

CHAPTER 9



Guantánamo Bay, the Rise of the Courts, and the Revenge of Politics

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In the grand scheme of things, Guantánamo Bay is not the location or phenomenon of most concern in the “war on terrorism”: it has housed a relatively small number of detainees, been under sustained attention from civil society institutions, and been the focus of considerable litigation in the American and British courts. As a result, we know a substantial amount about the prison and what has happened there, and its detainees have availed of the federal court system in trying to establish and enforce their rights. That notwithstanding, Guantánamo Bay remains the focus of substantial legal, scholarly, and political attention. This concentration on Guantánamo Bay has largely been because of its symbolism and the potency of the images that have emerged from it: orange jumpsuits and barbed wire have become deeply associated with injustice and arbitrariness in the popular imagination of the “war on terrorism.” Guantánamo Bay has become “a semiotic for the extra-judicial ‘war on terrorism,’ a visceral expression of a nation that is troubled, not just by feelings of impotence and rage, but of guilt too.”¹

For some time Guantánamo Bay was (mis)characterised as a “legal black hole,” but over the past ten years the U.S. Supreme Court has developed a jurisprudence to show that *at least some* law applies to what happens in Guantánamo Bay and that federal courts can exercise stronger-than-expected judicial review over activities there. Consequently, the Bush administration’s original jurisdictional rationale for detaining

suspected terrorists there has largely been undone. In spite of this, and in the face of President Obama's clear and high profile commitment to close the prison, Guantánamo Bay remains open. This chapter explores this paradox between the current legal position, in which Guantánamo Bay has lost much of the original rationale for its use, and a political reality in which Congress continues to obstruct its closure. The question is whether this congressional "push-back" represents what Mark Tushnet terms "political constitutionalism" in his contribution to this collection,² or whether it is mere *quotidian* politics, saturated in the hyperbolic and panic-ridden discourse of the "war on terrorism." This chapter argues the latter: the refusal to close Guantánamo Bay is a matter of unvirtuous politics, rather than of political constitutionalism.

GUANTÁNAMO BAY AND THE CONSTRUCTION OF A "LEGAL BLACK HOLE"

Guantánamo Bay is a place that is fully bound up with law, in terms of both the arguments made by the Bush administration to justify the detention of suspected terrorists there and the degree to which those individuals are entitled to due process and other legal protections. Having decided to detain suspected terrorists as "enemy combatants" in the "war on terrorism," the Bush administration next had to decide where these people ought to be detained. The answer was multifaceted, seeming to depend on the prisoner's personal status and the place of capture. Thus, four different detention strategies developed in the course of the "war on terrorism": detention within the United States itself, detention on the "traditional" battlefields of Iraq and Afghanistan, detention in "black sites" operated by the CIA in other countries, and detention in Guantánamo Bay. When it comes to Guantánamo Bay, its unique territorial and jurisdictional status in American law was primary a consideration in its selection as a detention centre.

The Bush administration's jurisdictional reasoning went as follows: (1) Cuban law did not apply to Guantánamo Bay on the basis of the terms of the agreement leasing the property to the United States;³ (2) U.S. federal courts had no jurisdiction and constitutional rights did not apply because it was *de jure* Cuban territory;⁴ (3) U.S. statutes did not apply there unless they expressly provided for extraterritorial application; and (4) unincorporated international human rights law did not apply there because it had neither domestic nor extraterritorial effect. Although international humanitarian law (IHL) might have applied there (inasmuch as

there was a qualifying armed conflict), the U.S. government claimed that IHL either allowed for the detentions in question or did not apply at all to the unconventional “war on terrorism.” Law was therefore central to the construction of Guantánamo Bay as a place beyond law, and consequently “de-exceptionalised” Guantánamo Bay.⁵ That is, it was law itself rather than power or politics alone that determined where and how the law would apply. According to the Bush administration’s legal arguments, therefore, the law did not reach foreign enemy combatants detained at Guantánamo.

