

Executive Order 13491: Re-Leashing the C.I.A.

Cyrus Jabbari & Andrew Malek

President Barack Obama on January 22, 2009 issued Executive Order (EO) 13491, "Ensuring Lawful Interrogations," revoking institutions and regulations stipulated by former President George W. Bush's Executive Order (EO) 13440. In order for us to understand what this means, we need to dissect Bush's executive order in its genesis and its evolution.

The Bush administration issued EO 13440 in the context of a nation engaged in war; and this setting is in no way novel to many presidential prescriptions of the past. The precipitating controversies from any of these war-time directives manifest a classic friction in democracies: leveling civil liberties with national security. Individual liberties cease to exist without the security of a nation, for any constitution is rendered meaningless without a government or people secure enough to defend it. At least that is what President Abraham Lincoln advanced in the face of the Union's greatest test of fortitude. Lincoln administered 48 executive orders during the American Civil War.ⁱ He maneuvered tremendous executive authority in the face of a rebellion rapidly upsetting the security and balance of a nation.

That same Constitution threatened by confederate anatomization granted Lincoln implied authority for his executive orders. Its framers envisaged a president needing room to swiftly and defensively maneuver a fragile new nation, emerging from war and declaring neutrality to subsequent engagements in the 1790s between France and Great Britain.ⁱⁱ The U.S. Constitution grants in Article II that "the executive power shall be vested in a President of the United States," commissioning the President as "Commander in Chief of the Army and Navy," whereby he or she "shall take Care that the Laws be faithfully executed."ⁱⁱⁱ However, this framework for presidential power provides no clear language regulating the effect of executive memoranda, proclamations, or orders.

Despite the framers' establishment of checks and balances to curb those executive privileges, vague rhetoric surrounding such authority left room for a host of future contentions. Indeed, Congress limited the President in its ability to impeach him or her, and in its sole capacity to declare and maintain wars.^{iv} Alexander Hamilton nevertheless foreshadowed, "It is of the nature of war to increase the executive at the expense of the legislative authority."^v

Lincoln doubtless fulfilled this prophecy as he excluded the legislative body in several of his executive mandates during the Civil War. In the span of a brief 80-day recess of Congress in 1861, Lincoln mobilized and increased funding for the Army and Navy, blockaded infrastructure to avoid Confederate seizure, and suspended writs of habeas corpus.^{vi} One fell swoop of executive action absent of legislature launched the executive into a higher seat of jurisdiction. He labeled his military exertions as acts of suppressing rebellion rather than acts of war, acting within his constitutional limits under that terminology.^{vii} Yet, suspension of writs of habeas corpus, beginning with the arrest of Confederate saboteur John Merryman, ushered fervent grievances particularly in Justices Roger B. Taney and David Davis.

Though Taney approved Merryman's lawyer's petition for the writ, Lincoln ordered the General holding Merryman captive to deny its delivery. Taney cited several of his contentions against Lincoln's constitutional overreach in that (i) the suspension clause of Article I dealing with congressional powers conveys solely Congress could authorize suspension of the writ and (ii) Chief Justice Marshall's comments in *Ex parte Bollman* were that only the legislature may suspend powers of the courts for public safety.^{viii} Lincoln rebutted these claims, firstly positing a "necessity defense" in suspending the writ to save the government, and secondly rallying behind the suspension clause in that he possessed authority to suspend the writs during a state of emergency.^{ix}

Lincoln effectively defended his position for the purposes of the war in his interpretation of the suspension clause, but more heavily supported his executive authority in his "necessity defense" and "war powers defense."^x Arguing that his actions aligned with powers allotted to the president during rebellion, Lincoln "revealed how elastic executive emergency powers could be, setting an ominous precedent regarding the potential power of future administrations."^{xi}

Justice Davis wrote five years posterior to Lincoln's suspension of the writs, "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of protection all classes of men, at all times, in all circumstances."^{xii} Davis authored this in light of the Supreme Court's newly established understanding that Indiana was not under attack when Lincoln suspended the writs of its citizens and residents.^{xiii} A constitutional "shield" could neither protect those citizens, nor restrain presidential orders.

