

Jefferson Memorial Lecture

The War on Terror and the Rule of Law^{*}

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I. INTRODUCTION

Since the end of World War II, American lawyers and judges—myself included—have preached the benefits of the rule of law throughout the world.¹ This American message has generally been received with favor, whether by officials of the former Soviet Union, former Communist bloc jurists in Eastern Europe, or legal groups in Africa, the Middle East, Asia, the Pacific Islands, or elsewhere.

The American legal messenger, so to speak, has been regarded throughout the world as a trusted figure of goodwill, mainly by virtue of close identification with the message borne: that the rule of law is fundamental to a free, open, and pluralistic society; that ours is a government of laws and not of persons; that no one—not even the President—is above the law; and that the government is bound by the Constitution and laws enacted in conformance therewith.

The credibility of this message, however, has been steadily undermined over the last six years since we began the so-called “War on Terror.” Since then, the American rule of law message—as well as its messenger—has been greeted with increasing skepticism and even hostility. The actions we have taken in the War on Terror, especially our detention policies, have belied our commitment to the rule of law and caused this dramatic shift in world opinion.

Since 9/11, the Bush Administration has been at war with the rule of

^{*} This is a slightly extended and footnoted version of the Jefferson Memorial Lecture, delivered at the University of California, Berkeley, on September 17, 2007. I am grateful to Dean Andrew J. Szeri, of the Graduate Division, and Professor Harry N. Scheiber, Chair of the Jefferson Lecture Committee, for their hospitality during my wife’s and my visit to Berkeley. I also acknowledge the research assistance of Michelle Comeau, one of my law clerks for the 2006-07 term, and Todd Borden, a student at UCLA Law School, an extern in my chambers in the summer of 2007.

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1. I have been among that legion, having made numerous trips abroad, both at the behest of the former United States Information Agency and the Department of State, as well as on behalf of a number of non-governmental organizations.

law. While declaring a state of war with al Qaeda and the Taliban, this Administration has denied prisoner-of-war status to enemy combatants captured on the battlefield, depriving them of the protection of the Geneva Conventions. The Administration insists that it can indefinitely detain suspected terrorists, including those captured in non-combat locations, as long as the War on Terror lasts.

The Administration has attempted to suspend the writ of habeas corpus in contravention of the Constitution. In violation of our obligations under the Convention Against Torture,² the Administration has transferred detainees to regimes it knows will subject them to torture. Indeed, torture-filled interrogations and detentions have become integral parts of the CIA's extraordinary rendition program.³ The Administration insists that it can hold prisoners, including U.S. citizens, in the U.S. indefinitely without charging them with any crime, while denying them the right to counsel and the right to hearings of any kind.

Underlying this assault on the rule of law is the notion that the President is not bound by law—that he can flout the Constitution, treaties, and statutes of the United States as Commander-in-Chief during times of war. Yet, the Administration's litigation record of defending the premises of its legal position in the War on Terror, including legislation passed by a compliant Congress, is far from successful.

With these preliminary observations in mind, I would like to focus on one aspect of the War on Terror: our detainee treatment policy. First, I outline the development of this policy. Then I explain why our detention rules fall short of complying with the rule of law. Finally, I reflect on what changes might bring our policy in line with the rule of law and our Constitution, and thus put us on the road toward regaining respect as a nation of laws and not of persons.

II. DEVELOPMENT OF DETAINEE TREATMENT POLICY

Since September 11, 2001, the Administration has been detaining suspected terrorists without criminal charges and without designation as prisoners of war, opting instead to label these suspects as "enemy combatants" or "unlawful combatants." The greatest number and

2. Article III of the Convention provides: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 114. *See also* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681, 2681-822 (codified at 8 U.S.C. § 1231 note) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

3. *See* JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* 190, 198-99 (2007).

concentration of detainees in U.S. custody are the approximately 375 now held at Guantanamo Bay Naval Base in Cuba,⁴ but there are others, including detainees held in the U.S. Facing the prospect of indefinite detention, detainees began petitioning for writs of habeas corpus. Because the Guantanamo detainees were held incommunicado, these petitions were often filed through relatives acting as next friends. The ensuing litigation eventually reached the Supreme Court in the cases of *Rasul v. Bush*,⁵ *Hamdi v. Rumsfeld*,⁶ and *Padilla v. Rumsfeld*⁷ in 2004.

The Court's rulings in these and other enemy combatant cases have tended to hinge on narrow jurisdictional questions; however, important constitutional concerns lie in the background of these cases and in the legislative and administrative responses to them. Of particular concern is the question of whether detaining enemy combatants without criminal charges and without access to the courts violates the Suspension Clause of the Constitution, which forbids Congress from suspending the writ of habeas corpus "unless when in cases of rebellion or invasion the public safety may require it."⁸

The development of the legal framework governing detainee treatment may be understood in terms of three major phases. Phase One started with the September 2001 Authorization for Use of Military Force ("AUMF"), followed by the November 2001 presidential order authorizing military commissions for enemy combatants, and continued through the first three Supreme Court decisions responding to detainee petitions seeking judicial review of their confinement. Phase Two consisted of the legislative and executive responses to the 2004 Supreme Court cases—*Rasul*, *Hamdi*, and *Padilla*—including the establishment of Combatant Status Review Tribunals ("CSRTs") and passage of the Detainee Treatment Act ("DTA"). It also includes *Hamdan v. Rumsfeld*,⁹ the Court's interpretation of the DTA. Finally, Phase Three brings us to the present, with the enactment and recent appellate interpretations of the Military Commissions Act ("MCA").

A. Phase One: from 9/11 to Hamdi, Rasul, and Padilla

One week after the September 11, 2001 attacks on the World Trade Center and the Pentagon, Congress passed the AUMF, which authorized the President "to use all necessary and appropriate force against those

4. Helene Cooper & William Glaberson, *At White House, Renewed Debate On Guantanamo*, N.Y. TIMES, Jun. 23, 2007, at A1. The authors also note that the administration plans to bring cases before military commissions for eighty of the current detainees. Seventy-five other detainees have been cleared for release, but no country will accept them. Approximately 400 other detainees have spent time in Guantanamo and have since been released.

5. 542 U.S. 466 (2004).

6. 542 U.S. 507 (2004).

7. 542 U.S. 426 (2004).

