Terrorist Detainee Policies: Can the Constitutional and International Law Principles of the *Boumediene* Precedents Survive Political Pressures?

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I. INTRODUCTION

In response to the 9/11 attacks, the United States undertook dramatic new initiatives to combat transnational terrorism. President Bush proclaimed a "War on Terrorism" to be conducted on multiple levels. A coalition of forces led by the United States invaded Afghanistan, and later Iraq, resulting in the detention of alleged "enemy combatants," many captured in the theatre of war but, as time went on, others arrested elsewhere on suspicion of aiding al-Qaeda or other terrorist groups. The Bush Administration's determination to hold detainees indefinitely without legal rights in the interests of obtaining information on terrorist activities posed serious issues of constitutional and international law. The American military base at Guantanamo Bay, Cuba, was selected by the Bush Administration because, as Cuban territory occupied by the United States on long-term lease, it was believed to be beyond the reach of American courts. In cases brought by the detainees, the United States Supreme Court worked through the complexities of such American constitutional doctrines as separation of powers, due process, and the right to habeas corpus, as well as of the international law of armed conflict. In four key decisions since 2004, the last of which was *Boumediene v. Bush*[1] in June 2008, the Supreme Court rejected significant Bush Administration positions concerning executive powers and upheld individual rights under both the Constitution of the United States and international law.[2]

As the Supreme Court decisions threw up barriers to the Bush detention policies, Congress responded with statutes designed to prevent judicial interference. Although these decisions expressed caution in the exercise of judicial review as to sensitive matters regarding separation of powers and national security, they nevertheless consistently rejected the various permutations in the Administration's detention policies and the

1. Boumediene v. Bush, 128 S. Ct. 2229 (2008).

2. *See, e.g.*, *id.* at 2277. For insight into the differing ideological positions and disagreements between supporters and critics of the "war on terror" approaches, see generally Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1 (2008), and JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007).

congressional support of them. The end result was a strengthening of the legal basis for limits on the power of the American government to detain alleged enemy combatants, the availability of the courts to challenge detention, and the applicability of the international law of armed conflict.[3]

Criticism of the Bush detention policies was a key feature of the Obama presidential campaign. On his first day in office, President Obama signed executive orders ordering the closing of Guantanamo within a year and rejecting enhanced interrogation techniques which had been attacked as contrary to U.S. and international law.[4] However, closure of Guantanamo ran into practical and political problems for the Obama Administration as to where detainees would be released to and whether some were considered too dangerous to release at all. Likewise, detention centers other than Guantanamo (for example, the American Air Force base at Bagram in Afghanistan) had been continued to be used as confinement facilities considered not subject to the Supreme Court's Guantanamo decisions. In a speech at the National Archives in May 2009, President Obama indicated that his Administration would continue a number of the measures of the Bush Administration, including trial by military commissions, although with increased procedural safeguards.[5] These positions raise the same kind of legal and constitutional objections that the *Boumediene* line of cases had asserted against Bush policies. Thus the *Boumediene* legacy is still uncertain as ongoing executive and congressional detention policies are subjected to court challenges.

II. THE GUANTANAMO DETENTIONS

Detention at Guantanamo, and certain other places around the world, like secret Central Intelligence Agency (C.I.A.) "rendition"

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3. The law of war is sometimes known as the law of armed conflict, reflecting its applicability to undeclared wars, or as international humanitarian law, emphasizing its humanitarian purpose to protect civilians in an armed conflict. The Geneva Conventions of 1949, to which the United States and almost all nations are signatories, is, as international law, the law of the land under the Supremacy Clause. U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land. . . .").

4. Mark Mazzetti & William Glaberson, *Obama Will Shut Guantanamo Site and C.I.A. Prisons*, N.Y. TIMES, Jan. 22, 2009, at A1.

5. Barack Obama, U.S. President, Remarks by the President on National Security (May 21, 2009), http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09.

interrogation centers,[6] was viewed by the Bush Administration to be indefinite. The detainees were said to be "unlawful enemy combatants,"[7] not entitled to treatment as prisoners of war (because they did not satisfy such requirements of the Geneva Convention as wearing uniforms and carrying weapons openly)[8] and therefore subject to broad interrogation, but also subject to being held until the end of all hostilities. Enemy combatants would not be released until they were no longer considered a useful source for information or a threat to security by returning to combatant or terrorist activities.

The detainees were not entitled to an attorney or access to the court system. For those who might be prosecuted for war crimes, President Bush, through an Executive Military Order issued on November 13, 2001,[9] resurrected military commissions (used extensively in the Civil War and to a limited degree after World War II).[10] The prescribed procedures lacked a number of the safeguards provided in courts-martial and civilian courts, such as proceedings open to the public, presumption of innocence, counsel of one's own choosing, right to be informed of adverse evidence and accuser(s), review by a higher tribunal, and availability of habeas corpus in civilian courts.[11] Some of these procedures were changed after intense public criticism. The Bush Administration justified these policies as necessary to fight the War on

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6. David Ignatius, '*Rendition' Realities*, WASH. POST, Mar. 9, 2005, http://www.washingtonpost.com/wp-dyn/articles/A18709-2005Mar8.html; *see also* Michael Bilton, *Post-9/11 Renditions: An Extraordinary Violation of International Law*, CTR. FOR PUB. INTEGRITY, May 22, 2007, http://projects.publicintegrity.org/militaryaid/report.aspx?aid=855.

7. "Under the Bush administration, the designation as an unlawful enemy combatant triggered two consequences: first, the authority to preventively detain based on the principle of military necessity; and second, jurisdiction of the military commissions established to try detainees for alleged violations of the laws of war." Geoffrey S. Corn & Eric Talbot Jensen, *The Obama Administration's First Year and IHL: A Pragmatist Reclaims the High Ground*, 12 Y.B. OF INT'L HUMANITARIAN LAW 1, 8 (2009); *see also infra* note 145 and accompanying text.

8. Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention (III)].

9. Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (stating that the effective conduct of military operations and prevention of military attacks make it necessary to detain certain noncitizens and, if necessary, to try them "for violations of the laws of war and other applicable laws by military tribunals").

10. Edward F. Sherman, *Military Tribunals*, *in* 2 ENCYCLOPEDIA OF AMERICAN CIVIL RIGHTS AND LIBERTIES 656, 657 (Otis H. Stephens, Jr. et al. eds., 2006).

11. *See* Jonathan Mahler, *After the Imperial Presidency*, N.Y. TIMES, Nov. 9, 2008, at MM42 ("The Bush administration claimed the authority to deny captured combatants—U.S. citizens and aliens alike—such basic due-process rights as access to a lawyer. It created a detention facility on Guantanamo Bay that it declared was outside the jurisdiction of the federal courts and built a new legal system—without any input from Congress—to try enemy combatants. And it argued that the president's commander-in-chief powers gave him the authority to violate America's laws and treaties, including the Geneva Conventions.").

Terror effectively, as a proper exercise of the President's Executive and Commander-in-Chief powers, and as authorized by the Authorization for Use of Military Force Act[12] (AUMF) passed by Congress shortly after 9/11.

III. *HAMDI V. RUMSFELD*[13]

The first cases to reach the Supreme Court involved persons captured in the Afghan conflict. Yaser Esam Hamdi was captured by the Afghan Northern Alliance during the American invasion of Afghanistan in November 2001 and turned over to the U.S. military authorities.[14] The U.S. government alleged that he was there fighting for the Taliban.[15] Through his father, who filed a writ of habeas corpus[16] for him in a Virginia federal court, he claimed he was a relief worker and mistakenly captured.[17] He was first sent to Guantanamo Bay, but was later transferred to a naval brig in the United States when it was discovered that he had American citizenship.[18]

The federal district judge found the government's evidence supporting Hamdi's detention was based on hearsay and bare assertions and ordered the government to produce documents for *in camera* review to enable him to perform "meaningful judicial review" (such as the statements by the Northern Alliance concerning dates and circumstances of capture, interrogations, and names of the officials who determined he was an unlawful combatant).[19] The government had provided only a short declaration stating that Hamdi was affiliated with a Taliban unit, was captured with the unit, and had surrendered a weapon; he was labeled an enemy combatant "[b]ased upon his interviews and in light of his association with the Taliban."[20] The government appealed the order, and the United States Court of Appeals for the Fourth Circuit reversed.[21] It stated that it was "undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict" and that a court could not

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12. Authorization for Use of Military Force Act, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (authorizing the President to use "all necessary and appropriate force" against nations, organizations or persons associated with the September 11, 2001 terrorist attacks).

13. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

14. *Id.* at 510 (plurality opinion).

15. *Id.*

16. U.S. CONST. art. I, § 9, cl. 2 ("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.").

17. *Hamdi*, 542 U.S. at 511 (plurality opinion).

18. *Id.* at 510.

19. *Id.* at 513-14.

20. *Id.* at 512-13 (internal quotation marks omitted).

21. *Id.* at 514.

challenge his status, given the broad war-making powers of the President and the principle of separation of powers.[22]

At the Supreme Court, no single opinion commanded a majority, but Justice O'Connor's plurality opinion stands as the opinion of the court. Five justices agreed with Justice O'Connor's statement that detention of enemy combatants abroad "for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[23] However, Justice O'Connor's opinion also declared, "It is a clearly established principle of the law of war that detention may last no longer than active hostilities."[24] President Bush had commented that the war on terror might be generations long.

Although the Supreme Court upheld the traditional right to hold an enemy combatant until the end of hostilities,[25] eight justices agreed that the Executive Branch does not have the power to hold indefinitely a U.S.

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22. *Id.* at 514-15 (internal quotation marks omitted).

23. *Id.* at 518 ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war'" (quoting *Ex parte* Quirin, 317 U.S. 1, 28, 30 (1942)). The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 572 (2002) ("[C]aptivity in war is neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war" (internal quotation marks omitted)).

24. *Hamdi*, 542 U.S. at 520 (plurality opinion), (citing Geneva Convention III, *supra* note 8, art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.")); *see also* Hague Convention (II) with Respect to the Laws and Customs of War on Land art. 20, July 29, 1899, 32 Stat. 1803 (requiring repatriation of prisoners of war as soon as possible after "conclusion of peace"); Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 20, Oct. 18, 1907, 36 Stat. 2301 (requiring repatriation of prisoners of war as soon as possible after "conclusion of peace"); Geneva Convention Relative to the Treatment of Prisoners of War art. 75, July 27, 1929, 47 Stat. 2055 (stating that repatriation should be accomplished with the least possible delay after conclusion of peace); Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 510-11 (2003) (restating that prisoners of war "can be detained during an armed conflict, but the detaining country must release and repatriate them without delay after the cessation of active hostilities, unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences" (internal quotation marks omitted)).

25. Justice O'Connor's opinion was based on the traditional view of an enemy combatant as one captured on the battlefield:

> [F]or purposes of this case, the "enemy combatant" that it is seeking to detain is an individual who, it alleges, 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. . . . We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.

