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Editors’ Introduction

Our founding fathers, faced with perils we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience’s sake. And so to all the other peoples and governments who are watching today, from the grandest capitals to the small village where my father was born: know that America is a friend of each nation and every man, woman, and child who seeks a future of peace and dignity, and that we are ready to lead once more.

Barack Obama
Inaugural Address
January 20, 2009

The Northeastern University Law Journal is not a traditional law review. While we share with traditional law reviews both intellectual rigor and dedication to enriching the legal discourse, we are different. Each issue of the Journal focuses on a single topic, and features articles about representation, advocacy, and legal strategy, as well as legal theory and analysis. Our articles are written by practicing attorneys, and meld legal theory with legal practice while discussing cutting-edge issues in the law. Northeastern University School of Law is often called the nation’s premiere public interest law school, and the Journal shares the school’s focus on social justice, public service, and the practice of law in the public interest.

This year, we present an edition of the Journal focusing on the representation of individuals held by the United States Government at Guantánamo Bay, Cuba.

Two years ago, when this topic was selected, although Guantánamo had received abundant coverage in the popular press, it did not receive equivalent attention from legal academics. Although the representation of detainees was, and remains, controversial, the dearth of serious legal analysis relating to the representation of Guantánamo Bay detainees was likely not due to timidity or delicacy in the legal community. Rather, there was no serious legal analysis of the law as applied to Guantánamo Bay detainees—because there was no law to apply.
Guantánamo Bay detainees existed, at that time, in a legal dead zone, outside of the American criminal justice system, outside the reach of the Constitution, yet not quite within the reach of international law and treaties. Lawyers do not shrink from analyzing and mastering even the most abstract of legal concepts, opaque statutes, or esoteric aspects of common law—but it is difficult to write about the law when the rule of law itself is in the object in controversy.

Despite this apparent legal void, detainees at Guantánamo have a right to legal counsel. The Center for Constitutional Rights has spearheaded the effort to secure representation for detainees. The “Guantánamo Bay Bar Association” numbers more than a hundred. These attorneys, both practitioners and academics, from diverse backgrounds, practice areas, and practice settings, have faced representational challenges unlike any other. They have had to apply for security clearances to meet with their clients, had their notes designated top secret and removed to a secure facility, and have come across other complex roadblocks in the federal courts. Their clients have often been held in solitary confinement, been tortured, become emotionally distraught, and have every reason to be deeply suspicious of everyone, including their attorneys and translators.

As a journal of legal practice, the Northeastern University Law Journal was in the unique position to provide a forum for these attorneys to discuss these challenges. We were honored to host a symposium in the spring of 2008, and anticipated following the symposium with the publication of our first issue that fall. We were proud to have submissions from Stewart “Buz” Eisenberg, Nicole Moen, Berhard Docke, Jason Pinney, Professor Randall Coyne, Sabin Willett, and Colleen Costello. The pieces ranged from short reflections, to a model brief, to a longer, more traditional piece.

On June 12, 2008, the United States Supreme Court handed down a decision that changed everything. In *Boumediene v. Bush*, the Court decisively stated that there are no law-free zones. The United States Government was obligated to extend constitutional protections to the detainees at Guantánamo Bay. Most of our pieces had to be modified to incorporate *Boumediene*. Our publication was, necessarily, delayed. Despite the additional work, nothing in the world could have made us happier.

During the fall, while our staff and our authors re-worked each
Editors’ Introduction

piece, the Nation’s attention was focused on the looming presidential election. One of the candidates, a former constitutional law professor, campaigned on a platform of change. The quote which opens this introduction is from President Obama’s inaugural address. He pledges that America will once again cleave to its ideals, to uphold the rule of law and the rights of man. President Obama put this promise into action on January 21, 2009, when he issued an order halting the prosecution of Guantánamo detainees by military commissions. Within hours of that order, the Associated Press came into possession of a draft of an order closing Guantánamo. The Obama administration has not, at the time of this writing, indicated when or whether this order will be issued.

Change is imminent in Guantánamo. In the two years we have labored over this journal, we have seen the United States go from a nation which practiced enhanced interrogation techniques, asserted the right to hold individuals indefinitely without hearing, and claimed that secret tribunals were a legitimate substitute for the great writ, to a nation which is again prepared to embrace the rule of law. Military commissions have been halted, and the detention facility at Guantánamo Bay will be shuttered in less than two years. Our journal may be published, not in the waning days of Guantánamo, but at the time of its extinction. What a happy obsolescence!

Although the representation of detainees at Guantánamo may be at an end, it is our belief that the articles in this edition have broader value. These articles are more than cautionary tales of what happens when we, as a nation, surrender our ideals for the sake of security. These articles deal with legal representation under the most strained circumstances, the availability of habeas corpus during times of crisis, and the United States’ obligations under international human rights agreements.

Colleen Costello’s Model Brief against Transfer to Torture, while focused on Guantánamo, is a useful resource outside of the Guantánamo context. The brief provides incisive analysis and argument regarding the requirements of international treaties against refoulement. The applications of these treaties to United States actions may prove invaluable in the refugee and asylum context. Berhard Docke’s piece, detailing his experience using the news media and diplomacy to gain his client’s freedom highlights the importance of using all available resources on behalf of a client, even weapons outside of the attorney’s customary arsenal. Sabin
Willett's exhaustive exploration of the impact of judicial attitudes on the legal process as experienced by Guantánamo detainees has the significance and weight of the best pieces featured in traditional law reviews, and we are deeply honored to publish it. Nicole Moen, Stewart “Buz” Eisenberg, Jason Pinney, and Randall Coyne each provided insightful reflections on the trials and tribulations they faced while representing their clients.

We are proud of all our articles, our authors, and our staff.

In addition, we would like to extend our thanks to the previous editorial boards, the Northeastern University School of Law faculty and staff, our symposium participants and our keynote speaker Tom Wilner, and Michael Ratner of the Center for Constitutional Rights.

Northeastern University Law Journal
Editorial Board
February, 2009.
GUANTÁNAMO AND THE LAWYER AS HERO:
500 AND COUNTING

Michael Ratner

I first visited the U.S. Naval Station at Guantánamo Bay, Cuba in the early 90s. I was part of a team of lawyers trying to close down a refugee camp populated by HIV-positive Haitians. Ultimately we succeeded, although we had to litigate our way through Republican (George H. W. Bush) and Democratic (Bill Clinton) administrations. It was a personally searing experience. Entire families were imprisoned behind barbed wire in 110 degree heat with little shelter and with even less hope. I described it after a visit as “Dante’s Ninth circle of Hell.”

When I heard in early January 2002 that Guantánamo would again be used as an offshore holding facility for human beings—this time a prison and not a refugee camp—I had some sense of what to expect, but could not have imagined the horror that Guantánamo would become. I knew its history: the U.S. lease with Cuba was one of adhesion that gave the United States “complete jurisdiction and control” over the 45 square mile base. I knew that despite this control, litigating on behalf of detainees would be difficult. The U.S. had argued and again that no law applied to those imprisoned at Guantánamo and that no court had jurisdiction to decide otherwise. To the extent we could rely on the Haitian precedents, they had been vacated as part of a settlement. More importantly, a World War II era Supreme Court case arguably divested courts of jurisdiction over cases brought by aliens held “outside” the fifty states.

Access to our clients had been a major issue in the Haitian litigation. In that litigation, despite government resistance, a strong federal judge quickly gave us access to Guantánamo. This time access would take a lot longer. It was over two years until we finally won Rasul v. Bush in the Supreme Court. That case recognized statutory habeas rights for

* Mr. Ratner is President of the Center for Constitutional Rights, which has been litigated Guantánamo detainee cases including Boumediene v. Bush and Al Odah v. U.S. The author of Guantánamo: What the World Should Know, he has also served as president of the National Lawyers Guild and lectured on international human rights litigation at the Yale Law School and Columbia School of Law.

1 542 U.S. 466 (2004).
the Guantánamo prisoners, and that enabled lawyers to finally meet with their clients. Our Guantánamo clients had not known of the litigation before then. We were not permitted to communicate with them; we represented members of their families as “next friends.”

Politically, the Haitian litigation had been difficult. It was not popular then and it would still be unpopular today to bring HIV-positive Haitian refugees into the United States. Lawyers who took on the cause were not heroes to most. But the unpopularity of that cause pales in comparison with the representation of those the Bush administration labeled as the “worst of the worst”: a claim demonstrated to be utterly unfounded, but one that still persists as part of the public discourse. From the beginning up until the present, lawyers were attacked for representing Guantánamo prisoners. They were skewered in the press, sometimes in their law firms, and often by the government itself. One question that someday will be answered by historians is how these lawyers kept going. Many of them were from the biggest firms in the country, whose other clients may not have been happy with this representation; others were from small firms or solo practitioners who gave up much of their regular work and income to take on the Guantánamo cases.

Over five hundred attorneys stepped up to these difficult (some would say impossible) cases. It needs to be said for all to hear: these lawyers have written a heroic chapter in American legal history. In the midst of the so-called war on terror and in a country terrified of the next attack, these attorneys took on the most unpopular of causes. And the cases were not just unpopular. Client visitations were difficult, to put it mildly. Mistrust of American lawyers ran high. Lawyers were dealing with prisoners that were abused and tortured. Prison guards told prisoners they would never get out if they had lawyers, or that Jewish lawyers should not be trusted. These problems only hint at the difficulties; the essays to follow give an important in depth look at these problems.

Lawyers, perhaps because of their training, understood early the abomination that was Guantánamo. We were all taught to understand the Magna Carta and Habeas Corpus. The assertion, written into executive orders by the Bush administration, that a person could be imprisoned, held incommunicado, tortured and never challenge their detention—this was and is anathema to these lawyers, to the very idea of human rights. The claim that a person’s legal rights could be deter-
mined at the whim of the Executive cuts against the fundamental under- 
pinnings of a county claiming to adhere to law. Every human being has 
a status under law; that status is not dependent on the occupant of the 
Oval Office.

The struggle to close Guantánamo and treat its prisoners fairly 
under law has been Sisyphean. Each victory has been followed by a con-
gressional reaction that sought to undermine rights which we thought 
had been established. It took seven years and three trips to the Supreme 
Court to finally get the courts to recognize the constitutional right to 
Habeas Corpus.

But lawyers have stayed with it and will continue to advocate 
until this offshore prison camp, and hopefully others like it around 
the world, are dismantled. We must not allow more Guantánamos to 
continue.
"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 kingdom; but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore more dangerous engine of arbitrary government."

- Sir William Blackstone, 1 Commentaries *136

**INTRODUCTION**

On June 12, 2008, the Supreme Court issued the much-anticipated decision in *Boumediene v. Bush.* At issue was a controversial provision in the Military Commissions Act (MCA) that denied federal courts jurisdiction over habeas corpus claims filed by alleged “enemy combatants” held at the military detention camp in Guantánamo Bay, Cuba. Petitioners were Guantánamo detainees whose habeas petitions had all been denied based on the language in the MCA, and they argued that this provision was an unconstitutional suspension of the writ. The
Government’s response relied on *Johnson v. Eisentrager*\(^4\) to argue that the Suspension Clause does not apply to non-citizens held outside the territorial sovereignty of the United States.\(^5\) It was further argued that even assuming the Suspension Clause does reach Guantánamo Bay, the Detainee Treatment Act (DTA) provided an adequate substitute for the writ.\(^6\) In a 5-4 decision written by Justice Anthony Kennedy, the Court rejected both prongs of the Government’s analysis, distinguishing *Eisentrager* on its facts,\(^7\) and pointing to inadequacies in the DTA procedures.\(^8\) Chief Justice Roberts dissented, arguing the case should be dismissed based on Petitioners’ failure to exhaust all remedies.\(^9\) In a dramatic dissent, Justice Scalia agreed with Roberts’ analysis, rejected the Court’s handling of *Eisentrager*, and described what he claimed are the “disastrous consequences” of the decision.\(^10\)

Only time will tell if the consequences of *Boumediene* are as disastrous as Scalia predicts. Even though the practical effects of this case are still unclear, it is widely accepted that it will have a tremendous impact on the Guantánamo detention center.\(^11\) This casenote does not attempt to predict the future of the detention center or those detained there. Instead, the note explores the history of habeas corpus and Guantánamo Bay, and the Court’s analysis in *Boumediene*. Having established this framework, the note investigates how *Boumediene* does, or does not, upset the historical balance between executive power and the doctrine of habeas corpus. In light of the writ’s history, this note celebrates the judgment in *Boumediene*, but also adopts a slightly critical approach to its limited applicability. In short, it argues the Court should have taken this opportunity to overrule parts of *Eisentrager* that are inconsistent with the historical office of the writ. Finally, the note briefly explores some recent developments in immigration law, questioning whether this decision will affect habeas petitions in that context.

\(^5\) *Boumediene*, 128 S. Ct. at 2251.
\(^6\) *Id.* at 2262.
\(^7\) *Id.* at 2236.
\(^8\) *Id.* at 2275.
\(^9\) *Id.* at 2280-81.
\(^10\) *Id.* at 2293-2307.
Before proceeding, however, it should be noted that Boumediene’s impact on the doctrine of habeas corpus is especially important now, as the Northeastern University Law Journal goes to press. Since this issue of the Journal focuses on the practical challenges of representing detainees at Guantánamo Bay, this case note attempts to bridge the gap between those challenges and the future of the Great Writ. In this context, the lessons learned from Guantánamo Bay may prove valuable in resolving future conflicts between executive power and the Great Writ.

I. Background

A. Legal Background of Habeas Corpus

There is much debate about the precise origins of the writ of habeas corpus. Many people today commonly associate the writ with the Magna Carta, likely because of Sir William Blackstone’s description of habeas in his famous Commentaries on the Laws of England. However, even Blackstone’s understanding of the writ’s origins may have been inaccurate. Furthermore, many accounts of the writ’s history have relied too heavily on a relatively limited set of printed sources, which may not paint an entirely accurate picture of the writ’s history.

Whatever the exact origins of the writ, however, it is clear its original function was not as a protector of liberty, but as a protector of power for the English king and his court. In fact, the earliest origins of the writ may have had nothing to do with detention and liberty. For example, the writ’s usage in the 13th Century was “limited to the mere

12 Daniel John Meador, Habeas Corpus and Magna Carta: dualism of power and liberty 28-9 (University Press of Virginia ed., 1966); William Blackstone, 1 Commentaries *134-4; see also Magna Carta § 39 (1215) (“No freemen shall be taken or imprisoned . . . except by the lawful judgment of his peers or by the law of the land.”).
14 For a brief discussion on the problems with creating a historically accurate picture of the writ’s development, see id. at 588-92.
15 Id. at 586 (“[C]onceptually the writ arose from a theory of power rather than a theory of liberty.”).
producing of the party as ordered by the court.”16 This device was used in civil actions as a last resort to force the appearance of the defendant, in order for the court to enforce its judgment.17 In the criminal context, the writ was issued as an order for the sheriff to deliver a certain person on a specified date to the King’s court to answer the charges against him.18 In this function, the writ was a useful instrument in allowing the King to secure peace and maintain sovereignty.19 The writ’s power to force the accused to appear before the court on a criminal charge is perhaps why Edward Jenks famously, if somewhat inaccurately, quipped, “[T]he writ of Habeas Corpus was originally intended not to get people out of prison, but to put them in it.”20

By the 17th Century, the writ had slowly developed some association with freedom. Court archives from that period show that the King’s Bench would issue the writ as an order for the jailer to deliver the prisoner to the Court and justify his detention.21 The jailer could satisfy this burden by issuing a return, or a form of response, which laid out the reasons for detention.22 However, any practical association the writ shared with liberty at that point in time was lessened by the fact that the King could issue the writ at his own prerogative.23 Thus, “[t]he single most important feature of habeas corpus jurisprudence [at the time] did not concern how King’s Bench justices decided the fate of prisoners. It concerned the fact that the justices decided their fate, regardless of who locked them up.”24

By deciding whom to grant extra-judicial mercy, the King effectively decided who was to be in jail, and who was to be free. By supporting such strong executive power, the writ was a far cry from a

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17 Id.
19 See id.
21 Halliday & White, supra note 13, at 598-99.
22 Meador, supra note 12, at 13.
24 Halliday & White, supra note 13, at 600.
Writing Off the Great Writ

protector of liberty. A famous example of the King’s abuse of this power is *Darnel’s Case*, in which the King instituted a “forced loan” policy, requiring his subjects to lend him money or be sent to prison. Darnel and four others refused to comply and were jailed. The King responded to their habeas claim by issuing a return stating they were being held “by the special command of his majesty.” The King’s Bench ruled that this simple response was enough to justify their continued detainment.

The outcome of *Darnel’s Case* led to considerable protest. Not long after, the financial state of the nation forced the King to assemble a Parliament. The House of Commons soon joined the debate over habeas corpus by passing a number of resolutions that sought to extend habeas rights to everyone, thus revoking the King’s prerogative power. These resolutions were quickly defeated by King’s Counsel, and Parliament was soon dissolved.

At the same time, however, the court’s usage of the writ began to change. In *Chambers’s Case*, a London merchant appeared before the King’s Court on a writ of habeas corpus and argued the Court of Star Chamber had no authority to punish him for words he had previously said before the Privy Council. Even though the Court rejected the argument, *Chambers’s Case* confirmed that the writ could be used as a vehicle to challenge authority, rather than just as a tool for the Court to retain its jurisdiction with a collateral effect on freedom.

This usage of the writ continued through 1640, when Parliament finally reconvened. Soon thereafter, Parliament passed the Habeas Corpus

25 Boumediene v. Bush, 128 S. Ct. 2229, at 2245 (citing Darnel’s Case, 3 How. St. Tr. 1 (K.B. 1627)).
26 Meador, supra note 12, at 13 (citing Darnel’s Case, 3 How St. Tr. 1).
28 Duker, supra note 18, at 43 (quoting Darnel’s Case, 3 How St. Tr. 1).
29 Boumediene, 128 S. Ct. at 2245 (discussing Darnel’s Case, 3 How St. Tr. 1).
30 Id.
31 Duker, supra note 18, at 44.
32 Id. at 44-5.
33 Id. at 45.
34 Boumediene, 128 S. Ct. at 2245.
35 Duker, supra note 18, at 46 (citing Chambers’s Case, 79 Eng. Rep. 717 (K.B. 1629)).
36 Id. at 46.
Act of 1641. Because the Court of Star Chamber could still operate at
the King’s prerogative, the Habeas Corpus Act dismantled the Court and
attempted to place a strict timeline on the processing of the writ.\textsuperscript{37} Yet,
the Act had little, if any, impact on judiciary independence over the next
four decades. Moreover, the division of power between the branches of
government only widened during that time.\textsuperscript{38} By 1670, courts began to
recognize that the “writ of habeas corpus is now the most usual remedy
by which a man is restored again to his liberty.”\textsuperscript{39} Despite this ubiquity,
there were still severe procedural defects in the writ that undermined its
effectiveness.\textsuperscript{40} For instance, the writ could not issue when the court
was not in session, and jailers could completely circumvent its effects by
shipping prisoners off to a faraway land.\textsuperscript{41}
Parliament sought to fix these defects in the writ by enacting the
Habeas Corpus Act of 1679. The 1679 Act, celebrated by Blackstone,\textsuperscript{42} is
recognized as “probably the most famous statute in the annals of English
Law,” save for the Magna Carta itself.\textsuperscript{43} This Act solidified the modern
doctrine of habeas\textsuperscript{44} by codifying clear procedures for the issuance of the
writ.\textsuperscript{45} Among other things, these procedures required returns to cite
established law, rather than mere personal will, to justify the detainment.\textsuperscript{46}
The Act also allowed the writ to issue during periods of court recess,\textsuperscript{47} and
forbade the shipment of prisoners to destinations that were out of reach
of the English courts.\textsuperscript{48}
As great a milestone as the 1679 Act was, it is somewhat unclear
how it affected the writ’s application in foreign lands. On the one hand,
there is evidence that the writ extended to territories such as the Channel

\textsuperscript{37} Id. at 47.
\textsuperscript{38} Duke, \textit{supra} note 18, at 48-52.
\textsuperscript{39} Bushell’s Case, 124 Eng. Rep. 1006, 1007 (C. P. 1670).
\textsuperscript{40} Duke, \textit{supra} note 18, at 52-58.
\textsuperscript{41} See id.
\textsuperscript{42} Clarke D. Forsythe, \textit{The Historical Origins of Broad Federal Habeas Review
Blackstone, \textit{i Commentaries} *135}.
\textsuperscript{43} Duke, \textit{supra} note 18, at 52.
\textsuperscript{44} Meador, \textit{supra} note 12, at 26-27.
\textsuperscript{46} Forsythe, \textit{supra} note 42 at 1096.
\textsuperscript{47} Id.
\textsuperscript{48} Boumediene, 128 S. Ct. at 2304 (Scalia, J., dissenting).
Islands and India. However, as these territories were still under the English Crown, they may not have been all that “foreign.” In addition, although English courts within those territories could issue the writ, there are no available cases that demonstrate the writ issuing to those territories from a court sitting in Great Britain. On the other hand, there is evidence the writ did not extend to Scotland and Hanover. English Courts may have abstained from issuing the writ to those territories for reasons similar to today’s prudential concerns: potential conflict with the Scottish legal system and practical concerns with the distance.

Regardless of the writ’s foreign application, the doctrine from the 1679 Act carried over to the American colonies, and the history leading to that Act was familiar to the Framers. To them, the history likely exemplified how a unitary, unchecked system of government inevitably fostered corruption. The writ was therefore indispensable in the system of separated powers created by the Constitution. However, the effect of the writ on individual liberty was also not to be ignored, and as a result, habeas earned the epithet, “Great Writ.” The integral role of habeas in protecting a trifurcated system of government, while securing individual liberty, is recognized in the limited circumstances in which Congress may constitutionally suspend the writ: only “when in Cases of Rebellion or Invasion the public Safety may require it.”

The Court has had very few opportunities to interpret this language of the Suspension Clause. Most cases that have explored its meaning have concluded the Suspension Clause is not violated if habeas review is replaced with a functionally adequate substitute. An interesting issue,

50 *Id.*
51 *Id.*
52 *Id.* at 2249-50.
53 *Id.* at 2250 (“[W]e cannot disregard the possibility that the common-law courts’ refusal to issue the writ to these places was motivated not by formal legal constructs but by what we would think of as prudential concerns.”).
54 *Id.* at 2246.
55 *Id.* at 2246-47.
57 U.S. Const. art. I, § 9, cl. 2.
58 See *United States v. Hayman*, 342 U.S. 205, 210 (1952); *Swain v. Pressley*, 430
however, arose during the Civil War when President Abraham Lincoln formally suspended the writ. Although one could make a strong argument that the Civil War met the rebellion and public safety requirements of the Clause, the question remains whether the executive branch itself had the power to order the suspension.\(^59\) Even though it appears likely President Lincoln lacked that power, the question was never fully resolved, and has not arisen since.\(^60\)

Shortly before the end of the Civil War, habeas rights began to be restored.\(^61\) Less than two years later, Congress passed the Habeas Corpus Act of 1867, which extended the federal court’s jurisdiction to hear habeas claims “in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.”\(^62\) Even though this Act may have been intended to protect freed slaves from imprisonment by hostile laws in the southern states,\(^63\) the broad jurisdictional grant allowed non-citizens to bring habeas actions in federal court,\(^64\) as well as state prisoners who wanted to challenge their sentences under federal law.\(^65\) This Act, now codified as amended at 28 U.S.C. § 2241, provides the statutory mechanism most prisoners today use to file habeas. When this statutory mechanism is unavailable, for whatever reason, prisoners may still invoke the constitutional mechanisms in the Suspension Clause, but only if they are constitutionally entitled to access the writ.\(^66\) The distinction between constitutional and statutory habeas is important. As with other areas, the Constitution provides a floor, but

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59 The Clause appears in Article I’s enumeration of legislative powers and states that “Congress” may suspend the writ in those cases. U.S. CONST. art. I, § 9, cl. 2. The Constitution itself is silent on any authority, or limits, with regards to the executive branch and habeas corpus.

60 \textit{Duker, supra} note 18, at 141-49.

61 \textit{Id.} at 149.


65 See, e.g., \textit{Ex parte} Royall, 117 U.S. 241, 248 (1885).

Congress may statutorily expand rights beyond that minimum.

Of the many important cases that have invoked the language of statutory habeas corpus, none are as pertinent to *Boumediene* as *Johnson v. Eisentrager*. In *Eisentrager*, a number of German soldiers were taken into custody, tried, and convicted by a military commission in China, and returned to Germany to serve their sentences.67 Being held at Landsberg Prison, which was under the control of American forces, they filed habeas petitions in the U.S. District Court for the District of Columbia.68 The issue of whether the District Court could exercise jurisdiction over these petitions reached the Supreme Court. The Court refused to allow them such access, citing a number of considerations, such as their citizenship, and the location of the detention.69 Practical considerations may also have played a significant role in that holding.

The history of the writ, from English common law to today, demonstrates that the heart of the writ lies in executive power. Throughout the centuries, the writ evolved from a means of protecting the Crown to a means of counterbalancing it. As such, the writ became an indispensable mechanism for protecting individual liberty from the arbitrary exercise of executive power. Although history may have left open the question of how far the writ can go to protect that sacred balance in foreign lands, the lessons learned from the development of this balance cannot be forgotten.

B. Factual Background of *Boumediene v. Bush*

The infamous events of September 11, 2001 significantly altered how the nation balanced national security and individual liberty. As early as the next day, newspaper headlines announced the President’s intentions to take retaliatory measures for the attacks, which were being blamed on Osama bin Laden.70 Congress also did not waste any time in responding to the “worst and most audacious terror attack in American history,”71 as it enacted the Authorization for Use of Military Force (AUMF) just

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68 *Id.* at 765-66.
69 *Id.* at 776-81.
71 *Id.*
one week after the attack.\footnote{72} The AUMF authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”\footnote{73}

The President used this broad grant of authority to initiate a military response to the attacks. On October 8, 2001, the United States led an invasion of Afghanistan aimed at toppling the Taliban government, which was accused of harboring Osama bin Laden and other Al Qaeda operatives.\footnote{74} By the following month, President Bush had ensured that no one detained from that conflict would have access to federal courts by declaring that military commissions had exclusive jurisdiction over their cases.\footnote{75}

Despite this jurisdictional order, the military faced territorial conflicts with the detainments. First, just before the September 11 attacks, the Supreme Court expressed its strong reluctance to revoke habeas corpus rights from non-citizens held within the United States.\footnote{76} There was thus a strong possibility that detainees within the territorial borders of the United States could access federal courts notwithstanding President Bush’s order. Second, even if the detainees were held outside the United States, they may still have been protected as “prisoners of war” by the Geneva Conventions.\footnote{77} The executive branch surpassed the first obstacle by citing the territorial implications of \textit{Eisentrager}. Based on that case, the Department of Justice wrote a memorandum to the Department of Defense, suggesting Guantánamo Bay as a location where detainees would not have access to habeas corpus.\footnote{78} The administration

\begin{footnotes}
\item[73] \textit{Id.} § 2(a).
\item[77] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, of Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (granting judicial access in domestic conflicts and defining prisoner of war).
\item[78] Memorandum from Patrick F. Philbin & John C. Yoo, Office of the Deputy Ass’t Att’y Gen., to William J. Haynes, II, Gen. Counsel, Dep’t of Def., \textit{Possible}
then overcame the second hurdle when President Bush officially defined Taliban and Al Qaeda detainees as “unlawful combatants,” and thus not covered by the Geneva Conventions.79

Without access to the judiciary, and without the protections of international law, it was only natural that the detainees began challenging the legality of their detention. The first Guantánamo case to come before the Supreme Court was the habeas corpus petition in *Rasul v. Bush.*80 Petitioners in *Rasul* were non-citizens captured in Afghanistan and held at the facility in Guantánamo Bay.81 The Court distinguished the problematic *Eisentrager* precedent by interpreting it as a decision on constitutional habeas corpus, and not statutory habeas corpus.82 Because the Court believed *Rasul* involved statutory habeas, it turned to *Ahrens v. Clark,* the statutory predecessor of *Eisentrager.*83 *Ahrens* established that Congress intended to strictly limit 28 U.S.C. § 2241 to those “confined or detained within the territorial jurisdiction of the court.”84 However, *Braden v. 30th Judicial Circuit Court of Ky.* overruled the jurisdictional limitations in *Ahrens* and established that § 2241 “requires nothing more than the court issuing the writ have jurisdiction over the custodian.”85 Thus, the Court reasoned the Guantánamo petitioners in this case had access to habeas corpus under § 2241 because *Braden* overruled the

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80 542 U.S. 466.


82 Id. at 476 (“[T]he Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners’ constitutional entitlement to habeas corpus. The Court had far less to say on the question of petitioners’ statutory entitlement to habeas review.” (internal citation omitted) (emphasis in original)).

83 Id. at 476-78.

84 *Ahrens v. Clark,* 335 U.S. 188, 192 (1948).

“statutory predicate” to *Eisentrager*. On the same day the Court issued its *Rasul* opinion, it also decided *Hamdi v. Rumsfeld*. As Hamdi was an American citizen held on United States soil, all parties agreed he had access to habeas corpus. However, the plurality opinion, authored by Justice O'Connor, concluded that Hamdi’s detention under the AUMF could only be lawful if he had the right to challenge his status as an “enemy combatant” in front of an impartial tribunal that conformed to certain requirements of the Due Process Clause.

*Rasul* and *Hamdi* provoked reactions from both the executive and legislative branches of the government. First, attempting to comply with the process requirements of *Hamdi*, the Department of Defense established a Combatant Status Review Tribunal (CSRT) through which individual detainees could challenge their status as “enemy combatants.” Following a hearing at which evidence and testimony is presented, the Tribunal would determine “in a closed session . . . whether the detainee is properly detained as an enemy combatant.”

Second, Congress explicitly stripped all habeas rights from Guantánamo detainees through the Detainee Treatment Act of 2005 (DTA). The DTA also gave the U.S. Court of Appeals for the District of Columbia Circuit exclusive jurisdiction to hear appeals regarding the “validity of any final decision” of a CSRT panel “that an alien is properly detained as an enemy combatant.”

The Supreme Court, in turn, reviewed these government actions in the next Guantánamo case, *Hamdan v. Rumsfeld*. The Court first ruled that the habeas-stripping language of the DTA did not apply to petitioners whose claims were already pending when Congress enacted the DTA. *Hamdan* thus confirmed that Guantánamo detainees had habeas rights, including the approximately 300 whose petitions were pending

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86 *Rasul*, 542 U.S. at 479.
88 *Id.* at 533 (plurality opinion).
90 *Id.* at 3, § (g)(12).
92 *Id.* at § 1005(e)(2)(A).
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at the time the DTA was enacted.\textsuperscript{94} Again responding to the Court, Congress enacted the Military Commissions Act of 2006 (MCA). One provision of the MCA stripped the federal district courts of jurisdiction to hear habeas petitions from any enemy combatants, not just those held at Guantánamo; another provision expressly applied the habeas-stripping language to pending claims.\textsuperscript{95}

The D.C. Circuit upheld the constitutionality of the MCA, concluding Congress could not have been clearer regarding its intent to strip statutory habeas, and detainees did not otherwise have constitutional habeas rights.\textsuperscript{96} The Supreme Court originally denied certiorari in the case because Petitioners had not exhausted all available remedies.\textsuperscript{97} However, on June 29, 2007, the Court vacated its earlier order and granted certiorari.\textsuperscript{98} The Court’s shift signaled it was finally ready and willing to answer the constitutional questions raised by the MCA regarding Guantánamo imprisonments.

II. Analysis in Boumediene v. Bush

Justice Kennedy wrote the majority opinion for the Court. Despite the length of the opinion, the reasoning behind the holding is simple. First, the Court establishes the MCA denies the federal courts of

\textsuperscript{94} At the time the Supreme Court issued its decision, approximately 300 of the 760 Guantánamo cases were considered “pending.” The Supreme Court and Guantánamo: What Bush can do, and what he can’t, The Economist, July 8, 2006, at 81.

\textsuperscript{95} Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (2006) (28 U.S.C. § 2241(e)) (“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 to have been properly detained as an enemy combatant or is awaiting such determination.”); id. at § 7(b) (28 U.S.C. § 2241 NOTE) (“The amendment shall apply to all cases, without exception, pending on or after the date of the enactment of this Act . . . ”).


\textsuperscript{97} Boumediene v. Bush, 127 S. Ct. 1478 (U.S. Apr. 2, 2007) (Stevens, J., denying cert.).

\textsuperscript{98} Boumediene v. Bush, 127 S. Ct. 3078 (U.S. June 29, 2007) (granting cert.).
habeas jurisdiction over pending claims, and therefore, if the MCA is valid, the petitions must be denied. Second, Kennedy explores the long history of habeas corpus and the extraterritorial reach of the Constitution in general, determining the Suspension Clause applies at Guantánamo Bay. Third, because the DTA procedures are an inadequate substitute for habeas corpus, the Suspension Clause has been violated. Finally, no other prudential or separation-of-powers concerns bar the Court from reaching this decision.

A. Section 7 of the MCA

The threshold issue in the Court’s analysis is whether the habeas-stripping language in the MCA applies to petitioners in this case. According to section 7(b) of the MCA, this provision is effective as of the statute’s enactment date, and applies to all pending cases of detained aliens since September 11, 2001. The Court rejects Petitioners’ argument that section 7 is ambiguous, finding the intent to strip habeas rights from all Guantánamo detainees to be clear, especially considering Congress enacted the MCA as a reaction to Hamdan. Since the intended application is clear, the Court holds that if the statute is found to be valid, Petitioners’ claims must be dismissed.

B. Does the Suspension Clause apply at Guantánamo Bay?

After discussing much of the aforementioned history of habeas corpus, Justice Kennedy recognizes the integral role the Suspension Clause now plays in individual liberty, but finds that the historical application of the writ to foreign territories is not at all conclusive when applied to

100 Id. at 2262.
101 Id. at 2272.
102 Id. at 2274-77.
103 MCA § 7(b) (“The amendment . . . 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.”).
104 Boumediene, 128 S. Ct. at 2243.
105 Id. at 2246.
the situation at Guantánamo.\textsuperscript{106} History thus leaves the extent to which the writ applies to the American military installation at Guantánamo Bay as an open question.

As a threshold matter, the Court addresses the geographical limits of the Constitution. Not only did the Framers contemplate future expansions of American territory when they drafted the Constitution, but America actually expanded for a long period immediately following ratification.\textsuperscript{107} Despite this history, questions concerning the Constitution’s applicability to new territories never arose because statutory enactments always preemptively resolved such issues.\textsuperscript{108} Not until the 20th Century, when the country began occupying noncontiguous territories, did statutory law cease to exert the full force of the Constitution to newly acquired, outlying areas.\textsuperscript{109}

This period of staunch interventionism gave rise to several cases challenging the precise applicability of the Constitution in territories such as Puerto Rico, Guam, Hawaii, and the Philippines.\textsuperscript{110} These cases, known as the Insular Cases, established the doctrine of territorial incorporation.\textsuperscript{111} According to this doctrine, the Constitution does not fully apply if the occupation is merely temporary, whereas it does apply during occupations of territories destined for possible statehood. The Philippines provides an insightful example of temporary occupations.\textsuperscript{112} There the Court refused to apply all provisions of the Constitution because their legal system was so drastically different from the Anglo-American system that applying some provisions to the islands would disrupt its functioning.\textsuperscript{113} Such a disruption could not be justified considering the short duration of the

\textsuperscript{106} \textit{Id.} at 2248.
\textsuperscript{107} \textit{Id.} at 2253.
\textsuperscript{108} The Court cites a number of legislative enactments that expanded the Constitution’s reach as the United States expanded westward. See \textit{id.} at 2253.
\textsuperscript{109} \textit{Boumediene}, 128 S. Ct. at 2253-54.
\textsuperscript{110} The line of cases that examined whether the Constitution ran with the Flag became known as the Insular Cases. See De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Hawaii v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904).
\textsuperscript{111} For more on territorial incorporation, see \textit{Dorr}, 195 U.S. at 143 (1904); see also \textit{Downes}, 182 U.S. at 293 (1901).
\textsuperscript{112} See \textit{Downes}, 182 U.S. at 282.
\textsuperscript{113} \textit{Boumediene}, 128 S. Ct. at 2254.
American occupation.  

However, even in cases of temporary occupation, some constitutional provisions are too important to be disregarded. At a minimum, the government must afford non-citizens of the occupied land “guaranties of certain fundamental personal rights declared in the Constitution,” regardless of the length of occupation. Even in the Philippines, the question was thus not whether the Constitution applied, but which parts of it applied. The Insular Cases show that the answer depends on the circumstances of each specific situation. The result of territorial incorporation therefore created a balance between the practicalities of occupation and the importance of fundamental constitutional liberties that allowed the Court “to use its power sparingly and where it would be most needed.”

The balance between practicality and liberty again became important a half-century later. In Reid v. Covert, two wives of American servicemen were charged for crimes in military courts in Japan and England. Petitioners argued they had Fifth Amendment rights to jury trials because they were not military personnel. Yet, the logistics of a jury trial would have been difficult given their foreign locations. A badly fractured court concluded Petitioners’ American citizenship rendered military commissions inappropriate, and found the Constitution “in its entirety” applied to their trials. In Boumediene, however, Justice Kennedy argues that their citizenship could not have been the only dispositive factor, or else the Reid Court would have had to overrule the inconsistent In re Ross precedent, where a sailor aboard an American vessel was denied such rights. While the plurality in Reid may have been

114 See Downes, 182 U.S. at 282; see also Boumediene, 128 S. Ct. at 2254.
115 Boumediene, 128 S. Ct. at 2255 (quoting Balzac v. Porto Rico, 258 U.S. 298, 312 (1922)).
116 Boumediene (discussing Reid v. Covert, 354 U.S. 1, 77 (1957)).
117 Boumediene, 128 S. Ct. at 2255 (discussing Reid, 354 U.S. at 15-16).
118 Reid, 354 U.S. at 3-5.
119 Boumediene, 128 S. Ct. at 2256 (discussing Reid, 354 U.S. at 11-12).
120 Boumediene, 128 S. Ct. at 2256.
121 Reid, 354 U.S. at 5-6, 18-19.
122 Boumediene, 128 S. Ct. at 2256.
123 Even though the sailor in Ross was a British citizen, it was long recognized that the laws of the vessel’s home country apply. Because this was an American vessel, Ross meant that American citizens on board also did not have such
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prepared to overrule *Ross* completely, Justices Harlan and Frankfurter went to great lengths to distinguish the cases based on practicalities.\(^{124}\) Although the Court’s plurality opinion focused on fundamental rights, these concurrences show that the inherent balance between those rights and practical concerns still existed through the 1950’s.

Having established that practical concerns still guided decisions well after the Insular Cases, Kennedy proceeds to tackle the problematic *Johnson v. Eisentrager* precedent, arguing that it also partially turned on such concerns. Although geography was an important factor in the *Eisentrager* decision,\(^{125}\) the Court immediately rejects the Government’s contention that the case adopted a “formalistic, sovereignty-based test” to determine access to the writ.\(^ {126}\) Instead, the Court believes an array of factors, including practical considerations, contributed to the outcome in *Eisentrager*.\(^ {127}\) Furthermore, to find *Eisentrager* adopted a strict sovereignty rule would make little sense, considering the United States lacked both *de jure* and *de facto* sovereignty over Landsberg Prison.\(^ {128}\) Such a finding would also imply the Constitution is powerless outside the borders of the United States, contradicting both the Insular Cases and *Reid*.\(^ {129}\) Although sovereignty concerns may have played a role in *Eisentrager*, they were coupled with the “objective factors and practical concerns” present throughout this line of cases.\(^ {130}\)

Using this entire background of cases, the Court holds three factors are relevant in determining the reach of the Suspension Clause.

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\(^{124}\) *Boumediene*, 128 S. Ct. at 2256-7; *see also Reid*, 354 U.S. at 58-64 (Frankfurter, J., concurring); id. at 75 (Harlan, J., concurring in result).

\(^{125}\) See *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950) (the prisoners “at no relevant time were within any territory over which the United States is sovereign, 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”).

\(^{126}\) *Boumediene*, 128 S. Ct. at 2257.

\(^{127}\) Id. at 2257; *see Eisentrager*, 339 U.S. at 779 (among many other possible issues, “our army must transport them across the seas for hearing,” “transportation for whatever witnesses the prisoner desired,” “allocation of shipping space, guarding personnel, billeting and rations,” and the fact “trials would hamper the war effort”).

\(^{128}\) See *Boumediene*, 128 S. Ct. at 2258 (suggesting that the *Eisentrager* Court was “not concerned exclusively with the formal legal status” of the prison).

\(^{129}\) *Boumediene*, 128 S. Ct. at 2258.

\(^{130}\) Id.
These include:

(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.\(^\text{131}\)

First, while it was undisputed the detainees in *Boumediene* were not American citizens, their enemy status was in dispute. In contrast, the prisoners in *Eisentrager* did not challenge their “enemy alien” status.\(^\text{132}\) Nor would it have been easy for them to raise such challenges, as they had comprehensive rights to determine their status through rigorous adversarial proceedings.\(^\text{133}\) The CSRT hearings, however, lack such process—detainees face accusatorial proceedings without counsel, and have only limited review in the Court of Appeals.\(^\text{134}\)

Second, the Court considers the nature of the apprehension and detention sites. In this case, like in *Eisentrager*, the apprehensions and detentions all took place outside the United States.\(^\text{135}\) However, there are some “critical differences” between the two military bases involved regarding the assertion of sovereignty.\(^\text{136}\) The United States was not the only country that exercised jurisdiction over Landsberg Prison after World War II; the base was controlled by the combined Allied Forces.\(^\text{137}\) Furthermore, the Allies planned neither permanent occupation of Germany, nor complete displacement of the country’s institutions.\(^\text{138}\) In contrast, the United States is the only country that exercises jurisdiction over Guantánamo Bay, and this jurisdiction is subject to an indefinite

\(^{131}\) *Id.* at 2259.

\(^{132}\) *Id.* at 2259-60; see also *Eisentrager*, 339 U.S. at 763.

\(^{133}\) *Boumediene*, 128 S. Ct. at 2260.

\(^{134}\) *Id.*

\(^{135}\) *Id.*

\(^{136}\) *Id.* (citing Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany, June 5, 1945, 60 Stat. 1649).

\(^{137}\) *Id.*

\(^{138}\) *Id.* (citing Rasul v. Bush, 542 U.S. 466, 480, 487 (2004)).
lease, indicating the base is not a transient possession.\textsuperscript{139} Thus, “[i]n every practical sense, Guantánamo is not abroad.”\textsuperscript{140}

Third, the practical obstacles to granting habeas review at Landsberg were much greater than in the present case. In post-war Germany, the Allied powers were responsible for both quelling guerilla uprisings around Landsberg Prison and managing a large occupation zone, encompassing 18 million people.\textsuperscript{141} The security concerns are not the same for the “isolated and heavily fortified military base” at Guantánamo Bay, where the long-term population consists only of “American military personnel, their families, and a small number of workers.”\textsuperscript{142} Furthermore, because Cuban courts do not have jurisdiction over the base, there is no chance that habeas proceedings would cause any friction with the host Cuban government.\textsuperscript{143}

After weighing the detainees’ questionable status, the American government’s control over their detainment site, and the practical concerns, the Court holds that the Suspension Clause has “full effect at Guantánamo Bay.”\textsuperscript{144} Although the Court has never found that non-citizens have habeas rights at a facility where another country has retained \textit{de jure} sovereignty, the three factors demonstrate the unique attributes of these particular cases.\textsuperscript{145} Congress cannot deprive Guantánamo detainees of habeas corpus rights unless they formally suspend the writ.\textsuperscript{146} As no formal suspension has occurred, in either the MCA or elsewhere, the detainees are presumably entitled to habeas.\textsuperscript{147}

\begin{thebibliography}{99}
\bibitem{Boumediene} Boumediene, 128 S. Ct. at 2260-61. (citing Letter from President Truman to Secretary of State Byrnes (Nov. 28, 1945) in 8 Documents on American Foreign Relations 257 (R. Dennett & R. Turner eds. 1948); Pollock, A Territorial Pattern for the Military Occupation of Germany, 38 Pol. Sci. Rev. 970, 975 (1944)).
\bibitem{Id} \textit{Id.} at 2261.
\bibitem{Id} \textit{Id.}
\bibitem{Id} \textit{Id.}
\bibitem{Id} \textit{Id.} at 2262.
\bibitem{Id} \textit{Id.}
\bibitem{Id} \textit{Id.}
\end{thebibliography}
C. Was the Suspension Clause violated by not providing an adequate substitute for habeas relief?

Following its conclusion that the Suspension Clause applies at Guantánamo Bay, the Court next examines whether Congress violated it. The Court has traditionally found that the writ may be restricted, as long as Congress replaces the process with an adequate substitute. However, the leading cases on habeas substitutes have only limited applicability in the current situation. In United States v. Hayman, a statute allowed federal prisoners to petition the sentencing court, rather than the district court, if they believed their sentence was unlawful. Similarly, a District of Columbia statute in Swain v. Pressley substituted the traditional habeas process by establishing a collateral process in the Superior Court of the District of Columbia. Although both statutes created alternative processes for habeas relief, the alternatives were designed to strengthen the review process, not to frustrate it. More importantly, each statute had a savings clause that allowed traditional habeas relief “if the alternative process proved inadequate or ineffective.”

The jurisdiction-stripping provisions of the DTA and MCA do not have the important characteristics that saved the statutes in Hayman and Swain. Rather, the DTA and MCA expressly prohibit any habeas review. Congress’ express intent to limit habeas review in that manner is clear from its narrow jurisdictional grant to the Courts of Appeals only

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148 Id. at 2262-63 (The Court of Appeals for the District of Columbia did not reach the question after concluding that the writ does not apply to the situation. Despite its usual practice of declining to answer questions left unresolved by a lower court, the court found that these cases presented “exceptional” circumstances, and that it would eventually decide the issue of adequate habeas corpus substitution anyway.).


150 Boumediene, 128 S. Ct. at 2264; see also Hayman, 342 U.S. at 206-7.

151 Boumediene, 128 S. Ct. at 2264; see also Swain, 430 U.S. at 374-78.

152 Boumediene, 128 S. Ct. at 2265.

153 Id.

to “assess whether the CSRT complied with the ‘standards and procedures specified by the Secretary of Defense’ and whether those standards and procedures are lawful.”

Valid habeas substitutes typically grant federal courts much broader fact-finding authority. It is even more problematic that if this limited process were to fail, there is no savings clause to enable detainees to file habeas as a last resort. Given the limited DTA procedures, the Boumediene Court stated “[t]he present cases test the Suspension Clause in ways that Hayman and Swain did not.”

Even though Congress could be acting on the outer fringes of its authority, the Court refuses to delineate the requirements of an adequate habeas substitute. At a minimum, however, proceedings must allow the prisoner a “meaningful opportunity” to claim that his detention is unlawful, and the court itself must have the power to issue his conditional release. Any further requirements depend upon the individual circumstances of each case.

Many habeas petitions submitted during the 19th Century focused on the adequacy of the underlying proceedings. Prisoners in those cases were often able to challenge their detention in light of “exculpatory evidence that was either unknown or previously unavailable to the prisoner.” Federal courts would nonetheless accord great deference to convictions issued by courts of record, as such courts had rigorous procedural requirements to conform to due process constraints. However, the prisoners in Boumediene were not detained pursuant to an

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156 Boumediene, 128 S. Ct. at 2265-66.