8. U.S. CONST. art. I, § 9, cl. 2.

9. 126 S. Ct. 2749 (2006).

nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”¹⁰ Unlike previous congressional war powers authorizations, the AUMF targets not a particular nation state but rather terrorist organizations and the parties supporting them.¹¹ The Administration has relied on the AUMF to argue that the scope of its “all necessary and appropriate force” includes the indefinite detention of suspected terrorists as enemy combatants.¹²

On November 13, 2001, the President signed a Military Order authorizing the Secretary of Defense to detain any alien the President determined to be a member of al Qaeda; or who had engaged in, aided or abetted, or conspired to commit international terrorism; or who had harbored someone who had done any of those acts.¹³ The Order also authorized the trial of such detainees before military tribunals and denied them the right to seek recourse in any other tribunal, including state and federal courts. The Order specified the AUMF as a basis for authorizing detentions and military commissions and was the first authorization of military commissions since World War II.¹⁴ To date, only ten detainees have been charged with violating the laws of war by a military commission either under this Military Order or under the subsequently enacted MCA, and no commission has reached a final verdict in any case, although some proceedings have begun.¹⁵

Amidst the subsequent fighting in Afghanistan in late 2001, hundreds of suspected Taliban and al Qaeda associates were captured by U.S. military forces or handed over to U.S. forces by anti-Taliban Afghan allies.¹⁶ By January 2002, twenty such detainees had been transported to

10. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note).

11. See generally Jay M. Zitter, Annotation, *Construction and Application of Authorization for Use of Military Force (AUMF)*, 16 A.L.R. FED. 2D 333 (2007) for a discussion of how the AUMF has been interpreted and applied.

12. The Government asserted this position in *Rasul*, *Hamdi*, *Padilla*, *Hamdan*, and *al-Marri*, discussed *infra*.

13. Mil. Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 13, 2001). See 32 C.F.R. §§ 9.1-18.6 for the implementing regulations.

14. See generally Detlev F. Vagts, *Military Commissions: A Concise History*, 101 AM. J. INT’L L. 35 (2007) (outlining the history of military commissions in the U.S. from the Revolutionary War to World War II).

15. As in the case of *Hamdan*, where the commission was suspended by court order for its procedural failings. See *infra* text accompanying notes 91-103. For a list of the ten pending cases, see U.S. Dep’t of Defense, <http://www.defenselink.mil/news/commissionsarchives.html> (last visited Nov. 12, 2007).

16. Only 5% of Guantanamo detainees were captured by U.S. forces; 86% were arrested by Pakistan or the Northern Alliance before being turned over to U.S. custody. MARK DENBEAUX, ET. AL., REPORT ON GUANTANAMO DETAINEES, A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 2 (2006), available at http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

Guantanamo Bay Naval Base in Cuba,¹⁷ and by February 2002, 300 were being held at Guantanamo.¹⁸ Rather than treat the suspects as prisoners of war, the Administration labeled these detainees “unlawful combatants”¹⁹ and claimed that this status placed them beyond the protections of the Third Geneva Convention.²⁰ The Administration argued, among other things, that al Qaeda was not a state party to the Geneva Conventions.²¹

Under traditional law of war concepts, all enemy combatants are lawful or unlawful. Lawful combatants are entitled not only to prisoner-of-war status but also to combatant immunity; that is, they may attack legitimate military targets without facing criminal prosecution for war crimes.²² Thus, a lawful combatant can kill enemy forces in war without facing murder charges, whereas an unlawful combatant lacks such immunity. The Executive branch acted alone in designating these enemy combatants “unlawful,” and detainees were given no forum to contest this designation—until CSRTs were implemented in 2004 and, accordingly, detainees began filing habeas petitions in U.S. federal courts. In the summer of 2004, the Supreme Court ruled on three such petitions, primarily addressing jurisdictional matters.

On June 28, 2004, in *Rasul v. Bush*, the Court addressed the status of alien detainees at Guantanamo for the first time.²³ Two alien Guantanamo detainees, through relatives, filed federal habeas petitions seeking release under 28 U.S.C. § 2241, the federal habeas corpus statute, in the District of Columbia district court.²⁴ The district court dismissed the petitions for lack of jurisdiction, relying on *Johnson v. Eisentrager*, a case that arose from World War II.²⁵ *Eisentrager* involved German nationals who were convicted before a United States Military Commission for violating laws of war by continuing to fight on behalf of Japan after Germany’s surrender.²⁶

17. Katharine Q. Seelye, *First “Unlawful Combatants” Seized in Afghanistan Arrive at U.S. Base in Cuba*, N.Y. TIMES, Jan. 12, 2002, at A7.

18. Katharine Q. Seelye, *Rumsfeld Lists Outcomes for Detainees Held in Cuba*, N.Y. TIMES, Feb. 27, 2002, at A10.

19. The Administration has maintained no clear distinction between “unlawful combatants” and “enemy combatants.” I use the term “enemy combatant” in keeping with the terminology of subsequent regulations and statutes. The CSRT process would determine whether detainees were “enemy combatants” and the MCA’s habeas statute amendment would also use “enemy combatant”; however, the MCA only authorized military commissions for “unlawful enemy combatants” (emphasis added).

20. Sean D. Murphy, *Decision Not to Regard Persons Detained in Afghanistan as POWs*, 96 AM. J. INT’L L. 475, 476-77 (2002).

21. See Ari Fleischer, Statement by the Press Secretary on the Geneva Convention (May 7, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html> (last visited Nov. 7, 2007).

22. Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325, 330-32 (2003).

23. 542 U.S. 466 (2004).

24. *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002).

25. 339 U.S. 763 (1950).

26. *Id.* at 765-67.

