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ARTICLE

REFLECTIONS OF A CHILD OF THE SIXTIES—I HAVE LIVED TO SEE THE POST-CONSTITUTIONAL ERA THROUGH GUANTÁNAMO BAY LITIGATION

Stewart “Buz” Eisenberg*

INTRODUCTION

Born in 1950, I spent my teenage years in the Sixties. Like all adolescents, I thought the world I saw was the world that had to be. I knew enough to understand that mores and culture were always going to change, but ever the Pollyanna,¹ it never entered my mind that change would come in any way other than linearly. Change would be cumulative, building on what came before. The brutish human would continue to evolve in an inevitably more civilized direction. I learned of the social contract—that while I had the right to swing my leg, that right ends where your shin begins. Society revered the compassionate and deplored the selfish, and all we had to do was learn where the lines fall. Humanism was not an aspiration in the wake of the atrocities of World War II, it was a compulsion.

The Atlanta of my adolescence was awash in *Brown v. Board of Education*,² our school corridors echoed the judicial fiat that separate was not to be mistaken for equal.³ I was a fourteen-year-old in Atlanta when the Civil Rights Act of 1964⁴ was passed. I was still a couple years away from eleventh grade when my high school

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1. *Pollyanna Principle*, WORLD PUBLIC LIBRARY, http://www.worldlibrary.org/articles/pollyanna_principle [<http://perma.cc/NKC6-2J74>] (referencing the Pollyanna principle which, “portrays the positive bias people have when thinking of the past”).

2. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

3. *Id.* at 495.

4. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in various sections of 42 U.S.C. § 2000).

was integrated by enrolling four African American students. I did not understand what I was hearing at the time, but I could not miss the shouts over voting rights,⁵ Jim Crow laws,⁶ and the elimination of the laws that criminalized interracial marriage.⁷ Growth spurts were everywhere—I was outgrowing shoes at the same time society was outgrowing its criminal justice regime. As my first driver's license ushered in a blessed freedom for me, hardly an evening passed without Walter Cronkite reporting another step towards freedom over the previously unquestioned power of state.

In short, the Warren Court⁸ shaped my worldview. By the time I attained adulthood, I thought incremental checks on the abuse of state power defined the march of history. Throughout my lifetime, the courts would craft ways to amplify the voice of the voiceless. And watching a powerful president being forced to resign for unlawful conduct did nothing to dampen that impression.⁹ That was what history was for me, an irrepressible march to distance us from the chaos of tyranny. Human history chronicles a succession of civilizations crawling their way towards justice and increasing egalitarian forms of governance. The framers' intent would be eventually realized, and we would be governed by the Rule of Law.¹⁰

But I now live in a different sixties—the term now refers to my age, not to a decade. The ensuing forty years have been a retrenchment, a time during which the powerful consolidated the power diffused in the Sixties, effectively limiting the advances in equality, in justice for all—and alas, in democracy. But nowhere has the damage to the Constitutional Rule of Law been more starkly apparent than in the dreadful theater of Guantánamo Bay.

5. Voting Rights Act of 1965, 52 U.S.C. § 10301 (2015).

6. *Freedom Riders, Jim Crow Laws*, PBS.ORG, <http://www.pbs.org/wgbh/americanexperience/freedomriders/issues/jim-crow-laws/> [http://perma.cc/UL9P-PBHP] (last visited Nov. 24, 2015).

7. *Loving v. Virginia*, 388 U.S. 1 (1967).

8. The Warren Court refers to the Supreme Court when Earl Warren served as Chief Justice from 1953 to 1969. James A. Thomson, *Capturing the Future: Earl Warren and Supreme Court History*, 32 TULSA L.J. 843, 849–50 (1997).

9. For many of us who lived through Watergate, it was not the traumatic or shocking event some may characterize it as. The fact that even a president could finally be held accountable portended a more ethical government in the future. “Watergate was potentially the best thing to have happened to the Presidency in a long time. If the trails were followed to their end, many, many years would pass before another White House staff would dare take the liberties with the Constitution and the laws the Nixon White House had taken.” ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 417–418 (First Mariner Books ed. 2004) (1973).

