

# **The Growth of the Unitary Executive - Saying Goodbye to the Separation of Powers: US Presidential War Powers Before & After the 'Long War' (aka The GWOT)**

US Foreign Policy

Fall 2009

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Please note, again:  
These lecture slides will be  
placed on the IS System for  
the class

# Class Discussion Question

After reading Wildavsky on the Two  
Presidencies, think about Presidential  
decisions to use military force.

Should that decision be made by a deliberative  
democratic body like Congress, or a unitary,  
decisive individual like the president?

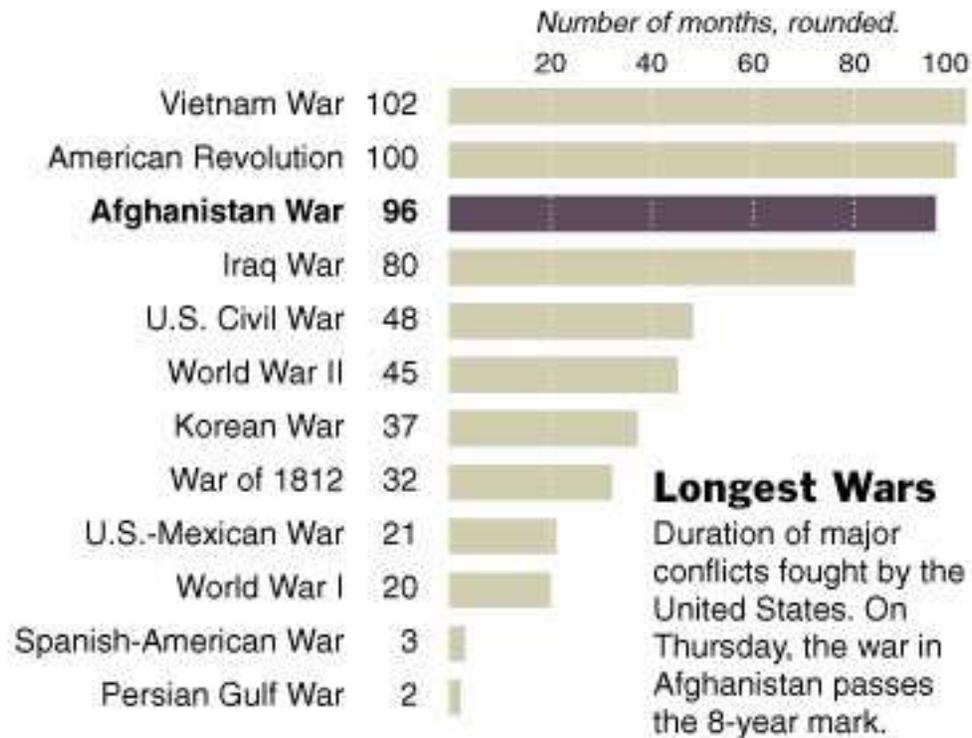
Is deliberation always preferable to democracy?

Is democracy always preferable to deliberation?

Under what circumstances should the decision  
to go to war be solely in the president's hands?

And, finally, how does this exercise of power  
(this tension over war-making) affect our  
knowledge of "presidential failure in USFP?"

# War in US Political History, Fall 2009



Source: Congressional Research Service

THE NEW YORK TIMES

# Extent of Presidential War Powers

- How broad is the President's defensive war power?
- Since all American wars are defensive
  - Can the President always act without Congressional approval?
  - Can Bush invade Iran as a defensive measure?
  - Can he order domestic spying?
- Can the Pres' inherent power to defend the US be circumscribed by Congress?

# Declared & Undeclared Wars

- Formal Declarations:

## Joint Resolution of Dec. 8, 1941

Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America: Therefore be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.

## A Somewhat Longer List

1798-1800 -- Naval War with France	1846-48 -- Mexican War	1873 -- Colombia (Bay of Panama)	1904 -- Dominican Republic	1925 -- China	1978 -- Zaire
1801-05 -- Tripoli.	1849 -- Smyrna	1873 -- Mexico	1904 -- Tangier, Morocco	1925 -- Honduras	1980 -- Iran
1806 -- Mexico (Spanish territory).	1851 -- Turkey	1874 -- Hawaiian Islands	1904 -- Panama	1925 -- Panama	1981 -- El Salvador
1806-10 -- Gulf of Mexico.	1851 -- Johannes Island	1876 -- Mexico	1904-05 -- Korea	1926 -- China	1981 -- Libya
1810 -- West Florida (Spanish territory)	1852-53 -- Argentina	1882 -- Egypt	1906-09 -- Cuba	1926-33 -- Nicaragua	1982 -- Sinai
1812 -- Amelia Island	1853 -- Nicaragua	1885 -- Panama	1907 -- Honduras	1927 -- China	1982 -- Lebanon
1813 -- West Florida (Spanish territory).	1853-54 -- Japan	1888 -- Korea	1910 -- Nicaragua	1932 -- Chin	1982 -- Lebanon
1813-14 -- Marguesas Islands.	1853-54 -- Ryukyu and Bonin Islands	1888 -- Haiti	1911 -- Honduras	1933 -- Cuba	1983 -- Egypt
1814 -- Spanish Florida.	1854 -- China	1888-89 -- Samoa	1911 -- China	1934 -- China	1983-89 -- Honduras
1814-25 -- Caribbean.	1854 -- Nicaragua	1889 -- Hawaiian Islands	1912 -- Honduras	1940 -- Caribbean.	1983 -- Chad
1815 -- Algiers.	1855 -- China	1890 -- Argentina	1912 -- Panama	1941 -- Greenland	1983 -- Grenada
1815 -- Tripoli.	1855 -- Fiji Islands	1891 -- Haiti	1912 -- Cuba	1941 -- Netherlands (Dutch Guiana	1984 -- Persian Gulf
1816 -- Spanish Florida.	1855 -- Uruguay	1891 -- Bering Strai	1912 -- China	1941 -- Iceland	1985 -- Italy
1816-18 -- Spanish Florida - First Seminole War.	1856 -- Panama, Republic of New Grenada	1891 -- Chile	1912 -- Turkey	1945 -- China	1986 -- Libya
1817 -- Amelia Island	1856 -- China	1893 -- Hawaii	1912-25 -- Nicaragua	1946 -- Trieste	1986 -- Libya
1818 -- Oregon.	1857 -- Nicaragua	1894 -- Brazil	1912-41 -- China	1948 -- Palestine	1986 -- Bolivia
1820-23 -- Africa.	1858 -- Uruguay	1894 -- Nicaragua	1913 -- Mexico	1948 -- Berlin	1987-88 -- Persian Gulf
1822 -- Cuba.	1858 -- Fiji Islands	1894-95 -- China	1914 -- Haiti	1948-49 -- China	1988 -- Panama
1823 -- Cuba.	1858-59 -- Turkey	1894-95 -- China	1914 -- Dominican Republic	1950-53 -- Korean War	1989 -- Libya
1824 -- Cuba.	1859 -- Paraguay	1894-96 -- Korea	1914-17 -- Mexico	1950-55 -- Formosa (Taiwan)	1989 -- Panama
1824 -- Puerto Rico	1859 -- Mexico	1895 -- Colombia	1915-34 -- Haiti	1955-55 -- China	1989 -- Andean
1825 -- Cuba.	1859 -- China	1896 -- Nicaragua	1916 -- China	1956 -- Egypt	1989 -- Philippines
1827 -- Greece.	1860 -- Angola, Portuguese West Africa	1898 -- Nicaragua	1916-24 -- Dominican Republic	1958 -- Lebanon	1990 -- Panama
1831-32 -- Falkland Islands.	1860 -- Colombia, Bay of Panama	1898-99 -- China	1917 -- China	1959-60 -- The Caribbean	1990 -- Saudi Arabia
1832 -- Sumatra --	1863 -- Japan	1899 -- Samoa	1917-18 -- World War I	1962 -- Cuba	1991 -- Iraq
1833 -- Argentina	1864 -- Japan	1899 -- Samoa	1917-22 -- Cuba	1962 -- Thailand	1991 -- Iraq
1835-36 -- Peru	1864 -- Japa	1899-1901 -- Philippine Islands	1918-19 -- Mexico	1962-75 -- Laos	1991 -- Zaire
1836 -- Mexico	1865 -- Panama	1900 -- China	1918-20 -- Panama	1964 -- Congo	1992 -- Sierra Leone
1838-39 -- Sumatra	1866 -- Mexico	1901 -- Colombia (State of Panama)	1918-20 Soviet Russia	1964-73 -- Vietnam War	1992 -- Iraq
1840 -- Fiji Islands	1866 -- China	1902 -- Colombia	1919 -- Dalmatia	1965 -- Dominican Republi	1992 -- Somalia
1841 -- Drummond Island	1867 -- Nicaragua	1902 -- Colombia	1919 -- Turkey	1967 -- Congo	1993 -- Iraq
1841 -- Samoa.	1867 -- Formosa	1903 -- Honduras	1919 -- Honduras	1970 -- Cambodia	1993 -- Iraq
1842 -- Mexico	1868 -- Japan	1903 -- Dominican Republic	1920 -- China	1974 -- Cyprus	1993 -- Bosnia-Herzegovina
1843 -- China	1868 -- Uruguay	1903 -- Syria	1920 -- Guatemala	1975 -- Evacuation from Vietnam	1993 -- Bosnia-Herzegovina
1843 -- Africa	1870 -- Mexico	1903-04 -- Abyssinia	1920-22 -- Russia (Siberia)	1975 -- Evacuation from Cambodia	1993 -- Iraq
1844 -- Mexico	1870 -- Hawaiian Islands	1903-14 -- Panama	1921 -- Panama	1975 -- South Vietnam	1993 -- Somalia
	1871 -- Korea		1922 -- Turkey	1975 -- Mayaguez incident	1993 -- Iraq
			1922-23 -- China	1976 -- Lebanon	1993 -- Iraq
			1924 -- Honduras	1976 -- Korea	1993 -- Macedonia]
			1924 -- China		

