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De-cloaking Torture: Boumediene and the Military Commissions Act

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De-cloaking Torture: *Boumediene* and the Military Commissions Act

ALAN W. CLARKE*

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[The Report] tells the largely untold human story of what happened to detainees in our custody when the Commander-in-Chief and those under him authorized a systematic regime of torture. This story is not only written in words: it is scrawled for the rest of these individual[s]’ lives on their bodies and minds.

–Major General Anthony Taguba¹

I. INTRODUCTION: TORTURE AS A CLOAKED STATE PRACTICE

The Military Commissions Act of 2006² (MCA) marked the high tide and endgame for hiding torture.³ Its unraveling did more to uncover the

1. Dan Froomkin, *General Accuses WH of War Crimes*, WASH. POST, June 18, 2008, <http://www.washingtonpost.com/wp-dyn/content/blog/2008/06/18/BL2008061801546.html>.

2. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), enacting Chapter 47A of title 10 United States Code (codified at 10 U.S.C. §§ 948a–950w and other sections of titles 10, 18, 28, and 42).

3. I am not the first to suggest that the Administration attempted to hide torture. See, e.g., James Thuo Gathii, *Torture, Extraterritoriality, Terrorism, and International Law*, 67 ALB. L. REV. 335, 337–39 (2003). See Adam Zagorin, *One Life Inside Gitmo*, TIME, Mar. 13, 2006, at 20 (quoting Hofstra law professor Eric Friedman) for a discussion concerning the Military Commissions Act. “It would be an outrage if evidence being used to hold prisoners was extracted by unconscionable methods and that fact did not come to light in a court of law.” *Id.* Furthermore, there can no longer be doubt that what the administration euphemistically called “alternative interrogation techniques” involved torture by any reasonable definition of the term. The highly credible confidential report of February 14, 2007 by the International Committee of the Red Cross concluded, “the ill-treatment to which [fourteen *high value detainees*] were subjected while held in the CIA

Bush administration's secret interrogation practices than did the political change in Washington. International and domestic backlash against the government's embrace of harsh interrogation techniques, frequently rising to the level of torture,⁴ also played a role. However, the Supreme Court's decisions ending in *Boumediene v. Bush*⁵ played the decisive role. *Boumediene*, and the Supreme Court decisions that led up to it, made inevitable that which politics had left contingent and reversible. It also provided legal and political cover.

Through the MCA, the Bush Administration sought to prosecute non-citizen detainees outside of the United States using secret, coerced, and hearsay evidence⁶ without interference from U.S. habeas courts.⁷ Appeals were limited.⁸ The MCA also left a loophole for the use of evidence obtained by outright torture,⁹ and rendered evidence of torture immune from disclosure.¹⁰ If the Administration had succeeded, it could have hidden, or at least insulated, its coercive interrogation program. Because of *Boumediene*, these non-citizen detainees gained access to

program, either singly or in combination, constituted torture." INT'L COMM. OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN "HIGH VALUE DETAINEES" IN CIA CUSTODY 26 (2007), available at <http://www.nybooks.com/icrc-report.pdf> [hereinafter ICRC REPORT]. Finally, memoranda issued by the Office of Legal Counsel between 2002 and 2005 leave little doubt that waterboarding and other harsh techniques were used in interrogating detainees. Sam Stein, *Bush Torture Memos Released By Obama: See The Complete Documents*, HUFFINGTON POST, Apr. 16, 2009, http://www.huffingtonpost.com/2009/04/16/bush-torture-memos-releas_n_187867.html.

4. Commentary following the release of the Red Cross report has called U.S. interrogation practices "torture" and called for criminal prosecution. ICRC REPORT, *supra* note 3. Eugene Robinson, commentator for The Washington Post, for example argues: "I have believed all along that we urgently need to conduct a thorough investigation into the Bush administration's moral and legal transgressions. Now I am convinced that some kind of "truth commission" process isn't enough. Torture—even the torture of evil men—is a crime. It deserves not just to be known, but to be punished." Eugene Robinson, *Crimes That Deserve Punishment*, WASH. POST, Apr. 10, 2009, at A17.

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

6. See generally, Military Comm'n R. Evid. 304 (the Military Commission Rules of Evidence are located in Part III of the Manual for Military Commissions (2007), available at <http://www.defenselink.mil/news/MANUAL%20FOR%20MILITARY%20COMMISSIONS%202007%20signed.pdf>; Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2608 (2006) (codified at 10 U.S.C. §§ 949(a), (d)).

7. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (codified at 28 U.S.C. § 2241).

8. Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2608 (2006) (codified at 10 U.S.C. § 950(g)).

9. See *infra* Part IX.

10. *Id.*

U.S. courts, thus making disclosure of some of the most secret details¹¹ of these harsh and sometime torturous interrogations inevitable.¹² While not likely,¹³ this could expose complicit officials to civil or even criminal prosecution.¹⁴ The stakes remain high.

11. Of course *Boumediene* will not directly affect the assertions of the state secrets privilege in civil cases, which are being filed in cases arising out of the Pentagon's extraordinary rendition program. The Obama administration has continued to assert the privilege using the same arguments as the former Bush administration. See, e.g., Ronald Goldfarb, *State Secrets? Let the Courts Weigh In.*, WASH. POST, Feb. 22, 2009, at B2; Nedra Pickler & Matt Apuzzo, *Obama Backs Bush: No Rights for Bagram Prisoners*, ASSOCIATED PRESS, Feb. 21, 2009, <http://www.infowars.com/obama-backs-bush-no-rights-for-bagram-prisoners/>; Bob Egelko, *Obama's Justice Dept. in Court over Challenge to Bush Wiretap Policy*; *National Security*, S.F. CHRON., Feb. 13, 2009, at A6; Bob Egelko, *Hearing in Rendition Case Could Reveal Obama's Policy*, S.F. CHRON., Feb. 9, 2009, at A1. The U.S. government has vigorously asserted the state secrets privilege in reply to the civil lawsuits flowing out of the government's extraordinary rendition program, suggesting that much about this program remains secret. See, e.g., *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007). Had the courts continued to sustain the privilege, discovery of torture through civil litigation would be difficult, if not impossible. However, in *Mohamed v. Jeppesen Dataplan, Inc.*, the Ninth Circuit Court of Appeal rejected the administration's broad assertions of state secrets privilege and remanded that case back to the District Court to "determine what evidence is privileged and whether any such evidence is indispensable either to plaintiffs' prima facie case or to a valid defense otherwise available to Jeppesen. Only if privileged evidence is indispensable to either party should it dismiss the complaint." *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 1009 (9th Cir. 2009). It is not clear as of this writing whether the administration may appeal to the United States Supreme Court.

12. Court proceedings are recognized in international law as being indispensable in protecting against violations of non-derogable rights, such as the right to be free from torture. The Inter-American Court of Human Rights stated in an Advisory Opinion that "[h]abeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected . . . in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment." *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (Ser. A) (1987), available at http://www.corteidh.or.cr/docs/opiniones/seriea_08_ing.pdf, in Brief for Amnesty International et al. as Amici Curiae Supporting Petitioners, *Boumediene v. Bush*, 128 S. Ct. 2229 (2007) (Nos. 06-1195, 1196).

13. See *infra* Part I.

14. The War Crimes Act criminalizes various breaches of the Geneva Conventions. 18 U.S.C. § 2441 (2006). The MCA limits criminal prosecution to "grave breaches" and immunizes at least some conduct that would heretofore have been unlawful. Torture is criminalized under 18 U.S.C. § 2340A (2006). Sending persons to places where they might face torture is also prohibited. See Foreign Affairs and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (codified at 8 U.S.C. § 1231 (2006)). The Detainee Treatment Act of 2005 immunizes officials if the interrogations were "officially authorized and determined to be lawful at the time that they were conducted" and the official "did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful." Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1003, 1004, 119 Stat. 2739. Plainly, both the MCA and the DTA reduce, but do not entirely eliminate the likelihood of criminal or civil prosecution under the War Crimes Act.

To understand how and why *Boumediene v. Bush*¹⁵ greatly reduced the administration's odds of being able to hide torture, one needs first to understand the background events leading up to the Military Commissions Act of 2006, the reasons for its adoption, and its practical application to military commission trials of detainees at Guantanamo Bay. Only then can one understand the significance of extending the constitutional writ of habeas corpus to detainees at Guantanamo.

Legislation rarely finds itself enmeshed in covering up earlier wrongdoing. It may be that many in Congress did not so intend. However, consequences matter. One consequence of the MCA—had it succeeded without interference from the U.S. court system—would have been to insulate government officials, high and low, from public knowledge of the consequences of torture and cruel, inhuman, and degrading interrogations of detainees. Indeed, the current administration's decision to halt the military commissions¹⁶ recognizes that *Boumediene* changes both political and legal reality. Once disclosure became inevitable, the flaws in the military commissions demonstrated in this article also became far more visible. With that visibility came both domestic and international political embarrassment that would have followed no matter who had become president. Thus *Boumediene* radically shifted the political reality as well as the legal landscape. If this is so—and it is at least arguably so—*Boumediene* may well prove to be one of the most important cases ever.

This case is proving to have profound effects on the detainees as courts following *Boumediene* are slowly¹⁷ starting to order the release of

15. *Boumediene v. Bush* 128 S. Ct. 2229 (2008).

16. On May 1, 2009, the New York Times reported that the Obama administration was moving towards reinstating the military commissions for at least some of the remaining detainees at Guantanamo Bay. William Glaberson, *U.S. May Revive Guantanamo Military Courts*, N.Y. TIMES, May 1, 2009, at A1, available at <http://www.nytimes.com/2009/05/02/us/politics/02gitmo.html?em>. Administration lawyers are concerned that, because of harsh interrogation techniques and the need to use hearsay evidence, they would not be able to effectively prosecute in federal district courts. *Id.*

17. Amnesty International vigorously criticizes the slow pace of habeas corpus relief for Guantanamo detainees, complaining that “10 months after the U.S. Supreme Court ruled, in *Boumediene v. Bush*, on 12 June 2008, that the detainees were entitled to a prompt habeas corpus hearing to challenge the lawfulness of their detention, only a handful of them have received a hearing on the merits of their challenges. Moreover, indefinite detention has continued even in cases where judges have ordered the immediate release of detainees after such hearings.” *USA: Detainees Continue to Bear Costs of Delay and Lack of Remedy*, AMNESTY INT’L REPORT 2009 (Amnesty International), Apr. 9,

Guantanamo detainees pursuant to writs of habeas corpus.¹⁸ The issue for both the government and detainees is not just that conviction rates were always likely to be higher in military commissions with fewer fair trial protections. Even those whom the United States seeks to deport rather than try are affected. This is because, in some cases, the United States holds detainees it cannot justifiably keep and cannot easily let go. At least one federal district court has tentatively ruled that the government cannot deport detainees held in Guantanamo Bay, Cuba, or Bagram air base in Afghanistan to their home countries where they face torture.¹⁹ Another ordered the release of Chinese Uyghurs, apparently innocent refugees and no longer thought to be enemy combatants, who were swept up in the war against terror.²⁰ The Court of Appeals for the District of Columbia reversed and held that notwithstanding their eligibility for release on a writ of habeas corpus these people could be excluded from the United States under immigration laws.²¹ Because no

2009, at 1, <http://www.amnesty.org/en/library/asset/AMR51/050/2009/en/dfccba17-8b5a-430a-9059-af374d5d8c2d/amr510502009eng.pdf>.

18. Federal District Courts in the District of Columbia have issued writs of habeas corpus ordering the release of some of the detainees at Guantanamo Bay. It remains to be seen how these cases may turn out on appeal but it seems likely that at least some detainees will ultimately secure relief. For example, on January 13, 2009, District Judge Richard Leon ordered the release of detainee Mohammed El Gharani, a Chadian citizen born in Saudi Arabia. The Government failed to establish by a preponderance of the evidence that he was an enemy combatant. Judge Leon wrote:

Simply stated, a mosaic of tiles bearing images this murky reveals nothing about the petitioner with sufficient clarity, either individually or collectively, that can be relied upon by this Court. Accordingly, the Court must, and will, GRANT the detainee's petition for a writ of habeas corpus and order the respondents to take all necessary and appropriate diplomatic steps to facilitate his release forthwith.

El Gharani v. Bush, 593 F. Supp. 2d 144 (D.D.C. Jan. 14, 2009), available at <http://jurist.law.pitt.edu/paperchase/2009/01/federal-judge-grants-guantanamo.php>. Judge Leon had previously ordered the release of five detainees while allowing the government to continue to hold a sixth. Jaclyn Belczyk, *Federal Judge Orders Five Guantanamo Detainees Released*, JURIST, Nov. 20, 2008, <http://jurist.law.pitt.edu/paperchase/2008/11/federal-judge-orders-five-guantanamo.php>.

19. Josh White, *Judge Orders U.S. Not to Transfer Tunisian Detainee*, WASH. POST, Oct. 10, 2007, at A11. See John R. Crook ed., *Contemporary Practice of the United States Relating to International Law: Developments Regarding the Military Commissions Act*, 101 AM. J. INT'L. L. 636, 659–61 (2007), for other instances where the U.S. has sought to send Guantanamo detainees to places where they might be tortured.

20. District Judge Urbina, of the Federal District Court of the District of Columbia, ordered the release of seventeen of the Uyghur detainees. Joe Shaulis, *DC Circuit Extends Stay of Uyghurs Release Pending Expedited Appeal*, JURIST, Oct. 21, 2008, <http://jurist.law.pitt.edu/paperchase/2008/10/dc-circuit-extends-stay-of-uyghurs.php>. Three of these Uyghur detainees are now seeking asylum in Canada with support from Canadian sponsors. Safiya Boucaud, *Guantanamo Uyghur Detainees Seek Asylum in Canada*, JURIST, Feb. 3, 2009, <http://jurist.law.pitt.edu/paperchase/2009/02/guantanamo-uyghur-detainees-seek-asylum.php>. This order was stayed by the Court of Appeals for the District of Columbia with Judge Rogers dissenting. *Id.*

21. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).

other country has yet to take them, and because there is apparently a realistic fear that they would be tortured if returned to China,²² the practical effect of this ruling is to leave their continued and indefinite detention to the political branch. If upheld, this ruling means that for at least some people the ancient and constitutional remedy of habeas corpus is meaningless. The political question becomes: will the United States continue to hold innocent people, wrongfully swept up in the war against terror, in detention simply because no other nation will take them? For the courts, the question becomes: are there constitutionally wrongful detentions that are nonetheless without remedy? Even so, the Uyghurs' case represents a small part of the problem ultimately addressed by *Boumediene*, and it will undoubtedly be resolved in the political arena precisely because of what *Boumediene* represents.

