

An hourglass-shaped graphic with a globe in the top bulb and another globe in the bottom bulb. The hourglass is light blue and has a dark blue top and bottom. The globe in the top bulb is dark blue, and the globe in the bottom bulb is light blue. The hourglass is centered on the page.

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*Enemy Combatant Detainees: Habeas Corpus Challenges in  
Federal Court*

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September 10, 2008

**Abstract.** This report provides an overview of the CSRT procedures, summarizes court cases related to the detentions and the use of military commissions, and summarizes the Detainee Treatment Act, as amended by the Military Commissions Act of 2006, analyzing its effects on detainee-related litigation in federal court. The report summarizes pending legislation and provides an analysis of relevant constitutional issues that may have some bearing on Congress's options with respect to the Guantanamo detainees.

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# Enemy Combatant Detainees: *Habeas Corpus* Challenges in Federal Court

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## Summary

After the U.S. Supreme Court held that U.S. courts have jurisdiction pursuant to 28 U.S.C. § 2241 to hear legal challenges on behalf of persons detained at the U.S. Naval Station in Guantanamo Bay, Cuba, in connection with the war against terrorism (*Rasul v. Bush*), the Pentagon established administrative hearings, called “Combatant Status Review Tribunals” (CSRTs), to allow the detainees to contest their status as enemy combatants, and informed them of their right to pursue relief in federal court by seeking a writ of *habeas corpus*. Lawyers subsequently filed dozens of petitions on behalf of the detainees in the District Court for the District of Columbia, where district court judges reached inconsistent conclusions as to whether the detainees have any enforceable rights to challenge their treatment and detention.

In December 2005, Congress passed the Detainee Treatment Act of 2005 (DTA) to divest the courts of jurisdiction to hear some detainees’ challenges by eliminating the federal courts’ statutory jurisdiction over *habeas* claims by aliens detained at Guantanamo Bay (as well as other causes of action based on their treatment or living conditions). The DTA provides instead for limited appeals of CSRT determinations or final decisions of military commissions. After the Supreme Court rejected the view that the DTA left it without jurisdiction to review a *habeas* challenge to the validity of military commissions in the case of *Hamdan v. Rumsfeld*, the 109<sup>th</sup> Congress enacted the Military Commissions Act of 2006 (MCA) (P.L. 109-366) to authorize the President to convene military commissions and to amend the DTA to further reduce access to federal courts by “alien enemy combatants,” wherever held, by eliminating pending and future causes of action other than the limited review of military proceedings permitted under the DTA.

In June 2008, the Supreme Court held in the case of *Boumediene v. Bush* that aliens designated as enemy combatants and detained at Guantanamo Bay have the constitutional privilege of *habeas corpus*. The Court also found that MCA § 7, which limited judicial review of executive determinations of the petitioners’ enemy combatant status, did not provide an adequate *habeas* substitute and therefore acted as an unconstitutional suspension of the writ of *habeas*. The immediate impact of the *Boumediene* decision is that detainees at Guantanamo may petition a federal district court for *habeas* review of the legality and possibly the circumstances of their detention, perhaps including challenges to the jurisdiction of military commissions. Pertinent legislation includes H.R. 267, S. 185, S. 576, S. 1547, S. 1548, H.R. 1415, H.R. 1416, H.R. 1585, H.R. 4986, H.R. 1189, H.R. 2543, H.R. 2710, H.R. 2826, S. 1249, H.R. 5658, S. 3001, S. 3002, H.R. 2212in and H.R. 6274.

## Contents

Introduction .....	1
Background .....	3
<i>Rasul v. Bush</i> .....	3
Combatant Status Review Tribunals .....	5
Court Challenges to the Detention Policy .....	7
<i>Khalid v. Bush</i> .....	8
<i>In re Guantanamo Detainee Cases</i> .....	9
<i>Hamdan v. Rumsfeld</i> .....	10
Jurisdiction.....	11
Presidential Authority .....	11
The Geneva Conventions and the Law of War .....	12
Analysis .....	13
<i>Al-Marri</i> .....	14
Detainee Treatment Act of 2005 (DTA) .....	17
The Military Commissions Act of 2006 (MCA) .....	19
Provisions Affecting Court Jurisdiction .....	19
Provisions Regarding the Geneva Conventions .....	21
Post-MCA Issues and Developments .....	23
Possible Application to U.S. Citizens.....	23
DTA Challenges to Detention .....	24
<i>Bismullah v. Gates</i> .....	24
<i>Parhat v. Gates</i> .....	26
<i>Boumediene v. Bush</i> .....	28
Constitutional Considerations and Options for Congress.....	33
Scope of Challenges .....	36
The Fact and Length of Detention .....	37
Conditions of Detention.....	38
Available Remedy .....	39
Extraterritorial Scope of Constitutional Writ of <i>Habeas</i> .....	40
Use of <i>Habeas</i> Proceeding to Challenge the Jurisdiction of a Military Commission .....	41
Congressional Authority over Federal Courts .....	41
Separation of Powers Issues .....	43
Legislative Action in the 110 <sup>th</sup> Congress .....	44
National Defense Authorization Provisions .....	44
<i>Habeas Corpus</i> Amendments.....	45
Bills to Regulate Detention .....	47
Conclusion.....	48

## Contacts

Author Contact Information .....	49
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## Introduction

In the 2004 case *Hamdi v. Rumsfeld*,<sup>1</sup> a divided Supreme Court declared that “a state of war is not a blank check for the president” and ruled that persons deemed “enemy combatants” have the right to challenge their detention before a judge or other “neutral decision-maker.” The Court did not decide whether the same right applies to aliens held as enemy combatants outside of the United States, but held in *Rasul v. Bush*<sup>2</sup> that federal courts have jurisdiction to hear *habeas* petitions by or on behalf of such detainees. The latter decision reversed the holding of the Court of Appeals for the District of Columbia Circuit, which had agreed with the Bush Administration that no U.S. court has jurisdiction to hear petitions for *habeas corpus* by or on behalf of the detainees because they are aliens and are detained outside the sovereign territory of the United States. Lawyers filed dozens of petitions on behalf of the detainees in the District Court for the District of Columbia, where judges reached conflicting conclusions as to whether the detainees have any enforceable rights to challenge their treatment and detention.

After the Supreme Court granted certiorari to hear a challenge by one of the detainees to his trial by military tribunal, Congress passed the Detainee Treatment Act of 2005 (DTA). The DTA requires uniform standards for interrogation of persons in the custody of the Department of Defense (DOD), and expressly bans cruel, inhuman, or degrading treatment of detainees in the custody of any U.S. agency. At the same time, however, it divested the courts of jurisdiction to hear challenges by those detained at Guantanamo Bay based on their treatment or living conditions. The DTA also eliminated the federal courts’ statutory jurisdiction over *habeas* claims by aliens challenging their detention at Guantanamo Bay, but provided for limited appeals of status determinations made pursuant to the DOD procedures for Combatant Status Review Tribunals (CSRTs) or by military commissions.

In *Hamdan v. Rumsfeld*, decided June 29, 2006, the Supreme Court rejected the government’s argument that the DTA divested it of jurisdiction to hear that case, and reviewed the validity of military commissions established to try suspected terrorists of violations of the law of war, pursuant to President Bush’s military order. The Court did not revisit its 2004 opinion in *Hamdi v. Rumsfeld* upholding the President’s authority to detain individuals in connection with antiterrorism operations, and did not resolve whether the petitioner could claim prisoner-of-war (POW) status, but held that “in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”

In response to the Court’s decision, the 109<sup>th</sup> Congress enacted the Military Commissions Act of 2006 (MCA) (P.L. 109-366) to authorize the President to convene military commissions and to amend the DTA to further reduce the access of aliens in U.S. custody to federal court by expressly eliminating court jurisdiction over all pending and future causes of action other than the limited review of military proceedings permitted under the DTA. A federal district judge dismissed Hamdan’s new petition for *habeas corpus* on the basis of the DTA, as amended, holding that the MCA is not a suspension of the Writ of Habeas Corpus within the meaning of the Constitution.<sup>3</sup> The U.S. Court of Appeals for the D.C. Circuit issued an order dismissing other detainee cases

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<sup>1</sup> 542 U.S. 507 (2004).

<sup>2</sup> 542 U.S. 466 (2004).

<sup>3</sup> *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9 (D.D.C. 2006).

based on similar reasoning.<sup>4</sup> The Supreme Court initially denied the petitioners' request for review,<sup>5</sup> but later granted the petitioners' motion to reconsider.<sup>6</sup>

In the consolidated cases of *Boumediene v. Bush* and *Al Odah v. United States*,<sup>7</sup> decided June 12, 2008, the Supreme Court held that aliens designated as enemy combatants and detained at Guantanamo Bay have the constitutional privilege of *habeas corpus*. The Court also found that MCA § 7, which applied DTA review procedures to petitioners' claims, did not provide an adequate *habeas* substitute and therefore acted as an unconstitutional suspension of the writ of *habeas*. The immediate impact of the *Boumediene* decision is that detainees at Guantanamo may petition a federal district court for *habeas* review of the circumstances of their detention. Although the Court held that DTA review procedures were an inadequate substitute for *habeas*, it made "no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards," and emphasized that "both the DTA and the CSRT process remain intact."<sup>8</sup> Whether these procedures violate due process standards, facially or as applied in a given case, and whether a particular detainee is being unlawfully held, are issues that will be addressed by the District Court when reviewing the *habeas* claims of Guantanamo detainees.

In the meantime, the U.S. Court of Appeals for the Fourth Circuit addressed whether it retained jurisdiction under the MCA to hear a petition on behalf of an alien arrested in the United States and detained as an enemy combatant. In 2007, the court granted *habeas* relief to a resident alien who was arrested in Illinois on criminal charges but then transferred to South Carolina and detained in military custody as an "enemy combatant."<sup>9</sup> While one judge on the panel dissented with respect to the holding that the detention was not authorized by Congress, all three judges on the panel agreed that the MCA did not divest it of jurisdiction to hear the petition, notwithstanding the MCA's lack of geographical limits. The government asked for, and was granted, a rehearing *en banc*.<sup>10</sup> On rehearing, the full circuit agreed that the jurisdictional issue had been resolved by the recent Supreme Court *Boumediene* decision, but found little agreement on the other issue presented.<sup>11</sup> As a result, the case is remanded to the district court for a hearing to determine whether the petitioner is properly detained to be an "enemy combatant." The petitioner has reportedly asked the Supreme Court to intervene.

This report provides an overview of the CSRT procedures, summarizes court cases related to the detentions and the use of military commissions, and summarizes the Detainee Treatment Act, as amended by the Military Commissions Act of 2006, analyzing its effects on detainee-related litigation in federal court. The report summarizes pending legislation and provides an analysis of relevant constitutional issues that may have some bearing on Congress's options with respect to the Guantanamo detainees.

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<sup>4</sup> *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

<sup>5</sup> *Boumediene v. Bush*, 127 S.Ct. 1478 (2007).

<sup>6</sup> *Boumediene v. Bush*, 127 S.Ct. 3078 (2007).

<sup>7</sup> *Boumediene v. Bush*, 553 U.S. \_\_\_, 128 S.Ct. 2229 (2008).

<sup>8</sup> *Id.*, 128 S.Ct. at 2270, 2275.

<sup>9</sup> *Al-Marri v. Wright*, 487 F.3d 160 (4<sup>th</sup> Cir. 2007).

<sup>10</sup> *Al-Marri v. Pucciarelli*, Case No. 06-7427 (4<sup>th</sup> Cir.).

<sup>11</sup> *Al-Marri v. Pucciarelli*, \_\_\_ F.3d \_\_\_, 2008 WL 2736787 (4<sup>th</sup> Cir. 2008).

## Background

The White House determined in February 2002 that Taliban detainees are covered under the Geneva Conventions,<sup>12</sup> while Al Qaeda detainees are not,<sup>13</sup> but that none of the detainees qualifies for the status of prisoner of war (POW).<sup>14</sup> The Administration deemed all of them to be “unlawful enemy combatants,” and claimed the right to detain them without trial or continue to hold them even if they are acquitted by a military tribunal. Fifteen of the detainees had been determined by the President to be subject to his military order (“MO”) of November 13, 2001,<sup>15</sup> making them eligible for trial by military commission.<sup>16</sup> The Supreme Court, however, found that the procedural rules established by the Department of Defense to govern the military commissions were not established in accordance with the Uniform Code of Military Justice (UCMJ).<sup>17</sup> The following sections trace the judicial developments with respect to the detention of alleged enemy combatants.

### *Rasul v. Bush*<sup>18</sup>

Petitioners were two Australians and twelve Kuwaitis (a petition on behalf of two U.K. citizens was mooted by their release) who were captured during hostilities in Afghanistan and were being held in military custody at the Guantanamo Bay Naval Base, Cuba. The Administration argued, and the court below had agreed, that under the 1950 Supreme Court case *Johnson v. Eisentrager*,<sup>19</sup> “the privilege of litigation’ does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign.’” The Court distinguished *Rasul* by noting that *Eisentrager* concerned the constitutional right to habeas corpus rather than the right as implemented by statute. The *Rasul* Court did not reach the constitutional issue, but found authority for federal court jurisdiction in 28 U.S.C. § 2241, which grants courts the authority to hear applications for habeas corpus “within their respective jurisdictions,” by any person who claims to be held “in custody in violation of the Constitution or laws or treaties of the United States.”<sup>20</sup>

<sup>12</sup> The two most relevant conventions are the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317 (hereinafter “GPW”); and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516 (hereinafter “GC”).

<sup>13</sup> White House Memorandum, “Humane Treatment of al Qaeda and Taliban Detainees” (February 7, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf>.

<sup>14</sup> For more history and analysis, see CRS Report RL31367, *Treatment of “Battlefield Detainees” in the War on Terrorism*, by Jennifer K. Elsea.

<sup>15</sup> Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, November 13, 2001, 66 *Federal Register* 57833 (2001)(hereinafter “MO” or “military order”).

<sup>16</sup> For an analysis of the military commission rules, see CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea.

<sup>17</sup> 10 U.S.C. § 801 *et seq.*

<sup>18</sup> **542 U.S. 466 (2004).**

<sup>19</sup> 339 U.S. 763 (1950).

<sup>20</sup> *Rasul*, 542 U.S. at 478-79. When *Eisentrager* was decided in 1950, the *Rasul* majority found, the “respective jurisdictions” of federal district courts were understood to extend no farther than the geographical boundaries of the districts (citing *Ahrens v. Clark*, 335 U.S. 188 (1948)). According to the Court, that understanding was altered by a line of cases, recognized in *Braden v. 30<sup>th</sup> Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973), as overruling the statutory interpretation that had established the “inflexible jurisdictional rule” upon which *Eisentrager* was implicitly based. (continued...)

The Court also declined to read the statute to vary its geographical scope according to the citizenship of the detainee. Justice Kennedy, in a concurring opinion, would have found jurisdiction over the Guantanamo detainees based on the facts that Guantanamo is effectively a U.S. territory and is “far removed from any hostilities,” and that the detainees are “being held indefinitely without the benefit of any legal proceeding to determine their status.” Noting that the Writ of Habeas Corpus (“Writ”) has evolved as the primary means to challenge executive detentions, especially those without trial, the Court held that jurisdiction over *habeas* petitions does not turn on sovereignty over the territory where detainees are held. Even if the *habeas* statute were presumed not to extend extraterritorially, as the government urged, the Court found that the “complete jurisdiction and control” the United States exercises under its lease with Cuba would suffice to bring the detainees within the territorial and historical scope of the Writ.

Without expressly overruling *Eisentrager*, the Court distinguished the cases at issue to find *Eisentrager* inapplicable. *Eisentrager* listed six factors that precluded those petitioners from seeking *habeas* relief: each petitioner “(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.”<sup>21</sup> The *Rasul* Court noted that the Guantanamo petitioners, in contrast, “are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.”

As to the petitioners’ claims based on statutes other than the *habeas* statute, which included the federal question statute<sup>22</sup> as well as the Alien Tort Statute,<sup>23</sup> the Court applied the same reasoning to conclude that nothing precluded the detainees from bringing such claims before a federal court.<sup>24</sup>

The Court’s opinion left many questions unanswered. It did not clarify which of the *Eisentrager* (or *Rasul*) factors would control under a different set of facts.<sup>25</sup> The opinion did not address whether persons detained by the U.S. military abroad in locations where the United States does

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(...continued)

Justice Scalia, with Chief Justice Rehnquist and Justice Thomas, dissented, arguing that the *habeas* statute on its face requires a federal district court with territorial jurisdiction over the detainee. The dissenters would have read *Braden* as distinguishing *Ahrens* rather than overruling it. For more analysis of the *Rasul* opinion, see CRS Report RS21884, *The Supreme Court 2003 Term: Summary and Analysis of Opinions Related to Detainees in the War on Terrorism*, by Jennifer K. Elsea.

<sup>21</sup> *Rasul*, 542 U.S. at 475 (citing *Eisentrager*, 339 U.S. at 777).

<sup>22</sup> 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

<sup>23</sup> 28 U.S.C. § 1350 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

<sup>24</sup> *Rasul*, 542 U.S. at 484 (“nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the ‘privilege of litigation’ in U.S. courts”).

<sup>25</sup> The Court noted that “*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.” *Rasul*, 542 U.S. at 476 (emphasis original).

not exercise full jurisdiction and control would have access to U.S. courts. The *Hamdan* opinion seems to indicate that a majority of the Court regarded *Eisentrager* as a ruling denying relief on the merits rather than a ruling precluding jurisdiction altogether.<sup>26</sup> Under this view, it may be argued, there was no statutory bar precluding detainees in U.S. custody overseas from petitioning for *habeas* relief in U.S. courts, although it may be substantially more difficult for such prisoners to identify a statutory or constitutional infraction that would enable them to prevail on the merits.

The Court did not decide the merits of the petitions, although in a footnote the majority opined that “Petitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’” The opinion left to lower courts such issues as whether the detentions are authorized by Congress, who may be detained and what evidence might be adduced to determine whether a person is an enemy combatant, or whether the Geneva Conventions afford the detainees any protections. The Court did not address the extent to which Congress might alter federal court jurisdiction over detainees’ *habeas* petitions, but *Boumediene* appears to foreclose the option of eliminating it completely, at least without an adequate substitute procedure. This issue is discussed more fully below.

## Combatant Status Review Tribunals

In response to Supreme Court decisions in 2004 related to “enemy combatants,” the Pentagon established procedures for Combatant Status Review Tribunals (CSRTs), based on the procedures the Army uses to determine POW status during traditional wars.<sup>27</sup> Detainees who are determined not to be enemy combatants are to be transferred to their country of citizenship or otherwise dealt with “consistent with domestic and international obligations and U.S. foreign policy.”<sup>28</sup> CSRTs have confirmed the status of at least 520 enemy combatants. Any new detainees that might be transported to Guantanamo Bay will go before a CSRT. The CSRTs are not empowered to determine whether the enemy combatants are unlawful or lawful, which led two military commission judges to hold that CSRT determinations are inadequate to form the basis for the

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<sup>26</sup> *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2793 (2006)(characterizing the *Eisentrager* decision, 339 U.S. 763, 790(1950), as having rejected the treaty claim “on the merits”). Justice Kennedy’s *Boumediene* opinion rejected the view that *Eisentrager* imposed a strict jurisdictional test based solely on the sovereignty of the territory involved, finding instead that all of the “practical considerations” considered in the opinion were integral to the ultimate holding. *Boumediene* at 2257.