# Commander in Chief

“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States”

- Article I Section 2, US Constitution

# Setting Up Conflict - The Congress Shall Have Power:

“To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia...”

- Article I Section 8, US Constitution

# What did the Founders Mean?

- Rejected British model
- Knew Locke's argument and rejected it
- Knew about limited war and didn't make an exception for it
  - A Quasi-War with France during the Revolutionary War period
- Made exception for sudden attacks
- Military subordinate to civilian power

# Madison's Reasoning

- War is, “the true nurse of executive aggrandizement...In war, the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.”

# John Jay, Federalist 4

- “Absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of the people.”

# 20<sup>th</sup> Century Uses of War Powers

“I don’t have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait.”

-President George H. W. Bush, 1990



# Why the shift from Congressional to Presidential Preeminence in War Powers?

- General growth of Presidential prominence
- Military technology
- Secret agencies, growth of intel infrastructure
- US becomes global power
- Alternative sources of legitimacy
- Theory adoption of the “unitary Executive” thesis & legal framework

# Why the shift from Congressional to Presidential Preeminence in War Powers?

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- Alternative sources of legitimacy
- Theory adoption of the “unitary Executive” thesis & legal framework
- ***ADD: The Congressional abdication of responsibilities – an important caveat***
- Can, and does Congress, pardon the expression, “fight back?”

# Undeclared Wars

- Gulf of Tonkin Resolution



- Aug 4, 1964: Pres. Johnson reports to Congress
  - N.Vietnamese patrol boats made an unprovoked attack on the destroyer *USS Maddox* in int'l waters, & claimed "unequivocal proof" of an "unprovoked" second attack against the *Maddox*
- Aug. 7, 1964: Congress passes H.J.Res 1145
  - "to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance"
  - Vote in House 416-0; in Senate 88-2



## Squadron commander James Stockdale, flying overhead

- "[I] had the best seat in the house to watch that event; our destroyers were just shooting at phantom targets -- there were no PT boats there.... nothing there but black water and American fire power."
- Johnson later said in private:
  - "for all I know, our Navy was shooting at whales out there."

# The Gulf of Tonkin Resolution

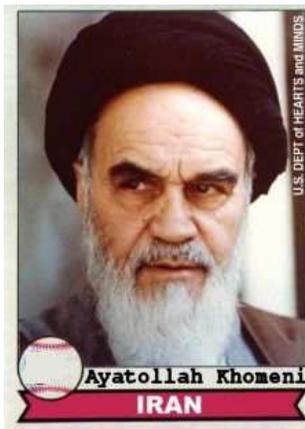
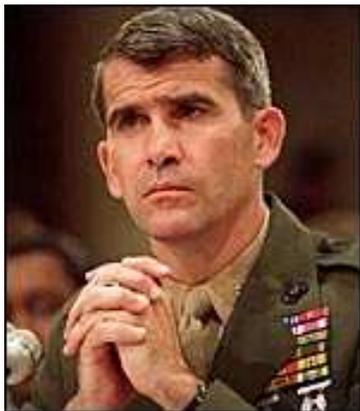
“Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression...**[the US is] prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.**”

# Covert Wars & Actions

- Defying Congress

- Ronald Reagan and the Boland Amendment

- Barred US intelligence agencies from spending funds “to support military or paramilitary operations in Nicaragua.”



- If the president had authorized Col. Oliver North's actions:

- Would the action have been constitutional?

# Key ? : “Justiciability” in Wartime

- *Mora v. McNamara* (1967)
  - Are these questions “justiciable?”
    - I. Is US military activity in Vietnam a 'war' within the meaning of Article I, Section 8, Clause 11 of the Constitution?
    - II. May the President draft for that military activity, when no war has been declared by Congress?
    - III. Do treaty obligations of the US enlarge/restrict pres. power?
    - IVa. Do US military operations fall within the terms of the joint Congressional ('Tonkin Bay') Resolution of August 10, 1964?
    - IVb. If the Resolution purports to give the Pres. authority to commit US forces to armed conflict limited only by his own absolute discretion, is the Resolution a constitutionally impermissible delegation of all or part of Congress' power to declare war?
- Answer these questions vis a vis ‘The Long War’ (i.e., The Global War on Terrorism, GWOT)

# War Powers Resolution (WPR)

## Consulting Requirement:

- “The President in every possible instance shall consult with Congress before introducing US Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress...”

# War Powers Resolution (WPR)

## Reporting Requirement

- In the absence of a declaration of war, when troops are introduced
  - 1) Into hostilities or imminent hostilities
  - 2) Into the territory of a foreign nation armed for combat
  - 3) In numbers which substantially enlarge the forces in a nation or region...