Finally, the Bush administration claimed the right to detain persons it designated as “enemy combatants” until the end of hostilities. This potential life sentence even applies to those who are completely innocent of any crime.²³ Recourse to a civil habeas court alters that by permitting release in appropriate cases.²⁴ Thus, the problem with lack of civilian court access before *Boumediene* applied to most, if not all, detainees at Guantanamo Bay, Cuba, and the broader fallout from this case will likely affect all—even the Uyghurs.

22. *Id.* at 1024.

23. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), *vacated and dismissed by* *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007). Judge Green wrote at 465–466:

The government asserts the right to detain an “enemy combatant” until the war on terrorism has concluded or until the Executive, in its sole discretion, has determined that the individual no longer poses a threat to national security. The government, however, has been unable to inform the Court how long it believes the war on terrorism will last. Indeed, the government cannot even articulate at this moment how it will determine when the war on terrorism has ended. At a minimum, the government has conceded that the war could last several generations, thereby making it possible, if not likely, that “enemy combatants” will be subject to terms of life imprisonment at Guantanamo Bay. Short of the death penalty, life imprisonment is the ultimate deprivation of liberty, and the uncertainty of whether the war on terror—and thus the period of incarceration—will last a lifetime may be even worse than if the detainees had been tried, convicted, and definitively sentenced to a fixed term.

In re Guantanamo Detainee Cases, 355 F. Supp. 2d. at 465–66 (citations omitted).

24. The inability of the Combatant Status Review Tribunals to release a detainee is one of the reasons for the court’s decision in *Boumediene*. *See* *Boumediene v. Bush*, 476 F.3d at 1006.

A. *The Fact of Torture: What We Know and What We Can Infer*

The Bush administration consistently attempted to move the law in the direction of permitting torture, in part by blurring the lines between torture and cruel, inhuman, and degrading treatment. By doing so, they also provided legal cover for those who have engaged in either torture or cruel, inhuman, or degrading treatment.²⁵ As Christopher Kutz pointed out, even if the torture lawyers of the Office of Legal Counsel (OLC) fell short of persuading the courts to create a judicial space for torture, the very existence of the torture lawyers' opinions creates an "advice of counsel" defense for senior administration officials.²⁶ They also create a defense for lower-level operatives, even those who may never have heard of the OLC opinions and who therefore lack any advice of counsel defense. A person merely following orders is not criminally responsible in the absence of a manifestly unlawful command. Thus, as David Luban points out, "skilled legal counsel can point to the Office of Legal Counsel and Department of Defense memos" as evidence that a CIA agent's or a soldier's conduct could not have been manifestly unlawful.²⁷ Moreover, recent revelations make it clear that the National Security Council, with President Bush's explicit approval,²⁸ micromanaged the interrogation²⁹ of "high-value" detainees right down to dictating the details of waterboarding, a practice most Americans,³⁰ as well as most

25. Jonathan Hafetz argues:

Since September 11, the Bush Administration has developed an unprecedented global detention system, designed to operate outside any established legal framework or independent oversight. By evading existing constraints on custodial interrogations under domestic and international law, this detention system has undermined the United States' longstanding commitment to the prohibition against torture and other abuse.

Jonathan Hafetz, *Torture, Judicial Review and the Regulation of Custodial Interrogations*, 62 N.Y.U. ANN. SURV. AM. L. 433 (2007).

26. Christopher Kutz, *The Lawyers Know Sin: Complicity in Torture*, in *THE TORTURE DEBATE IN AMERICA* 241, 241–46 (Karen J. Greenberg ed., 2006).

27. David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1427 (2005), reprinted in *THE TORTURE DEBATE IN AMERICA* 35, 55 (Karen J. Greenberg ed., 2006).

28. Jan Crawford Greenburg, Howard L. Rosenberg & Ariane de Vogue, *Bush Aware of Advisors' Interrogation Talks*, ABC NEWS, Apr. 11, 2008, <http://abcnews.go.com/TheLaw/LawPolitics/story?id=4635175&page=1b>.

29. Press Release, *Highest-Level Bush Administration Officials Approved, Discussed U.S. Post-9/11 Torture Program*, CTR. CONST. RTS., Apr. 10, 2008, <http://ccrjustice.org/newsroom/press-releases/highest-level-bush-administration-officials-approved-discussed-post-911-torture-program>.

30. See, e.g., *Poll Results: Waterboarding is Torture*, CNN.com, Nov. 6, 2007, <http://www.cnn.com/2007/POLITICS/11/06/waterboard.poll/>.

other people throughout the world,³¹ consider a form of torture. As I point out in *Creating a Torture Culture*, a person following even unlawful orders is protected from prosecution if those orders were not “manifestly unlawful.” This makes prosecution and conviction difficult for the added reason that it would be very hard to prove that the orders of the President together with the support of the entire National Security Council, including the Attorney General, were “manifestly unlawful.”³²

However, difficult does not mean impossible. Jordan Paust argues that the OLC’s legal advice was “manifestly erroneous”³³ and that administration officials up to former President Bush should be prosecuted.³⁴ Others argue that the recently released secret OLC memoranda demolishes the “good faith” excuse.³⁵ Moreover, the leak of a confidential report by the International Committee of the Red Cross demonstrates that not only was the treatment of detainees far worse than previously reported, but that the Red Cross calls for prosecution of those responsible.³⁶ This

31. One poll shows that 59% of people around the world reject torture to elicit information even if it would save innocent lives. Opposition to torture is strongest in Europe generally—81% of Italians are opposed to the practice, as are 72% of British and 58% of American. The poll had an N=27,407 with margins of error varying by country from 2.5 to 4 percent. *World Citizens Reject Torture, Global Poll Suggests*, BBC NEWS, July 26, 2007, http://www.bbc.co.uk/pressoffice/pressreleases/stories/2006/10_october/19/poll.shtml. 74% of Canadians agreed that “[c]lear rules against torture should be maintained,” while only 22% thought “[g]overnments should now be allowed to use some degree of torture.” *Torture is Rejected, Even in Struggle against Terrorism*, BBC NEWS, http://www.globescan.com/news_archives/bbctorture06/detail.html (providing detailed country by country results from this worldwide poll) (last visited Sept. 20, 2009).

32. Alan Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT’L L. REV. 1, 46–50 (2008).

33. Jordan J. Paust, Op-Ed., *The Second Bybee Memo: A Smoking Gun*, JURIST, Apr. 22, 2009, <http://jurist.law.pitt.edu/forumy/2009/04/second-bybee-memo-smoking-gun.php> (arguing that the second Bybee memo provides evidence of “serial criminality” and that the advice was “manifestly erroneous” as to waterboarding and placing people in small boxes).

34. Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 Val. U. L. Rev. 1535, 1565–67 (2009) (setting out the bases for prosecuting torture and other harsh interrogations and arguing that members of the Bush administration—from lawyers in the Department of Justice to members of the National Security Council’s principals committee—were criminally involved in committing torture and that President Bush approved).

35. Posting of Brian Tamanaha, *The Collapse of the “Good Faith” Excuse for Yoo (Bybee, Delahunty)*, to BALKINIZATION, <http://balkin.blogspot.com/2009/03/collapse-of-good-faith-excuse-for-yoo.html> (Mar. 5, 2009).

36. Red Cross, *supra* note 3, at 27 (recommending “that the U.S. authorities investigate all allegations of ill-treatment and take steps to punish the perpetrators, where appropriate, and to prevent such abuses from happening again”).

report details highly credible allegations of torture as to fourteen “high value” detainees. A criminal complaint was filed against former Bush administration lawyers in Spain’s Audiencia Nacional asserting universal jurisdiction for crimes against humanity.³⁷ Prosecutors there recommended against going forward with a prosecution, and the case has now been referred to an investigating magistrate.³⁸ Law professor Scott Horton argues that the ICRC report calling U.S. interrogations torture “makes it far more likely that the Spanish prosecution will go forward.”³⁹ Moreover, other pressures for prosecution continue to mount,⁴⁰ and prosecution under the universal jurisdiction doctrine remains possible.⁴¹

Nonetheless, the U.S. is unlikely to extradite anyone to Spain, and the Obama administration will likely continue to resist any such prosecution, as it will be hesitant to see such a precedent affecting not only high-level members of the preceding administration but potentially the former president as well.⁴²

37. Andrew Gilmore, *Spain Judge Weighing Probe of U.S. Lawyers Who Promoted Guantanamo: Reports*, JURIST, Mar. 28, 2009, <http://jurist.law.pitt.edu/paperchase/2009/03/spain-judge-weighing-probe-of-us.php>.

38. Tere Miller-Sparrer, *Spain Court Assigns New Judge to Probe U.S. Officials Who Backed Guantanamo*, JURIST, Apr. 24, 2009, <http://jurist.law.pitt.edu/paperchase/2009/04/spain-court-assigns-new-judge-to-probe.php>.

39. Scott Horton, *Investigate and Punish the Perpetrators*, HARPERS, Apr. 6, 2009, <http://harpers.org/archive/2009/04/hbc-90004701>.

40. The U.N. special rapporteur on torture, Manfred Nowak, said on April 24, 2009, that the Department of Justice is obligated under the Convention Against Torture to prosecute lawyers who drafted the recently released memos outlining controversial interrogation techniques for the CIA and providing the legal rationale. Steve Czajkowski, *U.S. Must Prosecute CIA Interrogation Memo Authors: U.N. Torture Investigator*, JURIST, Apr. 25, 2009, <http://jurist.law.pitt.edu/paperchase/2009/04/us-must-prosecute-cia-interrogation.php>. See also Lucas Tanglen, *U.S. Must Investigate Bush-Era CIA Interrogators: U.N. Torture Expert*, JURIST, Apr. 19, 2009, <http://jurist.law.pitt.edu/paperchase/2009/04/us-must-investigate-bush-era-cia.php>; Veronika Oleksyn, *U.N. Torture Envoy: U.S. Must Prosecute Bush Lawyers*, ASSOCIATED PRESS, Apr. 24, 2009, <http://abcnews.go.com/International/wireStory?id=7420160>.

41. Jason Webb, *Spain Could Open Second Guantanamo Torture Probe*, REUTERS, May 5, 2009, <http://www.reuters.com/article/latestCrisis/idUSL534094> (reporting that Spanish Judge Eloy Velasco has asked U.S. authorities to confirm whether an investigation has begun into allegations of officially approved torture. This is a formality as it is known that no U.S. prosecution exists, but it would be a necessary step as the Spanish Court cannot act if domestic U.S. courts proceed. Another judge, Baltazar Garzon has launched a separate probe into the allegations swirling around the treatment of detainees at Guantanamo Bay).

42. As columnist Thomas L. Friedman has argued:

The president’s decision to expose but not prosecute those responsible for this policy is surely unsatisfying; some of this abuse involved sheer brutality that had nothing to do with clear and present dangers. Then why justify the Obama compromise? Two reasons: the first is that because justice taken to its logical end here would likely require bringing George W. Bush, Donald Rumsfeld, and other senior officials to trial, which would rip our country apart; and the other is that Al Qaeda truly was a unique enemy, and the post-9/11 era a deeply confounding war. . . .

Moreover, these formerly higher-level officials who generated the orders will undoubtedly argue that they relied in good faith on competent legal counsel.⁴³ The lawyers involved argue that they gave good faith advice in conditions of radical uncertainty.⁴⁴ And the followers of such advice will argue good faith compliance with orders vetted by competent counsel that were not manifestly unlawful. The issue that any court, domestic or foreign, must confront will be whether such orders were so manifestly unlawful as to render the giving or taking of such advice illusory. Plainly it will be difficult for any court, domestic or foreign, to conclude that orders running from the former President, after relying on legal advice from the Department of Justice, were either in bad faith or manifestly unlawful. This is a political fact rather than a strictly legal conclusion; prosecutions leading to the former U.S. president remain problematic.⁴⁵

Thomas L. Friedman, Op-Ed., *A Torturous Compromise*, N.Y. TIMES, Apr. 29, 2009 at A23.

43. Advice of counsel can provide a defense to the mental state required for some crimes. The issue here would be whether the advice of counsel, scrupulously followed, would render the interrogator's conduct "not manifestly unlawful." The general rule has been stated:

(1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report.

United States v. Van Allen, 524 F.3d 814, 823 (7th Cir. 2008). While not a certainty, one can argue that the general rule applies here. This fact likely provides a strong reason beyond politics for the Obama administration's position that C.I.A. interrogators should not be prosecuted so long as they followed the legal advice of the Department of Justice. Editorial, *Taking on Torture: An Investigation Into Abuse of Suspected Terrorists is Vital, But It Must be Conducted with Care*, L.A. TIMES, Apr. 27, 2009, at A20.

44. Former head of the Office of Legal Counsel, Jay Bybee, who signed off on some of the most controversial of the "torture memos" has said:

The central question for lawyers was a narrow one; locate, under the statutory definition, the thin line between harsh treatment of a high-ranking Al Qaeda terrorist that is not torture and harsh treatment that is. I believed at the time, and continue to believe today, that the conclusions were legally correct. . . . The legal question was and is difficult And the stakes for the country were significant no matter what our opinion. In that context, we gave our best, honest advice, based on our *good-faith analysis* of the law.