Hamdi, 542 U.S. at 516 (internal quotation marks and citation omitted).

citizen (which Hamdi was) without basic due process protections enforceable through judicial review.[26] The government had not contested the right of Hamdi, as a U.S. citizen, to a writ of habeas corpus, but maintained that, as held by the Fourth Circuit, a court must give great deference to the military's determination of enemy combatant status, even without a full-blown proceeding and the right to obtain evidence.[27] Justice O'Connor's opinion found that it is "clear both that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts[28] and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process."[29] Not long after the court's decision, Hamdi was freed and sent to Saudi Arabia.[30]

Justice O'Connor had observed that "the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal."[31] Thus, after *Hamdi*, the Department of Defense established Combatant Status Review Tribunals (CSRTs) to determine whether a Guantanamo detainee was an "enemy combatant" as the Department defined that term.[32] A later memorandum established procedures for the CSRTs, which the government maintained were in compliance with the due process requirements identified by the plurality in *Hamdi*.[33] It would require further cases to scrutinize those procedures in light of the requirements of due process and the Geneva Conventions.

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26. *Id.* at 534 (plurality opinion), 568 (Scalia. J., dissenting).

27. *Id.* at 527 (plurality opinion).

28. The habeas corpus statute provides that "the applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts," 28 U.S.C. § 2243 (1948), and allow the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories. *Id.* § 2246.

29. *Hamdi*, 542 U.S. at 526. Justice O'Connor's opinion found that although Congress had expressly authorized the detention of unlawful combatants in its AUMF, due process still required a meaningful opportunity to challenge detention. It applied the three-prong "balancing" test of *Mathews v. Eldridge*, 424 U.S. 319, 341-47 (1976), as to what due process was required and suggested that the Department of Defense create fact-finding tribunals to determine status as an enemy combatant. It stressed that there should be a right to an attorney. *Hamdi*, 542 U.S. at 527-39.

30. Adam Liptak, *Justices To Rule on Detainee Held in U.S. in Terror Case*, N.Y. TIMES, Dec. 6, 2008, at A11.

31. *Hamdi*, 542 U.S. at 538.

32. Boumediene v. Bush, 128 S. Ct. 2229, 2241 (2008). Regarding CSRTs, see generally *Combatant Status Review Tribunals/Administrative Review Boards*, U.S. DEP'T OF DEF., http://www.defense.gov/news/Combatant_Tribunals.html (last updated Oct. 17, 2007).

33. *Boumediene*, 128 S. Ct. at 2241. For procedures, see Memorandum for the Sec'y of the Navy on the Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

IV. *RASUL V. BUSH*[34]

The *Hamdi* case had not involved the right to habeas corpus of non-U.S. citizens captured outside the United States and held at Guantanamo. This situation was addressed by the Supreme Court the same day in *Rasul v. Bush*. The decision focused only on jurisdictional issues. It found that the D.C. federal district court's jurisdiction over the detainees' custodians was sufficient for subject-matter jurisdiction under the habeas corpus statute.[35] It further held that the district court had jurisdiction over the detainees' non-habeas claims.[36]

Now that there was new hope for court review after *Hamdi*, a number of Guantanamo detainees filed writs of habeas corpus. When the Supreme Court agreed to hear one of the cases, Congress quickly passed a statute to bar writs of habeas corpus by Guantanamo detainees.[37] The Detainee Treatment Act of 2005 (DTA)[38] amended the habeas corpus statute to provide that "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 Department of Defense at Guantanamo Bay, Cuba."[39] Another section provided that the United States Court of Appeals for the District of Columbia Circuit would have "exclusive" jurisdiction to review decisions of the CSRTs.[40]

V. *HAMDAN V. RUMSFELD*[41]

Salim Ahmed Hamdan was a Yemeni captured during the Afghanistan invasion and held at Guantanamo.[42] He admitted to being Osama bin Laden's personal driver and bodyguard, claiming that he

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

35. *Id.* at 483-84.

36. *Id.* at 484-85 (stating that nothing in the federal question statute or Alien Tort Claims Act "categorically excludes" aliens outside the United States from bringing such claims).

37. Mahler, *supra* note 11, at MM 44 ("In the fall of 2005, days after the Supreme Court agreed to hear a Guantanamo detainee's lawsuit against President Bush, [Senator Lindsey] Graham came to the administration's rescue with a bill devised to kick the case off the court's docket and to make all pending and future detainee challenges illegal. (The bill passed, but the justices nevertheless refused to dismiss the case, Hamdan v. Rumsfeld.)").

38. Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

39. *Id.* § 1005(e)(1); *see* Brian D. Fahy, *Given an Inch, the Detainee Effort To Take a Mile: The Detainee Legislation and the Dangers of the "Litigation Weapon in Unrestrained Enemy Hands,"* 36 PEPP. L. REV. 129, 164 (2008) (criticizing *Hamdi* and *Rasul* and observing that "[t]o ensure that federal courts would not further expand the scope of the detainees' legal entitlements, the political branches sought to deny federal courts the legal authority to do so").

40. Detainee Treatment Act § 1005(e)(2).

41. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

42. *Id.* at 566.

needed the $200 monthly salary.[43] He was charged with terrorism-related offenses, including conspiracy, and was designated for trial before a military commission.[44] He filed a writ of habeas corpus,[45] and the government moved to dismiss based on the DTA's prohibition of habeas corpus for Guantanamo detainees.[46]

A. Habeas Jurisdiction-Stripping

In a decision by Justice John Paul Stevens (to which there were concurrences and three dissents),[47] the Supreme Court did an end run around the DTA. It found that the DTA was not intended to strip federal courts of jurisdiction over habeas cases *pending at the time* the DTA was enacted (thus not applying to the detainees at Guantanamo before the passage of DTA).[48] The DTA said that certain subsections "shall apply with respect to any claim . . . that is pending on or after the date of the enactment of this Act," but it did not state whether the habeas-stripping section applied to pending cases.[49] Finding Congress "chose not to so provide—after having been presented with the option," the Court concluded that the "omission [was] an integral part of the statutory scheme."[50]

B. Trial by Military Commission

As for Hamdan's challenge to trial before a military commission, Justice Stevens' decision noted, "The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity"[51] and has only been used in the case of military exigency. Military commissions were first used in the Mexican War to try crimes committed in occupied Mexican territory when the American commander had "available to him no other tribunal."[52] They were again

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43. *1st Terrorism Trial Begins at Guantanamo Bay*, CBC NEWS, July 21, 2008, http://www.cbc.ca/world/story/2008/07/21/hamdan-trial.html.

44. *Id.* at 569-71.

45. For a discussion of the extraordinary efforts and travails of Hamdan's military and civilian lawyers, see generally JONATHAN MAHLER, THE CHALLENGE: *HAMDAN V. RUMSFELD* AND THE FIGHT OVER PRESIDENTIAL POWER (2008).

46. *Hamdan*, 548 U.S. at 571-72.

47. *Symposium: A* Hamdan *Quartet: Four Essays on Aspects of* Hamdan v. Rumsfeld, 66 MD. L. REV. 750 (2007).

48. *Hamdan*, 548 U.S. at 575-76.

49. *Id.* at 574-75.

50. *Id.* at 584.

51. *Id.* at 590.

52. *Id.*

used in the Civil War when the civilian courts and courts-martial were inadequate, and to a limited extent in World War II.[53]

The Court did not decide whether the President had the constitutional power to convene military commissions because even if he possessed that power, it found that the commission would have to be authorized by statute or by the "law of war," as codified by Congress in article 21 of the Uniform Code of Military Justice (UCMJ).[54] There was nothing in the AUMF "even hinting" at expanding the President's war powers beyond those enumerated in article 21.[55] Instead, the Court said, the AUMF, UCMJ, and DTA "at most acknowledge" the President's authority to convene military commissions only where justified by the exigencies of war, but still operating within the laws of war.[56]

C. Compliance with UCMJ and Laws of War

As for compliance with the UCMJ and laws of war, the Court stated, "The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself . . . and with the 'rules and precepts of the law of nations.'"[57] The UCMJ and Geneva Conventions both require more protections than the proposed military commissions provided. UCMJ article 36(b) requires that rules applied in courts-martial and military commissions be "uniform insofar as practicable," but the Court found significant deviations from court-martial practice.[58] Under the commission rules, the defendant and his attorney could be forbidden access to certain evidence used against the defendant, and the attorney could be forbidden from discussing certain evidence with the defendant.[59] Evidence judged to have any "probative value" could be admitted at the judge's discretion, including hearsay, unsworn live testimony, and statements gathered through torture.[60] There was no right

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53. *Id.* at 590-91.

54. *Id.* at 593-95; Uniform Code of Military Justice art. 21, 10 U.S.C. § 821 (2006) ("The provisions of this chapter 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.").

55. *Hamdan*, 548 U.S. at 594.

56. *Id.* at 594-95.

57. *Id.* at 613 (quoting *Ex parte* Quirin, 317 U.S. 1, 28 (1942)).

58. Uniform Code of Military Justice art. 36, 10 U.S.C. § 836(b) (2006); *Hamdan*, 548 U.S. at 620-25.

59. *Hamdan*, 548 U.S. at 613-14.

60. *Id.* at 614 (majority opinion), 652 (Kennedy, J., concurring).

to appeal to a court, but only within the Executive Branch (including the President or Secretary of Defense).[61]

Commission procedures were also found to violate common article 3 of the Geneva Conventions. This provision affords minimal protection to combatants "in the territory of one of the High Contracting Parties," which includes being tried by a "regularly constituted court," which a military commission is not.[62] The Court found it unnecessary to determine whether doubt as to Hamdan's status as a prisoner of war, entitling him to a hearing before a "competent tribunal" (which the CSRT did not satisfy), violated the Third Geneva Convention.[63]

Certain parts of Justice Stevens' opinion commanded only a plurality because Justice Kennedy did not join as to certain sections.[64] Justice Kennedy felt that having found that the military commission was not authorized, the Court did not need to decide whether common article 3 of the Geneva Conventions requires that the accused have the right to be present at all stages of a criminal trial or to address the validity of the conspiracy charge against Hamdan.[65] In one of these sections, Justice Stevens addressed the issue of whether military commissions can try conspiracy charges. He argued that military commissions are not courts of general jurisdiction authorized to try any crime, and that the Supreme Court has traditionally held that offenses against the law of war may only be tried by military commission when they are clearly defined as war crimes by statute or strong common law precedent.[66] Finally, he found that there was no support in statute or court precedent for law-of-war military commissions trying charges of "conspiracy," either in the

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61. *Id.* at 587 (majority opinion).

62. *Id.* at 629-33; *see* Matthew Sonn, Hamdan v. Rumsfeld*: A Bad Decision with the Best Intentions—Why the Court Was Wrong in Interpreting the Geneva Conventions and What Should Be Done*, 19 PACE INT'L L. REV 143, 145 (2007) (arguing that *Hamdan* "erroneously interpreted the Geneva Convention to grant protection to members of al Qaeda and other terrorist organizations," that "the Geneva Convention, as currently written, does not encompass the new face of war—fighting between states and non-state international organizations," and that "a new convention is necessary").

63. *Hamdan*, 548 U.S. at 629 n.61 ("Hamdan observes that Article 5 of the Third Geneva Convention requires that if there be 'any doubt' whether he is entitled to prisoner-of-war protections, he must be afforded those protections until his status is determined by a 'competent tribunal' . . . . Because we hold that Hamdan may not, in any event, be tried by the military commission the President has convened pursuant to the November 13 Order and Commission Order No. 1, the question whether his potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved.").