# War Powers Resolution (WPR)

- Reporting
  - The President shall submit within 48 hours to the Speaker of the House and President of the Senate a report, in writing including
    - The circumstances requiring forces
    - The constitutional and legislative authority under which troops were introduced
    - The estimated duration of the hostilities

# War Powers Resolution (WPR)

- Automatic Removal Mechanism
  - Within 60 days after the report is submitted or required to be submitted, the President shall terminate any use of United States armed forces unless the Congress
    - Declares war
    - Has extended by law the 60 day period
    - Is physically unable to meet

# Post-WPR Presidential Behavior

- Reagan
- Bush I
- Clinton
- Bush II – Distinct, post-9/11 model
- Common behaviors:
  - Relying on United Nations as source of legitimacy
  - Denying Congress has a role in initiating conflict
  - Moving troops first, to apply pressure to Congress

# Why does Congress fail to protect its Constitutional role?

- Standing army/navy/air force give president first-mover power & advantage
- Constituents rally around the flag
- Members hold common misconceptions about powers of Commander in Chief

# Misconceptions

- President Bush (#41)
  - “There is a fundamental difference of opinion between the Senate and the White House over the Senate’s role in declaring war—one that dated back before the War Powers Act”

# Misconceptions

- Clinton (#42)
  - “I think I have a big responsibility to appropriately consult with Members of Congress in both parties— whenever we are in the process of making a decision which might lead to the use of force. But I think that, clearly, the Constitution leaves the president, for good and sufficient reasons, the ultimate decision making authority.”
  - “The authority under which air strikes can proceed, NATO acting out of area pursuant to UN authority, requires the common agreement of our NATO allies.”

# Misconceptions

- Senator Judd Gregg (R-NH), 1995
  - “It is appropriate that we as a Congress act to either approve or disapprove that action...Clearly the power to undertake actions which put American soldiers’ lives in harm’s way lies primarily and first with the President, but obviously we as a Congress also play a major role, not only on the appropriating side, but more importantly, on the side of being concerned for our soldiers, many of whom will obviously be our constituents.”

This leaves us, at this point to ask the question:

Under what circumstances should the President be responsible for war powers?

Are those criteria always met in the modern era?

Post-9/11, for example?

Is Congress equipped to handle its constitutional role?

# Presidential War Powers After September 11, 2001

So, what of the Executive-  
Legislative Tensions Over Force  
in the Post-9/11 Era?

# Presidential Prerogative Power

- Locke's idea that the executive can assume extra-legal and extra-constitutional powers to preserve the nation, in times of crisis.
- Cited, famously (infamously?) by John Yoo, now at Boalt & UC Berkeley School of Law.

# Non-Wartime Prerogative Power

- Labor strikes
- Great depression
- Desegregation crisis
- Riots

# Bush (#43)'s Response to 9-11

- Afghanistan
- Expanded investigative authority
- Enemy combatant detentions
- NSA Wiretapping
- War in Iraq



# Congress Authorizes the President 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.”

# Authorization for Use of Military Force

- Public Law 107-40 (Sept. 18, 2001)
  - 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 Sept. 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.
  - This section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

# U.S.A. P.A.T.R.I.O.T. Act

1. Allows surveillance if organizations appear to be intended to influence government policy by intimidation or coercion
2. Bars entry into the US to anyone who has ever said anything that undermines US efforts against terrorists
3. Authorizes covert searches of a person's home or office if a warrant would hurt the investigation
4. Allows the FBI to request private materials with the only stated cause to be to protect against international terrorism.
5. Allows the government to conduct secret wiretaps and personal searches without having to show probable cause as long as the purpose is to collect foreign intelligence
6. Allows the attorney general to detain immigrants for 7 days with no charges.

# War in Iraq

“We don’t want to be in the position of asking Congress to authorize the use of force when the president already has that full authority. We don’t want, in getting a resolution, to concede that it was constitutionally necessary.”

- An anonymously named Senior Bush Administration Official, quoted in the *Washington Post*, August 26, 2002

# Senator Byrd on the Iraq Resolution

“We are being hounded into action on a resolution that turns over to President Bush the Congress’ Congressional power to declare war...We may not always be able to avoid war, particularly if it is thrust upon us, but Congress must not attempt to give away the authority to determine when war is to be declared. We must not allow any president to unleash the dogs of war at his own discretion and for an unlimited period of time.” (*NYT* 10/10/02)



# Congress' Authorization of Force in Iraq

1. The Congress of the United States supports the efforts by the President to
  - a. Strictly enforce through the UN Security Council all relevant Security Council resolutions applicable to Iraq and encourages him in those efforts
  - b. Obtain prompt and decisive action by the Security Council to ensure that Iraq abandons its strategy of delay, evasion and noncompliance and promptly and strictly complies with all Security Council resolutions

# Congress' Authorization of Force in Iraq

1. President is authorized to use the Armed Forces of the US as he determines necessary and appropriate in order to:
  - a. Defend the national security of the United States against the continuing threat posed by Iraq
  - b. And enforce all UN Security Council resolutions regarding Iraq.
2. Requires the president to comply with the WPR requirements

# Key Questions that Affect Practice of War-making Policies & Presidential Failure

- Did the President legitimately use prerogative powers in the aftermath of 9/11? Where should the boundaries of the president's powers be in the war on terror? Who should impose checks on him? How?
- What values should have guided American policymaking in the lead-up to the Iraq war: democratic deliberation or decisiveness? Why? Which one out? Why?
- Why do these questions matter at all?

# Part II

Crisis of Presidential Power & the  
Failure to Govern in USFP: The  
Move to the Unitary Executive

# The Constitutional Roles of the US President Affecting USFP

1. Commander in chief
2. Chief diplomat
3. Chief administrator
4. Chief of state
5. Chief legislator
6. Voice of the people
7. Chief judicial officer

# Presidential Power – Limits & Constraints

1. Time
2. Information
3. Bureaucracy
4. Congress
5. State & Local, Minor Governments
6. Political Parties
7. Media
8. Public Opinion
9. The Global Context

# The Paradox of Presidential Power

- It is commonly thought that the president has almost unlimited power.
- In fact, though leading in his Constitutional role through 7 jobs, the president also has to meet the expectations of the Congress, the Senate, & by extension, the public.
- Congress can impeach, overrule vetoes.
- Beginning is easy, but then each decision is checked and criticized.

