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THE EVALUATION OF LEGAL RIGHTS GRANTED TO NON-CITIZEN
DETAINEES

by

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A thesis submitted in partial fulfillment of the requirements
for the Honors in the Major Program in Political Science
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ABSTRACT

For over two decades, the United States imprisoned and detained hundreds of suspected terrorists at the United States Naval Base in Guantánamo Bay, Cuba. While many of these prisoners were suspected of being terrorists, no formal charges were ever levied against the detainees. All of the prisoners detained were considered non-citizens of the United States. They were not citizens of either Cuba or the United States. Instead, they were citizens of another country. While the legal precedent in the United States' territorial jurisdiction is that non-citizens are granted specific Constitutional rights, Guantánamo Bay was a legal black hole to which the United States had not claimed territorial jurisdiction. This paper seeks to understand if the prisoners at Guantánamo Bay held any Constitutional rights when they were brought to the Naval Base. Through the examination of the Supreme Court cases that dealt with non-citizen prisoners located outside of the United States borders and through the classification of the prisoners as unlawful enemy combatants, the question of the legal rights held by these prisoners will be answered. A better understanding of the events that transpired at Guantánamo Bay will allow the United States federal government and subsequent intelligence communities better insight into the rights that non-citizens possess.

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Introduction

The United States intelligence community is a group of eighteen federal agencies and multiple military units who are responsible for gathering foreign and domestic information and transforming it into actionable intelligence. The main goal of any intelligence agency or unit is to provide the federal government with the necessary intelligence it needs to protect the national security of the nation. In order to gather the necessary intelligence, it is imperative that these units operate in secret to prevent their suspects from actively hiding the information they are looking to gather. Despite the shroud of secrecy that surrounds the United States intelligence community, there are a few incidents that have received international attention and critique from both allies and enemies alike. One of these incidents is the terrorist attacks of September 11th, 2001. Better known as 9/11, this day has been viewed as one of the largest intelligence failures of the 21st century resulting not only in domestic and international scrutiny, but also a mass restructuring of the intelligence community.

The terrorist attacks of September 11th, 2001, began when United Airline flights 93 and 175 and American Airlines flights 77 and 11 were hijacked by Islamic jihadists who were members of the terrorist organization Al Qaeda. Three of the flights hit their targets. American Airlines flight 11 and United Airlines flight 175 hit the World Trade Center in New York and American Airlines flight 77 hit the Pentagon in Virginia. The fourth flight, United Airlines flight 93 was crashed in an empty field in Pennsylvania. While the intended destination of the fourth flight is debated, many speculate that the final destination was either the White House or the Capitol Building. In the aftermath of these attacks, Congress created a committee to investigate the different agencies and military units in the intelligence community to determine if there had

been a way to prevent the tragedy and how to detect and prevent future attacks against American citizens (Huiskes, K. 2021, October 5) (Kamarck, E. 2022, March 9).

The 9/11 Commission Report found that there had been a lack of communication and sharable intelligence between the different agencies. The State Department, Federal Bureau of Investigation, Central Intelligence Agency, and the Navy had all gathered information on the individuals who were responsible for the aerial attacks, but policy had prevented any agency from communicating with one another about the information they had been able to gather. Each agency had a piece of intelligence that, alone did not provide the full picture, but if they have been able to collaborate with other agencies, they possibly could have pieced together the terrorist's plan (Kamarck, E. 2022, March 9). However, at the time of the attacks, the different agencies were not allowed to share information with one another.

The committee decided that it was in the best interest of American national security that the intelligence community undergo a massive reconfiguration (Bipartisan Policy . 2001, September). The creation of the Office of the Director of National Intelligence, the National Counterterrorism Center, the National Counterproliferation Center, and the Department of Homeland Security were the new agencies that the committee recommended as a result of their findings (Richelson, J. T. 2008). The committee determined that the existing agencies were being dwarfed by all of the information they were required to analyze and believed that if new centers were opened, they could assist in alleviating the amount of information each agency was responsible for processing. Before the events of 9/11, the government and the intelligence community had been collecting vast amounts of information, but had been unable to process most of it. A lack of employees and translators meant that large amounts of information were not being analyzed in time to create an actionable intelligence report (Kamarck, E. 2022, March 9).

The committee believed that with more agencies, there would be more individuals to sort through all of the information that had been gathered to transform it into actionable intelligence.

Despite the backlog that the agencies faced, there was also a call for more information to be gathered on terrorist cells, specifically Al Qaeda. Before 9/11, most terrorist acts were linked to concrete political goals that could be identified through the organization's demands. This new form of terrorism "...wasn't considered 'normal' in the world of counterterrorism" according to Gina Bennett, a State Department analyst at the time of the attacks (Kamarck, E. 2022, March 9). Where before terrorist groups would only target the combatants of an opposing country, now the new groups that were emerging did not care about killing non-combatants. These new organizations paid no attention to the mass casualties that they were committing, nor did they have achievable political goals (Kamarck, E. 2022, March 9). The intelligence community needed to quickly gather information on the emerging terrorists in order to determine the best way to prevent future attacks.

Before the attacks of 9/11, there had been a heavy reliance on technical collection within the intelligence community (Richelson, J. T. 2008). This misguided confidence in the collection capabilities of satellites and other emerging technologies placed other sources of information gathering, including human sources, on the back burner (Richelson, J. T. 2008). The information that was needed on Al Qaeda and other terrorist cells could not adequately be gathered just through the use of technical sources. The information that could be gathered did not provide the information that was needed about the organization. The information that needed to be collected: insight on plans, political goals, and Al Qaeda's leadership system, would need to be collected through human sources.