Neil A. Lewis, *Official Defends Signing Interrogation Memos*, N.Y. TIMES, Apr. 28, 2009, at A12, available at <http://www.nytimes.com/2009/04/29/us/politics/29bybee.html?scp=1&sq=bybee%20good%20faith&st=Search> (emphasis added).

45. Bar complaints against former administration lawyers may be another matter. Carrie Johnson reports in the Washington Post that unnamed sources within the Department

Finally, one may reasonably ask: how could low-level agents second-guess the lawfulness of practices approved by some of the administration's senior lawyers and indeed by the administration itself? How could such a practice be "manifestly unlawful" to them and not their superiors? These memoranda, and the administration's admission that it approved of the practices used, by their simple existence, create uncertainty, which in turn facilitates the argument that the interrogations could not have been "manifestly unlawful."

The Bush administration was forced, by the practical need to protect its agents from prosecution,⁴⁶ to admit some fraction of its practices; that does not, however, mean that the former administration would want all the details to be made public or to have anyone, civilian courts included, learn of the scope and intensity of what it euphemistically calls its "alternative interrogation techniques."

As Jonathan Hafetz points out:

[A]s a series of government memoranda and reports suggest, post-September 11 detentions have been motivated in large part by the desire to avoid established restrictions on custodial interrogations and, in turn, to keep the methods of those interrogations secret. The resulting abuses are now legion, including the torture and other mistreatment at the Guantanamo Bay Naval Base, at Abu Ghraib in Iraq, and at the network of CIA-run "black sites" or secret prisons, where some of the most coercive interrogations have been carried out.⁴⁷

Moreover, notwithstanding the mounting pressures,⁴⁸ the new administration may also not be enthusiastic about full disclosure. Indeed, in light of the continued assertion of the state secrets privilege

of Justice's Office of Professional Responsibility say that an early draft of its investigation recommended referrals for disciplinary action against at least two former Office of Legal Counsel lawyers: Jay S. Bybee and John C. Yoo. Carrie Johnson, *Democrats Seek More Interrogation Documents*, WASH. POST, May 5, 2009, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/04/AR2009050403510.html?hpid=more-headlines>.

46. See *infra* Part X.A (noting that war crimes prosecutions remain unlikely notwithstanding *Boumediene*; and pointing out that recent disclosures of the details of the methods by which "high value" detainees were interrogated, including the use of waterboarding, and the fact that these methods emanated from the National Security Council and ultimately from President Bush himself work to lessen the prospect of such prosecutions by making it harder to demonstrate that any such order was "manifestly unlawful").

47. Hafetz, *supra* note 25, at 434.

48. See, e.g., Johnson, *supra* note 45 (reporting that "House Judiciary Committee Chairman John Conyers (D-Mich.) and House Foreign Affairs Committee Chairman Howard L. Berman (D-Calif.) asked officials at the State Dept. and National Archives to produce a May 2005 memo[.]" by Philip D. Zelikow who wrote in a blog, "that he dissented from conclusions by the Justice Department Office of Legal Counsel four years ago that the [interrogation] methods were legal. Additionally, he wrote that . . . White House officials . . . 'attempted to collect and destroy all copies of my memo'").

by the Obama administration in civil cases alleging torture,⁴⁹ it appears that the present administration is reluctant to open new avenues that would make full disclosure more likely.

Furthermore, the present administration has continued the Bush administration policy of maintaining that the writ of habeas corpus extends no further than Guantanamo Bay, Cuba. The administration has told a federal judge that detainees in Afghanistan cannot seek release in the U.S. civilian court system.⁵⁰ The District Judge rejected the administration's position,⁵¹ but the administration has sought certification for an interlocutory appeal.⁵² On issue after issue, disclosure has come involuntarily and grudgingly. Government admits what it must⁵³ and continues to obscure what it can. The importance of this point cannot be overstated. For all of its supposed openness, the Obama administration has no interest in full disclosure. Such would invite Republican resistance⁵⁴ and would open the United States to even greater international pressure. This underlines *Boumediene's* importance in uncovering and exposing torture.

49. See sources cited *supra* note 11.

50. Charlie Savage, *Embracing Bush Argument, Obama Upholds Detainee Policy in Afghanistan*, N.Y. TIMES, Feb. 21, 2009 at A6.

51. *Al Maqaleh v. Gates*, No. 06-1669, 604 F. Supp. 205 (D.D.C. July 18, 2007). See *infra*, notes 278–279 and accompanying text (discussing the importance of this case and the issues that it will raise on appeal).

52. Andrew Gilmore, *Obama Administration to Appeal Bagram Detainees Habeas Ruling*, JURIST, Apr. 11, 2009, <http://jurist.law.pitt.edu/paperchase/2009/04/obama-administration-to-appeal-bagram.php>.

53. Even the recent release of secret memos authorizing waterboarding and other harsh interrogation techniques was likely not voluntary. Secretary of Defense Robert Gates is reported to have supported the disclosure notwithstanding his assessment that it might put U.S. forces at risk because disclosure was inevitable. Thom Shanker, *Gates Voices Concerns About Release of Interrogation Memos*, N.Y. TIMES, Apr. 24, 2009 at A14; *Administration, Senate Leaders Weigh in Against Independent Probe of Bush Officials*, BULLETIN'S FRONTRUNNER, Apr. 24, 2009.

54. Professor Benjamin Davis of the University of Toledo College of Law writes that members of the Senate threatened “the nominations of Dawn Johnsen to head the Office of Legal Counsel and [Dean]Harold Hongju Koh to be Department of State Legal Adviser,” because of the threatened release of still classified documents from the Bush administration relating to harsh interrogations. Benjamin Davis, *America's Moment of Truth on Torture*, JURIST, Apr. 10, 2009, <http://jurist.law.pitt.edu/forumy/2009/04/american-moment-of-truth-on-torture.php>. Some senators are apparently threatening to “go nuclear.” *Id.* Similarly, Professor Marjorie Cohn of Thomas Jefferson School of Law argues, “Obama fears that holding Team Bush to account will risk alienating Republicans whom he still seeks to win over.” *War Criminals, Including Their Lawyers, Must Be Prosecuted*, <http://www.marjoriecohn.com/2009/02/war-criminals-including-their-lawyers.html> (Feb. 19, 2009, 17:29).

This Article then accepts the proposition that, despite denials that the U.S. has tortured,⁵⁵ that it, at least until the end of the Bush administration,⁵⁶ continued to use abusive interrogation practices, and continued to protect itself by sending people offshore⁵⁷ for unfair trials, thereby enabling them to hide abusive practices. Right up until its last days, the Bush administration continued to pursue policies that insulated officials from allegations of torture and other cruel, inhuman, and degrading interrogation practices.⁵⁸ It also accepts that the Obama administration has shown tepid interest in uncovering or disclosing its predecessor's conduct.⁵⁹

55. A FBI report on Guantanamo interrogations observed:

On a couple of occasions [sic], I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated [sic] on themselves [sic], and had been left there for 18–24 hours or more. On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MP's what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occasion [sic], the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious [sic] on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occasion [sic], not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.

Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 474 (2005), *vacated and dismissed sub nom*, Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007), *decided* 128 S. Ct. 2229 (2008).

56. It appears that the CIA has, since the inauguration, adopted new interrogation procedures that discontinue so-called enhanced interrogation techniques. The agency has also closed secret prisons or black sites around the world. At the same time the CIA has acknowledged the destruction of ninety-two videotapes of interrogations of detained suspected terrorists. Brian Jackson, *CIA Outlines New Detention and Interrogation Policies*, JURIST, Apr. 10, 2009, <http://jurist.law.pitt.edu/paperchase/2009/04/cia-outlines-new-detention-and.php>.

57. The practice of sending and holding people at Guantanamo Bay, Cuba was controversial enough to spark debate within the Bush administration. Then Secretary of State Condoleezza Rice, former Secretary of State Colin Powell, and Secretary of Defense Robert Gates all argued in favor of closing it down and sending detainees elsewhere. Vice President Dick Cheney and the Department of Justice sought to keep Guantanamo Bay open. Crook, *supra* note 19, at 660–61.

58. As Richard Bilder and Detlev Vagts point out: “even if [the OLC legal] memoranda somehow have the effect of protecting persons involved in torture or war crimes from prosecution under U.S. law, they may not provide protection from prosecution or liability in international tribunals or the courts of other countries.” Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM J. INT’L L. 689, 694 (2004), *reprinted in* THE TORTURE DEBATE IN AMERICA 151, 154 (Karen J. Greenberg ed., 2006).

59. The ACLU responded to the continued assertion of the state secrets privilege in the Jeppesen case:

We are shocked and deeply disappointed that the Justice Department has chosen to continue the Bush administration's practice of dodging judicial scrutiny of

Finally, intent is in play. Some political actors, not all, do have things to hide⁶⁰ and the consequence of the MCA would have been to insulate those practices from scrutiny. While many in Congress may have intended well, the consequences of this legislation were not benign.

According to its defenders, the purpose of the MCA (as with all earlier actions) was and is to protect national security and specifically to protect sensitive information. This Article argues that, whatever its intent, its actual consequences are very different. Indeed, if protection of sensitive information was all that was necessary, the MCA would look very different and its ability to hide torture would be less extreme. As we will see, the MCA tilted the balance far beyond what would be necessary for protecting national secrets; it hides torture. *Boumediene* readdresses that imbalance and opens the way for disclosure.

Context is critical to this analysis. When one views the rules formally and in isolation, the protection of national security and important state secrets may seem the plausible goal. This is, however, superficial and pretextual. When we look at the consequences of one Administration move after another, we can see the MCA endgame for what it is: the final move in a series to protect and screen from scrutiny a U.S. "torture culture."

To see why this is so will require detailed review of the U.S. response to the attacks of September 11, 2001. This paper maintains that the MCA prevented disclosure of abusive interrogation practices⁶¹ that many

extraordinary rendition and torture. This was an opportunity for the new administration to act on its condemnation of torture and rendition, but instead it has chosen to stay the course. Now we must hope that the court will assert its independence by rejecting the government's false claims of state secrets and allowing the victims of torture and rendition their day in court.

Press Release, ACLU, Justice Department Stands behind Bush Secrecy in Extraordinary Rendition Case (Feb. 9, 2009), <http://aclu.org/safefree/torture/38695prs20090209.html>. The Ninth Circuit Court of Appeals rejected the administration's state secrets claim and it is not known at this time whether the administration will appeal. See sources cited *supra* note 11.

60. See sources cited *supra* note 11.

61. See, e.g., *CIA Admits Waterboarding Inmates*, BBC NEWS, Feb. 5, 2008, <http://news.bbc.co.uk/1/hi/world/americas/7229169.stm>; see also, Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 90 n.5 (2007). CIA officials, speaking off the record, have identified these as officially authorized methods. See, Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1322866>; Dana Priest, *Covert CIA Program Withstands New Furor: Anti-Terror Effort Continues to Grow*, WASH. POST, Dec.

people consider torture.⁶² It infers that much more is unknown about these abusive practices.⁶³ It assumes that, if we did know, we would be shocked. It infers that the former Bush administration would not want the world to discover all, and that the present administration will have to be pushed if full disclosure is to occur.

B. Structure of the Argument

Part II begins with a few more reasons why *Boumediene* is so important. By removing the MCA's habeas stripping provisions it exposes these cases to review, putting the torture issue at the end of a series of moves into the endgame.

Part III addresses the early Administration's response to the attacks of September 11, 2001 with a particular focus on the effect of the Joint Resolution by Congress for the Authorization for the Use of Military Force and the broad assumptions made by those who responded during this period. This response prepared the way for the Administration to establish a "torture culture." Part IV delves into the first military commissions, why they were so problematic, and why they eventually ran into trouble. Part V provides the legal reasoning behind the Administration's many moves toward a "torture culture" and Part VI

30, 2005, at A1; Dana Priest, *Inside the CIA Officials Relieved Secret Is Shared*, WASH. POST, Sept. 7, 2006, at A17.

62. *Poll Results: Waterboarding is Torture*, *supra* note 30.

63. The fact that then Attorney General nominee (Attorney General in the Bush administration following Alberto Gonzales) Michael Mukasey refused to call waterboarding "torture" has led to speculation that he did not want to get into the position of calling a technique that our forces have in fact used to be torture, because that would then put him in the position of having to decide whether or not to prosecute under the War Crimes Act, 18 U.S.C. § 2441, or under the Anti-torture act, 18 U.S.C. § 2340. The United States prosecuted waterboarding as a war crime when carried out by others during World War II. *See, e.g.*, Philip Shenon, *Senate Committee Approves Mukasey Nomination*, N.Y. TIMES, Nov. 7, 2007, at A22. It is widely thought that the U.S. has waterboarded people and that the highest levels of the administration approved the technique. The U.S. did not invent the technique, which was called "tortura del aqua," or water torture, during the Spanish Inquisition. Administration officials deny that its practices are similar, claiming that the present practice is subject to strict safeguards and does not involve water coming into the lungs. Dan Eggen, *Justice Official Defends Rough CIA Interrogations*, WASH. POST, Feb. 17, 2008, at A3.

The French used waterboarding in fighting the Algerian insurgency in the 1950s. French journalist Henri Alleg who was reporting on the war in Algeria describes waterboarding:

I was put on a plank, on a board, fastened to it and taken to a tap [water faucet]. And my face was covered with a rag. Very quickly, the rag was completely full of water. You have the impression of being drowned. And the water ran all over my face. I couldn't breathe. It's a terrible, terrible impression of torture and of death, being near death.

Amy Goodman, *A Vote for Mukasey is a Vote for Torture*, DEMOCRACY NOW, http://www.truthdig.com/report/item/20071106_a_vote_for_mukasey_is_a_vote_for_torture/.

follows with the initial judicial response limiting the effect of much of what the Administration had sought to accomplish to that point. The Administration's response to the Courts exposes the "torture culture" for what it is. Part VII introduces the Combatant Status Review Tribunals and the Detainee Treatment Act of 2005, which attempted to undo the Supreme Court's work. It is at this point that we can clearly see the scramble to hide torture.

