

NYSBA

**REPORT ON
EXECUTIVE DETENTION,
HABEAS CORPUS AND
THE MILITARY
COMMISSIONS ACT OF 2006**

**NEW YORK STATE BAR ASSOCIATION'S
COMMITTEE ON CIVIL RIGHTS**

MAY 2008

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INTRODUCTION AND SUMMARY

The freedom from indefinite and unlawful imprisonment lies at the heart of our Anglo-American judicial system, and the “Great Writ” of Habeas Corpus has long been recognized as the vehicle vindicating that right.¹ In sharp contrast to that tradition, Section 7 of the Military Commissions Act of 2006 (“MCA”) bars non-citizens classified as “enemy combatants” from filing petitions of habeas corpus in federal courts challenging the lawfulness of their detention by the Executive.² This bar perpetuates the indefinite – and in potentially many cases unlawful – detention without trial of hundreds of individuals held as enemy combatants since January 2002 at the Guantanamo Naval Base at Guantanamo Bay, Cuba (“Guantanamo”). Absent the writ of habeas corpus to challenge the legality of their detention, these individuals have been held without charge and many face no prospect of trial or release in the foreseeable future.

This Report provides an informational resource on the fundamentals of English and American law of habeas corpus and habeas’ traditional role as a bulwark against arbitrary and unlawful detention, the current tension between those basic tenets and the MCA’s suspension of habeas corpus, and the current legal battle before the United States Supreme Court that may resolve this apparent conflict.³ As detailed below, it is the position of the Committee on Civil Rights that the habeas corpus stripping provisions of Section 7 of the Military Commissions Act are unconstitutional. Notwithstanding the Supreme Court’s forthcoming decision in *Boumediene*, the Committee recommends that the New York State Bar Association (“Association”) adopt a resolution urging Congress to restore the power of the federal courts to hear petitions for writs of habeas corpus filed by “enemy combatants,” including those held at

¹ Hamdi v. Rumsfeld, 542 U.S. 507, 554 -55 (2004) (Scalia, J., dissenting).

² Military Commissions Act (MCA) of 2006 § 7, Pub. L. No. 109-366, 120 Stat. 2600, 2636 (2006).

³ Boumediene v. Bush, 127 S. Ct. 3078 (2007).

Guantanamo. Moreover, given that the current system for detaining and trying those enemy combatants does not exhibit even the most basic hallmarks of due process, we recommend that the Association urge Congress to revisit the current system and craft a new regime that adheres to certain bedrock principles of our judicial system, such as the right to counsel and the reasonable opportunity to present evidence challenging the legality of detention.⁴ Finally, we recommend the Association adopt a resolution urging Congress to hold hearings concerning individuals held as enemy combatants in extra-territorial military detention centers under the control of the United States, in addition to Guantanamo, and examine appropriate avenues for such detainees to challenge their detention.

A. The Guantanamo Detainees

In response to the September 11th attacks, the United States invaded Afghanistan in retaliation for the Taliban's harboring of the al-Qaeda terrorist organization, which had directed and implemented the September 11th atrocities.⁵ In the aftermath of the Afghanistan invasion, the U.S. captured and detained hundreds of individuals beginning in January 2002 at Guantanamo.⁶ The Executive imprisoned these individuals at Guantanamo on the basis that they were "enemy combatants" in the war against international terrorism and – at least initially –

⁴ We understand that the Association has recently agreed to join the New York City Bar Association in calling upon Congress to conduct hearings regarding the fairness and independence of the current military commissions system designed to try enemy combatants. We applaud the Association for joining that resolution, but recommend that the resolution expand to request hearings concerning all aspects of detention at Guantanamo, including the initial enemy combatant classification pending trial by military commission.

⁵ One week after the September 11th attacks, Congress passed the Authorization for Use of Military Force ("AUMF") granting the President authority to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of intentional terrorism against the United States by such nations, organizations, or persons. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224. The President ordered the invasion of Afghanistan shortly after passage of the AUMF.

⁶ Human Rights Watch, United States: Guantanamo Two Years On, Jan. 9, 2004, <http://www.hrw.org/english/docs/2004/01/09/usdom6917.htm>.

asserted that these individuals were outside the purview of the U.S. judicial system.⁷ In response to several Supreme Court decisions beginning in 2004 concerning the detention of enemy combatants, the Administration and Congress created a new system wherein those held at Guantanamo were determined to be enemy combatants by a Combatant Status Review Tribunal (“CSRT”) and detained until the United States determined they should be released.⁸ In the interim, the CSRT decision was subject to limited review by the D.C. Circuit Court of Appeals pursuant to the Detainee Treatment Act of 2005 (“DTA”).⁹

Six years later not a single Guantanamo detainee has faced trial.¹⁰ In fact, of the 775 detainees held at Guantanamo Bay over the last six years,¹¹ only 15 detainees have been formally charged; one has pled and the rest face upcoming trials, although it is unclear when those trials will begin.¹² Approximately 130 detainees remain detained indefinitely without charge and without any realistic trial date in the foreseeable future.¹³

⁷ See Military Order of November 13, 2001 §7(b)(2), 66 FED. REG. 57,831 (Nov 16, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>. The definition of the term “enemy combatant” has changed over time. The current governmental definition is “an individual who was part of or supporting the Taliban or al-Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” Dep’t of Defense, Guantanamo Detainee Processes, <http://www.defenselink.mil/news/Sep2005/d20050908process.pdf>.

⁸ See Part III, *infra*, for a detailed discussion of the current system under the CSRT, DTA and MCA.

⁹ Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

¹⁰ See U.S. Dep’t of Defense, Military Commissions, <http://www.defenselink.mil/news/commissions.html> (listing the status of cases which have been or are in the process of being referred to trial by commission).

¹¹ Mark Tran, *FBI Files Detail Guantánamo Torture Tactics*, GUARDIAN, Jan. 3, 2007, available at <http://www.guardian.co.uk/world/2007/jan/03/guantanamo.usa>. Guantanamo held approximately 220 detainees shortly after it opened in January 2002. CNN, *New Group of Detainees Arrives at Guantanamo* (Feb 10, 2002), <http://archives.cnn.com/2002/WORLD/americas/02/10/ret.guantanamo.detainees/index.html>.

At its high point, Guantanamo held approximately 680 detainees. Jeffrey Toobin, *Camp Justice*, NEW YORKER, Apr. 14, 2008, at 32, 32. As of May 2, 2008 Guantanamo held approximately 270 detainees. News Release, U.S. Dep’t of Defense, *Detainee Transfer Announced (May 2, 2008)*, available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=11893>. Over the last few years, hundreds of prisoners have been released to their home countries or other nations that would accept them if they promised to not affiliate with al-Qaeda or the Taliban. See Toobin, *supra*, at 36.

¹² In one rare case, the Australian detainee David Hicks accepted a plea and was released to his native country. Josh White, *Australian’s Guilty Plea Is First at Guantanamo*, WASH. POST, Mar 27, 2007, at A2. The only trial currently scheduled is the case of Salim Ahmed Hamdan. Final Trial Schedule, *United States v. Hamdan* (military commission), available at <http://www.defenselink.mil/news/Dec2007/Hamdan%20MCTJ%20Trial%20>

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But the glacial pace of the administration of justice at Guantanamo is only one of many problems with the current system. First, there is mounting evidence that detainees were likely subject to some form of torture.¹⁴ Human rights groups have made allegations of torture at Guantanamo since shortly after it opened. For instance, reports based on government records or on-site inspection indicate that many detainees were likely tortured, abused, and humiliated at Guantanamo.¹⁵ Various news reports state that U.S. government officials have employed interrogation tactics tantamount to torture such as physical beatings, sleep deprivation, withholding medical care, and sexual abuse.¹⁶

Second, recent allegations by former Army officials indicate that the system designed to detain and subsequently try the detainees at Guantanamo “appeared to be rigged” to ensure detention and then conviction.¹⁷ To make matters worse, even though the Administration

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Schedule%2012%2020%202007.pdf. However, given that pre-trial motions are still being heard, it is unclear whether the trial will start on May 28, 2008 as scheduled. See Michael Melia, *Ex-Gitmo Prosecutor Alleges Politics*, WASH. POST, Apr. 28, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/28/AR2008042801401.html>. Notably, of the fourteen detainees currently slated for trial, the government is seeking the death penalty for six. William Glaberson, *U.S. Seeking Execution for 6 in Sept. 11 Case*, N.Y. TIMES, Feb. 11, 2008, available at <http://www.nytimes.com/2008/02/11/us/11gitmo.html>.

¹³ See Toobin, *supra* note 11, at 36. Of the approximately 270 detainees left at Guantanamo, approximately 60 have been approved for transfer to other countries. *Id.* The government estimates that of the remaining detainees it has sufficient evidence to try about 60 to 80 detainees, which leaves approximately 130 detainees for which the government has no intention to try or transfer. *See id.*

¹⁴ BBC News, *ICRC Raises Guantanamo Conditions* (Feb. 15, 2005), <http://news.bbc.co.uk/2/hi/americas/4267297.stm> (quoting leaked ICRC memo stating that Guantanamo interrogation procedures are “tantamount to torture”).

¹⁵ See, e.g., Center for Constitutional Rights, *FAQs: Does the U.S. Torture People?*, <http://ccrjustice.org/learn-more/faqs/faqs%3A-does-u.s.-torture-people%3F> (listing forms of torture found by the United Nations Special Rapporteurs on Guantanamo Bay, the International Committee of the Red Cross, and U.S. military investigators); Survey, Federal Bureau of Investigation, *GTMO Counterterrorism Division Inspection Special Inquiry* (Sept. 2, 2004), available at <http://foia.fbi.gov/guantanamo/detainees.pdf> (summarizing responses of FBI personnel at Guantanamo concerning possible mistreatment of detainees at the hands of law enforcement or military personnel).

¹⁶ Tran, *supra* note 11.

¹⁷ See Testimony of Lt. Cmdr. Charles Swift before the Committee on the Judiciary, United States Senate (Jul. 11, 2006) (quoting an e-mail from Capt. Jon Carr, military prosecutor, to Col. Fred Borch); William Glaberson, *Ex-Prosecutor Tells of Push by Pentagon on Detainees*, N.Y. TIMES, Apr. 29, 2008, available at <http://www.nytimes.com/2008/04/29/washington/29gitmo.html> (former military commissions chief prosecutor testifying as defense witness at hearing on motion to dismiss alleging unlawful influence of overseeing military officer and stating that he was politically pressured and told there could be no acquittals).

consistently characterized these detainees as the “worst of the worst,”¹⁸ it now appears that the majority of Guantanamo detainees may in fact be innocent.¹⁹ A report by Seton Hall Law School, based on the Government’s own records, found that less than half of the Guantanamo detainees (45%) had committed a hostile act against the United States or its allies.²⁰ This should come as no surprise since the same report concludes that an estimated 86% of the Guantanamo detainees were in fact not captured by U.S. forces;²¹ rather, like in the case of Mr. Murat Kurnaz described below, they were handed over to the U.S. in exchange for handsome ransoms.²²

Kurnaz’s experience illustrates the failings of Guantanamo. Three weeks after September 11th, Kurnaz, a 19-year old Muslim from Bremen, Germany, traveled to Pakistan to deepen his knowledge of Islam.²³ Three weeks later, the Pakistani police arrested an unarmed Kurnaz in a routine check of a passenger bus near the city of Peshawar, about 25 miles from the Afghani border and far from any live conflict.²⁴ Shortly thereafter, the Pakistani police transferred Kurnaz to American military officials in Pakistan for a bounty of approximately three thousand dollars.²⁵ Accused of being a member or ally of al-Qaeda, Kurnaz was detained as an enemy

¹⁸ Dan Darling, *The Worst of the Worst?* (Mar. 7, 2006), <http://www.weeklystandard.com/Content/Public/Articles/000/000/011/936fhnpp.asp>.

¹⁹ See Toobin, *supra* note 11, at 34 (citing findings of Benjamin Wittes, a fellow at the Brookings Institute, that based on CSRT proceeding records only a third of the detainees held in 2006 could be reasonably classified as terrorists or enemy combatants); Nicholas D. Kristof, *A Prison of Shame, and It’s Ours*, N.Y. TIMES, May 4, 2008, available at <http://www.nytimes.com/2008/05/04/opinion/04kristof.html> (summarizing stories of several allegedly innocent detainees and arguing that “most of the inmates were probably innocent all along, but Pakistanis or Afghans turned them over to America in exchange for large cash rewards”).

²⁰ See MARK DENBEAUX, ET AL., REPORT ON GUANTANAMO DETAINEES, available at <http://law.shu.edu/aaafinal.pdf>.

²¹ See *id.*

²² Mark Landler & Souad Mekhennet, *Freed German Detainee Questions His Country’s Role*, N.Y. TIMES, Nov. 11, 2006, at A8.

²³ Richard Bernstein, *One Muslim’s Odyssey to Guantanamo*, N.Y. TIMES, Jun. 5, 2005, available at www.nytimes.com/2005/06/05/international/europe/05prisoner.html.

²⁴ *Id.*

²⁵ Landler & Mekhennet, *supra* note 22.

combatant, moved to a facility in Kandahar, Afghanistan and then to Guantanamo around February 2002.²⁶

Kurnaz claims that while detained at Guantanamo he was routinely beaten, locked in solitary confinement for months, dunked in water, sexually humiliated and hung from the ceiling in chains, all of which the Pentagon denies.²⁷ In September 2004 – over two years after arriving at Guantanamo – a CSRT classified Kurnaz as an enemy combatant, underlying the basis for his detention at Guantanamo.²⁸ Three months later, U.S. District Court Judge Joyce H. Green reviewed Kurnaz’s challenge to the legality of the CSRT process and his detention.²⁹ In denying the Government’s motion to dismiss, Judge Green highlighted the fact that the gravamen of the evidence forming the basis of the CSRT’s decision was classified evidence that Kurnaz was prohibited from seeing.³⁰ The Government’s reliance on secret evidence to detain Kurnaz and the prohibition against assistance by counsel “jointly deprive[d] [Kurnaz] of sufficient notice of the factual bases for [his] detention and den[ied] [him] a fair opportunity to challenge [his] incarceration.”³¹

But Judge Green’s decision had little impact on Kurnaz’s detention. Kurnaz remained at Guantanamo until, after substantial public pressure and press, Germany negotiated his release in

²⁶ *Id.* Kurnaz cannot be sure about the date he was transferred to Guantanamo, because detainees were not allowed access to clocks or calendars. *Id.* Kurnaz has recently released a book about his experiences. MURAT KURNAZ, FIVE YEARS OF MY LIFE: AN INNOCENT MAN IN GUANTANAMO (2008).

²⁷ *Id.* Kurnaz’s allegations, however, are consistent with reports from FBI officials stationed at Guantanamo who were asked to report possible mistreatment of detainees at the hands of law enforcement or military personnel. GTMO Counterterrorism Division Inspection Special Inquiry, *supra* note 15.

²⁸ *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443, 470-71 (D.D.C. 2005), *vacated sub nom.* Boumediene v. Bush, 476 F.3d 981 (2007), *cert. granted sub nom.* Al Odah v. United States, 127 S. Ct. 3067.

²⁹ *See In re Guantanamo Detainee Cases*, 355 F.Supp.2d at 443.

³⁰ *Id.* at 470-472.

³¹ *Id.* at 472. The decision was stayed pending appeal, vacated by the D.C. Circuit Court of Appeals, and is now currently consolidated with the other Guantanamo cases before the Supreme Court in *Boumediene*.

2006.³² In sum, Kurnaz was detained at Guantanamo for over four and a half years without formal charges against him or any reasonable opportunity to challenge the legality of his detention. The fact that Kurnaz was likely innocent all along and probably suffered torture and abuse during his detention exemplify the tragic departure from American ideals of justice and fair play at Guantanamo.

Perhaps the greater tragedy is that Guantanamo could have been avoided if the detainees had been granted the right of habeas corpus to challenge their detention, or if the process created by the Administration had adopted certain hallmarks of the American justice system such as the right to counsel and the prohibition against the use of secret evidence. At its core, the purpose of habeas corpus – and the due process the writ protects – is to combat the excesses of Executive abuse of power that Guantanamo has come to signify: indefinite and arbitrary detention of individuals without notice or the reasonable opportunity to challenge the charges against them.

B. Report Summary

Part I of the Report begins with a detailed history of English common law and early American law confirming habeas corpus as a bulwark against the excesses of the Executive. First, it examines the traditional reliance on habeas corpus by non-citizens to challenge the legality of their detention even in times of war and even when detained outside the geographic boundaries of the Crown. Second, Part I provides an overview of several World War II cases in which German and Japanese prisoners of war challenged their detention and trial by military commission under the writ of habeas corpus and summarizes the circumstances of the four instances when Congress lawfully suspended the writ of habeas corpus – the Civil War,

³² See Craig Whitlock, *U.S. Faces Obstacles To Freeing Detainees*, WASH. POST, Oct. 17, 2006, at A01. Notably, the United States apparently tried to release Kurnaz in 2002, but Germany, his country of residence, initially refused to take him back because he had not renewed his residency permit while at Guantanamo. *Id.*

Reconstruction, the aftermath of the Spanish-American War, and World War II. Part I concludes with a discussion of the “adequate and effective” substitute test applied by the Supreme Court when Congress withdraws the writ from those constitutionally entitled to it.

Part II briefly examines the relevant provisions of the Uniform Code of Military Justice and the Geneva Conventions, such as the guarantees of notice, right to counsel and the prohibition against torture.

Part III turns to the Executive detention of various individuals in the war against international terrorism and the Congressional and Judicial responses to the Administration’s detention of those individuals at Guantanamo. This Part reviews the seminal Supreme Court decisions *Hamdi v. Rumsfeld* and *Rasul v. Bush*, which respectively held that American citizens detained as enemy combatants were entitled to a meaningful opportunity to challenge the basis of their detention, and that federal district courts had statutory jurisdiction to hear challenges of aliens detained at Guantanamo. Part III also provides a background of the CSRT process implemented by the Administration in response to *Hamdi* and *Rasul* to determine whether those detained at Guantanamo were enemy combatants. It also summarizes the limited judicial review of CSRT decisions by the U.S. District Court of Appeals provided by the DTA, as well as the DTA’s suspension of habeas as to Guantanamo detainees.

Finally, Part III examines *Hamdan v. Rumsfeld*, the last in the trilogy of Supreme Court Executive detention cases, and the Congressional response to that decision. *Hamdan* held that the DTA’s habeas stripping provisions did not apply retroactively and that the Administration’s military commissions trying enemy combatants was unlawful. Within months of the decision, Congress responded with the MCA, granting the President the authority to try enemy combatants

by military commission and prohibiting those detained from challenging the lawfulness of their detention under habeas corpus.

Part IV turns to *Boumediene v. Bush*, the pending case before the Supreme Court addressing the MCA's suspension of the writ of habeas corpus. The issues before the Supreme Court in *Boumediene* are (1) whether the Guantanamo detainees have a constitutional right to challenge their detention under the writ of habeas corpus; and (2) if so, whether Congress unlawfully suspended the writ by stripping the federal courts of jurisdiction to hear any challenges to their detention brought by Guantanamo detainees; and (3) if the Guantanamo detainees do have a right and the writ was unlawfully suspended against them, then whether the current system of classifying, detaining, and trying the Guantanamo detainees under the CSRT, DTA and MCA is an adequate and effective substitute to habeas corpus.

As argued in Part V of this Report, it is the position of this Committee that Congress unlawfully suspended the writ and that the Guantanamo detainees are entitled to challenge their detention by the Executive under the writ of habeas corpus. In *Rasul v. Bush*, the Supreme Court held that the Guantanamo detainees had a statutory right under federal law to challenge their detention because Guantanamo was under the control of the US. Applying the reasoning of *Rasul*, the writ of habeas corpus would have reached the Guantanamo detainees at common law. Moreover, as Congress made no predicate finding of rebellion or invasion, nor limited the suspension in time or location, the MCA's suspension of the writ is unlawful. Finally, because the current system does not provide even the minimal cluster of rights traditionally protected by habeas corpus to test whether detention is unlawful, it is not an adequate and effective substitute.

Part VI concludes with various recommendations for the post-*Boumediene* context. First, we urge the Association to adopt a resolution joining others in calling Congress to repeal Section 7(a) of the MCA, restoring habeas corpus for individuals detained by the U.S.³³

Second, the Committee recognizes the dire need to construct a system to adjudicate claims against suspected terrorists captured and detained abroad. As New Yorkers, we understand – perhaps more than others – the need for the Government to have the proper tools to capture, detain and prosecute those who would attack us for no other reason than being American. But those means cannot stray – as the Administration’s practices in Guantanamo have – from our traditional values of justice and fair play.

To that end, this Report also recommends that whatever the outcome of *Boumediene*, Congress should create a regime addressing the failings of Guantanamo. We recommend that the Association adopt a resolution urging Congress to hold hearings on the current status of the Guantanamo detainees and to select a system consistent with the fundamental protections of due process to assess the enemy combatant status of those held at Guantanamo and try those charged with substantive crimes. At a minimum, the system – whether based in our current criminal or military justice systems or a hybrid – should provide the following basic protections that should not unduly burden the Executive in its ongoing efforts against international terrorism: (1) detainees should be informed of the basis of their detention and entitled to view the evidence against them; (2) detainees should be afforded a reasonable opportunity to present evidence challenging their detention; (3) enemy combatant classifications and any trials should be heard by an impartial decision-maker; (4) detainees are entitled to a timely review and release if detention is unlawful; (5) detainees should be entitled to counsel at all phases of their detention

³³ As discussed in Part IV(D), *infra*, there are several pending Congressional bills that seek to restore the federal
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and trial; and (6) evidence obtained by torture should not be admissible at any point in the process.

Finally, this Report recommends that the Association urge Congress to hold hearings concerning detainees in other foreign locations under the de facto control of the U.S. government and whether the federal habeas statute should be amended to cover these detainees. We have seen the results of “legal black holes”³⁴ such as Guantanamo – indefinite detention for years without charge of probably innocent men who are more than likely subjected to torture and abuse by Government officials. At a minimum, Congress should examine the extra-territorial detention at other U.S. military bases like Guantanamo to apply the lessons learned from the last six years and construct a more just approach.

The United States has long been considered a champion of justice and freedom. The current Administration’s Guantanamo policies and practices have damaged not only our country’s image, reputation and potential for diplomacy around the world, but have also placed American soldiers in jeopardy of harsh treatment when detained overseas. The near universal wave of condemnation of such practices can only be turned by returning habeas corpus to its traditional role as a check against such abuses. We believe that the Association’s adoption of a resolution urging Congress to take the three steps outlined above will substantially assist the ongoing process to restore this country’s commitment to equal justice for all.³⁵

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habeas statute to its status quo before the MCA.

³⁴ Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1, 1 (2004); see also Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantanamo*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 127, 146 (2006).

³⁵ On behalf of the Committee on Civil Rights and Committee Chair Fernando A. Bohorquez, Jr., Baker Hostetler, we thank the contributions made to this Report by Patrick Campbell, Baker Hostetler, and Committee Member Joni Kletter, Meyer, Suozzi, English & Klein, P.C., whose hard work and dedication was integral to this project. We also recognize Jason Scoggins, Baker Hostetler, and Committee Member Jocelyn Rettic for their contributions. Finally, we thank the New York Law School Justice Action Center for its support in this endeavor.

I. HISTORY OF HABEAS CORPUS

A. The Origins of Habeas Corpus: England

Habeas corpus, literally meaning “that you have the body,” is an ancient writ employed to bring a person before a court. From its inception, the purpose of habeas corpus was to guard against indefinite and unjust detention by the King.³⁶ The modern day habeas has its roots in 13th century England.³⁷ However, the writ was originally used only to bring parties to an action into court, rather than as a mechanism to gain release from detention.³⁸ The transformation of the writ into a “guardian of liberty” dates to the 14th century, when the Norman Conquest overlaid a centralized court system onto England’s existing court system.³⁹ It was during this period that prisoners started initiating habeas proceedings to challenge the factual and legal basis of their detention.⁴⁰ The first such use was by privileged persons, who would bring habeas corpus proceedings in the central courts, challenging the legal rulings of the inferior courts.⁴¹ As the power of the common law courts grew in the 15th century, so did the scope and availability of habeas corpus.⁴² The writ evolved into a favored tool used by Parliament and the judiciary to confront the English monarch’s unbridled power.⁴³ The writ also gained significance as a

³⁶ BLACK’S LAW DICTIONARY, definition of habeas corpus (8th ed. 2004).

³⁷ Habeas corpus dates back to Clause 39 of the Magna Carta of 1215. Clause 39 states: “No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.” ENCARTA ENCYCLOPEDIA, Magna Carta, *available at* http://encarta.msn.com/encyclopedia_761565830/Magna_Carta.html#s6. As Blackstone noted, “[habeas corpus was] established on the firmest basis by the provisions of the *magna carta*.” The Founders’ Constitution, Article 1, Section 9, Clause 2, William Blackstone, Commentaries 3:129-37, *available at* http://press-pubs.uchicago.edu/founders/documents/a1_9_2s4.html. Clause 39 and Clause 40 are the only Magna Carta clauses that remain relevant in modern day England.

³⁸ *Hamdan v. Rumsfeld*, 464 F.Supp. 2d 9, 13 (D.D.C. 2006) (*Hamdan (II)*); Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 378 (1998) (noting that in the 13th century, the writ was used to bring jurors, witnesses, and parties to an action into court so that the judiciary could conduct its business); Steven R. Swanson, *Enemy Combatants and the Writ of Habeas Corpus*, 35 ARIZ. ST. L.J. 939, 946 (2003).

³⁹ *Hamdan (II)*, 464 F.Supp. 2d at 13.

⁴⁰ *Id.*

⁴¹ *Id.* The central courts used such grants to assert the primacy of their jurisdiction. *Id.*

⁴² *Id.*

⁴³ *Id.*

mechanism to challenge political arrests by the King or his ministers.⁴⁴ By 1670, habeas became the most common remedy under English law to challenge unjust or arbitrary detention.⁴⁵ As

Blackstone commented:

. . . the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity of expressing upon every commitment the reason for which it is made . . .⁴⁶

The Habeas Corpus Act of 1679 (the “1679 Act”) exemplified the growing significance of the writ.⁴⁷ Adopted in reaction to the abuses of power by King Charles I and his ministers,⁴⁸ the 1679 Act defined and strengthened the writ of habeas corpus and came to be known as “the second magna carta, and stable bulwark of [British] liberties.”⁴⁹ The writ afforded a guarantee that individuals could not be detained by executive fiat, rather than on legally recognized grounds, that criminal charges would be resolved according to the common law, and that prisoners could not languish in pretrial detention when they should be bailed.⁵⁰

[T]he writ of habeas corpus . . . is a remedial mandatory writ, [that] commands the production of that subject, and inquiries after the cause of imprisonment, and it is a writ of such a sovereign and transcendent authority, that no privilege of person or place can stand against it. It runs, at the common law, to all dominions held of the Crown . . . [and] is accommodated to all persons and places.⁵¹

⁴⁴ Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 971 (1998).

⁴⁵ *Hamdan (II)*, 464 F.Supp. 2d at 13.

⁴⁶ The Founders’ Constitution, Article 1, Section 9, Clause 2, William Blackstone, Commentaries 3:129-37, available at http://press-pubs.uchicago.edu/founders/documents/a1_9_2s4.html.

⁴⁷ *Hamdan v. Rumsfeld*, 464 F.Supp. 2d 9, 13 (D.D.C. 2006) (*Hamdan (II)*). The 1679 Act is one of the most important statutes in English constitutional history and, though amended, remains on the books today. For the complete text of the 1679 Act, see The Founders’ Constitution, Article 1, Section 9, Clause 2, Habeas Corpus Act, available at http://press-pubs.uchicago.edu/founders/documents/a1_9_2s2.html.

⁴⁸ The Founders’ Constitution, Article 1, Section 9, Clause 2, William Blackstone, Commentaries 3:129-37, available at http://press-pubs.uchicago.edu/founders/documents/a1_9_2s4.html.

⁴⁹ 1 WILLIAM BLACKSTONE, COMMENTARIES 133 (1765).

⁵⁰ Neuman, *supra* note 44.

⁵¹ The Founders’ Constitution, Article 1, Section 9, Clause 2, Opinion on the Writ of Habeas Corpus, available at http://press-pubs.uchicago.edu/founders/documents/a1_9_2s3.html.

Habeas corpus thus came to complement the principles of due process of law, also derived from the Magna Carta.⁵² The twin doctrines of habeas corpus and due process combined to secure personal liberty against arbitrary detention by the State and ensured that any deprivation of liberty was in accordance with the law and not at the whim of the King. In particular, at common law habeas ensured that pre-trial detainees had a means to challenge the facts underlying their detention and securing a right to trial.⁵³

The English Parliament suspended the writ under certain narrow circumstances in the 17th and 18th centuries. All the suspensions were (1) for periods less than one year; (2) adopted in response to conspiracies against the Crown or all out rebellions; and (3) limited to suspected crimes of treason.⁵⁴ As Blackstone described the habeas suspensions:

For the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for doing so . . . In like manner this experiment ought not only to be tried in cases of extreme emergency; and in these the nation parts with it[s] liberty for a while, in order to preserve it for ever.⁵⁵

⁵² Neuman, *supra* note 44.

⁵³ Hafetz, *supra* note 34, at 156.

⁵⁴ Tor Ekeland, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, of the United States Constitution and the War on Terror*, 74 *FORDHAM L. REV.* 1475, 1482 (2005). For example, the writ was suspended in 1744 because of a threatened French invasion, in 1746 because of a threatened rebellion in Scotland and in 1777 because of the American Revolution. Max Rosenn, *The Great Writ – A Reflection of Societal Change*, 44 *OHIO ST. L.J.* 337, 338 (1983); *see also* Rex A. Collings, Jr., *Habeas Corpus for Convicts – Constitutional Right or Legislative Grace*, 40 *CAL. L. REV.* 335, 339 (1952). Notably, under the suspension acts, courts could still issue writs of habeas corpus to determine the sufficiency of a warrant authorizing the detention or to ensure that detention properly fell under the legislation authorizing the suspension.

⁵⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 561-62 (2004) (Scalia, J., dissenting) (quoting 1 *BLACKSTONE, supra* note 49, at 132).

B. Extra-Territorial Application of Habeas Corpus at Common Law

At early English common law, courts also exercised habeas jurisdiction over writs filed by enemy alien detainees.⁵⁶ In the seminal 1759 case of *Rex v. Schiever*,⁵⁷ a Swedish citizen who had been captured on a French vessel and detained in Liverpool, England, filed a writ of habeas corpus challenging the legality of his detention. Although the court reviewed the petition, it denied the petitioner relief because it found ample evidence that he was a prisoner of war.⁵⁸ *The Case of Three Spanish Sailors*, decided in 1779, involved a habeas corpus petition filed by three Spanish seamen who had boarded a merchant vessel bound for England on the promise of wages upon arrival.⁵⁹ After arriving in England, the ship's captain refused to pay them wages and turned them over to a warship as prisoners of war. The court denied relief but only after reviewing the merits of the habeas petition. In *Somerset's Case*, 1772, the court reviewed a habeas petition by an African slave brought into England from Virginia.⁶⁰ In rendering his decision, Lord Mansfield adopted the now fundamental principle that English common law provided certain minimum levels of substantive protection to anyone who came to England, including non-citizens.⁶¹ Many other pre-1789 English cases confirmed the principle that non-citizens had the right to challenge the legality of their detention on habeas review.⁶²

There are no cases where an English court refused to exercise habeas jurisdiction because the enemy being held, while under the control of the Crown, was not within the Crown's

⁵⁶ *Rasul v. Bush*, 542 U.S. 466, 482 (2004).