10. *Rule of Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

I. THE SUPREME COURT AND THE SIXTIES

A. *The Warren Court*

In *Katz v. United States*¹¹ the Supreme Court of the United States elevated a reasonable expectation of privacy over the government's unbridled ability to search us.¹² *Mapp v. Ohio*¹³ previously proved that evidence obtained in violation of privacy constraints would be inadmissible, excluding hard evidence the police had obtained despite those constraints.¹⁴ *Gideon v. Wainright*¹⁵ trumpeted the Sixth Amendment right to counsel and selectively incorporated it to the states, whether the accused could afford one or not.¹⁶ *Miranda v. Arizona*¹⁷ reshaped policing.

My body was still filling out as *Griswold v. Connecticut*¹⁸ gave us a right of privacy in our bedrooms, *Tinker v. Des Moines Independent Community School District*¹⁹ pushed First Amendment protections through the schoolhouse gates, and *Lemon v. Kurtzman*²⁰ allowed the Establishment Clause²¹ to flex its own burgeoning muscles. There was even a War on Poverty²² as I deposited my first paycheck. And I was celebrating attaining adulthood at the same time our culture celebrated the notion of reasonable regulation—not regulations aimed at increasing the grip of those in power—but regulations designed to give power to the powerless.

B. *A “New” Sixties: Age and a Decade Name Change*

I now live in a different sixties—the term now refers to my age, not to a decade. Now I have been forced to acquiesce to a painful truth—that the decade of the Sixties did not reflect the only judicial

11. *Katz v. United States*, 389 U.S. 347 (1967).

12. *Id.* at 358.

13. *Mapp v. Ohio*, 367 U.S. 643 (1961).

14. *Id.* at 655.

15. *Gideon v. Wainright*, 372 U.S. 335 (1963).

16. *Id.* at 342. See U.S. CONST. amend. VI.

17. *Miranda v. Arizona*, 384 U.S. 436 (1966).

18. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

19. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

20. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

21. U.S. CONST. amend. I.

22. THE COUNCIL OF ECONOMIC ADVISERS, THE WAR ON POVERTY 50 YEARS LATER: A PROGRESS REPORT 2 (Jan. 2014), https://www.whitehouse.gov/sites/default/files/docs/50th_anniversary_cea_report_-_final_post_embargo.pdf [<https://perma.cc/XF7G-ZTLD>].

trajectory possible as I had thought. Even the name of that decade has to change—instead, I am a child of the Halcyon Sixties.²³ Rather than heralding a modern Enlightenment, I have been forced to accept that the humanism of the Halcyon Sixties was an anomaly.

The Voting Rights Act²⁴—had little effect in the face of unabashed gerrymandering and *Citizens United v. Federal Election Commission*.²⁵ A woman's right to choose has been under incessant assault since *Roe v. Wade*,²⁶ from *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁷ through last year's rulings that protestors may legally impede a woman's path to a health care facility.²⁸ Even a corporate entity's religious rights trump a woman's need to access health care.²⁹ Countless examples could be listed, but that won't be necessary.

We know there has always been a tension in the balance between individual liberty and the public safety, and that reasonable minds may differ about where the balance falls. But the scales were already tipping inexorably towards public safety when the unthinkable occurred: September 11, 2001. Under a brilliant blue sky, the blackest of clouds swept lives away, destroyed precious property, and left a gaping hole in our sense of security. And by doing so, it engulfed our Constitutional framework in an assault that continues to this day.

C. *Post-September 11th Constitutional Framework*

The Warren Court cases discussed above³⁰ venerated the Bill of Rights and limited the power of government to invade the province of the individual without first demonstrating a compelling enough need. But in the post-September 11th era, the Constitutional architecture upheld by the Warren Court has been incessantly battered. The calamitous misadventures in Iraq and Afghanistan and the toll they have taken on those people and our troops, the erosion of the Fourth Amendment attending the

23. The term Halcyon is used to describe periods of time that are associated with happiness, calm, and an idyllic nature. This term is often used to describe both the sixties and the eighties.

24. See Civil Rights Act of 1964, *supra* note 4.

25. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

26. *Roe v. Wade*, 410 U.S. 113 (1973).

27. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

28. *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

29. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

30. See Thompson, *supra* note 8; see also *supra* Section I.A.

passage of the USA PATRIOT Act,³¹ the National Security Agency excesses disclosed by Edward Snowden,³² the descent into torture and the memos that sought to rationalize its use, the unfathomable extent to which militarization has shifted available resources from social uses to private contractors—these are just a few examples of the damage done by every one of the three branches, each shirking its Constitutional duty in a rush to appear tough on terror. That phenomenon is nothing new. Fear has always been freedom’s greatest enemy.