The states of war and national emergency since Lincoln's time have transformed solitary executive action into a seemingly untamable force. Defenses for rapid, unilateral presidential decision-making granted clearance for a host of successful bypasses of congressional consent. President Franklin Delano Roosevelt issued more executive orders than any president to date did, totaling to 3,721; President Woodrow Wilson placed second in passing Congress with 1,803 orders.^{xiv} Prior to President Theodore Roosevelt, who issued the third most orders in history;^{xv} executive orders were largely undocumented, adding to the enigmatic and ambiguous nature of this privilege's genesis and expansion.

Franklin D. Roosevelt articulated his plans to extend the power of executive orders most clearly in his Inaugural Address: "I shall ask the Congress for the one remaining instrument to meet the [depression] crisis — broad executive power to wage a war against the emergency, as great as the power that would be given me if we were in fact invaded by a foreign foe."^{xvi} The depressed economy was enough of a national emergency, likened to the force of an enemy threatening the preservation of the nation, for Roosevelt to maneuver his commands with relatively few Congressional or judicial checks. Though Congress acted with Roosevelt to enter World War II, it would be the body's last declared war.^{xvii}

The president administered his most infamous directive during that war in response to the Japanese attack on Pearl Harbor. Executive Order 9066 allowed military leaders to mandate that Japanese-American citizens be placed in internment camps where "the right of any person to enter, remain in, or leave [would] be subject to whatever restrictions . . . [the] Military Commander [imposed] in his discretion."^{xviii} Of those that were forcibly moved by the War Relocation Authority, 70 percent were second-generation Americans,^{xix} and Congress backed this order by detailing violation of the military commander's restrictions as a criminal offense.^{xx}

The Supreme Court case *Korematsu v. United States* concerns Fred Korematsu's resistance to internment and subsequent arrest. His conviction was brought to the Court only to be upheld by majority opinion that national security from Japanese espionage outweighed Korematsu's individual rights, and that EO 9066 set legal precedent for that decision. The convictions would be overturned after 40 years by the U.S. District Court for the Northern District of California, in light of concealed reports from the time exhibiting a total lack of evidence for a Japanese-American security threat.^{xxi} This ruling would only exist as a moral victory for Korematsu and company. Though it exposed the arbitrary power-wielding of the government, it neither revoked EO 9066, which was suspended by Roosevelt toward the end of the war and further terminated by President Gerald Ford,^{xxii} nor did it set precedence impeding an EO like 9066 from being reinstated in the future. Without any judicial or congressional measures banning a similar suspension of individual rights or restricting executive privileges, the District Court's ruling had little effect on future executive orders.

Only ten years before Korematsu and company's indemnification though, the removal of habeas corpus rights as a national security measure again transpired, however this time in Britain. As the Irish Republic Army (IRA) fought for an Independent Republic of Ireland, tensions with the United Kingdom rose and violence escalated in 1970 and 1971 in Northern Ireland.^{xxiii} The situation intensified so great that the Northern Ireland government deemed internment the only remaining option to end IRA aggression,^{xxiv} thereby effecting Operation Demetrius.

The campaign against Northern Ireland's government began March 1971 with the murders of three young off-duty soldiers.^{xxv} Large-scale protests ignited, and allied to wider concerns both politically and militarily, a counter-measure became inevitable. Thus, "internment without trial" was introduced in August 1971.^{xxvi} As the internment tactic was not utilized on both sides of the Irish border,^{xxvii} it consequently became clear that the internment was impossible without the help of the British army.^{xxviii} Though British troops had already been deployed in Northern Ireland in 1969, the Northern Ireland government still required in 1971 to obtain consent from the British government in order to set out Operation Demetrius together.^{xxix}