64. *Id.* at 655 (Kennedy, J., concurring).

65. *Id.* at 653-55.

66. *Id.* at 611-12 (Stevens, J., plurality).

Geneva Conventions, in the earlier Hague Conventions, or at the Nuremberg Trials.[67]

There were concurring opinions by Justices Kennedy and Breyer and dissents by Justices Scalia, Thomas, and Alito. (Chief Justice Roberts did not participate.) Justice Scalia relied on the DTA to justify the jurisdiction-stripping and disagreed with Justice Stevens' view of its intent not to apply to cases pending at the time the act was passed.[68] He also argued that Hamdan, held outside the territorial jurisdiction of the United States, had no right to the writ of habeas corpus, referring back to the position he took in *Hamdi* to contend that Hamdan "is already subject to indefinite detention" after an adverse determination by the CSRT.[69]

The *Hamdan* decision was a setback for the Administration's detainee policies, but President Bush and his supporters in Congress were not ready to give up. Because *Hamdan* read the DTA as not intended to strip the courts of habeas jurisdiction prior to the act, this time Congress would make it clear. It quickly passed the Military Commissions Act of 2006 expressly denying all federal habeas corpus jurisdiction to detainees declared to be enemy combatants. The stage was set for another constitutional confrontation before the Supreme Court in the case of *Boumediene v. Bush*.

D. Military Commissions Act of 2006

The Military Commissions Act of 2006 (MCA)[70] made some changes in the procedures for military commissions,[71] including replacing the review of convictions that had been limited by the Presidential Order to the President or Secretary of Defense. It established a military appeals court (the Court of Military Commission Review) to hear appeals, with a further appeal to the D.C. Circuit and discretionary review by the Supreme Court.[72] But it was its habeas

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67. *Id.* at 604, 610-11.

68. *Id.* at 656 (Scalia, J., dissenting).

69. *Id.* at 671 n.7.

70. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of titles 10, 18, 28, and 42 U.S.C.).

71. For prescribed procedures at various times, see NAT'L INST. OF MILITARY JUSTICE, PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM: ANNOTATED GUIDE (2002); NAT'L INST. OF MILITARY JUSTICE, MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK (2003).

72. Military Commissions Act of 2006 § 3(a)(1). The MCA also defined an "unlawful enemy combatant" as including not only engaging in hostilities against the United States, but also "purposefully and materially support[ing] hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)." *Id.*

provisions that were most desired by the Bush Administration. These provisions amended the habeas corpus statute to deny jurisdiction with respect to habeas corpus actions by detained aliens who had been determined to be enemy combatants. The act also denied jurisdiction as to "any other action against the United States . . . relating to any aspect of the detention, transfer, treatment, trial or conditions of confinement" of a detained alien determined to be an enemy combatant.[73] Finally, it was provided that the amendments "shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after [that] date . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained . . . since September 11, 2001."[74] President Bush signed the MCA into law on October 17, 2006, and it was cited as a "security victory" for the Administration in time for the congressional elections.[75]

VI. *BOUMEDIENE V. BUSH*[76]

Lakhdar Boumediene is an Algerian Muslim who went to Bosnia with five other Algerian men in the 1990s to fight with the Bosnians against the Serbs in the civil war. He stayed, married a Bosnian, and he and the other Algerians obtained jobs working with orphans for Muslim charities. He was arrested with the five other Algerians by Bosnian police on suspicion of involvement in a plot to bomb the United States Embassy. After a three-month investigation, they were ordered released by the Bosnian Supreme Court for lack of evidence, and the Bosnian Human Rights Chamber ruled that they had a right to remain in the country. However, after they were freed, they were seized, turned over to the Americans, and transported to Guantanamo.[77]

Boumediene was alleged to have links to al-Qaeda, and at an American tribunal hearing an unidentified source said he "was known to be one of the closest associates of an al-Qaeda member in Europe."[78] Boumediene and the other Algerians maintained their innocence, and their lawyer claimed that the source of the bomb-plot allegations was an

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73. Military Commissions Act of 2006 § 7(a).

74. *Id.* § 7(b).

75. The D.C. Circuit, in upholding a rejection of a writ of habeas corpus for Boumediene, noted: "Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule Hamdan." Boumediene v. Bush, 476 F.3d 981, 986 (D.C. Cir. 2007).

76. Boumediene v. Bush, 128 S. Ct. 2229 (2008).

77. Andy Worthington, *Profiles: Odah and Boumediene*, BBC NEWS, Dec. 4, 2007, http://news.bbc.co.un/1/hi/world/americas/7120713.stm.

78. *Id.* (internal quotation marks omitted).

angry former brother-in-law of one of the men. All six men claimed they were "treated brutally in Guantanamo [and] subjected to 'enhanced interrogation techniques' involving prolonged isolation, forced nudity and sleep deprivation."[79] The U.N. Special Rapporteur on Torture, Manfred Novak, commented, "They were fighters during the Bosnian war, but that ended in 1995" and that "they may be radical Islamists, but they have definitely not committed any crime."[80]

Boumediene filed for a writ of habeas corpus, alleging violations of the Constitution, various statutes and treaties, U.S. common law, and international law.[81] The writ was denied by the federal district court in D.C. and the D.C. Circuit, and he appealed to the Supreme Court.[82]

A. Habeas Jurisdiction-Stripping Redux

Habeas jurisdiction-stripping was now directly before the Supreme Court; there was no room for uncertainty in Congress's language in the MCA. Senate Majority Whip Mitch McConnell (R-Ky.) referred to it as "wartime legislation," saying: "Armed with these tools, the president will be able to continue the terrorist interrogation program that we know has saved innocent American lives. The tribunal system codified in this legislation protects our troops, protects classified information and protects the rights of defendants."[83]

There was considerable congressional debate over whether the Bush Administration's "enhanced interrogation techniques" should be sanctioned or restricted. Parts of the MCA bill seemed to permit what would be prohibited as torture under military regulations, such as water-boarding and intense physical and psychological deprivations. Opposed

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79. *Id.*

80. *Id.*

81. *See Boumediene*, 128 S. Ct. at 2240.

82. *Id.* at 2241-42. His case was consolidated with that of Fawzi al-Odah. *Id.* at 2242. Al-Odah was a "Kuwaiti primary school teacher whose father, a retired air force pilot, fought with US forces during the Gulf War in 1991." Worthington, *supra* note 77. Al-Odah said he took a holiday trip to Afghanistan in August 2001 and established contact with the then-Taliban Government to be able to visit schools to teach the Koran. He moved to Jalalabad near the Pakistan border after 9/11, staying with a family that gave him an AK-47 assault rifle, he said, to protect himself. He joined others to cross the mountains to Pakistan and handed himself in at the border, expecting to be escorted to the Kuwaiti Embassy, but was instead handed over to U.S. forces. *Id.* At his military review in Guantanamo, he was charged with "firing a Kalashnikov [AK-47] rifle at some targets, . . . staying in a house in Jalalabad with three Arabs who appear to be fighters who carried Kalashnikovs, and fleeing Afghanistan with a group of men who may have had some al-Qaeda or Taliban members." Worthington, *supra* note 77 (internal quotation marks omitted).

83. Martin Kady II, *Congress Clears Detainee Bill*, C.Q. WEEKLY REP., Oct. 2, 2006, at 2624, 2624.

by, among others, three Republican Senators (John W. Warner of Virginia, John McCain of Arizona, and Lindsey Graham of South Carolina), language that "would have redefined U.S. obligations toward prisoners under the Geneva Conventions"[84] to permit enhanced interrogation techniques was dropped. However, broad power was left to the President to define what was prohibited under the military regulations. The jurisdiction-stripping provisions were passed after an amendment by Senator Arlen Specter (R–PA.) to strike the provision failed, 48-51, mostly on party lines. Senator Specter announced that although he would vote for the bill, he believed the habeas provisions would be found unconstitutional by the Supreme Court.[85]

The Court held, 5 to 4 in an opinion by Justice Kennedy, that habeas corpus jurisdiction extends to Guantanamo because of de facto American control.[86] It further found that Congress's attempt to suspend habeas corpus violated the Suspension Clause of the Constitution that prohibits the suspension of the writ "unless when in Cases of Rebellion or Invasion the public Safety may require it"[87] (conditions clearly not met concerning the Guantanamo detainees). Finally, it found that trial by a military commission under the procedures prescribed by the Presidential Order was not an adequate substitute for habeas corpus because it limited certain rights such as the right to discover and present evidence, receive effective assistance of counsel, confront witnesses, and be aware of the government's allegations.[88]

The result in *Boumediene* was not surprising. The three previous decisions had already defined a broad right of habeas corpus. But what made upholding the right to habeas corpus more difficult was that Congress had now spoken in no uncertain terms, pitting both elective branches against the Court's ultimate decision. Justice Scalia's dissent stated: "What drives today's decision is . . . an inflated notion of judicial supremacy."[89] On the other side, executive actions even in times of grave necessity have been ruled unconstitutional before (as with President Lincoln's limited suspension of habeas corpus in the Civil War and

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84. *Id.*

85. *Id.* at 2624-25; *see* Charles Babington & Johnathan Weisman, *Senate approves Detainee Bill Backed by Bush*, WASH. POST, Sept. 29, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/09/8/AR2006092800824.html.

86. *Boumediene*, 128 S. Ct. at 2262.

87. U.S. CONST. art. I, § 9, cl. 2.

88. *Boumediene*, 128 S. Ct. at 2272-75.

89. *Id.* at 2302 (Scalia, J., dissenting).

President Truman's seizure of the steel mills during a nationwide strike).[90] *Boumediene* can therefore be viewed as consistent with precedents upholding the ultimate power of judicial review, going back to Chief Justice Marshall's decision in *Marbury v. Madison*.[91]

The *Boumediene* opinions are a delight for history buffs, with Justices Kennedy and Scalia in dissent offering well-researched disquisitions on the history of habeas corpus. Justice Kennedy's majority opinion devoted over twenty pages to the history of habeas corpus in England from its roots in the *Magna Carta* of 1215 to the nineteenth century. The opinion then considered the American history of the writ from 1789 to the post-World War II period. It also examined the precedents for the exterritorial application of American laws and, in particular, the writ of habeas corpus. Availability of the writ in territories outside the United States that fall under U.S. control were compared to English precedents where the writ was applied in the Channel Isles and Ireland, but not in Scotland (which was explained as having kept its unique system of laws even after its union with England in 1707),[92] with which account Justice Scalia vehemently disagreed.

B. The Precedent of Johnson v. Eisentrager

The government especially relied on the Supreme Court's 1950 decision in *Johnson v. Eisentrager*.[93] Twenty-one Germans incarcerated in an American occupation prison in Germany (Landberg Prison) filed writs of habeas corpus challenging their convictions by an American military commission. They had been found guilty of violating the laws of war, by engaging in continued military activity against the United States in China after Germany's surrender but before the surrender of Japan. Their hostile operations consisted of collecting and furnishing intelligence to the Japanese armed forces concerning American forces and their movements. A military commission ordered by the Commanding General of American forces in the China Theatre sat in China, with the express consent of the Chinese government. After the sentences were approved by the American military reviewing authority,

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90. *See, e.g.*, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); *see also* WILLIAM H. REHNQUIST, THE SUPREME COURT: NEW EDITION 158-67 (2001).

91. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

92. *See, e.g.*, *Boumediene*, 128 S. Ct. at 2244-59.

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

the prisoners were repatriated to an American prison in Germany to serve their sentences.[94]

The Supreme Court held that the writ of habeas corpus does not extend to such foreign nationals not on American soil.[95] It noted, in language often quoted by the government, that the prisoners "at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."[96] In *Boumediene*, Justice Kennedy conceded that "before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution."[97] However, he found that citizenship and the geographical location of the events and detention were only factors to be considered in determining the extraterritorial application of habeas corpus on a case-by-case basis.[98]

Justice Kennedy's opinion found many factors that distinguished the Guantanamo detainees from *Eisentrager*.[99] There were practical considerations soon after World War II, such as difficulties of ordering prisoners in Germany to attend a habeas proceeding in the United States; allocating limited shipping space; logistics of guarding billeting, and rations; and damage to the prestige of military commanders at a sensitive time.[100] These were not present as to the Guantanamo detainees, many of whom had been held for more than six years (a fact particularly stressed in Justice Souter's concurring opinion[101]). The United States lacked sovereignty and only possessed temporary control over Landberg Prison during a limited occupation, compared to a long-term lease and complete

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94. *Id.* at 765-66.

95. *Id.* at 783-85.

96. *Id.* at 778.

97. *Boumediene*, 128 S. Ct. at 2262.

98. *Id.* at 2259 ("Based on this language from *Eisentrager*, and the reasoning in our other extraterritoriality opinions, we conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.").

99. It has been argued that Justice "Kennedy's casuistic and flexible approach" to the extraterritorial scope of the United States Constitution "lends itself to possible manipulation" and that "this danger can be reduced by adopting the minimum standards of international law as a second order framework for constitutional interpretation." Jean-Marc Piret, Boumediene v. Bush *and the Extraterritorial Reach of the U.S. Constitution: A Step Towards Judicial Cosmopolitanism?*, 4 UTRECHT L. REV. 81, 83 (2008); *see also* Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259 (2009).

100. *Boumediene*, 128 S. Ct. at 2257.

101. *Id.* at 2278 (Souter, J., concurring).

control over Guantanamo.[102] Most importantly, the Germans did not contest that they were enemy combatants and were allowed a trial with representation of counsel and right to cross-examine prosecution witnesses. In contrast, the Guantanamo detainees contested that they were enemy combatants and were held indefinitely without charges, trials, or access to courts.[103]

Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, strongly disagreed with the majority's distinguishing of *Eisentrager*. He maintained that it "held—*held* beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign."[104] He added that the Court's majority "admits that it cannot determine whether the writ historically extended to aliens held abroad, and it concedes (necessarily) that Guantanamo Bay lies outside the sovereign territory of the United States."[105]

C. Adequacy of the CSRT

Having found that Boumediene was entitled to a writ of habeas corpus, Justice Kennedy's opinion noted, "The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain."[106] Thus, "[t]o determine the necessary scope of habeas corpus review," the Court had to assess the CSRT process, "the mechanism through which petitioners' designation as enemy combatants became final."[107] The opinion viewed the most serious deficiency in the CSRTs as "the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant."[108] He would not have the assistance of counsel or an awareness of critical allegations on which his detention was based.[109] Because the only limitation on the admission of hearsay evidence was that the tribunal deem it relevant and helpful, "the detainee's opportunity to question witnesses is likely to be more theoretical than real."[110]

The government argued that the CSRT process was designed to conform to the procedures suggested by the plurality opinion in *Hamdi*.

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102. *Id.* at 2251-53, 2257 (majority opinion).
103. *Id.* at 2259.
104. *Id.* at 2298-99 (Scalia, J., dissenting).
105. *Id.* at 2297.
106. *Id.* at 2269 (majority opinion).
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*

However, Justice Kennedy noted that the Court in *Hamdi* was not asked to define the necessary scope of habeas jurisdiction (because the suspension of habeas corpus by the DTA had not yet occurred).[111] Making "no judgment as to whether the CRSTs, as currently constituted, satisfy due process standards,"[112] Justice Kennedy found that "effective" habeas review could not be made by a court based on a record that might come from a CSRT.[113] "By foreclosing consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings, the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete."[114] In addition, there was no provision for the court of appeals to admit and consider newly discovered evidence that could not have been made part of the CSRT record because it was unavailable to either the government or the detainee when the CSRT made its findings.[115] Finally, the opinion also concluded that a detainee is not required to exhaust review procedures in the court of appeals before pursuing a habeas corpus action in the district court.[116]

Justice Kennedy closed his opinion with cautions about reading too much into this decision, especially as to battlefield or other situations where a hearing would be difficult. The Executive is entitled to "a reasonable" period of time to determine a detainee's status before a court entertains a habeas corpus petition.[117] "In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody."[118] No such considerations, however, were found to be present concerning the Guantanamo detainees, many of whom had been held for more than six years.

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111. *Id.*

112. *Id.* at 2270.

113. *See id.* at 2270-74.

114. *Id.* at 2273.

115. *Id.* at 2272-73 ("This is not a remote hypothetical. One of the petitioners, Mohamed Nechla, requested at his CSRT hearing that the Government contact his employer. The petitioner claimed the employer would corroborate Nechla's contention he had no affiliation with al Qaeda. Although the CSRT determined this testimony would be relevant, it also found the witness was not reasonably available to testify at the time of the hearing. Petitioner's counsel, however, now represents the witness is available to be heard. . . . If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court.").

116. *Id.* at 2275.

117. *Id.* at 2275-76.

118. *Id.* at 2275.

The approach of the *Boumediene* majority has been characterized as essentially pragmatic (though for some much too activist), and consistent with the tenets of "legal realism."[119] The Court also proffered considerable flexibility to the lower courts in determining the procedures to be used in habeas corpus proceedings. The Suspension Clause, it said, "does not resist innovation in the field of habeas corpus. Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ."[120]

D. The Dissents

Justice Scalia's dissent (joined by Justices Roberts, Thomas, and Alito) maintained that "the procedures prescribed by Congress in the Detainee Treatment Act provide the essential protections that habeas corpus guarantees; there has thus been no suspension of the writ, and no basis exists for judicial intervention beyond what the Act allows."[121] He said that the commission of terrorist acts by former prisoners at Guantanamo Bay after their release "illustrates the incredible difficulty of assessing who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection."[122] A consequence of the Court's majority decision will be that "how to handle enemy prisoners in this war will ultimately lie with the [judiciary, the] branch that knows least about the national security concerns that the subject entails."[123] He closed with strong language: "Today the Court warps our Constitution in a way that goes beyond the narrow issue of the reach of the Suspension Clause . . . . The Nation will live to regret what the Court has done today. I dissent."[124]

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119. *See* Megan Gaffney, Boumediene v. Bush*: Legal Realism and the War on Terror*, 44 HARV. C.R.-C.L. L. REV. 197, 197-98 (2009) ("With *Boumediene*, the Court asserted its role in the War on Terror. In order to insert itself in the conflict, the Court abandoned formalism and wrote a legal realist opinion. Legal realism understands the law as indeterminate, necessitating judges to look to extralegal considerations. Legal realists have argued that judges should consider the practices and values of the system at large in order to be truly responsive to the issue before them. In this case, the majority looked beyond precedent and procedure and considered both the reality of combatant detention at Guantanamo and the separation of powers. Had the Court not allowed these issues to influence its decision, it would have essentially removed the judicial branch from occupying any oversight role over cases in which terrorists are detained.").

120. *Boumediene*, 128 S. Ct. at 2276.

121. *Id.* at 2294 (Scalia, J., dissenting).

122. *Id.* at 2295.

123. *Id.* at 2296.

124. *Id.* at 2307.

Chief Justice Roberts' dissent (also joined by the other dissenters) took a more tempered approach, focusing on whether the DTA process afforded the Guantanamo detainees was an adequate substitute for the habeas protections the Constitution guaranteed. He answered in the affirmative, finding that the CSRTs fully respected rights to present evidence and question witnesses.[125] This was reminiscent of *Eisentrager* which found that due to practical logistical concerns and that the petitioners had been afforded the process available for traditional military war crimes trials which complied with the Geneva Conventions, adequate substitutes for habeas review had been provided.

VII. HABEAS PROCEEDINGS AFTER THE *BOUMEDIENE* DECISION

After *Boumediene* was decided, habeas petitions from Guantanamo detainees were consolidated in the D.C. District Court, most before Judge Thomas F. Hogan, with some before Judge Richard J. Leon, and later some fifteen other district court judges. They issued case management orders (CMOs)[126] concerning the process to be followed. As of November 2009, thirty detainees had been ordered released due to insufficient government evidence, while eight had their petitions denied. The hearings usually lasted a day or two.[127]

Boumediene declined to identify the process due to detainees in habeas proceedings. The American Bar Association (ABA) has proposed a highly civilianized procedure which is at odds with the Pentagon's narrower view of rights in habeas proceedings. In a vote of the ABA House of Delegates on February 16, 2009, a resolution was passed urging that "the District Court, not Congress nor the Executive, [is] the proper forum to address the procedural standards applicable to Guantanamo detainee habeas proceedings."[128] It said detainees should be afforded:

(1) the procedural rights ordinarily available to federal habeas petitioners under the Federal Habeas Statutes and accompanying rules, such as discovery, an evidentiary hearing and compulsory process,
(2) the right to exculpatory *Brady* information and

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125. *Id.* at 2280-89 (Roberts, C.J., dissenting).

126. *See, e.g.*, Case Management Order, Boumediene v. Bush, No. 04-1166 (RJL) (D.D.C. Aug. 27, 2008) *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/08/leon-case-manage-order-8-27-08.pdf.

127. Pete Yost, *Dozens of Gitmo Detainees Finally Getting Day in Court*, CHI. DAILY HERALD, Nov. 16, 2009, at 4.

128. AM. BAR ASS'N, RECOMMENDATION 10A, at 1 (July 28, 2008), *available at* http://www.abanet.org/leadership/2009/midyear/recommendations/10A.pdf.

(3) the right to confront the witnesses against them, *unless* the Government can demonstrate exigent circumstance outweighing provision of these procedural safeguards.[129]

The ABA proposal also provided that the government "bear the burden of justifying the petitioner's detention[,] and hearsay should be generally inadmissible unless it falls within an established exception and [is] supported by sufficient indicia of reliability. Finally, discovery and admissibility of classified information should be guided by the rules and precedent under the Classified Information Protective Act."[130]

The Case Management Orders issued by Judges Hogan and Leon were more lenient to the government than the ABA proposal as to use of hearsay and protection of security information in reference to confrontation of witnesses. They allowed hearsay evidence if the government established its reliability and the detainee had an opportunity to challenge its credibility and weight. They adopted a "preponderance of the evidence" burden of proof standard, which is a less demanding than the criminal law's "beyond a reasonable doubt."[131] However, in January 2010, Judge Hogan excluded almost two dozen interrogation summaries in the case of an al-Qaeda-linked suspect who was challenging his detention. He found the reports "not reliable" where the suspect had been subjected to physical and psychological mistreatment in being interrogated in Afghanistan and later by a "clean team" at Guantanamo in an attempt to remedy the defect.[132]

Boumediene also did not address whether a writ of habeas corpus could be used to challenge not only designation and detention as an enemy combatant, but such other treatment as shipment to other countries, interrogation techniques, and conditions of confinement. In the fall of 2008, Judge Hogan denied a writ filed by a Guantanamo detainee seeking a blanket, mattress, and his medical records.[133] The denial was based on lack of jurisdiction, indicating that the scope of habeas would not extend to conditions of confinement. Whether

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129. *Id.*

130. *Id.*

131. *See, e.g.*, Case Management order, *supra* note 126, at 3.