In order to gather the human intelligence (HUMINT), the Guantánamo Bay prison camps were opened on January 11th, 2002. Located on the south east coast of Cuba, Guantánamo Naval base was built on a patch of land leased to the United States government in a lease agreement signed by the two countries in 1903 after the 1898 Spanish-American War (*Factsheet: The history and evolution of Guantánamo Bay detention camp*. Bridge Initiative. 2020, July 18). The Guantánamo Bay prison camps were opened nearly a decade after the base's construction, with each camp being separated based on different factors such as: transparency, the prisoners who were held there, and the security level of each site. (*Factsheet: The history and evolution of Guantánamo Bay detention camp*. Bridge Initiative. 2020, July 18). Prisoners who were captured overseas and thought to possess knowledge of a terrorist cell or suspected of being a terrorist themselves were transported to many detention facilities around the world; but the majority were transported to Guantánamo Bay. Despite the negative international response to this practice by many of the United States' allies, the practice continued as the desire for information on Al Qaeda and other terrorist groups grew.

Transferring prisoners to undisclosed locations was not the only practice that was taken by the federal government and the intelligence community that was criticized by the United States' international allies. While attempting to gather information on different terrorist organizations, there were a series of questionable practices that were employed by interrogators. These practices were known as enhanced interrogation techniques (Senate. 2014, December 9). These practices raised a series of questions surrounding the legality of the detaining prisoners at Guantánamo Bay, including if these individuals held any rights under the United States Constitution. Did the prisoners who were detained at Guantánamo Bay have any legal rights under the United States Constitution? Furthermore, if these individuals did have rights, were

these rights denied to these individuals during the duration of their detainment? In this thesis, I will attempt to discover if the prisoners who were at Guantánamo Bay held any legal rights under the Constitution and if the government, at any point during the prisoner's detainment, denied them these rights.

Importance of Thesis

In the immediate aftermath of the World Trade Center attack, there were a series of actions taken by both the federal and state governments that, in the moment, were meant to ensure the protection of the United States' national security but, in retrospect, were deemed to infringe upon the constitutional rights of United States citizens and non-citizens alike.

Immediately following 9/11, the New York Police Department (NYPD) established a new division whose sole purpose was to record and monitor Muslim Americans in the city (Lubin, A. 2021). The NYPD believed this would be the best way to gather information on any other terrorist cells or sympathizers in the city immediately following the attack. The profiling that was done by this new police division had a detrimental effect upon the lives of Muslim Americans in New York. The Muslim American Civil Liberties Coalition found that Muslim Americans living in the city felt as if their civil liberties were being attacked by the constant surveillance that the new division the NYPD placed upon them (Lubin, A. 2021).

While state governments were implementing their own protective measures to gather information on terrorist cells in their jurisdiction, Congress was working on passing legislation that would allow the federal government to do that very same thing. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, or the USA PATRIOT Act, was passed by Congress a month after 9/11. This bill allowed the government to collect data from private companies in order to build a profile of suspected terrorists in order to catch and question them before they were able to commit an attack against the United States. More importantly, Section 412 of the USA PATRIOT Act allowed the government to indefinitely detain immigrant and non-citizen terrorist suspects. This

section was used to profile immigrants and non-citizens who were Arab, Muslim, and South Asian for detainment (Lubin, A. 2021).

The PATRIOT Act was passed quickly through both chambers of Congress without any discussion regarding what the Act would allow the federal government to do. Only a few members of Congress spoke out about the act, including Senator Russ Feingold, who was concerned that the actions that would now be permissible might undermine the civil liberties of United States citizens (Lubin, A. 2021). Despite the concern that Senator Feingold and other members of Congress had raised, this legislation soon came into effect when President George W. Bush signed off on the act, arguing that the measures that would now be allowed were necessary in order to protect the nation (Lubin, A. 2021).

While it is easy to look back at the measures that were taken by the NYPD and Congress and discuss how both the state and federal government greatly reduced the civil liberties and protections of both citizens and non-citizens, these steps were seen at the time as necessary protective measures. Even a large portion of the general public agreed with the steps that were being taken, as they believed it would help prevent another attack. When the PATRIOT Act was officially signed, there was very little pushback from the public about the new oversights and the data that the government would now have access to. This contradicted the public's opinion about government overreach just before the attack on the twin towers, where there was call amongst the public for greater civil liberties and more oversight of the government to ensure that they were not abusing their power (Lubin, A. 2021).

It was common practice prior to 9/11, that a person who committed a terrorist act or was suspected of committing a terrorist act, be prosecuted before the court and rendered punishment (Lubin, A. 2021). This process changed as the public's attitude after the attack about terrorists

and suspected terrorists shifted. This shift allowed the government to change how it handled terrorists and suspected terrorists, “Neoconservatives argued that civil libertarians’ concerns about executive authority had enabled al-Qaeda’s ability to thrive and grow...” (Lubin, A. 2021). Many members of the public felt that the President should be able to act quickly and without restraint in order to deter any future terrorist attacks, even if this meant sacrificing some civil liberties and protections. If sacrificing their privacy and some liberties would ensure their protection from another attack, United States citizens were willing to make that trade-off (Lubin, A. 2021).

The novelty of the current security climate was another reason why citizens were so willing to hand over their rights. The United States had not experienced an attack on inside its borders or on any of its territories since the bombing on Pearl Harbor during World War Two. The term ‘ground zero’ was used to describe the area that the towers once stood after the attack and was supposed to emphasize that the United States’ vulnerability in the face of this new enemy. However, it is the selection of this term that was unique. Ground-zero was originally used to describe the point where an atomic bomb had been denoted, where life could no longer grow. Using this term to describe the area where the World Trade Center once stood was the people’s way of acknowledging that the way they used to live their lives had changed (Lubin, A. 2021).