⁵⁷ *Rex v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759).

⁵⁸ *Boumediene v. Bush*, 476 F.3d 981, 988-89 (D.C. Cir. 2007), *cert. granted*, 127 S.Ct 3078.

⁵⁹ *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779).

⁶⁰ *Id.* at 989-90 (citing *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772)).

⁶¹ George Van Cleve, *Somerset's Case and its Antecedents in Imperial Perspective*, 24 LAW & HIST. REV. 601, 636 (2006).

⁶² *I.N.S. v. St. Cyr*, 533 U.S. 289, 301-302 (2001) (collecting cases).

sovereignty.⁶³ Rather, the prevailing authority at common law established that the reach of the writ depended not on formal notions of territorial sovereignty, but on the practical question of the extent and nature of the jurisdiction or dominion exercised by the Crown.⁶⁴

Writs were issued by English courts located in overseas territories. English courts had power to issue writs to the American colonies, the West Indies and other overseas territories.⁶⁵ Although India in the eighteenth century was not sovereign territory belonging to the Crown, it was under de facto British control.⁶⁶ English courts were established in India to ensure that the East India Company did not violate British common law.⁶⁷ Because the “jailer” was operating under the authority of the Crown or Crown-chartered organization, the Supreme Court of Calcutta had jurisdiction over habeas claims, regardless of the alienage of the petitioner.⁶⁸ For example, in 1775, a revenue collector was released after the East India Company had detained him for alleged late payments.⁶⁹ The writ was even used to settle family disputes and to defend people who were held pursuant to private authority rather than Company authority.⁷⁰ Thus, regardless of a prisoner’s alienage, the writ was available to any territory where the crown possessed sufficient power and control to ensure the jailor’s obedience to the writ’s command.

⁶³ *Boumediene*, 476 F.3d at 1000 (Rogers, C.J., dissenting).

⁶⁴ *Rasul v. Bush*, 542 U.S. 466, 482 (2004) (citing *Ex parte Mwenya*, 1 Q.B. 241, 303 (C.A. 1959) (Lord Evershed, M.R.); and *Ex parte Anderson*, 121 Eng. Rep. 525 (Q.B. 1861) (court exercised its common law powers to issue writ of habeas corpus to Quebec in Upper Canada)).

⁶⁵ *See R. v. Cowle*, 97 Eng. Rep. 587, 600 (K.B. 1759) (Mansfield J.); *see also* *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 36 (H.L. 1758) (“it runs, at common law, to all dominions held of the Crown . . . [i]t is accommodated to all persons and places”); *King v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669) (writ issued to Channel Island of Jersey on behalf of individual committed on suspicion of treason); *King v. Overton*, 82 Eng. Rep. 1173 (K.B. 1668) (writ issued to Jersey); *Bourn’s Case*, 79 Eng. Rep. 465, 466 (K.B. 1619) (writ issued to Calais).

⁶⁶ M.P. JAIN, *OUTLINES OF INDIAN LEGAL HISTORY* 83-137 (1952).

⁶⁷ 13 Geo. 3, § 14 (1773) (Eng.).

⁶⁸ *R. v. Ramgovind Mitter*, Ind. Dec. (O.S.), I, 1009 (Sup. Ct., Calcutta 1781).

⁶⁹ *Cumall a Deen Ally Khan v. Charles Goring*, BL Add. MSS 38,400 folio 84 (Sup. Ct. Calcutta, 1775).

⁷⁰ 21 Geo. 3 c. 70, § 19.

C. Early American Habeas Law

It is no surprise that the early colonists claimed a right to habeas corpus from the beginning.⁷¹ In the famous *Bushell's Case*, Edward Bushell was jailed for refusing to issue a guilty verdict against William Penn and William Meade for their “criminal” participation in Quaker worship. Bushell was eventually released by writ of habeas corpus, when the court decided that jurors must be free to return verdicts based on the evidence and un-coerced by the courts.⁷² As a result, the writ of habeas corpus was memorialized in certain colony charters, in state legislation, and in state constitutions that either expressly guaranteed the availability of the writ, or prohibited its suspension.⁷³ Most colonial charters and state legislators adopted the substance of the 1679 Act.⁷⁴ Four states had habeas corpus guarantees in their constitutions before 1789.⁷⁵

The Constitution’s framers were concerned not only with protections for the preservation of the writ but also the prerogative to suspend the writ in times of national security.⁷⁶ The framers believed it would be necessary to suspend the writ in times of rebellion or invasion, or when the public safety may require it.⁷⁷ However, the concept of habeas corpus as a safeguard of personal liberty was not lost on the framers. Alexander Hamilton commented in the *Federalist* No. 84 that: “. . . the practice of arbitrary imprisonments, have been, in all ages, the favorite and

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⁷¹ *Id.*

⁷² Rosenn, *supra* note 54, at 337-38.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Neuman, *supra* note 44, at 972. For example, The Massachusetts Constitution of 1780, which supplied the most direct model for the Federal Suspension Clause, stated that habeas corpus could not be suspended except for the most urgent and pressing circumstances, and then only for a limited time not exceeding one year. *Id.*

⁷⁶ Rosenn, *supra* note 54, at 338; Ekeland, *supra* note 54, at 1482.

⁷⁷ Ekeland, *supra* note 54, at 1484.

most formidable instruments of tyranny.”⁷⁸ Commenting on the necessity of judicial review, Hamilton stated (quoting Blackstone):

To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation: but confinement of a person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.⁷⁹

Habeas corpus ran so strong in colonial America that some of the framers, particularly the anti-federalists, were afraid that the Suspension Clause was a loophole that could be abused by the Executive to imprison political dissidents, and argued for an affirmative habeas provision like the one in North Carolina’s constitution.⁸⁰ In a letter to James Madison, Thomas Jefferson rhetorically queried “Why suspend the [habeas corpus] in insurrections and rebellions?”⁸¹ Jefferson answered that arrested persons should instantly be charged with a well-defined crime.⁸²

The original draft of the Suspension Clause included a time limit, and was placed in Article III of the Constitution under the judiciary powers.⁸³ The final version of the Suspension Clause did not have a time limit and was placed in Article I under congressional powers.⁸⁴ In the end, the Constitutional Convention delegates refused to expressly include the writ in the Constitution, and the compromise resulted in the Suspension Clause, providing that: “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of

⁷⁸ THE FEDERALIST NO. 84 (Alexander Hamilton).

⁷⁹ *Id.*

⁸⁰ Neuman, *supra* note 44, at 973. The North Carolina Constitution provided “[t]hat every freeman, restrained of his liberty, is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same, if unlawful; and that such remedy ought not to be denied or delayed.” *Id.* at 972 (quoting N.C. Const. of 1776, art. XIII).

⁸¹ The Founders’ Constitution, Rights, Thomas Jefferson to James Madison, *available at* <http://press-pubs.uchicago.edu/founders/documents/v1ch14s46.html>.

⁸² *Id.*

⁸³ Ekeland, *supra* note 54, at 1485.

⁸⁴ U.S. CONST. art. I, § 9, cl. 2.

Rebellion or Invasion the public Safety may require it.”⁸⁵ The writ of habeas corpus thus enjoys the unique status of being the only common law writ referred to in the Constitution,⁸⁶ and one of the limited number of provisions protecting individual rights before the Bill of Rights.⁸⁷

After adoption of the Constitution, the next pivotal step in the evolution of the writ as a bulwark against unlawful and indefinite executive detention was the Judiciary Act of 1789 (the “1789 Act”) – the first of a long line of habeas statutes giving federal courts statutory authority to issue writs of habeas corpus.⁸⁸ The first case brought under the 1789 Act was *Ex parte Burford*.⁸⁹ In *Burford*, the Supreme Court held that the writ of habeas corpus was a writ of right that could not be refused.⁹⁰ Acting upon the writ, the Court ordered the release of the prisoner because there had been no judgment of conviction and no judicial determination following a court hearing.⁹¹ The evolution of the writ continued with *Ex parte Bollman*, where Chief Justice Marshall, again on habeas review, ordered the release of a prisoner charged with treason because the affidavits and depositions forming the basis of his pre-trial detention did not state facts sufficient for probable cause.⁹² In granting the writ, the Court explained that one of the purposes of habeas corpus is to protect the liberty of the citizen from arbitrary government officials with nothing to fear except “from their own consciences, the opinion of the public, and the . . .

⁸⁵ *Id.*

⁸⁶ David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 61 (2006).

⁸⁷ Neuman, *supra* note 44, at 972.

⁸⁸ “All . . . courts of the United States shall have [the] power to issue writs of . . . habeas corpus . . . provided that writs of habeas corpus shall in no case extend to prisoners in jail, unless they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.” Judiciary Act of 1789 § 14, ch. 20, 1 Stat. 73, 81-82. The 1789 Act only reached those held in federal custody, not those held by the States.

⁸⁹ *Ex parte Burford*, 7 U.S. 448 (1806).

⁹⁰ *Id.* at 448.

⁹¹ *Id.* at 452-53.

⁹² *Ex parte Bollman*, 8 U.S. 75, 136 (1807).

judgment of their posterity[.]”⁹³ *Bollman* read the Suspension Clause as affirmatively requiring Congress to vest habeas jurisdiction with the federal courts to inquire into federal confinements.⁹⁴ Relying on common law precedent in reaching the merits of the habeas petition, the Court decided that it was vested with the power to look behind the order of commitment on habeas review for, if not, habeas review would be useless.⁹⁵ Thus, early American law followed the English common law tradition to ensure the right to challenge the factual and legal basis of Executive detention.⁹⁶

D. Early American Extension of Habeas Corpus to Aliens and Alien Enemy Combatants

It is important to note that the privilege of habeas corpus, during the time period before and at the adoption of the Constitution, did not just extend to subjects of the British Crown or U.S. citizens; rather, the common law privileges of the writ extended also to aliens, enemy aliens, and other alien enemy combatants. In the U.S., any alien held in federal custody could file for the writ, even enemy aliens during wartime.

Neither the text of the Suspension Clause, nor the 1789 Act, drew any distinctions between U.S. citizens and aliens held in federal custody.⁹⁷ Early U.S. common law, beginning

⁹³ *Id.* at 82. Marshall continued “they [the first Congress] must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity, for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.” *Id.* at 95.

⁹⁴ Neuman, *supra* note 44, at 974.

⁹⁵ *Bollman*, 8 U.S. at 111.

⁹⁶ One early constitutional commentator, St. George Tucker, stated: “[t]he writ of habeas corpus . . . is the great and efficacious remedy provided for all cases of illegal confinement.” The Founders’ Constitution, Article 1, Section 9, Clause 2, St. George Tucker, Blackstone’s Commentaries 1:App. 290-92, 1803, available at http://press-pubs.uchicago.edu/founders/documents/a1_9_2s12.html.

⁹⁷ U.S. CONST. art. I, § 9, cl. 2. The same is true regarding the federal habeas statute. *Rasul v. Bush*, 542 U.S. 466, 481 (2004) (“Considering that the Habeas Statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee’s citizenship”).

with *U.S. v. Villato*,⁹⁸ followed the trend of early English common law, extending habeas to all persons detained within the dominion of the Crown. In *Villato*, a Spaniard residing in the U.S., was detained on charges of high treason in Philadelphia.⁹⁹ Reviewing *Villato*'s habeas corpus petition, the court ruled that he had to be discharged because he was not a U.S. citizen.¹⁰⁰ Similarly, in *Ex parte D'Olivera*, Portuguese sailors were detained in Boston for deserting a Portuguese vessel.¹⁰¹ The court, again deciding the merits of a habeas petition, discharged the sailors because their detainment was not authorized under the Foreign Seamen-Statutory Regulations.¹⁰²

Enemy aliens held within U.S. sovereignty have also been allowed to challenge their detention through habeas corpus. The Alien Enemies Act of 1798 (the "1798 Act"), which is still in force today in modified form, authorizes the President to detain, relocate, or deport enemy aliens during times of war.¹⁰³ However, the 1798 Act did not preclude enemy aliens from petitioning the courts to review their detention. One of the earliest examples of this principle was *Lockington's Case*, where a subject of the British Crown, detained in Pennsylvania during the War of 1812 as an enemy combatant, filed a habeas petition to challenge the lawfulness of his detention.¹⁰⁴ After being detained for failing to comply with a federal marshal's relocation

⁹⁸ *U.S. v. Villato*, 28 F.Cas. 377 (Pa. Dist. 1797).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 379.

¹⁰¹ *Ex parte D'Olivera*, 7 F.Cas. 853 (C.C.Mass. 1813).

¹⁰² *Id.* at 854.

¹⁰³ Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien*, 9 GREEN BAG 2D 39, 39 (2005). The government currently defines "enemy alien" as an individual who "is part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States." Joseph Pope, *Opening the Flood Gates: Rasul v. Bush and the Federal Court's New World-Wide Habeas Corpus Jurisdiction*, 26 N. ILL. U. L. REV. 331, n.2 (2006) (quoting Dep't of Defense, Fact Sheet Guantanamo Detainees). The current definition is different from the term "enemy alien" employed in the 1798 Act. The 1798 Act defines "alien enemy" as a citizen of a country which is at war with the United States who is in the United States but not naturalized. 50 U.S.C. § 21 (2007).

¹⁰⁴ *Lockington's Case*, Bright. (N.P.) 269 (Pa. 1813).

order, the petitioner moved for a writ of habeas corpus from the Pennsylvania court.¹⁰⁵ The court decided that the petitioner was entitled to review of his detention, but denied the habeas petition on its merits.¹⁰⁶ In *United States v. Thomas Williams*, Chief Justice Marshall sitting by designation in the U.S. Circuit Court for the District of Virginia in December of 1813,¹⁰⁷ granted a writ of habeas corpus demanding that the petitioner, an enemy alien detained in a county jail, be brought to court.¹⁰⁸ Justice Marshall found that the petitioner fell outside the scope of the President's regulations regarding enemy aliens and ordered his release.¹⁰⁹ In sum, as in England, early American history shows that the writ extended to enemy aliens detained within the U.S.

American courts continued to extend the privileges of the writ to aliens throughout the 19th century and into the 20th century. One landmark decision was *Yick Wo v. Hopkins*.¹¹⁰ In *Yick Wo*, the petitioner filed a writ of habeas corpus alleging he was unlawfully deprived of his personal liberty by the City of San Francisco, and specifically, its sheriff.¹¹¹ The petitioner was a native of China and still a subject of China, but had resided in the U.S. for over twenty years.¹¹² The Supreme Court first decided that it had jurisdiction to review the alien's habeas petition.¹¹³ The Court then reasoned that the protections of the Fourteenth Amendment were not limited to U.S. citizens and that the rights of the petitioner were no less because he was still a subject of

¹⁰⁵ *Boumediene v. Bush*, 476 F.3d 981, 988 (D.C. Cir. 2007), *cert. granted* 127 S. Ct. 3078.

¹⁰⁶ *Id.*

¹⁰⁷ Neuman & Hobson, *supra* note 103, at 41.

¹⁰⁸ *Id.* at 42.

¹⁰⁹ *Id.*

¹¹⁰ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹¹¹ *Id.* at 366.

¹¹² *Id.*

¹¹³ *Id.* at 365.

China.¹¹⁴ Ultimately, the court concluded that the alien petitioner’s imprisonment was illegal and ordered discharge.¹¹⁵

E. American Suspension of Habeas Corpus

The writ has been lawfully suspended four times in the approximately 230 years of the Republic. The first followed the President’s unlawful attempt to suspend the writ during the Civil War. *Ex parte Merryman* settled the rule that only Congress, and not the Executive, could authorize the suspension of the writ.¹¹⁶ In *Merryman*, President Lincoln had authorized the Commanding General of the Army to suspend the writ in response to rioting between Washington D.C. and Philadelphia, as union troops moved down the coast.¹¹⁷ After being detained without charge by the military, the petitioner filed a writ of habeas corpus and the military officer responded that he had the authority, bestowed upon him by President Lincoln, to suspend the writ at his discretion.¹¹⁸ The Court held that President Lincoln acted beyond his constitutional authority in attempting to suspend the writ, as only Congress had the authority to

¹¹⁴ *Id.* at 368 (“The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the emperor of China.”).

¹¹⁵ *Id.* at 368. Another landmark case extending the writ to alien petitioners was *Kaoru Yamataya v. Fisher*, 189 U.S. 86 (1903). In *Yamataya*, the petitioner was a Japanese national who was detained on the charge of illegally arriving in the United States and filed a writ of habeas corpus to challenge her detention. The Court held that even though Congress can regulate immigration, once an alien has landed in the U.S., Congress cannot deprive her liberty without the reasonable opportunity to be heard. The Court also stated that even after illegal entry to the United States, an alien is subject to U.S. jurisdiction and may not be taken into custody and deported without being given the opportunity to be heard. The writ was dismissed on other grounds. *Id.* at 87-101. For other early decisions granting aliens the right to challenge the legal basis of an immigration officer’s denial of admission into the U.S., see *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (“An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful.”); *United States v. Jung Ah Lung*, 124 U.S. 621, 627-29 (1888) (noting that the Chinese Restriction Acts did not preclude the federal courts from habeas review).

¹¹⁶ *Ex parte Merryman*, 17 F.Cas. 144 (1861).

¹¹⁷ *Hamdan v. Rumsfeld*, 464 F.Supp. 2d 9, 14 (D.D.C. 2006) (*Hamdan (II)*).

¹¹⁸ *Merryman*, 17 F.Cas. at 148-49.

suspend it.¹¹⁹ The law remains that only Congress can act to suspend the writ, or can delegate to the President the power to suspend the writ.¹²⁰

Congress has authorized habeas suspension only four times: two times were within the continental U.S., while the other two occasions occurred outside of the continental U.S. in areas within U.S. jurisdiction. Every habeas suspension statute was accompanied by clear suspension language and was limited to the periods during the predicate conditions of rebellion or invasion.¹²¹ All suspensions, except for the first, were limited to a confined geographical area.¹²² The first authorization immediately followed *Merryman*, where Congress enacted the Habeas Corpus Suspension Act of 1863 (the “1863 Act”) authorizing habeas suspension and empowering President Lincoln to suspend the writ as necessary to advance the war effort.¹²³ Thereafter, Lincoln issued suspension proclamations pursuant to the 1863 Act.¹²⁴ However, the 1863 Act was limited to the time of rebellion and contained certain safeguards reserving judicial review. For example, Section 2 of the 1863 Act stated that anyone subject to Executive

¹¹⁹ *Merryman*, 17 F.Cas. at 151-52. “It would seem, as the power is given to congress to suspend the writ of habeas corpus, in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body.” *Id.*

¹²⁰ “Although [the Suspension Clause] does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause’s placement in Article I.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting); *Hamdan (II)*, 464 F.Supp. 2d at 14.

¹²¹ *Hamdan (II)*, 464 F.Supp. 2d at 14. All suspensions have been via congressional grant to the Executive. *Id.*

¹²² Amanda L. Tyler, *Is Suspension a Political Question?* 59 STAN. L. REV. 333, 345 n.162 (2004).

¹²³ “Be it enacted . . . that, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof.” Habeas Corpus Suspension Act of 1863, 12 Stat. 755 (1863); Tyler, *supra* note 122, at 343 n.48.

¹²⁴ See *Hamdan v. Rumsfeld*, 464 F.Supp.2d 9, 14-15 (D.D.C. 2006) (*Hamdan (II)*). For instance, in 1863, Lincoln suspended the writ for persons held by military officials “either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled or drafted or mustered or enlisted in, or belonging to, the land or naval forces of the United States, or as deserters therefrom, or otherwise amendable to military law.” Proclamation No. 7, *reprinted in* 13 Stat. 734 (1863).

detention, where federal courts were still operating, against whom a grand jury failed to return an indictment, was subject to discharge by the court.¹²⁵

The limits of the 1863 Act were tested in *Ex parte Milligan*. There, the Supreme Court addressed questions regarding the detention and trial by military commission of Lambdin P. Milligan.¹²⁶ Milligan had been arrested by military authorities in Indiana and held on the suspicion that he supported a pro-rebel group.¹²⁷ A federal circuit court in Indiana commissioned a grand jury to hear his case, and the grand jury did not issue an indictment.¹²⁸ However, Milligan was sentenced to death by a military commission.¹²⁹

The Supreme Court addressed whether a writ of habeas corpus should issue, whether Milligan should be released from custody, and whether the military commission had jurisdiction to hear the charges against Milligan.¹³⁰ The Court stated that the privilege of the “Great Writ” had never been suspended before, but both the congressional authorization and the subsequent executive suspension was valid.¹³¹ However, “[t]he suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.”¹³² The Court also ruled that the suspension of the writ does not suspend the writ itself, as the writ is issued as a matter of course.¹³³ It is on the return of the writ that the court decides whether the party applying for it is denied any further proceedings.¹³⁴ The Court held Milligan’s detention did not fall within the 1863 Act and a valid writ of habeas corpus could be issued

¹²⁵ Ekeland, *supra* note 54, at 1495. The Executive was required to submit a list of those detained to the local federal district court to facilitate that process. Tyler, *supra* note 122, at 344-45. The 1863 Act was repealed in 1873. *Id.*

¹²⁶ *Ex parte Milligan*, 71 U.S. 2, 8-9 (1866).

¹²⁷ *Id.* at 130-35.

¹²⁸ *Id.* at 107-08.

¹²⁹ *Id.* at 107.

¹³⁰ Swanson, *supra* note 38, at 948.

¹³¹ *Ex parte Milligan*, 71 U.S. 2, 115 (1866).

¹³² *Id.* at 115.

because Milligan was a loyal citizen living in a loyal state and could be tried by an Article III court as Article III courts were still functioning in the state where Milligan was being held and no indictment was issued.¹³⁵ Thus, the privilege of the writ of habeas corpus can be viewed as separate from the writ itself and even if the writ is suspended by Congress, federal courts still have jurisdiction to determine whether the suspension is constitutional and whether the habeas petitioner falls within the bounds of the suspension.¹³⁶

After the Civil War, to assist President Grant in dealing with the emergence of the Ku Klux Klan, Congress passed the Ku Klux Klan Act of 1871 granting Grant authority to suspend the writ in areas where the strength of armed resistance to Reconstruction made normal law enforcement impracticable.¹³⁷ Congress gave the President limited power to suspend the writ in states where the Ku Klux Klan were so organized, armed, numerous, and powerful to be tantamount to an armed militia rebelling against the United States.¹³⁸ The President could suspend the writ only during the continuation of such rebellion, and the habeas corpus stripping provision of the statute was set to expire after the end of the following congressional session.¹³⁹ Upon learning that nine counties in South Carolina effectively were in a state of rebellion, Grant invoked his suspension authority to assist federal efforts in rooting out the Klan in those areas.¹⁴⁰

The writ of habeas corpus was suspended twice more, both outside the continental U.S. In 1902, Congress granted power to the governor of the Philippines to suspend the writ in that

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¹³³ *Id.* at 130-31.

¹³⁴ *Id.* at 131.

¹³⁵ *Id.* at 135-36.

¹³⁶ Ekeland, *supra* note 54, at 1495.

¹³⁷ Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411 n.101 (2006). The Act was modeled on the 1863 Act and incorporated, by reference, its limitations. Neuman, *supra* note 44, at n.85.

¹³⁸ Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, 14-15.

¹³⁹ *Id.*

territory during a rebellion.¹⁴¹ That suspension act provided that habeas corpus could not be suspended in the Philippines unless a situation of rebellion, insurrection, or invasion existed, and could be suspended only during the time period of the predicate condition.¹⁴² In 1905, habeas corpus was suspended for nine months in certain Philippine provinces by proclamation of the Philippine Governor.¹⁴³ In *Fisher v. Baker*, the petitioner filed for a writ of habeas corpus alleging he was being detained illegally by the Philippine authorities in one of those provinces.¹⁴⁴ The Supreme Court, in deciding whether the suspension of the writ was valid, quoted extensively from the Governor's resolution, which stated in part that organized bands of ladrones created a state of insecurity and terrorism among the people of the Philippines to the extent that criminal investigations and prosecutions could not be conducted in the ordinary way.¹⁴⁵ The Court ruled that the Governor's habeas suspension resolution was valid and effectively rescinded its jurisdiction to hear the habeas petition.¹⁴⁶

Finally, in 1942, President Franklin D. Roosevelt approved the suspension of the writ by the Governor of the Hawaiian Territory immediately following the bombing of Pearl Harbor.¹⁴⁷ According to the Governor, suspension was necessary due to the Japanese invasion. The Hawaii Organic Act of 1900 gave the Governor of the Hawaiian Territory broad power to suspend the writ in the case of rebellion or invasion.¹⁴⁸ Along with approving the habeas suspension, Roosevelt immediately declared martial law in the Territory. In one case challenging the

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¹⁴⁰ Tyler, *supra* note 122, at 345.

¹⁴¹ The Philippine Civil Government Act of July 1, 1902, Ch. 1369, 32 Stat. 692; David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1755 (2004).

¹⁴² The Philippine Civil Government Act of July 1, 1902, Ch. 1369, 32 Stat. 692.

¹⁴³ See *Fisher v. Baker*, 203 U.S. 174, 180-81 (1906); see also Tyler, *supra* note 122, at 346.

¹⁴⁴ *Id.* at 178.

¹⁴⁵ *Id.* at 179-80.

¹⁴⁶ *Id.* at 181.

¹⁴⁷ Tyler, *supra* note 122, at 346-47.

President's approval of the Governor's actions, a stockbroker in Honolulu challenged his subjection to a military tribunal.¹⁴⁹ After the Supreme Court accepted the case on certiorari, President Roosevelt restored the writ in October of 1944 thus mooting the constitutional question before the Court.¹⁵⁰

Another case dealing with the Hawaiian habeas suspension was *Ex parte Zimmerman*.¹⁵¹ In *Zimmerman*, the petitioners filed for a writ of habeas corpus complaining that they were being interned illegally by military officials in Hawaii during World War II.¹⁵² The Ninth Circuit held the Governor's suspension until further notice was authorized by the Constitution and specific acts of Congress because of the circumstances and aftermath of Pearl Harbor.¹⁵³ The court reasoned that suspension could continue as long as the Hawaiian Territory remained in a state of the gravest emergency with an imminent threat of a resumption of the invasion.¹⁵⁴ The court concluded that because of the valid habeas suspension, it could not issue a writ of habeas corpus.¹⁵⁵

F. World War II and the Extension of Habeas Corpus to Enemy Aliens

The modern precedent regarding enemy aliens' ability to challenge the legality of executive detention within U.S. sovereignty on habeas review was established by two prominent

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¹⁴⁸ *Id.* at 346. The military government took over all affairs in the Territory, including the courts. During this period, trial by jury and indictment by grand jury were abolished.

¹⁴⁹ *Duncan v. Kahanamoku*, 327 U.S. 304, 309-10 (1946).

¹⁵⁰ *Id.* at n.5. The court ultimately concluded that the trial by military tribunal was unconstitutional because the Hawaii Organic Act of 1900 did not grant the President or the Governor of the Hawaiian Territory the authority to supplant the court system with military tribunals. *Id.* at 316.

¹⁵¹ *Ex parte Zimmerman*, 132 F.2d 442 (9th Cir. 1942).

¹⁵² *Id.* at 443.

¹⁵³ *Id.* at 445.

¹⁵⁴ *Id.* (emphasizing that in the months following the attack on Pearl Harbor, the Hawaiian Territory, along with the mainland of the Pacific coast, remained subject to Japanese attack).

¹⁵⁵ *Id.* at 446.

cases during World War II.¹⁵⁶ In *Ex parte Quirin*, German petitioners trained in sabotage surreptitiously entered various parts of the United States during World War II.¹⁵⁷ The petitioners were captured and detained by agents of the Federal Bureau of Investigation and tried by a military commission.¹⁵⁸ The petitioners then filed for writs of habeas corpus, claiming that the President was without authority to try them by military commissions and were entitled to be tried by civil courts with all of the appropriate constitutional safeguards.¹⁵⁹ The Government argued that petitioners should be denied access to civil courts because they were enemy aliens.¹⁶⁰ The Court reasoned that nothing in the proclamation establishing the military commissions or the fact that the petitioners were enemy aliens foreclosed consideration by the courts of the petitioners' contentions that the Constitution and the laws of the United States forbade their trial by military commission.¹⁶¹ The Supreme Court, noting its duty to preserve the constitutional safeguards of civil liberty, then decided, without avoidable delay, whether the military commissions were in conflict with the Constitution or laws of the United States.¹⁶² Accordingly, the Court reviewed the petitioner's claims, but held for the Government.¹⁶³

¹⁵⁶ Enemy aliens were also able to use the court system in civil lawsuits. In *Ex parte Kumezo Kawato*, the petitioner, born in Japan but a U.S. resident since 1905, filed a civil suit for injuries he allegedly sustained on a vessel. 317 U.S. 69, 70 (1942). The respondent moved to dismiss the petition, arguing that since the petitioner was an enemy alien (the case arose during World War II), he had no right to use the U.S. court system during the war. *Id.* at 70-71. In deciding the issue, the Supreme Court first looked to English common law, where enemy aliens residing in England, even enemy aliens who had been interned, had been able to maintain actions in English courts and that resident enemy aliens here could be prohibited from using the courts only so far as necessary to prevent the use of the courts to accomplish a purpose that might hamper U.S. war efforts or give aid to the enemy. *Id.* at 73-75. Finding none of these conditions, the court decided in favor of the petitioner.

¹⁵⁷ *Ex parte Quirin*, 317 U.S. 1, 21 (1942).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 24.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 25.

¹⁶² *Id.* at 19.

¹⁶³ *Id.* at 48 (holding that the petitioners were held in lawful custody and did not show cause for their discharge because the President was authorized to order trial by military commission for the alleged offenses).

In the second prominent World War II case, *Yamashita v. Styer*, the petitioner, a general in the Japanese army, was detained at a U.S. army base in the Philippines and charged with, and convicted of, violations of the laws of war by a military commission.¹⁶⁴ Petitioner sought habeas, alleging, *inter alia*, that the military commission was not lawfully created and the charge against him did not state a violation of the law of war.¹⁶⁵ Reviewing the habeas petition on its merits, the Court held that it was not concerned with the guilt or innocence of the petitioner, but rather with the lawful power of the commission to try the petitioner for the offense charged.¹⁶⁶ Further, the Court stated that absent a valid suspension of the writ, neither Congress nor the Executive could withdraw from the courts the duty and power to make an inquiry into the authority of the commission to try enemy aliens as may be made by habeas corpus.¹⁶⁷ Ultimately, after reviewing the habeas petition, the court held that the military commission was lawfully created and that the charge against the petitioner was valid.¹⁶⁸

In *Ludecke v. Watkins*, Justice Frankfurter summarized habeas practice under the Alien Enemies Act during the First and Second World Wars.¹⁶⁹ Frankfurter stated that aliens could challenge the construction and the validity of the statute and underlying basis for detention, question the existence of a “declared war,”¹⁷⁰ and review the determination of enemy alien status.¹⁷¹ Throughout the 1940s, federal courts permitted German enemy aliens to challenge the Government’s efforts to deport them to Germany without opportunity to relocate to another

¹⁶⁴ *Yamashita v. Styer*, 327 U.S. 1, 5 (1946).