157 Id.

158 Id. at 2266.

159 Boumediene, 128 S. Ct. at 2266.

160 Id. at 2267.

161 Id.

162 Id.

163 Id. at 2268; see also Ex parte Watkins, 28 U.S. (3 Pet.) 193, 193-94 (1830). Later in the Boumediene opinion, Justice Kennedy points out military courts are not courts of record. 128 S. Ct. at 2271.
order by a court of record, but pursuant to an executive order.\textsuperscript{164} As demonstrated throughout the history of habeas in England, judicial review of executive detainments is even more crucial.\textsuperscript{165} The judicial review need not be tantamount to a full-blown criminal trial, but the “writ must be effective” when the procedural protections are viewed as a whole, considering both direct and collateral stages.\textsuperscript{166}

Without specifically deciding on the sufficiency of the CSRT proceedings, Justice Kennedy strongly suggests this direct stage would not survive a procedural challenge. Petitioners point to a number of possible deficiencies of the CSRT process. In CSRT proceedings, the accused faces a high burden to overcome the presumption that the Government’s “enemy combatant” designation is valid.\textsuperscript{167} A detainee has little means to overcome this burden when he has no access to counsel, no awareness of the Government’s most critical allegations, and practically no ability to confront witnesses in a system with liberal hearsay admissions.\textsuperscript{168} The Government defends this process by arguing that it was established in order to meet the requirements in \textit{Hamdi}.\textsuperscript{169} Kennedy quickly dismisses the Government’s reliance on \textit{Hamdi} by pointing to the statutory grounds behind its holding.\textsuperscript{170}

Regardless of the intrinsic sufficiency of the CSRT proceedings, the collateral protections must also be sufficient to protect the effectiveness of the writ.\textsuperscript{171} At the very least, the closed and accusatorial nature of the CSRT proceedings creates a strong risk of error, even when all the parties act with “diligence and in good faith.”\textsuperscript{172} In order for the writ of habeas corpus to be effective, the reviewing court must have the power

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{164} \textit{Boumediene}, 128 S. Ct. at 2268.
\item \textsuperscript{165} \textit{Id.} at 2269.
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Id.}
\item \textsuperscript{170} \textit{Boumediene}, 128 S. Ct. at 2285. The quick dismissal is criticized by Chief Justice Roberts as a “constitutional bait and switch.” \textit{Id.} at 2285 (Roberts, C.J., dissenting).
\item \textsuperscript{171} Kennedy points out the statutes in \textit{Hayman} and \textit{Swain} would have been automatically constitutional, as those prisoners had full trials that conformed to the strictest requirements of the Bill of Rights. \textit{Id.} at 2270 (majority opinion).
\item \textsuperscript{172} \textit{Id.}
\end{enumerate}
\end{footnotesize}
to correct such errors. A habeas substitute must therefore be able to “assess the sufficiency of the Government’s evidence against the detainee,” as well as “admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.” The crucial question thus becomes whether the DTA allows the Court of Appeals to conduct proceedings that meet these standards.

The DTA fails this test because it does not enable the Court of Appeals to make necessary findings of fact. The Court focuses on the detainee’s inability to present exculpatory evidence, as would be constitutionally required by such a review process. Under the most generous interpretation of the jurisdictional grant, the DTA would allow exculpatory evidence to be introduced if it was “reasonably available” to the party at the time of the proceeding and not submitted as part of the record. If that evidence were unavailable, as is the case with newly discovered evidence, the proceedings likely still conformed to the “standards and procedures,” thus barring the Court of Appeals from considering the evidence. The Government asserts that a detainee in such a situation may request a new CSRT. However, the Court finds that this option is inadequate, as the Deputy Secretary has complete discretion on whether to authorize new proceedings, and his authorizations are not judicially reviewable.

Even though the Court concentrates on the problems with exculpatory evidence, it clarifies that there are additional deficiencies of the DTA. If these deficiencies were merely read into the language of the DTA, the practical effect would be reinstating 28 U.S.C. § 2241 against the clear congressional intent to restrict it. Therefore, the Court’s only option is to make a decision based on the adequacy of the DTA review.

173 Id.
174 Id.
175 Id. at 2272-3.
176 Id. (quoting Bismullah I, 501 F.3d 178, 180 (D.C. Cir. 2007)).
177 Id. at 2272-73. The Court cites the example of Mohamed Nechla to show the possibility of newly discovered evidence is not an academic question. Id. at 2273.
178 Id. at 2273.
179 Id. at 2274 (Deputy Secretary discretionary determinations not “status determinations” or “final judgments”). Id. at 2273-2274.
180 Boumediene, 128 S. Ct. at 2274.
181 Id.
process, which fails to meet the collateral review standards. Because this process is not an adequate substitute for habeas, MCA § 7 is an unconstitutional suspension of the writ.

D. Concerns Over Prudential Barriers and Executive Power

Having answered the constitutional question, the Court proceeds to analyze whether any prudential barriers bar the district court’s review of the petitions. The Court usually requires a defendant to exhaust all available remedies before it will decide a case. However, to require these detainees to first seek review under the insufficient DTA process would “require additional months, if not years, of delay.” Cases of “undue delay” may therefore bypass the DTA process through habeas petitions. It is important to note, however, that this holding still requires younger cases to pursue all remedies under the DTA before filing habeas petitions.

Even though cases of “undue delay” may circumvent DTA review, “it does not follow that a habeas corpus court may disregard the dangers the detention in these cases was intended to prevent.” As a result, Kennedy stresses that habeas courts should conduct proceedings in a flexible manner, reducing the burden on the military. For instance, by channeling all cases through the U.S. District Court for the District of Columbia, the petitioners could make their claims while somewhat reducing the strain on military resources. Additionally, the hearing judge should be careful in his or her handling of confidential information. Above all, and especially with regard to the prevention of terrorism, “proper deference must be accorded to the political branches.” However, if today’s generations are to learn from the history of the writ, the lesson is that the branches of government must continue to operate within established legal

182 Id.
183 Id.
184 Id. at 2275.
185 Id. at 2276 (“Except in cases of undue delay, federal courts should refrain from entertaining an enemy combatant’s habeas corpus petition . . . ”).
186 Id.
187 Id.
188 Id.
189 Id.
190 Boumediene, 128 S. Ct. at 2277.
E. Dissenting and Concurring Opinions

Chief Justice Roberts’ dissenting opinion first explores how he would have disposed of the case, and then attacks the reasoning behind the majority’s conclusions. First, Roberts argues that the case should have been dismissed based on the doctrine of exhaustion. As conceded by Justice Kennedy, DTA section 1005(e)(2)(C) allows review of CSRT proceedings by the D.C. Circuit, and yet there has been no such review in this case. Roberts argues that the Court may reach the question of whether a review is sufficient only after it has actually taken place. After all, if those procedures turn out to be sufficient, there is no need to address the constitutional issue because such concerns would be entirely speculative. According to Roberts, this exhaustion barrier therefore required the Court to maintain its original position in denying certiorari.

Second, Roberts attacks the Court’s reasoning in reaching its conclusions, and discusses at length the adequacy of the DTA process. Roberts sees the CSRT proceedings not as a part of the initial determination process, but as a review of the detainees’ “enemy combatant” status, which may be reviewed by a court of appeals for legal or factual error. Because this review was established in reliance on the Hamdi opinion, he argues the Court’s invalidation of it now is a “constitutional bait and switch.” Even worse, a process may be an adequate habeas substitute per se if it vindicates the petitioners’ rights. Roberts contends that here, however, the Court dismantles these procedures without announcing which specific due process rights they deprive of the detainees.

191 Id. at 2277.
192 Id. at 2280 (Roberts, C.J., dissenting).
193 Id.
194 Id. at 2280-81.
195 Id. at 2281.
196 Id. at 2280.
197 Id. at 2283-91.
198 Id. at 2283-84.
199 Id. at 2285.
200 Id. at 2286-87.
201 Id. at 2286 (noting that habeas corpus is a “flexible remedy rather than a
Roberts believes the Court does not cite the infringed rights because there are none; the DTA process is already a more generous review process than prisoners of war receive under the Geneva Conventions.202 Regarding the admittance of hearsay evidence at these proceedings, Roberts argues that it is sometimes the most reliable evidence available, and that requiring more would burden “our forces abroad [whose mission] is to fight terrorists, not serve subpoenas.”203 The “Personal Representative” each Guantánamo detainee receives, who can summarize confidential information and help him prepare his case, is arguably a sufficient substitute for counsel.204 The fact that the detainee may receive summaries of confidential information from this “Personal Representative” is more than sufficient access to the evidence.205

Given the generosity of these procedures, Roberts argues that the majority’s focus on post-proceeding exculpatory evidence is flimsy at best.206 A remedy for this evidentiary problem could arguably be read into the DTA, especially when detainees are allowed annual status reviews.207 Similarly, one could read the DTA as authorizing the Court to release a prisoner who is successful at the D.C. Circuit.208 According to Roberts, the Court’s ability to interpret the statute as requiring the perceived deficiencies does not justify ruling the statute unconstitutional.209

Roberts concludes his dissent by raising rhetorical questions of how habeas review will differ from the DTA procedures, and change the detainees’ overall position.210 “What makes the majority think witnesses will become magically available when the review procedure is labeled ‘habeas’?”211 Roberts further questions how the procedures will handle the practical difficulties of issuing subpoenas to individuals in foreign lands and calling officers as witnesses.212 With these questions still open,
Roberts claims there is a “distinct possibility that [the] ‘habeas’ remedy will, when all is said and done, end up looking a great deal like the DTA review [the Court] rejects.”

Justice Scalia agrees with Roberts’ analysis that the DTA provides an adequate substitute for habeas, but voices a more fundamental critique of the decision, namely that habeas “does not, and never has, run in favor of aliens abroad.” Scalia begins his dissent by discussing what he believes to be the “disastrous consequences” of the decision. He predicts that habeas proceedings will raise the evidentiary standard in these cases, and thus force the military to release a number of detainees. Of those released, statistics suggest that a sizeable number will return to the battlefield.

As the history of the writ is unclear on whether it applies extraterritorially, and since the majority concedes Guantánamo Bay does not come under the sovereignty of the United States, Scalia argues that the Court should defer to the political branches on the question of the constitutionality of MCA section 7. Furthermore, Scalia attacks the way the majority distinguishes Eisentrager, and argues that the precedent’s facts make the case controlling.

Finally, Scalia, an originalist, focuses on the Framers’ intended purpose of the Suspension Clause. Scalia cites the writ’s inapplicability in Scotland and the language of the 1679 Act, which prohibited the shipment of prisoners to evade the writ rather than extend its office abroad, as conclusive proof that the common law writ remained in power only under the sovereign territory of the Crown.

Justice Souter spends most of his short concurrence focusing on two aspects of the case that “one might overlook after reading the dissents.” First, Congress had already superseded the Court’s decision in Rasul that statutory habeas corpus applies to Guantánamo detainees, and therefore,

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213 *Id.*
214 *Id.* at 2294 (Scalia, J., dissenting).
215 *Boumediene*, 128 S. Ct. at 2294.
216 *Id.* at 2295.
217 *Boumediene*, 128 S. Ct. at 2294-95.
218 *Id.* at 2296-97.
219 *Id.* at 2298-2302.
220 *Id.* at 2304.
221 *Id.* at 2278 (Souter, J., concurring).
the Boumediene decision should come as no surprise. Second, the extraordinary length of detainment in these cases demonstrates the futility in requiring petitioners to first exhaust DTA review procedures. Both of these reminders help place the dissenting arguments in perspective.

III. Implications

In the words of Justice Souter, the “[Boumediene] decision is no judicial victory, but an act of perseverance in trying to make habeas review . . . mean something of value both to prisoners and to the Nation.” Whether one believes that this decision is such a necessary act of perseverance, or an objectionable display of judicial activism, the decision will no doubt have an enormous impact on the lives of those still detained at Guantánamo Bay. The practical effects of this case on current events do not require a complicated legal analysis: many detainees who are held without sufficient evidence may finally obtain their freedom, and many people may begin to question the detention center’s raison d’être. However, as respectable as the Court’s holding is, and as significant as the practical effects on current events are, the opinion contributes surprisingly little to the centuries-old conflict between executive power and habeas corpus.

A. Executive Authority

The Boumediene decision does not significantly restrict the authority of the executive branch to defend the nation. The President’s powers as Commander-in-Chief are rooted in Article II of the Constitution. When exercising those powers, or any powers in general, the President has the greatest authority when his actions are pursuant to an act of Congress. Here, the President has broad congressional authority under the AUMF to use “all necessary and appropriate force” in the War on

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222 \text{ Id.}
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223 \text{ Id.}
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224 \text{ Id. at 2279.}
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225 \text{ Glaberson, supra note 11.}
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226 \text{ U.S. Const. art. II, § 2, cl. 1.}
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227 \text{ Youngstown Sheet \\ & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 635 (1952) (Jackson, J., concurring).}
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The President thus has enormous authority to act in protection of national security, and courts will likely continue to grant the executive branch substantial deference in the exercise of that authority. It does not seem likely the *Boumediene* decision will upset that great power, regardless of the outcome of the habeas petitions.\(^{229}\) First, every dismissed habeas petition is itself an approval of the executive’s exercise of power. Second, even if many habeas petitions are granted, the *Boumediene* decision still supports the executive’s general power to detain. Finally, regardless of a petition’s success, *Boumediene* provides procedural flexibilities that give generous deference to executive powers.

In analyzing post-*Boumediene* executive authority, one might first consider the possibility that some habeas petitions will be denied. As the purpose of habeas corpus is merely to test the legality of the prisoner’s detention,\(^{230}\) the writ is far from a get-out-of-jail-free card for prisoners.\(^{231}\) The government allegedly already has evidence against each detainee; it is now only required to produce that information to the judicial branch. The inevitably unsuccessful habeas petitions that will arise after this case will vindicate the President’s detainment order.\(^{232}\) Such vindications can only serve to strengthen executive power.\(^{233}\)

Even if many habeas petitions are granted, the decision still provides strong support for the executive power to detain individuals. Crucially, the *Boumediene* holding applies only to unreasonably long detentions.\(^{234}\) The Court does not define when exactly a detainment becomes unreasonably long, but determines that the six-year delay in this case is sufficient.\(^{235}\)


\(^{229}\) *Boumediene*, 128 S. Ct. at 2277 (“Our opinion does not undermine the Executive’s powers as Commander in Chief.”).

\(^{230}\) *See* Walker v. Wainwright, 390 U.S. 335, 336 (1968) (“Whatever its other functions, the great and central office of the writ of habeas corpus is to test the legality of a prisoner’s current detention.”).

\(^{231}\) *See Boumediene*, 128 S. Ct. at 2277 (it is possible that the detainees “do not obtain the relief they seek”). For a discussion of the theory of the counter-habeas writ that views it as a get-out-of-jail-free card, see Steven Semeraro, *Two Theories of Habeas Corpus*, 71 Brook. L. Rev. 1233 (2006).

\(^{232}\) *Boumediene*, 128 S. Ct. at 2277.

\(^{233}\) *Id.*

\(^{234}\) *Id.* at 2275.

\(^{235}\) *Id.*
Although this rule may enable many current Guantánamo detainees to file habeas petitions, it also enables the military to hold future detainees for many years without any access to judicial review. Hypothetically, a person could begin a detention at Guantánamo Bay tomorrow, and not have any judicial review of that detention until five or six years later. The power to detain for such a long period without judicial review reaffirms the President’s “substantial authority to apprehend and detain those who pose a real danger to our security.”

Regardless of how the petitions are ultimately decided, the Boumediene decision constructs a procedural flexibility that affords generous deference to the executive branch. Chief Justice Roberts’ dissenting opinion attacks the habeas process as burdening military resources by requiring evidence to be gathered and subpoenas to be served abroad. Unwilling to “anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees’ habeas corpus proceedings,” the majority expressly declines to resolve such questions. However, the Court rules that habeas proceedings are flexible, and instructs the habeas courts to be sensitive to such logistical issues when shaping evidentiary procedures. Throughout the history of habeas corpus jurisprudence in the United States, the executive branch, the very branch the modern writ restrains, has likely never been allowed such flexibility. This novel approach arguably expands the executive branch’s privileges, at least within the framework of habeas proceedings.

Not even the practical effects of these procedures appear to place significant restraints on executive power. In addition to Roberts’ concerns, Scalia fears two possible ways habeas proceedings could be detrimental to national security: the likelihood that released detainees will return to the battlefield, and the likelihood that confidential military information

236 Id. at 2277.
237 See id. at 2288 (Roberts, C.J., dissenting) (“The dangerous mission assigned to our forces abroad is to fight terrorists, not serve subpoenas.”).
238 Id. at 2276 (majority opinion).
239 Id.
240 Kennedy cited Felker, Swain and Hayman as exemplifying the Suspension Clause’s flexibility. Boumediene, 128 S. Ct. at 2276 (these cases “stand for the proposition that the Suspension Clause does not resist innovation in the field of habeas corpus”). However, those cases tempered such flexibility onto the legislative, not the executive, branch.
will fall into the wrong hands.\textsuperscript{241} Although Scalia may exaggerate the gravity of these risks, they are real concerns. It is widely expected that habeas proceedings will have higher evidentiary standards than the CSRT proceedings, thus resulting in the release of at least some detainees.\textsuperscript{242} In assessing that risk, however, it is important to remember the extreme duration of these detainments. The longer a search for evidence is unsuccessful, the greater the likelihood that such evidence does not exist, and thus the greater the likelihood that the detainee is innocent. The time mechanism in \textit{Boumediene} should therefore significantly lower that risk. Likewise, the handling of confidential information entails some risks to national security. The majority therefore instructs the habeas courts to be sensitive to those dangers.\textsuperscript{243} Such instruction may not be sufficient to soothe Scalia’s nerves, but courts have experience handling confidential information. There is no reason to believe that neither the State Secrets Privilege\textsuperscript{244} nor traditional \textit{in camera} review could be used in a way to accommodate the needs of both parties. Although neither of these national security concerns can be completely resolved, \textit{Boumediene’s} apparent flexibility in response demonstrates how little the case has eroded the President’s powers in that area.

\textbf{In sum}, the amount of support \textit{Boumediene} provides for executive power demonstrates that it hardly places burdensome restrictions on it. The habeas petitions that are denied will vindicate the President’s power in

\textsuperscript{241} \textit{See Boumediene}, 128 S. Ct. at 2294-95 (Scalia, J., dissenting).

\textsuperscript{242} \textit{See id.} at 2295 (habeas proceedings “will be more detainee-friendly than those now applied,” and thus, “the number of the enemy returned to combat will obviously increase”). The media have also reported that a number of detainees are expected to be released, \textit{see}, \textit{e.g., Glaberson}, \textit{supra} note 11, at A28. Other cases further suggested the Government is holding people based on insufficient evidence or insufficient process. \textit{See Parhat v. Gates}, 532 F.3d 834 (D.C. Cir. 2008) (reliance on interview report for detainee status determination inconsistent with standards and procedures; evidence insufficient to support determination detainee is enemy combatant); \textit{see also} \textit{al-Marri v. Pucciarelli}, 534 F.3d 213, 216 (4th Cir. 2008) (per curiam) (en banc) (holding the prisoner did not had not been afforded sufficient process to challenge his status). Before this note went to press, the U.S. District Court for the District of Columbia granted five of six habeas petitions in a consolidated case that was the first to be heard since the Supreme Court’s \textit{Boumediene} decision. \textit{Boumediene} v. Bush, No. 04-1166, 2008 WL 4949128, at *5 (D.D.C. Nov. 20, 2008).

\textsuperscript{243} \textit{Boumediene}, 128 S. Ct. at 2276.

\textsuperscript{244} \textit{See United States v. Reynolds}, 345 U.S. 1 (1953).
individual cases. Most importantly, however, by restricting habeas access to cases of undue delay, the Boumediene holding reaffirms the President’s power to detain individuals for some period of time. The burdens placed on the executive branch by petitions that have met the time requirement do not appear overly stringent in light of the unprecedented deference those habeas proceedings offer the executive branch.

B. The Writ of Habeas Corpus

While not placing unduly burdensome restrictions on the executive branch, Boumediene does not greatly expand the future of habeas corpus either. The unique sovereignty conditions at Guantánamo, combined with the holding’s time requirements, make this case difficult to apply in future situations. While some limitations may be reasonable, the Court should have simply taken this opportunity to overrule the troublesome Eisentrager precedent.

First, the sovereignty issues in Boumediene provide the most significant limitation on its holding. One of the primary ways Justice Kennedy distinguishes Guantánamo Bay from Landsberg Prison is by referencing the de facto sovereignty the United States maintains over Guantánamo, even in the absence of de jure sovereignty.245 The lack of a precise historical parallel, despite centuries of habeas jurisprudence, exemplifies the unique nature of sovereignty at Guantánamo Bay. Even today, very few locations in the world share these attributes of sovereignty. This rare discrepancy between de facto and de jure sovereignty makes future application of this holding extremely difficult.

Second, even within the unique jurisdictional confines of Guantánamo Bay, the Court does not allow full access to the writ. As stated above, only those detainees who have been detained for an unreasonable period may file habeas petitions.246 Prisoners whose detention lengths have yet to meet the definition of “unreasonable” may still only proceed under

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245 Boumediene, 128 S. Ct. at 2261 (“The detainees … are held in a territory that, while technically not part of the United States, is under the complete and total control of our government.”).

246 Id. at 2275 (“If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time.”).
the DTA. Thus, the hypothetical detainee who arrives at Guantánamo Bay tomorrow may have to wait several years and face numerous futile CSRT proceedings before he may access the writ. Deferece to the armed forces may justify this time restriction.247 In the course of combat, the military should be able to make swift decisions concerning someone’s status as an enemy combatant. The Boumediene timeline enables the military to make these determinations, while also allowing the opportunity to later correct mistakes through CSRTs. Giving the military initial authority to review these decisions arguably satisfies exhaustion concerns.248 The possibility of future judicial review may also motivate the military to run these procedures under stricter standards. As restricting as the timeframe may be on a detainee’s petition, the Court may not have been able to overcome these issues and reach the holding without it.

Even assuming the timeline makes sense in light of the Court’s holding, such a restriction may have been unnecessary if the Court ruled on the CSRTs directly. Kennedy cites a number of possible deficiencies of the CSRT process, but declines to rule on the adequacy of the proceedings, instead ruling based on the collateral review of those procedures.249 Of all the potential problems of the review process, Kennedy hones in on the inability to introduce newly discovered evidence to the record.250 Roberts’ dissent articulates a strong argument that this is thin support for finding the process as a whole an inadequate substitute for habeas.251 As prejudiced against the detainees as the CSRTs are, from strong presumptions of guilt, to lack of counsel and wide hearsay latitudes, the Court may have been able to articulate more support for invalidating them altogether. Such a ruling would have rendered the timeline issue irrelevant by not

247 Every member of the Court agrees the military is afforded some deference in these determinations, even if the amount of that deference is in dispute. Id. at 2276 (“In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches.”); id. at 2280-81 (Roberts, C.J., dissenting); id. at 2295-96 (Scalia, J., dissenting).

248 Habeas petitions are often viewed as a remedy of last resort, and will only be entertained after the prisoner has exhausted all other available remedies. See Ex parte Hawk, 321 U.S. 114, 116 (1944).

249 Boumediene, 128 S. Ct. at 2269-70.

250 Id. at 2272-73.

251 Id. at 2289 (Roberts, C.J., dissenting) (“If this is the most the Court can muster, the ice beneath its feet is thin indeed.”).
requiring a detainee to exhaust such a seemingly futile remedy before filing habeas. However, invalidating the CSRTs would have presented its own difficulties, as the military established CSRTs in response to the Court’s opinion in *Hamdi*. It may have been hypocritical for the Court to claim that the executive deserves wide deference in battlefield determinations, but then revoke the very process that the military created to review those determinations.\textsuperscript{252} Furthermore, as it is unclear how the military could improve upon the deficiencies of the CSRTs, it may not be helpful to deprive the detainees of the only administrative oversight currently available to them. Completely dismantling the CSRTs therefore may not be a viable option.

Considering the necessities of time requirements and administrative review, the Court should have at least taken this opportunity to overrule *Eisentrager* by eliminating the considerations of territorial sovereignty and citizenship. In analyzing the citizenship factor, the *Eisentrager* Court argued that access to habeas corpus was one of many rights protected by American citizenship.\textsuperscript{253} Viewing habeas corpus as an individual right is contrary to the original history of the doctrine, which was more concerned with expanding jurisdiction than individual liberty. Even as far as the modern doctrine is concerned, Chief Justice Roberts points out that habeas is not a substantive right.\textsuperscript{254} If the writ is not a substantive right, it makes little sense to consider what rights one has acquired through citizenship as a threshold to determining one’s access to the writ.

Any kind of sovereignty test that considers geography, no matter how flexible, makes just as little sense. It would be uncontroversial to claim that, at a minimum, habeas jurisdiction requires the Court to have the power to order the prisoner’s release.\textsuperscript{255} The authority to entertain habeas petitions would be useless otherwise. The history of the writ,

\textsuperscript{252} See id. at 2295-96 (Scalia, J., dissenting).
\textsuperscript{253} Johnson v. Eisentrager, 339 U.S. 763, 769-70 (1950).
\textsuperscript{254} Boumediene, 128 S. Ct. at 2286 (Roberts, C.J., dissenting) (“But habeas is, as the majority acknowledges, a flexible remedy rather than a substantive right.”).
\textsuperscript{255} See id. at 2266 (majority opinion) (an adequate substitute must carry that power); id. at 2283 (Roberts, C.J., dissenting) (“Because the central purpose of habeas corpus is to test the legality of executive detention, the writ requires most fundamentally an Article III court able to hear the prisoner’s claims and, when necessary, order release.”); see also Munaf v. Geren, 128 S. Ct. 2207, 2216-17 (2008) (a prisoner is “in custody” for statutory habeas purposes when the U.S. has the power to produce him).
Writing Off the Great Writ

despite Kennedy’s conclusion that it is unclear, strongly suggests that this fundamental sovereignty over the official, rather than the territory, is the dispositive issue. For instance, the writ ran to the Channel Islands and India, where the English Crown retained sovereignty, including the power over the jailers.\textsuperscript{256} Inversely, the lack of control over the Scottish legal structure may explain why the Court did not issue the writ to Scotland.\textsuperscript{257} If an English court ordered a Scottish official to release a prisoner, and that order was not obeyed, the ruling would have been as embarrassing to the courts as it would have been disempowering.\textsuperscript{258} Interpreting the writ as merely requiring the executive’s control over the jailer is entirely consistent with the writ’s history.

The operational requirement of the writ is also evident in its application under 28 U.S.C. § 2241. The statutory mechanism for habeas has no geographical limitations in its language, as it applies to all persons “in custody under or by color of the authority of the United States.”\textsuperscript{259} On the same day the Court decided \textit{Boumediene}, it reconfirmed the extraterritorial reach of this provision in \textit{Munaf v. Geren}. In \textit{Munaf}, the Court held that the federal court had jurisdiction to entertain habeas petitions filed by two American citizens detained by the Multinational Force in Iraq.\textsuperscript{260} Sovereignty issues regarding the location of the detainment were not problematic, and the Court held that, even though the United States shared its jurisdiction with other nations, its ability to produce the petitioners meant that they could access § 2241.\textsuperscript{261} Even before \textit{Munaf},

\textsuperscript{256} See \textit{Boumediene}, 128 S. Ct. at 2249; see also Halliday & White, supra note 13, at 586-7 (“The clear message of our historical account is that it was not the location of an incarceration that was taken as controlling the issuance of the writ, but the sovereign status of the officials holding a prisoner in custody. So long as officials of the king, or his equivalent, were exercising custody over the bodies of prisoners in a territory, the basis of that custody could be challenged by prisoners through habeas writs.”).

\textsuperscript{257} \textit{Boumediene}, 128 S. Ct. at 2250. Scalia argues that Scotland was beyond the territorial reach of the Crown, thus precluding issuance. \textit{Id.} at 2303-4 (Scalia, J., dissenting). However, his own reasoning demonstrates the separate legal structures between England and Scotland, as Scotland retained its own king. It is entirely possible that the writ’s issuance would have been different if some gaols in Scotland were entirely operated by England.

\textsuperscript{258} See \textit{id.} at 2250 (majority opinion).


\textsuperscript{260} \textit{Munaf}; 128 S. Ct. at 2216-18.

\textsuperscript{261} \textit{Id.}
both *Braden* and *Rasul* confirmed that § 2241 operates upon the person holding custody, not the prisoner.\(^{262}\) Furthermore, to the person with custody of the prisoner, it makes no difference whether an order to release has constitutional or statutory roots. To be sure, using § 2241 as guidance on constitutional habeas is not to suggest that legislative expansions of rights automatically become embedded in the Constitution. However, this example does illustrate the practical similarities between the operations of the two mechanisms. The way that both mechanisms are orders on the jailer, combined with the writ’s history, show that constitutional access to the writ should also depend on the government’s power over the jailer, not the technical location of the detention.

The Court should have adopted a broad, general rule that *anyone* detained by the U.S. Government *anywhere* under its control could file a habeas petition. This rule may sound familiar, as Justice Black proposed it in his *Eisentrager* dissent.\(^{263}\) Black criticized the *Eisentrager* holding:

> If the opinion thus means, and it apparently does, that these petitioners are deprived of the privilege of habeas corpus solely because they were convicted and imprisoned overseas, the Court is adopting a broad and dangerous principle . . . [T]he Court’s opinion inescapably denies courts power to afford the least bit of protection for any alien who is subject to our occupation government abroad, even if he is neither enemy nor belligerent and even after peace is officially declared.\(^{264}\)

Black was concerned with the large loophole created by the majority in *Eisentrager*: the executive can circumvent habeas requirements by detaining individuals abroad. The existence of Guantánamo Bay demonstrates just how prophetic Black’s concerns were. As if on cue, the Department of Justice cited *Eisentrager* nearly half a century later, when it suggested Guantánamo Bay as a detention site, precisely because the


\(^{263}\) Johnson v. *Eisentrager*, 339 U.S. 763, 798 (Black, J., dissenting) (proposing to hold “that our courts can exercise [habeas corpus] whenever any United States official illegally imprisons any person in any land we govern”).

\(^{264}\) *Eisentrager*, 339 U.S. at 795-96.
courts could not likely afford any protection to the prisoners there.\textsuperscript{265} Even more troubling, Scalia cites Black’s concerns as conclusive proof that these efforts to deny rights should be given deference.\textsuperscript{266}

Kennedy is also clearly worried about this loophole, as he cites the “troubling separation of powers concerns” raised by a strict sovereignty test.\textsuperscript{267} In fact, Kennedy takes the analysis one step further and raises the possibility that the government could merely “surrender[] formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, [and] it would be possible for the political branches to govern without legal constraint.”\textsuperscript{268} By precluding such situations, Kennedy tightens the \textit{Eisentrager} loophole to some extent, yet the government is still able to select a detainment site that does not share the attributes of Guantánamo. Kennedy should have resolved that loophole completely by adopting Black’s proposed rule.

The \textit{Boumediene} Court probably could not have avoided some of the important limitations on its holding. In many regards, the decision is a welcome and novel one. However, if the Court really wanted to preserve the future of habeas corpus, it would have recognized that the writ is solely dependant on the government’s sovereignty over the custodian, without regard to the geographical location of the detainment or the citizenship of the detainee. Such a holding would have required overruling parts of \textit{Eisentrager} that, when viewed in context, were likely wrongly decided.

\textbf{C. Other Concerns With The Future of Habeas Corpus}

However limited the holding may be, \textit{Boumediene} is novel in that it confirms that some non-citizens detained outside the technical borders of the United States are constitutionally entitled to the writ.\textsuperscript{269} This holding is especially interesting in light of Congress’ recent efforts to circumscribe the writ to non-citizens who are \textit{within} the borders of the United States.

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\textsuperscript{265} See Philbin & Yoo, \textit{supra} note 78.
\textsuperscript{267} \textit{Id.} at 2258 (majority opinion).
\textsuperscript{268} \textit{Id.} at 2258-59.
\textsuperscript{269} \textit{Id.} at 2262 (“It is true that before today the Court has never held that non-citizens detained by our Government in territory over which another country maintains \textit{de jure} sovereignty have any rights under our Constitution.”).
\end{flushleft}
Throughout our nation’s history, habeas has been a crucial instrument in the area of immigration law. Habeas was so important to non-citizens facing deportation or exclusion that the Immigration and Nationality Act (INA) provided its own habeas guarantees in section 106(a)(10).

Congress first attempted to restrict the writ in this context with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The AEDPA section entitled “Elimination of Custody Review by Habeas Corpus” repealed the habeas corpus guarantee in section 106(a)(10) of the INA and replaced it with a provision precluding any judicial review of deportation orders based on the alien’s commission of certain criminal offenses. Later that December, Congress also enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). This legislation limited the scope of habeas review to determining whether the petitioner is an alien, was removed, and was a permanent resident or refugee/asylee.

The Supreme Court was reluctant to surrender habeas corpus rights so easily. In *I.N.S. v. St. Cyr*, the Court concluded that despite the deletion of the habeas corpus guarantee from the INA, and despite the title of AEDPA section 401(e), “Elimination of Custody Review by Habeas Corpus,” both statutory and constitutional habeas corpus survived the legislation. The Court justified this based on the “strong

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270 Before enactment of the Immigration and Nationality Act of 1952 (INA), anyone who alleged a legal right to remain in the United States had a right to habeas corpus relief. See *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (aliens already residing in the country); *Chin Yow v. United States*, 208 U.S. 8, 13 (1908) (aliens excluded at the border).


273 *Id.* § 440(a).


275 IIRIRA deleted the remainder of INA § 106 and replaced it with the new INA § 242. IIRIRA § 306(a)-(b), 8 U.S.C. § 1252 (2000).


277 *Id.* at 305 (supporting constitutional habeas corpus); see also *id.* at 314
presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.”

Essentially, because the revocation of habeas corpus would invoke “the outer limits of Congress’ power,” the writ could not be revoked without “specific and unambiguous statutory directives.”

Despite the Court’s attempts to save habeas corpus in *St. Cyr*, however, Congress finally issued “specific and unambiguous statutory directives” to supersede the decision. Worried that the *St. Cyr* decision gave criminal aliens more judicial review than non-criminal aliens, and thus “allows criminal aliens to delay their expulsion from the United States for years,” Congress expressly revoked statutory habeas corpus review of removal proceedings as part of the REAL ID Act of 2005 (REAL ID).

This amendment prohibits any judicial review by the district court, and instead limits a detained alien to one argument in front of the court of appeals.

The similarities between the habeas-stripping provisions of REAL ID and section 7 of the MCA are striking. As with CSRTs, those detained for removal are not guaranteed access to counsel. As a result, as many as 80% of those detained by Immigration and Customs Enforcement (ICE)

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278 Boumediene, 128 S. Ct. at 298.
279 Id. at 299.
280 Id.
284 Although immigration detainees have the “privilege” of counsel, that counsel must be “at no expense to the Government.” INA § 292, 8 U.S.C. 1362 (2000). Furthermore, the recent practice of detaining individuals prior to removal makes it even more difficult for them to obtain counsel, even if they can pay for it. Richard Peña, Recommendation and The Quest to Fulfill Our Nation’s Promise of Liberty and Justice for All: ABA Policies on Issues Affecting Immigrants and Reform, A.B.A., at 3 (Feb. 13, 2006), available at http://www.abanet.org/intlaw/policy/humanrights/immigration2.06107A.pdf (recommendation for Congress to provide full access to counsel in immigration proceedings).
are not able to have counsel represent them. Access to counsel is crucial at immigration proceedings, where the complexity of immigration law and the potential language and culture barriers to understanding the process make it difficult for detainees to overcome the adversarial process. Furthermore, the provision in REAL ID limiting a detainee’s review to one argument before the Court of Appeals, which can only review issues of law, is quite similar to the inadequate collateral review process under MCA section 7. As in Boumediene, the high possibility of error in front of the immigration judge, combined with the limited judicial review of those proceedings, reveals the inadequacies of REAL ID. Despite these potential inadequacies, courts have previously found this process to be an adequate habeas substitute. 

These legal developments exacerbate two aspects of the immigration landscape that were already problematic. First, the number of detentions by ICE is increasing at an alarming rate. In the decade between 1996 and 2006, the annual number of detainments by ICE tripled to 283,115. Not only are many of these detentions unnecessary and arbitrary, but they may continue for unnecessarily long periods. Second, the conduct of ICE officials and conditions of detainment are often deplorable. For instance, enforcement officials have recently been accused of failing to provide adequate medical and legal access to detainees. Both of these

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287 *See* Mohamed v. Gonzales, 477 F.3d 522, 526 (8th Cir. 2007) (“Congress has created a remedy as broad in scope as a habeas petition. It is an adequate and effective substitute to test the legality of a person’s detention.”); *see also* Aguilar v. U.S.I.C.E., 510 F.3d 1, 17 (1st Cir. 2007).


290 A leading habeas case in the immigration context involved a detention on Ellis Island of indefinite length. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). A more recent case has limited detainments to six months, but that rule only applies to cases where a judicial order has already been issued. *See* Zadvydas v. Davis, 533 U.S. 678, 701 (2001).

291 Nina Bernstein has written a series of articles reporting such issues. *See* Nina
problematic aspects of the immigration landscape remain underscored by the high stakes of such detentions. As early as 1921, the Supreme Court recognized that deportation can result “in loss of both property and life, or of all that makes life worth living.”\(^\text{292}\) Now, it remains unclear what impact, if any, \textit{Boumediene} will have on these legal and operational developments in immigration law.

Despite the disturbing questions that remain unanswered, one potentially positive effect of \textit{Boumediene} in the immigration context concerns border detentions. Courts have always been reluctant to grant habeas rights to people detained by the United States before legal admission into the country. One leading example is \textit{Shaughnessy v. United States, ex rel., Mezei}, involving a legal permanent resident of the United States for twenty-five years, who had a family and life established in Buffalo, N.Y.\(^\text{293}\) In 1948, Mezei went to visit his dying mother, who was living in Romania at the time. Denied entry to Romania, Mezei remained in Hungary for nineteen months.\(^\text{294}\) When he returned to Ellis Island in 1950, immigration officials refused to honor his visa based on confidential security-related information.\(^\text{295}\) At the same time, no other country would accept Mezei for admission.\(^\text{296}\) As a result, Mezei was stranded on Ellis Island for nearly two years.\(^\text{297}\) Despite Mezei’s indefinite detainment on Ellis Island, the Court ruled that he could not challenge his detention because he was not technically detained; as someone who was not legally readmitted into the United States, he could go anywhere...

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Judge Selya denounced ICE’s raid tactics, even though ICE was ultimately successful in the appeal. \textit{Aguilar,} 510 F.3d at 24 (“[W]e express our hope that ICE, though it has prevailed, nonetheless will treat this chiaroscuro series of events as a learning experience in order to devise better, less ham-handed ways of carrying out its important responsibilities.”).

\(^\text{292}\) Ng Fung Ho v. White, 259 U.S. 276, 284 (1921).
\(^\text{293}\) 345 U.S. at 216 (Black, J., dissenting).
\(^\text{294}\) \textit{Id.} at 208.
\(^\text{295}\) \textit{Id.}
\(^\text{296}\) \textit{Id.} at 219-20 (Jackson, J., dissenting).
\(^\text{297}\) \textit{Id.} at 208-209 (majority opinion).
else. Justice Jackson criticized the shortsightedness of this approach with his famous words: “That might mean freedom, if only he were an amphibian!” Today, many detainments at border crossings more closely fit the technical definition of detention. Such cases, and perhaps even the odd situation like Mezei, may be positively influenced by Boumediene. In Bayo v. Chertoff, the Seventh Circuit strongly suggested that Boumediene extends the reach of habeas corpus to border prisons, where the United States may exercise de facto sovereignty.

The effect that Boumediene will have on immigration law remains unclear. However, the slow erosion of habeas rights in immigration law, at a time when detainments are raising more and more troubling questions, shows that habeas still faces many challenges in the future.

IV. Conclusion

One can only hope future presidents will not allow people to be detained without the ability to challenge their detention. Times of conflict, however, often lend themselves to such situations. The Boumediene Court’s unwillingness to accept “national security” as a blank check to detain during such times is truly an “act of perseverance.” Affording the executive branch too much deference would have been a return to the days of Darnel’s Case, when the King could use the writ as a means to detain anyone arbitrarily. However, this holding does not mean the writ is now on safe ground. With the continued survival of Eisentrager, and the current developments in immigration law, the Great Writ still faces significant challenges ahead.

298 Id. at 213.
299 Id. at 220 (Jackson, J., dissenting).
300 535 F.3d 749, 754 (7th Cir. 2008).
CLERICALISM AND THE GUANTÁNamo LITIGATION

Sabin Willett

“A trial judge should go on the bench every day and try cases.”

INTRODUCTION

On January 31, 2005, United States District Judge Joyce Hens Green denied motions to dismiss a group of habeas corpus petitions. These were no routine cases. Filed by prisoners held at the United States Naval Station at Guantánamo Bay, they had been fought tooth and nail for years by the President’s lawyers in the United States Department of Justice. Judge Green’s decision, In re Guantanamo Detainee Cases, was widely anticipated, closely reasoned, and thoughtful. It was often cited in legal circles, and its core proposition of a constitutional right to habeas review ultimately would be vindicated in Boumediene v. Bush.

* Mr. Willett is a partner at Bingham McCutchen, LLP. The author gratefully acknowledges the research of associates Samantha Stonework and Erin Smart, the unflagging contribution of colleagues Susan Baker Manning, Neil Mcgaraghan, Jason Pinney, Rhea Rutkowski, Francesca Miceli, Sam Rowley, and Catherine Murphy to the Guantánamo litigation, and the larger inspiration of colleagues from all corners of the bar, who have rallied to the urgent need to restore the rule of law in Guantánamo and elsewhere.


But that would be three years later. Three days later, Judge Green issued a second decision, staying the habeas cases before her while the Government appealed her ruling. The bar focused on her denial of the motions to dismiss, paying little heed to this short order. Yet her ruling on the motions to dismiss spoke only to the right of a few discrete litigants to judicial review. At issue in the stay order was the role of the judiciary itself.

The thesis of this paper is that the second was the more profound decision. It proceeded from a clerical approach to law. In the Guantánamo litigation, this clerical tendency saw judges and advocates as members of an elite whose first allegiance was to an abstraction—the law—rather than to the litigants who brought cases and controversies. It mirrored the tendency of organized religions to develop an elite ministry engaged in doctrinal struggle, concerned more with the faith than the faithful. A three-year stay of cases attacking indefinite executive detention should have been intolerable to bench and bar alike. But where law and history intersected so urgently, the pull toward clericalism in the profession was subtle and powerful. The appeals and the literature flourished. The clericalism of the Guantánamo litigation overwhelmed the legal culture. No one seemed to remark that this was antithetical to our Constitution and federal jurisprudence, under which the judiciary’s job is to decide discrete cases and controversies—as Judge Young might put it, to go on the bench and try cases. After six years, the results are manifest. They illustrate the wisdom of our founding document, and the folly of departing from it.

To place Judge Green’s February 2005 stay order within this clerical context, a little history is necessary. Since 2002, the federal courts had weighed the question whether prisoners at Guantánamo had the

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6 See U.S. Const. art. III, § 2, cl. 1.
7 See Young, supra note 1.
8 Guantánamo prisoners are generally referred to by the Government and the courts as “detainees;” their incarceration as “detention.” The word choice is intended to invoke law-of-war concepts, such as the undisputed right of the President to detain as prisoners of war combatants during the pendency of international armed conflict. The word choice serves another important interest as well—“detention” suggests something more transient and temporary than long-term imprisonment. I think the term misleading, in light of what is now
right to be heard in court at all.9 The cases presented a clash of important constitutional values. The Executive claimed it had seized the men in wartime and held them pursuant to the war power, arguing it was engaged in a new kind of warfare against a new kind of enemy. On September 18, 2001, Congress authorized the President to use military force against those responsible for the 9/11 atrocities, and those who harbored them.10 The Government’s briefs were shrill. Their centerpiece was 9/11, and no evidence linking Guantánamo prisoners to those crimes was thought necessary. The Government colored all debate with the premise that the Guantánamo prison was bound up in a “war” being prosecuted in response to the outrages of 9/11.

The prisoners said they were non-combatant civilians, held without judicial process on territory under United States control. As civilians, they claimed the right to immediate release under the Due Process Clause of the Fifth Amendment to the Constitution,11 and under the Third Geneva Convention, a treaty of the United States,12 as applied through §§ 2241(a) and (c) of 28 United States Code.13 They argued the Administration’s theory presumed an executive power to pluck persons from any street corner on the globe, and hold them prisoner during an undeclared “war” against a common noun.14

The memory of the 9/11 murders seared the minds of everyone, including judges, and it is hardly surprising that the prisoners lost the early rounds. The District Court granted motions to dismiss in 2002, ruling

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11 U.S. Const. amend. V.
the prisoners had no right to judicial review in American courts.\textsuperscript{15} The Court of Appeals for the District of Columbia Circuit affirmed in 2003.\textsuperscript{16} Then in \textit{Rasul v. Bush}, decided in June 2004, the Supreme Court reversed, holding that the district courts had jurisdiction to hear habeas petitions filed by Guantánamo prisoners.\textsuperscript{17} The Court could scarcely have spoken more plainly. It remanded the cases to the District Court, and directed that court to “consider in the first instance the merits” of the petitions.\textsuperscript{18} Lest there be any doubt about what that meant, the Court noted that the petitioners had stated valid claims.\textsuperscript{19}

After remand, the Government moved to dismiss again, this time asserting a metaphysical distinction between \textit{Rasul}'s jurisdictional ruling and the question whether petitioners had stated claims for relief. These were the motions Judge Green decided in January 2005. In considerable detail, she reviewed the habeas “returns”\textsuperscript{20} submitted by the Government, and held the Petitioners had stated valid claims that they were held unlawfully.\textsuperscript{21}

So in January 2005, the state of play was this: the Executive had imprisoned men for more than three years without charge. None had received a judicial hearing. The conditions of confinement were excruciating.\textsuperscript{22} There was jurisdiction in habeas to hear these claims, and

\begin{itemize}
\item \textsuperscript{16} \textit{al-Odah}, 321 F.3d at 1143-44; \textit{see also} \textit{Rasul} v. \textit{Bush}, 542 U.S. 466, 470-73 (2004) (reciting the procedural history).
\item \textsuperscript{17} \textit{Rasul}, 542 U.S. at 485.
\item \textsuperscript{18} \textit{Id}.
\item \textsuperscript{19} \textit{Id.} at 483 n.15 (finding that “[p]etitioners' allegations . . . describe 'custody in violation of the Constitution or laws or treaties of the United States'”) (quoting 28 U.S.C. §§ 2241(a), (c)(3)).
\item \textsuperscript{20} In habeas, the government’s “return” serves as an answer, certifying the true cause of the detention. \textit{See} 28 U.S.C. § 2243.
\item \textsuperscript{21} \textit{In re} Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 477 (D.D.C. 2005).
\item \textsuperscript{22} Declassified interviews with FBI agents served at Guantánamo Bay, Cuba describing mistreatment including “detainee[s] chained hand and foot in a fetal position to the floor with no chair, food, or water. Most times they had urinated or defecated [sic] on themselves and had been left there for 18, 24 hours or more; "a German Shepard [] placed in front of [detainee] while his handler commanded the dog to growl, bark, and show his teeth;” “detainee with a full head of hair and a beard whose head was wrapped in duct tape” . . . “because he would not stop chanting the Koran.” \textit{See} Center for Human Rights in the Americas, \textit{Testimonies of FBI Agents}, http://humanrights.ucdavis.edu/projects/
in *Rasul* the Supreme Court had remanded them to Judge Green’s court with specific instructions to “consider in the first instance the merits.” The Court now having denied the Government’s motion to dismiss, all that remained was to find the facts and decide the cases on the merits.