132. Carrie Johnson, *Military Trial of Terror Suspects Could Open Cases to Legal Uncertainty*, WASH. POST, Mar. 14, 2010, http://www.washingtonpost.com/wp-dyn.content/article/2010/03/13/AR2010031302252.html.

133. H. Candace Gorman, *Judge Hogan on Medical Records*, GUANTÁNAMO BLOG (Sept. 25, 2008, 1:19 PM), http://gtmoblog.blogspot.com/2008/09/judge-hogan-on-medical-records.html; *see* Lyle Denniston, *Sharp Dispute over Shape of Detainee Cases*, SCOTUSBLOG (July 26, 2008, 8:49 AM), http://www.scotusblog.com/2008/07/sharp-dispute-over-shape-of-detainee-cases/.

Boumediene can be extended to challenge conditions of confinement may have to be resolved in future litigation.

A. Resolution as to Boumediene

In November 2008, Judge Leon heard the petitions of Boumediene and the five Algerian men arrested with him. He ordered the release of all but one, finding the evidence insufficient to hold them as enemy combatants.[134] They were charged with planning to travel from Bosnia to Afghanistan to engage U.S. forces, but the judge found the only evidence was a classified document from an unnamed source.[135] The government did not provide information to adequately evaluate the credibility and reliability of the source's information, or any corroborating evidence that the detainees knew of and were committed to such a plan. Although the report was found to be "sufficient for the intelligence purposes for which it was prepared, it is *not* sufficient for the purposes for which a habeas court must now evaluate it."[136] However, evidence concerning one of the men, Belkacem Bensayah, that he had a link to an al-Qaeda facilitator, was found to be sufficiently corroborated, and he was not released.[137] In May 2009, Boumediene was released from Guantanamo and sent to France.[138]

B. Resolution as to Hamdan

As for Hamdan, despite his success at the Supreme Court in challenging the procedures for military commissions under the Presidential Order, he was cleared for a commission trial under the changes made in the MCA. On July 18, 2008, his petition for a writ of habeas corpus to prohibit his commission trial, brought on multiple constitutional grounds including the possibility of hearsay evidence or evidence resulting from coercion, was denied by a federal district judge. The judge commented that "serious constitutional questions" about the MCA procedures remained. However, he ruled that if convicted,

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134. Memorandum Order at 11, 13-14, *Boumediene v. Bush*, No. 04-1166 (RJL) (D.D.C. Nov. 20, 2008). The Justice Department said it was reviewing the case. *See also* William Glaberson, *Judge Declares Five Detainees Held Illegally*, N.Y. TIMES, Nov. 21, 2008, at A1. In late 2008, the Department of Defense announced that three of the detainees had been transferred to Bosnia. Jaclyn Belczyk, *US Transfers Three Algerian Guantanamo Detainees to Bosnia*, JURIST, Dec. 16, 2008, http://jurist.law.pitt.edu/paperchase/2008_12_16_indexarch.php.

135. Memorandum Order, *supra* note 134, at 9-10.

136. *Id.* at 10-11.

137. *Id.* at 111-12.

138. William Glaberson, *Vowing More Rights for Accused, Obama Retains Tribunal System*, N.Y. TIMES, May 16, 2009, at A1.

Hamdan could appeal to the D.C. Circuit under the revised procedures of the Act.[139]

Hamdan was convicted in August of 2008 by a panel of six military officers of one of two war crimes charges (providing material support for terrorism), but acquitted of the more serious charge of conspiracy.[140] Although the prosecution asked for a sentence of not less than thirty years, the sentence was sixty-six months in prison, with credit given for the sixty-one months he had already served in military detention.[141] The Pentagon suggested that he would continue to be held in indefinite detention as an "enemy combatant" after he served his sentence,[142] which his attorneys were prepared to contest. With one month remaining in his sentence, he was flown from Guantanamo to Yemen where he would serve the last month of his sentence. Given that more than a hundred of the more than 250 prisoners at Guantanamo were Yemenis, this was seen as solving a sticky diplomatic situation for the Bush (and shortly thereafter the Obama) Administration, although it continued to consider Hamdan a dangerous terrorist.[143]

VIII. OBAMA ADMINISTRATION'S CONFRONTATION WITH UNDECIDED ISSUES

The *Boumediene* line of decisions answered important questions as to American and international law, but left other questions for future decision. This is particularly true as to policies adopted by the Obama Administration as it "pick[ed] through the detention policies and practices of the Bush [A]dministration, to determine what it will keep and what it will abandon in an effort to distance itself from some of the harsher approaches."[144]

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139. Scott Shane & William Glaberson, *Rulings Clear Military Trial of a Detainee*, N.Y. TIMES, July 18, 2008, at A1; Lyle Denniston, *Judge: "World's Eyes on Guantanamo"; Lawyers: No Appeal Now*, SCOTUSBLOG (July 18, 2008, 1:01 PM), http://www.scotusblog.com/2008/07/hamdan-opinion-now-available/.

140. William Glaberson, *Panel Convicts bin Laden Driver in Split Verdict*, N.Y. TIMES, Aug. 7, 2008, at A1.

141. Carol J. Williams, *Bin Laden's Driver Is Going Home*, L.A. TIMES, Nov. 25, 2008, at 13.

142. Glaberson, *supra* note 140.

143. Williams, *supra* note 141.

144. Eric Schmitt, *U.S. Will Expand Detainee Review in Afghan Prison*, N.Y. TIMES, Sept. 13, 2009, at A1.

A. Habeas Corpus Challenges To Holding Legal Residents of the United States Indefinitely as Enemy Combatants

"Enemy combatant" was a category devised by the Bush Administration to apply to persons captured in the theatre of hostilities (and subsequently extended to other locations throughout the world) who acted as combatants or aided the enemy effort.[145] They were to be held indefinitely until it was determined that they were of no further intelligence value and were not a threat to the United States. Some might be tried by military commissions for violations of the laws of war, and some might be prosecuted in federal courts for civilian crimes. Although they would be held indefinitely, they did not meet the requirements under the Geneva Conventions for POW status (such as wearing recognizable insignia and carrying weapons openly) and therefore were not entitled to the rights of a POW (such as freedom from forced interrogation).

Detaining indefinitely any person claimed to be an enemy combatant, whether captured in a zone of hostilities or arrested elsewhere, would be an enormous expansion of government power. The power to hold persons *resident in the United States* without charges on the grounds that they are enemy combatants was raised by a habeas petition brought by Ali Saleh Kahlau al-Marri. He was the only person on the American mainland held as an enemy combatant. A citizen of Qatar, al-Marri was legally in the United States where he was living with his family and studying computer science at an Illinois university. He was arrested in 2003 by civilian authorities for credit card fraud. While al-Marri was being held, President Bush, acting under the authority of the AUMF,[146] determined that al-Marri was an enemy combatant because he was "closely associated with al Qaeda" and "engaged in conduct that constituted hostile and war-like acts."[147] The government claimed he was an al-Qaeda "sleeper agent" sent to "facilitate terrorist activities and explore disrupting [the United States'] financial system through computer hacking." He was held in a Navy brig in South Carolina for almost six years "without charge and without any indication when [the] confinement will end."[148]

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145. President Obama has said in legal filings that he will cease using the term. *See* Nedra Pickler, *Obama Administration Abandons the Bush Term 'Enemy Combatant,'* DESERET NEWS, Mar. 14, 2009, at A07. This change in terminology has been described as "mainly symbolic while lacking genuine substance." Corn & Jensen, *supra* note 7, at 8.

146. *See* Al-Marri v. Pucciarelli, 534 F.3d 213, 219 (4th Cir. 2008).

147. *Id.*

148. *Id.* at 219-20; *see also* Liptak, *supra* note 30.

The federal court in the District of South Carolina denied al-Marri's application for habeas corpus. Nevertheless, a panel of the Fourth Circuit ruled that even though he was accused of "grave crimes," there was no authority to treat him as an enemy combatant, and the President had no power to order him detained indefinitely:[149]

> In light of al-Marri's due process rights under our Constitution and Congress's express prohibition in the Patriot Act on the indefinite detention of those civilians arrested as "terrorist aliens" within this country, we can only conclude that in the case at hand, the President claims power that far exceeds that granted him by the Constitution.[150]

He was ordered released from military detention either to be freed or to be placed in civilian detention where the federal government would have to charge him with crimes. In an en banc appeal, the Fourth Circuit, in closely divided opinions issued after the Supreme Court's decision in *Boumediene*, reflected very different views of what *Boumediene* had decided. The majority ruled that if the government's allegations were true, Congress had empowered the President to detain al-Marri indefinitely as an enemy combatant even though he was a resident in the United States, but that he had not been afforded sufficient due process to challenge his designation as an enemy combatant.[151]

The case was remanded to the district court, and the Supreme Court granted certiorari. The issue was: "Does the president have the power to order the indefinite military detention of legal residents of the United States?"[152] It was clear that the government wanted to avoid Supreme Court review. In February 2009, Attorney General Holder announced that a federal grand jury in the Central District of Illinois had returned a two-count indictment charging al-Marri with acts of terrorism by providing and conspiring to provide material support to al-Qaeda. He said the Office of the Solicitor General would now move to dismiss al-Marri's Supreme Court appeal. The question was then whether the Supreme Court would proceed with the oral arguments, as urged by al-Marri's attorneys because the government had failed to renounce the option of returning him to military detention if he were found innocent or finished his sentence.[153] In a one-paragraph ruling, the Supreme Court

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149. Al-Marri v. Wright, 487 F.3d 160, 164 (4th Cir. 2007), *modified en banc*, *Al-Marri*, 534 F.3d 213.

150. *Id.* at 193.

151. *Al-Marri*, 534 F.3d at 216.

152. Adam Liptak, *Justices Erase Court Ruling That Allowed a Detention*, N.Y. TIMES, Mar. 7, 2009, at A9.

153. *See* David Johnston & Neil A. Lewis, *U.S. Will Give Qaeda Suspect a Civilian Trial*, N.Y. TIMES, Feb. 27, 2009, at A1.

said it would not hear the case in light of his indictment, but also erased the Fourth Circuit opinion which had denied the writ based on the majority's expansive view of executive authority and narrow reading of *Boumediene*.[154]

As preparations for his civilian trial proceeded, al-Marri pleaded guilty to the terrorism charges and was sentenced to 8.5 years, less than the fifteen years sought by the federal prosecutor. In assessing the sentence, the judge referred to the conditions under which al-Marri had been held and criticized the interrogation methods used on him, including threats that his family might be harmed.[155] Al-Marri admitted in his guilty plea that he attended terrorist training camps between 1998 and 2001, where he studied weapons and operational security. He also admitted that he met with Khalid Sheikh Mohammed and "offered his services" and was told to travel to America by September 2001, and wait for further instructions.[156] While enrolled at Bradley University, he researched cyanide on the Internet and continued communicating with al-Qaeda.[157] The upshot of the al-Marri case is that there is no definitive Supreme Court decision on the issues raised, but the reversal of the Fourth Circuit opinion seems consistent with a reading of the *Boumediene* line of cases holding that the President lacks authority to detain indefinitely without charges persons legally in the United States.