The convicts were transferred back to Germany, where they served their sentences in a prison overseen by an American army officer.²⁷ The Germans petitioned for habeas corpus in a U.S. federal court, which ruled that U.S. federal courts lacked jurisdiction to hear such petitions.²⁸ The D.C. Circuit Court of Appeals also relied on *Eisentrager* in affirming the *Rasul* holding.²⁹

However, the Supreme Court reversed, holding that the federal habeas corpus statute does grant jurisdiction to federal courts to hear extraterritorial habeas petitions by detainees in Guantanamo.³⁰ The Court distinguished the *Eisentrager* situation from that of the current detainees on several grounds.³¹ While the detainees in *Eisentrager* had been tried before a military commission and found guilty of violating laws of war, the Guantanamo detainees had been afforded no hearing or judicial review of their confinement.³² The Court also noted that, unlike occupied Germany in the 1940s, the U.S. exercises “complete jurisdiction and control” over Guantanamo Bay under a lease agreement with Cuba.³³ Finally, the Court reasoned that a federal court in a judicial district that has personal jurisdiction over the custodian of the detainees should have jurisdiction to hear the detainees’ habeas petitions.³⁴

Disregarding larger constitutional questions raised by the potentially indefinite confinement of the Guantanamo detainees, the Court in *Rasul* focused on the question of how to interpret the federal habeas corpus statute. Concluding that *Eisentrager* does not “categorically exclude[] aliens detained in military custody outside the United States from the ‘privilege of litigation’ in U.S. courts,”³⁵ the Court permitted the habeas petitions to proceed, remanding the case to district court to consider the merits of the petitions in the first instance.³⁶

27. *Id.* at 766.

28. *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949).

29. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

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

31. *Id.* at 475-77.

32. *Id.*

33. *Id.* at 480-81. For a detailed discussion of why the Administration housed detainees at Guantanamo Bay Naval Base and an argument that for purposes of constitutional analysis, Guantanamo Bay should be considered U.S. territory, see Baher Azmy, *Constitutional Implications of the War on Terror: Rasul v. Bush and the Intra-territorial Constitution*, 62 N.Y.U. ANN. SURV. AM. L. 369 (2007).

34. 542 U.S. at 478-80 (relying on *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973), which held that a petitioner’s presence within the territory of a district court was not an “invariable prerequisite” to a district court’s jurisdiction over a habeas petitioner).

35. *Id.* at 484.

36. *Id.* at 485 (explaining that the Court is only ruling on the matter of jurisdiction to hear the petitioners’ claims, not the merits of their claims). On remand, the petition was denied again, and on appeal the petition was consolidated as *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), and the petition was again denied. After an initial denial of certiorari on April 2, 2007, *cert. denied*, 127 S. Ct. 1478 (2007), certiorari was granted on June 29, 2007, *cert. granted*, 127 S. Ct. 3067 (2007). See discussion *infra* text accompanying notes 107-125.

Decided on the same day as *Rasul, Hamdi v. Rumsfeld*³⁷ also dealt with a habeas petition by a detained “enemy combatant.” The petitioner here, however, was a U.S. citizen.³⁸ Hamdi was captured by the Northern Alliance in Afghanistan and handed over to U.S. forces.³⁹ Initially detained in Guantanamo until his American citizenship was discovered, Hamdi was then transferred to a naval brig in the U.S.⁴⁰ He was held incommunicado, without access to counsel, and was not charged with any crime.⁴¹ Hamdi’s father filed a habeas petition in federal court on his behalf, after which the Government produced a declaration that Hamdi was an enemy combatant.⁴² The district court, unpersuaded, demanded of the Government further documentation.⁴³ The Fourth Circuit Court of Appeals reversed and dismissed the habeas petition.⁴⁴ The court of appeals reasoned that, because Hamdi was captured in a combat zone on foreign soil, no production of evidence by the Government was required and no further review of the basis for his confinement was due.⁴⁵ It also held that Hamdi’s detention was valid under both the AUMF and the President’s authority as Commander-in-Chief.⁴⁶

The Supreme Court faced two issues. The first was whether the Government had authority to detain a citizen apprehended abroad as an enemy combatant. Hamdi had argued that his detention violated the Non-Detention Act, which bars the detention of U.S. citizens without congressional authorization.⁴⁷ Producing no majority opinion, the Court by a plurality concluded that the Government had the authority to detain a U.S. citizen as an enemy combatant as part of the “all necessary and appropriate force” provision authorized by the AUMF.⁴⁸ Justice Thomas, adding a fifth vote, agreed that the Government was authorized to hold Hamdi as an enemy combatant but relied on the President’s inherent authority under Article II.⁴⁹ A dissent by Justice Scalia, joined by Justice Stevens, argued that the Government may not detain a U.S. citizen without charge, unless Congress expressly suspends the writ of habeas corpus, as

37. 542 U.S. 507 (2004).

38. *Id.* at 510.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 511-12.

43. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002).

44. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

45. *Id.* at 459.

46. *Id.* at 467-68.

47. 18 U.S.C. § 4001(a) (2006) (“No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”).

48. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519-20 (2004). For a detailed analysis of the *Hamdi* case, as it relates to the Suspension Clause, see Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411 (2006).

49. 542 U.S. at 594 (Thomas, J., dissenting).

provided in the Suspension Clause of Article I of the Constitution.⁵⁰ Another dissent by Justice Souter, joined by Justice Ginsberg, argued that holding a U.S. citizen as an enemy combatant does violate the Non-Detention Act and that the AUMF did not authorize such detentions.⁵¹

The second issue concerned what, if any, form of judicial review Hamdi was entitled to regarding his detention. Every Justice, except Justice Thomas, agreed to reverse the Fourth Circuit on this question and to hold that Hamdi was entitled to some form of due process. The plurality opinion by Justice O'Connor concluded that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."⁵² The opinion attempted to balance the habeas rights against military necessity: it allowed for limitation of the habeas process by including military judges⁵³ and created a burden-shifting scheme under which, once the Government put forth "credible evidence," the burden would shift to the petitioner to rebut such evidence.⁵⁴

In response to this ruling, the Government and Hamdi reached an agreement in late September 2004.⁵⁵ The Government agreed to release Hamdi, and Hamdi agreed to leave the U.S. and renounce his U.S. citizenship.⁵⁶ There were no further judicial proceedings in this case.

The third case, also decided by the Supreme Court in late June 2004, was *Padilla v. Rumsfeld*.⁵⁷ Jose Padilla, a U.S. citizen, was detained at the Chicago O'Hare Airport in May 2002 and accused of planning to carry out terrorist attacks in the U.S.⁵⁸ He was originally held on a material witness warrant issued by the district court for the Southern District of New York. He was then declared an "enemy combatant" by the President and transferred to a naval brig in South Carolina.⁵⁹ After Padilla filed a federal habeas petition in the Southern District of New York, the court found that it did have jurisdiction to hear Padilla's petition; however, on the merits, it ruled that the President had authority as Commander-in-Chief to detain Padilla as an enemy combatant.⁶⁰ The Second Circuit Court of Appeals agreed on the jurisdictional question but reversed on the merits, holding

50. *Id.* at 554 (Scalia, J., dissenting).