<sup>27</sup> See Department of Defense (DOD) Fact Sheet, “Combatant Status Review Tribunals,” available at <http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf>. CSRT proceedings are modeled on the procedures of Army Regulation (AR) 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997), which establishes administrative procedures to determine the status of detainees under the Geneva Conventions and prescribes their treatment in accordance with international law. It does not include a category for “unlawful” or “enemy” combatants, who would presumably be covered by the other categories.

<sup>28</sup> See DOD Press Release, “Combatant Status Review Tribunal Order Issued” (June 7, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040707-0992.html>; Memorandum from the Deputy Secretary of Defense to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, July 7, 2004 (hereinafter “CSRT Order”), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; Memorandum from Deputy Secretary of Defense, Implementation of Combatant Status Review Tribunals Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, July 14, 2006 (hereinafter “CSRT Implementing Directive”), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

jurisdiction of military commissions.<sup>29</sup> Military commissions must now determine whether a defendant is an unlawful enemy combatant in order to assume jurisdiction.<sup>30</sup>

The tribunals are administrative rather than adversarial, but each detainee has an opportunity to present “reasonably available” evidence and witnesses<sup>31</sup> to a panel of three commissioned officers to try to demonstrate that the detainee does not meet the criteria to be designated as an “enemy combatant,” defined as “an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners[,] ... [including] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”<sup>32</sup> Each detainee is represented by a military officer (not a member of the Judge Advocate General (“JAG”) Corps)<sup>33</sup> and may elect to participate in the hearing or remain silent.<sup>34</sup> The government’s evidence is presented by the recorder, who is a military officer, preferably a judge advocate.<sup>35</sup>

The CSRTs are not bound by the rules of evidence that would apply in court, and the government’s evidence is presumed to be “genuine and accurate.”<sup>36</sup> The government is required to present all of its relevant evidence, including evidence that tends to negate the detainee’s designation, to the tribunal.<sup>37</sup> The CSRT is required to assess, “to the extent practicable, whether any statement derived from or relating to such detainee was obtained as a result of coercion and the probative value, if any, of any such statement.”<sup>38</sup> Unclassified summaries of relevant evidence may be provided to the detainee.<sup>39</sup> The detainee’s personal representative may view classified information and comment on it to the tribunal to aid in its determination<sup>40</sup> but does not act as an

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<sup>29</sup> See Josh White and Shailagh Murray, *Guantanamo Ruling Renews The Debate Over Detainees*, WASH. POST, June 6, 2007, at A3.

<sup>30</sup> *United States v. Khadr*, No. 07-001, (U.S.C.M.C.R. September 7, 2007) (finding CSRT designation alone insufficient to confer jurisdiction on military commission, but holding that the military commission judge has the inherent authority to determine the status of the accused).

<sup>31</sup> Witnesses from within the U.S. Armed Forces are not “reasonably available” if their participation, as determined by their commanders, would adversely affect combat or support operations. CSRT Implementing Directive, *supra* note 28, at encl. 1, para. G(9)(a). All other witnesses, apparently including those from other agencies, are not “reasonably available” if they decline to attend or cannot be reached, or if security considerations prevents their presence. *Id.* at encl. 1, para. G(9)(b). It is unclear who makes the security determination. Non-government witnesses appear at their own expense. Testimony is under oath and may be provided in writing or by telephone or video.

<sup>32</sup> CSRT Order, *supra* note 28, at 1.

<sup>33</sup> CSRT Implementing Directive, *supra* note 28, at encl. 1, para. B.

<sup>34</sup> *Id.* at encl. 1, para. F.

<sup>35</sup> *Id.* at encl. 1, para. C(2). In an affidavit submitted in DTA litigation, the government acknowledged that it has not utilized the procedures set forth in the CSRT Implementing Directive. See *Bismullah v. Gates*, 501 F.3d 178, 194-95 (D.C. Cir. 2007) (order on motions) (Rogers, J. Concurring) (citing differences between written procedures and those described by Rear Admiral James M. McGarrah in the *Boumediene* case). Rather than having a JAG officer in the rank of O-3 or above compile government information, the Department of Defense has utilized research, collection, and coordination teams to gather information to be assessed by a “case writer” who has “received approximately two weeks of training.” *Id.* at 94. Thus, the reporter assigned to represent the government’s case may not have had access to all government information.

<sup>36</sup> CSRT Implementing Directive, *supra* note 28, at encl. 1, para. G(7) & (11).

<sup>37</sup> *Id.* at encl. 1, para. G(8).

<sup>38</sup> *Id.* at encl. 10.

<sup>39</sup> *Id.* at encl. 1, para. E(3)(a).

<sup>40</sup> *Id.* at encl. 1, para. H(7).

advocate for the detainee.<sup>41</sup> If the tribunal determines that the preponderance of the evidence is insufficient to support a continued designation as “enemy combatant” and its recommendation is approved through the chain of command, the detainee will be informed of that decision upon finalization of transportation arrangements (or earlier, if the task force commander deems it appropriate).<sup>42</sup>

In March 2002, the Pentagon announced plans to create a separate process for periodically reviewing the status of detainees.<sup>43</sup> The process, similar to the CSRT process, affords persons detained at Guantánamo Bay the opportunity to present to a review board, on at least an annual basis while hostilities are ongoing, information to show that the detainee is no longer a threat or that it is in the interest of the United States and its allies to release the prisoner. If new information with a bearing on the detainee’s classification as an “enemy combatant” comes to light, a new CSRT may be ordered using the same procedures as described above.<sup>44</sup> The detainee’s State of nationality may be allowed, national security concerns permitting, to submit information on behalf of its national.

## Court Challenges to the Detention Policy

While the Supreme Court clarified in *Rasul* and *Boumediene* that the detainees have recourse to federal courts to challenge their detention, the extent to which they may enforce any rights they may have under the Geneva Conventions and other law continues to remain unclear. Prior to the enactment of the Detainee Treatment Act provisions eliminating *habeas* review, the Justice Department argued primarily that *Rasul v. Bush* merely decided the issue of jurisdiction, but that the 1950 Supreme Court decision in *Johnson v. Eisentrager*<sup>45</sup> remained applicable to limit the relief to which the detainees may be entitled. While more than one district judge from the D.C. Circuit agreed,<sup>46</sup> others did not, holding for example that detainees have the right to the assistance of an attorney.<sup>47</sup> One judge found that a detainee has the right to be treated as a POW until a “competent tribunal” decides otherwise,<sup>48</sup> but the appellate court reversed. The following sections summarize the three most important decisions prior to the enactment of the MCA, including the cases that eventually reached the Supreme Court as *Boumediene v. Bush* and *Hamdan v. Rumsfeld*. The Court of Appeals for the D.C. Circuit had ordered these cases dismissed for lack of

<sup>41</sup> *Id.* at encl. 2, para. D (the personal representative is required to explain to the represented detainee that he or she is neither the attorney or advocate for the detainee, and that any information provided by the detainee is not confidential).

<sup>42</sup> *Id.* at encl. 1, para. I(9)-(10).

<sup>43</sup> See DOD Press Release, “DoD Announces Draft Detainee Review Policy” (March 3, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040303-0403.html>; Memorandum from Deputy Secretary of Defense, Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Navy Base, Guantánamo Bay, Cuba (July 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>.

<sup>44</sup> CSRT Implementing Directive, *supra* note 28, at encl. 10 (implementing Detainee Treatment Act provisions).

<sup>45</sup> 339 U.S. 763 (1950) (holding that the federal courts did not have jurisdiction to hear a petition on behalf of German citizens who had been convicted by U.S. military commissions in China because the writ of *habeas corpus* was not available to “enemy alien[s], who at no relevant time and in no stage of [their] captivity [have] been within [the court’s] jurisdiction”).

<sup>46</sup> *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005); *Hamdan v. Rumsfeld*, 464 F. Supp.2d 9 (D.D.C. 2006).

<sup>47</sup> *Al Odah v. United States*, 346 F. Supp. 2d 1 (D.D.C. 2004).

<sup>48</sup> *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev’d* 415 F.3d 33 (D.C. Cir.), *rev’d* 548 U.S. 557 (2006).

jurisdiction on the basis of the MCA,<sup>49</sup> but the Supreme Court reversed in both its *Hamdan* and *Boumediene* decisions, returning the cases to the district court for consideration on the merits. Also discussed is a Fourth Circuit case involving an alien arrested in the United States and subsequently held in military custody as an enemy combatant. The petition, brought by Ali al-Marri, may reach the Supreme Court during its upcoming term. Al-Marri has also petitioned separately for relief from certain conditions of detention.<sup>50</sup>

### *Khalid v. Bush*<sup>51</sup>

Seven detainees, all of whom had been captured outside of Afghanistan, sought relief from their detention at the Guantanamo Bay facility. U.S. District Judge Richard J. Leon agreed with the Administration that Congress, in its Authorization to Use Military Force (AUMF),<sup>52</sup> granted President Bush the authority to detain foreign enemy combatants outside the United States for the duration of the war against al Qaeda and the Taliban, and that the courts have virtually no power to review the conditions under which such prisoners are held. Noting that the prisoners had been captured and detained pursuant to the President's military order,<sup>53</sup> Judge Leon agreed with the government that "(1) non-resident aliens detained under [such] circumstances have no rights under the Constitution; (2) no existing federal law renders their custody unlawful; (3) no legally binding treaty is applicable; and (4) international law is not binding under these circumstances."<sup>54</sup>

Judge Leon rejected the petitioners' contention that their arrest outside of Afghanistan and away from any active battlefield meant that they could not be "enemy combatants" within the meaning of the law of war, finding instead that the AUMF contains no geographical boundaries,<sup>55</sup> and gives the President virtually unlimited authority to exercise his war power wherever enemy combatants are found.<sup>56</sup> The circumstances behind the off-battlefield captures did, however, apparently preclude the petitioners from claiming their detentions violate the Geneva Conventions.<sup>57</sup> Other treaties put forth by the petitioners were found to be unavailing because of their non-self-executing nature.<sup>58</sup>

<sup>49</sup> *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

<sup>50</sup> *Al-Marri v. Gates*, Case No. 05-2259 (D.S.C. filed March 13, 2008).

<sup>51</sup> 355 F. Supp. 2d 311 (D.D.C. 2005), *vacated and dismissed sub nom.* *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd* *Boumediene v. Bush*, 553 U.S. \_\_\_, 128 S.Ct. 2229 (2008).

<sup>52</sup> Authorization for Use of Military Force ("the AUMF"), P.L. 107-40, 115 Stat. 224 (2001).

<sup>53</sup> Although the MO authorized detention as well as trial by military commissions, only fifteen of the detainees were formally designated as subject to the MO.

<sup>54</sup> 355 F. Supp. 2d at 314.

<sup>55</sup> *Id.* at 320.

<sup>56</sup> *Id.* at 318. Judge Leon wrote:

The President's ability to make the decisions necessary to effectively prosecute a Congressionally authorized armed conflict must be interpreted expansively. Indeed, the Constitution does not delegate to Congress the power to "conduct" or to "make" war; rather, Congress has been given the power to "declare" war. This critical distinction lends considerable support to the President's authority to make the operational and tactical decisions necessary during an ongoing conflict. Moreover, there can be no doubt that the President's power to act at a time of armed conflict is at its strongest when Congress has specifically authorized the President to act.

<sup>57</sup> *Id.* at 326.

<sup>58</sup> *Id.* at 327. It may be argued that the *habeas* statute itself (28 U.S.C. § 2241), which authorizes challenges of detention based on treaty violations, provided a means for private enforcement, at least prior to its amendment by the (continued...)

The court declined to evaluate whether the conditions of detention were unlawful. Judge Leon concluded that “[w]hile a state of war does not give the President a ‘blank check,’ and the courts must have some role when individual liberty is at stake, any role must be limited when, as here, there is an ongoing armed conflict and the individuals challenging their detention are non-resident aliens.”<sup>59</sup> He dismissed all seven petitions, ruling that “until Congress and the President act further, there is ... no viable legal theory under international law by which a federal court could issue a writ.”

On appeal, the *Khalid* case was consolidated with *In re Guantanamo Detainee Cases* as *Boumediene v. Bush*.

### *In re Guantanamo Detainee Cases*<sup>60</sup>

U.S. District Judge Joyce Hens Green interpreted *Rasul* more broadly, finding that the detainees do have rights under the U.S. Constitution and international treaties, and thus denied the government’s motion to dismiss the eleven challenges before the court. Specifically, Judge Green held that the detainees are entitled to due process of law under the Fifth Amendment, and that the CSRT procedures do not meet that standard. Interpreting the history of Supreme Court rulings on the availability of constitutional rights in territories under the control of the American government (though not part of its sovereign territory), Judge Green concluded that the inquiry turns on the fundamental nature of the constitutional rights being asserted rather than the citizenship of the person asserting them. Accepting that the right not to be deprived of liberty without due process of law is a fundamental constitutional right, the judge applied a balancing test to determine what process is due in light of the government’s significant interest in safeguarding national security.<sup>61</sup> Judge Green rejected the government’s stance that the CSRTs provided more than sufficient due process for the detainees. Instead, she identified two categories of defects. She objected to the CSRTs’ failure to provide the detainees with access to material evidence upon which the tribunal affirmed their “enemy combatant” status and the failure to permit the assistance of counsel to compensate for the lack of access. These circumstances, she said, deprived detainees of a meaningful opportunity to challenge the evidence against them.

Second, in particular cases, the judge found that the CSRTs’ handling of accusations of torture and the vague and potentially overbroad definition of “enemy combatant” could violate the due process rights of detainees. Citing detainees’ statements and news reports of abuse, Judge Green noted that the possibility that evidence was obtained involuntarily from the accused or from other witnesses, whether by interrogators at Guantanamo or by foreign intelligence officials elsewhere, could make such evidence unreliable and thus constitutionally inadmissible as a basis on which to determine whether a detainee is an enemy combatant. Judge Green objected to the definition of “enemy combatant” because it appears to cover “individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies.” She noted that

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(...continued)

MCA. See *Eisentrager*, 339 U.S. at 789 (while noting that the 1929 Geneva Convention did not provide for private enforcement, considering but rejecting the *habeas* claim that the treaty vitiated jurisdiction of military commission).

<sup>59</sup> *Id.* at 330 (citations omitted).

<sup>60</sup> 355 F. Supp. 2d 443 (D.D.C. 2005), *vacated and dismissed sub nom.* *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev’d* *Boumediene v. Bush*, 553 U.S. \_\_\_, 128 S.Ct. 2229 (2008).

<sup>61</sup> *Id.* at 465 (citing *Hamdi v. Rumsfeld*).

government counsel had, in response to a set of hypothetical questions, stated that the following could be treated as enemy combatants under the AUMF: “[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities, a person who teaches English to the son of an al Qaeda member, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.”<sup>62</sup> Judge Green stated that the indefinite detention of a person solely because of his contacts with individuals or organizations tied to terrorism, and not due to any direct involvement in terrorist activities, would violate due process even if such detention were found to be authorized by the AUMF.<sup>63</sup>

This case was consolidated with the *Khalid* decision and heard as *Boumediene v. Bush* by the D.C. Circuit Court of Appeals, and on appeal, the Supreme Court.

### *Hamdan v. Rumsfeld*

Salim Ahmed Hamdan, who was captured in Afghanistan and is alleged to have worked for Osama Bin Laden as a bodyguard and driver, brought this challenge to the lawfulness of the Secretary of Defense’s plan to try him for alleged war crimes before a military commission,<sup>64</sup> arguing that the military commission rules and procedures were inconsistent with the UCMJ<sup>65</sup> and that he had the right to be treated as a prisoner of war under the Geneva Conventions.<sup>66</sup> U.S. District Judge Robertson agreed, finding no inherent authority in the President as Commander-in-Chief of the Armed Forces to create such tribunals outside of the existing statutory authority, with which the military commission rules did not comply. He also concluded that the Geneva Conventions apply to the whole of the conflict in Afghanistan, including under their protections all persons detained in connection with the hostilities there,<sup>67</sup> and that Hamdan was thus entitled to be treated as a prisoner of war until his status was determined to be otherwise by a competent tribunal, in accordance with article 5 of the Third Geneva Convention (prisoners of war).

The D.C. Circuit Court of Appeals reversed, ruling that the Geneva Conventions are not judicially enforceable. Judge Williams wrote a concurring opinion, construing Common Article 3 to apply to any conflict with a non-state actor,<sup>68</sup> without regard to the geographical confinement of such a conflict within the borders of a signatory state. The Circuit Court interpreted the UCMJ language to mean that military commission rules have only to be consistent with those articles of the UCMJ that refer specifically to military commissions, and therefore need not be uniform with the rules that apply to courts-martial. After the appellate court decision was handed down, Congress passed the Detainee Treatment Act of 2005 (DTA),<sup>69</sup> which revoked federal court jurisdiction to hear

<sup>62</sup> *Id.* at 475 (internal citations omitted).

<sup>63</sup> *Id.* at 476.

<sup>64</sup> 344 F. Supp. 2d 152 (D.D.C. 2004), 415 F.3d 33 (D.C. Cir. 2005), *rev’d* 548 U.S. 557 (2006).

<sup>65</sup> 10 U.S.C. §§ 801 *et seq.*

<sup>66</sup> There are four Conventions, the most relevant of which is The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317 (hereinafter “GPW”).

<sup>67</sup> 344 F. Supp. 2d at 161.

<sup>68</sup> GPW art. 3. For a discussion of Common Article 3, see CRS Report RL31367, *Treatment of “Battlefield Detainees” in the War on Terrorism*, by Jennifer K. Elsea.

<sup>69</sup> P.L. 109-148, §1005(e)(1) provides that “no court shall have jurisdiction to hear or consider an application for habeas corpus filed by an alien detained at Guantanamo Bay.” The provision was not yet law when the appellate court decided against the petitioner, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *rev’d* 548 U.S. 557 (2006). At issue was (continued...)

*habeas corpus* petitions and other causes of action brought by Guantanamo detainees. (The provisions of the DTA are discussed in greater detail *infra*.) The Supreme Court nevertheless granted review and reversed.

## Jurisdiction

Before reaching the merits of the case, the Supreme Court declined to accept the government's argument that Congress, by passing the DTA, had stripped the Court of its jurisdiction to review *habeas corpus* challenges by or on behalf of Guantanamo detainees whose petitions had already been filed.<sup>70</sup> The Court also declined to dismiss the appeal as urged by the government on the basis that federal courts should abstain from intervening in cases before military tribunals that have not been finally decided,<sup>71</sup> noting the dissimilarities between military commission trials and ordinary courts-martial of service members pursuant to procedures established by Congress.<sup>72</sup> The government's argument that the petitioner had no rights conferred by the Geneva Conventions that could be adjudicated in federal court likewise did not persuade the Court to dismiss the case. Regardless of whether the Geneva Conventions provide rights enforceable in Article III courts, the Court found that Congress, by incorporating the "law of war" into UCMJ article 21,<sup>73</sup> brought the Geneva Conventions within the scope of law to be applied by courts. Justice Scalia, joined by Justices Thomas and Alito, dissented, arguing that the DTA should be interpreted to preclude the Court's review.

## Presidential Authority

With respect to the authority to create the military commissions, the Court held that any power to create them must flow from the Constitution and must be among those "powers granted jointly to the President and Congress in time of war."<sup>74</sup> It disagreed with the government's position that Congress had authorized the commissions either when it passed the Authorization to Use Military

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(...continued)

whether this provision applies to pending cases. The Court found that the provision did not apply to Hamdan's petition, because the case did not fall under either of the categories of cases over which the DTA had created appellate review in the D.C. Circuit. The Court did not resolve whether the DTA affects cases that fall under the DTA's provisions regarding final review of Combatant Status Review Tribunals, for which *habeas* review was eliminated as to pending cases. *Hamdan*, 126 S.Ct. at 2769, and n.14.