II. GUANTÁNAMO LITIGATIONS IN A POST-CONSTITUTIONAL JURISPRUDENCE

Eleven years and eight clients later, I have learned how far in the distance we have left the jurisprudence of the Halcyon Sixties during the post-September 11th era through my involvement with the Guantánamo Bay Detention Camp. The Halcyon Sixties forged the lens through which I saw the world when I began my involvement with the Guantánamo Bay Detention Camp in November of 2004. I thought my role would be to carry the Constitution to Guantánamo Bay, let its light illuminate the darkness, and the Article III courts would provide remedy and force reason through the razor wire. But in the Guantánamo litigations, individual rights are not even in the back seat—they are stored in the trunk. The car is operated by a frightening successor to separate but equal branches. The mission of the Guantánamo Bar has been far more ambitious than just pointing out injustice and unlawful detention. Our mission has been to revive that Constitution under which I was raised. Its parameters need to be resurveyed, its scope reasserted, and the very notion of a living Constitution resuscitated.

A. *Guantánamo Bay: Running From Remedy*

Chief Justice Marshall wrote, “[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”³³ Unlike the Warren Court of my youth, the Roberts

31. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

32. Editorial Board, *Edward Snowden, Whistle-Blower*, N.Y. TIMES (Jan. 1, 2014), Jan. 2, 2014, at A18, <http://www.nytimes.com/2014/01/02/opinion/edward-snowden-whistle-blower.html>.

33. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

Court³⁴ and the DC Circuit have locked judicial review in the trunk, letting it out only to foster suppression of individual liberty, rather than to promote it. Nowhere is that pattern more apparent than in the Guantánamo litigations.

There is an abundance of examples of an Article III court finding the actions of one or the other branches unlawful. I will touch on but a few. In *Kiyemba v. Obama*³⁵ (hereinafter *Kiyemba II*), US District Judge Ricardo Urbina found in *habeas* that nine Uighurs were innocent, because they were. They had not committed any hostile acts against the US or their allies. When taken into custody they had merely been fleeing a brutal repression by China. Judge Urbina therefore found they had been unlawfully detained in Guantánamo Bay and ordered the government to bring them to DC and release them into the US by the end of that week.³⁶ The government requested a stay and appealed to the DC Circuit.³⁷ Dodging the question of innocence, the Circuit ruled that a district court could not order release because it lacks the power to order another sovereign to take the prisoners.³⁸ I remember to this moment reading *Kiyemba II* and trying to reconcile the ruling with the sense of “justice” that had been shaped for me. This was so difficult for me because the ruling is unfathomable—a federal court ruling ordering innocent men to remain imprisoned because there is no “power” to order their release.³⁹ *Marbury* held a hallowed place in the first year of my law school curriculum and there was something profoundly comforting in Justice Marshall’s warning that the Rule of Law will “certainly cease . . . if the laws furnish no remedy for the violation of a vested legal right.”⁴⁰

In 2014 the European Court of Human Rights ordered Poland to pay over 100,000 euros in damages to two Guantánamo detainees in a case brought by colleague Joe Margulies.⁴¹ Margulies explained how like many others, those two men had been secretly imprisoned and tortured by the Central Intelligence

34. *The Roberts Court Defines Itself*, N.Y. TIMES (March 31, 2012), at SR12, http://www.nytimes.com/2012/04/01/opinion/sunday/the-roberts-court-defines-itself.html?_r=0.

35. *Kiyemba v. Obama*, 561 F. 3d 509 (D.C. Cir. 2009).

36. *See id.* at 510.

37. *Id.* at 511.

38. *Id.* at 515–16.

39. *Id.* at 516.

40. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

41. *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13 Eur. Ct. H.R. § X.A(d) (567) (2014).