This jurisdictional reasoning accompanied an institutional concern with minimising judicial oversight. The perceived benefit of Guantánamo Bay, in the executive’s mind, was its jurisdictional isolation so that the detainees there could not seek habeas corpus review of their treatment or detention. In his account of the aftermath of 9/11, John Yoo writes that a primary concern in relation to detention was to ensure that the federal courts would not have the capacity to “interfere” with detention policy.⁶ This was to be achieved by arguing that not only was Guantánamo Bay beyond the geographical jurisdiction of the federal courts, but also it was beyond their institutional competence. Constructing the American response to the attacks as a “war” facilitated the argument that its management was an executive matter. The executive branch, it was argued, was authorised to detain individuals suspected of involvement in terrorist activity, under the Constitution, the Authorization for the Use of Military Force, and, in later years, various pieces of empowering legislation. Thus, the argument here was not that Guantánamo Bay was beyond law per se, but rather that the law itself placed the naval base beyond the courts’ reach by means of elaborate jurisdictional rules. The government’s legal argument might have lacked principle, but Guantánamo’s territorial and jurisdictional status under it was nevertheless a legal construct.

Seen in this way, Guantánamo Bay was not a place wholly beyond law. However, this did not mean that it posed no challenge to law or, more specifically, to constitutionalism and liberal legalism. In fact, the challenge posed was a substantial one. In the first place, the attempted construction of Guantánamo Bay as a lawless space highlighted the capacity of fundamental legal rules to undermine the very rule-of-law principles they were designed and intended to protect. The paradoxical legal claim that law created lawlessness did not represent the radical Schmittian exception, but it did express the nihilistic potential of law when applied in an unprincipled manner, unshackled from a broader, liberal rule-of-law context. This nihilism was further highlighted by the Bush administration’s sustained and deliberate attempts to ensure that the federal courts would not have any oversight of the Guantánamo prisons. To say that the mere location of

governmental action ought to preclude all judicial review of executive decisions mounted a powerful challenge to law as a relevant and autonomous constitutionalist force.

THE RISE OF THE COURTS

The Bush administration's legal representation of Guantánamo Bay posed a challenge to liberal legal order and could for that reason be considered "counter-constitutionalist." However, the U.S. Supreme Court has resisted this counter-constitutionalism (at least to some extent) in a series of cases. Although those decisions do not appear to have resulted in effective and positive changes in the detainees' actual circumstances, they have sent an important constitutionalist message that the executive branch cannot so easily avoid judicial oversight. In this way, the Supreme Court has largely dismantled the legal rationale for detaining people at Guantánamo Bay. Although it still remains unclear exactly what rights those detained there are entitled to under the Constitution, it is now beyond question that the Constitution regulates government behaviour in Guantánamo Bay to at least some degree. This proposition is a considerably more constitutionalist one than that originally advanced by the Bush administration.

The first argument that the Supreme Court dismantled was the claim that the federal habeas statute did not extend to Guantánamo Bay. In *Rasul v. Bush*,⁷ a number of Guantánamo detainees alleged that they had both statutory and constitutional rights of access to federal courts. Leaving the constitutional claim for future determination, the Supreme Court held that the habeas statute did apply to Guantánamo Bay, because it was under the complete and effective control of the U.S. government. Some members of Congress were outraged at this perceived judicial interference in Guantánamo Bay and national security affairs.⁸ Within a very short period of time, the Detainee Treatment Act of 2005 (DTA) had been introduced, part of which was clearly directed towards undoing *Rasul*.⁹ This act sought to strip the federal courts of their habeas jurisdiction over Guantánamo Bay. In *Hamdan v. Rumsfeld*,¹⁰ the Supreme Court then interpreted the DTA in a way that frustrated Congress' intention. Because Hamdan had lodged his petition for habeas corpus before the passage of the DTA, the Court decided that the act had no retrospective effect in the case and that it could exercise jurisdiction based on *Rasul*. *Hamdan* then introduced some of the most significant procedural and rights-based changes to the detention and military commission regimes at Guantánamo Bay; through its interpretation of the Uniform Code of Military Justice (UCMJ), the Court found that

the “war on terrorism” constituted a non-international armed conflict to which at least the minimum provisions of international humanitarian law, including Common Article 3 of the Geneva Conventions, applied.