<sup>70</sup> *Id.* at 2763-64. To resolve the question, the majority employed canons of statutory interpretation supplemented by legislative history, avoiding the question of whether the withdrawal of the Court's jurisdiction would constitute a suspension of the Writ of Habeas Corpus, or whether it would amount to impermissible "court-stripping." Justice Scalia, joined by Justices Alito and Thomas in his dissent, interpreted the DTA as a revocation of jurisdiction.

<sup>71</sup> *Id.* at 2769-70. The court below had also rejected this argument, 413 F.3d 33, 36 (D.C. Cir. 2005).

<sup>72</sup> *See Hamdan*, 126 S.Ct. at 2771 (stating that the bodies established by the Department of Defense to review the decisions of military commissions "clearly lack the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces....").

<sup>73</sup> 10 U.S.C. § 821 ("The provisions of [the UCMJ] conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.")

<sup>74</sup> *Hamdan*, 126 S.Ct. at 2773 (citing Congress's powers to "declare War ... and make Rules concerning Captures on Land and Water," Art. I, §8, cl. 11, to "raise and support Armies," *Id.*, cl. 12, to "define and punish ... Offences against the Law of Nations," *Id.*, cl. 10, and "To make Rules for the Government and Regulation of the land and naval Forces," *Id.*, cl. 14.).

Force (AUMF)<sup>75</sup> or the DTA. Although the Court assumed that the AUMF activated the President's war powers, it did not view the AUMF as expanding the President's powers beyond the authorization set forth in the UCMJ. The Court also noted that the DTA, while recognizing the existence of military commissions, does not specifically authorize them. At most, these statutes "acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the 'Constitution and laws,' including the law of war."<sup>76</sup>

## The Geneva Conventions and the Law of War

The *habeas corpus* statute permits those detained under U.S. authority to challenge their detention on the basis that it violates any statute, the Constitution, or a treaty.<sup>77</sup> The D.C. Circuit nevertheless held that the Geneva Conventions are never enforceable in federal courts.<sup>78</sup> The Supreme Court disagreed, finding the Conventions were applicable as incorporated by UCMJ Article 21, because "compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted."<sup>79</sup> In response to the alternative holding by the court below that Hamdan, as a putative member of al Qaeda, was not entitled to any of the protections accorded by the Geneva Conventions, the Court concluded that Common Article 3 of the Geneva Conventions applies even to members of al Qaeda, according to them a minimum baseline of protections, including protection from the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>80</sup>

While recognizing that Common Article 3 "obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict," and that "its requirements are general ones, crafted to accommodate a wide variety of legal systems," the Court found that the military commissions under M.C.O. No. 1 did not meet these criteria. In particular, the military commissions did not qualify as "regularly constituted" because they deviated too far, in the Court's view, from the rules that apply to courts-martial, without a satisfactory explanation of the need for such deviation.<sup>81</sup> Justice Alito, joined by Justices Scalia and Thomas, dissented, arguing that the Court is bound to defer to the President's plausible interpretation of the treaty language.

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<sup>75</sup> P.L. 107-40, 115 Stat. 224 (2001).

<sup>76</sup> *Hamdan*, 126 S.Ct. at 2775.

<sup>77</sup> 28 U.S.C. § 2241(c)(3)(permitting petitions by prisoners "in custody in violation of the Constitution or laws or treaties of the United States").

<sup>78</sup> See 415 F.3d at 39 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 789, n. 14(1950)).

<sup>79</sup> *Hamdan*, 126 S.Ct. at 2794.

<sup>80</sup> GPW art. 3 § 1(d). The identical provision is included in each of the four Geneva Conventions and applies to any "conflict not of an international character." The majority declined to accept the President's interpretation of Common Article 3 as inapplicable to the conflict with al Qaeda and interpreted the phrase "in contradistinction to a conflict between nations," which the Geneva Conventions designate a "conflict of international character". *Hamdan*, 126 S.Ct. at 2795.

<sup>81</sup> *Id.* at 2796-97 (plurality opinion); *Id.* (Kennedy, J., concurring) at 2804. Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter, further based their conclusion on the basis that M.C.O. No. 1 did not meet all criteria of art. 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). While the United States is not party to Protocol I, the plurality noted that many authorities regard it as customary international law.

## Analysis

While the *Hamdan* Court declared the military commissions as constituted under the President's Military Order to be "illegal," it left open the possibility that changes to the military commission rules could cure any defects by bringing them within the law of war and conformity with the UCMJ, or by asking Congress to authorize or craft rules tailored to the "Global War on Terrorism" (GWOT). The Court did not resolve the extent to which the detainees, as aliens held outside of U.S. territory, have constitutional rights enforceable in federal court.

The decision may affect the treatment of detainees outside of their criminal trials; for example, in interrogations for intelligence purposes. Common Article 3 of the Geneva Conventions mandates that all persons taking no active part in hostilities, including those who have laid down their arms or been incapacitated by capture or injury, are to be treated humanely and protected from "violence to life and person," torture, and "outrages upon personal dignity, in particular, humiliating and degrading treatment." Insofar as these protections are incorporated in the UCMJ and other laws, it would seem the Court is ready to interpret and adjudicate them, to the extent it retains jurisdiction to do so. It is not clear how the Court views the scope of the GWOT, however, because its decisions on the merits have been limited to cases arising out of hostilities in Afghanistan.

The opinion reaffirms the holding in *Rasul v. Bush*<sup>82</sup> that the AUMF does not provide the President a "blank check," and, by finding in favor of a noncitizen held overseas, seems to have expanded the *Hamdi* comment that

[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.<sup>83</sup>

The dissenting views also relied in good measure on actions taken by Congress, seemingly repudiating the view expressed earlier by the Executive that any efforts by Congress to legislate with respect to persons captured, detained, and possibly tried in connection with the GWOT would be an unconstitutional intrusion into powers held exclusively by the President.<sup>84</sup> Expressly or implicitly, all eight participating Justices applied the framework set forth by Justice Jackson in his famous concurrence in the *Steel Seizures* case,<sup>85</sup> which accords greater deference to the President in cases involving national security where he acts with express congressional authority than when he acts alone. The differing views among the Justices seem to have been a function of their interpretation of the AUMF and other acts of Congress as condoning or limiting executive actions.<sup>86</sup> The Military Commissions Act of 2006 likely resolves many issues regarding the scope of authority the President may exercise; however, the constitutionality of the various measures remains to be resolved, assuming the courts retain jurisdiction to resolve them.

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<sup>82</sup> 542 U.S. 466 (2004).

<sup>83</sup> 542 U.S. 507, 535 (2004).

<sup>84</sup> See, e.g., *Oversight of the Department of Justice: Hearing Before the Senate Judiciary Committee*, 107<sup>th</sup> Cong. (2002) (testimony of Attorney General John Ashcroft) (arguing that a statute that could be read to interfere with the executive power to detain enemy combatants must be interpreted otherwise to withstand constitutional scrutiny).

<sup>85</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>86</sup> For information about relevant legislation, see CRS Report RL31600, *The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice*, by Jennifer K. Elsea.

## Al-Marri

The case of Ali Saleh Kahlah al-Marri differs significantly from cases discussed above in that the petitioner, a lawful alien resident, was arrested and is imprisoned within the United States. Al-Marri, a Qatari student, was arrested in December 2001 in Peoria, Illinois, and transported to New York City, where he was held as a material witness for the grand jury investigating the 9/11 attacks. He was later charged with financial fraud and making false statements and transferred back to Peoria. Before his case went to trial, however, he was declared an “enemy combatant” and transferred to military custody in South Carolina. Al-Marri’s counsel filed a petition for *habeas corpus* challenging al-Marri’s designation and detention as an “enemy combatant.” The petition was eventually dismissed for lack of jurisdiction by the U.S. Court of Appeals for the Seventh Circuit,<sup>87</sup> and a new petition was filed in the Fourth Circuit. In March 2005, Judge Floyd agreed with the government that the detention was authorized by the AUMF and transferred the case to a federal magistrate to examine the factual allegations supporting the government’s detention of the petitioner as an enemy combatant.<sup>88</sup> The government provided a declaration asserting that al-Marri is closely associated with al Qaeda and had been sent to the United States prior to September 11, 2001 to serve as a “sleeper agent” for al Qaeda in order to “facilitate terrorist activities and explore disrupting this country’s financial system through computer hacking.”<sup>89</sup> The magistrate judge recommended the dismissal of the petition on the basis of information the government provided, which al-Marri did not attempt to rebut and which the magistrate judge concluded was sufficient for due process purposes in line with the *Hamdi* decision.<sup>90</sup> The district judge adopted the magistrate judge’s report and recommendations in full, rejecting the petitioner’s argument that his capture away from a foreign battlefield precluded his designation as an “enemy combatant.”<sup>91</sup>

Al-Marri appealed, and the government moved to dismiss on the basis that the MCA strips the court of jurisdiction. The petitioner asserted that Congress did not intend to deprive him of his right to *habeas* or that, alternatively, the MCA is unconstitutional. The majority avoided the constitutional question by finding that al-Marri does not meet the statutory definition as an alien who “has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”<sup>92</sup>

<sup>87</sup> *Al-Marri v. Rumsfeld*, 360 F.3d 707 (7<sup>th</sup> Cir. 2004), *cert. denied* 543 U.S. 809 (2004).

<sup>88</sup> *Al-Marri v. Hanft*, 378 F. Supp.2d 673 (D. S.C. 2005) (order denying summary judgment).

<sup>89</sup> *Al-Marri v. Pucciarelli*, slip op. at 4 (4<sup>th</sup> Cir. 2008)(Motz, J., concurring)(citing declaration Jeffrey N. Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism).

<sup>90</sup> *Al-Marri v. Wright*, 443 F. Supp. 2d 774 (D. S.C. 2006) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)). With respect to the “due process hearing” required to establish that an enemy combatant is properly held, the *Hamdi* plurality stated that:

enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.

<sup>91</sup> *Id.* at 778-80.

<sup>92</sup> The court held that the MCA requires a two-step process for determining whether persons are properly detained as enemy combatants, but that the President’s determination of the petitioner’s “enemy combatant” status fulfilled only (continued...)

Turning to the merits, the majority found that al-Marri does not fall within the legal category of “enemy combatant” within the meaning of *Hamdi*, and that the government could continue to hold him only if it charges him with a crime, commences deportation proceedings, obtains a material witness warrant in connection with grand jury proceedings, or detains him for a limited time pursuant to the Patriot Act.<sup>93</sup> In so holding, the majority rejected the government’s contention that the AUMF authorizes the President to order the military to seize and detain persons within the United States under the facts asserted by the government, or that, alternatively, the President has inherent constitutional authority to order the detention.

The government cited the *Hamdi* decision and the Fourth Circuit’s decision in *Padilla v. Hanft*<sup>94</sup> to support its contention that al-Marri is an enemy combatant within the meaning of the AUMF and the law of war. The court, however, interpreted *Hamdi* as confirming only that “the AUMF is explicit congressional authorization for the detention of individuals in the *narrow category* ... [of] individuals who were ‘part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.’”<sup>95</sup> Likewise, *Padilla*, although captured in the United States, could be detained pursuant to the AUMF only because he had been, prior to returning to the United States, “‘armed and present in a combat zone’ in Afghanistan as part of Taliban forces during the conflict there with the United States.”<sup>96</sup> The court explained that the two cases cited by the government, *Hamdi* and *Padilla*, involved situations similar to the World War II case *Ex parte Quirin*,<sup>97</sup> in which the Supreme Court agreed that eight German saboteurs could be tried by military commission because they were enemy belligerents within the meaning of the law of war.<sup>98</sup> In contrast, al-Marri’s situation was to be likened to *Ex parte Milligan*,<sup>99</sup> the Civil War case in which the Supreme Court held that a citizen of Indiana accused of conspiring to commit hostile acts against the Union was nevertheless a civilian who was not amenable to military jurisdiction.<sup>100</sup> The court concluded that enemy combatant status rests, in accordance with the law of war, on affiliation with the military arm of an enemy government in an international armed conflict.

Judge Hudson dissented, arguing that the broad language of the AUMF, which authorized the President “to use all necessary and appropriate force against those nations, *organizations, or persons* he determines” were involved in the terrorist attacks of September 11, 2001, “would

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the first step. The court next found that Al-Marri could not be said to be awaiting such a determination within the meaning of the MCA, inasmuch as the government was arguing on the merits that the presidential determination had provided all of the process that was due, and the government had offered the possibility of bringing Al-Marri before a CSRT only as an alternative course of action in the event the petition were dismissed. Further, the majority looked to the legislative history of the MCA, from which it divined that Congress did not intend to replace *habeas* review with the truncated review available under the amended DTA in the case of aliens within the United States, who it understood to have a constitutional as opposed to merely statutory entitlement to seek habeas review. *Al-Marri v. Wright*, 487 F.3d 160, 172 (4<sup>th</sup> Cir. 2007), *vacated sub nom.* *Al-Marri v. Pucciarelli*, \_\_\_ F.3d \_\_\_ (2008)(per curiam).

<sup>93</sup> *Id.* at 196.

<sup>94</sup> 423 F.3d 386 (4<sup>th</sup> Cir. 2005). The government is no longer holding Jose Padilla as an enemy combatant, having turned him over to civil authorities for trial on charges associated with terrorism.

<sup>95</sup> *Al-Marri*, 487 F.3d at 180 (citing *Hamdi* at 516-17)(emphasis in original).

<sup>96</sup> *Id.* (citing *Padilla*, 423 F.3d at 390-91).

<sup>97</sup> 317 U.S. 1 (1942).

<sup>98</sup> *Al-Marri*, 487 F.3d at 179 (citing *Quirin*, 317 U.S. at 37-38; *Hamdi*, 542 U.S. at 519; *Padilla*, 423 F.3d at 391).

<sup>99</sup> 71 U.S. (4 Wall.) 2 (1866).

<sup>100</sup> *Al-Marri* at 189.

certainly seem to embrace surreptitious al Qaeda agents operating within the continental United States.”<sup>101</sup> He would have found no meaningful distinction between the present case and *Padilla*.

The government petitioned for and was granted a rehearing *en banc*.<sup>102</sup> On rehearing, the narrowly divided Fourth Circuit full bench rejected the earlier panel’s decision in favor of the government’s position that al-Marri fits the legal definition of “enemy combatant,” but also reversed the district court’s decision that al-Marri was not entitled to present any more evidence to refute the government’s case against him. Four of the judges on the panel would have retained the earlier decision, arguing that it was not within the court’s power to expand the definition of “enemy combatant” beyond the law-of-war principles at the heart of the Supreme Court’s *Hamdi* decision.<sup>103</sup> However, these four judges joined in Judge Traxler’s opinion to remand for evidentiary proceedings in order “at least [to] place the burden on the Government to make an initial showing that normal due process protections are unduly burdensome and that the Rapp declaration is “the most reliable available evidence,” supporting the Government’s allegations before it may order al-Marri’s military detention.”<sup>104</sup>

Judge Traxler, whose opinion is controlling for the case although not joined in full by any other panel member, agreed with the four dissenting judges that the AUMF “grants the President the power to detain enemy combatants in the war against al Qaeda, including belligerents who enter our country for the purpose of committing hostile and war-like acts such as those carried out by the al Qaeda operatives on 9/11.”<sup>105</sup> Accordingly, he would define “enemy combatant” in the GWOT to include persons who “associate themselves with al Qaeda” and travel to the United States “for the avowed purpose of further prosecuting that war on American soil, ... even though the government cannot establish that the combatant also ‘took up arms on behalf of that enemy and against our country in a foreign combat zone of that war.’”<sup>106</sup> Under this definition, American

<sup>101</sup> *Id.* at 196 (Hudson, J., dissenting).

<sup>102</sup> *Al-Marri v. Pucciarelli*, \_\_F.3d \_\_, 2008 WL 2736787 (4<sup>th</sup> Cir. 2008)(per curiam). The intervening Supreme Court decision in *Boumediene* led the court to reject the government’s contention that the MCA had divested the court of jurisdiction.

<sup>103</sup> *Id.* at \*13 (Motz, J. concurring)(citing *Hamdi*, 542 U.S. at 518). Judge Motz, joined by three other judges, characterized leading precedents as sharing two characteristics:

- (1) they look to law-of-war principles to determine who fits within the “legal category” of enemy combatant; and
- (2) following the law of war, they rest enemy combatant status on affiliation with the military arm of an enemy nation.

Under their interpretation of the law of war, there is no combatant status in non-international armed conflict, where detention is controlled by domestic law. For a discussion of U.S. practice with respect to the wartime detention of suspected enemies, whether civilians or combatants, see CRS Report RL31724, Detention of American Citizens as Enemy Combatants, by Jennifer K. Elsea.

<sup>104</sup> *Al-Marri*, at \*32.

<sup>105</sup> *Id.* at \*32 (Traxler, J., concurring).

<sup>106</sup> *Id.* at \*37. Judge Traxler further suggested that the types of activities that would distinguish a combatant from a civilian enemy would include violent activities. *See id.* At \*39 (describing the allegations that al-Marri “directly allied himself with al Qaeda abroad, volunteered for assignments (including a martyr mission), received training and funding from al Qaeda abroad, was dispatched by al Qaeda to the United States as an al Qaeda operative with orders to serve as a sleeper agent, and was tasked with facilitating and ultimately committing terrorist attacks against the United States within this country”). The dissenting judges suggested similar definitions for determining who may be treated as an “enemy combatant.” *See id.* at \*61 (Williams, J., concurring in part and dissenting in part)(defining enemy combatant covered by the AUMF as “an individual who meets two criteria: (1) he attempts or engages in belligerent acts against the United States, either domestically or in a foreign combat zone; (2) on behalf of an enemy force”); *id.* at \*99 (Wilkinson, J., concurring in part and dissenting in part)(proposing two-part test in which “an ‘enemy’ is any individual who is (1) a member of (2) an organization or nation against whom Congress has declared war or authorized the use of (continued...)

citizens arrested in the United States could also be treated as enemy combatants under similar allegations,<sup>107</sup> at least if they had traveled abroad and returned for the purpose of engaging in activity related to terrorism on behalf of al Qaeda.

However, Judge Traxler did not agree that al-Marri had been afforded due process by the district court to challenge the factual basis for his designation as an enemy combatant. While recognizing that the *Hamdi* plurality had suggested that hearsay evidence might be adequate to satisfy due process requirements for proving enemy combatant status, Judge Traxler did not agree that such relaxed evidentiary standards are necessarily appropriate when dealing with a person arrested in the United States:

Because al-Marri was seized and detained in this country,... he is entitled to habeas review by a civilian judicial court and to the due process protections granted by our Constitution, interpreted and applied in the context of the facts, interests, and burdens at hand. To determine what constitutional process al-Marri is due, the court must weigh the competing interests, and the burden-shifting scheme and relaxed evidentiary standards discussed in *Hamdi* serve as important guides in this endeavor. *Hamdi* does not, however, provide a cookie-cutter procedure appropriate for every alleged enemy-combatant, regardless of the circumstances of the alleged combatant's seizure or the actual burdens the government might face in defending the habeas petition in the normal way.<sup>108</sup>

Al-Marri's case will return to the district court for evidentiary hearings, unless the Supreme Court decides to grant certiorari or, perhaps, if the government ceases to detain him as an "enemy combatant."