An agreement formed on August 5, 1971 at a meeting in Prime Minister Edward Heath's office in London ruled that the British and Northern Ireland government would together implement internment.^{xxx}

Operation Demetrius was executed August 9,^{xxxii} and with the help of the British army, 342 people were arrested, although the arrest list contained 520 names.^{xxxiii} The internees were held at Crumlin Road Prison, Belfast, camps at Long Kesh and Magilligan, and aboard the Maidstone prison ship.^{xxxiii} IRA internment illustrates an extension of habeas corpus rights removal from state-actors to non-state actors, and correlates comparably to the United States. Like in the United States, habeas corpus rights removal in Northern Ireland transpired in a legal system based on common law, and the subjects of that system (the IRA) were the focus of governmental discrimination. The defense of “national security” helped both actors (the United States and Northern Ireland) create a necessity for the removal of habeas corpus rights of insurgent individuals and guarantee their greater populations’ safety.

President Harry Truman took advantage of the state of national emergency and his predecessors’ augmentation of executive orders. Not only did he mobilize and pledge U.S. forces to the Korean War independent of Congressional consent, but he furthermore confiscated private factories contributing to the war effort to maintain combat operations.^{xxxiv} Truman’s EO 10340 ordered that the Secretary of Commerce capture steel mills to stymie steelworkers’ strikes, fearing a long strike could derail military operations in Korea.^{xxxv} Though his Solicitor General, Philip Perlman, contended Truman’s actions were protected by the aforementioned stipulations of Article II, Section 2 of the Constitution, the Supreme Court could not disagree more, finding seizure of private property the red line for executive overreach.

Despite the historical submissiveness of the Court and Congress to executive orders during an emergency in the state, *Youngstown Sheet & Tube Co. v. Sawyer* proved a shift in Court attitude towards executive interpretation of the Constitution. The Court’s nullification of the seizure’s rested in two particular Justice’s articulations: those of Justice Hugo Black and of Justice Robert Jackson. While the Truman administration defended a loose interpretation of the Commander in Chief Clause, the Court could not conceive seizure of private property as an act permissible when occurring independent of consent of Congress. Justice Black provided the nullifying majority opinion, arguing the President must realize his ability to preserve the laws of the land as distinct from legislating laws unilaterally.^{xxxvi} Justice Black maintained that executive orders “must stem either from an act of Congress or from the Constitution itself” and must be compatible “with the express or implied will of Congress.”^{xxxvii}

Black's definition adhered to a weak interpretation of executive powers, upholding that "the Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."^{xxxviii} While Justice Black wholly objected to unilateral executive legislation, Justice Jackson's concurrence exceeded the written majority opinion in influencing the American judiciary through his evaluation of presidential orders based on degrees of Congressional influence. He established a tripartite test of executive authority, vetting weak, strong, and neutral influence of Congress and the Constitution. Presidential authority is at its peak when moving "pursuant to [the] express or implied authorization of Congress."^{xxxix} When Congress neither denies nor authorizes presidential authority and the President acts unilaterally, there exists a "zone of twilight in which [the President] and Congress may have concurrent authority, or in which distribution is uncertain."^{xl}

In this second category of evaluation, analysis of presidential actions during Congressional inaction rests solely in the facts of the situation, analyzing costs and benefits had the President not acted.^{xli} Finally, presidential authority is least acceptable when he or she "takes measures incompatible with the express or implied will of Congress,"^{xlii} as the President in this instance disregards the constitutional powers of Congress while solely championing his or her own implied powers. Justice Jackson's framework upholds the Framers' fear of unlimited executive authority displayed by King George III, restoring an executive checked by legislation in times of emergency or evaluated by degrees of legislative consideration following that emergency.

