.

Detainees are held in various camps across the base. Camp X-Ray processed detainees in 2002, but this camp was designed to be a temporary setting. Camp Delta replaced Camp X-Ray in mid 2002. Within Camp Delta there are various camps that hold non-compliant detainees and more compliant detainees in separate quarters. There also have been unconfirmed reports of a Camp No, which allegedly exists just outside the broader Camp America perimeter. In Camp No several detainees died, and whether they committed suicide or not is unclear (Horton 2010). Camp No is named as such because those who allegedly asked of its existence were told, "No, it doesn't [exist]" (Horton

2010). Guantanamo Bay still operates as a detention center today, although its population has decreased significantly. In total, 780 detainees have been held at some point during their detention at GTMO. Most detainees have been released over the years, either to their home countries or to other third party countries that agreed to accept them. 40 detainees remain at GTMO and there have been 9 deaths in custody since 2002 (Scheinkman 2018).

GTMO did not emerge from thin air, the history behind the facility explains how we got to where we are today. GTMO as a legally ambiguous space was a deliberate construction that dates back to the 1990s. The idea of GTMO as a "law free" zone in which the U.S. is not the formal legal sovereign is an idea that combines executive preferences with the language of the original Guantanamo leases. Moreover, the intervention of the courts in regards to executive action is not new, either. A federal judge did intervene in the Haitian refugee crisis in 1993, ordering the release of remaining refugees from their legal-limbo status but there was a precedent of using this law-less space that seemed to have created less outrage earlier.

The Distinction between Exceptional and Administrative Spaces

Exceptional spaces are referred to as legal black holes because they exist outside the law's reach. There are no recognizable legal rights in exceptional spaces. Exceptional spaces are typically constructed through some act of government, usually either an executive order or a piece of legislation declaring exceptional circumstances. A person detained in such a space may or may not have his detention publicly acknowledged. The discussion on how Haitian refugees were processed at Guantanamo is an example of an

exceptional space in action. The refugees were at times able to be sent back to their country of origin because they were not technically on U.S. soil, despite international laws governing the cases of refugees declaring this as unlawful.

Administrative spaces, on the other hand, are very much within law's reach. In fact, these spaces are characterized by law operating in *excess*. What this means is that multiple legal actors are asserting that certain sets of laws apply to both the space and individuals held in that space. These assertions foster an environment of uncertainty as to which laws supersede others and who has final say over what particular matters. In part because to this uncertainty, rights do not exist in their totality in these kinds of spaces. While a person detained in an administrative space is publicly acknowledged to be held in this location, they typically experience the diffusion of rights in an irregular manner. By this, I mean that rights are a subject of contestation in an administrative space, so rights are never clearly defined and can be experienced differently as they change during one's detention.

Both exceptional and administrative spaces deal with sovereignty. Sovereignty at its core is "the right to decide life and death" eventually "conditioned by the defense of the sovereign, [for] his own survival" (Foucault 1990, 135). In exceptional spaces, part of being the sovereign is the power to create and mandate exceptions to the rule of law. Here sovereignty is concentrated into a singular branch or a few select individual(s). In administrative spaces, sovereignty is much more contested. In these spaces decisions regarding life, death, and detention are fought out between actors who desire different

outcomes for different motivations, including preserving their relevance and asserting their power.

An Exceptional Guantanamo

The exceptional lens is the predominant view for understanding Guantanamo. This framework is characterized by the absence of law, as it views GTMO as a legal black hole operating outside the realm of law's reach. An exception is a deviation from the standard operating procedure permitted by the sovereign, or the ultimate decision-making actor(s) of the State. One of the primary theorists from the exceptional view of camps such as Guantanamo is Giorgio Agamben, an Italian political theorist. In Agamben's *Homo Sacer*, the figure of homo sacer is at the center of the work. Homo sacer under Roman law was a classification that stripped a man of his rights-bearing social-political life, known as his *bios*. Once a man was deemed homo sacer he only retained his *zoe*, or 'bare life'. In this set of circumstances, the sovereign has the power to forcibly remove his political life; unlike women and children who are born only retaining bare life. A man deemed to be *homo sacer* was classified as being outside of society, so he could be legally killed but not sacrificed. He is still linked to the sovereign's power, but unlike others in society his link does not come with protections from external threats. Sovereignty is also exercised here because the State has made someone able to be killed without punishment, thereby exerting its power over life and death. Decisions over life, death, and classifications dealing with these issues are intrinsically linked to exercising sovereign power. The ability to strip a man of his *bios* has roots in the state's power to create exceptions within the law. Moreover, this power sanctioned his ability to be killed

through legalized violence. As the State maintains a monopoly over violence, it is actively declaring homo sacer's body as a space of exception to act out extended legalized violence.

A discussion on exceptions must include exclusion. Agamben describes how exceptions are types of sovereign mandated exclusions, arguing that "[t]he most proper characteristic of the exception is that what is excluded in it is not, on account of being excluded, absolutely without relation to the rule," going on to assert that the exception does not exist in a totally distinct reality from the norm (Agamben 1998, 17). Rather, norms and rules apply to the exception because of their active withdrawal from it. Agamben further clarifies that "[t]he state of exception is thus not the chaos that precedes order but rather the situation that results from its suspension" (Agamben 1998, 18). *Homo sacer* was excluded from Roman society, but he was not without relation to it. His relation to society is in his unpunished killing by Roman rights-bearing men. The suspension of law permits his death, and distinguishes it from the legal classification of murder which would warrant punishment. Exceptions maintain a relationship to the systems that cast them outside of the system's domain.

Agamben argues that within this state of exception "it is impossible to distinguish transgression of the law from execution of the law" (Agamben 1998, 57). What would typically be considered a transgression under routine circumstances can be viewed as the norm under a sovereign-enacted state of exception. Transgressions becoming the norm are taken to their extreme in the camp setting. The camp setting actually has origins from when the Spanish colonial forces established them in Cuba in 1896 as a means of

suppressing the native population from opposing colonial rule (Agamben 1998, 166). In the Spanish-Cuban context "a state of emergency linked to a colonial war is extended to an entire civil population. The camps are thus born not out of ordinary law...but out of a state of exception and martial law" (Agamben 1998, 166-167). A situation that warrants a deviation from standard operating procedure, such as the rise of the Cuban independence movement in colonial Cuba, serves as the foundation for the use of a colonial camp. Within the space of a camp, "the state of exception begins to become the rule...the state of exception, which was essentially a temporary suspension of the rule of law on the basis of a factual state of danger, is now given a permanent spatial arrangement" (Agamben 1998, 168-169). Exceptional periods are drawn out in duration within the camp setting. The exception is given a fixed physical space. Creating a fixed physical location for the exception gives rise to a more stable implementation of the exception, transforming it from a temporary state to an fixed constant within the camp.

How do these concepts apply to GTMO? From its inception as a holding center in the 1990s, Guantanamo Bay has been constructed as an exceptional space that exists outside the American legal infrastructure. It is physically located outside of the United States, and due to the circumstances around the lease it is not considered to be a territory in the legal sense like other spaces acquired after the Spanish American War, such as Puerto Rico or Guam. The executive, under both Bush administrations, purposefully constructed Guantanamo Bay in ways that align with an exceptional framework. Both Haitian refugees and current GTMO detainees initially existed in a "law free zone…[where they] had absolutely no rights under international law or under the

Constitution" (Ratner 2004, 86). Immigration law and constitutional law were not without relation to the crisis. Agamben's exception still maintains relations to the law. In the exceptional framework, the Haitian refugees in this space were constructed as a 20th century homo sacer. They did not retain the rights afforded to refugees under international law because the space they were in was constructed as existing both physically and legally outside of international law's reach. Because they were outside of the law's reach, this set the stage for repatriation under the executive order, contrary to the standard rights for refugees.

What about Guantanamo during the War on Terror? GTMO underwent a physical transformation from Camp X-Ray to Camp Delta, with the latter acting as "permanent spatial arrangement" (Agamben 1998, 169). Detainees were very explicitly removed from the category of prisoner of war to avoid affording them the rights under the Geneva Conventions. This removal of the application of rights parallels very closely to the removal of homo sacer from *bios* rights-bearing life. While making these connections is relevant to fitting GTMO into the exceptional framework, we do not have to rely exclusively on Agamben's pre-GTMO works. He directly discusses GTMO in his subsequent work *State of Exception,* written in 2003. Regarding GTMO, Agamben wrote that

> [t]he immediately biopolitical significance of the state of exception as the original structure in which law encompasses living beings by means of its own suspension clearly emerges in the "military order" issued by the president...on November 13, 2001, which authorized the "indefinite detention" and trial by "military commissions" (not to be confused with the military tribunals provided for by the law of war) of noncitizens suspected of involvement in terrorist activities (Agamben 2003, 3)

This assertion echoes that of *Homo Sacer*. The military order that paved the path to GTMO in this exceptional framework resulted in the removal of individuals from the standard operating procedures of the laws of war. He goes as far as to say that this new order "erases the legal status of the individual, thus producing a legally unnamable and unclassifiable being" (Agamben 2003, 3). Agamben emphasizes the removal of detainees from judicial oversight. *State of Exception* was written prior to the Supreme Court's involvement and during the time in which the executive's assertion that the judicial branch lacked any jurisdiction over Guantanamo due to Cuban ultimate sovereignty. Michael Ratner, who was involved with GTMO litigation leading up to the Supreme Court's intervention, captured the executive's mindset when he stated "while the [U.S.] claims Cuban courts would have no authority over [a detainee's lawsuit challenging his detention], at the same time, if a person tries to bring it to a U.S. court...they claim that complete jurisdiction and control is not sufficient for there to be U.S. jurisdiction because ultimate sovereignty resides in Cuba" (Ratner 2004, 86). Essentially, the 1903 lease's language was used to create a space that cannot be located in either Cuban or American sovereignty, resulting in the withdrawal of rights and law. This same mindset was used in the George H.W. Bush administration when Guantanamo was used to hold Haitian refugees. This common thread between the two eras of detention reflect the sovereign's ability to create a space outside law's reach.

In the exceptional framework, GTMO exists in an ambiguously defined space that is neither entirely separate nor entirely incorporated into the state. Guantanamo offered the U.S. what no other location could. If the U.S. held detainees in a foreign country such

as Pakistan or Afghanistan "there would be (at least in theory) courts of that country where a person could challenge a detention" (Ratner 2004, 87). This was not the case with Guantanamo, as Cuba's 'ultimate sovereignty' has proven to be little more than authority on paper and not in practice.

Scholarship from the early GTMO period reflects the executive's construction of an exceptional space for exceptional circumstances. In *Guantanamo Bay: The Legal Black Hole,* Johan Steyn conducts a historical analysis of how states deal with wartime security threats and connects it to U.S. actions in Guantanamo. He expresses concern regarding "[i]ll conceived rushed legislation [being] passed [to grant] excessive powers to executive governments which compromise the rights and liberties of individuals beyond the exigencies of the situation" (Steyn 2004, 1). While he emphasizes democracies' right to defend themselves, he detailed the troubling trends across histories and countries reacting to a security threat in ways that infringe on human rights. The purpose of detaining War on Terror prisoners at GTMO was to "put them beyond the rule of law…the procedural rules do not prohibit the use of force to coerce prisoners to confess," and at certain points in GTMO history, proceedings were permissive of admitting statements made under physical and mental duress if these statements held certain probative value (Steyn 2004, 14). These characteristics exemplify the black hole definition. They also heavily tie in with the ideas of *Homo Sacer*. The U.S. was the ultimate decider over issues such as life, death, and classification of laws and bodies.

How do legal black holes relate to the ideas of sovereignty and exception? A legal black hole channels immense power into the hands of the executive, thereby increasing

the executive's ability to unilaterally make decisions. This is case in point what occurred in the early GTMO period. Steyn notes that "[d]eference to the executive has so far eroded the cardinal principles of habeas corpus," further elaborating that stripping detainees of the right to challenge their detention is a clear violation of customary international law (Steyn 2004, 21). Deference to President Bush's administration allowed it to circumvent the Geneva Conventions and constitutional rights of due process. The Bush administration sought to create an exceptional system of indefinite detention through these means. While GTMO's population has decreased significantly, there is no clear plan for the remaining detainees and there is no guarantee that Guantanamo won't become an expanded detention facility in the future. The current classifications at play in GTMO have established remaining detainees as 'forever prisoners'. Therefore, Steyn's concern here remains relevant today, as President Trump has made statements in favor of sending more people to Guantanamo.

Handling the 9/11 attacks as "acts of war" marked a shift toward a "war paradigm" and expansion of executive power (Alexander 2011, 1115-1116). Prior to 9/11, terrorist attacks were prosecuted in domestic criminal court[3]. Military commissions were constructed in a way that intended to have a higher rate of success than criminal courts. In theory, circumventing certain judicial requirements in criminal court[4] would

[3] Examples include the 1993 bombing of the World Trade Center, an al Qaeda attack, and the Oklahoma City bombing in 1995, carried out by Timothy McVeigh and Terry Nichols, unrelated to al Qaeda operations.

[4] Military commissions under the 2006 MCA had a lower threshold for what evidence could be introduced. This MCA allowed evidence obtained through coercive means if it had a certain probative value and also had lax regulations surrounding hearsay. Detainees also lacked right to counsel and the threshold for proof was not beyond a reasonable doubt (Alexander 2011, 1121).

result in a large number of convictions and put the issue of indefinite detention to rest. This is not how the commissions played out in practice. Instead, the commissions had "more symbolic value than practical" value (Alexander 2011, 1121). The symbolic role of these commissions was to affirm the idea that "this was *'a different type of war'* in which old methods, old laws, and old legal constraints were inadequate" (Alexander 2011, 1121). Under the Bush administration only 3 detainees were convicted through the military commissions (Alexander 2011, 1120). Only one of these convictions was through an adversarial trial. One of these convictions was achieved via plea deal and the other detainee boycotted his trial, receiving a life sentence at the conclusion of the trial. GTMO's detainee population declined from 684 detainees in June 2003 to 242 detainees when Bush left office in January 2009, yet this decline is attributed mostly to transfers to detainees' countries of origin (Scheinkman 2018). With so many detainees in U.S. custody, why were there so few convictions during this timeframe? To contrast, criminal courts have processed and convicted hundreds of terrorism related cases in the post 9/11 period (Alexander 2011, 1120). What accounts for this prioritization of symbolism over practicality? Alexander attributes the low conviction rate to the government's motives. GTMO was not meant to have a judicial system for these detainees. In fact, prior to the Supreme Court's intervention the government argued it could and would hold detainees indefinitely without trial. It firmly argued that neither habeas corpus, due process rights, nor the Geneva Conventions applied to the detention facility. It was in the government's interest to delay these trials, since with or without them the state could meet its end-game goal of holding detainees indefinitely. The state classified the vast majority of detainees

as enemy combatants through CSRT hearings. The very low standard of evidence established by the executive was used to determine an enemy combatant status that a detainee could not question, even though later some of these classifications were changed to non-enemy combatants. After this determination the state asserted it could detainees indefinitely, so "a trial would make no practical difference" (Alexander 2011, 1123). Actually having military commission trials would work against the state's intended goal, since "conviction by either a military commission or a court would result in a determinate sentence, which even if long would not be indefinite" (Alexander 2011, 1123). Even with the Court's interventions over the years, Alexander still considers GTMO a space "outside of law's reach," or a legal black hole (Alexander 2011, 1151).

Exceptional frameworks are the primary lens used to study GTMO, but they are not the only lens available to us (Hussain 2007a, 739). The administrative framework is another valuable analytical tool for viewing the detention facility, offering its own insights into how it should be understood. The main distinction between exceptional spaces and administrative spaces is the role of law. While exceptional spaces are characterized by law's absence, administrative spaces are known for law's 'excessive' presence. What this means is that there are so many different legal actors putting their own unique (and often conflicting) demands on a space that result in a layering of law. These conflicting sources of law are what give rise to a space's legal ambiguity, as opposed to an exceptional space's ambiguity that emerges from law's withdrawal. What follows is a discussion on how an administrative framework makes sense of GTMO.

An Administrative Guantanamo

Guantanamo is subject to legal influence by multiple actors from all three of the government branches. Within these branches there are numerous actors exerting their influence over this space. Within the executive this includes the President, Vice President, and Secretary of Defense. Prime examples of executive influence include executive orders and memos within the administration(s). In the legislative branch this involves both Senate and House committees as well as individual members of Congress. Types of legal influence over GTMO from the legislative branch include passing legislation to either authorize or work against the executive's plans. Within the judiciary there is the Supreme Court, as well as lower district and appeals courts. Judicial branch influence includes Supreme Court jurisprudence acting as a check on the executive and legislative courses of action, as we shall see in Chapter 2. The lower courts have also exerted their influence over detainee cases, as we will see in Chapter 3. There is also influence of actors such as the CIA and Department of Defense, among others. The degrees of influence these different actors have varies, but they all have the potential to put demands on how the detention space conducts itself.

This view moves us away from a purely exceptional framework, which has predominated GTMO scholarship and reflects an executive desire to construct the facility in such a matter. The layers of law going on at GTMO are often overlooked due to the "near monopoly of a single theoretical paradigm, that of the state of exception" (Hussain 2007a, 739). This monopoly masks the complexities taking place within this space. Nasser Hussain argues that "emergency laws are neither temporary nor distinct from a larger set of state practices" and that GTMO is "shorthand for a larger set of formations"

(Hussain 2007a, 735-736). While this may appear like the same argument that Agamben is making in *Homo Sacer*, Hussain departs from Agamben in this piece. While Agamben claimed in *State of Exception* that GTMO detainees were "legally unnamable and unclassifiable being[s]," Hussain asserts otherwise (Agamben 2003, 3). The state went to great lengths to give legal names and classifications for detainees, ranging from enemy aliens, enemy combatants, and unlawful belligerents (Hussain 2007a, 739). Each of these legal classifications comes with its own set of administrative functions and procedures. By naming individuals *detainees* rather than *prisoners*, the executive set the stage early on to argue that the Geneva Conventions did not apply to individuals in this space. The classification of enemy combatant carries a distinct legal meaning and followed a distinct set of procedures under the Combatant Status Review Tribunals (CSRTs) and the military commissions.

Nasser Hussain puts forth the concept of hyperlegality to help us understand what impact 'layers of law' can have. Hyperlegality consists of "the increasing use of classifications of persons in the law…[and] the use of special tribunals and commissions" for these classified persons (Hussain 2007b, 516). While all laws use classification systems to some degree, Hussain distinguishes those that happen under hyperlegality by stating that "[t]he process has a strong predictive quality, combining who people supposedly are with what they are likely to do, and, as with much predictive activity, invariably involves racial and cultural presumptions" (Hussain 2007b, 516). GTMO detainees are primarily from Afghanistan, Saudi Arabia, and Yemen. All detainees are Muslim and all are male (Hilal 2017). Even detainees from countries that do not have a

Muslim-majority are Muslim, such as Chinese detainees who are Uighurs. There is a clear demographic make-up for who is classified as an *enemy combatant,* which Hussain cites as a prime example of classification in a space operating under hyperlegality. These newly classified individuals are processed with an increasingly fragmented legal system that rises out of the special tribunals and commissions. Spaces operating under hyperlegality contend with both "the intersections of law and bureaucracy, security and otherness" (Hussain 2007b, 531). These elements come together to result in an administrative setting rather than an exceptional one. What else does this framework have to say about GTMO?