B. Habeas Corpus Challenges To Holding Detainees Outside the United States Other than at Guantanamo

The question after *Boumediene* was whether it applied to detainees held outside the United States other than at Guantanamo. With President Obama's announcement that Guantanamo would be closed,[158] it appeared

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154. Liptak, *supra* note 152. In seeking not to have the Supreme Court hold arguments, the Obama administration took pains to show that it was not manipulating the legal system in an attempt to avoid an adverse ruling. Such manipulation had been alleged against the Bush administration when, after the Supreme Court had set argument on his case, it moved Jose Padilla, who had been held without charges on a claim that he planned the use of a radioactive "dirty bomb," from military detention to criminal court in 2007 (where he was convicted of a different charge, conspiracy to conduct terrorist activities abroad). *See id.*

155. *Al Qaeda Sleeper Agent Pleads Guilty to Terror Charges*, FOX NEWS, Apr. 30, 2009, http://www.foxnews.com/story/0,2933,518546,00.html; Brian Jackson, *Former 'Enemy Combatant' al-Marri Sentenced on Conspiracy Charges*, JURIST, Oct. 30, 2009, http://jurist.law.pitt.edu/paperchase/2009/10/former-enemy-combatant-al-marri.php.

156. Plea Agreement and Stipulation of Facts at 9-11, United States v. Al-Marri, No. 09-CR-10030 (L.D. III. Peoria Div. Apr. 30, 2009); *See Al Qaeda Sleeper Agent Pleads Guilty to Terror Charges*, *supra* note 155.

157. Plea Agreement and Stipulation of Facts, *supra* note 156, at 14-17.

158 William Glaberson & Helene Cooper, *Obama's Closing of Guantanamo May Take a Year*, N.Y. TIMES, Jan. 13, 2009, at A1. For a varied discussion of what should happen to the

that certain detainees could be sent to locations outside the United States that, without the same degree of American sovereignty as at Guantanamo, might not be reachable by American courts on a writ of habeas corpus. Although Obama had indicated an intention to close CIA "rendition centers" abroad, the Administration could continue the practice of turning over prisoners to foreign allies known for harsh interrogation methods. More importantly, a sizable number of detainees (said to be more than 600)[159] were held by American military authorities at Bagram Air Force Base in Afghanistan. In February 2009, the Obama Administration "told a federal judge that military detainees in Afghanistan have no legal right to challenge their imprisonment there, embracing a key argument of [the Bush Administration]."[160]

The issue came to a head in April 2009, when U.S. district court Judge John Bates, in a hearing on habeas petitions by two Yemeni and a Tunisian who were held without charges at Bagram, ruled that they had a right to have their petitions heard in a U.S. court.[161] In *Al Maqaleh v. Gates*, he ruled that although the MCA's elimination of habeas jurisdiction had only been invalidated in *Boumediene* as applied to Guantanamo, the Suspension Clause also rendered it unconstitutional regarding Bagram.

Judge Bates, applying the factors laid out in *Boumediene*, ruled that the habeas right extended to these detainees because they "are virtually identical to the Guantanamo detainees in *Boumediene*, and the circumstances of their detention are quite similar as well."[162] He conceded that Bagram, unlike Guantanamo, was within an active theatre of war, but, noting that the detainees were not Afghans, said that *Boumediene* was "motivated in no small part by the concern that the Executive could, under its argument, shuttle detainees to Guantanamo to govern without legal constraint."[163] He found no habeas jurisdiction, however, as to a fourth detainee petitioner who was an Afghan, based on the sixth factor that the possibility of diplomatic friction with Afghanistan, the host nation of the base, would make the assertion of jurisdiction impracticable.[164]

Guantanamo detainees upon closure, see Tyler Davidson & Kathleen Gibson, *Experts Meeting on Security Detention Report*, 40 CASE W. RES. J. INT'L L. 323, 342-43 (2009).

159. Schmitt, *supra* note 144.

160. Charlie Savage, *Embracing Bush Argument, Obama Upholds a Policy on Detainees in Afghanistan*, N.Y. TIMES, Feb. 22, 2009, at A6.

161. Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 209, 235 (D.D.C. 2009).

162. *Id.* at 232.

163. *Id.* at 220 (internal quotation marks omitted).

164. *Id.* at 230-31.

Judge Bates granted the Obama Administration's request for an immediate interlocutory appeal and a stay of proceedings pending appeal.[165] Meanwhile, the Obama Administration announced new guidelines for Bagram to give detainees significantly more ability to challenge their custody. A military official (not a lawyer) would be assigned to each detainee to assist him in gathering witnesses and evidence, including classified material, to challenge his detention before a military review board.[166] The decrepit Bagram facility would be replaced with a new forty-acre complex, and for the first time the International Committee of the Red Cross would be notified of the identities of detainees held in secret at Bagram, as well as at a camp separate in Iraq.[167]

On the *Al Maqaleh* appeal, the D.C. Circuit, in an opinion by Chief Judge Sentelle, and joined by Judges Tatel and Edwards, reversed, holding that "the jurisdiction of the courts to afford the right to habeas relief and the protection of the Suspension Clause does not extend to aliens held in Executive detention in the Bagram detention facility in the Afghan theater of war."[168] Deputy Solicitor General Neal Kumar Katyal, who had represented the detainees in *Boumediene*, argued against the extension of *Boumediene* to Bagram. The opinion rejected what it called each party's "extreme understanding" of the law after *Boumediene*.[169] The government had argued that the *Boumediene* analysis has no application beyond territories that are, like Guantanamo, outside the de jure sovereignty of the United States but are subject to its de facto sovereignty. The D.C. Circuit said that *Boumediene* had expressly repudiated a "sovereignty-based" test. On their part, the detainees had argued that U.S. control of Bagram under the lease is itself sufficient to justify the extraterritorial application of the Suspension Clause.[170] The circuit court also rejected that position as creating a potential for the "extension of the Suspension Clause to noncitizens held in any United

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165. Al Maqaleh v. Gates, 620 F. Supp. 2d 51, 53 (D.D.C. 2009).

166. Schmitt, *supra* note 144.

167. In late November 2009, there were revelations by former detainees that American military Special Operations forces continued to run secret jails in Afghanistan and Balad Air Base in Iraq. Used to interrogate high-value detainees held without access to the Red Cross, the jails were described as consisting of "windowless concrete cells, each illuminated by a single light bulb glowing 24 hours a day" where detainees' "only human contact was at twice-daily interrogation sessions." Alissa J. Rubin, *Afghans Detail U.S. Detention in 'Black Jail at U.S. Base*,*'* N.Y. TIMES, Nov. 29, 2009, at A1.

168. Al Maqaleh v. Gates, 605 F.3d 84, 99 (D.C. Cir. 2010).

169. *Id.* at 94.

170. *Id.* at 95.

States military facility in the world, and perhaps to an undeterminable number of other United States-leased facilities as well."[171]

The opinion applied the three *Boumediene* factors to the Bagram detainees—(1) "the citizenship and status of the detainee and the adequacy of the process through which that status determination was made"; (2) "the nature of the sites where apprehension and then detention took place"; and (3) "the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[172] The circuit court found that the first factor favored habeas jurisdiction. It noted that alien citizenship was not found in *Boumediene* to weigh against the detainees and that the adequacy of the process through which the status determination was made was even less favorable here than in *Boumediene*.[173] The second factor—the nature of the detention site—favored the government.[174] While the United States had maintained total control of Guantanamo for over a century, even in the face of a hostile government, there were options as to the duration of the Bagram lease and "there is no indication of any intent to occupy the base with permanence, nor is there hostility on the part of the 'host' country."[175]

It was the third factor—the practical obstacles in enforcing the writ—that the court found most persuasive. Bagram, indeed all of Afghanistan, is an active theatre of war, and the court cited the concerns expressed in *Eisentrager* (which it said was not overruled, but rather reinforced, by *Boumediene*). In language perhaps better suited to World War II, the opinion said that trials in a theatre of war would hamper the effort and give comfort to the enemy by diminishing the prestige of our commanders.[176] Finally, the opinion addressed the argument of the detainees that the United States could choose the place of detention and might be able to "evade judicial review . . . by transferring detainees into active conflict zones."[177] The three detainees all alleged that they were

171. *Id.*

172. *Id.* at 95-97 (internal quotation marks omitted).

173. *Id.* at 96. The Bagram detainees' status was determined by an Unlawful Enemy Combatant Review Board (UECRB) that provided even less protection of their rights than the CSRTs used for Guantanamo detainees. *Id.*

174. *Id.*

175. *Id.* at 97.

176. *Id.* at 97-98.

177. *Id.* at 98. Judge Bates, in upholding the writ, said that Boumediene was "motivated in no small part by the concern that the Executive could, under its argument, shuttle detainees to Guantanamo to govern without legal constraint." Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 220 (D.D.C. 2009) (internal quotation marks omitted).

captured outside Afghanistan.[178] Nevertheless, the court found that "the notion that the United States deliberately confined the detainees in the theater of war rather than at, for example, Guantanamo, is not only unsupported by the evidence, it is not supported by reason."[179] This left open the possibility that habeas would lie where it is shown that the government intentionally transferred detainees to certain foreign detention centers to avoid the reach of habeas corpus. Likewise, the *Al Maqaleh* decision might not apply at detention centers that are not in a country where there are no active hostilities, as, for example, a person alleged to have given material aid to terrorists who is arrested in Europe and sent to Bagram or another detention facility in a county with active hostilities.

C. Habeas Corpus Challenges To Holding Detainees Indefinitely as Enemy Combatants

Following the *Boumediene* decision, a large number of Guantanamo detainees filed writs of habeas corpus, and the federal district court in D.C. began hearings on the writs. The detainees maintained that only those who directly participated in hostilities could be held. In responding to a writ of habeas corpus filed by a detainee, the Justice Department now cited on behalf of the President the aggregate powers of the executive and legislative branches as "consistent with the laws of war" as the authority for holding detainees indefinitely.[180] This contrasted with the assertion of plenary executive authority by the Bush Administration.

The claim of congressional authorization was based on the AUMF passed shortly after 9/11, stating that the President has the authority to take action "against these nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."[181] The detention is consistent with international law, Holder maintained, because "[l]aw-of-war principles do not limit the United States' detention authority to this limited category of

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178. *Al Maqaleh*, 605 F.3d at 87. Conversely, a sworn declaration by an American commander of detention operations claimed Al Maqaleh was captured in Afghanistan. *Id.*

179. *Id.* at 99.

180. *See* Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 5-6, *In re* Guantanamo Bay Detainee Litig., No. 08-422 (TFH) (D.D.C. Mar. 13, 2009).