## Detainee Treatment Act of 2005 (DTA)

The Detainee Treatment Act of 2005 (DTA), passed after the Court's decision in *Rasul*, requires uniform standards for interrogation of persons in the custody of the Department of Defense,<sup>109</sup> and expressly bans cruel, inhuman, or degrading treatment of detainees in the custody of any U.S. agency.<sup>110</sup> The prohibited treatment is defined as that which would violate the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution, as the Senate has interpreted "cruel, inhuman,

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military force" and a combatant is "a person who knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of an enemy nation or organization").

<sup>107</sup> See *id.* at \*53 (Gregory, J., concurring).

<sup>108</sup> *Id.* at \*47. Judge Traxler formulated a general rule under which such enemy combatants "would be entitled to the normal due process protections available to all within this country, including an opportunity to confront and question witnesses against him[, unless] the government can demonstrate to the satisfaction of the district court that this is impractical, outweighed by national security interests, or otherwise unduly burdensome because of the nature of the capture and the potential burdens imposed on the government to produce non-hearsay evidence and accede to discovery requests, [in which case] alternatives should be considered and employed." *Id.* at \*49.

<sup>109</sup> Section 1002 of P.L. 109-148 requires DOD to follow the Army Field Manual for intelligence interrogation. See DEPARTMENT OF THE ARMY FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION (1992), available at <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/FM34-52IntelInterrogation.pdf> (September 1, 2004). For an analysis of the approved interrogation procedures, see CRS Report RL32567, *Lawfulness of Interrogation Techniques under the Geneva Conventions*, by Jennifer K. Elsea.

<sup>110</sup> Section 1003 of P.L. 109-148. See CRS Report RL33655, *Interrogation of Detainees: Overview of the McCain Amendment*, by Michael John Garcia.

or degrading” treatment banned by the U.N. Convention Against Torture.<sup>111</sup> The provision does not create a cause of action for detainees to ask a court for relief based on inconsistent treatment, and it divests the courts of jurisdiction to hear challenges by those detained at Guantanamo Bay based on their treatment or living conditions.<sup>112</sup> It also provides a legal defense to U.S. officers and agents who may be sued or prosecuted based on their treatment or interrogation of detainees.<sup>113</sup> This language appears to have been added as a compromise because the Administration reportedly sought to have the Central Intelligence Agency excepted from the prohibition on cruel, inhuman and degrading treatment on the grounds that the President needs “maximum flexibility in dealing with the global war on terrorism.”<sup>114</sup>

The DTA also includes a modified version of the “Graham-Levin Amendment,”<sup>115</sup> which requires the Defense Department to submit to the Armed Services and Judiciary Committees the procedural rules for determining detainees’ status.<sup>116</sup> The amendment neither authorizes nor requires a formal status determination, but it does require that certain congressional committees be notified 30 days prior to the implementation of any changes to the rules. As initially adopted by the Senate, the amendment would have required these procedural rules to preclude evidence determined by the board or tribunal to have been obtained by undue coercion, however, the conferees modified the language so that the tribunal or board must assess, “to the extent practicable ... whether any statement derived from or relating to such detainee was obtained as a result of coercion” and “the probative value, if any, of any such statement.”

The Graham-Levin Amendment also eliminated the federal courts’ statutory jurisdiction over *habeas* claims by aliens detained at Guantanamo Bay, but provides for limited appeals of status determinations made pursuant to the DOD procedures for Combatant Status Review Tribunals (CSRTs). In June 2008, the Supreme Court invalidated the provision that eliminated *habeas corpus* jurisdiction, but stated that the DTA appellate process “remains intact,”<sup>117</sup> although it appears that the process is not an adequate substitute for *habeas* review. However, it no longer constitutes the sole avenue by which a detainee may seek judicial review of his detention, as a detainee may also seek *habeas* review by a federal district court. It appears that courts will not require detainees to exhaust their options under the DTA appeals process prior to seeking *habeas* review, at least in cases currently pending.

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<sup>111</sup> Section 1003(d) of P.L. 109-148. For more information, see CRS Report RL32438, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, by Michael John Garcia.

<sup>112</sup> Section 1005 of P.L. 109-148 (denying aliens in military custody privilege to file writ of *habeas corpus* or “any other action against the United States or its agents relating to any aspect of the[ir] detention. . .”).

<sup>113</sup> Section 1004 of P.L. 109-148 provides a defense in litigation related to “specific operational practices,” involving detention and interrogation where the defendant:

did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.

<sup>114</sup> See Eric Schmitt, *Exception Sought in Detainee Abuse Ban*, N.Y. TIMES, October 25, 2005, at 16.

<sup>115</sup> 151 CONG. REC. S12667 (daily ed. November 10, 2005)(introduced by Sen. Graham, passed by roll call vote, 49 - 42), as amended by S.Amdt. 2524, 151 CONG. REC. S12771 (daily ed. November 14, 2005).

<sup>116</sup> The amendment refers to both the Combatant Status Review Tribunals (“CSRTs”), the initial administrative procedure to confirm the detainees’ status as enemy combatants, and the Administrative Review Boards, which were established to provide annual review that the detainees’ continued detention is warranted.

<sup>117</sup> *Boumediene v. Bush*, 553 U.S. \_\_\_, 128 S.Ct. 2229, 2275 (2008).

Under the appellate process prescribed by the DTA, the D.C. Circuit Court of Appeals has exclusive jurisdiction to hear appeals of any status determination made by a “Designated Civilian Official,” but the review is limited to a consideration of whether the determination was made consistently with applicable DOD procedures, including whether it is supported by the preponderance of the evidence, but allowing a rebuttable presumption in favor of the government. The procedural rule regarding the use of evidence obtained through undue coercion applies prospectively only, so that detainees who have already been determined by CSRTs to be enemy combatants may not base an appeal on the failure to comply with that procedure. Detainees may also appeal status determinations on the basis that, “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.” Jurisdiction was to cease if the detainee were transferred from DOD custody. (Currently, jurisdiction is cut off if the detainee is transferred from U.S. custody.)

The DTA also provides for an appeal to the Court of Appeals for the District of Columbia Circuit of final sentences rendered by a military commission. As initially enacted, the DTA required the court to review capital cases or cases in which the alien was sentenced to death or to a term of imprisonment for 10 years or more, and made review over convictions with lesser penalties discretionary. The scope of review was limited to considering whether the decision applied the correct standards consistent with Military Commission Order No. 1 (implementing the President’s Military Order) and whether those standards were consistent with the Constitution and laws of the United States, to the extent applicable.

## **The Military Commissions Act of 2006 (MCA)**

After the Court’s decision in *Hamdan*, the Bush Administration proposed legislation to Congress,<sup>118</sup> a version of which was enacted on October 17, 2006. The Military Commissions Act of 2006 (MCA) authorized the trial of certain detainees by military commission and prescribed detailed rules to govern their procedures.<sup>119</sup> The MCA also amended the DTA provisions regarding appellate review and *habeas corpus* jurisdiction.

### **Provisions Affecting Court Jurisdiction**

The MCA expanded the DTA to make its review provisions the exclusive remedy for all aliens detained as enemy combatants anywhere in the world, rather than only those housed at Guantanamo Bay, Cuba. It does not, however, require that all detainees undergo a CSRT or a

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<sup>118</sup> Senator Frist introduced the Administration’s proposal as the “Bringing Terrorists to Justice Act of 2006,” S. 3861. The Senate Armed Services Committee reported favorably a bill called the “Military Commissions Act of 2006” (S. 3901), which was in many respects similar to the Administration’s proposal, but varied with respect to jurisdiction and some rules of evidence. The House Armed Services Committee approved H.R. 6054, also called the “Military Commissions Act of 2006,” which closely tracked the Administration’s proposal. After reaching an agreement with the White House with respect to several provisions in S. 3901, Senator McCain introduced S. 3930, again entitled the “Military Commissions Act of 2006.” Representative Hunter subsequently introduced a modified version of H.R. 6054 as H.R. 6166, which the House of Representatives passed on September 28, 2006. A manager’s amendment to S. 3930, substantially identical to the bill passed by the House, was passed by the Senate the following day.

<sup>119</sup> P.L. 109-366. For a further description of the procedures associated with these military commissions, see CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea.

military tribunal in order to continue to be confined. Thus, any aliens detained outside of Guantanamo Bay might be effectively denied access to U.S. courts, except perhaps by means of *habeas* review.

Appeals from the final decisions of military commissions continue to go to the United States Court of Appeals for the District of Columbia Circuit,<sup>120</sup> but are routed through a new appellate body, the Court of Military Commission Review (CMCR). CSRT determinations continue to be appealable directly to the D.C. Circuit. Review of decisions of a military commission may only concern matters of law, not fact.<sup>121</sup> Appeals may be based on inconsistencies with the procedures set forth by the MCA, or, to the extent applicable, the Constitution or laws of the United States.

The MCA § 7 revoked U.S. courts' jurisdiction to hear *habeas corpus* petitions by all aliens in U.S. custody as enemy combatants, including lawful enemy combatants, regardless of the place of custody. It replaced 28 U.S.C. § 2241(e), the *habeas* provision added by the DTA, with language providing that

(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) [review of CSRT determinations] and (3) [review of final decisions of military commissions] 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.<sup>122</sup>

This amendment took effect on the date of its enactment, and applied to “all cases, without exception, pending on or after the date of [enactment] 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.” In *Boumediene v. Bush*, discussed *infra*, the Supreme Court held that MCA § 7 constituted an unconstitutional suspension of the writ of *habeas corpus*, and authorized Guantanamo detainees to petition federal district courts for *habeas* review of CSRT determinations of their enemy combatant status.

Under the DTA appeals provision, there is no apparent limit to the amount of time a detainee could spend awaiting a determination as to combatant status. Aliens who continue to be detained despite having been determined not to be enemy combatants are not permitted to challenge their continued detention or their treatment, nor are they able to protest their transfer to another country, for example, on the basis that they fear torture or persecution. However, these matters may be raised in *habeas* petition. The extent of relief the courts may be able to grant remains to be addressed by the courts.

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<sup>120</sup> MCA § 5.

<sup>121</sup> 10 U.S.C. § 950g(b).

<sup>122</sup> MCA § 7.

## Provisions Regarding the Geneva Conventions

A continuing source of dispute in the detention and treatment of detainees is the application of the Geneva Convention. As noted previously, the *habeas corpus* statute has traditionally provided for, among other things, challenges to allegedly unlawful detentions based on rights found in treaties.<sup>123</sup> Thus, for instance, Common Article 3 of the 1949 Geneva Conventions, which prohibits the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples,” has been used as a basis for challenging the confinement of detainees.<sup>124</sup>

Section 5 of the MCA, however, specifically precludes the application of the Geneva Conventions to *habeas* or other civil proceedings.<sup>125</sup> Further, the MCA provides that the Geneva Conventions may not be claimed as a source of rights by an alien who is subject to military commission proceedings.<sup>126</sup> Rather, Congress deems that the military commission structure established by the act complies with the requirement under Common Article 3 of the Geneva Convention that trials be by a regularly constituted court.<sup>127</sup>

In addition, the act provides that the President shall have the authority to interpret the meaning of the Geneva Conventions.<sup>128</sup> The intended effect of this provision is unclear. While the President generally has a role in the negotiation, implementation, and domestic enforcement of treaty obligations,<sup>129</sup> this power does not generally extend to “interpreting” treaty obligations, a role more traditionally associated with courts.<sup>130</sup> In general, Congress is prohibited from exercising powers allocated to another branch of government.<sup>131</sup> In *United States v. Klein*,<sup>132</sup> the Congress

<sup>123</sup> 28 U.S.C. § 2241.

<sup>124</sup> GPW art. 3 § 1(d). See *Hamdan*, 126 S.Ct. at 2796-2797 (noting the application of this provision of the Geneva Conventions to detainees through the UCMJ Article 21).

<sup>125</sup> MCA § 5(a) provides that “No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.”

<sup>126</sup> MCA § 3 (10 U.S.C. § 948c) provides that “No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.”

<sup>127</sup> MCA § 3 (10 U.S.C. § 948b(f), as amended) provides that a military commission is a “regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.” While this language could be construed as directing a court to find that the MCA does not conflict with the Geneva Conventions, a better reading would appear to be that, to the extent that there is a conflict between the MCA and the Geneva Conventions, that the MCA should be given precedence. See generally *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429 (1992).

<sup>128</sup> MCA § 6(a)(3)(A) provides that “the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.”

<sup>129</sup> See, e.g., *id.* (President is given power to promulgate higher standards and administrative regulations for violations of treaty obligations).

<sup>130</sup> See, e.g., MCA § 6(a)(3)(B) (“No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441.”).

<sup>131</sup> See *Dickerson v. United States*, 530 U.S. 428, 438 (2000) (striking down congressional statute purporting to overturn the Court’s Fourth Amendment ruling in *Miranda v. Arizona*); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (Congress’ enforcement power under the Fourteenth Amendment does not extend to the power to alter the Constitution); *Plaut v. Spendthrift Farm*, 514 U.S. 211, 225 (Congress may not disturb final court rulings).

<sup>132</sup> 80 U.S. (13 Wall.) 128 (1871).

passed a law designed to frustrate a finding of the Supreme Court as to the effect of a presidential pardon.<sup>133</sup> Similarly, a law that was specifically intended to grant the authority of the President to adjudicate or remedy treaty violations could violate the doctrine of separation of powers, as providing relief from acts in violation of treaties is a judicial branch function.<sup>134</sup> Instead, what appears to be the main thrust of this language is to establish the authority of the President within the Executive Branch to issue interpretative regulations by Executive Order.<sup>135</sup> However, the context in which this additional authority would be needed is unclear.

One possible intent of this provision is that the President is being given the authority to “interpret” the Geneva Convention for diplomatic purposes (e.g., to define treaty obligations and encourage other countries to conform to such definitions). This interpretation seems unlikely, as the President’s power in this regard is already firmly established.<sup>136</sup> Another possible meaning is that the President is being given the authority to apply the Geneva Conventions to particular fact situations, such as specifying what type of interrogation techniques may be lawfully applied to a particular individual suspected of being an enemy combatant. This interpretation is possible, but it is not clear how the power to “interpret” would be significant in that situation, as the MCA precludes application of the Geneva Convention in those contexts in which such interrogations would be challenged—military commissions, *habeas corpus*, or any other civil proceeding.<sup>137</sup>

The more likely intent of this language would be to give the President the authority to promulgate regulations prescribing standards of behavior of employees and agents of federal agencies. For instance, this language might be seen as authorizing the President to issue regulations to implement how agency personnel should comply with the Geneva Conventions, policies which might otherwise be addressed at the agency level. Thus, for instance, if the CIA had established internal procedures regarding how to perform interrogation consistent with the Geneva Convention, then this language would explicitly authorize the President to amend such procedures by Executive Order.<sup>138</sup> Whether the President already had such power absent this language is beyond the scope of this report.

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<sup>133</sup> The Court struck down the law, essentially holding that the Congress had an illegitimate purpose in passage of the law. “[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. . . . It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.” 80 U.S. at 146. The Court also found that the statute impaired the effect of presidential pardon, and thus “infringe[ed] the constitutional power of the Executive.” *Id.* at 147.

<sup>134</sup> See generally *Miller v. French*, 530 U.S. 327, 350-51 (2000) (Souter, J., concurring).

<sup>135</sup> MCA § 6(a)(3)(B).

<sup>136</sup> “If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance.” *Whitney v. Robertson* 124 U.S. 190, 194 (1888).

<sup>137</sup> MCA § 5(a). It is unclear why the MCA addresses the application of the Geneva Convention to *habeas corpus* proceeding brought by detainees, since such suits are precluded by the DTA and the MCA. Section 1405(e) of P.L. 109-63; MCA, §7(a). It may be intended to apply to *habeas* cases brought by U.S. citizens or by aliens who do not fall under the definition of “enemy combatant.” On the other hand, as will be discussed *infra*, there may be constitutional issues associated with limiting access of enemy combatants to *habeas corpus* proceeding. In the event the *habeas* restrictions of the DTA are found to be unconstitutional, then this provision may become relevant to those proceedings.

<sup>138</sup> Executive Order 13340, *Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*, 72 Fed. Reg. 40707 (July 20, 2007).

## Post-MCA Issues and Developments

Shortly after the enactment of the MCA, the government filed motions to dismiss all of the *habeas* petitions in the D.C. Circuit involving detainees at Guantanamo Bay<sup>139</sup> and the petition of an alien detained as an enemy combatant in a naval brig in South Carolina.<sup>140</sup> Legislation introduced at the end of the 109<sup>th</sup> Congress to amend the MCA did not reach the floor of either house.<sup>141</sup>

### Possible Application to U.S. Citizens

Some observers raised concern that the MCA permits the President to detain American citizens as enemy combatants without trial.<sup>142</sup> The prohibition in the MCA with respect to *habeas corpus* petitions applied only to those filed by or on behalf of aliens detained by the United States as enemy combatants. However, the MCA can be read by implication to permit the detention of U.S. citizens as enemy combatants, although it does not permit their trial by military commission, which could affect their entitlement to relief using *habeas corpus* procedures.

A plurality of the Supreme Court held in 2004, in *Hamdi v. Rumsfeld*,<sup>143</sup> that the President has the authority to detain U.S. citizens as enemy combatants pursuant to the AUMF,<sup>144</sup> but that the determination of combatant status is subject to constitutional due process considerations. The *Hamdi* plurality was limited to an understanding that the phrase “enemy combatant” means an “individual who...was ‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the United States’ there,”<sup>145</sup> but left it to lower courts to flesh out a more precise definition. The U.S. Court of Appeals for the Fourth Circuit found that the definition continued to apply to a U.S. citizen who returned to the United States from Afghanistan and was arrested at the airport.<sup>146</sup> More recently, the Fourth Circuit appears to have expanded the definition of “enemy combatant” to individuals arrested in the United States on suspicion of planning to participate in terrorist acts without necessarily having engaged in hostilities in Afghanistan. (See discussion of *Al-Marri*, *supra*.)

In theory, the executive branch could detain a citizen as an enemy combatant and argue that the definition of “unlawful enemy combatant” provided in the MCA, which does not explicitly limit the definition to aliens and includes persons who provide material support to terror groups engaged in hostilities against the United States, should also apply to the detention authority already found by virtue of the AUMF. Constitutional due process would apply, and the citizen

<sup>139</sup> See Karen DeYoung, *Court Told It Lacks Power in Detainee Cases*, WASH. POST, October 20, 2006, at A18 (reporting notice submitted by Justice Department to courts of intention to move for dismissal of pending enemy combatant cases).

<sup>140</sup> *Al-Marri v. Wright*, 487 F.3d 160 (4<sup>th</sup> Cir. 2007), *vacated sub nom. Al-Marri v. Pucciarelli*, \_\_\_ F.3d \_\_\_ (2008)(per curiam).

<sup>141</sup> See S. 4081 and H.R. 6381, 109<sup>th</sup> Cong.

<sup>142</sup> See, e.g., Scott Shane and Adam Liptak, *Detainee Bill Shifts Power to President*, N.Y. TIMES, September 30, 2006, at A1.

<sup>143</sup> 542 U.S. 507 (2004).

<sup>144</sup> P.L. 107-40, 115 Stat. 224 (2001).

<sup>145</sup> 542 U.S. at 516.

<sup>146</sup> *Padilla v. Hanft*, 423 F.3d 386 (4<sup>th</sup> Cir. 2005).

could petition for *habeas corpus* to challenge his detention, but under the MCA, the citizen-combatant would not be able to assert rights based on the Geneva Convention in support of his contention that he is not an enemy combatant. In that sense, U.S. citizens could be affected by the MCA even though it does not directly apply to U.S. citizens.