¹⁶⁵ *Id.* at 6.

¹⁶⁶ *Id.* at 8.

¹⁶⁷ *Id.* at 9 (“[Neither Congress nor] the Executive branch [of the Government] could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus”).

¹⁶⁸ *Id.* at 13-18.

¹⁶⁹ *Ludecke v. Watkins*, 335 U.S. 160 (1948).

¹⁷⁰ *Id.* at 171.

¹⁷¹ *Id.* at n.17.

destination.¹⁷² In particular, enemy aliens were allowed to challenge, on habeas, the determination of enemy alien status, both on the grounds that they were citizens,¹⁷³ and on the grounds that they were not natives or nationals of an enemy power.¹⁷⁴ Thus, it is well settled that enemy aliens, even prisoners of war, detained within U.S. sovereignty have the constitutional right to habeas corpus.

In *Johnson v. Eisentrager*, the Supreme Court addressed the right to habeas corpus for enemy aliens detained outside the United States.¹⁷⁵ *Eisentrager* involved a habeas petition filed by German nationals captured in China during World War II who were charged with permitting or ordering continued military activities against the United States after Germany surrendered.¹⁷⁶ They were tried by military commission in China, convicted, and imprisoned in Germany, at that time under Allied control.¹⁷⁷ The petitioners then appealed to the D.C. District Court for writs of habeas corpus, which granted their petitions.¹⁷⁸

By a vote of 6-3, the Supreme Court on certiorari overturned the court of appeals, finding that the petitioners were not entitled to habeas relief.¹⁷⁹ *Eisentrager* recognized that aliens are afforded a generous and ascending scale of rights as they increase their identity within American society.¹⁸⁰ During an alien's probationary residence, courts have steadily enlarged this right to a

¹⁷² *United States ex rel. Hoehn v. Shaughnessy*, 175 F.2d 116 (2nd Cir. 1949) (habeas proceeding that questioned removal order).

¹⁷³ *United States ex rel. Stabler v. Watkins*, 168 F.2d 883 (2nd Cir. 1948) (granting habeas relief to individual whose citizenship was revoked by default judgment).

¹⁷⁴ *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898 (1943) (on habeas review, granting habeas petition and ordering discharge because detainee was found not to be German citizen).

¹⁷⁵ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

¹⁷⁶ *Id.* at 766.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 765.

¹⁷⁹ *Id.* at 781.

¹⁸⁰ *Eisentrager*, 339 U.S. at 770 (“Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization”).

full and fair hearing before possible deportation.¹⁸¹ The Court also emphasized the U.S. history of generous access to courts for resident enemy aliens.¹⁸² With regard to enemy aliens held within the U.S., the Court explained that while a resident enemy alien is constitutionally subject to summary arrest, internment, and deportation whenever a state of war exists, courts will entertain his plea for freedom from executive custody to ascertain both whether a state of war exists and whether the detained alien is in fact an enemy alien.¹⁸³

However, the *Eisentrager* court found that it did not have knowledge of any court having issued a writ of habeas corpus to an enemy alien who had not been within its jurisdiction during the crimes at issue, his initial detention, trial or imprisonment.¹⁸⁴ Accordingly, the Court held that non-resident enemy aliens, especially those who have remained in the service of the enemy, do not have even qualified access to U.S. courts.¹⁸⁵ “[T]he privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection.”¹⁸⁶ The petitioners in the case, the Court reasoned, were at no relevant time within any territory over which the U.S. maintains sovereignty and “the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States.”¹⁸⁷ The Court also highlighted ancillary reasons for refusing the writ, including: (1) the current aliens were actual enemy aliens and not enemy aliens simply because of legal definition;¹⁸⁸ (2) transportation of the prisoners to a U.S. court

¹⁸¹ *Id.* at 770-71.

¹⁸² *Id.* at 776.

¹⁸³ *Id.* at 775.

¹⁸⁴ *Id.* at 768.

¹⁸⁵ *Eisentrager*, 339 U.S. at 766.

¹⁸⁶ *Id.* at 777-78.

¹⁸⁷ *Id.* at 778.

¹⁸⁸ *Id.*

would be burdensome;¹⁸⁹ and (3) no reciprocity could be expected in return for placing the litigation weapon in unrestrained enemy hands.¹⁹⁰

Notwithstanding *Eisentrager*'s holding that enemy aliens held outside the U.S. have no right to habeas review, commentators have argued that in reaching the merits of the petition and dismissing it on the merits, the Court recognized its inherent jurisdiction.¹⁹¹ Although *Eisentrager* denied that many of the rights grounded in federal law applied to the overseas alien detainees,¹⁹² the Court also took great pains to review the petitioner's constitutional claims.¹⁹³ Nonetheless, recent decisions have relied on *Eisentrager* in ruling that enemy aliens held outside U.S. sovereignty do not have any constitutional rights, including the right to habeas corpus.¹⁹⁴

G. Relevant Post-World War II Habeas Developments

After World War II, the development of habeas corpus jurisprudence focused on federalism and issues of comity between state court decisions and federal post-conviction review of the same.¹⁹⁵ Where the Warren Court viewed federal habeas review as a tool against arbitrary detention and unlawful confinement by the state, the Burger and Rehnquist Courts moved the pendulum back to primacy and finality of state court convictions. A complete discussion of

¹⁸⁹ *Id.* at 778-79.

¹⁹⁰ *Eisentrager*, 339 U.S. at 779-80.

¹⁹¹ *See, e.g.*, James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497, 519 (2006).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Boumediene v. Bush*, 476 F.3d 981, 991 (2007), *cert. granted* 127 S. Ct. 3078 (relying on *Eisentrager* in concluding that enemy aliens not detained within U.S. sovereignty do not have the constitutional right to habeas review); *Hamdan v. Rumsfeld*, 464 F.Supp. 2d 9, 17-19 (D.D.C. 2006) (*Hamdan (II)*) (stating *Eisentrager* was controlling authority); *see also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (the Court, relying on and drawing an analogy from *Eisentrager*, rejected the claim that aliens are entitled to Fifth Amendment rights outside of U.S. sovereignty). However, refer to discussion of *Rasul v. Bush*, *infra* Part III(A), distinguishing *Eisentrager* from aliens detained at Guantanamo.

¹⁹⁵ Richard Fallon & Daniel Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2043 (2007).

these issues is far beyond the scope of this Report. However, below are select decisions and statutes relevant to our discussion.

For one, the Supreme Court’s decision in *Braden v. 30th Judicial Circuit Court of Kentucky* cast doubt on the continuing validity of the strict “territorial jurisdiction” rule of *Eisentrager*.¹⁹⁶ The petitioner in *Braden*, a U.S. citizen imprisoned in Alabama, applied to the United States District Court for the Western District of Kentucky for a writ of habeas corpus to compel Kentucky to grant him a speedy trial on an indictment returned by a grand jury of the respondent court regarding whether Kentucky had lodged a detainer with Alabama.¹⁹⁷ The district court granted the writ, but the court of appeals reversed, holding that federal district courts can only issue writs to those physically detained within their respective jurisdictions.¹⁹⁸ On certiorari, the Supreme Court reversed, holding that “[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody.”¹⁹⁹ *Braden* concluded that the federal habeas statute only requires the custodian of the habeas petitioner to be within its jurisdiction, not the petitioner himself.²⁰⁰ In applying this more flexible standard, *Braden* found that the habeas petition filed in Kentucky should not have been dismissed on jurisdictional grounds because even though the petitioner was

¹⁹⁶ *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973). As discussed in greater detail *infra* Part III(A), in *Rasul v. Bush*, the Supreme Court relied on *Braden* in ruling that the relevant inquiry for habeas jurisdiction is the location of the jailer rather than the detainee and possibly overruling the “territorial jurisdiction” rule of *Eisentrager*.

¹⁹⁷ *Braden*, 410 U.S. at 485-86.

¹⁹⁸ *Id.* at 486.

¹⁹⁹ *Id.* at 494-495. The Court first reasoned that it would be more cost effective for the petitioner’s habeas claim to be reviewed in Kentucky. *Id.* at 494 (“The expense and risk of transporting the petitioner to the Western District of Kentucky . . . would in all likelihood be outweighed by the difficulties of transporting records and witnesses from Kentucky to the district where petitioner is confined”).

²⁰⁰ *Id.* at 495 (“So long as the custodian can be reached by service of process, the court can issue a writ ‘within its jurisdiction’ . . . even if the prisoner himself is confined outside the court’s territorial jurisdiction”).

not physically within the territorial jurisdiction of the Western District of Kentucky District Court, the respondent was properly served in that jurisdiction.²⁰¹

Although the federal habeas statute incorporates – and continues to incorporate – the basic procedures of the common law to challenge the legality of detention,²⁰² in recent years Congress has elected to narrow certain protections previously afforded by the statutes.²⁰³ In the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), for example, Congress imposed a statute of limitations for habeas corpus cases,²⁰⁴ and substantially restricted a petitioner’s ability to file successive habeas petitions.²⁰⁵ Federal courts must dismiss any claims raised in a previous petition, and claims not previously raised are subject to dismissal unless the “petitioner is able to demonstrate either that the claim relies on a new retroactive legal rule, or that new facts have been discovered . . . and that these facts establish by clear and convincing evidence that no reasonable fact-finder would have found the petitioner guilty.”²⁰⁶ AEDPA also regulated (and narrowed) the circumstances under which a federal district court is allowed to hold an evidentiary hearing in cases in which the petitioner has failed to take advantage of state court factual development opportunities.²⁰⁷ Finally, AEDPA added a new section to the habeas

²⁰¹ *Id.* at 500-01.

²⁰² The federal habeas statute allows prisoners to submit evidence contesting the government’s allegations, 28 U.S.C. § 2243 (2006), and authorizes the district court to conduct evidentiary hearings into the lawfulness of his confinement, *id.*, including accepting testimonial evidence in person or by deposition or affidavit. *See id.* In other words, petitioners are “entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts.” *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

²⁰³ *Evans v. Thompson*, 465 F.Supp. 2d 62, 67 (D.Mass. 2006). In addition to its limited power to suspend the writ during times of invasion or rebellion, Congress has broad power in defining its scope. *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (the Supreme Court has long recognized that the decision regarding the scope of the writ of habeas corpus is a decision for Congress to make); *Evans*, 465 F.Supp.2d at 72-73.

²⁰⁴ 28 U.S.C. § 2244(d)(1) (2000). Previously, there was no set time limit restricting a petitioner’s ability to seek federal review of a state court decision. John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259, 270 (2006).

²⁰⁵ 28 U.S.C. § 2244(b)(1); Blume, *supra* note 204, at 270.

²⁰⁶ Blume, *supra* note 204, at 270.

²⁰⁷ 28 U.S.C. § 2254(e)(2).

statute that limits the circumstances under which federal courts can grant habeas relief.²⁰⁸ As discussed *infra*, Part I(H), the Supreme Court upheld the constitutionality of AEDPA's restrictions, including the limitation on successive habeas petitions.

Congress also attempted to narrow non-citizens' rights to habeas corpus, particularly in deportation proceedings. In *I.N.S. v. St. Cyr*,²⁰⁹ the Supreme Court addressed Congress' further narrowing of the federal habeas statute in the Illegal Immigration Reform and Responsibility Act of 1996 ("IIRIRA").²¹⁰ IIRIRA attempted to preclude judicial review in deportation proceedings by providing that: (1) "no court shall have jurisdiction to review any final order of removal" relating to criminal aliens²¹¹ and (2) "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."²¹²

In June 2001, a permanent resident alien challenged the provisions of the IIRIRA filing a writ of habeas corpus with the district court.²¹³ At issue in *St. Cyr* was whether the IIRIRA precluded the petitioner from challenging his deportation by writ of habeas corpus in federal court.²¹⁴ The Court noted "at the absolute minimum, the Suspension Clause protects the writ as it existed in 1789" and "[a]t its historical core, the writ of habeas corpus has served as a means of

²⁰⁸ 28 U.S.C. § 2254(d); Blume, *supra* note 204, at 271. Section 2254(d) states: "An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

²⁰⁹ Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1562 (2000).

²¹⁰ *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001).

²¹¹ 8 U.S.C. § 1252(a)(2)(C).

²¹² 8 U.S.C. § 1252(g).

²¹³ *St. Cyr*, 533 U.S. at 293.

reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.”²¹⁵ Because of the importance of habeas, the Court further reasoned that in order to abrogate the writ’s protections, Congress has to state so in clear language.²¹⁶ After reviewing the history of the extension of habeas to non-enemy aliens, the Court held that federal courts had jurisdiction over at least habeas petitions regarding pure questions of law in deportation proceedings.²¹⁷ Applying this minimum constitutional guarantee combined with no clear congressional abrogation of jurisdiction, the Court granted the habeas petition.²¹⁸

H. Adequate and Effective Habeas Substitute

Notwithstanding the limitations of the Suspension Clause, Congress can deny the privileges of habeas corpus so long as it creates an adequate and effective habeas substitute. However, “if a subject of Executive detention ‘were subject to any substantial procedural hurdles which ma[k]e his remedy . . . less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered [under the Suspension Clause].”²¹⁹ Thus, the Supreme Court has always taken a hard look at attempts to create habeas substitutes, and held that the habeas substitute must provide rights and remedies commensurate with traditional habeas review.²²⁰ The Supreme Court has found a replacement to habeas review adequate and effective in only three instances, and only in situations in which federal courts are reviewing state court decisions. In *U.S. v. Hayman*, the Supreme Court reviewed Section 2255 of Title 42, which extinguished the writ for those convicted of federal crimes before Article III judges in

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²¹⁴ *Id.* at 298.

²¹⁵ *Id.* at 301 (internal citations and quotations omitted).

²¹⁶ *Id.* at 299-300.

²¹⁷ *St. Cyr*, 533 U.S. at 305.

²¹⁸ *Id.* at 326.

²¹⁹ *Boumediene v. Bush*, 476 F.3d 981, 1004 (Rogers, C.J., dissenting), *cert. granted* 127 S. Ct. 3078 (quoting *Sanders v. United States*, 313 U.S. 1, 14 (1963)).

exchange for recourse before the sentencing court.²²¹ The Court held Section 2255 to be an adequate or effective substitute for habeas review because the statute provided that if the Section 2255 procedure was shown to be inadequate or ineffective, the habeas remedy would remain open to afford the defendant the necessary hearing.²²² In essence, Section 2255 provided a remedy commensurate to habeas.²²³ Twenty-five years later, the Supreme Court reviewed Section 23-110(g) of the District of Columbia Code, which provides an alternative collateral review procedure which a defendant must utilize in the place of filing a habeas corpus petition.²²⁴ The court in *Swain v. Pressley*, relying heavily on *Hayman*, held that Section 23-110(g) was an adequate and effective substitute for habeas because the final clause of the statute allowed the District Court to entertain a habeas corpus application if it appeared that the remedy created by the statute was inadequate or ineffective to test the legality of the defendant's detention.²²⁵

Finally, in 1996, the Supreme Court reviewed restrictions on successive petitions for the writ under the AEDPA.²²⁶ In *Felker v. Turpin*, the Court concluded that the statute did not unconstitutionally suspend the writ for two reasons: first, the requirement that a habeas petitioner obtain leave from the court of appeals before filing a second petition in the district court simply transferred from the district to the court of appeals a screening function that would have previously been performed by the district court; and second, the restrictions imposed by the AEDPA were part of the evolutionary process of the habeas corpus protocol for abuse of the writ

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²²⁰ *Sanders v. United States*, 373 U.S. 1, 14 (1963).

²²¹ *United States v. Hayman*, 342 U.S. 205 (1952).

²²² *Id.* at 223.

²²³ Donna Duffy & Michael A. Mello, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 473 (1990/1991).

²²⁴ *Swain v. Pressley*, 430 U.S. 372, 375 (1977).

²²⁵ *Id.* at 381.

and did not impose on the writ itself.²²⁷ The most recent discussion of what constitutes an adequate and effective habeas substitute occurred in the dissent to the D.C. Circuit Court's decision in *Boumediene v. Bush*, which will be discussed in detail *infra* Part IV(A).

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²²⁶ The statute in question was 28 U.S.C. § 2244(b), which provided restrictions on the filing of successive habeas corpus petitions.

²²⁷ *Felker v. Turpin*, 518 U.S. 651, 664-65 (1996).

II. LAWS OF WAR REGARDING ENEMY COMBATANTS PRE-SEPTEMBER 11TH

Before the MCA, military commissions had to comply with, *inter alia*, the Uniform Code of Military Justice (“UCMJ”) and the four Geneva Conventions signed in 1949.²²⁸ While an exhaustive review of the UCMJ and Geneva Conventions is beyond the scope of this Report, we briefly highlight a few relevant provisions below.

A. The Uniform Code of Military Justice

The UCMJ can be traced back to the Articles of War of 1775.²²⁹ The American Articles of War consisted of rules for the Continental Army based on the British Articles of War.²³⁰ Two hundred years later, after World War II, Congress created a code applicable to all branches of the armed services, creating greater uniformity in the substantive and procedural law governing the administration of military justice.²³¹ This standardized code, the UCMJ, superseded all the existing military codes and became effective in 1951.²³² The following is a short summary of the relevant provisions of the UCMJ, the Rules for Courts-Martial (“R.C.M.”) and the Military Rules of Evidence (“Mil. R. Evid.”), issued under the UCMJ.²³³ Among others, prisoners of war in custody of the armed forces and individuals who are subject to military tribunal jurisdiction under the laws of war may be tried under these provisions.²³⁴

²²⁸ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2786 (2006) (reasoning that the UCMJ conditions the use of military commissions on the American common law of war, the UCMJ itself and with the rules and precepts of the laws of nations, including the 1949 Geneva Conventions).

²²⁹ Major Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1, 7 (2005).

²³⁰ *Id.*

²³¹ *Id.* at 9.

²³² *Id.* The UCMJ is codified at 10 U.S.C. §§ 801 et seq.

²³³ 10 U.S.C. § 836.

²³⁴ 10 U.S.C. §§ 802(a)(9) & 818. The UCMJ also applies to persons “[s]ubject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.” 10 U.S.C. § 802(a)(12).

The UCMJ and its corresponding rules exhibit several hallmarks of due process. For instance, the UCMJ requires the accused to have notice of his charges as soon as possible.²³⁵ Generally, a prisoner must be brought to trial within 120 days of the preferral of charges or imposition of restraint, whichever date is earliest.²³⁶ Similarly, the UCMJ provides that once the prisoner is in custody or charges have been brought, the prisoner has the right to counsel present during questioning and a right to military counsel at government expense, and may also hire civilian counsel.²³⁷ The UCMJ and its corresponding rules are also carefully orchestrated to preserve impartiality, both of the judge and triers of fact. The unlawful influence of courts martial through admonishment, censure, reprimand of its members by the convening authority or commanding officer or any unlawful attempt by a person subject to the UCMJ to coerce or influence the action of a court martial or convening authority is prohibited.²³⁸

Under the UCMJ, the accused is presumed innocent until his guilt is established beyond a reasonable doubt.²³⁹ Custodial coerced confessions without the statutory equivalent of Miranda warnings are not admissible as evidence unless a narrow “public safety” exception applies.²⁴⁰ No person subject to the UCMJ may be compelled to answer incriminating questions.²⁴¹ A search conducted by a foreign official is unlawful if the accused is subject to gross and brutal treatment.²⁴² Also, the prisoner has the right to compel witnesses necessary to his defense.²⁴³

²³⁵ 10 U.S.C. § 830(b).

²³⁶ R.C.M. 707(a).

²³⁷ 10 U.S.C. § 838; Mil. R. Evid. 305(d)(1). Counsel must be qualified and certified and must not have taken any part in the investigation, unless so requested by the accused. 10 U.S.C. § 827.

²³⁸ 10 U.S.C. § 837.

²³⁹ R.C.M. 920(e). The burden of proof to establish guilt is on the prosecution and any reasonable doubt must be resolved in favor of the defendant. *Id.*

²⁴⁰ 10 U.S.C. § 831.

²⁴¹ 10 U.S.C. § 831(a).

²⁴² Mil. R. Evid. 311(c).

²⁴³ R.C.M. 703.

Finally, although the UCMJ provides a direct appeal mechanism involving military appeals, the primary means of appeal after military appeals have been exhausted for those sentenced by military courts is by writ of habeas corpus. On habeas review, the federal district court must determine whether the military courts have given fair consideration to each of a prisoner's claims.²⁴⁴

B. The Geneva Conventions

In the wake of World War II, four Geneva Conventions were adopted or revised in 1949. This Report focuses on The Third Geneva Convention of 1949, the Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva Convention III").²⁴⁵ Geneva Convention III deals with the protection afforded to prisoners of war ("POWs").²⁴⁶ POWs are lawful combatants who fall into the hands of an enemy.²⁴⁷

Geneva Convention III Article 3 provides that in a conflict not of international character occurring in the territory of one of the High Contracting Parties, each party shall be bound to apply, at a minimum, certain provisions protecting persons no longer taken part in active combat, including those being detained.²⁴⁸ Article 3, which applies even if the relevant conflict is not between signatories of Geneva Convention III, prohibits, with respect to those detained "(1) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and

²⁴⁴ Burns v. Wilson, 346 U.S. 137, 144 (1953).

²⁴⁵ Geneva Convention III replaced the Geneva Convention Relative to the Treatment of Prisoners of War first adopted in 1929 by the United States and 40 other nations ("1929 Geneva Convention III"). Some commentators have observed that 1929 Geneva Convention III played a significant role in the treatment of prisoners of war during World War II. The reality "that millions of prisoners of war from all camps, notwithstanding the holocaust, did return, is due exclusively to the observance of the Geneva Prisoners of War Convention." Josef L. Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision*, 45 A.M. J. INT'L L. 37, 43-45 (1951). The American Red Cross attributed the fact of the survival of 99 percent of the American prisoners of war held by Germany during World War II to compliance with 1929 Geneva Convention III. HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 10 n.44 (1977).

²⁴⁶ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316.

²⁴⁷ See William Haynes, Memorandum to the Members of the ASIL-CFR Roundtable, http://www.cfr.org/publication/5312/enemy_combatants.html.

torture; (2) taking of hostages; (3) outrages upon personal dignity, in particular, humiliating and degrading treatment; [and] (4) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all of the judicial guarantees which are recognized as indispensable by civilized peoples.”²⁴⁹

The balance of Geneva Convention III deals with many aspects of a prisoner’s captivity and punishment. For the purpose of this Report, we have briefly highlighted relevant provisions of Geneva Convention III:

Prisoners at all times must be treated humanely and with respect for their persons and honor;²⁵⁰

No physical or mental torture, or any other type of coercion, may be inflicted upon prisoners of war to secure information;²⁵¹

“In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defense provided for in Article 105 [of Geneva Convention III];”²⁵²

The use of moral or physical coercion to induce a prisoner to admit guilt is prohibited;²⁵³

No prisoner may be convicted without having had an opportunity to present his defense and the assistance of qualified advocate or counsel;²⁵⁴

Judicial investigations relating to prisoners shall be conducted as rapidly as the circumstances permit and so that their trials can take place as soon as possible;²⁵⁵

The maximum amount of time a prisoner shall be detained while awaiting trial is three months;²⁵⁶

Prisoners are entitled to the assistance of their fellow prisoner comrades, to defense by a qualified advocate or counsel of their choice, to the calling of witnesses and to the services of a competent interpreter;²⁵⁷

(continued)

²⁴⁸ Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 246, at art. 3.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at art. 13-14.

²⁵¹ *Id.* at art. 17.

²⁵² *Id.* at art. 84. Further, Article 87 prohibits torture and cruelty when administering punishment. *Id.* at art. 87.

²⁵³ *Id.* at art. 99.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at art. 103.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at art. 105.

The detaining power must advise a prisoner of his rights in due time before trial;²⁵⁸

The prisoner's advocate or counsel must be allowed at least two weeks before the trial, as well as the necessary facilities, to prepare the defense of the accused, to freely visit the prisoner and interview him in private and to confer with any witnesses, including other prisoners; and²⁵⁹

The particulars of the charge[s] on which the prisoner is to be arraigned, along with any other customary information provided to the accused by the detaining power, must be communicated to the prisoner in a language that he understands and in good time before the start of the trial.²⁶⁰

C. Army Regulation 190-8

The obligations of the U.S. in treating enemy prisoners of war in accordance with the laws of war have been implemented by Army Regulation 190-8 ("AR 190-8").²⁶¹ AR 190-8 is a multi-service regulation and applies to the Army, Navy, Air Force and Marine Corps.²⁶² The regulation establishes policies and guidance for the treatment, care, accountability, legal status and administrative procedures for enemy prisoners of war, civilian internees, retained persons, and other detainees.²⁶³ AR 190-8 has been applied for the processing and adjudication of enemy combatants during Operation Desert Storm (where 69,822 Iraqi prisoners were processed), in Panama (where 4,100 detainees were processed and 100 of those detainees were granted POW status) and during the current conflict in Iraq to determine the status of captured enemy belligerents.²⁶⁴

²⁵⁸ *Id.* Failing a choice by the prisoner, the detaining power must provide the prisoner with a competent advocate or counsel to conduct his defense. *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* The prisoner's advocate or counsel is also entitled to these communications. *Id.*

²⁶¹ Army Regulation 190-8, Enemy Prisoners of War, Civilian Internees, Retained Persons and Other Detainees (1997), available at <http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf>.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Frederic L. Borch, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 22, 29 & 104-06 (2001); Dep't of Defense, Briefing on Enemy Prisoner of War Status, Categories, Release and Paroles (May 9, 2003). Further, the U.S. military provided impartial tribunals to determine POW status during Vietnam. Borch, *supra*, at 29.

In pertinent part, AR 190-8 provides that all persons taken into custody by the U.S. shall enjoy the provisions of Geneva Convention III until some other status is determined by competent legal authority.²⁶⁵ Moreover, for those detainees who assert POW status, even for those who have committed a belligerent act or engaged in hostilities in aid of enemy forces and assert POW status, a competent tribunal shall determine their status.²⁶⁶ Such hearings are designed to take place shortly after a prisoner's capture and detention and anyone determined to be an innocent civilian is promptly returned to his home or otherwise released.²⁶⁷ Finally, AR 190-8 prohibits the admission of evidence gained by torture.²⁶⁸

It has been the long-standing policy of the Department of Defense to comply with the laws of war, including Geneva Convention III, in conducting military operations and related activities in an armed conflict.²⁶⁹ The Military instructs its commanders to adhere to the laws of war regardless of the nature of the conflict and to, at least initially, afford all enemy personnel the protections of Geneva Convention III.²⁷⁰

²⁶⁵ “In accordance with Article 5 [of Geneva Convention III], if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the U.S. Armed Forces, belongs to any of the categories enumerated under Article 4 [of Geneva convention III], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” Army Regulation 190-8, *supra* note 261, at § 1-6(a).

²⁶⁶ *Id.* at § 1-6(b).

²⁶⁷ *See id.* at § 1-6(e)(10)(c).

²⁶⁸ *Id.* at § 2-1a(1)(d) (“The use of physical or mental torture or any coercion to compel prisoners to provide information is prohibited”).

²⁶⁹ JUDGE ADVOCATE GENERAL’S SCHOOL, OPERATIONAL WAR HANDBOOK 10 (O’Brien, ed. 2003); *see also* Department of Defense Directive No. 5100.77, ¶5.3.1 (Dec. 9, 1998).

²⁷⁰ OPERATIONAL LAW HANDBOOK, *supra* note 270, at 22.

III. EXECUTIVE DETENTION OF ENEMY COMBATANTS AND LEGISLATIVE AND JUDICIAL RESPONSES

It has been commonly said that September 11th changed everything. Due process concerns inherent to Executive detention have returned to the public discourse as a result of the Administration's new approach to detaining suspected terrorists since September 11th. This new approach has involved an ongoing dialogue between all three branches of Government: the Executive's practices, the Judiciary's review of the same, and Congressional responses to both.

A. *Hamdi & Rasul*

In *Hamdi v. Rumsfeld*, the Supreme Court addressed the constitutionality of the Government's detention of a United States citizen, Yaser Esam Hamdi, as an enemy combatant.²⁷¹ One week after the September 11th attacks, Congress passed the Authorization for Use of Military Force ("AUMF") which granted the President the ability to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons,

²⁷¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004). In the related case of *Rumsfeld v. Padilla*, the Supreme Court reviewed a habeas petition filed by an American citizen detained without charge or trial as an enemy combatant at a naval brig in Charleston, North Carolina. 542 U.S. 426, 430-32 (2004). The Court dismissed Padilla's petition without prejudice because he had filed the writ in the Southern District of New York instead of the District of South Carolina. *Id.* at 451. After dismissal, Padilla's lawyers properly re-filed his case in the District of South Carolina, and that court granted his petition. Norman Abrams, *Developments in U.S. Anti-Terrorism Law*, 4 J. INT'L CRIM. JUST. 1117, 1121 (2006). The Government appealed, and the 4th Circuit reversed the district court's decision. Padilla then filed a petition seeking review by the Supreme Court. *Id.* Shortly thereafter, the Government transferred Padilla into civilian custody for a criminal trial on terrorism related offenses that allegedly occurred before he had been declared an enemy combatant. *Id.* The criminal charges filed against Padilla bore no relationship to the reasons for which he was held in military custody. Bruce Ackerman, *Terrorism and the Constitutional Order*, 75 FORDHAM L. REV. 475, 484 (2006). Padilla was charged with participating in a North American terror cell providing money, goods, and recruits abroad to assist in global jihad. The original accusations against him of planning a "dirty bomb" attack and blowing up apartment buildings were not mentioned in his indictment. Terry Aguayo, *Jury Selection is Slow Going in Padilla Terrorism Trial*, N.Y. TIMES, Apr. 24, 2007, at A21. Although Padilla was convicted and sentenced to 17 years imprisonment, his lawyers alleged that – and even moved to dismiss on the grounds that – Padilla was subject to systematic abuse, including sleep deprivation, detention in a 9-foot-by-7-foot cell, being chained in painful positions and being subjected to mind altering drugs. Peter Whoriskey, *Jury Convicts Jose Padilla of Terror Charges*, WASH. POST, Aug. 17, 2007, at A01. Legal critics have maintained that Padilla's verdict proved that suspected terrorists can be tried in criminal courts, without needing to be designated as "enemy combatants" and held for years without formal charges. *Id.*

in order to prevent any future acts of intentional terrorism against the United States by such nations, organizations, or persons.”²⁷² Soon thereafter, the U.S. invaded Afghanistan.²⁷³ During the conflict with the Taliban, Hamdi was seized by the Northern Alliance (a coalition of military groups opposed to the Taliban) and eventually turned over to the U.S. military.²⁷⁴ Alleged to have taken up arms against the U.S., Hamdi was transferred to Guantanamo in 2002.²⁷⁵ In April 2002, upon learning that Hamdi was in fact a U.S. citizen, the Government transferred him to a naval brig in Norfolk, Virginia where he remained until transfer to a brig in Charleston, South Carolina.²⁷⁶ The Government detained Hamdi as an enemy combatant and on that basis alleged that they could hold Hamdi indefinitely, without formal charges or proceedings, unless and until it made the determination that access to counsel or further process was warranted.²⁷⁷ Hamdi’s father filed a writ of habeas corpus, challenging the lawfulness of his son’s detention.²⁷⁸

The plurality in *Hamdi* first held that Congress, through the AUMF, authorized Hamdi’s detention.²⁷⁹ The court reasoned that the AUMF authorized the President to use all necessary and appropriate force against nations, organizations, or persons associated with the September 11th attacks, and that detaining individuals within that limited category fell within the Congressional authorization.²⁸⁰

However, the plurality did not consider Hamdi’s detention immune from judicial review, emphasizing that “a state of war is not a blank check for the President when it comes to the rights

²⁷² Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224.