The term ‘homeland’ was used to describe the United States and the term ‘protect the homeland’ was often used following 9/11. The government often employed the use of the phrase when they began implementing new security measures in their pursuit of terrorist organizations. The term homeland conjures up an image of a land that can be taken away from those who are not willing to work towards protecting it (Lubin, A. 2021). The term homeland further has an

impact on individuals through the way that it diminishes the barriers between foreign and domestic events (Lubin, A. 2021). Actions and ideologies that were previously thought to be contained by a nation's borders were no longer restrained by a nation's physical distance (Lubin, A. 2021).

Looking back at the events that transpired on 9/11, the public's attitude and the government's legislative response, one can see how it led to the detainment of terrorists or suspected terrorists at Guantánamo Bay. In times of war, the general public tends to approve of the harsh tactics employed by their government, even if it violates the citizens civil liberties (Olson, J. M. 2006). Even though the PATRIOT Act and the actions taken by local police units in New York have been admonished by the American people, there still remains a large debate around the actions that were taken at Guantánamo Bay.

While some approve of the actions that were taken by the government in gathering information post 9/11, there are those who believe that these actions were immoral, regardless of the information that these prisoners may have possessed. The purpose of examining the indefinite detainment of the prisoners held at Guantánamo Bay and whether or not the government was aware of any rights they may have held, is to ensure that the lessons that were learned in the aftermath of 9/11 and Guantánamo Bay are not repeated. While the measures that were taken by the government at the time were deemed necessary, reflection upon the events has proven that not all the steps that were taken were morally correct or even needed. The public may be willing to sacrifice the civil liberties and freedoms that are granted to them for the sake of national security, even if it is unnecessary to do so. If the actions that were taken after 9/11 are not properly examined and if the same security climate emerges in the future, there is a chance we may repeat the same historical mistakes, despite already knowing the outcome.

Classification of Detainees

After the attack on the World Trade Center, President George Bush declared the Global War on Terror and deployed United States military forces into Afghanistan and then Iraq (Nolen, J. L). During their deployment, the military was also tasked with capturing suspected terrorists who may be able to provide information on terrorists and terrorist cells. The idea behind capturing terrorists, or suspected terrorists, was so that any information they possessed could be used to help defend United States national security interests. Upon their capture, these prisoners were taken from the country they had been residing and immediately transported to the prison camps at Guantánamo Bay Naval base in Cuba. When these individuals were captured by United States forces, they were not told the reason of their detainment or the charges that were being levied against them, they were simply captured and transported to an entirely new location (Nolen, J. L).

Why was a prison on a Naval base located in Cuba selected as the facility to house these prisoners instead of a prison located within the United States? The prisoners who were brought to Guantánamo Bay were thought to possess time sensitive information on terrorist acts and organizations. There was an incentive to extract any information these individuals had if they were unwilling to reveal it themselves (Bristol, M. 2020, February 6). The tactics that were used to extract any information from the prisoners was referred to as enhanced interrogation techniques. These techniques included measures such as water boarding, sleep deprivation, slapping, keeping prisoners in stress positions, and nudity (Senate. 2014, December 9). Even though these interrogation measures were at first approved by President George W. Bush to be used on the prisoners, these techniques were illegal to be employed on prisoners on United States

soil (Bristol, M. 2020, February 6). In order for the interrogating officers to employ these measures, they needed to find a prison outside the confines of United States jurisdiction that would permit the utilization of such techniques. Furthermore, the prison needed to be in a location that could be easily accessed by members of the intelligence community and Congress alike.

Guantánamo Bay was selected as the most ideal location to house the suspected terrorists. The Naval base was believed to be far outside of the United States jurisdiction where the limitations against interrogation techniques would not apply; but was still close enough to allow for members of the government to visit whenever they thought it was necessary (Philbin , P., & Yoo, J. 2001, December 28). Additionally, having the prisoners outside of the United States would ensure that these individuals would not have access to the United States judicial system.

In the 1950 case of *Johnson v. Eisentrager*, The United States Supreme Court had come to the consensus that a nonresident enemy alien captured and held in a military compound overseas during a time of war was not able to petition the United States court system. This decision was reached based on the fact that the petitioner was a nonresident enemy alien who was not within the territorial jurisdiction of the American civil court upon his request. The Court then went on to say that a nonresident enemy alien would also have no access to the judicial system during wartime (*Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

Even though the prison was located just outside the jurisdiction of United States law, the prisoners held at Guantánamo Bay would still be protected from the enhanced interrogation techniques under the Third Geneva Convention. Under the convention, there were certain protections that were granted to individuals who classified as a prisoner of war (POW) (*Combatants and POWs*. Combatants and POWs). In order to be labeled as a prisoner of war, an

individual who is participating in an international armed conflict must: 1) be commanded by an individual who is responsible for those who are in their command; 2) have a recognizable sign affixed to their clothing; 3) openly carry their arms; 4) distinguish themselves from civilians; 5) and must operate their military assignment in accordance with international law (*Combatants and POWs*. Combatants and POWs). If a combatant conformed to the listed requirements, they would classify as a lawful enemy combatant and a prisoner of war which would then grant them certain protections under the Third Geneva Convention while in the custody of an enemy.

Upon capture, a POW could not be transferred to any power that does not respect to the Third Geneva Convention or is not a signing member. The capturing party must respect the prisoner's allegiance towards their power and cannot punish them for their participation in any hostilities. There are also rules on how to treat POWs when they are in enemy care, as well as rules on disciplinary proceedings or punishments. Furthermore, a POW can only be detained to prevent them from participating in hostile actions against a nation. The prisoners would have to be released upon the end of any hostilities or if they have conflicting health reasons that would prevent them from being able to participate in any hostile actions against their enemy (*Combatants and POWs*. Combatants and POWs).