On the other hand, since the MCA definition for unlawful enemy combatant applies on its face only for the purposes of the new chapter 47a of Title 10, U.S. Code (providing for the trial by military commission of alien unlawful enemy combatants), it may be argued that outside of that context, the term “enemy combatant” should be understood in the ordinary sense, that is, to include only persons who participate directly in hostilities against the United States. This interpretation seems unlikely, given that it would also mean that this narrower definition of “enemy combatant” was also meant to apply in the context of the MCA’s *habeas corpus* provisions, such that some aliens who fall under the jurisdiction of a military commission under the MCA would nevertheless have been able to argue that the MCA did not affect their right to petition for *habeas corpus* or pursue any other cause of action in U.S. court, a reading that does not seem consistent with Congress’s probable intent. Further, it does not appear that Congress meant to apply a different definition of “enemy combatant” to persons depending on their citizenship. Congress could specify that U.S. citizens captured in the context of the “Global War on Terror” be subject to trial in U.S. court for treason or a violation of any other statute, or prescribe procedures for determining whether U.S. citizens are subject to detention as enemy combatants, if constitutional, but it has not done so.

## **DTA Challenges to Detention**

At the same time as it was considering the *Boumediene* case, the D.C. Circuit was reviewing several challenges brought pursuant to the DTA in which detainees contested CSRT determinations that they are properly detained as “enemy combatants.” The most advanced of these cases involved Haji Bismullah, who was captured in Afghanistan in 2003, and Husaifa Parhat and six other detainees, all ethnic Chinese Uighers captured in Pakistan in December 2001.

### ***Bismullah v. Gates***

At issue at this stage in the proceedings was a series of motions filed by both parties seeking to establish procedures governing access to classified information, attorneys’ access to clients, and other matters. The petitioners sought to have the court adopt rules similar to what the district court had ordered when the cases were before it on petitions of habeas corpus. The government sought to establish rules restricting scope of discovery and attorney-client communication to what it viewed as the proper scope of the court’s review, that is, the CSRT proceedings.

The D.C. Circuit in July 2007 issued an order rejecting the government’s motion to limit the scope of the court’s review to the official record of the CSRT hearings (*Bismullah I*).<sup>147</sup> Rather, the court decided, in order to determine whether a preponderance of evidence supported the CSRT determinations, it must have access to *all* the information a CSRT “is authorized to obtain and consider, pursuant to the procedures specified by the Secretary of Defense.” The court denied the petitioners’ motion for discovery, at least for the time being, stating there was no need for additional evidence to challenge a CSRT’s ruling that specific evidence or a witness was not

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<sup>147</sup> *Bismullah v. Gates*, 501 F.3d 178 (*Bismullah I*), *reh’g denied* 503 F.3d 137(D.C. Cir. 2007) (*Bismullah II*).

reasonably available. And, because the DTA does not authorize the court to hold a status determination invalid as “arbitrary and capricious,” there was no need for it to evaluate the conduct of other detainees’ CSRTs. The court also denied as unnecessary the petitioners’ motion to appoint a special master.

The court also promised to enter a protective order to implement guidelines for handling classified and sensitive information and for government monitoring of attorney client written communications (“legal mail”). Again stressing its mandate under the DTA to determine whether a preponderance of the evidence supports a CSRT’s status determination, the court found that counsel for the detainees, to aid in their capacity to assist the court, should be presumed to have a “need to know” all government information concerning their clients except for highly sensitive information, in which case the government could present the evidence to the court *ex parte*. The court rejected the government’s proposal that would have allowed the government, rather than the court, to determine what unclassified information would be required to be kept under seal. With respect to legal mail, the court agreed to the government’s proposal to have mail from attorneys to detainees reviewed by a “privilege team,” composed of Department of Defense personnel not involved in the litigation, to redact information not pertinent to matters within the court’s limited scope of review.

The government asked the panel to reconsider the ruling based on its belief that the order would require the government to undertake an overly burdensome search of all relevant federal agencies in order to create a new record for each detainee that would be entirely different from the record reviewed by the CSRT for that case. The court denied the request for rehearing, explaining its view that its previous order would not require a search for information that is not “reasonably available” (*Bismullah II*).<sup>148</sup> The court also suggested that the government might instead convene new CSRTs to reconfirm the detainees’ status, this time ensuring that the relevant documents are retained for the purpose of review under the DTA. The government also objected to the requirement that it turn over classified information to the petitioners’ counsel on the basis of the risk to intelligence sources and methods as well as the burden of conducting the necessary reviews to determine which information must be turned over. The court rejected the argument, pointing out that DOD regulations declare classified information to be not reasonably available where the originating agency declines to authorize its use in the CSRT process. In light of this fact, the court suggested, the burden of reviewing the information should not be as great as the government had argued.

The government then asked for an *en banc* hearing, but the D.C. Circuit, evenly divided, declined.<sup>149</sup> The government then sought expedited review at the Supreme Court, urging the Court to decide the cases concurrently with the *Boumediene* case, but the Court took no action on the request.<sup>150</sup> Instead, it granted certiorari and vacated the decision, remanding for reconsideration in light of its decision in *Boumediene*.<sup>151</sup> On August 22, 2008, the D.C. Circuit reinstated without explanation its decisions in *Bismullah I* and *Bismullah II*, presumably because it did not find the *Boumediene* ruling to conflict with its decisions in these cases.<sup>152</sup>

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<sup>148</sup> *Bismullah II*, 503 F. 3d 137 (D.C. Cir. 2007).

<sup>149</sup> *Bismullah v. Gates*, 514 F.3d 1291 (D.C. Cir. 2008).

<sup>150</sup> *Gates v. Bismullah* (U.S., filed February 14, 2008) (07-1054).

<sup>151</sup> *Gates v. Bismullah*, 128 S.Ct. 2960 (2008).

<sup>152</sup> *Bismullah v. Gates*, Case No. 06-1197, Order (D.C. Cir. August 22, 2008) (*per curium*), available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/08/bismullah-order-8-22-08.pdf>.

The D.C. Circuit's determination of how to carry out its mandate under the DTA was a matter of interest to the Supreme Court as it was considering *Boumediene*, and may have had some bearing on the ultimate determination in that case that the DTA procedures are not an adequate substitute for the writ of habeas corpus. Accordingly, it may be worthwhile to review some of the shortcomings described by the dissent, the only opinion of the panel that addressed the adequacy of the DTA procedures as a substitute for *habeas corpus*. Judge Janice Rogers Brown, concurring separately in *Bismullah I*, set forth a number of issues she felt call into question the fairness of the CSRT proceedings. For example, she noted that the detainee bears the burden of proving that he is not an "enemy combatant"—a term she described as elastic in nature, even though the detainee may not be aware of the information he is expected to rebut, all without the assistance of counsel.<sup>153</sup> Further, the record presented to the CSRT is limited by the Executive, and the detainee's only recourse for seeking further evidence is through the DTA review process. If the detainee is successful in obtaining new evidence, his remedy appears to be a new CSRT.<sup>154</sup> Finally, she noted evidence that the CSRTs do not necessarily follow their own regulations regarding the collection and presentation of evidence.<sup>155</sup>

### *Parhat v. Gates*

In October 2007, while the government's petition to the Supreme Court for certiorari in the *Bismullah* case was pending, the government produced to the counsel of Husaifa Parhat, one of the parties to the *Bismullah* case, a record (including both classified and unclassified material) of what was actually presented to Parhat's CSRT. Parhat subsequently filed a separate motion to the D.C. Circuit requesting review of the CSRT's determination that he was an enemy combatant. In June 2008, a three-judge panel for the D.C. Circuit ruled in the case of *Parhat v. Gates* that petitioner had been improperly deemed an "enemy combatant" by a CSRT, the first ruling of its kind by a federal court. Because the court's opinion contained classified information, only a redacted version has been released.<sup>156</sup>

Parhat, an ethnic Chinese Uigher captured in Pakistan in December 2001, was found to be an "enemy combatant" by the CSRT on account of his affiliation with a Uighur independence group known as the East Turkistan Islamic Movement (ETIM), which was purportedly "associated" with Al Qaeda and the Taliban and engaged in hostilities against the United States and its coalition partners. The basis for Parhat's alleged "affiliation" with the ETIM was that an ETIM leader ran a camp in Afghanistan where Parhat had lived and received military training. For his part, Parhat denied membership in the ETIM or engagement in hostilities against the United States, and claimed he traveled to Afghanistan solely to join the resistance against China, which was not alleged to have been a coalition partner of the United States.

The Circuit Court agreed with Parhat that the record before the CSRT did not support the finding that he was an "enemy combatant," as that term had been defined by the DOD, and accordingly the CSRT's determination was not supported by a "preponderance of the evidence" and "consistent with the standards and procedures specified by the Secretary of Defense for

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<sup>153</sup> See *Bismullah I*, 501 F.3d at 193 (Rogers, J. Concurring).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* (citing differences between written procedures and those described by Rear Admiral James M. McGarrah in the *Boumediene* case).

<sup>156</sup> *Parhat v. Gates*, — F.3d —, 2008 WL 2576977, No. 06-1397 (June 20, 2008).

Combatant Status Review Tribunals,” as required by the DTA.<sup>157</sup> The DOD defined an “enemy combatant” as

an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.<sup>158</sup>

Both parties agreed that for a detainee who is not a member of the Taliban or Al Qaeda to be deemed an enemy combatant under this definition, the government must demonstrate by a preponderance of the evidence that (1) the detainee was part of or supporting “forces”; (2) those forces are associated with Al Qaeda or the Taliban; and (3) the forces are engaged in hostilities against the United States or its coalition partners.<sup>159</sup>

The Circuit Court found that the evidence presented by the government to support the second and third elements was insufficient to support the CSRT’s determination that Parhat was an enemy combatant. Most significantly, the court found that the principal evidence presented by the government regarding these elements—four government intelligence documents describing ETIM activities and the group’s relationship with Al Qaeda and the Taliban—did not “provide any of the underlying reporting upon which the documents’ bottom-line assertions are founded, nor any assessment of the reliability of that reporting.”<sup>160</sup> As a result, the Circuit Court found that neither the CSRT nor the reviewing court itself were capable of assessing the reliability of the assertions made by the documents. Accordingly “those bare assertions cannot sustain the determination that Parhat is an enemy combatant,”<sup>161</sup> and the CSRT’s designation was therefore improper. The Circuit Court stressed that it was not suggesting that hearsay evidence could never reliably be used to determine whether a person was an enemy combatant, or that the government must always submit the basis for its factual assertions to enable an assessment of its claims. However, evidence “must be presented in a form, or with sufficient additional information, that permits the [CSRT] and court to assess its reliability.”<sup>162</sup>

Having found that the evidence considered by the CSRT was insufficient to support the designation of Parhat as an enemy combatant, the Circuit Court next turned to the question of remedy. Although Parhat urged the court to order his release or transfer to a country other than China, the court declined to grant such relief, postulating that the government might wish to hold another CSRT in which it could present additional evidence to support Parhat’s designation as an enemy combatant. While acknowledging that the DTA did not expressly grant the court release authority over detainees, the court stated that there was nonetheless “a strong argument...[that release authority] is implicit in our authority to determine whether the government has sustained

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<sup>157</sup> Although Parhat argued that the DOD’s regulatory definition of “enemy combatant” exceeded the scope authorized by the 2001 AUMF, the Circuit Court declined to reach this issue, finding that the government provided insufficient evidence to demonstrate that Parhat met the DOD’s own regulatory definition.

<sup>158</sup> *Id.*, 2008 WL 2576977 at \*7, quoting Dept. of Def. Order Establishing Combatant Status Review Tribunal (July 7, 2004), at 1.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*, 2008 WL 2576977 at \*11.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*, 2008 WL 2576977 at \*14.

its burden of proving that a detainee is an enemy combatant,”<sup>163</sup> and indicated that it would not “countenance ‘endless do-overs’” in the CSRT process.

The Circuit Court also noted that following the Supreme Court’s ruling in *Boumediene*, Parhat could pursue immediate *habeas* relief in federal district court, where he would “be able to make use of the determinations we have made today regarding the decision of his CSRT, and...raise issues that we did not reach” before a court which unquestionably would have the power to order his release.<sup>164</sup> Parhat has also filed a *habeas* petition with the U.S. District Court for D.C., and requested that the court parole him into the United States pending the court’s ruling.<sup>165</sup> Parhat’s case, along with his motion for parole into the U.S., is currently pending.

## *Boumediene v. Bush*<sup>166</sup>

The petitioners in *Boumediene* are aliens detained at Guantanamo who sought *habeas* review of their continued detention. Rather than pursuing an appeal of their designation as enemy combatants by CSRTs using the DTA appeals process, the petitioners sought to have the district court decisions denying *habeas* review reversed on the basis that the MCA’s “court-stripping”<sup>167</sup> provision was unconstitutional.<sup>168</sup> On appeal, the D.C. Circuit affirmed, holding that the MCA stripped it and all other federal courts of jurisdiction to consider petitioners’ *habeas* applications. Relying upon its earlier opinion in *Al Odah v. United States*<sup>169</sup> and the 1950 Supreme Court case *Johnson v. Eisentrager*,<sup>170</sup> in which the Supreme Court found that the constitutional writ of *habeas* was not available to enemy aliens imprisoned for war crimes in post-WWII Germany, the D.C. Circuit held that the MCA’s elimination of *habeas* jurisdiction did not operate as an unconstitutional suspension of the writ, because aliens held by the United States in foreign territory do not have a constitutional right to *habeas*.<sup>171</sup> Consequently, the court did not examine whether the DTA provides an adequate substitution for *habeas* review.

<sup>163</sup> *Parhat*, 2008 WL 2576977 at \*14.

<sup>164</sup> *Id.*, 2008 WL 2576977 at \*15.

<sup>165</sup> Husaifa Parhat’s Motion for Immediate Release on Parole into the Continental United States Pending Final Judgment on His Habeas Petition, In re: Guantanamo Bay Litigation, No. 05-1509 (July 23, 2008).

<sup>166</sup> For further discussion, see CRS Report RL34536, *Boumediene v. Bush: Guantanamo Detainees’ Right to Habeas Corpus*, by Michael John Garcia.

<sup>167</sup> The practice of divesting courts of jurisdiction over particular issues is sometimes referred to as “court-stripping.”

<sup>168</sup> *In re Guantanamo Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) and *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005), *consolidated, vacated and dismissed sub nom.* *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

<sup>169</sup> *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir 2003), *rev’d sub nom Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>170</sup> 339 U.S. 763 (1950).

<sup>171</sup> 476 F.3d 981 (D.C. Cir. 2007). Judge Randolph, joined by Judge Sentelle, found that the measure does not constitute a suspension of the Writ within the meaning of the Constitution because the majority was “aware of no case prior to 1789 going the detainees’ way,” and were thus convinced that “the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government.” Judge Rogers, in dissent, would have given greater deference to the Supreme Court’s *Rasul* opinion, in which it drew a distinction between the situation faced by the Guantanamo detainees and the post-WWII convicts, 542 U.S. 466, 475 (2004), and in which it found the naval base to be within the historical scope of the Writ. *Boumediene*, 476 F.3d at 1002 (Rogers, J., dissenting)(citing *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003)).

The Supreme Court initially denied the petitioners' request for review,<sup>172</sup> with three Justices dissenting to the denial and two Justices explaining the basis for their support.<sup>173</sup> In June 2007, however, the Court reversed its denial and granted certiorari to consider the consolidated cases of *Boumediene* and *Al Odah*. In a 5-4 opinion authored by Justice Kennedy, the Court reversed the D.C. Circuit and held that petitioners had a constitutional right to *habeas* that was withdrawn by the MCA in violation of the Constitution's Suspension Clause.<sup>174</sup>

### ***Constitutional Right to Habeas***

The petitioners in *Boumediene* argued that they possess a constitutional right to *habeas*, and that the MCA deprived them of this right in contravention of the Suspension Clause, which prohibits the suspension of the writ of *habeas* except "when in Cases of Rebellion or Invasion the public Safety may require it." The MCA did not expressly purport to be a formal suspension of the writ of *habeas*, and the government did not make such a claim to the Court. Instead, the government argued that aliens designated as enemy combatants and detained outside the *de jure* territory of the United States have no constitutional rights, including the constitutional privilege to *habeas*, and that therefore stripping the courts of jurisdiction to hear petitioners' *habeas* claims did not violate the Suspension Clause.

The Court began its analysis by surveying the history and origins of the writ of *habeas corpus*, emphasizing the importance placed on the writ for the Framers, while also characterizing its prior jurisprudence as having been "careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ."<sup>175</sup> The Court characterized the Suspension Clause as not only a "vital instrument" for protecting individual liberty, but also a means to ensure that the judiciary branch would have, except in cases of formal suspension, "a time-tested device, the writ, to maintain the delicate balance of governance" between the branches and prevent "cyclical abuses" of the writ by the executive and legislative branches.<sup>176</sup> The Court stated that the separation-of-powers doctrine and the history shaping the design of the Suspension Clause informed its interpretation of the reach and purpose of the Clause and the constitutional writ of *habeas*.

The Court found the historical record to be inconclusive for resolving whether the Framers would have understood the constitutional writ of *habeas* as extending to suspected enemy aliens held in foreign territory over which the United States exercised plenary, but not *de jure* control. Nonetheless, the Court interpreted the Suspension Clause as having full effect at Guantanamo. While the Court did not question the government's position that Cuba maintains legal sovereignty over Guantanamo under the terms of the 1903 lease giving the U.S. plenary control over the

<sup>172</sup> *Boumediene v. Bush*, 127 S.Ct. 1478 (2007).

<sup>173</sup> Justice Stevens, joined by Justice Kennedy, wrote a statement explaining their view that, "despite the obvious importance of the issues raised," the petitioners should first exhaust remedies available under the DTA unless the petitioners can show that the government is causing delay or some other ongoing injury that would make those remedies inadequate. *Id.* at 1478. Justice Breyer, joined by Justices Souter and Ginsburg, would have granted certiorari to provide immediate attention to the issues. The dissenters viewed it as unlikely that further treatment by the lower courts might elucidate the issues, given that the MCA limits jurisdiction to the Court of Appeals for the D.C. Circuit, which had already indicated that Guantanamo detainees have no constitutional rights. Justices Breyer and Souter would have granted expedited consideration.

<sup>174</sup> U.S. CONST. Art. 1, § 9, cl. 2.

<sup>175</sup> *Boumediene* at 2248 (citing *INS v. St. Cyr*, 533 U. S. 289, 300—301(2001)).

<sup>176</sup> *Id.* at 2247.

territory, it disagreed with the government's position that "at least when applied to non-citizens, the Constitution necessarily stops where *de jure* sovereignty ends."<sup>177</sup>

Instead, the Court characterized its prior jurisprudence as recognizing that the Constitution's extraterritorial application turns on "objective factors and practical concerns."<sup>178</sup> Here, the Court emphasized the functional approach taken in the *Insular Cases*, where it had assessed the availability of constitutional rights in incorporated and unincorporated territories under the control of United States.<sup>179</sup> Although the government argued that the Court's subsequent decision in *Eisentrager* stood for the proposition that the constitutional writ of *habeas* does not extend to enemy aliens captured and detained abroad, the Court found this reading to be overly constrained. According to the Court, interpreting the *Eisentrager* ruling in this formalistic manner would be inconsistent with the functional approach taken by the Court in other cases concerning the Constitution's extraterritorial application,<sup>180</sup> and would disregard the practical considerations that informed the *Eisentrager* Court's decision that the petitioners were precluded from seeking *habeas*.