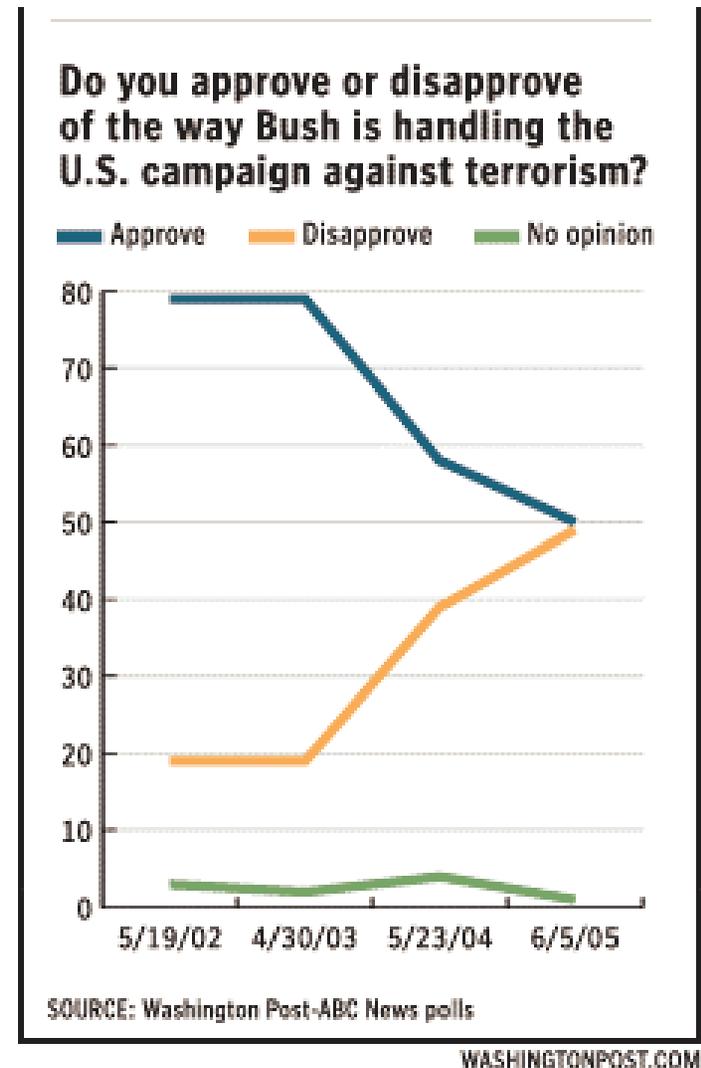
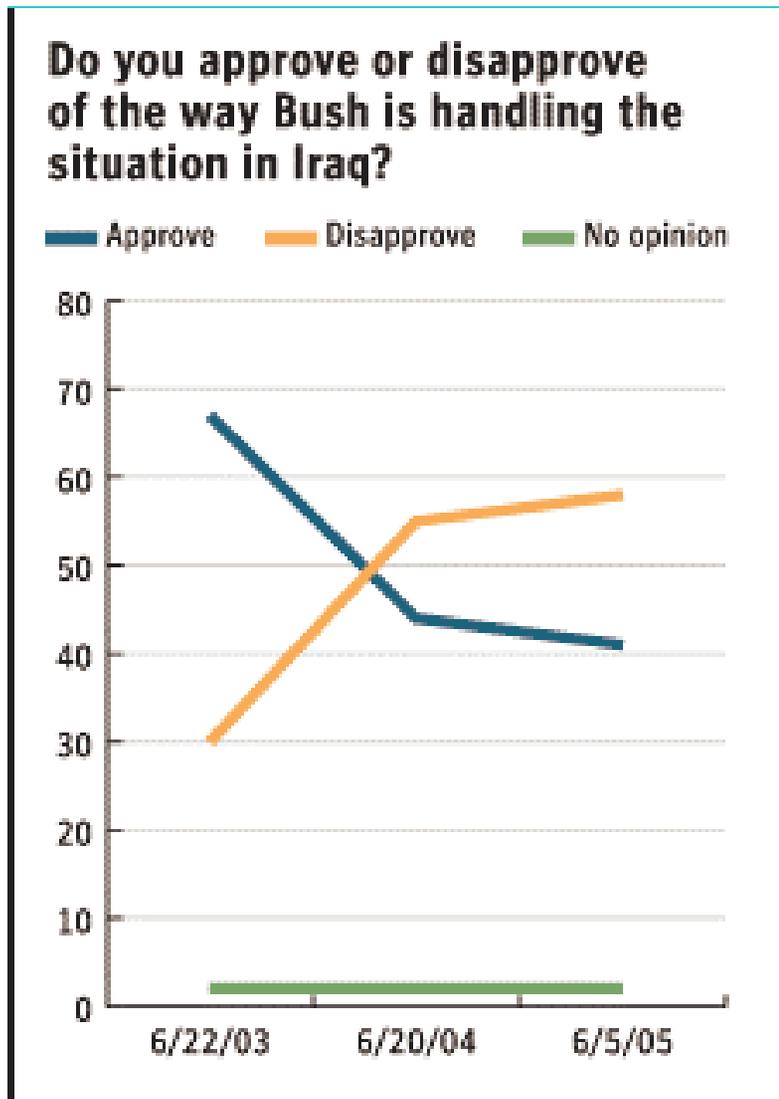
Impeachment  
of President  
Andrew  
Johnson



# Presidential Life Cycles

- Elected - strong & influential; More recently, a high rate of EO's issued
- Honeymoon with Congress and Media
- Affairs in office affect public approval
- Since Vietnam, the majority party of Congress is different than the elected president's
- During time, usually, public support declines and then the president can exercise power less efficiently

# Support, President George W. Bush, 2002 - 2005

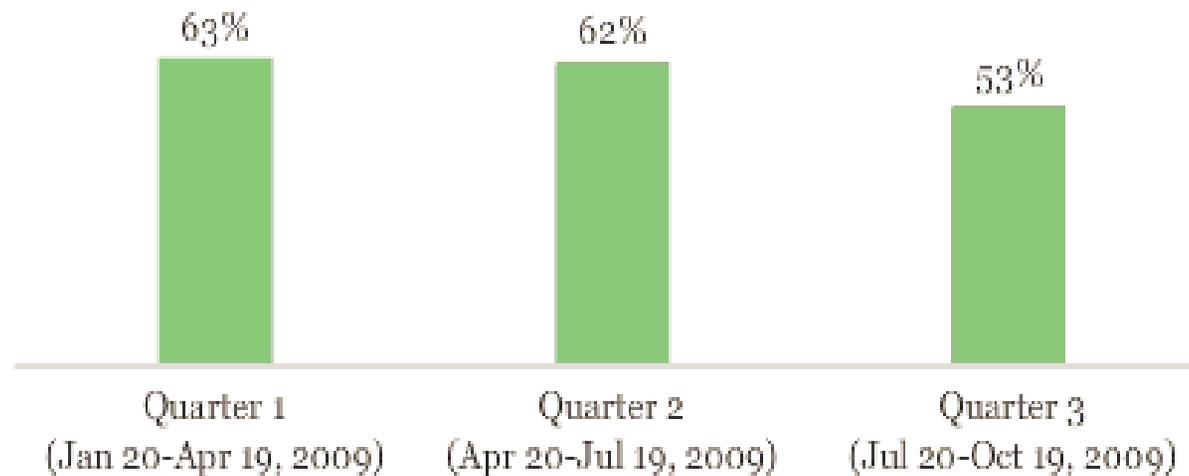


# Recent Obama Slide in Pop.:

## Released by Gallup, 21 October 2009

### *Barack Obama's Quarterly Job Approval Averages*

Based on Gallup Daily tracking



GALLUP®

# Obama Slide, cont'd

*Change in Presidential Job Approval Averages, Second to Third Quarter in Office, Elected Presidents*

<b>President</b>	<b>Second-quarter average %</b>	<b>Third-quarter average %</b>	<b>Change (pct. pts.)</b>
Eisenhower	72	68	-4
Kennedy	76	77	+1
Nixon	62	60	-2
Carter	64	60	-4
Reagan	61	57	-4
G.H.W. Bush	64	69	+5
Clinton	44	48	+4
G.W. Bush	56	72	+16
Obama	62	53	-9

GALLUP®

*Largest Declines in Average Job Approval Ratings Between Quarters During Presidents' First Year in Office*

<b>President</b>	<b>Change (pct. pts.)</b>	<b>Prior quarter</b>	<b>Subsequent quarter</b>
Truman	-19	69% (3rd Qtr.)	50% (4th Qtr.)
Truman	-13	82% (2nd Qtr.)	69% (3rd Qtr.)
Ford	-15	59% (1st Qtr.)	44% (2nd Qtr.)
Clinton	-11	55% (1st Qtr.)	44% (2nd Qtr.)
Obama	-9	62% (2nd Qtr.)	53% (3rd Qtr.)
Reagan	-6	57% (3rd Qtr.)	51% (4th Qtr.)