181. *See* Authorization for Use of Military Force Act, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

individuals"[182] (that is, "enemy combatant," a term that he said the administration would no longer use).[183] "A contrary conclusion would improperly reward an enemy that violates the laws of war by operating as a loose network and camouflaging its forces as civilians."[184]

The Center for Constitutional Rights, which represented detainees, objected: "This is really a case of old wine in new bottles. . . . It is still unlawful to hold people indefinitely without charge. The men who have been held for more than seven years by our government must be charged or released."[185] The Justice Department maintained that under the congressional authorization, prisoners can only be detained if their support for al-Qaeda, the Taliban, or "associated forces" was "substantial."[186] In addition, it pointed out that "[t]he government's new standard relies on the international laws of war to inform the scope of the president's authority under this statute."[187]

The Obama reliance on congressional authorization, rather than plenary executive power, was a change from the Bush position. "Although President Bush could have just as readily invoked the same source of authority, he consistently refused to do so, arguing instead that the AUMF was effectively superfluous because the Constitution vested him with the unilateral authority to order detentions of enemy combatants in time of war."[188] What is the significance of President Obama's failure to rely solely on executive powers? It is consistent with his theme of respecting Congress's role in war-making and national security matters and reflects his critical view of detainee practices of the Bush Administration. However, it is not at all clear that Obama was ceding the right to rely on executive powers in authorizing a sort of preventive detention. *Hamdi* recognized a right to hold an enemy combatant until the end of hostilities, although this was based on the traditional view of enemy combatants as having been captured in the theatre of war. Obama's claim to be able to hold indefinitely persons considered to be dangerous, apparently without regard to whether they

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182. Pickler, *supra* note 145.

183. *US Drops 'Enemy Combatant' Term*, BBC NEWS, Mar. 13, 2009, http://news.bbc.co.uk/2/hi/americas/7943114.stm.

184. Pickler, *supra* note 145.

185. *Obama Administration Offers Essentially Same Definition of Enemy Combatant Without Using the Term*, CENTER FOR CONST. RTS., Mar. 13, 2009, http://ccrjustice.org/newsroom/press-releases/Obama-administration-offers-essentially-same-definition-enemy-combatant-with.

186. Pickler, *supra* note 145 (internal quotation marks omitted).

187. Press Release, Dep't of Justice, Department of Justice Withdraws "Enemy Combatant" Definition for Guantanamo Detainees (Mar. 13, 2009), http://www.justice.gov/opa/pr/2009/March/09-ag-232.html.

188. Corn & Jensen, *supra* note 7, at 7.

were captured in the theatre of war, would seem to go beyond the *Hamdi* court's perception of detention of enemy combatants.[189]

D. Release or Trial of Detainees in the United States

The detention of detainees after the closing of Guantanamo became a major political issue in the United States early in the Obama Administration. The number of detainees there had been reduced to about 255 by the time President Obama took office due to release of some and return of others to their countries of origin. Some sixty detainees were cleared for release by the end of 2008, but the Bush Administration had difficulty in finding countries that would accept them.[190] As the Obama Administration struggled to set a date for closing the facility, it was clear that many detainees, even if cleared for release, could not return to their countries because of fear of persecution or refusal of the country to accept them.

The Chinese Uighurs are a case in point. Seventeen men from the largely Muslim region of western China were turned over to American authorities in 2002 after the invasion of Afghanistan and sent to Guantanamo. They had recently fled from what they claimed was persecution in China to a camp in Afghanistan.[191] They claimed that their lives were in danger if they were sent back to China. After almost eight years at Guantanamo, when the government had no evidence against them and did not claim that they were dangerous, a federal judge ordered them released into the care of supporters in the Washington, D.C., area, but was reversed by the D.C. federal circuit court.[192] Some then accepted refuge in Bermuda, Palau, and Switzerland, but five declined on the ground that there was no Uighur community there.[193] In March 2010, the Supreme Court vacated the order of the D.C. Circuit (which had held that federal courts lack the power to order release of Guantanamo detainees into the United States), but dismissed their case because of their refusal to be relocated elsewhere.[194]

The House of Representatives and Senate "voted in May [2009] to bar the resettlement of detainees in [the United States] and stripped an

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189. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

190. William Glaberson & Margot Williams, *Next President Will Face Test on Detainees*, N.Y. TIMES, Nov. 3, 2008, at A1.

191. *Kiyemba v. Obama*, CENTER FOR CONST. RTS., http://ccrjustice.org/ourcases/current-cases/kiyemba-v.-bush (last visited Sept. 20, 2010).

192. *Id.*

193. *Uighurs' Gambit*, WASH. POST, Mar. 3, 2010, at A16.

194. *Constitution Project Welcomes Supreme Court Order Vacating Decision of Appeal Court in Uighurs Case*, CONST. PROJECT NEWSL., Mar. 11, 2010, at 4.

emergency war-spending bill of $50 million for closing Guantanamo until after the administration submitted a detailed plan."[195] In a subsequent bill signed by the President, Congress must be given forty-five days' notice by the President before bringing any Guantanamo detainees into the United States.[196] By November 2009, when about 215 detainees remained at Guantanamo with 90 cleared for release,[197] the Obama Administration had settled on an almost empty federal maximum-security prison in Standish, Michigan, for detainees once Guantanamo was closed. Although local officials favored the move as a way to bring 300 jobs to the depressed area, there were some local dissenters and nationwide debate.[198]

Even more divisive was the Obama Administration's decision to try certain detainees in U.S. courts. In his May 2009 speech, President Obama stated that some detainees who are deemed to be too dangerous to release but too difficult to prosecute could be brought to the United States for preventive detention.[199] A task force of Justice Department and Pentagon prosecutors developed a system in July of 2009 for evaluating what to do with each detainee; it included factors such as where offenses took place, the identity of victims, and the manner in which evidence was gathered. After a review of all the cases, Attorney General Holder announced in November 2009, that five of the detainees would be tried in the federal court in New York City, blocks from the site of the World Trade bombing, on counts of murder and conspiracy for their role in the 9/11 attack.[200] The most prominent was Khalid Sheikh Mohammed, the self-described mastermind of the attack.

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195. Susan Saulny, *State Prison in Michigan Is Considered for Detainees*, N.Y. TIMES, Aug. 13, 2009, at A17.

196. Charlie Savage, *U.S. To Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. TIMES, Nov. 14, 2009, at A1.

197. *Id.*

198. Kari Lydersen, *Detainee Plan Draws Fear, Opposition*, WASH. POST, Aug. 21, 2009, at A3; Saulny, *supra* note 195.

199. Obama, *supra* note 5 ("Now, finally, there remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people. And I have to be honest here—this is the toughest single issue that we will face. We're going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country. But even when this process is complete, there may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted, but who nonetheless pose a threat to the security of the United States. Examples of that threat include people who've received extensive explosives training at al Qaeda training camps, or commanded Taliban troops in battle, or expressed their allegiance to Osama bin Laden, or otherwise made it clear that they want to kill Americans. These are people who, in effect, remain at war with the United States.").

200. *See U.S. Likely To Seek Death Penalty for Sept. 11 Terror Suspects*, FOXNEWS.COM, Nov. 13, 2009, http://foxnews.com/politics/2009/11/13/self-proclaimed-sept-mastermind-face-trial.

This drew fire from some New York City citizens who worried that a trial there would make the city a target for terrorists and from some prominent Republicans who had already criticized any bringing of detainees into the United States for incarceration as dangerous to the surrounding community because of the possibility of escape.[201] Whether the federal courts are appropriate to try terrorists was a much disputed issue. Opponents said that terrorists were being given the full panoply of rights of Americans to which they were not entitled.[202] There was also concern that security information might not be protected in a civilian court, as it would in a military commission. A *New York Times* editorial argued in response that "[t]he federal courts have long been able to handle cases involving classified evidence."[203] Since 2001, hundreds of terrorist suspects have been successfully tried in civilian federal courts.[204]

Both sides in the debate over civilian trails invoked basic American values. Former New York City Mayor Rudy Giuliani said:

> I do not understand why they cannot try Khalid Sheikh Mohammed in a military tribunal. That also would demonstrate that we are a nation of laws. That is the way we have tried enemy combatants in the past. . . . In this particular case, we are reaching out to give terrorists a [legal] benefit that is unnecessary.[205]

On the same day Senator Jack Reed (D-R.I.) said that a civilian trial would deny terrorists what they crave:

> [Khalid Sheikh] Mohammed wants to be considered a holy warrior, a jihadist. And if we try him before military officers, that image of a soldier will be portrayed by the Islamic community . . . . You are vindicating this country's basic values. Not to condone terrorism, but to stand as a symbol to the world of something different than what the terrorists represent.[206]

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201. Savage, *supra* note 196.

202. *See U.S. Likely To Seek Death Penalty for Sept. 11 Terror Suspects*, *supra* note 200. Senator John Cornyn, R-Tex., commented, "These terrorists planned and executed the mass murder of thousands of innocent Americans. Treating them like common criminals is unconscionable." *Id.*

203. *Justice Delayed*, N.Y. TIMES, Sept. 13, 2009, at WK15.

204. *See* Diane Marie Amann, *Punish or Surveil*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 873, 888 (2007). For example, French defendant Zacarias Moussaoui received a life sentence for his role in the 9/11 attacks. Richard Reid, the "shoe bomber," received a "life sentence after pleading guilty to an attempt to ignite bombs hidden in his sneakers during a Paris-to-Miami flight." *Id.* John Walker Lindh, so-called "American Taliban," was sentenced to twenty years after pleading guilty to aiding the Taliban and carrying explosives. *Id.*

205. *US Civilian Trial for Terror Suspects Sparks Debate*, VOANEWS.COM, Nov. 15, 2009, http://www.voanews.com/English/news/a-13-2009-11-15-voa21-70424057.html (internal quotation marks omitted).

206. *Id.* (internal quotation marks omitted).

In March 2010, the *Washington Post* reported that President Obama's advisors were nearing a recommendation that Khalid Sheikh Mohammed would be prosecuted in a military tribunal, reversing Attorney General Holder's plan to try him in a civilian court.[207] A strong critic of civilian trials, Senator Lindsey Graham (R-S.C.) announced that "I will do anything in my power to make sure Khalid Sheikh Mohammed never sees the inside of a federal court."[208] He proposed legislation that would create a national-security exception to the warning requirements of *Miranda v. Arizona* and an official process for holding terrorism suspects indefinitely.[209]

In October 2010, the first civilian trial of a Guantanamo detainee began in federal court in New York City. Ahmed Khalfan Ghailani was charged with complicity in the bombing twelve years earlier of U.S. embassies in Kenya and Tanzania that killed 224 people. Just before the trial, the federal judge blocked the government from calling its star witness on the grounds that it had learned of him through its coerced interrogation of Ghailani, and thus his testimony had to be suppressed as "fruit of the poisonous tree."[210] Opponents of civilian trials cited this as evidence that the procedural niceties of civilian law would prevent proper prosecution of terrorists in civilian courts.[211] Ghailani was convicted of one count of conspiracy to destroy U.S. property, but was acquitted on

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207. Anne E. Kornblut & Peter Finn, *Obama Advisers Set To Recommend Military Tribunals for Alleged 9/11 Plotters*, WASH. POST, Mar. 5, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/03/041AR2010030405209.html?hpid=topnews.

208. David Ingram, *Republican Senator Stiffens Resistance to KSM Trial*, BLT: BLOG LEGAL TIMES (Sept. 20, 2010, 3:36 PM), http://legaltimes.typepad.com/blt/2010/09/republican-senator-stiffens-resistance-to-ksm-trial.html (internal quotation marks omitted).