Based on the language found in the *Eisentrager* decision and other cases concerning the extraterritorial application of the Constitution, the Court deemed at least three factors to be relevant in assessing the extraterritorial scope of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the status determination process; (2) the nature of the site where the person is seized and detained; and (3) practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Applying this framework, the Court characterized petitioners' circumstances in the instant case as being significantly different from those of the detainees at issue in *Eisentrager*. Among other things, the Court noted that unlike the detainees in *Eisentrager*, the petitioners denied that they were enemy combatants, and the government's control of the post-WWII, occupied German territory in which the *Eisentrager* detainees were held was not nearly as significant nor secure as its control over the territory where the petitioners are located. The Court also found that the procedural protections afforded to Guantanamo detainees in CSRT hearings are "far more limited [than those afforded to the *Eisentrager* detainees tried by military commission], and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."<sup>181</sup>

While acknowledging that it had never before held that noncitizens detained in another country's territory have any rights under the U.S. Constitution, the Court concluded that the case before it "lack[ed] any precise historical parallel."<sup>182</sup> In particular, the Court noted that the Guantanamo

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<sup>177</sup> *Id.* at 2253.

<sup>178</sup> *Id.* at 2258.

<sup>179</sup> 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; *Hawaii v. Mankichi*, 190 U. S. 197 (1903); *Dorr v. United States*, 195 U. S. 138 (1904).

<sup>180</sup> *Boumediene*, at 2255-56, 2258 (discussing plurality opinion in *Reid v. Covert*, 354 U. S. 1 (1957)). In his concurring opinion in *Reid*, Justice Harlan argued that whether a constitutional provision has extraterritorial effect depends upon the "particular circumstances, the practical necessities, and the possible alternatives which Congress had before it" and, in particular, whether judicial enforcement of the provision would be "impracticable and anomalous." *Reid*, 354 U.S. at 74-75 (Harlan, J., concurring in result).

<sup>181</sup> *Id.* at 2260.

<sup>182</sup> *Id.* at 2262.

detainees have been held for the duration of a conflict that is already one of the longest in U.S. history, in territory that, while not technically part of the United States, is subject to complete U.S. control. Based on these factors, the Court concluded that the Suspension Clause has full effect at Guantanamo.

### *Adequacy of Habeas Corpus Substitute*

Having decided that petitioners possessed a constitutional privilege to *habeas corpus*, the Court next assessed whether the court-stripping measure of MCA § 7 was impermissible under the Suspension Clause. Because the MCA did not purport to be a formal suspension of the writ, the question before the Court was whether Congress had provided an adequate substitute for *habeas corpus*. The government argued that the MCA complied with the Suspension Clause because it applied the DTA's review process to petitioners, which the government claimed was a constitutionally adequate *habeas* substitute.

Though the Court declined to “offer a comprehensive summary of the requisites for an adequate substitute for *habeas corpus*,” it nonetheless deemed the *habeas* privilege, at minimum, as entitling a prisoner “to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law,” and empowering a court “to order the conditional release of an individual unlawfully detained,” though release need not be the exclusive remedy or appropriate in every instance where the writ is granted.<sup>183</sup> Additionally, the necessary scope of *habeas* review may be broader, depending upon “the rigor of any earlier proceedings.”<sup>184</sup>

The Court noted that petitioners identified a myriad of alleged deficiencies in the CSRT process which limited a detainee's ability to present evidence rebutting the government's claim that he is an enemy combatant. Among other things, cited deficiencies include constraints upon the detainee's ability to find and present evidence at the CSRT stage to challenge the government's case; the failure to provide a detainee with assistance of counsel; limiting the detainee's access to government records other than those that are unclassified, potentially resulting in a detainee being unaware of critical allegations relied upon by the government to order his detention; and the fact that the detainee's ability to confront witnesses may be “more theoretical than real,”<sup>185</sup> given the minimal limitations placed upon the admission of hearsay evidence.

While the Court did not determine whether the CSRTs, as presently constituted, satisfy due process standards, it agreed with petitioners that there was “considerable risk of error in the tribunal's findings of fact.”<sup>186</sup> “[G]iven that the consequence of error may be detention for the duration of hostilities that may last a generation or more, this is a risk too serious to ignore.”<sup>187</sup> The Court held that for either the writ of *habeas* or an adequate substitute to function as an effective remedy for petitioners, a court conducting a collateral proceeding must have the ability to (1) correct errors in the CSRT process; (2) assess the sufficiency of the evidence against the

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<sup>183</sup> *Boumediene*, at 2266-67.

<sup>184</sup> *Id.* at 2268.

<sup>185</sup> *Id.* at 2269.

<sup>186</sup> *Id.* at 2270.

<sup>187</sup> *Id.*

detainee; and (3) admit and consider relevant exculpatory evidence that was not introduced in the prior proceeding.

The Court held that the DTA review process is a facially inadequate substitute for *habeas* review. It listed a number of potential constitutional infirmities in the review process, including the absence of provisions (1) empowering the D.C. Circuit to order release from detention; (2) permitting petitioners to challenge the President's authority to detain them indefinitely; (3) enabling the appellate court to review or correct the CSRT's findings of fact; and (4) permitting the detainee to present exculpatory evidence discovered after the conclusion of CSRT proceedings. As a result, the Court deemed MCA § 7's application of the DTA review process to petitioners as failing to provide an adequate substitute for *habeas*, therefore effecting an unconstitutional suspension of the writ.

In light of this conclusion, the Court held that petitioners could immediately pursue *habeas* review in federal district court, without first obtaining review of their CSRT designations from the D.C. Circuit as would otherwise be required under the DTA review process. While prior jurisprudence recognized that prisoners are generally required to exhaust alternative remedies before seeking federal *habeas* relief, the Court found that petitioners in the instant case were entitled to a prompt *habeas* hearing, given the length of their detention. The Court stressed, however, that except in cases of undue delay, federal courts should generally refrain from considering *habeas* petitions of detainees being held as enemy combatants until after the CSRT had an opportunity to review their status. Acknowledging that the government possesses a "legitimate interest in protecting sources and methods of intelligence gathering," the Court announced that it expected courts reviewing Guantanamo detainees *habeas* claims to use "discretion to accommodate this interest to the greatest extent possible," so as to avoid "widespread dissemination of classified information."<sup>188</sup>

### *Implications of Boumediene*

As a result of the *Boumediene* decision, detainees currently held at Guantanamo may petition a federal district court for *habeas* review of status determinations made by a CSRT. However, the full consequences of the *Boumediene* decision are likely to be significantly broader. While the petitioners in *Boumediene* sought *habeas* review of their designation as enemy combatants, the Court's ruling that the constitutional writ of *habeas* extends to Guantanamo suggests that detainees may also seek judicial review of claims concerning unlawful conditions of treatment or confinement or to protest a planned transfer to the custody of another country.<sup>189</sup>

The conduct of trials before military commissions at Guantanamo may also be affected by *Boumediene*, as enemy combatants may now potentially raise constitutional arguments against their trial and conviction. Aliens convicted of war crimes before military commissions may also potentially seek *habeas* review of their designation as an enemy combatant by the CSRT, a designation that served as a legal requisite for their subsequent prosecution before a military commission.

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<sup>188</sup> *Id.* at 2275.

<sup>189</sup> See *Boumediene*, at 2274 ("In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.").

Although the *Boumediene* Court held that DTA review procedures were an inadequate substitute for *habeas*, it made “no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards,” and emphasized that “both the DTA and the CSRT process remain intact.”<sup>190</sup> Whether these procedures violate due process standards, facially or as applied in a given case, and whether a particular detainee is being unlawfully held, are issues that will be addressed by the District Court when reviewing the *habeas* claims of Guantanamo detainees.

Some 250 *habeas* petitions have been filed on behalf of Guantanamo detainees in the U.S. District Court for the District of Columbia. In the aftermath of the *Boumediene* ruling, the District Court adopted a resolution for the coordination and management of Guantanamo cases. The resolution calls for all current and future Guantanamo cases to be transferred by the judge to whom they have been assigned to Senior Judge Thomas F. Hogan, who has been designated to coordinate and manage all Guantanamo cases so that they may be “addressed as expeditiously as possible as required by the Supreme Court in *Boumediene v. Bush*....”<sup>191</sup> Judge Hogan is responsible for identifying and ruling on procedural issues common to the cases. The transferring judge will retain the case for all other purposes, though Judge Hogan is to confer with those judges whose cases raise common substantive issues, and he may address those issues with the consent of the transferring judge. District Court Judges Richard J. Leon and Emmet G. Sullivan have declined to transfer their cases for coordination, and it is possible that the three judges may reach differing opinions regarding issues common to their respective cases.

## Constitutional Considerations and Options for Congress

The Supreme Court decision in *Boumediene* holding that the DTA violates the Constitution’s Suspension Clause (article I, § 9, cl. 2) leaves open a number of constitutional questions regarding the scope of the Writ of Habeas Corpus and what options are open to Congress to make rules for the detention of suspected terrorists. The following sections provide a brief background of the writ of *habeas corpus* in the United States, outline some proposals for responding to the *Boumediene* holding, and discuss relevant constitutional considerations.

The Writ of Habeas Corpus (*ad subjiciendum*), also known as the Great Writ, has its origin in Fourteenth Century England.<sup>192</sup> It provides the means for those detained by the government to ask a court to order their warden to explain the legal authority for their detention. In the early days of the Republic, its primary use was to challenge executive detention without trial or bail, or pursuant to a ruling by a court without jurisdiction, but the writ has expanded over the years to include a variety of collateral challenges to convictions or sentences based on alleged violations of fundamental constitutional rights.<sup>193</sup> The *habeas* statute provides jurisdiction to hear petitions by persons claiming that they are held “in custody in violation of the Constitution or laws or treaties of the United States.”<sup>194</sup> A court reviewing a petition for *habeas corpus* does not

<sup>190</sup> *Id.* at 2275.

<sup>191</sup> U.S. Dist. Court for the District of Columbia, Resolution of the Executive Session, July 1, 2008, available at <http://www.dcd.uscourts.gov/public-docs/system/files/Guantanamo-Resolution070108.pdf>.

<sup>192</sup> For a general background and description of related writs, see 39 AM. JUR. 2d. *Habeas Corpus* § 1 (1999).

<sup>193</sup> *See generally* S. DOC. NO. 108-17 at 848 *et seq.*

<sup>194</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

determine the guilt or innocence of the petitioner; rather, it tests the legality of the detention and the custodian's authority to detain. If the detention is not supported by law, the detainee is to be released.<sup>195</sup> Minor irregularities in trial procedures that do not amount to violations of fundamental constitutional rights are generally to be addressed on direct appeal.<sup>196</sup>

Article I, § 9, cl. 2, of the Constitution provides: "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." Given the emphasis the *Rasul* Court had placed on the distinction between the statutory and constitutional entitlement to *habeas corpus*, it might have seemed reasonable to suppose that Congress retained the power to revoke by statute what it had earlier granted without offending either the Court or the Constitution, without regard to establishing a public safety justification. However, as the *Boumediene* case demonstrates, the special status accorded the Writ by the Suspension Clause complicates matters.

The relevance of the distinction between a "statutory" and a "constitutional" privilege of habeas corpus is not entirely clear. The federal courts' power to review petitions under *habeas corpus* has historically relied on statute,<sup>197</sup> but it has been explained that the Constitution obligates Congress to provide "efficient means by which [the Writ] should receive life and activity."<sup>198</sup> While the Court has stated that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789,'"<sup>199</sup> it has also presumed that "the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789."<sup>200</sup> The *Boumediene* Court declined to adopt a date of reference by which the constitutional scope of the writ is to be judged.<sup>201</sup> Accordingly, it remains unclear whether statutory enhancements of habeas review can ever be rolled back without implicating the Suspension Clause.<sup>202</sup> The constitutionally mandated scope of the writ may turn on the same kinds of "objective factors and practical considerations" that the Court stated would determine the territorial scope of the writ.

Under *Boumediene*, it appears that Congress's ability to revoke altogether the courts' jurisdiction over *habeas* petitions by certain classes of persons is constrained by the Constitution, but Congress has the power to impose some procedural regulations that may limit how courts consider such cases.<sup>203</sup> Congress also retains the option of withdrawing *habeas* jurisdiction if it

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<sup>195</sup> *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (Marshall, C.J.) ("The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause.").

<sup>196</sup> 39 AM. JUR. 2d. *Habeas Corpus* § 27 (1999).

<sup>197</sup> *Ex parte Bollman*, 8 U.S. (4 Cr.) 75 (1807).

<sup>198</sup> *Id.* at 94.

<sup>199</sup> *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 301 (U.S. 2001).

<sup>200</sup> *Felker v. Tupin*, 518 U.S. 663 (1996)(citing *Swain v. Pressley*, 430 U.S. 372 (1977)).

<sup>201</sup> See *Boumediene* at 2248 ("The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ.").

<sup>202</sup> *Cf. INS v. St. Cyr*, 533 U.S. 289, 340 n.5 (2001) (Scalia, J., dissenting)("If . . . the writ could not be suspended within the meaning of the Suspension Clause until Congress affirmatively provided for habeas by statute, then surely Congress may subsequently alter what it had initially provided for, lest the Clause become a one-way ratchet.").

<sup>203</sup> *Cf. Felker* (Holding that restrictions on successive petitions for *habeas corpus* by prisoners convicted in state courts did not suspend the writ, but merely applied a modified *res judicata* rule to control abuse of the writ); *Boumediene* at 2276-77 (explaining that some reasonable regulations on *habeas* cases to relieve governmental burden or preserve security will be permissible).

provides an effective and adequate alternative means of pursuing relief.<sup>204</sup> The Court's opinion in *Boumediene* did not fully delineate the lower bounds of what the Court might consider as necessary either to preserve the constitutional scope of the writ or to provide an adequate substitute, but indicated that the prisoners are entitled to "a meaningful opportunity to demonstrate that [they are] being held pursuant to the erroneous application or interpretation of relevant law."<sup>205</sup> A more direct option to affect the outcome of *habeas* cases brought by detainees may involve enacting a clear statutory definition of who may be detained and the purpose of the detention, along with an appropriate procedure designed to distinguish those who meet the definition from those who do not. Such an approach could potentially increase certainty with respect to courts' decisions regarding whether the detention of particular alleged enemy combatants comports with statutes and treaties, although constitutionally based claims may remain less predictable.

Congress could formally suspend the writ with respect to the detainees, although it is unclear whether Congress's views regarding the requirements of public safety are justiciable.<sup>206</sup> If they are, then a reviewing court's assessment of the constitutionality of habeas-suspending legislation would likely turn on whether Al Qaeda's terrorist attacks upon the United States qualify as a "rebellion or invasion," and whether the court finds that "the public safety" requires the suspension of the writ.

Congress might be able to impose some limitations upon judicial review of CSRT determinations if it strengthened the procedural protections afforded to detainees in CSRT status hearings. Legislation addressing some or all of the potential procedural inadequacies in the CSRT process identified in *Boumediene* might permit judicial review of CSRT determinations to be further streamlined.

Attorney General Michael Mukasey has recommended that Congress enact new legislation to eliminate the DTA appeals process and make *habeas corpus* the sole avenue for detainees to challenge their detention in civilian court, and also to eliminate challenges to conditions of confinement or transfers out of US custody. In a speech before the American Enterprise Institute on July 21, 2008,<sup>207</sup> General Mukasey discussed this suggestion along with five other points he feels Congress should address:

- Courts should be prohibited from ordering that an alien captured and detained abroad be brought to the United States for court proceedings, or be admitted and released into the United States.
- Procedures should be put in place to ensure that intelligence information, including sources and methods, would be protected from disclosure to terrorist suspects.

<sup>204</sup> See *United States v. Hayman*, 342 U.S. 205 (1952); *Hill v. United States*, 368 U.S. 424 (1962); *Swain v. Pressley*, 430 U.S. 372 (1977); *Felker v. Turpin*, 518 U.S. 651 (1996); *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001).

<sup>205</sup> *Boumediene* at 2266.

<sup>206</sup> The *Boumediene* Court did not address the matter because the MCA did not purport to act as a formal suspension of the writ. *Boumediene* at 2262.

<sup>207</sup> The Attorney General's prepared statement is available at <http://www.scotusblog.com/wp/mukasey-curb-courts-powers-on-detainees/>.

- Detainees awaiting trial by military commission should be prevented from bringing *habeas* petitions until the completion of their trials.
- Congress should reaffirm the authority to detain as enemy combatants persons who have “engaged in hostilities or purposefully supported al Qaeda, the Taliban, and associated organizations.”
- Congress should establish sensible procedures for *habeas* challenges by assigning one district court exclusive jurisdiction over the cases, with one judge deciding common legal issues; by adopting “rules that strike a reasonable balance between the detainees’ rights to a fair hearing ... and our national security needs ...” that would “not provide greater protection than we would provide to American citizens held as enemy combatants in this conflict”; and ensuring that court proceedings “are not permitted to interfere with the mission of our armed forces.”

Other proposals that have been floated include the creation of a new national security court to authorize preventive detention of terror suspects<sup>208</sup> or the use of civilian or military courts to prosecute all detainees who cannot be released to their home country or another country willing to take them. Among the issues associated with prosecuting all of the detainees in civilian court is that the detainees may not have committed any crimes cognizable in federal court. Persons accused of engaging in terrorist acts (including attempts, conspiracies and the like) against the United States could likely be prosecuted,<sup>209</sup> but jurisdiction over offenses involving the provision of material support to a terrorist organization abroad is somewhat more limited, and for acts occurring prior to 2004, included only persons subject to the jurisdiction of the United States.<sup>210</sup>

Congress could also take no action and allow the courts to address the issues in the course of deciding the *habeas* petitions already docketed.

## Scope of Challenges

Whether Congress enacts legislation to guide the courts or permits courts to resolve the *habeas* cases as they now stand, courts will be faced with determining the scope of the writ as it applies to detainees in Guantanamo and perhaps elsewhere. Although the *Boumediene* Court held that DTA review procedures were an inadequate substitute for *habeas*, it expressly declined to assess “the content of the law that governs” the detention of aliens at Guantanamo.<sup>211</sup> Nonetheless, the Supreme Court identified a number of potential deficiencies in the status review process that

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<sup>208</sup> See Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System, Hearing before the Senate Judiciary Committee, June 4, 2008. For a review and criticism of some proposals, see the Constitution Project, *A Critique of “National Security Courts,”* available at [http://www.constitutionproject.org/pdf/Critique\\_of\\_the\\_National\\_Security\\_Courts.pdf](http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf).

<sup>209</sup> See, e.g., 18 U.S.C. § 2332 (prescribing penalties for homicides of U.S. nationals abroad and other violence directed at the United States, so long as the act is “intended to coerce, intimidate, or retaliate against a government or a civilian population”); 18 U.S.C. § 2332b (acts of terrorism transcending national boundaries).

<sup>210</sup> See 18 U.S.C. § 2339B (provision of material support to designated terrorist organization prior to amendment by P.L. 108-458, § 6603(d), December 17, 2004); see also 18 U.S.C. § 2339 (proscribing harboring or concealing terrorists, but only after October 26, 2001 enactment of P.L. 107-56, title VIII, § 803(a)). The *Ex Post Facto* Clause prevents prosecution for charges that would not have been applicable when the offense occurred, U.S. CONST. art. 1, § 9, cl. 3.

