October 28, 2015

Democracy and Torture

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Available at: https://works.bepress.com/patrick_maurer/2/
September 11th spawned an era of political changes to fundamental rights. The focus of this discussion is to highlight Guantanamo Bay torture incidents. This analysis will explore the usages of torture from a legal standpoint in the United States.
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Preface

I still remember that fateful day that changed the course of the United States. I remember someone in my art class urging the teacher to turn on the news. As soon as the news came on all I saw was terror. Within thirty minutes the World Trade Center was in flames. In the last fourteen years the United States government has been in violation of basic civil rights because of these tragic events at the turn of the century.

The government has implemented many policies which have led to the detentions of many suspected terrorists. The purpose of this discussion is to provide modern legal thought pertaining to the government’s anti-terrorism sentiments. These sentiments have created violations pertaining to basic civil liberties including the right to protect yourself from unlawful detentions and torture.

The purpose of this thesis is to highlight many legal challenges that the courts have dealt with in the past and present pertaining to torture and unlawful detentions. It has been a long year as I have researched this topic. I want to personally thank Dr. Brian Frederking and my close friends and family for the inspiration they have given me as I have tirelessly worked on this Senior Thesis. I want to thank Dr. Patrick Folk for the inspiration to get my paper published.
Introduction

Do democracies torture less than autocratic regimes? The September 11th terror attacks are at the forefront of this question. Before this discussion can begin it is important to understand exactly what torture is. Henry Shue (1978) argues that torture is morally more reprehensible, and sinks below any “well-regulated” killing that naturally occurs in a just war (Shue 1978 p.130). Shue (1978) also argues that “torture begins only after the fight is – for the victim-finished” (p.130). Shue discusses how in a “fair fight” only the losers of a battle are tortured, powerless over the situation and rendered as a defenseless victim. This defenselessness is the cornerstone of Shue’s discussion. David Sussman (2005) discusses the nature of torture in relationship to war. Torture is a unique situation because of the setting which the victim and the tormentor are in, the realization that the victim is completely at the mercy of the tormentor (Sussman 2005 p.6). The relationship between the victim and the tormentor is asymmetrical. Victims of torture have a clear inability to guard against and or retaliate against the tormentor. The importance this definition provides is central to this thesis, in that those detained on account of being a suspected threat to national security lack the freedom to elude assault. The purpose of this thesis is to provide a possible answer to the initial question of whether or not democracies prevent against torture.

Therefore, the next section of this discussion will provide the legal theory that is pertinent to this subject matter. The rest of this discussion will involve not only the legal theory discussing torture in democratic states, namely the United States in this instance. It will also discuss 1. the historical role the courts have played in times of national crisis and the potential implications involved, 2. the potential for international agreements to urge domestic courts to comply with treaties as well as conventions, 3. Modern court decisions post-9/11, 4. Vague Remedies.
Legal Theory

From a legal standpoint, Judicial Independence is the ability of courts to procure decisions independent of the other two branches of government. This ability to act independently of the other branches, provides a key element to support this thesis that democracies will prevent the usages of torture in times of crisis. However, the terrorist attacks of September 11th provide legal scholars with countless detentions and claims of torture by inmates in detention centers ordained by the United States. This brings up another question this thesis will discuss and that is: if democracy is crucial to prevent against torture, then how is the United States allowed to practice torture?

There are two models of legal reasoning that provide contrasting views of national security which explains the detentions under the guise of national security. The “Business As Usual” model which provides that under no circumstances can the government step outside of normal constitutional powers to preserve the state. In contrast to this model is the “Extra-legal measures” model which allows the government to act outside the constitution in emergencies. The courts before September 11th acted on these extra-legal measures by deciding cases from a judicial deference tone. Judicial deference or the courts willingness to defer to the government in times of national security has been the common standard for the United States courts before September 11th.

The cases discussed are split between cases under judicial deference and the legal shift seen after international treaties. This thesis acknowledges these treaties as the basis for this shift from cases based on judicial deference to a legal landscape that proactively reigns in the government. Thus, democracies will prevent against the usages of torture, in an effort to preserve liberties; rights that are protected by not only the United States Constitution but also by internationally accepted treaties.
Judicial Independence is crucial to the survival of a democracy and its constitutional rights. Conrad and Moore (2010) argue that countries with independent judiciaries are associated with a proactive approach that protects “physical integrity rights” (p.464). There are many aspects of judicial independence that help explain why democracies are less likely to torture. One is judicial autonomy, or the ability of judges to act on their own accord and develop opinions without the influence of outside political forces. As Hornhauser (2002) concludes, judges should be “authors of their own decisions” (p.48). Thus, the ability of judges to have independent voices, is critical to the protections guaranteed by the United States Constitution.