The United States, which sought to use its enhanced interrogation techniques against those that were captured, realized that none of the prisoners could fall under the POW classification, otherwise it would not be able to interrogate them for information. In order to avoid these regulations, the Bush administration decided that those who were housed at Guantánamo Bay, would not be labeled as lawful enemy combatants (Cole, D., & Dempsey, J. X. 2006). It was argued by the administration that the prisoners who were captured, and then subsequently transported to Guantánamo Bay, were instead, unlawful enemy combatants. Since

they did not abide by the requirements of a lawful enemy combatant, they would not be protected under the POW status of the Third Geneva Convention. At the time, there were no international treaties, regulations, or rules that dictated how an unlawful enemy combatant should be treated while in the hands of an enemy. The designation of the detainees as unlawful enemy combatants ensured that the United States would not be violating any international norms it was a party to if they employed the use of its enhanced interrogation techniques on the prisoners housed at the Naval base.

Through the extra steps that the federal government took, by housing the prisoners outside of United States' legal jurisdiction and the classification of the prisoners as unlawful enemy combatants, they effectively ensured that those who were brought to Guantánamo Bay would have no protections under the law. Even though the government had sought out a location in which they would not have to employ American legal standards, the government still requested that the detention facility meet United States prison standards (Senate. 2014, December 9). The federal government further requested that the interrogation operations undertaken be tailored in order to meet the requirements of United States. law and the federal rules of criminal procedure (Senate. 2014, December 9). President George Bush even requested that prisoners who were held at the base be treated in a humane manner that would be consistent with the principles of the Third Geneva Convention (Masters, J. 2021, October 5).

While this may seem rather contradictory, since there were many steps, the government had taken to prevent these individuals from having any protections under international or United States law, the reason these individuals were being held was to gather information. At the time of these detentions, the United States was only focused on gathering as much information as possible on terrorist organizations and, it was thought at the time, that a prisoner would not

willingly give up the information they possessed. Furthermore, the classified nature of the evidence surrounding the suspects and their detainment required that the proceedings that were taken remain confidential for the sake of America's national security.

There was also a fear that the government was operating under a 'ticking time bomb' scenario. There was a belief that if information was not gathered quickly there might not be enough time for the government to prevent another tragedy from occurring (Lubin, A. 2021). The government's main goal in gathering the information was to protect the national security of the United States, which is why it believed it was necessary to classify the prisoners as unlawful enemy combatants and to detain them in a prison outside of United States' legal jurisdiction.

The Rights of Non-Citizens

The government went to great lengths to ensure that the prisoners would not have the full scope of rights that would have otherwise been granted to them if they had been housed in a prison within the United States borders. What rights would these prisoners have if they had been held in a facility inside of the United States? It is an indisputable fact that every citizen in America, whether they are a citizen by birth or naturalization, has access to all the rights that are listed in the United States Constitution and the Bill of Rights. The only time that a citizen can be stripped of their rights is when they are incarcerated for committing a felony. Even if a citizen is incarcerated for a crime, there a number of rights in place that provide them certain protections while behind bar. But what about non-citizens?

A non-citizen is defined as “any individual who is not a national of a State in which he or she is present,” and it stands for anyone who enters a country to which they have no citizenship (*Study Guide: The Rights of Non-Citizens*. The rights of non-citizens. 2003). Whether they are simply visiting the country, on vacation, or have entered it illegally, if an individual is not a citizen of the country, they classify as a non-citizen. What rights would a non-citizen have while inside of United States borders? This question has been the center of many debates throughout the course of American history and there is still no clear answer. This question becomes even murkier when a non-citizen commits a crime while inside United States borders. While a citizen has protections within the judicial system, do non-citizens have access to these same protections?

Certain rights listed within the Constitution have explicitly written limitations that ensure that they are only guaranteed to citizens, such as the right to vote in election cycles. However, many of the amendments listed in the Constitution are not explicitly limited just to citizens.

Much of the Constitution is written in language that can be interpreted in a way that allows the rights listed within to be applicable to non-citizens while they are on American soil. The United States Supreme Court has been attempting to help define the exact number of rights that a non-citizen possesses while on United States soil, especially the rights they possess in the judicial system, for well over a decade.

Since 1886, there have been a series of court cases brought before the Supreme Court that attempt to define how many rights a non-citizen possesses while in a United States courtroom. In order to determine just how these rights will protect non-citizens in the judicial system, the courts must first look at the language that was used when they were written. For instance, the First Amendment does not specify whether the protections that are listed are only for citizens, it merely states that the freedoms listed shall be protected for the people (*The U.S. Constitution*). However, the Fifteenth Amendment explicitly states a citizen's right to vote shall not be denied by any federal or state government on account of their race (*The U.S. Constitution*). Most amendments within the United States Constitution do not distinguish if the rights that are listed are reserved for American citizens or if they will also apply to non-citizens (Cole , D. 2003). The only rights that are reserved explicitly for citizens are those that guarantee that their right to vote shall not be infringed and their right to run for federal elective office (Cole , D. 2003). The rest of the rights that are listed within the founding documents have no such limitations (Cole , D. 2003).

From 1886, there have been a series of Supreme Court cases that dealt with defining the limitations that non-citizens possess while in a United States court room. While these court cases have helped to clarify what protections these individuals have when being prosecuted in the United States, there is no clear signifier of how encompassing these rights will extend within the

judicial system. It still remains to be determined by the residing courts and the current government if non-citizens will be granted protections in a United States court room equal to that of a citizen.