In Part VIII, we see the Supreme Court again setting rules that, if allowed to play out, would have exposed the torture regime as it then existed. This then is the context leading up to Part IX, *How the Military Commissions Act Cloaked Torture*, and is the reason for proceeding through so much recent history. It is at this point that we can see this legislation as the last major move of a waning Administration focused on finally cloaking torture. It is in this section that we review how the rules will likely work once military commissions actually begin to try detainees, and how these rules facilitate torture, and insulate coercive interrogation practices. Finally, in Part X, we show how *Boumediene* alters the situation such that no administration can any longer effectively hide torture. Whatever President Obama's political leanings, *Boumediene* opened up the process and made uncovering the prior administration's use of harsh interrogation techniques inevitable. Whether *Boumediene* simply provided political cover for what the Obama administration already wanted to do, or forced its hand, is irrelevant. Either way, *Boumediene* pushes strongly in the direction of more openness.

II. THE ISSUE'S IMMEDIATE IMPORTANCE

At first, the United States Supreme Court denied certiorari in *Boumediene v. Bush*.⁶⁴ It later changed course after two votes (Justices Kennedy and Stevens) switched.⁶⁵ The wording of the order itself demonstrated the importance of the case in that it mentioned two pending lower appeals court decisions and forewarned that additional briefing would be required.⁶⁶ Ordinarily, the U.S. Supreme Court prefers

64. *Boumediene v. Bush*, 549 U.S. 1328 (2007) (*cert. denied*).

65. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (*cert. granted*).

66. The order read:

Petitions for rehearing granted. Orders entered April 2, 2007, denying the petition for writ of certiorari vacated. Petition for writ of certiorari granted. The case is consolidated and a total of one hour is allotted for oral argument. As it would be of material assistance to consult any decision in *Bismullah v. Gates*,

to allow an important issue to percolate through the lower courts so that they will have the benefit of lower court reasoning as well as a fully developed and argued record. Moreover, the Court rarely takes on a case before it is fully exhausted, as sometimes events transpire in the courts below that moot the necessity for Supreme Court review. That notwithstanding, at least five justices were apparently concerned enough about the unfairness of the still unfolding process that they were willing to take the case even before exhaustion of available remedies.⁶⁷ The Court not only cut off having the military's process run its course, it also cut off percolation of the issues through the lower courts. Reversals of a denial of certiorari are unquestionably rare,⁶⁸ and they are rarer still where the Court has legitimate reasons, based on sound institutional practice, to wait.

An affidavit filed with the Supreme Court by Lt. Col. Stephen Abraham,⁶⁹ detailing just how much of a sham⁷⁰ the Combatant Status

No. 06-1197, and *Parhat v. Gates*, No. 06-1397, currently pending in the United States Court of Appeals for the District of Columbia Circuit, supplemental briefing will be scheduled upon the issuance of any decision in those cases.

Boumediene v. Bush, 127 S. Ct. 3078 (2007). In *Bismullah v. Gates*, the Court of Appeals ultimately gave "guidance as to what evidence can be made part of the record on review and what access the detainees can have to counsel and to classified information." *Boumediene*, 128 S. Ct. at 2263. *Boumediene* went on to say, "Under the circumstances we believe the costs of further delay substantially outweigh any benefits of remanding to the Court of Appeals to consider the issue it did not address in these cases." *Id.* at 87.

67. The Statement of Justice Stevens and Justice Kennedy respecting the denial of certiorari, said in part:

Despite the obvious importance of the issues raised in these cases, we are persuaded that traditional rules governing our decision of constitutional questions, and our practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus, make it appropriate to deny these petitions at this time. However, "[t]his Court has frequently recognized that the policy underlying the exhaustion-of-remedies doctrine does not require the exhaustion of inadequate remedies." If petitioners later seek to establish that the Government has unreasonably delayed proceedings under the Detainee Treatment Act of 2005, Tit. X, 119 Stat. 2739, or some other and ongoing injury, alternative means exist for us to consider our jurisdiction over the allegations made by petitioners before the Court of Appeals. Were the Government to take additional steps to prejudice the position of petitioners in seeking review in this Court, "courts of competent jurisdiction," including this Court, "should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised.

Boumediene v. Bush, 549 U.S. 1328 (2007) (citations omitted).

68. On April 26, 2007, Justice Roberts denied an application for an extension of time for a petition to rehear the order denying certiorari saying that "This most extraordinary relief will not be granted unless there is a 'reasonable likelihood of this Court's reversing its previous position and granting certiorari.'" Plainly, Chief Justice Roberts did not think reversal likely. *Boumediene v. Bush*, 550 U.S. 1301, 1302 (2007) (quoting *Richmond v. Arizona*, 434 U.S. 1323 (1977)).

69. Abraham "described a haphazard, inconsistent system of presenting at-times classified intelligence to military officers assigned specifically to serve at Guantanamo,"

Review Tribunals⁷¹ (CSRTs) were in practice, may have influenced this remarkable turnaround. (CSRTs came relatively late in the process in response to adverse Supreme Court decisions,⁷² and are discussed more fully below).

Boumediene drew some forty-nine briefs, including amici briefs⁷³ from: the American Bar Association; Canadian Parliamentarians and Canadian Professors of Law; Arlen Specter, Ranking Member, Senate Judiciary Committee; The National Institute of Military Justice; U.S. Diplomats; a variety of NGOs; U.S. law professors with expertise in Federal Courts and International Law; Louise Arbour, United Nations High Commissioner for Human Rights; Professors of Legal History (including Sir. John H. Baker, Downing Professor of the Laws of England, St.

and he wrote that “What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence.” Carl Rosenberg, *Bush’s Anti-Terror Powers to Get High Court Review*, MIAMI HERALD, June 30, 2007, at A3.

70. There are a number of reported incidences where the CSRP returned a finding that the detainee was “not/no longer” an enemy combatant. The Department of Defense convened new panels (in one case there were three), which eventually returned a finding that the detainee was an enemy combatant subject to a military commission. “The Department of Justice has denied these allegations in court filings.” Crook, *supra* note 19, at 660. See also, Tom J. Farer, *The Two Faces of Terror*, 101 AM. J. INT’L L. 363, 377 (2007). See *infra* Part VII (discussing Combatant Status Review Tribunals).

71. A detainee at Guantanamo Bay, Cuba, must first be found to be an “alien illegal enemy combatant” before he may be tried before a military commission pursuant to the Military Commissions Act of 2006. Military Commissions Act, 10 U.S.C. § 948(a) (2006). It is the role of the Combatant Status Review Panel to make this determination. Indeed, the case of Canadian citizen, Omar Khadr, revolved around the issue of whether the military commission had jurisdiction given that the CSRP only found him to be an “enemy combatant” not an “illegal enemy combatant.” The military trial judge presiding over Khadr’s military commission ruled he lacked jurisdiction due to this classification; The Court of Military Commission Review set up to review tribunal decisions under the MCA of 2006 reversed this decision and held that the military judge had the authority to make this determination. Khadr’s lawyers attempted to appeal this decision to the Court of Appeals for the District of Columbia, but the Court dismissed the case for lack of jurisdiction. Once remanded, Khadr’s case came before Colonel Peter Brownback, U.S. Army Judge, on November 8, 2007 where he determined that Khadr was in fact an illegal enemy combatant. Khadr’s trial before a military commission was originally set for May 2008, but that date has been cancelled. *Khadr v. United States*, 529 F.3d 1112, 1114 (D.C. Cir. 2007). The first detainee to actually reach a trial before a military commission was former bin Laden driver Salim Hamdan who was convicted and received a 5 1/2-year sentence. William Glaberson, *Detainee Convicted on Terrorism Charges*, N.Y. TIMES, Nov. 4, 2008, at A19, available at <http://www.nytimes.com/2008/11/04/washington/04gitmo.html>.

72. See *infra* Part VI.

73. See Scotuswiki, http://www.scotuswiki.com/index.php?title=Boumediene/Al-Odah_v._Bush, for the amicus briefs.

Catherine's College, University of Cambridge); and a brief by 383 U.K. and European Parliamentarians. The writer cannot remember any recent case generating this amount of interest. It confronts the historical reach of the Great Writ, and its answer goes directly to the heart of what it means to be a constitutional democracy with a rule of law that provides access to neutral and impartial justice. *Boumediene* may well come to be seen as one of the Court's greatest decisions in favor of liberty. But it might have been otherwise; it could have become its greatest failure of nerve since it validated the internment of the Japanese during World War II.⁷⁴

III. THE PRESIDENT'S WAR POWERS: ASSUMPTIONS ON THE ROAD TO TORTURE

Within a week of September 11, 2001, Congress passed by joint resolution the Authorization to Use Military Force, giving the President broad powers to prosecute a new kind of war, not solely against a nation, but also against amorphously defined terrorists and all who helped them, wherever they might be.

Presidential powers included the use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks"⁷⁵ It also provided "specific statutory authorization" under the war powers resolution.⁷⁶ The circumstances were extreme.⁷⁷ It is, however, difficult to imagine a broader mandate; Congress, overwhelmingly supported by frightened Democrats,⁷⁸ gave blanket permission. Thus, regardless of

74. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the exclusion order leading to the internment of people of Japanese descent during World War II, this case is widely considered to be one of the Supreme Court's worst decisions).

75. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 225 (codified in note following 50 U.S.C. § 1541 (2000, Supp. III)).

76. *Id.* § 2(b)(1).

77. President Bush said of these events:

Today, our fellow citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts. The victims were in airplanes, or in their offices; secretaries, businessmen and women, military and federal workers; moms and dads, friends and neighbors. Thousands of lives were suddenly ended by evil, despicable acts of terror. The pictures of airplanes flying into buildings, fires burning, huge structures collapsing, have filled us with disbelief, terrible sadness, and a quiet, unyielding anger. These acts of mass murder were intended to frighten our nation into chaos and retreat. But they have failed; our country is strong.

Statement by President Bush in his address to the nation on Sept. 11, 2001, <http://www.september11news.com/PresidentBush.htm>.

78. The House vote was 420 to 1. Philip Shenon, *After the Attacks: The Lone Voice—In One Vote, a Call for Restraint*, N.Y. TIMES, Sept. 16, 2001, at 6, available at <http://www.nytimes.com/2001/09/16/us/after-the-attacks-the-lone-voice-in-one-vote-a->

whether the “war on terror” is a true war under the laws of war,⁷⁹ President Bush became a wartime president.⁸⁰

The Bush administration began with the assumption that the enemy (at a minimum, the Taliban and al-Qaeda⁸¹) consisted of non-state terrorists, themselves bound by no law and therefore outside the protection of the law.⁸² They also assumed that harsh interrogation methods generally

call-for-restraint.html. The lone dissenting vote came from Barbara Lee of California, who is a committed pacifist and whose district includes Oakland and Berkeley. *Id.*

79. Scholars have argued that the “war on terror” does not meet the criteria for war because it is not against a state, nation, belligerent, or even an insurgent group as those groups are understood in international law. *See*, Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1340–41 (2004). This distinction is important because under the laws of war certain conduct that would otherwise be unlawful becomes legitimate, and it confers unwarranted status on al-Qaeda. *Id.* at 1342–43.

80. “[W]e assume that the AUMF activated the President’s war powers . . . and that those powers include the authority to convene military commissions in appropriate circumstances.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 594 (2006).

81. On January 2, 2002 OLC lawyers John Yoo and Robert Delahunty wrote to William J. Haynes II, General Counsel, Department of Defense, arguing that the Geneva Conventions did not apply to either the Taliban or al Qaeda. Al Qaeda was deemed not a signatory to the Conventions while the Taliban at best represented a failed state as to which the Geneva Conventions also need not apply. On January 11, Robert Taft of the State Department objected to this novel failed state theory but on January 18, President Bush initially decided that the Geneva Conventions had no applicability to either the Taliban or al-Qaeda. Secretary of State Colin Powell objected, and then on January 22, 2003, Jay Bybee issued an additional memorandum to Haynes and to Alberto Gonzales, then Counsel to the President, echoing arguments against having the Geneva Conventions apply to either the Taliban or al Qaeda. On January 25, Alberto Gonzales ruled that the initial Yoo memorandum is definitive and recommended that Bush adhere to his initial position. Powell again on January 26 wrote a memo to the White House arguing that the Geneva Conventions do apply but, on February 1, 2002 Attorney General John Ashcroft opined that the Geneva Conventions do not apply and that the failed state theory supports that conclusion. Ultimately, on February 7, 2002 President Bush decided not to follow the failed state theory. He ruled that the Geneva Conventions, however, would not apply. As to al Qaeda he accepted the argument that it was not a state and was not a signatory to the Geneva Conventions. As to the Taliban, while Afghanistan was a state signatory to the Geneva Conventions, because they did not wear distinctive uniforms they could not be considered to be prisoners of war. Nor, did Common Article 3 apply because it was interpreted narrowly to only apply to civil wars and other internal struggles not crossing international borders. *See THE TORTURE DEBATE IN AMERICA* (Karen J. Greenberg ed., 2006); MICHAEL RATNER, *THE TRIAL OF DONALD RUMSFELD*, Chapter 4 (2008).

82. “Partly driving the process was a righteous indignation that the virtuous United States had been attacked by immoral terrorists fighting a total war involving attacks on innocent civilians.” David P. Forsythe, *United States Policy toward Enemy Detainees in*

work better than softer methods, and that quick and successful interrogations would save lives.⁸³

Their method turned on using quirky, ahistorical, and formalistic interpretations of statutory or treaty language that allowed them to find gaps where arguably no law applied. From those gaps they inferred permission.⁸⁴ They failed to recognize, or ignored, the fact that their legal reasoning closely mirrored that of Nazi lawyers over sixty years ago.⁸⁵ Indeed, the Nazis thought that International Humanitarian Law was “the relic of a chivalrous notion” while U.S. Attorney General Alberto Gonzales thought the Geneva Conventions “quaint” and “obsolete.”⁸⁶ Nor did the Administration credit the French experience in

the “War on Terrorism”, 48 HUM. RTS. Q. 465, 471 (2006) (citing James Mann, RISE OF THE VULCANS: THE HISTORY OF BUSH’S WAR CABINET 297 (2004)).