²⁷³ *Hamdi*, 542 U.S. at 510.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 510-11.

²⁷⁸ *Id.* at 511.

²⁷⁹ *Hamdi*, 542 U.S. at 517.

²⁸⁰ *Id.* at 518.

of the Nation’s citizens.”²⁸¹ Absent suspension, the writ of habeas corpus remained available to every individual detained in the U.S.²⁸² “[T]he Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining [the] delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.”²⁸³

After determining that the petitioner had the constitutional right to due process via habeas review, the plurality highlighted the minimum amount of process due. The plurality referenced the federal habeas statute, Section 2241 and its companion provisions, as providing a skeletal outline of the basic procedures to be afforded in habeas review.²⁸⁴

[A] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker . . . It is equally fundamental that the right to notice and opportunity to be heard must be granted at a meaningful time and in a meaningful manner. These essential constitutional promises may not be eroded.²⁸⁵

The plurality also held that the detainee has the right to access counsel during the proceedings.²⁸⁶

However, the plurality also found that, aside from the foregoing elements, enemy combatant proceedings may be conducted in such a way as to alleviate the uncommon potential to burden the Executive during an ongoing military conflict.²⁸⁷

²⁸¹ *Id.* at 536.

²⁸² *Id.* at 525.

²⁸³ *Id.* at 536.

²⁸⁴ *Id.* at 525.

²⁸⁵ *Hamdi*, 542 U.S. at 533 (internal citations and quotations omitted).

²⁸⁶ *Id.* at 539.

²⁸⁷ *Id.* at 533. For example, the court reasoned that hearsay may be accepted as evidence and a presumption in favor of the Government’s evidence may be utilized so long as the presumption remains rebuttable and a fair opportunity for rebuttal is provided. *Id.* at 533-34. After the case was remanded to the district court Hamdi was released to Saudi Arabia without charges, after two and half years of detention. Jerry Markon, *Hamdi Returned to Saudi Arabia*, WASH POST., Oct 12, 2004, at A2. Notably, Justice Scalia, in his dissenting opinion, stated “Hamdi is entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus.” *Hamdi*, 542 U.S. at 573.

On the same day of the *Hamdi* decision, the Supreme Court considered in *Rasul v. Bush* the reach of the federal habeas statute to alien enemy combatants detained at Guantanamo.²⁸⁸ Similar to *Hamdi*, petitioners – two Australians and 12 Kuwaitis – were captured abroad during the conflict in Afghanistan.²⁸⁹ After being transferred to Guantanamo in early 2002, the petitioners’ next friends filed habeas petitions and/or complaints for, *inter alia*, access to U.S. courts and notice of the charges against them.²⁹⁰ Relying on *Eisentrager*, the district court, handling all actions as habeas corpus petitions, dismissed the petitions for lack of habeas jurisdiction. The court of appeals affirmed, also relying on *Eisentrager* that: “the privilege of litigation does not extend to aliens in military custody who have no presence in any territory over which the United States is sovereign.”²⁹¹

The *Rasul* court reversed the appellate court holding that the district court had jurisdiction under the federal habeas statute to hear habeas petitions filed by or on behalf of alien enemy combatants held at Guantanamo.²⁹² After reviewing the traditional role of the “Great Writ” as a shield against unlawful executive detention since the Magna Carta, the Court examined the common law and early American jurisprudence establishing access to the writ for citizens and non-citizens alike even during times of war.²⁹³

The Court found that extending the habeas statute to aliens detained in a territory over which the U.S. exercises plenary and exclusive jurisdiction, but not absolute sovereignty, was “consistent with the historical reach of the writ of habeas corpus.”²⁹⁴ At common law, courts exercised habeas jurisdiction over petitions of aliens detained, not only within the sovereignty of

²⁸⁸ *Rasul v. Bush*, 542 U.S. 466 (2004).

²⁸⁹ *Id.* at 470-71.

²⁹⁰ *Id.* at 471-72.

²⁹¹ *Id.* at 472-73 (internal quotations and citations omitted).

²⁹² *Id.* at 484.

²⁹³ *Id.* at 474-75.

the realm, but also in all other dominions under the sovereign's control.²⁹⁵ The Court reasoned that the common law reach of the writ depended not on technical notions of sovereignty, but on the extent and nature of the dominion exercised in fact by the sovereign.²⁹⁶

Applying these principles, *Rasul* held that because the United States exercises “complete jurisdiction and control” over Guantanamo, those detained there were entitled to habeas under the federal habeas statute.²⁹⁷ The *Rasul* Court first looked at the 1903 Lease Agreement of Guantanamo Bay executed with Cuba in the aftermath of the Spanish-American War wherein the U.S. recognized the continued sovereignty of Cuba, but Cuba consented to the U.S. exercising complete jurisdiction and control over and within the areas of the base.²⁹⁸ In 1934, the U.S. and Cuba entered into another treaty providing that the U.S. would remain in control of Guantanamo Bay unless it abandoned the area.²⁹⁹ Thus, by the express terms of the agreements between the U.S. and Cuba, the U.S. exercises complete jurisdiction and control over Guantanamo Bay, and may continue to exercise such control permanently if it so chooses and thus clearly within the territorial jurisdiction of the U.S.³⁰⁰ As Justice Kennedy summed up in his concurrence “[f]rom a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the ‘implied protection’ of the United States to it.”³⁰¹

The Court rejected the court of appeals' reliance on *Eisentrager* as misplaced.³⁰² Unlike the petitioners in *Eisentrager*, the petitioners in *Rasul* were not nationals of countries at war with

(continued)

²⁹⁴ *Rasul*, 542 U.S. at 481.

²⁹⁵ *Id.* at 481-82.

²⁹⁶ *Id.* at 482.

²⁹⁷ *Id.* at 480-81.

²⁹⁸ *Id.* at 471.

²⁹⁹ *Id.*

³⁰⁰ *Rasul*, 542 U.S. at 480-81.

³⁰¹ *Id.* at 487 (Kennedy, J., concurring).

³⁰² *Id.* at 479 (majority op.).

the U.S., denied having engaged in or plotted acts of aggression against the U.S., had not been afforded access to any tribunal, much less been charged or convicted of any wrongdoing, and had for more than two years been detained in a territory in which the U.S. has complete jurisdiction and control.³⁰³ In addition to distinguishing *Eisentrager* on its facts, the Court found that *Braden* had over-ruled *Ahrens v. Clark*, which – relying on *Eisentrager* – held that petitioner’s presence within the territorial jurisdiction of the district court was a prerequisite to jurisdiction under the federal habeas statute.³⁰⁴ Relying on *Braden*, *Rasul* held that “as long as the custodian can be reached by service of process,” the district court could exercise jurisdiction under the federal habeas statute.³⁰⁵

In his concurring opinion, Justice Kennedy also found the facts in *Rasul* distinguishable from *Eisentrager*: first, Guantanamo is in every practical purpose a territory of the U.S. and is far removed from hostilities, and second, the petitioners have been held indefinitely at Guantanamo with no semblance of process, while the petitioners in *Eisentrager* were tried, convicted, and sentenced by a military commission.³⁰⁶ Particularly for the latter reason, Justice Kennedy found, the district court should have jurisdiction to hear the habeas petitions.³⁰⁷

B. Combatant Status Review Tribunals and The Detainee Treatment Act of 2005

Within a week after the *Hamdi* and *Rasul* decisions, the Department of Defense issued an order establishing the Combatant Status Review Tribunals (“CSRT”).³⁰⁸ The CSRT process is

³⁰³ *Id.* at 475-76.

³⁰⁴ *Id.* at 478-79 (Kennedy, J., concurring).

³⁰⁵ *Id.*

³⁰⁶ *Rasul*, 542 U.S. at 487-88.

³⁰⁷ *Id.* at 488.

³⁰⁸ David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantanamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 169 (2008).

currently still used to classify aliens as enemy combatants.³⁰⁹ Once detainees arrive at Guantanamo Bay, they are required to appear before a CSRT.³¹⁰ According to the CSRT procedures, prior to CSRT review, each detainee has already been determined to be an enemy combatant through multiple levels of review by military officers and officials of the Department of Defense.³¹¹ The criteria to be designated as an enemy combatant are as follows:

An “enemy combatant” for purposes of this order shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.³¹²

Each CSRT is composed of three commissioned officers of the U.S. Armed Forces, with each officer having an equal vote as to a detainee’s enemy combatant status.³¹³ A personal representative (who is also a military officer) who can assist the detainee in reviewing unclassified information and questioning witnesses is appointed to each detainee.³¹⁴ Classified information may be used in the CSRT with the concurrence of the originating agency.³¹⁵ The CSRT rules state that the personal representative is not the detainee’s legal counsel³¹⁶ and, in fact, the rules prohibit the detainee from being represented by legal counsel.³¹⁷ The personal representative may share only non-classified information with the detainee, which means the

³⁰⁹ Memorandum from Gordon England, Deputy Secretary of Defense on Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay, Cuba (Jul. 14, 2006), *available at* <http://www.defenselink.mil/news/aug2006/d20060809csrtprocedures.pdf>.

³¹⁰ Robert A. Peal, *Combatant Status Review Tribunals and the Unique Nature of the War on Terror*, 58 VAND. L. REV. 1629, 1651 (2005).

³¹¹ Memorandum from Gordon England, *supra* note 309, at Combatant Status Review Tribunal Process § B.

³¹² *Id.*

³¹³ *Id.* at Combatant Status Review Tribunal Process § C(1).

³¹⁴ *Id.* at Combatant Status Review Tribunal Process § C(3).

³¹⁵ *Id.* at Combatant Status Review Tribunal Process § D(2). If the originating agency does not approve the use of classified information, such information is not “reasonably available.” *Id.*

³¹⁶ *Id.* at Personal Representative Qualifications, Roles and Responsibilities § D.

³¹⁷ *Id.* at Combatant Status Review Tribunal Process § F(5).

detainee is not given access to classified information.³¹⁸ Also, the personal representative has to tell the detainee that no confidential relationship exists or may be formed between the parties.³¹⁹

The personal representative may, when appropriate, be questioned by the CSRT.³²⁰

The CSRT is not bound by the rules of evidence as would apply in courts of law.³²¹ The CSRT can review any information it deems relevant and helpful, such as hearsay evidence or, potentially, evidence derived from coercion or torture, to resolve the issues before it.³²² The CSRT also may admit into evidence the testimony of witnesses not appearing at the hearing, provided via such mediums as email, fax, telephone, or video.³²³

To classify an alien as an enemy combatant, the CSRT must find such classification by a preponderance of the evidence.³²⁴ The Government Evidence submitted against the detainee is given a rebuttable presumption of being genuine and accurate.³²⁵ After a CSRT decision, a legal advisor to the CSRT renders a legal opinion as to the legal sufficiency of the CSRT proceedings to the Director of the CSRT.³²⁶ The Director can either approve the CSRT decision or remand

³¹⁸ *Id.* at Personal Representative Qualifications, Roles and Responsibilities § D.

³¹⁹ *Id.* at Personal Representative Qualifications, Roles and Responsibilities § C(1).

³²⁰ *Id.* at Personal Representative Qualifications, Roles and Responsibilities § C(7).

³²¹ *Id.* at Combatant Status Review Tribunal Process § G(7).

³²² *Id.*; see also CNN, Government: Evidence Gained by Torture Allowed (Dec 2, 2004),

<http://www.cnn.com/2004/LAW/12/02/guantanamo.detainees/index.html> (reporting statement from Deputy Associate Attorney General Brian Boyle that if CSRTs "determine that evidence of questionable provenance were reliable, nothing in the due process clause (of the Constitution) prohibits them from relying on it.")

³²³ Memorandum from Gordon England, *supra* note 309, at Combatant Status Review Tribunal Process § G(9)(c).

³²⁴ *Id.* at Combatant Status Review Tribunal Process § G(11). A majority of the CSRT has to vote for an enemy combatant finding. *Id.* at Combatant Status Review Tribunal Process § G(12).

³²⁵ *Id.* at Combatant Status Review Tribunal Process § G(11). Government Information constitutes reasonably available information in the Government's possession bearing on the issue of whether a detainee meets the enemy combatant criteria, including information in connection with the detainee's initial determination as an enemy combatant, as well as any subsequent reviews of that determination and any records, determinations or reports generated in connection with such proceedings. *Id.* at Combatant Status Review Tribunal Process § E(3).

Government Evidence constitutes that part of the Government Information as may be sufficient to support a detainee's classification as an enemy combatant, such as the circumstances of how the detainee was taken into custody of U.S. or allied forces. *Id.* at Combatant Status Review Tribunal Process § H(4). In the event that the Government Information contains evidence that suggests the detainee should not be designated as an enemy combatant, such information shall be provided to the CSRT separately. *Id.*

³²⁶ *Id.* at Combatant Status Review Tribunal Process § I(7).

for further proceedings.³²⁷ If the Director approves a decision that does not classify a detainee as an enemy combatant, then that detainee is referred to the Secretary of State for deportation.³²⁸

If a detainee is classified as an unlawful enemy combatant, his status is reviewed annually by an Administrative Review Board (“ARB”).³²⁹ The ARB’s task is to determine whether the U.S. should continue to hold a detainee based on whether that detainee “represents a continuing threat to the U.S. or its allies in the ongoing armed conflict against al Qaeda and its affiliates and supporters . . . and whether there are other factors that can form the basis for continued detention.”³³⁰ Other factors include, but are not limited to “(1) the likelihood that the enemy combatant may be subject to trial by military commission and (2) whether the enemy combatant is of continuing intelligence value.”³³¹ An ARB’s determination is forwarded to the Director of Office for the Administrative Review of the Detention of Enemy Combatants (“OARDEC”), who then notifies the Department of Defense and other Government agencies of the ARB’s decision.³³² After OARDEC’s Staff Judge Advocate reviews the ARB’s determination for legal sufficiency, the decision is forwarded to the Designated Civilian Official who renders the decision as to whether an enemy combatant should still be detained.³³³

³²⁷ *Id.* Combatant Status Review Tribunal Process § (I)(8).

³²⁸ *Id.* at Combatant Status Review Tribunal Process § (I)(9).

³²⁹ Memorandum from Gordon England, Deputy Secretary of Defense on Implementation of Administrative Review Board Procedures for Enemy Combatants Detained at Guantanamo Bay, Cuba (Jul. 14, 2006), *available at* <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>. The ARB, like the CSRT, is comprised of military officers and the detainee is again given the option to be assisted by a military officer. *Id.* at Administrative Review Board Process § 2.

³³⁰ *Id.*; Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1111 n.154 (2008).

³³¹ Memorandum from Gordon England, *supra* note 329.

³³² *Id.* at Administrative Review Board Process § 3(g).

³³³ *Id.* at Administrative Review Board Process § 3(h).

In January 2005, D.C. District Court Judge Joyce Green decided several habeas petitions filed by detainees detained as enemy combatants under various CSRTs.³³⁴ The district court found that the CSRT procedures violated the Due Process Clause of the Fifth Amendment because detainees were neither given access to the classified information that supported their detention nor were they given counsel to review that information.³³⁵ Further, with regard to information obtained by coercion, the court found that “[a]t a minimum, due process requires a thorough inquiry into the accuracy and reliability of statements alleged to have been obtained by torture.”³³⁶ Finally, the court held that the overly broad definition of enemy combatant – “an individual who was part of or supporting Taliban or al Qaeda forces[] or associated forces . . .” – was violative of due process.³³⁷

However, D.C. District Court Judge Richard Leon came to a different conclusion in *Khalid v. Bush*.³³⁸ Judge Leon held that the Guantanamo detainees had no constitutional right to habeas and distinguished *Rasul* as limited to the federal habeas statute.³³⁹ Both cases were stayed and consolidated with *Boumediene v. Bush*, as discussed in Part IV(A), *infra*.

Attempting to abrogate *Rasul* and provide the sole review mechanism for CSRT decisions, Congress passed the Detainee Treatment Act of 2005 (“DTA”).³⁴⁰ In pertinent part, the DTA amended Section 2241 of the federal habeas statute to clarify that “no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus

³³⁴ *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005), *vacated sub nom.* *Boumediene v. Bush*, 476 F.3d 981 (2007), *cert. granted sub nom.* *Al Odah v. United States*, 127 S. Ct. 3067. Petitioners’ claims were based on the U.S. Constitution, treaties, statutes, regulations, the common law, and customary international law.

³³⁵ *Id.* at 468-71. The court used the *Matthews v. Eldridge* (424 U.S. 319 (1976)) balancing test to weigh the detainees’ significant liberty interest with the government’s substantial interest in national security, attempting to determine “what procedures will help ensure that innocents are not indefinitely held as ‘enemy combatants’ without imposing undue burdens on the military to ensure the security of this nation and its citizens.” *Id.* at 465-67.

³³⁶ *Id.* at 472-73.

³³⁷ *Id.* at 475-76. The D.C. Circuit vacated this decision in *Boumediene v. Bush* (discussed *infra* Part IV(A)).

³³⁸ 355 F.Supp.2d 311 (D.D.C. 2005).

filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.”³⁴¹ The DTA also established exclusive jurisdiction in the United States Court of Appeals for the District of Columbia to review final decisions of the CSRTs, thus withdrawing all jurisdiction from the federal district and other appellate courts.³⁴²

The review mechanism established by the DTA is limited to only two inquiries: (1) whether the decision classifying an alien as an enemy combatant was consistent with the standards and procedures adopted by the Department of Defense for the CSRTs and (2) whether the use of such standards and procedures is consistent with the Constitution and laws of the United States, to the extent that they apply.³⁴³ The DTA does not address the many detainees that have not been classified as enemy combatants and are still held by the Government.³⁴⁴

In *Bismullah v. Gates*, the D.C. Circuit addressed the scope of review under the DTA.³⁴⁵ In *Bismullah*, eight foreign nationals classified as enemy combatants by CSRTs and detained at Guantanamo petitioned the D.C. Circuit for review of their enemy combatant classification.³⁴⁶ The court held that the DTA required review based on a record consisting of all the information a CSRT is authorized to obtain and consider (Government Information) and not just the information actually obtained and included in the CSRT record.³⁴⁷ The court defined Government Information as information reasonably available and in the possession of the

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³³⁹ *Id.* at 322.

³⁴⁰ Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2007).

³⁴¹ Detainee Treatment Act § 1005(e)(1). The federal habeas statute was later amended by the MCA, as discussed *infra* Part III(D).

³⁴² Detainee Treatment Act § 1005(e)(2)(A). The Military Commissions Act of 2006 provides a review mechanism for decisions of military commissions. See Part III(D), *infra*.

³⁴³ Detainee Treatment Act § 1005(e)(2)(C).

³⁴⁴ Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CALIF. L. REV. 1193, 1209 (2007).

³⁴⁵ *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007).

³⁴⁶ *Id.* at 180.

³⁴⁷ *Id.* The ruling does not go so far as to enable detainees to submit their own evidence on combatancy. Chesney & Goldsmith, *supra* note 330, at 1116.

Government bearing on the issue of whether a detainee meets the criteria to be defined as an enemy combatant, which includes any information presented to the tribunal by the detainee or his personal representative.³⁴⁸ The court further held that in order for its review to be meaningful, it is necessary for the detainees' attorneys to have access to classified portions of the record.³⁴⁹ Counsel for the detained would presumably “need to know” classified information relating to a detainee’s case, except that the Government may withhold from counsel (but not from the court) certain highly sensitive information.³⁵⁰ Moreover, the Government may inspect correspondence from counsel to a detainee and redact anything that does not concern the events leading up to the detainee’s capture.³⁵¹ Finally, lawyers offering his or her services will have up to two visits with a detainee in order to obtain the detainee’s authorization to seek review of enemy combatant status as determined by a CSRT.³⁵²

Judge Rogers, in a concurring opinion, noted that the Executive’s failure to implement and conduct the CSRT procedures in accordance with the rules promulgated by the Department of Defense and the corruption of electronic files containing Government Information undermines confidence in the capacity of the DTA to act as a substitute for habeas review.³⁵³

³⁴⁸ *Bismullah*, 501 F.3d at 180.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.* at 181.

³⁵³ *Id.* at 193-94 (Rogers, C.J., concurring). The D.C. Circuit denied the Government’s petition for rehearing in October 2007. *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007). The D.C. Circuit also denied the Government’s petition for rehearing en banc. *Bismullah v. Gates*, 514 F.3d 1291 (D.C. Cir. 2008) (“*Bismullah III*”). In rebutting the dissenters’ arguments for not including Government Information as part of the record, the *Bismullah III* court noted that a person imprisoned after a probable cause hearing will receive a speedy trial and then either be convicted or released. Here, “the determination of a CSRT is only a determination of the detainee's status as an enemy combatant. Thereafter, it may be that nothing prevents the Government from holding an enemy combatant for the duration of the relevant conflict.” *Id.* at 1297 (internal quotations and citations omitted).

C. *Hamdan v. Rumsfeld*

At the time the DTA was enacted, a number of habeas petitions filed by Guantanamo detainees were on appeal in the District of Columbia.³⁵⁴ One case, *Hamdan v. Rumsfeld*, was also on the Supreme Court's docket.³⁵⁵ In July 2004, the Government filed criminal charges against Hamdan, a Yemeni national captured by military forces in Afghanistan, subsequently detained at Guantanamo, and scheduled to be tried by military commission.³⁵⁶ Before the trial, Hamdan filed suit in federal district court, seeking to enjoin the trial on various legal grounds.³⁵⁷ The district court granted the injunction, the court of appeals reversed, and Hamdan sought review by the Supreme Court, which granted certiorari in November 2005.³⁵⁸ After the Supreme Court granted certiorari in *Hamdan*, Congress passed the DTA, which included a provision barring Guantanamo detainees from filing habeas corpus petitions.³⁵⁹ Shortly thereafter, the Government moved to dismiss *Hamdan* on the ground that the DTA withdrew jurisdiction of the federal courts to hear habeas petitions filed by Guantanamo detainees, even those filed before the DTA was enacted.³⁶⁰ The petitioner contended that such a repeal of habeas corpus was invalid on both constitutional and statutory grounds.³⁶¹

Relying on canons of statutory construction, the Court avoided the constitutional questions to hold that the DTA did not strip the federal courts of jurisdiction to hear Guantanamo detainee habeas petitions pending at the time of the DTA's enactment.³⁶² Turning to the merits of the petition, the Court then found, at most, the President was allowed to convene military

³⁵⁴ Abrams, *supra* note 271, at 1124.

³⁵⁵ *Id.*

³⁵⁶ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2760 (2006); Abrams, *supra* note 271, at 1124.

³⁵⁷ Abrams, *supra* note 271, at 1124.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 1124-25.

³⁶¹ *Id.* at 2763-64.

commissions in circumstances where justified under the Constitution and laws, including the laws of war.³⁶³ However, the Court invalidated the military commissions established to try Hamdan as violative of the UCMJ, the American common law of war, and all four 1949 Geneva Conventions.³⁶⁴ In a concurring opinion, Justice Breyer stated that Congress denied the President the legislative authority to create the military tribunals at issue in *Hamdan*.³⁶⁵ However, in what turned out to be a precursor of events to come, Justice Breyer noted that “[n]othing prevents the President from returning to Congress to seek the authority he believes necessary.”³⁶⁶

D. Military Commissions Act of 2006

1. Legislative History

In response to *Hamdan*, the Senate passed the Military Commissions Act of 2006 (“MCA”) on September 28th, 2006, by a vote of 65-34,³⁶⁷ and the House on September 29th by a vote of 250-170.³⁶⁸ President Bush signed the MCA into law on October 17, 2006, just months after the *Hamdan* decision.³⁶⁹ The MCA expressly grants the President authority to prosecute terror suspects by military tribunal,³⁷⁰ providing the procedural and legal framework for trials by military commission of unlawful enemy combatants alleged to have engaged in or supported

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³⁶² *Hamdan (II)*, 126 S. Ct. at 2769.

³⁶³ *Id.* at 2775. Article of War 15 does not give the President a sweeping mandate to invoke military commissions whenever he deems them necessary. *Id.* at 2774.

³⁶⁴ *Id.* at 2786.

³⁶⁵ *Id.* at 2799 (Breyer, J., concurring).

³⁶⁶ *Id.*

³⁶⁷ United States Senate, U.S. Senate Roll Call Votes 109th Congress – 2nd Session, Vote summary on Passage of Bill (S. 3930 as Amended), available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00259#position.

³⁶⁸ Final Vote Results for Roll Call 508, S. 3930, available at <http://clerk.house.gov/evs/2006/roll508.xml>.

³⁶⁹ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); see also John Yoo & Julian Ku, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 222 (2006) (discussing Congress’ apparent rejection of *Hamdan* in the MCA).

³⁷⁰ Edward Babayan, *Legislative Watch*, 14 NO. 1 HUM. RTS. BRIEF 48, 48 (2006).

hostilities against the U.S.³⁷¹ Despite admitted improvements from the past system, notably providing detainees with several important procedural protections,³⁷² the MCA contains many questionable procedural, substantive, and jurisdictional provisions. Perhaps the most controversial part of the MCA is its provisions stripping federal courts of jurisdiction to hear habeas petitions filed by anyone defined as an alien unlawful enemy combatant, including but not limited to the Guantanamo detainees.

Although the ultimate vote may not reflect it, the MCA was heavily debated. U.S. Senator and 2008 Republican Presidential Nominee John McCain urged the passage of the MCA to address the void and uncertainty left by *Hamdan* that Congress needed to quickly fill to fight the war on terrorism.³⁷³ Notably, McCain did not mention the Act's habeas corpus jurisdiction stripping provisions in his remarks on the Senate floor, nor later in an op-ed for the *Wall Street Journal*, where he dismissed the Act's arguably overbroad definition of "Enemy Combatant," and criticized his opponent's assertion of detainees losing the right to habeas corpus as a "myth."³⁷⁴

The Senate Judiciary Committee held hearings on the constitutionality of the MCA.³⁷⁵ Bradford Berenson, former Associate Counsel to President Bush, criticized *Rasul v. Bush* as "open[ing] the floodgates" for lawsuits from Guantanamo detainees, arguing that the case was

³⁷¹ *Id.*

³⁷² Ida L. Bostian, *One Step Forward, Two Steps Back: Hamdan v. Rumsfeld and the Military Commissions Act of 2006*, 5 SANTA CLARA J. INT'L L. 217, 230 (2006).

³⁷³ U.S. Senator John McCain, McCain Urges Final Passage of the Military Commissions Act of 2006, available at http://mccain.senate.gov/press_office/view_article.cfm?ID=760.

³⁷⁴ U.S. Senator John McCain, Look Past the Tortured Distortions, WALL ST. J., available at http://mccain.senate.gov/press_office/view_article.cfm?ID=883. "Another myth is that, under our bill, detainees would lose the basic right to challenge their imprisonment. Actually, both the Detainee Treatment Act and the Military Commissions Act allow an individual to challenge his status in administrative and judicial fora. These challenges are in excess of what our soldiers would be afforded as prisoners of war." *Id.*

³⁷⁵ The MCA's habeas stripping provisions were strongly criticized in the House Judiciary Committee, but were ultimately retained by a party-line vote of 20-19. John R. Crook, *New U.S. Legislation on Military Commissions, Interrogations, Judicial Review of Detainee Claims*, 101 AM. J. INT'L L. 185, 191 (2007).

the first time that any court of a nation at war had held that its enemies captured in battle had the right to access domestic courts and could sue the Commander-in-Chief to challenge their detentions.³⁷⁶ Berenson contended that the MCA's habeas stripping provisions were constitutional for three reasons: first, the scope of the writ does not include enemy aliens of the U.S. captured during an armed conflict and held abroad; second, even if those enemy aliens had that right, the procedures of the DTA were an adequate and effective habeas substitute; and third, there was a strong argument under the Suspension Clause in the current circumstances to suspend or otherwise limit the applicability of habeas corpus to enemy aliens.³⁷⁷

The MCA had its opponents as well. Senator Patrick Leahy, who voted against the bill, stated that the Act was “a giant step away from fairness and a further leap away from any accountability for actions by the United States Government.”³⁷⁸ Passing laws that remove the few checks available to stop the mistreatment of prisoners will not help in the war efforts, he added.³⁷⁹ Senator Leahy argued that the legislation would have a devastating effect on American security,³⁸⁰ and departed from fundamental American values: “. . . eliminat[ing] habeas corpus review even for persons inside the United States, and even for persons who have not been determined to be enemy combatants.”³⁸¹ The most important purpose of habeas corpus

³⁷⁶ Testimony of Bradford Berenson, Partner, Sidley Austin LLP, Regarding Habeas Corpus Review for Prisoners of War Before the Committee on Senate Judiciary, 2006 WL 2735365.

³⁷⁷ *Id.*

³⁷⁸ U.S. Senator Patrick Leahy, Leahy Opposes “Flagrantly Unconstitutional” Military Commission Bill, September 28, 2006, available at <http://leahy.senate.gov/press/200609/092806c.html>.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.* “It [the MCA] has moved from detention of those who are captured having taken up arms against the United States on a battlefield to millions of law-abiding Americans that the Government might suspect of sympathies for Muslim causes and who knows what else – without any avenue for effective review.” *Id.*

according to Leahy was to correct errors of Executive detention of innocent people and for this reason the “Great Writ” should not be suspended or otherwise eliminated.³⁸²

Several proposed amendments to the MCA were all defeated. One amendment, endorsed by Senator Robert Byrd, would have added a sunset provision expiring the MCA after five years.³⁸³ Senator Ted Kennedy endorsed an amendment that proposed outlawing specific interrogation techniques, including waterboarding.³⁸⁴ Finally, in a proposed amendment that drew considerable debate, Senator Arlen Specter endorsed a modification to the MCA that would have struck the habeas stripping provisions.³⁸⁵ The amendment was narrowly defeated 51-48.³⁸⁶

2. Scope

The MCA applies to a broad class of individuals. The act covers any alien unlawful enemy combatant, as determined by a CSRT or other tribunal established under the authority of the President or Secretary of Defense.³⁸⁷ The term “alien” is defined as a person who is not a citizen of the United States³⁸⁸ and the term “unlawful enemy combatant” is defined as:

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.³⁸⁹

³⁸² *Id.*

³⁸³ The Library of Congress, Military Commissions Act of 2006 – (Senate – September 28, 2006), Amendment No. 5104.

