THE SUSPENSION OF LIBERTIES, AN EXTENSION OF RIGHTS: EXAMINING HABEAS JURISDICTION FOR NON-CITIZEN GUANTANAMO DETAINEES IN THE AL ODAH AND BOUMEDIENE APPEALS

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STATEMENT OF ORIGINALITY – This paper contributes to the literature surrounding the constitutional rights afforded to detainees currently held at the naval base in Guantanamo Bay, Cuba. More specifically, it offers a prospective and predictive analysis of the recent oral arguments heard in the consolidated Al Odah and Boumediene cases, held in December of 2007, in a historical context of previous judicial decisions and legislative decrees. Previous literature has not considered the constitutional protections, if any, afforded to non-citizen detainees held outside the territorial United States. Legal research has mainly focused on the application of either international law to Guantanamo detainees (if non-citizen) or domestic United States law (if citizens) – but untouched has been the question of whether domestic law applies to non-citizens by the very virtue of their detention by U.S. military forces in a territory solely under the control of the United States. This is exactly the issue in the Al Odah and Boumediene cases currently before the Supreme Court, from which we can expect a decision from in early summer.

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INTRODUCTION

Incorporated into our Constitution from the common law of England, the right to petition a court for the right to hear the legal basis for one’s incarceration has long been one of the most cherished and protected safeguards of liberty in the United States. Where the writ of habeas corpus applies, individuals are assured an entitlement to a procedural mechanism guarding against unfair and illegal detention as well as the right to petition the courts for its enforcement. But for the hundreds for detainees still incarcerated in the Guantanamo Naval Base in Cuba, the writ became important not hundreds of years ago but rather in the early morning hours of
September 11, 2001, when several Al Qaeda hijackers launched their notorious attacks and inflicted a catastrophic human, financial and psychological impact on our nation. In response, Congress passed a joint resolution authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks … or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Authorization for Use of Military Force (AUMF). With legislative approval granted, President George W. Bush initiated military action against Al Qaeda and the Taliban regime in Afghanistan soon after, and the legal questions have been mounting ever since. During operations on the ground – which, to this day, have no end in sight – several individuals actively fighting Allied forces were taken into custody, designated as “enemy combatants,” and shipped off to the Guantanamo Bay Naval Base in Cuba. In addition to those captured during the course of battle, however, military authorities also began holding individuals not actually physically present during military operations pursuant to the AUMF and transporting them to Guantanamo under the premise that such individuals were, even from countries as far away as Bosnia and Thailand, actively assisting terrorist organizations.

Guantanamo detainees have been classified by the Bush administration as “enemy combatants,” and it is this classification, according to the administration, that authorizes their continued detention for an indefinite period of time until the country’s war on terror is finished or until the military determines that a particular detainee no longer poses – or, perhaps, never was – a threat to the national security of the United States. It has been only recently that Guantanamo detainees were given the procedural rights to challenge their classification and subsequent detention. Before the summer of 2004, the majority of those labeled as “enemy

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combatants” were denied access to counsel, not informed of the charges against them, restricted from any and all contact to the outside world, and not allowed to challenge their detention. Present estimates indicate that there are approximately 340 of these detainees still held at Guantanamo.²

While the Supreme Court has heard from Guantanamo detainees three times before, the consolidated Al Odah and Boumediene petitions represent the first time the Court will have had to consider, first, whether Constitutional habeas protections extend to non-citizen detainees being held at the Guantanamo Naval Base in Cuba and second, if the former is answered in the affirmative, whether the military tribunals offered by the government provide an adequate substitute for habeas jurisdiction. This Article attempts to provide both a methodological review of current law relative to the rights provided to detainees still being held, some for more than six years, at Guantanamo, as well as an analysis of how the Supreme Court will solve the constitutional quandary presented in the Boumediene and Al Odah cases currently before its consideration. Section One introduces the intricate dance between past judicial and legislative verdicts on the extension of Executive power in the area of jurisdiction over Guantanamo detainees, representing a primer on the habeas cases the Supreme Court has previously heard and the Congressional responses these opinions have generated. Section Two begins with a discussion on the origins of the Boumediene and Al Odah petitions and a sketch of the main points at issue between the Bush Administration and the detainees. In particular, Section Two examines three matters in contention: (1) whether Congress’ legislation effectively strips from non-citizen Guantanamo detainees the statutory right to habeas relief; (2) whether constitutional

protections nevertheless extend to them; and, if so, (3) whether the current military tribunals are an adequate substitute for habeas jurisdiction. Section Three offers a prediction, based on recent oral arguments as well as on previous detainee decisions, that the majority of the Court’s members will likely render a narrowly-tailored verdict in favor of extending Constitutional protections to non-citizen Guantanamo detainees, and probably remand to the D.C. Circuit with instructions to outline the procedural protections required of the tribunal system. A minority of Justices, however, will particularly take issue with the extension of constitutional rights beyond the territorial boundaries of the United States to non-citizens without any presence, property or relationship with the country. The Article concludes by offering some finishing remarks as to the larger impact the Boumediene case may have on the remaining Guantanamo cases, if any, and on the scope of the habeas writ in general.

I. HISTORY OF GUANTANAMO DETAINEE’S HABEAS PETITIONS


Rasul v. Bush was the first case that challenged both the legality of the detainment at Guantanamo Bay as well as the conditions of that detention.\(^3\) It was originally filed on February 19, 2002 as a “next friend” habeas petition by the relatives of two British and one Australian national under 28 U.S.C. § § 2241 and 2242. By way of relief, the petition urged the release of the detainees, as well as permission for the detainees to privately meet with legal counsel and the suspension of any interrogation methods during the duration of the litigation.\(^4\) And by way of legal justification, petitioners grounded their claims in the Fifth, Sixth, Eighth and Fourteenth

\(^3\) Rasul v. Bush, 02-CV-0299 (CKK).

Amendments, looking also for support to the International Covenant on Civil and Political Rights the American Declaration on the Rights and Duties of Man. Very soon thereafter, the second challenge came by way of *Al Odah v. Bush*, which also sought to challenge the legality of the continued detention, without charge, of its petitioners in Guantanamo.

The government moved to dismiss both of these challenges, arguing that neither petitioners, as non-citizens, had the proper standing to petition the courts for habeas relief. It pointed specifically to Supreme Court precedent, *Johnson v. Eisentrager*, which earlier found that German nationals convicted during World War II by a United States military commission in China had no standing to file a claim for habeas relief in the courts of United States. Interpreting *Eisentrager* as barring claims of any alien seeking habeas relief unless said alien was being held in custody within sovereign United States territory, the District Court granted the government’s motion to dismiss. Judge Colleen Kollar-Kotelly maintained that because Guantanamo was not such territory, there was no other choice but to dismiss the cases for lack of jurisdiction over any Constitutional claims. Joined by another dismissed habeas case, *Habib v. Bush*, all three were appealed to the Court of Appeals for the D.C. Circuit in September 2002.

The D.C. Circuit upheld the lower court decisions on March 11, 2003, affirming the dismissal of all three petitions. It was standard law, the judges held, that foreign nationals without a presence within the country had no claim to any rights under the United States Constitution, and thus no federal court would have the proper jurisdiction to grant habeas relief.