51. *Id.* at 541 (Souter, J., dissenting). This opinion further argued that Congress passed the Non-Detention Act with the intent of not repeating the World War II internments of citizens of Japanese Ancestry by requiring congressional authorization for any executive detention. *Id.* at 543-45.

52. *Id.* at 509.

53. *Id.* at 538.

54. *Id.* at 533-34.

55. Eric Lichtblau, *U.S., Bowing to Court Ruling, Will Free 'Enemy Combatant,'* N.Y. TIMES, Sept. 23, 2004, at A1.

56. *Id.*

57. 542 U.S. 426 (2004).

58. *Id.* at 430-31.

59. *Id.* at 431-32.

60. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

that the President lacked authority to detain a U.S. citizen captured in the U.S. as an enemy combatant.⁶¹

The Supreme Court, addressing only the jurisdictional question, held that only the direct custodian of Padilla, the military commander of the naval brig—not the Secretary of Defense—was the proper respondent under the federal habeas statute. The Court then held that the Southern District of New York lacked jurisdiction over the commander of the South Carolina naval brig, because habeas petitions must be filed in the district of the detainee’s confinement.⁶² The majority opinion therefore did not reach the merits of Padilla’s habeas petition. Justice Stevens, joined by three other Justices, dissented. He argued that the majority read the jurisdictional requirements of the habeas statutes too narrowly, and that the Second Circuit was correct to conclude that the President had no legal authority to detain a U.S. citizen arrested in the U.S. as an enemy combatant.⁶³

Padilla then filed a second habeas petition in the District of South Carolina, which that court granted.⁶⁴ However, the Fourth Circuit Court of Appeals reversed, holding that the AUMF authorized the President to hold a U.S. citizen as an enemy combatant, even if the citizen was arrested within the U.S.⁶⁵ While Padilla’s petition for certiorari was pending, Padilla was released from military custody and charged with federal crimes.⁶⁶ The Supreme Court then denied certiorari essentially because Padilla’s habeas petition had become moot.⁶⁷ Thus, while Padilla was held incommunicado in military custody for three years, the Court never addressed whether the purported authority for his detention was valid. In 2004, *Rasul* and *Hamdi* afforded citizen and alien detainees who had been designated “enemy combatants” by the President some opportunity to challenge the basis of their detention through the federal habeas corpus process.

B. Phase Two: Regulatory and Statutory Responses to Hamdi and Rasul

On July 7, 2004, less than two weeks after the Court ruled in *Rasul*, Deputy Secretary of Defense Paul Wolfowitz responded by establishing the Combatant Status Review Tribunal, a procedure to review the status of the Guantanamo detainees.⁶⁸ By July 29, the Secretary of the Navy had issued

61. *Padilla v. Rumsfeld*, 352 F.3d 695 (2nd Cir. 2003).

62. 542 U.S. at 446-47.

63. *Id.* at 464 n.8 (Stevens, J., dissenting).

64. *Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005).

65. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

66. Eric Lichtblau, *In Legal Shift, U.S. Charges Detainee in Terrorism Case*, N.Y. TIMES, Nov. 22, 2005, at A1.

67. *Padilla v. Hanft*, 547 U.S. 1062 (2006).

68. PAUL WOLFOWITZ, ORDER ESTABLISHING COMBATANT STATUS REVIEW TRIBUNAL (Jul. 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>. (hereinafter “Wolfowitz Order”).

an implementing order,⁶⁹ and by August 2, the first hearings had begun.⁷⁰

The CSRT procedures depart dramatically from the normal rules governing court proceedings. In lieu of an attorney, the detainee is assigned a military officer as a “personal representative.”⁷¹ The detainee can access only the unclassified evidence that supports his designation as an enemy combatant⁷² and may attend proceedings only when testimony would not “compromise national security.”⁷³ The detainee may call only those witnesses that the tribunal deems “reasonably available”; witnesses who are members of the U.S. Armed Forces are deemed unavailable if their commanders determine their presence would affect combat operations.⁷⁴ Unsworn statements and hearsay, including evidence obtained by torture, are admissible as evidence.⁷⁵ Finally, the order establishes a rebuttable presumption in favor of the Government’s evidence, institutes a “preponderance of evidence” standard, and requires a majority vote of the three officers who sit on the tribunal to deem the detainee an enemy combatant.⁷⁶ If the CSRT concludes that the detainee is not an enemy combatant, the Government may seek repeated hearings before other CSRT tribunals until it succeeds.

Information about actual CSRT proceedings is classified. An April 19, 2006 Department of Defense document lists the names of 558 individuals who have undergone CSRT hearings.⁷⁷ The CSRT Convening Authority, which is designated by the Secretary of the Navy, is required to keep records documenting the CSRT proceedings,⁷⁸ but only 102 such records have been released in full under federal court orders in habeas proceedings.⁷⁹ Portions of other CSRT records have been released as a result of a Freedom of Information Act lawsuit. A review of the available records of CSRT proceedings shows that, in at least three of 102 full proceedings, detainees were not found to be enemy combatants.⁸⁰ However, the Defense Department ordered a new tribunal convened in those three

69. GORDON ENGLAND, IMPLEMENTATION OF COMBATANT STATUS REVIEW TRIBUNAL PROCEDURES FOR ENEMY COMBATANTS DETAINED AT U.S. NAVAL BASE GUANTANAMO BAY, CUBA (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

70. MARK DENBEAUX ET AL., NO-HEARING HEARINGS: CSRT: THE MODERN HABEAS CORPUS? 10 (2006), available at http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

71. Wolfowitz Order at § (c). Because the “personal representative” is not an attorney, no attorney-client privilege attaches to a detainee’s communications with his personal representative.

72. See *id.* at § (g) for the full description of the procedures. For a more detailed treatment of the shortcomings of the CSRT procedures, see Azmy, *supra* note 33, at 421-31.

73. Wolfowitz Order at § (g)(4).

74. *Id.* at § (g)(8).

75. *Id.* at § (g)(9).

76. *Id.* at § (g)(12).

77. DEPARTMENT OF DEFENSE, LIST OF DETAINEES WHO WENT THROUGH COMPLETE CSRT PROCESS (Apr. 19, 2006), http://www.dod.mil/pubs/foi/detainees/detainee_list.pdf.