³⁸⁴ The Library of Congress, Military Commissions Act of 2006 – (Senate – September 28, 2006), Amendment No. 5088.

³⁸⁵ The Library of Congress, Military Commissions Act of 2006 – (Senate – September 28, 2006), Amendment No..

³⁸⁶ 152 CONG. REC. S11197 (2006).

³⁸⁷ 10 U.S.C. §§ 948c & 948d(c). The MCA does not provide provisions regulating the procedures of the CSRTs, the tribunals which determine the status of alien combatants. See Part III(B), *supra*, for discussion on CSRTs.

³⁸⁸ 10 U.S.C. § 948a(3); *see also* Rules for Military Commission [hereinafter R.M.C.] § 103(a)(1).

³⁸⁹ 10 U.S.C. § 948a(1)(A); *see also* R.M.C. 102(a)(24). The Act defines “co-belligerent” as “with respect to the United States . . . any State or armed force joining and directly engaged with the United States in hostilities or

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The definition of unlawful enemy combatant can potentially apply to lawful resident aliens.³⁹⁰

3. Procedures

Military commissions under the MCA must be made up of at least 5 members³⁹¹ and are presided over by a military judge.³⁹² The Secretary of Defense prescribes regulations providing for the manner in which military judges are detailed to military commissions.³⁹³

As mentioned above, the MCA provides certain procedural advantages that were not afforded to detainees in the military commissions at issue in *Hamdan*.³⁹⁴ The Act specifies that detainees should receive notice of charges “as soon as practicable,”³⁹⁵ and affords detainees some form of Fifth Amendment protection against self-incrimination.³⁹⁶ Also, detainees are allowed to present evidence for defense purposes, cross examine witnesses who testify against them, and respond to evidence against them on the issues of guilt, innocence, or sentencing.³⁹⁷ Furthermore, the detainees are generally afforded the right to be present at all sessions of the military commission.³⁹⁸

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directly supporting hostilities against a common enemy.” 10 U.S.C. § 948a(1)(B); *see also* R.M.C. 102(a)(24)(C). The Act defines “lawful enemy combatant” essentially as those enemy combatants who belong to the regular forces of a State or who belong to regular armed forces who profess allegiance to a State engaged in hostilities with the U.S. 10 U.S.C. § 948a(2).; *see also* R. M.C. 102(a)(14).

³⁹⁰ Babayan, *supra* note 370.

³⁹¹ 10 U.S.C. § 948m; *see also* R.M.C. 501 (requiring also that capital cases have twelve members, and even under exigent circumstances at least nine).

³⁹² 10 U.S.C. § 948j(a); *see also* R.M.C. 501.

³⁹³ 10 U.S.C. § 948j(a). R.M.C. 503(b) provides that judges are selected from a list of military judges nominated by the Judge Advocates General of each service.

³⁹⁴ Bostian, *supra* note 372, at 230-31.

³⁹⁵ 10 U.S.C. § 948q(b); *see also* R.M.C. 308, 602 (requiring service of charges “sufficiently in advance of trial to prepare a defense”).

³⁹⁶ 10 U.S.C. § 948r(a); *see also* Military Commission Rule of Evidence [hereinafter M. Comm. R. Evid.] 301(a) (barring the compulsion of testimony before the military commission itself).

³⁹⁷ 10 U.S.C. § 949a(b)(1)(A); *see also* R.M.C. 913.

³⁹⁸ 10 U.S.C. § 949a(b)(1)(B) (“The accused shall be present at all sessions of the military commission (other than those for deliberations or voting)” . . .”); *see also* R.M.C. 804.

In addition to prohibiting torture,³⁹⁹ the Act specifically provides that statements obtained by the use of torture would be inadmissible at a military commission.⁴⁰⁰ However, the MCA also provides:

Statements obtained before the DTA in which the degree of coercion is disputed may be admitted if (1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (2) the interests of justice would best be served by admission of the statement into evidence.⁴⁰¹

Further, statements after the DTA where the degree of coercion is disputed may be admissible if:

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; (2) the interests of justice would best be served by admission of the statement into evidence; and (3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.⁴⁰²

Evidentiary rules under the MCA are relaxed. Evidence is admissible under the Act if the military judge deems it would have probative value to a reasonable person.⁴⁰³ Hearsay evidence, as well as classified evidence against the accused in situations where the accused has not had an opportunity to review and challenge the sources, methods, or activities by which that evidence was gained, may be admissible.⁴⁰⁴ For example, the head of the executive, military or concerned government agency may prevent classified information from disclosure if disclosure would be detrimental to national security.⁴⁰⁵ In addition, the Act limits the Government's responsibility to fully disclose exculpatory evidence to the accused.⁴⁰⁶

³⁹⁹ John Duberstein, *Excluding Torture: A Comparison of the British and American Approaches to Evidence Obtained by Third Party Torture*, 32 N.C. J. INT'L L. & COM. REG. 159, 176 (2006).

⁴⁰⁰ 10 U.S.C. § 948r(b); *see also* M. Comm. R. Evid. 304.

⁴⁰¹ 10 U.S.C. § 948r(c); *see also* M. Comm. R. Evid. 304(c).

⁴⁰² 10 U.S.C. § 948r(d); *see also* Mil. Comm. R. Evid. 304(d).

⁴⁰³ 10 U.S.C. § 949a(b)(2)(A); *see also* M. Comm. R. Evid. 401, 402.

⁴⁰⁴ 10 U.S.C. §§ 949(b)(2)(E) & 949d(f)(2)(B); Bostian, *supra* note 372, at 230-31. *See also generally* M. Comm. R. Evid. 507 (identity of informants), 802 (hearsay).

⁴⁰⁵ 10 U.S.C. § 949d(f)(1)(A)-(B); *see also* M. Comm. R. Evid. 505. To make such a determination, the information has to be properly classified and disclosure of the information would have to be detrimental to national security.

⁴⁰⁶ 10 U.S.C. § 949j(c)-(d); Bostian, *supra* note 372, at 231; *see also* M. Comm. R. Evid. 505.

Another troubling section of the MCA is its exclusion of the Geneva Conventions as a source of rights for the detained.⁴⁰⁷ For instance, the Act provides that: (1) “[n]o alien unlawful enemy combatant subject to trial by military commission . . . may invoke the Geneva Conventions as a source of rights”⁴⁰⁸ and (2) “no person may invoke the Geneva Conventions . . . in any habeas corpus or other civil action . . . to which the United States . . . is a party as a source of rights in any court of the United States or its States or territories.”⁴⁰⁹ Notably, the exclusion of the Geneva Conventions as a source of rights contradicts another provision of the MCA that the military commissions organized under its jurisdiction afford all the necessary judicial guarantees that are recognized as indispensable to civilized people for purposes of common Article III of the Geneva Conventions.⁴¹⁰ Some crimes within the MCA’s jurisdiction are also defined in the MCA by reference to the Geneva Conventions, creating the paradox of a person being charged with a crime but not being able to cite the source of law providing the basis of his prosecution.⁴¹¹

Regarding convictions and penalties, the Act provides that no person shall be convicted of any offense under the Act except by concurrence of two-thirds of the members present at the time the vote is taken.⁴¹² For offenses that result in life imprisonment, or confinement for more than 10 years, three-fourths of the members present at the time the vote is taken must concur.⁴¹³ When the death penalty is sought, the number of members of a military commission shall not be

⁴⁰⁷ Assoc. of the Bar of the City of New York, The City Bar’s Commitment to National Security & the Rule of Law, http://www.abcnyc.org/NationalSecurity_Rule_Law.htm.

⁴⁰⁸ 10 U.S.C. § 948b(g).

⁴⁰⁹ Military Commissions Act of 2006 § 5(a), Pub. L. No. 109-366, 120 Stat. 2600.

⁴¹⁰ 10 U.S.C. § 948b (f); Bostian, *supra* note 372, at 231.

⁴¹¹ Bostian, *supra* note 372, at n.83.

⁴¹² 10 U.S.C. § 949m(a); *see also* R.M.C. 921(c)(2).

⁴¹³ 10 U.S.C. § 949m(b)(2); *see also* R.M.C. 1006(d)(4)(B).

less than 12.⁴¹⁴ For imposition of the death penalty, the vote must be unanimous as to the guilt of the offense charged and the sentence of death.⁴¹⁵

4. Habeas Corpus

Section 7(a) of the MCA amends the federal habeas statute by providing:

[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.⁴¹⁶

Section 7(b) further amends the federal habeas statute in pertinent part:

Except as provided in [the DTA] . . . no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.⁴¹⁷

Regarding the verdicts of military commissions, the MCA allows collateral appeals only to the D.C. Circuit Court and, by writ of certiorari, to the U.S. Supreme Court.⁴¹⁸ The MCA limits the D.C. Circuit's review to matters of law and retains the DTA's scope, limiting the D.C. Circuit's review to whether the final decision was consistent with the standards and procedures of the MCA and, to the extent applicable, the Constitution and laws of the United States.⁴¹⁹ The MCA precludes all other possible avenues of judicial review by stating that:

⁴¹⁴ 10 U.S.C. § 949m(c)(1); *see also* R.M.C. 501(b). Under limited circumstances, a lesser amount of members may be present when the death penalty is sought, but never less than nine members. 10 U.S.C. § 949m(c)(2); *see also* R.M.C. 501(c).

⁴¹⁵ 10 U.S.C. § 949m(b)(1)(C)-(D); *see also* R.M.C. 1004. Further, the penalty of death must be expressly authorized for the offense charged and trial counsel must file a notice seeking the death penalty in advance of trial. 10 U.S.C. § 949m(b)(1)(A)-(B); *see also* R.M.C. 1004.

⁴¹⁶ Military Commissions Act of 2006 § 7(a), Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 28 U.S.C. § 2241(e)(1)).

⁴¹⁷ Military Commissions Act of 2006 § 7(b), Pub. L. No. 109-366, 120 Stat. 2600 (codified at 28 U.S.C. § 2241(e)(2)).

⁴¹⁸ 10 U.S.C. § 948g; Bostian, *supra* note 372, at 234.

⁴¹⁹ 10 U.S.C. § 950g(b)-(c).

no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.⁴²⁰

Finally, jurisdiction stripping provisions of the MCA apply retroactively.⁴²¹

The habeas stripping provisions of the MCA also eliminate any meaningful way of enforcing the Act's anti-torture provisions.⁴²² While Section 6(c)(1) of the MCA provides that no individual in U.S. custody shall be subject to cruel, inhuman, or degrading treatment or punishment,⁴²³ section 7(a) strips the federal courts of jurisdiction to hear habeas corpus petitions challenging any aspect of the treatment or detention of a detainee, without providing an alternative means of challenge.⁴²⁴

⁴²⁰ 10 U.S.C. § 950j(b).

⁴²¹ Military Commissions Act of 2006 § 7(a), Pub. L. No. 109-366, 120 Stat. 2600 (codified at 28 U.S.C. § 2241 note); *see also* 10 U.S.C. § 950j(b) (“[the amendments to the federal habeas statute] shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.”)

⁴²² Section 5 of the MCA, which states that no person may invoke the Geneva Conventions as a source of rights against the United States, also has the potential to render the torture prohibition provisions of the MCA ineffective. In *In re Iraq and Afghanistan Detainees Litigation*, plaintiffs brought suit against the former Secretary of Defense and other high ranking military officials seeking monetary damages stemming from torture and other abuses while detained in Iraq and Afghanistan. The court dismissed all complaints, relying in part on Section 5 of the MCA. *In re Iraq and Afghanistan Detainees Litig.*, 479 F.Supp.2d 85, 117 (D.D.C. 2007) (the MCA confirms the court's view that Geneva Convention IV is not self-executing). This case is discussed in further detail *infra* Part IV(C).

⁴²³ W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT'L L. 852, 853 (2006).

⁴²⁴ *Id.* at 854.

IV. BOUMEDIENE AND POST-MCA DEVELOPMENTS

A. *Boumediene v. Bush*

Shortly after passage of the MCA in October 2006, the Government moved to dismiss various pending habeas petitions in the District of Columbia.⁴²⁵ Before the MCA, as discussed in Part III(B), *supra*, Judge Green rejected the Government's motion to dismiss petitioners' habeas petitions in *In re Guantanamo Detainee Cases*.⁴²⁶ Judge Richard J. Leon, however, granted the motion to dismiss in the two cases before him (*Khalid v. Bush* and *Boumediene v. Bush*).⁴²⁷ On appeal, the D.C. Circuit consolidated all cases for argument. The lead case was *Boumediene v. Bush*, with the companion case named *Al Odah v. United States*.⁴²⁸ A divided appellate court upheld the constitutionality of the habeas corpus jurisdiction stripping provisions of the MCA in *Boumediene*.⁴²⁹ Although the Supreme Court first denied petitioners' certiorari petition, the Court later reversed itself, agreeing to hear the case and held oral arguments in December 2007. The decision is expected at the end of the 2007-2008 Term.

The issue in *Boumediene* was whether the MCA stripped the ability of the detainees to file habeas petitions in federal court and, if so, whether the MCA constituted an unconstitutional stripping of habeas corpus.⁴³⁰ The majority first held that the MCA applies retroactively, thus barring the federal courts from hearing all pending Guantanamo habeas petitions.⁴³¹ Turning to the constitutional question, the court examined the history of habeas at common law, and found

⁴²⁵ Karen De Young, *Court Told it Lacks Power in Detainee Cases*, WASH. POST, Oct. 20, 2006, at A18. The Justice Department listed 196 pending cases. *Id.*

⁴²⁶ *In re Guantanamo Detainee Cases*, 355 F. Supp.2d 443 (D.D.C. 2005), *vacated sub nom.* *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted* 127 S.Ct 3078.

⁴²⁷ *Khalid v. Bush*, 355 F.Supp.2d 311 (D.D.C. 2005), *vacated sub nom.* *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted* 127 S.Ct 3078.

⁴²⁸ *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted* 127 S.Ct 3078. *Al-Odah* was one of the eleven cases contained in *In re Guantanamo Detainee Cases*. When that case was appealed, it was renamed *Al-Odah*.

⁴²⁹ *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted* 127 S.Ct 3078.

⁴³⁰ *Id.* at 986-88.

no cases extending the writ to enemy aliens outside the sovereignty of the British Crown.⁴³² The majority thus concluded that habeas corpus would not have been available in 1789 to aliens without presence or property within the United States.⁴³³ The majority also relied on *Eisentrager* and subsequent cases as “establishing that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of [the United States’] geographic borders.”⁴³⁴ Notably, the majority declined to distinguish those detained at Guantanamo from *Eisentrager*, citing Congress’s determination in the DTA that in a geographical sense, the United States does not include Guantanamo Bay.⁴³⁵ In sum, the majority held that petitioners did not have a constitutional right to habeas corpus and dismissed the case.⁴³⁶

In her dissent, Judge Rogers argued that the MCA’s suspension of habeas corpus was unconstitutional and did not preclude federal courts from hearing habeas petitions filed by Guantanamo detainees.⁴³⁷ The dissent first agreed with the majority that the habeas corpus jurisdiction stripping provisions of the MCA applied retroactively to the pending detainee petitions.⁴³⁸ However, the dissent strikingly departed from the majority in concluding that the writ as it existed in 1789 would have been available to the Guantanamo detainees. According to Judge Rogers, the lack of English cases showing an extension of habeas to enemy alien detainees held outside the Crown’s sovereignty was “a consequence of the unique confluence of events that defines the situation of those detainees and not a commentary on the reach of the writ at

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⁴³¹ *Id.* at 987.

⁴³² *Id.* at 989.

⁴³³ *Boumediene*, 476 F.3d at 990.

⁴³⁴ *Id.* at 991 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)).

⁴³⁵ *Id.* at 992.

⁴³⁶ *Id.* at 994.

⁴³⁷ *Boumediene*, 476 F.3d at 994-95 (Rogers, C.J., dissenting).

⁴³⁸ *Id.* at 999.

common law.”⁴³⁹ Conversely, the dissent pointed out that there are no cases where an English court “has refused to exercise habeas jurisdiction because the enemy being held, while under the control of the Crown, was not within the Crown’s dominion.”⁴⁴⁰ Indeed, the dissent noted various examples from the common law establishing that foreign nationals were able to challenge their detention under habeas whether detained within or without the sovereignty of the Crown.⁴⁴¹ Most importantly, the dissent criticized the majority for ignoring the Supreme Court’s declaration in *Rasul* that “[a]pplication of the habeas statute to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus.”⁴⁴²

After concluding that petitioners were entitled to habeas, the dissent examined whether the CSRT and MCA were adequate and effective habeas substitutes. Applying the “adequate and effective” standard, the dissent found that the CSRT procedure and the accompanying limited judicial review failed to provide a procedure commensurate to habeas corpus.⁴⁴³ The dissent noted various failings of the CSRT rendering it an inadequate and ineffective habeas substitute. First, the CSRT procedure did not provide sufficient similar procedure afforded to a petitioner in habeas review.⁴⁴⁴ Typically, the detainee must have notice of the charges against him and be afforded a reasonable opportunity to present evidence contesting the legality of his detention.⁴⁴⁵ Under the CSRT, however, the detainee might not be informed of his charges and might not be given the opportunity to introduce rebuttal evidence.⁴⁴⁶

⁴³⁹ *Id.* at 1000-01.

⁴⁴⁰ *Id.* at 1000.

⁴⁴¹ *Id.* at 1001-04.

⁴⁴² *Boumediene*, 476 F.3d at 1002 (quoting *Rasul v. Bush*, 542 U.S. 481 (2004) (alterations in original)); *see also* Part III(A), *supra*, for discussion of *Rasul*.

⁴⁴³ *Id.* at 1005.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

Furthermore, the dissent concluded, the limited appeal structure of CSRT determinations were not designed to cure the procedural inadequacies. The D.C. Circuit Court may review only the record developed by the CSRT to assess whether the CSRT has complied with its own standards and procedures.⁴⁴⁷ Also, while the D.C. Circuit Court can review the CSRT to ensure consistency with the Constitution and laws of the United States, the writ should always issue whenever the Executive lacks a lawful justification for continued detention.⁴⁴⁸ Finally, even if the D.C. Circuit in its limited review capacity determines that a detainee is being unlawfully held, a remedy is not guaranteed.⁴⁴⁹ Thus, the dissent concluded that the MCA did not set up an adequate and effective substitute for federal habeas review.

In conclusion, the dissent addressed the validity of Congress' suspending the writ. Congress, the dissent argued, has rarely suspended the writ and, in those rare instances, has always made the predicate finding of rebellion or invasion and limited the suspension to the length of the predicate conditions.⁴⁵⁰ Because the MCA contains neither of these hallmarks of suspension, the dissent found that the MCA was not a valid habeas suspension.

The Supreme Court initially denied certiorari in *Boumediene*.⁴⁵¹ The *Boumediene* petitioners filed a motion for rehearing of the denial of certiorari, and the Court, reversing itself,

⁴⁴⁷ *Boumediene*, 476 F.3d at 1006.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* at 1007.

⁴⁵¹ *Boumediene v. Bush*, 127 S. Ct. 1478 (2007). While recognizing the obvious importance of the issues raised, Justices Stevens and Kennedy stated that traditional rules governing constitutional questions and the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus justified denying the certiorari petitions. *Id.* The Justices added, however, that the petitioners need not exhaust ineffective remedies, and they would reconsider the certiorari petition if it alleged: 1) that the Government was unreasonably delaying the proceedings, 2) some other and ongoing injury, or 3) that the Government was taking additional steps to prejudice the positions of petitioners in seeking review by the Supreme Court. *Id.* Justices Breyer, Souter, and Ginsburg would have granted certiorari, and Justices Breyer and Souter would also have expedited arguments, as they considered the issue of immense constitutional importance. *Id.* at 1478-79.

granted the motion for rehearing and ordered the case set for oral argument.⁴⁵² This development was quite surprising, as the Court has not granted a motion to reconsider an initial denial of certiorari in recent memory.⁴⁵³ Although there is little information as to the Supreme Court's change of heart, it has been speculated that Justice Kennedy changed his vote,⁴⁵⁴ thus retreating from his earlier position that the other remedies available to the petitioners had to be exhausted first.⁴⁵⁵ Lawyers involved in the case speculated that an affidavit by Stephen E. Abraham, a former military official who worked in the Office for the Administrative Review of the Detention of Enemy Combatants, may have influenced the Court's decision.⁴⁵⁶ Abraham's affidavit alleged, among other things, a biased process that was skewed towards classifying detainees as enemy combatants.⁴⁵⁷

Many individuals and organizations filed amicus curiae briefs in *Boumediene* before the Supreme Court.⁴⁵⁸ A group of retired military officers filed a brief supporting *Boumediene* and Al Odah, while another group supported the government's position.⁴⁵⁹ Legislators from Canada, the United Kingdom, and Europe filed in support of the petitioners,⁴⁶⁰ as did a group of legal

⁴⁵² *Boumediene v. Bush*, 127 S. Ct. 3067 (2007).

⁴⁵³ William Glaberson, *In Shift, Justices Agree to Review Detainees' Case*, N.Y. TIMES, June 30, 2007, available at <http://www.nytimes.com/2007/06/30/washington/30scotus.html>.

⁴⁵⁴ *Id.*

⁴⁵⁵ *See supra* note 451.

⁴⁵⁶ Glaberson, *supra* note 453.

⁴⁵⁷ *Id.*; *see also* Reply to Opposition to Petition for Rehearing for Khaled A. F. Al Odah, et al., No 06-1196 (Jun. 22, 2007), available at <http://www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf> (reprinting the Abraham affidavit).

⁴⁵⁸ Brief of Amicus Curiae the Association of the Bar of the City of New York in Support of Petitioners, *Boumediene v. Bush*, No. 06-1195 (Aug 24, 2007), 2007 WL 2414901.

⁴⁵⁹ *Compare* Brief of Retired Admirals and Generals, et al. as Amici Curiae in Support of Respondents, *Boumediene v. Bush*, No. 06-1195 (Oct. 9, 2007), 2007 WL 2986451 *with* Brief Amicus Curiae of Retired Military Officers in Support of Petitioners, *Boumediene v. Bush*, No. 06-1195 (Aug 24, 2007), 2007 WL 2441579.

⁴⁶⁰ Amicus Curiae Brief of 383 United Kingdom and European Parliamentarians in Support of Petitioners, *Al Odah v. United States*, No. 06-1196 (Aug 24, 2007), 2007 WL 2441594; Brief of Amici Curiae Canadian Parliamentarians and Professors of Law in Support of Reversal, *Boumediene v. Bush*, No. 06-1195 (Aug. 24, 2007), 2007 WL 2456943.

historians⁴⁶¹ and several groups of law professors.⁴⁶² Interestingly, conservative and libertarian organizations were split, with the American Center for Law and Justice and the Washington Legal Foundation supporting the government.⁴⁶³ Meanwhile, the Cato Institute and the Rutherford Institute supported the detainees.⁴⁶⁴ Senator Arlen Specter, the ranking Republican member of the Senate Committee on the Judiciary, also filed a brief supporting Boumediene and Al Odah's position.⁴⁶⁵ But perhaps the most interesting brief was filed by a group of specialists in Israeli military and constitutional law, who argued that Israel has managed to preserve meaningful judicial review of executive detentions (including the right to counsel) under extremely difficult circumstances, and that there is no reason America should not follow suit.⁴⁶⁶

B. *Hamdan (II), al-Marri and other MCA Case Law*

As discussed above, after the passage of the MCA, the Department of Justice formally notified the D.C. District Court that it no longer had jurisdiction to consider the hundreds of pending habeas corpus petitions filed by Guantanamo detainees.⁴⁶⁷ The first case to be decided by the D.C. District Court after the notice was *Hamdan v. Rumsfeld (II)*.⁴⁶⁸ On remand from the Supreme Court's *Hamdan* decision, the Government sought dismissal of Hamdan's petition for

⁴⁶¹ Brief of Legal Historians as Amici Curiae in Support of Petitioners, *Boumediene v. Bush*, No. 06-1195 (Aug. 24, 2007), 2007 WL 2441583.

⁴⁶² See, e.g., Brief of Amici Curiae Canadian Parliamentarians and Professors of Law in Support of Reversal, *supra* note 460.

⁴⁶³ Motion of Leave to File and Brief Amicus Curiae of the American Center for Law and Justice in Support of Respondents, *Boumediene v. Bush*, No. 06-1195 (Oct. 9, 2007), 2007 WL 2972244 (organization headed by noted conservative Supreme Court advocate Jay Sekulow); Brief of Retired Admirals and Generals, et al. as Amici Curiae in Support of Respondents, *supra* note 459 (filers of brief included the Washington Legal Foundation, a pro-free enterprise, anti-regulation group).

⁴⁶⁴ Brief of the Cato Institute as Amicus Curiae in Support of Petitioners, *Boumediene v. Bush*, No. 06-1195 (Aug. 24, 2007), 2007 WL 2441584 (leading libertarian organization); Brief for Amici Curiae Coalition of Non-Governmental Organizations, *Boumediene v. Bush*, No. 06-1195 (Aug. 24, 2007), 2007 WL 2428372 (brief from a diverse array of organizations, including the moderate-to-conservative Rutherford Institute).

⁴⁶⁵ Brief Amicus Curiae of United States Senator Arlen Specter in Support of Petitioners, *Boumediene v. Bush*, No. 06-1195 (Aug. 24, 2007), 2007 WL 2441578.

⁴⁶⁶ Brief of Amici Curiae Specialists in Israeli Military Law and Constitutional Law in Support of Petitioners, *Boumediene v. Bush*, No. 06-1195 (Aug. 24, 2007), 2007 WL 2441592.

⁴⁶⁷ De Young, *supra* note 425, at A18.

habeas relief, arguing that the court lacked subject matter jurisdiction in light of the MCA. The court first ruled that Congress did in fact intend to limit the statutory habeas jurisdiction of the federal courts,⁴⁶⁹ but held that the MCA was not a constitutionally valid suspension of the writ of habeas corpus.⁴⁷⁰ The protection of habeas corpus is absolute in the absence of rebellion or invasion, and because neither rebellion nor invasion were occurring at the time the MCA was enacted, as it had during the four times Congress had previously suspended habeas, “the Great Writ ha[d] survived the Military Commissions Act . . . [and] if and to the extent that the MCA operates to make the writ unavailable to a person who is constitutionally entitled to it, it must be unconstitutional.”⁴⁷¹

The court, however, held that Hamdan was not entitled to habeas corpus. Finding no authority in the common law where aliens outside of the Crown’s sovereignty had the right to seek habeas relief, the court concluded that in American habeas actions, alien petitioners had access to the writ largely because they resided, lawfully or unlawfully, on American soil.⁴⁷² Hamdan lived for five years within the plenary and exclusive jurisdiction of the United States, the court reasoned, but he has not become enough a part of the population to separate himself from the common law tradition generally barring non-resident aliens from accessing courts during wartime.⁴⁷³ Relying on *Eisentrager* as the controlling authority on the availability of constitutional habeas to enemy aliens, the court dismissed Hamdan’s petition for lack of subject matter jurisdiction.⁴⁷⁴ Recently, the Supreme Court, without discussion, denied the petitioner’s

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⁴⁶⁸ Hamdan v. Rumsfeld, 464 F.Supp.2d 9 (D.D.C 2006).

⁴⁶⁹ *Id.* at 11-12.

⁴⁷⁰ *Id.* at 12-16.

⁴⁷¹ *Hamdan (II)*, 464 F.Supp.2d at 16.

⁴⁷² *Id.* at 17.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 17-19. See Part I(F), *supra*, for *Eisentrager* discussion.

motion to expedite consideration for a writ of certiorari,⁴⁷⁵ and the case is now on appeal to the D.C. Circuit Court.

Hamdan (II) foretold the D.C. Circuit Court's later decision in *Boumediene* and several other courts have relied on *Boumediene*'s holding in dismissing habeas petitions from foreign nationals. In *Kiyemba v. Bush*, the D.C. Circuit Court dismissed petitions from nine alleged enemy combatants being held at Guantanamo Bay because of lack of subject matter jurisdiction.⁴⁷⁶ The D.C. District Court in *Hicks v. Bush* relied on *Boumediene* to reject an injunction application under the All Writs Act because it lacked subject matter jurisdiction.⁴⁷⁷ Finally, in *Zalita v. Bush*, the D.C. District Court cited *Boumediene* to decline to enjoin the Government from transferring a detainee to a country where he alleged he would be subject to torture and extrajudicial killing.⁴⁷⁸

The Government's reliance on the MCA to dismiss habeas petitions filed by those detained as enemy combatants is not limited to Guantanamo detainees. In *al-Marri ex rel. Berman v. Wright*, the Government moved to dismiss al-Marri's habeas petition challenging his detention in a South Carolina naval brig as an alleged enemy combatant. In 2003, al-Marri, a citizen of Qatar and lawful U.S. resident under a student visa, was weeks away from trial for credit card fraud when the Bush administration declared him an enemy combatant, removed him

⁴⁷⁵ *Hamdan v. Gates*, 127 S. Ct. 1507 (2007) (Justices Souter and Breyer would have granted expedited consideration).

⁴⁷⁶ *Kiyemba v. Bush*, 219 Fed App'x 7 (D.C. Cir. 2007).

⁴⁷⁷ *Hicks v. Bush*, No. 02-299, 2007 WL 902303 (D.D.C. Mar. 23, 2007) (holding that because the court had no jurisdiction to hear a habeas petition under *Boumediene*, it lacked authority to issue an injunction under the All Writs Act to halt his forthcoming trial by military commission). The petitioner pled guilty, was sentenced to seven years' imprisonment with all but nine months suspended, and was released in December 2007. Patrick Porter, Writer, Jurist, Ex-Guantanamo Bay detainee Hicks released from Australian prison, <http://jurist.law.pitt.edu/paperchase/2007/12/ex-guantanamo-bay-detainee-hicks.php>.