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5 Id.
9 Id.
to said non-citizens even where they had not yet been charged with any crime against the United States.¹²

Petitioners turned to the Supreme Court in September of 2003, which granted certiorari in November of the same year for all three leading habeas petitions.¹³ In agreeing to determine whether United States courts lacked jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and detained at Guantanamo, the Court consolidated the appeals under the name Rasul v. Bush.¹⁴ Oral arguments were heard April 20, 2004, and the Court’s opinion was issued on June 28, 2004.¹⁵ The Court ruled 6-3 in favor of the petitioners and affirmed the right of non-citizen detainees to challenge their incarceration in the courts of the United States.¹⁶ In reversing the Circuit Court decision, the majority distinguished the facts at hand with those of the Eisentrager case brought forth by the government.¹⁷

[The Guantanamo detainees] are not nationals of countries at war with the United States, and that 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.¹⁸

Moreover, it pointed out the unique character of the agreement with Cuba that allowed the United States to exercise “complete jurisdiction and control” over the Guantanamo Naval Base.¹⁹

¹⁴ Id.
¹⁵ Id.
¹⁶ Id.
¹⁷ There is sufficient evidence to indicate that the Administration sought to walk a legal tightrope in keeping detainees in Guantanamo – within the control of the United States, but beyond the reach of federal courts. See Memorandum for William J. Hayes: Possible Habeas Jurisdiction Over Aliens Held in Guantanamo Bay, Cuba (December 28, 2001), in KAREN J. GREENBURG & JOSHUA L. DRATEL, EDS., THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 29 (Cambridge 2005).
¹⁸ 542 U.S. at 473.
¹⁹ 542 U.S. at 476. The United States is the sole occupier of the Guantanamo Bay territory as consequence of entering a lease agreement in 1903 with the Republic of Cuba after the end of the Spanish-American War. Under
As such, the *Rasul* Court held that detainees had the same rights as Americans to invoke the federal courts’ authority under the habeas statute to challenge their incarceration, and remanded the petitioners to the lower courts.\textsuperscript{20}

The Supreme Court decided *Hamdi v. Rumsfeld* the same day as *Rasul*.\textsuperscript{21} The *Hamdi* case was brought on behalf of Yaser Esam Hamdi, a United States citizen detained at Guantanamo as an enemy combatant, by his father in June of 2002 in the Eastern District of Virginia.\textsuperscript{22} District Court Judge Robert G. Doumar ordered that a federal public defender be given access to Hamdi, but the Fourth Circuit reversed and remanded Justice Doumar’s order, ruling that he had failed to give proper deference to the government’s “intelligence and security interests.”\textsuperscript{23} The District Court in turn denied the government’s motion to dismiss based on the weakness of the government’s evidence supporting the detention, and ordered the government to produce various documents for review by the court.\textsuperscript{24} The government appealed the order to the Fourth Circuit, which again agreed with the government’s position and denied a petition for rehearing en banc.\textsuperscript{25}

Hamdi’s father appealed this decision, and the Supreme Court agreed to hear the case.\textsuperscript{26} Although there was no majority opinion, all but one of the justices were in agreement that the Executive was overstepping its authority in attempting to indefinitely hold a citizen of the United

\textsuperscript{20} Id.
\textsuperscript{22} 294 F.3d 598 (4th Cir. Va. 2002).
\textsuperscript{23} 296 F.3d 278 (4th Cir. 2002).
\textsuperscript{24} 243 F. Supp. 2d 527 (E.D. Va. 2002).
\textsuperscript{25} 337 F.3d 335 (4th Cir. 2003).
\textsuperscript{26} 540 U.S. 1099 (2004), granting certiorari.
States without access to basic due process protections.\textsuperscript{27} Justice O’Connor wrote the plurality, holding that although Congress’ AUMF permitted the detention of unlawful combatants, the mandates of due process required Hamdi to have an opportunity to challenge his incarceration.\textsuperscript{28}

Although nowhere in the O’Connor opinion was there any explicit language extending protections to non-citizen detainees, O’Connor’s reliance on the Geneva Convention in Section III, part D of her opinion states that habeas relief should be made available to “alleged” enemy combatants.\textsuperscript{29} Combined with the language and holding in \textit{Rasul}, which held that Guantanamo detainees had proper standing in federal United States courts to petition their detention, the Court ended their 2004 term by having granted significantly more due process rights to citizen and non-citizen detainees than they had been originally allotted by the Executive.


Mere days after the final \textit{Rasul} and \textit{Hamdi} decisions, then-Deputy Secretary of Defense Paul Wolfowitz released an Order on July 7, 2004 that outlined the creation of a Combatant Status Review Tribunal (CSRT), a military tribunal system that would now be in charge of reviewing the legal designation of all Guantanamo detainees as “enemy combatants.”\textsuperscript{30} For the purposes of the CSRT, an “enemy combatant” was to be defined as:

\begin{quote}
\textit{… 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 … [including] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.}\textsuperscript{31}
\end{quote}

\textsuperscript{28} 542 U.S. at 509 (“[A]lthough Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”).
\textsuperscript{29} 542 U.S. at 515.
\textsuperscript{30} Wolfowitz’s July 7, 2004 Order can be found here: \url{www.defenselink.mil/news/Jul2004/d20040707review.pdf}.
\textsuperscript{31} \textit{Id.}
Both Wolfowitz’s Order and a Memorandum issued on July 29th by Secretary of the Navy Gordon England set out the procedures by which detainees could challenge their detention as enemy combatants before a panel of three commissioned military officers, thereby attempting to create a substitute for the judicial process available in United States courts. With the tribunals detainees had, for the first time, the right to hear the basis for their detention, so long as that information was not considered classified by the administration. Detainees could challenge their detention both by testifying as to why their designation as enemy combatant by the government was erroneous and by introducing any potentially exculpating evidence deemed relevant and “reasonably available” by the tribunal.

The protections offered by the tribunal, however, are more limited than those regularly offered by federal courts, a main contention of the petitioners discussed at length later in this Article. Although detainees are each assigned a military officer as a representative offering assistance with the case, they do not have a right to assign or meet with counsel of their own choosing. Formal rules of evidence do not apply to the proceedings. Detainees are also faced with a presumption in favor of the government’s classification. And while the tribunal is free to consider classified evidence against detainees, the detainees are not allowed to know the

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33 Id.

34 During oral arguments in the Boumediene appeal to the Supreme Court, petitioner attorney Seth Waxman pointed out that in Vietnam, the only other war in which the United States was engaged in military operations where the enemy did not wear uniforms, the government provided them with counsel. Transcript of Oral Argument at 16, Boumediene v. Bush, No. 06-1195 (S. Ct. Argued December 7, 2007) [hereinafter “Oral Argument Transcript”], available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1195.pdf.

35 Supra note 32.

36 Id.
details of said information, access the information, or use the information in their defense.\textsuperscript{37}

Finally, the only oversight available for detainees contesting the tribunal’s decision is review by the Staff Judge Advocate for the Convening Authority, the body that appoints tribunal members and representatives.\textsuperscript{38}

Still, the government argues that these tribunals provide sufficient protections for detainees labeled as enemy combatants, so much that enemy combatants at Guantanamo now have more rights than any other detainees in history.\textsuperscript{39} On the basis of the existence of these tribunals, the government filed motions to dismiss the still-pending habeas cases, insisting that they should instead be heard within the CSRT system instead of federal courtrooms. Within days of each other in January of 2005, D.C. District Court Judge Richard L. Leon dismissed two cases under this justification, including the \textit{Boumediene} case,\textsuperscript{40} while Judge Joyce H. Green found that the \textit{Al Odah} detainees continued to have a right to constitutional protections not properly protected by the military tribunals.\textsuperscript{41} Both cases went up the D.C. Circuit court.\textsuperscript{42}

In response to the confusion over whether habeas was still an option for Guantanamo petitioners, the legislature attempted to clarify the matter in approving the Detainee Treatment Act (DTA) in December of 2005.\textsuperscript{43} The DTA added a new subsection (e) to the habeas statute, which stated that, “[e]xcept as provided in section 1005 of the [DTA], no court, justice, or judge” could exercise jurisdiction over:

\begin{quote}
\textit{i. an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or}
\end{quote}

\begin{footnotes}
\textsuperscript{37} Id. \\
\textsuperscript{38} Id. \\
\textsuperscript{39} Brief of Respondent at 10, \textit{Al Odah v. United States}, No. 06-1196 (S. Crt. argued December 5, 2007), available at http://ccrjustice.org/files/Brief%20for%20the%20Respondents.pdf. \\
\textsuperscript{41} \textit{In re Guantanamo Detainee Cases}, 355 F. Supp. 2d 443 (D.D.C. 2005). \\
\textsuperscript{42} \textit{Al Odah v. United States (In re Guantanamo Detainee Cases)}, 2005 U.S. App. LEXIS 4651 (D.C. Cir. 2005). \\
\end{footnotes}
ii. any other action against the United States or its agents relating to any aspect of the
detention of by the Department of Defense of an alien at Guantanamo Bay, Cuba, who
(1) is currently in military custody; or
(2) has been determined by the United States Court of Appeals for the District of
Columbia Circuit … to have been properly detained as an enemy combatant.