In the administrative framework, Guantanamo is a space that operates through the use of legalized loopholes facilitated by hyperlegality's often contradictory layers of law. This confusing layering is very much intentional, and Hussain emphasized that "what is typically colonial...is not that they claim a space is beyond law but rather that a space is *between* laws, in the intersection of multiple legal orders" (Hussain 2007a, 738, emphasis added). Placing GTMO between these spheres of law results in the demand that the U.S. be off the hook for adhering to certain legal constraints. The U.S. has had complete control over the space as per the 1903 lease. In its *Rasul* arguments, the state asserted that since GTMO is a U.S. military base it has certain leeway with its operations, but Cuban sovereignty was cited as reasoning for why detainees should not be permitted to challenge their detention in U.S. courts. This argument relies on discretion for sovereignty' sake while simultaneously denying American sovereignty. This type of argument can exist because it emerges from relying on several types of legal authority:

the original lease between the U.S. and Cuba, the constitutional powers of the president, and congressional legislation that supportive executive decision-making.

Administrative spaces adapt when judicial intervention demands it. In an administrative space, some laws are suspended, but all laws are not suspended in their totality. These suspensions are justified with a series of regulations and classifications. Relating to GTMO, the focus on whether courts had jurisdiction over detainees' habeas corpus petitions was the subject of debate for numerous years, rather than the merits of indefinite detention or the generation of the new legal term enemy combatant. Narrowing questions to jurisdiction curtailed the court's ability to decide on the merits of decisions made by various such as the CIA or Department of Defense, or the executive. But as the next chapter will highlight, the Supreme Court did get involved in habeas corpus matters for detainees at GTMO. However, this involvement unfolded in a particular way that granted rights on a case by case basis rather than on territorial grounds, reinforcing the idea that GTMO can exist between jurisdictions. What's more, this involvement carries the likelihood of due process continuously being contested. After the courts ruled that detainees had certain rights, this ruling was contested both through executive and congressional action. Spaces between jurisdictions impact due process in particular ways, as we will see in the following chapters.

GTMO employs all sorts of laws and norms to uphold its collection of procedures. Fleurs Johns in *Guantanamo Bay and the Annihilation of the Exception* characterizes this space as one in which "law and liberal proceduralism operate in *excess*" rather than a space that is experiencing the law's retreat (Johns 2005, 614). Johns focuses her analysis

on Camps Delta and America. She asserts that norms and proceduralism are what make this space function, deconstructing the Agamben-exceptional framework for GTMO. Johns traces this proceduralism even *before* GTMO was taken up by the Supreme Court, building a strong argument for the administrative lens. She illustrates GTMO's administrative qualities prior to the Court's intervention by detailing the assurances given by Paul Butler[5] in a press briefing in February 2004. Johns describes an elaborate, multi-stage screening and evaluation process through which each detainee is processed. In this briefing she detailed how an "'*integrated team of interrogators, analysts, behavioral scientists and regional experts'* works alongside military lawyers and federal law enforcement officials to decipher and consider *'all relevant information"*" (Johns 2005, 616, emphasis marks quotes from Butler). The Department of Defense had put in place this series of bureaucratic measures to handle detainees within the detention center. This proceduralism is evident when Butler asserted in the briefing that "[W]e have a process…and…that process will take its own course" (Johns 2005, 617). This process relies on a foundation of hyperlegalism to take place. After the Supreme Court's intervention later that year, this "[network of] normative and institutional[ism] ...bec[a]me even denser" (Johns 2005, 618). Chapter 2 will explore how the Court's interventions contributed to this denseness.

Johns acknowledges that GTMO does appear to act in exceptional ways from time to time, citing arguments from the Justice Department who have asserted "the unlimited

[5] Butler served as the Principal Deputy Assistant Secretary of Defense for Special Operations and Low Intensity Conflict at the time of this briefing (Johns 2005, 616).

discretion" afforded to the president regarding how to handle enemy combatants (Johns 2005, 629). State arguments to the Supreme Court have echoed this belief. Yet Johns addresses a departure that GTMO has taken from traditional exceptional spaces, the role of the judiciary. In exceptional settings, if the judiciary has a role, it is an extremely limited one involving matters of jurisdictional competence. However, the judiciary took on a more significant role than this. Not only did they rule they had jurisdictional competence, as Chapter 2 will show, they asserted the competence of the lower courts as well, as the case study in Chapter 3 will show. Moreover, Johns uncovers the degree of thought behind decision-making at GTMO. In a case in which a detainee previously classified as an enemy combatant was deemed a non-enemy combatant, Navy Secretary Gordon England stated in a press briefing that

> [I]n this case we – we set up a process, we're following that process, we're looking at all the data...Determinations were made he was an enemy combatant. We now have set up another process; more data is available. Time has gone by . . . I believe the process is doing what we asked the process to do, which is to look at the data as unbiased as you can, from *a reasonable person point of view* . . . and I believe the process is working . . . (Johns 2005, 631, emphasis added).

This statement is indicative of several things. The designation of enemy combatant is both a legal classification *and* a 'process' that involves data, time, and a purported level of objectivity from a reasonable standpoint. Leonard Feldman critiqued the concept of a reasonable point of view in his analysis on Supreme Court jurisprudence on immunizing police violence. Feldman argued that instead of dealing with racial biases that shape judgement, the Supreme Court circumvented racial issues entirely by pushing forward concepts of reasonableness, objectivity, and the impact of compressed time on these concepts and officers (Feldman, 2017). While his work deals with domestic police

violence, its applications to cases dealing with terrorism have the same issues of compressed time and reasonableness, as well as racial and religious biases.

This description also mirrors how law unfolds and "is suggestive of efforts to construct a series of normatively airtight spaces in which the prospect of agonizing over an impossible decision may be delimited and, wherever possible, avoided" (Johns 2005, 631). Johns' work is from 2005, but this analysis is even more accurate in light of the cases that reached the Supreme Court after its publication and the resulting contestation over rights that followed. Rather than being absent, laws are replicated within this space to take on similar, but not exact, purposes they serve in their normal context. For example, a CSRT was designed to determine a detainee's *status*, not his *guilt*. He was afforded a personal representative, not a lawyer. GTMO has become more enmeshed with laws over time, but this entanglement has taken on various departures from how the law operates in a traditional setting. These departures are due to how contested law's implementation is between the three branches.

We have examined the roles of law within GTMO, but what's more is that within administrative spaces there is a desire to 'keep up appearances' of the *rule* of law. This desire to maintain a semblance of the rule of law is not evident in exceptional settings. Executive memos from 2001-2003 laid out what many considered to be "authorizing torture" by arguing the Federal Torture Statute (1994) should not be enforced in cases relating to treatment of GTMO detainees because doing so "would challenge the president's authority" (Lokaneeta 2016, 73-74). The memos also claim that asserting anti-torture laws for enemy combatant cases could be unconstitutional due to a supposed

conflict with the President's war powers. These memos would later be withdrawn due to their controversial nature. These memos will be discussed extensively in Chapter 2, but before doing so I would like to fit them in the exceptional versus administrative continuum. The memos have "been considered [to be] exceptional document[s] because of [their] attempt to narrow protections against torture," but as Jinee Lokaneeta points out, the memos do contain elements of 'aggressive' hyperlegalism as well due to their withdrawal by the state (Lokaneeta 2016, 72). Aggressive hyperlegalism is linked to very narrow legal interpretations of torture, and allows for classifications to divorce certain acts from being classified as such. This narrow understanding was received negatively, and thus needed to be withdrawn. In addition to the fact they were withdrawn to preserve the legitimacy of the liberal state, these memos have other elements of administrative qualities worth examination. The fact that the executive felt the need to justify its actions through previously classified memos shows how extensively GTMO operations relies on a balance of legitimacy. Just as they were withdrawn to maintain democratic legitimacy, they were written to generate administrative legitimacy within GTMO. These memos helped keep up appearances of the rule of law by appealing to presidential war powers. The rule of law mandates the generation of legitimacy, and by instilling such legitimacy in GTMO operations, the case for an administrative Guantanamo is a valid one.

Locating GTMO on the Exceptional vs. Administrative Axis

The existing debate has sought to definitively place GTMO somewhere on the exceptional-administrative axis. Initially, in my research, I had aimed to do the same. However, as I progressed in my research I came to the conclusion that GTMO doesn't

occupy a single spot on this axis. Rather, it has a temporal quality of changing its spot on this continuum depending on circumstances surrounding the contestation of rights for particular cases. GMTO's place in this debate depends; on the year of analysis, what type of rights you are looking at, even the individual detainees you are studying. The existing debate casts the space as being either one or the other, but this mindset ignores the dynamic temporal features this space has exhibited since 2002. Picture a line that represents the continuum of exceptional and administrative spaces. Guantanamo has the unique capability of jumping along this continuum at various points in its post 9/11 history. Rights at GTMO have unfolded on a case by case basis, so while one detainee's case study may be rife with hyperlegality, another may be experiencing Guantanamo as a legal black hole.

As time goes on, more administrative elements have been observed within most detainee cases. This increase in administrative behavior will become evident within Chapters 2 and 3. But what will also become evident in these chapters is the constant tug of war between the three branches of government, which facilitate the rise of due process lite. This contestation results in GTMO changing its place on the exceptional-administrative continuum in a non-linear manner. The Guantanamo Bay detention facility exists on a continuum of exceptional versus administrative spaces, and its place along this continuum has been subject to constant contestation since its inception as a War on Terror detention facility. Its place on the axis is dependent on numerous variables and is subject to change as these variables change. GTMO as a space that changes its place on this continuum is significant because it reveals how rights such as habeas corpus, due

process, and access to counsel can be contested as well, taking on unique definitions in these spaces that will have lasting impacts for the concept of detainees moving forward. By pushing the debate away from a one-or-the-other understanding and toward a characterization that accepts GTMO's ability to shift between these theoretical frameworks, we are better able to describe how GTMO impacts the rights of due process. GTMO's ability to process different cases in either exceptional or administrative ways is illustrative of due process lite in action. Due process rights take on similar degrees of exceptionalism and administrativism as the space itself. As the following chapters will show, looking at how due process rights have been a site of tug-of-war between the three branches can help us understand where GTMO is at in a particular point in time. Articulating the detention center's ability to shift between exceptionalism and administrativism changes the language and concepts we use to describe GTMO cases, contributes to a new understanding of how due process is actually unfolding, and has significant consequences for those who are experiencing it. This articulation marks a key distinction between due process lite and due process; due process seeks to protect individuals from such a contestation whereas due process lite ignores the consequences of such contestation.

Understanding that GTMO changes its place on this continuum is important because reveals the malleability of law in these hybrid spaces. Law's ability to enter and exit this space over time has a measurable impact that Chapters 2 and 3 will explore. Chapter 2 will examine how law and rights unfold in GTMO through Supreme Court jurisprudence, executive decisions and memos, and legislative action. Chapter 3 will

examine the role of the lower courts as well as the executive in a particular case study of Majid Khan, a current GTMO detainee. Both chapters reveal the trend of due process rights adopting new definitions and implementations inside the detention center. This trend can be understood as due process rights morphing into the concept of due process lite. These chapters will show the real world effects of a detention facility changing its degrees of exceptionalism and administrative features. This is important to understand because the real world consequences of these shifts have amounted to rights being implemented in ways that distinguish them from our current understanding of due process, constitutional law, and international law.

Chapter 2: Contestation Among the Three Branches and Due Process

The previous chapter introduced the concept of due process lite as the consequence of GTMO's ability to shift on the exceptional-administrative continuum. This chapter seeks to build on that discussion by detailing how the three branches of government have approached GTMO, which can be read as administrative or exceptional behavior. This chapter acts as an interpretive study of government language, memos, legislation, and Supreme Court jurisprudence. What this study will illustrate is how the contestation over rights for GTMO detainees between the three branches gave ground for due process lite to manifest. This chapter is divided into three phases, the era 2001 to 2003, 2004 to 2008, and 2009 to the present. These eras mark significant developments relating to GTMO in regard to the introduction of legal rights for detainees. In each of these eras there are clashes between the three branches that contributed to increasing administrative behavior, which in turn facilitated the emergence of due process lite. By synthesizing analyses of the three branches in this manner, this chapter will track how due process rights have become malleable concepts.

Establishing GTMO as a Detention Site

The Bush administration's language in the immediate aftermath of 9/11 conveyed the need for a new approach to the law of war (Jackson 2007; Alexander 2011). The new paradigm that was sought was the state of exception to deal with the extraordinary and horrific event that had occurred. Congress manifested the executive's exceptional language through its Authorization for the Use of Military Force (AUMF), passed on September 14th, 2001. The AUMF declares that

> the President is authorized 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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons (*Authorization* 2001).

This act resulted in the U.S. entering into two armed conflicts: one conflict with al Qaeda, a terrorist organization, as well as a second with Afghanistan, which was operating under a Taliban-controlled government at the time. The AUMF has been cited to authorize operations in Afghanistan, Iraq, Cuba (regarding Guantanamo Bay), the Philippines, Georgia, Djibouti, and Yemen, among others (Weed 2016). Since 2016, the AUMF was cited by the president 37 times, 18 under Bush and 19 under Obama (Weed 2016). As we saw in the previous discussions from Agamben, Steyn, and Alexander, exceptions require suspensions of the law. The AUMF acts as that suspension. However, the Bush administration would not remain unchallenged in their construction of an exceptional setting as time went on. The contestation over an exceptional GTMO entered the conservation with the question *how long will this moment last?* As time progressed, there was a divide regarding how to handle individuals held at GTMO. A purely exceptional space completely devoid of law's influence was not sustainable forever, as the Supreme Court would make clear in their assertion of jurisdiction.

The Bush Administration's Exceptional Construction

The George W. Bush administration argued quite clearly that GTMO should remain a law free zone as it had during its time as a refugee center in the 1990s. The executive's preference under the Bush administration was to maintain the exceptional nature of Guantanamo Bay and keep out the influences of the judiciary. The first element

related to this executive preference is the November 13th, 2001 Military Order titled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," referred to here as the November 13th order. This order, in conjunction with the AUMF, defined individuals within the scope of this order as a non-citizen who is suspected of being a member of al Qaeda, has engaged in or assisted in acts of international terrorism, has knowingly harbored individuals who are members or have assisted in such groups or acts, or if it "is in the interest of the United States that such individual be subject to this order" (Bush 2001, Military Order). The November 13th order authorizes the Secretary of Defense to detain individuals subject to the order "at an appropriate location … *outside or within the United States"* (Bush 2001, Military Order). The order also empowers the Secretary of Defense to construct military commissions for detained persons. The November 13th order would be cited as a means for authorizing the Guantanamo Bay detention camps the following year. By setting the detention center outside of the United States, the Bush administration hoped to avoid both Congressional and judicial oversight over the commissions.

Furthermore, language seen in both speeches and memos offer clear examples of an exceptional construction of GTMO. In this construction, statutes against torture in custody were viewed as incompatible with the new and necessary paradigm. For example, in an August 2002 memo from Assistant Attorney General Jay Bybee to Alberto Gonzales, Bybee wrote that "this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions" (Jackson 2007, 357). The new paradigm had the power of rending international law either

"obsolete" or "quaint" (Jackson 2007, 357). Moreover, Tracing executive memos and language within the administration reveals the creation of the term *enhanced interrogation* to distance actions such as waterboarding and solitary confinement from the category of torture. Evidence for this term generation stems from the *Memorandum for Alberto R. Gonzales,* referred from here on as the 2002 Torture Memo. In this memo, Bush administration Assistant Attorney General Jay Bybee argued that 18 U.S.C. Sections 2340-2340A[6] "prohibits only extreme acts" such as "pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" or "significant psychological harm or significant duration...lasting for months or even years" that must meet a series of other qualifications (Office of the Assistant Attorney General 2002, 1). This memo established a convenient loophole that distinguished acts of torture from being classified as such. Sect. 2340-2340A does not, under this line of reasoning, include "certain acts [that] may be cruel, inhuman, or degrading" because they do "not produce pain and suffering of the requisite intensity to fall within Section 2340A's proscription against torture" (Office of the Assistant Attorney General 2002, 1). Bybee also argued that enforcing anti-torture laws potentially could be unconstitutional because this enforcement would go against the President's Commander-in-Chief powers (Office of the Assistant Attorney General 2002, 46). By clearing the way for 'enhanced interrogation' at GTMO, this memo classifies interrogation methods such as waterboarding as not only outside the scope of 2340A, but also determines that use of

[6] This statute incorporated the U.N. Convention against Torture into domestic U.S. law. This convention prohibits both torture and cruel and inhumane treatment.

2340A to prevent such interrogation would be against the law. These memos are evidence of the creation of new terms to divorce acts of torture from the category of torture within the space of Guantanamo, as well as beyond this space. The administration's language as seen through these memos shows the executive was on the far end on the exceptional side of the scale leading up to Supreme Court litigation.

Congressional Support for Exceptional Construction

Congress passed the AUMF nearly unanimously. Scholars have expressed concerns about the AUMF, specifically concerns involving increasing executive power to acting as a "blank check" for decision making, as also expressed by Rep. Barbara Lee (D-CA) (Lee). The AUMF has remained an influential piece of legislation since its passage, and its invocation across administrations speaks to its broad use. The Bush administration cited the AUMF in its Supreme Court litigation to support detention practices at GTMO. This 'blank check' permitted the rejection of habeas corpus and right to counsel.

Significance of the Era

The era 2001 to 2003 included the creation of the GTMO detention center, as well as executive language and memos that would act as the basis for due process rights undergoing numerous transformations inside this space. As the analysis on executive language from this era showed, the 'new paradigm' that emerged mandated a rejection of international law, including the Geneva Conventions and other anti-torture statutes that had been incorporated into domestic law. Due process was transformed in the following two eras culminating in due process lite, which has the ability to undermine substantive liberty and justice while providing a space the legitimacy that comes with it.

Enemy Combatant Cases

In 2004 the constitutionality of the detention center's practices was up on the docket. The Supreme Court took up three cases related to enemy combatants. These cases were critical for several reasons. First, irrespective of the rulings, they established that GTMO issues were the prerogative of the courts and that the judicial system had some oversight over executive and legislative decision making. The courts' role regarding Guantanamo was not by any means obvious, especially due to the unique sovereignty the U.S. exercises over the space. The courts' role had been contested by the Bush administration leading up to 2004. Second, the actual rulings of these cases transformed how Guantanamo Bay operates. These initial cases triggered the space's adaptability it displays today. These rulings put Guantanamo Bay under some degree of obligation to constitutional procedures. To what extent the facility was/is obligated to adhere to constitutional rights and norms will be discussed within the following cases. This era is characterized by Supreme Court intervention challenging GTMO's purely exceptional construction. This section of this chapter will examine this intervention in regard to how it shaped due process rights in the detention center.