⁴⁷⁸ *Zalita v. Bush*, No. 05-1220, 2007 WL 1183910, at *1 (D.D.C. Apr. 19, 2007) (dismissing for lack of subject matter jurisdiction under Section 7(a) of the MCA). However, the court has granted a motion for reconsideration and stayed further proceedings pending the Supreme Court's decision in *Boumediene*. See Ctr. For Constitutional Rights, *Zalita v. Bush*, <http://ccrjustice.org/ourcases/current-cases/zalita-v.-bush>.

from the criminal justice system, and detained him in a military brig in South Carolina.⁴⁷⁹ Human Rights Watch alleged that “[h]e was held incommunicado for sixteen months until attorneys acting on his behalf finally were allowed to see him.”⁴⁸⁰ He then filed a habeas corpus petition in the District Court of South Carolina.⁴⁸¹ After the district court dismissed his habeas petition, al-Marri appealed to the Fourth Circuit.⁴⁸² The MCA was passed during al-Marri’s appeal and the Government moved to dismiss arguing that the MCA stripped all federal courts of jurisdiction over any non-citizen determined to be an unlawful enemy combatant, regardless of where they were arrested or detained.⁴⁸³ The case marked the first instance of the Administration’s attempt to use the MCA’s broad scope to classify a lawful U.S. resident an enemy combatant and detain him within the U.S. without habeas review.⁴⁸⁴

The Fourth Circuit reversed the district court’s denial of the writ. Because al-Marri was captured and detained within the United States, he had a constitutional right to habeas unless Congress had invoked its powers under the Suspension Clause, and it had not.⁴⁸⁵ The Government claimed that the CSRT process was an adequate and effective substitute, but the Fourth Circuit questioned whether the process could provide al-Marri with a substitute remedy, as he was never afforded a CSRT and nothing guaranteed that he be granted one.⁴⁸⁶ Al-Marri also raised substantial questions as to whether the process, had it been available to him, would be

⁴⁷⁹ Human Rights Watch, Al-Marri Case Tests Administration Attempt to Strip Rights of Legal Residents in the United States, *available at* <http://hrw.org/english/docs/2006/11/22/usdom14660.htm>.

⁴⁸⁰ *Id.*

⁴⁸¹ al-Marri *ex rel.* Berman v. Wright, 443 F.Supp.2d 774 (D.S.C. 2006).

⁴⁸² Human Rights Watch, *supra* note 479.

⁴⁸³ *Id.*

⁴⁸⁴ Holly Manges Jones, Writer, Jurist, DOJ Asserts MCA Bars Enemy Immigrants, Gitmo Detainees from Judicial Review, *available at* <http://jurist.law.pitt.edu/paperchase/2006/11/doj-asserts-mca-bars-enemy-immigrants.php>.

⁴⁸⁵ al-Marri v. Wright, 487 F.3d 160, 167 (4th Cir. 2007), *reh’g granted en banc* Aug 22, 2007.

⁴⁸⁶ *Id.* at 168.

constitutionally adequate.⁴⁸⁷ The court declined to answer the constitutional question, however, relying on the well-established canons of statutory construction that, if fairly possible, a statute should be construed in a way to avoid serious constitutional issues.⁴⁸⁸ Thus, the court construed the MCA as inapplicable to al-Marri.

Turning to the merits, the government's primary claim was that detention of al-Marri was authorized by the AUMF. The court contrasted al-Marri with the cases of Hamdi and Padilla, noting that the latter had borne arms against the United States in Afghanistan while the former had not.⁴⁸⁹ The court used this distinction to underscore the reason the detention of Hamdi and Padilla was authorized: to prevent their return to the battlefield. According to the court, *Hamdi* and *Padilla* follow *Ex parte Quirin*: that individuals who have allied themselves with the "military arm of the enemy government" are considered enemy combatants.⁴⁹⁰ In contrast, citing *Ex parte Milligan*, the court stated that an individual who merely communicated with the enemy, conspired to seize munitions, and joined an organization whose purpose was to overthrow the government of the United States was not an enemy combatant.⁴⁹¹ Additionally the court pointed out that Congress has provided for a means of detaining enemy civilians under the Patriot Act – which authorizes detention only by civilian law enforcement, places the process under Congressional oversight, and limits the detention to a period far shorter than the period of time al-Marri has been detained.⁴⁹²

Accordingly, the Fourth Circuit reversed the lower court's decision and remanded the case with instructions to grant a writ of habeas corpus directing the release of al-Marri from

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* at 183.

⁴⁹⁰ *Id.* at 181 (quoting *Ex Parte Quirin*, 317 U.S. 1, 37 (1942)).

⁴⁹¹ *al-Marri*, 467 F.3d at 182.

⁴⁹² *Id.* at 189-91.

military custody.⁴⁹³ As the Fourth Circuit voted to rehear the case en banc, al-Marri remains in military custody. According to a March 14, 2008 article in the *Charleston Post and Courier*, al-Marri has now been held in solitary confinement for more than 1,700 days.⁴⁹⁴

C. Extra-Territorial Executive Detention Outside of Guantanamo

As the numbers of detainees held at non-Guantanamo locations increases, several cases concerning the detention of individuals held in locations such as Iraq and Afghanistan have surfaced. For instance, in 2007, Judge Thomas F. Hogan of the D.C. District Court held that individuals detained in Iraq and Afghanistan could not bring a civil action against high-ranking military officers for alleged torture.⁴⁹⁵ The court declined to find a cause of action arising from *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* and its progeny, establishing personal liability for Government officials for violating clearly established constitutional rights of which a reasonable person would have known.⁴⁹⁶ Because the defendants were “nonresident aliens who were injured extraterritorially while detained by the military in foreign countries where the United States is engaged in wars,” the court found it clearly established that the protections of the Fifth and Eighth Amendments did not apply.⁴⁹⁷ The court cited to several Supreme Court precedents, including *Eisentrager*, *United States v. Verdugo-Urquidez*, and *Zadvydas v. Davis*, to support its conclusion.⁴⁹⁸ The court also relied on

⁴⁹³ *Id.* at 195. In another case, a petition for habeas filed by a U.S. resident captured in Pakistan has been denied pending resolution of the issues before the Supreme Court in *Boumediene*. See Order filed in Case 1:06-cv-01690-RBW, available at <http://ccrjustice.org/ourcases/current-cases/khan-v.-bush/-/khan-v.-gates>, Khan_Order Denying MTD_2_29_08.pdf.

⁴⁹⁴ Toney Bartelme, *Brig Prisoner in Danger of Losing Sanity, Lawyers Say*, POST & COURIER (Charleston, S.C.), Mar 14, 2008, available at http://www.charleston.net/news/2008/mar/14/brig_prisoner_danger_losing_sanity_lawye33797/.

⁴⁹⁵ *In re Iraq and Afghanistan Detainees Litig.*, 479 F.Supp.2d 85 (D.D.C. 2007).

⁴⁹⁶ *Id.* at 93-107.

⁴⁹⁷ *Id.* at 95-98 (discussing and applying *Zadvydas v. Davis*, 533 U.S. 678 (2001), *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and *Johnson v. Eisentrager*, 359 U.S. 763 (1950)).

⁴⁹⁸ *In re Iraq and Afghanistan Detainees Litig.*, 479 F.Supp.2d at 98-99.

Boumediene to bolster its holding that aliens without property or presence in the United States have no constitutional rights.⁴⁹⁹

In *Omar v. Harvey*, an American citizen held in Iraq filed a habeas petition challenging his detention.⁵⁰⁰ Omar alleged that he was being held by American military officials as an enemy combatant, for over two years without formal charges and access to counsel.⁵⁰¹ His habeas petition was brought upon his referral to the Central Criminal Court of Iraq for trial.⁵⁰² The *Omar* court held that the federal habeas statute reached American citizens detained in Iraq. Because the respondents (the Secretary of the Army and two high-ranking army officers) were amenable to service in the District of Columbia and Omar was in custody under or by color of the United States, the district court had jurisdiction to hear Omar's habeas petition.⁵⁰³

In *Ruzatullah v. Rumsfeld*, two detainees at Bagram Air Force Base in Afghanistan filed habeas petitions, and the government has moved for dismissal based on the MCA.⁵⁰⁴ The detainees argue that the MCA is not applicable to them since they do not enjoy even the limited procedural protections available to detainees at Guantanamo, or, in the alternative, that it violates their constitutional habeas rights. They argue that Bagram Air Force Base is just as much under U.S. control as Guantanamo, citing provisions of the lease for the use of the base.⁵⁰⁵ The D.C.

⁴⁹⁹ *Id.* at 98-99. The court also held that “special factors” counseled against creating a *Bivens* remedy — namely, the deference given to the political branches over military affairs. *Id.* at 103-07. In addition, the court held that military officers would be entitled to qualified immunity even if there were liability under *Bivens* because even if plaintiffs’ rights were violated, it was not clearly established that they had those rights in the first place. *Id.* at 108-09.

⁵⁰⁰ *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007), *cert. granted* 128 S. Ct. 741.

⁵⁰¹ *Id.* at 3-4.

⁵⁰² *Id.* at 4.

⁵⁰³ *Id.* at 9.

⁵⁰⁴ Respondents’ Response to Order to Show Cause and Motion to Dismiss Second Amended Petition for Lack of Jurisdiction, *Ruzatullah v. Rumsfeld*, No. 06-CV-01707 (GK) (D.D.C.).

⁵⁰⁵ Petitioners’ Reply and Opposition to Respondents’ Motion to Dismiss the Second Amended Petition, *Ruzatullah v. Rumsfeld*, No. 06-CV-01707 (GK) (D.D.C.).

District Court has denied the government's motion to dismiss pending the Supreme Court's ruling in *Boumediene*.⁵⁰⁶

D. Legislative Proposals

On December 5, 2006, Senators Specter and Leahy introduced the Habeas Corpus Restoration Act of 2006 – a bill that would grant statutory habeas rights to those whose rights were repealed by the MCA.⁵⁰⁷ The bill would strike the limitations on habeas corpus created by the MCA, striking Subsection (e) of Section 2241 of Title 28, and amending Section 950j of Title 10 to allow habeas relief.⁵⁰⁸ In his remarks to Congress, Senator Specter stated that he believed the federal courts would strike down the habeas corpus jurisdiction stripping provisions of the MCA.⁵⁰⁹ The United States was not in a time of rebellion or invasion and the limited review provided by the D.C. Circuit Court would not maintain the traditional constitutional right of habeas corpus.⁵¹⁰ Moreover, Senator Specter stated that the Supreme Court in *Rasul* made it clear that habeas corpus rights apply to aliens as well as U.S. citizens.⁵¹¹ Senator Leahy's remarks focused on the repercussions of the habeas corpus jurisdiction stripping provisions of the MCA. He stated that “the remedy that secures the most basic of freedoms [freedom from indefinite detention at the will of the Executive] is habeas corpus,” and the MCA eliminated that right permanently for any non-citizen determined to be an enemy combatant, or who was

⁵⁰⁶ Order on Motion to Dismiss/Lack of Jurisdiction, *Ruzatullah v. Rumsfeld*, No. 06-CV-01707 (GK) (D.D.C.).

⁵⁰⁷ Habeas Corpus Restoration Act of 2006, S. 4081, 109th Cong. (2006).

⁵⁰⁸ S. 4081. Section 950j(b), as amended, would read: “Except as otherwise provided *in this chapter or in 2241 of title 28 or any other habeas corpus provision*, and notwithstanding any other provision of law, no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.” (emphasis added)

⁵⁰⁹ 152 CONG. REC. S11197 (2006).

⁵¹⁰ *Id.*

⁵¹¹ *Id.*

awaiting such determination.⁵¹² Included in that category, Senator Leahy emphasized, were the approximately twelve million lawful permanent residents within the United States who pay taxes, work for American firms, and raise American children.⁵¹³

In 2007, Senator Chris Dodd introduced the Restoring the Constitution Act of 2007. This legislation would require that the United States comply with the Geneva Conventions, provide for the appeal of military commission decisions to the United States Court of Appeals for the Armed Forces, create new war crimes for denial of trial rights and engaging in cruel, degrading, and inhuman treatment, and repeal the jurisdiction stripping portion of the DTA.⁵¹⁴ The act was read twice and referred to a committee, but no further action has been taken on it.⁵¹⁵

Senators Leahy and Specter also introduced the Habeas Corpus Restoration Act of 2007, which is identical to its 2006 counterpart. By a vote of 11-8, the Senate Committee on the Judiciary passed the Habeas Corpus Restoration Act. The bill has yet to come before the full Senate.⁵¹⁶ A companion bill, H.R. 1416, was introduced in the House; however, no action has been taken on it in over a year.⁵¹⁷

⁵¹² 152 CONG. REC. S11198 (2006).

⁵¹³ *Id.*

⁵¹⁴ S. 576, 110th Cong. (1st Sess. 2007). The bill would also eliminate the conclusive presumption that being declared an enemy combatant by the CSRT would make one liable to trial by military commission and would exclude statements made under coercion from being entered into evidence during military commissions.

⁵¹⁵ See Thomas Bill Status for S. 576, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN00576:>.

⁵¹⁶ See Thomas Bill Status for S. 185, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN00185:>.

⁵¹⁷ See THOMAS Bill Status for H.R. 1416, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:H.R.1416:>.

V. CONSTITUTIONAL ANALYSIS OF THE MCA'S HABEAS STRIPPING PROVISIONS

As discussed above in Part III, *supra*, Section 7 of the MCA amends the federal habeas statute to provide that no court, justice, or judge of the United States shall have jurisdiction to hear a petition for habeas corpus filed by an alien determined to be an enemy combatant or awaiting such determination.⁵¹⁸ Section 3 of the MCA provides that, notwithstanding the federal habeas statute, no court, justice, or judge of the U.S. shall have jurisdiction to hear any claim relating to the prosecution, trial, or judgment of a military commission, including challenges to the lawfulness of procedures of military commissions. Taken together, these provisions prevent any federal court from hearing any habeas corpus challenges to the legality of the detentions of those held at Guantanamo.

The issue raised before the Supreme Court in *Boumediene* is whether the MCA is consistent with the Suspension Clause of the U.S. Constitution. The few courts that have addressed the issue of whether Congressional action qualifies as a valid suspension have generally followed a three-prong approach. First, courts look to whether Congress suspended the writ consistent with the prerequisite requirements of rebellion or invasion of the Suspension Clause. If so, the analysis ends there and congressional suspension is constitutional, no matter the class of persons subject to the suspension. If Congress has not validly suspended the writ, courts will decide whether the class of persons to which Congress has stripped of access to the courts have the right to habeas corpus. If not, then the Congressional action does not offend the Suspension Clause. If so, Congress will not have violated the Suspension Clause only if it has

⁵¹⁸ Section 7 also prohibits courts, justices, or judges of the U.S. from considering actions against the United States relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who was determined to be an enemy combatant, or who is awaiting such determination.

established an adequate and effective substitute to habeas review.⁵¹⁹ Applying this analysis, this Report concludes that Congress has not validly suspended the writ, that the class of persons held at Guantanamo have the constitutional right to habeas review, and that Congress has failed to provide them an adequate and effective habeas substitute.

A. The MCA Unconstitutionally Suspends Habeas Corpus

Except during the rare valid suspensions, habeas corpus has steadfastly remained a critical check on the Executive ensuring against indefinite and unlawful detention.⁵²⁰

Accordingly, any abrogation by Congress of so fundamental a tool for securing liberty has been, and should be, subject to the strictest of judicial review. Congress and the courts are held to the clear and unambiguous language of the Constitution which commands that suspension of habeas corpus is limited to only two narrow circumstances: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”⁵²¹ The statutory history of the clause demonstrates that this narrow exception was intended to be limited to the rare circumstances identified therein. The Constitution’s Framers agreed to the narrow exception of rebellion or invasion only after considering – and rejecting – authorizing suspension “on the most urgent occasions” or forbidding suspension altogether.⁵²² Moreover, the limiting language is not discretionary. The phrase “shall not be suspended” is

⁵¹⁹ This approach has been followed in *Hamdan v. Rumsfeld*, 464 F.Supp.2d 9 (D.D.C. 2006) (*Hamdan (II)*), and *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), cert. granted 127 S. Ct. 3078.

⁵²⁰ *Hamdi*, 542 U.S. at 525 (2004) (plurality op.); see also Part I(E), *supra*. Described by Chief Justice Marshall, habeas is the “high prerogative writ ... the great object of which is the liberation of those who may be imprisoned without sufficient cause.” *Ex Parte Watkins*, 28 U.S. (3 Pet) 193, 202 (1830). Or as stated more recently by Justice Scalia, “[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been the freedom from indefinite imprisonment at the will of the Executive” and due process rights – that cluster of common law protections preventing the Government from arbitrarily depriving a person of life, liberty, or property – “have historically been vindicated by the writ of habeas corpus.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 554-56 (2004) (Scalia, J., dissenting).

⁵²¹ U.S. CONST. art. I, § 9, cl. 2; *Hamdi*, 542 U.S. at 562 (2004) (Scalia, J., dissenting).

⁵²² *Boumediene*, 476 F.3d at 998 (Rogers, C.J., dissenting) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 438 (Max Farrand ed., rev. ed., 1966)).

mandatory and therefore any suspension falling short of the invasion or rebellion predicate is constitutionally invalid as “[the Suspension Clause’s] protection is absolute in the absence of ‘invasion’ or ‘rebellion.’”⁵²³

A strict approach is not only required by the express language of the Suspension Clause itself, but also by Congress’ historically narrow application. Congress has only authorized suspension of the writ four times.⁵²⁴ In all four cases, each suspension (1) was accompanied by clear legislative statements of Congressional intent to suspend the writ; (2) occurred during a period of incontrovertible rebellion or invasion; and (3) was limited to times of rebellion or invasion and narrowed geographically to the location of the uprising.⁵²⁵

Furthermore, the Supreme Court has made clear that when Congress suspends habeas, the suspension should be carefully construed to ensure that the person being denied habeas actually falls within the ambit of the suspension. As detailed *supra* Part I(F), in *Ex parte Milligan*, Congress suspended the writ of habeas corpus during the Civil War in war-torn areas that had broken down to the point that Article III judges were no longer holding court. The Government denied Milligan habeas review in a jurisdiction where Article III courts were in fact functioning and argued that he still fell under the suspension act. The Court held that Milligan was entitled to habeas as he was detained in an area where Article III courts were still operating and Congress had only contemplated suspending habeas corpus in jurisdictions where courts were no longer

⁵²³ Hamdan v. Rumsfeld, 464 F.Supp.2d 9, 16 (D.D.C. 2006) (*Hamdan (II)*).

⁵²⁴ *Id.* at 16.

⁵²⁵ *Id.* As discussed in detail in Part I(E), *supra*, the writ was first suspended during the Civil War in 1863. After the Civil War, Congress suspended the writ a second time during Reconstruction in the face of Klu Klux Klan uprisings throughout the former Confederate South. In 1902, in the aftermath of the Spanish-American War, Congress suspended habeas corpus during a rebellion in the Philippines. Most recently, the writ was suspended during World War II in Hawaii, after the bombing of Pearl Harbor.

available.⁵²⁶ Thus, the text and history of the Suspension Clause indicate that courts strictly review any Congressional abrogation of the writ.

In passing the MCA, Congress did not validly suspend the writ of habeas corpus.⁵²⁷ The text of Article I, Section 9, Clause 2 clearly states that Congress may not suspend the writ unless one of two possible circumstances exist – rebellion or invasion. Here, neither rebellion nor invasion was occurring at the time the MCA was passed.⁵²⁸ Unlike all of the prior suspensions, Congress made no findings of rebellion or invasion in the MCA. The terms “rebellion” or “invasion” do not appear anywhere in Section 7 of the MCA (the habeas corpus jurisdiction stripping section) nor do those terms appear anywhere else in the MCA. Moreover, contrary to prior valid suspensions, the MCA’s habeas corpus jurisdiction stripping provisions are without time and geographic limits.⁵²⁹ Accordingly, the MCA should be struck down as outside Congressional authority or repealed by Congress itself.

B. Guantanamo Detainees are Entitled to Habeas Corpus

As of the writing of this Report, approximately 270 detainees remain at Guantanamo.⁵³⁰ These detainees have been held – some as long as six years – without judicial review into the legality of their detention. The immediate question before the Supreme Court in *Boumediene* is

⁵²⁶ *Ex parte Milligan*, 71 U.S. (1 Wall.) 2, 137 (1866).

⁵²⁷ *Boumediene v. Bush*, 476 F.3d 981, 1007 (D.C. Cir. 2007) (Rogers, C.J., dissenting), *cert. granted*, 127 S. Ct. 3078; *Hamdan (II)*, 464 F.Supp.2d at 16.

⁵²⁸ *Hamdan (II)*, 464 F.Supp.2d at 16; 152 CONG. REC. S11197-S11199 (statement of Sen. Specter) (stating, while introducing the Habeas Corpus Restoration Act of 2006: “. . . the Constitution of the United States is explicit that habeas corpus may be suspended only in time of rebellion or invasion. We are suffering neither of those alternatives at the present time. We have not been invaded and there has not been a rebellion. That much is conceded.”)

⁵²⁹ Neither is there any basis to conclude that the September 11th attacks place the U.S. in a constant threat of invasion or rebellion. The U.S. was unequivocally attacked on September 11, 2001. However, a continued threat of invasion or rebellion did not exist at the time the MCA was passed, approximately five years later. In *Ex parte Zimmerman*, the continued suspension of habeas corpus after the attack on Pearl Harbor was justified because of the high likelihood of further attacks, as evidenced by actual attacks and military build up for planned attacks. *Ex parte Zimmerman*, 132 F.2d 442, 445 (9th Cir. 1942). Not only has the U.S. not been attacked since September 11th, but the evidence that another attack is pending is far too speculative to fall within *Zimmerman*’s ambit.

⁵³⁰ U.S. Dep’t of Defense, *supra* note 11.

whether these detainees have a constitutional right to challenge their detention under the writ of habeas corpus. For the reasons stated below, the Committee concludes that they do.

1. Historical Access of Non-Citizens to Habeas Corpus

Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep in legal theory, is just outside our gates . . . United States officers [may not] take without due process of law the life, the liberty or property of an alien who has come within our jurisdiction; and that means he must meet a fair hearing with fair notice of the charges.⁵³¹

Habeas has traditionally been afforded to aliens, including enemy combatants and prisoners of war, even in times of war. In England, the protections of the writ were not limited to subjects of the Crown, as aliens, enemy aliens, and prisoners of war were allowed to challenge the legality of their detention on habeas review.⁵³² The broad protections of the writ continued in early American jurisprudence, as both before and after adoption of the Constitution, aliens were given access to habeas corpus to challenge their detentions in the context of treason and deportation proceedings.⁵³³ For instance, enemy aliens during the War of 1812 were allowed to challenge the legality of their detention, and in one case, an enemy alien even won his release on habeas review.⁵³⁴ The law has long been that once an alien enters the U.S. and becomes part of its population (even illegally), that alien cannot be deported, nor otherwise deprived of his life, liberty, or property without due process.⁵³⁵

Most recently, during World War II and its aftermath, enemy aliens and prisoners of war, detained within the U.S., even though subject to military commissions, were allowed to

⁵³¹ *Shaughnessy v. United States ex. rel. Mezel*, 345 U.S. 209, 218-219 (1953) (Jackson, J., dissenting).

⁵³² See Part I(A)-(B), *supra*.

⁵³³ See Parts I(B) and I(D), *supra*.

⁵³⁴ See Part I(D), *supra*.

⁵³⁵ See *id.*

challenge the legality of their detentions on habeas review.⁵³⁶ The Supreme Court has consistently held that, absent suspension of the writ, neither Congress nor the Executive could eliminate the power of the courts to rule on the legality of the detainee’s detention on habeas review.⁵³⁷ In sum, when detained within the U.S., aliens, no matter their status, have the constitutional right to habeas review regarding the legality of their detention. There is no question that if the Guantanamo detainees were held in a state or territory of the United States they would have an unfettered right to challenge their detention by habeas review.

2. At Common Law, Rights of Aliens to Habeas Corpus Review Extended to Territories Under Dominion of the Crown Similar to Those Held at Guantanamo

“[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789.”⁵³⁸ As explained by the Supreme Court in *Rasul* and discussed *supra* Part IV(B), “at common law courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called ‘exempt jurisdictions,’ where ordinary writs did not run *and all other dominions under the sovereign’s control*.”⁵³⁹ Quoting Lord Mansfield, the Supreme Court concluded that “even if a territory was ‘no part of the realm,’ there was ‘no doubt’ as to the court’s power to issue writs of habeas corpus if the territory was ‘under the subjection of the Crown.’”⁵⁴⁰ The *Rasul* court continued that “later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of ‘the extent and nature of the jurisdiction or dominion exercised in fact by the Crown.’”⁵⁴¹ Nor did the *Rasul* court find that

⁵³⁶ See Part I(F), *supra*.

⁵³⁷ See, e.g., *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001).

⁵³⁸ *Id.*; see also Part I(G), *supra*.

⁵³⁹ *Rasul v. Bush*, 542 U.S. 466, 482 (2004) (emphasis added).

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.*

access to habeas review depended on who sought its protections, concluding that “the remedy of habeas corpus was not confined to British subjects but would extend to ‘any person ... detained’ within reach of the writ.”⁵⁴²

Rasul’s finding – albeit dicta – is consistent with the writ’s historic application. In addition to those noted by the Supreme Court, there are numerous other examples from 17th and 18th century England of the writ extending to territories beyond the sovereignty of the Crown, such as the American colonies, West Indies, and other territories.⁵⁴³ For example, the writ extended to India well before England’s assertion of sovereignty in 1813.⁵⁴⁴ In fact, there are no cases where an English court refused to exercise habeas jurisdiction because the enemy being held, while under the control of the Crown, was not within the Crown’s sovereignty.⁵⁴⁵

Applying these principles, the Supreme Court in *Rasul* found that because the United States exercises “complete jurisdiction and control” over Guantanamo, those detained there by the Administration were entitled to habeas under the federal habeas statute.⁵⁴⁶ The *Rasul* court examined the de facto indicia of control the U.S. has over Guantanamo apparent in the various treaties and lease agreements with Cuba.⁵⁴⁷ By the express terms of the agreements between the U.S. and Cuba, the U.S. exercises complete jurisdiction and control over Guantanamo, and may continue to exercise such control permanently if it so chooses; thus, Guantanamo is clearly within the territorial jurisdiction of the U.S.⁵⁴⁸ As Justice Kennedy summed up in his concurrence “[f]rom a practical perspective, the indefinite lease of Guantanamo Bay has

⁵⁴² *Id.* at 482 n.14 (internal quotations and italics omitted) (alteration in original).

⁵⁴³ See Part I(B), *supra* (discussing examples of the writ extending to places outside of the Crown’s sovereignty).

⁵⁴⁴ *Boumediene v. Bush*, 476 F.3d 981, 1003-04 (D.C. Cir. 2007) (Rogers, C.J., dissenting), *cert. granted* 127 S. Ct. 3078 (collecting cases).

⁵⁴⁵ *Id.* at 1000.

⁵⁴⁶ *Rasul*, 542 U.S. at 480-81.

⁵⁴⁷ *Id.* at 471.

⁵⁴⁸ *Id.* at 480-81.

produced a place that belongs to the United States, extending the ‘implied protection’ of the United States to it.”⁵⁴⁹

For the purposes of a constitutional right to habeas corpus, the U.S.’s complete control and territorial jurisdiction over Guantanamo in the context of statutory habeas is equally applicable to the reach of common law habeas. Indeed, the tone and tenor of the *Rasul* opinion steeped in common law precedent and authorities can lead to no contrary conclusion that the Guantanamo detainees fall squarely within the ambit of the writ as it existed in 1789.

Many have argued that the Supreme Court’s decision in *Johnson v. Eisentrager* (discussed *supra* Part I(E)) precludes extension of habeas rights to the Guantanamo detainees.⁵⁵⁰ As explained by the Supreme Court in *Rasul*, *Eisentrager* relied on six facts, all critical, in making its determination that the alien petitioners detained outside of U.S. sovereignty did not have the constitutional right to habeas review:

he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; and (f) is at all times imprisoned outside the United States.⁵⁵¹

Rasul emphasized that the detainees at Guantanamo “differed from the *Eisentrager* detainees in important respects.”⁵⁵² The former are not nationals of countries at war with the United States and deny that they have engaged in or plotted aggression against the United States.⁵⁵³ Moreover, most detainees at Guantanamo were not captured by the U.S. or its allies in the conventional

⁵⁴⁹ *Id.* at 487 (Kennedy, J., concurring).

⁵⁵⁰ The decisions in *Hamdan* and *Boumediene* were both predicated on *Eisentrager*. *Boumediene v. Bush*, 476 F.3d 981, 990 (D.C. Cir. 2007), *cert. granted* 127 S. Ct. 3078 (“[*Eisentrager*] ends any doubt about the scope of common law habeas”); *Hamdan v. Rumsfeld*, 464 F.Supp.2d 9, 17 (D.D.C. 2006) (*Hamdan (II)*) (“It is the *Eisentrager* case that appears to provide the controlling authority on the availability of constitutional habeas to enemy aliens.”); see also *Rasul v. Bush*, 542 U.S. 466, 472-73 (2004) (lower courts dismissed habeas petition relying on *Eisentrager*).

⁵⁵¹ *Rasul*, 542 U.S. at 475-46.

⁵⁵² *Id.* at 476.

sense; rather, they were handed over in exchange for handsome ransoms.⁵⁵⁴ Most importantly, as noted in the *Rasul* plurality opinion and emphasized by Justice Kennedy in his concurrence, the detainees at Guantanamo – unlike the prisoners of war in *Eisentrager* – “have never been afforded access to any tribunal much less charged with and convicted of wrongdoing” and are being held indefinitely.⁵⁵⁵ Although some military commissions are finally about to take place, most detainees have been held for over five years with no access to any tribunal, much less an impartial one, and with bleak prospects of access to any tribunal in the near future.⁵⁵⁶ Finally, Guantanamo detainees are imprisoned in a place that is, in every practical respect, a United States territory, unlike the detainees in *Eisentrager*, who were convicted in China and detained in Germany.⁵⁵⁷

The Guantanamo detainees thus stand in sharp contrast to the *Eisentrager* petitioners who were convicted war criminals and admitted enemy aliens and had received full military trials. The habeas petitions brought in *Eisentrager* – unlike those brought by the Guantanamo detainees – are therefore more akin to collateral, post-conviction challenges, which traditionally are more circumscribed than pre-conviction challenges because of the presumption of some validity to the underlying trial.⁵⁵⁸ Whereas here, when the “Executive detains an individual without trial, the

(continued)

⁵⁵³ *Id.*

⁵⁵⁴ DENBEAUX ET AL., *supra* note 20.

⁵⁵⁵ *Rasul*, 542 U.S. at 476; *id.* at 488-89 (Kennedy, J., concurring).

⁵⁵⁶ In all, 14 Guantanamo Bay detainees face trial. However, the scheduling of the actual trials is uncertain and seems distant. For one, military lawyers are in short supply. Also, the cases involve potential death penalties and claims of torture by interrogators that can take months or longer to sort out legally. In reality, only a few of these cases may be tried before the end of the year. William Glaberson, *New Roadblocks Delay Tribunals at Guantanamo, Frustrating the Pentagon*, N.Y. TIMES, Apr. 10, 2008, at A16.

⁵⁵⁷ *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring).