But on February 3, 2005, Judge Green made war upon herself. In her second order, she stayed herself from hearing facts in the cases before her, pending resolution of all appeals in *In re Guantanamo Detainee Cases* and *Khalid v. Bush.* Functionally, there was no difference between this ruling and an order granting the Government’s motion to dismiss. The facts would not be disclosed for the indefinite future. There would be no opportunity for a prisoner to obtain release until the dismissal theories were tested on appeal, and then tested again on certiorari to the Supreme Court. This process would consume more than three years. While it played out, most of the Green petitioners, and hundreds of others, would remain at Guantánamo.

Groundhog Day dawned again on June 12, 2008. At a stroke, the habeas litigation returned precisely to where it had begun six years before. In *Boumediene v. Bush,* the Supreme Court decided that the Guantánamo prisoners have substantive habeas rights. In a 5-4 decision, the Court

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23 *Rasul,* 542 U.S. at 485.

24 Two weeks before Judge Green denied the motions to dismiss before her, District Judge Richard Leon dismissed a habeas corpus petition brought in *Khalid v. Bush,* 355 F. Supp. 2d 311 (D.D.C. 2005). His dismissal of the case was a final order, subject, of course, to a right of appeal; *Khalid,* restyled as *Boumediene,* would indeed go up on appeal. *See Boumediene v. Bush,* 476 F. 3d 981 (D.C. Cir. 2007) (noting that *Khalid* and other habeas cases were also consolidated on appeal). But, as discussed below, the denial of a motion to dismiss is not appealable as of right. *See discussion infra Section I.A.* Nevertheless, once Judge Green stayed her own hand, her denial would also go up on appeal to the D.C. Circuit. *al-Odah v. United States,* 321 F.3d 1134 (D.C. Cir. 2003). The appeal sat for more than two years, until Congress abolished the habeas remedy, and the circuit court vacated the decisions of the district court, and dismissed all the cases for want of jurisdiction. *Boumediene,* 476 F.3d 981.

observed that whether the President had authority to detain particular prisoners was “to be resolved in the first instance by the District Court.”

The petitioners had traversed a great circle and reached the precise point of their beginning. During six years, the district courts had developed no factual records in their cases and would have to start anew, and by late 2008, those courts were just beginning that process. Two trips through the entire federal appellate apparatus and untold millions of dollars in expenses had been consumed, all to establish that the prisoners could start to make a case.

Habeas petitioners immediately filed motions in the district court to reopen long-dormant cases, but as this paper went to press, only a handful had begun in earnest and few had reached decision. Whether we will finally see the usual practice in habeas—cases decided by reference to the record of a specific case, supplemented as needed on an individual basis, so that the habeas judge may determine whether the detention is lawful—remains uncertain. Throughout late 2008, the Government successfully tied up the litigation through assignment to a “coordinating judge,” thereby imposing the “efficiency” of a single funnel on hundreds of distinct cases. Six months after Boumediene, and fifty-four since Rasul, some prisoners had begun their eighth year at Guantánamo.

Academics may recite the string of government losses in the Supreme Court—Rasul, Hamdi, Hamdan, and now Boumediene—but these “losses” are trivial. Again and again, the Government has won the battles that counted: stay orders having nothing to do with the merits at all. From the Government’s perspective, delay is indistinguishable from success on the merits. For sheer ineffectiveness and waste, the Guantánamo litigation may long stand supreme. It has been a monument to clericalism—and to the folly of ignoring the final judgment rule.

26 Id. at 2240.
27 Senior District Judge Thomas Hogan issued Case Management Orders establishing rules and procedures for the conduct of habeas corpus proceedings. See, e.g., Case Management Order, In re Guantánamo Bay Detainee Litigation, Misc. No. 08-442 (TFH) (D.D.C. Nov. 6, 2008).
29 See Resolution of the Executive Session (D.D.C. July 1, 2008) (designating Judge Hogan “to coordinate and manage proceedings in all Guantánamo Bay cases”).
I. THE URGENCY OF FACT-BASED DECISION-MAKING

A. The Final Judgment Rule

1. Thesis

The halting approach to the judicial function described above—in which litigation reached its sixth year before factual hearings in any case even began—ignored entirely the final judgment rule, which as a general matter bars appellate review until a final judgment is entered in the court of first instance.30 The courts seem to have abandoned the judicial imperative that cases and controversies be decided at all. In an area where the law is said to be new and evolving—the so-called “war on terror”31—the bench has been engaged in writing opinions premised largely on allegations only—that is to say, hypotheses. After Judge Green entered her stay order, other District Court judges followed suit and entered stays in hundreds of habeas cases. Petitioners’ lawyers contested the stays, but few took appeals. A mandamus remedy is available when a court refuses to decide a case, yet few requests for mandamus were filed.32 The Supreme Court always has original jurisdiction in habeas. The issuance of the stays convincingly demonstrated that all other courts were literally closed to the petitioners, yet only two habeas petitions for original jurisdiction were filed in the Supreme Court.

Academics and scholars wrote volumes about the substantive issues at play, and little or nothing about the stays. Like the appellate courts, they focused on law as an abstraction rather than a vehicle for case resolution. For some lawyers, the imperative to defend the principle of habeas may have been as urgent as the imperative to defend

31 Congress is the sole branch of government entrusted by the Constitution with the power to authorize warfare. See U.S. Const. art. 1, § 8, cl. 1-2. Congress never authorized any “war on terror.” The AUMF is closely limited to those with direct involvement in the 9/11 attacks, and those who “harbored” them—that is, gave physical refuge or shelter to them, as for example, did the former government of Afghanistan. See Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2078 (2005).
a client. Counsel emphasized the deployment of legal theory, the strategic positioning of cases before higher courts, and the importance of appealing to any appellate judge standing at the pivot. This was a tactical campaign designed to best influence development of the law. The focus on the tactics of law made an absurdity somehow tolerable. Guantánamo became a lightning rod in politics and culture. The thrust and parry of the myriad appeals made its way to the press and Guantánamo itself to the cinema. Who would write the learned article, brief, or opinion that would withstand the critique of her fellow lawyers? In short, the bar itself was not immune to the culture of clericalism that infected the courts. The prisoners were foils.

2. The Final Judgment Rule

The cornerstone of federal appellate review is the final judgment rule, codified at § 1291 of the Judicial Code. This rule bars piecemeal review by limiting appellate review to final judgments: “The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.” While both the statute and cases identify exceptions, this presumptive limitation on piecemeal review has always been a core proposition of federal jurisprudence. “Finality as a condition of review is an historic characteristic of federal appellate procedure.” In a leading decision, Justice Frankfurter explained the policy:

Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration . . . To be effective,

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33 This article necessarily addresses the public litigation approach of the bar. Many volunteer lawyers performed quiet and heroic nonpublic efforts in their clients’ behalf, for example, by helping to arrange for diplomatic release to foreign governments.


35 Id.

36 Cobbledick v. United States, 309 U.S. 323, 324 (1940).
judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause . . . Encouragement of delay is fatal to the vindication of the criminal law.37

Courts encourage finality as “crucial to the efficient administration of justice,” a mandate that is “inimical to piecemeal appellate review of trial court decisions which do not terminate the litigation.”38 This conception of judicial review dates from early in the Republic.

The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of nisi prius proceedings await their termination by final judgment . . . . This insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases.39

Ordinarily there is no appellate review for decisions like Judge Green’s denial of a motion to dismiss, or for denial of summary judgment, because those decisions keep a case alive before a trial judge, as opposed to ending it in a final judgment.40 The rule compels the trial judge to address the relevant facts and law and reach a decision, and avoids the risk that cases will be prolonged by piecemeal appeals, and never decided at all.

37 Id. at 325.
3. Exceptions to the Final Judgment Rule

Exceptions to the final judgment rule take two forms. First, one may appeal rulings that, while not final, are so similar to final judgments in their disposition of property or other rights that delay of review works an intolerable hardship. Parties have an explicit right to appeal certain interlocutory orders concerning injunction, receivership, arbitrations, admiralty, and patent infringement, which effectively dispose of property rights. Even in those areas, the right to appeal covers only those orders as to which denial of immediate review would have “serious, perhaps irreparable, consequences.”

Second, appeals may lie where a decision presents a dispute so thematically distinct from the case as to be appropriate for separate resolution. This exception covers only a “small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” To qualify for this exception, “[s]uch orders ‘must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.”

The Guantánamo litigation implicated neither exception. Instead, Judge Green grounded her stay in 28 U.S.C. § 1292(b), which provides that a district judge who enters an order not otherwise appealable, but that “involves a controlling question of law as to which there is substantial ground for difference of opinion,” may certify the order, provided “an

44 Hollywood Motor Car Co., 458 U.S. at 265-66 (discussing exception to the final judgment rule for an appeal from an order denying motion to dismiss indictment counts due to prosecutorial misconduct) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (internal citations omitted)).
immediate appeal from the order may materially advance the ultimate termination of the litigation.”45 One can assume the first test was met. Judge Green had held the petitioners had substantial rights, and her colleague Judge Leon had held to the contrary. The issues surrounding habeas review were certainly controlling, important, and hotly disputed.46 But one needed no foresight to see that the second test was not met. Judge Leon’s order granting dismissal was final and would be appealed. That appeal would proceed no faster if coupled with Judge Green’s cases. An appeal of her cases would not “materially advance the ultimate termination of the litigation.”47 Quite the contrary, it was obvious then, and would become painfully obvious later, that development of factual records in Judge Green’s cases would have provided enormous assistance to reviewing courts. Subsequent events showed that piecemeal appellate review has massively delayed the resolution of the core controversy presented by each petition: how far the President’s war power extends.

But let that pass. Even if an interlocutory appeal was appropriate, why was a stay appropriate? The statute presumes against it, with this proviso:

*Provided, however, that application for appeal hereunder shall not stay proceedings in the district court unless the district judge, the Court of Appeals, or a judge thereof shall so order.*48

There is no jurisprudential reason why, having denied a motion to dismiss, Judge Green ordered a stay. It is even more remarkable that other judges, in other cases, involving wholly different facts, did so too. In Judge Green’s and similar cases where valid claims have been stated, factual records should have been developed. This point is particularly compelling because of the mandate of *Rasul*, which directed the District Court “to consider in the first instance the merits” of the petitions.49

48 Id.
B. The Final Judgment Rule is an Essential Component of the Effective Administration of Justice.

1. Efficiency in the Administration of Justice

Imagine a contest between Benson and Clark as to who owns Blackacre. The dispute will contain discrete sub-disputes: points of law, points of procedure, and points of evidence. A “mathematically” correct outcome of Benson v. Clark would require correct resolution of each discrete sub-dispute. Yet if each sub-dispute must be pursued to the last court of review, the case will never be resolved. Someone has to pay taxes to the town, repair the roof, and mow the grass. Benson, Clark, the town, the neighbors, and their bankers need to know who is responsible. Law is not mathematics: resolution of the dispute may be as urgent a social imperative as correct resolution of the dispute.

The final judgment rule reflects what experience teaches: where controversies between litigants are concerned, the imperative toward resolution trumps the interest in perfect correctness. Justice Story long ago observed that it is “of great importance to the due administration of justice” to prohibit fragmentary review of cases, as successive appeals would lead to “great delays” and “oppressive expenses” for the parties. To Justice Frankfurter, the rule “avoids the mischief of economic waste and of delayed justice” that results from incessant appeals from interlocutory orders. The rule also lessens the burden on judicial dockets by weeding...
out cases in which alleged errors prove inconsequential to the outcome of, or are rendered moot by, subsequent proceedings. The notion that resolution is important to the administration of justice, and that it is disserved by a lack of fidelity to the final judgment rule, is so broadly held as to be axiomatic.

2. The Duty to Decide

Just beneath the resolution principle lies an acknowledgment of the obvious: administration of a justice system founded on cases and controversies demands that cases and controversies actually be decided.}


54 The primary purpose of the finality rule, since its inception, has been to foster judicial efficiency by preventing piecemeal review of lower court judgments. See Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 178 (1955) (noting “Congress has long expressed a policy against piecemeal appeals”); Forgay v. Conrad, 47 U.S. (6 How.) 201, 205 (1848) (noting “[i]n limiting the right of appeal to final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit; and to have the whole case and every matter in controversy in it decided in a single appeal”); Canter v. Am. Ins. Co., 28 U.S. (3 Pet.) 307, 318 (1830) (stating it is “in furtherance of the manifest intention of the legislature…that causes should not come up here in fragments, upon successive appeals”); McLish v. Roff, 141 U.S. 661 (1891) (noting reviewing a matter in its entirety, rather than on successive appeals of interlocutory judgments, avoids unnecessary delays and preserves the continuity of litigation); see also Theodore D. Frank, Requiem for the Final Judgment Rule, 45 Tex. L. Rev. 292, 292 (1966) (the final judgment rule “effectuates … an efficient utilization of judicial manpower and permits the initial stage of litigation to operate in a smooth, orderly fashion without disrupting appeals”); Patrick Edward McGinnis, Civil Procedure—New Insight on Finality of State Court Judgments, 1975 Ariz. St. L.J. 627, 628 (stating that “the rule was fashioned to preclude the delay and harassment resulting from incessant appeals from interlocutory orders”).

55 Popular culture supplies a demonstration of the tug between the precision and finality principles. Professional football has always been replete with judges
This duty reaches its apex where the courts must pass upon the assertions
of power by the coordinate branches of government. As the Supreme
power, but a duty of the judicial branch to order that unlawful conduct of
the Executive cease.\footnote{Nixon, 418 U.S. at 703-05; see also Franklin v. Gwinnett County Pub. Sch.,
503 U.S. 60, 74 (1992) (noting judicial remedies are a necessary safeguard
against abuses by the executive branch).}

3. The Final Judgment Rule is a Necessary Adjunct to the
Judicial Power

Commentators and courts recognize the final judgment rule
is a necessary adjunct of meaningful judicial power. This idea is more
nuanced. On its face, the power to issue a judgment—deprive a litigant
of property, or liberty, or even of life—is as awful a power as exists in
government. Yet judgment day is powerful only if it arrives.\footnote{In the
author's youth, a charming rogue practiced in criminal courts in the
Boston area. Whenever a case was called in Newton, a breathless associate
would appear to report that Attorney P was before Judge So-and-so in Malden,
Worcester, or Cambridge. The case called would be continued. The author
cannot recall Attorney P ever winning a case. He did not need to. Engaging
attorney P guaranteed a client a year of continuances, and rendered courts
impotent. His practice boomed.} A regimen
of piecemeal appeals permits a litigant to beguile its coming indefinitely;
taken to extremes, this leaves a trial court impotent.\footnote{A familiar adage of business negotiations has it that “you can set the price,
provided I set the terms.” Trial judges set the price. If litigants set the terms—if
the price need never be paid, or need be paid only in something other than
cash, or only on conditions—the negotiation may be nugatory.} As the Supreme
Court noted in *Firestone Tire & Rubber Co. v. Risjord*, the final judgment rule:

>[E]mphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system.\(^{60}\)

The rule “helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the pre-judgment stages of litigation” and “reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals.”\(^{61}\)

4. Fairness to the Litigants

It is often said that “justice delayed will be justice denied.”\(^{62}\) Delay is inevitable in litigation, but generally courts work to mitigate its effects. Yet the delays in the Guantánamo cases are remarkable. The first habeas petition, *Rasul v. Bush*, was filed in early 2002.\(^{63}\) Since then, hundreds of habeas petitions have been filed; following enactment of the Detainee Treatment Act (DTA) in 2005, scores of DTA cases were filed. These cases

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\(^{60}\) *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (no appeal from order denying motion to disqualify counsel in a civil case); *see Nixon*, 418 U.S. at 690 (the Court allowed appeal from denial of sitting president’s motion to quash subpoena despite lack of contempt order to avoid clash between branches of government. “The finality requirement of 28 U.S.C. § 1291 embodies a strong congressional policy against . . . obstructing or impeding an ongoing judicial proceeding by interlocutory appeals”).


\(^{62}\) *Guardians Ass’n v. Civil Serv. Comm’n of the City of New York*, 463 U.S. 582, 627 (1983) (J. Marshall, dissenting from holding that parties may not obtain compensatory relief for racial discrimination absent a showing of intentional discrimination). The epigram is popularly attributed to the English statesman and Prime Minister William Gladstone.

address the core concern of classical habeas corpus—indefinite executive detention, in which there has never been any judicial process. Late in 2008, almost none of them had been resolved.

Delay in a habeas case is substantive—it prolongs the wrong of which the prisoner complains. This proved uniquely destructive in the harsh isolation of Guantánamo. Jumah al-Dossari, a Saudi petitioner, appeared before Judge Green. He filed a habeas case, contesting his status, but no record was ever established. Like the other petitioners who appeared before Green, he never had his day in court. The military alleged that he had been “present at Tora Bora” and had gone to Bosnia to fight, yet no criminal charges were ever brought against him. The delay in al-Dossari’s release can only be ascribed to a failure by the judiciary to hear his case. Finally, in 2007, after years of diplomatic pressure, the government released him, and today he is a free man in Saudi Arabia.

But the stay in his case was very nearly fatal. Al-Dossari struggled mightily with the intense isolation of Guantánamo. In March 2005, he asked his lawyer, “What do I do to keep myself from going crazy?” He began to feel suicidal. During an October 2005 meeting with his counsel, al-Dossari asked to use the bathroom. The lawyer stepped outside the hut. When he returned, he found that al-Dossari had cut open his arm—the wound later required surgery—and hanged himself. Al-Dossari was saved, but his mental health continued to deteriorate, and he attempted suicide again in 2005 and 2006. Observers attributed this to the despair he felt over his indefinite confinement. He remained suicidal until his release the following year.

5. Case Management

Stays are case management tools. Courts must manage dockets,
apply scarce resources, and attend to statutory speedy-trial requirements. In the habeas cases, however, stays were not issued to help manage the docket, at least not overtly so; they were issued in the hope that the appeal of the decisions made by Judges Leon and Green would clarify the law. This followed a well-explored path. A litigant (here, the Government) seeks in one case a stay pending appeal of another, surmising that the appeal may settle the rule of law for both. For example, suppose a case before the Supreme Court tests the reach of a statute of limitations. If a second case involving similar facts and the same statute is before a trial court, trying the second case may seem wasteful. The argument is that it is more efficient to await the higher court’s ruling before proceeding with a case that may be barred.

Before today, the counterarguments always held more sway. The Supreme Court may distinguish the statute, decide the case on other grounds, or dismiss for mootness after settlement. In a common-law system, there is always an appellate court somewhere, deciding an issue that might color the outcome of a case before the trial court. Trial courts would grind to a halt if every such case could be stayed. This may explain why the Supreme Court emphasized the “rare circumstances” under which a litigant could procure a stay because a pending appeal in another case might clarify the law.\footnote{Landis v. N. Am. Co., 299 U.S. 248, 255 (1936).}

[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.\footnote{Id. at 255; see also Dellinger v. Mitchell, 442 F.2d 782, 787 (D.C. Cir. 1971) (‘Any protracted halting or limitation of plaintiffs’ right to maintain their case would require not only a showing of ‘need’ in terms of protecting the other litigation involved but would also require a balanced finding that such need overrides the injury to the parties being stayed. This consideration is of particular importance where the claim being stayed involves a not insubstantial claim of present and continuing infringement of constitutional rights.’).}
The idea that one case should be stayed because the appeal of another might settle the rule of law for both has always been thought particularly inappropriate to habeas, where the liberty of the individual is at stake. The Ninth Circuit Court of Appeals faced that question in *Yong v. I.N.S.* A Cambodian citizen, adjudicated as a criminal in the United States, filed a habeas petition challenging his indefinite detention after the United States was unable to negotiate an agreement for his repatriation to Cambodia. The District Court entered a stay pending resolution of similar issues on appeal in *Ma v. Reno*, then being considered by the Ninth Circuit. The Court of Appeals reversed: “[H]abeas proceedings implicate special considerations that place unique limits on a district court’s authority to stay a case in the interests of judicial economy.” The Court observed, “The stay . . . placed a significant burden on Yong by delaying, potentially for years, any progress on his petition. Consequently, although considerations of judicial economy are appropriate, they cannot justify the indefinite, and potentially lengthy, stay imposed here.” Recognizing that the “writ is intended to be a ‘swift and imperative remedy in all cases of illegal restraint of confinement,’” the Ninth Circuit vacated the seven-month old stay order and remanded the case for further proceedings.

Habeas is—or at any rate used to be—different. Delay results in indefinite imprisonment, that is, more of the substantive harm itself. Delay in ruling is a substantive ruling—for the jailer. In classical habeas, involving challenges to executive detention, delay amounts neither to check nor balance, but to the yielding of the judicial branch to the executive. This explains the unusual provisions for prompt returns, immediate hearings, and summary disposition of habeas cases. Courts

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74 208 F.3d 1116 (9th Cir. 2000).
75 Id. at 1118.
76 Id.
78 *Id.* 208 F.3d at 1120.
79 Id. at 1120-21.
80 Id. (quoting Fay v. Noya, 372 U.S. 391, 400 (1963)).
81 See 28 U.S.C. §§ 2241, 2243, 2246, 2248; see also Braden v. 30th Jud. Cir. Ct. of Ky., 410 U.S. 484, 490 (1973) (noting interest of prisoner and society in “preserv[ing] the writ of habeas corpus as a swift and imperative remedy in all cases of illegal restraint or confinement”) (internal quotations and citation omitted); *Yong*, 208 F.3d at 1120 (“[H]abeas proceedings implicate special
have noted that a habeas petition is the most urgent case on a court’s civil docket. It is a judicial imperative that “usurps the attention and displaces the calendar of the judge or justice who entertains it.” Even an adjudicated criminal alien who has never made legal entry into the United States, and has no legal right to be here, must be released into the United States rather than be indefinitely detained.

These are all fine pronouncements. They were all discarded in the Guantánamo litigation.

C. The Final Judgment Rule is Essential to Good Decision-making

The proposition that full records make better law is widely recognized. This is common sense. A complaint—or a habeas petition—

82 See Schlup v. Delo, 513 U.S. 298, 321-22 (1995) (noting “habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare” and “[c]xplicitly tying the miscarriage of justice exception to innocence thus accommodates both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the ‘extraordinary case’”) (internal quotations omitted).

83 Ruby v. United States, 341 F.2d 585, 587 (9th Cir. 1965) (“One who seeks to invoke the extraordinary, summary and emergency remedy of habeas corpus must be content to have his petition or application treated as just that and not something else.”); see also Van Buskirk v. Wilkinson, 216 F.2d 735, 737-38 (9th Cir. 1954) (writ of habeas corpus is a “speedy remedy, entitled by statute to special, preferential consideration to insure expeditious hearing and determination”).

The courts have long stated that prompt resolution is a judicial imperative. Rasul v. Bush, 542 U.S. 466, 473-75 (2004); see also I.N.S. v. St. Cyr, 533 U.S. 289, 304-05 (2001); Johnson v. Rogers, 917 F.2d 1283, 1284 (10th Cir. 1990) (if delay in deciding habeas petition, absent good reason, were routinely permissible, “the function of the Great Writ would be eviscerated”); Jones v. Shell, 572 F.2d 1278, 1280 (8th Cir. 1978) (“The writ of habeas corpus, challenging illegality of detention, is reduced to a sham if the trial courts do not act within a reasonable time.”); Cross v. Harris, 418 F.2d 1095, 1105 n.64 (D.C. Cir. 1969) (“This is a habeas corpus proceeding, and thus particularly inappropriate for any delay.”).


85 See The Finality Rule, supra note 53, at 1006 (with a completed case, the Court can review a federal question “within the context of a developed factual record
is a document of contentions. A ruling on a motion to dismiss is an assessment of those contentions. But a decision on the merits proceeds from facts, and thus enables courts to make narrow decisions based on reality. When the appellate court has only a portion of the record, or no record at all, “[t]he opportunity for a short-sighted decision is manifest.” An appellate court is less likely to make a bad decision after reviewing a full record.

In the Guantánamo habeas cases, the Executive argued in effect that war changed everything. It would be too burdensome to gather facts. National security was at issue; the Executive’s Article II powers were at issue. In times like these, was not some deference due the Executive? As Lincoln famously asked, “[A]re all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?” Meanwhile, an increasingly clerical judicial branch and bar began to adopt the idea that tests of pleadings—motions to dismiss, and appeals of those motions—would somehow forge consistency and better decision-making than would decisions on the merits of particular cases. This inclination, like the deference idea, flourishes best when we ignore our history.

Challenge by the judicial branch of the Executive’s assertion of war powers is nothing new. It has been a regular feature during times of crisis in the nation’s history, in time of professed and actual warfare. Arguably the need for vigorous judicial scrutiny is far more acute now than in the past. There was nothing new about the nature of treason

and the articulated reasoning and legal conclusions of the trial judge”); Note, The Requirement of a Final Judgment or Decree for Supreme Court Review of State Courts, 73 Yale L.J. 515, 516 (1964). But see Timothy B. Dyk, Supreme Court Review of Interlocutory State-Court Decisions: “The Twilight Zone of Finality,” 19 Stan. L. Rev. 907, 938 (1967) (full record is a less significant factor when judgment lacks finality because appellate court remanded case for new trial; record from the new trial could be substantially different in several respects).


87 President Abraham Lincoln, Message to Congress in Special Session, 37th Cong., 1st Spec. Sess. (July 4, 1861) (quoted in al-Marri v. Wright, 487 F.3d 160, 195 (4th Cir. 2007)).

88 Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807) (striking military capture of Aaron Burr on suspicion of treason).

89 Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861); see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
when President Jefferson suspected Aaron Burr in 1807;⁹⁰ nor about the nature of civil war when the Confederacy was formed two generations later. With an enemy army encamped at Sharpsburg, Maryland, Lincoln’s fear may have had more force than our own does today. Further, if, as the Executive argues, the current struggle is unprecedented—if it operates in the uncertain environment of a “new” paradigm of warfare, against a “new” kind of enemy so unconventional that a former Attorney General declared the Geneva Conventions as “quaint”⁹¹—good law is more necessary than ever. Now more than ever, the judicial branch should develop complete records and decide discrete cases. The novelty argument is, in short, an argument for cases decided on factual records.

Last is what every trial lawyer knows: there is nothing quite like the vigor and unpredictability of facts. Facts will surprise you. Early on, the Guantánamo prisoners were painted as fearsome enemies, the “worst of the worst.”⁹² Who could have guessed that in 2005, military panels had already secretly concluded that some prisoners were not enemy combatants at all?⁹³ That as to others, the Pentagon procured “enemy combatant” determinations only after reassigning second military panels more pliant than the first, and by routinely withholding exculpatory evidence from them?⁹⁴ Who could have known that an Afghan prisoner’s satire of a former American president’s extramarital affair would be deemed a “hostile act” justifying military detention?⁹⁵ Or that, as to a group of Uighur prisoners, “[w]e were shocked they even put those guys through the [Combatant Status Review Tribunals]. They had already been identified for release.”⁹⁶ Facts like these remained hidden, as long as

⁹⁰ *Ex parte* Bollman, 8 U.S. (4 Cranch) 75.
⁹¹ Memorandum from Alberto R. Gonzales, Att’y Gen, to the President (Jan. 25, 2002), reprinted in *De* el *presidente* de *la* *nación* (Michael Ratner & Ellen Ray eds., 2004).
⁹² Agence France-Presse, *Cheney Says Detainees Are Well Treated*, N.Y. Times, June 24, 2005, at A16 (internal quotations omitted).
⁹⁴ See infra note 130.
⁹⁵ The prisoner, Abdul Rahim Muslim Dost, is discussed in Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* 210-11 (Simon & Schuster 2006).
the regime of motions to dismiss, followed by appeals continued.

III. Failure to Follow the General Rule In the Guantánamo Litigation

A. The Motion-to-Discard Model

The first habeas petition was filed in February 2002.\(^97\) The Government moved to dismiss, and the motion was allowed.\(^98\) In 2003, the D.C. Circuit affirmed.\(^99\) The Supreme Court reversed the lower court’s decision in 2004 and remanded to “consider in the first instance the merits.”\(^100\) More than two years had passed, during which factual records could have been developed but were not. Now the parties had to start all over again.

The same pattern ensued. The Government moved to dismiss. As we have seen, even after Judge Green denied those motions, the cases were stayed and appealed. After Judge Green ruled, every district judge in the District of Columbia followed suit, entering stays of Guantánamo habeas cases, although no appellate court ordered them to do so. This meant, among other things, that the district court did not distinguish among prisoners who allegedly participated in battlefield activities, or were sold for bounties, or were captured as civilians in countries far from Afghanistan, or were cleared for release—but not actually released—by the military. The appellate courts could not and did not benefit from the factual distinctions between these prisoners.

It then took the Court of Appeals more than two years to decide whether the pleadings stated a claim. Two intervening Acts of Congress, the Detainee Treatment Act of 2005,\(^101\) which provided for a limited appellate review of “enemy combatant” status, and the Military

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\(^98\) Rasul, 215 F. Supp. 2d at 72.


\(^100\) Rasul, 542 U.S. at 484.

Clericalism and the Guantánamo Litigation

Commissions Act of 2006 (MCA),\(^{102}\) which stripped habeas rights, as well as the intervening decision in *Hamdan v. Rumsfeld*,\(^{103}\) complicated intermediate appellate review. At last *Boumediene* was decided in February 2007. Up it went again to the Supreme Court, where it was argued in December 2007, not decided until June 12, 2008, and where once again, only the pleadings were considered. During the more than three years since Judge Green ruled that good claims for release had been stated, many of her petitioners remained prisoners at Guantánamo. No court had yet to consider a fact in any of their cases.

B. *Clericalism under the DTA*

Although the debate whether Guantánamo prisoners had habeas rights raged for six years, there was no question after December 2005 that the prisoners had a statutory right of judicial review under the DTA.\(^{104}\) Nevertheless, although DTA cases were filed from early 2006, the culture of clericalism continued to characterize judicial response. Clericalism was carried to new and remarkable levels.

*Bismullah v. Gates* exemplified this culture as clearly as the habeas cases had done in the past.\(^{105}\) Haji Bismullah is an Afghan who claimed to have fought against the Taliban and supported the Karzai government. He said he was turned in to U.S. forces by an envious neighbor who sought his government post. Huzaifa Parhat is a Uighur—a refugee from a region in central Asia that is controlled by Communist China—who was captured by bounty hunters in 2001.\(^{106}\) Each filed a DTA case in 2006.

The DTA cases were paired under the caption, *Bismullah v. Gates*, and early in 2007 assigned to a panel to determine what the "record on

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\(^{104}\) DTA § 1005(e)(2), (3) (providing judicial review of decisions of combatant status review tribunals of propriety of detention and of decisions of military commissions, respectively).

\(^{105}\) *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007) (order establishing record on review).

\(^{106}\) At the time this paper went to press, each remained imprisoned at Guantánamo.
review” should be.\textsuperscript{107} This was a preliminary matter—appellate review could not begin until a record was established. Parhat and Bismullah initially requested exculpatory evidence in the Government’s possession. The question was decided on July 20, 2007, in petitioners’ favor.\textsuperscript{108} The Government moved to reconsider. The motion was denied in October 2007, but a motion for en banc review remained open until February 1, 2008, when the Court issued five opinions, splitting 5-5 on whether to review the decision.\textsuperscript{109} The Government then filed a petition for certiorari along with a request that the case be “held” pending resolution of \textit{Boumediene v. Bush}.\textsuperscript{110} The Supreme Court took no action, which in effect granted the Government an indefinite stay. In June 2008, the high court denied certiorari, but vacated \textit{Bismullah} and remanded for further consideration.\textsuperscript{111} In short, eighteen months into Bismullah’s and Parhat’s DTA cases, the case had generated seven judicial opinions and a Supreme Court certiorari petition concerning the threshold question of what should form the record on review, yet the record on review had not been produced in those cases—nor any other. No one could predict when the Government would actually tender a record, or when the cases would be briefed and decided.

While \textit{Bismullah} played out, the Court simply refused to decide other DTA cases at all. For example, the very first DTA petitioner, Saifullah Paracha, filed a petition in January 2006. He argued the order

\begin{itemize}
\item \textsuperscript{107} \textit{Bismullah}, 503 F.3d at 139; see also \textit{Parhat v. Gates}, 532 F.3d 834 (D.C. Cir. 2008). The Government argued that only documents presented by the military to a prisoner’s CSRT could be part of the record on review. Pointing to a regulation that required that the military cull from exculpatory “reasonably available information,” and present those materials to the CSRT panels, and noting that prisoners, without a right of confrontation or counsel, had no practical way to present such evidence themselves, petitioners argued that the larger universe of “government information” had to be part of the record.
\item \textsuperscript{108} \textit{Bismullah v. Gates}, 501 F.3d 178 (D.C. Cir. 2007).
\item \textsuperscript{109} \textit{Bismullah v. Gates}, 503 F.3d 137 (D.C. Cir. 2007) (denying rehearing); \textit{Bismullah v. Gates}, 514 F.3d 1291 (D.C. Cir. 2008) (denying en banc review).
\item \textsuperscript{110} In October 2007, in a brief filed in \textit{Boumediene}, the Government argued that the Supreme Court’s review of that case ought to be delayed, pending the outcome in \textit{Bismullah}. See Brief for the Respondents in Opposition, \textit{Boumediene v. Bush}, 128 S. Ct. 2229 (Mar. 21, 2008).
\item \textsuperscript{111} \textit{Bismullah v. Gates}, 128 S. Ct. 2960 (June 23, 2008) (No. 07-1054) (petition for certiorari granted).
\end{itemize}
creating CSRTs did not apply to non-combatants like him. The motion was simply never considered.\textsuperscript{112} DTA cases stopped in their tracks.\textsuperscript{113} Once again, a court of first instance put actual cases and controversies on indefinite hold, waiting for appellate rulings in other cases. Once again, this inaction prevented the development of a factual record in any case.

The case of one hapless Guantánamo prisoner illustrates how the tangle of stays ensured that courts would not conduct any kind of factual review, even where required by statute. Aymen Batarfi filed a habeas case in 2005, challenging his imprisonment at Guantánamo.\textsuperscript{114} At the time, the Court had jurisdiction over his claim, but the case was immediately stayed. Two years passed, during which Congress stripped Batarfi’s habeas rights in favor of the DTA. The court denied efforts to lift the stay in his habeas case, directing that Batarfi wait for Supreme Court review of \textit{al-Odah} and \textit{Boumediene}.\textsuperscript{115} So Batarfi filed a petition under the DTA. His counsel pressed the Government for the record on review, so that his DTA case could be decided. Citing disputes involving the extent of the record in other DTA cases, the Government refused to produce any record, and sought a stay of the DTA case pending the resolution of \textit{Bismullah}, the other DTA record disputes, and the habeas appeal in \textit{Boumediene}.\textsuperscript{116} As of June 2008, Batarfi remained at Guantánamo. No hearing calendar of any kind had ever been entered by any court.

In July 2008, the Government moved for reconsideration of \textit{Bismullah}. The D.C. Circuit reinstated its \textit{Bismullah} ruling, but in November 2008, the Government obtained an order for further appellate review of the question.\textsuperscript{117} Throughout this excruciating process, no actual record was considered.

\textsuperscript{112} Paracha v. Gates, No. 06-1038 (D.C. Cir. filed Mar. 21, 2006).
\textsuperscript{113} One exception to this general rule was Parhat himself. Arguing that he could prevail even on the Government’s narrow view of the record on review, he filed a motion for judgment on the pleadings. The D.C. Circuit decided the case on June 20, 2008. Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008). See discussion \textit{infra} Section III.D.1.
\textsuperscript{115} \textit{Batarfi}, No. 05-0409 (order denying motion, Aug. 17, 2007).
\textsuperscript{116} See Respondent’s Opposition to Petitioner’s Second Motion to Compel, Batarfi v. Gates, No. 07-1100 (D.C. Cir. filed Feb. 28, 2008).
\textsuperscript{117} Bismullah v. Gates, No. 06-1197 (D.C. Cir. Nov. 5, 2008) (order granting panel rehearing of motion for en banc review).
C. Clericalism in Related Contexts: Rasul II

The trend of “fact avoidance” in the D.C. Circuit reached another remarkable milestone early in 2008, when the court affirmed dismissal of Rasul v. Myers (Rasul II).\(^{118}\) In Rasul II, British prisoners who had been released in 2004 sought damages for alleged torture suffered at Guantánamo. An exhaustion requirement in the Federal Tort Claims Act placed a procedural hurdle before their recovery.\(^{119}\) Where agents of the United States commit torts within the scope of their authority, the plaintiff must first seek redress from the relevant agency.\(^{120}\) At issue in Rasul II was whether this procedural bar applied; specifically, whether torture was within the scope of employment of military policemen and other United States forces. This turned on whether it was reasonably foreseeable that United States military personnel would torture their prisoners. Based on the pleadings and without a factual hearing, the Circuit Court concluded that torture was reasonably foreseeable.

It is beyond the scope of this paper to grapple with this astonishing proposition, or the breadth of its insult to the armed forces. American military officers are well schooled in the Geneva Conventions, Army Regulation 190-8, and the various service field manuals, all of which prohibit torture. The point here is that once again a decision was reached without facts. No one knows what the military personnel knew, thought, or had been trained to do; no one knows the exigencies (or lack of exigency) of the conduct in question. Absent a reversal, no one ever will.

D. The Impact of Record-Avoidance on the Development of Good Law

Whether a class of persons is subject to military power, and outside the protections of the Constitution or judicial review has been a question at the heart of the Guantánamo debate. Who may be deemed an “enemy combatant”? Boumediene avoided ruling on this question. A plurality of the Supreme Court briefly addressed it in Hamdi, citing to conventional law-of-war principles pertaining to the capture and


\(^{120}\) 28 U.S.C. § 2675(a).
detention of the traditional enemy soldier.\footnote{Hamdi v. Rumsfeld, 542 U.S. 507, 518-19 (2004).} Meanwhile the Fourth Circuit Court of Appeals has wrestled with the question whether an alien seized domestically and alleged to have terrorist motives and strong links to Al Qaeda may be held outside of the criminal process, as part of the war power.\footnote{al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (en banc), \textit{cert. granted}, 129 S. Ct. 680 (Dec. 5, 2008) (No. 08-368).} The government has frequently alleged that it is engaged in a “new kind of war,” against a “new kind of enemy,” and that classical law-of-war theory must be expanded to accommodate this new situation. If that is so, the need for courts to delineate the law in this new area is even more pressing, and thus the interest in developing and reviewing full factual records is paramount.

A key problem with litigation based on pleadings is its tendency to leave concealed facts whose early airing might have led to prompt dispute resolution. The Guantánamo litigation demonstrates this in powerful ways.

After \textit{Rasul}, the Department of Defense (DoD) rushed to install a tribunal system at the Guantánamo Naval Base. These Combatant Status Review Tribunals (CSRTs) were implemented between September 2004 and March 2005.\footnote{See Memorandum from Paul Wolfowitz, Deputy Sec’y of Defense, Order Establishing Combatant Status Review Tribunal Procedures (July 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.} According to the Government, the purpose of the CSRTs was to provide for a fair review of the status determinations that had already been made about prisoners by the military.\footnote{\textit{Id.}} Critics asserted that the sole intent and effect was to create the appearance of process, and thereby deflect judicial review. Whether CSRT review was meaningful is important—a rigorous and fair examination of whether a prisoner was indeed an “enemy combatant” in connection with ongoing international armed conflict might be influential, and perhaps dispositive, in a habeas case. Because the federal judiciary stayed all habeas cases filed in 2004 and 2005, no one could test these assertions.

It has been difficult to understand the conduct of the CSRTs, since proceedings took place in secret and outside the adversary system. Prior to 2007, the best insight was a series of quantitative reviews, prepared by scholars at Seton Hall Law School, of information pried

\begin{itemize}
\item \textbf{124} \textit{Id.}
\end{itemize}
from the Government through Freedom of Information Act requests. The conclusions were disturbing and at odds with public rhetoric about the Guantánamo population. While high government officials had branded the prisoners the “worst of the worst,”125 battlefield enemies, and “terrorists” and “bomb-makers,”126 Seton Hall’s analysis, based solely on military allegations, showed most prisoners had been sold for profit by bounty hunters, and few were alleged to have engaged in either military or terrorist activity.127 This was, of course, still blind man’s bluff, for neither Seton Hall nor anyone else had been permitted to develop anything like the full factual record that a court might have developed.128

In mid-2007, new evidence emerged regarding the character of the CSRTs. After the May 15, 2007 oral argument in Bismullah v. Gates, Admiral James McGarrah filed a declaration purporting to “clarify” representations made to the Court.129 At issue was whether military officers had placed all of the Government’s exculpatory evidence before the CSRT panels.130 A Government attorney had assured the D.C. Circuit at oral argument that they had. Admiral McGarrah’s affidavit

126 Agence France-Presse, Cheney Says Detainees Are Well Treated, N.Y. Times, June 24, 2005, at A16.
128 Spirited federal defenders traveled to Afghanistan for one client, gathering a mass of affidavits, documented on videotape, from doctors and hospital administrators that their client had simply been a hospital orderly. Hamad v. Bush, No. 05-1009 (D.D.C. filed May 18, 2005), consolidated into Hicks v. Bush, 452 F. Supp. 2d 88 (D.D.C. 2006). Because of the stays, in practical effect no court was open to consider those materials.
disclosed the Government’s assurance was not true. Rather than first-hand accounts of battlefield capture, the information presented at the CSRTs was hearsay, and exculpatory information was often omitted.

Soon after, Lt. Col. Stephen Abraham, a decorated army intelligence officer who had served on a CSRT panel, filed a responsive affidavit. In it, he cited the contractors’ poor training, the withholding of information by government intelligence agencies, and intense command pressure to bring in enemy-combatant determinations. He claimed the information provided to his CSRT panel “lacked even the most fundamental earmarks of objectively credible evidence,” and accordingly, his particular panel determined the prisoner was not an enemy combatant. Thereafter, he averred, command pressure was brought to bear, and when the panel refused to buckle, the matter was reassigned to a new CSRT panel that determined the prisoner was an enemy combatant. Similar affidavits have since emerged.

It is hardly surprising that the Government and the prisoners should dispute the fairness of the CRSTs. Yet disputes as to the character of CSRTs applied in specific cases might have been explored with evidence in 2005, following Judge Green’s decision. Courts could have examined the question systematically, with factual accounts from percipient witnesses from relevant tribunals. Inquiry could have been conducted in a manner in which trial courts are expert: cross-examination where appropriate, protective orders as needed. Not only would this have led to reliable records in discrete cases and controversies, it might have been of enormous utility to Congress, which, in the December 2005 DTA, and again in the October 2006 MCA, enacted new statutory remedies

132 More specifically, the information for the CSRTs was gathered by contractors, working in and for the Pentagon, hired in Fall 2004, immediately after the Rasul decision. Bismullah v. Gates, 501 F.3d 178 (D.C. Cir. 2007).
133 Declaration of Stephen Abraham, Joint Appendix at 103, Boumediene v. Bush, 128 S. Ct. 2229 (June 15, 2007) (No. 06-1196).
134 Id. at ¶¶ 6-7, 11-14, 22.
135 Id. at ¶¶ 22-23.
136 Id. at ¶¶ 14, 22-23.
premised on the fairness of the CSRTs themselves. Because federal district judges issued stays, neither the public, nor Congress, nor the petitioners had reliable knowledge as to what had happened in the review hearings. The facts did not emerge until two-and-a-half years later, and then only in a haphazard matter.

The D.C. Circuit issued its first systemic review of a CSRT on June 20, 2008. It was an overwhelming indictment.

1. Huzaifa Parhat

Huzaifa Parhat is the only Guantánamo prisoner ever to litigate to the merits in a DTA case. He won his case, but as this paper went to press, he remained at Guantánamo.

A Uighur refugee from China, Parhat was living in Afghanistan in 2001. He fled U.S. bombing to Pakistan, where bounty hunters arrested him and delivered him to U.S. forces. He was transported to Guantánamo in June 2002, and has been imprisoned there ever since. In July 2005, Parhat filed a habeas petition. He contended that he had never engaged in military activity hostile to the United States or its allies, nor had he ever planned to do so. Following Judge Green's lead, District Judge Ricardo Urbina entered a stay of Parhat's habeas case pending the outcome of the al-Odah appeal because “the state of the law in this circuit concerning the habeas rights of GTMO [prisoners] is unclear.” Judge Urbina excused the Government from filing a return.

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139 Id. at 837.
140 Id.
141 Id.
remained silent.

Parhat appealed the stay to the Court of Appeals. The D.C. Circuit did not act on the appeal until after Congress had enacted the MCA and stripped Parhat’s habeas remedy in 2006. At that point, it dismissed the appeal for lack of subject matter jurisdiction.\(^{143}\)

In December 2006, Parhat filed a DTA petition and asked the D.C. Circuit to expedite consideration.\(^{144}\) He requested discovery of certain items his counsel believed would demonstrate non-combatant status. As discussed previously, his case was consolidated with Bismullah’s and he embarked on the odyssey of preliminaries concerning what should constitute a “record on review” in a DTA case.\(^ {145}\)

For many months, the Government refused to produce to Parhat even its version of the “record on review.”\(^ {146}\) At last, on October 29, 2007, those documents were produced. At this point Parhat had been seeking judicial relief for well over two years. He learned for the first time that in 2003, military authorities had confirmed that he represented no threat to United States interests and should be released, and that his CSRT panel found no evidence that he had engaged in any hostile military activity, or aligned himself with any hostile military force. Parhat moved for judgment, contending that he was entitled to release even on the Government’s limited record. The case was briefed and argued before the Court of Appeals on April 4, 2008,\(^ {147}\) and decided in Parhat’s favor—but not until June 20, 2008,\(^ {148}\) almost three years after he first sought judicial review. The Government was ordered to release him, arrange for his transfer, or submit him to another CSRT.

The Uighur cases had always been exceedingly complicated.\(^ {149}\) The men could not be returned to China, where the State Department


\(^{145}\) See discussion supra at Section III.B.

\(^{146}\) See Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008).

\(^{147}\) Id. at 840.

\(^{148}\) Id. at 839.

\(^{149}\) The history of the Uighurs’ efforts to obtain release after Parhat v. Gates is summarized below. See generally Bush v. Kiyemba, No. 08-5424, Brief of Appellees (D.C. Cir. Oct. 31, 2008).
has documented a substantial history of torture of Uighur dissidents. While the Justice Department litigated vigorously for the power to continue detaining them, the State Department had for three years quietly sought to resettle the men with American allies. Perhaps skeptical of the inconsistency, no country had agreed to take them, until, as discussed below, Albania consented in 2006 to accept five of Parhat’s companions. Following a diplomatic outcry from China in response to this, foreign doors shut, and the Uighurs remained stranded at Guantánamo while the litigation played out.