***Padilla v. Rumsfeld* (2004)**

Padilla (2004) is the first enemy combatant case that merits attention. On May 8th, 2002, U.S. citizen Jose Padilla took a return flight from Pakistan to Chicago O'Hare airport. Federal agents apprehended Padilla at the Chicago airport under the authority of the U.S. District Court for the Southern District of New York. Accused of working closely with al Qaeda, Padilla was held in federal criminal custody in New York. On May

22nd, his lawyer filed to vacate the warrant used to apprehend him. This motion was still awaiting a decision when President Bush declared Padilla an enemy combatant on June 9th and ordered Secretary Rumsfeld to detain Padilla militarily in South Carolina. This case dealt with the issue of whether U.S. citizens can be detained as enemy combatants, with the added complexity of whether this detention can occur when the citizen is arrested on American soil. Two days after being transferred to South Carolina, Padilla's counsel filed for habeas corpus as his next friend for the Southern District of New York. The legal issue in this case had two components. First, did Padilla properly file his habeas petition in the Southern District of New York? Second, did the President have the authority to detain Padilla, a U.S. citizen captured on U.S. soil, militarily? Because the Court ruled that the case was improperly filed in the Southern District of New York, and not in South Carolina's district where it should have been filed, it would not reach a decision regarding the merits of the case. Since Padilla and his lawyer were challenging his detention in South Carolina, the Southern District of New York did not have proper jurisdiction over the matter.

The larger significance of *Padilla* (2004) lies in an examination of the oral arguments. While the issue of torture does not appear at all in the official opinion of the Court, Justice Ginsburg brought torture and executive power into the conversation in oral arguments. Ginsburg said that "if the law is what the executive says it is, whatever is necessary and appropriate in the executive's judgement, as the resolution you gave us that Congress passed, and it leads you up to the executive, unchecked by the judiciary. So what is it that would be a check against torture?" ("Rumsfeld v. Padilla, Oral

Argument"). Deference to the executive up to this point had created a selective application of the laws of war that relied on Bush's interpretation (Ratner 2004, 17). Ginsburg went on to ask if "mild torture" authorized by "executive command" would be permitted, and Clement, arguing for the State, asserted "our executive doesn't [do that]" ("Rumsfeld v. Padilla, Oral Argument). Clement also argued that treaty obligations would prevent such actions from occurring. This position was not an accurate depiction of the Bush administration's approach to interrogation. In fact, on April 28th 2004, the same day as *Padilla* oral arguments, *60 Minutes II* broadcasted the infamous photographs of U.S. military personnel physically and sexually abusing Iraqi prisoners in Abu Ghraib. While the Court has exhibited reluctance to take up matters of torture of enemy combatants in final opinions, bringing it up in oral arguments did mark a shift from the status quo for the Court.

***Rasul v. Rumsfeld* (2004)**

Rasul v. Bush (2004) marked the beginning of a contestation of power between the judicial and executive/legislative branches. This case involves 12 Kuwaiti GTMO detainees and 2 Australian GTMO detainees, Mamdouh Habib and David Hicks. The plaintiffs were all captured during the War on Terror campaign and renditioned to Guantanamo at various points in 2002. The detainees denied they had committed any terrorist acts or that they were enemy combatants. They filed for habeas corpus through the D.C. District Court, seeking to challenge their detention status and asserted that they should "be allowed to meet with their families and with counsel, and to have access to the courts or some other impartial tribunal" (*Rasul v. Bush,* 2004). At this point, none of the

detainees had a guaranteed right to counsel. They had also been denied contact with family members. Defense attorneys asserted that this lack of access to counsel and access to the Courts amounted to constitutional and international law violations (*Rasul v. Bush,* 2004). The uniqueness of GTMO as a sovereign space came into play in this case. Since Guantanamo Bay is located at the United States' Cuban naval base and not within the traditional territory of the U.S., did American courts even have jurisdiction to hear challenges from the foreign-national detainees at the detention facility? This was the legal issue at hand in *Rasul*.

In a 6-3 ruling, the Court determined that GTMO detainees were entitled to a *certain degree* of habeas corpus rights. The Court drew on a variety of arguments to reach this ruling. The first of these arguments centers on the history of the habeas writ. In the majority opinion, Justice Stevens wrote that the Judiciary Act of 1789 had extended the writ to prisoners in custody, under or by colour of the authority of the United States" and in 1867, Congress further expanded the reach of the writ to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States" (*Rasul v. Bush,* 2004). At its core, the writ is designed to act as a check on executive powers to detain an individual. Justice Stevens emphasizes in the majority opinion that "this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace," such as with an American citizen in a civil war case *Ex parte Milligan* (1866) and an enemy-alien in the case of *Ex parte Quirin* (1942) during World War II (*Rasul v. Bush,* 2004).

The Executive argued that the Court should follow the *Eisentrager* precedent[7] and reject the detainees' appeal for habeas corpus. However, the *Rasul* Court disagreed with the State's argument that *Eisentrager* should apply here. In its reasoning, the Court asserted that the *Rasul* plaintiffs differed from the *Eisentrager* plaintiffs in several critical ways. First, the *Rasul* plaintiffs "are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States" (*Rasul v. Bush,* 2004). Second, the GTMO detainees "have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing" (*Rasul v. Bush,* 2004). This contrasts with the *Eisentrager* plaintiffs in the sense that they had already been convicted of war crimes via a military tribunal. Third, and most critically for future cases, the Court determined that these detainees have for "more than two years … been imprisoned in territory over which the United States exercises exclusive jurisdiction and control" (*Rasul v. Bush,* 2004). Whereas the *Eisentrager* plaintiffs had never been held in U.S. custody, the *Rasul* plaintiffs had been held in a naval base under which the United States had "exclusive jurisdiction and control" (*Rasul v. Bush,* 2004). This determination is particularly important because it addresses the sovereignty question that had lingered from 2002 to 2004 regarding the detention facility. The State employed this ambiguous sovereignty in its arguments against the writ. Scholars have discussed the dual argument at hand here; on one hand the State is

[7] In *Eisentrager* (1950), the Court determined that 21 German citizens who had been convicted of war crimes in Nanking, China, were not entitled to the writ due to six factors. Since the plaintiffs were enemy aliens who had never been to or resided in the United States, had been captured outside U.S. territory and were being held as a prisoner of war, had already been tried and convicted by a military commission outside of the U.S. for war crimes that had been committed outside of the U.S., and had never been imprisoned in the U.S., they were not eligible for habeas corpus.

claiming it should have certain allowances because it is a U.S. naval base, but on the other hand it is pushing forward the idea that de jure sovereignty lies with Cuba (Hussain 2007, 738). This contradictory set of positions did not hold up in the *Rasul* Court. Through this reasoning the Court rejects the State's argument that since 'ultimate sovereignty' lies with Cuba as per the 1903 lease agreement, the courts were not within their jurisdiction to hear these cases. Here layers of law are unfolding in real time in contestation of each other. The original lease agreement, habeas writ statutes from the 18th and 19th centuries, and Supreme Court jurisprudence from post WWII are colliding at a particular point in time, and this collision resulted in the introduction of some due process rights at GTMO.

The significance of *Rasul* is multifaceted. *Rasul* refuted the State's argument that habeas corpus rights did not apply to Guantanamo detainees due to ultimate Cuban sovereignty. It also asserted that the federal courts did have jurisdiction over these types of cases. This assertion was critical because it opened the door for subsequent litigation. However, *Rasul* does not elaborate on what "further proceedings" for detainees will look like, at the time the Court only asserted that federal courts had jurisdiction over similar matters (*Rasul v. Bush,* 2004). These 'further proceedings' emerged in the form of CSRTs, but those would be deemed unconstitutional due to their failures to meet UCMJ and Geneva Conventions requirements in 2006.

***Hamdi v. Rumsfeld* (2004)**

Hamdi (2004) answered to some degree what the further proceedings for enemy combatants would look like that *Rasul* (2004) left unanswered. The case centered on

Yaser Esam Hamdi, a man with joint U.S. and Saudi Arabian citizenship who was captured in Afghanistan in 2001. Hamdi had traveled to Afghanistan a few months prior to the September 11th attacks; with the government arguing he had been receiving training from the Taliban and his father arguing he was in the country for "relief work" (*Hamdi v. Rumsfeld,* 2004). Hamdi was transferred to GTMO in January 2002. When his U.S. citizenship became known to the government, he was transferred to Virginia in April 2002. The Bush administration classified Hamdi as an enemy combatant. The legal issue at hand was two-fold: did the government violate Hamdi's Fifth amendment rights through holding him indefinitely and could the executive branch have the authority to classify American citizens as enemy combatants?

Regarding the second question, the AUMF comes into play. The State argued that the executive did not need authorization from Congress to detain U.S. citizens as enemy combatants due to the President's Article II powers. The Court avoids the issue of defining a president's Article II powers, instead relying on the AUMF as the required congressional authorization needed to authorize Hamdi's detention (*Hamdi v. Rumsfeld,* 2004). Federal criminal law 18 U.S.C. 4001(a) requires that no citizen be imprisoned or detained by the U.S. except pursuant to an Act of Congress, but the AUMF acted as congressional authorization. Therefore, Hamdi's argument about the illegality of his detention in this manner is rejected by the court.

In a plurality decision, 8 of the 9 Justices agreed that Hamdi was entitled to due process to dispute his enemy combatant classification before a "neutral decision maker" (*Hamdi v. Rumsfeld,* 2004). While U.S. citizens can be deemed enemy combatants, they

still have their due process rights and right to challenge their enemy combatant status. Specifically, the Court ruled that "[w]e hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker" (*Hamdi v. Rumsfeld,* 2004). This language is important to dissect. The Court describes a sort of balancing of priorities on behalf of the state and the detainee. The Court elaborates somewhat on this process when they determine that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker" (*Hamdi v. Rumsfeld,* 2004). The other side of this balancing act comes into play when the Court ruled that "at the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict" (*Hamdi v. Rumsfeld,* 2004). The court goes on to describe how hearsay could be accepted in this process and that it would not necessarily be unconstitutional to have a presumption of favor of the government's evidence "so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided" (*Hamdi v. Rumsfeld,* 2004). Essentially, the *Hamdi* Court requires some revised process for citizen-detainees, but this process is allowed to deviate from traditional constitutional safeguards to a certain but unspecified degree.

At times, Hamdi was also denied access to an attorney. While he was given one before the Court finalized its decision, the lead Justice in this case wrote that he "unquestionably has the right to access to counsel in connection with the proceedings on remand" (*Hamdi v. Rumsfeld,* 2004). The plurality opinion points out that a citizen's constitutional right to contest their detention outweighs any "threats to military operations" (*Hamdi v. Rumsfeld,* 2004). The Court also contests the government's argument for a reduced role of the judicial branch, asserting that "we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances" (*Hamdi v. Rumsfeld,* 2004). The contestation between the executive and judicial branches is coming to a head in the Court's decision. Similar to *Rasul*, *Hamdi* acts as an assertion of judicial power and influence regarding Guantanamo matters. This assertion resulted in the creation of the CSRTs, which in theory were meant to be the neutral decision-making body that permitted detainees to contest their enemy combatant designation.

Hamdi exerted judicial power over Guantanamo matters and forced the space to comply with judicial rulings in addition to previous executive and legislative influences. *Hamdi* countered the government's position that the judicial branch should take a back seat to matters concerning citizens classified as enemy combatants. *Hamdi's* plurality opinion also insisted that Hamdi had the right to contest his detention and the right to counsel to navigate proceedings.

Significance of Supreme Court Jurisprudence

Scholars have debated how much of an impact the enemy combatant cases have had on GTMO. Some scholars point out the cases' shortcomings. *Padilla* has been dubbed essentially inconsequential by most because of the Court ruling on a technicality. Regarding *Rasul* and *Hamdi*, scholars either express lukewarm appreciation or apprehensive views about how significant they would be. Michael Ratner's[8] take on the situation at Guantanamo prior to these rulings shows what issues these opinions did resolve, at least partially. Specifically relating to the jurisdiction question in *Rasul*, Ratner said that "[i]f we lose, it would effectively mean that no Guantanamo detainee could ever test his detention. It would be a disaster for a country that claims to adhere to the rule of law…[d]etention by the executive branch would be unchecked by any judicial review" (Ratner 2004, 83). However, the Court did rule that U.S. courts do have jurisdiction to hear habeas petitions in *Rasul.* Executive branch detention would be checked by the judiciary in future Supreme Court litigation. While the power of this check was limited to jurisdiction claims in *Rasul*, *Hamdan* (2006)[9] would resolve some issues regarding the application of the Geneva Conventions. The *Rasul* ruling left the door open for subsequent litigation rather than shutting down the possibility of future cases (Ratner 2004, 83). What's more, taking GTMO matters to the Supreme Court also resulted in changes in executive behavior. Ratner detailed that the Bush administration released "up to 140 detainees" in the months following the Court's announcement they

[8] Ratner was the president of the Center for Constitutional Rights (CCR) leading up to the enemy combatant cases. The CCR represented detainees for these cases.
[9] Which will be discussed in the following 2005 to 2008 era.

would take up the *Rasul* case on the docket (Ratner 2004, 84). One of the *Rasul* plaintiffs, David Hicks, was given a military lawyer. The Department of Defense established panel review boards to assess if detainees were still a threat. However, Ratner detailed how "these reviews don't offer any real legal protection" and that detainees can be detained even if their review results indicate otherwise (Ratner 2004, 85). Despite these issues, Ratner argued that "had we not been granted review, the government would have done absolutely nothing" since the prior (lack of) a system still facilitated a status of indefinite detention (Ratner 2004, 85). These changes in executive behavior show the influence of the judiciary in shaping GTMO matters.

Other scholars have taken a cautious approach in viewing these cases as substantially significant. Benjamin Wittes dubbed the cases "a kind of victory for the administration dressed in defeat's borrowed robes" (Wittes 2013, 102)[10]. His reasoning for this is that the cases left too many critical manners unaddressed. Whether or not GTMO is "legally defective" is not addressed in the scope of the decisions, nor is the question of if the executive "could still evade federal court oversight altogether by simply avoiding detention facilities abroad that happen to be formally leased to the executive" (Wittes 2013,114). As records have shown, other black sites in countries around the world were used in the same period of GTMO operations. Because Hamdi did permit the U.S. to classify citizens as enemy combatants, it "by no means clarifie[d] that judicial review … will function as meaningful, as opposed to symbolic, restraint on executive

[10] In addition to Wittes, Dworkin also expressed views arguing that praise for the Court may be "exaggerat[ing] the practical impact of the decisions" due to the Court being permissive of future procedures omitting certain "traditional protections," like allowing hearsay (Dworkin 2004).

behavior" (Wittes 2013, 108). The Court accepted in its decision the power for the State to classify citizens as enemy combatants, which was no small victory. However, the Court was quite clear of the obligations for habeas corpus and access to counsel. He characterizes the three enemy combatant cases as "a big legal question mark" for detainees in military custody (Wittes 2013, 129). What's more, this legal question mark would open the door for due process rights to undergo significant transformations. Rather than a space in which due process was suspended, GTMO was now gaining administrative qualities that created conditions for due process lite.

Other scholars view the cases as having a modest degree of influence. Steven Vladeck categorizes them as "a fairly modest–but clear–rebuke to the U.S. government" due to the "unbridled assertion of *judicial* power—that these were disputes *to be decided* by the courts, first and foremost" (Vladeck 2014, emphasis original). While these cases were "only relatively modest setbacks" for Guantanamo operations, these rulings' larger significance is that the judicial branch was willing to involve itself in shaping GTMO, going as far as to mandate a neutral decision maker in *Hamdi* (2004) (Vladeck 2014). When the Court's own role and power are at stake, they are more likely to become involved than when their influence is not questioned in cases such as wiretapping. While the Supreme Court has not taken up these issues, it is important to consider that the lower courts have also been able to intervene in such counterterrorism matters. These lower courts have dealt with highly complex matters involving classified evidence, which the State had argued they were not qualified to do (Vladeck 2014). Without the Supreme

Court asserting the judicial branch's power in these Guantanamo matters, this emerging role of the lower courts would have likely been called into question.

While the degree of influence the enemy combatant cases has had over GTMO matters remains debatable, what is evident is that these cases resulted in the rejection of a law free zone. Instead, GTMO responded to these decisions by adopting more administrative elements. As the following section will show, the neutral decision maker mandated by *Hamdi* (2004) that emerged from these rulings was the Combatant Status Review Tribunals (CSRTs). CSRTs acted as a means for detainees to contest their enemy combatant status, although as well be discussed in the following section, they also acted as a means for due process rights to exist on a sliding scale. Along with other aspects of the military tribunals and commissions, CSRTs are illustrative of how administrative layers result in due process lite.

Establishing CSRTS

The enemy combatant cases had a significant role in reshaping Guantanamo as an administrative space. If the executive considered this a lawless space, the judiciary was unwilling to consider it entirely as a legal blackhole. Instead the cases ended up representing a compromise of objectives. This compromise gave rise to an administrative GTMO. In regards to their procedural impact, *Rasul* and *Hamdi* resulted in the creation of the CSRTs, which in theory were to act as a neutral decision-maker to determine if detainees met the requirements of enemy combatant status. What were CSRTs, how were they implemented, and what do they reveal about the emergence of due process lite?

CSRTs were established on July 7th, 2004 by Paul Wolfowitz, the Deputy Secretary of Defense at the time. This was a few weeks after the enemy combatant case rulings. CSRTs would operate from 2004 to 2007. Wolfowitz's order mandates that CSRTS "appl[y] only to foreign nationals held as enemy combatants in...Guantanamo Bay" (Wolfowitz 2004). Subsection A asserts that "[e]ach detainee subject to this Order has been determined to be an enemy combatant through multiple levels of reviews by officers of the Department of Defense" (Wolfowitz 2004). Detainees going through this process had been previously classified as enemy combatants, so a CSRT was meant to act as a means to contest this designation. A CSRT hearing "is not a criminal trial and is not intended to determine guilt or innocence; rather, it is an administrative process structured under the law of war to confirm the status of enemy combatants detained at Guantanamo as part of the Global War on Terrorism" (Combatant Status Review Tribunals: Purpose 2006). Because CSRTs were not criminal trials, detainees were not entitled to a lawyer. It was an administrative process that had no bearings on if detainees would be released from GTMO, as a 'non-enemy combatant' designation did not necessarily mean a detainee would be released.

As the Supreme Court's language in *Hamdi* (2004) stipulated, the State needed to provide a "neutral decision maker" to provide detainees some degree of access to habeas corpus rights. Per the Court's rulings, CSRTs were entitled to some departures from traditional courts. According to Congressional Research Service author Jennifer Elsea, CSRTs are "not bound by the rules of evidence such as would apply in a court of law" (Elsea 2005, 3). What she means by this is that the tribunals were able to operate in the

ways in which the Supreme Court hinted in its *Hamdi* (2004) ruling. Hearsay would be allowed and an assumption that the State's evidence is "genuine and accurate" would be the basis of operation (Elsea 2005, 3). This genuine and accurate assumption has been widely considered as a way to ignore evidence obtained through 'enhanced interrogation' practices, which as discussed in the beginnings of this chapter, essentially amounted to torture.

How did CSRTs operate, and how did these procedures reflect the more administrative side of GTMO? Throughout the CSRT, the detainee was entitled to attend all meetings of the tribunal except those in which the tribunal is deliberating or voting on his case and except in hearings in which classified information is being discussed. Per CSRT guidelines, a detainee was afforded a personal representative, a person he was entitled to meet with before his hearing to discuss his case. The personal representative was allowed to attend all meetings except those that involve deliberation or voting. Detainees were also entitled to call "reasonably available" witnesses to provide testimony on his behalf and were allowed an interpreter to deal with language barriers throughout the process.