Agency in a “black site” in Poland from December 2002 to September 2003.⁴² Though the United States no longer thinks Abu Zubaydah was a member of Al Qaeda⁴³ he has been held without charges at the US prison in Guantánamo Bay, Cuba, since 2006.⁴⁴

A total of 779 men have been detained at Guantánamo.⁴⁵ As of this writing, 112 remain caged there, fifty-two of whom have been cleared for transfer.⁴⁶ Seven of the men, for whom I have filed an appearance, have been transferred from Guantánamo, the last being Palestinian Mohammed Abdullah Taha Mattan who, along with five others, was resettled in Uruguay in December 7, 2014.⁴⁷

Mattan had been held without charge in that dreadful prison since March of 2002, over twelve and a half years.⁴⁸ He spent much of that time in isolation, trapped in a world I prefer not to imagine.⁴⁹ He had been cleared for transfer three times, the first in

42. Joseph Margulies, *‘Black sites’ Ruling Rebuke to Poland, the CIA and Torture*, L.A. TIMES (July 26, 2014, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-margulies-poland-black-site-rendition-ruling-20140727-story.html>.

43. *Id.*

44. *Id.*

45. GUANTÁNAMO REVIEW TASK FORCE, FINAL REPORT 3 (2010).

46. Charlie Savage, *Saudi Held at Guantánamo Is Repatriated, Reducing Number of Detainees to 114*, N.Y. TIMES (Sept. 22, 2015), http://www.nytimes.com/2015/09/23/us/politics/us-repatriates-a-saudi-detainee-from-guantanamo.html?_r=0.

47. Mohammed Abdullah Taha Mattan, et al., v. Obama, et al., 618 F. Supp. 2d 246 (D.C. May 21, 2009); Leonardo Haberkorn & Ben Fox, *U.S. Sends 6 Prisoners from Guantánamotomto Uruguay*, ASSOCIATED PRESS (Dec. 7, 2014, 1:35 PM), <http://www.militarytimes.com/story/military/2014/12/07/us-sends-6-prisoners-from-guantanamo-to-uruguay/20048621/> [<http://perma.cc/B79R-PCTC>].

48. Memorandum from Mark H. Buzby, Rear Admiral, U.S. Navy Commanding to Commander, U.S. Southern Command, 3511 NW 91st Avenue, Miami, FL 33172 (Apr. 16, 2008), <http://projects.nytimes.com/guantanamo/detainees/684-mohammed-abdullah-tahamuttan>.

49. The release of any and all communications between a Guantánamo detainee and his National Security Cleared attorney is governed by a protective order that has been amended from time-to-time. That protective order deems the content of all such communications “Classified” and “Sealed,” and therefore disclosure is prohibited unless and until it has been deemed “Unclassified” after review by the Privilege Team of the Litigation Security Office. Those restrictions have continued through various amendments of the original Protective Order of November 8, 2004. Unlike much of the information passed between habeas counsel and our client Taha Mattan, by a review of our notes, our client’s reports to us that had long been held in isolation were finally deemed “Unclassified” in 2012. See *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004), *supplemented by judicial order*, Order Addressing Designation Procedures for “Protected Information,” *In re Guantanamo Detainee Cases*, 04–CV–01166 (RJL) (D.D.C. Nov. 10, 2004); *and* Order Supplementing and Amending Filing Procedures Contained in the November 8, 2004, Amended Protective Order, Order Supplementing and Amending Filing Procedures Contained, 04–CV–01166 (RJL)

January of 2007 under the Bush administration.⁵⁰ Mattan is one of the Guest House 23.⁵¹ The offense he and the other twenty-two men committed was sleeping in the same guesthouse (motel) that a bad guy had stayed in three weeks before.⁵² A US District Judge had heard all the evidence about the guesthouse back in 2008 and ruled that there was no legal basis to hold the men.⁵³

After trial with my co-counsel Jerry Cohen of Burns & Levinson, DC, District Judge Gladys Kessler granted the writ of habeas corpus to our client, primarily finding the torture-procured evidence to be unreliable.⁵⁴ The torture involved in this case was unthinkable (e.g., razor slashing of the chest and penis), and she spent about half of her eighty-two-page memorandum opinion condemning the evidence collection practices and explaining why, as a result, the government failed to meet its burden.⁵⁵ Her order reads in relevant part: “Order[ed] the Government to take all necessary and appropriate diplomatic steps to facilitate Petitioner’s release forthwith. . . . and to report back to the Court no later than December 17, 2009, as to the status of that release and what steps have been taken to secure that release.”⁵⁶

The Suspension Clause of the US Constitution reaffirms the eight hundred year prohibition at the core of the *Magna Carta*; the right of a prisoner to challenge the lawfulness of his detention before an independent court.⁵⁷ If a prison inmate is successfully granted the writ of habeas corpus in, for example, the US District Court of Massachusetts, the court orders the jailer to facilitate the inmate’s release forthwith, and the individual walks out of jail and looks at the sky. But notwithstanding Judge Kessler’s order granting the writ, Farhi Saeed bin Mohammed was never

(D.D.C. Dec. 13, 2004).