78. Wolfowitz Order at §§ (f), (h).

79. DENBEAUX ET AL., *supra* note 70, at 7.

80. *Id.* at 37-39.

cases, and all three detainees were eventually determined to be enemy combatants. In the case of one detainee, it took three tribunals to reach this decision.⁸¹ Only thirty-eight Guantanamo detainees, seven percent of the total, have been released following their CSRT hearings.⁸²

In one instance, two Chinese Muslim Uighurs, whom Pakistani forces had turned over to U.S. forces to be detained in Guantanamo, were found by CSRTs not to be enemy combatants. However, failing to find a country willing to resettle these two detainees, the Government continued to detain them at Guantanamo.⁸³ The district court ultimately held that the potentially indefinite detention of petitioners was unlawful, but it also found that under *Rasul*, no effective remedy was available.⁸⁴ The detainees were eventually settled in Albania⁸⁵ and their habeas appeals were dismissed as moot.⁸⁶

Also in response to *Rasul*, Congress in late 2005 passed the Detainee Treatment Act, which the President signed into law on December 30, 2005.⁸⁷ The DTA established interrogation rules for government personnel and limited civil and criminal liability for those interrogators. However, the DTA also amended the federal habeas corpus statute, 28 U.S.C. § 2441, stripping all courts of their jurisdiction to hear habeas petitions or any other lawsuit against the U.S. or its agents brought by, or on behalf of, alien detainees held at Guantanamo.⁸⁸

The DTA further granted the D.C. Circuit a limited power of judicial review over the results of the CSRT process, but only to determine whether a CSRT hearing conformed to procedural standards specified by the

81. *Id.*

82. *Id.* at 39.

83. Neither the detainees nor their counsel were informed of the outcome of the CSRT until five months after the determination had been made and after the habeas proceedings had already begun. See *Qassim v. Bush*, 382 F. Supp. 2d 126, 127 (D.D.C. 2005).

84. *Qassim v. Bush*, 407 F. Supp. 2d 198, 201-03 (D.D.C. 2005) (rejecting both outright release of the detainees, release into the civilian population at Guantanamo Bay, or any kind of “parole” as unworkable).

85. Neil A. Lewis, *Freed From Guantanamo but Stranded Far From Home*, N.Y. TIMES, Aug. 15, 2006, at A1.

86. *Qassim v. Bush*, 466 F.3d 1073, 1074 (D.C. Cir. 2006).

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

88. The habeas corpus statute was amended by adding a new subsection (e):

(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to consider—

(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

(A) is currently in military custody; or

(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

28 U.S.C. § 2241(e) (2006).

Secretary of Defense.⁸⁹ Finally, the DTA also granted the D.C. Circuit the power to review the final outcome of military commissions conducted under the November 2001 Military Order.⁹⁰

In late June 2006, in *Hamdan v. Rumsfeld*,⁹¹ the Supreme Court addressed a habeas petition by a Guantanamo detainee brought before a Military Commission for the first time since the DTA's passage. Salim Hamdan had allegedly served as Osama bin Laden's driver and bodyguard.⁹² After his capture by an Afghan militia, he had been transferred to the U.S. military in 2001 and detained at Guantanamo Bay in 2002.⁹³ On July 3, 2003, the President had declared Hamdan eligible to be tried before a military commission, under the 2001 Military Order, although no specific charges were brought at that time.⁹⁴ One year later, on July 13, 2004, the military commission charged Hamdan with conspiracy to attack civilians, and on November 8, 2004 the D.C. District Court granted Hamdan's habeas petition and stayed the commission's proceedings on the grounds that (1) the President's power to grant military commissions extends only to offenses triable by military commissions under the law of war; (2) the law of war includes the Third Geneva Convention; (3) Hamdan was entitled to the full protections of the Third Geneva Convention until adjudged, in compliance with that treaty, not to be a prisoner of war; and (4) regardless of Hamdan's classification as a POW or an enemy combatant, the commission convened to try him violated both the Uniform Code of Military Justice ("UCMJ") and Common Article 3 of the Third Geneva Convention because the commission had the power to convict based on evidence Hamdan would never see.⁹⁵

The D.C. Circuit reversed, holding that the Geneva Conventions were not judicially enforceable and that the commission's proceedings did not violate the UCMJ or the regulations implementing the Geneva Conventions.⁹⁶ The Supreme Court granted certiorari to determine whether the commission trying Hamdan had authority to do so and whether he could invoke the protections of the Geneva Conventions.

The Court first addressed whether the DTA stripped federal courts of jurisdiction to hear Guantanamo detainees' habeas petitions. The Court rejected the Government's claim that DTA § 1005(e)(1) deprived the Court of jurisdiction to hear Hamdan's petition because Hamdan had filed the

89. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2739, 2742 (2005) (codified at 10 U.S.C. § 801 note).

90. *Id.* at § 1005(e)(3).

91. 126 S. Ct. 2749 (2006).

92. *Id.* at 2761.

93. *Id.* at 2759.

94. *Id.* at 2760.

95. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004). The district court issued its decision prior to the passage of the DTA, so it did not apply the revised habeas statute.

96. *Hamdan v. Rumsfeld*, 415 F.3d 33, 38-40, 42-43 (D.C. Cir. 2005).

petition before the DTA was enacted; the Act's "effective date" did not apply retroactively.⁹⁷ However, it then applied the canon of constitutional avoidance, declining to consider whether the DTA stripped federal courts of jurisdiction to hear subsequent habeas petitions.⁹⁸

The Government then argued that even if federal courts had jurisdiction to hear Hamdan's petition, they should defer to the commission until the commission had determined whether Hamdan had committed any crimes.⁹⁹ The Court rejected this argument and turned to address the merits of Hamdan's challenge to the authority of the military commission itself.