Parhat v. Gates, issued twelve days after Boumediene, had reestablished Parhat’s habeas rights, and the Circuit noted that it was now open to Parhat to use habeas relief before the district court to obtain release. So he reopened his habeas case. In August 2008, the Government waived the right to conduct another CSRT, and obtained from Judge Urbina a six-week postponement within which to determine whether it would seek to treat Uighur prisoners differently, or concede that all were entitled to Parhat’s relief. On September 30, the Government conceded that there was no legally material distinction in their circumstances.150

On October 7, 2008, Judge Urbina ordered Parhat and the other Uighurs released into the United States, finding there was no other remedy available. Arguing that the President’s immigration powers precluded an order that he release the men here, the Government obtained an emergency stay, and the D.C. Circuit ordered expedited briefing.151 The case was argued on November 24, 2008, and as this paper went to press, no decision had issued. Parhat remained imprisoned.

The stark reality is that the Government’s September 30, 2008 concession that there was no basis for enemy combatant status would have been obtained years earlier had a stay not been granted. Huzaifa Parhat’s imprisonment was prolonged, perhaps for as much as three years, because the final judgment rule was ignored. For two of those years, from late 2006 through mid-2008, Parhat was held in near-solitary confinement in Camp 6.152

150 Id.
151 Id.
152 Id.
2. Qassim v. Bush

On March 10, 2005, two of Parhat’s Uighur companions, Adel Abdul Hakim, and Abu Bakker Qassim, had filed habeas petitions.\textsuperscript{153} The Government moved to stay on March 29, asserting that disposition of their cases depended on the Circuit Court’s resolution of the \textit{al-Odah} appeal. The Government further argued it would be unduly burdensome to gather information justifying the incarceration of Hakim and Qassim as enemy combatants. Just three days prior, both petitioners had been deemed non-combatants upon completion of the CSRT process. But the Government did not disclose this.

Unaware of the non-combatant finding, the court stayed the case, pending the outcome of \textit{al-Odah}. The fact that a military panel had concluded that they were non-combatants did not emerge until counsel was first permitted to meet petitioners at Guantánamo Bay, in July 2005. The belated emergence of the facts led to a series of hearings and postponed the disposition of the case for several months. Even after the disposition, certain facts remained secret—including the Pentagon’s directive to CSRT panels requiring non-combatant determination hearings be redone.\textsuperscript{154} On May 5, 2005, the last business day before the oral argument and hearing scheduled for May 8, Respondents sent them to Albania and moved to dismiss the appeal as moot.\textsuperscript{155} Considering the timing of the release of the prisoners and the movement in the litigation, it is hard to believe that this was mere coincidence.\textsuperscript{156}

\footnotesize
\begin{itemize}
\item \textsuperscript{153} Qassim v. Bush, No. 05-0497 (D.D.C. filed Mar. 10, 2005).
\item \textsuperscript{154} \textit{See In re Petitioner Ali}, No. 06-1194 (U.S. filed Feb. 12, 2007).
\item \textsuperscript{155} The District Court in \textit{Qassim} held that continued detention of NEC Uighurs was “unlawful,” but that the judiciary is powerless to provide a remedy. \textit{Qassim v. Bush}, 407 F. Supp. 2d 198, 201 (D.D.C. 2005). \textit{See Declaration of Samuel M. Witten, Emergency Motion to Dismiss As Moot (Witten Decl.), Qassim v. Bush (D.C. Cir. May 5, 2006) (No. 05-5477); see also Declaration of Sabin Willett, Status Report Filed by Appellants Abu Bakker Qassim and Adel Abu al-Hakim and Request for Briefing Schedule (Willett Decl.), \S\ S 4-5, Qassim v. Bush, No. 05-5477 (D.C. Cir. May 17, 2006) (No. 05-5477).}
\item \textsuperscript{156} At present writing, one of the men lives in Sweden with an asylum application pending. The second remains in Albania.
\end{itemize}
3. Murat Kurnaz

Murat Kurnaz, a Turkish citizen and legal resident of Germany, was in the process of becoming a German citizen when he was arrested in Pakistan in late 2001 and transported to Guantánamo in 2002. Kurnaz filed a habeas petition, which came before Judge Green in 2005.

As to Kurnaz’s “enemy combatant” status, Judge Green found “the unclassified evidence alone is [not] sufficiently convincing.” Noting the “unclassified evidence establishes that Mr. Kurnaz had been friends with an individual named Selcuk Belgin, who is alleged to have been a suicide bomber,” Judge Green pointed out this was not sufficient to establish enemy combatant status, and noted further exculpatory evidence in the record. Indeed, she was correct. Nevertheless, Judge Green stayed the case, thereby blocking further factual development. In March 2005, while the stay was in place, Kurnaz’s counsel conducted investigations through German and Turkish authorities. As the authorities confirmed in writing, Selcuk Belgin was living in Bremen, Germany, had not been involved in any suicide bombings, and was not suspected of wrongdoing.

But none of this came to light in Kurnaz’s habeas case because Judge Green had stayed it and blocked factual development. His release was not a result of judicial review, but his lawyer’s successful campaign pressuring the German government to intercede on Kurnaz’s behalf and convince the United States to end his imprisonment.

4. Saifullah Paracha

Saifullah A. Paracha has been in United States custody for approximately six years. He has sought judicial review of his confinement since November 18, 2004, when he filed a petition for habeas. In 2005, Paracha’s case, like all the others, was stayed. He filed an appeal of the stay and a petition for mandamus, seeking an order directing the district court to hear the case. This appeal and petition were dismissed as

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157 See Murat Kurnaz, Five Years of My Life: An Innocent Man in Guantánamo 15 (2008). For a first-hand account of one prisoner’s arrest, rendition, and detention at Guantánamo Bay, see generally id.
159 Id.
Clericalism and the Guantánamo Litigation

moot in 2007 after Congress abolished habeas corpus. On January 24, 2006, Paracha was the first to file a case under the newly enacted DTA. In short, Paracha has been seeking judicial review for more than four years. No judge has ever considered the facts of his case.

Paracha is precisely the kind of case that demands a factual record. The author understands that the Government alleges Paracha conspired with Khaled Sheikh Mohammed to commit terrorist acts, met Osama bin Laden in pursuance thereof, and had numerous contacts with other terrorist organizations. The Government does not, however, allege any conventional military activity, apparently conceding Paracha was an international businessman.

Paracha himself professes to be anti-terrorist and pro-American. Formerly a legal resident alien in New York, Paracha ran an export business trading clothing from Pakistan to America. He also owned a television film studio in Pakistan. While in Pakistan, two men approached him to discuss the investment in and expansion of his studio. The Government claims these men were Al Qaeda operatives; Paracha says he believed they were legitimate investors.

In 2003, Paracha was lured to Bangkok under false pretenses that he was meeting with K-Mart buyers, and was kidnapped at the Bangkok Airport. He was hooded and shackled, taken to Bagram Air Force Base in Afghanistan for fourteen months, then sent to Guantánamo, where he remains today.

The unclassified summary of evidence from his CSRT did not suggest he engaged in any military activity; there was no allegation he had committed any military hostilities against United States or coalition forces. The allegations did however suggest theories of cooperation with Al Qaeda terrorists that, if true, could support criminal charges. While

163 Because the Government has never filed charges or been required by a court to submit a bill of particulars, no citation is possible as to what its theory really is.
164 The Government filed Paracha’s CSRT transcript as part of its factual return in his habeas case, 04-2022, Jan. 18, 2005.
Paracha vigorously disputes the allegations, he has never been charged with any crime, had any other judicial process, or an official opportunity to contest the allegations against him.

Does this sound like war, or international law enforcement? How can such a person qualify for military detention? As the judicial branch struggles to identify who may be held for the pendency of this so-called unconventional war, cases like Paracha’s are precisely the kind which require full records.

5. The “High Value” Prisoners

In August 2006, the President transferred fourteen “high value” prisoners, who had been held for years at undisclosed locations, to Guantánamo Bay. Among those transferred was Khaled Sheikh Mohammed, thought to be a mastermind of 9/11. These prisoners were held for criminal proceedings before military commissions. Two years later, many of the prisoners had yet to be charged with a crime. Few

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166 His case is remarkably similar to that of Ali Saleh Kahlah al-Marri, who was determined to be a non-combatant as a matter of law. al-Marri v. Wright, 487 F.3d 160, 189 (4th Cir. 2007), reh’g en banc granted, (Aug. 22, 2007), cert. granted, 77 U.S.L.W. 3344 (U.S. Dec. 5, 2008) (No. 08-368).
cases were tried before the end of the Bush Administration in 2009.\textsuperscript{169} The lead case involved Omar Khadr, a Canadian charged with murdering a United States soldier during an Afghan firefight in 2001, when Khadr was fifteen. Pretrial proceedings have raised troubling allegations of tortured confessions. After entertaining a variety of defense motions, the trial judge was summarily replaced by the government.\textsuperscript{170}

E. Use of Piecemeal Review by Prisoners Charged with Crimes

We have seen, in the Government’s defense of the habeas and DTA actions, systemic violation of the final judgment rule through piecemeal review. \textit{Al-Odah} and \textit{Boumediene} featured interlocutory appeals of serial motions to dismiss, one over two years, and \textit{Bismullah} consumed eighteen months, seven judicial opinions, a Supreme Court certiorari petition, and subsequent briefing in the court of appeals regarding what should be included in a record on review that the Government has yet to assemble.\textsuperscript{171} The Government avoided decisions on the merits, which came at a considerable cost to the court’s credibility, the government’s interest in legitimacy, and, above all, the well being of those held at Guantánamo.

In fairness, the Government was not the only party to resort to piecemeal review with at least the collateral consequence of delay. Prisoners

\begin{footnotesize}
\begin{enumerate}
\item[170] \textit{Khadr War Crimes Trial Set for Oct. 8 at Guantánamo Bay: Judge says date can be changed for legal reasons}, CBC NEWS, June 19, 2008, http://www.cbc.ca/world/story/2008/06/19/khadr-gitmo.html.
\item[171] One of the regulations governing the Combatant Status Review Tribunals obliged the Recorder, a military officer, to cull the “Government Information” (reasonably available information about the prisoner in government records) for exculpatory evidence and present the CSRT panel with all exculpatory evidence. \textit{See} Memorandum from Gordon England, Sec’y of the Navy, \textit{Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantánamo Bay Naval Base, Cuba}, at Enclosure (1) § H.(4) (July 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf; \textit{see also id.}, at Enclosure (2) § B.(1). To ascertain whether the government complied with this requirement, the court ruled that all “Government Information” must be included in the record on review. \textit{Parhat v. Gates}, 532 F.3d 834, 839-40 (D.C. Cir. 2008). Which documents in a specific case were “reasonably available to the government” is an open question.
\end{enumerate}
\end{footnotesize}
in the few criminal cases pursued by the Government have also used this tactic. The case of Salim Ahmed Hamdan, the bin Laden driver, best illustrates the use of piecemeal review by criminal defendants. In November 2001, Hamdan, a Yemeni national, was captured in Afghanistan.\footnote{Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 155 (D.D.C. 2004).} By his own admission, he was a driver and occasional bodyguard of Osama bin Laden.\footnote{Hamdan v. Rumsfeld, 415 F.3d 33, 35-36 (D.C. Cir. 2005).} American military forces captured and detained Hamdan, transferring him to Guantánamo in 2002. In July 2003, Hamdan was designated for trial by a military commission.\footnote{Id.} He could have proceeded to trial on the merits before a military commission and then challenged the commission’s legality on appeal. Instead, he sought piecemeal habeas review, arguing he was entitled to a court martial under the Uniform Code of Military Justice.\footnote{Hamdan, 344 F. Supp. 2d at 155.} In November 2004, the District Court agreed, holding he could not be tried lawfully before a military commission because its procedures were inconsistent with the safeguards of court martial and thus violated the Geneva Convention.\footnote{Id.} The Government appealed and won reversal. Hamdan was granted review in the Supreme Court, and on June 29, 2006, almost five years after his capture, the Court reversed, agreeing that the military commission violated both the Uniform Code of Military Justice and the Geneva Conventions.\footnote{Hamdan v. Rumsfeld, 548 U.S. 557 (2006).} Congress responded by enacting the MCA, which changed the landscape of prisoner hearings and established a military commission process for Hamdan’s trial.\footnote{Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 10-11, 19 (D.D.C. 2006).} Hamdan tried again to secure a constitutional challenge to the MCA in advance of trial, but this time failed.\footnote{Hamdan v. Gates, 565 F. Supp. 2d 130, 137 (D.D.C. 2008).} Hamdan was convicted by a military commission and served a short sentence. He was repatriated to Yemen, while many prisoners who were never charged with wrongdoing remain at Guantánamo.
process that included a trial on the merits by a military commission and review in the Supreme Court. On September 3, 1945, Yamashita surrendered to the United States Armed Forces in the Philippines and became a prisoner of war. Twenty-two days later, he was charged with violating the laws of war. Yamashita was represented by six Army officer-lawyers and tried by a military commission just over a month after his surrender. The hearing produced more than three thousand pages of testimony from 286 witnesses, and, on December 7, 1945, Yamashita was found guilty and sentenced to death. On February 4, 1946, the Supreme Court denied his application for leave to file a petition for writ of habeas corpus. Nineteen days later, Yamashita was hanged.

Today, seven years can pass with nothing accomplished except preliminaries. September 11, 2008 was the seventh anniversary of 9/11. As this paper went to press, few habeas cases had reached decision. Of twenty-two prisoners declared by courts to be noncombatants, twenty remained at Guantánamo.

IV. THE EFFICIENT MODEL

A. Hamdi and Judge Doumar

The efficacy of a more traditional jurisprudential model—a trial judge promptly affording the litigants an opportunity to develop a full factual record on which the court will base its decision—has been tested only once in the detention cases, and then only partially. The case was Hamdi v. Rumsfeld.

It was an unusual case. Yaser Hamdi was alleged to be an “enemy

181 Id. at 5.
182 Id. (Yamashita was convicted and executed on a theory of command responsibility for atrocities committed by soldiers within his chain of command, a proposition that has eerie resonance today).
183 Id.
184 Id.
185 Id. at 26.
combatant,” yet he was also an American citizen. He was seized in Afghanistan in 2001 and transported to Guantánamo Bay in 2002, where it was discovered that he was an American citizen. As a result he was transferred to the United States. He brought a habeas case in the United States District Court for the Eastern District of Virginia. His case was attacked on jurisdictional grounds and came before the Supreme Court in 2004. At that time, Hamdi was being held at a naval brig in Charleston, South Carolina, in isolation. He had not been permitted to meet with a lawyer.

The entire Hamdi record was based on a declaration (never tested or subject to cross-examination) filed by Michael Mobbs, identified only as a “special advisor” to the "Under Secretary of Defense for Policy." Mobbs declared he had reviewed “records and reports” regarding Hamdi, and had thereby learned about the events surrounding his capture. Though Mobbs had no direct percipient knowledge of anything, he stated that Hamdi had been captured on the battlefield, Kalashnikov in hand.

188 Id.
189 Id. at 507, 510.
190 Id. at 511 (habeas petition filed by Hamdi’s father).
191 Id. at 507.
192 Id.
193 Id. at 539.
194 Id. at 512.
195 Id. Only thirty-six of the 517 prisoners held at Guantánamo were captured by U.S. forces making percipient, battlefield observations. Mark Denbeaux & Joshua W. Denbeaux, Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data 14 (Seton Hall Pub. Law, Research Paper No. 46, 2006), http://law.shu.edu/aaafinal.pdf. Hamdi was no different. The Supreme Court’s recitation speaks volumes to a trial lawyer about the gaping holes in the factual record. “At some point [When? Why can’t a capturing military force be precise about the date of capture?] that year [2001], he was seized by members of the Northern Alliance [Who?], a coalition of military groups [That is to say, a loose and roiled aggregation of Afghan tribes, motivated by impenetrable tribal grievances], opposed to the Taliban government, and eventually [Why eventually? When? On what terms? What happened in the interim?] was turned over to the United States military.” Hamdi v. Rumsfeld, 542 U.S. 507, 513 (2004). This is all hearsay from some identified person. Who?
196 Hamdi, 542 U.S. at 513. His father contended, to the contrary, that Hamdi was an “inexperienced aid worker caught in the wrong place at the wrong time.” Id. at 554 (Scalia, J., dissenting).
The trial judge, Robert G. Doumar, dismissed this as “the government’s ‘say-so,’” and demanded to see the underlying records in camera.197 The Government stoutly resisted. Throughout this period, which exceeded two years, Hamdi was held in isolation, said to be too dangerous to even consult with counsel.198

The Supreme Court remanded the case, ruling Hamdi was entitled to counsel and some form of due process hearing regarding his combatant status.199 Judge Doumar did not follow the path soon to be trodden by his brethren across the Potomac. He did not permit the case to proceed by means of motions testing pleadings, and appeals on those decisions.200 Instead, he issued a simple order: bring Hamdi to my courtroom.201 The Government resisted and the Court granted extra time—but not much. The Government was ordered to produce the habeas petitioner in court on Monday, October 11, 2004. The day before, the Government released Hamdi to the Kingdom of Saudi Arabia, where today he is a free man.202

The Government never explained the circumstances surrounding Hamdi’s release. If he had indeed been captured during an international armed conflict in which active hostilities had not concluded, the Government certainly would have been able to justify his detention as a prisoner of war. According to a plurality of the Supreme Court, he was entitled only to a rudimentary process to contest his status. If the theory is that he was a criminal (for example, one who had engaged in terrorism in violation of 18 U.S.C. §§ 2331-2339D), one can only wonder why the Government released him.

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198 Id. at 528.
199 Id. at 539.
200 See id. at 513-14. Even Judge Doumar’s record on this score is compromised. In 2003, after Judge Doumar ordered the Government to produce the “records and reports” behind the Mobbs declaration, the Government moved for leave to appeal that interlocutory order. Judge Doumar allowed the request and certified the question to the Fourth Circuit. His caution in this regard may have derived from the efforts of the Fourth Circuit to micromanage his review of the record.
Only the Government knows why Hamdi was released, but there is a jurisprudential lesson here. The executive branch must have had some informed view as to (i) Hamdi’s actions prior to his imprisonment, and (ii) whether, in its own view, his release was against policy interests. It decided to release him, saving years of incarceration, briefs, hearings, motions, and appeals. When a federal judge indicated he would demand the facts and ensure development of a full record, the Government had to act immediately. This marked a relatively swift and efficient end to the litigation. Had Judge Doumar followed the D.C. Circuit model, the case might still be on appeal, testing the efficacy of pleadings.

V. THE CONSEQUENCES OF FAILURE OF THE FINAL JUDGMENT MODEL IN THE GUANTÁNAMO LITIGATION

A. The Government

So thoroughly has the government bungled its detention policy that many have forgotten that when this all began, the United States was the victim. The government contends it is lawfully imprisoning the Guantánamo population, an assertion that in most cases has never been vindicated by any factual determination. The government’s victories have been strictly procedural: either inaction, allowing imprisonment to continue, or decisions granting motions to dismiss, indirectly endorsing the ability of the government to operate beyond judicial scrutiny. In a time of international struggle against violent criminals with religious or ideological motivations, the government lost from its detention policy the legitimacy it might have gained from decisions rendered on full records.

The government has a significant interest in maintaining camp discipline and the health of the prison population. The absence of effective judicial review created, and over time exacerbated, a poisonous atmosphere in the camp, leading to widespread depression and despair, and culminating in massive hunger strikes, collective disobedience, suicide attempts, and at least four successful suicides.\(^{203}\)

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B. The Prisoners

Many prisoners endure a longer incarceration at Guantánamo after filing for judicial relief than before. There is little doubt that the legal delay and the Executive's increasingly harsh incarceration regimen has pushed men to, and in some cases past, the brink of sanity.\textsuperscript{204}

The consequences of judicial inaction are manifest in three suicides in 2006,\textsuperscript{205} and a fourth in 2007.\textsuperscript{206} The Base Commander branded these suicides, “act[s] of asymmetrical warfare.”\textsuperscript{207} Yet no one can say with any certainty that they were not simply acts of despair. Not one of the men who committed suicide attempted to harm anyone else. Following years of isolation, repeated government claims that it had the right to imprison them indefinitely, Rasul's promise of judicial review appeared to most to be a sham. Many lost all hope. It is not surprising the four decided to end their lives, and that many more have attempted suicide. At the present writing, despair remains rampant.\textsuperscript{208}

C. The Courts

Inaction has also hurt the judiciary itself. Its refusal—or inability—to decide cases on the merits has wounded its credibility. Within the clerical bounds of the bar itself, opinions on pleadings are celebrated as intellectual tours-de-force; to outsiders the process seems self-involved and absurd. A judicial system that cannot in six years resolve a dispute about a man's imprisonment is simply not an effective system for resolving cases and controversies. In time, the present period may be viewed as the zenith of judicial impotence.

The judiciary's failure is particularly acute because the need for urgent judicial remedies in cases involving indefinite imprisonment is

\textsuperscript{204} See discussion infra Section V.C.
\textsuperscript{206} See Glaberson, supra note 203.
\textsuperscript{207} Rear Admiral Harry B. Harris said, “They are smart. They are creative, they are committed . . . They have no regard for life, neither ours nor their own. I believe this was not an act of desperation, but an act of asymmetrical warfare waged against us.” \textit{Guantanamo Suicides 'acts of war,'} BBC News, June 11, 2006, http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/5068606.stm.
\textsuperscript{208} See Glaberson, supra note 203.
well established—not simply for the prisoner, but for the judiciary itself. In Yong, the District Court entered a five-month stay of an alien's habeas petition pending an appeal in a parallel case. Yong appealed; the Court held that the stay was indefinite and unlawful.\(^{209}\) While acknowledging the possibility that a “short stay” might be permissible in these circumstances, the Yong Court rejected the Government’s argument that the stay was justified on grounds of judicial economy and the public interest, noting that “[a] long stay threatens to create the perception that courts are more concerned with efficient trial management than with the vindication of constitutional rights.”\(^{210}\)

There are international consequences as well. Few would contest the proposition that Guantánamo diminishes the nation's international prestige. Policies of unilateral force often deter foreign governments cooperating with other nations as necessary for international law enforcement. The fault lies in the first instance with political branches that have overreached, but the third branch of government is not free from blame either. Prompt fact-finding and decision-making might either have hastened the emptying of the prison, or helped to legitimize it by providing a justification for the imprisonments. Another consequence of judicial inaction is misguided legislation. In 2005, the DTA created a remedy focused on the CSRTs. Later developments showed that Congress acted on a serious misapprehension of the CSRT process. In short, the consequences of such judicial inaction were profound, and show that trial courts should decide cases, as speedily as possible, on the basis of a full factual record.

Early in January 2009, the author visited Guantánamo. For a fleeting moment he stood across a fence from two men famous in American jurisprudence, the Bosnian Lakhdar Boumediene and the Uighur Huzaifa Parhat. Each had been adjudicated a noncombatant. Each was still a prisoner.

Most of their colleagues had not even reached adjudication. In June 2008, Boumediene and Parhat came down. We stood again at the beginning, and as this article went to press early in 2009, almost all habeas cases were mired in preliminaries. The Government had not even filed a factual return to justify imprisonment in most cases. Six years

\(^{209}\) Yong v. I.N.S., 208 F.3d 1116, 1121 (9th Cir. 2000).
\(^{210}\) Id. at 1120.
of infidelity to the final judgment rule had laid out a stark lesson for the bench and bar. Whether we shall have learned it in the short term remains doubtful.

AFTERWORD

After this article went to press, the D.C. Circuit dismissed Bismullah v. Gates for want of subject matter jurisdiction. The court ruled that in the DTA, Congress had impliedly conditioned its grant of statutory judicial review on the efficacy of the DTA’s strip of habeas corpus rights. As Boumediene v. Bush had ruled the habeas strip unconstitutional in June 2008, DTA review was revoked.

No words actually appear in the DTA that condition jurisdiction on the habeas strip. This was immaterial: the Court could discern Congress’ intent. Immaterial, too, was the Supreme Court’s observation in Boumediene that the “DTA . . . process remains intact,” a statement that the Circuit Court explained had to be read in “context”—what context rendered plain words void the Court of Appeals left mysterious. Remarkably, the theory of implied jurisdictional revocation was one the Government itself had never dreamed of until, late in 2008, Circuit Judge Randolph theorized in Basardh v. Gates that it might provide a way out of the box. In any event, DTA review is now almost certainly dead.

By this deus ex machina the Government at last in 2009 escaped the hook Congress hung it on in 2005, and avoided disclosure of exculpatory information the D.C. Circuit first ordered produced in July 2007. That information had never seen the light of day—or even the murk of a filing under seal. A right of judicial review under a statute still on the books was vaporized based on an implication, three years after prisoners were told the statute afforded their sole remedy. To those prisoners, the opinion offered a crumb—a footnote that strongly suggests Parhat v. Gates is res judicata nonetheless. But it was only a footnote. As remarkably as anything that had gone before, the decision illustrates the continued vigor of clericalism. On the day the Circuit issued its decision, many of the luckless Guantánamo naïfs who had diligently pursued the remedy to which Congress had directed them, including some—like Huzaifa Parhat himself—who had prevailed, remained at Guantánamo. They had not
realized judicial review was never to be more than an academic exercise after all.
A LAW PROFESSOR’S REFLECTIONS ON REPRESENTING GUANTÁNAMO DETAINES

Randall T. Coyne

INTRODUCTION

As a professor of law at the University of Oklahoma, I am evaluated annually by my peers on my performance in three areas: teaching, scholarship and service. Since joining the faculty in 1990, I have elected to satisfy my service obligations to the university by providing legal representation, usually pro bono, to the most despised members of society: those who are facing capital charges or awaiting execution.

I have had the honor and privilege of representing death row prisoners in Texas, California, Colorado, and Oklahoma. In recent years, I have represented Guantánamo detainees. Abdenour Sameur is an Algerian army deserter who had been granted refugee status by Britain in 2000. Aminullah Tukhi is an Afghani who fled the Taliban and landed in Iran, where he worked as a taxi driver. Mr. Sameur was freed from confinement in 2007, largely due to the efforts of Reprieve, an international human rights organization based in London. Around the time of Mr. Sameur’s release, Mr. Tukhi was transferred from Guantánamo to Polecharky prison in Afghanistan. He also was ultimately released.

Currently, I represent two capital clients. Scott Eizember is a resident of Oklahoma’s death row. Ahmed Khalfan Ghailani has been designated by the federal government as a “high value detainee.” Mr. Ghailani has spent the past four years in solitary confinement. The last two of those years were spent at Guantánamo, awaiting a capital trial in

* Professor Coyne is the Frank Elkouri and Edna Asper Elkouri Professor of Law, University of Oklahoma College of Law.
3 Email from Pardiss Kebriaei, Staff Attorney, Center for Constitutional Rights, to Randall T. Coyne (Apr. 30, 2008) (on file with author)
New York and facing the prospect of a military commission proceeding.
I once heard Professor Michael Tigar, a truly great lawyer, describe his license to practice law as a ticket. I agree. A license to practice law, properly used, entitles the bearer to a front row seat to some of the most compelling dramas known to man. These are the dramas in which the government, with its virtually limitless resources, seeks to deprive some hapless creature, a murder suspect, or an alleged enemy combatant, of his freedom or his life.

I. DEBUNKING THE ENEMY COMBATANT/ TERRORIST MYTH

Guantánamo detainees have been branded by our highest government officials as “terrorists” or “al Qaeda fighters.” According to government officials, these detainees were captured on the battlefield, or committed hostile acts against Americans or their allies. Secretary of Defense, Donald Rumsfeld, called the men detained at Guantánamo “the worst of the worst.”

6 For example, during a March 28, 2002 Department of Defense briefing, former Secretary of Defense Donald Rumsfeld said:
   As has been the case in previous wars, the country that takes prisoners generally decides that they would prefer them not to go back to the battlefield. They detain those enemy combatants for the duration of the conflict. They do so for the very simple reason, which I would have thought is obvious, namely to keep them from going right back and, in this case, killing more Americans and conducting more terrorist acts.
7 On September 20, 2001, in an address to a joint session of Congress, President George W. Bush said, “Either you are with us, or you are with the terrorists.” Report on Recovery and Response to Terrorist Attacks on World Trade Center and Pentagon—Message From the President, 147 Cong. Rec, 107th Cong. S9553 (2001), 2001 WL 1103998 (Cong.Rec.). The Washington Post, on October 23, 2002, quoted Secretary of Defense Rumsfeld as calling the detainees “the
In 2006, Professor Mark Denbeaux of Seton Hall University School of Law published a study which put the lie to these bald assertions. Relying exclusively on the military’s conclusions, and without regard to the statements or contentions of any prisoner or prisoner’s lawyer, the Seton Hall study suggests the following conclusion:

95% of the detainees were not in fact captured on the battlefield.

If not captured on the battlefield, how did these enemy combatants stumble into U.S. custody and begin their interminable residence at America’s gulag? American forces distributed leaflets in Afghanistan. These leaflets exhorted Afghans to turn suspected terrorists over to American forces in order to receive valuable rewards. A typical leaflet features a smiling Afghan who says:

Get wealth and power beyond your dreams. . . . You can receive millions of dollars helping the Anti-Taliban forces catch Al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people.

Professor Denbeaux reports that 86% of the detainees were delivered to American forces by people who received these leaflets. 92% of the detainees are not al Qaeda fighters. According to the government’s own records, just 8% of the detainees are properly characterized as al Qaeda fighters. Of the remaining

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10 Mark Denbeaux, supra note 9, at 2.
11 Id. at 25.
12 Id. at 2-3.
13 Id. at 2.
92%, 40% have no definitive connection with al Qaeda, while 18% have no definitive affiliation with al Qaeda or the Taliban.\(^{14}\)

55\% of the detainees are not determined to have committed a hostile act against the United States, its allies or anyone else.\(^{15}\)

This is true, though “hostile act” has been given the broadest definition possible. Fleeing from the bombing of American forces qualifies as a “hostile act.” Consider also that in 2001 Afghanistan had an estimated population of 8 million adult males, and 10 million Kalashnikov rifles. The evidence against 39% of the detainees consisted, in part, of the possession of a Kalashnikov rifle.\(^{16}\)

What of my released client, former Guantánamo detainee Abdenour Sameur? Was he “the worst of the worst,” someone who, if released, would “return to the battlefield to kill” more Americans and conduct “more terrorist acts”?\(^{17}\)

Mr. Sameur was arrested in the mountains between Afghanistan and Pakistan in the company of other Arabs. He had been shot in the leg. Mr. Sameur admitted having prior knowledge of the September 11, 2001 terrorist attacks, although he later explained that this confession was extorted from him by his American captors who refused to treat his leg injury until he confessed. Fearing that his leg would have to be amputated if treatment was delayed, Mr. Sameur told the authorities what they wanted to hear.\(^{18}\)

Despite the frenzied fear-mongering of the Bush administration, one can safely assume that Mr. Sameur, who was reunited with his family in England late last year after being freed from Guantánamo, is not now and never has been a terrorist.

Mr. Tukhi’s story is similar. It begins shortly after the United States commenced bombing Afghanistan. Articulate and well-educated in economics, Mr. Tukhi was rounded up with other Afghans in Iran,

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15 Id.
16 Id. at 19.
17 See Warden *supra*, note 3.
primarily because he lacked appropriate documentation. He spent a month in an Iranian prison and then was transferred to a place, probably a CIA site, that he described as “the underground” or “dark prison,” run primarily by Afghans. At this facility, he was interrogated by Americans several times. Next, he was sent to Bagram and then to Guantánamo. He spent five years there before being transferred to Polecharky Prison in Afghanistan. No charges were ever filed against Mr. Tukhi, and he too was eventually released.

Mr. Sameur and Mr. Tukhi’s obvious innocence is not anomalous. Many Americans will recall Shafiq Rasul, who succeeded in persuading the U.S. Supreme Court to review his case. After Mr. Rasul’s case came before the Court, and three months before the Court handed down its opinion in his favor, Mr. Rasul was quietly released from U.S. custody. Scores of other detainees, classified as enemy combatants, have been released during the “war on terror.” On March 6, 2007, the U.S. Defense Department reported that since 2002, approximately 390 detainees had been released or transferred from Guantánamo. As of December 16, 2008, approximately 250 detainees remained incarcerated at the Guantánamo Bay Naval base in Cuba. More detainees have been released or transferred than still remain in Guantánamo.

II. UNDER THE SECURITY CLEARANCE MICROSCOPE

20 Id.
21 Id.
22 Email from Lynne Cooper to Randall Coyne, Apr. 8, 2008 (on file with author).
Before an attorney is authorized to travel to Guantánamo to meet with the client, the lawyer must first obtain a Secret Security Clearance through either the Department of Defense (DOD) or the Department of Justice (DOJ). Among other things, the security clearance application process involves filling out a comprehensive government form, 86 (EG), which normally requires the applicant to provide personal information relating to activities in the past seven years. In the Guantánamo litigation, the government has extended the reporting period to ten years. Applicants must submit fingerprints and sign an authorization empowering the government “to obtain any information relating to my activities from individuals, schools, residential management agents, employers, criminal justice agencies, credit bureaus, consumer reporting agencies, collection agencies, retail business establishments, or other sources of information.” Additionally, applicants must sign an authorization for the release of medical information and are required to permit the Internal Revenue Service to reveal confidential information about them.

Finally, applicants must submit to an interview with a Federal Bureau of Investigation special agent and sign a nondisclosure agreement. If the security clearance is granted, the applicant receives a security clearance briefing from a DOJ staffer. Before given access to any classified information, counsel must first sign a “Memorandum of Understanding” agreeing to comply with the terms of the Protective Order.

In connection with my representation of Mr. Sameur and Mr. Tukhi, I received the most basic security clearance designation: Secret. However, because Mr. Ghailani was designated as a “high value detainee” by the government, I faced two additional hurdles prior to receiving authorization to meet with him. First, I was required to upgrade my security clearance level from Secret to Top Secret.

29 Questionnaire for National Security Positions (revised Sept. 1995), http://gsa.gov/portal/gsa/ep/home.do?tabid=0 (follow “forms” hyperlink, then type “SF86” into the “find a form” search box.).
31 Id.
update my original security clearance application and undergo even more searching scrutiny. Second, to fully represent Mr. Ghailani I was required to apply to become a member of the Military Commission civilian defense counsel pool. I submitted this application to the DOD on June 26, 2008, and received conditional approval on July 21, 2008, subject to my obtaining a Top Secret Security Clearance designation. More than seven months have passed since I applied for a Top Secret Security Clearance Upgrade. I have heard nothing from the government.

III. LOGISTICAL NIGHTMARES AND THE CONE OF SILENCE

Those who survive the security clearance quagmire and are granted membership in the Military Commission civilian defense counsel pool confront even greater challenges once they are approved to represent Guantánamo detainees. An Orwellian labyrinth of security rules converts even the simplest aspect of providing competent representation into an ordeal.

Notes taken by a detainee’s lawyer during client interviews must be turned over to military personnel.34 These notes are then sent by secure means to a secure facility in Crystal City, Virginia, for review by Department of Defense officials and possible declassification.

Even the most mundane pleadings must first be sent by secure means for clearance to the “Court Security Office” (CSO) in Washington, D.C.35 Only after the CSO determines that the document may be publicly filed and gives defense counsel the “all clear” approval may the document be filed electronically on the public court docket. The irony is that the CSO gives the pleading to the government attorney assigned to the case—the opposing counsel—who then determines whether the filing contains anything that should be kept secret.

Should counsel need to quote from materials classified as secret in pleadings or filings, headaches increase. Counsel must fly to Washington, D.C. to draft the document. Counsel must use a government-supplied computer located in the secure facility in Crystal City, Virginia. Once the document is finished and all errant copies are shredded, counsel makes

34 In re Guantánamo Detainee Cases, 344 F.Supp. 2d 174, 176-77.
35 Id. at 178-79.
copies on a government-supplied photocopier and hands them over to the secure facility administrator. At that point, the pleading is considered filed. The administrator then calls the CSO, which sends someone over to collect the document. Once opposing counsel gives the “all clear” approval, the document may be filed publicly. Counsel is prohibited from removing even a single copy of the pleading from the secure facility.36

Co-counsel wishing to discuss their client’s case may face additional hurdles. In a new millennium incarnation of Get Smart’s “cone of silence,”37 counsel with appropriate security clearances can discuss top secret material only in the secure facility.38 Because most of the words spoken or written by high value detainees are considered classified, co-counsel’s need to strategize about the case or even discuss what the client said during a recent interview may necessitate a trip to Crystal City.

IV. CONSEQUENCES OF REPRESENTING THE DESPISED

One emerging criticism, leveled with increasing frequency against those of us who seek to protect the rights of the detainees, is that we have been engaging in “lawfare.”39 Because the terrorists have engaged in “warfare,” those who would seek to enforce the rule of law by protecting the rights of accused terrorists are accused of engaging in “lawfare.”

Berkeley Law professor John Yoo, considered by many to be the

37 The Cone of Silence is one of many recurring joke devices from Get Smart, an American comedy television series of the 1960s. Invented by “Professor Cone,” the device is designed to protect the most secret of conversations by enshrouding its users within a transparent sound-proof shield. Whenever Maxwell Smart (“Agent 86”) wants to speak to his boss (“Chief”) about a top secret matter, “86” would insist on using the comically defective technology despite being reminded that it never works. The Chief, usually with annoyed skepticism, would press a switch, causing the device to descend from above his desk, surrounding the heads of the would-be conversers.
chief architect of the Bush Administration’s pro-torture policies, was sued by convicted terrorist Jose Padilla. Professor Yoo whined, “Even as our brave young soldiers fight in Afghanistan and Iraq, and our intelligence agents succeed in disrupting follow-ups to the 9/11 attacks, terrorists are using our own legal system as a weapon against us.” One wonders whether Professor Yoo considers the American legal system to be private property. He has publicly pouted, “Lawfare has become another dimension of warfare.” It is as if he believes that neither law nor justice has a role in the struggle against terrorism. Professor Yoo’s complaints are hardly surprising, coming from an administration which appointed Charles Cully Stimson the Deputy Assistant Secretary of Defense for Detainee Affairs. Stimson angered many with his shocking suggestion that corporate America should boycott law firms that represent Guantánamo detainees.

This brings to mind an anecdote—perhaps apocryphal—I heard years ago as a summer associate at the prestigious D.C. law firm Arnold & Porter, known to take up unpopular liberal causes. As the story goes, the firm’s co-founding partner, Paul Porter, was accosted one day at the country club by an obviously hostile and irate conservative U.S. Senator. The Senator spat, “I understand that law firm of yours represents Communists and homosexuals and the like.” Firm legend asserts that Porter coolly replied, “That’s true. And what can we do for you, Senator?”

Closer to home, my work on behalf of Guantánamo prisoners has generated a fair share of criticism. A typical example is an email I received after a local newspaper reported favorable comments I made about the Supreme Court’s ruling in Boumediene v. Bush:

Dear Sir,

Re: Your representation of Terrorists

41 Id.
128 S.Ct. 2229 (2008) (Guantanamo detainees entitled to challenge the legality of their confinement using the writ of habeas corpus).
It makes me sad to think that someone from my alma mater, OU, presumably a reasonably-paid professor, is representing a terrorist enemy of the United States. I, as a Vietnam vet, don’t believe that they even deserve the rights accorded by the Geneva Convention, let alone the rights conferred on them by the recent (liberal) Supreme Court decision.

I would like to be really angry with you, but I have decided not to say what I am really feeling about you just now. I just thought that you should know that I, for one, am very humiliated by what you are doing.\textsuperscript{44}

\section{V. PRACTICAL CONSIDERATIONS AFFECTING ACADEMICS}

Before concluding, I would like to spend a few moments discussing some practical problems peculiar to academics that choose to represent Guantánamo detainees. There are law professors scattered across the country deeply involved in this litigation, from Harvard, Yale, Georgetown, New York University, Fordham, the University of Texas, Northeastern University and many other remarkable law schools.

\subsection{A. Finding Shelter for Guantánamo Representation Under General University Policies}

University policy regarding governance and oversight of faculty activity is typically set forth in a Faculty Handbook. Several provisions of the University of Oklahoma Faculty Handbook (OUFH) are relevant to my work on behalf of Guantánamo detainees.

As a threshold matter, the OUFH reminds each new employee of his or her duty to have a signed and notarized Loyalty Oath as part of the employee’s personnel file.\textsuperscript{45} By statute, each member of the OU community must solemnly swear, among other things, to support, obey and defend both the United States Constitution and the Oklahoma state

\textsuperscript{44} Email to author (Jun. 13, 2008) (on file with author) (name of sender deleted).

constitutions. This is not particularly problematic. I teach constitutional law and I am a strong proponent of the rule of law.

More troublesome is the provision requiring affirmation that the employee "do[es] not advocate . . . or justify, directly or indirectly . . . and [is] not a member of or affiliated with any party or organization, political or otherwise, known . . . to advocate . . . revolution, sedition, treason or a program of sabotage, or the overthrow of the [federal government or Oklahoma state government] or a change in the form of government thereof by force, violence or other unlawful means." Here, I can confidently argue that my advocacy on behalf of those accused terrorists falls far short of advocating terrorism.

I take some comfort from a Statement of General Policy in the OUFH:

Employee participation in outside professional, commercial and pro bono publico activities can make important direct and indirect contributions to the strength and vitality of the University. . . . Because of its value to the University, its rewards for individual employees, and its contributions to the larger society of which the University is a part, the University recognizes that employee participation in outside professional . . . or pro bono publico activities is often appropriate.

Further shelter for my work on behalf of Guantánamo detainees can be found in a different handbook provision, describing professional service and public outreach:

Professional . . . service and public outreach is work done by a faculty member to advance the interests and capabilities of various communities, either inside or outside the University. These activities should stem from the faculty member’s professional expertise . . . and . . . should support and enhance the faculty member’s

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47 Id. at § 36.2A.
48 Norman Campus Faculty Handbook, supra, note 45, at §5.10.2(B).
Each year, in addition to constitutional law, I teach courses in criminal procedure and capital punishment. Of greater relevance to my Guantánamo work, I also teach a seminar on terrorism and civil liberties.

B. Common Sense and Pragmatic Suggestions

Although sometimes in short supply in the academic world, common sense can help protect academics that perform service work viewed by many as controversial and by some as tantamount to treason. Some of these suggestions are enshrined as university policy and are mandated; others appear to me to simply make sense.

In speaking or acting as private persons, faculty members should avoid creating the impression of speaking or acting for their college or university.\(^{50}\)

I recall when I first started working on behalf of accused Oklahoma City bomber Timothy McVeigh; I received a call from the university president’s office, and was asked by a presidential underling whether I expected to be sitting at a counsel table during Mr. McVeigh’s trial. Given that Mr. McVeigh stood accused of murdering 168 people (including 19 children) 25 miles away from campus, I was sensitive to the university’s concern. However, as a lawyer, my first duty was to my client. I refused to let administrative skittishness interfere with my ability to form a trusting relationship with my client.\(^{51}\)

A related piece of advice:

Don’t use University letterhead in connection with your representation of controversial clients.

Even though you may be justifiably proud of your membership in the academy, and you may have reason to believe that your status as “law professor” may entitle you and your client to somewhat better treatment and greater consideration than that afforded by the government to lay

\(^{49}\) NormaCampus Faculty Handbook, supra, note 45, at §3.6.3.

\(^{50}\) NormaCampus Faculty Handbook, supra, note 45, at §3.2.1(C)(emphasis added).

\(^{51}\) For an account of the difficulties encountered in representing Timothy McVeigh, see Randall Coyne, Collateral Damage in Defense of Timothy McVeigh, 1 Cooley J. of Ethics and Responsibility 19 (2006).
practitioners, the safest course is to avoid using university letterhead in connection with your representation of accused terrorists.

*Don’t let pro bono work interfere with your primary academic mission: teaching.*

Far from interfering with my teaching duties, I find that all my service work on behalf of criminal defendants greatly enhances my effectiveness as an instructor. On rare occasions, if classes must be cancelled due to litigation conflicts, it is essential that the classes are made up. Failure to do so is giving aid and comfort to your enemies, those who may resent your work and wish you harm.

*Make every effort to minimize incurring any costs that will be borne by the University.*

Other institutions may be more flexible in this area. Bringing a personal laptop to work for use on controversial matters can help blunt inevitable criticism. Similarly, when long distance calls are necessary, I make sure to use my personal cell phone for that purpose. The last thing you want to do as an academic working for a public university is to create a paper trail that gives some misguided critic ammunition to raise hell with the legislature about how taxpayer dollars are being used to subsidize the next terrorist attack on American soil.

*Take care with respect to the use of student research assistants.*

The Department of Justice, which is the government agency in control of the security clearance process, has refused to permit law students to apply for clearances. Thus, students are not permitted to meet with clients because all information received from clients is presumptively classified.

**CONCLUSION**

On September 20, 2001, addressing a joint session of Congress, President George W. Bush infamously said, “Either you are with us,
or you are with the terrorists.”\textsuperscript{54} Such simplistic declarations are both extremely divisive and patently unhelpful. It bears reemphasizing that most of the men unilaterally labeled enemy combatants and incarcerated indefinitely at Guantánamo are neither enemies nor combatants, much less terrorists.\textsuperscript{55}

In my opinion, President George W. Bush has demonstrated utter contempt for the rule of law. If fighting for the rule of law, struggling in support of separation of powers, and insisting that executive power be checked during this so-called war on terror means I am with the “terrorists,” so be it. I am with the terrorists. Given that the Bush administration has created an atmosphere in which torture is commonplace—if standing up against torture means I am with the terrorists, then I am with the terrorists. Given that I love my country, though I loathe the monstrous injustices perpetrated by the current government—I am with the terrorists. Given that I have dedicated my life to the pursuit of justice and passionately support the protections of the United States Constitution and the Bill of Rights, my place is alongside the terrorists. Is there anyone on this planet in greater need of zealous legal representation?\textsuperscript{56}

Like you, I have worked extremely hard for my ticket; and as long as I am able, I will use it to fight for fairness and freedom. The privilege of practicing law is precious. Use your ticket wisely.


\textsuperscript{55} See supra notes 9-17 and accompanying text.

\textsuperscript{56} See, e.g., Lonnie T. Brown, Jr., Representing Saddam Hussein: The Importance of Being Ramsey Clark, 42 Ga. L. Rev. 47, 118 (2007) (“Individuals widely viewed as morally repugnant are arguably the ones most in need of quality representation in order to balance the adversarial playing field and ensure that the process is fair, whatever the outcome”).
LOST AND FOUND:
THE EXPERIENCES OF A LAWYER FROM “OLD EUROPE”
DEFENDING IN A LAW-FREE ZONE

Bernhard Docke* 

INTRODUCTION

In May 2002, Rabiye Kurnaz entered my office in Bremen, Germany, and signed a power of attorney. She expected me to bring her son, Murat Kurnaz, home from the U.S. Naval Base at Guantánamo Bay as quickly as possible. Unfortunately, bringing him home was not so easy.