50. Andy Worthington, *Who Are the 55 Cleared Guantánamo Prisoners on the List Released by the Obama Administration?*, CLOSE GUANTÁNAMO (Mar. 14, 2014), <http://www.closeguantanamo.org/Articles/69-Who-Are-the-55-Cleared-Guantanamo-Prisoners-on-the-List-Released-by-the-Obama-Administration> [<http://perma.cc/XX87-HXSM>].

51. Lauren Carasik, *The Tragic Tale of Guantánamo Detainee #684*, ALJAZEERA (June 19, 2013), <http://www.aljazeera.com/indepth/opinion/2013/06/20136187241638856.html> [<http://perma.cc/EW83-3Q3V>].

52. *Id.*

53. Mohammed Abdullah Taha Mattan, et al., v. Obama, et al., 618 F. Supp. 2d. 246 (D.C. May 21, 2009).

54. Mohammed v. Obama, 704 F. Supp. 2d 1, 28 (D.D.C. 2009).

55. *Id.* at 26.

56. *Id.* at 32.

57. U.S. CONST. art. I, § 9, cl. 2.

released.⁵⁸ In fact, when Farhi was finally transferred it was to the custody of Algeria, where no charges were pending against him.⁵⁹ And although her order was for the government to release forthwith, Farhi didn't board the plane out of Guantánamo until January of 2011.⁶⁰ Thru all of this, the courts sat on their hands as the *Great Writ*, age 800, was thusly abused. Why?

B. *The National Defense Authorization Act*

In 2009, the 111th Congress passed the National Defense Authorization Act for Fiscal Year 2010 (hereinafter the "NDAA of 2010").⁶¹ The NDAA of 2010 prohibited any Guantánamo detainee from entering the United States, even to be tried.⁶² The NDAA of 2010 was a direct challenge to President Obama who stated his intention to close Guantánamo during his first presidential campaign in 2007.⁶³ Just inaugurated, the President's second Executive Order on January 22, 2009, began the process of effectuating that closure, creating the Interagency Review Team from nine of the fifteen departments in his Cabinet.⁶⁴ The President ordered the Interagency Review Team to scrutinize every page of every file of every detainee and identify those whose transfer from Guantánamo was in the national security interest of the United States.⁶⁵

Congress effectively thwarted his plan by attaching the McCain Amendment to the NDAA of 2010, all but barring the President from spending even one dollar of the Defense Budget on the release or transfer from Guantánamo of any of the men held

58. Andy Worthington, *How Binyam Mohamed's Torture was Revealed in a US Court*, ANDY WORTHINGTON (Apr. 5, 2010), <http://www.andyworthington.co.uk/2010/05/04/how-binyam-mohameds-torture-was-revealed-in-a-us-court/> [<http://perma.cc/HWL7-T8N5>].

59. *Man Repatriated from Guantánamo to Algeria Against His Will*, CENTER FOR CONSTITUTIONAL RIGHTS (Jan. 6, 2011), <https://ccrjustice.org/home/press-center/press-releases/man-repatriated-guant-namo-algeria-against-his-will> [<https://perma.cc/ZKU8-KJDE>].

60. *Id.*

61. H.R. 2647, 111th Cong. § 1023 (1st Sess. 2009), <http://www.gpo.gov/fdsys/pkg/BILLS-111hr2647eh/pdf/BILLS-111hr2647eh.pdf> [<http://perma.cc/5ZJU-3R2X>] [hereinafter H.R. 2647].

62. H.R. 2647, *supra* note 61, § 1023.

63. Elizabeth White, *Obama Says Gitmo Facility Should Close*, WASHINGTON POST (June 24, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/24/AR2007062401046.html> [<http://perma.cc/ZAX7-M77X>].

64. Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

65. *Id.*

there.⁶⁶ There is an out—a process that empowers the Secretary of Defense to authorize a transfer, but only after certifying that the transferee *will not* engage in hostilities against the US or its allies post-transfer. Of course, in reality there is only one way to assure that—to ensure the detainee will remain locked up by the receiving country.

Every year since, Congress has included the same or similar restrictions in its annual bill funding the military, and it has presented an even more draconian version for 2016.⁶⁷ Despite a Presidential Veto on October 22, 2015,⁶⁸ the National Defense Authorization Act for Fiscal Year 2016 (hereinafter the “NDAA of 2016”) became law on November 25, 2015, authorizing appropriations to fund virtually all military activities of the Department of Defense for fiscal year 2016.⁶⁹

Not only were the NDAA of 2010 and its progeny a challenge to the President’s authority and agenda, but they were also a direct challenge to the authority of the Article III courts and the very concept of habeas. Despite the grant of the writ of habeas corpus by an Article III court or having been cleared for transfer by the Guantanamo Bay Task Force of the Interagency Review Team or by the military’s Periodic Review Board, the NDAA of 2016 effectively says that even if it has been determined that the transfer of such men is in the national security interest of the United States, or that they have been deemed unlawfully detained, Congress is going to do everything it can to bar their release, and make their transfer as unlikely as possible.⁷⁰ So the courts again sit on their hands.

The provisions of the NDAA of 2016 impose a staggering array of conditions on the President, requiring compliance if the President wishes to fund the Department of Defense. Section 1032

66. *Compare* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2454–55 (2009), <https://www.congress.gov/bill/111th-congress/house-bill/2647/text> (replacing section 1023 of H.R. 2647 with section 1041 with the addition of subsection (b) which freezes the use of funds to transfer detainees from October 1, 2009 to December 31, 2010) [hereinafter NDAA 2010], *with* H.R. 2647, 111th Cong. § 1023 (1st Sess. 2009).

67. National Defense Authorization Act for Fiscal Year 2016, H.R. 1735, 114th Cong. (1st Sess. 2015) (pending action since October 22, 2015 when the bill was vetoed by the president) [hereinafter NDAA 2016].

68. Mackenzie Eaglen, *President Obama Vetoed the Defense Policy Bill. Now What?*, AEIDEAS (Oct. 22, 2015, 4:06 PM), <https://www.aei.org/publication/president-obama-veto-defense-policy-bill/> [https://perma.cc/SMF8-AAXX].

69. NDAA 2016, *supra* note 67.

70. NDAA 2016, *supra* note 67.

reiterates that no detainee may be transferred to the United States, even if cleared for transfer, and even if he prevailed at habeas.⁷¹ Section 1031 prohibits constructing or modifying any prison to hold detainees in the United States.⁷² Section 1033 forbids ever transferring men to Libya, Somalia, Yemen, and Syria.⁷³ Section 1034 imposes the certification regime, requiring the Secretary of Defense to guarantee that any detainee transferred anywhere will never engage in hostilities.⁷⁴ These provisions essentially dare the President to do anything other than to ensure the detainees are held in perpetuity. Even if not detained in Guantánamo, then these provisions ensure their indefinite captivity wherever it is they are transferred.

Section 1035 demands a report on “detention strategy” for current *and future* detainees under the September 18, 2001 Authorization for Use of Military Force.⁷⁵ Section 1036 says the president can’t close Guantánamo or give it back to Cuba.⁷⁶ The ensuing sections require show-and-tell reports about Guantánamo, high value detainees, former detainees and bad acts, recidivism, diplomatic notes, use of Guantánamo as a propaganda tool, reward programs, and, astonishingly, the funds expenditure for combating terrorism program.⁷⁷

The President’s veto indicated a willingness to fight Sections 1031, 1033, and 1034.⁷⁸ But by eventually signing the NDAA of 2016 and choosing not to fight, he has all but guaranteed that despite his objections, Guantánamo will remain open when he leaves office on January 20, 2017. The Executive Branch has once again failed to respect the constitutional notion of due process that defines a democracy, and its reverence for freedom.

One should take some solace in the separation of powers in our system, insofar as we do have a third branch—an independent judiciary—that may provide remedy to a constitutional insult such as that delivered by the two political branches. As to the Article III courts, Judicial Review provides available remedies. One such remedy was sought and its appropriateness clearly demonstrated in

71. NDAA 2016, *supra* note 67, § 1032; see NDAA 2010, *supra* note 66, § 1041.

72. *Id.* § 1031.