DTA § 1005 (e)(1). As such, the DTA explicitly stripped habeas rights from any Guantanamo
detainee who had not already filed a habeas petition by December 31, 2005. It also removed the
jurisdiction of the D.C. circuit courts and handed authority over these cases to the military
tribunal system set up under CSRT. In January of 2006 the government moved to have any
remaining Guantanamo habeas cases dismissed for lack of jurisdiction, arguing that the DTA
should apply retroactively to those approximately 200 pending petitions.44


At this point, the Hamdan v. Rumsfeld case was already before the Supreme Court,
seeking to resolve this very issue.45 The plaintiff in this case was Salim Hamdan, a citizen of
Yemen captured during United States military operations in Afghanistan and charged in July of
2004 with conspiracy to commit terrorism and held in Guantanamo.46 Hamdan filed a habeas
petition after the Bush administration attempted to try him before a military commission, arguing
that the commission was in violation of both the Geneva Convention and the United States
Uniform Convention of Military Justice.47 After the Supreme Court’s ruling in Hamdi, Hamdan
was brought before a CSRT, which determined that he was properly classified as an enemy

44 Marjorie Cohn, Why Boumediene Was Wrongly Decided, JURIST, February 27, 2007, available at
47 Id.
combatant, “either a member of or affiliated with Al Qaeda,” and thus eligible for detention by the United States.\textsuperscript{48}

Upon reviewing Hamdan’s habeas petition, D.C. District Court Judge James Robertson sided with Hamdan and held that the government was not entitled to submit Hamdan to a military commission without first demonstrating that he was not, in fact, a prisoner of war under the Geneva Convention.\textsuperscript{49} Soon after, in July of 2005, a panel of D.C. Circuit judges reversed Judge Roberston’s decision and upheld the legality of the military commission.\textsuperscript{50} Judge Randolph, author of the decision, rejected Hamdan’s contention that the Executive had violated the separation of powers by establishing the military commissions.\textsuperscript{51} On the contrary, the Court found, Congress had properly authorized the establishment of the commissions through the AUMF in 2001 and through both 10 U.S.C. § 821 and § 836.\textsuperscript{52} As such, military commissions were legitimate forums to try enemy combatants because they had the blessing of Congress. The Court also disagreed with Hamdan that the Geneva Convention could be enforced by the judicial branch of the United States government.\textsuperscript{53}

On November 7, 2005, the Supreme Court granted certiorari and agreed to consider, for the third time now, whether Guantanamo detainees had the right of habeas review in federal courts.\textsuperscript{54} Justice Stevens wrote the opinion for the court, although there was majority agreement only in part. The Supreme Court held, on purely statutory grounds, that Hamdan could not be brought and tried before military commission, and in doing so avoided having to tackle the greater constitutional question of the degree to which the Executive’s power extended in this

\textsuperscript{49} 344 F. Supp. 2d 152 (D.C. 2004).
\textsuperscript{50} 415 F. 3d 33 (2005).
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} 126 S. Ct. 2749 (2006).
context. It first denied the government’s motion to dismiss under the DTA because of a lack of any language on part of Congress explicitly precluding Supreme Court jurisdiction.\textsuperscript{55} It pointed to a provision of the DTA stating that subsections (e)(2) and (e)(3) of section 1005 “shall apply with respect to any claim … that is pending on or after the date of the enactment of this Act.”\textsuperscript{56} In contrast, no provision of the DTA stated whether subsection (e)(1) applied to any cases currently pending. Finding that Congress had considered and thus must have subsequently decided not to provide such language, the Court asserted that the omission had to have been deliberate and “an integral part of the statutory scheme.”\textsuperscript{57} Justice Breyer’s concurrence, in which four members joined, put it best:

\begin{quote}
Nothing prevents the President from returning to Congress to seek the authority he believes necessary … Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine – through democratic means – how best to do so.\textsuperscript{58}
\end{quote}

The Court also dismissed the government’s use of \textit{Schlesinger v. Councilman},\textsuperscript{59} which applied to a member of the U.S. military who was being tried before a military court-martial and held that federal courts should refrain from intervening in pending court-martials against service members.\textsuperscript{60} Stevens found that the facts of Hamdan’s petition – including the fact that he was not a member of the U.S. military, and would be tried before a military \textit{commission}, not a \textit{court-martial} – decisive.\textsuperscript{61}

Second, the opinion did not decide whether the Executive had the power to create military commissions; even if the President did have such power, the Court reasoned, the

\textsuperscript{55} 126 S. Ct. at 2754.  
\textsuperscript{56} DTA § 1005(h).  
\textsuperscript{57} 126 S. Ct. at 2769.  
\textsuperscript{58} 126 S. Ct. at 2799.  
\textsuperscript{59} 420 U.S. 738 (1975).  
\textsuperscript{60} 126 S. Ct. at 2769-73.  
\textsuperscript{61} Id.
tribunals would still have to pass muster by being either authorized by statute or approved by the laws of war (per Article 21 of the Uniform Code of Military Justice). But nothing in either the UCMJ, AUMF or the DTA expanded the Executive’s powers beyond those enumerate in Article 21, and all three stopped with acknowledgement that the President’s commissions were only justified during war time but still required to operate within the laws of war – including the Geneva Conventions.

Finally, in examining the commissions authorized by the DTA, the Court found that they suffered too many inadequacies to pass muster under either military law or the Geneva Conventions, and as a result Hamdan could not be brought before them as they currently existed. For instance, the defendant and his attorney could be prevented from seeing certain evidence used against the defendant, the evidentiary rules for these commissions did not exclude hearsay, unsworn live evidence or information gathered through torture, and appellate review was limited to the Executive Branch, not the judiciary. However, the Court did not preclude military commissions themselves; rather, it only considered the constitutional adequacy of commissions as they currently existed. In leaving that issue open, one could argue that Congress was invited to return to the topic, debate further and enact clearer legislation – which it did in October of 2006, much to the detriment of Guantanamo detainees hopeful that Congress would be their savior.

D. Congress Clarifies: Military Commissions Act (2006)

62 126 S. Ct. at 2774.
63 126 S. Ct. at 2781.
64 126 S. Ct. at 2789.
65 When military commissions were first authorized, there was no prohibition against evidence that was produced through torture or coercion, so long as the presiding officer considered such evidence to have “probative value.” Department of Defense Military Commissions Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism at 6, March 21, 2002, available at http://www.defenselink.mil/news/Mar2002/d20020321lord.pdf. The MCA, however, eliminated the consideration of such evidence. MCA § 3, adding 10 U.S.C. § 948r(c).
Unfortunately, none of the Justices could have predicted that Congress’ plan for action would have resulted in the complete elimination of the statutory right to habeas for Guantanamo detainees. Partly in response to the Bush Administration’s sense of urgency and a desire not to look weak in the fight against terrorism, 66 Congress passed the Military Commissions Act (MCA) on October 17, 2006, which explicitly outlined the CSRT process as an adequate substitute for habeas proceedings in the courts of the United States. 67 Section 7 of the MCA is titled “Habeas Corpus Matters,” and here Congress again amends § 2241(e) by way of subsection (a). The new amendment was more explicit than that provided by the earlier DTA:

i. No court, justice or judge shall have jurisdiction to hear or consider an application for a write 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.

ii. Except as provided in [section 1005(e)(2) and (e)(3) of the DTA], no court, justice or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

MCA § 7(a) (internal quotation marks omitted). Moreover, subsection (b) was even clearer, providing:

The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act, which relate to any aspect of the detention, transfer, treatment, trial or conditions of detention of an alien detained by the United States since September 11, 2001.