A second aspect is judicial effectiveness, or the compliance of judicial actions by the legislative and executive branches of government. For the judicial system to be effective, other political actors must be willing to comply with the decisions of the court.
Furthermore, these outcomes are directly related to judicial independence and the autonomous effects of independent opinions (Stanton and Moore 2011 p.559). Thus, if this stands true, then the notion of judicial independence is crucial in the protection of civil liberties pertaining to the usages of torture.

Staton and Moore (2011) discuss another legal concept pertaining to torture by turning focus to Judicial Review or more modernly called “constitutional review”. Constitutional Review allows for the courts to engage in “creative policymaking” and dissolve policies considered unconstitutional (Staton and Moore 2011 p.564). Thus this creative policymaking has been the driving force that protects liberties and rights of citizens in democratic nations. This innovative policymaking forces the government to forfeit the ability to interpret the constitution. Moreover, it is this forfeiture that enables a third party, the justice system, to provide an ex-post review of the liberties that are violated during torture (Staton and Moore 2011 p.564). There are two specific legal models: “Business as Usual” model and the “Extra-Legal Measures” model which are important to discuss because of their relationship to the cases discussed later.

**“Business As Usual” Model**

The importance of the Business As Usual model is that a state of emergency does not justify special “emergency powers” beyond explicit constitutional authority. The Business as Usual model is grounded on concepts of constitutional absolutism and constitutional perfection. Constitutional Absolutism asserts that any powers that a government possesses cannot undermine or diminish the scope or suspend constitutionally established guarantees, such as due process (Gross 2003 p.1046). If the constitution itself establishes a specific power, then it is allowed. However, the government cannot work outside of the structure of the United States Constitution (Gross 2003 p.1047).
Constitutional perfection asserts that the framework should be the same in times of peace and in times of war. This perfection supports the Business as Usual Model of emergency powers in times of dire crises (Gross 2003 p.1047) because it maintains the original constitutional rights no matter the state of the nation. At this point, there are three important concepts that support this thesis that democracy prevents torture: Judicial independence, judicial review and this legal model. Therefore, from a legal standpoint it could be argued that democracies will prevent torture: if they have an independent judiciary that invokes both judicial review and this business as usual model of legal thought.

However, as Oren Gross (2003) points out, “The Business as Usual Model” is naïve, because when governments are faced with grave crises, governments will preserve the state (Gross 2003 p. 1021). Therefore, the model is an “illusory façade of normalcy” (p.1045) which is the foundation for the discussion of America’s utilization of extra-legal measures model. The extra-legal measures model allows for a government to preserve order and security in a nation with the intent to return to a sense normalcy when the conflict is terminated.

Extra-Legal Measures

There is a commonly practiced model which is known as “Extra-legal Measures Model” which has two basic assumptions. The first assumption is the “assumption of separation” which states as a nation we can separate emergencies and crises from a sense of normalcy. This assumption accepts an expansion in governmental power in times of great crises. As soon as the crises is over, the key is to return to a sense of normalcy. Furthermore, “extra-legal” measures under this assumption are not directed at ordinary citizens but terrorists themselves (Gross 2003 p.1022).
Secondly, the “assumption of constitutionality” is based on the constitution; in that all powers of emergency are found and limited by the constitution. Under this assumption, it holds that terrorists are lawless and operate outside of legal principles, rules and norms (Gross 2003 p. 1023). Democratic nations much like the United States must preserve the rule of law and democracy by fighting terrorism to its defeat. It is important to view the fight against terrorism in this light, defeating terrorism without correspondingly destroying the very liberties and privileges afforded by the United States Constitution (Gross 2003 p. 1022).

Therefore, during emergencies the government can act constitutionally against these lawless actors. Gross (2003) argues that the assumption of constitutionality in extra-legal measures may in fact strengthen rather than weaken the fabric of the constitution, because these extra-legal measures preserve security. Thus, extra-legal measures are more likely to have more constitutional fidelity than less (Gross 2003 p. 1023). It is advocated that these extra-legal measures preserve constitutional order and its fundamental constitutional protections (Gross 2003 p. 1024) because of the security risks associated with terrorism. Risks that threaten the very liberties of the constitution in which it intends to protect.

However these extra-legal measures have often led the courts to defer to the government in times of national crises. Thus judicial deference has checkered American legal history under the extra-legal measures model. This checkered legal history poses the next big question of this thesis: if the United States is a democracy with an independent judiciary that often practices judicial review, then how can the United States practice torture? This question leads this discussion into a legal concept known as judicial deference or the courts unwillingness to decide on an issue because it is either a political question or it is a matter of national security.
Judicial Deference

Historically speaking, the courts have engaged in judicial deference during “wars” and “other public emergencies” (Scheppel 2012 p.92). Judicial reasoning for this hand off approach comes from the Latin term: “inter arma silent leges: in war, the law is mute” (Scheppel 2012 p.92). John Locke argued that “the end of the government is the preservation of all” and that “having the power to act according to discretion” and sometimes against the “prescription of the law” was the ends required for the security of a nation. Chief Justice Rehnquist established this later by claiming that in wartime “freedom and order” lean heavily towards order rather than freedom. Thus, the courts deference seen in the following cases maintains the stance that in times of war, the government knows what is best for its own preservation. One of the first examples of judicial deference is seen in Dorr’s Rebellion.