The two amendments that the Supreme Court stated make no distinction between legal citizens and non-citizen are the First and the Fifth Amendments. The First Amendment states that Congress shall make no law that inhibits the freedom of speech, religion, press, the right to petition, or the right to peacefully assemble (*The U.S. Constitution*). Since there is no signifier that states that these rights shall only be enjoyed by American citizens, these rights have since been interpreted to apply to any person who sets foot on American soil (Cole , D. 2003).

The Fifth Amendment states that no person shall be held to answer for a capital crime without an indictment by a Grand Jury unless they are being tried in a military court (*The U.S. Constitution*). It further states that no person shall be prosecuted for the same offense twice or be compelled to be a witness against themselves during the course of a trial, nor will they be deprived of life, liberty, or property without due process of law or have private land taken away without proper compensation (*The U.S. Constitution*).

While the First Amendment has been openly interpreted to be applicable to any person who resides in the United States, there are two Supreme Court cases that establish a non-citizens' right to the protections under in the Fifth Amendment. The first case was in 1945, *Bridges v. Wixon*, where the petitioner was to be deported from the United States due to his affiliation to the communist party (*Bridges v. Wixon*). The court held that the petitioner could not be deported due to his association with the communist party, as it went against his first amendment right of freedom of speech which is granted to every person who resides in the United States regardless of their citizenship. The court went on to say that the petitioner had a legal right to insist that

they be present for the case as it was argued before the court, as they were protected under the due process of the law as granted by the Fifth Amendment (*Bridges v. Wixon*). This decision was further reenforced in the 1993 Supreme Court case *Reno v. Flores* when non-citizens were being detained ahead of their deportation proceedings (Frazee, G. 2018, June 25). In this particular case, the court stated that non-citizens were guaranteed access to the due process of the law that is promised under the Fifth Amendment and therefore should be allowed to have their day in court to sit before the judge presiding over their case (Frazee, G. 2018, June 25).

The right to have legal counsel present during a criminal case is also guaranteed to non-citizens. The Sixth Amendment states that those who are being charged with a crime will have the right to speedy and fair trial, by an impartial jury of their peers, shall be informed of the accusations that are being levied against them, shall be able to confront any witnesses being used against them, and have the right to have legal counsel to assist with their defense (*The U.S. Constitution*). Perhaps one of the most well-known Supreme Court cases was the 1963 case *Gideon v. Wainwright*, which guaranteed any person being charged with a felony would have access to legal counsel, even if they did not have the funds to hire an attorney. If an individual was not able to hire their own counsel the government was required to appoint an attorney to help represent the defendant during trial (*Gideon v. Wainwright*).

Even though in *Gideon v. Wainwright* case had been determined with an American citizen defendant, the right to counsel extended to non-citizens when it came to criminal charges (Frazee, G. 2018, June 25). The court's decision stated that any person who is facing a felony and did not have the funds to hire their own legal counsel, was required to be appointed one by the government (Frazee, G. 2018, June 25). So, while a non-citizen has the right to legal counsel

while being charged with a criminal offense, in order for the government to appoint them legal counsel they must be charged with a felony (Frazee, G. 2018, June 25) (*Gideon v. Wainwright*).

The Fourth Amendment was also found to be one of the rights granted to non-citizens. The Fourth Amendment protects individuals from unreasonable searches and seizures without probable cause or with a warrant that explicitly states the place that can be searched and items that can be seized. In the 1980 court case *Truong Dinh Hung v. U.S*, the court found that the defendant's Fourth Amendment rights had been violated. In *Truong Dinh Hung v. U.S*, the defendant was being wiretapped and surveilled for the criminal act of espionage. A warrant had not been issued despite the defendant being located on American soil when the information was collected. Due to the defendant's location at the time of the collection, the court ruled that his Fourth Amendment rights had been violated, and that there should have been a warrant issued before the surveillance of the individual (WINTER, C. J., & [97] DONALD RUSSELL, C. J. 1980, July 17). The court stated that any surveillance of the defendant that had not taken place on American soil had not been a violation of his Fourth Amendment rights since he would only possess such protections when in the United States (WINTER, C. J., & [97] DONALD RUSSELL, C. J. 1980, July 17).

In addition to the First, Fourth, Fifth, and Sixth amendments, non-citizens also are protected under the Fourteenth Amendment. While the Fourteenth amendment has five sections listed under it, only the first section is found to be applicable to non-citizens. Section 1 of the Fourteenth Amendment says that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (*The U.S. Constitution*).

The first case to address whether non-citizens had access to the Fourteenth Amendment was the 1886 Supreme Court case of *Yick Wo v. Hopkins*. In this case, the court determined that the Fourteenth Amendment applies to all persons within the territorial jurisdiction of the United States without regard to their citizenship status, race, or color. The defendant in this case could not be discriminated against by a California State law based off of his citizenship status with the United States (*Yick Wo V. Hopkins, 118 U.S. 356 (1886)*).

The second case to address the protections non-citizens possess under the Fourteenth Amendment was in the 1982 Supreme Court case *Plyler v. Doe*. The case was presiding over the question of whether or not a state can prevent an undocumented immigrant's child from attending a public school since the child is not a legal citizen. The court's decision rested on the phrase "...within its jurisdiction..." in the Fourteenth Amendment. The court interpreted this phrase to mean that a state would not be able to deny a non-citizen from attending a public school based on their citizenship status and, that these individuals would be protected under the amendment as long as they were to reside within American borders (*The U.S. Constitution*) (*Plyler v. Doe, 457 U.S. 202 1982*).