MCA § 7(b). The amendments provided by the MCA were a clear manifestation of President Bush’s intention to get explicit Congressional authorization for the use of military tribunals. The MCA removed any claims from judicial review brought by non-citizen detainees challenging their confinement, regardless of whether they had already been labeled by the CSRT as enemy combatants or were simply awaiting such a determination. And in a direct rebuke to the Court’s Hamdan decision, the MCA eliminated statutory habeas corpus rights from all Guantanamo detainees – even those whose petitions were, like Hamdan’s, pending on December 31, 2005.

In a more recent development, as this paper was being written a military judge in Guantanamo applied the MCA to the original petitioner in Hamdan. After hearings on December 5 and 6, Navy Captain Keith J. Allred ruled that § 948a(1)(i) of the MCA granted the proper jurisdiction over Hamdan as an “unlawful enemy combatant,” which in turn meant he could be properly tried by a military commission. Allred concluded that Hamdan’s participation in driving a vehicle equipped with surface-to-air missiles to a battlefield in Afghanistan where U.S. Army forces were stationed made him an active participant in the hostilities against the United States from 1997 to 2001. Applying the newly-enacted MCA, Allred found that Hamdan’s activities qualified him as an enemy combatant but not as a lawful one, under either the definitions of the MCA or the Geneva Conventions. Finally, the judge referred to the D.C. Circuit decision in Boumediene in holding that “the United States Constitution does not protect detainees at Guantanamo Bay,” and that Hamdan could not

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69 Id.
70 Id. at 6.
71 Id. at 7-8.
challenge the constitutionality of his trial.\textsuperscript{72} It is this last point that remains unresolved – at least, until we hear the Supreme Court’s conclusion in the \textit{Boumediene} case in June of 2008.

II. \textbf{BEFORE THE COURT: AL ODAH AND BOUMEDIENE}

\textbf{A. Background and Origin}

The \textit{Hamdan} decision made it possible for \textit{Al Odah} to continue in the federal court system instead of being sent to a military commission. Although introduced briefly earlier, the complexity of interlocking cases and legislation makes a background summary of both the \textit{Al Odah} and \textit{Boumediene} cases merited for the sake of simplicity. \textit{Al Odah} was originally filed by the Center for Constitutional Rights (CCR) in April of 2002 on behalf of twelve Kuwaitis imprisoned in Guantanamo seeking habeas review in the District Court for the District of Columbia. In their \textit{Al Odah} petition, the attorneys for the detainees raised four points of contention. First, was the lower Circuit court decision incorrect in finding that the detainees had no constitutional rights and, second, in holding that habeas had not been unconstitutionally suspended by Congress? Third, does the Geneva Convention apply to the detainees, guaranteeing them due process rights?\textsuperscript{73} Finally, is there a way to avoid constitutional questions

\textsuperscript{72} Id. at 10. See also the \textit{Boumediene v. Bush} D.C. Circuit opinion, available here: http://pacer.caed.uscourts.gov/docs/common/opinions/200702/05-5062b.pdf.

\textsuperscript{73} For the purposes of brevity and in consideration of page limits, I refrain in this paper from considering whether non-citizen Guantanamo detainees may properly invoke the protections of the Geneva Convention after the enactment of the MCA. The proper consideration of this matter requires more time and space than I can properly give it here. For the reader’s information, MCA § 5(a) provides that “no person may invoke the Geneva Conventions or any protocols thereto [as a source of rights] in any habeas corpus or other civil action … to which the United States [or any current or former official or agent] is a party.” Moreover, as a matter of U.S. domestic law, the legislature may properly limit the judicial enforcement of rights under international conventions. See generally Richard H. Fallon, Jr. & Daniel J. Meltzer, \textit{Habeas Corpus Jurisdiction, Substantive Rights and the War on Terror}, 120 Harv. L. Rev. 2029, 2094-95 (2007); Curtis A. Bradley, \textit{The Military Commissions Act, Habeas Corpus, and the Geneva Conventions}, 101 AJIL 322, 322-28 (2007).
by reading the MCA as inapplicable to pending habeas petitions. The second case that the Supreme Court is concurrently hearing is that of Boumediene v. Bush, originally filed as a petition for a writ of habeas corpus on July 8, 2004. The lead plaintiff in the original Boumediene case is Lakhdar Boumediene, an Algerian-Bosnian citizen captured in Bosnia around October of 2001. Similarly, the Boumediene plaintiffs constructed their arguments around two main issues – whether the MCA took away federal court jurisdiction over the detainees’ petitions, and whether the detainees were still entitled to challenge the legal basis their detentions through habeas petitions.

When District Court Judge Kollar-Kotelly granted the government’s motion to dismiss in the original Al Odah case and the D.C. Circuit affirmed, CCR consolidated the Al Odah petition with both the Rasul and Habib v. Bush cases and the Supreme Court eventually granted certiorari. Subsequent to the Rasul decision, the remaining habeas petitions, including Al Odah and Boumediene, were remanded to the lower courts. Once there, conflicting District Court decisions were issued in both cases in January of 2005, and both cases were subsequently appealed to the D.C. Circuit. Two years of sporadic decisions by the D.C. Circuit and jurisdiction-stripping legislation from Congress passed before the D.C. Circuit heard the cases.

But in February of 2007, a two-judge majority issued a consolidated opinion for both cases where they upheld the MCA’s elimination of statutory habeas jurisdiction that the Supreme

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75 Supra note 6.
78 Supra note 40.
Court had protected in *Rasul*. The Court held that in the absence of a statutory habeas right – which here was legislatively removed by the MCA – the Constitutional protections afforded by habeas relief only extended to those recognized at common law in 1789. And in 1789, the Court reasoned, the United States legal system did not provide the right of habeas to aliens held outside the United States’ territorial boundaries. Thus, because detainees could not prove a presence within the United States, they in turn could not ascertain any constitutional rights whatsoever.

For constitutional purposes, the Guantanamo Naval base was considered outside the United States territorial boundaries, even if the United States continued to exert absolute control over it. If the detainees wanted appellate review, the D.C. Circuit held, they would first have to go through the CSRT, get a decision from the tribunal and *only then* would they be able to appeal to the D.C. Circuit.

Judge Rogers dissented from the decision supported by the other two justices. In her view, the nature of the Suspension Clause was more suitably understood as “a limitation on the power of Congress,” and when properly applied to the Guantanamo detainees protected their right to bring habeas claims in federal court. It was only by incorrectly interpreting the historical record and the Supreme Court’s prior *Rasul* decision, she continued, that the majority was able to find that the detainees had no right to challenge their own detention. Moreover, she found that the limited reviews provided by the tribunals under the MCA and DTA were so

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81 Boumediene *v.* Bush, 476 F.3d 981 (D.C. Cir. 2007).
82 476 F.3d at 990-91.
83 Id.
84 Id. at 994.
85 476 F.3d at 994-96.
86 Id.
87 Id. at 1002.
flawed as a substitute for habeas relief that they could not be used to justify a constitutional suspension of the writ by Congress.\textsuperscript{88}

The CCR appealed the consolidated cases to the Supreme Court in March of 2007, which initially denied review in April and suggested plaintiffs and their counsel first exhaust their administration remedies – namely, the review process set up by the DTA – before seeking judicial relief.\textsuperscript{89} Not even two months later, however, the Supreme Court reversed its earlier denial and agreed to hear the consolidated cases.\textsuperscript{90} The detainees’ representatives and their co-counsel filed the opening briefs in the Supreme Court in August of 2007, which were accompanied by numerous amicus briefs from a variety of supporters.\textsuperscript{91} The government filed their opposition briefs on October 9th, and oral argument was scheduled for and held on December 5th.\textsuperscript{92}