“Dorr’s Rebellion”

Dorr’s Rebellion of 1841 in Rhode Island led to an alternative government that operated under the old colonial charter. The governor declared martial law and requested federal troops. The governor deputized Borden to break into Luther’s home. In Luther v. Borden (1849) the courts held that it could not answer the question of his break in because it was a matter of political importance rather than legal. The courts announced that this is a case of a “political questions doctrine” which the courts have followed since (Luther v. Borden 1849). The courts grounded this claim on Locke’s argument that a government may “resort to the rights and usage of war to maintain itself” (p.45). Luther v. Borden provides future courts a precedent that allows the government to partake in extra-legal measures because the courts often deference to the government in times of national crises and outright war. Thus, Luther v. Borden became the main point of discussion in both the Civil War Cases and World War 2 court cases.
“Civil War Deference”

In Ex Parte Vallandigham 1863), a trial court had refused to issue a writ of habeas corpus on the grounds that “such are necessary to the protection of the government and constitution” (p.922). Furthermore, the Ex Parte Vallandigham 1863) court found that the writ of habeas corpus was “unenforceable” during times of national crisis like the Civil war, when this case was decided. Ex Parte Vallandigham (1863) illustrates judicial deference during the civil war with similar language of Luther v. Borden 1849 nearly fourteen years prior.

However, as seen in Ex Parte Milligan 1866), the courts curtailed this approach. Ex Parte Milligan pertains to Lincoln’s suspension of Habeas Corpus during the Civil War. Lamdin Milligan, a citizen of the United States, was arrested and charged in Military Courts with “Conspiracy against the government of the United States” (Milligan 1866 p. 6) he was charged with joining as well as aiding the Sons of Liberty. With the intent to overthrow the government, holding communication with the enemy, conspiring to seize ammunition of war in the arsenals, and the liberation of prisoners of war (Ex Parte Milligan 1866 p. 6-7).

The courts found that the suspension of rights in times of great national peril does not extend to the suspension of jurisdiction and suspension of the courts (Ex Parte Milligan 1866). This case was decided after the Civil War and the threat was over, indicating that the courts after the mess do provide a reprieve after mass right violations. Ex Parte Milligan is still deference because it was decided after not during the Civil War. However, it appears to have been ineffective in future cases as seen during World War 2. The first case to analyze is Ex Parte Quirin because of the significance with another major American conflict.
“World War 2 Deference”

Ex Parte Quirin 1942 is another example of the courts upholding the government in times of crisis by judicial deference. Eight Germans were captured and taken by submarine as saboteurs by one confession to the FBI which led to all eight detentions. The courts held that the charges against the petitioners were authorized by the President which the “President is authorized to order” before a “military commission” (p. 18). The court in this case deny “motions for leave” to grant the petitioners habeas corpus in American Courts (Ex Parte Quirin 1942 p. 18). Thus, denying the writ the courts defer to the government because of the potential threat of sabotage by the Third Reich.

In Hirabayashi v. United States 1943 the government placed a curfew on Japanese people living on the west coast. The Supreme Court deferred to the political branches during wartime by arguing “the war power of the national government” extends to “every matter and activity” (Hirabayashi 1943 p.93). Thus these wartime activities are meant for the preservation of the state. In Koremastu v. United States 1944, the courts used Hirabayashi as a precedent to determine the fate of the Japanese internment camp detainees. The court argued that exclusion “from a threatened area” in that the detention of these Japanese Americans is “no less than curfew” which “has a definite and close relationship to the prevention of espionage and sabotage” (pgs.217-18). This prevention of espionage and sabotage is crucial for the continuation of the United States. In Johnson v. Eisentrager 1950, German Petitioners had been detained in China by the U.S Army and tried by a U.S tribunal. In this case, the Supreme Court denied the petitioner’s access to American Courts (Schepele 2012 p.104). Justice Jackson contended that because the detainees were imprisoned and tried “outside the United States” there was not enough of a connection between “the petitioning enemy aliens and the United States to warrant habeas jurisdiction in American Courts” (Johnson v. Eisentrager 1950 pgs.777-78).
Justice Jackson delivered an expansive view of the ability of the President to detain in
times of national crises by stating that, “Executive power over enemy aliens, undelayed and
unhampered by litigation, has been deemed, throughout our history, essential to war-time
security” (Johnson v. Eisentrager 1950 p.774). Therefore, the “war-time security” has been the
foundation of judicial deference in times of national calamity.