Let us look more closely at the role of the personal representative and its significance in regards to a GTMO shifting closer toward administrative qualities. As discussed in Chapter 1, a group of scholars have viewed GTMO as a space experiencing hyperlegality. This term describes a space's use of a classification system to create a new set of legal terminology and the establishment of a special tribunal or commission system to deal with these newly classified individuals. While most of the academic work focuses

on how the term "*enemy combatant"* is an example of hyperlegality[11], the role of "*personal representatives"* deserves an examination in a similar light. The obligations and behaviors of personal representatives differ in a few critical ways from those of a lawyer. These differences are worth an analysis in relation to the administrative facets at work in the facility that gave rise to due process lite.

The creation of the personal representative role is evidence of the layers of procedural practices within this space. These procedural practices in turn normalized due process rights, such as right to counsel, being implemented in ways that put their meaningfulness into question. Who were personal representatives, and how did they function in their capacity? A personal representative would be "a military officer, with the appropriate security clearances, as a personal representative for the purpose or assisting the detainee in connection with the review process" (Wolfwitz 2004). This representative "may share any information with the detainee, except for classified information, and may participate in the Tribunal proceedings" (Wolfwitz 2004). What is critical to note is that a personal representative is *not* a lawyer. This distinction is important for several reasons. While lawyers carry the responsibility of defending their clients, personal representatives are simply permitted, and not obligated, to participate in the CSRT process. What did this participation actually look like? 78% of the time, personal representatives met with their assigned detainee only once (Denbeaux et al 2006, 1233). 13% of these meetings lasted less than 20 minutes (Denbeaux et al 2006,

[11] By classifying detainees as enemy combatants and not prisoners of war, the Bush administration sought to circumvent Geneva Conventions obligations. The creation of this new category also justified the existence of the CSRT process; which Nasser Hussain considered to be another layer of the administrative practices supporting Guantanamo Bay operations.

1233). During the hearings, 12% of representatives remained completely silent. While representatives made "substantive comments" in 52% of the hearings, "[s]ometimes, the substantive comments of the personal representative…advocated for the government and against the detainee" (Denbeaux et al 2006, 1235). This analysis of personal representatives' behavior reveals the stark contrasts between the role of a representative and the role of counsel. During a typical meeting, the representative informed the detainee that

> I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. *None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing.* I am available to assist you in preparing an oral or written presentation to the Tribunal should you desire to do so (Denbeaux et al 2006, 1242, emphasis original).

This statement captures the distinction between a representative and a lawyer. There is no such thing as 'representative-client' privilege akin to an attorney-client privilege. If inclined to do so, the representative had the choice to either remain silent or speak against the detainee's case during the tribunal. No lawyer would actively choose to remain silent during a whole tribunal or sabotage their client's case in such a manner. The creation of this role to replace the role of counsel falls within the same realm of creating terms like 'enemy combatant' to replace the legal classification of POWs to avoid the Geneva Conventions. Employing 'personal representatives' as a substitute for a lawyer is indicative of a shift toward GTMO being a space of hyperlegality and not a suspension of law. Personal representatives acted as a means to meet Supreme Court obligations. They also are exemplary of how due process lite functions. They provided a certain degree of

legitimacy to the CSRTs while functioning in ways that are distinct from usual representation.

Personal representatives are just one example of how classification generation contributes to due process lite. Classification generation is something that the Court has briefly touched on in *Hamdi.* Regarding the creation of enemy combatant as a distinct category from a prisoner of war, the Court noted that the exact scope of the classification has been up for debate and "the Government has never provided any court with the full criteria that it uses in classifying individuals as such" (*Hamdi v. Rumsfeld,* 2004). The Court accepts that for now, the State has defined the term as someone who has joined or provided assistance to Taliban or al Qaeda forces. Nasser Hussain offers a diverging take on the *Rasul* and *Hamdi* opinions. He asserts that "[t]hese two cases… are better understood as eclipsing an older vision of emergency with one that extends the reach of law, but not of full legal protection, and one that validates in law an ambiguous and evolving classification of persons" (Hussain 2007a, 746). This new version of emergency is an adaptable and flexible set of rules that changes the meaning of due process within this space. By accepting the State's authority to create a new classification system for detainees, the Court facilitated "other classifications that have also been used to detain people without charge" (Hussain 2007a, 746). These classifications fell under employing immigration laws in such ways to permit detention without charge. Due process exists in these settings, but it is not in a substantial form and often renders those detained as other in some form. Viewed in this light, the administrative elements at work in GTMO end up mimicking the legal regime of U.S. immigration law. In these types of regimens, due

process has become flexible in its implementation. This flexibility at GTMO is particularly unique due to the fact that there is no universally recognized sovereign authority. While the U.S. immigration system occurs on U.S. soil, and is subject to exclusive U.S. jurisdiction, GTMO has been legally obscure in these matters throughout its history. This ambiguity has allowed due process lite to occur at a high frequency in a relatively small period of time.

Detainee Treatment Act (2005)

The bulk of the previous discussions have been about the tension between the executive and judicial branches. Congress's role during this period beyond passing the AUMF warrants analysis as well. After the enemy combatant cases, the *60 Minutes II* broadcast detailing the cases of torture at Abu Ghraib, and executive actions setting up the CSRTs, Congress entered the conversation about how to handle detainees at GTMO by passing the Detainee Treatment Act (DTA). The DTA had direct implications for detainee cases at GTMO; as it dealt with issues of torture in custody. This act was passed in light of the Abu Ghraib scandal in Iraq that exposed the public to the use of torture in U.S. detention facilities abroad. The approval for enhanced interrogation practices and torture for certain types of classifiable detainees and not others proved to be a division that existed only on paper. Creating a different and lower standard for treatment for enemy combatants compared to those not classified as such "led to a decline in the overall standards for interrogations" (Suleman 2006, 258). Having separate standards of treatment dependent on a certain classification of detainee led to the opportunity for the

more permissive of CIDT[12] and torture standards to trickle down into other types of detainees, which is exactly what occurred in Iraq (Suleman 2006, 258). This was one of the issues the DTA sought to resolve.

The DTA has five sections. Sections 1002 and 1003 were the result of Senator John McCain (R-AZ), a former POW himself who pushed for improved conditions of detention. Section 1002 mandates that "[n]o person in the custody *or under the effective control* of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation" (Detainee Treatment Act 2005, emphasis added). These provisions were a direct response to the Bybee memo and the reports of detainee abuses at Abu Ghraib and GTMO. The DTA was a pushback against an executive point of view that was permissive of prioritizing presidential power over anti-torture statutes. Section 1002 affects both Department of Defense (DOD) personnel and personnel from other agencies questioning a person detained by the DOD. Suleman points out that this section's shortfall is that it was "too specific," and that transferring a detainee to a facility not under the control of the DOD can (and did) act as a legal loophole to this section (Suleman 2006, 260). Additional loopholes included revising the Army Field Manual or employing criminal/immigration detention instead of Department of Defense detention to circumvent this provision (Suleman 2006, 260).

[12] Shorthand for cruel, inhuman, and degrading treatment

Section 1003 tried to resolve these loopholes by mandating that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment" (Detainee Treatment Act 2005). This section defines CID treatment in relation to the fifth, eighth, and fourteenth amendments of the U.S. Constitution as well as the U.N. Convention against Torture (UNCAT). This provision was intended to be applicable to all people regardless of their location of detention or citizenship status. It was a response to the Bush administration's view that UNCAT did not apply to the detainees in the war on terror. The DTA's assertion that such laws did apply is further evidence of contestation between the branches. Section 1003 defines cruel, inhuman, and degrading treatment using the Senate reservations of the United States' 1984 UNCAT ratification as a means to circumvent the executive view of the inapplicability of these amendments. It is important to note that Section 1003 "can be circumvented through the use of extraordinary rendition," which is a process of transferring a detainee from one state to another (and potentially further states) to reach an endpoint detention facility (Suleman 2006, 261). These transfers occur in different sites where torture has been documented, including the Salt Pit and Bagram in Afghanistan, and many different locations in Europe and the Middle East. Furthermore, extraordinary rendition occurs outside of the judiciary's scope because of these transfers and the detainee "lacks the ability to challenge his transfer and detention through a legal process in either state" (Suleman 2006, 262). Suleman went as far as to say that if this

aspect of the DTA were to be heavily enforced it "may encourage the use of rendition" to avoid compliance (Suleman 2006, 262).

Section 1004 deals with individuals acting under the authority of their superiors relating to CID or torture allegations. Section 1004 states that any U.S. official who was involved in the detention or interrogation of a non-citizen detainee in which torture allegations arise can invoke a defense of good faith, specifically stating that

> … it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. … Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful (Detainee Treatment Act 2005).

Section 1004 provides a congressionally approved defense for personnel who directly implemented CID or torture policy. What exactly a 'good faith reliance' or an individual of 'ordinary sense' mean is not defined within the DTA, but it is fair to read this section as having a wide scope of application. This provision is a continuation of the Bybee memo's assertion of a necessity defense for personnel who engaged in torture. While the DTA was pushing back against the executive in some aspects, here Congress is contributing to the layers of law that made GTMO an ambigous space characterized by confusion. While torture was against the law, those who engaged in torture could point to the DTA as a source of a good faith defense.

Section 1005 permits the use of evidence obtained through CID or torture if it has a certain degree of probative value. Regarding evidence "[d]erived with [c]oercion", the DTA mandates that that officials will determine "whether any statement derived from or

relating to such detainee was obtained as a result of coercion" as well as "the probative value (if any) of any such statement" for the detainee's CSRT hearing (Detainee Treatment Act 2005). This particular aspect of the DTA was harshly criticized. Moreover, Section 1005 curtailed the jurisdiction of the courts to hear habeas corpus petitions from detainees. It limited jurisdiction to the United States Court of Appeals for the District of Columbia Circuit. Outside of this court no other court would be permitted to hear or consider habeas writs or "any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay" who has either been classified as enemy combatant or awaiting classification (Detainee Treatment Act 2005). Section 1005's limitation on jurisdiction would come under examination in *Boumediene v. Bush* (2008). Thus the DTA on one hand provided congressional protections against torture for detainees in DOD custody, but on the other hand provided legal defenses for past cases of torture and curtailed jurisdiction for habeas corpus matters to the Appeals Court of D.C.

***Hamdan v. Rumsfeld* (2006)**

The Supreme Court again took up Guantanamo matters in 2006 with *Hamdan* (2006). Salim Hamdan, a Yemeni citizen, acted as Osama Bin Laden's personal driver from 1996 to 2001. In November 2001 he was captured by the U.S. military and renditioned to Guantanamo in June 2002. In 2003, President Bush "deemed him eligible for trial by military commission for then-unspecified crimes. After another year had passed, Hamdan was charged with one count of conspiracy 'to commit … offenses triable by military commission'" (*Hamdan v. Rumsfeld,* 2006). Before being granted habeas

corpus in his federal court filing, he was designated an enemy combatant on July 7th, 2004 through his CSRT.

The legal issues at hand in this case were two-fold. First, the Court needed to determine if the Geneva Conventions were enforceable in the federal courts. Second, the Court needed to say if the military commissions used to try Hamdan and other GTMO detainees were constitutional or not. The Court ruled that "the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions" (*Hamdan v. Rumsfeld,* 2006). The Court determined that "[n]one of the overt acts that Hamdan is alleged to have committed violates the law of war...These facts alone cast doubt on the legality of the charge and, hence, the commission" (*Hamdan v. Rumsfeld,* 2006). Moreover, whereas the UCMJ requires the accused to be allowed to attend all proceedings except deliberation and voting, CSRTs "permits exclusion of the accused from proceedings and denial of his access to evidence in certain circumstances" (*Hamdan v. Rumsfeld,* 2006). The government countered with arguing that only 9 of the 158 UCMJ articles applied to the GTMO commissions and that adhering to all 158 of the articles would "hamstr[i]ng" the President and that doing so would be "impracticable" according to the President (*Hamdan v. Rumsfeld,* 2006). The Court disagreed, determining that "[n]othing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case" (*Hamdan v. Rumsfeld,* 2006).

Regarding the Geneva Conventions, the Court determined that at they very least, Common Article 3 applied to GTMO detainees. Common Article 3 governs how to

handle individuals detained in armed conflict. The article asserts that in conflicts "not of international character occurring in the territory of one of the High Contracting Parties, each Party…to the conflict shall be bound to apply, as a minimum," a certain set of provisions and procedures (*Hamdan v. Rumsfeld,* 2006). This minimum threshold offers protections to people who are not involved in the conflict as well as "members of armed forces who have laid down their arms and those placed *hors de combat*[13] by … detention" (*Hamdan v. Rumsfeld,* 2006). Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" (*Hamdan v. Rumsfeld,* 2006). Afghanistan is a High Contracting Party to the Geneva Conventions and according to the Court, Hamdan met the *hors de combat* by detention requirement. The Court determined that the CSRTs used to try Hamdan did not meet the "regularly constituted" threshold because of their deviations from the UCMJ.

Hamdan (2006) deemed CSRTs unconstitutional and also asserted that the Geneva Conventions could be enforceable in federal courts. Applying Common Article 3 to GTMO operations forced Congress to pass the Military Commissions Act of 2006 to replace the CSRT process. It also rendered moot some of the goals of the Bush administration's term generation. One of the central goals of creating the term enemy combatant was to avoid the requirements of dealing with prisoners of war under the Geneva Conventions. With the Supreme Court applying Article 3 to enemy combatants

[13] Means "out of combat"

such as Hamdan, GTMO once again needed to develop a new set of procedural processes to meet this requirement. With Congress being encouraged to write the law to establish these new procedures in Ginsburg's concurrent opinion, the administrative web began to branch in a different direction in order to adapt.

Military Commissions Act (2006)

Congress responded to the Court's rulings with the Military Commissions Act (MCA) of 2006. Military commissions have been used in a variety of contexts to try violations of the laws of war. The U.S. set up military commissions in Mexico from 1846-1848, in the Philippines from 1899-1902, and in Germany and Japan after World War II in 1945 (Elsea 2014, 6). Military commissions typically follow the U.S. Code of Military Justice (UCMJ) guidelines, which guarantee specific rights such as the right to a speedy trial and freedom from self-incrimination. Essentially, the UCMJ affords the same basic rights as the U.S. civilian justice system. The MCA, on the other hand, contained several key departures from the military commissions system. However, these two articles were "expressly exempt[ed]" out of the MCA of 2006 (Elsea 2014, 7). These commissions act as another example of due process lite unfolding at GTMO. The meaning of commissions took on a new meaning in this space, showing the adaptability of due process.

The MCA maintains the legitimacy of the CSRT hearings by relying on them for classifying detainees regarding their unlawful enemy combatant status. Detainees were still not allowed to have access to the full body of evidence, as classified evidence was withheld from them but can be used by the state during the commission as evidence.

Detainees did obtain access to attorneys rather than personal representatives, which does mark a departure from CSRTs. However, they were not able to select their own attorneys; since they could only pick from either military lawyers or civilian lawyers with the proper security clearances. The trials could be closed at times so that classified evidence can be discussed. The MCA specifically stipulates that "no alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights" (Military Commissions Act 2006). This clause is clearly aimed at deconstructing the weight of the Court's prior *Hamdan* (2006) ruling. This stipulation is indicative of tensions between Congress and the judiciary, and the conflicting views on Geneva's applicability contributes to the administrative facets of GTMO. While the detainees were barred from invoking Geneva as a "source of rights," the State still has the power to invoke the Conventions as "as a source of power to punish," as Vazquez points out that the MCA borrows language from the Geneva Conventions to define certain crimes, such as using the term "protected persons" in relation to murder charges (Vazquez 2007, 84).

Furthermore under the MCA, only two-thirds of the commission members are needed to convict a detainee (Military Commission Act 2006). In the sentencing phase, three-fourths of the votes are needed for a life sentence "or to confinement for more than 10 years" (Military Commissions Act 2006). Lesser sentences only require a two-thirds majority. Moreover, the MCA contains a provision that allows "statements obtained before [the Detainee Treatment Act of 2005] in which the degree of coercion is disputed may be admitted" if it contains "sufficient probative value" and that "the interests of

justice would best be served by admission of the statement into evidence" (Military Commissions Act 2006). Seeing as high value detainees were tortured at various CIA black sites before the DTA, this particular clause is highly relevant. The confessions made during this period were eligible to be used as evidence. The MCA also contains provisions to permit evidence obtained with "degree[s] of coercion" if the statements are deemed to be "reliable and possessing sufficient probative value" and if the interrogation methods did not use CID methods as defined by Section 1003 of the DTA (Military Commissions Act 2006). How does one measure degrees of coercion (i.e. torture) to balance them out for their probative value? This question is not answered within the MCA legislation; and the absence of this answer is meant to contribute to the ambiguity of the administrative procedures.

Section 7 of the MCA specifically targets the right to habeas corpus. The section states that "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 as an enemy combatant or is awaiting such determination" (Military Commissions Act 2006). As was also evident with the structure of CSRTs, the MCA again tries to remove habeas rights for detainees. This removal goes against prior Supreme Court jurisprudence asserting that habeas rights exist to some degree for detainees. Eliminating detainees' rights to file for habeas corpus would be the MCA of 2006's downfall in the Court.

Boumediene v Bush (2008)

Boumediene v. Bush (2008)[14] is the last Supreme Court case that dealt with issues surrounding the GTMO detention facility. The detainees in *Boumediene* include Lakhdar Boumediene[15] and five other Algerian citizens who were detained with him. After they were not convicted in a Bosnian court, in 2002 they were renditioned to GTMO and classified as enemy combatants. They were not charged with crimes while in U.S. custody at GTMO. Boumediene's lawyers filed for a habeas petition which was denied in light of the MCA. They argued that denying him a habeas petition amounted to constitutional due process clause violations.

Boumediene brought several issues to the Supreme Court docket that revolve around issues of geography and sovereignty. The central issue of this case was determining if GTMO detainees had the "constitutional privilege of habeas corpus," a privilege that can only be suspended in a select set of extreme circumstances within the Suspension Clause of the constitution. The Suspension Clause stipulates that only "in cases of Rebellion or Invasion of the public Safety" can habeas corpus be suspended (USCS Const. Art. I, § 9, Cl 2). The Justices contended with the issue of Guantanamo Bay as a space that is not U.S. territory but is not exactly exclusively Cuban territory, either. How far and in what ways does the constitution apply in a extraterritorial manner?

Other legal issues at hand in this case were discerning if Section 7 of the MCA meant to strip federal courts of their jurisdiction to hear habeas petitions from GTMO

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[14] *Boumediene* followed the *Rasul*, *Hamdi,* and *Hamdan* decisions from 2004 and 2006, as well as the DTA of 2005 and the MCA of 2006. The DTA and the MCA contained sections to restrict the courts' ability to hear detainees' habeas petitions.