Murat Kurnaz left Bremen for a pilgrimage through Pakistan in October 2001—perhaps the worst possible time to travel to that region.2

Earlier that year, Kurnaz married a very devout Muslim young woman and in an effort to learn more about Islam himself, traveled to Pakistan to immerse himself in Islamic studies.3 Shortly thereafter, he was arrested, without cause, by Pakistani police and sold for $3,000 to American forces

* Mr. Docke is currently a partner at the law firm of Dr. Heinrich Hannover und Partner. He is known for his work in international human rights advocacy. In 2006, Docke was awarded the Carl von Ossietzky medal in recognition of his dedication to human rights law, in particularly his advocacy for Guantánamo detainee Murat Kurnaz. In 2007, Docke, along with two others, helped inaugurate One World Berlin 2007, an annual film festival dedicated to documentary films focusing on human rights. One World Berlin 2007 is associated with One World International Documentary Film Festival, established in Prague in May 1999.


2 Combatant Status Review Tribunal (CSRT) Decision Report, encl. 2, at 4 (Sept. 30, 2004) (Summarized Sworn Detainee Statement) (“I went to study in Pakistan at the wrong time. I wasn’t aware there was a war going on in Afghanistan.”).

3 Id. (“My reason for going to Pakistan . . . was to study Islam.”) (quoting Murat Kurnaz); see also Mark Landler & Souad Mekhennet, Freed German Detainee Questions His Country’s Role, N.Y. TIMES, Nov. 4, 2006, at A8.
on the Afghani side of the border. However, it was not until late 2001 that Kurnaz’s family in Germany finally learned he was being detained by the United States.

Representing Kurnaz was a strange, Orwellian experience. It was “like defending a phantom. It has the taste of the Middle Ages, in modern times.” The skills and knowledge I acquired during my career as a criminal defense lawyer in Germany were useless as I continually collided with Guantánamo’s wall of legal restrictions. My co-counsel and I had no access to Kurnaz and no file to review; there was no arrest warrant, no official charge, no prosecutor, and no court. We dealt with a country that extolled the “rule of law,” yet all of the legal procedures and standards erected in the United States to protect its accused were systematically denied. We did not know when, where, or why our client had been detained. Nor did we have any idea how long he would be detained, or if he would face trial for the allegations against him. But we would later learn one thing—he was tortured.

Even though I had the assistance of co-counsel, I felt powerless. I was just one German lawyer, a mere David, facing off against the most powerful nation in the world, modern-time’s Goliath. President Bush claimed this fight was not governed by any of the traditional rules, domestic or international. Unlike David, we did not even have a slingshot with which to slay Goliath—at least not until Rasul v. Bush.

Kurnaz’s immigration status added another layer of complexity to his case. He was born and raised in Germany, yet remained a Turkish citizen because his parents entered Germany on a foreign worker’s visa and never obtained German citizenship. In her attempts to secure his

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9 Richard Bernstein, One Muslim’s Odyssey to Guantánamo, N.Y. TIMES, June 5,
release, Kurnaz’s mother wrote letters to the U.S. embassy, the Turkish embassy and the German government. Each of these three sovereign nations gave her the runaround: the U.S. embassy told her she needed to contact the Turkish government; the Turkish embassy claimed it could offer no assistance; and the German Foreign Office said it could be of little aid in procuring the release of a Turkish citizen.¹⁰

I soon realized I needed to reevaluate what I considered the traditional roles and duties of an attorney within the framework of Guantánamo. My representation of Kurnaz was a battle fought in the court of public opinion rather than in the halls of justice. More often than not, I pled my case to the media and lobbied the German and Turkish governments to apply diplomatic pressure. While I had previously spent my career making arguments before a judge or jury, I soon found myself appealing to the European Parliament and the Council of Europe to put Guantánamo on their agenda.

II.

Fortunately, this story took a positive turn when human rights organizations and attorneys in the United States challenged the Bush administration’s practices in Guantánamo. In Rasul v. Bush, the Supreme Court held that federal courts had jurisdiction under the then-current

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¹⁰ Bremen Taliban: Guantánamo Prisoner Vexing German Authorities, SPIEGEL ONLINE INTERNATIONAL, Jan. 10, 2006, http://www.spiegel.de/international/0,1518,394415,00.html (last visited Nov. 1, 2008); Bahar Azmy, No Prison Beyond the Law: Seton Hall Gets Involved, SETON HALL LAW Vol. 7, Issue 1 (Fall 2005) at 9, available at http://law.shu.edu/administration/alumni_relations/magazine/vol7_issue1.pdf (recounting Professor Baher Azmy’s experience representing Murat Kurnaz: “The Turkish officials recognize they have a formal obligation to receive Murat if the U.S. releases him, but seemed remarkably uninterested in arguments about international law and human rights violations committed against one of its citizens.” “I also traveled to Germany to conduct a series of very well-attended press conferences there and meet with high-ranking government officials in the parliament and foreign ministry. I left with some lukewarm promises to approach the United States directly or in cooperation with Turkey to inquire about Murat.”).
federal habeas statute to consider challenges to the legality of the detention of foreign nationals at Guantánamo. Yet, battles over jurisdiction and the rights of detainees continue to rage in the U.S. federal court system. These battles have been prolonged by appeals, and derailed by new laws attempting to strip the courts of jurisdiction. Even though the adage “justice delayed is justice denied” is generally true, some of these proceedings yielded useful results in Kurnaz’s case. For example, my colleague and co-counsel, Baher Azmy, gained access to our “ghost-client” only as a result of these proceedings. Once we were able to inspect the Combatant Status Review Tribunal (CSRT) file, we learned about, and informed the public of, the basis of the allegations against our client. Azmy documented Kurnaz’s story, provided him with contact to the outside world, and, together, we continued our efforts to release him.

Both Rasul and In re Guantánamo Detainee Cases were incredibly important from a legal standpoint, but these cases were also vital to our public relations battle. When the German press first learned of Kurnaz in early 2002, several publications branded him the “Bremen Taliban.” The pseudonym vilified Kurnaz by referring to allegations that he left Bremen in 2001 specifically to join forces with the Taliban. These allegations, along with others, were unsubstantiated. A German investigation into Kurnaz’s purported Taliban ties came to a close, determining the allegations to be

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false. Regardless, the nickname stuck; Guantánamo remained on the periphery of the German media radar.

The attitude toward Kurnaz changed for several reasons. First, once federal courts began to challenge the legal foundation of Guantánamo, it became more acceptable in Germany to criticize the Guantánamo detainee system. Second, by 2005 we collected enough information to notify the media of the systematic torture of Guantánamo detainees. Third, new information enabled us to refute unfounded accusations from the CSRT hearing that labeled Kurnaz an enemy combatant, yet ignored exculpatory evidence. As a result, we effectively swayed the court of public opinion in our favor. By the end of 2005, a substantial number of papers, radio, and television documentaries—in Germany, the United States, and throughout the world—focused attention on the fundamental deprivations of human rights and due process at Guantánamo.

Around this time I wrote a letter to Germany’s new chancellor, Angela Merkel, requesting assistance in securing Kurnaz’s release. The former government had rebuffed our requests, claiming the United States was unwilling to help; Chancellor Merkel replied within three days of my letter and offered her assistance. In January 2006, she put Kurnaz’s case on President Bush’s desk and requested his release. Long negotiations between the United States and Germany concluded in an agreement to release Kurnaz. He was flown back to Germany and freed on August 24, 2006.

It is ironic that it took a conservative chancellor to finally unlock Kurnaz’s cell while former Chancellor Gerhard Schröder—the head of the more liberal Red-Green coalition—had allowed him to languish in

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16 Carol Leonnig, Panel Ignored Evidence on Detainee: U.S. Military Intelligence, Germany Authorities Found No Ties to Terrorists, WASH. POST, Mar. 27, 2005, at A01.

17 Germany Negotiates with US to Free Guantánamo Detainee, supra note 15.

Guantánamo for years. It is an unfortunate and bitter truth that Germany was complicit in Kurnaz’s detention from the beginning.

III.

Kurnaz’s release generated incredible media attention in Germany. Azmy and I fought to protect his privacy and manage the pressures of the media upon his return. It took quite a while before Kurnaz was willing and able to speak to the public on his own.

As the media took greater interest in his story, many journalists began to focus on Germany’s role in the events. Bowing to the growing public pressure, Germany’s national parliament, the Bundestag, set up two investigative committees to explore the German government’s involvement in the Kurnaz case. The objective of the first investigative committee was to determine whether the former government missed an opportunity to have Kurnaz released years earlier. The objective of the second investigative committee was to explore whether German soldiers physically abused Kurnaz while he was being detained by the United States in Afghanistan prior to his transfer to Guantánamo. While the report of the first investigation is still unpublished, the committee report on the alleged abuse by German soldiers in Kandahar has been published. The result: Kurnaz’ statements seem to be credible, and the beatings could have happened, but due to a lack of evidence the case was closed.

A.

By January 2002, the German army and intelligence agencies informed the German government that American forces were holding Kurnaz in Kandahar. Thereafter, the Bundeskriminalamt, our Federal Criminal Investigation Agency, supplied the FBI with a file on Kurnaz, compiled by the Bremen police, which suggested he might have intended

19 Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, EUR. PARL. DOC. PE 382.420, at 15 (2007).
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to join the Taliban forces upon arriving in Pakistan.\textsuperscript{21} Under German federal law,\textsuperscript{22} these transfers of information may be made, in response to a formal request by a foreign government. These informational transfers typically require the requesting government to provide assurances to German prosecutors that the accused will receive a fair trial, and that the death penalty will not be imposed. In this case, Germany seemed to obediently comply with the United States’ request for information, and supplied the information in question without the traditional assurances. We believe it likely that this information was the catalyst for Kurnaz’s transfer to Guantánamo.

American forces captured only five percent of the detainees eventually sent to Guantánamo.\textsuperscript{23} Pakistani armed forces, the Northern Alliance, and others captured the rest and handed them over to the United States.\textsuperscript{24} While on the ground in Afghanistan, the American armed forces made the decision, with regard to each individual prisoner, whether the prisoner was to be transferred to Cuba or not. Some of the individuals detained in Afghanistan, captured under circumstances similar to Kurnaz, were released rather than transferred to Guantánamo.

Because Kurnaz was originally arrested by Pakistani police, we are now fairly certain the United States had no information regarding who he was, why he was arrested, or whether he fit the criteria for transfer to Guantánamo. Hopefully the day will come when the United States is willing to disclose its files outlining the reasons for Kurnaz’s transfer.


\textsuperscript{24} Denbeaux, supra note 22.
to Guantánamo. Ultimately, it is even possible that the decision to transfer Kurnaz was based on information provided by Germany. If the information provided by Germany indeed played a part in Kurnaz’s transfer, there is a strong argument Germany was responsible for Kurnaz’s prolonged detention from the beginning, not just from the time Germany squandered the opportunity to have him released.

B.

In September 2002, three German agents came to Guantánamo and interrogated Kurnaz.25 After finding no links to terrorism or involvement in criminal or terrorist plots, the agents determined Kurnaz was not a security threat.26 Furthermore, the German agents sent a message to Berlin stating the United States “considers Kuraz’s [sic] innocence to be proven. He is to be released in approximately six to eight weeks.”27

In October 2002, the prosecutor in Bremen suspended the local investigation into Kurnaz and his fellow suspects due to a lack of evidence.

Finally, on October 29, 2002, officials from the Foreign Office, the Interior and Justice Ministries, and various German intelligence agencies


met to discuss Kurnaz.28 Regardless of the consensus reached between Germany and the United States as to Kurnaz's innocence, and despite Germany's ability to request Kurnaz's freedom, the German government instead decided to turn its back on Kurnaz, preventing him from coming home.29

According to disclosed documents, the United States was irritated by this decision because the release had been planned as a diplomatic favor to Germany.30 Instead of releasing Kurnaz to Turkey, as an alternative, the United States kept him in Guantánamo for four more years.31 On September 30, 2004, Combatant Status Review Tribunal #5 determined Kurnaz was properly designated as an enemy combatant, a designation that was justified with fabricated allegations.32

C.

The German government tried to rid itself of any responsibility toward Kurnaz simply by annulling his right to return and remain in Germany. A joint action by the cities of Berlin and Bremen revoked Kurnaz's residency permit.33 According to German federal law (Auslaendergesetz), residency permits expire once a foreigner stays abroad for more than

28 Beste, supra note 18.
29 Id.; see also European Parliament, Former Guantánamo detainee meets MEPs investigating CIA renditions (Nov. 22, 2006), available at http://www.statewatch.org/cia/documents/prel-kurnaz-22-11-2006.pdf (Germany allegedly refused early release because surveillance conditions required by the United States were too costly).
31 Craig Whitlock, U.S. Frees Longtime Detainee; Court Had Ruled in Favor of Turk, WASH. POST, Aug. 25, 2006, at A09.
33 Beste, supra, note 27.
six months. While Kurnaz originally intended to reenter Germany with a return ticket from Pakistan within the requisite time period, the longstanding detention at Guantánamo obviously kept Kurnaz abroad for a period of time significantly longer than six months. Fortunately, we were able to appeal this decision successfully; in November 2005, an administrative court decided Kurnaz’s stay in Guantánamo—not surprisingly—was not of his free will. The administrative court decision coincided with Merkel’s ascension to the chancellery and may have helped sway her to our cause.

D.

After his release, Kurnaz claimed he was physically beaten by troops from Germany’s Special Forces Command (KSK) while he was held in Afghanistan by the United States. While the German Defense Ministry initially denied these claims outright, it subsequently made a series of statements suggesting the answer was all but clear. First, it claimed Kurnaz was lying and that there were no German troops in Afghanistan in January of 2002. Next, it conceded German troops were in the region at the time, but denied having contact with Kurnaz while he was in U.S. custody. A few weeks after this concession, the Defense Ministry admitted it knew he was being held, but denied having contact with him. Finally 2 soldiers admitted to both meeting and speaking with Kurnaz but maintained that no one beat him. The prosecutor initiated a criminal investigation against these two soldiers, and after questioning approximately twenty German soldiers, the prosecutor expressed his concern regarding the veracity of the responses he was receiving. It was his impression that they had coordinated their responses before speaking with him.

The existence of a truck on the prison compound represents one vital clue verifying Kurnaz’s claim. According to Kurnaz, he was beaten behind a vehicle used to move human waste. Most of the soldiers who were questioned denied the existence of such a truck. Their strategy was simple—by denying the existence of the truck, the credibility of the claim would be destroyed.

The German newsmagazine Der Spiegel verified the existence of the truck by interviewing several American soldiers serving at the camp. Several confirmed that human waste was removed from the camp and incinerated using a two-and-a-half-ton military truck driven through the camp’s main gate. In response to this report, the German prosecutor asked the United States if it would permit U.S. military personnel to testify regarding the actions of German military personnel. The US-Embassy in Berlin answered:

After careful consideration of all aspects of this matter, the United States has determined it cannot provide the assistance you have requested. The United States appreciates Germany’s important contributions to the Afghanistan mission and is confident that any reports of abuses will be appropriately investigated and addressed through existing law enforcement and judicial processes.

In May 08 the criminal investigation ended in a stay of proceedings based on the principle “in dubio pro reo.” According to the prosecutor, Kurnaz’ allegations seemed credible, yet there was insufficient evidence to put the soldiers on trial.

E.

A political crisis erupted as all the information regarding Germany’s disgraceful actions came to the surface. Germans wanted answers, and they wanted to know, if Germany was indeed complicit, who

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37 Id.
38 Id.
was responsible. In addition to the two Parliamentary inquiries that were established, Frank-Walter Steinmeier, Germany’s Foreign Minister and the former Chief of the Chancellor’s Office, came under fire for his handling of Kurnaz’s case. In his defense, he offered two arguments. First, he claimed the United States never explicitly offered to free Kurnaz in the fall of 2002. While a formal offer may not have been made, the United States sent clear, well-documented signs regarding its intentions. The three German agents who visited and interrogated Kurnaz in September 2002 were told by US-agents that US-investigators considered Kurnaz innocent, and that he was to be released in approximately six to eight weeks. Rather, it was Germany’s lack of political will that kept Kurnaz in detention.

Second, Steinmeier insisted Kurnaz still represented a possible threat to German security interests. This is inconsistent with the previous findings of the prosecutor, German secret services, and investigations by the United States. Even if this were not inconsistent, Germany should not be allowed to use a system like Guantánamo as a means of protecting its security interests. Had the allegations against Kurnaz been legitimate, Germany should have brought him home to stand trial in Germany.

In an attempt to alleviate the political pressure, Steinmeier adopted a strategy of simply blaming the victim. While some in the media branded him a heartless technocrat, others took Steinmeier’s side and recycled old, disproved allegations that Kurnaz was a security risk with terrorist motivations. Some painted the debate as a choice between our own Foreign Minister and some foreign Turk. Others exploited the population’s fears by focusing on the long beard Kurnaz had grown while being held in detention.

Nonetheless, Kurnaz has received no apology, been shown no remorse, nor received any compensation. Adding insult to injury, Steinmeier refuses to accept any blame, and maintains that, given the

40 See Beste, supra note 27.
41 Id.
43 Id.
44 Id.
choice, he “wouldn’t decide any differently today.”

IV.

Even after securing Kurnaz’s release, my work on his behalf is still very different from the traditional duties of an attorney. On one hand, I assist with his rehabilitation and help him return to normal life after spending five years living in chains. Upon returning, he had a very warm-hearted reunion with his family. Friends, neighbors and even the mayor of Bremen welcomed him home personally, and the city of Bremen helped him to get a job. I also help Kurnaz with public relations. In particular, I helped arrange several interviews so he could personally tell his story and promote his book, Five Years of My Life: An Innocent Man in Guantánamo. Plans for a film are in the making.

I also assisted Kurnaz in a more traditional legal sense. For example, I assisted him in testifying before the two investigative committees at the Bundestag and at the committee of the European Parliament assessing foreign renditions. In addition, I represented Kurnaz in the criminal investigation of two German soldiers who are suspected of the beatings in Kandahar.

Conclusion

All told, Kurnaz lost nearly five years of his life. He did not have to—he could have been released as early as the fall of 2002. Though the United States kept him detained despite its findings of innocence, Germany is also responsible for missing the opportunity to have him released four years earlier.

In Germany, I have begun to review the disclosed documents to determine whether it will be appropriate to file a lawsuit. However, because the legal obligation to assist a citizen differs from the obligation to assist a foreigner, Kurnaz’s nationality continues to be a concern. Other key facts remain unclear. In particular, we are still not certain why Kurnaz was selected for transfer to Guantánamo—it may have been because of

45 Id.
the information provided by Germany, or perhaps some other reason. If the decision to transfer were based on the German files, it would be much easier to argue that Germany not only had a moral obligation, but also a legal duty to secure Kurnaz’s release from Guantánamo.

Working on Kurnaz’s case has been time consuming and at times both frustrating and depressing, particularly when we responded to fake allegations of Kurnaz’s release to Turkey in March 2005 and read information about Kurnaz being tortured. Yet, the experience has also been delightful, such as when we learned about the role of U.S. federal judges and heard of favorable court decisions in both the United States and Germany. Beyond Kurnaz’s release, the highlight of my experience has been working with and the support of British and US human rights organizations and, especially, with my colleague Baher Azmy, who became a close friend.

Given the choice, I, much like Foreign Minister Steinmeier, “wouldn’t decide any differently today.”

48 Beste, supra, note 27.
GUANTÁNAMO BAY: REDEFINING CRUEL AND UNUSUAL

Stewart Eisenberg*

Representing Guantánamo detainee Mohammed Abd Al Al Qadir (Guantánamo Internee Security Number 284) has been an experience unlike any other of my legal career. While serving as counsel for Mr. Al Qadir (also known as Tarari Mohammed), Jerry Cohen and I encountered numerous obstacles unique to Guantánamo cases. Convoluted administrative procedures, allegedly implemented to protect national security, made representation difficult for lawyer and client alike.

In 2004, the U.S. Department of Defense issued procedures to assess the need to continue detaining enemy combatant detainees.

Nevertheless, he was still detained in Guantánamo Bay’s Camp 6 as of

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our March 20, 2008 visit. When Jerry and I arrived at the base, guards escorted us to an interview cell. When the cell door was unlocked, we saw our client shackled to the floor, as always, and immediately noticed he was wearing a white respirator on his face. The respirator was of the sort a contractor wears when working with toxic materials. Alarmed, I asked if he was all right. As the interpreter began to translate my question, our client interrupted, saying something in Arabic. The interpreter shot us a look and said, “We will talk about it.” After the guards left the room and locked the door behind them, Tarari uncharacteristically spoke in a serious and determined tone. On all other occasions, he had been extremely polite, deferential, and allowed us to lead the conversation. Tarari Mohammed proceeded to tell his story, one he had clearly been waiting to tell.

Approximately three weeks prior, he had an appointment with a representative of the International Committee of the Red Cross (ICRC). He met with the representative, who brought a letter from our client’s sister. The letter was the first and only communication our client received from any member of his family in over six years of detention. In the letter, Tarari’s sister informed him of their mother’s death, but did not provide details as to the date or cause. The letter also stated that, prior to her death, his mother had been distraught over her son’s detainment; it also detailed his father’s sadness. Tarari expressed that his heart was breaking and that he wanted to return to his cell. At the conclusion of their meeting, the ICRC representative told Tarari that his family had not received any letters from him. Tarari explained he had written and sent many letters during his detainment. The military never forwarded the letters.

Communication is a constant struggle for both detainees and counsel. Lawyers must comply with a protective order (PO) entered by

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7 For more information about the ICRC visits, see Neil A. Lewis, Red Cross Officials to Visit Prisoners at Guantanamo, N.Y. TIMES, Sept. 20, 2006, at A18.
8 A protective order is a “court order prohibiting or restricting a party from engaging in conduct . . . that unduly annoys or burdens the opposing party or third-party witness.” BLACK’S LAW DICTIONARY (8th ed. 2004).
the court, regulating the dissemination of information. The protective order renders all communication with the detainee, whether to or from him, subject to review by a designated authority. More specifically, all communications must be handled, transported, and stored in a secure manner as described in the PO. The order places an additional burden on an already strained attorney-client relationship, rendering the detainee's lawyer powerless, unable to have mail delivered between them, or between the client and his family.

Petitioner’s counsel (“habeas counsel”) must treat all written and oral communication with a detainee as classified, unless otherwise determined by the reviewing authority. Even the notes we take during our client meetings are subject to review. Mail is also a source of constant strife for habeas counsel. There are two types of mail, “legal mail” and “non-legal mail,” which are processed in different manners. Legal mail


10 The protective order categorizes each communication. In re Guantánamo Detainee Cases, 344 F. Supp. 2d at 186-9 (outlining the review procedures of incoming and outgoing mail, as well as communications into and from meetings with clients). Different authorities are responsible for reviewing each category of communication. Id. (assigning some communications review to a privilege team, and some review to the military personnel at the Guantánamo base).

11 Id. at 178.

12 Id. at 187.

13 Id. at 176, 179, 188.

14 “Legal mail” is defined as “[l]etters written between counsel and a detainee that are related to the counsel’s representation of the detainee, as well as privileged documents and publicly-filed legal documents relating to that representation.” Id. at 184. “Non-legal mail” is any mail that falls outside that definition, including letters from “family and friends of the detainee.” Id. at 186. The protective order provides that non-legal mail, such as letters from family members, must be sent to an address provided by the government to be “reviewed by military personnel at GTMO under the standard operating procedures for detainee non-legal mail.” Id. at 186-7. Family members of other detainees have also complained that their letters often do not pass this screening and do not reach the recipient. For instance, Mr. David Hicks is an Australian citizen and Guantánamo detainee whose parents’ letters were
is reviewed in a secure facility in or around Washington, D.C.,\textsuperscript{15} while non-legal mail is reviewed by the military.\textsuperscript{16}

In theory, POs are intended to surmount the many logistical obstacles generated by these cases, and to reconcile the divergent priorities of the government and habeas counsel.\textsuperscript{17} Secrecy and national security are of paramount interest to the government,\textsuperscript{18} while habeas counsel advocates for open communication with clients, their families and home countries, as well as the public at large.\textsuperscript{19} The government contends that without the prescribed screening process, messages could be transmitted to terrorist organizations, possibly endangering the United States or its allies.\textsuperscript{20} In reality, the process operates to compound the psychological and emotional damage these men suffer, further isolating them from the outside world.\textsuperscript{21}

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\textsuperscript{16} In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 186-7.
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\textsuperscript{17} \textit{Id. at 175} (finding a conflict in the government’s need to protect national security information and the detainees’ need to access adverse evidence). For a lengthy discussion on the purpose and goals of these protective orders, see Brendan Driscoll, Note, \textit{The Guantánamo Protective Order}, 30 FORDHAM INT’L. L.J. 873, 885-90 (2007).
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\textsuperscript{19} William Glaberson, \textit{Many Detainees at Guantánamo Rebuff Lawyers}, N.Y. TIMES, May 5, 2007, at A1 (some detainees “have come to rely on the lawyers as their only conduit to the outside world”).
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\textsuperscript{20} See Al Odah v. United States, 346 F. Supp. 2d 1, 4 n.4 (D.D.C. 2004) (government argued three particular detainees could easily communicate orders to terror networks while in prison).
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\textsuperscript{21} The International Committee of the Red Cross has warned that some of the government’s efforts to mentally abuse the detainees are “tantamount to torture.” Neil A. Lewis, \textit{Red Cross Finds Detainee Abuse in Guantánamo}, N.Y.
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Not only are detainees isolated from the outside world, but some, like Tarari, have been punished without cause. Tarari’s few freedoms were drastically reduced after his ICRC meeting. Guards came to his cell to measure him for clothing, explaining he was no longer allowed to wear his white jumpsuit, which indicated compliance, and instead must wear orange.22 When asked why they were punishing him, the guards replied that he was in trouble for spitting.23 Tarari denied ever spitting on anyone, yet the guards said he would not only have to wear the orange jumpsuit, but also a respirator.24

During our visit, Tarari asked how anyone could have such hate in their hearts that they punish someone for the death of his mother. He told us that at 2:00 a.m., on the morning after the guards’ visit, they returned to search his cell, harassing him further.25

Tarari then informed us that following the status change, and before our visit, he sought out a particular Non-Commissioned Officer (NCO) who had always treated him fairly. He asked the NCO why he had been disciplined, maintaining he had never spit and that the accusations were

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22 The color of a detainee’s jumpsuit reflects the military’s view of him as a security risk or a disciplinary problem. The men the military deems most compliant wear white, those deemed semi-compliant wear tan, and those considered the least compliant wear orange. Kathleen T. Rhem, Detainees Living in Varied Conditions at Guantanamo, ARMED FORCES PRESS SERV., Feb. 16, 2005, available at http://www.defenselink.mil/news/newsarticle.aspx?id=25882. We have seen our client only in white or tan, meaning he is compliant.

23 Spitting at another detainee is a Category III offense, the same as “tampering with locks or restraints.” Procedures, supra note 6, app. at B.8. Spitting at a guard is a Category V offense, which is the most serious category of offenses, such as escape and hitting a guard. Id.

24 In the event a detainee spits on a guard, “Behavioral Health staff will evaluate the clinical need for Seclusion / Restraint.” Id. at § 30-10. The Procedures further specifies staff “will remain aware of the fact that a respirator mask is required to protect against airborne infectious diseases” in the presence of bodily fluids. Id. at § 19-9(a)-(e).

25 Even though the Procedures insists “[t]he intent is to search for safety, not harass or invade dignity,” guards are given wide latitude to determine when to search. Id. at § 6-3(a).
false. Tarari trusted the NCO, who told him he would not be punished further. Yet, despite the NCO's assurances, the punishment did not cease. The NCO later told him that his superior had ordered the reprimand, offering no further justification.

Absent another explanation, my co-counsel and I concluded Tarari was punished for having learned his mother had passed away. We speculated that this was a preemptive effort to ensure his compliance, for should Tarari get upset over his mother's passing, the sanctions would make him easier to control—lending new meaning to the term “prior restraint.”

26 We may never know whether our client actually committed a punishable offense, or whether the guards were simply acting out of spite. While anything is possible, it is unlikely our client would lie to us, given our long-established attorney-client relationship and the many hours we have spent together.

Tarari celebrated the beginning of his seventh year in captivity, with no charges ever having been brought against him, by learning that he had lost his mother. Even if this otherwise compliant man had acted out after learning of his mother's death, is that so hard to understand? Tarari is just one of the many Guantánamo detainees who must suffer punishment without recourse. Together, their stories reveal the government's actions at Guantánamo, redefining cruel and unusual.

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26 Nothing in the Procedures prohibits this sort of preemptive restraint. On the contrary, the Procedures broadly indicates restraint “[w]hen a detainee is in imminent risk of injuring self or others.” Id. at § 30-8(IV)(a)(1).
Winter came early to Boston in 2002. Winds swept down from Canada and off the North Atlantic bringing snow and ice; by December the Charles River was white and frozen. In my Federal Courts class, jaded and surly 3Ls sat hunched over laptops typing their notes. The students were all bundled in sweaters and scarves, except for me, a native Minnesotan with a brisk hike to class, and my friend Hannah, who was eight months pregnant at the time; Hannah and I took notes in our T-shirts.

The class struggled somewhat painfully through the thicket of federal jurisdiction, winding our way through Section 1983, abstention, and *Ex Parte Young.* On that particular winter day, we moved onto habeas corpus and the Antiterrorism and Effective Death Penalty Act (AEDPA); more specifically, we were engaged in a discussion of statutory limitations on habeas jurisdiction. We learned habeas corpus was an ancient and fundamental right—a check on the executive, mandating an uncharged prisoner be brought before a judge. We also learned habeas had long since evolved into a collateral remedy generally employed by less-than-sympathetic prisoners who had already been charged, tried, convicted, and had the opportunity to appeal. It was this complicated statutory

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3 U.S. Const. art. 1, § 9, cl. 2; Judiciary Act of 1789 § 14, 1 Stat. 73 (1789).

4 Teague v. Lane, 489 U.S. 288, 311 (1989) (holding federal constitutional law
version of habeas with which we toiled.

At one point, a student raised her hand and asked whether Congress could completely strip habeas jurisdiction. The professor responded that while it was a good question, it was an academic one. “Every now and again Congress gets upset at something—immigration or what have you—and a bill is proposed to strip federal courts of habeas jurisdiction, but then someone like Ted Kennedy gets up and says, ‘Of course, that would present a serious Constitutional problem,’ and Congress grumbles and it goes away.”

We smiled at the reference, dutifully typed it into our notes, and returned to the intricacies of a writ of habeas corpus under Section 2254 of 28 United States Code. We spent little time discussing the history of habeas as a fundamental right because we believed there was no need for it: of course prisoners in the United States receive the full measure of due process. At the time, we assumed habeas went into effect after a prisoner’s day in court.

I later learned that at the same moment, several hundred people, including my future client, were being detained at the U.S. Naval Base at Guantánamo Bay in Cuba. Not a single detainee had been charged, tried or convicted. The government did not release their names. Just a few weeks before our lecture on habeas corpus, Major General Geoffrey Miller, the recently-installed base commander at Guantánamo, instituted new “enhanced” interrogation techniques. Some time later, Major General

will not be applied or announced on collateral review unless the rule falls within one of two narrow exceptions); see Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970); see also Keith G. Meyer & Larry W. Yackle, Collateral Challenges to Criminal Convictions, 21 U. Kan. L. Rev. 259 (1973).


7 Katharine Q. Seelye, A NATION CHALLENGED: AT GUANTÁNAMO; Moscow, Seeking Extradition, Says 3 Detainees are Russian, N.Y. TIMES, Apr. 3, 2002, at A13.

8 Ted Conover, In the Land of Guantánamo, N.Y. TIMES MAG., June 29, 2003, at 40.
Miller and his techniques were transferred to the Abu Ghraib prison in Iraq. When evidence of abuse at Abu Ghraib emerged, the techniques used at both facilities came under scrutiny.

We never discussed Guantánamo in my Federal Courts class or in any of my other law school classes. We simply did not know about it. I graduated from law school in June 2003 and started work at a firm the following fall. I spent my first year as an associate immersed in commercial litigation and had no reason to think about habeas corpus or Guantánamo. Habeas corpus faded from my memory.

Some lawyers, however, began paying attention to the situation at Guantánamo. In June 2004, while I was busy reviewing documents and drafting research memoranda for my commercial cases, the Supreme Court decided three detainee cases: *Rasul*, *Hamdi* and *Padilla*. Joe Margulies, a Minneapolis lawyer, delivered a speech at my firm after the *Rasul* decision.

Shortly after, a firm-wide e-mail stated that the firm had decided to take a detainee case and was looking for volunteers to work on it. I first read the e-mail at my desk, surrounded by pages of documents interspersed with cases and treatises. Although I had already spent much time on pro bono matters, this sounded even more interesting and exotic—after all, it involved Cuba—and memories of Federal Courts resurfaced. My classmate's question about the reach of ancient habeas and federal jurisdiction, which had been set aside as “academic” a couple years earlier, suddenly appeared concrete. I accepted the invitation to the initial meeting.

In the beginning, some twenty lawyers from my firm volunteered to work on the case. We contacted the Center for Constitutional Rights (CCR), the non-profit organization in New York that acted as a clearinghouse, matching individual detainees with lawyers. We informed

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11 Joseph Margulies is a faculty member at Northwestern University School of Law. Mr. Margulies has been a leader in coordinating the nationwide litigation challenging the Bush Administration’s post-9/11 detention policy and was Counsel of Record in *Rasul v. Bush*. Northwestern University School of Law, Faculty Profiles, http://www.law.northwestern.edu/faculty/profiles/JosephMargulies (last visited Oct. 23, 2008).
CCR that we had an associate who was ethnically Pakistani and spoke Urdu, albeit with a North Dakota accent. CCR was delighted and said we could represent all the Pakistani detainees; CCR would contact the Pakistani government to make the arrangements.

We were therefore surprised when CCR came back and told us the Pakistani government had informed them there were no Pakistani detainees at Guantánamo. Were not many of the detainees picked up in or near Pakistan? A few months later, we learned several Pakistani detainees were transferred from Guantánamo back to Pakistan.\(^\_1\) This was our first glimpse “through the looking glass” into the world of Guantánamo.

Meanwhile, the cases continued to accumulate. In September 2004, habeas lawyers were allowed to travel to the base at Guantánamo to meet with their clients for the first time.\(^\_1\) Around that time, CCR gave the firm a few detainees from which to choose. Among them was Ahcene Zemiri, an Algerian whose wife and infant child lived in Montreal. A native Canadian, his wife spoke English, as well as French and some Arabic. Believing the relatively close geographical proximity and common language would facilitate representation, we took the case.

We soon discovered that, although our client had lived in Canada for many years, he spoke only Arabic and French, so we also needed a translator. At a subsequent firm meeting, the partners looked around the room and asked if anyone spoke Arabic or French. Just barely into my second year at the firm and quite possibly the most junior person at the meeting, I raised my hand and said that I majored in French in college. I would be the translator.

In November 2004 we filed a petition for writ of habeas corpus on behalf of Ahcene in the U.S. District Court for District of Columbia. In December the government filed a motion to dismiss our petition, along with every other habeas petition, and shortly afterward the Court stayed the case. At that point, we had no idea how long the stay would last, or when the jurisdictional issues would be resolved.

Nevertheless, on March 20, 2005, two partners and I boarded a plane for Guantánamo. The partners, Jim Dorsey and John Lundquist, were in charge of the interview and responsible for taking notes, asking

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questions, and getting our client’s story. I was along to translate. Although I had studied abroad in France during college, I had not spoken much French since then. I hoped I would be able to communicate with our client because otherwise, our entire trip would be a waste.

The following morning, we were taken to Camp Echo, one of the Guantánamo detention camps, to meet with our client. Although we gave advance notice of our visit, Ahcene was not waiting for us when we arrived, and the guards initially brought out the wrong detainee. Finally, we overheard on one of the guard’s radios that “the package has arrived,” and they let us in.

We passed through the triple gates and into a gravel courtyard surrounded by identical small plywood structures, each about the size of a large tool shed. The sheds served as meeting rooms for detainees and their attorneys. The guards led us up the path to a shed where we could meet with Ahcene.

As we walked the last few feet towards the shed, we were not sure what to expect. We were unable to speak with Ahcene before our visit, so we did not know much about his detention or how he felt about being represented by Americans. We had sent him a letter explaining who we were and that we were volunteering to represent him, but we had no way of knowing if he ever received the letter.

We had heard, however, that most detainees were not doing well psychologically and that many did not trust their lawyers, at least not in the beginning. We had also heard that the detainees had virtually no contact with the outside world for three years and had little knowledge of current events. In Ahcene’s case, we did not know if he knew his wife, pregnant the last time he saw her, had since given birth to their first child, a son. Finally, we had been told that the color of a detainee’s uniform would correspond with his level of compliance with prison rules: white for compliant, tan for semi-compliant, and the “non-compliant” detainees would be in orange.

The Military Police (MP) led us into Ahcene’s shed. The shed was air-conditioned, equipped with a surveillance camera, and had one small, narrow window. Ahcene was seated at a table, facing us and the door. His legs were shackled through a bolt in the floor, and his wrists were chained to a belt at his waist. He leaned back in his chair, arms crossed, squinting slightly. Although we were only five feet away, there could have been a
wall between us.

Ahcene was wearing orange.

We asked the MPs to remove the handcuffs, which they did, and Ahcene immediately rubbed his wrists. The MPs pointed out the emergency call button to us one final time and then left, closing the door behind them and leaving us alone with our client.

All three lawyers sat down on the plastic chairs; I sat in the middle, between John and Jim. Ahcene barely moved and did not make a sound as John made the introductions, watching John with silent detachment. When John finished speaking, three sets of eyes turned to me.

I cleared my throat, mulled over John's words, and began to translate, choosing my words carefully. I watched Ahcene to determine whether he understood me and to my relief, he nodded slightly when I finished the introductions. I smiled, optimistic and hopeful that we were getting through to him. I kept my eyes on Ahcene's as John picked up the conversation again.

We met regularly with Ahcene over the next two days. His passive exterior dropped away, and his eyes, which had initially seemed blank or hard, soon became friendly and engaging. He was quick to smile, a warm, toothy grin.

During our meetings, Ahcene told us everything about his background and his time at Guantánamo. When he described the interrogation techniques that had been used, I found it difficult to translate because his descriptions seemed so bizarre; I simply could not believe Americans used such methods. Had I misunderstood his French or had he misunderstood my questions? We later learned the interrogation techniques Ahcene described—including exposure to extreme heat and cold, sleep manipulation and deprivation, and stress positions—not only occurred, but were standard practice at Guantánamo.¹⁴

Ahcene also recounted the story of how he had ended up at Guantánamo. As a result of an ill-fated decision to move to Afghanistan in June 2001, Ahcene and his wife were living in Jalalabad on September 11, 2001.¹⁵ They stayed put when the air campaign began in early

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¹⁵ There is no allegation that Ahcene ever attended any of the Al Qaeda training camps that existed in Afghanistan at that time. The Government's allegations against Ahcene relate to his association with another Algerian while living in
October. After the Northern Alliance began to advance towards Jalalabad following the fall of Mazar-i-Sharif and Kunduz, they fled.\footnote{Dexter Filkins, \textit{A Nation Challenged: The Holdouts; Taliban Negotiating Surrender of Kunduz, Their Last Stronghold in Afghanistan’s North}, N.Y. TIMES, Nov. 15, 2001, at B3.} The couple wisely decided his wife would have an easier time escaping Afghanistan if she were not accompanied by an Arab male, so she left with a neighbor’s wife.

Ahcene meanwhile headed toward Pakistan and soon fell in with a group of other Arab males trying to escape Afghanistan. As the group neared the Pakistani border in the mountains of Tora Bora, two guides approached them and offered to lead them into Pakistan. Sixty of the two hundred men, including Ahcene, agreed. That night, they set out in the darkness and were soon spotted by American warplanes. Within minutes, all sixty were dead or wounded.

During this incident, Ahcene took shrapnel in his right arm. His arm broken, he made his way to a nearby village where the villagers promised to help him. Instead, they turned Ahcene over to the Northern Alliance, who took him to a prison in Kabul. He was later transferred to U.S. custody in exchange for a bounty and kept in American prisons in Kabul and Kandahar before being sent to Guantánamo in early spring 2002.

The surreal—and horrifying—nature of the conversation added a layer of difficulty to translation: how do you say “shrapnel” in French? During these conversations I kept my eyes locked on Ahcene’s, doing my best to understand him and willing him to understand me. I have never maintained eye contact with anybody for such a long time, and this was my first meeting with a client who was chained to the floor. At the end of the day we were all exhausted.

Despite the circumstances, we established a good relationship with Ahcene and acquired a detailed understanding of his story. We also managed to explain habeas corpus and the procedural posture of his case in terms he understood. Yet it was clear that far more significant to Ahcene than our legal discussion was the opportunity to see friendly faces and interact with people who were not MPs or interrogators.

As our final visit drew to a close, the MPs returned to make sure Ahcene was secure and to escort us out. Jim and John said goodbye as...
we stood to leave. I smiled and told Ahcene “au revoir,” then added “à bientôt,” meaning “see you soon.” My goal was to be friendly and reassure him that we were his lawyers and would stay in contact with him. It later occurred to me that we would see him again soon—not in Canada or a courtroom—but at Guantánamo.

Ahcene just smiled back, replied “à bientôt” and waved us away.

We have visited Ahcene five times. He remains at Guantánamo to this day. The Supreme Court has considered the question of ancient habeas and the jurisdiction of the Federal Courts in 2004, 2006, and most recently in 2008, in Boumediene v. Bush.17 Ahcene’s habeas petition, which had been stayed since 2005, is now being litigated as a result of Boumediene.18 He has yet to be formally charged or to appear before a judge.

INTRODUCTION

On January 12, 2002, the day the first detainees arrived at Guantánamo, former Chairman of the Joint Chiefs of Staff, General Richard B. Myers, told the American people that the men at Guantánamo “are people that would gnaw through hydraulic lines at the back of a C-17 to bring it down.” Two weeks later, former Secretary of Defense Donald H. Rumsfeld echoed these comments when he said that the prisoners at Guantánamo were “among the most dangerous, best-trained, vicious killers on the face of the earth.” The message was clear. The people at Guantánamo are dangerous. They are enemies of America and they deserved to be punished.

This was not a knee-jerk reaction. More than three years later, the government’s position was exactly the same. In June 2005, former President George W. Bush told the American people that the prisoners at Guantánamo were “people picked up off the battlefield in Afghanistan. They weren’t wearing uniforms . . . but they were there to kill.” Four days


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4 President’s News Conference with European Union Leaders, 41 WEEKLY COMP.
later, former Vice President Dick Cheney remarked:

The people that are there are people we picked up on the battlefield primarily in Afghanistan. They’re terrorists. They’re bomb-makers. They’re facilitators of terror. They’re members of al Qaeda and the Taliban . . . [T]he 520-some that are there now are serious, deadly threats to the United States, for the most part. If you let them out, they’ll go back to trying to kill Americans.\(^5\)

Again, the message was clear. The men at Guantánamo are terrorists. They pose a deadly threat to all Americans.

In 2009, as Guantanamo entered its eighth year, the message of the Bush administration was exactly the same. On January 13th, 2009—just seven days before the inauguration of President Barack Obama—former Vice President Cheney told the world:

The other key thing that people forget is that we’ve got a couple hundred very bad actors down there. […] But now what’s left, that is the hardcore. And you’ve got to decide what you’re going to do with those folks before you’re going to control—before you’re going to close the facility. These are al Qaeda members. These are people that we captured on the battlefield. These are folks whose main objective in life is to kill Americans.\(^6\)

These statements are not true. There are innocent men at Guantánamo. There are men that were never picked up on any battlefield, never part of al Qaeda or the Taliban, and never intent on harming America. But this is not the worst part of it. A careful review of the evidence suggests that the United States tried to prevent the release of innocent men by falsely designating them “enemy combatants.” When


\(^6\) *Live Interview with the Vice President by Bill Bennett*, Morning in America (Syndicated Radio Broadcast, Jan. 13, 2009).
military tribunals concluded otherwise, the government manipulated the system in order to secure enemy combatant designations.

Perhaps the best—but by no means the only7—example of this is the Uighur prisoners at Guantánamo. The Uighurs are a small subset of twenty-two prisoners at Guantánamo.8 These men idolized the United States.9 They looked to our country for support in their opposition to the Communist Chinese regime that has taken over their homeland and oppressed their people.10 Still, these men were brought to Guantánamo and designated as enemy combatants, despite overwhelming evidence to the contrary.11 Why? In a word: China. It is only through litigation that the truth has emerged. The Uighurs have come to exemplify much of what is wrong with Guantánamo, and the abuse that can occur when executive power goes unchecked.

I. The Uighur People

If you have never heard of the Uighurs, you are not alone. Neither had I until a few years ago, when my law firm agreed to represent several of these men in habeas corpus proceedings. To prepare for their representation, we researched the history of the Uighur people. What we

7 60 Minutes: Five Years (CBS television broadcast, Mar. 30, 2008) (recounting the story of Murat Kurnaz, a German citizen held at Guantánamo for five years even after the FBI, U.S. intelligence and German intelligence found that he had no connection with terrorism).
found surprised us.

Uighurs come from an area known as “East Turkistan” in the Western part of China. Their country fell under Chinese rule in 1949, just a few years after the end of World War II. Since that time, the Uighurs have been subject to severe political, social and religious oppression by the Communist Chinese Government. For example, China enforces a policy that compels Uighur women to undergo abortions and sterilizations. China has also used violence to suppress Uighurs who oppose the government’s political ideology. The Chinese government has an established record of treating ethnic groups who peacefully advocate for independence as terrorists. Just ask the Dalai Lama.

The United States has publicly condemned China’s human rights record with respect to the Uighurs. In fact, the persecution faced by the Uighurs is so well documented that dissidents are routinely granted

12 See Parhat, 532 F.3d at 837 (detailing that the Uighurs are from “the far-western Chinese province of Xinjiang, which the Uighurs call East Turkistan”); for lengthy discussion on the history and origins of the Uighurs and the East Turkistan “issue,” see The History and Development of Xinjiang, 3 CHINESE J. INT’L. L. 629 (2004).
13 World Uyghur Congress, East Turkistan, http://www.uyghurcongress.org/En/AboutET.asp?mid=1107905016 (“In October of 1949, the People’s Liberation Army (PLA) troops marched into East Turkistan, effectively ending the [East Turkistan Republic].”).
14 Press Release from Erkin Alptekin, President, World Uyghur Congress, The 50th Anniversary of the So-Called Xinjiang Uyghur Autonomous Region, (Sept. 30, 2005), http://www.uyghurcongress.org/En/pressrelease.asp?ItemID=1128068692 (Since 1949, “China’s strategic, political and economic objectives in East Turkestan have remained unchanged. The present Chinese leaders are continuing the same policy to transform East Turkistan completely into a Chinese colony, culturally assimilate the Uyghur people, and economically exploit their natural resources”).
16 Id. at 3, 61-62.
The Uighurs at Guantánamo

Our clients fled China in 2000 and 2001 to escape persecution. Eventually, they found their way to the White Mountains of Afghanistan, near the Pakistan border, after receiving word of a Uighur village there. Afghanistan, after all, does not have reciprocity with China.

Many of our clients were only in the village for a few months before the terrorist attacks on September 11th. Thereafter, the United States began bombing the region. In mid-October, the Uighur village was hit, and eighteen survivors fled to the mountains. After running out of food, the men journeyed to Pakistan.