The precedent set out by these court cases causes alarm to those who support liberties and
protections of the constitution because of judicial deference. This prior judicial deference is the
answer to why the United States in more modern times is exempt from torture prevention. This
rubber stamp of approval has allowed the government to take “extra-legal” measures in times of
crises because the judicial branch has often thrown their hands up when it came time to discuss
matters of national emergency and war.

The notion of judicial independence during the days of judicial deference is non-existent.
Instead of acting independent of the government as many would expect. The courts either
ignored the issue by claiming it’s a political question or by applying lockean principles;
principles that enable a government to use extra-legal measures to preserve the nation.

However, it appears there is a legal shift away from judicial deference. As Scheppele
argues is the “new judicial deference”. A new way of ruling as will be seen later in the
September 11th detainment cases. Cases that rely on two international treaties that the United
States is a party of to address the concerns pertaining to the reclassification of terrorists, as
unlawful combatants in the modern world.
International Treaties

The same year as the Eisentrager case in 1950, the international community set forth the Geneva Convention relative to the Treatment Prisoners of War (GPW) which established rules that govern the treatment of Prisoners of War. It is essential because of President Bush’s reclassification of “enemy combatant”. The third Geneva Convention defines prisoners of war in relation to members of a conflict that are not officially a part of the armed services in a conflict as such:

- Members of volunteer corps, militias, and organized resistance forces that are not part of the armed services of a party to the conflict are entitled to POW status if the organization (a), is commanded by a person responsible for his subordinates (b) uses a fixed distinctive sign recognizable at a distance c) carries arms openly d) that of conducting their operations in accordance with the laws and customs of war (GPW art 4(2

The United States is a signed party to this convention.

In 1987 the Convention against Torture went into effect, and the United States subsequently ratified the treaty. The CAT defines torture as “[a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third persons information or a confession…”(Convention Against Torture (CAT), Article 1, section 1).

The importance of these two international agreements is seen in the post September11th era which arguably could be seen as a shift in the courts from days of judicial deference. These agreements provide the courts a resolve to restrain the governments overbearing tactics. Thus, even though the courts deferred in the past in times of crisis, Judicial Independence has at least some fighting chance for democracies and the prevention of unlawful detentions and torture.
Post September 11th Era

September 11th 2001 was a time in American History that initiated the vast government interventions of the 21st century. When the sheer terror shell shocked American lifestyle it allowed for the implementation of interventions; interventions that led to the capture, detention and instances of torture in Guantanamo Bay and other detention centers. The detentions have opened up a floodgate of concerns that pits domestic security against civil liberties and the constitution itself. During times of grave crisis according to Oren Gross (2003), democratic nations are more prone to lower the standard in protecting fundamental legal rights (Gross 2003 p. 1019). September 11th saw a redefinition of the notion of “enemy combatant” to include terrorists and those that aid terrorist groups.

Enemy Combatants

To start off the next set of cases, it is important to discuss the Bush Administrations redefinition of “enemy combatant” to include these terrorists that attacked the United States. President Bush after the September 11th attacks defended his detentions claiming that these terrorists are not treated as prisoners of war as defined in the Geneva Convention Relative to the Treatment of Prisoners of War. Bush argues this because they fail to meet the international standards as lawful combatants (Department of Defense, Secretary Rumsfeld and General Myers). Furthermore, the Bush era also argued that Al Qaeda remains outside of the protections of the Geneva conventions because the President had determined that members of these terrorist groups remain outside of the Convention because of the lack of definition of statehood. Thus this lack of statehood prevents them from the protections afforded as Prisoners of War.
Moreover, it is important to dissect how the government interpreted this Convention as to provide for an answer to “enemy combatant” as unlawful and subjectable to detentions. First, under the first premise, “is commanded by a person responsible for his subordinates” argues that a military unit must be commanded by a leader. For the Bush administration, “they were not organized in military units, as such, with identifiable chains of command” (Rumsfeld Press Conference, supra note 7). Under the second tenet “uses a fixed distinctive sign recognizable at a distance”. Rumsfeld contended that the terrorist cells did not in fact have “distinctive signs, insignias, symbols or uniforms” and often “sought to blend in with civilian noncombatants, hiding in mosques and populated areas” supporting the government’s claim that they are unlawful combatants (Rumsfeld Press Conference, supra note 7).