[15] an Algerian citizen detained by Bosnian authorities in 2002 on suspicion of being involved in planning to attack a U.S. embassy

detainees. Moreover, were GTMO detainees entitled to the Fifth amendment of due process and could they challenge the adequacy of the existing judicial review process of their detention before going through that process? In a divided 5-4 decision the Court ruled that Section 7 of the MCA did intend to strip federal courts of their jurisdiction and that this was an invalid suspension of the habeas corpus writ. Moreover, the Court determined that the DTA disadvantages detainees by limiting "the scope of collateral review to a record that may not be accurate or complete" because of how it "foreclos[es] consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings" (*Boumediene v. Bush*, 2008). The Court made sure to note that this was not a hypothetical possibility, as it cited the experience of Mohamed Nechla, one of the case's petitioners. Nechla requested that authorities contact his employer to provide evidence he was not affiliated with al Qaeda in his CSRT hearing. His employer's testimony was deemed relevant but officials "also found the witness was not reasonably available to testify at the time of the hearing. Petitioner's counsel, however, now represents the witness is available to be heard… Even under the Court of Appeals' generous construction of the DTA, however, the evidence identified by Nechla would be inadmissible in a DTA review proceeding" (*Boumediene v. Bush*, 2008). This example is in part what led the Court to deem the DTA an inadequate set of procedures for status reviewal.

The Court then parses through what exactly is meant by sovereignty as both a political and legal issue. The Court "do[es] not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense" over

GTMO (*Boumediene v. Bush*, 2008). The *de jure* sovereign is Cuba. But the Court did not end at this point. As much as sovereignty means a state's control over an area to the exclusion of others, the Court notes that "it is not altogether uncommon for a territory to be under the de jure sovereignty of one nation, while under the plenary control, or practical sovereignty, of another" (*Boumediene v. Bush*, 2008). Indeed, this is what occurred with Guantanamo Bay as a result of the Spanish American war. The Court was willing to go as far as saying "by virtue of its complete jurisdiction and control over the base, [the U.S.] maintains de facto sovereignty over this territory" (*Boumediene v. Bush*, 2008). This assertion of American de facto sovereignty allowed the Insular Cases to be factored into consideration. The Insular Cases allow for extraterritorial application of the constitution "in part in unincorporated Territories" (*Boumediene v. Bush*, 2008). American de facto sovereignty allowed for some application of constitutional provisions, including the habeas writ. The Court rejected the State's view that de jure sovereignty was needed, asserting that "[n]othing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus" (*Boumediene v. Bush*, 2008). Relying squarely on de jure sovereignty "raises troubling separation-of-powers concerns" because "[o]ur basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply" (*Boumediene v. Bush*, 2008). Similar to the 2004 enemy combatant cases, because the role of the judiciary was at stake the Court was willing and incentivized to offer such a rebuke of the State (Vladeck 2014).

The *Boumediene* Court concluded that GTMO detainees were entitled to some degree of a Fifth amendment to due process. The Court also contended with the realities of war, stating that

> In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody. If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time (*Boumediene v. Bush*, 2008).

The *Boumediene* plaintiffs had been in U.S. custody for six years, so this deference stipulation is not applicable to these detainees according to the Court. The Court also casted doubt on the Court of Appeals' ability to "complete a prompt review of their applications," and requiring the detainees to go through the DTA review process to evaluate their enemy combatant status would result in months or years in delay (*Boumediene v. Bush*, 2008). The Court does concede to the State that delays are a part of going through the legal system, and "[w]hile some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody" (*Boumediene v. Bush*, 2008). Therefore the detainees at the center of this case were permitted to file their habeas petitions to the District Court rather than go through the DTA process in the Court of Appeals.

Boumediene's significance has multiple components. First it asserted that the U.S. is the de facto sovereign over Guantanamo Bay, and that in turn this de facto sovereignty requires some extraterritorial applications of the constitution. This application encompasses the Suspension Clause, and the Court determined that the Military

Commissions Act designed to suspend habeas writs was in violation of this clause. Applying the Insular Cases to GTMO resulted in some degree of due process for detainees at this location. This ruling resulted in a revised Military Commissions Act in 2009 that did not include the same suspension of jurisdiction and habeas corpus.

A Change in Executive

The transition from the Bush administration to Obama administration also marked a transition in which branch of government would lead the push to keep GTMO open. As part of his presidential campaign, then-candidate Barack Obama pledged to close the Guantanamo Bay detention center. As president on January 22nd, 2009 he issued Executive Order 13492 which called for a review of all GTMO detainees and for the facility to be "closed as soon as practicable, and no later than 1 year from the date of this order" (Executive Order 13492, 2009). The order also called for a review of all detainees at GTMO, and if individuals remained at the time of closure they should "be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States" (Executive Order 13492, 2009). However, Guantanamo remained open well past a year from President Obama's Executive Order. It still operates today, albeit with a much smaller detainee population. What happened that resulted in GTMO remaining open today?

The optics of having GTMO detainees transferred into congressional members' districts was viewed as a major political risk. No member of Congress wanted detainees transferred into their districts when their constituents would likely respond by voting

them out of office for allowing it to happen. Congress took up the mantle of maintaining GTMO operations in 2011 with the National Defense Authorization Act, which cuts funding for transferring detainees from Guantanamo to U.S. federal detention sites. While Obama made a signing statement expressing that he viewed this as Congress stepping over his presidential power, he signed the act with the provisions intact (Gerstein 2011). Congress defunding transfers acted as a de facto way of keeping detainee proceedings at Guantanamo. Therefore, with the MCA of 2006 labeled unconstitutional, Congress needed to go back to the drawing board.

Significance of the Era

The period 2004 to 2008 was a time of significant change for GTMO. The Supreme Court's involvement forced GTMO to radically change from an exceptional zone to a space that would be contested between the executive, Congress, and the judiciary. After the enemy combatant cases of 2004, the Department of Defense set up CSRTs as a means of complying with the Court's insistence of a neutral body for classification designation appeals. The Court's intervention resulted in habeas corpus and due process language being used in discussions on GTMO detainees, whereas before this era the applicability of these rights was an unknown. In this era Congress pushed back at both the executive and judiciary. Through passing the DTA, they critiqued the executive's views on enhanced interrogation, and by limiting jurisdiction for habeas petitions, they attempted to curtail the influence of the Supreme Court. This era saw the introduction of the concept of due process inside this space. However, the ways in which due process rights were introduced on a gradual sliding scale illustrate that they can

become malleable concepts during the back and forth transitions between the exception and the administrative. The last era covers GTMO developments from 2009 to the present; and will serve to provide an up to date account on how the facility operates.

Military Commissions Act (2009)

After suspending military commissions in January 2009, Obama announced in May 2009 that he "was considering restarting the military commission system with some changes to the procedural rules" (Elsea 2014, 3). The MCA of 2009 was passed as part of the Department of Defense Authorization Act of 2010. This MCA maintained the rights detainees had under the 2006 system, such as the presumption of innocence and right to present evidence. However, it also contained several key departures from its predecessor. The MCA of 2009 eliminated its predecessor's Section 7 that *Boumediene* (2008) deemed unconstitutional due to restricting habeas corpus rights of detainees. Another important change to note regards the use of coerced evidence obtained prior to the DTA. Under the prior MCA coerced evidence could be admitted if it were deemed to have a certain probative value and if the interests of justice warranted such evidence. The revised MCA "eliminates the distinction above, making statements obtained through cruel, inhuman or degrading methods inadmissible regardless of when they were made" (Elsea 2014, 27). This meant that coerced statements made before the passing of the DTA became inadmissible. The MCA of 2009 has a new section called classified information procedures, which deals with how to handle, restrict, or close hearings in the interest of protecting classified information (Elsea 2014, 22). Section 5 also asserts that the military judge may "object to any question or line of inquiry that may require the witness to

disclose classified information not previously found to be admissible during testimony" (Military Commissions Act 2009). The MCA provides access to a military lawyer and also permits detainees to hire civilian lawyers who meet certain requirements, such as being a U.S. citizen and having a certain level of security clearance. The MCA of 2009 also provided guidelines in determining the voluntariness of a statement, advising military judges to take into account

> 1) the details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities; 2) the characteristics of the accused, such as military training, age, and education level; and 3) the lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused (Rondon 2012).

Yolanda Rondon characterizes the MCA of 2009 as an expansion of due process rights from the act's 2006 counterpart. She points to the elimination of allowing coerced evidence and taking the voluntariness of statements in the totality of circumstances (Rondon 2012). This MCA offers a more substantive due process because of these provisions, but it is not without its own issues.

It is important to emphasize that "the MCA does not address the monitoring of communications between the accused and his attorney, and does not provide for an attorney-client privilege" (Elsea 2014, 24). Previously, the Department of Defense at times has insisted that "civilian counsel were required to agree that communications with the client were subject to monitoring. That requirement was later modified to require prior notification and to permit the attorney to notify the client when monitoring is to occur" (Elsea 2014, 24). This monitoring has raised concerns as to how effective a detainee's lawyers can be when working in an environment that is subject to surveillance.

In fact, this Congressional overview addresses allegations of microphones in attorney client meeting rooms as far back as 2013. Lawyers discovered these microphones hidden inside smoke detectors (Rosenberg 2013). Monitoring attorney-client meetings is an issue that has persisted in select GTMO cases, resulting in additional layers of procedural confusion.

A Change in Executive

The election of President Trump in 2016 leaves GTMO even more of an open question than in years past. Trump has signaled intent to keep GTMO open, and potentially use it as a space to detain ISIS members going forward. In 2018 Trump signed an executive order keeping the facility open, but no new detainees have been transferred to the site. One detainee was transferred from GTMO to his country of origin under his administration as per the detainee's 2014 plea deal. Also in 2018, the Office of Special Envoy for Guantanamo Closure (GTMO Closure Office) was closed. The GTMO Closure Office, which had been run through the State Department, was tasked with negotiating transfers of GTMO detainees to either their countries of origin or a third party country. The office also acted as a source of information about detainees after their release from GTMO. Closing this office has consequences for GTMO operations, and it can be argued that its closure poses a threat to national security. Losing the means to keep track of detainees after their release from GTMO is a loss to the intelligence agencies. Moreover, negotiating transfers will be made more difficult without this office. Furthermore, eliminating this office has "increased the government's difficulty in fulfilling its plea

agreements, making it less likely that GTMO detainees will cooperate in the dysfunctional military commissions system" (Farley 2018). As we will see in the next chapter's case study, fulfilling plea bargains under the commissions system has remained a complex and complicated matter.

Larger Implications

In this chapter we have discussed how the three branch's actions toward shaping GTMO can be read as both exceptional or administrative, depending on the point in time and particulars of the case(s) at hand. GTMO's nearly twenty year history as a War on Terror detention center has been characterized by a slow and contested implementation of habeas corpus, due process, and elements of international law. Overall, the role of law inside this space has increased as the Supreme Court pushed back against the executive and Congress's insistence that the judicial branch lacked jurisdiction. The tension between the branches resulted in the implementation of due process rights at GTMO in a particularly peculiar manner. Habeas corpus and due process remain hotly contested issues in regard to GTMO detainees. The next chapter will go in depth at how due process has unfolded by analyzing detainee Majid Khan's trajectory to and at Guantanamo Bay. Khan's case is illustrative of the concept due process lite; rights were implemented in a gradual pace in ways that detracted from their original intent, and these deviations had certain consequences as a result. These consequences reach the levels of life, death, and torture in custody and warrant heavy analysis.

Chapter 3: Majid Khan and Due Process Lite

We have discussed GTMO's ability to shift in real time along the exceptional-administrative dimension, as well as how the tensions between the three branches molded GTMO into the space it is today. After the Supreme Court designated that habeas corpus and due process rights needed to exist in some capacity inside this setting, the CSRTs and military commissions were meant to meet this requirement. This chapter analyses the case study of Majid Khan, a detainee who had been held in purely exceptional black sites prior to his rendition to GTMO in 2006. Through an analysis of Khan's timeline in custody, we can discern when due process enters GTMO, how the entrance of due process unfolded, and what his case can illustrate in regard to due process rights lite as a concept.

Majid Khan's case is valuable to understanding due process lite because his case is an example of the implications and consequences of due process rights undergoing departures meant to detract from their meaning. After his transfer to GTMO in 2006, his case became a 'legal question mark' that needed to be dealt with by both the executive and judiciary. Khan's case can be discussed in terms of how law operates or does not operate, in various detention sites in the post 9/11 context. Examining this case allows us to see the real world implications of the deviations due process has undergone in this space. Khan's case is significant for understanding the concept of detainees going forward at GTMO.

In particular, three areas of rights concerning Majid Khan were impacted: habeas corpus, due process, and access to counsel. These departures were facilitated by the

contestation between the three branches of government discussed in the prior chapter. The Supreme Court's rulings mandated that there be some integration of rights within GTMO, but the *Rasul* Court failed to address how future proceedings should operate and the *Hamdi* Court allowed for significant but unspecified deviations in legal proceedings in the military commissions. As this chapter will show, the shift from a law-free zone to an administrative space simultaneously created conditions for what I term 'due process lite,' which entails legal rights taking significant departures from their traditional definitions.

Why do the deviations happening to these rights matter? By creating a space where due process lite can exist, both constitutional and international law are undermined in terms of substantive liberty and justice both in this space and more generally. Efforts to assert GTMO's legitimacy through layers of law include the CSRT process and the military commissions process. These conditions for GTMO's legitimacy resulted in a new form of due process that does not carry the same degree of meaningfulness that due process in its traditional form is meant to carry. For detainees such as Majid Khan, this due process lite regimen has implications at the level of life, death, torture, and continued detention. As GTMO became a more administrative space, Majid Khan experienced first-hand how due process lite became implemented. Certain aspects of rights are provided at GTMO but in a manner that diverges from their original meaning, and therefore diverges from how they are experienced.

This chapter will examine Khan's case in relation to three aspects of due process. These aspects are access to counsel, which includes how easy or difficult accessible

counsel is as well as counsel's access to evidence and witnesses. Another aspect of due process is the conditions of detention. How is torture in this context dealt with in relation to due process? When Guantanamo was exclusively an exceptional space divorced from law, these issues did not need to be explicitly addressed. However, when more sources of law were introduced these elements of due process needed to be addressed in some capacity. Looking at Majid Khan's case allows for an examination of to what extent these facets of due process have been defined, dealt with, and put into practice.

Background

Before discussing Majid Khan's case in relation to the elements of due process and detention, it is important to discuss how Majid Khan ended up at GTMO. The timeline consists of four core blocks of time. 1996 to 2003 is the first of these periods, which involve Khan's life in the United States and his travels to Pakistan. 2003 to 2006 marks his arrest in Pakistan and his detention at various black sites. There is somewhat extensive documentation of this period in the Senate's 2014 report on CIA torture tactics. Khan is one of the primary focuses of this report. This report will be used to provide details of Khan's time in CIA custody. In September 2006, President Bush designated Khan as a "high value" detainee and ordered his rendition to the Guantanamo Bay detention facility, where he has been held since. 2006 to 2012 entails litigation from the Center for Constitutional Rights (CCR) on behalf of Khan to get him access to counsel, as well as efforts to preserve evidence of torture. In 2012, Majid Khan pled guilty in exchange for a plea deal. The period of 2012 to the present will be examined for the ramifications of his plea deal to the present day.

Context, Capture, and Charges

Majid Khan is a 38 year old Pakistani citizen with U.S legal residentship. Khan moved to Baltimore, Maryland with his family in 1996. He was granted political asylum in 1998 (Joint Task Force 2008). While in Baltimore, Khan's father, Ali Khan, owned and operated a gas station that Majid Khan worked at. Majid Khan graduated from a Baltimore high school in 1999. He also applied for Permanent Resident Status in this year. He worked as an Oracle Database Administrator for the Maryland Office of Planning after graduating high school. He also volunteered at the Islamic Society of Baltimore[16] as a database administrator for the center's youth careers program (*Khan v. Bush* 2006, 8). The government's Joint Task Force-GTMO Assessment of Khan states that in January 2002, Khan traveled to Pakistan to "attend numerous family weddings and find a wife for himself" (Joint Task Force 2008, 3). He married Rabia Yaquob during this trip, to whom he is still legally married to and had a daughter who was born after his arrest in 2003. After marrying Yaquob in 2002, Khan returned in the U.S. on March 15th of that year, while his wife remained in Pakistan. During his CSRT hearing, Khan claimed that he cooperated with the FBI in at some point in 2002 to detain an illegal Pakistani immigrant, although the FBI declined to comment on this remark during the time of the hearing, so the validity of this claim is uncertain (Rich 2007). The JTF report claims Khan told his parents he wanted to return to Pakistan in July 2002. The JTF report states that his parents withheld his passport, but eventually returned it to Khan when he

[16] Also referred to as IBS in court documents, the organization provides prayer services, daycare, and community programs to the Baltimore Muslim population.

convinced them he would stay in the U.S. Contrary to the alleged promise he made to his parents, he did return to Pakistan in March 2003. He stayed with his brother Mohammed Khan and his wife, who had recently gave birth to the Khan's niece. In November 2002 the JTF report describes Khan's efforts to convince U.S. authorities he was in the country while he actually was in Pakistan. Aafia Siddiqui flew to the U.S. to pose as his wife and apply for a P.O. box (Joint Task Force 2008, 4). Later that year a different man, Uzhair Paracha, went to the post office posing as Majid Khan and provided a change of address. Money was deposited into this account to give the appearance that Khan was in the U.S. at the time. Paracha also called the U.S. Immigration and Naturalization Services office posing as Khan to obtain unspecified travel documents.

This period is when the State asserts that Khan became associated with al Qaeda leader Khalid Sheikh Mohammed. The government cites interviews from various friends and family of Khan, such as Iyam Faris, Khan's father, and Khan's brother. Iyam Faris was a friend of the Khan family. Faris is a Pakistani-American citizen who acted as a double agent for the FBI against al Qaeda until it was discovered he was actually affiliated with al Qaeda. Faris told government officials that Khan referred to Khalid Sheik Mohammed as his "uncle" and that he considered becoming a suicide bomber to assassinate Pakistani President Pervez Musharraf (Rich 2007). Khalid Sheik Mohammed is considered the principal leader of the 9/11 attacks and has been detained at GTMO since 2003, a few days prior to Khan's arrest. These assassination plans also are discussed within Khan's Joint Task Force Assessment.

The State's account is not the only account of this interview. Faris offers a conflicting version of events in his voluntary written responses as his testimony in Khan's CSRT hearing in 2007. This account, of course, was given years after the initial encounter with State officials, and Faris's collaboration in a plot to destroy the Brooklyn Bridge does not exactly make him a reliable witness. However, this does not mean his version of events should be left out of this discussion entirely. In his testimony for Khan's CSRT, officials inquired about a "mid 2001" dinner Faris attended at the Khan family home in Baltimore. Question 1 implies that Khan and Faris spoke about "the fighting and struggle in Afghanistan," yet in his answer Faris states the discussion revolved around "religious duty and what he liked to do in life, like work in construction and not in his father's business" ("Verbatim" 2007, 10). When asked about Khan's relationship with KSM and his intention to martyr himself to assassinate the Pakistani President, Faris said "[t]hat is an absolute lie" and that he was coerced "by the FBI. If I don't tell them what they wanted to hear, they were going to take me to GTMO" ("Verbatim" 2007, 10-11). These statements are part of a pattern of assertions that previously-made statements regarding Khan were false. The conflicting aspects between the State's version of events and Faris's version cannot be completely resolved; but noting that the conflict exists deserves attention, considering there is a thread of contradictory statements throughout the case that contain strong elements of coercion.