\textbf{B. The Main Issues At Stake:}

The consolidated \textit{Boumediene} and \textit{Al Odah} cases, the fourth time the Supreme Court has heard from Guantanamo detainees, exemplify the extent of the ongoing tug-of-war between the expanding powers of the executive branch, on the one hand, and the judiciary’s ability to restrain those advances, on the other. But the Court’s composition has changed significantly since it last considered appeals from Guantanamo detainees back in the 2006 \textit{Hamdan} decision, which has led some commentators to suggest that the Court is not likely to be as friendly to detainees as it has been in the past. In the \textit{Rasul} decision, for example, Justices Stevens, Ginsburg, O’Connor, 

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\item \textsuperscript{88} \textit{Id.} at 1006.
\item \textsuperscript{89} \textit{Boumediene v. Bush}, 127 S. Ct. 1478 (2007).
\item \textsuperscript{90} \textit{Supra} note 6.
\item \textsuperscript{91} \textit{Id.}
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Breyer, Souter and Kennedy voted to expand the rights of detainees, while Chief Justice Rehnquist, Thomas and Scalia declined to do the same. In the years since that decision, both vacant spots, those left by Chief Justice Rehnquist and Justice O'Connor, have been replaced by two justices who are both likely to defer to the Executive and promote a vision of broadened executive power. While the Court is still likely to expand constitutional protections to Guantanamo detainees, it will manage to do so by only the slimmest of margins.93

Although the Supreme Court did a great justice to the Guantanamo detainees in reversing their earlier refusal to hear the Al Odah and Boumediene petitions, the reach of any decision will still likely be somewhat limited because the issues at stake are considerably narrower. For instance, both cases involve foreign nationals and petitioners detained in a very unique location – a region outside the territorial boundaries, but still within the complete control of, the United States. And none of the petitioners actually face any criminal charges in either civil or military courts. Still, the Court’s pending decision will inevitably serve as a useful jurisprudential guide for the hundreds of remaining detainees, even if not specifically at issue in the present cases. An example is the Fourth Circuit’s current consideration of the government’s request to rehear, en banc, its earlier decision in prohibiting the military from detaining any civilian suspected of terrorism and captured inside the United States.94

The Supreme Court heard oral argument in the consolidated cases on December 5th of 2007, and a decision is expected in the summer of 2008. As gleaned mainly from petitioners’, respondents’ and amici briefs, as well as transcripts of the December oral argument, the Supreme Court will be faced with sorting out three main issues. First, does Congress’ penning of the

MCA signal an explicit revocation of any statutory right to habeas relief that Guantanamo detainees may have had? If so, are Guantanamo detainees nonetheless entitled to a constitutional assurance of habeas jurisdiction, despite their status as non-citizens held outside the United States? Finally, if petitioners are found to be within the protective habeas umbrella, are the military tribunals offered by the MCA and DTA adequate substitutes?

i. Statutory Right to Habeas Relief Under the MCA

Our nation’s adoption of the English writ of habeas corpus is a treasured one, long having played a central role in the protection of our individual liberties. A shield against unlawful incarceration, the writ, at its most basic, allows the detainee to petition the court for a demonstration of a lawful basis for the detention. Because of its importance it is protected by statute, the Constitution and common law.  

And this is exactly the central issue most at stake in Boumediene and currently before the Supreme Court -- whether the MCA can justifiably take away the detainee’s statutory right to habeas that the Court formerly granted back in 2004 in the Rasul decision.

Beginning in 1789, federal courts have had statutory jurisdiction to review the legal basis for detentions ordered by the Executive. Perhaps the government’s best argument is the contention that Congress knew what it was doing when it penned the MCA, which explicitly took away any statutory right to habeas relief from Guantanamo detainees. Moreover, the government attorneys offer a different interpretation of the Supreme Court’s Rasul decision – contrary to the detainees’ argument, the government claims that the Rasul holding did not establish a constitutional right to habeas for detainees but only acknowledged a statutory one,

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which was purposely taken away by the legislature through the MCA. The government made the same argument earlier in October of 2004, when it was moving to dismiss the thirteen pending habeas petitions remaining in the district courts. According to the government’s interpretation the *Rasul* holding only gave the district courts statutory jurisdiction to hear the detainees’ petitions, so the courts would have to dismiss all of the petitions, since non-citizens outside the United States would have no rights the courts could enforce. District Judge Leon agreed and dismissed the *Boumediene* case;\(^97\) District Judge Green disagreed and denied the government’s move to dismiss the *Al Odah* case.\(^98\)

However, petitioners contend that Congress’ enactment of the MCA does not qualify as a specific enough statutory directive necessary to repeal of habeas, as required by *INS v. St. Cyr*, 533 U.S. 289, 299 (2001).\(^99\) “Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction.”\(^100\) Because Congress did not provide such a statutory directive as to pending habeas actions, the argument goes, it cannot be the case that the repeal of habeas jurisdiction in MCA § 7(a) applied to them – especially in light of the historical importance of the writ.\(^101\)

### ii. Non-Citizen Detainees’ Entitlement to Constitutional Protections

Although the MCA may have defeated the detainees’ *statutory* right to habeas relief, the *Rasul* Court earlier upheld their *constitutional* right to habeas corpus. When the Bush Administration was considering a holding location for the detainees collected in the war against


terrorism, the Guantanamo Naval Base in Cuba stood out as nearly perfect – it was within relatively easy reach to mainland United States, was in complete control of the United States and, in the words of then-Deputy Assistant Attorney General John Yoo, “seemed to fit the bill … [T]he federal courts probably wouldn’t consider Gitmo as falling within their habeas jurisdiction.” To support their argument that the Supreme Court had earlier denied habeas relief to noncitizens and should similarly do so for the Rasul petitioners, the government pointed to the Court’s earlier decision in Johnson v. Eisentrager. In Eisentrager, the Court refused to extend the protection of habeas corpus to several German citizens who had been captured by the United States army while in China and held on war crime charges, and used a six-factor test to determine whether an alien could be entitled to constitution habeas protections in the courts of the United States:

... To support that assumption we must hold that prisoner of our military authorities is constitutionally entitled to the writ, even through he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

Based on consideration of the above six factors, the Eisentrager Court declined to extend habeas relief to the German prisoners.

The Rasul Court, however, found the ruling in Eisentrager inapplicable, given the major factual distinctions between the other rights afforded to the German prisoners and the situation facing the Guantanamo detainees. Specifically, it found that:

> [p]etitioners in [the Guantanamo] cases differ from the Eisentrager detainees in important respects: They are not nationals of countries at war with the United States, and

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102 John Yoo, War by Other Means: An Insider’s Account of the War on Terror 142-43 (2006).
104 Id.
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 any wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercised exclusive jurisdiction and control.\textsuperscript{106}

Moreover, the Rasul Court rejected the government’s argument that Guantanamo was not under the sovereign control of the United States.\textsuperscript{107}

\textbf{By the express terms of its agreements with Cuba, the United States exercises ‘complete jurisdiction and control’ over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses … Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority under § 2241.}\textsuperscript{108}

Justice Stevens concurred, finding that “Guantanamo Bay is in every practical respect a United States territory.”\textsuperscript{109} As such, the Rasul Court confirmed that Guantanamo detainees, “no less than American citizens,” have the right to challenge the legal basis for their continued detention in the United States court system through habeas petitions.\textsuperscript{110}

Still, the government points to the historical foundation for the writ and argues that the Founders in 1789 could not have anticipated the writ as reaching beyond the nation’s territorial boundaries. It is exactly because “the common-law writ of habeas corpus would not have extended to alien enemy combatants held outside the territory of the United States” that any attempt to broaden the off-shore coverage of constitutional protections should be challenged.\textsuperscript{111}

To that effect the government proposes a different reading of \textit{Eisentrager} than that relied on by the Supreme Court’s Rasul decision, one that arguably suggests a categorical finding that federal courts lack jurisdiction over non-citizens detained abroad. In \textit{Eisentrager} “the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their

\textsuperscript{106} Rasul v. Bush, 542 U.S. at 476-78.
\textsuperscript{107} Rasul v. Bush, 542 U.S. at 476.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 487 (Kennedy, J., concurring in judgment).
\textsuperscript{110} Id. at 481.
\textsuperscript{111} Brief of Respondent at 10, Al Odah v. United States, No. 06-1196 (S. Crt. argued December 5, 2007), available at http://ccrjustice.org/files/Brief\%20for\%20the\%20Respondents.pdf.
presence in the country implied protection”;

because the Guantanamo detainees have limited contacts with the United States, the government argues, the Constitution does not compel an enlargement of the same jurisdiction to grant them habeas rights. Practical considerations also provide a compelling enough reason to support this interpretation, as efforts to entertain petitions abroad during ongoing military operations – let alone actually challenging them – would considerably drain our national resources back home and strain the productivity of our judiciary.