GALLUP®

# Growing Crisis of Governance & Leadership

- President is elected to Govern
- However, since Vietnam the Congress is led by the opposite party to the president's
- This makes exercising power difficult & limited
- Lyndon Johnson: "You can't get anything through when half of the Congress is thinking how to beat you"

# Presidential Leadership & USFP

- Strong leaders exercise power easier
- A president that commands - fails
- A president that persuade - succeeds

## 3 Elements:

1. Professional Reputation- affects the way other politicians judge the president's actions.
2. Public Prestige is mainly counted for in federal bureaus, Congress or Media.
3. Choices- the President eventually decides to which advisor to listen and how to act.

# Electoral Mandate

- When being new in office, whether first or second term, the President claims to have electoral mandate.
- This means that all his decisions, actions and moves are according to the people's desire- they recently approved him, so he can do almost everything he claimed in his propaganda.
- This changes with time, sooner or later.

# The Post-Cold War Presidency Thesis

- Vietnam & Watergate symbolized the end of the US as a global dominator in international politics.
- Media became more critical, public more cynical.
- Constraints on President ability to run foreign policy increased, and Congress since then is always opposition.
- The USA does not unite again one common characteristic- Anti Communism.

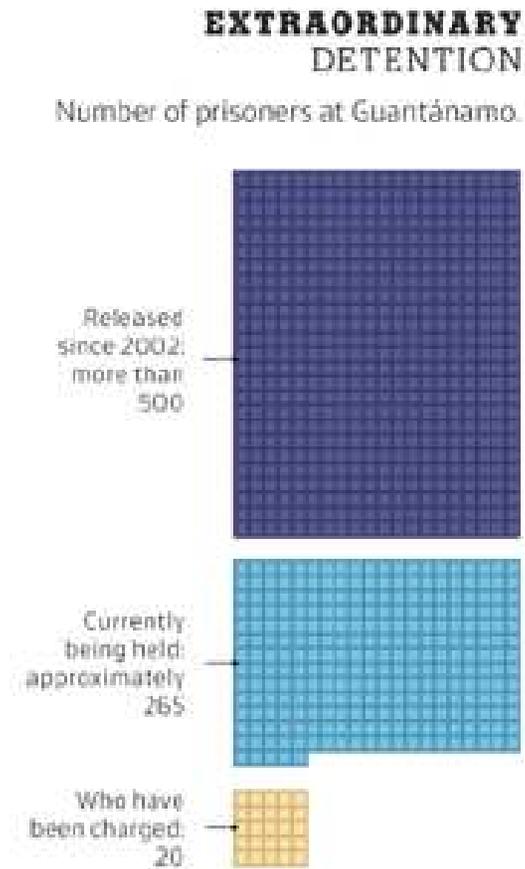
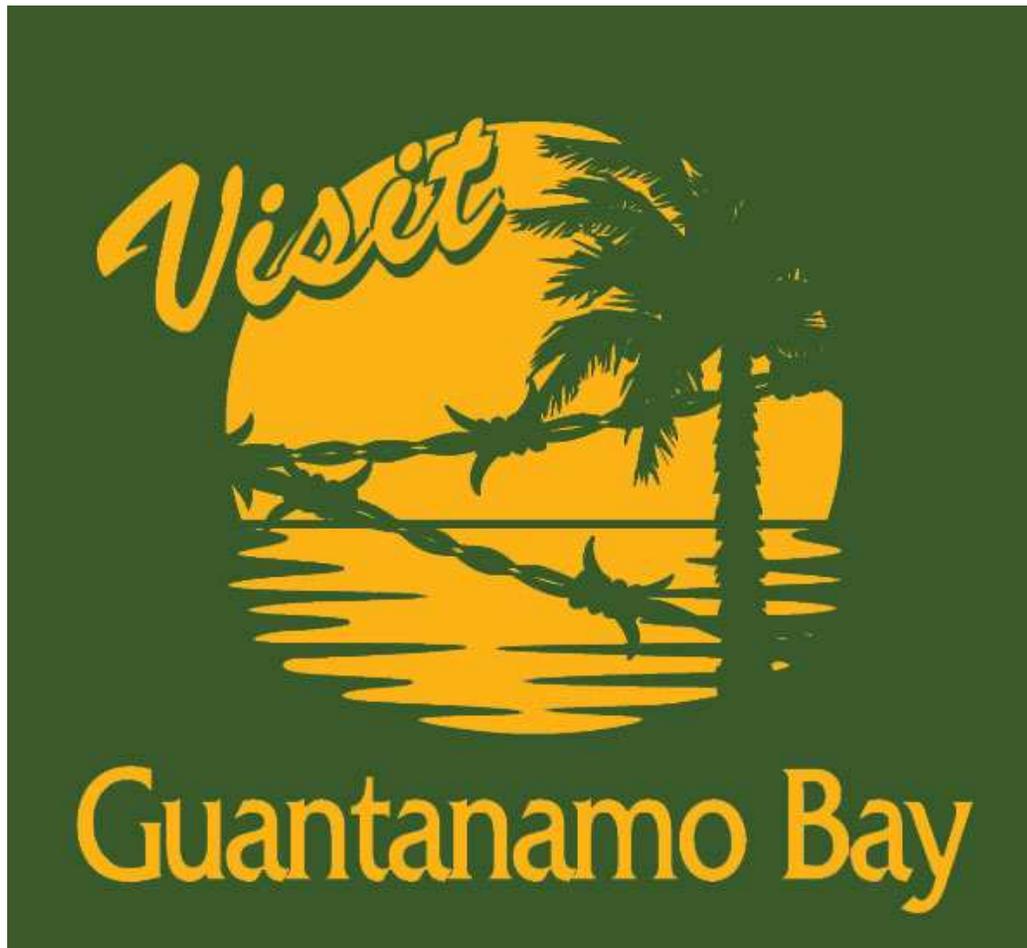
# The Imperial Presidency Thesis

- Presidential Management Theory considered to start with President Lyndon Johnson(1963).
- Means that the people holding high positions in federal offices feel directly committed to the President himself.
- The President is surrounded by experts and advisors, such as The National Security Council (NSC) & The Office of Management and Budget (OMB).