73. *Id.* § 1033.

74. *Id.* § 1034.

75. *Id.* § 1035.

76. *Id.* § 1036.

77. *Id.* §§ 1037–44.

78. Eaglen, *supra* note 68.

Paracha v. Obama.⁷⁹ *Paracha* pointed to the constitutional ban on Bills of Attainder contained in Article I, Section 9, Clause 3 which states, “No Bill of Attainder or ex post facto Law shall be passed.”⁸⁰ The DC Circuit definitively ruled that an Act of Congress that targets a specific person or group and imposes punishment is in fact a constitutionally prohibited Bill of Attainder.⁸¹ “[T]he principal touchstone of a bill of attainder is punishment.”⁸² The courts have a long and proud history of remedying affronts such as that represented by the NDAA of 2016. “A bill of attainder is a legislative act which inflicts punishment without a judicial trial.”⁸³ But there is no reason to suspect they will do anything other than what they have done in the past with respect to the over-due process involving Guantanamo detainees—sit on their hands.

CONCLUSION

In those Halcyon Sixties, specifically in April of 1963, Martin Luther King Jr. wrote his remarkable *Letter from Birmingham Jail*.⁸⁴ In it he explained to his fellow clergy—critical of his sit-ins, marches, and direct action—why he felt non-violent activism was necessary.⁸⁵ He wrote from his cell that he had “almost reached the regrettable conclusion that the Negro’s great stumbling block in his stride towards freedom is not . . . the Ku Klux Klanner, but the white moderate, who is more devoted to ‘order’ than to justice.”⁸⁶ He acknowledged that while his fellow clergy truly do agree with the goals he seeks, they choose to avoid the tension of activism.⁸⁷ After the long day at the office or chauffeuring the kids around, we need to relax in front of the TV or open a good book. It is one thing to implore those of privilege who understand wrong when they see it to become active, but should we have to motivate the federal bench to remedy recognized wrongful behavior by the government? What else are they there for?

79. *Paracha v. Obama*, No. 02–2022(PLF) (D.D.C.) (omitting direct references to the documents filed, as these documents have not been released to the public).

80. U.S. CONST. art. I, § 9, cl. 3.

81. *Foretich v. U.S.*, 351 F.3d 1198 (D.C. Cir. 2003).

82. *Id.* at 1218. See also Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203, 208 n.18 (1996).

83. *Cummings v. Missouri*, 71 U.S. 277 (1866).

84. MARTIN LUTHER KING JR. WHY WE CAN’T WAIT 77–100 (1963) (publishing the notorious *Letter from the Birmingham Jail*).

85. *Id.* at 78.

86. *Id.* at 84.

87. See *id.* at 84–87.

The Constitution is comprised of a series of aspirations. Our rulers may themselves be ruled by the law, and we may impose restrictions on even their conduct. It is an admittedly fragile construct. But it is holding on by its fingernails, and they are losing their purchase. The Talmud says that “[o]ne whose deeds exceed his wisdom, his wisdom endures. But one whose wisdom exceeds his deeds, his wisdom does not endure.”⁸⁸

There are many wise among us, many reading this article. But admit it, we must lack in our conviction. We will only regain our purchase when the wise decide that mere wisdom is not enough—that our wisdom will be measured only by our deeds. Our courts only function when they provide remedy. We will resume our march toward liberty only when we decide to take ownership of our Constitution, and consider it as among our dearest possessions—one that we must bequeath in our wills to our loved ones.

To regain our grip, Article III courts must fix what they find to be broken. If our courts do not provide remedy when justice is affronted by the other two branches who will? Like King, we must realize that the stakes are already way too high. Our branch is the caretaker of a delicate constitutional democracy, a democracy specifically designed to require its protection. Without its vigilance, in that delicate balance between individual liberty and national security, the individual will always buckle under the power of the state. It is up to us to restore our Constitution and the principles it embodies to the promise of those Halcyon Sixties. The frightening truth is that our failures to act may not be at our expense. It is our children’s liberty we are gambling with.

88. BABYLONIAN TALMUD, ETHICS OF OUR FATHERS ch.3, p.10.