As in *Rasul*, however, *Hamdan* based jurisdiction on statute, meaning that Congress could once again attempt to strip jurisdiction from the federal courts. Indeed, Congress tried to do this with the Military Commissions Act of 2006 (MCA), making it clear that the federal courts had no prospective or retrospective habeas jurisdiction over Guantánamo Bay.¹¹ By the time the case of *Boumediene v. Bush*¹² came before the Supreme Court, it was clear that the Court had two options: (1) either accept that it had no habeas jurisdiction because it had been stripped by the MCA and the constitutional habeas corpus provisions did not apply, or (2) find that, to at least some extent, detainees in Guantánamo Bay were constitutional rights bearers. The Court chose the latter course in *Boumediene*. Writing for the majority, Justice Kennedy repeated the reasoning of *Rasul*, explaining that Guantánamo Bay is to all intents and purposes a territory of the United States, giving it de facto sovereignty over the base. Consequently, as habeas corpus “must not be subject to manipulation by those whose power it is designed to restrain,”¹³ at least some constitutional rights applied to those detained there. Although the exact scope of those rights was unclear, there was now no question that habeas corpus was among them. Congress could restrict that right only in conformity with the Constitution’s suspension clause,¹⁴ which it had not done in this instance.

These cases show a judicial resistance to the core claims of the U.S. government in relation to Guantánamo Bay. The first core claim—that Guantánamo Bay was beyond the reach of law—was categorically rejected in *Rasul*, but by means of what, it must be admitted, was a result-oriented reading of the existing authorities. It would have been just as easy, and more politically astute, of the Supreme Court to find that in fact the principle of extraterritoriality meant that statutory habeas corpus did not apply in Guantánamo Bay. Instead, the Court passed the baton back to Congress, which responded with express support for the executive preference for a legally unregulated space, or at least a space where the regulatory approach was a minimalistic one. The result was the Detainee Treatment Act, whereby Congress essentially handed full authority to the executive branch to operate Guantánamo Bay within the loosely defined, broad parameters of the Combatant Status Review Tribunals (CSRT) and military tribunals. Not only did Congress not succeed in closing off the petitions already lodged from Guantánamo Bay at the time of its enactment (due to *Hamdan*), but it also failed to deter the Supreme Court from finding in *Boumediene* that at least some of the Constitution applies in Guantánamo

Bay. This not only asserted beyond any doubt that Guantánamo Bay was governed by law, but also secured the judiciary's position as the final arbiter of constitutional meaning even there. Certainly, *Boumediene* can be criticised on a number of grounds, including the fact that it does little or nothing to relieve the deprivations of rights and liberty experienced by detainees. Nevertheless, if one views *Boumediene* from its constitutionalist perspective, it is an important reassertion of fundamental values: that is, that government action is subject to meaningful limits, including those laid down by the Constitution and that, no matter the exigencies of the situation, a counter-constitutionalist turn will be resisted by the Court.

Following these cases, it was clear that in the absence of a constitutional suspension of habeas corpus removing the federal courts' jurisdiction, the rationale for Guantánamo Bay's continued use as a detention centre for suspected terrorists had been badly wounded by the Supreme Court. This, perhaps, made it easier for Barack Obama to commit during the 2008 presidential campaign to closing Guantánamo Bay. Indeed, one of the first acts of his presidency was the signing of executive orders directed towards closing the Guantánamo prisons within a year of his inauguration.¹⁵ Making the promise was relatively easy, but events over the first term of his presidency demonstrated that keeping that promise was almost insurmountably difficult.

THE REVENGE OF POLITICS

President Obama appointed a Task Force to review and report on the appropriate courses of action as regards the remaining detainees in Guantánamo Bay. That Task Force reported in 2010¹⁶ outlining three primary categories of detainees: (1) those who were eligible for release or transfer, including those who could not be returned to their countries of origin for reasons of national security or their own personal safety; (2) those who were eligible for prosecution, although not necessarily before regularly constituted civilian courts; and (3) those who were not eligible for release or transfer, but who could not be tried and should therefore continue to be detained. In order to fulfil his ambition to close Guantánamo Bay, Obama had to put in place systems to manage detainees who fell into each of these categories. In each case, Congress acted to frustrate him.