But if the Suspension Clause continues to protect the writ as it existed at the time of the nation’s founding, such protection was based on the “exact extent and nature of the jurisdiction or dominion exercised” by the government. Because the United States occupied what is now considered Guantanamo Bay at the time of the 1903 lease with Cuba, independent Cuba never had a chance to exert its own sovereignty over the territory. Even if the historical record argues in favor of having sovereignty as the decisive test of the writ’s applicability, the nature of the United States’ control over the naval base speaks to sovereignty in everything but name. For instance, it is the United States that is the supreme law-making, law-applying and law-enforcing authority in the territory, thanks to the terms of the land lease agreement with Cuba.

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112 Johnson v. Eisentrager, 339 U.S. at 777-78.
115 Rasul, 542 U.S. at 482.
117 See Duro v. Reina, 495 U.S. 676, 685 (1990) (noting that “[a] basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign’s territory, whether citizens or aliens.”).
118 Supra note 13.
Many scholars have in fact gone further, concluding that it is the very terms of that lease that provide the United States with territorial sovereignty over Guantanamo.\textsuperscript{119}

As some legal scholars have pointed out, a restrictive focus on sovereignty, using its most restrictive definition, does not properly account for the unprecedented nature of a “war on terror” where we fight an enemy without a nation, state or allegiance to any one particular country.\textsuperscript{120} If the traditional understanding behind habeas truly considered such a right to be coextensive with statehood, a right restricted by the territorial boundaries of the nation, then the justification could not possibly have accounted for the modern world of global threats we now live in and should be adapted to fit contemporary realities.\textsuperscript{121} On the other hand, if the requirement of “presence or property” within the country was meant as a method by which to establish minimum contacts with the United States, then the very virtue of the United States’ control over every segment of the detainees’ life and livelihood surely reaches that minimum threshold.\textsuperscript{122}


\textsuperscript{122} Id.
iii. The Suitability of Tribunals as an Adequate Substitute for Habeas Jurisdiction

If, in fact, the Court is convinced that the legislature fully intended to strip away the detainees’ statutory right to habeas through the MCA, then it will have to look at whether the MCA violates the Suspension Clause of the Constitution. Habeas corpus relief can be constitutionally suspended only in times of invasion or rebellion, and it has been done in the past only under those circumstances – perhaps most notably by President Lincoln during the Civil War. The MCA would be the first time Congress has suspended habeas without a finding of either rebellion or invasion. And, as the Court pointed out in St. Cyr, “[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest.”

However, neither Due Process nor the Suspension Clause forbid Congress from withdrawing federal habeas jurisdiction so long as it provides an adequate and capable substitute supplying petitioners with “a remedy exactly commensurate with that which had been previously available by habeas corpus.” Only twice has the Supreme Court approved an alternative to federal habeas review. Once in 1962 the Court restricted review of federal prison sentences to the district court that rendered the sentence and removed jurisdiction from all other federal courts. Then again in 1977, in their Swain v. Pressley decision, the Court upheld Congress’s removal of jurisdiction from federal courts to the D.C. Superior Court for criminal convictions,

123 U.S. Const. art. I, § 9, cl. 2.
124 Ex Parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861).
126 533 U.S. at 301.
128 Id. at 427.
but even this move kept federal court habeas review as a fail-safe option in case the review in
D.C. Superior Court was found to be “inadequate or ineffective.”\textsuperscript{129} Both of these kept some sort of judicial review available within the civil court system of the United States, and none of them handed jurisdiction over to a military tribunal.

To be sure, the government’s creation of such tribunals came as a response to the judiciary’s response in \textit{Hamdi}, and was roughly modeled on what the \textit{Hamdi} opinion had outlined as the Due Process requirements in such a context.\textsuperscript{130} Through the tribunals, the government contends, the proper balance is struck between the need to preserve liberty and the need to accommodate the government’s security interests by ensuring that “those who have in fact fought with the enemy during a war do not return to battle against the United States.”\textsuperscript{131} And the tribunals, as hearings for any and all detainees allowing them to challenge whether they actually fit the definition of “enemy combatant” that justified their detention, signified a significant concession to the detainees in comparison to the Executive’s earlier stance that had resisted any and all rights for Guantanamo detainees.\textsuperscript{132} As the government puts it, “[p]etitioners, along with the other enemy combatants being held at Guantanamo Bay, enjoy more procedural protections than any other captured enemy combatants in the history of

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\textsuperscript{130} According to respondents, the procedural protections offered by the CSRT are modeled on Army Regulation 190-8, which specifies procedures for determining the status of detainees under the Geneva Convention. Brief of Respondent at 2, \textit{Al Odah v. United States}, No. 06-1196 (S. Crt. argued December 5, 2007), available at http://ccrjustice.org/files/Brief%20for%20the%20Respondents.pdf. But certain amici curiae, specifically retired military officers, point out the significant differences between the protections offered by the 190-8 guidelines and those actually offered in practice by the CSRT. See Brief of Retired Military Officers as Amici Curiae Supporting Petitioners at 9-13, \textit{Al Odah v. United States}, No. 06-1196 (S. Crt. argued December 5, 2007), available at http://ccrjustice.org/files/Brief%20Amicus%20of%20Retired%20Military%20Officers%20in%20Support%20Petitioners.pdf.
\textsuperscript{131} \textit{Hamdi}, 542 U.S. at 531 (plurality opinion).
warfare.” Institution of the tribunal system ensures that we not worry about “our troops fighting in the war on terror [getting] sued in every court in the land by our enemies based on every possible complaint,” as had been the concern of some senators. Currently, all but two detainees at Guantanamo have received a hearing before a military tribunal, and thirty-eight detainees have been released as a result of the CSRT system.

Even so, troubling and decisive questions remain as to the adequacy of procedures and protections offered by the CSRT system and what they mean for the hundreds of detainees still in custody at Guantanamo. As discussed earlier, the CSRT operates according to rules that are substantially different from those applicable to the federal court system, and the result, petitioners allege, has been rudimentary proceedings and the protection of very few rights. Some of the procedural guarantees that we take for granted in courtrooms across the nation are noticeably lacking in the military tribunals, which continue to operate with almost no rules of evidence, discovery or precedent. Offering an illustrating example, author Muneer Ahmad relates the difficulty his legal team had in representing a Guantanamo detainee facing a military commission when trying to determine what, if any, precedent from the federal and military courts could be used in the hearing: “[Our military co-counsel] attempted to learn what case law, if any – domestic or international, criminal or civil, military or civilian – would be followed, to which the presiding officer responded, ‘If you want to know if … a particular case is applicable

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or a point of law, file a motion and I will decide it based on the briefs and the arguments and the law.”

There is no question that the procedural rules of the CSRT leave the detainees at a disadvantage; the only issue up for the Court’s consideration is whether such disadvantage is constitutional. Most evidently, the materials used in the tribunal are limited to the information that is “reasonably available” to the government – and any evidence presented is done so with a presumption in favor of the government. The detainee is not allowed to bring forward any additional evidence that may help his case nor, in the event the evidence presented against him is classified, allowed to even access the evidence supporting his detention. A recent study examining the cases of almost four hundred detainees discovered that the government did not produce any documentary evidence or present any witnesses until after the hearing in a whopping ninety-six percent of the documented cases. Moreover, the tribunals only offer an assigned military officer as a “personal representative,” since detainees are denied assistance of counsel of their own choosing. This “personal representative” is designed as a substitute for an attorney, even though anything a detainee tells his representative can be used against him and almost a third of the time the representative does not offer any substantive comments. And although detainees are allowed to call witnesses under standard CSRT regulations, in practice the tribunals have denied every request for witnesses other than fellow detainees and three-quarters

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142 Id.
of the requests for the latter. Finally, the very definition of an “enemy combatant” is not open to challenge by the detainee, and the tribunal is limited in the type of relief that can be offered: namely, that it cannot authorized a detainee’s release.