Yet, Justice Jackson's middle ground of presidential powers exercised alongside a deferential Congress during perceived national emergencies leaves tremendous room for unilateral executive legislation; such opportunities are only heightened when solutions to those emergencies must operate confidentially. The history of the Central Intelligence Agency, since its formal inception by the Central Intelligence Act in 1949, and even prior to this act while still operating as the Central Intelligence Group in accordance with the National Security Act of 1947 (which centralized the clandestine services of World War II Office of Strategic Services), is comprised of hundreds, if not thousands, of Executive Orders and Presidential memoranda. Many of these contradict and revoke previous ones, and many are still considered classified. There prevails a long and controversial tradition of Presidents wanting to bend the agency to the limits of the law, and a history of required congressional oversight in order to be able to use it as an indispensable instrument and extension of their foreign policy.

Beginning with President Eisenhower who took plausible deniability to such an extent that formal notes were not even taken during his intelligence briefings, the CIA has always had clandestine services that comprised much more than just the gathering and analysis of intelligence, by any and all means, as directed by the Director of Central Intelligence Agency and the President of the United States.

JFK asked his Attorney General and brother, Robert Kennedy, to spend some time at the CIA and rein it in. Robert Kennedy after spending a considerable amount of time at the agency, was so impressed by the quality of the people and the work they did that he reported back to the President recommending the creation of a new National Security Council committee for overseeing Counterinsurgency operations by the CIA.^{xliii} During the Vietnam War years, before the massive mobilization and infusion of troops into South Vietnam and from Kennedy to Johnson to Nixon, CIA black operations agents were engaged in Laos and Cambodia. Later on through operations such as the Phoenix Program, the CIA created, directed, and engaged in a program "to identify and 'neutralize' the enemy via infiltration, capture, terrorism, torture, and assassination."^{xliv}

The overreach of CIA activities as directed by various Presidents during the Vietnam War became the subject of sensational Congressional hearings during the Ford Administration and many of its secret operations were revealed and many of its top operational directors were scape-goated. After the perceived failed presidency of Jimmy Carter, especially in the arena of national security and intelligence, where the CIA Director had to borrow a book about Khomeini's political writings from the Washington Post's Rosenfeld,^{xlv} President Reagan on December 4, 1981, issued Executive Order 12333, establishing United States intelligence guidelines overturning many of the restrictions instituted in the 1970s.

Under this Order, the CIA was permitted "to direct domestic counter intelligence, foreign intelligence, covert operations, and law enforcement activity against United States citizens" and thus by many accounts, ignoring the limits imposed by the National Security Act of 1947 and the Central Intelligence Act of 1949 which specifically prohibited the CIA from engaging in domestic espionage.^{xlvi}

No President has since revoked or challenged Executive Order 12333, save for President George W. Bush who in the aftermath of September 9/11 and the reorganization of the national intelligence apparatus amended it with EO 13355, on August 27, 2004, and later, on July 30, 2008, with EO 13470 to strengthen the role of the Director of National Intelligence.^{xlvii}

It is therefore quite apparent that Presidents and Congressional intelligence oversight bodies have from time to time responded in accordance with the political as well as the security interests of the times to rein in or unleash the CIA as the national or political interest and expediency dictated. With regards to the rendition policies and the enhanced interrogation techniques used by the CIA, the evidence is clear that all the Congressional oversight bodies were briefed and informed. Accordingly, no real objection, other than making sure that there is plausible deniability, was ever made; until the practices became, as in the aftermath of another unpopular war, the Vietnam War, politically untenable and an embarrassment.