<sup>211</sup> *Boumediene*, at 67.

necessitated *habeas* review of CSRT determinations, including the detainee's lack of counsel during the hearings; the presumption of validity accorded to the government's evidence; procedural and practical limitations upon the detainee's ability to present evidence rebutting the government's charges against him and to confront witnesses; potential limitations on the detainee's ability to introduce exculpatory evidence; and limitations on the detainee's ability to learn about the nature of the government's case against him to the extent that it is based upon classified evidence.<sup>212</sup> Whether these procedures violate due process standards, facially or as applied in a given case, and whether a particular detainee is being unlawfully held, are issues that will be addressed by the District Court when reviewing the *habeas* claims of Guantanamo detainees.

*Boumediene* considered challenges to the legality of detention, the issue at the heart of most of the *habeas* challenges brought by Guantanamo detainees to date. However, there are also some cases challenging the conditions under which a detainee is being held. These two categories of challenges may involve different procedural routes and the application of different constitutional rights. The extent to which Congress may limit the scope of challenges Guantanamo detainees may bring may turn on the unresolved question of which constitutional rights apply to aliens detained in territory abroad.

The Supreme Court has not directly addressed whether there must exist a judicial forum to vindicate all constitutional rights. Justice Scalia has pointed out that there are particular cases, such as political questions cases, where all constitutional review is in effect precluded.<sup>213</sup> Other commentators point to sovereign immunity and the ability of the government to limit the remedies available to plaintiffs.<sup>214</sup> However, the Court has, in cases involving particular rights, generally found a requirement that effective judicial remedies must be available.<sup>215</sup> Although the extent of constitutional rights enjoyed by aliens outside the territory of the United States is subject to continuing debate, the right of aliens within the United States to liberty except when restricted in accordance with due process of law seems well established.

## The Fact and Length of Detention

The DTA provides a means for challenging the validity of decisions by a CSRT that a detainee is an enemy combatant. The D.C. Circuit Court of Appeals has not fully clarified the scope of evidence it may review in reaching such a determination. The government has argued that administrative law (applicable to reviews of agency determinations) supplies the appropriate model for reviewing CSRT determinations, so that only the record of the CSRT proceedings is subject to review, and that extrinsic evidence not already part of the record should not be subject to discovery.<sup>216</sup> The D.C. Circuit, however, rejected that view, holding that its review must encompass all of the information a CSRT is authorized to obtain and consider.<sup>217</sup>

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<sup>212</sup> See *Boumediene*, at 37-38, 54-56.

<sup>213</sup> 486 U.S. at 612-13 (Scalia, J., dissenting).

<sup>214</sup> *Bartlett v. Bowen*, 816 F.2d 695, 719-720 (1987)(Bork, J., dissenting).

<sup>215</sup> See e.g., *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987)(holding that the Constitution mandates effective remedies for takings).

<sup>216</sup> See Gov't Br. Address. Pend. Prelim. Mots. at 49-51, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir.).

<sup>217</sup> *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. July 20, 2007)(order on procedural motions).

The D.C. Circuit's jurisdiction under the DTA also includes constitutional review of whether the standards and procedures utilized in the military proceedings below were consistent with the Constitution and laws of the United States. This seems to bring the scope of DTA proceedings closer to that which would be available in habeas review. However, *habeas* challenges may also permit challenges to detention not based solely on the adequacy of CSRT procedures. First, there is no statutory requirement that all detainees receive a CSRT determination in order to be detained, nor that detainees receive any kind of a hearing within any certain period of time after their capture. This might have left some detainees without effective means to pursue a DTA challenge. Moreover, it appears that some detainees who were determined by CSRTs to be properly classified as enemy combatants have been released from Guantanamo without a new determination, which may call into question the importance of the CSRT procedure as the primary means for obtaining release and therefore, the sole focus of a collateral challenge. Detainees may also be transferred or released based on the results of periodic reviews conducted by Administrative Review Boards (ARBs)<sup>218</sup> to determine whether the detainee is no longer a threat or that it is in the interest of the United States and its allies to release the prisoner. There is no opportunity under the DTA to appeal the result of an ARB finding. While new evidence uncovered by this process may result in the convening of a new CSRT to determine continued enemy combatant status,<sup>219</sup> the DTA does not provide an avenue to appeal a decision not to convene a new CSRT.<sup>220</sup> The Supreme Court's ruling that the constitutional writ of *habeas* extends to Guantanamo suggests that detainees may seek *habeas* review in such cases.

## Conditions of Detention

Although it appears less common for challenges to prison conditions to be entertained under *habeas* review, such cases have been heard by federal courts on *habeas* petitions.<sup>221</sup> Prisoners in federal prison may also ask a district court to address such complaints using their general jurisdiction to consider claims that arise under the Constitution,<sup>222</sup> by means of a writ of mandamus.<sup>223</sup> These writs, which are directed against government officials, have been used to

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<sup>218</sup> See DOD Press Release, "DoD Announces Draft Detainee Review Policy" (March 3, 2004), *available at* <http://www.defenselink.mil/releases/2004/nr20040303-0403.html>; Memorandum from Deputy Secretary of Defense, Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Navy Base, Guantanamo Bay, Cuba (July 14, 2006), *available at* <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>.

<sup>219</sup> CSRT Implementing Directive, *supra* note 28, at encl. 10 (implementing Detainee Treatment Act provisions).

<sup>220</sup> *Boumediene* at 2273-74 (stating that the ability to request a new CSRT to consider new evidence is an "insufficient replacement for the factual review these detainees are entitled to receive through habeas corpus").

<sup>221</sup> "A motion pursuant to § 2241 generally challenges the execution of a federal prisoner's sentence, including such matters as the administration of parole, computation of a prisoner's sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions." *Jiminian v. Nash*, 245 F.3d 144 (2d Cir. 2001). See, e.g., *Rickenbacker v. United States*, 365 F. Supp. 2d 347 (E.D.N.Y. 2005) (challenging failure to provide drug and psychiatric treatment in accordance with sentencing court's recommendation).

<sup>222</sup> 28 U.S.C. § 1331. See *Caldwell v. Miller*, 790 F.2d 589 (7<sup>th</sup> Cir. 1986).

<sup>223</sup> *Russell Donaldson, Mandamus, under 28 U.S.C.A. §1361, To Obtain Change in Prison Condition or Release of Federal Prisoner*, 114 A.L.R. Fed. 225 (2005). Relief in mandamus is generally available where: (1) the plaintiff can show a clear legal right to the performance of the requested action; (2) the duty of the official in question is clearly defined and nondiscretionary; (3) there is no other adequate remedy available to the plaintiff; (4) there are other separate jurisdictional grounds for the action. *Id.* at 1(a). A writ of mandamus may issue only where "the duty to be performed is ministerial and the obligation to act peremptory, and clearly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and undisputable." *Ali v. Ashcroft*, 350 F. Supp. 2d 28, 65 (D.D.C. 2004), *quoting* *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1479 (D.C. Cir. 1995).

require those officials to act in compliance with constitutional requirements. Although these challenges are often denied on the merits or on procedural grounds, cases have been brought based on the First Amendment,<sup>224</sup> Sixth Amendment,<sup>225</sup> Eighth Amendment<sup>226</sup> and various other grounds.<sup>227</sup>

The *Boumediene* Court declined to discuss whether challenges to conditions of detention are within the constitutional scope of the writ as it applies to Guantanamo detainees.<sup>228</sup> A variety of challenges has been raised by detainees in Guantanamo regarding conditions of their detention, including such issues as whether prisoners can be held in solitary confinement<sup>229</sup> when they can be transferred,<sup>230</sup> or whether they can have contact with relatives.<sup>231</sup> Although some of these were brought as *habeas corpus* cases,<sup>232</sup> Guantanamo detainees have also sought relief from the courts using the All Writs Act,<sup>233</sup> principally to prevent their transfer to other countries without notice,<sup>234</sup> but for other reasons too.<sup>235</sup> Use of the All Writs Act by a court is an extraordinary remedy, generally not invoked if there is an alternative remedy available.<sup>236</sup>

## Available Remedy

Under Title 28, U.S. code, a court conducting *habeas* review must “award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the detainee is not entitled to it.”<sup>237</sup> The court can order either party to expand the record by submitting additional information bearing on the petition.<sup>238</sup> The court may order hearings to assist it in determining the facts, and is authorized to “dispose of the matter as

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<sup>224</sup> See *Long v. Parker*, 390 F.2d 816 (3<sup>rd</sup> Cir. 1968) (prisoner suit to obtain access to religious weekly newspaper stated a valid cause of action worthy of a factual hearing).

<sup>225</sup> *Stover v. Carlson*, 413 F. Supp. 718 (D. Conn. 1976) (ending federal prison practice of opening privileged communications outside of prisoner’s presence).

<sup>226</sup> *Fullwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962) (keeping prisoner in solitary confinement for more than two years for minor disciplinary infractions violates the Eighth Amendment). It should be noted that where a prisoner has not yet been convicted of a crime, a challenge to conditions of detentions may sound in Due Process rather than as an Eighth Amendment challenge. *Bell v. Wolfish*, 441 U.S. 520 (1979).

<sup>227</sup> See generally *Donaldson*, *supra* note 220.

<sup>228</sup> See *Boumediene*, at 2274 (“In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.”).

<sup>229</sup> Paul Shukovsky, *Terrorism Suspect’s Suit Tells of U.S. Abuse: Documents in Guantanamo Case Describe Extreme Isolation*, SEATTLE POST-INTELLIGENCER, August 6, 2004, at A1.

<sup>230</sup> *Al-Anazi v. Bush*, 370 F. Supp. 2d 188 (D.D.C. 2005).

<sup>231</sup> Josh White, *Lawyers Seek Improved Conditions for Suicidal Detainee*, WASH. POST, November 5, 2005, at A8.

<sup>232</sup> See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480-81 (D.D.C. 2005)(rejecting claims on other grounds).

<sup>233</sup> All Writs Act, 28 U.S.C. § 1651.

<sup>234</sup> *Belbach v. Bush*, 520 F.3d 452, 456 (D.C. Cir. 2008) (holding the MCA leaves intact the presumptive jurisdiction of federal courts to inquire into the constitutionality of a jurisdiction-stripping statute).

<sup>235</sup> See *El-Banna v. Bush*, 2005 U.S. Dist. LEXIS 16880 (2005) (seeking preservation of records relating to treatment of detainees).

<sup>236</sup> *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 196 (D.D.C. 2005).

<sup>237</sup> 28 U.S.C. § 2243.

<sup>238</sup> Rules Governing § 2255 Cases, Rule 7, 28 U.S.C.A. foll. § 2255 (applicable to prisoners subject to sentence of a federal court).

law and justice require,”<sup>239</sup> or in criminal cases, to vacate a sentence, grant a new trial, or order that a prisoner be released.<sup>240</sup>

By contrast, the DTA review procedures do not address the remedies available to detainees who prevail in a challenge. Detainees who succeed in persuading a CSRT that they are not enemy combatants do not have a right to release or even a right initially to be informed of the CSRT’s decision. If the CSRT Director approves a finding that a detainee is no longer an enemy combatant, the detainee may be held for as long as it takes the government to arrange for his transfer to his home country or another country willing to provide asylum, during which time he need not be told of the CSRT’s conclusion.<sup>241</sup> According to one report of unclassified CSRT records, in the event the CSRT Director disapproves of the finding, new CSRTs may be convened, apparently without notifying or permitting the participation of the detainee, although the government might present new evidence to the new panel.<sup>242</sup>

The Supreme Court viewed the lack of an express power permitting the courts to order the release of a detainee as a factor relevant to the DTA’s inadequacy as a substitute proceeding.<sup>243</sup> In the context of CSRT determinations, the government suggested to the Court that remand for new CSRT proceedings would be the appropriate remedy for a determination that an error of law was made or that new evidence must be considered.<sup>244</sup> Whether such a remedy would be acceptable probably depends on whether measures are taken to decrease the risk of error under the CSRT procedures. It seems unlikely that a court would consider itself constitutionally obligated to permit a detainee to enter the United States and be released into the United States unless the detainee has previously formed some ties to the country.<sup>245</sup>

### **Extraterritorial Scope of Constitutional Writ of *Habeas***

In *Boumediene*, the Supreme Court held that the constitutional writ of *habeas* extended to persons detained at Guantanamo, even though they are held outside the *de jure* sovereign territory of the United States. Left unresolved in the Court’s discussion of the extraterritorial application of the Constitution is the degree to which the writ of *habeas* and other constitutional protections applies to aliens detained in foreign locations other than Guantanamo (e.g., at military facilities in

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<sup>239</sup> 28 U.S.C. § 2243.

<sup>240</sup> 28 U.S.C. § 2255.

<sup>241</sup> CSRT Implementing Directive, *supra* note 28, at encl. 1, para. I(9)-(10).

<sup>242</sup> See Mark Denbeaux *et al.*, *No-Hearing Hearings, CSRT: The Modern Habeas Corpus?*, at 37-40 (2006), available at [http://law.shu.edu/news/final\\_no\\_hearing\\_hearings\\_report.pdf](http://law.shu.edu/news/final_no_hearing_hearings_report.pdf). The named author is a professor at Seton Hall University School of Law and serves as counsel to two Guantanamo detainees.

<sup>243</sup> *Boumediene* at 2271.

<sup>244</sup> See Gov’t Br. in Opp. to Pet. for Reh’g, *Boumediene v. Bush*, No. 16-1195 (U.S.).

<sup>245</sup> See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32 (1981) (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative”); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (1953) (finding that an inadmissible alien’s “right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate”). On the other hand, whether or not a *habeas* court would ever deem the release into the United States of an alien with no prior ties to the country as an appropriate remedy to his unlawful detention abroad remains uncertain. At least one Guantanamo detainee has requested a federal district court to order the government to parole him into the United States pending resolution of his habeas claim. Huseifa Parhat’s Motion for Immediate Release on Parole into the Continental United States Pending Final Judgment on His Habeas Petition, In re: Guantanamo Bay Litigation, No. 05-1509 (July 23, 2008).

Afghanistan and elsewhere, or at any undisclosed U.S. detention sites overseas). The *Boumediene* Court indicated that it would take a functional approach in resolving such issues, taking into account “objective factors and practical concerns” in deciding whether the writ extended to aliens detained outside U.S. territory. Practical concerns mentioned in the majority’s opinion as relevant to an assessment of the writ’s extraterritorial application include the degree and likely duration of U.S. control over the location where the alien is held; the costs of holding the Suspension Clause applicable in a given situation, including the expenditure of funds to permit *habeas* proceedings and the likelihood that the proceedings would compromise or divert attention from a military mission; and the possibility that adjudicating a *habeas* petition would cause friction with the host government.<sup>246</sup> The *Boumediene* Court declined to overrule the Court’s prior decision in *Eisentrager*, in which it found that convicted enemy aliens held in post-WWII Germany were precluded from seeking *habeas* relief. Whether enemy aliens are held in a territory that more closely resembles post-WWII Germany than present-day Guantanamo may influence a reviewing court’s assessment of whether the writ of *habeas* reaches them, as well as its assessment of the merits of the underlying claims.

### **Use of *Habeas* Proceeding to Challenge the Jurisdiction of a Military Commission**

Whether detainees who are facing prosecution by a military commission may challenge the jurisdiction of such tribunals prior to the completion of their trial remains unsettled, although the district court has so far declined to enjoin military commissions.<sup>247</sup> Supreme Court precedent suggests that *habeas corpus* proceedings may be invoked to challenge the jurisdiction of a military court even where *habeas corpus* has been suspended.<sup>248</sup> *Habeas* may remain available to defendants who can make a colorable claim not to be enemy combatants within the meaning of the MCA, and therefore to have the right not to be subject to military trial at all, without necessarily having to await a verdict or exhaust the appeals process.<sup>249</sup> Interlocutory challenges contesting whether the charges make out a valid violation of the law of war, for example, seem less likely to be entertained on a *habeas* petition.<sup>250</sup>

### **Congressional Authority over Federal Courts**

Whether Congress can limit the ability of detainees to bring cases challenging the conditions of their detention may depend on the extent that such challenges are based on constitutional considerations. If it is determined that no other procedure is available to vindicate constitutional

<sup>246</sup> *Boumediene* at 2261-62.

<sup>247</sup> See *Khadr v. United States*, No. 07-1405 (D.C. Cir. June 20, 2008); *Hamdan v. Gates*, No. 04-1519 (JR) (D.D.C. July 18, 2008)(order denying injunction of military commission proceedings).

<sup>248</sup> See *ex parte Milligan*, 71 U.S. (4 Wall.) 2, 115-16 (1866); cf. *ex parte Quirin*, 317 U.S. 1, 24-25 (1942)(dismissing contention that presidential proclamation stripped Court of authority to review case, stating that “nothing in the Proclamation precludes access to the courts for determining its applicability to the particular case”).

<sup>249</sup> *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)(finding judicial abstention is not appropriate in cases in which individuals raise “ ‘substantial arguments denying the right of the military to try them at all,’ ” and in which the legal challenge “turn[s] on the status of the persons as to whom the military asserted its power”); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 76 (1955).

<sup>250</sup> Cf. *New v. Cohen*, 129 F.3d 639, 643 (D.C. Cir. 1997).

rights, then it might be argued that the Congress's limitation on the use of *habeas corpus* or other avenues of redress by the detainees is an unconstitutional limitation.

The Constitution contains few requirements regarding the jurisdiction of the federal courts. Article III, Section 1, of the Constitution provides that

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.<sup>251</sup> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Although Article III provides for a Supreme Court headed by the Chief Justice of the United States,<sup>252</sup> nothing else about the Court's structure and operation is set forth, leaving the size and composition of the Court, as well as the specifics, if any, of the lower federal courts, to Congress.<sup>253</sup> Utilizing its power to establish inferior courts, Congress has also created the United States district courts,<sup>254</sup> the courts of appeals for the thirteen circuits,<sup>255</sup> and other federal courts.<sup>256</sup>

On its face, there is no limit on the power of Congress to make exceptions to or otherwise regulate the Supreme Court's appellate jurisdiction, to create inferior federal courts, or to specify their jurisdiction. However, the same is true of the Constitution's other grants of legislative authority in Article I and elsewhere, which does not prevent the application of other constitutional principles to those powers. "[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas," Justice Black wrote for the Court in a different context, but "these granted powers are always subject to the limitations that they may not be exercised in a way that violates other specific provisions of the Constitution."<sup>257</sup> Justice Harlan seems to have had the same thought in mind when he said that, with respect to Congress's power over jurisdiction of the federal courts, "what such exceptions and regulations should be it is for Congress, in its wisdom, to establish, having of course due regard to all the Constitution."<sup>258</sup>

Thus, it is clear that while Congress has significant authority over administration of the judicial system, it may not exercise its authority over the courts in a way that violates constitutional rights

<sup>251</sup> The latter part of this quoted language dovetails with clause 9 of § 8 of Article I, under which Congress is authorized "[t]o constitute tribunals inferior to the supreme Court."

<sup>252</sup> Although the position of Chief Justice is not specifically mandated, it is referenced in Article I, § 3, Cl. 6, in connection with the procedure for the Senate impeachment trial of a President:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no Person shall be convicted without Concurrence of two-thirds of the Members present.

<sup>253</sup> By the Judiciary Act of 1789, it was established that the Court was to be composed of the Chief Justice and five Associate Justices. The number of Justices was gradually increased to ten, until in 1869 the number was fixed at nine, where it has remained to this day.

<sup>254</sup> 28 U.S.C. §§ 81-131, 132.

<sup>255</sup> 28 U.S.C. §§ 41, 43 (District of Columbia Circuit, First Circuit through Eleventh Circuit, Federal Circuit).