The nature of military tribunals also poses a risk for detainees in that the neutrality of the decision-maker is at least a questionable concept. Standard habeas rights require a detainee’s guardian to present to a neutral decision-maker the legal and factual basis for the detention. In the military, more so than in other government agencies or offices, exists a powerful deference to authority that inevitably serves to undermine any effort on part of the decision-maker to remain impartial and objective. The extent of the danger this influence posed to the validity of any decision rendered by the CSRT was outlined extensively in the amicus brief submitted by a variety of retired military officers, with amicus curiae pointing out that previously military courts had found command influence to be such a danger to impartiality and so threatening to the validity of any judgment that it is prohibited by the Code of Military Justice and the rules governing court-martials. Moreover, command influence is such an inherent part of the CSRT by virtue of its military nature – with detainees in the position of having to contest their prior designation in front of none other than the comrades of those who made the original determination – that any attempt to extricate one from the other is doomed to fail. There have actually been occasions where a higher-ranking officer requested that a tribunal be re-done when

144 Supra note 82, at 2-3.
145 Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 131 (1866) (allowing detainee to challenge his designation as a prisoner of war as a matter of law).
146 The only remedy offered by the DTA is that it allows the D.C. Circuit to remand the case back to “the agency” for a new CSRT. Brief of Petitioner-Appellant at 39, Al Odah v. United States, No. 06-1196 (S. Crt. argued December 5, 2007), available at http://ccrjustice.org/files/Brief%20for%20Petitioners%20Al%20Odah,%20et%20al..pdf.
an initial finding held that a detainee’s original classification as an enemy combatant was incorrect. Increasingly inflammatory rhetoric from the Bush Administration, often equating Guantanamo detainees to “killers,” only stacks the deck further against the petitioners.

III. PREDICTIONS FOR THE ROBERTS’ COURT

The Court’s reversal in initially refusing to hear the consolidated cases, instead encouraging petitioners to exhaust the tribunal process, and then unexpectedly agreeing to do so strongly suggests a resolve to clarify, once and for all, what judicial relief is available to Guantanamo detainees. As discussed in previous sections, the Supreme Court has heard from Guantanamo detainees several times earlier but this is the first time that the Court will consider whether or not Constitutional protections extend outside the territorial boundaries of the United States to detainees who have no other contact with the United States other than their detention at Guantanamo and, if so, weigh whether the military tribunals offered by the Bush administration qualify as adequate substitute for habeas protection.

A. Striking a Constitutional Balance

Judging from both the transcripts of the December 5th oral argument and their earlier rulings in the previous detainee cases, the majority of the Justices are very likely to support extending habeas protections to non-citizens held at Guantanamo but will refrain from examining the broader, categorical question of whether these same protections extend to other non-citizens. The Court’s narrow ruling will strive to reinforce the territorial sovereignty language it used in Rasul to include the Guantanamo Naval Base as part of the United States for purposes of federal

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court jurisdiction. The Justices can phrase their decision as a modest step forward from *Rasul* and find that Guantanamo is, for all intents and purposes, an extension of American territory. They will consider decisive the extent of control that the United States exerts over Guantanamo (one of the factors it hinted at in the *Rasul* opinion earlier), and find Constitutional protections to be equally coextensive with the territorial reach of the United States in this specific instance where the United States is the sovereign maker and enforcer of its own laws to the permanent exclusion of any and all other sovereigns. As petitioner attorney Seth Waxman argued, “If our law doesn’t apply, it is a law-free zone.”¹⁵¹ In fact, if the questions vetted during the December 5th oral argument are any indication of the way the judges are leaning, at least five Justices seem ready to consider the Guantanamo Naval base as falling within the jurisdiction of United States federal courts, at least for the purpose of habeas review – the same Justices who comprised the majority in both *Hamdan* and *Rasul*.¹⁵²

As some authors have suggested, even if the Court chooses only to extend “fundamental” Constitutional rights to non-citizens detained in Guantanamo, habeas rights would still apply.¹⁵³ The Court can feel safe in offering at least these fundamental protections to non-citizen Guantanamo detainees: the unique nature of the Guantanamo territory means that the Court need not fear that its ruling will be misinterpreted by later courts wanting to expand Constitutional

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protections to non-citizens around the globe.\footnote{See generally Christina Burnett, \textit{United States: American Expansion and Territorial De-annexation}, 72 U. Chi. L. Rev. 797 (2005).} Considering the manner of questions Justice Kennedy asked during oral argument, a narrow ruling on these grounds might be the route he has a role in persuading the rest of the Court to take in order to gain numerical sufficiency for a majority.\footnote{Joan Biskupic, \textit{No Quick Resolution to Guantanamo Detainees’ Cases}, USA Today, December 6, 2007, at 8A, available at \url{http://www.usatoday.com/printedition/news/20071206/a_court06.art.htm}.}

Because the constitutional protections afforded by the Suspension and Due Process Clauses require the availability of habeas jurisdiction, the Court will then turn its attention to whether the military tribunals promoted by the Bush Administration and congressionally sanctioned by the CSRT are adequate substitutes. Here, the Court appears ready to draw a road map for the appeals court to follow in expanding upon the procedural protections granted to the detainees.\footnote{Linda Greenhouse, \textit{Justices to Answer Detainee Question}, N.Y. Times, Dec. 5, 2007, available at \url{http://www.nytimes.com/2007/12/06/washington/06scotus.html?_r=1&pagewanted=all&oref=slogin}.} As Justice Ginsburg noted during oral arguments, the D.C. Circuit never reached the issue of whether the military method was a sufficient judicial outlet for the detainees because they ended their analysis once they had found the writ entirely inapplicable to the non-citizen Guantanamo detainees.\footnote{Joan Biskupic, \textit{No Quick Resolution to Guantanamo Detainees’ Cases}, USA Today, December 6, 2007, at 8A, available at \url{http://www.usatoday.com/printedition/news/20071206/a_court06.art.htm}.} There is significant indication that the criticism surrounding the procedures offered by the CSRT may have been behind the Supreme Court’s abrupt reversal and decision to hear the \textit{Al Odah} and \textit{Boumediene} decisions after all.\footnote{Andy Worthington, \textit{Guantanamo Whistleblower Launches New Attack on Rigged Tribunals}, The Huffington Post, November 20, 2007, available at \url{http://www.huffingtonpost.com/andy-worthington/guantanamo-whistleblower_b_73544.html}.}

rigged by its reliance on intelligence “of a generalized nature – often outdated, often ‘generic,’ rarely specifically relating to the individual subjects of the CSRTs or to the circumstances related to those individuals’ status,” to almost always return a guilty verdict.\textsuperscript{159} Abraham submitted his affidavit to the Supreme Court on June 22, and the Justices reversed their earlier denial of certiorari several days later.\textsuperscript{160}

During the recent arguments in front of the Court, the majority of Justices seemed poised to, in some way or manner, reverse the D.C. Circuit’s earlier decision stripping non-citizen detainees of the right to present their habeas petitions in federal court. As the arguments progressed the Court fettered questions on the two main issues covered by both cases – first, whether non-citizen Guantanamo detainees had the right to habeas review, and second, assuming the previous question was answered in the affirmative, whether the current military tribunals provided an adequate alternative.\textsuperscript{161} Several justices appeared to find powerful Waxman’s cited example of a detainee being held for four years who, after considerable resistance from the government, was able to secure counsel.\textsuperscript{162} And it was only through this counsel, Waxman emphasized, that this man was able to find out the nature of the charges against him, introduce evidence demonstrating that the detainee’s claimed association with a terrorist was an impossibility, and on those grounds obtained his release.\textsuperscript{163} Both Justice Ginsburg and Justice