⁵⁵⁸ *Omar v. Harvey*, 479 F.3d 1, 8 (D.C. Cir. 2007), *cert. granted* 128 S.Ct 741.

risk of unlawful incarceration is at its apex,” as is the judiciary’s power to test that detention.⁵⁵⁹ *Eisentrager* is inapposite.⁵⁶⁰

C. The Current System of Review, Detention and Trial of Enemy Combatants is Not an Adequate and Effective Habeas Substitute

Notwithstanding the foregoing, Congress can avoid violation of the Suspension Clause by creating an adequate and effective alternative to habeas review that alien detainees can employ to challenge the legality of their detention.⁵⁶¹ As discussed *supra* Part I(H), the Supreme Court has upheld a habeas substitute in only three instances.⁵⁶² In those cases the Supreme Court set forth two underlying principles for assessing substitute habeas regimes: first, the substitution must afford the same cluster of protections afforded by the traditional writ (in all constitutional respects), and second, the substitute must provide a remedy as adequate and effective as the traditional writ.⁵⁶³ However, even if the habeas substitute did not afford the traditional protections of the writ, an “escape hatch” allowing the detainee to access habeas review in the event that the substitute proved inadequate would suffice.

The CSRT, ARB, and MCA procedures and the accompanying appellate review under the DTA and MCA do not possess those qualities nor do they provide the required “escape hatch.” Indeed, when viewed as a whole, the regime constitutes a dramatic departure from even the most basic protections of habeas corpus and therefore cannot qualify as an adequate substitute because: (1) the current system does not provide detainees with meaningful notice of

⁵⁵⁹ *Id.*

⁵⁶⁰ *Cf.* *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2794 (2006) (“[*Eisentrager*] does not control this case”); *Rasul*, 542 U.S. at 484.

⁵⁶¹ *I.N.S. v. St. Cyr*, 533 U.S. 289, 314 n.38 (2001); *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (“the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person’s detention does not constitute a suspension of the writ of habeas corpus.”).

⁵⁶² *Boumediene v. Bush*, 476 F.3d 981, 1004 (D.C. Cir. 2007) (Rogers, C.J., dissenting), *cert. granted* 127 S. Ct. 3078.

⁵⁶³ Refer to Part I(H), *supra*.

the charges against them; (2) the present structure does not grant a detainee a reasonable opportunity to present evidence to combat the charges against him, nor plenary review of his claims; (3) the proceedings do not guarantee a neutral and impartial review; (4) the system does not provide for a speedy release if the grounds for detention are unlawful; (5) the detainees do not have the right to counsel at all times; and (6) evidence gained by torture is permissible grounds for detention. We address each in turn below.

1. Notice

Notice is a bedrock principle of law.⁵⁶⁴ “For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.”⁵⁶⁵ The Supreme Court made clear in *Hamdi* that a “citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification . . .”⁵⁶⁶ And as discussed above, when depriving an individual of life or liberty, there is no basis for the state to afford the required notice to a citizen-detainee and withhold such notice to an alien one.⁵⁶⁷

Moreover, the Supreme Court’s conclusion that a detainee is entitled to notice of the factual basis for his classification and initial detention as an enemy combatant is obviously equally applicable to the charges brought against him under a military commission, which could result in further loss of liberty or even death.

However, the CSRT does not provide detainees with meaningful notice of the alleged factual basis for their initial detention. Detainees are not permitted to review classified information allegedly justifying the basis for their detention, even though most CSRTs rely

⁵⁶⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (quotations and citations omitted).

⁵⁶⁵ *Id.* (quotations and citations omitted)

⁵⁶⁶ *Id.*

almost solely on classified evidence and in many instances this secret evidence is the only basis for the CSRT decision and detention.⁵⁶⁸ The *Boumediene* petitioners demonstrated in their brief to the Supreme Court the Kafkaesque nature of the process:

Although the government charged that ‘[w]hile living in Bosnia, the Detainee associated with a known Al Quida operative,’ it would not disclose the name of that individual – leaving [Petitioner Ait Idir] no way to confirm or deny the allegation. When Mr. Ait Idir pointed out the absurdity of the process, the CSRT panelists burst into laughter.⁵⁶⁹

The *El-Banna* petitioners in a companion case to *Boumediene* did not fare much better:

Abdullah Al Kandari was designated an enemy combatant principally because ... an ‘alias’ of his name was allegedly found on a list of names on a document saved on a computer hard drive allegedly ‘associated with a senior al Qaeda member.’ Mr. Al Kandari ... asked what name appeared on the list. He was not allowed to know; the information was classified. The name of the ‘senior al Qaeda member’ was likewise classified, as was the place where the hard drive was found.⁵⁷⁰

The DTA does not remedy the issue as it prevents any de novo review of the evidence forming the basis of the CSRT’s decision.⁵⁷¹ The CSRT and DTA permit – indeed promote – detention by secret evidence that is commonly and consistently withheld from the accused, a clear departure from the principle of notice traditionally followed by American courts.⁵⁷²

(continued)

⁵⁶⁷ See Part I(D), *supra*.

⁵⁶⁸ See *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C.2005), *vacated sub nom.* *Boumediene v. Bush*, 476 F.3d 981 (2007), *cert. granted sub nom.* *Al Odah v. United States*, 127 S. Ct. 3067 (holding Due Process Clause was violated because detainees were neither given access to the classified information that supported their detention nor were they given counsel to review that information); Brief for Lakhdar Boumediene et. al., *Boumediene v. Bush*, No. 06-1195, 2007 WL 2441590, at 20 and n.19; Brief for Jamil El-Banna et al., *Al-Odah v. United States*, No. 06-1196 (Aug. 24, 2007), 2007 WL 2414903, at 33.

⁵⁶⁹ Brief for Lakhdar Boumediene et. al., *supra* note 568, at 21 (first alteration in original).

⁵⁷⁰ Brief for Jamil El-Banna et al., *supra* note 568, at 34 (internal citations omitted).

⁵⁷¹ Detainee Treatment Act of 2005 § 1005(e)(2)(C), Pub. L. No. 109-148, 119 Stat. 2739, 2742 (amending 28 U.S.C. § 2241(e)).

⁵⁷² See, e.g., *Greene v. McElroy*, 360 U.S. 474, 496 (1959) (“The evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue”).

2. Reasonable Opportunity to Present Evidence

Another bedrock of due process and habeas corpus is the right to “careful consideration and plenary processing of [the habeas petitioner’s] claims including full opportunity for presentation of the relevant facts.”⁵⁷³ Since colonial times, English and American courts have long recognized the requirement that one detained against his will should be able to present evidence justifying his release.⁵⁷⁴ When not facing an imminent trial, the detainee must be afforded the opportunity to traverse the writ, explaining why the grounds for detention are insufficient in either fact or law.⁵⁷⁵ In *Hamdi*, for instance, the Supreme Court emphasized that a citizen-detainee at Guantanamo is entitled to a “fair opportunity to rebut the Government’s factual assertions . . .”⁵⁷⁶

But the CSRT and DTA do not offer a detainee a “fair” opportunity to contest the charges justifying his detention. For starters, the immense practical obstacles to defend oneself in a CSRT faced by a non-English speaking detainee, separated by thousands of miles from any helpful potential witnesses or documents, and with no access – by telephone, internet or fax – to either exculpatory avenue is manifest. But even when a detainee was able to overcome the substantial practical hurdles to identify potentially exculpatory evidence, the CSRT panel refused to accept them into evidence as not “reasonably available.”⁵⁷⁷ These problems are only exacerbated by the fact that the CSRT prohibits the detainee any assistance of counsel and, as

⁵⁷³ *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

⁵⁷⁴ *See e.g.*, *R. v. Deleval*, 97 Eng. Rep. 913, 915-16 (K.B. 1763) (allowing submission of evidence by petitioner and ordering release); *Gardner’s Case*, 78 Eng. Rep. 1048 (Q.B. 1653) (same); *New Jersey v. Liddle*, No. 31316, N.J. State Archives, Minutes Book No. 62, Folio p. 525 (N.J. Nov. Term 1785) (same).

⁵⁷⁵ *Boumediene v. Bush*, 476 F.3d 981, 1005 (D.C. Cir. 2007) (Rogers, C.J., dissenting), *cert. granted* 127 S. Ct. 3078.

⁵⁷⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004)

⁵⁷⁷ Brief for Lakhdar Boumediene et. al., *supra* note 568, at 5 & 28.

discussed above, many times the Government withheld the nature of the allegations justifying a detainee's initial detention under the CSRT process because it was classified.

The DTA does little to allow the D.C. Circuit Court any meaningful review and provide a "fair" opportunity to challenge the CSRT designation.⁵⁷⁸ The DTA limits the court's review to whether the CSRT complied with its own standards.⁵⁷⁹ The D.C. Circuit Court is not authorized to rule on the ultimate question: whether the detainee was properly classified as an enemy combatant.

3. Neutral and Impartial Review

Courts have long held that deprivation of life or liberty must be subject to review by an impartial and neutral arbiter.⁵⁸⁰ In *Hamdi*, for instance, the Supreme Court made clear that a citizen-detainee not only must receive factual notice of the basis for his detention and a reasonable opportunity to rebut those grounds, but must also have the opportunity to be heard before a "neutral decisionmaker."⁵⁸¹ As Justice Kennedy explained in *Hamdan*, an acceptable degree of independence from the Executive is necessary to render a commission regularly constituted under the U.S. system of justice, and any suggestion of using Executive power to interfere with an ongoing judicial process raises fundamental questions of fairness.⁵⁸² Moreover, at common law, it was emphasized that the decision as to whether Executive detention was

⁵⁷⁸ See *Boumediene*, 476 F.3d at 1006 (Rogers, C.J., dissenting); refer to Part III(B), *supra*.

⁵⁷⁹ *Id.* The D.C. Circuit may also consider whether that process is "consistent with the Constitution and laws of the United States." *Id.*

⁵⁸⁰ See, e.g., *Morrissey v. Brewer*, 408 U.S. 471 (1972) (requiring a neutral decision-maker before revocation of parole); *Ward v. Village of Monroe*, 409 U.S. 57, 61-62 (1972) (holding that petitioner, convicted of two traffic offenses by the town mayor, is entitled to a neutral judge in the first instance); *Tumey v. Ohio*, 273 U.S. 510 (1927) (subjecting liberty and property before a judge that has a direct and substantial pecuniary interest in the outcome is a denial of due process).

⁵⁸¹ *Hamdi*, 542 U.S. at 533.

⁵⁸² *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2804 (2006) (Kennedy, J., concurring); Shaden Yousef, *Military Tribunals: Cure for the Terrorism Virus or a Plague All Their Own?*, 42 HOUS. L. REV. 911 (2005).

justified was a judgment “grounded upon [the court’s] own inferences and understandings and not upon [the Executive’s].”⁵⁸³

However, the CSRT, as well as the annual review of CSRT determinations under the ARB, do not provide for a hearing before an independent tribunal.⁵⁸⁴ The CSRT and ARB tribunals are comprised of panels of three mid-level military officers, but unlike military judges under the UCMJ, CSRT panel officers do not have institutional protection against command influence. Command influence is justifiably recognized as the “mortal enemy of military justice.”⁵⁸⁵ For that reason, the UCMJ prohibits unlawful command influence on court-martial judges.⁵⁸⁶ Even the MCA prohibits unlawful command influence on military commission judges.⁵⁸⁷ But there is no prohibition against command influence on CSRT panelists. The lack of protections against command influence is exacerbated by the fact that prior to the CSRT hearing, the detainee has already been classified by several layers of review.⁵⁸⁸ Moreover, for years the highest ranking officers – including the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff – consistently characterized the Guantanamo detainees as dangerous enemy combatants and the “worst of the worst.”⁵⁸⁹

It is to no surprise then that the CSRT proceedings were riddled with evidence of command influence. A recent report shows that when at least three detainees were initially determined by CSRTs not to be enemy combatants, the detainees were subject to a second, and

⁵⁸³ Bushell’s Case, 124 Eng. Rep. at 1007.

⁵⁸⁴ See Part III(B), *supra*, for discussion on the CSRT and ARB procedures.

⁵⁸⁵ United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).

⁵⁸⁶ 10 U.S.C. § 837.

⁵⁸⁷ 10 U.S.C. § 949b.

⁵⁸⁸ Memorandum from Gordon England, *supra* note 309, at Combatant Status Review Tribunal Process § B.

⁵⁸⁹ See, e.g., Human Rights Watch, U.S.: Guantanamo Kids at Risk, <http://www.hrw.org/press/2003/04/us042403.htm>

in one case a third, CSRT proceeding until they were finally classified as enemy combatants.⁵⁹⁰

Lieutenant Colonel Stephen Abraham – an officer assisting the CSRT process – confirmed these reports before the House Armed Services Committee:

When our panel questioned the evidence, we were told to presume it to be true. When we found no evidence to support an enemy-combatant determination, we were told to leave the hearings open. When we unanimously held the detainee not to be an enemy-combatant, we were told to reconsider. And ultimately when we did alter our course . . . a new panel was selected that reached a different result.⁵⁹¹

Several military officers have made similar claims concerning the military commissions' process, alleging that the system appears to be rigged to facilitate convictions.⁵⁹² In fact, a military judge recently ruled that Brigadier General Thomas W. Hartmann, a senior Pentagon official at the Office of Military Commissions, have no further role in the first trial scheduled to start in May 2008.⁵⁹³ Ruling on a petition from Guantanamo detainee Salim Hamdan that General Hartmann had exerted unlawful influence over the prosecution, the judge removed the

⁵⁹⁰ *Boumediene v. Bush*, 476 F.3d 981, 1006-07 (D.C. Cir. 2007) (Rogers, C.J., dissenting), *cert. granted* 127 S. Ct. 3078.

⁵⁹¹ Testimony of Stephen Abraham, Lt. Colonel, U.S. Army Reserve, before the House Armed Services Committee (July 26, 2007).

⁵⁹² Testimony of Charles Swift, *supra* note 17 (quoting an e-mail from Capt. Jon Carr, military prosecutor, to Col. Fred Borch). Captain Carr also told Col. Borch that the Chief Prosecutor had told him that “the military panel will be handpicked and will not acquit these detainees.” *Id.* Another military prosecutor, Maj. Robert Preston, told Col. Borch that “writing a motion saying that the process will be full and fair when you don’t really believe it is kind of hard – particularly when you want to call yourself an officer and a lawyer.” *Id.* (quoting e-mail from Maj. Preston to Col. Borch). See generally Neil A. Lewis, *Two Prosecutors Faulted Trials for Detainees*, N.Y. TIMES, Aug 1, 2005, available at <http://www.nytimes.com/2005/08/01/politics/01gitmo.html>. A third former prosecutor requested reassignment at the same time as Capt. Carr and Maj. Preston. Leigh Sales, Writer, Australian Broadcasting Corporation, *Third Prosecutor Critical of Guantanamo Trials* (Aug. 3, 2005), <http://www.abc.net.au/news/newsitems/200508/s1428749.htm>. Col. Morris Davis, former Chief Prosecutor, recently testified in April 2008 for the defense about political pressures faced by the prosecution. Jane Sutton, Writer, Reuters, *Former Guantanamo Prosecutor Says Trials Tainted*, available at <http://www.reuters.com/article/topNews/idUSN4L28227120080428?feedType=RSS&feedName=topNews> (noting Col. Davis’s testimony that “[t]here was that consistent theme that if we didn’t get this thing rolling before the election it was going to implode”). See also William Glaberson, *Ex-Prosecutor Tells of Push by Pentagon on Detainees*, N.Y. TIMES, Apr. 29, 2008, available at <http://www.nytimes.com/2008/04/29/washington/29gitmo.html> (testimony of former chief prosecutor alleging that he was politically pressured and told there could be no acquittals).

⁵⁹³ William Glaberson, *Judge Drops General from Trial of Detainee*, N.Y. TIMES, May 10, 2008, at A14.

general from Hamdan’s trial because he did not have the “required independence from the prosecution.”⁵⁹⁴

4. Speedy Release if Detention is Unlawful

From common law, to early adoption in America, to its incorporation into the Constitution, the writ has always guaranteed the speedy release from unlawful executive detention.⁵⁹⁵ In addition to granting a remedy of release, at common law the habeas petitioner was entitled to “a swift and imperative remedy” concerning the lawfulness of his detention.⁵⁹⁶ The writ of habeas corpus’s “province, shaped to guarantee the most fundamental of all rights, is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person.”⁵⁹⁷

Six years and counting, the current regime obviously does not provide a swift and imperative remedy. Indeed, it may not provide any at all. As discussed in Part III(B), *supra*, on their face, the CSRT and ARB procedures do not provide for release of a detainee if he is determined to not be an enemy combatant or is later found to no longer pose a threat to the U.S. or its allies. Further, the CSRT has no power to release a detainee even after a finding that the detainee is not an unlawful enemy combatant.⁵⁹⁸ Such a determination must be approved by the CSRT Director and then forwarded to the Secretary of State to coordinate deportation of the detainee with his or her home country, or for other disposition consistent with applicable laws, consistent with the domestic obligations, international obligations, and foreign policy of the

⁵⁹⁴ *Id.*

⁵⁹⁵ *See, e.g.*, 3 BLACKSTONE, COMMENTARIES *133 (1769); *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (“It is clear . . . that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody”); *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (purpose of habeas was the “liberation of those who may be imprisoned without sufficient cause”).

⁵⁹⁶ *Price v. Johnston*, 334 U.S. 266, 283 (1948).

⁵⁹⁷ *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968); *see also* *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005).

⁵⁹⁸ *See* Part III(B), *supra*.

United States.⁵⁹⁹ There is no time limit or deadline on this process and it is subject to change at any time.⁶⁰⁰ The ARB likewise does not provide a sure remedy. Its annual decisions are only recommendations to a Designated Civilian Official, who in turn makes a decision as to whether an enemy combatant should still be detained according to established Deputy Secretary of Defense policy.⁶⁰¹ Another problem with the annual review is that the detainee’s “intelligence value” is another basis for continued detention.⁶⁰²

The appellate review established by the DTA similarly fails to provide an adequate remedy. As discussed Part III(B), *supra*, the D.C. Circuit Court only has the authority to determine the validity of any final decision of the CSRT.⁶⁰³ A detainee is not entitled to release even if the D.C. Circuit Court determines that the CSRT’s enemy combatant classification was erroneous.

The problem persists to the MCA. There is no guarantee under the MCA that a detainee, classified as an enemy combatant under a CSRT, then charged and tried by a military commission, and then found innocent of all charges, will then be released. Indeed, it appears that even after a defendant is acquitted, there is a good chance that he will simply be returned to Guantanamo until the end of the war on terror so long as the Government believes the individual may pose some danger to troops in the field.⁶⁰⁴

⁵⁹⁹ Brief for United States Senator Arlen Specter as Amicus Curiae Supporting Petitioners, *supra* note 465, at 12-13.

⁶⁰⁰ *Id.* at 13.

⁶⁰¹ Yousef, *supra* note 582, at 923. There is no review of the Designated Civilian Official’s decision. *See* Memorandum from Gordon England, Deputy Sec’y of Def. to Sec’ys of the Military Depts., Chairman of the Joint Chiefs of Staff, and Under Sec’y of Def. for Policy, Jul 14, 2006, *available at* <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>.

⁶⁰² Toobin, *supra* note 11, at 34; *see also* Part III(B), *supra*.

⁶⁰³ Brief for United States Senator Arlen Specter as Amicus Curiae Supporting Petitioners, *supra* note 465, at 24-25.

⁶⁰⁴ Toobin, *supra* note 11, at 35.

There are approximately 270 detainees left at Guantanamo.⁶⁰⁵ Of those 270, the U.S. has deemed approximately 60 detainees eligible for transfer or release.⁶⁰⁶ Fourteen await trial by military commission,⁶⁰⁷ and the Government anticipates that there is sufficient evidence to try a total of 60 to 80.⁶⁰⁸ In other words, there are at least approximately 130 detainees that the Administration currently has no plan for other than indefinite detention without trial.⁶⁰⁹

5. Right to Counsel

The Supreme Court has long recognized the right to counsel, especially in cases concerning deprivation of life or liberty.⁶¹⁰ Even though initial and continued detention as an enemy combatant is determined by a CSRT and the annual review of that determination is reviewed by the ARB, neither provide a detainee with the right to counsel, in fact he is prohibited from procuring his own counsel.⁶¹¹ Instead, the CSRT provides for a “personal representative” who lacks a duty of loyalty and confidentiality to the detainee. This “personal representative” is instructed to disclose to the detainee that he is neither the detainee’s lawyer nor advocate, and that no confidentiality duty, including the attorney-client privilege, applies.⁶¹² These “personal representatives” can then in turn be questioned by the CSRT.

The prohibition against assistance of counsel at the CSRT is egregious on several levels. First, as discussed above, the initial CSRT ruling is incredibly important as there are approximately 130 current detainees who have been detained – some for as long as six years – on

⁶⁰⁵ *Id.* at 36.

⁶⁰⁶ *Id.*

⁶⁰⁷ William Glaberson, *New Roadblocks Delay Tribunals at Guantanamo, Frustrating the Pentagon*, N.Y. TIMES, Apr. 10, 2008, at A16.

⁶⁰⁸ Toobin, *supra* note 11, at 36.

⁶⁰⁹ *Id.*

⁶¹⁰ Brief for Association of the Bar of the City of New York as Amicus Curiae Supporting Petitioners, *supra* note 458, at 10.

⁶¹¹ *See* Part III(B), *supra*.

the basis of CSRT determinations and will likely continue to be detained indefinitely based on those determinations.⁶¹³ The CSRT decisions were all made without the detainees being assisted by counsel. Second, as detailed earlier, without assistance of counsel, detainees were unable to gather evidence in their favor. Finally, also as discussed above, D.C. Circuit review of CSRT decisions is limited to determining whether the CSRT followed its own procedures and whether it complied with the laws of the United States. Therefore, even though the detainee may have assistance of counsel before the D.C. Circuit, it is too little too late as even the most talented advocate is prohibited from introducing new exculpatory evidence that the detainee did not have access to at the time of the CSRT.

6. Evidence From Torture

Torture has been viewed with abhorrence for over 500 years.⁶¹⁴ Noting that torture has been held inimical to British common law since the 15th century, Britain's highest court recently ruled that information obtained by torture is never admissible evidence.⁶¹⁵ The CSRT, however, clearly provides for continued detention on the basis of evidence obtained through torture.⁶¹⁶ The DTA includes an anti-torture provision, but that applies only to future CSRTs.⁶¹⁷ Although

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⁶¹² Brief for Professors of Constitutional Law and Federal Jurisdiction as Amici Curiae Advocating Denial of Motion to Dismiss (Reversal) at 23 & n.26, *al-Marri ex rel. Berman v. Wright*, No. 06-7427 (4th Cir. Dec. 12, 2006), available at http://hrw.org/pub/2006/Brief_Amici_Curiae_Professors.pdf.

⁶¹³ In fact, of the approximately 558 CSRTs conducted as of late March 2005, only 38 detainees were found not to be enemy combatants. News Transcript, Defense Dep't Special Briefing on Combatant Status Review Tribunals, available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2504>. For the 328 ARBs conducted in 2006, only 55 detainees were recommended for transfer, while the rest (273) were recommended for continued detention. News Transcript, Annual Administrative Review Boards for Enemy Combatants Held at Guantanamo Attributable to Senior Defense Officials, available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902>.

⁶¹⁴ *Boumediene v. Bush*, 476 F.3d 981, 1006 (D.C. Cir. 2007) (Rogers, C.J., dissenting), cert. granted 127 S.Ct 3078.

⁶¹⁵ See Sarah Lyall, *Britain's Top Court Rules Information Gotten by Torture Is Never Admissible Evidence*, N.Y. TIMES, Dec. 9, 2005, <http://www.nytimes.com/2005/12/09/international/europe/09britain.html>.

⁶¹⁶ *Boumediene*, 476 F.3d. at 1006 (Rogers, C.J., dissenting).

⁶¹⁷ Detainee Treatment Act of 2005 § 1005(b)(1), Pub. L. No. 109-148, 119 Stat. 2739; *Boumediene*, 476 F.3d at 1006 (Rogers, C.J., dissenting).

the MCA prohibits evidence gained by torture, it allows the admissibility, under certain circumstances, of evidence gained by coercion.⁶¹⁸ This is problematic because of the Administration's controversial stance on what constitutes "torture" and the "coercive" interrogation techniques employed at Guantanamo.⁶¹⁹

This is not an academic concern. According to surveys of FBI employees who worked at Guantanamo, the interrogation of Guantanamo detainees was commonly intermixed with abuse and what most would consider torture – detainees are chained hand and foot in fetal positions to the floor, with no chair, food, or water, at times for more than 24 hours; interrogators use a variety of invasive and humiliating physical and psychological techniques including wrapping the detainee's head in duct tape and threatening the detainee with German Shepherd dogs; and interrogators restrain detainees in chains and force them to stand in "baseball catcher" positions.⁶²⁰ The *El-Banna* Petitioners' Brief is replete with further allegations of torture.⁶²¹

⁶¹⁸ 10 U.S.C. § 948r; refer to Part III(D)(3), *supra*; see also William Glaberson, *Judge's Guantanamo Ruling Bodes Ill for System*, N.Y. TIMES, May 11, 2008, at A26 (under the MCA, evidence gained through torture is inadmissible, but the prosecution can build its case from evidence derived from coercion).

⁶¹⁹ In 2005, former Attorney General Gonzalez approved a legal memorandum providing "explicit authorization to barrage terror suspects with a combination of painful physical and psychological tactics, including head-slapping, simulated drowning and frigid temperatures." Later that year, the DOJ approved a "secret" opinion, one most lawmakers did not know existed, declaring that none of the C.I.A. interrogation techniques constituted "cruel, inhuman and degrading" treatment. David Johnston, James Risen & Scott Shane, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1. The recent release of a 2003 memorandum authored by then-Assistant Attorney General John Yoo has sparked resurgent criticism of the Executive's legal opinions on torture. David Johnston & Scott Shane, *Memo Sheds New Light on Torture Issue*, N.Y. TIMES, Apr. 3, 2008, available at <http://www.nytimes.com/2008/04/03/washington/03intel.html>. On May 6, 2008, the House Judiciary Committee held a hearing on the 2003 Yoo memorandum with one witness describing how the memo damaged perceptions of the United States abroad. John Conyers, Jr., Chairman, House Judiciary Comm., Committee Examines Administration Torture Policies, Many Questions Left Unanswered (May 6, 2008), available at <http://judiciary.house.gov/newscenter.aspx?A=965>. Professor David Luban stated that the memorandum "misled" American soldiers and officials into using illegal methods. *Id.* Chairman Conyers issued a subpoena to David Addington, the Vice President's chief of staff the next day. John Conyers, Jr., Chairman., House Judiciary Comm., Conyers Issues Subpoena to Addington (May 7, 2008), available at <http://judiciary.house.gov/newscenter.aspx?A=967>. Yoo, now a professor at UC Berkeley, agreed to attend voluntarily at the hearing, scheduled for June 26. Notably, two controversial memos written by Stephen G. Bradbury, the head of the Office of Legal Counsel, in May 2005 remain undisclosed. Johnston & Shane, *supra*.

⁶²⁰ GTMO Counterterrorism Division Inspection Special Inquiry, *supra* note 15. The survey consists of responses of FBI employees who worked at Guantanamo and were asked to report possible mistreatment of detainees at the hands of law enforcement or military personnel.

In sum, the current regime under the CSRT, ARB, DTA, and MCA do not form an adequate and effective substitute for habeas review.⁶²² Moreover, the limited review of these determinations under the DTA by the D.C. Circuit, while important, do not ameliorate these concerns and do not rise to the level of an “escape hatch” as required by *Hayman* and *Swain*.⁶²³ Accordingly, Congress has not created an adequate and effective substitute for habeas review.

(continued)

⁶²¹ Brief for Jamil El-Banna et al., *supra* note 568, at 38-41.

⁶²² In addition to the procedural deficiencies highlighted above, there are additional considerable evidentiary concerns with the current system. For instance, the rules of evidence used by the CSRT are dangerously relaxed. As discussed *supra* Part III(B), the CSRT can review any evidence it deems relevant and helpful to the resolution of the issue, even hearsay evidence. The CSRT may accept testimony from witnesses who are not reasonably available, a practice that raises serious Confrontation Clause concerns. The military commissions under the MCA also have a very low threshold for admissible evidence. Hearsay evidence, as well as classified evidence that the accused has not had the opportunity to review and challenge may be admissible. As discussed *supra* Part III(D)(3), evidence is admissible under the MCA if the military judge deems it would have probative value to a reasonable person, which is a much broader standard than the federal civil or criminal evidentiary rules.

⁶²³ *See* Part I(H), *supra* (noting that *Hayman* and *Swain* require the habeas remedy to remain available should the substitute prove inadequate and ineffective).

VI. RECOMMENDATIONS

As demonstrated *supra* Part V, the MCA's suspension of habeas corpus as to those held at Guantanamo cannot pass constitutional muster. Moreover, the system crafted to substitute habeas corpus for these detainees is neither adequate nor effective. Accordingly, this Committee recommends that (1) the Association adopt a resolution urging Congress to repeal the MCA's habeas stripping provisions; (2) the Association pass a resolution urging Congress to take a fresh look at the current system, hold hearings, and create a more just and fair regime to address the detention of those held at Guantanamo and how and whether they should be tried for any charges against them; and (3) to prevent any potential for Executive abuses at other military detention centers outside of Guantanamo, the Association adopt a resolution urging Congress to hold hearings to consider amending the federal habeas statute to reflect the Great Writ's historically broad ambit to extend to pre-trial detainees within the custody of the Administration and detained in locations under the de facto control of the American government.

A. Congress Should Repeal the MCA's Habeas Stripping Provisions

As demonstrated above, the habeas stripping provisions of the MCA are unconstitutional and inimical to our fundamental traditions of due process of law. Should the *Boumediene* court refuse to invalidate the habeas stripping provisions of the MCA, we therefore recommend that the Association adopt a resolution urging Congress to repeal Section 7(a) of the MCA and its codification in the federal habeas statute at Section 2241(e) of title 28 of the United States Code and Subsection. We note that the pending legislation summarized in Part IV(D), *supra*, such as the Habeas Corpus Restoration Act of 2007, would address our concerns.

B. Congress Should Select a System for Detention and Trial of Aliens Detained as Enemy Combatants Consistent with Due Process

Should the *Boumediene* Court affirm the D. C. Circuit's decision, the current system of detaining and trying enemy combatants will stand. Conversely, should the Supreme Court overturn the D.C. Circuit's ruling, the Court may limit its ruling to the habeas question and not reach the issue as to whether the current system is an adequate and effective habeas substitute. The Court may also flatly reject the current system under the CSRT, ARB, DTA, and MCA, or at minimum in dicta cast a shadow questioning the propriety of the process. In any event, it is the position of this Committee that the Association should adopt a resolution urging Congress to revisit the current regime regardless of the outcome in *Boumediene* and fashion a system more consistent with our nation's long held traditions of due process.⁶²⁴

Any system of pre-trial detention of enemy combatants and subsequent trial of those held by the Government on substantive charges should provide at minimum the traditional cluster of due process protections afforded by habeas corpus against unlawful executive detention. At minimum, the pre-trial and trial system should contain the following hallmarks of our judicial system for those held by the Government.⁶²⁵

The detainee should have notice of the grounds for detention and charges against him. To the extent classified information is involved, such information should, at a minimum, be disclosed to the detainee's counsel;

⁶²⁴ We note that in June 2002, the Association passed a resolution on military commissions urging Congress that military commissions should only be employed in narrow circumstances, such as 1) where there are compelling national security interests to use military commissions instead of Article III courts; 2) the persons tried were accused of violating the laws of war or participating in the September 11th attacks; 3) the persons tried are non-citizens apprehended and appropriately detained outside the U.S.; and 4) the trials take place outside the U.S. Assoc. of the Bar of the State of New York, Resolution on Military Commissions, http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&CONTENTID=2740&TEMPLATE=/CM/ContentDisplay.cfm. The resolution also urged that any military commissions should afford due process consistent with the UCMJ and provide habeas corpus relief and that Congress should take steps to determine whether military commissions should be created. *Id.* The recommendations in this Report are intended to complement and update the Association's June 2002 resolution.