Rumsfeld is contending that because there was no visible distinctions between the enemy combatants and likewise the ordinary citizenry creates a notion of concealment as discussed in the United States Army Field Manual, in that combatants “lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property”. (FM 27-10, supra note 27, at para. 74). Therefore holding these terrorists as unlawful is supported by United States military law as well as the Geneva Convention. However, it is not as clear cut as it appears to be.

Jennifer Elsea (2005) argues that if these terrorist groups did not in fact have a central command or leadership, then it would be nothing more than a “lawless mob” that would be unlikely to affect damage outside of Afghanistan (Elsea 2005 p.29). Therefore, the Bush Administration’s claim is in fallacy because claiming they have no leader is a serious contention for debate.
Furthermore, Elsea (2005) contends that the pentagon’s claim that these terrorists whom lacked proper uniform are not in direct violation of the third Geneva Convention. The U.S Special Forces troops have been often known to operate in secrecy. This secrecy allows these soldiers to dress often times in civilian clothing in order to infiltrate enemy territory (Elsea 2005 p. 32). Thus it is a contradiction for the Bush Administration to claim this violation when these special forces often act in civilian dress.

Bruce Ackerman (2004) discusses the nature of what exactly an enemy combatant is in light of the terrorist acts of September 11th 2001, within the context of the “war on terrorism” and its tenets post September 11th attacks that disrupted our nation’s core (p.1032). Traditionally speaking war is a state of “belligerence between sovereigns” (Ackerman 2004 p.1032). The intended wars in Afghanistan and Iraq under this notion are considered wars because all parties involved are recognized as sovereign nation states. It follows that combatants in this strict sense would be considered “enemy combatants”. However, Ackerman (2004) argues that in instances of “war on terror” individuals that aid or are a part of these terrorist groups are not considered to be a sovereign nation. This class distinction of “enemy combatants” is not justified in the same way as say Germany in World War 2 (Ackerman 2004 p.1032).

Furthermore, Ackerman argues that under this premise anyone could be detained for aiding and abetting a terrorist. Everyone is subjected to detention by the commander in chief. Furthermore, the detentions could possibly be endless as terrorist groups continue to be redefined under new authorities (Ackerman 2004 p.1033). Therefore, the redefined enemy combatant status is the highlight of the proceeding cases that establish a normative basis for a legal review of Post September 11th attacks.
September 11th initiated a resolution by congress by the name of the “Authorization for Use of Military Force AUMF which established powers vested in the President to detain enemy combatants in the wake of September 11th. In Hamdi v. Rumsfeld 2004 the question of “enemy combatant” was at the forefront of this case. Hamdi the Petitioner had been classified as an enemy combatant for what the government alleges, “…taking up arms with the Taliban during the conflict…” (p.1). Hamdi had traveled pre-September 11th in July or August of 2001 to Afghanistan. According to the government, Hamdi was an enemy combatant because of his affiliation with a “Taliban military unit” (p.5).

Furthermore, it asserts that Hamdi had remained with his Taliban unit until his capture through the attacks on September 11t when Hamdi surrendered his”Kalishrikov assault rifle” (Hamdi v. Rumsfeld 2004 p.5). Hamdi is an American citizen currently in detention at a naval brig in Charleston South Carolina. The district court had found the government had fallen “far short” to support the detainment of Hamdi post 9-11 (Hamdi 2004 p.5). In fact the court had criticized the affidavit as a nothing more than a “little more than the government’s ‘say so”. The court demanded the release of numerous materials for “in camera review” of all testimonies of Hamdi and notes taken at the interviews that were conducted during his detention (Hamdi 2004 p.5). The district court resounded with a strong deferential tone as seen in pre September 11th. The district court argued that, “the Constitution does not specifically contemplate any role for courts in the conduct of war” (Hamdi v. Rumsfeld, (4th District 2003) p.474). The district court had remanded back to the trial courts and instructed them to be “more deferential” to any claims of “access to counsel would harm national security” (Hamdi v. Rumsfeld, 4th Circuit 2002). The ongoing battle continued between the trial and district courts.
Ultimately the case has ended up in front of the Supreme Court on a writ of habeas corpus, on the grounds of Hamdi’s detention at a military brig has violated both his fifth and fourteenth amendment rights. The Supreme Court granted writ of Habeas Corpus. Justice O’Conner delivered the opinion of the court. The courts appeared to reign in the executive by claiming times of crises are not “A blank check for the president” which is the start of legal changes that surround the writ of habeas corpus pertaining to the war on terrorism (Hamdi v. Rumsfeld 2004).