The Court found no explicit Congressional authorization for the 2001 presidential order establishing military commissions in the AUMF, the UCMJ, or the DTA.¹⁰⁰ Further, the Court held that the commission created to try Hamdan was unlawful because its procedures did not comply with the UCMJ,¹⁰¹ and further that these procedures violated Common Article 3 of the Geneva Conventions.¹⁰² Avoiding direct review of the D.C. Circuit's holding that the Geneva Conventions gave Hamdan no judicially enforceable rights, the Court presumed the lower court correct and held that the Geneva Conventions were part of the law of war to which military commissions must conform under the UCMJ's Article 21. It thus rejected the Government's argument that Common Article 3 did not apply to the conflict with al Qaeda. Thus, finding neither specific congressional authorization for military commissions, nor general compliance of the commissions with relevant UCMJ and Geneva Convention provisions, the Court reversed and remanded the case, allowing the habeas petition to proceed.¹⁰³

C. Phase Three: Developments Since Hamdan

In response to the *Hamdan* decision, Congress enacted the Military Commissions Act ("MCA") on October 17, 2006, just before the midterm election.¹⁰⁴ The MCA was the first explicit legislative authorization to try alien "unlawful enemy combatants" before military tribunals.¹⁰⁵ The Act also created a new Court of Military Commission Review, an appellate tribunal comprised of military judges appointed by the Secretary of

97. 126 S. Ct. at 2769.

98. *Id.* at 2769 n.15.

99. *Id.* at 2769-72 (relying on *Schlesinger v. Councilman*, 420 U.S. 738 (1975)).

100. *Id.* at 2774-75.

101. *Id.* at 2786.

102. *Id.* at 2793.

103. *Id.* at 2798.

104. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of titles 10, 18, 28, and 42 of the United States Code).

105. See Carlos Manuel Vazquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73 (2007) for a brief history of the MCA's passage and a summary of provisions relating to military commissions.

Defense.

Further, the MCA again amended the habeas corpus statute by repealing the DTA's specific reference to Guantanamo Bay detainees, and applying the habeas jurisdiction-stripping provision not only to all individuals who were determined to be "enemy combatants" or who awaited such determination,¹⁰⁶ but also "to all cases, without exception, pending on or after the date of the enactment of this Act."¹⁰⁷ Through this language, Congress sought to ensure that courts would apply the new provision retroactively to pending cases, thus preempting further rulings like *Hamdan*.

*Boumediene v. Bush*¹⁰⁸ was the first major appellate decision in a Guantanamo detainee case to be rendered after *Hamdan* and the MCA's passage. Decided on February 20, 2007, *Boumediene* was a consolidated appeal of multiple Guantanamo detainees' habeas petitions.¹⁰⁹ A divided D.C. Circuit panel ruled that the MCA effectively stripped habeas jurisdiction from federal courts to hear already pending habeas petitions by the detainees in this case.¹¹⁰ The majority reasoned that the statutory language, requiring the amended version of 28 U.S.C. § 2241 to "apply to all cases, without exception, pending on or after the date of enactment," and the legislative intent were clear.¹¹¹ Thus, the court interpreted the MCA as overruling *Hamdan* and as applying to habeas petitions filed before the MCA's enactment, which included all of the petitions in this appeal.¹¹²

The court of appeals also held that the MCA's removal of habeas jurisdiction did not violate the Suspension Clause.¹¹³ Relying on *INS v. St. Cyr*, which held that "at the absolute minimum, the Suspension Clause

106. The MCA amends 28 U.S.C. § 2441(e):

(1) No 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.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), 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.

Military Commissions Act, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (2006). Presumably "awaiting such determination" refers to those detainees "captured and held outside the United States—whom Congress both believed had no constitutional right to habeas and expected would receive a CSRT based on the larger DTA-MCA scheme." *Al-Marri v. Wright*, 487 F.3d 160, 173 (4th Cir. 2007).

107. Military Commissions Act § 7(b).

108. 476 F.3d 981 (D.C. Cir. 2007), *cert. denied*, 127 S. Ct. 1478 (2007), *cert. granted*, 127 S. Ct. 3078 (2007).

109. Including the petitioner in *Rasul*. See *supra* note 36.

110. 476 F.3d at 986-88.

111. *Id.*

112. *Id.*

113. *Id.* at 988-94.

protects the writ ‘as it existed in 1789,’¹¹⁴ the court then examined three historic cases from that period and concluded that in 1789, the writ of habeas corpus did not extend to enemy aliens detained abroad.¹¹⁵ In the court’s reasoning, these three cases established the bounds of habeas corpus in 1789,¹¹⁶ and because none of the cases involved the extraterritorial detention of an alien, the writ of habeas corpus, as it existed in 1789, would not have extended to the Guantanamo detainees.¹¹⁷ Thus, the court concluded that denying availability of the writ to the Guantanamo detainees did not violate the Suspension Clause.¹¹⁸ It then dismissed the detainees’ habeas petitions for lack of jurisdiction.¹¹⁹

In dissent, Judge Judith Rogers argued that while Congress did intend to revoke federal courts’ jurisdiction to hear the Guantanamo detainees’ habeas petitions, such a revocation of jurisdiction exceeds Congress’ powers. Based on her reading of the historical cases, Judge Rogers found that the writ of habeas corpus, as it existed in 1789, would have extended to aliens held abroad, such as the Guantanamo detainees; she argued that the majority ignored important dicta in *Rasul* to that effect.¹²⁰

The detainees petitioned for writ of certiorari, but on April 2, 2007, the Supreme Court denied review; only three Justices voted to grant certiorari.¹²¹ In a statement by Justices Stevens and Kennedy respecting this denial, the Court relied on the principle of avoiding decisions on constitutional questions before all administrative remedies are exhausted in reviewing habeas petitions.¹²² The detainees here had not exhausted their appeals of the CSRT process in the D.C. Circuit, as afforded under the DTA.

Justice Breyer, in a dissent from the denial, joined by Justice Souter and in part by Justice Ginsberg, made three arguments for granting certiorari. First, the purpose of the writ of habeas corpus was to provide speedy judicial inquiry into the legality of detention, and since the petitioners had been detained for over five years, an immediate review of their claims was warranted.¹²³ Second, the petitioners plausibly argued that the D.C. Circuit had misapplied *Rasul*, which, though limited to interpreting habeas corpus under the then-existing statute, did note that

114. *Id.* at 988 (citing *INS v. St. Cyr.*, 533 U.S. 289, 301 (2001)).

115. *Id.* at 988-90 (citing *Lockington's Case*, *Brightly's* (N.P.) 269 (Pa. 1813); *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779); *Rex v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759)).

116. *Id.*

117. *Id.* at 990-91.

118. *Id.* at 993-94.

119. *Id.* at 994.

120. *Id.* at 999-1004 (Rogers, J., dissenting).

121. *Boumediene v. Bush*, 127 S. Ct. 1478 (2007).