The possibility of allowing individuals who were eligible for release or transfer to live freely (although under surveillance) in the United States was never seriously contemplated, or at least not in a public manner. This was so even in relation to those individuals who could not be repatriated

to their countries of origin, because of the risk that they might be subjected to torture there or because the security position in that state made it unsafe to return them. The latter concern was largely connected with the fact that the Task Force did not consider that deeming someone eligible for release or transfer necessarily meant that the individual was not dangerous or did not pose a risk; still, any risk posed could be managed without the need for detention in Guantánamo Bay.¹⁷ This then fed into the concern expressed both by politicians and, in some cases, by judges of “recidivism,” or the “return to combat” dilemma.

The nature of this determination, together with the security expense, risk, and possible domestic unpopularity that a third country’s government would have to take on in accepting a released detainee, already made the process of negotiating agreements with third countries difficult. Congress subsequently exacerbated that difficulty, however, by introducing a process of “proxy clearance.” Under this system, Congress could restrict public expenditures for the transfer of detainees from Guantánamo Bay to third countries and subject them to a certification process at least thirty days prior to the transfer.¹⁸ The secretary of defense, with the concurrence of the secretary of state, had to issue a certificate stating that the country to which the individual was to be transferred was: (1) not a designated state sponsor of terrorism, (2) maintained effective control over the detention facilities in which the individual is to be housed (if he is to be detained), (3) did not face a threat that was likely to have a substantial impact upon its capacity to exercise control over the transferee, (4) had agreed to take “effective steps” to make sure that the transferee could not undertake activities that would threaten the United States or its allies in the future, (5) had taken satisfactory steps to prevent the detainee’s involvement in terrorist activities, and (6) had agreed to share certain information with the United States.¹⁹ Thus, although transfers to third countries were—and are—still possible, it would be fair to say that Congress’ certification process made them more difficult, on top of the already delicate political and diplomatic task of convincing a foreign state to accept former detainees.

The Task Force further identified forty-six detainees in relation to whom “prosecution in either federal court or a military commission was appropriate and potentially feasible.”²⁰ If prosecution was feasible and appropriate it could take place either by normal criminal trial or by military commission; the Task Force did not prefer one over the other. Even before completion of the Task Force’s final report, the Obama administration had shown a clear preference for prosecuting individuals in federal courts wherever possible. This was clear from the announcement in November 2009 that Khalid Sheikh Mohammed, the alleged “mastermind”

of the 11 September 2001 attacks, and his alleged co-conspirators were to be prosecuted in New York City. That announcement immediately ignited controversy with a substantial number of commentators arguing that this would make the city vulnerable to further attack, although Attorney General Holder argued the decision had been based solely on prosecutorial rationality.²¹ So great was the political and popular outcry against trying Mohammed and his alleged co-conspirators in New York City that this prosecutorial determination could withstand for only two months the political pressure to drop the prosecution.²² After this executive retreat, any hopes for the swift prosecution of detainees, in order to facilitate the closure of Guantánamo Bay, seemed to dissipate as political resistance grew. That resistance culminated in Congress' passage of a legislative bar on transferring Guantánamo Bay detainees to the United States for *any* purpose, including trial.²³ President Obama was therefore placed in a position where he effectively had no option but to announce, in March 2011, that the military commissions suspended at the beginning of his term of office would be recommenced, albeit with more rights-based procedures than had previously been the case.²⁴