O’Conner extrapolates on the contention of interrogative measures to procure evidence against an enemy combatant. This coerced confession cannot be relied on in any factual basis in a court. The evidence procured by the government should be considered hearsay because regardless of the effectiveness an interrogation technique, it seemingly cannot provide for constitutionally adequate fact-finding function before the courts. In Hamdi v. Rumsfeld 2004, the courts arguments here are grounded on the premise of a “secure interrogations environment” (p.31). This secure interrogations environment is largely dependent upon a “relationship of trust and dependency” (p.31). Therefore, the confessions and evidence are dependent on those who do the detaining. The court argued these interrogations are biased and grounded from a non-factual basis. To answer the petitioner’s plea of 5th Amendment violations, these secure interrogation environments violate the basic premise of the 5th amendment which establishes the right to protect a person from self-incrimination. It violates this because Hamdi’s in a situation for which he cannot willingly safeguard himself from incrimination.

Furthermore, the question of due process is a large portion of this case because of the fact that Hamdi was ineligible to have his facts heard in counter to the government’s case. Compounded with the courts affirmation that the process by which the government the United States achieved this information against Hamdi was intolerable.
Therefore, it is no wonder that the Supreme Court ruled in Hamdi’s case because this is a clear violation of his 5th amendment rights and more specifically the due process clause. Justice O’Conner brings to the discussion this sense of due process while in detention by stating that, “the interest in being free from physical detention by one’s own government,” is of the most elemental liberty interests for the private person (Hamdi v. Rumsfeld 2004 p. 22). The elemental right to be free from “bodily restraint” has been at the helm of the Due Process clause in defense of private liberties (Foucha v. Louisiana 504 U.S. 71, 80 1992). The court contended that his detention is very likely to be indefinite because this war will not end in a “cease-fire agreement” (Hamdi v. Rumsfeld (2004) p.12). The argument here then is that Hamdi’s situation is beyond the scope of the AUMF. The Supreme Court acknowledges the AUMF but does not support the government in this case because “the purpose of interrogation is not authorized” Hamdi v. Rumsfeld (2004) p.12). At least theoretically speaking the courts has shown a desire to reign in the executive which is a legal shift from the days of judicial deference.

In Padilla v. Bush, the government had provided a bare bone declaration of evidence against Jose Padilla. The Supreme Court in Padilla’s case, a mere technical case, affords legal scholars that this case is nothing more than an evasion of the political question surrounding Padilla’s detention.

According to Scheppele (2012), the Supreme Court not only avoided the question of “what to do about Padilla’s detention” but the court also failed to “defer” (p.116). The courts bought time for a “political resolution” outside of the courts; by not necessarily putting an official stamp of approval on the President’s actions but also not restricting the executive either (Sheppele p.116).
However, these are only two cases that deal with specifically American enemy combatants. This discussion must proceed to non-American citizens to capture an entire picture of judicial scales in this very politically charged question. In Rasul v. Bush there were 14 petitioners to this case. Rasul was a lead petitioner in this case which he was released to Britain before the Supreme Court decided this case. The Supreme Court decided that the other petitioners require attention and then proceeded with this case on grounds that the other petitioners had unresolved claims (Scheppel 2012 p.126).

**Enemy Combatants "Non-Citizens"**

In Rasul, the lower courts branded Rasul v. Bush with the rulings from the Eisentranger case with refusal to hear the claims, see Al Odah v. United States, (D.C. Cir. 2003; Rasul v. Bush, (D.D.C 2002). However, the Supreme Court accepted the case and reversed the lower courts (Scheppel 2012 p.127). Justice Stevens argued that there were no longer restraints to the detainees held by the U.S. and subsequentially their challenge to their detentions. Eisentrager specifically, Justice Stevens criticized the lower courts for its comparison because unlike the petitioners of Eisentrager case; the petitioners in Guantanamo detainees did not have the chance to contest their detentions. The Eisentrager detainees had been imprisoned after a full military trial (Rasul v. Bush 2004).

According to Scheppele (2012), what Hamdi, Padilla and Rasul all have in common is the author’s reliance on “new judicial deference”, (p.129) which unlike pre-September 11th actually delivered a “defeat to the policy of government. There are two more important cases that need to be addressed to complete this picture of new judicial deference.
In Hamdan, Salim Hamdan challenged the “military commission system” at Guantanamo which Hamdan was held for detention (Hamdan v. Rumsfeld 2006). The district court held that the crimes which the government had charged Hamdan; were not properly considered crimes in the law of war and within the context of the Geneva Conventions Framework (Hamdan v. Rumsfeld, D.C Cir 2005).

During the time this case went to the Supreme Court, congress enacted the “Detainment Treatment Act of 2005” (Scheppele 2012 p.129). The DTA of 2005 “denied” all Guantanamo detainees the right of habeas corpus in American Courts. The Supreme Court held that this act did not apply to cases that were currently pending. The court also argued that the commissions were unlawful because they violated “provisions of the Uniform Code of Military Justice (UMCJ)” and likewise the court found that the UMCJ had incorporated common Article 3 of the Geneva Convention which had minimum standards that bush failed to meet (Scheppele 2012 p.130).