At this time, the United States was paying bounties for Pakistanis who “turned in” a terrorist. During the month of November, the military was dropping leaflets in Pakistan promising a reward for the capture of al Qaeda and Taliban soldiers. One of the flyers read as follows:


21 Id.

22 See Parhat, 532 F.3d at 837.

23 Michelle Faul, Weekender, Cash-rich US buying POWs, Gold Coast Bulletin (Austl.), June 11, 2005, at 7. See also Parhat, 532 F.3d at 837 (noting that the men fled the Uighur village after it had been bombed).

24 Faul, supra note 23.

25 Id.

26 Petition for Immediate Release and Other Relief Under Detainee Treatment Act of 2005, And, In the Alternative, For Writ of Habeas Corpus at ¶ 52,
Get wealth and power beyond your dreams . . . You can receive millions of dollars helping the anti-Taliban forces catch Al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people.27

How many leaflets were dropped? According to former Defense Secretary Rumsfeld, “We have leaflets that are dropping like snowflakes in December in Chicago.”28

In December 2001, all eighteen Uighurs were lured into a mosque by Pakistani villagers.29 That night, they feasted on lamb and went to sleep on the floor. Throughout the night, men were coming in and out of the mosque. The next morning they were arrested by Pakistani security forces, and turned over to the United States military.30 The government reportedly paid $5,000 a head for the men.31

After their capture, the Uighurs were taken to the United States military base in Kandahar, Afghanistan.32 In 2002, after approximately six months, the men were transferred to Guantánamo where they have now entered their eighth year in U.S. custody.33 Ironically, some of my clients told me they were thrilled with the news of the Guantánamo transfer. They thought it meant they were coming to America. No more persecution. Freedom to practice their religion. No more human rights abuses. Now, in 2009, they are still being held without any legal justification.

31 Id.
32 Id. at ¶ 55.
33 Id. at ¶ 62.
III. Evidence of Innocence

A. Government Admissions

In representing the Uighurs, we have uncovered layer upon layer of evidence supporting their innocence. Yes, there are documents such as client statements and newspaper reports. But one does not have to

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34 See, e.g., Testimony of Hozaifa Parhat, Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) Documents at 001466, http://www.dod.mil/pubs/foi/detainees/csrt/Set_18_1463-1560.pdf (“I am not with the Taliban or al Qaida or any other organization. I was teaching and not doing anything else. I didn’t have any activities at all. I never went to any training camp. I was never part of any organization. I never participated in any fighting, confrontation or anything. So if you think it is true that I am an al Qaida member, please go ahead show me the proof.”); see also Testimony of Abu Bakr Qasim, Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) Documents at 001181, http://www.dod.mil/pubs/foi/detainees/csrt/Set_12_1179-1239.pdf (“I am just a worker from Afghanistan, not a soldier. I have nothing political, or any other reason [to be] against Americans . . . I have no religious differences with Americans, since they allow freedom of religion. These eight points I have stated show I have no enmity towards the Americans, and never have. So, I am not an enemy. There is no a [sic] proof that I could work for an organization that hates the United States.”)

35 See, e.g., Tim Golden, For Guantánamo Review Board, Limits Abound, N.Y. Times, Dec. 31, 2006, at A1 (“‘We were shocked that they even sent those guys before the C.S.R.T.’s,’ said one former national security official who worked on the matter. ‘They had already been identified for release.’”); Neil A. Lewis, Freedom for Chinese Detainees Hinges on Finding a New Homeland, N.Y. Times, Nov. 8, 2004, at A17 (In early November 2004, military officials told the New York Times that “at least half of the Uighurs here are eligible for release”); Washington In Brief, WASH. POST, Oct. 29, 2004, at A14 (“Defense officials have authorized the release of a majority of the 22 Chinese Muslims being held at the military prison at Guantanamo Bay, Cuba, the State Department said yesterday. Spokesman Richard Boucher said the Bush administration is trying to relocate the Uighurs, who are from northwest China, to a third country because they do not wish to resettle in China. Boucher said it is unclear whether they would be eligible for asylum in the United States.”); Demetri Sevastopulo, Uighurs Face Return to China From Guantánamo, FINANCIAL TIMES, Mar. 16, 2005, at 14 (“The Pentagon determined last year that half of the two dozen Uighur Chinese captured in the war on terrorism have no intelligence value and should be released. The US [sic] has so far resisted Beijing’s demands for repatriation out of concern that they may be tortured once back in China.”);
rely on these items alone. Since 2003, in a series of public statements, the government has quietly conceded the Uighurs’ innocence:

2007: The United States has made extensive and high-level efforts over a period of four years to try to resettle the Uighurs in countries around the world.

2006: The Uighur [presents] sort of a conundrum—we would like to transfer or release a number of the Uighurs who are in Guantanamo, and—but we have not been able

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36 Gordon England, Sec’y of the Navy, U.S. Dep’t of Defense Special Briefing on Combatant Status Review Tribunals, (Mar. 29, 2005), http://www.globalsecurity.org/security/library/news/2005/03/sec-050329-dod01.htm (“[W]e have Uighurs from China that we have not returned to China, even though, you know, some of those have been deemed, even before these hearings, to be non-enemy combatants . . . ”); Carol D. Leonnig, Chinese Detainees’ Lawyers Will Take Case to High Court, Wash. Post, Jan. 17, 2006, at A3 (“The government acknowledges that the Uighurs were imprisoned by mistake in 2002. Military officials determined in 2004 that they were not enemy combatants and should be released.”).

to find any country in the world that is willing to take them back . . . . And at this point, it’s difficult for us because we’ve been criticized for holding them . . . and yet have not found a country that is willing to help us to take them.\textsuperscript{38}

2005: I think it has been reported we have Uighurs from China that we have not returned to China, even though, you know, some of those have been deemed, even before these [CSRT] hearings, to be non-enemy combatants because of concerns and issues about returning them to their country.\textsuperscript{39}

2004: [T]he Uighurs are a difficult problem and we are trying to resolve all issues with respect to all detainees at Guantanamo. The Uighurs are not going back to China, but finding places for them is not a simple matter, but we are trying to find places for them.\textsuperscript{40}

2003: At the time of my TDY [temporary duty at Guantanamo], [December 2, 2002 - January 16, 2003] . . . US Officials were considering whether to return the Uighurs to the Chinese, possibly to gain support for anticipated US action in the Middle East.\textsuperscript{41}

With statements like these, an attorney might think he has an easy road ahead. After all, how many other Guantánamo attorneys can claim that Colin Powell has publicly proclaimed the innocence of their clients?

\textsuperscript{38} John B. Bellinger, State Dep’t Legal Advisor, State Department Press Center Briefing, Update on U.S. Detainee Policy and Criminal Prosecutions in Iraq (Feb. 15, 2006).


In reality, however, it was just the opposite. Despite these admissions, the government fought tooth and nail to label the Uighurs enemy combatants, and hold them indefinitely at Guantánamo.\footnote{Qassim v. Bush, 407 F. Supp. 2d 198, 200 (D.D.C. 2005).}

B. The Uighur Litigation

1. Qassim v. Bush

Some of the most convincing evidence of innocence comes from the Uighur litigation. The first case, captioned \textit{Qassim v. Bush}, was filed in March 2005 on behalf of two Uighurs.\footnote{Id. at 199.} At the time our team filed the petition, we knew very little about our clients. We did not even know what language they spoke. After waiting months for security clearances, we were granted permission to visit them at the base in July 2005.

What we discovered during our first visit was shocking. The government had already designated our clients as non-enemy combatants.\footnote{ Transcript of Status Conference before the Honorable James Robinson, United States Dist. J., at 7. \textit{Qassim}, 407 F. Supp. 2d 198 (No. 05-497).} This means that even by the government’s standards,\footnote{For example, according to the CSRT procedures, there is a presumption of guilt, and the accused is not allowed to see all the evidence against him.} our clients were innocent of any wrongdoing. In the four months of litigation proceeding our visit, the government had failed to tell us this, even when prompted. Instead, they informed the court that our clients were similarly situated to other detainees and moved for a stay.\footnote{See \textit{Respondent’s Motion to Stay Proceedings Pending Related Appeals and Continued Coordination}, at 2, \textit{Qassim v. Bush}, 466 F.3d. 1073 (D.C. Cir. 2006) (No. 05-497).} We only learned about our clients’ status after a JAG officer at the base informed us.

Upon our return, we moved for the immediate release of our clients.\footnote{Qassim v. Bush, 328 F. Supp. 2d 126, 128 (D.C. Cir. 2005).} After all, both sides agreed these were innocent men. The Government opposed.\footnote{Id.} In doing so, they claimed our clients were \textit{not} non-enemy combatants, but \textit{no longer} enemy combatants.\footnote{Id. at 127-8.} Because they \textit{used to be} enemy combatants, the Government claimed that it could
continue to detain our clients indefinitely or, in its words, “for as long as it takes.” In pursuing this argument, the government was claiming the right to go anywhere in the world and pick up any person—*for any reason, even by mistake*—and imprison that person for the rest of his life.

In December 2005, the judge decided our case. After noting the Government’s “Kafkaesque” reliance on the *no longer* enemy combatant language, the court found that our clients’ detention was illegal, but—and this is a big but—the court found it was powerless to do anything about it.

We immediately appealed. A hearing was set in the Court of Appeals for District of Columbia Circuit for Monday, May 8th, 2006, at 9:30 a.m. I remember all the work we put into those briefs. Innocent men. You cannot hold them forever. Our papers were powerful, and had sparked an interest with the media.

On Friday, May 5th, 2006, at 4:30 p.m.—one business hour before the start of the hearing—the Government filed an emergency motion to dismiss our appeal as moot.

How could our appeal be moot? Because the government had just transferred the men to Albania, along with three other Uighurs that had been designated as non-enemy combatants. Later, the government claimed the timing of the transfer was purely coincidental.

The circumstances surrounding the transfer have never been fully disclosed. We do know however, that Vice President Cheney endorsed Albania for admission into NATO the day after the transfer, a move that would have significant financial benefits for the second poorest country in Europe.

50 Transcript of Status Conference, *supra* note 50, at 18.
51 *Qassim*, 407 F. Supp. 2d at 198.
52 *Id.* at 200-201.
55 *Qassim*, 466 F.3d at 1074.
2. *Kiyemba v. Bush*

In July 2005, we filed a second case in the District Court on behalf of nine Uighur men, captioned *Kiyemba v. Bush*. Unlike *Qassim* however, all but one of these nine men were classified as enemy combatants. This was surprising as all the men in this group had been picked up alongside the very same men who had been sent to Albania. The enemy combatant determinations among the Uighurs were inconsistent.

Like *Qassim*, we did not get factual returns in *Kiyemba*. Instead, our case was almost immediately stayed pending the resolution of other Guantánamo litigation. The Government had yet to produce any evidence supporting the detention of these men. There was little we could do. We appealed the stay, and the case was argued in September 2006. In the meantime, we continued to meet with our clients and gather information.

3. *In re Petitioner Ali*

We are not the only lawyers representing Uighur prisoners. *In re Petitioner Ali* is an original habeas corpus petition filed in the Supreme Court on behalf of a Uighur prisoner. Unlike our cases, Ali successfully obtained a factual return from the District Court, which served as the basis for his petition.

The *Ali* fact record was startling. The record disclosed that in 2003, military officials determined that he “[did] not represent a threat to the United States,” and that “[a]ll efforts should be made to expedite...
Furthermore, the record disclosed that Ali had not one but two Combatant Status Review Tribunal (CSRT) Hearings. His first CSRT concluded that he was not an enemy combatant. Thereafter, the Government undertook an “inculperty search,” presumably to look for evidence justifying his detention, and convened a second CSRT Hearing to assess his status. The second time around, the CSRT panel found that Ali was an enemy combatant. There is no basis in the CSRT procedures for ordering a second CSRT following a non enemy combatant determination.

4. **Parhat v. Gates**

*Parhat v. Gates* was filed in December 2006, under the Detainee Treatment Act of 2005 (DTA). In October 2007—after almost a year of argument and briefing—the Government produced the factual record for most of the *Parhat* petitioners. Finally, after two and a half years of litigation, a factual record! Like the record in *Ali*, the *Parhat* record disclosed that military officials had called for Parhat’s release in 2003.

Upon obtaining the record, we immediately filed a motion for judgment as a matter of law, arguing the record did not support an enemy combatant designation. We won. In June of 2008, the *Parhat* court rejected the Government’s enemy combatant determination and ordered that Parhat be released, transferred, or that a new CSRT be convened.

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68 Id. at 7-8.
69 Id.
70 Id. at 7-8. See also Motion to Dismiss of the United States at 1-2, n.1, *In re Ali*, 128 S. Ct. 2954 (2008) (No. 06-1194).
74 *Parhat*, 532 F.3d at 840.
75 Id. at 837.
76 *Parhat*, 532 F.3d at 854.
The Government waived its right to subject Parhat to a second CSRT, and accepted the court’s non-enemy combatant determination. The only question remaining was release.

Ten days after Parhat was decided, the Supreme Court held in Boumediene v. Bush that Guantánamo detainees had a right to habeas corpus. Suddenly, Parhat had a right to release under habeas in addition to the DTA, and we were back in the District Court.

But what about the other Uighurs? By September 30, the Government conceded the ruling in Parhat applied to all the Uighurs at Guantánamo. After close to seven years in United States custody, and three-and-a-half years of protracted litigation, the Government finally relented, and admitted that all the Uighurs were non-enemy combatants. On October 7, 2008, District Court Judge Urbina ordered the release of these men into the United States.

IV. ENEMY COMBATANT DESIGNATIONS

The Government knew by at least 2003 that most if not all of the Uighurs were not enemy combatants. But it did nothing to correct its mistake. Instead, it put the Uighurs through CSRT hearings and sought to falsely label them as enemy combatants.

The most compelling evidence of this is found in the Ali Petition. Buried in the unclassified record is a critical e-mail concerning the Uighurs. In a message sent to the Chair of Ali’s second CSRT panel, an unnamed military officer wrote:

Two points to consider in determining [Ali’s] status:

16 of 22 Uighurs have been classified as EC and the same criteria applied (Per SPECIAL Uighur Chart) to them

77 The court ordered the government “to release or to transfer the petitioner, or to expeditiously hold a new CSRT . . . ” Id. at 854. After the opinion was issued, the government did not conduct a second CSRT, thereby waiving its right to “expeditiously hold” a new CSRT and accepting the determinations made by the court. Id.
78 See Boumediene, 128 S. Ct. at 2277.
79 Kiyemba v. Bush, FULL CITE, 10/8/08 decision.
80 The Government never produced a “SPECIAL Uighur Chart.”
as well. Inconsistencies will not cast a favorable light on the CSRT process or the work done by OARDEC. This does not justify making a change in and of itself, but is a filter by which to look at the overall Uighur transaction since they are all considered the same notwithstanding a specific act.

By properly classifying them as EC, then there is an opportunity to (1) further exploit them here in GTMO and (2) when they are transferred to a third country, it will be controlled transfer in status. The consensus is that all Uighurs will be transferred to a third country as soon as the plan is worked out.81

The e-mail is troubling on its face. First, it suggests that non-enemy combatant findings are disfavored. This is most clearly demonstrated by the second CSRT convened for Ali. We know of at least one other Uighur who was subject to a second CSRT after the first found him to be a non-enemy combatant.82 This is clear manipulation of the tribunal process in order to secure enemy combatant designations.

Second, the e-mail suggests that the Uighurs—all cleared for release—should be classified as enemy combatants in order for the U.S. to control their transfer. Thus the Government sought to transfer the Uighurs on its own terms, not when justice required it. It is now 2009, and “the plan” still has not been “worked out.”

Third, the email argues that an enemy combatant designation will provide an opportunity to “further exploit” the Uighurs at Guantanamo. It is unclear what “further exploit” means. The Uighurs had no intelligence value whatsoever. Putting that aside, however, the Government’s desire to “further exploit” innocent men has no basis in law.

Another breakthrough in the Uighur cases occurred, oddly


82 Memoranda of J.M. McGarrah, Director of Combatant Status Review Tribunals, Regarding Review of Combatant Review Status Tribunal for Detainee ISN # 328, at 2, n.1 (Department of Defense, Jan. 25, 2005) (noting that detainee had previously been determined not to be an enemy combatant by a previous CSRT).
enough, in a non-Uighur case. In *Hamad v. Bush*, attorneys for the petitioner secured a declaration from an unnamed military official and CSRT tribunal member to support the flaws in the petitioner’s CSRT.

Coincidentally, the same tribunal member sat on a number of Uighur CSRT panels, in which he and his colleagues concluded that the Uighurs prisoners were not enemy combatants. The officer described the military’s reaction to his rulings:

I sat on up to 6 CSRT hearings where there was a unanimous decision that the detainee was a Non Enemy Combatant (“NEC”). In all of those NEC cases, the Command directed that a new CSRT be held or the original CSRT was ordered reopened.

. . .

I participated in two meetings with many other tribunal members in which we were briefed by CID (intelligence) agents who were brought in by Command to explain why the NEC results were wrong. There were discussions after these briefings among the CSRT members and between the JAG officers that this was an attempt to influence the results of CSRT hearings. At the briefing, we were told that inconsistent results in the Uighur cases were a problem.

. . .

In addition to the two general briefings, I participated in a heated conference that included Admiral McGarrah on the telephone. This occurred after the inconsistent decisions in the Uighur cases. Admiral McGarrah was the officer assigned to be the chief administrator of the CSRT process . . . . The conference was to discuss the NEC findings in Uighur cases. The Admiral expressed the desire to obtain more uniformity of result across the

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spectrum of those cases. I recall that I suggested that inconsistent results were good for the system. I explained that based upon my experience of the criminal justice system, with different panels, recorders and personal representatives one could expect different results and that was not a bad thing and would show that the system was working correctly. There was no response from Admiral McGarrah to that statement.86

The Hamad declaration provides further evidence that the Government actively sought to designate the Uighurs as enemy combatants—even when there was no evidence to support such a determination.

**Conclusion**

What bothers me most about the Government’s handling of the Uighurs is not that it made a mistake in picking them up, but that it refused to correct the problem. Rather than admitting its error, and accepting responsibility for its actions, it put innocent men through CSRT hearings in order to label them enemy combatants, and thereby control their release. When it did not receive the determination it wanted, the Government manipulated the process, and ordered the CSRT panel members to do it again. Then, it engaged in years of litigation before admitting that the Uighurs—all of them—are not enemy combatants. In taking these actions, the Government abandoned the core principles that our system of justice was founded upon.

I wish that every American knew the truth about my clients. Often, when I tell someone that I represent Guantánamo detainees, I sense a certain discomfort. I can tell the person assumes all men detained at Guantánamo are terrorists, whatever that means. I tell them about the Uighurs, but many times I sense that people don’t believe me. They think the Uighurs must have done something. They believe that everyone down there poses some sort of threat.

The reason for this, I think, has something to do with the former administration’s handling of Guantánamo. The government went on a

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86 *Id.*
campaign to convince the world that the men at Guantánamo were "the worst of the worst," and that they deserved to be detained indefinitely, on a remote island, beyond the court’s reach. Then, it sought to defend this position at all costs, even in the face of overwhelming evidence to the contrary. In doing so, the Government sacrificed the very principles it was trying to defend, and lost credibility in the eyes of the world.

Now, under the Obama administration, we must rebuild. It starts by admitting mistakes, taking responsibility for our actions, and making sharp decisions that result in real change. Too much time has passed for the Uighurs and for the other men at Guantánamo. I hope for their sake, and for ours, that we finally do what is needed to make things right.
CHALLENGING THE PRACTICE OF TRANSFER TO TORTURE IN U.S. COURTS: A MODEL BRIEF FOR PRACTITIONERS

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With the assistance of the National Security & Human Rights Clinic, University of Texas School of Law

Summary

Since the first detainee of the war-on-terror began to challenge the arbitrary and unlawful nature of their long-term detentions at the U.S. Naval Base at Guantánamo Bay in 2002, U.S. courts have been presented with hundreds of cases challenging the legality of the detainees’ status and treatment under domestic and international human rights law. Additionally, Guantánamo detainees have begun to challenge whether the United States should be transferring them to countries where they may face further long-term, arbitrary detention and likely torture. The practice

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1 The following students from the National Security & Human Rights Clinic, University of Texas School of Law, contributed significantly to the research and writing of this article: Stefanie Collins, Rabea Benhalim, Victoria Lauterbach, Annelies Lottman, Lindsey Stelcen, and Carter Thompson.
of returning aliens to torture is prohibited on an absolute basis by the Convention Against Torture (“CAT”), the 1951 Convention Relating to the Status of Refugees, the International Covenant on Civil and Political Rights (“ICCPR”), and other international human rights instruments. It is also prohibited by the statutes that implement and execute these standards, making them fully a part of U.S. law.

This Model Brief examines the major legal issues associated with these transfer-to-torture practices, and presents and develops the main legal arguments that can be used to challenge unlawful returns to torture that violate CAT and other international and domestic legal standards.² One key argument presented in this brief is that transfer-to-torture challenges are not subject to the same restrictions on judicial review and access to habeas corpus as those that the United States Government has tried to impose on other types of challenges raised under the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006. The other major element of this brief aims to set out the legal arguments on how best to challenge the United States’ use of diplomatic assurances to justify transfers to torture that would otherwise be considered violations of the CAT’s non-refoulement obligations.

Practitioners should keep in mind that the issue of preventing the transfer-to-torture of Guantánamo detainees is just one aspect of the broader problems associated with the United States Government’s more general tendency to avoid compliance with non-refoulement obligations under domestic and international law. The practice of “rendition to torture” (sending terror suspects to foreign jurisdictions to be interrogated and tortured), and immigration officials’ efforts to deport ‘undesirable’ aliens, particularly in cases where a substantial likelihood of torture has been established, provide other examples of how the United States is failing to comply with the non-refoulement requirements of CAT and its implementing legislation. This Model Brief provides several legal theories for challenging these unlawful and unethical transfers.

A number of legal arguments can be used to challenge the unlawful practice of transfers-to-torture of alleged terrorist detainees by the United States in violation of the CAT and other international and domestic laws. Section I addresses concerns regarding the lawfulness

² Not all of the legal issues presented in this brief may be relevant to every claim.
of the habeas-stripping provisions contained in the Detainee Treatment Act ("DTA") and the Military Commissions Act ("MCA") to detainees seeking to challenge their prospective transfers to other countries, where they face likely torture. Section II highlights other binding constitutional obligations that prohibit the practice of transfer-to-torture. Section III emphasizes the common law habeas rights available to Guantánamo detainees seeking to challenge their transfers to countries where they will face likely torture. Finally, Section IV provides an overview of mechanisms that may be used to secure a temporary injunction against transfer-to-torture, pending the outcome of a detainee’s habeas case or DTA appeal. The Model Brief concludes that, under international and domestic law, the United States cannot escape its responsibility to not return suspected terrorist detainees to countries where they face the likelihood of torture.
Challenging the Practice of Transfer to Torture in U.S. Courts: A Model Brief for Practitioners

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INTRODUCTION

In 2004, the Supreme Court issued a landmark ruling in one of the first Guantánamo detainee cases to reach the Supreme Court, holding that U.S. courts have jurisdiction to hear habeas petitions filed by terror suspects held at Guantánamo Bay, based on the fact that Guantánamo Bay is subject to the territorial jurisdiction of U.S. courts by virtue of its special status as a permanent leasehold of the U.S. government, even though it is physically located in Cuba. The Court’s extension of habeas rights to Guantánamo detainees centered on 28 U.S.C. § 2241, the federal habeas corpus statute, which confers statutory habeas corpus jurisdiction over detention challenges raised by prisoners held in U.S. custody. Following the Court’s decision, Congress and the Executive sought to limit the habeas rights and access to the courts of Guantánamo detainees and other suspected terrorists by passing two statutes—the Detainee Treatment Act of 2005 (“DTA”), followed by the Military Commissions Act of 2006 (“MCA”). The unconstitutionality of these efforts to restrict detainees’ rights under the DTA and MCA was confirmed by the Supreme Court on June 12, 2008, in Boumediene v. Bush. The Court held that alien detainees at Guantánamo Bay have a constitutional right to the writ of habeas corpus, and that Congress’ attempt to restrict their access to habeas through the MCA constituted an unconstitutional violation of the Suspension Clause of the U.S. Constitution, which prohibits the elimination of habeas except in times of invasion or rebellion, because the DTA did not provide an adequate and effective alternative to habeas review. By striking down the habeas-stripping provisions of the MCA, the Court again made available to detainees the federal habeas statute, 28 U.S.C. § 2241, which detainees may invoke the statute to challenge the lawfulness of their detentions.

The Court’s ruling in Boumediene has affected a number of other

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8 U.S. Const. art. I, § 9 cl. 2.
issues, ranging from the legitimacy of the procedures used to determine detainees’ “enemy combatant” status in DTA cases,\(^9\) to the rights of detainees to challenge the conditions of their confinement.\(^10\) Whether Guantánamo detainees who have been cleared for release or transfer from detention may be sent to countries where they face likely torture, in violation of the non-refoulement provisions of the Convention Against Torture (“CAT”)\(^11\) and the legislation incorporating the CAT’s prohibition of returns to torture into U.S. domestic law, is another related question that has come to the fore.

Prior to *Boumediene*, a number of detainees sought protection from the D.C. District and Circuit Courts against their prospective transfers. The D.C. Circuit Court held several detainees’ cases in abeyance, prohibiting transfers or refusing to suspend the 30-day notice requirements (which oblige the government to notify detainees at least 30 days prior to transfer), pending the Supreme Court’s resolution of *Boumediene*.\(^12\) The District Court for the District of Columbia also issued

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9 *Bismullah v. Gates*, 514 F.3d 1291 (D.C. Cir. 2008), cert. granted, 128 S. Ct. 2960 (U.S. June 23, 2008). The Court was asked to determine the scope of information that the government is obligated to provide to the Circuit Court for review of detainees’ “enemy combatant” status determinations. The Circuit court held that in order for its review of a Combatant Status Review Tribunal (“CSRT”) determination to be meaningful, the government must provide not only the information about the detainee that had been presented to the CSRT, but also any other information that is reasonably available to the government. The Supreme Court, in granting the petition for certiorari, remanded the case to the Circuit Court for further consideration in light of its decision in *Boumediene*.

10 *Paracha v. Bush*, No. 05-5194 (D.C. Cir. Apr. 9, 2007), cert. granted, No. 07-153, 2008 WL 2484721, (U.S. June 23, 2008). The Supreme Court was asked to address the question of whether the Military Commissions Act of 2006 and the Detainee Treatment Act of 2005 violate the rights of a lawful permanent resident held at Guantánamo to habeas corpus, in violation of the Suspension Clause of the U.S. Constitution and the Fifth Amendment Due Process Clause. The Court remanded the case to the Circuit Court for reconsideration of its dismissal of Paracha’s habeas petition, in light of *Boumediene*.


12 See, e.g., *Zalita v. Bush*, No. 07-5129 (D.C. Cir. Nov. 15, 2007) (per curiam),
similar orders either preventing a detainee’s transfer, or requiring the United States to provide 30-days’ notice prior to a detainee’s transfer.\textsuperscript{13}

Following the \textit{Boumediene} decision, the D.C. Circuit Court, in at least some cases, upheld the 30-day notice requirement by refusing to grant the government’s request that the notice requirement be lifted.\textsuperscript{14} In the single transfer challenge to successfully reach the Supreme Court, a petitioner had sought a writ of certiorari from the Court prior to \textit{Boumediene} to challenge his transfer from Guantánamo to a country where he feared likely torture.\textsuperscript{15} Just two weeks after \textit{Boumediene} was decided, the Court granted the petition and remanded the case for further consideration in light of \textit{Boumediene}.\textsuperscript{16}


\textsuperscript{14} \textit{In re Guantánamo Bay Detainee Litigation}, Misc. No. 0-442 (D.C. Cir. July 10, 2008).

\textsuperscript{15} \textit{Zalita}, No. 07-5129 (D.C. Cir. Nov. 15, 2007) (per curiam), cert. granted, 128 S. Ct. 2956 (June 23, 2008).

\textsuperscript{16} \textit{Id.} Zalita asked the Supreme Court to determine whether alien detainees held
at Guantánamo have the right, under U.S. and international law, to challenge their transfers to countries where torture is likely. The Circuit Court had denied Zalita’s petition for injunctive relief against transfer and dismissed Zalita’s case for lack of subject matter jurisdiction. 2007 U.S. App. LEXIS 9975 (D.C. Cir. Apr. 25, 2007). The Supreme Court granted the petition for cert. and remanded to the D.C. Circuit Court for further consideration in light of Boumediene. Not all transfer challenges have been successful, however. Prior to the Boumediene decision, the Supreme Court rejected a request for injunction against transfer in Belbacha v. Bush, No. 07A98 (U.S. Aug. 10, 2007) (order denying application for injunction).

The Supreme Court also recently considered the transfer issue in the context of U.S. citizens held overseas by U.S. and multinational forces in Munaf v. Geren, 128 S. Ct. 2207 (2008). This Model Brief primarily contemplates the transfer issue as it pertains to aliens detained at Guantánamo Bay, though some of the arguments that may be made in support of aliens challenging their transfers from Guantánamo might also be applicable in various other factual circumstances.

Although the Supreme Court’s decision in Munaf is significant in many respects, this Model Brief takes the position that that ruling does not apply to detainees held at Guantánamo Bay who seek to challenge their transfers-to-torture. In its June 12, 2008 decision, the Supreme Court in Munaf extended the statutory right of habeas corpus to detainees held overseas. Although the Court ultimately declined to prevent the detainees’ transfer to a foreign state, the Court’s holding was limited to the fact that the relief requested by the petitioners in Munaf – release from unlawful executive detention in order to avoid lawful sanctions by a foreign sovereign – could not be granted by the Court via the statutory writ of habeas corpus. The Court did not hold that detainees do not have a right to habeas to challenge their transfers; the Court only narrowly defined the circumstances in which the habeas writ would be granted to challenge certain types of transfers.

In contrast, in its decision in Zalita, which was rendered only 11 days after Munaf, the Supreme Court remanded Zalita to the D.C. Circuit Court to address the transfer-to-torture challenge in light of Boumediene – not in light of Munaf – indicating that the rights afforded to detainees in the Boumediene decision in the context of detention challenges are, similarly, to be accorded to detainees who seek to challenge transfers.

Moreover, in Munaf, the Court held that courts could not prevent the United States from transferring detainees held in U.S. custody to a foreign state for criminal prosecution. 128 S. Ct. at 2220. The detainees in Munaf were both scheduled to be transferred to Iraqi custody for further detention, investigation, and prosecution. Similarly, the petitioner in Zalita was also scheduled to be transferred to the custody of a foreign government for further detention, investigation, and/or prosecution. Yet, even though Zalita was scheduled to be
The lower federal courts are now poised to determine the rights of alien detainees at Guantánamo to challenge transfers to countries where they face likely persecution or torture. *Boumediene* lends substantial weight to detainees’ rights to challenge transfers to torture. Nevertheless, alternative legal arguments, not reliant upon *Boumediene*, strongly support the position that Guantánamo detainees may still effectively challenge transfers to torture using habeas petitions. This Model Brief posits that:

- the language of the DTA and MCA does not effectively eliminate access to habeas for detainees seeking to challenge their transfers;
- the common law writ of habeas corpus remains a viable basis for transfer-to-torture challenges, despite Congress’ attempt to restrict detainees’ access to statutory habeas remedies;
- certain provisions of the DTA and MCA may violate multiple provisions of the U.S. Constitution in the context of transfer challenge cases;
- the unlawful transfer-to-torture of detainees constitutes a violation of both U.S. domestic and international legal obligations, which are absolute in nature and cannot be avoided under any circumstances;
- absent an indication of clear congressional intent, the court-stripping provisions of the DTA and MCA cannot be read to unlawfully void preexisting treaty and statutory obligations; and
- in habeas and DTA appeals cases, detainees may seek an injunction against their transfer in order to preserve federal court jurisdiction over their pending cases.

Set out below are the key arguments in support of these positions.17

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17 Note to Practitioners: This article was originally written prior to the Supreme Court’s decision in *Boumediene v. Bush*, 128 S. Ct. 2229. The article was updated shortly after that decision was rendered, but it has not been substantially updated to include more recent case law—and policy decisions—made regarding the issue of Guantánamo Bay detainees and their legal rights.
ARGUMENT

I. THE HABEAS RESTRICTIONS CONTAINED IN THE DETAINEE TREATMENT ACT AND THE MILITARY COMMISSIONS ACT DO NOT APPLY TO DETAINEE TRANSFER CHALLENGES.

Habeas corpus has traditionally been used as a means of challenging a prisoner’s prospective transfer or deportation to another country. This form of relief existed as a remedy to alien detainees even at common law, when courts permitted prisoners to challenge not only the executive’s authority to detain an individual, but “all issues relating to the legality of the detention.” In some instances, it may be the only means of relief for an alien prisoner held by the United States Government. As a result, any attempt to limit the scope or availability of this relief must be reviewed carefully, and where there exist substantial reasons for believing that the curtailment of habeas corpus is unlawful, those limitations must be challenged.

There are a number of reasons why the statutory restrictions imposed on access to habeas corpus by the Detainee Treatment Act (DTA) and the Military Commissions Act (MCA) cannot be applied

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18 See Section II, infra.
21Pub. L. No. 109-366, 120 Stat. 2600 (2006). The DTA was passed in 2005 as a response to the Supreme Court’s ruling in Rasul, in which the Court held that detainees may invoke the federal habeas statute, 28 U.S.C. § 2241, to obtain meaningful judicial review of the lawfulness of their detentions. Rasul, 542 U.S. at 468. The DTA purported to strip U.S. federal courts of their jurisdiction over pending and future habeas petitions filed by Guantánamo detainees. However, in Hamdan v. Rumsfeld, the Supreme Court limited the reach of the DTA, holding that it only applied to future habeas petitions, leaving intact pending habeas cases. 548 U.S. 557, 575-76 (2006). Shortly thereafter, Congress attempted to limit the Court’s ruling in Hamdan by passing the MCA, which amends the federal habeas statute to eliminate habeas jurisdiction over all detainee habeas petitions. The MCA also places strict limits on the types of challenges that detainees may bring. According to § 7(a) of the MCA and §§ 1005(e)(2-3) of the DTA, detainees may only challenge status determinations made by the CSRTs and final decisions rendered by military commissions. Finally, the MCA funnels detainees’ DTA appeals (DTA §
to challenges involving claims of unlawful transfers-to-torture by Guantánamo Bay detainees. The primary reason is found by looking to the language of section 7(a) of the MCA. Section 7(a) amends the federal habeas statute, 28 U.S.C. § 2241, by stipulating:

(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. 22

That the statutory language of the DTA and MCA cannot be applied to transfer challenges is made evident by examining the relationship between the habeas restrictions implemented by the DTA and MCA, and the U.S. Constitution. The first section of the amended federal habeas statute—§ 2241(e)(1)—was held by the Supreme Court to be unconstitutional in the context of detention challenges. That section is, for the foregoing reasons, also unconstitutional in the context of transfer challenges. Section 2241(e)(1) of the amended federal habeas statute attempts to restrict detainees’ access to habeas corpus, but that restriction, coupled with Congress’s failure to provide an adequate and effective alternative form of judicial review of transfer challenges, renders the restrictions unconstitutional. In passing the MCA, some members of

1005(e)(2)) and military commission appeals (DTA § 1005(e)(3)) through the D.C. Circuit Court.
22 MCA § 7(a) (emphasis added).
Congress recognized that, pursuant to the Suspension Clause, legislators could not restrict access to habeas corpus without providing an “adequate and effective” alternative form of judicial review. The Supreme Court held, however, in the context of detention challenges, that the alternative form of judicial review that Congress did provide under the DTA “is, on its face, an inadequate substitute for habeas,” and therefore unconstitutional.

The inadequacy and ineffectiveness of these alternative procedures is all the more apparent in the context of transfer challenges. By its own terms, the alternative form of judicial review that Congress provided in the DTA applies only to challenges to final decisions rendered by Combatant Status Review Tribunals (“CSRTs”) and military commissions, which are only authorized to address issues involving detention and punishment, but not transfer issues. No alternative form of judicial review is provided for transfer challenges. The inadequacy of this alternative cannot be understated: no alternative to habeas exists for detainees seeking to challenge their transfers. To permit the elimination of habeas without providing an adequate and effective alternative form of judicial review would raise serious Suspension Clause issues. Moreover, the statutory restrictions on habeas corpus only apply to individuals determined to be “enemy combatants” or “those awaiting such determination,” classifications that detainees have consistently challenged, and which are currently being reviewed—and may not be upheld—by the lower courts following Boumediene.

The statutory language of the MCA cannot be applied to transfer challenges. The first section of the federal habeas statute, § 2241(e)(2), attempts to eliminate all access to habeas corpus. The second section of the amended habeas statute, § 2241(e)(2), attempts to limit judicial review over detainees’ claims in “any other action,” including transfer challenges, but it does not explicitly eliminate detainees’ access to habeas to challenge their transfers. While it is unclear whether the Supreme Court invalidated

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23 See Swain v. Pressley, 430 U.S. 372, 381 (1977) (Congress may only revoke access to habeas corpus so long as it provides an adequate and effective form of judicial review). See also note 40 and accompanying text.
25 See, e.g., Parhat v. Gates, 532 F.3d 834, 850 (D.C. Cir. 2008) (“[T]he evidence before the CSRT was insufficient to sustain its determination that Parhat is an enemy combatant”).
§ 2241(e)(2) in *Boumediene*,

it is nevertheless difficult to conclude that § 2241(e)(2) may be construed in such a way as to bar access to habeas corpus for transfer challenges. The Supreme Court requires that any elimination of habeas corpus be clear and unambiguous. This standard is not met by the language of § 2242(e)(2), which does not, by its own terms, explicitly eliminate habeas over transfer challenges. The statutory provisions of the DTA and MCA that restrict habeas and judicial review therefore cannot be applied to transfer cases.

**A. Any Reading of the DTA and the MCA That Accepts Restrictions on Detainees' Access to Habeas in Transfer Challenges Would Result in a Finding That Those Provisions of the Statutes Violate the Suspension Clause and are Unconstitutional in Light of the Lack of an Adequate and Effective Alternative to Habeas in the Transfer Context.**

Significant constitutional issues would be raised if the habeas-stripping provisions of the DTA and MCA are applied to detainees’ habeas transfer challenges without providing an adequate and effective alternative form of judicial review. *Boumediene* clearly emphasizes this point. Under the Suspension Clause of the U.S. Constitution, the writ of habeas corpus "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The MCA amended the federal habeas statute, 28 U.S.C. § 2241, by stipulating:

(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

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29 U.S. Const., art. I, § 9, cl. 2.
have been properly detained as an enemy combatant or is awaiting such determination.\textsuperscript{30}

In passing the MCA and DTA, Congress recognized that unless it made specific findings, in accordance with Suspension Clause requirements, that the United States was under rebellion or invasion, it could not suspend access to habeas without providing an adequate and effective alternative form of judicial review.\textsuperscript{31} To avoid potential Suspension Clause problems, Congress attempted to provide an alternative form of judicial review for detainees in the DTA by authorizing limited access to the courts for detainees to challenge both CSRT decisions concerning their “enemy combatant” status determinations, as well as military commission decisions.\textsuperscript{32} However, this alternative review mechanism applies only to very limited categories of detainees’ challenges, and does not cover transfer challenges, because transfer issues are not associated with CSRT or military commission decisions.

\textsuperscript{30} MCA § 7(a).

\textsuperscript{31} See Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 16 (D.D.C. 2006) (“Neither rebellion nor invasion was occurring at the time the MCA was enacted. Indeed, Congress itself must not have thought that it was ‘suspending’ the writ with the enactment of the MCA, since it made no findings of the predicate conditions, as it did when it approved Lincoln’s suspension in the Civil War and each of the subsequent suspensions in Mississippi, the Philippines, and Hawaii.”). See also Swain, 430 U.S. at 381.

\textsuperscript{32} This alternative form of judicial review, provided in the DTA, is found in sections 1005(e)(2)-(3) of that statute. The MCA preserved these sections of the DTA. In section 1005(e)(2) of the DTA, entitled “Review of Decisions of [CSRTs] of Propriety of Detention”, detainees are permitted to appeal CSRT status determinations to the D.C. Circuit Court of Appeals. That section reads, in pertinent part: “. . . (C) Scope of Review – The [D.C. Circuit Court’s jurisdiction] . . . on any claims with respect to an alien . . . shall be limited to the consideration of – (i) whether the status determination of the [CSRT] . . . was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] . . .; and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.” DTA § 1005(e)(2) (emphasis added). That provision permits appeals only for the purposes of challenging the lawfulness of detention, not transfer. Similarly, section 1005(e)(3) of the DTA permits detainees to appeal final decisions of military commissions in order to challenge their prison sentences, a matter that pertains to detention, not transfer.
In *Boumediene*, the Supreme Court addressed whether the alternative judicial review procedures provided under the DTA are constitutional in the context of detention challenges. In its decision, the Court held that Congress had stripped alien detainees of access to habeas corpus under the MCA without providing an adequate and effective alternative form of judicial review to challenge their detentions, in violation of the Suspension Clause. Thus, it held, the MCA constituted an unlawful suspension of habeas corpus. The Court’s findings are relevant to transfer-to-torture cases, in that detainees facing transfer are not afforded *any* means of judicial review—let alone a factual determination of the likelihood that they will be tortured—of decisions to transfer them. If the MCA effectively violates the Suspension Clause in detention cases, it most certainly violates the Suspension Clause in transfer cases.

In no part of the DTA did Congress provide for any alternative form of judicial review, appellate or otherwise, that permits detainees to challenge the legality of their proposed transfers. The alternative form of judicial review provided by Congress is found in sections 1005(e)(2)-(3) of the DTA. These sections limit the scope of review on appeal to the D.C. Circuit Court, from the final decision of a CSRT or military commission, to only two issues: first, whether the CSRT enemy combatant status determinations or military commission decisions were made in accordance with the relevant Department of Defense standards and procedures; and second, whether those procedures are valid and constitutional. Because neither the CSRTs nor military commissions have the authority to review transfer challenges, the DTA does not provide any appellate review of decisions related to transfer issues. In order to avoid issues of constitutionality, and in order to ensure Guantánamo detainees seeking to challenge their transfers are, like those challenging their detentions, properly afforded meaningful judicial review of their claims, the DTA and

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33 *Boumediene*, 128 S. Ct. at 2274.
MCA must be construed so as not to restrict their access to habeas corpus. To construe those statutes otherwise would raise significant Suspension Clause issues.

Because Congress has sworn to uphold the Constitution, courts will not assume Congress intended to pass a statute that violates the Constitution. Courts have uniformly held they will not interpret a statute so as to infer a congressional intent to restrict access to habeas that is not explicit and apparent on its face, or that would raise constitutional concerns if applied in violation of Suspension Clause standards. The canon of constitutional avoidance requires that if, after examining the language, structure, and purpose of a statute, it is still found susceptible to more than one interpretation, courts will construe the statute in such a way as to avoid substantial issues of constitutionality. If the court finds two equally plausible interpretations of a statute, “it should choose the construction that avoids confronting a constitutional question.” In that process, courts will consider every reasonable interpretation of the statute, so long as the interpretation does not conflict with clear congressional intent. “An interpretation which defeats the stated congressional purpose does not suffice to invoke the constitutional doubt rule, for it is plainly contrary to the intent of Congress.”

35 See St. Cyr, 533 U.S. at 299 (“Congress must articulate specific and unambiguous statutory directives to effect a repeal [of habeas jurisdiction]”; Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. at 482-83 (court will not interpret statute to broadly restrict judicial review of deportation claims absent clear and explicit indication of congressional intent); Hooper v. California, 155 U.S. 648, 657 (1895) (“[t]he elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality.”).

36 See Clark v. Martinez, 543 U.S. 371, 385 (2005) (“The canon … comes into play only when . . . the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them.”) (emphasis in original).

37 Zadvydas v. Davis, 533 U.S. 678, 707 (2001) (Kennedy, J. dissenting); see also St. Cyr, 533 U.S. at 300 (“A construction of [a statute] that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions.”).

38 Zadvydas 533 U.S. at 707 (internal citations and quotations omitted); see also Caminetti v. United States, 242 U.S. 470, 485 (1917) (citations omitted). ([T]he meaning of a statute must…be sought in the language in which the act is framed, . . . and if the law is written within the constitutional authority of the
At least two competing interpretations may be drawn from the text of the DTA and MCA, only one of which avoids constitutionality issues: (1) the DTA and MCA strip federal courts of their statutory jurisdiction over habeas petitions in all circumstances, including transfer cases; or (2) the DTA and MCA cannot be interpreted to strip federal courts of their habeas jurisdiction over transfer challenges, given their failure to provide an adequate and effective alternative form of judicial review in its place. The first interpretation, if adopted, would ultimately require the courts to find that the habeas-stripping provisions of the DTA and MCA are unconstitutional as they apply to transfer cases, because this interpretation would mean that Congress revoked detainees’ access to habeas corpus without providing an adequate and effective alternative to habeas. This was the conclusion that the Supreme Court came to in *Boumediene*, when it addressed the constitutionality of the DTA and MCA as applied to detention challenges. The second interpretation would result in a finding that the DTA and MCA are valid and constitutional only so long as habeas is preserved in the transfer context. This second interpretation is supported by the Supreme Court’s decision in *Boumediene*. The Court held that the DTA and MCA act to effectuate an unconstitutional suspension of habeas in detention challenges, because the alternative judicial review procedures that the DTA provides do not amount to an “adequate and effective” alternative to habeas. Likewise, those alternative review procedures are inadequate in the transfer context, for the reasons explained above. Moreover, there are indications in the legislative history of the MCA that Congress did not intend to restrict detainees’ habeas rights in the transfer context. In these circumstances,
then, the constitutional avoidance principle should be applied, and the courts should interpret the DTA's and MCA's habeas-restricting provisions as inapplicable to transfer cases. Using this approach, section 7(a) of the MCA cannot be read as having eliminated access to habeas in the context of transfer challenges.

B. *The Statutory Language of the DTA and MCA Do Not Explicitly Exclude Habeas Review of Transfer Challenges.*

There are several reasons why the specific terminology of the DTA and MCA cannot be adjudged as providing a basis for restricting or eliminating access to habeas corpus in transfer-to-torture challenges. First, in addition to Congress' attempt to limit detainees' access to habeas corpus by amending § 2241(e)(1) of the federal habeas statute, Congress also tried to prevent detainees from bringing “any other action” against the United States, including transfer challenges, by amending § 2242(e)(2). This restriction on judicial review of detainees’ transfer challenges does not reference habeas corpus. In order for a restriction on habeas to be binding and valid, Congress must explicitly indicate its intent to revoke habeas jurisdiction. No specific reference to the elimination of transfer cases can be found in §2241(e)(2).

Second, the jurisdiction-limiting provisions of the DTA and MCA only apply to detainees properly determined to be an “enemy combatants” or “awaiting such determination.” Neither of these definitions apply to the detainees slated for transfer, many of whom have cleared for release. See *Notes & Comments*, supra note 39.

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The court-stripping provisions included in this legislation would do serious harm to the longstanding rule that the government cannot just imprison people without giving them the opportunity for a fair and impartial determination that the detention is in accordance with the Constitution…. Individuals must always have an avenue to challenge their detention.”); 152 Cong. Rec. S10234-01 (Sept. 27, 2006) (statement of Sen. Durbin) (“[h]abeas corpus allows these people being held for years to ask why they are being held. They are not automatically released, but under habeas corpus they can ask: On what basis are you keeping me as a prisoner?“); 152 Cong. Rec. E1891 (extension of remarks Sept. 28, 2006 of speech Sept. 27, 2006) (statement of Rep. Costello) (“[T]his legislation also contains a provision that would strip Federal courts of their authority to review the detentions of almost all terrorism suspects”) (emphasis added).