Even though non-citizens have been granted protections under the First, Fourth, Fifth, Sixth, and Fourteenth amendments, they only retain these protections while they reside within United States borders and legal jurisdiction. If a non-citizen were to be detained outside of the United States by military forces, they should not expect to be granted the same rights as they would if they were detained on American soil. As long as a non-citizen is being prosecuted within the United States court system, they should expect to be granted the full protections that are offered under the above-mentioned amendments. Additionally, these court cases set the legal precedent of the treatment of non-citizens during the time that prisoners were detained at

Guantánamo Bay. This was another reason why the federal government sought to keep the prisoners outside of American borders and out of American legal jurisdiction.

Analysis

It was through the selection of the prison's location and the classification of the prisoners as unlawful enemy combatants, that the prisoners would not be protected under the legal precedent that the previous Supreme Court cases had set. Without these protections, the detainees were unable to challenge their detention inside United States federal courts. It also meant that the detainees were unable to access any of the international rights that are granted under the Third Geneva Convention. Their location outside the confines of United States legal jurisdiction and their classification as unlawful enemy combatants meant that the federal government did not have to provide any international protections to the prisoners that would otherwise have been granted. The loss of international rights also meant that the government could detain these individuals indefinitely without any legal repercussions (Cole, D., & Dempsey, J. X. 2006).

Holding the prisoners outside of United States jurisdiction also meant that the government did not have to provide a hearing to determine the status of the prisoners. Under the Third Geneva Convention, a country has the right to detain a prisoner who is fighting for the other side for the duration of the war. Although, if there is any doubt about the prisoner's status, as either a fighter or a bystander to the ongoing violence, the capturing country is required to give that individual a hearing (Cole, D., & Dempsey, J. X. 2006). In spite of this protection, due to the prisoner's classification as an unlawful enemy combatant, the Bush administration stated that they did not have to provide any hearings to any of the prisoners (Cole, D., & Dempsey, J. X. 2006).

While these individuals were not granted any international rights due to their classification as unlawful enemy combatants, the question of whether or not the detainees would have access to the full range of constitutional rights provided to non-citizens was a bit murkier. While the Supreme Court had set the precedent that non-citizens had access to certain legal rights, these cases were only about non-citizens who were inside United States borders. There was one court case that dealt with the legal rights of non-citizens being held in a military base overseas. The 1950 Supreme Court case of *Johnson v Eisentrager* concluded that a prisoner that was seized, tried, and held in a territory outside of the sovereign United States would not have access to its court system (Philbin , P., & Yoo, J. 2001, December 28).

Even though this decision provided the government with enough reason to believe that the detainees would not have access to legal rights, the Office of Legal Counsel was tasked with determining if these individuals had any right to file a petition of habeas corpus in the federal district court system. A December 28, 2001 memorandum sent from the Office of Legal Counsel to the General Counsel of the Department of Defense, William Hayes, addresses the question whether the detainees had access to any constitutional legal rights. The memorandum was issued because a question arose about whether any prisoners brought to the base would be able to file a writ of habeas corpus pending a trial by a military commission (Philbin , P., & Yoo, J. 2001, December 28). A writ of habeas corpus allows an individual in custody to make an inquiry before the court about the nature of their detainment (*Writ of habeas corpus*. U.S. Marshals Service. 2022, August 3).

If the detainees were able to file a petition for writ of habeas corpus, then it was possible they would be granted the full constitutional protections that are granted to all non-citizens prosecuted in the United States. However, even if the detainees were successful in their attempt

to petition for a writ of habeas corpus, there would be no charges the prisoners would be able to confront. Nearly all of the detainees that were held at Guantánamo Bay never had any charges made against them (Shamsi, H. 2023, February 24). Many of the detainees were brought to the camp because they were believed to possess intimate knowledge about Al Qaeda and other terrorist organizations at the time. The prisoners who were brought to the camp were captured at the sole discretion of the United States federal government based off of the intelligence that had been gathered or provided by other individuals (Cole, D., & Dempsey, J. X. 2006). Since there were no charges that are known to have been brought against the detainees, it was important to the federal government to determine if these individuals would be able to file a writ of habeas corpus petition.

The Office of Legal Counsel also believed that any individual who was detained at the base could not have their petition heard at any Federal District Court due to the base's location. The basis for their decision rested on the Supreme Court case, *Johnson v. Eisentrager*. Their memo went on to further state that it was believed that the Court had not wanted to establish a two-part test that would distinguish between the terms, territorial jurisdiction and sovereign territory. Instead, the Court had used those terms interchangeably to explain why any alien would have no jurisdictional or constitutional rights if held outside United States borders (Philbin , P., & Yoo, J. 2001, December 28). Guantánamo Bay was under a lease agreement with the Cuban government, and the agreement expressly listed Cuba as holding ultimate sovereign control over the land. Even though the agreement goes on to state that the United States will hold complete jurisdiction and control over the land within the area, the United States does not claim sovereignty over the land (Philbin , P., & Yoo, J. 2001, December 28).

The decision in *Johnson v. Eisentrager* was the first indicator to the government that those who were detained at Guantánamo would not have access to the legal rights that would otherwise be granted to a non-citizen in United States jurisdiction. However, this court case was not the only case that shaped the reasoning behind the government insisting that these individuals did not have any constitutional protections. The 1948 Supreme Court case, *Vermilya Brown Co. v. Connell*, questioned whether or not the Fair Labor Standards Act applied to a United States military base in Bermuda. During the decision for the case, all nine justices stated that it was their belief that neither Bermuda nor Guantánamo Bay were the subjects of United States sovereignty. In this case, the land in Bermuda was leased from Great Britain to the United States and when the agreement was signed the justices determined that it was not under United States sovereignty, but instead Great Britain's (Philbin , P., & Yoo, J. 2001, December 28). In fact, even in the dissenting position it was determined that, "Bermuda and like bases are not...our possessions... Guantanamo Naval Base...a leased base in Cuba...has been ruled by the Attorney General not to be a possession; it has not been listed by the State Department as among our 'non-self-governing territories,' and the Administrator of the very Act before us has not listed it among our possessions." (Philbin , P., & Yoo, J. 2001, December 28). Additionally in the written decision, it was said that, "a lease from the Republic of Cuba of an area of Guantanamo Bay ... the United States was granted by the Cuban lease substantially the same rights as it has in the Bermuda lease." meaning that the same ruling in the *Vermilya Brown Co. v. Connell* case would be applicable to any cases that emerged from Guantánamo Bay (Philbin , P., & Yoo, J. 2001, December 28).