Further, the court found that A. the very structure of the military commissions had violated both common laws for military tribunals and also the Geneva Convention directly; (Hamdan v. Rumsfeld 2006 pgs.595-635) B. that congress could authorize the tribunals but the president could not “invent them without such authorization” (Hamdan v. Rumsfeld 2006 p. 636), and C. that the president alone could not define the crimes of the tribunals. (Hamdan v. Rumsfeld 2006 p. 636-55). This judicial discussion brought into law was the Military Commissions Act of 2006 or (MCA of 2006). The MCA of 2006 according to Scheppele (2012) had “overtly permitted the President” to make the military commission different than that of a “courts martial”. Making this distinction satisfied the court requirements of the “structure” of the military commissions (Scheppele p.134).
The MCA also expanded the crimes that were allowable for charge to include: conspiracy as well as providing “material support” for terrorism (Scheppele 2012 p.134). In effect what the MCA did was established a legal framework that allowed for detentions by the executive and congress. It also permitted the “enemy combatant” status to remain in effect. This is significant because for the first time the courts influence in Hamdan’s case actually compelled the government to act in congressional terms to reign in the executive.

After extensive legal review of writ of habeas corpus pertaining to “enemy combatant the courts turned their eyes to Boumedine v. Bush. In Boumedine, the petitioner was of Algerian descent and was picked up in 2002 along with five other men in Bosnia. The Bosnian court held that the charges brought before them was “baseless” in fact (Scheppele 2012 p.137). The United States Supreme Court landed another sweeping victory for Judicial Independence.

During this case, two changes had occurred on the legal landscape: the passage of both the DTA of 2005 and the MCA in 2006. It could be presumed that the courts would have had tied hands. Because the DTA of 2005 which set up “Combatant Status Review Tribunal” in order to provide some “minimal review” of the evidence against the petitioners (Scheppele 2012 p.137). Furthermore, it blocked access to normal courts for Habeas petitions. Thereafter, the MCA established “congressional support” for the President’s detentions as well as a full ban of habeas petitions to the Supreme Court (Wilmer Hale, supra note 252).

Naturally, these laws came to the Supreme Court on constitutional grounds and was granted writ. The court resounded back with a “counterpoint to the checkered history” in that habeas petitions are only banned in the suspension of the writ (Scheppele 2012 p. 138).
The Court argued that: “In our own system the suspension clause is designed to protect against these cyclical abuses…by a means consistent with the essential design of the constitution” (Boumedine v. Bush 2008 p.15) The courts argued that except during periods of “formal suspension” that the judiciary has a “time-tested device”; the writ to maintain the “delicate balance of governance” in order to safeguard liberties that are entered in by the constitution itself (Boumedine v. Bush 2008 p.15). Thus, the post September 11th cases have provided a court that has shifted into this new judicial deference. However, it is important to understand that little remedies were provided for the petitioners.

_Vague Remedies?

This defeat provided for a slow relief if any to the petitioners in the long run (Scheppele 2012 p.129). Despite this change from the old Judicial deference of yesteryear the strong-arm of the judiciary has done little to nothing to provide actual remedies. The courts have only theoretically scorned the government for the mistreatment of Guantanamo Bay detainees. Furthermore Scheppele (2012) argues that the courts have used the cases as a mere critique of the system itself rather than providing solutions for the petitioners of habeas corpus.

Hamdi was finally released but had to renounce his citizenship and violent terrorism. In his settlement agreement he also agreed to restrictions on travel and restrictions on the ability to sue the United States for anything that had happened during his detention (Settlement Agreement, 2004 pg. 3).

Further, the Padilla court had argued that it was filed under the wrong jurisdiction. After Padilla retried his case in the proper court as mentioned in the original Supreme Court hearing; on an appeal to the 4th circuit, Padilla was dealt a loss. Padilla’s loss was grounded in the previous Supreme Court in that Padilla was in fact an authorized detainee.
Padilla was later charged with more incriminating charges. Charges that included: “participating in a terrorist plot centered in Florida” (Schepele 2012 p.120) this round of Supreme Court writ of habeas corpus the courts had denied the writ for Padilla. Padilla in 2007 finally stood trial for charges that were largely unknown to Padilla for more than four years into his detention (In the Courts: Jose Padilla, U.S Citizen, supra note 158).

For Hamdan changes were not so quickly produced. Hamdan was originally charged in 2004 with “conspiracy to commit a terrorist act” as well as being accused of being Osama Bin Ladins driver and body guard (Hamdan v. Rumsfeld 2006). In 2007, the charges were of conspiracy but also Hamadan was charged with providing material support for terrorism (Schepele 2012 p.135). During this time, Hamadan was held in solitary confinement. His lawyers argued that Hamadan’s mental state had “deteriorated” to a point which he could no longer “assist” in his own defense (Declaration of Andrea Prasow).