41 Status Report Submitted Jointly by Petitioners and Respondents Response to
or transfer, many have been classified as “non-enemy combatants” or “no longer enemy combatants.” Others who have been designated as “enemy combatants” have vociferously contested that classification. Because lower courts are now in the process of reviewing detainees’ habeas and DTA appeals cases to determine the lawfulness of their detentions, the detainee’s designations as “enemy combatants” are not conclusive. As such, Guantánamo detainees cannot be said to fit the definitions in §§ 2242(e)(1)-(2) that would subject them to restrictions on habeas or, more generally, judicial review.

1. While the MCA purports to preclude forms of judicial review in actions including transfer challenges, this provision does not explicitly revoke habeas jurisdiction over such cases.

The courts have strictly required Congress’ obligation, pursuant to the Suspension Clause, to explicitly describe and authorize any restrictions on access to habeas.\textsuperscript{42} Section 7(a) of the MCA amends § 2241(e)(2) of the federal habeas statute by providing that

\begin{quote}
(2) [e]xcept 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.\textsuperscript{43}
\end{quote}

\textsuperscript{42} St. \textit{Cyr}, 533 U.S. at 314 (the absence of an alternative judicial forum “coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law[,] strongly counsels against adopting a construction that would raise serious constitutional questions.”).

\textsuperscript{43} MCA § 7(a) (emphasis added).
As amended, § 2241(e)(2) speaks generally to restrictions on “any other action” relating to “any aspect of the . . . transfer” of detainees, but does not mention habeas explicitly. This is a fatal omission given the courts’ unwavering requirement that any statute restricting access to habeas do so in clear and direct language.  

Section 7(a) of the MCA, therefore, cannot be interpreted to restrict habeas corpus for detainees challenging their transfers. Moreover, considering that the MCA and DTA also attempt to restrict detainees’ access to habeas while failing to provide an adequate and effective alternative, §§ 2241(e)(1)-(2), as amended by the MCA, fail to restrict habeas access for detainees challenging their transfers.

2. The DTA and MCA do not apply to detainees who have been determined to be “non-enemy combatants” or who are “no longer enemy combatants.”

The DTA and MCA apply only to a specific class of detainees, one which does not include many of the detainees who have been cleared for release or transfer from Guantánamo Bay. Congress attempted to eliminate detainees’ access to judicial review by restricting federal courts’ habeas jurisdiction and eliminating altogether the courts’ jurisdiction over detainees’ claims in “any other action.” However, these restrictions on judicial review apply only to claims raised by suspected terrorists determined to be “enemy combatants” or aliens “awaiting such determination.” Many of the detainees at Guantánamo who have been cleared for release or transfer do not fit within this very specific definition. Instead, many have been found to either “no longer meet the criteria of enemy combatants or no longer pose a continuing threat to the U.S.

44 St. Cyr, 533 U.S. at 314.
46 28 U.S.C. § 2241(e)(1) provides, in relevant part, that “[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for the writ of habeas corpus filed by or on behalf of an alien . . . determined . . . to have been properly detained as an enemy combatant or is awaiting such determination.” (emphasis added). 28 U.S.C. § 2241(e)(2) provides, in relevant part, that “no court, justice, or judge shall have jurisdiction to hear or consider any other action . . . relating to any aspect of the . . . transfer . . . of an alien who . . . has been determined . . . to have been properly detained as an enemy combatant or is awaiting such determination.” (emphasis added).
security interests.” At least thirty-eight of 558 detainees were scheduled for release from Guantánamo to foreign states only after being found to be “non-enemy combatants” or “no longer enemy combatants.” There is a strong argument that even for those detainees still considered to be “enemy combatants,” whether or not they have been cleared for release or transfer, their “enemy combatant” status determination is not conclusive. This argument is supported by the Supreme Court’s ruling in Boumediene and subsequent review by the lower courts, at least one of which has found the “enemy combatant” determinations to be based on insufficient evidence. Thus, where a detainee has been certified for transfer or release, and where the detainee’s status as an “enemy combatant” is unresolved, the DTA and MCA cannot deprive that detainee of access to habeas or other forms of judicial review of his transfer challenges because those restrictions only apply to individuals who are “enemy combatants.”

II. THE COMMON LAW RIGHT TO HABEAS REMAINS A VIAL BASIS FOR TRANSFER-TO-TORTURE CHALLENGES IN U.S. COURTS, EVEN IF CONGRESS’ ATTEMPTS TO LIMIT THE AVAILABILITY OF STATUTORY HABEAS RIGHTS IN DETAINTEE CASES ARE ACCEPTED AS VALID.

The Supreme Court’s decision in Boumediene recognized the


49 See Parhat v. Gates, 532 F.3d at 836 (“[W]e cannot find that the government’s designation of Parhat as an enemy combatant is supported by a ‘preponderance of the evidence’ and ‘was consistent with the standards and procedures’ established by the Secretary of Defense, as required by the [DTA]”). See also Al-Marri v. Pucciarelli, 534 F.3d 213, 216 (4th Cir. July 15, 2008) (holding that the petitioner “has not been afforded sufficient process to challenge his designation as an enemy combatant,” and remanding case to lower court for further proceedings).
rights of alien detainees held at Guantánamo to challenge, by way of the common law writ of habeas corpus, the lawfulness of their detentions. That ruling did not directly address the rights of detainees to also challenge their prospective transfers to torture. However, because the common law writ would permit detainees to challenge transfers, the Court’s ruling in Boumediene does not foreclose that option for detainees under the common law writ.

The common law right to habeas corpus, which serves to prisoners from unlawful executive detention and violations of their fundamental right to liberty, pre-dates statutory habeas protections and cannot be restricted by statute. The Supreme Court has consistently recognized that the common law right to habeas corpus exists independently of any statutory habeas right, and when faced with jurisdiction-limiting statutes that attempt to restrict the federal courts’ review of certain issues via statutory habeas petition, the courts have always held that common law habeas remains in effect, and provides a separate and alternative basis for challenging unlawful executive action from the habeas statute. Congress’ attempts to restrict federal courts’ jurisdiction over detainees’ access to statutory habeas under the DTA and MCA do not affect detainees’ rights to common law habeas, particularly in transfer challenges, where the threat posed by the United States to core, constitutionally-protected rights is substantial.

A. **The Common Law Basis for Habeas Jurisdiction Remains Intact, Even If Congress’ Statutory Restrictions On Habeas Access for Guantánamo Bay Detainees are Deemed Applicable in Transfer Cases.**

The DTA and MCA habeas limitations cannot be applied to detainees’ transfer challenges for the reasons outlined in Section I, supra. But even if Congress’ restrictions on statutory habeas rights were applicable to transfer-to-torture challenges—a question never addressed

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50 See, e.g., *St. Cyr*, 533 U.S. at 303-305 (finding historical evidence that the writ was issued to "redress the improper use of official discretion" whether to release or deport an alien, and that "even assuming that the Suspension Clause protects only the writ as it existed in 1789, there is substantial evidence to support the proposition that pure questions of law . . . could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus.")
in *Boumediene*—those restrictions nevertheless fail to revoke detainees’ access to common law habeas protections. The common law writ of habeas corpus, which authorizes judicial challenges to the Executive branch’s actions that amount to unlawful deprivations of liberty and other core rights, exists independently of any statute, and cannot therefore be superseded by any act of Congress.\(^{51}\) The Framers recognized the importance and inviolability of the writ as a means to prevent the government from “enacting arbitrary and vindictive legislation, from encroaching on individual rights, and from usurping the power of other branches of government.”\(^{52}\) In order to preserve the protections guaranteed by the writ, those protections were specifically recognized and protected in the U.S. Constitution.\(^{53}\) By placing the writ of habeas corpus under the protections of the Constitution, the Framers ensured that the limitations placed on the Executive branch could not be abrogated by any statutory restrictions. To ensure that the protections of habeas corpus are not abridged by any branch of government, the preservation of the common law writ is necessary. Without the protections afforded by the constitutionally-protected writ of habeas corpus, the Executive branch

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\(^{51}\) See, e.g., *Boumediene*, 128 S. Ct. at 2246 (“That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension: ‘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.’”) (quoting U.S. Const. art 1, § 9, cl. 2); *Rasul*, 542 U.S. at 476-78 (recognizing the distinction between constitutional and statutory habeas rights); *I.N.S. v. St. Cyr*, 533 U.S. at 305 (refusing to read a statute as completely eliminating the constitutional right to habeas); *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945) (“We are dealing with a writ antecedent to statute, and throwing its root deep into the genius of our common law.”) (internal quotation marks omitted); *McNally v. Hill*, 293 U.S. 131, 135 (1934) (“The use of the writ of habeas corpus as an incident of the federal judicial power is implicitly recognized by article 1, § 9, cl. 2, of the Constitution . . . ”); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 130-31 (1866) (stating that the “suspension of the privilege of the writ of habeas corpus does not suspend the writ itself,” permitting prisoners to petition for a writ while leaving it up to the courts to determine whether or not they have a right to habeas).


\(^{53}\) U.S. Const. Art. I, § 9, cl. 2.
could unlawfully detain and transfer individuals by eliminating judicial review of their actions through statute. As the Supreme Court iterated in *Boumediene*, “[t]o hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not [the Supreme] Court, say ‘what the law is.’”

**B. The Common Law Habeas Protections Properly Apply to Guantánamo Bay Detainees Seeking to Challenge Their Transfers.**

Although the courts have recognized that the common law right to habeas corpus exists independently of any statute, until *Boumediene*, they had not had occasion to define the scope of this constitutional right. In *Boumediene*, the Supreme Court recognized that the constitutional right to habeas includes, at the very least, all of the protections that were available in 1789, when the common law right was first codified under U.S. law, but also noted that common law habeas “was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances.” At common law, the writ of habeas corpus would have extended to individuals, including aliens, detained by the United States in a territory controlled by the U.S. government. Guantánamo Bay, as a territory subject to the jurisdictional control of the United States, is subject to the reach of the common law writ. The Supreme Court also has recognized that aliens, enemies or not, are entitled to invoke the writ. The scope of the common law writ, moreover, would have certainly covered challenges to the lawfulness of detainees’ transfers, as such transfers may well constitute an unlawful deprivation of their right to liberty, exactly the form of injustice that habeas corpus was meant to protect. As such, detainees held at Guantánamo Bay seeking to challenge

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54 *Boumediene*, 128 S. Ct. at 2236.
55 *Id.* at 2248. The first Congress granted U.S. federal courts the authority to issue writs of habeas corpus, as it existed at common law, under the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82.
56 *Id.* at 2267 (citations omitted).
57 *Id.* at 2258; *Rasul*, 542 U.S. at 480.
58 *Boumediene*, 128 S. Ct. at 2262 (“We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantánamo Bay.”).
59 *Id.*
their unlawful transfers to torture may invoke the common law writ of habeas corpus to secure a remedy to the unlawful deprivation of their right to liberty.

1. The common law writ of habeas would have extended to alien detainees held by U.S. officials on territory controlled by the United States.

The Supreme Court has held that, “at the absolute minimum, the Suspension Clause protects the writ as it existed in 1789,” and that extending the right of habeas to aliens detained at Guantánamo Bay is “consistent with the historical reach of the writ of habeas corpus.” The Supreme Court has held that the historical reach of the writ at common law extended to all territories within the control of the government. Guantánamo Bay detainees, therefore, remain subject to the protections of the common law writ of habeas. Moreover, the Supreme Court has held that the common law writ, as it existed in 1789, would have extended to aliens held in U.S. custody. This is true even for detainees who have been classified as “enemy combatants.” The Supreme Court has recognized its authority to grant the writ to alien enemies even in times of war. Thus, regardless of the ultimate classification of detainees subject to transfer to a country where they face likely torture, they are entitled to the common law protections of the writ of habeas to challenge unlawful

60 Boumediene, 128 S. Ct. at 2248; St. Cyr, 533 U.S. at 301 (citations and footnote omitted).
61 Rasul, 542 U.S. at 481-82; see also Boumediene, 128 S. Ct. at 2262.
62 Boumediene, 128 S. Ct. at 2253-55; Rasul, 542 U.S. at 481-82.
63 Rasul, 542 U.S. at 480.
64 Boumediene, 128 S. Ct. at 2262; St. Cyr, 533 U.S. at 301 (“in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens”) (citing inter alia, United States v. Villato, 2 Dall. 370 (CC Pa. 1797) (granting habeas relief to non-enemy alien and ordering his release from U.S. custody)(additional citations omitted)).
transfers by the Executive branch.

2. The scope of the common law habeas writ allows detainees to challenge their transfers from detention.

The common law writ “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.”66 Courts have recognized the flexibility with which the writ may be applied to challenges of unlawful Executive action.67 Particularly where detainees lack any other means for meaningful access to courts to challenge their status and treatment, “the judicial review available by habeas corpus must be wider than usual in order that proper standards of justice may be enforceable.”68

As the Supreme Court has indicated, “[t]he ultimate nature and scope of the writ of habeas corpus are within the discretion of the judiciary unless validly circumscribed by Congress.”69 Because Congress has not “validly circumscribed” the common law writ of habeas by statutory action, the courts’ authority to elucidate the scope of habeas is not preempted by the legislative branch. In cases involving executive detention, where the protections of the writ are strongest, the scope of habeas permits detainees to challenge any issue relating to the legality of their imprisonment.70 In the context of transfer challenges, Guantánamo detainees subject to unlawful transfers to torture—a circumstance that likely involves continued detention where detainees are transferred to the custody of another state—cannot be denied access to the common law writ to challenge the lawfulness of their transfers.

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67 See supra, Section I(B).
68 In re: Yamashita, 327 U.S. at 31 (Murphy, J., dissenting).
69 Id. at 30.
70 See id. at n.14.
III. A NUMBER OF CONSTITUTIONAL ISSUES WOULD BE RAISED IF GUANTÁNAMO BAY DETAINEE ARE DENIED THE ABILITY TO CHALLENGE THEIR UNLAWFUL TRANSFERS-TO-TORTURE IN THE FEDERAL COURTS.

In addition to the Suspension Clause concerns raised in Section I, supra, there are a number of other constitutionally-based problems associated with restrictions on access to habeas in transfer cases. These include Article VI problems associated with the fact that pre-existing treaty-based and statutory standards would be violated by eliminating judicial review of transfer challenges, without the required explicit indication by Congress of its intention to supersede those standards. Additional constitutional problems also include potential due process, equal protection, and separation of powers violations.

The habeas restrictions of the DTA and MCA, if found applicable to transfer challenges, present a major conflict with the non-refoulement requirements of the CAT and its implementing legislation under the Foreign Affairs Reform and Restructuring Act ("FARRA"). Absent a clear congressional intent to restrict treaty and domestic law obligations, the DTA and MCA cannot be interpreted by the courts to prevail over the United States’ pre-existing treaty and domestic law obligations. The DTA and MCA also pose a significant threat to detainees’ fundamental rights, such as the rights to life and liberty. The failure to provide legal mechanisms for detainees to challenge the lawfulness of their transfers presents major constitutional issues under Fifth Amendment due process standards. In addition, the fact that the DTA and MCA habeas-restricting provisions only apply to a particular category of individuals, based on their national origin, presents an additional risk of unconstitutionality as a form of invidious discrimination in violation of the Constitution’s Equal Protection Clause.

The purported elimination of judicial review of detainees’ constitutional and treaty-based claims also threatens the separation of powers between the three branches of government because it denies

71 CAT, supra, note 11.
federal courts the ability to interpret and apply treaty and statutory law to the actions of U.S. officials, a traditional judicial function. FARRA implements the United States’ CAT obligations to ensure that transfers to other countries comply with the CAT’s Article 3 non-refoulement requirements. FARRA obliges all U.S. agencies involved in the transfer or deportation of individuals to foreign countries to enact regulations that bring the U.S. Government into compliance with the CAT’s non-refoulement provisions. It does not appear that the U.S. agencies responsible for detainee transfers have adopted regulations, as required by FARRA. The lack of regulations raises additional questions under CAT and FARRA regarding the lawfulness of the proposed transfers.

All of these considerations must be taken into account by the courts in assessing the applicability and validity of provisions of the DTA and MCA that attempt to prevent individuals from challenging unlawful transfers to torture.

A. Allowing the Elimination of Judicial Challenges to Transfer to Torture Would Unlawfully Void a Pre-Existing Treaty Obligation and Comparable Standards in Implementing Legislation.

Torture is universally recognized and condemned as a violation of international law. Numerous international treaties and standards recognizing this principle have been ratified by Congress and are legally binding and enforceable in the United States, including the Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”), the CAT, and the Geneva Conventions. Because the United States is willingly bound by these


See also Human Rights Committee, General Comment 20, art. 7, ¶9 U.N. Doc. A/47/40 (1992) (interpreting Article 7 of the ICCPR to require that states "not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."); 1951 Convention Relating to the Status of Refugees, art. 33.1, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 152 [hereinafter "1951 Convention"] ("No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."); 1967 Protocol Relating to the Status of Refugees, art. 1(1), 19 U.S.T. 6223, 606 U.N.T.S. 267, entered into force Oct. 4, 1967 [hereinafter "1967 Protocol"] (states party to the Protocol undertake to apply the substantive provisions of the 1951 Convention to situations arising after 1951).

Foreign courts have also recognized the binding nature of the prohibition of torture under international law. See, e.g., Case C-303/05, Advocaten voor de Wereld VZW v. Leden van de Ministerraad, E.C. Framework Decision 2002/584, ¶ 18, 2006 WL 2612698 (2006) (stating that an individual may not be extradited to a country "where there is a serious risk that the person would be subjected to the death penalty, torture, or other inhuman or degrading treatment"); Al-Adsani v. United Kingdom, Eur. Ct. H.R. application no. 35763/97 (2001) (finding that a State's duty not to transfer under the Convention for the Protection of Human Rights and Fundamental Freedoms ("CPHRFF") may be triggered where there is a substantial likelihood that he will be subjected to torture or cruel treatment in the receiving country), http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentld=697762&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649; Soering v. United Kingdom, Eur. Ct. H.R. (ser. A 161) at 35-6 (1989) (holding a State which, in spite of its duty under the CPHRFF, chooses to expel an individual to the second State, will be liable under the CAT in so far as its action directly results in the exposure of the individual to the proscribed ill treatment), http://cmiskp.echr.coe.int/tkp197/view.
treaties and standards, Congress and the courts have the authority, and indeed the legal obligation, to uphold and enforce domestic and international legal prohibitions on torture.

The prohibition of torture encompasses an obligation not to return individuals to countries where they face likely torture. The CAT, a multilateral treaty designed to prevent torture and other forms of cruel, inhuman, and degrading treatment, is particularly relevant in this regard, as Article 3 of that convention contains a clear and specific prohibition of the *refoulement*, or return, of individuals to countries where they are likely to be tortured. The United States signed the CAT on April 18, 1988, and ratified it on October 21, 1994.\(^{75}\) As a party to the CAT, the United States is bound to uphold its Article 3 *non-refoulement*\(^{76}\) obligations. Article 3 states:

(1) 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.\(^{77}\)

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\(^{75}\) The ratification was deposited with the U.N. Secretary General in November 1994. U.N. Doc. 571 Leg. SER E/13.IV.9 (1995).

\(^{76}\) “Refouler” in this context means exclusion or expulsion from a country.

\(^{77}\) The United States understands the phrase “where there are substantial grounds for believing,” contained in Article 3(1), to mean “if it is more likely than not
(2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The CAT’s non-refoulement obligation applies on an absolute basis, and no restrictions on or derogations of these requirements are to be made for any reason.\(^7\) By ratifying the CAT, Congress adopted these obligations as a part of U.S. domestic law and as the supreme law of the land.\(^7\) Moreover, the principle of non-refoulement is universally that he would be tortured.” This “understanding” was included in the U.S. Senate’s resolution of advice and consent to ratification of the CAT. See 136 Cong. Rec. S17, S17904-01 (daily ed., Oct. 27, 1990).

\(^7\) CAT art. 2, § 2 “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”


A separate issue exists as to whether the CAT is self-executing and therefore binding on the United States and its officials, without the need for implementing legislation. Upon ratification of the CAT, the U.S. Senate included a declaration that Articles 1-16 were not self-executing. See SEN. EXEC. RPT. 101-30, Resolution of Advice and Consent to Ratification (1990). While Congress subsequently adopted the non-refoulement requirements of Article 3 of the CAT under U.S. law, see supra note 71, as a general matter, the United States has an international duty to give domestic legal effect to its international obligations. SeeRestatement (Third) of Foreign Relations Law of the United States § 111 cmt. h (1987) (“If an international agreement or one of its provisions is non-self-executing, the United States is under an international obligation to adjust its laws and institutions as may be necessary to give effect to the agreement . . . . There can, of course, be instances in which the United States Constitution, or previously enacted legislation, will be fully adequate to give effect to an apparently non-self-executing international agreement, thus obviating the need of adopting new legislation to implement it.”).

Moreover, the universal prohibition of torture under the law of nations is binding on the United States. See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980) (“[T]here is at present no dissent from the view that the guaranties [to “human rights and fundamental freedoms” under the U.N. Charter] include, at a bare minimum, the right to be free from torture. This
accepted as part of customary international law,\textsuperscript{80} which also is part of U.S. domestic law.\textsuperscript{81} Significantly, the United States has accepted its responsibility to comply with the CAT’s \textit{non-refoulement} requirement by implementing and fully executing Article 3 of the CAT through statutory enactment under FARRA, which states that

\begin{quote}
[i]t shall be the policy of the United States not to expel, extradite, or otherwise affect 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 subject to torture, \textit{regardless} of whether the person is physically present in the United States.\textsuperscript{82}
\end{quote}

The United States has further recognized that this principle of \textit{non-refoulement} “applies to all components of the United States and to all individuals in U.S. custody, including those outside of U.S. territory.”\textsuperscript{83} Nevertheless, the judicial review restrictions of the DTA and MCA would, if upheld, effectively void the United States’ obligations

\textsuperscript{80} See \textit{Siderman de Blake v. Republic of Argentina}, 965 F.2d 699, 717 (9th Cir. 1992) (holding that “the right to be free from official torture is fundamental and universal, a right deserving the highest status under international law, a norm of jus cogens”); \textit{Tel-Oren v. Libyan Arab Republic}, 726 F.2d 774 (D.C. Cir. 1984) (Edwards, J., concurring); \textit{Filartiga}, 630 F.2d at 884 (“[W]e conclude that official torture is now prohibited by the law of nations.”); \textit{see also} Report of the United Nations High Commissioner for Refugees, 40 U.N. GAOR, Supp. No. 12 at 6, U.N. Doc. A/40/12 (1985) (“Due to its repeated reaffirmation at the universal, regional and national levels, the principle of \textit{non-refoulement} has now come to be characterized as a peremptory norm of international law”).

\textsuperscript{81} \textit{The Paquete Habana}, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice . . . as often as questions of right depending upon it are duly preserved for their determination.”); \textit{United States v. Smith}, 18 U.S. (5 Wheat.) 153, 161 (1820) (holding the law of nations against piracy is part of the common law).

\textsuperscript{82} FARRA § 2242(a) (emphasis added).

\textsuperscript{83} U.S. State Dep’t, U.S. Government’s 1-Year Follow-up Report to the Committee’s Conclusions and Recommendations (Oct 10, 2007), ¶ 16 Response, \textit{available at} http://www.state.gov/g/drl/rls/100740.htm.
under CAT and FARRA to prevent the unlawful transfer of individuals to countries where they will more likely than not be tortured. The lack of any means to challenge unlawful transfers, and the lack of any government regulations governing the detainee transfer process, would mean that there is no way to ensure that the United States’ CAT and FARRA obligations are met. Because Congress failed to explicitly state its intent to void the pre-existing treaty and statutory obligations under CAT and FARRA in the DTA and MCA, those subsequent statutes cannot supersede the pre-existing non-refoulement requirements.

Additionally, the United States Government cannot avoid its obligations to uphold CAT and FARRA by using inherently unreliable diplomatic assurances to justify the unlawful practice of transfers to torture. Those diplomatic assurances, as well as the decisions to transfer detainees to situations of torture, must be subject to review by the courts to ensure the United States lives up to its obligations under domestic and international law.

1. Pre-existing treaty and statutory obligations cannot be 
voided by subsequent statutes absent a clear and explicit 
statement of Congressional intent to supersede prior law.

The United States seeks to avoid its non-refoulement obligations under FARRA and CAT by restricting judicial review of transfer cases under the DTA and MCA. As a basic principle of statutory interpretation, the “last-in-time” doctrine permits Congress to revise prior statutory or treaty-based standards with subsequent legislation. However, Congress’ intent to revise pre-existing legislation or treaties must be explicitly and “clearly expressed” in the subsequent legislation. Otherwise, the

84 See infra Section III(E). While two other executive agencies have promulgated regulations in response to FARRA, the Department of Defense, the department with sole responsibility for transfer of detainees, has not promulgated any regulations.


86 See Cook v. United States, 288 U.S. 102, 120 (1933) (holding that “[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed.” The Court refused to interpret a subsequent statute as modifying a pre-existing treaty because the “reports and debates upon the [statute] . . . make no reference to the [treaty].”).
competing provisions of the subsequent legislation will fail to supersede those of the prior treaty or statute. A subsequent statute will likewise not abrogate a pre-existing treaty if the statute fails to meet the constitutional standards in some other respect. A conflict between the standards set out in prior and subsequent treaty or statutory enactments, without an explicit indication of congressional intent to amend or limit prior treaty or statutory standards, is not a sufficient basis to void pre-existing treaties or laws.

Applying these principles to the detainee transfer situation, the courts should not allow the judicial review restrictions of the DTA and MCA to produce what amounts to a sub rosa repeal of the non-refoulement requirements of the CAT and FARRA, absent a clear and unambiguous indication that elimination of these core requirements was something Congress specifically intended and articulated. Congress gave no indication that it intended the judicial review restrictions of those statutes to authorize voiding the non-refoulement prohibitions of CAT and FARRA.

The DTA and MCA purport to restrict all forms of judicial review over detainees’ transfer challenges, whereas the CAT and FARRA contemplate that prospective transferees shall receive meaningful judicial review and protection of the decision to transfer. These restrictions cannot be imposed absent clear congressional language indicating Congress’ intent to repeal these prior treaty and statutory mandates. There is no indication that Congress intended for either the DTA or the MCA to void the United States’ treaty or domestic law obligations under the CAT or FARRA. The only limitation placed on detainees’ ability to invoke U.S. treaties is contained in § 5(a) of the MCA, which prevents any person from invoking the Geneva Conventions in a civil or habeas action against the United States or its agents or officials. Clearly, Congress was aware of its power to restrict judicial review of treaty obligations at the time the MCA was passed. If Congress had intended to restrict detainees’ ability to press claims under CAT or FARRA, it would have explicitly recorded its intentions. However, no such congressional intent is reflected

87 See Reid v. Covert, 354 U.S. 1, 18 (1957).
88 See Section I, supra.
89 See, e.g., Cornejo-Barreto v. Seifert (Cornejo-Barreto I), 218 F.3d 1004, 1013 (9th Cir. 2000).
90 Cook, 288 U.S. at 120.
in the DTA or MCA. Allowing the DTA and MCA habeas-restricting provisions to void Article 3 would present an inherent conflict with the treaty standards set out in the CAT and the statutory standards provided in FARRA, and would fail to satisfy the doctrine of “clear congressional intent.”

2. The United States Government may not use diplomatic assurances as a means of avoiding its non-refoulement obligations under domestic and international law.

The United States cannot rely on diplomatic assurances to justify unlawful transfers to torture, or to avoid its compliance with the non-refoulement requirements of CAT and FARRA. One of the arguments made by the U.S. Government to justify its decisions for the transfer-or removal-to-torture of aliens, while avoiding judicial review of those decisions, is that “diplomatic assurances” obtained from the receiving state require that state to treat returnees fairly and without abuse, and therefore sufficiently guarantee against any harm to the transferee.91 The United States has made this argument even in cases where courts have made specific findings that torture would be likely.92 In those instances, the use of, and reliance upon, diplomatic assurances violates the absolute prohibition in CAT and its implementing legislation against returns to torture. Judicial review of the use of diplomatic assurances is required in


cases where individuals are able to demonstrate they will more likely than not be subjected to torture upon return to a foreign state. The decision to transfer an individual to a situation of torture cannot be left to the control of one branch of government, without any judicial oversight guaranteeing that the U.S. Government is acting in accordance with its statutory and treaty obligations.

a. **Diplomatic assurances cannot be used to restrict or eliminate the absolute right to not be returned to torture.**

The United States Government often relies on diplomatic assurances as a basis for carrying out transfers of detainees, whereby the receiving state—even those with well-documented histories of human rights abuses—is merely asked to confirm that it will not torture the transferee. This has been the practice not only in transfer cases, but also in extradition and immigration cases. The reliance on diplomatic assurances, when

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93 In the immigration context, this approach has been institutionalized in the regulations of the Department of Homeland Security, which contain a provision under 8 C.F.R. § 208.18(c) that authorizes returns or removals of aliens based on the receipt of diplomatic assurances that no torture will take place. 8 C.F.R. § 208.18(c)(1) specifically permits the Secretary of State, in the immigration context, to secure diplomatic assurances from the receiving state that the deportee will not be tortured. The Secretary of State and the Attorney General will review the assurances to determine their reliability. However, judicial review of CAT claims may only be had after a final order of removal is made pursuant to the Immigration and Nationality Act, § 242, 8 U.S.C. § 1252, see FARR § 2242(d), 8 U.S.C. § 1231; although no regulations are in place for the review of diplomatic assurances. But see Khourzam, 529 F. Supp. 2d at 559-61 (holding that the Executive Branch’s reliance on diplomatic assurances is judicially reviewable).

In the extradition context, 18 C.F.R. §§ 3184-3186 allows the Secretary of State to decide, after a preliminary finding by a judicial officer that an individual is extraditable, whether or not to extradite that individual. The regulations do not specifically provide that the Secretary may, upon a claim of imminent torture raised by the extraditee, seek diplomatic assurances. However, it is possible that the Secretary might nevertheless do so pursuant to 22 C.F.R. § 95.2(b), which allows the Secretary to determine “whether a person facing extradition from the U.S. ‘is more likely than not’ to be tortured in the State requesting extradition.” The Department of State has devised a set of guidelines
individuals have demonstrated that they will likely be tortured upon their transfer, violates the United States’ *non-refoulement* obligations under the CAT and FARRA. Because diplomatic assurances are frequently sought from countries with known torture practices and records of human rights abuses, reliance upon diplomatic assurances received from those countries is highly problematic. However, the requirements of FARRA and of Article 3 of the CAT prohibit the government from relying on diplomatic assurances when doing so would result in the return of an individual to a state where he more likely than not will be tortured.  


If the Secretary does decide to extradite based on diplomatic assurances, whether judicial review may be had over the extradition decision and the reliability of the diplomatic assurances is a question still up for debate. Compare *Hoxha v. Levi*, (*Hoxha II*), 465 F.3d 554, 564-65 (3d Cir. 2006) (leaving open the possibility that an alien may challenge the Secretary’s decision to extradite him under the Administrative Procedures Act (“APA”)); *Prasoprat v. Benov*, 421 F.3d 1009, 1016 n.5 (9th Cir. 2005) (recognizing the possibility left open by FARR that an individual may be able to challenge the Secretary’s decision to extradite him via a habeas petition); *Cornejo-Barreto I*, 218 F.3d at 1013 (Secretary of State’s decision to extradite is reviewable under the APA), disapproved by *Cornejo-Barreto v. Siefert* (*Cornejo-Barreto II*), 379 F.3d 1075, 1083 (9th Cir. 2004) (the holding in *Cornejo-Barreto I*, that the Secretary’s extradition decision is subject to judicial review, was non-binding dicta), vacated by *Cornejo-Barreto v. Siefert* (*Cornejo-Barreto III*), 389 F.3d 1307 (9th Cir. 2004) (en banc) (vacating *Cornejo-Barreto II* and denying the government’s request to vacate *Cornejo-Barreto I*); with *Hoxha v. Levi* (*Hoxha I*), 371 F. Supp.2d 651, 660 (E.D. PA 2005) (Secretary retains sole discretion whether to refuse to extradite based on humanitarian grounds), *aff’d by Hoxha v. Levi*, 465 F.3d at 564-65. See also 22 C.F.R. § 95.4 (Secretary’s decisions “concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review.”).

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the Department of Defense, in conjunction with the State Department, might seek diplomatic assurances from a foreign state prior to transferring a Guantánamo detainee, the agencies are required to uphold the United States’ obligations under Article 3 of the CAT, and may not rely on diplomatic assurances to circumvent the United States’ absolute duty not to return individuals to countries where they likely will be tortured.

b. U.S. “policy and practices” that authorize the use of diplomatic assurances are inconsistent with the non-return protections of the treaty and statutes they are designed to implement.

The Department of Defense’s policy of seeking diplomatic assurances to support decisions to transfer individuals to countries where they will face likely torture is inconsistent with the United States' obligation not to return individuals to situations of torture. According to the Deputy Assistant Secretary of Defense for Detainee Affairs, the Department of Defense will seek diplomatic assurances after a decision to transfer an individual has been made. Assurances are sought even in instances where serious concerns arise regarding the treatment and possible torture of a detainee. The Department of Defense, in conjunction with the State Department, recognizes the need to consider the individual risk faced by transferees in deciding whether to transfer or to obtain diplomatic assurances. However, there are no formal procedures by which a detainee may challenge the decision to transfer him or the reliability of the diplomatic assurances.

Article 3 of CAT, and the requirements of FARRA, prohibit on an absolute basis the transfer of persons to countries where they will “more likely than not” be tortured. Art. 2(2) of CAT states that “[n]o
exceptional circumstances whatsoever, whether a state of war or a threat
or war, internal political instability or any other public emergency, may be
invoked as a justification of torture.” Diplomatic assurances obtained in
spite of the non-refoulement obligations of CAT and FARRA are especially
unreliable when received from countries that have well-documented
records of systemic human rights abuses (including torture), where
an individual’s likelihood of torture can be sufficiently demonstrated,
or where the United States cannot adequately monitor an individual’s
treatment by the receiving state upon transfer.

The problematic nature of such unreviewable decisions is
demonstrated by the case of Maher Arar, a Canadian-Syrian citizen who
was detained by the United States and then transferred to Syria, based
on the receipt of diplomatic assurances from Syria that he would not be
tortured if transferred there. Mr. Arar repeatedly told U.S. authorities that
he would be tortured upon being returned to Syria, but was not provided
any opportunity to challenge the decision to transfer. Mr. Arar was
tortured by Syrian authorities for a period of approximately ten months.
The United States’ reliance upon assurances in these situations would
constitute a violation of Article 3 of CAT, FARRA, and international law.
For these reasons, the Department of Defense’s practice of relying on such
assurances cannot be permitted.

c. The CAT and FARRA oblige U.S. courts to
independently review the United States’ transfer
decisions and to determine both the validity of the
practice of using diplomatic assurances, and their
reliability in concrete cases.

In addition to the United States’ obligation to refrain from
relying on diplomatic assurances to justify transfers to torture, the U.S.

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98 Rendition to Torture: The Case of Maher Arar: J. Hearings Before House Subcomm.
on Intl Org., Human Rights, and Oversight and House Comm. on the Judiciary: Subcomm. on the Constitution, Civil Rights, and Civil Liberties, 110th Cong., 118 and 110th Cong. 52 (2007) (statement of Maher Arar), transcript available at
http://foreignaffairs.house.gov/110/38331.pdf (the United States is not alone in having conducted transfers based on unreliable diplomatic assurances; victims of rendition were denied the ability to challenge the decision to
transfer).
Government also is required, under domestic and international law, to provide “legislative, administrative, judicial or other” effective measures to prevent acts of torture.99 This requirement applies under any circumstance, regardless of whether a state faces “a state of war or a threat or war, internal political instability or any other public emergency.”100 The obligation applies not only under CAT, but also under U.S. domestic law. Under U.S. law, an act of Congress “ought never to be construed to violate the law of nations if any other possible construction remains.”101 This rule, known as the Charming Betsy canon, requires courts to interpret statutes consistent with international law, to the extent possible. The MCA and DTA fail to expressly abrogate the requirement of CAT that states take effective measures to prevent acts of torture. To avoid constitutionality issues, those statutes must therefore be interpreted to provide for judicial review of transfer decisions, in keeping with the requirements of CAT and FARRA.

Under Section 2242(d) of FARRA, which addresses courts’ jurisdiction over CAT claims, courts may conduct habeas review of CAT claims. Section 2242(d) provides that,

[n]otwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section “shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252)."102

While FARRA restricts judicial review of the legality of the regulations enacted by “appropriate agencies” (“except as part of the review of a final order of removal”), it does not prevent the courts from reviewing the

99 CAT art. 2 § 1.
100 Id., art. 2 § 2.
101 Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
102 FARRA § 2242(d).
validity of the transfer decisions themselves. It also does not prevent review of the bases for those transfer decisions, including the Executive branch’s reliance on diplomatic assurances to justify transfer decisions.

Section 2242(d), moreover, permits courts to address CAT claims through habeas petitions. In *Cornejo-Barreto v. Seifert (Cornejo-Barreto I)*, the Ninth Circuit held that § 2242(d) did not strip the court of its habeas jurisdiction to review CAT claims because that provision did not sufficiently indicate congressional intent to strip courts of such jurisdiction.103 Although this decision was rendered prior to the passage of the REAL ID Act of 2005,104 which amended the Immigration and Nationality Act (“INA”) so as to prevent aliens from filing CAT claims via habeas petitions to challenge their deportations—except pursuant to review of a final order of removal105—the same analysis utilized in *Cornejo-*

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103 218 F.3d 1004 (9th Cir. 2000).
104 Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231. The REAL ID Act limits the circumstances under which an alien may file a CAT claim to challenge the decision to remove him to a foreign country. Rather than allowing aliens to challenge their prospective removal via a habeas petition, the REAL ID Act only permits such challenges to be raised via a petition for review of a final order of removal. 8 U.S.C. § 1252(a)(4)-(5). However, the limitations of the REAL ID Act implicitly do not apply to Guantánamo Bay detainees. For one, when transferring detainees from Guantánamo Bay to a foreign country, the United States Government admittedly follows procedures different than those typically used in alien deportation cases. See Waxman Declaration, supra note 94. Moreover, the Immigration and Nationality Act (“INA”), provisions of which are amended by the REAL ID Act, applies to aliens entering or being deported from the United States. See, e.g., 8 U.S.C. §§ 1101(a)(4), (13)(A), and (47); § 1101(g). Under the INA, “United States” is defined as “the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.” 8 U.S.C. § 1101(a)(38). On its face, this definition does not include the Guantánamo Bay Naval Base. Thus, the INA, and any amendments made thereto by the REAL ID Act, do not apply to the transfer of detainees from Guantánamo Bay, a territory outside the United States for purposes of those statutes. Any limitations placed by the REAL ID Act on the availability of habeas corpus to aliens should not be construed to affect detainees held at Guantánamo Bay. Such a conclusion permits detainees to challenge the lawfulness of their prospective transfers via habeas petitions.

105 See, e.g., *Khouzam*, 549 F.3d at 244 (“[W]e agree with the Government that Congress spoke with sufficient clarity in the REAL ID Act to remove habeas jurisdiction over this matter. While this would ordinarily present a Suspension Clause problem, we do not reach the issue because, as discussed below, this
Barreto I applies in the transfer context. As explained in Section I, supra, Congress did not explicitly revoke detainees’ access to habeas corpus for purposes of challenging their transfers. Moreover, as further explained in Section II, supra, even if detainees’ access to habeas was suspended by Congress, legislators have not provided an adequate and effective alternative form of judicial review for transfer challenges, and as a result, any attempt to revoke access to habeas corpus for detainees must be found to violate the Suspension Clause of the U.S. Constitution. Under either rationale, access to habeas corpus continues to exist for detainees, and may be used as a means of raising CAT claims to challenge their prospective transfers. Review of CAT claims under FARRA, pursuant to a habeas petition, therefore falls squarely under the judiciary’s power of review.

The Supreme Court’s recent decision in Munaf v. Geren is not to the contrary. The Supreme Court’s cursory review of the petitioners’ transfer-to-torture claims in that case did not result in a decision that would preclude judicial review of detainees’ CAT claims under FARRA. The Court’s review of the transfer-to-torture issue was limited to cases in which U.S. citizens face transfer to a foreign country for criminal sentencing. The Court’s holding did not address the question of whether CAT claims may be raised under FARRA through a habeas petition because,

[106]either petitioner asserted a FARR Act claim in his petition for habeas, and the Act was not raised in any of the certiorari filings before [the Supreme] Court. Even in their merits brief in [the Supreme] Court, the habeas petitioners hardly discuss the issue. The Government treats the issue in kind. Under such circumstances we will not consider the question.”

106 Munaf, 128 S. Ct. at 2226 (internal citations omitted).

Although the Court indicated, in a footnote, that several issues would have to be addressed if the petitioners’ CAT claims were heard on the merits, none of those issues would preclude judicial review of CAT claims raised under FARRA, via a habeas petition, for Guantánamo detainees seeking to challenge their prospective transfers. First, the
language of FARRA applies to individuals who are scheduled to be “returned” or “expelled” to a foreign country. *Munaf* petitioners, because they are already detained in Iraq and are scheduled to be transferred to the custody of the Iraqi government, would not be “‘returned’ to ‘a country’—[they] are already there.” Guantánamo detainees, on the other hand, would be “returned” or “expelled” to a foreign country, permitting them to invoke the protections provided under those laws to prevent unlawful transfers to torture. Second, although FARRA does not, in and of itself, grant jurisdiction to federal courts to hear CAT claims, the Court did not address the fact that federal courts nevertheless have habeas jurisdiction to hear CAT claims raised under FARRA. As a result, detainees may invoke their right to habeas corpus to challenge the lawfulness of the U.S. Government’s decision to transfer them.

Not only may detainees challenge their unlawful transfers to torture in U.S. courts, but they may also challenge any decision by the U.S. Government to transfer them based on diplomatic assurances received from the foreign state to which they are to be sent. The U.S. Government may not circumvent its responsibility under CAT to provide effective judicial oversight of transfer decisions by using secret diplomatic assurances to evade judicial review of decisions to transfer an alien to another country. Judicial review of transfer decisions must be afforded, particularly where diplomatic assurances are relied upon to support the decision to transfer an individual to a country where it has been shown he will more likely than not be tortured in violation of his basic and fundamental rights to life and liberty. Permitting transfers based on unreliable and judicially unreviewable diplomatic assurances would be contrary to the intent of Congress to specifically implement the United States’ non-refoulement obligations under CAT and FARRA and to make them judicially enforceable. Although some level of judicial review of CAT claims is available under FARRA, the United States has thus far failed to implement any formal procedures providing for judicial review.

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107 Id. at 2226, n.6.
108 See supra notes 109, 110, and 106, and accompanying text.
109 See, e.g., *Khouzam*, 529 F. Supp. 2d at 562 (“There is no evidence that Congress believed that the Executive could trump a judicial determination . . . on the basis of a secret diplomatic assurance. Nor did Congress indicate that the Executive could circumvent processes intended to assure our nation's compliance with its treaty obligations.”).
of the reliability of diplomatic assurances, but has, instead, left it to the Executive Branch to make these determinations. The United States' full compliance with CAT and FARRA necessarily requires that courts examine the reliability of diplomatic assurances received by the United States Government that are used as a basis for transfer determinations.

A number of other countries have allowed courts to review the reliability or sufficiency of diplomatic assurances. Until recently, however, the United States was the only country that did not provide “the right to challenge the reliability and sufficiency of diplomatic assurances against torture before an independent, impartial body.” At least one circuit court has recognized the right of aliens to challenge the sufficiency and reliability of diplomatic assurances relied upon by the United States Government to justify returning them to a foreign state where they face likely torture. In Khouzam, the Third Circuit Court of Appeals recognized that the REAL ID Act revoked aliens’ access to habeas corpus, but declined to determine whether this deprivation, coupled with the United States’ failure to provide any form of meaningful process to challenge their deportations, constituted an unconstitutional violation of the Suspension Clause. Instead, the court held that aliens have a right to due process, which requires the United States to provide constitutionally

110 See supra note 92. See also Khouzam v. Attorney General of the United States, 549 F.3d 235, 255 (3rd Cir. 2008) (“FARRA does not contain a provision for removal based on diplomatic assurances, and does not address what level of process is due to someone in Khouzam’s position. . . . Rather, Congress left the specific issue of CAT procedures to the Executive Branch by way of the authority to regulate.”) (citation omitted).


112 Id.

113 Khouzam, 549 F.3d at 257-59 (holding that the government’s failure to provide an alien with constitutionally sufficient means with which to challenge the reliability of diplomatic assurances that serve as the basis for his removal constitutes a violation of due process and substantially prejudices the alien).

114 Id. at 244, 258-59. Prior to passage of the REAL ID Act, aliens could raise CAT claims pursuant to a petition for habeas. See, e.g., Cornejo-Barreto I, 218 F.3d 1004. However, the REAL ID Act revoked access to habeas corpus, at least for aliens challenging their deportation. See supra note 106. For a number of reasons, this Act cannot be construed to apply to detainees held at Guantánamo Bay. See id. and accompanying text.
sufficient review of those diplomatic assurances.\textsuperscript{115} Although the court’s decision pertained to the rights of aliens in the deportation context, its conclusion—that persons subject to be transferred to another country, where they face likely torture, have a right to challenge the reliability of diplomatic assurances upon which their transfer is based—applies equally to detainees held at Guantánamo Bay. As explained in Sections I and II, \textit{supra}, detainees have a right to habeas corpus to challenge violations of their rights under the Constitution and the laws of the United States. The right to habeas corpus necessarily entails the right to challenge the sufficiency of diplomatic assurances relied upon by the U.S. Government to justify their transfers. Moreover, as discussed in Section III(B), \textit{infra}, detainees held at Guantánamo Bay have a right to due process, which, as demonstrated in \textit{Khouzam}, requires the United States Government to provide constitutionally sufficient process to allow detainees to challenge the reliability of diplomatic assurances received from foreign states. Notably, the Supreme Court recognized the need for judicial review of the basis for transfer decisions in \textit{Munaf}. The Court recognized that in cases in which the likelihood of a detainee’s torture is evident and “well documented, even if the Executive fails to acknowledge it”\textsuperscript{116} and “decides to transfer him anyway,” the courts may extend relief to prevent the detainee’s transfer to torture.\textsuperscript{117} Any attempt by the United States to rely on diplomatic assurances to evade judicial review of transfer decisions cannot be maintained in light of its obligations under domestic and international law.

The U.N. Committee Against Torture (“CAT Committee”), which is the U.N. committee responsible for monitoring implementation of the CAT by state parties and interpreting the provisions of the CAT, has also expressed its view that the transfer of an individual to a country where he faces likely torture, without the opportunity for “the intervention of a judicial authority,” would constitute a deprivation of that individual’s rights.\textsuperscript{118} The CAT Committee has further stated that, lest the protections contained within the CAT be rendered illusory.