White House counsel Greg Craig notes, "While President [Obama] has clearly put an end to cruel tactics, [he continued to be] somewhat sympathetic to the spies' argument that their mission and circumstances are different."^{xlviii} Former Obama Administration Defense Secretary and CIA Director Leon Panetta has in his memoirs tried to balance the two sides of the argument: "Harsh interrogation did cause some prisoners to yield to their captors and produced leads that helped our government understand Al Qaeda's organization, methods, and leadership.... What we can't know—what we'll never know—is whether those were the only ways to elicit that information."^{xlix} The former CIA director goes on to call José Rodríguez, CIA's former Director of Covert Operations and the man responsible for the ordering of the destruction of the videotaped sessions of the interrogations, "an admirable public servant, and he makes a good case."ⁱ Rodríguez defended his actions saying the pattern of presidential executive order issuance and revocation jeopardizes operatives' safety and protection of identities when Congressional or administration leaders informed of CIA techniques waver with the public in a river of plausible deniability.ⁱⁱ

On January 20, 2007, Bush issued EO 13440 which stated that any persons affiliated with terrorist organizations such as al-Qaeda and the Taliban "are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war."ⁱⁱⁱ

This order was just one of many newly devised legislative and executive tools in response to the terrorist attacks of September 11, 2001 and the laws of war those attacks revised.

The consequence of the treatment of the detainees at Guantanamo Bay, Cuba was a series of lawsuits contesting the constitutionality of the “indefinite detention and trial by military tribunal.”^{liii} *Rasul vs. Bush* impeded the administration’s efforts to prevent US courts from hearing the writ of habeas corpus brought by Guantanamo detainees.^{liv} In *Hamdi vs. Rumsfeld*, the government advocated a “broad construction of executive power, contending such detentions were authorized by the president’s war powers.”^{lv} The case created a fractured court, but ultimately ruled the process provided by military commission constitutionally inadequate.^{lvi} Justice O’Connor contended Hamdi should be given a prospect to invalidate the evidence sustaining his confinement.^{lvii} The ruling in 2004 nevertheless represented a victory for the executive power because “trial by military tribunal received the Court’s approval, even though some additional process would be required.”^{lviii}

Hamdi vs. Rumsfeld in 2006 handed the Bush administration a blow to their policy of trial by military commission.^{lix} Through Common Article 3 of the Geneva Convention, the court rejected the “executive creation of trial by military commission as contrary to the will of Congress”.^{lx} The administration’s response was the Military Commissions Act (MCA).^{lxi} Signed into law on October 17, 2006, the MCA codified the furthest limits of executive power regarding the War on Terror, authorizing “unlawful combatant status designation along with the depressed rights afforded to those who fell under it and expanded the designation’s applicability to include anyone engaged in hostile action against the United States or its allies.”^{lxii} *Boumedienne vs. Bush* was a final effort by the court to “save itself from being completely cut-off in the War on Terror”.^{lxiii} The court concluded that MCA did not amount to the suspension of habeas corpus rights.^{lxiv}

Before the attacks, American forces were trained to treat and detain enemy combatants within their custody under the provisions of the Army Regulation and Army Fields Manuals. International and domestic laws governing civil treatment and detention of prisoners of war and other detainees ruled these manuals, including protocol outlined by the Third Geneva Convention.^{lxv}

However, the Bush administration asserted that members of terrorist groups were not regular enemy combatants — they are non-state actors. The Honorable Frank Williams, former Rhode Island Supreme Court Chief Justice and appointee to President Bush's military commissions, reiterated the administration's sentiments: "In order for the Geneva Conventions to apply, the detainees must be members of an adversary state's armed forces or part of an identifiable militia group that abides by the laws of war. Al-Qaeda members do not wear identifying insignia, nor do they abide by the laws of war."^{lxvi}

Under this new interpretation and with the aid of an amenable Congress, the Bush administration barred unlawful enemy combatants from Prisoner of War status as prescribed by the Geneva Convention treaty obligations; and appointed military personnel to commissions that would evaluate both facts and the law concerning detainees' cases, and further authorized the use of confidential detention sites administered by the CIA.