Additionally, there is a thread of contradiction between Khan's father and brother's version of events and the State's version of their accounts in CSRT records and media interviews. Government documents cite statements from Khan's father saying his

son has been "influenced by anti-American thoughts" and that his brother, Mohammed Khan, claimed he was "involved with a group believed to be al-Qaeda" (Rich 2007). In a letter submitted during the CSRT process, Khan's father wrote that "[a]nything we may have said about Majid Khan was simply out of shock because we only knew that Majid had disappeared and was pure speculation based on what FBI agents in the United States told us and pressured us to say" (Rich 2007).

Regarding Khan's capture, the Department of Defense acknowledges that "there are few details of [the] detainee's actual capture" and that Khan was arrested in Karachi, Pakistan on March 5th, 2003 (Joint Task Force 2008, 4). The Department of Defense notes in their JTF Report that the arrest "was likely as a result of his connections to Khaled Sheik Mohammed" (Joint Task Force 2008, 4). Other than these details, there is not much else discussion in the report regarding his arrest. However, the Department of Defense is not the only source of an account surrounding Khan's arrest. His CSRT hearing transcript does contain significant description of this arrest, albeit with redactions. In his written statement read to the CSRT hearing, Khan says that "I was sleeping in the apartment where my brother and my sister in-law and two-month-old niece lived in Karachi. Pakistan. At approximately 4:00AM we were all kidnapped by Pakistani [REDACTED]" ("Verbatim" 2007, 22). A 2006 filing clarifies that this home was located in Gulistan-e-Jauhar, Karachi (*Khan v. Bush,* 2006). Khan's relatives were taken into custody with him and were released "after a few weeks" ("Verbatim" 2007, 23). Other records describe his sister-in-law and niece being released after one week, and his brother being held for one month (*Khan v. Bush,* 2006). Their father was able to talk

to Mohammed, who in turn had been allowed to talk to his brother during this period. Between the time of Mohammed Khan's release and Majid Khan's transfer to GTMO in September 2006, the family received no word regarding their relative's whereabouts. An account with a similar degree of detail is not given within JTF, so there is not much to either confirm or contest this version of events.

Khan was accused of attempting to assassinate the former President of Pakistan and transferring $50,000 to Al-Qa'ida that assisted the terrorist organization in successfully bombing an Indonesian hotel which killed 11 people (Joint Task Force 2008). He was also accused of agreeing to work with KSM to discuss how to carry out terrorist attacks in the United States. Military officials argued because he worked at his father's gas station while in the U.S., he had enough background knowledge to assist in planning terrorist attacks such as blowing up gas stations (Finn 2012). The U.S. also accuses Khan of working with Osama Bin Laden, which he denied in his CSRT hearing. Khan has repeatedly offered to take a lie detector test to prove this and his other claims, but he has been denied by U.S. military personnel to do so (Joint Task Force 2008). In 2012 Khan pled guilty conspiracy, murder and attempted murder in violation of the law of war, providing material support for terrorism, and spying (Wittes 2015).

Extreme Exceptionalism: Transgressions in Practice

As previously mentioned, Khan's whereabouts from 2003 to 2006 were not publicly known. In this period he was held at either one or multiple CIA black site(s). These detention sites operate as purely exceptional spaces, referring back to the concepts discussed in Chapter 1. In a setting of exceptional detention, deviations from the rule of

law become standard operating procedure. Individuals held in these black sites do not have any access to due process or the capability of challenging their detention. They are, as Agamben would argue, removed from a rights-bearing status and exist outside the legal world of classification. This section will discuss what is publicly known about Khan's time in CIA custody through the Senate Intelligence Committee's report about torture in interrogation. The goal of the following sections is to illustrate how Majid Khan's experience shows the lived consequences of this type of detention in relation to due process, even after Khan's detention transitions away from Agamben's concept of the exception and into an administrative sphere. Khan's detention in an exceptional space would later act as justification for the continuation of blocking access to habeas corpus and due process. Therefore before delving into his legal proceedings at GTMO, it is important to detail what occurred prior to his rendition.

After Khan's arrest in Pakistan, he was detained first in Pakistani, then CIA custody for three years. The CIA black site program for terrorist suspects emerged in the early days after 9/11 when there were imminent fears of a second attack on the same horrific scale (Priest 2005). The CIA program consisted of a network across various foreign countries, including Afghanistan, Pakistan, Thailand, and several Eastern European countries. The locations of these facilities are classified and "virtually nothing is known about who is kept in the facilities, what interrogation methods are employed with them, or how decisions are made about whether they should be detained or for how long" (Priest 2005). Priest describes a debate within the agency regarding the "legality, morality, and practicality" of the black site program and that some mid-level and senior

CIA officials viewed the black site program as "unsustainable and [that it] diverted the agency from its unique espionage mission" (Priest 2005). Priest also notes the illegality of holding such detainees in isolated secret prisons in the United States, which resulted in establishing black sites abroad. However, she also brings up the illegality of such practices within host countries where detainees theoretically would have the right to a lawyer and an opportunity to present a defense against allegations of terrorism or terrorist related activity. Host countries of these black sites have signed and ratified UNCAT. The U.S. has also signed and ratified UNCAT. However, within these black sites CIA officials utilized "enhanced interrogation techniques," including those prohibited under international and U.S. military law (Priest 2005). These tactics include waterboarding, which simulates drowning, as well as wallings, beatings, sexual harassment by female guards, and sexual assault through rectal feeding. Khan's time at CIA black sites is a textbook example of an exceptional space in action. Khan's location was not known to his family and he had no recognizable legal rights within this space. There is no pathway to access law in a black site, and this is by its exceptional design.

The Senate Select Intelligence Committee's 2014 report regarding torture in custody is an extensive examination of CIA enhanced interrogation practices within an exceptional detention facility. The full classified report is at least 6,700 pages long, but a 712 page report that discusses key findings and provides summaries of its classified counterpart was released to the public, so this version will be used in this discussion. This report examines the CIA's "abuses and countless mistakes made between late 2001 to early 2009" (Senate 2014, 2). Khan's detention before GTMO falls within this timeframe,

as he was in CIA custody for three years within this period. His case is discussed both in general cases of enhanced interrogation tactics and in specific detail. While the locations of the black sites Khan was held in are mostly redacted, reporting from *The Washington Post* discusses the account of a detainee who claims to have seen Khan at the Salt Pit. This information about the black site was already publicly available, and the *Washington Post* even asserts that the Salt Pit was "in a land where there were no laws" (Leonning 2006).

As part of the enhanced interrogation program, Khan was "stripped and shackled nude, placed in the standing position for sleep deprivation, or subjected to other CIA enhanced interrogation techniques prior to being questioned by an interrogator in 2003" (Senate 2014, 77). Additionally, after being renditioned into CIA custody he "was subjected by the CIA to sleep deprivation, nudity, and dietary manipulation, and may have been subjected to an ice water bath" (Senate 2014, 89, footnote 497). While there is no specific date for Khan's transfer from Pakistani custody to CIA custody, it can be inferred it occurred before June 30th, 2003, as emails within the CIA on this date discuss Khan's case (Senate 2014, 89, footnote 497). These interagency emails discuss approvals for enhanced interrogation. The sender and recipient are redacted, but what content is given is worth looking into to understand Khan's experiences within a black site. In the June 30th email, the subject line stated that "Re: i hope the approvals for enhanced comes through quickly for this guy...this does not look good" (Senate 2014, 89). This email is indicative of the CIA already having custody of Khan and that there were some undefined difficulties in the interrogation process. No further information is given regarding this

specific email in the Senate's report. There is, however, an additional email from June 2006. In this email, a CIA official wrote that Majid Khan said he "fabricated a lot of his early [CIA] interrogation reporting to stop...what he called 'torture'" (Senate 2014, 89). The email also provides Khan's description of being *"hung up"* for "approximately one day in a sleep deprivation position and that he provided *"everything they wanted to hear to get out of the situation"* (Senate 2014, 89, italics mark specific email quotes). These CIA emails provide a window into what interrogation in sovereign-designated exception looks like. Memos eventually existed about the procedures to be used in a controlled manner, which is indicative of administrative elements trickling into an exceptional space. However, as the Senate report shows, these practices were divorced from congressional or judicial oversight. This separation of executive decision-making from congressional or judicial influence warrants the exceptional label.

Additionally, CIA cables and records indicate that Khan had been "subjected to rectal rehydration without evidence of medical necessity" (Senate 2014, 100). Once he obtained counsel in 2006, his lawyers asserted that this constituted rape. According to the report, from March 2004 to September 2006 Khan partook in "a series of hunger strikes and attempts at self-mutilation" (Senate 2014, 114). These suicide attempts included wrist cutting and "an attempt to chew into his arm at the inner elbow" (Senate 2014, 115). These drastic measures are illustrative of Khan's deteriorating mental health and offer a look at the impacts of enhanced interrogation. Within the report there is also a discussion on CIA exaggeration of the effectiveness of enhanced interrogation. At one point in time, a redacted official who served as the CTC Chief of Operations inaccurately depicted the

CIA as a vehicle of intelligence gathering for terrorism prevention. This official had been asked to name an instance in which CIA detainees provided information that led to a terrorist arrest. He claimed that Khan provided information that led to the arrest of Iyam Farris, but as the Senate points out, "Khan was not in CIA custody when he provided information on [Faris]," which meant that such CIA enhanced interrogation measures did not lead to that information (Senate 2014, 183). The report also reveals that Khan admitted to transferring $50,000 to an al-Qaeda affiliate while in the custody of a foreign government that used rapport building as an interrogation method, not while he was in CIA custody.

This report provides as in-depth of a look into black site operations as is practically available. Black sites are very much exemplary of exceptional spaces. There was no congressional oversight over these detention facilities, as Senator Rockefeller (D-WV) notes in his Additional Views section. He wrote that this program represented a "breakdown in our system of governance that… happened … through the active subversion of meaningful congressional oversight" (Senate 2014, 500). Within black sites such as the one(s) Khan was detained at "transgression of the law [became indistinguishable] from execution of the law" (Agamben 1998, 57). This occurred in part because of active evasion of congressional oversight. This space was constructed by the executive to exist outside the bounds of congressional authority and other sources of legal authority such as the courts.

Torture clearly occurred in this case as a result of this construction. Evidence of this construction is made apparent through a review of the executive memos from the

period. On the one hand, these memos framed torture as taking place in an exceptional setting. These memos helped push the mindset that Geneva Conventions obligations were incompatible with the new paradigm the U.S. found itself in. Torture was permitted because of this new paradigm. On the one hand, deference to the executive could be used to circumvent any criminal liability. The most infamous memo argued that enforcing anti-torture laws amounted to infringing on presidential power and therefore were not enforceable if they were at odds with such power. On the other hand, however, there are the beginnings of administrative elements at play here. These memos served a dual purpose by establishing a legal defense attached to ideas of presidential power and self-defense for those involved in the detention program. Efforts to build such a legalistic defense show the beginnings of administrative elements trickling into detention practices. These elements would continue to make their way into detention practices on a greater scale within Guantanamo Bay itself.

During the same period of Khan's CIA custody, the courts were involved in the litigation of due process rights within Guantanamo Bay. The CIA had abandoned its black site at Guantanamo. The agency in charge of GTMO is the Department of Defense, who was not able to evade oversight from legal actors as well as the CIA. While Khan was held in CIA custody during this time, *Rasul, Hamdi,* and *Hamdan* had already been decided. The DTA had also been passed in 2005 which contained stipulations against torture and cruel, inhuman, and degrading treatment. Law was clearly already at work in constructing a new operating procedure at GTMO by the time Khan was renditioned there in September 2006. What did the introduction of detainees who had previously

existed in exceptional facilities mean for an increasingly administrative GTMO? This question will be explored in the following sections for its significance for both Khan and the concept of detainees.

The Rise of 'Due Process Lite'

The remaining sections of this chapter examine the litigation battles between the State and the Center of Constitutional Rights (CCR) on Majid Khan's behalf, as well as the subsequent plea deal proceedings from 2012 onward. The back and forth between these two parties resulted in the accumulation of 'due process lite,' a deviation of standard substantial due process in which rights operate in distinct ways from their traditional counterparts in federal court. Access to counsel at GTMO is a primary example of due process lite in action. Access to counsel may be given, but the process of obtaining that counsel and the ways in which it is restricted detract from why one has access to counsel in the first place. Due process lite occurs when there is a shift from an exceptional site of detention toward an administrative site. It unfolds gradually over time and offers a space a certain kind of legitimacy that is desirable for the state to create. It has significant consequences in regards to constitutional and international law, which are undermined in the site of detention and more generally as interpretations of these laws become muddier in their application to detention sites. The following sections will trace Majid Khan's case at GTMO in regards to how due process lite has emerged.

Transitioning from Exceptional Detention to Administrative Detention

On September 6th, 2006, President Bush formally acknowledged the existence of CIA black sites as well as Majid Khan's detention in CIA custody ("Bush" 2006). Later

that month, Khan was renditioned to GTMO to stand trial via the newly implemented military commission process. When he was renditioned to GTMO, the CCR brought his case to the D.C. District Court to file for habeas corpus. In *Majid Khan v. Bush* (2006) the CCR filed for habeas corpus using his wife Rabia Khan as the Next Friend. This filing asserts that Khan "has not, nor has he ever been, an enemy alien" or enemy combatant (*Majid Khan v. Bush* 2006, 7). They also assert that because Khan was a civilian captured in a non-battlefield setting and did not contribute to the planning of execution of the September 11th attacks that the AUMF should not apply to him. The CCR invoked the fifth and sixth amendments of the U.S. constitution, which guarantee protections against self-incrimination/protections of due process of law and the right to access to counsel, respectively. The CCR also invoked the Third Geneva Convention, the ICCPR, and UNCAT as justification for the writ. They further argued that Section 1005(e) of the DTA that removes jurisdiction over habeas matters was unconstitutional due to the Suspension Clause. This aspect of the argument would eventually reach the Supreme Court in a different detainee case and be accepted by the Court in *Boumediene* (2008).

The CCR argued that Khan should either be released or that the government "establish in this Court a lawful basis for Petitioner Khan's detention" (*Majid Khan v. Bush* 2006, 2). This filing relies in part on a claim for relief vis a vis due process of law. The CCR asserted that Khan had been denied due process rights as a result of the "unlawful transfer of a civilian into the custody of the [U.S.] military and then ... the prolonged, indefinite, and arbitrary detention of Petitioner Khan without due process of

law" (*Majid Khan v. Bush* 2006, 27). In other words, the CCR was challenging the validity of the procedural aspects of GTMO, such as the CSRT process and absence of counsel. The CCR then filed an expedited motion for immediate access to counsel on October 8th. This motion argued that emergency access is needed "in order to assess his mental and physical health and/or injuries as a result of enhanced interrogation techniques used during his secret C.I.A. detention" (*Majid Khan v. Bush* 2006, 3).

Shortly after these court filings, the state entered the debate surrounding Khan's access to counsel by filing an objection to emergency counsel access. They reasoned that the District Court lacked jurisdiction over this matter as per the DTA and MCA of 2006, which was passed shortly after Khan's rendition to GTMO. Both pieces of legislation "by their explicit terms, withdraw habeas and other jurisdiction of the District Courts to consider detention related claims of individuals such as petitioner" (*Khan v. Bush* 2006, Respondents' memorandum, 1). In addition to arguing that habeas jurisdiction had been withdrawn, the government drew upon the "special concerns presented by Petitioner's circumstances" (*Khan v. Bush* 2006, Respondents' memorandum 2). Because of the classified nature of the CIA program and enhanced interrogation practices, the state argued that the habeas motion should be rejected. The government described scenarios in which Khan could potentially disclose top secret classified information such as locations of black sites which would endanger U.S. national security. It is worth noting that before Khan's rendition to GTMO, there were already publicly available reports from both media outlets and the European Union (EU) regarding the use of secret prisons and

rendition (Committee on Legal Affairs and Human Rights 2006)[17]. This EU report discussed the use of various cities around the world as transition points as well as the involvement of Romania and Poland in more permanent black sites. In November 2006 *The Washington Post* reported that Khan had likely been held in the Salt Pit black site in Afghanistan. This reporting occurred during the litigation to obtain access to his counsel. Having access to his CCR attorneys would not have affected the release of this information from these external sources. Lastly, the State's argument also cited a technicality flaw, as Rabia Khan did not sign or verify the petition as is required of Next Friend filings (*Khan v. Bush* 2006, Respondents' memorandum, 3). The most the government would be willing to consider is a further hearing to sort out jurisdictional issues in the case.

These initial filings in the District Court mark the start of how moving a detainee from an exceptional space to an administrative one becomes fraught with challenges and complexity. Just as we saw in Chapter 2 between the Supreme Court and the executive, there is a back and forth to contest what rights Khan will have access to and in what degree these rights can be exercised. This contestation shifts GTMO into a highly administrative space as it occurs on an increasingly case by case basis. These challenges include dealing with conflicting legal actors; while the executive still desired a lawless

[17] In a June 2006 report, several months *before* Khan's transfer to GTMO, the Committee on Legal Affairs and Human Rights wrote that "The central effect of the post-9/11 rendition programme has been to place captured terrorist suspects outside the reach of any justice system and keep them there. The absence of human rights guarantees and the introduction of *"enhanced interrogation techniques"* have led, in several cases examined, as we shall see, to detainees being subjected to torture" (Committee on Legal Affairs and Human Rights 2006). The report specified the use of various European/other foreign cities as stop over, operation, and transfer/drop off points for rendition.

space for Khan, the judiciary was not willing to let go of him completely. This conflict between branches, evident in Khan's case with the issues of counsel and the habeas writ, fostered an atmosphere where due process lite could form. Whereas the Supreme Court ruled in 2004 that detainees were entitled to the writ, subsequent congressional action reversed this course, but then further judicial cases deemed that congressional action unconstitutional. Between the Supreme Court, the District Court of D.C. and the D.C. Appeals Court, Congress, the three executive administrations that have overseen GTMO, and the Department of Defense, there are many administrative actors at play here. Over time, this back and forth within the different apparatuses of the state resulted in GTMO becoming a highly administrative space governed by conflicting sources of law rather than no law. Because of the various sources of law at play here, what these rights looked like and how they were experienced took on significant departures from how these rights are usually understood to operate.

On November 3rd the CCR replied to the government's objection to access to counsel. Their main argument was that they should be granted access to their client because "further delay of Petitioner Khan's access to counsel is likely to cause irreparable harm to his ability to pursue his challenge to the legality of his ongoing detention" (*Khan v. Bush: Reply Memorandum* 2006, 2). They further asserted that the District Court had jurisdiction and that the government is misusing its classification system to indefinitely deny Khan access to counsel. This misuse of classifying information is also aimed to conceal CIA use of torture, according to this CCR filing. According to the CCR there is "[n]o information in the record [that] establishes that

Petitioner Khan possesses properly classified TOP SECRET or TOP SECRET//SCI information" (*Khan v. Bush: Reply Memorandum* 2006, 6). They went as far as to say that "the Executive is attempting to misuse its classification authority [of information Khan may know as a result of his time at CIA black sites] ... to conceal illegal or embarrassing Executive conduct" (*Khan v. Bush: Reply Memorandum* 2006, 6). The CCR critiqued the State's use of "a pattern of erecting barriers to counsel access based on unfounded and blatantly inaccurate assertions" (*Khan v. Bush: Reply Memorandum* 2006, 8) This pattern included justification of monitoring meetings between detainees and counsel, which the Court rejected in *Al Odah v. United States* (2004). The CCR argued that if the Court would reject monitoring such meetings due to a detainee's knowledge about GTMO and interrogation practices, then they should similarly reject constraining a detainee's access to counsel on the same reasoning.