122. *Id.*

123. *Id.* at 1479 (Breyer, J., dissenting).

“Guantanamo Bay is in every practical respect a United States Territory.”¹²⁴ Third, some petitioners were natives of Algeria and citizens of Bosnia, seized in Bosnia—an issue that Justice Breyer argued was not addressed below and may bear on the constitutional questions.¹²⁵

Unexpectedly, after first denying review, the Supreme Court reversed course on June 29, 2007 and vacated its April 2 order, granting certiorari in *Boumediene*.¹²⁶

The most recent appellate court decision dealing with enemy combatants is that of *Al-Marri v. Wright*,¹²⁷ which involves a unique set of circumstances. Al-Marri was a legal U.S. resident who had returned to Illinois on September 10, 2006, to pursue a graduate degree. Three months later, he was arrested in Peoria, Illinois, as a material witness to the September 11 attacks; and in February 2002, he was charged in federal court with unauthorized possession of credit card numbers with intent to defraud. In January 2003, he was charged in a second indictment for making a false statement to the FBI and for additional financial crimes. Al-Marri pleaded not guilty, and on June 23, 2003, less than a month before the trial date, the President declared al-Marri to be an enemy combatant. The federal indictment was dismissed and al-Marri was transferred to military custody in South Carolina, after which counsel petitioned on his behalf for a writ of habeas corpus.¹²⁸

After the initial petition was dismissed for filing in the wrong venue,¹²⁹ al-Marri re-filed in the District Court of South Carolina. The Government responded by submitting a declaration that al-Marri was a “sleeper agent” of al Qaeda. In reply, al-Marri contended that he was not an enemy combatant but refused to submit rebuttal evidence, arguing that the Government bore the burden of producing evidence that he was an enemy combatant. The district court sided with the Government and dismissed al-Marri’s petition.¹³⁰ Thus, the factual circumstances of al-Marri, who was arrested and detained in the U.S., are distinct from that of the Guantanamo detainees.

On June 11, 2007, a divided panel of the Fourth Circuit reversed the district court. The court first addressed the Government’s jurisdictional argument, namely that the MCA precludes federal courts from hearing habeas petitions by individuals who have been determined to be enemy combatants or who are awaiting such a determination. The court rejected

124. *Id.* at 1479 (Breyer, J., dissenting) (quoting *Rasul*, 542 U.S. at 480-81).

125. *Id.* at 1480 (Breyer, J., dissenting).

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

127. 487 F.3d 160 (4th Cir. 2007).

128. *Id.* at 164-65.

129. *Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003), *aff’d sub nom.* *Al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir. 2004), *cert. denied*, 543 U.S. 809 (2004).

130. *Al-Marri v. Wright*, 443 F. Supp. 2d 774 (D.S.C. 2006).

this argument because the only determination that al-Marri was an enemy combatant was by the June 23, 2003 presidential declaration, not by a CSRT or other tribunal that weighed evidence in the manner prescribed by the DTA.¹³¹ The court interpreted the DTA and MCA as requiring a two-step process, wherein the executive's initial decision to detain an individual requires review by a second body.¹³² The court's further holding that al-Marri was not "awaiting" determination of his combatant status was based on its interpretation of statutory language; the term "awaiting" referred to combatants captured abroad who have yet to receive a CSRT.¹³³ In al-Marri's case, given his years of confinement, the court felt that such a determination should have already been made.

Finding that the federal courts had jurisdiction to hear al-Marri's claim, the Fourth Circuit turned to the merits of al-Marri's habeas claim: that al-Marri had been deprived of liberty without due process of law, in violation of the Fifth Amendment. The court found that the Due Process Clause applies to aliens legally residing in the U.S. and that neither the AUMF nor any other statute authorizes the President to detain al-Marri as an enemy combatant.¹³⁴ The court further rejected the Government's argument that the power to detain a legal alien as an enemy combatant is part of the President's "inherent constitutional power."¹³⁵ The court then granted the habeas petition, requiring either (1) release from military custody to face criminal charges, (2) removal proceedings, (3) limited detention as authorized by the Patriot Act, or (4) full release.¹³⁶ On August 22, 2007, the Fourth Circuit Court of Appeals agreed to rehear the case *en banc*.

III. SUMMARY

In sum, three categories of detainees are presently held as enemy combatants. The first category consists of U.S. citizens. *Hamdi* held that the Government may not hold citizens indefinitely as enemy combatants without some meaningful opportunity to contest their detention before a neutral decisionmaker. The Government has been reluctant to detain citizens as enemy combatants and, per public records, no citizen is currently so detained. The second category consists of alien detainees held as enemy combatants within U.S. borders. This category is small, and courts are skeptical of the validity of these detentions. The most recent relevant case, *Al-Marri v. Wright*, held that such detentions violate the Suspension Clause and are reviewable under the federal habeas statute. The

131. *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007).

132. *Id.* at 169.

133. *Id.* at 171-73.

134. *Id.* at 189.

135. *Id.* at 193-95.

136. *Id.* at 195.

third and largest category consists of alien detainees held abroad, including the Guantanamo detainees. This category currently receives the least judicial review. Under the *Boumediene* holding, detainees in this category have no opportunity to have their detention reviewed through a habeas petition.

The present status of military commissions is also unclear. In *Hamdan*, procedural defects in the original authorizing presidential order derailed any commission from reaching a verdict under that authorization. And, at present, the only two commissions to have commenced under the MCA are also stalled by jurisdictional impediments. The Court of Military Commissions Review and eventually the D.C. Circuit and Supreme Court may reverse the two commission trial judges' rulings, but the process will be slow. Also, the *Hamdan* decision raises serious questions about the legality of such commissions, even under the new MCA procedures. It is unlikely that a military commission will convict an enemy combatant anytime soon.

Such is the twisted history of the Administration's War on Terror policy of detainee treatment, and of the legislative and judicial responses thereto. The legal status of enemy combatants in military custody, both at Guantanamo and in the U.S., continues to shift. In fact, detainees' habeas petitions often become moot before the Court can rule on constitutional challenges, due to a combination of factors: amendments to the federal habeas statute, changes in administrative classification processes, and the Administration's practice of releasing detainees when it appears that the courts will rule on the merits of a detainee's case. These constant changes, coupled with the Supreme Court's reluctance to rule on constitutional questions, have left the Guantanamo detainees in legal limbo.