209. *Id.*; *see also* Charlie Savage, *Proposal Would Delay Hearings in Terror Cases*, N.Y. TIMES, May 14, 2010, http://www.nytimes.com/2010/05/15/us/politics/15miranda.html (stating that Obama legal advisors are "considering asking Congress to allow [detention of] terrorism suspects longer after their arrests before presenting them to a judge for an initial hearing" and allowing interrogators to withhold Miranda warnings).

210. Pete Yost, *Attorney General Holder Confident US Can Try Terrorism Case in Civilian Court Despite Setback*, S.F. EXAMINER, Oct. 6, 2010, http://www.sfexaminer.com/politics/ap/attorney-general-holder-confident-us-can-try-terrorism-case-in-civilian-court-despite-setback-104421778.html; *Times Topics: Ahmed Kahlfan Ghailani*, N.Y. TIMES, http://topics.nytimes.com/topics/reference/timestopics/people/g/ahmed_khalfan_ghailani/index.html (last updated Oct. 13, 2010).

211. *See* Marc Thiessen, Op-Ed., *Holder's Terror Trial Catastrophe*, WASH. POST, Oct. 11, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/11/AR201010112834.html ("[T]here is no need to try al-Qaeda terrorists like Ghailani—they can be held indefinitely under the laws of war[, b]ut if the Obama administration insists on prosecuting Ghailani, there is a forum where the key witness against him would almost certainly be permitted to testify: a military commission at Guantanamo Bay.").

more than 280 counts, including murder of each of the persons killed in the bombings. He faced a sentence ranging from twenty years to life.[212]

The issue remains controversial with many political and legal hurdles ahead.[213] Legal issues relating to admissibility of evidence, openness of proceedings, and scope of constitutional rights will have an important impact on the decision whether to try terrorists in U.S. civilian courts, military tribunals, or courts-martial.[214]

E. Adequacy of Military Commission Trials

The military commission system established by President Bush in 2001 (and modified somewhat thereafter) was only used in a small number of cases. Twenty-eight detainees were charged under military commissions, fourteen were referred to trial, and three were convicted and sentenced.[215] Other military commission charges left over from the Bush Administration were still in the works at the time of the change in Administrations.[216]

In May 2009, President Obama announced that his Administration would prosecute detainees held at Guantanamo before military commissions.[217] The announcement was a surprise to many. The

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212. Charlie Savage, *Terror Verdict Tests Obama Strategy on Trials*, N.Y. TIMES, Nov. 18, 2010, http://www.nytimes.com/2010/11/19/nyregion/19detainees.html; *see also* Ashby Jones, *What To Make of the Ghailani Verdict?*, WALL ST. J. BLOG (Nov. 18, 2010, 9:15 AM), http://blogs.wsj.com/law/2010/11/18/what-to-make-of-the-ghailani-verdict/.

213. Senator Lindsey Graham (R-SC) introduced legislation to prohibit the Department of Justice from using funds to prosecute 9/11 conspirators in regular Article III federal courts. S. 2977, 111th Cong. (2010).

214. Johnson, *supra* note 132; *see also* Jordan Paust, *Court-Martial: A Third Option for Trying Al Qaeda and Taliban Detainees*, JURIST, Mar. 12, 2010, http://jurist.law.pitt.edu/forum/2010/03/court-martial-third-option-for-trying.php.

215. NAT'L INST. OF MILITARY JUSTICE, NIMJ REPORTS FROM GUANTÁNAMO 10 (2009). The three convicted and sentenced were David Hicks (Australian citizen who pled guilty in 2007 and was released to the custody of his government to serve a nine-month sentence), Salim Hamdan, and Ali Hamza al Bahlul (former propaganda chief of al-Qaeda, who was convicted of terrorism charges at a trial in which he largely refused to participate and was sentenced to life in November 2008). *Id.*; *see* William Glaberson, *Detainee Convicted on Terrorism Charges*, N.Y. TIMES, Nov. 4, 2008, at A19.

216. Pretrial hearings were held in October 2008 for two detainees. *See* Andy Worthington, *Torture Allegations Dog Guantanamo Trials*, HUFFINGTON POST, Mar. 21, 2008, http://www.huffingtonpost.com/andy-worthington/torture-allegations-dog-g_b_92799.html. In November 2008, charges were refiled against Mohammed al-Qahtani, the so-called "20th hijacker" in the 9/11 plot. *See* William Glaberson, *Detainee Will Face New War-Crimes Charges*, N.Y. TIMES, Nov. 19, 2008, at A26.

217. Obama, *supra* note 5. At his November 2009 announcement that five detainees would be tried in the New York federal court, Attorney General Holder also announced that five detainees would be tried before military commissions, including the alleged mastermind of the bombing of the U.S.S. COLE. Savage, *supra* note 196.

American Civil Liberties Union emphasized that Obama had pledged to return the country to the rule of law and that "'continuing with the military commission system would be a retreat from that promise.'"[218] Bush Administration defenders hailed the decision as "coming to accept the Bush administration's thesis that terror suspects should be viewed as enemy fighters, not as criminal defendants with all the rights accorded by American courts."[219]

This kept alive the question of the sufficiency of military commission procedures under the Constitution and international law. Hamdan had challenged the procedures as to a number of matters including the admissibility of evidence that is hearsay or obtained by coercion or torture. However, his challenge was denied by a federal judge on habeas who said that although some of the procedures were a "startling departure" from usual standards, Hamdan would have to raise his constitutional issues on appeal. *Boumediene*, in its critique of the procedures followed by the CSRT, had a number of objections to the laxity of admitting evidence, although it did not rule on the commissions themselves.

In announcing that five detainees would be tried by military commission, the Obama Administration announced a number of changes in procedures to make them "a fairer avenue for prosecution," including limiting the use of hearsay evidence, banning evidence from cruel treatment, and providing defendants more latitude to select their attorneys.[220] Nevertheless, defendants would not be accorded all the rights available in American civilian courts. For example, so-called "clean confessions," which were untainted by torture or cruel treatment, might be admitted before a commission, although failure to give warnings against self-incrimination would prevent their admissibility in civilian courts.[221] The deviations from the rights accorded in civilian courts, and more importantly in courts-martial under the Uniform Code

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218. William Glaberson, *U.S. May Revive Guantanamo Military Courts*, N.Y. TIMES, May 2, 2009, at A1 (quoting Anthony D. Romero, ACLU Executive Director).

219. Glaberson, *supra* note 138 (quoting David B. Rivkin, Jr., a Reagan Administration official).

220. *Id.*

221. For accounts of enhanced interrogation techniques, see Mark Tran, *FBI Files Detail Guantánamo Torture Tactics*, GUARDIAN, Jan. 3, 2007, http://www.guardian.com.uk/world(2007) jan/03/Guantanamo/print; *Report Details Alleged Abuse of Guantanamo Bay, Abu Ghraib Detainees*, PBS NEWSHOUR, June 18, 2008, http://pbs.org/newshour/updates/military/jan-june08/ detaines-06-18.html; Jane Mayer, *The Secret History*, NEW YORKER, June 22, 2009, at 50.

of Military Justice, will certainly be tested if there are convictions in military commissions.[222]

Actual trials have been slow in coming since the Obama Administration announced in November 2009 that military commissions would be convened for certain detainees charged with violations of the laws of war. The expected trial of a Sudanese detainee was mooted when he pleaded guilty in August 2010.[223] The next case in line was that of Omar Khadr who was not an ideal defendant from a prosecutorial point of view. He was a Canadian citizen who was fifteen when captured in Afghanistan after being wounded in a firefight in which an American sergeant was killed. His family had links to al-Qaeda, and he claimed he was coerced by older relatives into working with it. He was initially charged with "murder in violation of the laws of war," terrorism, and spying. Killing an enemy in combat is not a crime for a soldier, but he was said to lack battlefield immunity because he did not satisfy the requirements for being a lawful combatant, such as wearing a uniform. In light of the fact that the Central Intelligence Agency drone operators also kill while not wearing uniforms, the Obama Administration legal team rewrote the commission rules to downgrade the charge to a domestic law offense. But a plea deal was worked out, with Khadr to receive not more than eight years and to be returned to Canadian custody to serve out his sentence. Human Rights Watch said the United States "should never have pursued the case" because child soldiers are almost never prosecuted for war crimes. A February 2011 trial was scheduled for the only remaining detainee scheduled to be tried by a commission, Noor Uthman Muhammed, a Sudanese detainee charged with running a terrorist training camp.[224]

IX. CONCLUSION

The *Boumediene* line of cases is a watershed in American jurisprudence as to separation of powers, the vitality of the writ of habeas

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222. *See* Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction* (Am. Univ. Wash. Coll. Of Law, Research Paper No. 2010-27, 2010), *available at* http://papers.ssrn.com/so13/papers.cfm?abstract_id=1661125## ("[I]t is impossible to have a meaningful debate over whether civilian courts or military commissions are a more appropriate forum for trying terrorism suspects so long as serious questions remain over whether the commissions may constitutionally exercise jurisdiction over particular offenses and/or offenders.").

223. Charlie Savage, *Deal Averts Trial in Disputed Guantanamo Case*, N.Y. TIMES, Oct. 26, 2010, at A12; *see also* Charlie Savage, *Child Soldier for Al Qaeda Is Sentenced for War Crimes*, N.Y. TIMES, Nov. 2, 2010, at A13.

224. *Id.*

corpus, and the rule of law as to due process deriving from both the Constitution and international law. *Boumediene*, building on the earlier cases, made it clear that its habeas analysis was grounded on separation-of-powers principles. "[T]he Suspension Clause," it said, "is designed to protect against . . . cyclical abuses" of the writ of habeas corpus by the political branches and "ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device . . . to maintain the delicate balance of governance that is itself the surest safeguard of liberty."[225] The Court rejected the government's sovereignty-based test for habeas, stating that "questions of extraterritoriality turn on objective factors and practical concerns,"[226] setting out a three-factor test.[227] In addition, the Court looked to the full range of sources applicable to the standards to be applied in a habeas writ, recognizing the references to the Geneva Conventions and international law principles in both the UCMJ and American law.

The *Boumediene* line of cases fleshed out the standards for seeking a writ of habeas corpus, but there are still many unanswered questions. The application of habeas to detainees held indefinitely at Guantanamo or held outside the United States are pending in the courts and raise significant issues of constitutional and international law. The federal district and appellate courts have applied *Boumediene* in somewhat different ways, and the 5 to 4 majority opinion in that case will be tested in these cases.

The decision of the Obama Administration to continue a number of the measures of the Bush Administration, including military commissions, indefinite detention, and secret prisons abroad, raise, despite increased procedural safeguards, the same kind of legal and constitutional objections that the *Boumediene* line of cases asserted against Bush policies. Finally, the Obama Administration's struggle to close Guantanamo, with its attendant problems of release of detainees into the United States, trial of certain detainees in civilian courts, and trial of others before military commissions, pose political and legal issues that have yet to be resolved.

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225. Boumediene v. Bush, 128 S. Ct. 2229, 2247 (2008) (internal quotation marks omitted).

226. *Id.* at 2258.

227. *Id.* at 2259.