Moreover, the CCR argued that information regarding the CIA black sites and enhanced interrogation had already entered public domain through reporting by news agencies, human rights groups, and accounts from released detainees. The general public already had access to descriptions of facilities, the names of some host countries, and flight records that revealed prisoner transfers (*Khan v. Bush: Reply Memorandum* 2006, 9). The State's view that Khan himself represented a national security risk if he had access to counsel does not make sense in this light. Furthermore, Khan was not the only detainee who was in CIA custody or subject to the agency's interrogation methods. Other former detainees who had been in similar circumstances had been afforded access to counsel (*Khan v. Bush: Reply Memorandum* 2006, 12). These detainees' access to

counsel and disclosure of CIA practices "did not result in further terrorist attacks" (*Khan v. Bush: Reply Memorandum* 2006, 13). The CCR asserted in this rebuttal that

> The Respondents cannot invoke their patently illegal disappearance and aggressive interrogations of Petitioner Khan to justify more restrictive counsel access procedures or any further delay in his access to counsel. Rather, these unique circumstances support his urgent need to consult with his counsel (*Khan v. Bush: Reply Memorandum* 2006, 13).

The CCR was essentially arguing that one period of detention without due process cannot justify another period of detention without due process in a new location. The misuse of the classification system and supposed threats to national security were not sufficient justification in the views of the CCR. It would be approximately a year until this motion for counsel access was granted, and at that point Khan's CSRT hearing had already taken place.

Meeting Counsel

On October 16th, 2007 Majid Khan met with his CCR lawyers for the first time since his detention. Gitanjali Gutierrez, who met with Khan, wrote an op-ed in *The Washington Post* before meeting with her client. She wrote this op-ed because after meeting with Khan she would be restricted in her public discussions about the case. Gutierrez wrote that Khan's "legal status as a person entitled to basic rights is under grave assault" (Gutierrez 2007). This statement gets at the heart of what happens within an administrative detention facility. Rather than remaining a ghost detainee without legal status, Khan would be afforded a classification within the legal system that permits the removal of certain due process rights like access to counsel. This is in part what occurred with his designation as an enemy combatant. However, as the District Court grew more

involved there would be a contestation over what rights Khan had access to in this space. In a purely exceptional space, Khan's classification as an enemy combatant would be justification for a suspension of all rights. This is not what unfolded at the time. Rather, his classification as an enemy combatant acted as a means to argue why the rights to counsel and habeas writ should be denied. When these rights were granted a year later, they were rendered less meaningful because of the time that passed to obtain them. A year at GTMO without counsel renders eventual access to counsel in this space as part of the due process lite regimen. This is because counsel is meant to guide an individual through the legal process and act as his advocate, and a year without counsel creates a more coercive environment in light of his treatment prior to GTMO. The delay in counsel is highly indicative of due process lite's distinctions from due process. Counsel can be given but in a particular way that renders its implementation significantly less substantial in terms of actual legitimacy of the proceedings.

Official Acknowledgement of Torture from the District Court

In 2007 the Majid Khan case would take on additional complexities, as the District Court would officially recognize that Khan was tortured in custody. This acknowledgement was in light of the CIA actively destroying evidence of torture in 2005, although this destruction of evidence was not known at the time of the CCR's filing ("CCR Attorneys" 2008). The CCR filed on November 30th a motion for the D.C. Appeals Court to call on the state to preserve all evidence of Khan's torture. This motion is significantly redacted, although the publicly available version of the document does offer more detail regarding how an administrative space treats such a case. His counsel

asserts that his “torture was decidedly not a mistake, an isolated occurrence, or the world of ‘rogue’ CIA officials or government contractors operating outside their authority or chain of command” and that “the program further appeals to have been carried out under the immediate direction of [REDACTED]...[the program] can only be characterized as *state-sanctioned torture*” (*Khan v. Bush*: Motion for Preservation 2007, 4-5, emphasis added). The Bush administration’s role in Khan’s detention and treatment in custody is likely what is being referred to here. The Bush administration was in power at both the time of Khan’s custody in black site(s) and during the time of this filing. Moreover, looking at statements from President Bush and Vice President Cheney result in the reasonable conclusion that the executive branch is being referenced in the redacted portion of this filing. When Bush announced that Khan would be renditioned to GTMO, he also stated that “[t]he United States does not torture … I have not authorized it, and I will not authorize it” (Karl 2006). Bush did briefly note that "an alternative set of procedures" had been developed for detainees in CIA custody (Karl 2006). This alternate set of procedures included things such as stress positions and waterboarding, among other tactics. In 2014 after the release of the Senate’s report, Vice President Dick Cheney did an interview with Chuck Todd on *Meet the Press.* Todd asked Cheney directly about Majid Khan. Todd specifically referred to the use of rectal feeding that was discussed in the report. Todd asked if “rectal feeding and rectal hydration...met the definition of torture?” (Friedersdorf 2014). Cheney first deflected by asserting “that does not meet the definition of what was used in the program” and then claimed it had been done for medical purposes (Friedersdorf 2014). In this interview, Cheney would only define

torture in terms of the September 11th attacks itself. While on the one hand these attacks should not be diminished in their horror or lasting impact, on the other hand there is a very clear denial and deflection of the facts here. Both the Senate and Khan's lawyers confirm this treatment occurred in CIA custody. No medical personnel would claim there would be medical necessity for such treatment (Friedersdorf 2014).

The D.C. Court of Appeals did order that the government "take all measures necessary to preserve the material described in the motion for preservation of torture evidence" (*Khan v. Gates,* 2007). This order is significant because it is legal acknowledgement that such evidence exists. There is significant contestation as to whether Khan was videotaped during his interrogations. State documents deny this, but notes by his lawyers that were eventually cleared for release detail otherwise. These notes detail how "CIA guards hooded and hung him from a metal pole for several days and repeatedly poured ice water on his mouth, nose and genitals. At one point, he said, they forced him to sit naked on a wooden box during a 15-minute videotaped interrogation" (Rohde 2015). This description of Khan's torture in custody is estimated to have occurred in July 2003. This description contradicts the claims that Khan was neither videotaped or waterboarded. If such tapes do exist and had not been destroyed before the protective order, they would be covered under this preservation order.

If GTMO were a purely exceptional space, the Court of Appeals would not have been able to grant such an order. The Appeals Court's approval of this protective order is indicative of how law can function in an administrative space. Granting such an order helped solidify the court's position in related matters. Whereas the State's arguments in

Khan's habeas petition cast doubt on the lower courts' ability to handle a case of this caliber, this order is illustrative of the courts handling a case that deals with classified information and the implementation of rights in an administrative setting. Similar to how the Supreme Court's involvement functioned in a way to assert their jurisdiction, Majid Khan's case in the lower courts was in part dealt with to push back at the executive viewpoint that the courts should not be involved in this matter. This judicial assertion also shows how law is not absent in GTMO. If law were absent, the Appeals Court would not grant such an order to preserve evidence of torture. Rather, law became a contested tool at GTMO. This contestation allowed due process laws to enter GTMO, but its entrance cannot be divorced from the administrative layerings that occurred alongside it. Therefore, the way due process was introduced into this setting separates it from substantive due process, and is rather more accurately described as due process lite.

Khan's CSRT also occurred in April 2007. Portions where Khan talked extensively about how he was tortured are either redacted or were simply not recorded during the hearing. However, in the transcript he asserts that his confessions during CIA custody are "definitely not true" ("Verbatim" 2007, 30). He was deemed an enemy combatant as a result of this hearing. Like other detainees he did not have a lawyer present, only a personal representative. Khan's CCR lawyers throughout maintained that he was not an enemy combatant and filed an appeal in August 2007 to contest this designation. The D.C. Circuit dismissed this petition in 2008, transferring the case to the District Court for D.C.

Continued Debates Around Due Process

In 2009 the District Court denied Khan his motion for expedited judgement. The court's reasoning merits a look in relation to due process at GTMO. The District Court wrote that

> (1) the petitioner, as an Asylee who was not within the jurisdictional boundaries of the United States of America at the time of his apprehension, is not protected by the Due Process Clause of the Fifth Amendment of the Constitution; (2) even assuming arguendo that the petitioner has Fifth Amendment due process rights, such protections will not necessarily trump the government's national security interest to militarily detain him (*Rabia Khan ex rel. Majid Khan v. Obama,* 2009).

The court went on to further assert that the AUMF provides legal authority for his detention as a result of his non-citizen status. This ruling asserts that Khan is not covered under the due process clause, and even if he were, the national security risks at hand in his case justify his militarily authorized detention. This reasoning in a post-*Hamdi* ruling is important to breakdown. *Hamdi* (2004) determined that enemy combatants were entitled to due process rights to review their detention before a neutral decision maker. The Supreme Court did note in this case that certain deviations from traditional proceedings were apt to occur due to the nature of the circumstances at GTMO. While a deviation that could come out of this ruling would be that enemy combatants cannot motion for an expedited judgement, the District Court here is saying that Khan is not protected under the due process clause at all. This language further shows the constant uncertainty on display for how law operates in administrative spaces. Due process lite has become so malleable that it can apply at various levels for different enemy combatants. This point reveals the significant consequences for detainees moving forward as well as for the cases discussed within this work.

The Context of Plea Bargaining

Plea bargaining is seen as a core part of the U.S. justice system in the 21st century, despite its relatively recent rise in the court system. At its simplest definition, plea bargaining is described as "the negotiation of an agreement between a prosecutor and a defendant whereby the defendant is permitted to plead guilty to a reduced charge" ("Plea Bargaining"). An expansion beyond the Merriam-Webster definition leads into debate over the merits of plea deals. John H. Langbein defines plea bargaining as "a nontrial mode of procedure…[that] has serious drawbacks. In particular, the accused cannot present defenses and have his guilt proved to a jury beyond a reasonable doubt--his greatest safeguard against mistaken conviction" (Langbein 1979, 261-262). At GTMO, where rights are already contested to a great degree, plea bargaining is another aspect of due process lite that Khan's case allows us to examine for its significance in relation to the legal process at GTMO.

The Supreme Court deemed plea bargaining constitutional in *Brady v. United States* (1970). *Brady* held that the possibility of the death penalty did not amount to coercive conditions in a plea deal. *Santobello v. New York* (1971) expanded on plea bargaining jurisprudence, asserting that "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities" (Langbein 1979, 262). Langbein warns that plea bargaining is a "procedure [that] subverts the design of our Constitution, which provides that 'in all criminal prosecutions, the accused shall enjoy the right to...trial…by an impartial jury" (Langbein 1979, 261). With the Court deeming plea bargains

constitutional in 1970, the frequency of guilty pleas in federal district courts increased from 85% in 1984 to 94% in 2001 (Fisher 2003). While these definitions, rulings, and statistics all discuss the domestic context of plea bargaining inside the U.S., they are valuable tools to analyze the even more recent developments of the intersection of plea deals at GTMO. *Brady* is especially relevant considering the circumstances and stakes of the military commissions at GTMO. While the possibility of the death penalty is not indicative of coercion under the *Brady* statute, what about the threats of indefinite detention and torture, the common threads throughout Khan's detention?

Majid Khan's Plea Deal

Majid Khan pled guilty to conspiracy, murder and attempted murder in violation of the law of war, providing material support for terrorism, and spying in 2012 as part of a plea deal (Wittes 2012). According to the terms of the deal, Khan would plead guilty in 2012 but not be sentenced until 2016. This four year gap was meant to allow Khan to cooperate with U.S. officials in order to receive a more lenient sentence. If Khan cooperated in the four year period between his guilty plea and his sentencing, his deal stipulated he would be sentenced to a maximum of 19 years. At most his sentence could be 25 years. However, as Finn noted at the time of the deal, "[a]t the conclusion of a detainee's sentence, the government reserves the right to hold him as an enemy combatant until the end of hostilities, which may well be never" (Finn 2012). The nature of the War on Terror as This aspect of the deal is characteristic of an administrative detention center. If the new type of a state of emergency never ends because emergencies

have become coded into law, then this path to indefinite detention despite the absence of a life sentence becomes clear.

In a statement to the press after Khan's plea, Chief Prosecutor Mark Martins make some remarks to the press that merit an analysis in relation to the administrative lens. Martins asserted that this conviction "affirms that [Khan's] years of detention *to date* have been grounded in strong legal authority" (Wittes 2012). Furthermore, Martins stated that Khan "has been well-advised by a zealous and competent team of three defense counsel, having regular access to that defense team" (Martins). These statements warrant attention. They represent a reconfiguration of the facts. Khan's access to counsel only occurred because of a year of litigation and strong opposition from the state. Constructing this access to counsel as "regular" glosses over the contentious legal battle that occurred to obtain this counsel. In this line of reasoning, this plea deal confirms the legality of Khan's detention in CIA custody as well as his detention at GTMO. This deal provides legitimacy to Khan's time in CIA custody and minimizes the torture he experienced. The conditions of Khan's plea deal provide basis for this claim. Once his guilty plea is accepted by the court, he "will not initiate any legal claims against the United States Government, any United States Government Agency or official, or any civilian or civilian agency regarding [his] capture, detention, or confinement conditions prior to [his] plea" (*United States v. Majid Khan* 2012, Offer for pretrial agreement). Rather than risk an adversarial trial in which evidence of torture would be discussed, the state opted to integrate a loophole in Khan's plea agreement. The use of a plea deal has allowed the U.S. to create a loophole which allows it to benefit from evidence gathered through

torture, without having to rely on it at trial. Plea deals such as Khan's are a part of how due process lite is being formed in an administrative GTMO. Even if Khan is sentenced in 2019 to the stipulated 19 to 25 years, there is no guarantee that the end of this sentence means the end of his detention. Plea bargaining in a domestic setting has already been criticized for its coercive nature. At GTMO, Khan's case represents one of only a handful of plea bargains. Khan's case is inseparable from the history of torture in detention, and therefore his case illustrates how plea bargaining has been ingratiate into due process lite by providing means to both legitimize and circumvent accountability for the conditions of Khan's detention and active efforts to block him from meeting counsel.

Khan's plea deal reflects the Obama era goal of finding some resolution to Guantanamo. Carol Rosenberg[18] characterizes the deal as "the Obama administration...unveiling its latest strategy toward an endgame" for GITMO detainees (Rosenberg 2016). Rosenberg notes that Khan's guilty plea comes after "a decade in detention...interrogation without charge [and] isolation...His lawyers will be allowed to bring this up at sentencing...in a plea for leniency" (Rosenberg 2016). Rosenberg interviewed Navy Lt. Cmdr. Charlie Swift, who commented on the difficulties of having a trial with evidence obtained through the CIA black site program. He said, "The way you avoid the door to the dark sites is you don't use the material...But in the end they can't avoid it. They wouldn't know he was a potential witness unless they tortured him" (Rosenberg 2016). Khan's case is so heavily rooted in his confessions made during CIA

[18] Rosenberg has been reporting on GTMO matters for the majority of its use as a War on Terror detention site for *The Miami Herald*, and most recently has been hired by *The New York Times* to continue her reporting.

custody that the only way to 'avoid the door' was to obtain a plea deal. This allows the state to avoid any issues with evidence obtained through torture. *The Washington Post* also described Khan's 2012 plea deal as "the beginning of an effort to accelerate the number of military commission cases" (Finn 2012). Charles Stimson, who worked for the Bush administration as the deputy assistant secretary of defense for detainee affairs, stated that "[y]ou would expect cases to start flowing, and one part of that is pleas" (Finn 2012). While cases did not 'start flowing' after 2012, the desire for efficiency and avoiding issues regarding torture fueled the hope on part of the Obama administration to make cases such as Khan's the precedent.

How does an administrative space impact this plea deal? Administrative spaces must contend with multiple forces exerting their often contrasting influences over their operating procedures. As per the plea agreement, Khan was meant to be sentenced in 2016 after four years of cooperation. However, Khan was not sentenced in 2016. Instead, Khan withdrew his legal plea to one of the charges against him when material support for terrorism was deemed not a war crime, and because of this the commissions no longer had jurisdiction (Jureic 2016). This charge was dismissed in this hearing. The judge in the case noted that "the revisions provide for a delay of seven years in sentencing proceedings" (Jurecic 2016). On April 1st, 2019, Khan and his counsel had a hearing to challenge restrictions on the defense calling witnesses during sentencing. This ongoing contestation between the prosecution and defense is still unfolding, but it is indicative of

another element of due process lite in practice[19]. The strong opposition to Khan's team bringing certain witnesses to sentencing hearings echoes the opposition to Khan having access to counsel in the first place. Khan is meant to be sentenced on July 1st, 2019, but due to issues surrounding witnesses for a mitigated sentencing argument from the defense, whether this happens remains to be determined.

Reflection on the Case Study

This chapter has examined the case study of Majid Khan in relation to how a divergent form of due process has been established through the GTMO administrative regimen. Khan's case is illustrative of a transition from an exceptional space such as a black site to an increasingly administrative space such as GTMO. This transition makes due process deviate from its traditional form. Deviations we have observed include access to counsel and more recently, bringing witnesses to make a mitigating sentencing case. GTMO's administrative qualities created conditions in which due process lite could form. The contestation observed in the layerings of legal input from the three branches allowed for the implementation of rights in ways that detract from their meaningfulness. This phenomenon of due process lite can be understood through the legal battles of Majid Khan's case, such as the litigation and legal arguments regarding his access to counsel. In

[19] Reporter Carol Rosenberg live-tweeted Khan's April 1st 2019 hearing. She tweeted that judge Army Col. Douglas Watkins conveyed that "there may be interest in postponing Khan's July sentencing date to give him time to testify in another case" (Carolrosenberg 2019). Dixon detailed the opposition from the prosecution related to bringing in witnesses for a mitigation case for sentencing. Rosenberg quoted him saying that the prosecution opposes these witnesses because *"the goal of the government is to avoid discussion of Mr. Khan's torture*" (Carolrosenberg 2019, italics indicate her quotes of Dixon). Rosenberg also tweeted that Dixon said "still sealed filings prosecutors threaten to withdraw from the plea agreement over the sought witnesses, calls it "*jeopardy*" (Carolrosenberg 2019). Since these developments are so recent and ongoing, their impact on Khan's case and due process lite remain undetermined.

addition to the consequences at the individual level of a detainee's experience, what are the larger implications of due process lite, as understood through this case study?

Due process lite undermines the established interpretations of constitutional and international laws. Constitutional rights to due process and habeas corpus and the rights provided by the Geneva Conventions for prisoners of war. The use of classifications in an administrative setting to justify creating a new form of due process that exists outside of how it is usually implemented has become a legitimate set of procedures through the layers of law occurring at GTMO. The violations of substantial due process rights—of liberty and justice—become normalized and legitimized over time. This legitimacy can be observed in the conditions of Khan's plea agreement. This agreement prevents Khan from making a legal claim against any person or agency for the torture experienced in detention. Legitimacy is gained through the agreement for both the conditions of Khan's custody and the ways in which he experienced due process. The agreement also represents a reconfiguration of how access to counsel was experienced at GTMO. Access to counsel is not suspended in its entirety, rather, it has been turned into another layer of law that can be the source of contestation between the three branches. Due process lite as observed through Khan's case highlights the very real consequences of a due process that loses its substantial features.