<sup>256</sup> See, e.g., 28 U.S.C. §§ 151 (U.S. bankruptcy courts); 251 (U.S. Court of International Trade).

<sup>257</sup> *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

<sup>258</sup> *United States v. Bitty*, 208 U.S. 393, 399-400 (1908).

such as the Fifth Amendment due process clause or precepts of equal protection. For instance, Congress could not limit access to the judicial system based on race or ethnicity.<sup>259</sup> Nor, without amendment of the Constitution, could Congress provide that the courts may take property while denying a right to compensation under the takings clause.<sup>260</sup> In general, the mere fact Congress is exercising its authority over the courts does not serve to insulate such legislation from constitutional scrutiny.

## Separation of Powers Issues

It is also clear that Congress may not exercise its authority over the courts in a way that violates precepts of separation of powers. The doctrine of separation of powers is not found in the text of the Constitution, but has been discerned by courts, scholars, and others in the allocation of power in the first three Articles; that is, the “legislative power” is vested in Congress, the “executive power” is vested in the President, and the “judicial power” is vested in the Supreme Court and the inferior federal courts. That interpretation is also consistent with the speeches and writings of the framers. Beginning with *Buckley v. Valeo*,<sup>261</sup> the Supreme Court has reemphasized separation of powers as a vital element in American federal government.<sup>262</sup> Justice Kennedy, in *Boumediene* stressed his view that the writ of *habeas corpus* itself plays an important role in preserving the operation of separation of powers principles.<sup>263</sup>

The federal courts have long held that Congress may not act to denigrate the authority of the judicial branch. In the 1782 decision in *Hayburn’s Case*,<sup>264</sup> several Justices objected to a congressional enactment that authorized the federal courts to hear claims for disability pensions for veterans. The courts were to certify their decisions to the Secretary of War, who was authorized either to award each pension or to refuse it if he determined the award was an “imposition or mistaken.” The Justices on circuit contended that the law was unconstitutional because the judicial power was committed to a separate department and because the subjecting of a court’s opinion to revision or control by an officer of the executive or the legislative branch was not authorized by the Constitution. Congress thereupon repealed the objectionable features of the

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<sup>259</sup> Laurence Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L.L. REV. 129, 142-43 (1981). For instance, segregation in courtrooms is unlawful and may not be enforced through contempt citations for disobedience, *Johnson v. Virginia*, 373 U.S. 61 (1963), or through other means. Treatment of parties to or witnesses in judicial actions based on their race is impermissible. *Hamilton v. Alabama*, 376 U.S. 650 (1964)(reversing contempt conviction of witness who refused to answer questions so long as prosecutor addressed her by her first name).

<sup>260</sup> The Fifth Amendment provides that no “private property [ ] be taken for public use without just compensation.”

<sup>261</sup> 424 U.S. 1, 109-43 (1976).

<sup>262</sup> It is true that the Court has wavered between two approaches to cases raising separation-of-powers claims, using a strict approach in some cases and a less rigid balancing approach in others. Nevertheless, the Court looks to a test that evaluates whether the moving party, usually Congress, has “impermissibly undermine[d]” the power of another branch or has “impermissibly aggrandize[d]” its own power at the expense of another branch; whether, that is, the moving party has “disrupt[ed] the proper balance between the coordinate branches [by] preventing the [other] Branch from accomplishing its constitutionally assigned functions.” *Morrison v. Olson*, 487 U.S. 654, 695 (1988). See also *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Mistretta v. United States*, 488 U.S. 361 (1989); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Airport Noise*, 501 U.S. 252 (1991).

<sup>263</sup> *Boumediene* at 2259( calling the writ of habeas corpus “an indispensable mechanism for monitoring the separation of powers”).

<sup>264</sup> 2 U.S. (2 Dall.) 409 (1792). This case was not actually decided by the Supreme Court, but by several Justices on circuit.

statute.<sup>265</sup> More recently, the doctrine of separation of powers has been applied to prevent Congress from vesting jurisdiction over common-law bankruptcy claims in non-Article III courts.<sup>266</sup>

Allocation of court jurisdiction by Congress is complicated by the presence of state court systems that can and in some cases do hold concurrent jurisdiction over cases involving questions of federal statutory and constitutional law. Thus, the power of Congress over the federal courts is really the power to determine how federal cases are to be allocated among state courts, federal inferior courts, and the United States Supreme Court. Congress has significant authority to determine which of these various courts will adjudicate such cases, and the method by which this adjudication will occur. For most purposes, the exercise of this power is relatively noncontroversial.

## Legislative Action in the 110<sup>th</sup> Congress

Congress passed a reporting requirement in the the National Defense Authorization Act for FY2008 addressing detainees at Guantanamo. Several bills have been introduced to authorize and regulate the detention of terrorist suspects, and others would amend the restrictions on detainees' ability to seek *habeas* review. The Senate Judiciary Committee Subcommittee on Terrorism, Technology and Homeland Security held a hearing December 11, 2007, entitled "The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and Is an End in Sight?"

### National Defense Authorization Provisions

The National Defense Authorization Act for Fiscal Year 2008, P.L. 110-181 (H.R. 4986), section 1067 requires the President to submit a report that contains information about detainees at Guantanamo Bay, Cuba, under the control of the Joint Task Force Guantanamo, who are or have ever been classified as "enemy combatants." The report is to identify the number of detainees who are to be tried by military commission; the number of detainees to be released or transferred; the number of detainees to be retained but not charged; and a "description of the actions required to be undertaken, by the Secretary of Defense, possibly the heads of other Federal agencies, and Congress, to ensure that detainees who are subject to an order calling for their release or transfer from the Guantanamo Bay facility have, in fact, been released."

The Senate reported a provision in two earlier versions of the FY2008 Defense authorization bill, S. 1547 and S. 1548, that would have required the Secretary of Defense to convene a CSRT, conducted in accordance with requirements similar to those that apply in military commissions, to determine the status of each detainee who has been held for more than two years as an "unlawful enemy combatant," unless such detainee is undergoing trial or has been convicted by a military commission. The provision adopted the definition of "unlawful enemy combatant" from the MCA, with the addition of an alien who is not a lawful combatant and who has been a "knowing

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<sup>265</sup> Those principles remain vital. *See, e.g.,* *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 113-14 (1948) ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government."); *Connor v. Johnson*, 402 U.S. 690 (1971).

<sup>266</sup> *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

and active participant in an organization that engaged in hostilities against the United States.” The provision would have prohibited the use of information acquired through coercion not amounting to cruel, inhuman or degrading treatment (as defined in the DTA) unless the totality of the circumstances renders the statement reliable and possessing sufficient probative value; the interests of justice would best be served by admission of the statement into evidence; and the Tribunal determines that the alleged coercion was incident to the lawful conduct of military operations at the point of apprehension; or the statement was voluntary. The provision was stripped out of the Senate version of the National Defense Authorization Act for Fiscal Year 2008 (H.R. 1585) prior to passage by the Senate.

The House-passed version of the National Defense Authorization Act for Fiscal Year 2009, H.R. 5658, contains a provision that would prevent the Department of Defense from implementing a successor regulation to Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, until 60 days after Congress is notified, (§ 1064). The bill would also declare military interrogation to be an inherently governmental function, prohibiting the use of contract personnel to interrogate detainees, (§1077). The Senate is considering a similar provision in its version of the FY2009 National Defense Authorization Act, S. 3001 and S. 3002.

## ***Habeas Corpus Amendments***

Several bills have been introduced in both Houses of Congress to amend the *habeas* provisions in the DTA. H.R. 1189, the Habeas Corpus Preservation Act, would provide that the MCA is to be construed to avoid any effect on the right of any U.S. resident to *habeas corpus*. Some of these would also amend the definition of “enemy combatant” in the MCA and revise other aspects of judicial review.

The Military Commissions Habeas Corpus Restoration Act of 2007, H.R. 267, would repeal subsection (e) of 28 U.S.C. § 2241. The bill would add a new Section 1632 to Title 28 providing that no court has jurisdiction to hear cases against the United States or its agents by aliens detained as enemy combatants except for the reviews provided in the DTA and *habeas corpus* petitions. H.R. 2826 would amend 28 U.S.C. § 2241(e) to allow *habeas corpus* actions and requests for injunctive relief against transfer, except in cases of detainees held in an active war zone where the Armed Forces are implementing AR 190-8 or any successor regulation. However, *habeas* challenges related to the decisions of CSRT would be limited to the United States Court of Appeals for the District of Columbia Circuit under the same restrictions in scope that currently apply to appeals of CSRT decisions under the DTA. The bill would also amend 10 U.S.C. § 950j(b) to restore jurisdiction for *habeas corpus*, but not for other actions, related to the prosecution, trial or judgment of a military commission.

H.R. 2710 would repeal 28 U.S.C. § 2241(e) to restore jurisdiction over all cases related to the detention of persons as “enemy combatants,” but would prohibit challenges other than *habeas corpus* actions in cases relating to the prosecution, trial, or judgment of a military commission. H.R. 2543, the Military Commissions Revision Act of 2007, would revise the definition of unlawful enemy combatant to cover only a “person who has engaged in, attempted, or conspired to engage in acts of armed hostilities or terrorism against the United States or its co-belligerents, and who is not a lawful enemy combatant.” Under the bill, CSRT decisions would no longer be dispositive for purposes of determining the jurisdiction of military commissions. Statements obtained by a degree of coercion less than torture would be admissible in a military commission only if the military judge finds that “the totality of the circumstances indicates that the statement possesses probative value to a reasonable person; the interests of justice would best be served by

admitting the statement into evidence; and the interrogation methods used to obtain the statement do not amount to cruel, inhuman or degrading treatment.” Habeas corpus jurisdiction would be restored for alien enemy combatants after two years since the date of detention if no criminal charges are pending against the detainee.

S. 185/H.R. 1416, the Habeas Corpus Restoration Act, would repeal subsection (e) of 28 U.S.C. § 2241, but would amend 10 U.S.C. § 950j so that court jurisdiction would continue to be unavailable for detainees seeking to challenge military commissions, except through the limited procedures under the DTA, as amended, and “as otherwise provided in [chapter 47a of title 10, U.S. Code] or in section 2241 of title 28 or any other habeas corpus provision.” S. 185 was reported favorably by the Senate Judiciary Committee without amendment.<sup>267</sup> S. 576, the Restoring the Constitution Act of 2007, and its companion bill, H.R. 1415, would amend the definition of “unlawful enemy combatant” in the MCA, 10 U.S.C. § 948a, to mean an individual who is not a lawful combatant who “directly participates in hostilities in a zone of active combat against the United States,” or who “planned, authorized, committed, or intentionally aided the terrorist acts on the United States of September 11, 2001” or harbored such a person. A status determination by a CSRT or other tribunal would no longer be dispositive of status under 10 U.S.C. § 948d. The bills would also expressly restrict the definition of “unlawful enemy combatant” for use in designating individuals as eligible for trial by military commission. They would repeal 28 U.S.C. § 2241(e), but limit other causes of action related to the prosecution, trial, and decision of a military commission. DTA provisions related to the limited review of status determinations and final decisions of military commissions would be eliminated, and appeals of military commissions would be routed to the Court of Appeals for the Armed Forces. H.R. 1415 would expand the scope of that review to include questions of fact. With respect to the Geneva Conventions, the bills would eliminate the MCA provision excluding their invocation as a “source of rights” by defendants (10 U.S.C. § 948b(g)), replacing it with a provision that military commission rules determined to be inconsistent with the Geneva Conventions are to have no effect. They would also add a reference to the effect that the President’s authority to interpret the Geneva Conventions is subject to congressional oversight and judicial review. Finally, the bills would provide for expedited challenges to the MCA in the D.C. district court. (Provisions amending the War Crimes Act or military commission procedures are not covered in this report.)

S. 1876 would modify the MCA definition of “enemy combatant” to mean persons other than lawful combatants who have engaged in hostilities against the United States or who have purposefully and materially supported hostilities against the United States (other than hostilities engaged in as a lawful enemy combatant). It would also exclude from the definition U.S. citizens and persons admitted for permanent residence in the United States, as well as persons taken into custody in the United States. The bill would provide for jurisdiction in the United States District Court for the District of Columbia to hear *habeas* petitions by persons determined by the United States to have been properly detained as an enemy combatant or persons detained for more than 90 days without such a determination. The court would also have jurisdiction to hear petitions by persons who have been tried by military commissions after they have exhausted the appeals process. Provisions of S. 1876 that address restrictions on detention and liability are described in the next section.

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<sup>267</sup> S.Rept. 110-90.

A version of the Habeas Corpus Restoration Act was offered as an amendment to the National Defense Authorization Act, H.R. 1585 (Senate amendment no. 2022), but was not adopted.<sup>268</sup> (After President Bush vetoed H.R. 1585, Congress passed a virtually identical bill, H.R. 4846, which became P.L. 110-181).

H.R. 6247, the “Boumediene Jurisdiction Correction Act,” would provide “exclusive original jurisdiction” to hear habeas petitions by persons held under military authority at Guantanamo, apparently including U.S. military personnel, to the “courts established under the Uniform Code of Military Justice and operating in that part of Cuba.” Because courts-martial are the only courts under the UCMJ that operate at the naval base, and these are not standing courts that would be capable of accepting such petitions, perhaps the bill should be interpreted to refer the civilian court created by the UCMJ with jurisdiction over Guantanamo. Under this interpretation, all *habeas* petitions by persons detained at Guantanamo would have to be referred to the Court of Appeals for the Armed Forces (CAAF). Otherwise, it seems *habeas* petitions for prisoners at Guantanamo would have to be referred to a commanding officer with court-martial convening authority there, which seems unlikely to provide the sort of independent collateral review that the *Boumediene* Court seemed to view as constitutionally required.

H.R. 6705/S. 3401, the Enemy Combatant Detention Review Act of 2008, would repeal subsection (e) of 28 U.S.C. § 2241. It would grant the U.S. District Court for the District of Columbia exclusive jurisdiction over, and make it the exclusive venue for consideration of, all *habeas corpus* applications by or on behalf of enemy combatants held at Guantanamo who are not U.S. citizens or aliens who have been admitted for permanent residence in the United States. All such applications would be consolidated before the Chief Judge of the District Court or a designee for consolidated proceedings and determinations on common questions of fact or law. A *habeas corpus* application could be filed to challenge the legality of the continued detention of a covered individual, but not any other claims relating to his detention, transfer, treatment, trial, or conditions of confinement, or any other action against the United States. Applications of persons subject to military commission proceedings would be stayed until those proceedings have been completed. The proposed legislation would also establish procedures for *habeas corpus* review of detainees, including the scope of permitted discovery, protection of national security information, the allowance of video hearings so that a detainee may participate from Guantanamo, and the admission of evidence (including hearsay).

## **Bills to Regulate Detention**

S. 1249 and H.R. 2212 would require the President to close the detention facilities at Guantanamo Bay and either transfer the detainees to the United States for trial (by military proceeding or Article III court) or for detention as enemy combatants as may be authorized by Congress; to transfer detainees to an appropriate international tribunal operating under U.N. auspices; to transfer detainees to their country of citizenship or a different country for further legal process, where adequate assurances are given that the individual will not be subject to torture or cruel, inhuman, or degrading treatment; or to release them from any further detention.

S. 1876, the “National Security with Justice Act of 2007,” would limit extraterritorial detention and rendition, modify the definition of “unlawful enemy combatant” for purposes of military

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<sup>268</sup> S.Amdt. 2022 to S.Amdt. 2011 to H.R. 1585, 153 CONG. REC. S11559 (daily ed. July 19, 2007).

commissions, and extend statutory habeas corpus to detainees at Guantanamo. The bill defines “aggrieved person” as an individual who is detained or subjected to rendition overseas by a U.S. officer or agent, except as authorized, excluding any individual who is an international terrorist (a non-U.S. person who “engages in international terrorism or activities in preparation therefor,” and any person (apparently including U.S. persons) who knowingly aids, abets or conspires with such a non-U.S. person in the commission of a terrorist act or activity in preparation of a terrorist act). An aggrieved person would have the right to sue the head of the agency or department responsible for his or her unlawful detention or rendition for damages, including punitive damages.

Extraterritorial rendition and detention would generally be permitted only with proper authorization by order of the Foreign Intelligence Surveillance Court (FISC), a court set up to authorize electronic surveillance of agents of foreign powers in the United States. Certain types of renditions and detentions appear to be excluded from these general requirements, including those of persons detained by the United States in Guantanamo on the act’s date of enactment who are transferred to a foreign legal jurisdiction, as well as the rendition or detention of individuals detained or transferred by the U.S. Armed Forces under circumstances governed by, and in accordance with, the Geneva Conventions. Otherwise, extraterritorial detention would require the authorization of the President or the Director of National Intelligence based on a certification that the failure to detain that individual “will result in a risk of imminent death or imminent serious bodily injury to any individual or imminent damage to or destruction of any United States facility” or the factual basis exists to demonstrate the individual is an international terrorist and there is reason to believe that the detention or rendition of such person is important to the national security of the United States. An application for detention must be submitted to the FISC within 72 hours in order to detain the person.

H.R. 6705/S. 3401 would expressly authorize the detention of persons who have been engaged in hostilities or who have purposefully and materially supported hostilities against the United States or its co-belligerents on behalf of the Taliban, Al Qaeda, or associated forces. It would bar a court from releasing a person into the United States who has been designated as an “enemy combatant” by a CSRT (other than a U.S. citizen or an alien admitted into the U.S. for permanent residence) and also make such a person ineligible for a entry visa or any immigration status, subject to the waiver of the President. If a court were to grant a detainee’s *habeas* application and order his release, he would be placed in the custody of the Secretary of Homeland Security for transfer to the detainee’s country of citizenship or a third country.

## Conclusion

The Administration’s policy of detaining wartime captives and suspected terrorists at the Guantanamo Bay Naval Station has raised a host of novel legal questions regarding, among other matters, the relative powers of the President and Congress to fight terrorism, as well as the power of the courts to review the actions of the political branches. The DTA was Congress’s first effort to impose limits on the President’s conduct of the Global War on Terrorism and to prescribe a limited role for the courts. The Supreme Court’s decision striking the DTA provision that attempted to eliminate the courts’ *habeas* jurisdiction may be seen as an indication that the Court will continue to play a role in determining the ultimate fate of the detainees at Guantanamo. However, the Court did not foreclose all options available to Congress to streamline *habeas* proceedings involving detainees at Guantanamo or elsewhere in connection with terrorism.

Instead, it indicated that the permissibility of such measures will be weighed in the context of relevant circumstances and exigencies.

As a general matter, the courts have not accepted the view that the President has inherent constitutional authority to detain those he suspects may be involved in international terrorism. Rather, the courts have looked to the language of the AUMF and other legislation to determine the contours of presidential power. The Supreme Court has interpreted the AUMF with the assumption that Congress intended for the President to pursue the conflict in accordance with traditional law-of-war principles, and has upheld the detention of a “narrow category” of persons who fit the traditional definition of “enemy combatant” under the law of war. Other courts have been willing to accept a broader definition of “enemy combatant” to permit the detention of individuals who were not captured in circumstances suggesting their direct participation in hostilities against the United States, but a plurality of the Supreme Court warned that a novel interpretation of the scope of the law of war might cause their understanding of permissible executive action to unravel. Consequently, Congress may be called upon to consider legislation to support the full range of authority asserted by the executive branch in connection with the GWOT. In the event the Court finds that the detentions in question are fully supported by statutory authorization, whether on the basis of existing law or new enactments, the key issue is likely to be whether the detentions comport with due process of law under the Constitution.

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