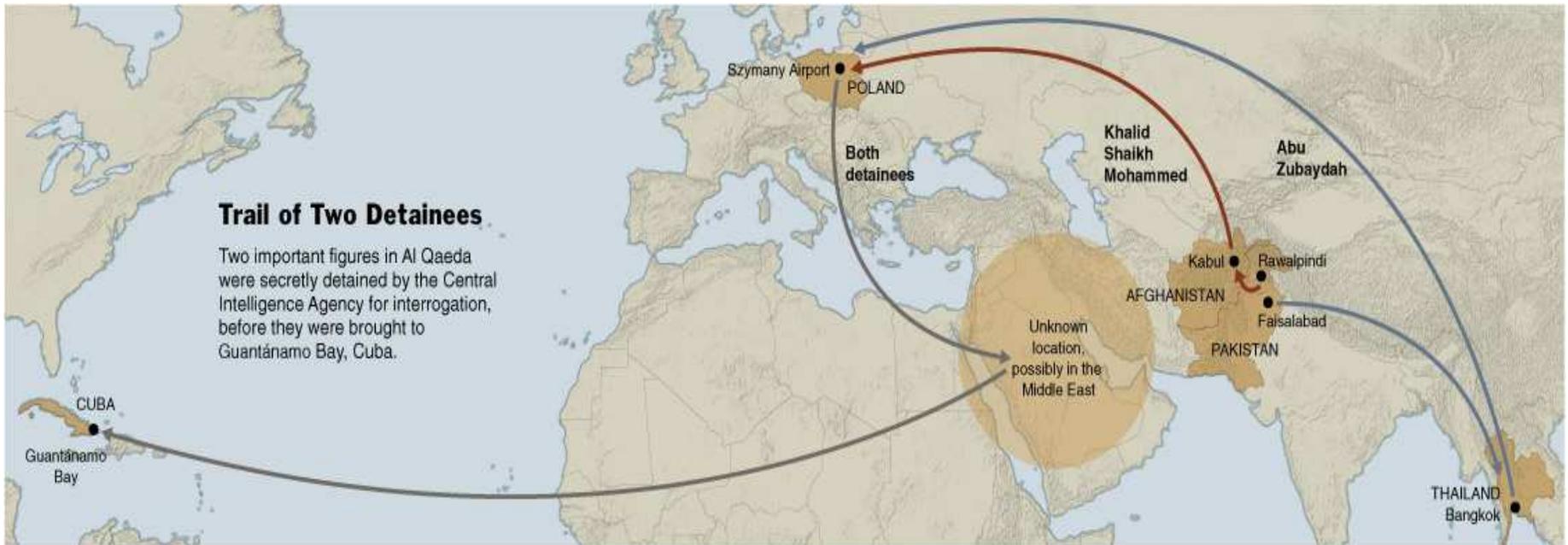
# Prerogative Power – An Excessive Power of the President?

- Richard Pious argues that:
- Gives the President almost unlimited power.
- The maximum the constitution permits.
- Using power during Crisis- using powers as national security/ national interest.
- May be used in emergencies: Lincoln (Civil War), Roosevelt (WW II) and Bush (2003) .
- Shouldn't be used for domestic issues.
- Risk if misused - losing power (LEGITIMACY) dramatically.

# The Conduct of War Carries With It a High Price: What to do with Americans & Non-American Enemy Combatants & Their Detention? What is the Process?



Source: Department of Defense.  
Chart by Charles M. Blow



**Abu Zubaydah**  
Travel and logistics manager for Al Qaeda

**1 PAKISTAN**  
MARCH 2002  
Captured in Faisalabad, Pakistan.

**2 THAILAND** WITHIN DAYS OF CAPTURE  
Flown to a secret C.I.A. prison near Bangkok, where he is subjected to severe interrogation. Before the harsh treatment began, he revealed Mr. Mohammed's role in the Sept. 11 attacks.

**3 POLAND** MANY MONTHS LATER  
Moved to the most important of the C.I.A.'s "black sites," or interrogation facilities, north of Warsaw. The site was chosen for Poland's lack of cultural and religious ties to Al Qaeda and cooperative local officials.

**4 UNKNOWN LOCATION**  
LATE 2005  
After the location of the Poland site is disclosed by press reports and human rights groups, both detainees are moved to an unknown location, possibly in the Middle East.

**5 CUBA**  
SEPT. 2006  
Flown to the American Naval base at Guantánamo Bay. Both men were arraigned on June 5 and await military tribunals.



**Khalid Shaikh Mohammed**  
Alleged master-mind of the Sept. 11 attacks

**1 PAKISTAN**  
MARCH 2003  
Captured in Rawalpindi, Pakistan.

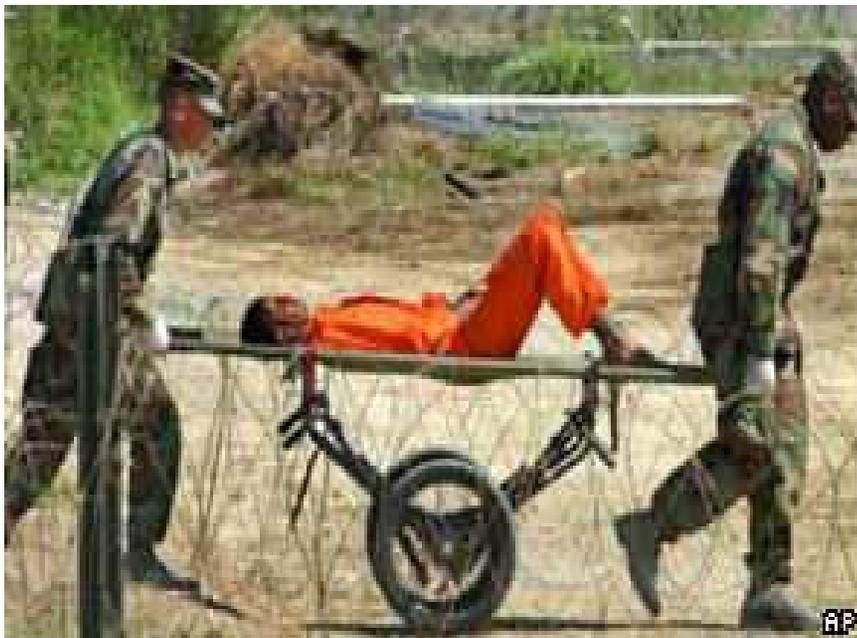
**2 AFGHANISTAN** WITHIN DAYS OF CAPTURE  
Moved to Kabul and kept there briefly.

**3 POLAND** WITHIN A FEW DAYS  
Moved to the prison in Poland where he is questioned using harsh techniques about 100 times over two weeks. As time passed, he began to provide details on Qaeda, some of which were included in the report of the national 9/11 commission.