IV. A COURSE CORRECTION

It has been nearly six years since most of the Guantanamo detainees have been captured and turned over to U.S. custody. It has been over three years since the Supreme Court ruled that alien detainees at Guantanamo had the right to petition for habeas corpus. Yet hundreds of detainees remain imprisoned without hearings to determine their status and without recourse to the courts.

It is now clear that the Administration's placement of its detainee prison at Guantanamo Bay was based on the notion that, in virtue of Cuba's residual sovereignty over that site, the writ of habeas corpus would not apply there.¹³⁷ *Rasul* struck down that legal logic. To circumvent *Rasul*, the

137. See JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 142 (2006) ("No location was perfect, but the U.S. Naval Station at Guantanamo Bay, Cuba, seemed to fit the bill [T]he federal courts probably wouldn't consider Gitmo as falling within their habeas jurisdiction").

Administration designed the CSRT system to deprive detainees of all procedural rights inherent in our legal system. The detainee has no right to see the evidence against him; he has no right to an attorney and no right to present evidence in his defense. The detainee does not even have the right to attend his own hearing. And if the Government loses—if the CSRT finds that the detainee is not an enemy combatant—the Government can convene subsequent CSRTs until it finally succeeds.

The Administration has also enlisted Congress's compliance through the MCA, enacted just before the 2006 midterm election, to bar detainee-enemy combatants from bringing habeas petitions in any U.S. court. It has argued that this provision does not violate the Suspension Clause,¹³⁸ despite *Rasul's* language to the contrary, and despite the inadequacy of the limited judicial review of these proceedings, which is preempted from securing the detainee's release from custody—the very object of the writ of habeas corpus.¹³⁹

We can expect a major Supreme Court decision in the *Boumediene* case in the October 2007 term. First, the case presents the question of whether the MCA's jurisdiction-stripping provision is a valid exercise of congressional power under the Suspension Clause. Second, the case presents the question of the source of executive authority to detain the petitioners indefinitely. In the courts, the Government has relied on the AUMF. However, the AUMF did not grant the President a roving commission to detain and imprison suspected terrorists anywhere in the world. It limited the President's powers to that of "[using] all necessary and appropriate force against those . . . persons he determines . . . committed, or aided the terrorist attacks that occurred on September 11, 2001."¹⁴⁰

Regardless of the outcome in *Boumediene*, the writ of habeas corpus cannot serve as the sole cornerstone of our detainee treatment policy. Congress must provide a statutory framework that comports with the rule of law and with our Constitutional and treaty obligations. We must return to the first principle that, under our Constitution, our federal government is one of limited, enumerated powers. Neither the Constitution nor any congressionally enacted law authorizes the President to capture suspected terrorists anywhere in the world and to detain them indefinitely without criminal charge, without access to counsel, and without a hearing before a neutral decisionmaker—but the Administration claims the power and the right to do exactly this. Is it any wonder that much of the world questions

138. The Suspension Clause states, "[t]he 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." U.S. CONST. art. I § 9, cl. 2.

139. See, e.g., *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody . . .").

140. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note).

the U.S.'s respect for the rule of law?

According to a recent American Bar Association poll of fifty lawyers involved in the defense of terrorism cases,¹⁴¹ fifty-eight percent disagreed with the statement that “[t]he terrorism cases brought in federal court have made the U.S. safer.” Eighty percent disagreed with the statement that “[t]he terrorism laws passed by Congress have made the U.S. safer.” Eighty-four percent thought that, of the three government branches, the Executive “has acquitted itself [the] worst on terrorism legal issues.” And when asked to grade “the entire U.S. justice system—including the executive, legislative, and judicial branches—in the legal war on terror,” fifty-four percent gave a D or F. Response data were limited to defense attorneys because the U.S. Department of Justice prohibited government attorneys to participate in the survey.

The ship of state badly needs a course correction, which Congress must provide. First, Congress must repeal the purported suspension of the writ of habeas corpus in the MCA. Second, either by reference to established law, such as the UCMJ, or as a separate stand-alone policy, Congress must enact new detainee hearing and appeal procedures, guaranteeing each detainee a timely hearing to determine whether he should be subject to detention. Such hearings, in order to satisfy minimum procedural justice standards, must be:

- ❖ Conducted by an impartial judge.
- ❖ Governed by established procedures that comport with due process, including:
 - Right to counsel.
 - Right to be present at all critical stages of the proceeding.
 - Right to confront witnesses against the detainee.¹⁴²
 - Right to present evidence.
 - Restricting evidence to evidence admissible in a court of law, unless the presiding judge finds the evidence reliable.
- ❖ Appealable to an impartial tribunal, not subject to command influence.
- ❖ Subject to reconsideration or rehearing only according to pre-established rules.
- ❖ Subject to judicial review in the U.S. courts.

If, at the conclusion of the hearing and appeal, a detainee is adjudged not to be an enemy combatant, he must be released.

141. Mark Hansen & Stephanie F. Ward, *The 50-Lawyer Poll*, A.B.A. J., Sept. 2007 at 30, available at http://www.abajournal.com/magazine/the_50_lawyer_poll (last visited Nov. 7, 2007).

142. Instead of providing, as CSRT procedures do, that the detainee may attend his own hearing only when the testimony would not “compromise national security,” Wolfowitz Order at § (g)(4), the better practice would be to adopt procedures analogous to the Classified Information Procedures Act, 18 U.S.C. App. 3, providing for disclosure of classified information only to pre-cleared counsel who would be prohibited from disclosing such information without court order.

Finally, detainees who are to be charged with crimes should be charged and tried promptly according to established procedures, either under the UCMJ or in our federal courts.

Sixty-five years ago, 120,000 Japanese Americans—myself included—were subjected to indefinite detention under Executive Order 9066. The U.S. government took forty-six years to acknowledge its wrongdoing in the World War II Japanese American internment and detention. As part of the Civil Liberties Act of 1988, the President offered an official apology for these wrongs.¹⁴³

For six years now, the Guantanamo detainees have been detained under inhumane conditions, in violation of our Constitutional and treaty obligations and in disregard of the rule of law. Let us not wait another forty years before we right these wrongs. Let us remember what we fight for and endeavor not to lose our souls in waging the War on Terror. Let us return to the rule of law in our treatment of War-on-Terror detainees.

143. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified at 50 U.S.C. App. § 1989 *et seq.*).