83. One of the strongest defenses of torture by the Bush Administration comes from columnist Charles Krauthammer, who has written, “[t]he monstrous thing about torture is that sometimes it does work.” Krauthammer goes on to describe the torture of a Palestinian who provided accurate information about an Israeli corporal who had been kidnapped. Charles Krauthammer, *The Truth about Torture*, WEEKLY STANDARD, Dec. 5, 2005, <http://www.weeklystandard.com/Content/Public/Articles/000/000/006/400rhqav.asp>. See Heather MacDonald, *How to Interrogate Terrorists*, in THE TORTURE DEBATE IN AMERICA 84 (Karen J. Greenberg ed., 2006), for another defense of the administration’s techniques while claiming that they do not amount torture.

84. Many scholars have pointed out the process by which administration lawyers purported to find gaps in the law and then from those supposed holes found implied permission for aggressive interrogation techniques. See Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007), for perhaps the clearest exposition of this. Satterthwaite argues that while the Administration does not explicitly defend torture or extraordinary rendition “they imply that the practice is legal by pointing to what they claim are lacunae in the relevant legal frameworks” where “prohibitions give way to permission,” and “territories outside the United States are conceptualized as locations where the U.S. may act as it pleases.” *Id.*

85. The Nazi’s refused to apply the Geneva and Hague Conventions of that era (precursors to the 1949 Conventions) to the eastern front, using arguments very similar to the ones advanced by administration lawyers planning the war on terror. As Scott Horton points out, the Nazi’s avoided these conventions because:

1. the conflict was non-conventional and against a “barbaric” enemy;
2. the opponent engaged in “terrorist” practices and were not entitled to protections under International Humanitarian Law;
3. the conventions were themselves obsolete;
4. application of Geneva Conventions was not in the “enlightened self-interest of Germany” because of lack of reciprocation;
5. interpretation of the law “should be driven” by national self-interest; and
6. “the rules of international law were subordinated to the military interest of the German state” as determined by the leader—Hitler.

Scott Horton, *Through a Mirror Darkly: Applying the Geneva Conventions to “A New Kind of Warfare”*, in THE TORTURE DEBATE IN AMERICA 136, 145–46 (Karen J. Greenberg ed., 2006). One can readily see how similar this reasoning was to that of the lawyers who devised the Bush Administration’s policies in this war.

86. Compare General-Field Marshal Wilhelm Keitel calling the Geneva and Hague Conventions “the relic of a chivalrous notion of warfare,” (quoted in Horton, *id.* at 140)

Algeria, where torture, even as it enjoyed limited success⁸⁷ in the battle of Algiers, was ultimately self-defeating in that it led to “increased domestic criticism, and loss of reputation in the world”⁸⁸ while failing to end the struggle. The lessons from Nazi Germany and the French experience in Algeria teach that even where torture leads to useful short-term information, in the long run it may not be successful.

As we will see in the next two sections, the Administration’s lawyers proceeded on debatable and probably false empirical premises about the efficacy of torture; they adopted hyper-technical analyses that justified a pre-ordained result; and finally, they ignored all contrary evidence that might have suggested a different approach. Their approach was so hyper-aggressive that some commentators argue for war crimes prosecution of these lawyers,⁸⁹ and triggering an ethics investigation by the Justice Department’s Office of Professional Responsibility.⁹⁰ Commentators have since criticized the Administration in *Boumediene*’s wake as “badly overplaying a winning hand,” putting “the Supreme Court in an impossible position: either rubber-stamp denials of due process to detainees who say they were seized by mistake, or create a new set of problems by making rules on a slow, messy, case-by-case basis.”⁹¹

with U.S. Attorney General Alberto Gonzales’s statement “in my judgment, this new paradigm renders *obsolete Geneva’s strict limitations on questioning . . . and renders quaint some of its provisions.*” Memorandum for the President of Jan 25, 2002 from Alberto R. Gonzales, Decision Re-Application of the Geneva Convention on Prisoners of War to Conflict With Al Qaeda and the Taliban, in *THE TORTURE PAPERS* 119 (Karen J. Greenberg & Joshua L. Dratel eds., 2005). See also, Rupert Cornwell, *We do not torture, Insists Bush’s Choice for Attorney General*, INDEPENDENT, Jan. 7, 2005, <http://www.independent.co.uk/news/world/americas/we-do-not-torture-insists-bushs-choice-for-attorney-general-95570.html>.

87. Although some attribute France’s victory in the Battle of the Casbah to the use of torture, political scientist Darius M. Rejali disputes this—arguing that torture played a minor and mostly counterproductive role, and that accurate intelligence and the cooperation of locals made the difference, not torture. Darius M. Rejali, *Does Torture Work?*, in *THE PHENOMENON OF TORTURE: READINGS AND COMMENTARY* 255, 255–59 (William F. Schultz ed., 2007). In any event, the backlash against torture ultimately cost the French the war.

88. Forsythe, *supra* note 82, at 470.

89. Milan Markovic, *Can Lawyers Be War Criminals?*, 20 *GEO. J. LEGAL ETHICS* 347 (2007).

90. Johnson, *supra* note 45, at A3.

91. Stuart Taylor Jr., *Overplaying Its Hand by Denying Gitmo Detainees Basic Legal Protections, The Bush Administration Forced the High Court to Act*, NEWSWEEK, June 23, 2008, at 38 (quoting Charles Fried).

Whether some of these lawyers were “rogue operators” and “out of control” as some allege⁹² or were just aggressively⁹³ representing presidential policy⁹⁴ will be for historians, bar associations,⁹⁵ the Department of Justice Office of Professional Responsibility,⁹⁶ and others⁹⁷ to determine. This Article will not review the evidence for whether harsh interrogation methods work,⁹⁸ nor will it expand upon

92. Michael Isikoff and Evan Thomas report that a former aide to Attorney General John Ashcroft has said that one lawyer with the Office of Legal Counsel, John Yoo, was seen as a rogue operator inside the Justice Department who was “out of control.” Michael Isikoff & Evan Thomas, *Bush’s Monica Problem*, NEWSWEEK, June 4, 2007, at 27.

93. Such aggressive representation raises ethical questions beyond the scope of this Article. George Annas points out that lawyers and judges were prosecuted at Nuremberg, “and many, if not most Americans would see a similar prosecution of the lawyers who distorted the Nuremberg Principles, the Geneva Conventions, the Covenant of Civil and Political Rights, and the Convention Against Torture, among other laws, as reasonable also.” George J. Annas, *Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror*, 87 B.U.L. REV. 427, 463 (2007). As José Alvarez points out “When governmental lawyers torture the rule of law as gravely as they have done here, international as well as national crimes may have been committed, including by the lawyers themselves.” José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175, 223 (2006). Moreover, legal advice cannot lawfully “provide a ‘road map’ for circumventing the law, and such advice may result in the lawyer being “held complicit in the client’s criminal conduct.” Bilder & Vagts, *supra* note 58.

94. Christopher Kutz points out that given the thinness of the arguments “it is hard not to conclude that the Bybee memo was meant more to frame and justify a policy position in ethical and political terms than to provide a legal analysis.” Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CAL. L. REV. 235, 248 (2007).

95. Johnson, *supra* note 45. The National Lawyer’s Guild has filed a complaint with the California State Bar against former Defense Department general counsel William Haynes II. Carol Williams reported that a lawyers group was targeting an ex-Bush administration official. A complaint was also to be filed in Pennsylvania against John Yoo. Carol J. Williams, *Lawyers Guild Acts in Prisoner Abuse*, L.A. TIMES, Mar. 17, 2009, at A8, available at <http://www.latimes.com/news/local/la-me-torture17-2009mar17,0,4869203.story>.

96. *The New York Times* reports, the Department of Justice’s Office of Professional Responsibility has written a draft report criticizing the legal opinions of three Bush administration lawyers connected to the torture memoranda. Scott Shane, *Debating Release of Interrogation Memos*, N.Y. TIMES, Apr. 1, 2009, at A22. As of this writing, the report has not yet been published. Carrie Johnson, *Report on Bush Policy May Come In ‘Weeks,’* WASH. POST, June 18, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/17/AR2009061701512.html>.

97. The Contra Costa Times reports that University of California officials are deciding whether to punish Professor John Yoo for misconduct in relation to his participation in the infamous torture memos. Matt Krupnick, *Yoo’s Work for White House could draw UC Punishment*, CONTRA COSTA TIMES, Mar. 23, 2009, <http://blogs.csun.edu/news/clips/2009/03/23/yoo%E2%80%99s-work-for-white-house-could-draw-uc-punishment/>.

98. Torture arguably proved effective on at least a few occasions. See, Richard A. Posner, *Torture, Terrorism, and Interrogation*, in TORTURE, A COLLECTION 291, 295 (Sanford Levinson ed., 2004). Historian Alfred W. McCoy, however, takes issue with these accounts, arguing that torture advocates like Richard Posner and Alan Dershowitz misrepresent the facts. One case cited where torture was allegedly effective revolved around the torture of an alleged terrorist in the Philippines. Police were able to secure information that supposedly prevented an airliner from being blown up. McCoy reports, however, that

historical parallels.⁹⁹ The administration also sought to increase executive power, and that motive has been widely reported.¹⁰⁰ Indeed, many of its actions can be seen from that perspective.¹⁰¹ However, analysis focused on presidential power is beyond the scope of this Article. This Article focuses exclusively on the “torture culture,”¹⁰² how the MCA cloaks torture, and how *Boumediene* strips away that torture cloak.

the police got “all the important information . . . in the first few minutes, when they seized [the terrorist’s] laptop Most of the supposed details gained from the sixty-seven days of torture that followed were . . . police fabrications that [the terrorist] mimed to end the pain.” ALFRED W. MCCOY, A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR 112 (2006). Others question whether torture ever works. See, e.g., DARIUS REJALI, TORTURE AND DEMOCRACY 23 (2007). Moreover, the strongest case demonstrating that torture has worked, has been debunked. Stephanie Athey, *The Tale of Abdul Hakim Murad*, in ON TORTURE 87 (Thomas C. Hilde, ed., 2008).

99. See *supra* notes 85–87.

100. See, e.g., Peter S. Canellos, *The Bush White House, a Mirror on Ford’s Travails*, BOSTON GLOBE, Dec. 28, 2006, at A2.

Cheney, Rumsfeld, and, to a lesser extent, George H.W. Bush—who took over a demoralized CIA during the Ford administration—all came out of the 1970s convinced that Congress had used the unpopular Vietnam War and President Nixon’s Watergate scandal to restrict the powers of the presidency too much. Cheney, Rumsfeld, and Bush made it their mission to restore presidential power, a goal that motivates the current president and his team.

Id. See also, Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, WASH. POST, June 25, 2007, at A1; Tracey Barnett, *Cheney’s Legacy on the Line*, NEW ZEALAND HERALD, Feb. 24, 2006; Andrew Sullivan, Op-Ed., *Imperial Bush Brought to Heel*, AUSTRALIAN, July 3, 2006, at 8; Andrew Sullivan, *Founding Fathers Save America’s Soul*, SUNDAY TIMES (London), July 2, 2006, at A14; Charlie Savage, *Hail to the Chief—Dick Cheney’s Mission to Expand—or ‘Restore’—The Powers of the Presidency*, BOSTON GLOBE, Nov. 26, 2006, at C1.

101. See John Yoo, *Transferring Terrorists*, in *The Changing Laws of War: Do We Need a New Legal Regime After September 11?*, 79 NOTRE DAME L. REV. 1183 (2004), for one of the strongest defenses of executive power (arguing that anything, including congressional legislation, that gets in the way of the president’s wartime powers as commander in chief is unconstitutional). See Kutz, *supra* note 94, at 266–70, for a sharply critical view (arguing that the Bush Administration’s expansive view of executive power parallels that of the German philosopher Carl Schmidt, whose views helped to justify the Nazi’s actions). Kutz believes this view of executive power goes too far and that necessity cannot be used as a “rolling justification for Executive supremacy.” *Id.* at 275.

102. David Luban uses the term “torture culture.” Luban, *supra* note 27, at 35.

IV. TORTURE'S ROOTS: THE MILITARY ORDER OF NOVEMBER 13, 2001

Almost immediately after the September 11 attacks, the Department of Justice began planning to set the legal framework for a new kind of war. Department lawyers were urged to be “forward leaning,”¹⁰³ to find ways to justify legally what the administration planned as a “gloves off”¹⁰⁴ war that did “away with all restrictions.”¹⁰⁵

These notions laid the groundwork for a supportive legal opinion from the Department of Justice’s Office of Legal Counsel (OLC) that laid out the legal basis for military commissions.¹⁰⁶ The President then issued the Military Order of November 13,¹⁰⁷ which authorized indefinite detention of al-Qaeda members (and others connected thereto), and created military tribunals to try them. This order could not have been cast more sweepingly—it applied to any non-citizen who “is or was a member of . . . al Qaeda,” who “engaged in, aided, or abetted, or conspired” in terrorism or who prepared for such, or who “knowingly harbored” any of the people so broadly described.¹⁰⁸ As written, it could apply to someone who unwittingly gave money to an organization associated with terrorism;¹⁰⁹ it could apply to the vaguest conspiracy regardless of its

103. According to Bradford Berenson, former associate White House counsel “[l]egally, the watchword became ‘forward leaning,’” which meant that key federal agencies wanted to take risks and to be aggressive in their interpretation of the law. Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1.

104. Vice President Dick Cheney is reported to have said that “the CIA had to take the gloves off to combat global terrorism[.]” and is quoted as saying, “[y]ou have to have on the payroll some very unsavoury [sic] characters . . . [t]his is a mean, nasty, dangerous, dirty business. We have to operate in that area.” Linda Diebel, *Inside My CIA Diaries*, TORONTO STAR, Mar. 30, 2003, at F1, available at <https://lists.resist.ca/pipermail/project-x/2003-March/002963.html>.