\textsuperscript{160} \textit{Id.}


Kennedy strongly indicated that federal court appellate review would need to be a part of the appeal process available to the detainees if the tribunals were kept in place.\textsuperscript{164}

However, some legal commentators have suggested that Kennedy, arguably the justice to be won over in this debate, may be satisfied with having the constitutional sufficiency of the tribunals be reviewed by the D.C. Circuit after simply finding that some sort of constitutional protections exist for the detainees, instead of having the Supreme Court detail the procedures and protections required of the tribunals.\textsuperscript{165} The few questions he asked during oral argument indeed seemed to indicate a preoccupation with the extent to which the appeals court might be able to go to remedy any flaws in the already existing procedures.\textsuperscript{166} To that extent it would not be surprising if a Kennedy opinion held that some limited constitutional protections existed that would not necessarily require detainees to have full access to the federal courts, so long as the current procedures offered by the military tribunal were overhauled and replaced with better protections.\textsuperscript{167}

Justice Souter, on the other hand, made it a point to clarify that even simply remanding the pending cases back to a retrofitted military tribunal would not rectify or eliminate the danger of bias or command influence that was discussed earlier as one of the most pervasive and inherently entrenched shortcomings of the tribunal.\textsuperscript{168} Likewise, Justice Stevens followed up on the significant differences in rights afforded to the detainees, in practice, compared to those

\begin{footnotesize}
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\item Id.
\item Id.
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afforded by the model Army Regulation 190-8.\(^{169}\) And through the implementation of various hypothetical scenarios to illustrate his point, Justice Breyer remained unconvinced that the protections and remedies afforded through the tribunals afforded an adequate substitute for habeas, especially in light of the present six year delay for some detainees.\(^{170}\) Even Chief Justice Roberts seemed surprised to hear government attorney General Clement admit repeatedly that the DTA did not authorize the detainees’ release, even if a CRST tribunal found that a detainee’s original classification as “enemy combatant” was erroneous; at most, it could order a new tribunal.\(^{171}\)

**B. In the Minority, A Legislative and Executive Deference**

At least three members of the Court, however, can be expected to favor judicial restraint and promote deference to a legislature whose members, they will argue, made clear that they intended to strip habeas jurisdiction from non-citizen detainees. These three Justices (most likely four) would strictly interpret the jurisdictional reaches of the United States as they were spelled out in the *Eisentrager* and *Rasul* opinions (basing the latter on statutory grounds) and find that the control exercised over the Guantanamo Navel Base is still not enough to bring it within the jurisdictional umbrella of the federal court system. As such, they would find a total and complete preclusion of habeas jurisdiction over non-citizen detainees held outside the United States – without property or presence – completely in line with the values enshrined in the Constitution. Chief Justice Roberts’ line of questioning indicated deference to the legislative

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\(^{169}\) Transcript of Oral Argument at 33-34.

\(^{170}\) Transcript of Oral Argument at 38-40 (“If he cannot make that argument, how does this become an equivalent to habeas, since that happens to be the argument that a large number of these 305 people would like to make?”); *Id.* at 61-62 (“Now, it has been six years, and habeas is supposed to be speedy … Is there anything in your opinion that this Court could say by way of remedy that could get the D.C. Circuit or the others to decide this and the CSRT claims, there are 305 people to do this quickly within a period of months rather than six more years?”).

\(^{171}\) Transcript of Oral Argument at 34-35.
judgment of Congress in § 1005(g) that the Guantanamo base did not fall under the sovereignty of the United States and, therefore, could not extend its constitutional protections that far.\textsuperscript{172} Justice Scalia’s exhaustive requests for previous cases where constitutional habeas protections had been extended beyond the territorial boundaries of the United States suggest the same.\textsuperscript{173} Without any constitutional claim to have their petitions heard in federal court, any habeas relief that they would otherwise be entitled to would have to be granted by statute, by Congress. Thus, the current statutory scheme would not contain any provision for habeas relief, nor require any substitute to be provided, for non-citizen detainees held at Guantanamo; in light of their exemption from Constitutional protection, the tribunals would be the only “judicial” remedy available for them to challenge their detention.

To be sure, this perspective still heavily values a healthy skepticism of detentions by the Executive without trial. In the view of the Justices rendering this decision, unlawful detentions are certainly a blatant violation of the separation of powers principle, as with such an act the Executive bypasses both the legislature and the courts by making and enforcing its own laws.\textsuperscript{174} And certainly the danger of the Executive’s favoring security over personal liberty – especially when the liberty being violated is an alleged terrorist involved in the killing of our own citizens – is higher during times of ongoing military operations, which in turn makes the checks provided by the judiciary ever more important.

But it is exactly this profound respect of a separation of powers, these Justices may point out, that insists on limiting habeas review for non-citizen detainees in Guantanamo. Congress


\textsuperscript{173} Oral Argument Transcript at 27.

spoke loudly and clearly when it stripped the statutory habeas right from these detainees -- not once or twice, but three times, with the establishment of the CSRT, the framing of the DTA and then, soon after, the clarifying MCA. And it was the Court itself who invited Congress to revisit the limitations of the DTA with its *Hamdan* opinion, which found in favor of the petitioners based on a lack of congressional authorization for the challenged detention. As a result, the MCA now provides the statutory authorization for trials of non-citizens that the *Hamdan* Court had earlier found absent.\(^{175}\) Chief Justice Roberts seemed to suggest that judicial interference may very well be at least part of the reason why some detainees had languished in Guantanamo for six years waiting for a tribunal, since the relevant legislation was enacted more than midway through that period.\(^{176}\)

Unlike the original and open-ended AUMF, which passed when nationalist sentiment was at an all-time high after the terrorist attacks, the subsequent pieces of legislation presumably benefited from sober thought, consideration and analysis. Moreover, although the Suspension Clause hints that the right to habeas should be one *only* suspended and not entirely *eliminated* during times of rebellion or invasion, a more explicit disavowal of the clause’s applicability to non-citizen Guantanamo detainees cannot easily be imagined. And evidence of that lies in the current legislative consideration of the Habeas Corpus Restoration Act of 2007, in which the proponents of the bill argue for the *repeal*, not *revision*, of the jurisdiction-stripping provisions of the MCA in order to extend habeas relief to non-citizens detained in Guantanamo.\(^{177}\) Even if the outcome of this decision would be considered unsavory (as at least one of the dissenting judges

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\(^{175}\) *Id.* at 2088-89.

\(^{176}\) Transcript of Oral Argument at 58-59.

CONCLUDING REMARKS

The world in 1789 was very different than it exists today, and it is certainly fair to suggest that the Founders could not have predicted the issues of habeas jurisdiction in front of the Supreme Court today. War was fought in a very different manner. Enemies came with countries. Our global reach was much less expansive. But although the specifics of the Al Odah and Boumediene cases could not have been predicted at the time the writ was being written, the preservation of judicial and legislative checks on the boundaries of the Executive’s power was a priority for those creating our Constitution. The hardest task facing the Court today, as the Justices pour over briefs, testimony and oral argument transcripts, will be the intricate balance it must undertake between how much deference to give to legislative agency and Executive privilege, on the one hand, and the preservation of one of the nation’s most treasured liberties, on the other.

On one side, Congressional authorization for the expansion of the Executive’s privileges, especially when war or public sentiment pushes for speedy legislation against an unpopular enemy, can often be too general to be of use and, at times, more likely an overly-broad manifestation of nationalist sentiment. On the other side, the very nature of the Executive ensures a propensity to err on the side of security in times of conflict. And, finally, in no small part due to the constantly changing nature of warfare during our nation’s history, constitutional precedents present a challenge for the current Court to reconcile the expanding influence of the United States with the static reach of the Constitution’s rights. After many repeated attempts by
all three branches to solve the Guantanamo dilemma the ball is back with the Supreme Court, which now shoulders the burden of normative judgment.