The third category of detainees—those who were ineligible for release, transfer, or trial—posed a clear difficulty for any attempt to close Guantánamo Bay, as they would have to be detained *somewhere* if the recommendation of the Task Force was accepted. In 2009, President Obama expressed a desire to acquire the Thompson Correctional Center in Illinois, which could then be used as a dedicated facility exclusively for the detention of such individuals. It would be a maximum security facility, but its presence within the United States itself would mean that the detention in question was somewhat more regularised than that in Guantánamo Bay. Once again, however, Congress stepped in to prevent this, just as it had tried before to block prisoner transfers to the continental United States. Congress had previously made unsuccessful attempts to ensure that any proposed transfer of an individual from Guantánamo Bay to the mainland United States would be subject to a 120-day clearing period, during which Congress would be furnished with a report on the security risks of any transfer.²⁵ In 2009, after the administration's proposal to acquire the Illinois prison, provisions were inserted into four spending bills in order to prevent the acquisition of this prison or any expenditure required to close the base.²⁶ Although none of these early legislative attempts were successful, Congress finally passed the National Defense Authorization Act for Fiscal Year 2011, prohibiting the use of any federal monies for the transfer of Guantánamo detainees to the United States or for the acquisition or modification of detention facilities to hold them.²⁷

On the whole, then, this congressional activity severely (and in all likelihood fatally) dented President Obama's capacity ever to close Guantánamo Bay, even though there remained clear pathways to doing so in a manner that would have likely satisfied security concerns. However, the question remains: what does this congressional resistance mean in the broader context of judicial and political constitutionalism and, indeed, of politics more generally?

POLITICS OR CONSTITUTIONALISM?

The political reaction to the Supreme Court's systematic removal of the jurisdictional rationale for the Guantánamo Bay detentions displays a "serial contempt for judicial propriety"²⁸ that is and ought to be of concern. This concern relates to constitutionalism and to the apparent political commitment to counter-constitutionalism. The cases about Guantánamo Bay might be presented and read as ones that implicate the long-standing inter-institutional tensions inherent in a system of separation of powers and checks and balances. However, they also point towards a rupture in the respective constitutionalist commitments of the American judicial and legislative branches. Although some commentators have criticised the Supreme Court majority for a perceived power grab in *Boumediene*,²⁹ that decision is better read as a reassertion not only of jurisdiction, but also of the values of judicialism in a system committed to constitutional supremacy: limited power, objective oversight, democratic values, the rule of law, and the limitation of liberty-sacrifice to that which is considered to be proportionate, justifiable, and equally experienced.

Congressional resistance to President Obama's attempts to close Guantánamo Bay contrasted starkly with Congress' approach to President Bush's determinations about Guantánamo Bay as a detention centre. In this and other matters, Congress originally supported the president, both before and after it became clear that American policy included controversial (if not illegal) processes, such as extraordinary rendition, waterboarding, and targeted killing. Even as time passed and concerns began to be voiced about Guantánamo Bay, rare attempts by legislators to shut Guantánamo Bay made little if any significant impact.³⁰ Instead, as noted above, Congress actually resisted federal court decisions that attempted to regularise Guantánamo Bay by exercising judicial review over it and extending constitutional rights to the detainees there. This pattern of resistance could be interpreted as *either* a manifestation of a principled political constitutionalism or crass politics simpliciter. Certainly, there was a hint of

political constitutionalism here, with Congress signalling its view of the appropriate division of powers between courts and the executive branch in times of emergency, conflict, and war. Whether political constitutionalism emerged here or whether this legislative opposition to the courts was simply politics as usual is, however, best judged by developments with Guantánamo Bay since the change of administration.

In a way, one would rather that congressional patterns could be explained by reference to principled political constitutionalism, for this at least would hint at some kind of grand constitutional vision informing the legislative processes there as they related to Guantánamo Bay, rather than political petulance. It is worth acknowledging here that the dividing line between political constitutionalism and ordinary politics is always blurred. This line arguably becomes more unclear in a crisis-ridden situation, where so much of so-called “everyday politics” is in fact constitutional politics; this is so, as “everyday politics” includes fundamental contestations about constitutional limitations and sometimes amendment of constitutional provisions to allow for action that is considered to be desirable or necessary.³¹ In discussions at the Copenhagen symposium from which this volume emerged, Tushnet made the point that ordinary politics can be understood as the practice of political constitutionalism. This certainly seems to be right in at least some circumstances. However, the events outlined above show that this is not inevitably so (nor, by the way, do I wish to suggest that Tushnet claims that is the case). Rather, in my view, the political reaction to judicial attempts to legally regulate Guantánamo Bay and the executive attempts to close its prisons was simply politics and not principle.