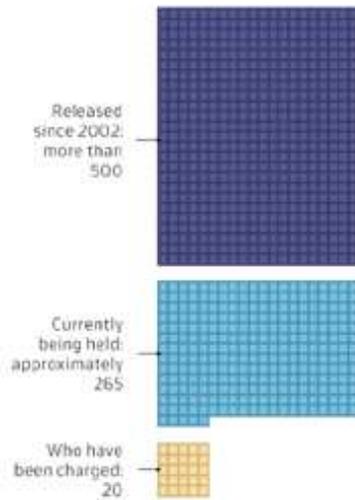




(AFP PHOTO)

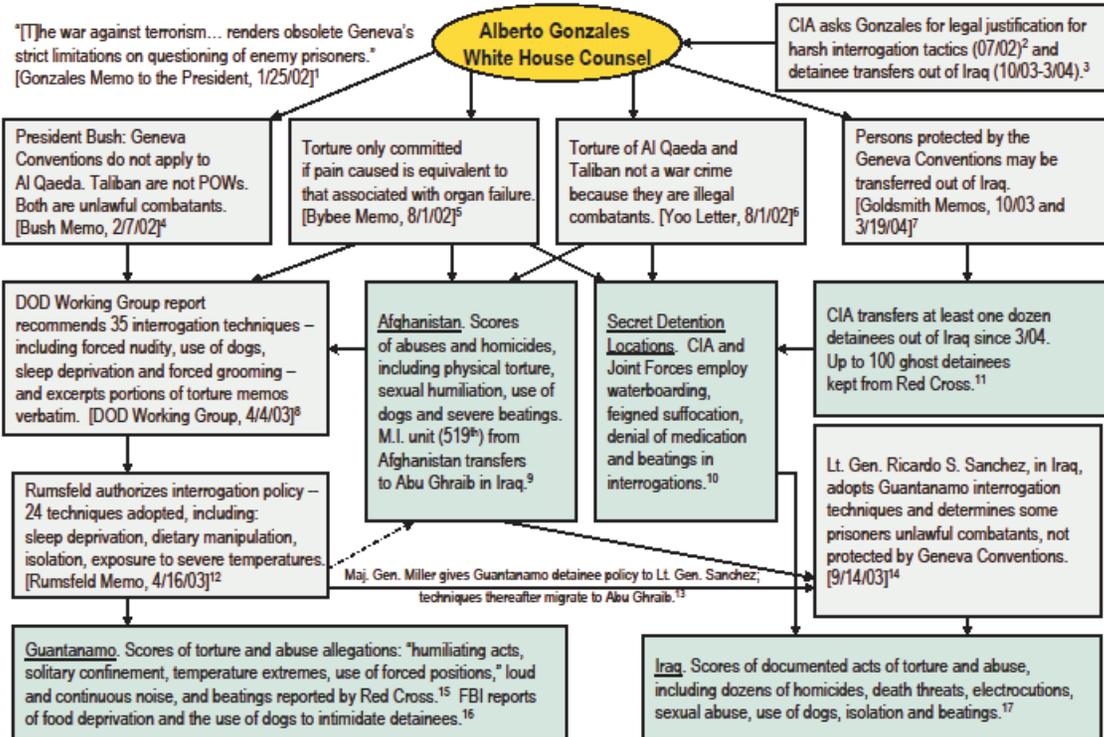
## EXTRAORDINARY DETENTION

Number of prisoners at Guantánamo.



Source: Department of Defense  
Chart by Charles M. Blow

## ROLE OF ALBERTO GONZALES IN SETTING TORTURE POLICY



# Military Order of Nov. 13, 2001

- Detention of Non-Citizens in the United States
- Findings

**Note how these findings resemble those found in legislative acts**

- *“it is necessary for individuals subject to this order .. To be detained, and ... tried ... by military tribunals.”*
- *“it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the US district courts.”*
- *“an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest ...”*

# Trial of Guantanamo Detainees

- By military commission [pursuant to] orders and regulations issued by the OSD (by the SecDef) himself)
  - Composition (3-7 military personnel), venue and time
  - Admission of probative evidence "in a manner consistent with the protection of classified information"
    - Some standard criminal procedures adopted
  - Conviction by 2/3 of judges
    - Standard of proof: *"beyond a reasonable doubt"*
  - Appeal and review by SecDef or President
  - Sentence up to life imprisonment / death

# Constitutional Issues

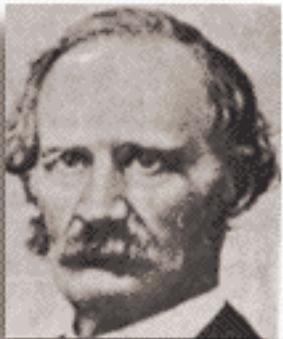
- Due Process - Generally

- Dec. Independence: causes for separation -



- King George III has *“affected to render the Military independent of and superior to the Civil Power.”*
    - *“depriving us, in many Cases, of the Benefits of Trial by Jury”*

- Ex parte *Milligan* (uprising during Civil War)



- *“Martial law ... destroys every guarantee of the Constitution ... Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; in the conflict, one or the other must perish.”*
    - *No military trials of citizens, at least if civilian courts are open*

# Constitutional Issues

- Due Process - Criminal Procedure Rights
  - 5<sup>th</sup> Amendment –
    - *“No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia”*
    - *“nor be deprived of life, liberty, or property, without due process of law”*
  - 6<sup>th</sup> Amendment –
    - *“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”*

# Constitutional Issues

- Structural – Separation of Powers
  - Does President “usurp” Art. III powers?
    - Art. III, § 2, Clause 1: *“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the US, and Treaties”*
  - Does Military Order “obstruct” Art III functions?
    - Preclusion of review by Art. III courts
  - Does Military Order “usurp” power of Congress
    - Art. I, § 8, Cl 11: “to declare war .. and make Rules concerning Captures on Land and Water”
    - Clause 14: “to make rules for the Government and Regulation of the land and naval Forces”

# Challenging Detentions

- Habeas Corpus (HC) clause, *Art. I, § 9, Cl. 2*:
  - *“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.”*
- Habeas Corpus statute, *28 U.S.C. § 2241*
  - *“(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.”*

## *Hamdi v. Rumsfeld* (2004)

- Legality of Military Detention and Trial
  - Due Process issues (incl. 5<sup>th</sup>/6<sup>th</sup> amendments)
  - Separation of Powers issues
- Military (Executive) Order of Nov. 13, 2001
  - What is an Executive Order?
- What Std of Review (aka, “Jackson Zone) applies?
  - Zone 1: Congress has authorized pres. action
    - Authorization for Use of Military Force
  - Zone 2: Pres. acts amid cong’l silence
  - Zone 3: Pres. acts against cong’l disapproval
    - Non-Detention Act (aka, the NDA, circa 1971)

# *Hamdi v. Rumsfeld* (2004)

- Justice O'Connor says Zone 1
  - Authorization for Use of Military Force (AUMF)
    - Capture and detention are incidents of war; an exercise of “necessary and appropriate force”
    - As such, AUMF “is explicit cong'l authorization for the detention of individuals” even though it
      - never mentions detentions; doesn't mention US citizens
  - What if Zone 3?
    - Can Pres. ignore Non-Detention Act? US says yes.
    - Is detention & trial of combatants a matter entrusted solely to President, with no shared power in congress
    - What if in “a moment of genuine emergency”?
  - What if Zone 2?