Conclusion

This thesis has synthesized discussions from political theory with an analysis of government decision-making and jurisprudence as well as an ongoing case study at GTMO. This synthesis leads one to conclude that GTMO has exhibited both exceptional and administrative features at various points throughout its history as a War on Terror detention center. GTMO has exhibited both exceptional and administrative qualities because of how the executive, legislative, and judicial branches have contested one another's influence over introducing law inside the facility. GTMO's ability to shift along the exceptional and administrative dimensions has contributed to due process being as strongly contested as it has been. These shifts toward either the exceptional or administrative ends of the spectrum are caused by one branch of the government asserting its decision-making capacity through some means, whether that be through memos, executive orders, legislation, or court rulings. These various means often contradict one another in an effort of one branch asserting its authority over the others. In cases of the executive branch, this typically pushes GTMO closer to an exception. In cases of the judiciary, their efforts to introduce and maintain the rule of law and uphold the constitutional and international law make their efforts more administrative. Congress, on the other hand, has exhibited both exceptional and administrative motives and behaviors in their role in decision-making regarding GTMO. This legal back and forth has resulted in conditions for due process lite to emerge inside GTMO.

Chapter 1 discussed sovereign exceptional spaces and hyperlegal administrative spaces. This chapter examined the conceptual debate of where GTMO belongs on this

continuum. Whereas theorists such as Agamben assert that GTMO operates in exceptional ways outside the sphere of law's influence, others such as Hussain argue that the detention center is overflowing with sources of law, classifications, and systems to process them. I argue that GTMO has exhibited certain shifts throughout its near-twenty year history as a War on Terror detention site. At certain times and in certain cases, GTMO behaves in very exceptional ways. At other times in other cases, it exhibits hyperlegal administrative behaviors, such as the CSRTs. Understanding GTMO's dynamic ability to change along this continuum in response to external pressures is important in understanding due process lite.

Chapter 2 traced the extensive timeline of how the executive, legislative, and judicial branches asserted their influence and power by changing how GTMO operates. Describing the impact that shifts in language, major pieces of legislation, and jurisprudence over Guantanamo Bay was important to answer the question of if GTMO was an exceptional or administrative space. The Supreme Court's involvement in GTMO resulted in GTMO moving away from a purely exceptional framework, as its involvement meant that law would operate in some capacity moving forward. The back and forth over habeas corpus and due process rights provided grounds for the due process lite to grow. The back and forth between the three branches gave rise to due process lite as a result of conflicting sources of law.

Chapter 3 applied my concept of due process lite to an ongoing case study of detainee Majid Khan. Khan had been held in purely exceptional black sites prior to his rendition to GTMO. After this rendition, the ways in which he experienced due process

are indicative of due process lite. His access to counsel was grounds for contestation between the executive and judiciary for approximately one year, during which he had already went through a CSRT hearing and questioning at the facility. Khan's case deals with issues of detention, torture in custody, and the need for legitimacy that is obtained through due process lite. Khan is designated to be sentenced later this year; and how his case unfolds after sentencing may reveal more about due process lite in action.

This thesis serves as an analysis into how due process put into practice can deviate from due process as we have come to understand it. These deviations result in due process lite, which offers a detention site a significant degree of legitimacy by providing a facet of due process in a manner that is not characteristic of a legal black hole, which loses legitimacy over time, but is not operating in its usual capacity, either. The concept due process lite is a contribution to the study of detention sites in the War on Terror, and perhaps detention sites more generally. Just as I chose to adapt 'torture lite' into a variant on due process, further research could just as easily apply due process lite to immigration detention centers. As I have discussed briefly in this study, GTMO proceedings have at times mirrored the types of due process observed in immigration centers. Additional research in this realm would be valuable to the study of immigration detention and due process rights.

State Documents Cited

Authorization for the Use of Military Force. 2001.

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

Bush, George W. 2001. Military Order of November 13, 2001— Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.

Combatant Status Review Tribunals: Purpose, History, and Procedural Protections. 2006. https://archive.defense.gov/news/Oct2006/d20061017CSRT.pdf. (February 13, 2019).

Committee on Legal Affairs and Human Rights., and Dick Marty. 2006. Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states: draft report - part II (explanatory memorandum) Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States: Draft Report - Part II (Explanatory Memorandum). Strasbourg: Council of Europe Parliamentary Assembly.

Detainee Treatment Act (2005), Public Law 109-148 of December 30, 2007, Title X; 119 STAT. 2739)[1].

Executive Order 12807. 1992. Executive order from the George H.W. Bush administration regarding Haitian Refugees at Guantanamo Bay, Cuba. https://www.hsdl.org/?view&did=463032

Executive Order 13492. 2009. President Obama's Executive Order mandating the closure of the Guantanamo Bay detention center.

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

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

Joint Task Force. 2008. JTF-GTMO Detainee Assessment *JTF-GTMO Detainee Assessment*. Joint Task Force. https://www.nytimes.com/interactive/projects/guantanamo/detainees/10020-majid-khan/documents/11 (April 22, 2019).

Joint Task Force. 2009. *Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10020.* https://nsarchive2.gwu.edu/torturingdemocracy/documents/20070415.pdf (March 12, 2019).

Khan v. Bush: Respondents' memorandum in opposition to petitioners' motion for emergency

access to counsel and entry of amended protective order. 2006. 1 (District Court for the District of Columbia).

Khan v. Bush: Reply Memorandum in Support of Expedited Motion for Emergency Access to Counsel And Entry of Amended Protective Order. 2006. (District Court for the District of Columbia).

Khan v. Bush: Motion for Preservation of Torture Evidence . 2007. (Court of Appeals for the District of Columbia Circuit).

Khan v. Gates. 2007. (Court of Appeals for the District of Columbia Circuit).

Military Commissions Act (2006), Public Law 109–366, 109th Congress.

Military Commissions Act (2009), H. R. 2647—385, 111th Congress.

Majid Khan v. George Bush. 2006. (Center for Constitutional Rights). September 29th, 2006.

Office of the Assistant Attorney General, and Jay S Bybee. 2002. Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees Re: Application of Treaties and Laws to Al Qaeda and Taliban Detainees. Washington D.C. https://www.justice.gov/sites/default/files/olc/legacy/2009/12/30/aclu-ii-012602.pdf.

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

Rabia Khan Ex Rel. Majid Khan v. Obama. 2009. (District Court for the District of Columbia).

Rumsfeld v. Padilla, 542 U.S. 426 (2004).

Senate., and Dianne Feinstein. 2014. Report of the Senate Select Committee on Intelligence committee study of the Central Intelligence Agency's detention and interrogation program, together with foreword by Chairman Feinstein and additional and minority views Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, Together with Foreword by Chairman Feinstein and Additional and Minority Views.

USCS Const. Art. I, § 9, Cl 2.

"Verbatim Transcript of Combatant Status Review Tribunal Bearing for ISN 10020." 2007. https://www.aclu.org/other/majid-khan-csrt-transcript

Wolfowitz, P. D. 2004. Order Establishing Combatant Status Review Tribunal.

https://en.wikisource.org/wiki/Order_Establishing_Combatant_Status_Review_Tribunal

United States v. Majid Khan: Offer for Pretrial Agreement . 2012. (U.S. Naval Station Guantanamo Bay, Cuba).

Books, Peer-Reviewed Articles, and Other Sources Cited

Agamben, Giorgio. 1998. *Homo Sacer*. Stanford, CA: Stanford University Press.

Agamben, Giorgio. 2005. State of Exception. Chicago: University of Chicago Press.

Alexander, Janet C. 2011." Military Commissions: A Place Outside the Law's Reach." *Louis ULJ*, *56*, 1115-1152.

"Bush: 'We're Fighting for Our Way of Life'." 2006. CNN. http://www.cnn.com/2006/POLITICS/09/06/bush.transcript/index.html (February 14, 2019).

Carolrosenberg. (2019, April 01). [Defense lawyer Dixon says prosecutors oppose the witnesses because "the goal of the government is to avoid discussion of Mr. Khan's torture." He says in still sealed filings prosecutors threaten to withdraw from the plea agreement over the sought witnesses, calls it "jeopardy."]. https://twitter.com/carolrosenberg/status/1112797675177562112.

Carolrosenberg. (2019, April 01). [The judge, Army Col. Douglas K. Watkins, said there may be interest in postponing Khan's July sentencing date to give him time to testify in another case, demonstrate substantial cooperation with the government.]. https://twitter.com/carolrosenberg/status/1112772270269915136.

"CCR Attorneys Release Revelations of Torture of Former Ghost Detainee Majid Khan." 2008. Center for Constitutional Rights. https://ccrjustice.org/home/press-center/press-releases/ccr-attorneys-release-revelations-torture-former-ghost-detainee (February 14, 2019).

Chávez, Karma R. 2012. "ACT UP, Haitian Migrants, and Alternative Memories of HIV/AIDS." Quarterly Journal of Speech 98(1): 63–68.

Crossette, Barbara. 1992. "U.S. to Close Refugee Camp At Guantanamo to Haitians." The New York Times. https://www.nytimes.com/1992/05/29/world/us-to-close-refugee-camp-at-guantanamo-to-haitians.html (February 14, 2019).

Denbeaux, Mark, Joshua W. Denbeaux, and John Walter Gregorek. 2006. "No-Hearing Hearings - CSRT: the Modern Habeas Corpus?" Seton Hall Law Review: 1231–67.

Dworkin, Ronald. 2004. "What the Court Really Said." The New York Review of Books. https://www.nybooks.com/articles/2004/08/12/what-the-court-really-said/ (February 1, 2019).

Elsea, Jennifer K. 2005. CRS Report for Congress: Detainees at Guantanamo Bay. Congressional Research Service, the Library of Congress. 1-6.

Elsea, Jennifer K, and Daniel H Else. 2016. "Naval Station Guantanamo Bay: History and Legal Issues Regarding Its Lease Agreements." Congressional Research Service . https://fas.org/sgp/crs/natsec/R44137.pdf (February 13, 2019).

Elsea, Jennifer K. 2014. The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues (113th) *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues.* Washington D.C. : Congressional Research Service.

Farley, Benjamin R. 2018. "Maybe Dismantling the GTMO Closure Office Wasn't Such a Good Idea." Just Security. https://www.justsecurity.org/55109/dismantling-gtmo-closure-office-wasnt-good-idea/ (April 2, 2019).

Feldman, Leonard C. 2017. "Police Violence and the Legal Temporalities of Immunity." Theory and Event, 20 (2), 329-350.

Finn, Peter. 2012. "Guantanamo Detainee Majid Khan Pleads Guilty, Promises Cooperation." The Washington Post. https://www.washingtonpost.com/world/national-security/guantanamo-detainee-majid-khan-pleads-guilty-promises-cooperation/2012/02/29/gIQAVuIaiR_story.html?utm_term=.31a213d3c66e (February 14, 2019).

Fisher, George. 2003. Plea Bargaining's Triumph: A History of Plea Bargaining in America. Stanford University Press.

Foucault, Michel, and Robert Hurley. 1990. *The History of Sexuality*. New York: Vintage Books.

Friedersdorf, Conor. 2014. "Dick Cheney Defends the Torture of Innocents." The Atlantic. https://www.theatlantic.com/politics/archive/2014/12/dick-cheney-defends-the-torture-innocents/383741/ (February 14, 2019).

Gutierrez, Gitanjali S. 2007. "Going to See a Ghost: Majid Khan and the Abuses of the 'War on Terror'." Center for Constitutional Rights. https://ccrjustice.org/home/press-center/press-releases/going-see-ghost-majid-khan-and-abuses-war-terror (February 14, 2019).

Gerstein, Josh. 2011. "Obama Signs Defense Bill That Could Cripple His Guantanamo Policy." POLITICO. https://www.politico.com/blogs/under-the-radar/2011/01/obama-signs-defense-bill-that-could-cripple-his-guantanamo-policy-031996 (February 1, 2019).

"Habeas Corpus." 2019. *Merriam Webster*. https://www.merriam-webster.com/dictionary/habeas corpus.

Hilal, Maha. 2017. "When Muslim Humanity Is Subjective: Guantanamo Bay and the Legacy of Institutionalized Islamophobia." The Huffington Post. https://www.huffingtonpost.com/entry/when-muslim-humanity-is-subjective-guantanamo-bay_us_59302446e4b017b267ee0098 (April 2, 2019).

Horton, Scott. 2010. "The Guantánamo 'Suicides': A Camp Delta Sergeant Blows the Whistle." WebCite query result. https://www.webcitation.org/query?url=http://www.harpers.org/archive/2010/01/hbc-90006368&date=2010-01-18 (February 14, 2019).

Hussain, Nasser. 2007a. "Beyond Norm and Exception: Guantanamo." *Critical Inquiry* 33(4): 734-53. https://www.journals.uchicago.edu/doi/pdfplus/10.1086/5215672 (February 1, 2019).

Hussain, Nasser. 2007b. "Hyperlegality." *New Criminal Law Review*: *In International and Interdisciplinary Journal 10*.4. 514-531. (February 1, 2019).

Jackson, Richard. 2007. "Language, Policy and the Construction of a Torture Culture in the War on Terrorism." *Review of International Studies* 33(03): 353–71.

Johns, Fleur. 2005. "Guantánamo Bay and the Annihilation of the Exception*." European Journal of International Law* 16(4): 613–35.

Joint Task Force. 2008. JTF-GTMO Detainee Assessment JTF-GTMO Detainee Assessment . New York Times . https://www.nytimes.com/interactive/projects/guantanamo/detainees/10020-majid-khan (February 13, 2019).

Jurecic, Quinta. 2016. "This Week at the Military Commissions, Special Majid Khan Edition: 'The Whole Enhanced Interrogation Thing.'" Lawfare. https://www.lawfareblog.com/week-military-commissions-special-majid-khan-edition-whole-enhanced-interrogation-thing (February 14, 2019).

Karl, Jonathan. 2006. "'High-Value' Detainees Transferred to Guantanamo." ABC News. https://abcnews.go.com/International/story?id=2400470 (February 14, 2019).

Langbein, John H. 1979. "Understanding the Short History of Plea Bargaining." *Law & Society Review* 13(2): 261.

Lee, Barbara. 2001. “Why I Opposed the Resolution to Authorize Force.” SFGate. https://www.sfgate.com/opinion/article/Why-I-opposed-the-resolution-to-authorize-force-2876893.php (February 1, 2019).

Leonnig, Carol D., and Eric Rich. 2006. “U.S. Seeks Silence on CIA Prisons.” The Washington Post. http://www.washingtonpost.com/wp-dyn/content/article/2006/11/03/AR2006110301793_pf.html (February 14, 2019).

Lokaneeta, Jinee. 2014. Transnational Torture: Law, Violence, and State Power in the United States and India. New York: New York University Press.

“Majid Khan.” 2015. Center for Constitutional Rights. https://ccrjustice.org/majid-khan (February 14, 2019).

“Plea Bargaining.” Merriam-Webster. https://www.merriam-webster.com/dictionary/plea bargaining (February 14, 2019).

Priest, Dana. 2005. “CIA Holds Terror Suspects in Secret Prisons.” Washington Post . http://w.jthomasniu.org/class/540/Assigs/SecretPrisons.pdf (February 13, 2019).

Ratner, Michael, and Ellen Ray. 2004. *Guantánamo: What the World Should Know*. Carlton North, Vic.: Scribe.

Rejali, Darius M. 2009. Torture and Democracy. Princeton: Princeton Univ. Press.

Rich, Eric. 2007. “Terrorism Suspect Alleges 'Mental Torture'.” The Washington Post. http://www.washingtonpost.com/wp-dyn/content/article/2007/05/15/AR2007051500935_pf.html?noredirect=on (February 14, 2019).

Rohde, David. 2015. “Exclusive: Detainee Alleges CIA Sexual Abuse, Torture beyond Senate...” *Reuters*. https://www.reuters.com/article/us-usa-torture-khan/exclusive-detainee-alleges-cia-sexual-abuse-torture-beyond-senate-findings-idUSKBN0OI1TW20150602 (February 14, 2019).

Rondon, Yolanda C. 2012. “The Military Commissions Act of 2009: Did Congress Get It Right?” *The Student Appeal*. https://thestudentappeal.com/the-military-commissions-act-of-2009-did-congress-get-it-right-1920660c4830 (February 1, 2019).

Rosenberg, Carol. 2016. “Guantánamo Plea Deal Unveils New Trial Strategy.” miamiherald. http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1939584.html (February 14, 2019).

"Rumsfeld v. Padilla, Oral Argument - April 28, 2004." Oyez. https://www.oyez.org/cases/2003/03-1027 (February 14, 2019).

"Shackled Detainees Arrive in Guantanamo." 2002. CNN. http://edition.cnn.com/2002/WORLD/asiapcf/central/01/11/ret.detainee.transfer/index.html (February 14, 2019).

Scheinkman, Andrei, et al. 2018, 2 May. "The Guantánamo Docket." *The New York Times*, The New York Times, www.nytimes.com/interactive/projects/guantanamo. Date of publication reflects latest changes in the records.

Steyn, Johan. 2004. "Guantanamo Bay: The Legal Black Hole." *International and Comparative Law Quarterly* 53(01): 1–15.

Suleman, Arsalan. 2006. "Detainee Treatment Act of 2005." *Harvard Human Rights Journal.* 257-265. (February 1, 2019).

Vázquez, C.M. 2007. The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide. *The American Journal of International Law, 101*(1), 73-98.

Vladeck, Steve. 2014. "The Supreme Court Goes to War:Hamdi, Padilla, and Rasul at 10." *Just Security*. https://www.justsecurity.org/12260/supreme-court-war/ (February 1, 2019).

Weed, Matthew. 2016. Presidential References to the 2001 Authorization for Use of Military Force in Publicly Available Executive Actions and Reports to Congress Congressional Research Service . https://fas.org/sgp/crs/natsec/pres-aumf.pdf (February 13, 2019).

Willis, Alex Spillius and Amy. 2012. "Guantánamo Bay 10-Year Anniversary: Timeline." The Telegraph https://www.telegraph.co.uk/news/worldnews/northamerica/usa/9006682/Guantanamo-Bay-10-year-anniversary-timeline.html (February 14, 2019).

Wittes, Benjamin. 2013. "Judicial Baby-Splitting and the Failure of the Political Branches." In *Terrorism, the Laws of War, and the Constitution. Debating the Enemy Combatant Cases,* ed. Peter Berkowitz. Hoover Press.

Wittes, Benjamin. 2015. "Military Commissions Charges Sworn Against Majid Khan." Lawfare. https://www.lawfareblog.com/military-commissions-charges-sworn-against-majid-khan (February 14, 2019).

Wittes, Benjamin. 2012. "Majid Khan Arraignment #5: Prosecution Remarks to the Press."

Lawfare. https://www.lawfareblog.com/majid-khan-arraignment-5-prosecution-remarks-press (February 14, 2019).