The starting point for this view is that these developments are confounding when seen against the history of legislative relations with the executive in times of crisis generally, and in the “war on terrorism” more specifically. In such times, the long-observed pattern is of a facilitative legislature, bending to the executive’s will. It seems certainly to be the case that congressional support for Bush-era policies regarding Guantánamo Bay was deferential. Such support can be read as having been politically constitutionalist, for it was truly about trying to arrange and scale out inter-institutional relations between the executive branch and the courts. However, the Obama-era politics of Guantánamo Bay has been different, primarily because of Congress’ rejection of three epistemic factors to which legislatures will normally defer to one degree or another: judicial review, executive initiative, and political morality. It is no argument for political constitutionalism to say that the congressional position is simply a continuation of previous executive policy; after all, constitutionalism does not mean favouring a certain institutional weighting when one likes the

persons populating the institution. That state of affairs is “just politics,” which is precisely what we have here.

Politics writ bare like this are unprincipled and unwise. They lack virtue in the Aristotelean sense, and without virtue there is cowardice, rashness, and imprudence. From historical experience, we know that all of these things produce security-biased policies, as well as laws and actions that unnecessarily rupture society and constitutionalist principles. As Oren Gross argues in his contribution to this volume,³² and as I have argued elsewhere,³³ what has transpired is law and policy affected by the panic and fear from which they emerge. What is particularly interesting about the Obama-era congressional engagement with Guantánamo Bay is that, unlike in the more immediate, panic-ridden aftermath of the 9/11 attacks, the current discourse is one that looks, feels, and operates much more like a classic manufactured moral panic.³⁴ In this panic, politicians tell us of the risks of terrorism from those detained in Guantánamo Bay, from civilian trials and from the “quaintness” of due process. Such discourse, however, is quite in contradistinction to rational, expertise-led risk analyses that suggest that many detainees in Guantánamo Bay do not need (or deserve) to be detained from a security perspective, that policies such as Guantánamo Bay detention arguably fester anti-American sentiment that might itself lead to more rather than less terrorism, that civilian trials are possible and desirable, that constitutional principles have application in Guantánamo Bay, and so on. These kinds of expertise-led analyses inform the executive position in favour of closing Guantánamo Bay; indeed, Obama’s Guantánamo policy is distinctly expertise-led (if not even slightly technocratic), as it depends so heavily for its practical rationale on the security-based assessments of the Task Force. Congress’ position, in contrast, seems to disregard both professional expertise and institutional preference that seemed to be held in such high political regard during the Bush administration.

CONCLUSION

Congress is on a solo run with its oppositionist turn here. Its obstructive course is not for constitutionalist reasons, but political ones, pure and simple. Being “strong on terrorism,” protecting the country, “standing firm,” and other machismo jargon are perceived by many politicians as playing well with the public. We may not feel as frightened, as vulnerable, and as insecure as we did in 2001, but people remember what that first panic felt like and some politicians are ready and willing to remind us, lest we would forget. To be sure, closing Guantánamo Bay would not necessarily

solve anything. Indeed, it might even make things worse for some individual detainees, who could find themselves somewhere else with fewer legal protections, such as Bagram Airbase. That notwithstanding, keeping Guantánamo Bay open in the face of all the imperatives for its closure is a semiotic of the reluctance of politics to follow law and the refusal of politicians to give up a powerful political symbol a hundred or so miles off the Florida coast.