# *Hamdi* - Plurality

- Can detain citizens as Enemy Combatants (EC)
- So long as active combat is underway
  - Include unconventional war against terrorism?
- But, HC available unless suspended
  - Envisions factual determination by Art III court
- Hamdi is entitled to Due Process (DP) hearing
  - *Matthews v. Eldridge* balancing of interests
  - “State of war is not a blank check for the President when it comes to rights of Nation’s citizens”

# *Hamdi* – Plurality USSC Decision

- Fair opportunity to rebut Gov't's assertions before “neutral decisionmaker”
  - Can be military tribunal
  - Includes access to counsel
- Tailored to exigencies of circumstances
  - Hearsay may be allowed
  - Burden shifting upon prima facie case
- Timing
  - Battlefield captures: DP procedures not req'd
  - Continued detention requires DP

# *Hamdi v. Rumsfeld* (2004)

- Should NDA (Non-Detention Act) be read broadly and AUMF narrowly?
  - Madison: “The constitution supposes, what the history of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature.”
  - George Mason: “Was against giving the power of war to the Executive because not safely to be trusted with it [he was] for clogging rather than facilitating war, but for facilitating peace.”
  - Magna Carta: King must obey “the law of the land”

# *Hamdi* – Souter Concurrence

- President does not have unilateral power to detain US citizens, even during war
- SoP and NDA require clear cong. authoriz'n
- Force Resolution is insufficient authorization
  - Focus is on military power, not detention
  - Could be read to authorize Law of War practices
    - Pres. claims Geneva Conv. doesn't apply; ECs are not "prisoners of war"; and not entitled to contest status
  - USA PATRIOT Act limits detentions to 7 days

# *Hamdi* – Scalia Dissent

- This case controlled by *Ex Parte Milligan*
  - US citizen cannot be detained by military
  - Quirin dealt with “admitted” ECs
- Only constitutional options are to charge Hamdi (e.g., treason) or suspend writ HC
  - No charges filed
  - Force Authorization is not a suspension of writ
  - No authorization as required by NDA
- Function of writ is to test executive process
  - Not to supply missing elements

# *Hamdi* – Thomas Dissent

- SoP has no place in military/foreign affairs
  - Constitution recognizes a “unitary executive”
  - That admits of no judicial interference
    - Pres’ determination is binding; courts can’t 2d guess
    - “even the ancient Israelites eventually realized the shortcomings of judicial commanders-in-chief”
- Pres has discretion to protect nat’l security
  - Both inherently and from Force Authorization
    - Supplies 5<sup>th</sup> vote on AUMF as exception to NDA
    - Not limited to battlefield ops, or Law of War
    - Access to counsel/DP hearing will hobble war effort

# The Unitary Executive Thesis

- J. Clarence Thomas in *Hamdi*
  - Constitution recognizes a “unitary executive”
    - SoP does not apply to pres’ national security powers
      - “The Executive’s decision that a detention is necessary ... need not and should not be subjected to judicial review.”
    - Cicero: *Inter arma enim silent leges*
      - "In times of war, the law falls silent."
- Authorization for Use of Military Force
  - The President is authorized to use all necessary and appropriate force against nations .. or persons he determines planned, authorized, committed, or aided the [9/11] terrorist attacks ... in order to prevent any future acts of int’l terrorism...

# The Unitary Executive, cont'd

- Article 48, Recall the Constitution of the Weimar Republic (1919)
  - “In case public safety is seriously threatened or disturbed, the Reich President may take the measures necessary to re-establish law and order, if necessary using armed force. In the pursuit of this aim, he may suspend the civil rights, partially or entirely.”
  - March, 1933
    - Reichstag cannot assemble parliamentary majority
    - President Paul von Hindenburg invokes Article 48 to give Chancellor Adolph Hitler emergency power to rule by decree
    - The rest is history

# Stevens in *Padilla v. US* (2004)

“At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber.

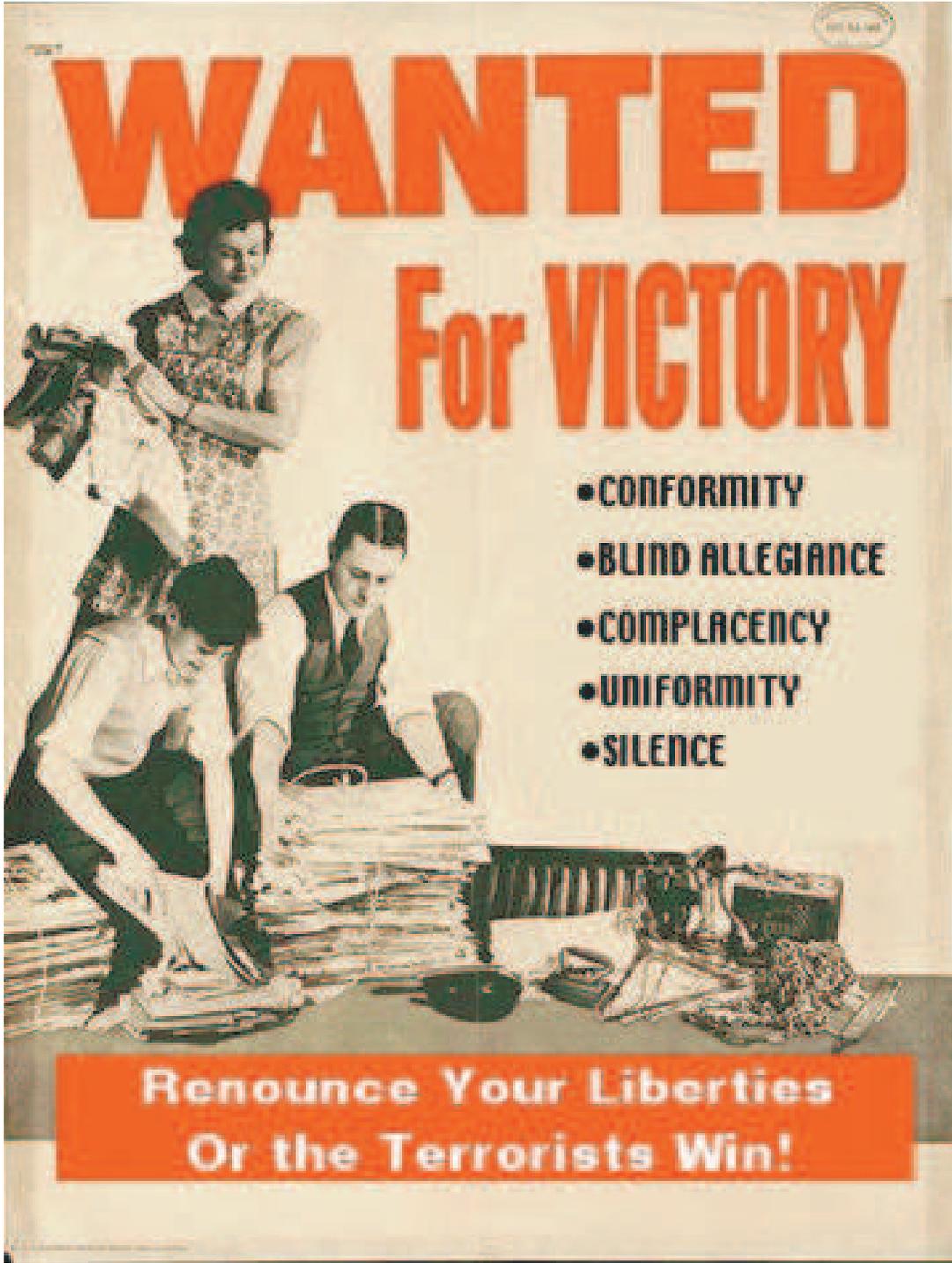
Executive detention is not justified by the naked interest in using unlawful procedures to extract information.

If this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.”

## *Inter arma enim silent leges?*

**“Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates ... the alarm attendant on a state of continual danger will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free.”**

- Hamilton, Federalist No. 8



# WANTED For VICTORY

- CONFORMITY
- BLIND ALLEGIANCE
- COMPLACENCY
- UNIFORMITY
- SILENCE

Renounce Your Liberties  
Or the Terrorists Win!