105. Colonel Lawrence Wilkerson, former aide to Secretary of State Colin Powell “has claimed that Cheney was the most prominent advocate . . . of mistreating prisoners under interrogation” and that he wanted to eliminate all restrictions. Gavin Esler, *Will ‘Chief Crazy’ Cheney Face a War Crimes Trial?*, DAILY MAIL (London), Dec. 5, 2005, at 18, available at <http://www.bookrags.com/highbeam/will-chief-crazy-cheney-face-a-war-20051205-hb/>.

106. On November 6, 2001, Deputy Assistant Attorney General Patrick Philbin provided the memorandum to then Attorney General Alberto Gonzales that laid out the legal basis for military commissions arguing that the President has the inherent power to order them and cited *Ex Parte Quirin*, 317 U.S. 1 (1942) as precedent.

107. Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833–36 (Nov. 13, 2001), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 25–28 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

108. Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 § 2(a) (Nov. 13, 2001).

109. Judge Green wrote in *In re Guantanamo Detainee Cases*:

This Court explored the government’s position on the matter by posing a series of hypothetical questions In response to the hypotheticals, counsel for the respondents argued that the Executive has the authority to detain the following

stage or ability to accomplish anything consequential. These broad definitions applied to anyone that the President in his sole and unreviewable discretion so determined. If the President claimed someone was somehow connected to terrorism, that person became the “worst of the worst.”¹¹⁰ Not surprisingly, this unfettered approach misfired, pulling in people wholly unconnected with terrorism.¹¹¹

Overbreadth was not the only problem. Once designated for detention, the new rules stacked the deck in favor of conviction. Punishment,

individuals until the conclusion of the war on terrorism: ‘[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities,’ . . . a person who teaches English-to the son of an al Qaeda member, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.

In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (Citations omitted).

110. Secretary of Defense Donald Rumsfeld described the detainees at Guantanamo Bay as the “worst of the worst.” See, Toby Harden, *Hunger Strike at Camp X-Ray Over Ban on Turbans*, DAILY TELEGRAPH (London), Mar. 1, 2002, at 15. According to Air Force General Richard Myers, “[t]hese are people that would gnaw through hydraulic lines in the back of a C-17 to bring it down,” Angus MacSwan & Charles Aldinger, ‘Worst of the Worst’ Captives Arrive in Cuba: Taliban, al-Qaeda Detainees Jailed at U.S. Base Won’t be Protected by Geneva Convention, Says Rumsfeld, OTTAWA CITIZEN, Jan. 12, 2002, at A10.

111. Among the people picked up in the war on terror were the Uyghurs who were the subject of habeas corpus proceedings before the Court of Appeals for the District of Columbia. See *supra* notes 17–21 and related text. The Uyghurs are an ancient group of Turkik Muslims living in China. Fleeing Chinese oppression some fled to Afghanistan and from there went to Pakistan where they were picked up by Pakistani bounty hunters and sold to the U.S. which shipped them to Guantanamo Bay. The Uyghur’s only connection to terrorism seems to have been that they were in the wrong place at the wrong time. Ulysses S. Smith, “More Ours than Theirs”: *The Uyghurs, Indefinite Detention, and the Constitution*, 40 CORNELL INT’L L.J. 265, 266–67 (2007). In 2006, five Uyghurs were released to Albania, and in December 2006 lawyers filed suit on behalf of seven more, saying that the process by which they were declared enemy combatants was flawed. The Department of Defense is defending the six year detention of another Uyghur, Huzaifa Parhat before the U.S. Court of Appeals for the D.C. Circuit because of his ties to the East Turkestan Islamic Movement, a separatist group in China that the U.S. has declared a terrorist organization. The U.S. admits that Parhat did not fight against the U.S. but, he still can be held under the Authorization for Use of Military Force Act of 2001. Steve Czajkowski, *DOJ Defends Detention of Uyghur at Guantanamo*, THE JURIST, Apr. 4, 2008, http://jurist.law.pitt.edu/jurist_search.php?q=DOJ+Defends+Detention+of+Uighur+at+Guantanamo. Originally, twenty-two Uyghurs were sold for bounties, seventeen remain in custody. Most have been cleared for release but no nation will as yet take them. While some Uyghurs seek a determination that they are not enemy combatants, others have sought legal protection through the Geneva Convention, seeking prisoner of war status. Seema Saifee, *Guantanamo’s Uyghurs: No Justice in Solitary*, JURIST, Apr. 6, 2008, <http://jurist.law.pitt.edu/forumy/2008/03/guantanamos-uyghurs-no-justice-in.php>.

including death, could follow trial based upon any evidence that had “probative value to a reasonable person.”¹¹² Hearsay on hearsay, even hearsay gleaned from torture, might suffice. Moreover, the prisoner might never be able to challenge such evidence. The order also provided for secrecy—cloaking classified or classifiable information—and allowed for convictions other than death “upon the concurrence of two-thirds of the members of the commission present at the time of the vote.”¹¹³

Finally, and most problematically, the order precluded any remedy in any court anywhere. The only appeal ran through the Secretary of Defense and the President.¹¹⁴ Thus, the very people who decided to detain the non-citizen would be the ultimate “deciders.”

In summary, any non-U.S. citizen deemed by the President to have an amorphous connection to terrorism could be picked up, tried, convicted, and even executed upon secret evidence, including evidence resulting from torture, and double or triple hearsay, without appeal to any neutral forum. Although these tribunals were to be called “military commissions” they were quite unlike earlier U.S. military commissions dating back to the Revolutionary War, which, with exceptions,¹¹⁵ can be said to have

112. Military Order of Nov. 13, *supra* note 108, § 4(c)(3).

113. *Id.* § 4(c)(6).

114. *Id.* § 4(c)(8).

115. The trial of General Tomoyuki Yamashita before a Military Commission in Manila in 1945 is perhaps one of the more glaring examples of victor’s justice imposed on the defeated Japanese. General Yamashita was held responsible for atrocities perpetrated by his troops despite the fact that by the later stages of the war he had little control over those troops, and was not alleged to have “had any knowledge of the commission” of these atrocities, nor did he commit or order them. Moreover, they occurred at a time when “the American forces [had] done everything possible to destroy and disorganize [Japanese] lines of communication” to disrupt Yamashita’s control over these same personnel claimed to have committed the atrocities. *In re Yamashita*, 327 U.S. 1, 34 (1946) (Murphy, J. dissenting). The United States Supreme Court upheld his death sentence, over vigorous dissents by Justices Murphy and Rutledge. The decision set the standard for command responsibility on the commander with an “affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.” *Id.* at 16. He was hanged on February 23, 1946. Yamashita’s trial has been criticized for the nearly impossible command standard required. The International Tribunal for the Former Yugoslavia has rejected this strict liability standard. *See, e.g.,* Anne E. Mahle, *Yamashita Standard*, PBS, http://www.pbs.org/wnet/justice/world_issues_yam.html.

On the other hand, Yamashita’s “doctrine of command responsibility [is] now recognized in Article 28 of the Rome Statute.” George P. Fletcher, *Hamdan Confronts the Military Commissions Act of 2006*, 45 COLUM. J. TRANSNAT’L L. 427, 463 (2007). *See also*, Markovic, *supra* note 89, at 358 (pointing out that the ICTY held that a commander’s omissions can result in criminal responsibility). “By being present during the mistreatment, and yet not objecting . . . the accused was necessarily aware that such tacit approval would be construed as a sign of his support and encouragement.” *Id.* However, even if the doctrine of command responsibility is moving in the direction of greater responsibility for the actions of subordinates, it certainly was not at that stage in 1945, and moreover,

been reasonably fair and justified by the exigencies of war.¹¹⁶ Contrariwise, the Bush administration argued that military necessity in this new type of war—without temporal or geographic boundaries—required that all alleged terrorists be held incommunicado without access to either lawyers or courts.¹¹⁷ The President's order prevented any court challenge to detention.¹¹⁸ Initially even U.S. citizens, whom the President determined to be enemy combatants, were held incommunicado and without access to lawyers.¹¹⁹

President Bush's Memorandum of February 7, 2002 declared that the Geneva Conventions would cover neither Taliban nor al-Qaeda fighters. These Presidential Orders, together with Executive Branch redefinitions of torture¹²⁰ and authorization of what has come to be called "torture

Yamashita's case seems to be an extreme example given Yamashita's questionable awareness of the atrocities committed by his troops. *Id.*

The other problem with Yamashita's trial is that it violates the principle of *nulla poena sine lege*, the notion that there can be no punishment without prior law—that one must have warning that one's conduct is not only wrong, but unlawful. The fact of being an "unlawful combatant" did not have criminal consequences under the Hague Convention and it was a stretch for the U.S. to make such a crime during World War II. The present military commissions suffer from this same defect providing an additional reason to oppose them as violating international law. For a good discussion of this argument see, George P. Fletcher, *The Law of War and Its Pathologies*, 38 COLOM. HUM. RTS. L. REV. 517, 543–46 (2007).

116. Detlev Vagts convincingly demonstrates in his short history of military commissions that while not all were fair, many were, and that there is nothing inherently unfair about their use in times of war. Detlev F. Vagts, *Military Commissions: A Concise History*, 101 AM. J. INT'L L. 35 (2007).

117. David A. Martin, *Judicial Review and the Military Commissions Act: On Striking the Right Balance*, 101 AM. J. INT'L L. 344, 355 (2007).

118. The President's order states in part:

[T]he individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

Military Order of Nov. 13, *supra* note 108, § 7(b)(2).

119. Jose Padilla and Yaser Esam Hamdi were both U.S. citizens labeled as "illegal enemy combatants." The Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), discussed below, led to their being allowed access to lawyers and the U.S. judicial process. Padilla has since been convicted in a Miami Federal District Court. He was sentenced on December 22, 2007 to seventeen years in prison. *Padilla Given Long Jail Sentence*, BBC NEWS, Jan. 23, 2008, <http://news.bbc.co.uk/2/hi/americas/7203276.stm>. Hamdi and Padilla are the only U.S. citizens treated this way. Martin, *supra* note 117, at 349.

120. See *infra* Part V.

lite”,¹²¹ brought about the detention of alleged “unlawful enemy combatants”¹²² at Guantanamo Bay, Cuba. The Administration thought that holding non-U.S. citizens outside of the jurisdictional confines of the United States would eliminate civilian court oversight. This would, it was then thought, protect the CIA and other interrogators from prosecution under the War Crimes Act,¹²³ the Anti-torture legislation,¹²⁴ or from violating the Foreign Affairs and Restructuring Act of 1998¹²⁵ (which prohibits sending people to places where they may be tortured).¹²⁶

These actions were widely criticized and quickly challenged in the courts as being beyond the President’s power to act without congressional approval and violative of the courts’ right to review cases under statutory habeas corpus.¹²⁷ The courts¹²⁸ eventually invalidated the scheme triggering the issues in *Boumediene*.

V. LEGAL PERMISSION TO (CLOAK) TORTURE

Two important events followed President Bush’s Military Order of November 13 setting up military commissions. First, on December 27, 2001, the administration settled on Guantanamo Bay for detaining what came to be called “unlawful enemy combatants” captured in the “war on

121. Forsythe, *supra* note 82, at 477.

122. The term “unlawful enemy combatant” did not imply criminal wrongdoing under international law until the Supreme Court made the leap from “unlawful” to “criminal.” *Ex Parte Quirin*, 317 U.S. 1 (1942). George P. Fletcher calls this “one of the greatest legal fallacies . . . ever encountered” because, among other things, it “confuses failure to qualify for status” with crime, it is illogical, and it is not a crime that could be recognized under international law. In short, the creation of “enemy combatancy” is “an American invention.” George P. Fletcher, *The Law of War and Its Pathologies*, 38 *COLOM. HUM. RTS. L. REV.* 517, 539–46 (2007).

123. 18 U.S.C. § 2441 (2008).

124. 18 U.S.C. § 2340 (2008).

125. Foreign Affairs and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. §§ 2681–761 (codified at 8 U.S.C. § 1231 (2000)).

126. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

127. 28 U.S.C. § 2241 (2006). Statutory habeas corpus under section 2241 is to be distinguished from common law habeas corpus jurisdiction set forth in Article I, Section 9 of the Constitution. Constitutional habeas embodies common law habeas corpus as inherited from Great Britain, whereas statutory habeas constitutes those statutory rights that Congress is prepared to grant. This is an instance where at least some common law rights have been enshrined in the Constitution and thereby partially insulated from legislative change. *See generally, Boumediene*, 128 S. Ct. 2229 (2008) (majority opinion).

128. *Hamdan v. Rumsfeld*, 548 U.S. 557, 591–92 (2006), discussed *infra*.

terror.”¹²⁹ By January 11, 2002 the first accused terrorists arrived at the U.S. base at Guantanamo Bay, Cuba.¹³⁰

On December 28 the Department of Justice’s Office of Legal Counsel provided its first legal opinion¹³¹ attempting to create a legal “black hole,” an area outside of oversight by courts or anyone else. That opinion, by Patrick Philbin and John Yoo, argued that Guantanamo Bay, Cuba, lay beyond the jurisdiction of the federal courts and thus prisoners held there would not be amenable to the writ of habeas corpus. Philbin and Yoo did acknowledge that there was a “[n]on-frivolous argument” that Guantanamo Bay might be “within the territorial jurisdiction of a federal court.”¹³² Nevertheless, they reasoned, erroneously as it turned out, that the better legal conclusion was “that a district court cannot properly entertain an application for a writ of habeas corpus by an enemy alien detained at Guantanamo Bay.”¹³³ Detainees thus would be beyond all legal process.

In retrospect these two important moves—sending detainees to, and justifying a law-free zone at, Guantanamo Bay—prepared the way for the MCA. While some other opinions received more notoriety,¹³⁴ this opinion, more than any other, set up the constitutional crisis that led to *Boumediene*. Only a lawyer-free and court-free zone would permit the kind of hyper-aggressive legal interpretations that were to set the administrative and legislative branches of government on a collision course with the courts.