The decision in this case further cemented the idea that the Guantánamo Bay Naval Base was not only far outside of the jurisdictional limit of the United States federal court system, but

also not under United States sovereignty. To further solidify the reasoning behind the idea that the federal courts would have no authority over the base was a 1995 Eleventh Circuit Court case, *Cuban Bar Association Inc. v Christopher*. The Court's decision rested on the fact that the, " 'control and jurisdiction' is equivalent to sovereignty...rejecting the argument that our leased military bases abroad which continue under the sovereignty of foreign nations...are 'functionally equivalent' to being land borders or ports of entry of the United States or otherwise in the United States" (Philbin , P., & Yoo, J. 2001, December 28). This decision determined that there is no legal basis for the government to believe that the base would be considered an extension of American borders and should therefore carry with it all of the provisions that are offered on its soil. Furthermore, the executive branch had repeatedly taken the position under various statutes, before the conception of the prison camps, that Guantánamo Bay was not a part of the United States, nor was it a possession of the country (Philbin , P., & Yoo, J. 2001, December 28).

Even though there were three court cases that seemed to support the idea that the federal district courts did not have any jurisdiction over anyone held at Guantánamo Bay, the Office of Legal Counsel still advised the federal government that these court decisions were not set in stone. The Office did bring to the attention to the federal government that, even though the courts decisions in the past supported the idea that these detainees would not be protected by the Constitution, a new court case could cause the court's decision to change. While the decision in *Eisentrager* states that any alien that is outside the sovereign and territorial jurisdiction of the United States, then the alien has no rights to expect any legal protections and while the detainee's meet the requirements of an alien in *Eisentrager* case, an argument could potentially be made that the base is within the territorial jurisdiction of the federal courts (Philbin , P., & Yoo, J. 2001, December 28).

With this concern though, it was noted that there had been no federal statute that included the base in any federal court's territorial jurisdiction (Philbin , P., & Yoo, J. 2001, December 28). It was also determined that if a federal court had ruled that Guantánamo Bay fell within its territorial jurisdiction, that the court would then interfere with matters that were “solely in the discretion of the political branches of government.” (Philbin , P., & Yoo, J. 2001, December 28). The Office of Legal Counsel said that if the courts were to claim jurisdiction it would be seen as interfering with the President's foreign affairs powers and prevent the President from taking important measures to protect the national security of the country (Philbin , P., & Yoo, J. 2001, December 28).

Due to these findings by the Office of Legal Counsel, the federal government operated under the opinion that the Guantánamo Bay was not under United States jurisdiction or sovereignty. Since this decision stripped the federal court system of any legal authority over those detained, there would be no way for the prisoners to file a writ of habeas corpus. The rights granted to non-citizens in the judicial system is only applicable if the individual is prosecuted in the federal court system, meaning the individual would have to be in its territorial jurisdiction, or in the continental United States and its territories. Since those who were indefinitely detained at the prison camp were held in Cuba, where the United States did not have sovereignty over the land, it was the federal government's consensus that the rights that would have been applicable if the suspected terrorists were held in the United States, would not protect those held in Cuba (Philbin , P., & Yoo, J. 2001, December 28).

In the beginning of the prison camp's operation, the assumption that the prisoners did not have access to any constitutional or international legal rights was correct. There had been no legal precedent that specified that an alien that was captured and detained overseas on a base

where the United States does not claim sovereignty would be granted legal rights. However, as more prisoners were brought to the camp and detained indefinitely, there were multiple cases that were filed in the federal court system on their behalf. Many attorneys and concerned citizens began to question the legality of the indefinite detainment of suspected terrorists who could not even argue against the charges made against them. The Center for Constitutional Rights (CCR) challenged whether or not the United States federal court system actually lacked jurisdiction to hear the cases from the prisoners who were detained at Guantánamo Bay (*Rasul v. Bush*. Center for Constitutional Rights).

The first case that questioned if the prisoners held the right to file a habeas corpus petition was the 2004 Supreme Court case *Rasul v. Bush*. In *Rasul v. Bush*, the question of whether or not the detainees could challenge their detentions in court was decided and it was determined that those who were held at the base had a right to challenge their detention in the United States federal court system (*Rasul v. Bush*. Center for Constitutional Rights). It also established that the detainees could not only challenge their detention, but the conditions of their confinement as well. Once this decision was made, the legal black hole that had hung over the prison camp was completely removed, paving the way for more court cases to be brought forward by the detainees (*Rasul v. Bush*. Center for Constitutional Rights).

The second court case that addressed the legality of the prisoners challenging their detention were the Supreme Court Cases of *Boumediene v. Bush* and *Al Odah v. United States*. These two cases combined when they were presented before the Supreme Court and sought to challenge the Combatant Status Review Tribunals that had been enacted since the *Rasul v. Bush* decision. These tribunals were tasked with reviewing the designation of each detainee as an unlawful enemy combatant to determine if they were correctly classified. The government was

arguing that if the detainees fell into the category of an unlawful enemy combatant, then they would be unable to challenge their detention or living conditions in the federal court system (*Boumediene v. Bush / Al Odah v. United States*. Center for Constitutional Rights). The cases were also questioning the legality of the Detainee Treatment Act which was being used by the federal government as a way to provide the detainees with a way to review their habeas corpus petitions (*Boumediene v. Bush / Al Odah v. United States*. Center for Constitutional Rights).