NOTES

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1. Ian Ward, *Law, Text, Terror* (Cambridge: Cambridge University Press, 2009) at 148.
 2. Mark Tushnet, "Legal and Political Constitutionalism, and the Response to Terrorism," Chapter 8 in this volume.
 3. Lease of Lands for Coaling and Naval Stations, February 23, 1903, U.S.-Cuba, Article III, T.S. No. 418; Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, Art. III, 48 Stat. 1683, T.S. No. 866.
 4. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
 5. Fleur Johns, "Guantánamo Bay and the Annihilation of the Exception" (2005) 16 *European Journal of International Law* 613.
 6. John Yoo, *War by Other Means: An Insider's Account of the War on Terror* (New York: Atlantic Monthly Press, 2006).
 7. *Rasul v. Bush*, 542 U.S. 466 (2004).
 8. See, for example, the speech of Sen. Lindsey Graham in the U.S. Senate, 151 *Congressional Record* S12657 (10 Nov. 2005).
 9. *Detainee Treatment Act of 2005*, Pub. L. No. 109-148, ss. 1001-1006 (2005).
 10. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
 11. *Military Commissions Act of 2006*, Pub. L. No. 109-366, 120 Stat. 2600 (2006).
 12. *Boumediene v. Bush*, 553 U.S. 723 (2008).
 13. *Ibid.* at 755-56 (2008).
 14. Article 1(9)(2), U.S. Constitution: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."
 15. Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, January 22, 2009, Executive Order No. 13,492, 74 Fed. 4897 Reg. (January 27, 2009); Review of Detention Policy Options, January 22, 2009, Executive Order No. 13,493, 74 Fed. Ref. 4901 (January 27, 2009).
 16. Guantánamo Review Task Force, Final Report, January 22, 2010.
 17. *Ibid.* at 17.
 18. *National Defense Authorization Act for Fiscal Year 2011*, H.R. 6523, Pub.L. 111-383, § 1033(a)(1).
 19. *Ibid.* at § 1033(b).
 20. Guantánamo Review Task Force, *supra* note 16 at 19.
 21. Eric Holder, Testimony to the Senate Judiciary Committee, 18 November 2009, available online at, U.S. Department of Justice, <http://www.justice.gov/ag/testimony/2009/ag-testimony-091118.html> (15 March 2011).
 22. Scott Shane and Benjamin Wieser, "U.S. Drops Plan for a 9/11 Trial in New York City," *New York Times* (29 January 2010) A1.

23. See *supra* note 18, at § 1032.
24. Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, March 7, 2001, available online at The White House, http://www.whitehouse.gov/sites/default/files/Executive_Order_on_Periodic_Review.pdf (March 11, 2011).
25. H.R. 5136, § 1033, as placed on Senate Calendar; see discussion in Fiona de Londras, *Detention in the “War on Terror”: Can Human Rights Fight Back?* (Cambridge: Cambridge University Press, 2011) at 125–26.
26. These provisions were inserted into spending and appropriations bills for the Departments of Homeland Security, Defense, State, Commerce, Justice and Science. See Walter Alarkon, “Congress Uses Spending Bills to Halt Closing of Guantánamo Bay” *The Hill* (4 October 2009).
27. *Supra* note 18 __ at § 1032.
28. Ward, *supra* note 1 at 155.
29. John Yoo, “The Supreme Court Goes to War,” *Wall Street Journal* (17 June 2008) available online at Wall Street Journal, <http://online.wsj.com/article/SB121366596327979497.html>.
30. National *Defence Authorisation Act for Fiscal Year 2007*, S. 2766 (as originally introduced). See Manu Raju and Elana Schor, “Feinstein, Harkin aim to shut Guantánamo through Defence Authorisation Bill,” *The Hill* (21 June 2007) available online at The Hill, <http://thehill.com/leading-the-news/feinstein-harkin-aim-to-shut-guantnamo-through-defense-authorization-bill-process-2007-06-21.html>; Editorial, “An Exit Strategy for Guantánamo,” *The New York Times* (3 May 2007) available online at The New York Times, <http://www.nytimes.com/2007/05/03/opinion/03thu2.html>.
31. This is not limited to national security crises. Indeed, in the course of trying to manage the global financial crisis domestic politics in numerous states has become fundamentally constitutional. In Spain, for example, the Constitution was amended to put in place a constitutional limit on public debt. This was only the second amendment of the Spanish Constitution, which was introduced in 1978.
32. Oren Gross, “Security vs. Liberty: On Emotions and Cognition,” Chapter 3 in this volume.
33. de Londras, *supra* note 25, ch 1.
34. Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (London: MacGibbon and Kee, 1972).