⁶²⁵ See Part V(C), *supra*, discussing the hallmarks of due process that are not available in the current system.

The detainee should have reasonable opportunity to present evidence justifying his release;

The detainee should be ensured of review of the evidence and charges against him by a neutral decision-maker. These protections should apply at all stages in the process, from pre-trial detention and review, through trial and appeal;

The detainee should have the opportunity to challenge his pre-trial detention before an impartial arbiter, granted in a timely manner, and speedy release if the pre-trial detention is unlawful or if acquitted of all charges after trial;⁶²⁶

The detainee should have the right to counsel at all stages of the proceedings; and A categorical ban on the introduction of evidence obtained by torture to justify a detainee's detention should be implemented.

These recommendations are meant as broad guidelines to be adhered to in the drafting of any proposed legislation. We do not endorse in this Report any particular system of pre-trial detention and trial of the Guantanamo detainees or other enemy combatants captured and held by the Executive Branch in its ongoing efforts to combat international terrorism. We are also aware of various proposals for reforming the system. One, propounded by Professors Neal Katyal and Jack Goldsmith, urges the creation of an Article III “national security court” similar to the Foreign Intelligence Surveillance Act courts, that would specialize in hearing cases of “preventive” detentions of terrorism suspects.⁶²⁷ Other critics propose that no alternate system for trying these detainees should be created; rather, the detainees should be processed through

⁶²⁶ Under no circumstances can the system continue to perpetuate indefinite detention. Similar to our criminal justice system, if a detainee is designated an enemy combatant, he must be brought to trial within a reasonable time. *Compare* 18 U.S.C. § 3161(c)(1) (“[i]n any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs”). If a detainee is not designated an enemy combatant, he must, in a reasonable time, be deported or released. *Compare* Alexander, *supra* note 344, at 1209 (discussing legal precedent that an illegal immigrant who cannot be deported to any country cannot be held indefinitely).

⁶²⁷ See Neal Katyal & Jack L. Goldsmith, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007. Professor Katyal was counsel for the petitioner in *Hamdan* and Professor Goldsmith, served as Assistant Attorney General for the Office of Legal Counsel. Together they propose that “a sensible first step” to dealing with the preventive detention problem is to establish a “national security court” composed of current Article III judges applying time-tested procedural and substantive rules that would attract fewer legal challenges. *See id.*; see also Jack Goldsmith, *The Laws in Wartime*, SLATE, Apr. 2, 2008, <http://www.slate.com/id/2187870/>. Goldsmith and Katyal further propose a specialized bar of elite defense attorneys with proper security clearances who would develop expertise in dealing with “the nuances of

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the criminal justice system.⁶²⁸ Although we applaud these efforts, we do not endorse any particular proposal in this Report. We only recommend that whatever system Congress adopts in the wake of the Supreme Court's decision in *Boumediene*, that system must include the foregoing lodestars of our nation's and the common law's jurisprudence.

C. Congress Should Consider Extending Habeas Corpus to All Pre-Conviction Detainees within the Custody of the U.S. Government Held at Locations within the De Facto Control of the U.S.

“At its core, the writ of habeas corpus has traditionally served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been the strongest.”⁶²⁹ Under *St. Cyr*'s “absolute minimum” standard, the writ's protection can not go below the floor set by the common law at 1789. However, as Justice Powell once stated: “No one would now suggest that this Court be imprisoned by every particular of habeas corpus as it existed in the late 18th and 19th centuries.”⁶³⁰

Indeed, the Supreme Court has emphasized that habeas corpus “is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.”⁶³¹ The Supreme Court explicitly recognized in *Swain v. Pressley* that habeas corpus has evolved beyond the limits that obtained during the 17th and 18th centuries.⁶³² The fundamental rights of due process and equal protection under the Fifth Amendment, the

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taking apart interrogation statements . . .” and the right to appeal. Katyal & Goldsmith, *supra*. They also insist that the same rules should apply to citizens and non-citizens. *Id.*

⁶²⁸ See Ctr. for Constitutional Rights, CCR Denounces Use of Flawed Secretive Guantanamo Commissions to Try Suspect, <http://www.ccrjustice.org/newsroom/press-releases/ccr-denounces-use-flawed-secretive-guantanamo-commissions-try-suspect> (arguing that no military commission can ever have legitimacy and recommending that a detainee be tried in federal court).

⁶²⁹ *I.N.S. v. St Cyr*, 533 U.S. 289, 301 (2001); *see also* Part I, *supra*.

⁶³⁰ *Schneckloth v. Bustamonte*, 412 U.S. 218, 256 (1973) (Powell, J., concurring).

⁶³¹ *Jones v. Cunningham*, 371 U.S. 235, 243 (1963).

⁶³² 430 U.S. 372, 380 n.13 (1977).

prohibition against cruel and unusual punishment under the Eighth Amendment, and a host of other constitutional provisions have changed over time according to evolving standards of decency.⁶³³ Habeas corpus has similarly evolved since the days of the Magna Carta and should continue to do so in the context of extra-territorial Executive detention.⁶³⁴ As Justice Marshall famously reminded, “we must never forget, that it is a constitution we are expounding [that is intended to] endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”⁶³⁵

Although the nation-state had already risen to prominence by 1789, concepts of sovereignty have evolved dramatically since then.⁶³⁶ Likewise, tectonic societal shifts since 1789 driven by revolutions in transportation, technology, communications, not to mention the very concept of human rights, have changed the global reach of the sovereign state and the rights and abilities of the individual.⁶³⁷ The stature of the United States on the world stage has changed dramatically since 1789. In addition to its fifty states, the U.S. has thirteen unincorporated territories across the world.⁶³⁸

⁶³³ See, e.g., *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) (“Due process clearly did not prohibit this process of judicial evolution at the time of the framing, and it does not do so today.”); *Atkins v. Virginia*, 536 U.S. 304 (2002) (finding unconstitutional the imposition of the death penalty on mentally retarded offenders because of “evolving standards of decency that mark the progress of a maturity society”).

⁶³⁴ The Suspension Clause is part of an evolving constitutional tradition and its efficacy is best preserved by a functional approach to surrounding changes. Neuman, *supra* note 44, at 970.

⁶³⁵ *McCulloch v. Maryland*, 17 U.S. 316, 407-15 (1819) (italics omitted).

⁶³⁶ See, e.g., Kofi A. Annan, *Two Concepts of Sovereignty*, *ECONOMIST*, Sept. 18, 1999, available at <http://www.un.org/News/ossg/sg/stories/articleFull.asp?TID=33&Type=Article>.

⁶³⁷ See William Pfaff, Writer, *Int’l Herald Tribune*, *Despite Global Changes, National Sovereignty Remains King*, available at http://web.nps.navy.mil/~relooney/3040_1314.htm.

⁶³⁸ Definitions of Insular Area Political Organizations, Office of Insular Affairs, U.S. Dep’t of the Interior, http://www.doi.gov/oia/Islandpages/political_types.htm. There is one incorporated territory, Palmyra Atoll, where the Constitution applies the same as it would in the fifty States. See *id.*

Most relevant to the immediate discussion, the U.S. has approximately 820 military bases in approximately forty countries around the world.⁶³⁹ Many of these bases are governed by Status of Forces Agreements (“SOFA”) between the United States and the host country wherein the parties negotiate concurrent jurisdiction with respect to the military base.⁶⁴⁰ Similar to Guantanamo, Bagram Air Force Base in Afghanistan (“Bagram”) serves as a detention center for approximately 630 detainees designated as enemy combatants by the Administration.⁶⁴¹ Also, similar to Guantanamo, there are several indicia of U.S. control over Bagram. For instance under the Accommodation Consignment Agreement between U.S. and Afghanistan, i.e., the Bagram lease, the U.S. can occupy the land, without rent, for so long as the U.S. wishes and without any interference from Afghanistan.⁶⁴²

The question on the horizon is how to address the next line of Guantanos like Bagram. There have been numerous reports that the President and his cabinet intend to close Guantanamo.⁶⁴³ As discussed earlier, the Administration has released or transferred many detainees from Guantanamo,⁶⁴⁴ while the detention center at Bagram now holds 630.⁶⁴⁵ A recent

⁶³⁹ Military of the United States, Wikipedia, http://en.wikipedia.org/wiki/Military_of_the_United_States (last accessed Apr. 28, 2008).

⁶⁴⁰ See Dep’t of Def., Glossary of Terms Used in the DOD Foreign Clearance Guide, [http://www.uscg.mil/hq/g-ci/affairs/travel/Enclosures/\(10\).doc&usg=AFQjCNEo18mWkwXEHIDUiToWBRy8qxs6IA](http://www.uscg.mil/hq/g-ci/affairs/travel/Enclosures/(10).doc&usg=AFQjCNEo18mWkwXEHIDUiToWBRy8qxs6IA) (defining a SOFA as “[a]n international agreement between two or more nations establishing the rights, privileges, and conditions under which military personnel of one contracting nation may enter, transit, or perform official duties within the territory of another contracting nation”).

⁶⁴¹ Tim Golden, *Foiling U.S. Plan, Prison Expands in Afghanistan*, N.Y. TIMES, Jan. 7, 2008, available at <http://www.nytimes.com/2008/01/07/world/asia/07bagram.html>.

⁶⁴² Petitioners’ Reply and Opposition to Respondents’ Motion to Dismiss the Second Amended Petition at 24-26, *Ruzatullah et al. v. Rumsfeld*, No. 06-CV-01707 (GK) (D.D.C. Mar. 30, 2007). Although petitioners in *Ruzatullah* alleged that there was no SOFA between the U.S. and Afghanistan covering Bagram, the Government responded that the U.S. had indeed executed a SOFA with Afghanistan covering Bagram in 2002. Respondents’ Reply to Petitioners’ Reply and Opposition to Respondents’ Motion to Dismiss the Second Amended Petition at 14, *Ruzatullah et al. v. Rumsfeld*, No. 06-CV-01707 (GK) (D.D.C. Apr. 20, 2007). The Government relied on this as well as *Eisenrager* and other legal precedent to argue that the Bagram detainees have no constitutional rights. The case is currently stayed pending resolution in *Boumediene*.

⁶⁴³ Toobin, *supra* note 11, at 32.

⁶⁴⁴ See *id.*

⁶⁴⁵ Golden, *infra* note 646.

lawsuit filed by various Afghans held at Bagram alleges that the conditions of confinement and levels of due process at Bagram are far worse than Guantanamo.⁶⁴⁶ In addition to Bagram, there have been various reports that the Administration has transported detainees in the war on terror to U.S.-operated prisons in foreign countries such as Thailand and Afghanistan without public disclosure or accountability.⁶⁴⁷ Along similar lines, there are widespread reports of the Administration's extraordinary rendition practices, where the Administration allegedly detains a suspected terrorist or informant and transports him to an allied country that does not prohibit torture where he can be interrogated without regard to due process or human rights and likely tortured in the process.⁶⁴⁸

This Committee recommends that Congress should examine extending the right of habeas corpus to pre-trial detainees within the custody of the Administration held at foreign locations under the de facto control of the United States. In an era when the Executive Branch can transport a detainee on a whim to far-flung military bases throughout the world, which may effectively operate under the independent control of the U.S., it stands to reason that the

⁶⁴⁶ Second Amended Petition for Writ of Habeas Corpus, Ruzatullah et al. v. Rumsfeld, No. 1:06-cv-1701 (GK) (D.D.C. Jan 09, 2007), at 10-12 citing Tim Golden, *Army Faltered in Investigating Detainee Abuse*, N.Y. TIMES, May 22, 2005, available at <http://www.nytimes.com/2005/05/22/international/asia/22abuse.html>; Douglas Jehl, *Army Details Scale of Abuse in Afghan Jail*, N.Y. TIMES, Mar. 12, 2005, available at <http://www.nytimes.com/2005/03/12/politics/12detain.html> (providing details on two homicides at Bagram and other abuses).

⁶⁴⁷ See, e.g., Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Feb 2, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html> (noting also prisons in several Eastern European countries that the Washington Post did not name after requests from senior U.S. officials).

⁶⁴⁸ See, e.g., BBC News, EU endorses damning report on CIA (Feb. 14, 2007), available at <http://news.bbc.co.uk/2/hi/europe/6360817.stm>; Stephen Grey & Ian Cobain, *Suspect's Tale of Travel and Torture*, GUARDIAN, Aug. 2, 2005, available at <http://www.guardian.co.uk/uk/2005/aug/02/guantanamo.humanrights>; Dana Priest, *Jet Is an Open Secret in Terror War*, WASH. POST., Dec. 27, 2004, available at <http://www.washingtonpost.com/ac2/wp-dyn/A27826-2004Dec26?language=printer>. But see 'Renditions save lives': Condoleezza Rice's Full Statement, TIMES (London), Dec. 5, 2005 (defending rendition but denying that individuals were sent to other countries for torture). See generally Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO WASH. L. REV. 1333 (2007).

protections of habeas corpus should follow the detainee – citizen or not – so long as he is within the custody of the U.S.

This approach is consistent with *Rasul*'s clear mandate elevating form over substance in terms of review of Executive detention and the protections of habeas corpus and the common law's emphasis on the jailer not the detainee. As discussed above, *Rasul* was less preoccupied with formal proclamations of sovereignty and more concerned with the fact that Guantanamo was effectively within the control of the United States.⁶⁴⁹ Moreover, focusing on the nature of the jailer is also consistent with *Braden v. 30th Judicial Circuit Court of Kentucky*, holding that “[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody” and establishing a more flexible jurisdictional rule allowing a district court to act upon a habeas petition so long as the custodian is within the court's jurisdiction.⁶⁵⁰ To the extent military bases holding detainees share the hallmarks of control that the *Rasul* court highlighted of Guantanamo, the reach of habeas protection should extend to those detention camps as well.⁶⁵¹

⁶⁴⁹ See generally Part III(A), *supra*.

⁶⁵⁰ 410 U.S. 484, 494-95 (1973); see also Part I(G), *supra*. In a recent case, the D.C. Circuit Court upheld the jurisdiction of the habeas court concerning an enemy combatant detained by a multinational force, but under U.S. control. *Omar v. Harvey*, 479 F.3d 1, 9 (D.C. Cir. 2007), *cert. granted* 128 S. Ct. 741 (finding that “the petition is “within the jurisdiction” of the district court because respondents, the Secretary of the Army and two high-ranking Army officers, are amenable to service in the District of Columbia”).

⁶⁵¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 524 (2004) (disagreeing with the position that there should have been a different result if Hamdi had been held at Guantanamo or in Afghanistan). Using effective control as a benchmark is commonly applied in the international human rights context. For instance, the Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights, of which the U.S. is a signatory, has developed two tests – the effective control test and the personal control test – to determine whether and where treaty norms apply to states that have agreed to comply with international human rights treaties. See Satterthwaite, *supra* note 648, at 1369. Under the effective control test, treaty provisions would apply to spaces abroad that are under the effective control of the State. *Id.* Thus, in the case of the United States, treaty provisions would apply to U.S. action in Guantanamo, and in other locations where the U.S. has effective control, such as the detention centers at the Bagram Air Base in Afghanistan. *Id.*

The Supreme Court has long upheld the extra-territorial reach of habeas to American citizens.⁶⁵² In *Reid v. Covert*, for instance, the Supreme Court heard habeas petitions filed by two wives of U.S. military servicemen who were accused of murdering their husbands while stationed in foreign U.S. military bases and faced trial by military commission under the UCMJ.⁶⁵³ The Government argued that it could detain and try American citizens abroad by any process, including the UCMJ, even if it departed from the Constitution's due process protections.⁶⁵⁴ The Court explicitly rejected the Government position and granted the petitions; holding instead that the Government cannot detain citizens abroad free of the Constitution.⁶⁵⁵ Notably, Justice Harlan's concurring opinion promoted a contextual approach to assessing whether certain rights secured by the Constitution were applicable to Government action abroad.⁶⁵⁶ Justice Harlan's analysis centered on whether depending on the circumstances of the given situation applying a particular constitutional provision would be "impractical or anomalous."⁶⁵⁷

As the Court recently affirmed in *Hamdi*, whether Hamdi was detained in a naval brig in South Carolina, or the detention camps in Guantanamo or Afghanistan, the location of the detention made no difference; he was entitled to certain basic due process protections.⁶⁵⁸ The extra-territorial application of habeas to citizens held within the custody of the Government

⁶⁵² *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 318 (1936) (holding that the right of habeas corpus extends to U.S. citizens outside U.S. sovereignty).

⁶⁵³ *Reid v. Covert*, 354 U.S. 1, 3 (1957).

⁶⁵⁴ *Id.*

⁶⁵⁵ *Id.* at 5-6 (holding that provisions of the Uniform Code of Military Justice extending court-martial jurisdiction to persons accompanying the armed forces outside the United States could not be constitutionally applied to trial of civilian dependents of members of the armed forces overseas, in times of peace, for capital offenses); *see also id.* at 56 (Frankfurter, J., concurring) ("[g]overnmental action abroad is performed both under the authority and the restrictions of the Constitution . . .").

⁶⁵⁶ *Reid*, 354 U.S. at 74-75 (Harlan, J., concurring) ("[T]he question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case").

⁶⁵⁷ *Id.*

outside the U.S. was recently affirmed in *Omar v. Harvey*, where the D.C. Circuit rejected the Government's motion to dismiss petitioner's habeas petition challenging his detention in Iraqi jail because petitioner was in the custody of the U.S. military.⁶⁵⁹

Certain fundamental constitutional protections have long extended to aliens in territories under the control of the U.S. Although in the so-called *Insular Cases* the Supreme Court declined to extend certain rights such as the Sixth Amendment jury trial right to inhabitants of U.S. unincorporated territories, such as the Philippines and Puerto Rico, it specifically held that “the guarantees of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Puerto Rico.”⁶⁶⁰ Justice Kennedy's concurring opinion in *United States v. Verdugo-Urquidez* relied on Justice Harlan's contextual approach in examining whether the protections of the Fourth Amendment against warrantless searches and seizures extended to searches done by U.S. authorities of a foreign national at his foreign residence.⁶⁶¹ Applying the balancing test adopted by Justice Harlan in *Reid v. Covert*, and relied on by Justice Kennedy in *United States v. Verdugo-Urquidez* to extend constitutional rights to aliens on a case by case basis, the process due to those detained indefinitely without trial within the custody of the U.S. at a location under the control of the U.S.

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⁶⁵⁸ *Hamdi*, 542 U.S. at 524.

⁶⁵⁹ 479 F.3d 1 (D.C. Cir. 2007), cert. granted 128 S. Ct. 741.

⁶⁶⁰ *Balzac v. Puerto Rico*, 258 U.S. 298, 312-13 (1922); see also *Downes v. Bidwell*, 182 U.S. 244, 283 (1901) (“even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property” and should not be “in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress”).

⁶⁶¹ 494 U.S. 259, 277-278 (1990) (Kennedy, J., concurring) (agreeing with the majority's holding that the Fourth Amendment did not apply to the search by American authorities of the Mexican residence of a Mexican citizen and resident who had no voluntary attachment to the United States).

could reasonably encompass the fundamental right to test the legality of that detention through the writ of habeas corpus.

Extending habeas to those held in locations where the U.S. exercises de facto control is also consistent with preventing the Executive Branch from creating “legal black holes” outside the rule of law.⁶⁶² The common law has long rejected this ruse. For instance, the 1667 impeachment of Edward Hyde charged the first Earl of Clarendon with attempting to avoid habeas corpus by sending certain prisoners to remote islands, garrisons, and other places where he believed they would be out of reach of the courts.⁶⁶³ In 1669, the English Parliament corrected that habeas loophole in Section 11 of the Habeas Corpus Amendment Act of 1679, and such ploys to evade habeas corpus have been unlawful in England ever since.⁶⁶⁴ There have been many reports that the Government chose Guantanamo to hold alien enemy combatants in the belief that the writ of habeas corpus would not be available to those detained there.⁶⁶⁵ Some four hundred years after the Earl of Clarendon, *Rasul* roundly rejected the Executive Branch’s attempt to create a “legal black hole” in Guantanamo outside the review of the Judiciary.⁶⁶⁶

A flexible interpretation of the writ of habeas corpus is particularly important here where detainees in the war on terror face indefinite detention. For instance, the remaining detainees at Guantanamo have been held – some for as long as six years – with no plans of trial, let alone release, in the near future. In addition, the manner in which individuals entered custody counsels broad habeas protections to ensure against unlawful or arbitrary detention. For instance, based

⁶⁶² See Hafetz, *supra* note 34, at 169 (discussing attempts by the government to prevent judicial review of the detention of alien detainees by holding them at locations where it believes the Constitution does not reach and/or by labeling them in such a way, as unlawful enemy combatants, as to preclude constitutional protections).

⁶⁶³ Steyn, *supra* note 34, at 8.

⁶⁶⁴ *Id.*

⁶⁶⁵ Elizabeth A. Wilson, *The War on Terrorism and “The Water’s Edge”: Sovereignty, “Territorial Jurisdiction,” and the Reach of the U.S. Constitution in the Guantanamo Detainee Litigation*, 8 U. PA. J. CONST. L. 165, 166 (2006).

on a study of 517 CSRT records, only 5% of those detained at Guantanamo were captured by U.S. forces and 86% were taken into custody by Pakistani and Northern Alliance forces when the U.S. government was offering substantial bounties for the capture of any suspected Arab terrorist.⁶⁶⁷ A study based on these CSRT records revealed that the vast majority of detainees never engaged in hostilities against the U.S., but instead were detained because of a varyingly loose association with one of 72 groups the military has deemed to have some connection to al-Qaeda or other terrorist groups.⁶⁶⁸

Moreover, detaining combatants indefinitely without the prospect of judicial review long after the conflict justifying their initial detention is inconsistent with modern and common law principles of habeas corpus preventing arbitrary deprivations of liberty and the exigencies of warfare. As Justice Kennedy explained in his concurrence in *Rasul*: “Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.”⁶⁶⁹

Finally and unfortunately, the conduct of this Administration has demonstrated the need to recognize review of any and all detentions by the Executive Branch in the war on terror as illustrated *supra*, Part V(C)(6). The allegations of torture – many substantiated – at Guantanamo have brought near universal criticism, some even likening Guantanamo as “the gulag of our times.”⁶⁷⁰

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⁶⁶⁶ See *Rasul v. Bush*, 542 U.S. 466, 481 (2004).

⁶⁶⁷ DENBEAUX ET AL., *supra* note 20, at 2, 15 (2006).

⁶⁶⁸ Baher Azmy, *Rasul v. Bush and the Intra-Territorial Constitution*, 62 N.Y.U. ANN. SURV. AM. L. 369, 426 (2007).

⁶⁶⁹ *Rasul v. Bush*, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring).

⁶⁷⁰ Dana Milbank, *An Administration's Amnesty Amnesia*, WASH. POST., Jun. 5, 2005, at A4 (quoting a report by Amnesty International); see also Part V(C)(6), *supra*.

The individual cases of Ali Saleh Kahlah Al-Marri and Jose Padilla, American resident and citizen, respectively, also serve as examples for the need for a strong judiciary to protect against Executive abuses through the writ of habeas corpus.⁶⁷¹ Al-Marri has been detained at a brig in South Carolina for over five years under conditions very similar to those that exist at Guantanamo.⁶⁷² He has been almost entirely isolated from the outside world and kept in solitary confinement, shackled, and in a cell measuring approximately three meters by two meters.⁶⁷³ During the first year of his detention, al-Marri was interrogated repeatedly and threatened with deportation and rape.⁶⁷⁴ Al-Marri has still not been able to communicate with family or friends, though he was finally granted access to a lawyer.⁶⁷⁵ Detained at the complete discretion of the Department of Defense, al-Marri potentially faces many more years of detention.⁶⁷⁶ Padilla was detained as an enemy combatant in a naval brig in Charleston, South Carolina.⁶⁷⁷ The Government finally brought criminal charges against Padilla – charges for terrorism-related offenses that bore no relationship to the reason he was being detained by the military.⁶⁷⁸ Padilla’s lawyers alleged that, throughout the process, Padilla was subject to systematic abuse, including sleep deprivation, detention in a 9-foot-by-7-foot cell, being chained in painful positions, and being subjected to mind-altering drugs.⁶⁷⁹

⁶⁷¹ Refer to Part IV(B), *supra*, for discussion of these cases.

⁶⁷² Amnesty International, USA: Three years on – Ali al-Marri remains in solitary confinement without charge or trial, *available at* <http://web.amnesty.org/library/index/engamr510952006>.

⁶⁷³ *Id.*

⁶⁷⁴ *Id.*

⁶⁷⁵ *Id.*

⁶⁷⁶ *Id.*

⁶⁷⁷ *Rumsfeld v. Padilla*, 542 U.S. 426, 430-32 (2004).

⁶⁷⁸ Ackerman, *supra* note 271, at 484.

⁶⁷⁹ Peter Whoriskey, *Jury Convicts Jose Padilla of Terror Charges*, WASH. POST., Aug. 17, 2007, at A01. For more information about alleged torture of al-Marri, Padilla and others, see Naomi Klein, *The U.S. Psychological Torture System Is Finally on Trial*, GUARDIAN, Feb. 23, 2007, *available at* <http://www.guardian.co.uk/commentisfree/0,201,4580,00.html> (Padilla); Brennan Center for Justice, *Al-Marri v. Pucciarelli: Court Cases*, http://www.brennancenter.org/content/resource/al_marri_v_pucciarelli/ (al-Marri). For information about Padilla’s trial (on charges unrelated to his cause for detention), see Peter Whoriskey & Dan Eggan, *Judge Sentences Padilla*

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Moreover, the infamous abuses at Abu Ghraib will always stand as a reminder to what can happen when the Executive Branch is left alone without any oversight.⁶⁸⁰ The loss of human dignity experienced by these detainees – many of whom are likely only guilty of being in the wrong place at the wrong time⁶⁸¹ – is immeasurable, and the damage to the United States’ reputation in eyes of the world is incalculable.

To be sure, we are mindful of potential practical and logistical problems that may arise in extending habeas to detainees held in U.S. foreign bases.⁶⁸² We are also mindful of Justice Kennedy’s caveat that there is a sphere within which the Executive must be able to operate without intrusion from the courts.⁶⁸³ Nevertheless, we maintain that Congress should at minimum examine more fully extra-territorial detentions of enemy combatants held in foreign U.S. military detention centers and assess whether habeas protection is due.⁶⁸⁴

The Supreme Court has historically emphasized that “[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in this context that its protections have been the strongest.”⁶⁸⁵ At a time when the U.S.’s stature in the realm of global human rights has reached an all-time low, ensuring that all detained by the

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to 17 Years, Cites His Detention, WASH. POST, Jan 23, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/22/AR2008012200565.html>.

⁶⁸⁰ See, e.g., BBC News, Iraq Abuse Ordered ‘from the top’, <http://news.bbc.co.uk/1/hi/world/americas/3806713.stm> (reporting Brig. Gen. Janis Karpinski’s allegations that she was told to treat detainees at Abu Ghraib like dogs); Dan Glaister & Julian Borger, *1,800 New Pictures Add to U.S. Disgust*, GUARDIAN, May 13, 2004, available at <http://www.guardian.co.uk/world/2004/may/13/iraq.usa> (noting “[p]hotographs of dogs snarling at prisoners, of women being forced at gunpoint to expose their breasts, of hooded prisoners being forced to masturbate, and of forced homosexual acts”).

⁶⁸¹ See Toobin, *supra* note 11, at 34 (citing research by Benjamin Wittes that suggests that perhaps only one-third of the detainees are terrorists or enemy fighters).

⁶⁸² 152 CONG. REC. S10270-71 (daily ed. Sept. 27, 2007) (statement of Senator Kyl) (arguing that to afford CSRTs to detainees in all future military conflicts would be impossible and allowing appeals of hundreds or thousands of CSRT decisions to the Supreme Court is impracticable).

⁶⁸³ *Rasul v. Bush*, 542 U.S. 466, 487 (2004).

⁶⁸⁴ The reporting requirements under the DTA regarding aliens in the custody of the Department of Defense outside the U.S. is a good but insufficient start. See Detainee Treatment Act § 1005, Pub. L. No. 109-148, 119 Stat. 2739 .

⁶⁸⁵ *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001).

Executive Branch are entitled to habeas protection would go a long way to repairing that image. The Supreme Court has already held in *Hamdi* that citizen-detainees in the war on terror are entitled basic fundamental rights against arbitrary detention. Congress needs to consider whether there is a basis to refuse the same protections to alien pre-trial detainees wherever they are held within the custody and control of the Executive Branch.

To that end, this Report urges the Association to adopt a resolution to Congress requesting that it hold hearings on extra-territorial detention and whether the federal habeas statute should be amended to address those issues.

VII. CONCLUSION

Indefinite and unlawful pre-trial detention is anathema to our nation's longstanding tradition of due process. Habeas corpus evolved as a necessary check against such abuses by the Executive by providing the means to test the factual and legal basis of imprisonment. For that reason, the Constitution's framers insisted that the writ could only be suspended in times of invasion or rebellion and courts have read its protections broadly.

The habeas stripping provisions of the MCA are inconsistent with our nation's most revered tenets of equity and justice as they perpetuate indefinite, and probably unlawful, detention without charge. Even if they do pass constitutional muster under *Boumediene* – which they likely will not – they should be repealed as a matter of bad policy that has damaged our reputation around the globe.

Restoring habeas relief is only the first step in adequately addressing the problems with the present policies of Executive detention. Congress should review the current system for detaining and trying suspected terrorists and select a system consistent with fundamental protections of due process such as notice, the right to counsel, and the reasonable opportunity to present evidence challenging detention. Learning from the lessons of Guantanamo, Congress should take into account that these detainees are not analogous to traditional prisoners of war. Many are not captured on a battlefield and do not wear uniforms of an enemy nation in a declared war; rather, they are apprehended by third parties with questionable agendas under possible mistaken or false information and face indefinite detention in a war with no end in sight.

These concerns counsel that more, not less, process is due than what is currently provided. As the Supreme Court reminded us in *Hamdi*, “[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is

in those times that we must preserve our commitment at home the principles for which we fight abroad.”⁶⁸⁶

⁶⁸⁶ Hamdi v. Rumsfeld, 542 US. 507, 532 (2004).