Further, Hamadan boycotted his trial and argued that:

America tells the whole world that it has freedom and justice. I do not see that… There are almost 100 detainees here. We do not see any rights. You do not give us the least bit of humanity… Give me a just court… Try me with a just law. (Colson 2008)

An undeniably angry petitioner is only half right because the courts in the end in theory had come to an end which provided for a legal framework that had judicial limits. These judicial limits are a far cry from the old judicial deference of the era before September 11th.

However, he is right because in the end he was held at Guantanamo for seven years (Schepele 2012 p.137) but the courts did not defer as the legal world might expect. Schepele (2012) argues, Hamadan’s case was a giant leap for “non-deference” but relatively little was done for Hamadan (Schepele 2012 p.137).
Finally after seven years Hamadan was acquitted on the conspiracy charge, but was charged with material support to terrorism. In the end, including the time he had spent in detention, Hamadan only had to serve an addition five months (Scheppele 2012 p.136). Furthermore, there is no mention of restitution for the other cases as well. Indicating that only theoretically a change in the courts behavior came from the Post September 11th cases.

**Conclusion**

Do Democracies prevent against torture? Conclusively, the days of judicial deference are theoretically in the past. The international treaties that came after this period provide the legal framework for the Supreme Court in the Post 9-11 cases to reign in the executive in times of national crises. Despite the notion of old judicial deference in times of national crises, the courts will place these treaties above not only any federal laws promoting these detentions but also will strike down these detentions as a violation of not only international treaties and domestic Constitutional law.

Post September 11th saw a shift in the courts from this American Exceptionalism and the typical extra-legal measures sought after by older court cases, into a new way of ruling which is based on the Business as Usual Model of legal thought. The Business as Usual Model, which is prevalent in these Post September 11th cases requires additional attention to understand the shift from Judicial Deference of courts past; into at least theoretically speaking a court that is often willing to restrain the other branches of government. This seeming blow to the government’s willingness to detain had at this point become a constitutional question rather than a political question. A legal shift from the days after Dorr’s Rebellion and the matter of political question doctrine. This legal shift from old judicial deference to the more promising yet undermined protection of liberty in times of war is the general basis for this thesis.
All of these cases before the international treaties provide a framework for a working answer to the question: how does the United States remain exempt, under the theory that democracy promotes human rights namely against torture? The illustrations seen in Luther v. Borden all the way to the Kormestu Case provides for judicial deference. Judicial deference is the answer to this question.

At least before the realm of terrorism, the courts often deferred to the other branches in times of national security often labeling it as nothing more than a political question that was established in Luther v. Borden. This political question doctrine is the very foundation which has for the better part of 100 plus years dominated the legal world. However, in light of the terrorist attacks of September 11th, the courts have shifted gears in their plight to preserve liberty and the constitution. As seen in many of the modern cases, this shift at least in theory has provided for a new way of ruling.

Henceforth, it has been the driving force behind the legal landscape changes; changes that end with Boudemine v. Bush in the final decree against the government. However, ultimately this discussion must bring resolve to the discussion of whether or not democracy does in fact prevent against the use of unlawful detention and torture. It appears in these later cases that judicial independence is at the forefront of these cases.

At first it does only because of Judicial Autonomy or the ability of the courts to decide freely is seen in the terrorist cases. In most instances the court, held a strong arm against judicial deference. Judicial effectiveness is co-equally important to an independent judiciary. This is seen by the passing of legislation that encouraged the restraining attributes of the courts. The passing of the DTA and MCA acts which at least attempted to tame down the reigns of the executive branch in detentions of enemy combatants post September 11th. However, it appears that the courts have placed not only constitutional law but treaties as well above these acts.
What is clear in this new form of court precedents is at least in the scope of larger protections, the courts protections against a tyrannical government which is based on the moral questions pertaining to detention and torture. Boudemine court makes this distinction by the courts resounding statement of “delicate balance of governance” in order to protect and “safeguard liberties entered in by the constitution itself” (Boudemine v. Bush 2008 p.15). The courts held that the meager attempts are unconstitutional because of the suspension clause in the U.S constitution. These blatant decisions are in essence judicial independence by its own right because these protects against tyranny by providing constitutional safeguards of the judiciary against unlawful detentions and torture. The decisions in these cases provide for a precedent that at the very least provides for hope for the constitutionalists and the like of those who would rather approach national security from a business as usual model rather than an extra-legal measures model.  

Therefore, it follows that in spite of the blatant governmental overarching power over detentions, the judiciary can have a positive effect against the usages of torture. Thus in conclusion democracies in times of national security with an independent judiciary will prevent against the usages of torture
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