\textsuperscript{115} \textit{Khouzam}, 549 F.3d at 259.
\textsuperscript{116} \textit{Munaf}, 128 S. Ct. at 2226.
\textsuperscript{117} \textit{Id.} at 2228 (Souter, J., concurring).
the prohibition on refoulement contained in article 3 should be interpreted the same way to encompass a remedy for its breach, even though it may not contain on its face such a right to remedy for a breach thereof . . . accordingly, the right to an effective remedy contained in article 3 requires . . . an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise.119

The Committee stated, furthermore, that failure to provide neutral oversight of transfer decisions could result in a violation of Article 3 of CAT.120 Based on the United States’ previous attempts to limit or eliminate judicial oversight of the use of secret diplomatic assurances, the CAT Committee has made specific recommendations that the United States “establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review.”121 The Committee’s decisions are entitled to respect, and may be used to interpret the CAT, even though the United States has not acknowledged the Committee’s authority to issue decisions legally binding on the United States.122

In cases where diplomatic assurances are obtained and used as a basis for a transfer decision, where detainees can demonstrate that they will more likely than not be tortured upon transfer, courts review diplomatic assurances that are used to undergird the transfer decision.

119 Agiza, Comm. No. 233/2003 at ¶13.6-7 (citing Arkauz Arana at ¶¶ 11.5, 12).
120 Id. at ¶13.6-7.
d. The rule of non-inquiry does not prevent the courts from examining the risk of torture that detainees face in being transferred.

One of the justifications frequently cited by the U.S. Government in circumventing judicial review of its decisions to transfer individuals is that courts are ill-equipped to determine the likelihood of torture that an individual will face upon his return to a foreign country.\(^{123}\) The government premises its opposition to judicial review on the rule of non-inquiry, a common law principle that stems from separation of powers concerns regarding the courts’ capacity to adjudicate matters that touch on foreign policy.\(^{124}\) The government invokes the rule to prevent courts from inquiring into matters it believes are strictly within the purview of the political branches. The government has argued that the rule of non-inquiry prevents courts from reviewing the reliability of diplomatic assurances, a position which, if accepted, obstructs the judicial review of transferees’ CAT claims not only in deportation and extradition cases, but also in transfer cases.\(^{125}\) The rule of non-inquiry is not absolute, however,

\(^{123}\) See, e.g., Matter of Requested Extradition of Smyth, 61 F.3d 711, 714 (9th Cir. 1995) (“[C]ourts are ill-equipped as institutions and ill-advised as a matter of separation of powers and foreign relations policy to make inquiries into and pronouncements about the workings of foreign countries’ justice systems”); Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990) (“The interests of international comity are ill-served by requiring a foreign nation . . . to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced”). The U.S. Supreme Court’s decision in Munaf v. Geren does not lend any weight to the government’s arguments, at least as they pertain to Guantánamo Bay detainees. 128 S. Ct. 2207. In Munaf, the Supreme Court stated that a detainee’s likelihood of torture is a matter “for the political branches, not the judiciary, to assess . . . .” Id. at 2225. However, that statement was made only with regard to cases involving the transfer of U.S. citizens to foreign countries for criminal prosecution or sentencing. In fact, the Supreme Court left open the possibility that U.S. courts would play a role in determining a detainee’s likelihood of torture upon transfer. See supra note 77, and accompanying text.

\(^{124}\) United States v. Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997) (the “rule of non-inquiry, like extradition procedures generally, is shaped by concerns about institutional competence and by notions of separation of powers”).

\(^{125}\) See Witten Declaration, supra note 93, at ¶ 3 (stating that even though judicial review is provided in extradition cases, the review is very limited and the courts
and has no preclusive effect on the courts’ ability to review CAT claims in transfer cases, for several reasons.

First, the rule of non-inquiry is trumped by FARRA, which provides a specific mandate that the United States Government, and all “appropriate agencies,” abide by the requirements of the CAT.\textsuperscript{126} It is well understood that the federal common law, as a law-making power exercised by the courts, may be trumped by Congress through statutory enactments.\textsuperscript{127} FARRA’s prohibition against transfers to torture is clear and absolute, and any alleged violation of that statute’s provisions may be addressed and enforced by U.S. federal courts through habeas. U.S. courts, as part of their judicial function, are obliged to enforce the United States’ compliance with federal law, and are not precluded by the rule of non-inquiry in ensuring the U.S. Government’s compliance with its laws. FARRA’s prohibition of transfers to torture is clear and absolute, and any alleged violation of those statute’s provisions may be addressed and enforced by U.S. federal courts when raised in habeas petitions.\textsuperscript{128}

Second, in order to ensure the United States’ compliance with FARRA and CAT, courts are necessarily obliged to inquire into the treatment of a detainee upon transfer to another country, a matter that is well within the courts’ competence to address. The rule of non-inquiry may only be invoked to prevent judicial review of matters that fall beyond the reach of the courts.\textsuperscript{129} The fact that transfer cases implicate foreign policy concerns does not insulate the U.S. Government’s actions from judicial review. As articulated by the Supreme Court, “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”\textsuperscript{130}

\textsuperscript{126} FARRA §§ 2242(a), (b).
\textsuperscript{127} City of Milwaukee v. Illinois, 451 U.S. 304, 314 (1981) (“when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaker by federal courts disappears.”).
\textsuperscript{128} See supra, Section III(A)(2)(c).
\textsuperscript{129} See Cornejo-Barreto II, 379 F.3d at 1083 (among the issues that the rule of non-inquiry would prevent courts from reviewing are an individual’s treatment by the foreign country, whether diplomatic assurances regarding an individual’s treatment should be sought, and the nature of diplomatic relations between the United States and the receiving state).
\textsuperscript{130} Baker v. Carr, 369 U.S. 186, 211 (1962); see also Japan Whaling Ass’n v. American
may never be considered an official act, given that all governments have condemned the practice of torture on an absolute and universal basis, and have unanimously agreed to its eradication.\textsuperscript{131} Torture may therefore never be considered a matter of foreign policy. CAT claims raised in transfer challenges do not implicate foreign policy concerns, but rather, raise “only the straightforward question of whether a fugitive would likely face torture in the requesting country.”\textsuperscript{132} Where “the prospect of torture is such that judicial review would be warranted,” the rule of non-inquiry cannot stand in the way of such review.\textsuperscript{133}

The courts are competent to review allegations that an individual will face torture upon his return.\textsuperscript{134} Claims of torture, persecution, and other types of abuse have long been reviewable by the courts, particularly in extradition and deportation cases, notwithstanding the foreign policy concerns that the government often raises in such cases. For example, federal regulations implement the United States’ obligations under CAT and provide jurisdiction for courts to consider CAT claims via habeas petitions in the immigration context,\textsuperscript{135} and similar regulations implement the CAT in the extradition context.\textsuperscript{136} The federal torture statute also implements the United States’ CAT obligations under criminal law.

\textit{Cetacean Soc.}, 478 U.S. 221, 230 (1986) (“the courts have the authority to construe treaties and executive agreements, . . . under the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones”).

\textsuperscript{131} \textit{Aldana v. Del Monte Fresh Produce, N.A., Inc.}, 416 F.3d 1242, 1247 (11th Cir. 2005) (citing \textit{Kadic v. Karadzic}, 70 F.3d 232, 243-44 (2d Cir. 1995)).

\textsuperscript{132} \textit{Mironec}, 480 F.3d at 672. The Supreme Court did not foreclose judicial review of transfer to torture claims where the likelihood of torture could be sufficiently demonstrated. \textit{See supra} notes 115-116, and accompanying text.

\textsuperscript{133} \textit{See Khouzam}, 529 F. Supp. 2d at 563-64.

\textsuperscript{134} \textit{See Khouzam}, 549 F.3d at 253-54 (recognizing that the rule of non-inquiry is frequently raised in the deportation context, does not apply in the extradition context where an alien raises a CAT claim, and might not apply in the transfer context). \textit{But cf. Blaxland v. Commonwealth Dir. of Pub. Prosecutions}, 323 F.3d 1198, 1208 (9th Cir. 2003) (recognizing that “potential abuses in the requesting country rising to the level of torture are reviewable by American courts,” but at least in extradition proceedings, where FARRA regulations are already in place, the Executive branch may more properly address these issues.).

\textsuperscript{135} 8 C.F.R. §§ 208.16-18, 1208.16-18 (2008).

making it a crime to commit torture. Similar legal provisions are found in the civil context, allowing individuals to file suit in U.S. courts for major violations of human rights, including acts of torture.

The courts’ competency to review claims of likely torture is also bolstered by the fact that ample evidence is often easily found as to the practice of torture in foreign countries. Each year, the U.S. State Department publishes Country Human Rights Reports detailing the human rights records of foreign countries. Respected non-governmental organizations, such as Human Rights Watch and Amnesty International, also publish periodical human rights reports. Courts rely on these publications as reliable sources of documented human rights abuses in order to determine whether a particular individual will face torture upon return to a foreign state.

The need for judicial review of the reliability of diplomatic assurances, and of decisions to transfer individuals to countries where they face imminent torture, is particularly strong because of the serious potential violations of constitutional and human rights that may be involved. The rule of non-inquiry cannot stand in the way of judicial review of U.S. laws and treaties. “Where the Government establishes a right to petition for relief on such a fundamental matter, it must provide a fair process.”

139 U.S. v. Decker, 600 F.2d 733, 738 (9th Cir. 1979) (“Even if in other respects a traditional political question analysis could apply, we would be reluctant to declare these cases nonjusticiable because such a holding would prevent us from reviewing the propriety of appellants’ convictions and prison sentences. We are less inclined to withhold review when individual liberty, rather than economic interest, is implicated.”).
140 Khouzam, 529 F. Supp. 2d at 564, n. 21.
B. The DTA and MCA Restrictions of Detainees’ Access to Habeas Raise Significant Due Process Concerns if Detainees are Denied a Right to Challenge Their Unlawful Transfers to Torture.

Serious due process problems arise from the indefinite detention of many of the Guantánamo Bay detainees, some for up to six years, and their involuntary transfer to situations of likely torture in violation of the non-refoulement provisions of the CAT and its implementing statute. These actions constitute deprivations of fundamental rights to life and liberty, protections that are embodied in the Fifth Amendment Due Process Clause. While Congress has substantial power to establish and to limit the jurisdiction of federal courts, this authority cannot be used to deprive individuals of their fundamental and constitutionally-protected rights.

1. Detainees held at Guantánamo Bay are entitled to due process to challenge their prospective transfers to torture.

The Fifth Amendment to the U.S. Constitution states that “No person shall be . . . deprived of life, liberty, or property, without due process of law.”141 Due process is “a restraint on the legislative as well as on the executive and judicial powers of the government, [which] cannot be so construed as to leave Congress free to make any process ‘due process of law’ by its mere will.”142 The definition of “due process of law” embraces, at the very least, the requirement that individuals be protected against “any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property.”143 At the core of the definition of “fundamental” rights are the rights to life and liberty, which are undoubtedly implicated by the government’s practice of transferring detainees to countries where they will more likely than not be tortured. The right to be free from torture is a fundamental right,144 one that may not be abrogated, actually or constructively, by jurisdictional restrictions imposed by Congress on the courts that deny individuals the protections of due process. Detainees, at

141 U.S. Const. amend. V.
144 Filartiga, 630 F.2d at 885.
the very least, are entitled to a meaningful opportunity to challenge their transfers.\(^{145}\)

The applicability of the Fifth Amendment Due Process Clause extends to both citizens and non-citizens alike, including non-citizens “permanently or temporarily residing in the territory of the United States.”\(^{146}\) Detainees held at Guantánamo Bay, a U.S. territory, are entitled, at minimum, to due process to challenge deprivations of their rights to life and liberty that would result from their unlawful transfers to torture.\(^{147}\) The danger to the fundamental right to be free from torture that is presented by the involuntary transfers of detainees is not speculative. A number of detainees who have raised transfer challenges, and who were nevertheless removed to other countries, have in fact been subsequently subjected to deprivations of their most basic human rights.\(^{148}\) The restrictions on detainees’ access to the courts to challenge their transfers would constitute an outright denial of due process for those detainees who face the likely and imminent deprivation of the most fundamental rights of life and liberty. If the right to due process was ever to be protected, it would be in the case of Guantánamo detainees who face imminent torture upon being transferred.

\(^{145}\) Jarbough v. Attorney General of U.S., 483 F.3d 184, 190 (3d Cir. 2007).
\(^{146}\) Yick Wo v. Hopkins, 118 U.S. 356, 368 (1886).
\(^{147}\) Boumediene, 128 S. Ct. at 2246 (“the substantive guarantees of the Fifth and Fourteenth Amendments, . . . protect[] persons as well as citizens”) (citations omitted) and at 2268 (recognizing that alien detainees are entitled to the common law writ of habeas, and that the scope of habeas review to be afforded detainees accords with the most basic protections provided by procedural due process); Rasul, 542 U.S. at 483 n. 15 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 277-278 (1990) (Kennedy, J., concurring) (Fifth Amendment due process protections apply to non-resident alien)). Even members of Congress, in discussing the effects of the MCA, recognized that detainees are entitled to certain due process rights). See, e.g., 152 Cong. Rec. S10251 (daily digest Sept. 27, 2006) (statement by Sen. Graham) (“any evidence gathered after the Detainee Treatment Act will have to comply with the 5th, 8th, and 14th amendments requirements that make up the heart and soul of the Detainee Treatment Act.”).
\(^{148}\) See Still at Risk: Diplomatic Assurances No Safeguard against Torture, Vol. 17, No. 4(D), Apr. 2005, available at http://www.hrw.org/reports/2005/eca0405/ (cataloging instances in which individuals from various countries have been subjected to abuse or torture after being transferred pursuant to diplomatic assurances).
Moreover, the United States Government’s transfer of an individual to a situation of likely torture, where the government is aware of, and yet disregards, the substantial risk of harm posed to the transferee, would constitute a violation of the transferee’s due process rights. Where the government restrains the physical liberty of an individual through imprisonment or similar means, the government owes that individual affirmative duties of care and protection against harm. The rule created in DeShaney, known as the “state-created danger” rule, prohibits the government from facilitating the abuse by a third party of a detainee held in the physical custody of the United States, in violation of the Fifth Amendment. The rule has since been adopted by nearly every circuit.

The transfer-to-torture of detainees, held under the control and custody of the United States, would present precisely the type of state-created danger that the DeShaney court intended to prohibit. Where the U.S. Government “actually [knows] of a substantial risk of serious harm to [the claimant] and disregarded that risk,” it stands in violation of the Fifth Amendment Due Process Clause. The transfer-to-torture of

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150 Id.
151 The state-created danger rule applies equally to both state and federal governments. Id. at 196 (recognizing that the state-created danger rule applies under both the Fourteenth and Fifth Amendments); see also Coyne v. Cronin, 386 F.3d at 287 (applying the state-created danger rule under the Fifth Amendment to a case involving a prisoner held in state custody but against a federal officer who encountered the prisoner while the prisoner was incarcerated).
152 See, e.g., Lockhart-Bembery v. Sauro, 498 F.3d 69 (1st Cir. 2007); Pena v. DePristo, 432 F.3d 98 (2d Cir. 2004); Kneipp v. Tedder, 95 F.3d 1199, 1210 (3d Cir. 1996); Pinder v. Johnson, 54 F.3d 1169, 1175–77 (4th Cir. 1995) (en banc), cert. denied, 516 U.S. 994 (1995); Kallstrom v. City of Columbus, 136 F.3d 1055, 1066–67 (6th Cir. 1998); Reed v. Gardner, 986 F.2d 1122, 1127 (7th Cir. 1993); Freeman v. Ferguson, 911 F.2d 52, 54-55 (8th Cir. 1990); Wood v. Ostrander, 879 F.2d 583, 589-90 (9th Cir. 1989); Ullrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995); Butera v. District of Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001).
153 Coyne, 386 F.3d at 288.
detainees involves affirmative acts taken by the government in complete disregard of the risk of harm that they face. Moreover, the government’s reliance on diplomatic assurances cannot be used to justify transfers to torture, because such assurances, particularly from countries that have a record of torture and human rights abuses, are inherently unreliable. To permit the transfer of a detainee in light of the substantial risk of physical harm he faces upon his return to a foreign country would directly contravene precisely the type of risk that the state-created danger rule in particular, and the Due Process Clause in general, were intended to prevent.

2. The court-stripping provisions of the DTA and MCA cannot be interpreted so as to eliminate constitutionally protected rights.

The jurisdictional restrictions contained within the MCA and DTA cannot be interpreted as stripping courts of their authority to hear constitutional claims. Where it appears that a statute will preclude judicial review of constitutional claims, thereby denying petitioners the right to due process, the courts will only infer a congressional intent to restrict judicial review where such intent is clear.154 This presumption in favor of judicial review where constitutional rights are affected is premised on the notion that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.”155 The power of the Legislative and Executive branches to create and enact the laws is great, but it does not go so far as to permit those branches to ignore entirely constitutional limitations, nor does it extend so greatly as to preclude any form of judicial review over constitutional claims.156 Thus far, however, the MCA and DTA have left detainees bereft of any

154 Bartlett, 816 F.2d at 699 (1987) (“only the clearest evocation of congressional intent to proscribe judicial review of constitutional claims will suffice to overcome the presumption that the Congress would not wish to court the constitutional dangers inherent in denying a forum in which to argue that government action has injured interests that are protected by the Constitution.”); see also Ramallo v. Reno, 114 F.3d 1210, 1214 (D.C. Cir. 1997) (“A statute that removes jurisdiction from all courts to vindicate constitutional rights poses serious constitutional objections.”) (emphasis in original).

155 Marbury v. Madison, 1 Cranch 137, 163 (1803).

opportunity to challenge their unlawful transfers to torture. In order to ensure that due process is provided, and detainees’ rights to life and liberty sufficiently protected, courts must interpret these statutes as not precluding any judicial review of detainees’ constitutional- or treaty-based claims. Some form of meaningful judicial review of their transfer challenges must be accorded.


Equal protection requires that aliens detained by the United States be afforded meaningful judicial review of their transfer-to-torture challenges. The DTA and MCA would deny alien “enemy combatants,” or those aliens “awaiting such determination,” access to the courts to challenge their transfers by eliminating federal court jurisdiction over claims raised by all aliens detained by the United States. Under the DTA and MCA, any detainee facing likely torture upon transfer to a foreign country would, unlike a U.S. citizen, be unequivocally denied the right to defend their constitutional and treaty-based rights to liberty and freedom from torture.

The MCA’s withdrawal of habeas remedies and its violation of vested constitutionally protected rights constitute an invidious form of discrimination in violation of Fifth and Fourteenth Amendment equal protection obligations. The Fourteenth Amendment provides that “[n]
o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The Equal Protection Clause applies to all persons within U.S. territory, including aliens, and all territories to which the U.S. Constitution extends, including Guantánamo Bay.

The right to be free from torture is a fundamental and universal right. Any classification impinging on a fundamental right is subject to strict scrutiny, and will only be upheld if “narrowly tailored to further compelling government interests.” Legislation that aims to impose “special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish.”

The absolute prohibition of return-to-torture under international and domestic law extends this government obligation to all persons, regardless of national origin. The United States’ obligation to not return individuals to countries where they will face likely torture is non-derogable, even during times of war or in the interest of national security or public safety. The Executive may have power over “enemy aliens” to ensure wartime security, however, the power only applies to individuals as an

(internal quotations and citations omitted); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

160 U.S. Const. amend. XIV, § 1 (emphasis added).


163 Guantánamo Bay detainees have a right to invoke the Suspension Clause of the U.S. Constitution in order to protect their fundamental liberties against encroachment by the Executive. Boumediene, 128 S. Ct. at 2262 (2008) (“We hold that Art. I, § 9, cl. 2 of the Constitution has full effect at Guantánamo Bay.”); see also Rasul, 542 U.S. at 480-81 (Guantánamo Bay is part of U.S. sovereign territory) and id. at 487 (Kennedy, J., concurring) (“[T]he indefinite lease of Guantánamo Bay has produced a space that belongs to the United States, extending the implied protection of the United States to it.”).

164 Filartiga, 630 F.2d at 885.

165 Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Plyler, 457 U.S. at 216-17 (“[W]e have treated as presumptively invidious those classifications that disadvantage a ‘suspect class,’ or that impinge upon the exercise of a ‘fundamental right.’”).

166 Plyler 457 U.S. at 216-17, n.14.
“incident of war and not as an incident of alienage.” While preventing terrorism may well be an important government interest, invidious classifications only pass constitutional muster if narrowly tailored to further that interest. The practice of transfer-to-torture is inherently discriminatory where the inevitable result, if not aim, is to remove aliens from U.S. territory to avoid compliance with treaty- and statutory-based legal obligations. The practical effect of the MCA’s and DTA’s restrictions on judicial review of constitutional- and treaty-based claims is to deny the fundamental right of freedom from torture to designated classes of aliens on an inherently discriminatory basis. As a result, the statutes would deny detainees vested rights and protections guaranteed under CAT, FARRA, and Article VI of the U.S. Constitution.

D. Significant Separation of Powers Concerns Would be Raised if Judicial Review of Unlawful Executive Action Were Eliminated.

The MCA purports to strip federal courts of jurisdiction over “any” claim brought by persons labeled as “enemy combatants,” or those “awaiting such determination.” This absolute elimination of judicial review would unlawfully deprive the courts of jurisdiction to consider detainees’ claims that are associated with vested rights and protections arising under the U.S. Constitution, U.S. domestic law, and international treaties to which the United States is a party, including the CAT. Such a blanket attempt to restrict vested rights raises serious separation of powers concerns.

The federal government is one “of limited powers,” and the primary purpose of the separation of the three branches of government was to place “a check on abuses of government power” in order to “ensure the protection of our fundamental liberties.” Separation of powers principles preclude Congress from depriving the courts of their authority to interpret the Constitution, laws, and treaties of the United States, particularly where the purpose is to impinge upon vested rights. It is the

168 U.S. Const. art. VI, § 1, cl. 2 (treaties and laws adopted pursuant thereto are the supreme law of the land).
169 MCA § 7(a).
judiciary, and not the political branches, that serves as the final arbiter of the law.\textsuperscript{171} Although Congress has the authority to define the jurisdiction of the lower federal courts,\textsuperscript{172} that power does not extend so far as to effectively eliminate the judiciary’s duty to interpret the laws and treaties of the United States, nor, in the process, to deprive any individual of his right to life, liberty, or property without due process of law, in violation of the Constitution.\textsuperscript{173} Any attempt by Congress to so narrowly construe the courts’ jurisdiction so as to effectively remove their ability to deal with and defend claims involving fundamental rights, is a violation of separation of powers principles, and is unconstitutional.

The broad elimination of federal court jurisdiction contained in the DTA and MCA far exceeds the confines of Congress’ authority to define lower courts’ jurisdiction, in direct contravention of well-established separation of powers principles. The federal courts, which have the power to make final interpretations of U.S. treaties under Article III of the Constitution, would be precluded from reviewing detainees’ transfer challenges arising under CAT and other treaties if the DTA and MCA’s court-stripping provisions are upheld. The fact that the courts would be precluded from providing any form of judicial review over their claims means that detainees who are subject to be transferred to situations of torture would be deprived of their fundamental rights to life, liberty, and freedom from torture. The protection of fundamental rights applies to all individuals in U.S. territories,\textsuperscript{174} a principle recently acknowledged in the context of Guantánamo Bay.\textsuperscript{175} If Congress’ authority to define the courts’ scope of jurisdiction is extended so as to strip the federal courts of their jurisdiction over transfer challenges, where the result is to deny

\begin{itemize}
  \item \textsuperscript{171} U.S. Const. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made.”); Marbury, 5 U.S. (1 Cranch) at 177 (“It is emphatically the province and duty of the judicial department [the judicial branch] to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).
  \item \textsuperscript{172} U.S. Const. art. I, § 8, cl. 9; id. art. III, § 1.
  \item \textsuperscript{173} United States v. Bitty, 208 U.S. 393, 399-400 (1908) (Congress may make exceptions and regulations to the Supreme Court’s appellate jurisdiction, so long as it exercises “due regard to all the provisions of the Constitution.”).
  \item \textsuperscript{174} See Ralpho v. Bell, 569 F.2d 607, 618-19 (D.C. Cir. 1977) (citations omitted).
  \item \textsuperscript{175} Bouredienne, 128 S. Ct. 2229; see also Rasul, 542 U.S. at 480-8, and id. at 487 (Kennedy, J., concurring).
\end{itemize}
individuals their vested rights to life, liberty, and freedom from torture, this would effectively permit the Executive branch to violate its obligations under U.S. domestic and international law, without providing any form of judicial oversight to serve as a “check” on unlawful or unconstitutional abuses of power. No branch of government is authorized to act completely outside the rule of law, and the jurisdiction-stripping approach cannot be used to accomplish this result.

E. Transfers of Detainees by the Department of Defense Cannot be Conducted Until They Have Adopted Administrative Regulations Pursuant to the Convention Against Torture and Its Implementing Legislation.

FARRA obligates “the appropriate agencies” to “implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the U.S. Senate resolution of ratification of the Convention.” The non-refoulement obligation under the CAT and FARRA is binding on all “appropriate agencies” engaged in transfers of aliens to foreign states. Thus far, however, only the Departments of Homeland Security, Justice, and State have implemented such regulations. The Department of Defense, which has primary responsibility for, and control over, the transfer of Guantánamo detainees, has failed to enact regulations to implement the United States’ obligations under international and domestic law. Absent the mandated

176 FARRA § 2242 (government agencies are obliged to enact “regulations to implement the obligations of the United States under Article 3 of the [CAT].”).
178 Richard-Prosper Declaration, supra note 47, at ¶ 2.
179 The fact that the Pentagon has not implemented regulations similar to those implemented by other agencies pursuant to § 2242(b) of FARRA is not altogether surprising. The Pentagon likely did not foresee the possibility that the military would play a substantial role in transferring individuals to other countries. However, while the Department of Defense may not have been an
administrative procedures to guard against prohibited transfers to torture, no government agency or branch has the power to “invade one’s personal liberty by handing him over to a foreign government . . . .”\textsuperscript{180} Unless and until the Department of Defense drafts regulations in compliance with the CAT and FARRA, the Department must be prohibited from conducting any further transfers, since the requisite administrative procedures are not in place to ensure against transfers to torture.

Because the Department of Defense’s role in conducting transfers of suspected terrorist detainees without the required regulations violates U.S. domestic law, Guantánamo detainees may use the Administrative Procedure Act (APA)\textsuperscript{181} to seek judicial review of the Department of Defense’s actions, and to seek compliance with FARRA. The APA establishes uniform standards by which agencies are to conduct formal rulemaking, and authorizes federal courts to review agency decisions to ensure they comply with legal requirements. Courts may review a claim brought by an individual “suffering legal wrong because of agency action,” or inaction or failure to act,\textsuperscript{182} and may also grant judicial relief.\textsuperscript{183} While certain limitations in the APA prevent courts from granting review of an agency’s action, those limitations do not apply in the case of the Department of Defense’s failure to enact requisite regulations pursuant to FARRA § 2242(b).\textsuperscript{184}

\textsuperscript{180} Holmes v. Laird, 459 F.2d 1211, 1219 n.59 (D.C. Cir. 1972) (citing Valentine v. United States ex rel. Neidecker, 299 U.S. 5, 7-9 (1936)) (additional citations omitted).


\textsuperscript{184} Judicial review is available under the APA except to the extent the governing statute precludes review, 5 U.S.C. § 701(a)(1) (2000), or where the agency action is committed to agency discretion by law. 5 U.S.C. § 701(a)(2) (2000). With regard to § 701(a)(1), although FARRA § 2242(d) attempts to preclude judicial review of the regulations enacted by the “appropriate agencies,”
The heads of all “appropriate agencies” are required to enact regulations within 120 days following the enactment of FARRA, in order to implement the United States’ Article 3 CAT obligations. The Department of Defense’s failure to enact the requisite regulations constitutes action “unlawfully withheld,” and also constitutes agency action that is “unreasonably delayed.” The Department of Defense may not have been considered an “appropriate” agency covered by these requirements because it did not, at the time FARRA was enacted in 1998, normally carry out the transfer of aliens. However, the Department’s recent involvement in the transfer of suspected terrorists to foreign states, and its status as the primary agency regarding transfer of Guantánamo detainees makes it subject to FARRA’s requirements. The Department’s failure to abide by the statutory mandate of § 2242(b) by “unlawfully with[holding]” administrative regulations governing transfers is therefore a violation of U.S. law.

Under the APA, where an agency’s action has been “unreasonably delayed,” a court may compel it to take the required action. The APA does not define what length of permissible delay of agency action is considered reasonable. The D.C. Circuit Court articulated a six-factor rule used to provide “useful guidance” to determine whether a particular delay in agency action is reasonable. FARRA requires the Department it does not preclude habeas review of CAT claims, nor does it commit to agency discretion the decision to abide by Article 3 of CAT. Rather, section 2242(b) of FARRA mandates that agencies enact the requisite regulations. See Cornejo-Barreto I, 218 F.3d at 1007 (the heads of all “appropriate agencies shall prescribe regulations to implement the obligations of [Article 3 of CAT]”) (emphasis added).

186 Telecomms. Research and Action Ctr. v. F.C.C. (“TRAC”), 750 F.2d 70, 80 (D.C. Cir. 1984). The court articulated those six factors as follows:

(1) the time agencies take to make decisions must be governed by a “rule of reason”; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not “find any
of Defense and other appropriate agencies to enact regulations within 120 days following passage of the statute. Although the Defense Department did not become involved in detainee transfers until after 2002, even under the most deferential interpretation of “unreasonable delay,” the Department of Defense’s delay of over four years would be characterized as unreasonable.

IV. DETAINEES MAY SEEK A TEMPORARY INJUNCTION AGAINST TRANSFERS-TO-TORTURE UNDER THE ALL WRITS ACT IN ORDER TO ALLOW THE COURTS TO PRESERVE THEIR JURISDICTION PENDING THE ADJUDICATION OF DETAINEES’ DTA OR HABEAS CASES.

In addition to challenging the substantive aspects of a detainee’s transfer to torture, detainees with pending habeas or DTA appeals cases may seek temporary relief to prevent transfers-to-torture pending adjudication of their claims. This form of relief is available through the All Writs Act, which allows the courts to issue a preliminary injunction in order to preserve their jurisdiction. Absent an order granting a preliminary injunction, a detainee’s transfer to another country would, as a practical matter, extinguish any claims he may have had, whether arising

impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed.’”

Id. at 80 (internal citations omitted). See also Air Line Pilots Ass’n, Int’l v. C.A.B., 750 F.2d 81, 86 (D.C. Cir. 1984) (the definition of “reasonableness” is necessarily flexible, as each case presents unique circumstances).
in a habeas\textsuperscript{187} or DTA appeal case.\textsuperscript{188} A preliminary injunction would not affect the courts' adjudication of the merits of a detainee's case, but it would provide interim relief pending the outcome of the litigation.

\textsuperscript{187} U.S. federal courts have habeas jurisdiction over detainee claims raised pursuant to the common law writ. \textit{See Boumediene}, 128 S. Ct. 2229. Federal courts may also exercise statutory habeas jurisdiction so long as the United States government exercises some level of control or custody over a prisoner. \textit{See, e.g.}, 28 U.S.C. § 2241(c) (enumerating the circumstances under which courts have statutory habeas jurisdiction, the relevant provisions of which require some element of U.S. custody or control over the prisoner); \textit{Al-Joudi v. Bush}, No. 05-0301, 2008 WL 821884, Slip op. at *1 (D.D.C. March 26, 2008) (no habeas jurisdiction over challenges to "collateral consequences" that occur after a prisoner is transferred to a foreign country, because U.S. courts cannot control the actions of a foreign sovereign); \textit{Abdah}, 2005 WL 589812 (transfer to another country "would effectively extinguish [detainee's] habeas claims"); \textit{Eisentrager}, 339 U.S. at 777 (statutory habeas jurisdiction does not extend to prisoners when all six of the following factors are present: the detainee “(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; (f) and is at all times imprisoned outside the United States.”) (emphasis added); \textit{Rasul}, 542 U.S. at 475-77 (courts may still have statutory habeas jurisdiction if the six \textit{Eisentrager} factors have not all been met).

\textsuperscript{188} Although the U.S. Supreme Court held, in \textit{Boumediene}, that the alternative form of judicial review instituted under the DTA constitutes an inadequate and ineffective substitute for habeas corpus, the Court was careful to limit its holding, at the very least, to cases in which detainees had already received a combatant status determination before a CSRT. 128 S. Ct. at 2276 (“The Executive is entitled to a reasonable period of time to determine a detainee’s status before a court entertains that detainee’s habeas corpus petition. . . . Except in cases of undue delay, federal courts should refrain from entertaining an enemy combatant’s habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to review his status.”). Thus, the Court did not completely repeal the DTA review process for all detainees. \textit{Id.} at 2275 (“. . . both the DTA and the CSRT process remain intact.”). In any DTA cases that may come before the courts, preliminary injunctions against transfer may still be sought to prevent the transfer of detainees to countries where they fear torture. Otherwise, absent an injunction against transfer, courts will lose their statutory jurisdiction upon the transfer of a detainee. \textit{See DTA § 1005(e)(2)(D)} (“jurisdiction of [D.C. Circuit Court] with respect to [detainee’s DTA appeal] shall cease upon the release of such alien from the custody of the Department of Defense”).
The purpose of securing a preliminary injunction is to prevent, at least temporarily, the U.S. government from conducting unlawful transfers of detainees to countries where they would face likely torture and other severe harm, in violation of the United States’ domestic and international human rights obligations. “It would be a cruel and irrational system of justice indeed that . . . would permit those affected by [the] court’s ruling . . . to perish before they can enjoy the benefits of a possible victory.”  

It is incumbent upon the courts to prevent the government from attempting to “commit a fraud upon the jurisdiction of the Federal courts” by transferring detainees outside the reach of U.S. courts’ jurisdiction. Where the government attempts to transfer a detainee prior to the final resolution of his U.S. court case, whether it arises in the context of a habeas case or a DTA appeal, the All Writs Act may be invoked to prevent, on a temporary basis, that detainee’s transfer, so that the court’s jurisdiction is preserved.

A. Preliminary Injunctions Against Transfers to Torture are Warranted Where the Irreparable Harm to a Detainee, Amounting to Violations of U.S. Domestic and International Law, Cannot be Outweighed.

The All Writs Act permits federal courts to “issue all writs necessary or appropriate in aid of [their] respective jurisdiction . . . .” In a habeas appeal, the Act preserves the court’s jurisdiction under 28 U.S.C. § 2241, and the common law writ of habeas under Article I, § 9, cl. 2 of the U.S. Constitution. In a DTA appeal, the Act preserves the jurisdiction granted to the D.C. Circuit Court in § 1005(e)(2)(A) and (3)(A). In either context, a preliminary injunction temporarily prevents the United States from conducting unlawful transfers of detainees to countries where they face likely torture and other severe harm, in violation of the United States’ domestic and international human rights obligations. The courts consider four factors when considering a motion for preliminary injunction:

192 DTA § 1005(e)(2)(A) and (3)(A) grant the D.C. Circuit Court exclusive jurisdiction to consider final decisions rendered by CSRTs and military commissions, respectively.
(1) whether Petitioners would suffer irreparable injury if an injunction were not granted; (2) whether Petitioners have a substantial likelihood of success on the merits; (3) whether an injunction would substantially injure other interested parties; and (4) whether the grant of an injunction would further the public interest. 193

These factors are balanced each against the other and weighed on a sliding scale. 194 “If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.” 195

Taking into account the first factor, the risk of harm to detainees is great—and irreparable. The transfer of an individual to a country where he faces likely torture is an act for which there is no remedy at law. Once a detainee is transferred to the custody and control of a foreign country, the federal courts lose their jurisdiction over the detainee, and are therefore unable to provide any form of judicial relief. 196 The transfer of a detainee to continued control and detention, without a right of judicial review or remedy, would certainly constitute “irreparable harm.” 197

Because no remedy at law exists that would allow detainees to challenge their transfers to torture, the risk of harm that detainees face qualifies as “irreparable harm.” While the specific threats that detainees face will depend on the factual circumstances of each case, where it can be shown that the harm is not merely “remote and speculative,” 198 the balance of factors will weigh in favor of granting an injunction. 199 The second factor,

193 Al-Joudi, 2005 WL 774847, at *3 (citations omitted).
194 Serono Lab., Inc. v. Shalala, 158 F.3d 1313, 1318 (D.C. Cir. 1998).
196 See supra notes 187-188, and accompanying text.
197 Abdah, 2005 WL 589812, at *4.
199 To demonstrate a risk of “irreparable injury,” it may be useful to refer to the U.S. State Department’s annual Country Reports on Human Rights Practices, available at http://www.state.gov/g/drl/rls/hrrpt/2007/index.htm, as well as reports published by Human Rights Watch or Amnesty International that document the same types of harm that a detainee faces upon transfer to a foreign country. Other additional facts, pertinent to each detainee who seeks a preliminary injunction, must be demonstrated on an individual basis.
“likelihood of success,” depends on the factual circumstances presented by a specific habeas case. Detainees need not demonstrate “a mathematical probability of success,”\textsuperscript{200} but, rather, must present questions that are so “serious, substantial, difficult and doubtful, as to make them a fair ground for litigation.”\textsuperscript{201}

The harm posed to the government by a preliminary injunction under the third ‘injury’ test could involve several types of potential harm.\textsuperscript{202} However, none of the harms that would befall the government would match the ultimate harm posed to a detainee who is transferred to a situation of torture. As previously mentioned, the harm to a detainee who is subjected to torture upon his return to a foreign country would be \textit{irreparable}, and would negatively impact fundamental rights. The harm posed to the government, while potentially significant,\textsuperscript{203} could likely be ameliorated, and would often be limited to a simple delay in carrying out the transfer. The loss of life or liberty of an individual, however, is far more significant.

Finally, the fourth factor—the public interest in granting a preliminary injunction—almost certainly falls in favor of a detainee seeking to prevent his transfer to torture. A detainee subject to transfer stands to lose a great deal, and the public has a substantial interest in protecting an individual’s constitutional and human rights. In contrast, the public interest in denying an injunction against transfer is weak. Although the government has an interest in preventing acts of terror, that interest may just as easily be met by continuing to detain an alleged terror suspect, rather than transferring him. The public, too, has an interest in ensuring that the United States abides by its international and domestic legal obligations. This will be achieved only if the courts are able to consider these claims, and to prevent unlawful transfer to-torture of detainees by the United States in violation of CAT and FARRA.

\textsuperscript{200} Washington Metro. Area Transit Comm’n, 559 F.2d 841, 844 (D.C. Cir. 1977).
\textsuperscript{201} Id. (citation omitted).
\textsuperscript{202} For example, the government may claim that a preliminary injunction against transfer would impinge upon the government’s diplomatic negotiations to secure a transfer, would interfere with the Executive’s foreign policy decisions, or would prevent the three branches of U.S. government from speaking with a unitary voice on the question of whether or not a detainee may be transferred.
\textsuperscript{203} See, e.g., Al-Anazi, 370 F. Supp. 2d at 198-99.
B. Nothing in the MCA or DTA Precludes Courts From Granting a Preliminary Injunction Against Transfer in a DTA Appeal.

Neither the DTA nor MCA diminishes or revokes the courts’ authority to grant remedial relief in a DTA appeal. Congress enacted the DTA and the MCA for the purpose of providing detainees with a means of challenging their military detentions and war crimes trials before the D.C. Circuit Court. Nothing in those statutes precludes the D.C. Circuit from granting temporary relief in order to preserve its jurisdiction, nor do any of the D.C. Circuit’s prior decisions prevent the court from granting a preliminary injunction against transfer in order to preserve its jurisdiction over DTA appeals. Section 7(a) of the MCA, which attempts to limit federal courts’ jurisdiction over detainee cases, and which creates an alternative system of judicial review, states, in relevant part:

\[
\text{[except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 . . . no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, . . . [or] trial . . . of an alien . . .]}
\]

Paragraphs (2) and (3) of DTA § 1005(e) grant jurisdiction to the D.C. Circuit Court of Appeals to hear appeals from final decisions of Combatant Status Review Tribunals and military commissions. Under DTA § 1005(e)(2), in an appeal from a CSRT decision, the D.C. Circuit Court has jurisdiction to consider whether the CSRT properly followed the CSRT standards and procedures in determining a detainee’s enemy combatant status, and whether the use of such standards and procedures is consistent with U.S. laws and the U.S. Constitution. Under § 1005(e)(3), in an appeal from a military commission decision, the D.C. Circuit Court has jurisdiction to consider whether the commission’s final decision was consistent with the military commission standards and procedures under chapter 27A of 10 U.S.C., and whether the use

\[204\] 28 U.S.C. § 2241(e)(2) (emphasis added).

\[205\] DTA § 1005(e)(2)(C).
of such standards and procedures is consistent with U.S. laws and the
U.S. Constitution. Paragraphs (2) and (3) of § 1005(e) both grant the
D.C. Circuit Court jurisdiction over specific types of appeals, but they
do not limit the Court’s authority to issue remedial relief to preserve its
jurisdiction over those appeals.

The MCA only bars U.S. courts from hearing “any other action,”
that is, actions other than CSRT and military commission appeals.
A motion for preliminary injunction against transfer, filed as part of a
pending DTA action, is not an “other action,” but rather, a procedural
motion filed as part of the same, ongoing action. The types of “other
action[s]” precluded from judicial review under section 7(a) of the
MCA include challenges to “any aspect of . . . detention, transfer, . . .
[or] trial.” The very purpose of the DTA is to provide for judicial review
of a detainee’s military detention or trial. If section 7(a) were read to
prevent the Circuit Court from providing remedial relief to preserve its
jurisdiction over detention or trial challenges, the section would e
ffectively
preclude judicial review of a detainee’s detention or trial. This, however,
was not Congress’ intent. By including detention and trial in the same
list of prohibited judicial actions as transfers, Congress did not intend
to prevent the D.C. Circuit Court from exercising judicial review over
challenges to detention or trial, raised pursuant to a DTA appeal. Rather,
Congress sought to prevent detainees from bringing lawsuits against the
United States other than those permitted under §§1005(e)(2-3) of the
DTA. Any interpretation of the DTA and MCA preventing the D.C.
Circuit from preserving its DTA jurisdiction allows the Executive branch
to avoid judicial review of its detention, trial, and transfer of detainees, in
contravention of Congress’ intent to statutorily authorize judicial review
detention and trial challenges. Ultimately, such an interpretation
means the Executive branch could deny the D.C. Circuit the ability to
review CSRT and military commission appeals simply by transferring a
detainee, without providing any form of judicial review to challenge the
lawfulness of the transfer. This interpretation cannot be maintained.

Moreover, nothing in the D.C. Circuit Court’s prior decisions
bars the court from issuing a preliminary injunction against transfer. The
D.C. Circuit has the power to enjoin the transfer of detainees,

206 DTA § 1005(e)(3)(D).
notwithstanding the court’s denial of preliminary injunctive relief in Hamliby v. Gates,\textsuperscript{208} and in dicta in Belbacha v. Bush,\textsuperscript{209} An order denying injunctive relief does not constitute the law of the case, although it can be persuasive.\textsuperscript{210} A court always has jurisdiction to determine whether it has jurisdiction,\textsuperscript{211} and in fact, the D.C. Circuit Court has already recognized its power to protect its DTA jurisdiction. In Bismullah, the court issued a protective order over certain sensitive information, citing for authority the All Writs Act to preserve its future jurisdiction “to ensure the parties do not frustrate the court’s ability to review a CSRT determination under the DTA.”\textsuperscript{212} Bismullah’s holding is consistent with the interpretation that the MCA only limits judicial review over actions falling outside the scope of the DTA, but not over the court’s inherent powers to protect its DTA jurisdiction. Reading the MCA any other way would have the effect of precluding the D.C. Circuit Court from granting remedial relief in the form of protective orders, as was done in Bismullah, or in the form of a preliminary injunction to enjoin transfers. Interpreting section 7(a)’s “any other action” provision in this way would leave the D.C. Circuit Court unable to provide any substantial or meaningful judicial review.

Additional compelling reasons support the Circuit Court’s authority to grant preliminary relief in DTA appeals. Detainees rely on the DTA as the statutorily means to challenge their detention and trials. Detainees’ reliance on the DTA as the sole means of judicial review over their CSRT and military commission challenges is based on this statutory scheme, created by Congress, mandating judicial review of such cases be permitted only in the D.C. Circuit Court, and only for limited purposes.\textsuperscript{213} It is inequitable, not to mention unlawful, for a detainee to be transferred to torture during the pendency of his DTA appeal without being afforded the opportunity to preserve his right to judicial

\textsuperscript{209} 520 F.3d 452 (D.C. Cir. 2008).
\textsuperscript{210} Belbacha, 520 F.3d 452, 458 (D.C. Cir. 2008) (citing Berrigan v. Sigler, 499 F.2d 514, 518 (D.C. Cir. 1974)).
\textsuperscript{211} In re Thornburgh, 869 F.2d 1503, 1510 (D.C. Cir. 1989).
\textsuperscript{212} Bismullah v. Gates, 501 F.3d 178, 187 (D.C. Cir. 2007), vacated and remanded, 128 S.Ct. 2960 (2008), dismissed on other grounds, 551 F.3d 1068 (D.C. Cir. Jan 09, 2009) (The D.C. Circuit Court dismissed the case based on the Supreme Court’s ruling in Boumediene, holding that that decision effectively invalidated the DTA’s grant of jurisdiction to federal courts).
\textsuperscript{213} DTA § 1005 (e)(3)(A) (2005).
review by way of a preliminary injunction, and without any recourse
to judicial review of the lawfulness of his transfer. Extending remedial
relief to detainees to prevent their transfers does not “contravene[] the
intent of Congress” any more than the D.C. Circuit Court’s decisions to
enter protective orders to preserve the court’s jurisdiction over CSRT and
military commission appeals.

CONCLUSION

The United States’ practice of transferring Guantánamo Bay
detainees to foreign countries, particularly where serious concerns exist
regarding those states’ human rights records, raises significant concerns
about the lawfulness of those transfers. Where detainees show they face
likely torture upon transfer to a foreign state, their transfer is unlawful as
a matter of international and domestic law, on an absolute basis pursuant
to the non-refoulement principles embodied in Article 3 of CAT and
FARRA. A number of constitutional issues, including due process and
equal protection concerns, are raised if restrictions on judicial review
to allow otherwise prohibited transfers of torture. The government’s
practice of unlawful transfers-to-torture has gone largely without review
by the courts.¹²¹ Detainees may challenge these potential deprivations of
constitutional and fundamental human rights pursuant to several legal
mechanisms currently in place. While the context of detainee transfers
is relatively uncharted territory, there are substantial legal arguments
supporting the federal courts’ ability and obligation to review transfer-to-
torture challenges. Although Congress attempted to restrict the availability
of habeas corpus and other forms of judicial review to terror suspects
detained by the United States, the DTA and MCA are inapplicable to
detainees raising transfer challenges. Furthermore, detainees may seek a
temporary injunction against transfer as a way of preserving the courts’
jurisdiction over their habeas or DTA appeals cases.

²¹⁴ Rosa Ehrenreich Brooks, War Everywhere: Rights, National Security Law, and the
Law of Armed Conflict in the Age of Terror, 153 U. PA. L. Rev. 675, 746
(2004).