President Obama sought to repeal Bush's EO 13440 with his own EO 13491 in order to "promote the safe, lawful, and humane treatment of individuals in United States custody and of United States personnel who are detained in armed conflicts, to ensure compliance with the treaty obligations of the United States."^{lxvii} Doubtless, the closure of CIA facilities interrupted the intelligence process, quality of products, and safety of agents, and moreover inflamed the historic theme of balancing the CIA between presidential administrations and executive orders. Just as the political or security interests of the nation dictated the restraint or release of the CIA between the Kennedy and Reagan administrations, Obama subjected the agency to his political agenda. Nonetheless, this political agenda was embedded in a moral framework that deemed the harsh detention and interrogation techniques of these unlawful combatants as no longer necessary.^{lxviii}

A Gallup poll in January 2009 showed 53 percent of Americans favoring the shutdown of Guantanamo Bay detention facility, which increased from 33 percent in 2007.^{lxix} Even so, public interest in closing Guantanamo Bay by June of 2009 abruptly dwindled to 32 percent, with 65 percent of Americans polled opposed to the shutdown.^{lxx}

Despite declining public support, Obama persisted with EO 13491, finding its revocations and issuances a necessary step in repairing the international opinion of the U.S. that declined under the Bush Administration in part due to the use of black sites, extraterritorial and extrajudicial detention at Guantanamo Bay, and torture.^{lxxi}

Former Dean of Naval War College Richard Suttie provides his personal opinion that “the specific use of enhanced interrogation conjures up three major issues: (1) the strategic cost and benefit; (2) moral challenges; (3) legal challenges.”^{lxxii} He explains that the United States was not prepared for the internal security threat al-Qaeda posed in 2001: the ability to use sleeper cells in the U.S. with a cultural patience to endure months or years of waiting combined with a sophisticated network with the means to communicate and fund itself, established a new type of threat.^{lxxiii}

Suttie concludes, however that “our intelligence systems have improved and the nature of the war has changed. We 'know' so much more. We have so much more information because we are better sensitized to networks and we are more collaborative in our collection efforts. I think we do not need as much intelligence from a single source as we did then.”^{lxxiv}

While criticisms concurrently surround the transparency of enhanced interrogation statistics, the Bush administration reported three detainees were water boarded at Guantanamo Bay.^{lxxv} Abu Zubaydah, a Bin-Laden lieutenant, was water boarded 83 times.^{lxxvi} Khalid Sheikh Mohammed, another highly valued detainee, was water boarded on 183 different occasions, and Abd al-Rahim al-Nashiri was water boarded an unknown amount of occasions.^{lxxvii} Executive Order 13491 completely and explicitly revoked Executive Order 13440.^{lxxviii} EO 13491 additionally expelled the use of CIA enhanced interrogation techniques such as water boarding while under administrative review, as well as terminated the use of CIA secret prisons, or “black sites.”^{lxxix} EO 13491 appointed a Special Interagency Task Force to review such enhanced interrogation tactics.^{lxxx} Nevertheless, there are facets that EO 13491 continued from EO 13440. EO 13491 utilized the exact same language for Common Article 3 of the Geneva Conventions as President Bush had in EO 13440, except for the limiting language used by Bush when construing Common Article 3.^{lxxxi} Furthermore, Obama defined torture citing the exact same Federal Statutes and International Conventions as cited by Bush in EO 13440.^{lxxxii}

The President continues to retain the capacity to authorize enhanced interrogation techniques. Despite recommendations by Senate Intelligence Committee Chairman Dianne Feinstein to ban future use of torture by the government,^{lxxxiii} notwithstanding Human Rights Watch appeals to the President,^{lxxxiv} Guantanamo Bay remains open, military commission suspensions are lifted, and torture remains possible. Perhaps Obama recognized the need to curb the policies of EO 13440 for a period of time, where political support and national interests summon such a move; but the nature of executive order issuance and revocation between and within administrations endures. The CIA once again takes the fall for now, only to be reinvested with new powers in the wake of another national security crisis.

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ⁱPeters and Woolley, 2015

ⁱⁱ O'Neil, 2011, p. 1425

ⁱⁱⁱU.S. Constitution, art. II., §§1-3

^{iv} O'Neil, 2011, p. 1425

^v Hamilton, 1787

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