The cases of *Boumediene v. Bush* and *Al Odah v. United States* were ruled in the favor of the plaintiffs. All the detainees that were held at Guantánamo Bay had the constitutional right to habeas relief. The court determined the habeas relief that had been offered under the Detainee Treatment Act did not provide the full habeas review that is legally granted to the prisoners because it did not allow the prisoners to accurately challenge their detainment. This case also established that every prisoner at the base held the right to challenge their detainment and the conditions of their detainment through a habeas corpus petition in United States federal court system (*Boumediene v. Bush / Al Odah v. United States*. Center for Constitutional Rights).

While the Office of Legal Counsel had proposed to the federal government that the prisoners would not be granted any legal rights since they were outside of the United States, they had warned that the Supreme Court could view the facts differently. The legal precedent that had been set in the past of non-citizens captured and detained overseas not being granted legal rights had been overturned. The government was not wrong in claiming that these individuals held no legal rights in the federal court system when they were first brought to Guantánamo Bay. The legal precedent before the 2004 Supreme Court cases were such that an alien that was captured and detained overseas had no legal rights in the United States court system. However, after 2004, the Supreme Court determined that these individuals possessed the legal right to challenge their

detention in the federal system. Moving forward, if the federal government did not grant these prisoners the right to challenge their own detainment, then they would be actively denying them their legal rights.

Conclusion

While there have been many times in United States history when the rights of non-citizens and even citizens have been stripped due to an abundance of fear, these instances have come to pass (Cole, D., & Dempsey, J. X. 2006). The Guantánamo Bay prison camps are still in use today. On March 9, 2023, a Saudi Arabian prisoner was released from the prison after being cleared for release nearly two decades after he was unsuccessfully tried in a military court, back in 2002 (Shamsi, H. 2023, February 24). During the conception of the prison camp there were constitutional legal rights granted to all non-citizens who were charged with a crime while on United States soil. The 1st, 4th, 5th, 6th, and 14th Amendments were all guaranteed protections for non-citizens in the judicial system. Since the United States is also party to the Geneva Conventions, non-citizens who are prosecuted inside its jurisdiction would also be protected by the international rules and regulations listed in these international treaties.

The federal government understood the full scope of rights that would have been granted to the detainees if they had been kept at a prison that was inside United States borders. The government was also aware of the rights that would be granted to these individuals if they fell under the prisoner of war status. Since the government believed that it was working against a ‘ticking time bomb’ scenario, and that the next terrorist attack was right around the corner, they were concerned that they would be unable to gather all the actionable information from the detainees without the use of advanced interrogation techniques. While these techniques were eventually found to be ineffective in the Senate’s final study of the Central Intelligence Agency’s Detention and Interrogation Program to the President, at the time, it was believed that the information provided during these sessions was assisting in the ‘War on Terror’ (Senate. 2014,

December 9) ¹. So, in order to employ these techniques, the government needed to operate in a location where the prisoners would not be able to file a writ of habeas corpus or access any other legal rights.

The selection of Guantánamo Bay and the classification of the prisoners as unlawful enemy combatants provided the legal loophole that the government believed was necessary to gather its information. According to the Office of Legal Counsel, it was the belief of the federal government that the location of Guantánamo Bay was far enough out of the territorial jurisdiction of the United States, and since it did not claim sovereignty over the land, that the prisoners would be unable to access any constitutional or international rights. The base's location was selected because it provided a locale that would be close enough to be observed by members of Congress and still ensure the protection of American national security from any potentially dangerous detainees.

So, did the government know that these prisoners would have had Constitutional legal rights on United States soil? Yes, they knew legal rights would have been granted to these prisoners had they been detained on American soil. However, the federal government did not actively deny these individuals any of their constitutional legal rights at the beginning of their detainment as they were not located on American soil, nor were they considered to be lawful enemy combatants who would then be entitled to certain international protections. The legal precedent that was set by previous court cases did not grant non-citizens any legal rights if they were detained and kept outside of the United States borders.

¹ The Senate's report of the Central Intelligence Agency's Detention and Interrogation Program to the President was a partisan report that omitted any testimony or interviews by CIA officers involved in the interrogation process

Did the government actively deny constitutional rights to the detainees at any point during their detainment? Despite the government not actively denying these rights in the beginning, a series of court cases that questioned the legality of the prisoner's detainment and the federal circuits court's jurisdiction to hear these cases proved that the government had violated their rights over the course of their imprisonment. In, *Rasul v. Bush*, the Supreme Court determined that the prisoners held at Guantánamo Bay could in fact challenge their detention and file a writ of habeas corpus. Upon the Supreme Court's decision to allow the detainees to question their detainment, another case determined that the prisoners had access to the constitutional right to habeas relief. *Boumediene v. Bush* explicitly established that the prisoners held the right to challenge their detainment in the United States federal court system, and that Guantánamo Bay fell into the legal jurisdiction of the federal courts.

The government may not have denied these rights to the prisoners at the beginning of their detainment at Guantánamo Bay. Nonetheless, once the Supreme Court determined that these individuals were within the jurisdiction of the federal court system, if the federal government did not allow these individual to petition the court, they would be denying them their legal rights. Once the Supreme Court announced its decision, the prisoners that were held at Guantánamo had access to the legal rights that they previously had been unable to utilize. While Guantánamo Bay remains open to this day, the individuals who are still held there have access to the Constitutional rights and the government cannot deny them these rights.

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