Stripping the courts’ jurisdiction created a firestorm of criticism.¹³⁵ Then White House Counsel Alberto Gonzales responded with an Op Ed piece

129. Charles Lane, *Terrorism Tribunal Rights Are Expanded: Draft Specifies Appeals, Unanimity on Death Penalty*, WASH. POST, Dec. 28, 2001, at A1.

130. Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, WASH. POST, June 25, 2007, http://blog.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_presi/index.html.

131. Memorandum from Patrick F. Philbin and John C. Yoo, Office of Legal Counsel, Department of Justice, to William J. Haynes, II, General Counsel, Department of Defense, Re: *Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba* (Dec. 28, 2001), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 29 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

132. *Id.* at 34.

133. *Id.* at 37.

134. By any standard, the most infamous memorandum issued by the OLC was the later withdrawn opinion by Jay S. Bybee concerning interrogation standards, which has come to be known pejoratively as the “torture memo.” *Id.* at 172.

135. See, e.g., George Lardner, Jr., *Legal Scholars Criticize Wording of Bush Order: Accused Can be Detained Indefinitely*, WASH. POST, Dec. 3, 2001, at A10.

in *The New York Times* claiming that the order did not mean what it said and that the courts would remain able to exercise the writ of habeas corpus.¹³⁶ That did not keep the administration from fighting to the end to prevent court review.¹³⁷

Next, the OLC wrote a series of opinions advising the President how to avoid the Geneva Conventions as to either al-Qaeda or the Taliban.¹³⁸ This culminated in the President's Memorandum declaring that al-Qaeda was not covered by Geneva Conventions; it also held that while the Geneva Conventions technically applied to the Taliban, its detainees were all (without further hearing of any kind) unlawful combatants and not prisoners of war under Article 4 of the Conventions. This single move arguably stripped not only the protections of the Geneva Conventions from all combatants in Afghanistan, but it also stripped them of any protection under the War Crimes Act, which criminalized grave breaches of the Geneva Conventions, as well as violations of Common Article 3 of the Geneva Conventions. It would have (had it worked) the effect of completely insulating from prosecution those who ordered or carried out torture.

Screening off the courts, however, did not suffice. The Administration also sought to change the rules by narrowing the definitional scope upon which any prosecution or lawsuit might act. By far the most controversial move to strip out all protections and oversight came with the infamous "torture memo" from James Bybee to Gonzales.¹³⁹ Legal scholars have

"The order is rife with constitutional problems and riddled with flaws," said Laurence H. Tribe, professor of constitutional law at Harvard. He said its reach is so sweeping that it could snap up not only terrorist leaders caught overseas but also any resident immigrant who might have once "knowingly harbored" a past or present member of al Qaeda or who is "believed" to have "aided or abetted . . . acts in preparation" for international terrorism.

Id. Tribe pointed out that the order also contains no definition of "international terrorism," thereby inviting arbitrary and possibly discriminatory decisions about who is to be tried. Bush's directive also gives the commission jurisdiction to try people not only for violations of the laws of war, but also for all "other applicable laws." *Id.*

136. Alberto R. Gonzales, Op-Ed., *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.

137. The Administration argued that Federal Courts had no habeas corpus jurisdiction to the Supreme Court which ruled against them in *Rasul v. Bush*. *Rasul v. Bush*, 542 U.S. 466, 544 (2004) (holding that statutory habeas applied to the detainees at Guantanamo Bay). The Administration vigorously argued after the jurisdiction stripping MCA was enacted that the detainees lacked constitutional habeas as well; a position that was rejected in *Boumediene*. *Boumediene*, 128 S. Ct. at 2262.

138. Greenberg, *supra* note 81.

139. Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, Re: *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A*, reprinted in THE TORTURE PAPERS 172–217 (Karen J. Greenberg & Joshua Dratel eds., 2005).

labeled it a “laughingstock”¹⁴⁰ and “a stunning failure of lawyerly craft.”¹⁴¹

That memo contained such a perversely narrow definition of torture that it deserves quotation at length:

[W]e conclude that torture . . . covers only extreme acts. . . . Where the pain is physical, it must be of an intensity akin to that which accompanies *serious physical injury such as death or organ failure*. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like post-traumatic stress disorder Because the acts inflicting torture are extreme, *there is significant range of acts that though they might constitute cruel, inhuman or degrading treatment or punishment fail to rise to the level of torture*. (emphasis added).

The goal was plain. Having deprived the court oversight, a narrow definition restricting torture to things that cause death or organ failure, had it been successful, would have permitted the administration to say that it did not allow torture while encouraging interrogators—with impunity and without oversight—to engage in practices that most people would consider torture. In short, the goal was to simultaneously evade and obfuscate.

As we will see, after this stratagem began to unravel, the Detainee Treatment Act of 2005 opened the door to the admission of evidence falling short of torture¹⁴² but which might be fairly characterized as having been obtained using cruel, inhumane, or degrading treatment. This narrowing of the definition of torture expanded the kinds of harsh interrogation techniques that plausibly can be claimed as lawful thereby reducing the chances a given interrogation practice might be found to have been “manifestly unlawful.”

That this definition of torture met with such a storm of controversy that it had to be withdrawn¹⁴³ does not detract from the basic point that

140. Luban, *supra* note 27, at 54.

141. Harold Koh, Dean of the Yale Law School, *quoted in* Steven Gillers, *Legal Ethics: A Debate*, in *THE TORTURE DEBATE IN AMERICA* 238 (Karen J. Greenberg ed., 2006).

142. It is because the DTA lacks a rule preventing derivative uses of evidence obtained by torture (a “fruit of the poisonous tree” bar), that the DTA contains a loophole allowing evidence obtained through the use of outright torture. Tom J. Farer, *The Two Faces of Terror*, 101 AM. J. INT’L L. 363 (2007). *See infra* text accompanying note 209.

143. Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to James B. Comey, Deputy Attorney General, Re: *Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A*, Dec. 30, 2004, <http://www.usdoj.gov/olc/dagmemo.pdf> (basically revoking the memo from Bybee, Re: *Interrogation Standards from August 2002*) [hereinafter Levin Memorandum]. This is the “new torture memo.”

the Administration sought, primarily through opinions from its Office of Legal Counsel, to change the legal landscape to both permit and hide torture. The critical point is that by setting up such a “torture culture” (as David Luban puts it)¹⁴⁴ torture became inevitable. When the courts failed to go along, the game shifted to legislation to protect what had been done. This Article is primarily concerned with the consequences. Intent is often difficult to prove, and with institutions it is generally unnecessary. However, intent here seems quite clear. One does not so radically change a definition otherwise.

The Bybee torture memorandum (as well as other OLC memos) did much more than redefine torture.¹⁴⁵ In addition to creating a vanishingly narrow definition of torture, this memorandum also provided a definition of specific intent that claimed that one could not torture unless one specifically intended to harm or cause pain. This suggested (without explicitly endorsing) that an interrogator would be free to cause even intense pain so long as the intent was interrogation.¹⁴⁶ Thus, plainly

Note: this repudiation of the Bybee torture memo came before Gonzales’ confirmation hearing.

144. Luban, *supra* note 27, at 36.

145. Significantly, most of these memoranda were never retracted during the Bush administration. The OLC memoranda asserting sweeping presidential powers were retracted at the very end of the Bush administration. Five days before the end, the Justice Department issued a secret retraction of some of the most sweeping assertions of presidential authority. Josh Meyer & Julian Barnes, *Memos Gave Bush Overriding Powers*, L.A. TIMES, Mar. 3, 2009, at A1.

146. For example, the recently released secret memorandum of August 1, 2001 from Assistant Attorney General Jay S. Bybee, to John Rizzo, Acting General Counsel of the Central Intelligence Agency, says that “a defendant acts in good faith when he has an honest belief that his actions will not result in severe pain or suffering.” Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, *Interrogation of al Qaeda Operative*, Aug. 1, 2002, at 16, available at http://image.guardian.co.uk/sys-files/Guardian/documents/2009/04/16/bybee_to_rizzo_memo.pdf [hereinafter Bybee Memorandum]. This statement came after a detailed analysis, which argued that since the suffering of waterboarding and other harsh interrogation techniques was not prolonged, it did not meet the definition of torture. Thus, the memorandum blurs the line between torture and lawful interrogation by asserting certain conduct was not calculated to cause pain within that highly circumscribed understanding of suffering. It then went on to say that if the interrogators intent was not to cause suffering, then even if he or she did, they would not have violated the law. *Id.* Moreover, the agent’s belief that the interrogation was not causing suffering within this extremely limited definition, did not even have to be a “reasonable belief” only an “honest belief.” *Id.* Thus, it seems that an honest but unreasonable belief that the detainee’s suffering, however intense, would not be “prolonged” sufficed to insulate the interrogator from criminal liability. *Id.* David Luban says: the phrase “specific intent” is a criminal lawyer’s term of art—unfortunately, one that has multiple meanings and that many lawyers find confusing. The Bybee Memo adopts one of these competing meanings, namely that to “specifically intend” some consequence when performing an action means to perform the action for the purpose of achieving that consequence. In other words, achieving the consequence is the goal of the action, not simply a foreseen but unintended by product of it. Knowingly inflicting pain on someone isn’t torture unless your purpose is to inflict severe pain. As the Memo puts it, “the infliction of such

foreseeable pain might not count if one sought information.¹⁴⁷ The Bybee memorandum also posits (as do other OLC memos from the Bush administration) that Congress lacks the power to prohibit torture if performed under the direction of the President. (This, of course, renders the distinction between torture and CID irrelevant—at least insofar as this argument ultimately prevails). These parts of the Bybee memorandum remained intact.¹⁴⁸ The Bush administration moved grudgingly to head off the worst criticism without changing course.

There are far too many OLC memoranda, as well as memoranda from the military, the State Department, and the Vice President's office, to review them all.¹⁴⁹ The important point is that the Administration sought to screen its actions from both legislative and judicial oversight and sought to create a permissive regime that would allow torture and cruel interrogation practices. The Administration has also deployed the state secrets privilege in order to prevent civil suits alleging torture or extraordinary rendition from going forward—even to the discovery stage.¹⁵⁰ It has thus avoided, until *Boumediene*,¹⁵¹ detailed judicial or legislative oversight.¹⁵²

pain must be the defendant's precise objective." It goes on to explain that "knowledge alone that a particular result is certain to occur does not constitute specific intent." Luban, *supra* note 27, at 59.

147. Luban, *supra* note 27, at 59–62. However, the recently released Memorandum of August 1, 2002 does acknowledge that "a single event of sufficiently intense pain may fall within this prohibition." Bybee Memorandum, *supra* note 146, at 9. This same memorandum concluded, however, that severe pain would only occur if it "is of an intensity akin to the pain accompanying serious physical injury" including "severe beatings with weapons such as clubs, and the burning of prisoners." *Id.* at 10.

148. See Levin Memorandum, *supra* note 143 (as to the sweeping claims of executive powers).

149. Most of these documents are collected in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

150. *El-Masri v. Tenet*, 479 F.3d 296, 308 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007) (state secrets privilege precluded litigation of El-Masri's claims which included kidnapping, rendition and torture); see also, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff'd en banc*, 532 F.3d 157 (2d Cir. 2008) (the government in *Arar* raised the state secrets privilege however, the case was decided on other grounds).

151. *Boumediene*, by providing habeas access to detainees, promises to change that by permitting access to civilian courts. *Boumediene*, 128 S. Ct. at 2262.

152. Detainees picked up in Iraq and Afghanistan, held in U.S. military facilities, allegedly tortured and then released without charge have also been unsuccessful in seeking civil damage remedies in U.S. courts. At least one lower court has said that the Constitution does not encompass nonresident aliens injured extraterritorially while detained by the U.S. military in foreign countries. *In Re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 95 (D.D.C. 2007). It remains to be seen whether this

VI. A MAJORITY IN THE SUPREME COURT STRIKES BACK

In 2004, the United States Supreme Court decided three cases directly related to the detention of alleged terrorists. In those cases, the government had one victory on a narrow procedural point. This was tempered by the fact that the other two cases, decided the same day, made clear that its lone victory would be short-lived.

A. *Rumsfeld v. Padilla*¹⁵³

The government started with a pyrrhic win, resorting to discreditable tactics in eking out the narrow win. The government picked up a U.S. citizen, Jose Padilla, on a material witness warrant and transported him to the Southern District of New York to appear before a grand jury investigating the terrorist attacks of September 11, 2001. Court-appointed counsel sought to vacate the warrant, and the court set a hearing date.

The government moved quickly and secretly to deprive the court of jurisdiction. On June 9, 2002, while the matter was still pending, President Bush determined Padilla to be an “enemy combatant” associated with al Qaeda and directed that the Secretary of Defense take custody of him from the Department of Justice. Government attorneys later that day, and without notice to defense counsel, notified the court *ex parte* that the government was withdrawing its grand jury subpoena. The court that day (a Sunday, when court is not ordinarily in session) vacated the warrant, and the Department of Defense immediately

ruling will hold up. It can be argued that while the Constitution may not apply with full force to aliens who are outside of territorial United States, certain fundamental rights such as Due Process do apply. Under this theory, the government cannot act in ways that “shock the conscience.” See, e.g., Elizabeth Sepper, *The Ties That Bind: How the Constitution Limits the CIA’s Actions in the War on Terror*, 81 N.Y.U. L. REV. 1805, 1828–29 (2006). The cases that come closest to answering this question are *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004), *Rasul v. Bush*, 542 U.S. 466, 480–81 (2004), and *Boumediene v. Bush*, 128 S. Ct. 2229, 2247 (2008), all of which are discussed. *Hamdi* was a U.S. citizen allegedly captured on the battlefield in Afghanistan who was entitled to due process. Does the *Hamdi* and *Boumediene* rule (or perhaps some watered-down variant thereof) extend to non-resident aliens? None of these cases satisfactorily answer the question. The fact that constitutional habeas corpus applies to detainees does not say whether or not other constitutional rights will apply. Moreover, *Maqaleh v. Gates* will not, even if upheld on appeal, answer this question as that case could be limited to the reach of habeas corpus as well. See *infra* notes 273–274 and accompanying text; *Maqaleh v. Gates*, No.06-1669, 2007 U.S. Dist. LEXIS 51593 (D.D.C. Apr. 2, 2009). In *Rasul v. Myers* (a somewhat analogous case arising out of Guantanamo Bay), the Supreme Court has vacated and remanded a lower court decision denying a variety of tort claims arising out of alleged torture and brutal treatment. The case was “remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Boumediene v. Bush*. *Rasul v. Myers*, 129 S. Ct. 763 (2008).

153. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

transferred Padilla to a naval brig in South Carolina. A majority on the U.S. Supreme Court found no fault with those tactics and dismissed the petition for a writ of habeas corpus filed in the Southern District of New York.¹⁵⁴

The issue before the Court came down to whether the petition was properly filed in New York where Padilla had been until secretly removed, or in South Carolina where his immediate custodian was located. The Court ruled 5 to 4 that Padilla would have to start over in South Carolina. According to the majority, the government's tactics did not change the usual (but not exceptionless) rule that a petition for a writ of habeas corpus must be filed in the district where the immediate custodian is located. The various other court-created exceptions were held not to control.

What is most troubling about this ruling is not discussed in any of the justices' opinions. Not only did the government resort to a secret ex parte proceeding, it did so in order to gain a clear tactical advantage. Any lawyer familiar with the rulings of the various circuit and district courts will recognize that the Southern District of New York and the Second Circuit Court of Appeals would ordinarily be a far more hospitable forum for Padilla than the more conservative federal courts with jurisdiction in South Carolina. Unquestionably, Padilla would also have been more able in New York to procure a timely hearing on the merits and create a record than in South Carolina. Moreover, in New York, Padilla was not in the custody of the Department of Defense and this could materially affect interrogation techniques as well as access to counsel. If one assumes the lower federal courts to be fungible and the custodian irrelevant, then one might argue that Padilla suffered no real loss other than delay. Lawyers could (and did) re-file in South Carolina.¹⁵⁵

154. Chief Justice Rehnquist delivered the opinion of the Court, O'Connor, Scalia, Kennedy and Thomas, JJ., joined. Kennedy, J., filed a concurring opinion joined by O'Connor, J., and Stevens, J., filed a dissenting opinion joined by Souter, Ginsburg, and Breyer JJ. *Id.* at 429.

155. A petition for habeas corpus was filed in the United States District Court for the District of South Carolina, decided in *Padilla v. Hanft*, holding that the President lacked the authority to detain him and that he must be criminally charged or released. *Padilla v. Hanft*, 389 F. Supp. 2d 678, 681 (2005). The Fourth Circuit Court of Appeals reversed, holding that the detention was lawful. *Padilla v. Hanft*, 432 F.3d 582 (2005), *cert. denied*, 547 U.S. 1062 (2006). On April 14, 2007 Padilla's trial began in Miami. His conviction by the government changed his designation from enemy combatant to criminal defendant in December 2005, just before a Supreme Court deadline on certiorari might have forced "precedent setting review." Mischa Gaus, *Interrogations Behind Barbed Wire*:

Such a view distorts reality. The government engaged in forum shopping and got away with it. The immediate goals were time, a more sympathetic court, and the ability to coercively interrogate Padilla without interference from civilian lawyers. In part because of the implications of the *Rasul* case (described below), decided two years later by the Supreme Court, Padilla was ultimately charged, tried, and convicted in Miami. Thus, in the end, the government's strategy of hiding Padilla from the courts failed.

Padilla, which involved a U.S. citizen arrested on U.S. soil,¹⁵⁶ was the government's weakest case, reaching the outer limits of what government lawyers were claiming for Presidential authority. It is one thing to claim that the Constitution does not extend offshore to Guantanamo or Afghanistan, or that it does not apply to non-U.S. citizens who are not

Who's to Blame for America's New Torture Techniques?, IN THESE TIMES, Feb. 2007, at 26.

156. The only other civilian that the author is aware of who was arrested in the U.S. and held as an enemy combatant was Ali Saleh Kahlah al-Marri, an alien lawfully residing in the United States, who was arrested in Peoria for credit card fraud and lying to federal agents. The President declared him to be an enemy combatant and the Department of Defense moved him to the Navy brig in S.C. He was allegedly threatened with torture and treated harshly. His Petition for a writ of habeas corpus was successful in the Fourth Circuit Court of Appeals, which ordered the district court to issue a writ of habeas corpus directing his release from military custody. *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007). Judge Motz wrote:

To sanction such presidential authority to order the military to seize and indefinitely detain civilians, even if the President calls them "enemy combatants," would have disastrous consequences for the Constitution—and the Country. For a court to uphold a claim to such extraordinary power would do more than render lifeless the Suspension Clause, the Due Process Clause, and the rights to criminal process in the Fourth, Fifth, Sixth, and eighth Amendments; it would effectively undermine all of the freedoms guaranteed by the Constitution. It is that power—were a court to recognize it—that could lead all our laws "to go unexecuted, and the government itself to go to pieces." We refuse to recognize a claim to power that would so alter the constitutional foundations of our Republic.

Id. at 195.

Ultimately, the Obama administration gave up on holding al-Marri as an enemy combatant. He was transferred to civilian authorities and charged with providing material aid to terrorists, to which he initially pled not guilty. The District Judge overseeing his case then ruled that he must remain in custody until tried, as he has failed to prove that he is not a danger to the community. Bhargav Katikaneni, *'Enemy Combatant' al-Marri to be Tried in U.S. Criminal Court*, JURIST, Feb. 27, 2009, <http://jurist.law.pitt.edu/paperchase/2009/02/enemy-combatant-al-marri-to-be-tried-in.php>; Amelia Mathias, *Al-Marri Pleads Not Guilty to Terrorism Charges*, JURIST, Mar. 24, 2009, <http://jurist.law.pitt.edu/paperchase/2009/03/al-marri-pleads-not-guilty-to-terrorism.php>. On April 30, 2009, al-Marri plead guilty to providing material support to a foreign terrorist organization in violation of 18 U.S.C. § 2339B. As a part of the agreement, al-Marri agreed not to appeal any sentence that he might receive, not to pursue a writ of habeas corpus, and not to oppose deportation to Qatar or Saudi Arabia after his sentence has been served. Bhargav Katikaneni, *Al-Marri Pleads Guilty to Terrorism Charges in Federal Court*, JURIST, May 1, 2009, <http://jurist.law.pitt.edu/paperchase/2009/05/al-marri-pleads-guilty-to-terrorism.php>.

found in the United States. Here the claim was that the President could call a U.S. citizen an enemy combatant, have him arrested within the United States, and then hold him incommunicado indefinitely. It is not surprising that the Administration sought to delay and move the proceedings to a more hospitable venue.

Moreover, the Administration must have thought it would be able to fend the lawyers off and in any event prevent Padilla from coming to a civilian court. It is important to recognize that Padilla was spirited out of New York in 2002. This was prior to the Administration's later 2004 defeat in the two other cases (decided the same day as *Padilla*), *Rasul*¹⁵⁷ and *Hamdi*,¹⁵⁸ which made Padilla's appearance in a civilian court inevitable. Thus, *Padilla* is important more for what it shows about the government's tactics in keeping detainees out of the courts and away from public disclosure, than it is for its holding. It provides evidence that early on the Bush administration sought to engage in and hide, harsh, and coercive interrogations, while denying that its practices could be what they appeared to be.

Padilla was tried in 2007 in Federal District Court in Miami and, along with two others, was convicted of conspiring to murder in Chechnya, Afghanistan, Bosnia, and elsewhere. On January 23, 2008 he was sentenced to serve seventeen years in prison. The government's original charge, that Padilla plotted to detonate a radioactive "dirty bomb," never surfaced and is presumably forever gone. Moreover, the judge also ruled that "[t]here is no evidence that these defendants personally maimed, kidnapped, or killed anyone in the United States or elsewhere."¹⁵⁹ Thus, the government's most incendiary charges were never proved. The government has denied Padilla's allegations of torture,¹⁶⁰ but the judge in the case agreed that he was subjected to "harsh conditions" and "extreme stresses."¹⁶¹

157. *Rasul v. Bush*, 542 U.S. 466, 484 (2004).

158. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004).

159. *Padilla Given Long Jail Sentence*, BBC NEWS, Jan. 23, 2008, <http://news.bbc.co.uk/2/hi/americas/7203276.stm>.

160. *Padilla Guilty in U.S. Terror Trial*, BBC NEWS, Aug. 16, 2007, <http://news.bbc.co.uk/2/hi/americas/6950333.stm>.

161. BBC NEWS, *supra* note 159 (Judge Cooke is quoted as saying that Padilla had been subjected to "harsh conditions" and "extreme environmental stresses" at a Navy jail in South Carolina).

B. Hamdi v. Rumsfeld¹⁶²

Yasser Esam Hamdi was a dual U.S and Saudi citizen picked up in Afghanistan by the Northern Alliance in 2001 and turned over to the Americans. He was declared an “illegal enemy combatant” and transported to Guantanamo Bay, Cuba. Upon discovery that he was a U.S. citizen, the government transferred him to a navy brig in South Carolina.

Hamdi raises an interesting question about the rights of a U.S. citizen abroad. Unlike Padilla, who was arrested in Chicago, Hamdi was captured in Afghanistan and was alleged to have been fighting alongside of the Taliban militia.¹⁶³ The fact, however, that he was turned over by the Northern Alliance suggests that bounty money may have had more to do with his capture than any actual guilt in fighting against the United States,¹⁶⁴ and Hamdi steadfastly denied that he ever took up arms against the U.S. or its allies.

Hamdi held that a citizen, even if picked up on a foreign battlefield, could not be held indefinitely without charges. At a minimum, he had a right to notice of the charges against him and a hearing of some ill-defined sort. Nonetheless, if captured-in-Afghanistan Hamdi had due process rights then Padilla *a fortiori* had rights, so *Hamdi* explains why the government subsequently acceded to a trial for Padilla in a civilian court. This access to some process entailed the right for someone who has been declared an enemy combatant to “receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision-maker.”¹⁶⁵ Writing for the plurality, Justice O’Connor said, “[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”¹⁶⁶ By itself, this case is of limited reach in that it only applied to U.S. citizens, surely a small subset of those detained in the war against terror. Nonetheless, this case breached the administration’s most extravagant claim: that the President could declare anyone at anytime an enemy combatant, and hold that person without any process whatsoever.

162. *Hamdi*, 542 U.S. at 507.

163. *Saudi-American Released to Riyadh*, BBC NEWS., Oct. 11, 2004, <http://news.bbc.co.uk/2/hi/americas/3733942.stm>.

164. See JOSEPH MARGUILLES, *GUANTANAMO, AND THE ABUSE OF PRESIDENTIAL POWER* 68–69 (2006), for a good account of how innocent people were swept up by the Northern Alliance for bounty monies ranging as high as \$5000 for Taliban and \$20,000 for al-Qaeda (huge sums for that part of the world). The Uyghurs are another example of how innocent people simply got swept into Guantanamo by the Northern Alliance seeking bounty monies. See Shaulis, *supra* note 20.

165. *Hamdi*, 542 U.S. at 533.

166. *Id.* at 536.

Hamdi's grant of access to a hearing seems to have had disastrous consequences for the U.S. position. Rather than try him for his alleged crimes, the U.S. reached an agreement with him and deported him to Saudi Arabia. Hamdi, who was never charged with any crime, spent over two years in captivity before surrendering U.S. citizenship.¹⁶⁷

This is the troubling aspect of this case. Had the government possessed truly persuasive evidence that Hamdi was a dangerous person who might return to the battle against the U.S., it surely would have made some effort to prove a case against him or found some other basis for holding him. While it is possible that the evidence against him was so secret that it could not be disclosed, the fact that he was turned over by the Northern Alliance suggests otherwise. Hamdi may have been one more innocent person swept up and sent wrongly to Guantanamo. At the least, he does not seem to have been a dangerous terrorist as initially claimed.

C. *Rasul v. Rumsfeld*¹⁶⁸

Rasul was the third, last, most difficult, and most significant of the terrorism cases decided during the Supreme Court's 2004 term.¹⁶⁹ Petitioners were non-citizens held at Guantanamo Bay, Cuba, and therefore outside the territorial United States. The Court decided the case on the narrowest possible ground, holding that the statutory writ of habeas corpus¹⁷⁰ applied to non-citizens detained at the Guantanamo Bay naval base. The case turned on the fact that, notwithstanding Cuba's ultimate sovereignty over the area, the U.S. naval base there was subject to the United States' exclusive jurisdiction. Cuban law had no application, so a different ruling would have left Guantanamo Bay wholly outside of any law. This ruling, however, had the potential of wiping out the administration's entire strategy of creating a law-free zone where alleged terrorists could be held and, more importantly, interrogated without judicial oversight.

By deciding the case on statutory grounds, the Supreme Court avoided deciding a more difficult constitutional question. The U.S. Constitution

167. *Saudi-American Released to Riyadh*, *supra* note 163.

168. *Rasul*, 542 U.S. at 466.

169. The Court often saves its most difficult and contentious cases to the end of the term, releasing them just before the summer recess. By any measure, *Padilla*, *Hamdi* and *Rasul* raised difficult issues of national importance.

170. 28 U.S.C. §§ 2241–43 (2006).

provides that “[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹⁷¹ This is the only human right specified in the original Constitution, and arguably the most important.¹⁷² The founders were unquestionably aware of the bitter fights over the Great Writ during the reign of the Stuarts, as well as the battle to secure the benefits of the Habeas Corpus Act of 1679 for those colonies as to which it did not apply.¹⁷³

The narrow basis for the Court’s decision left open the possibility that Congress might change the law adversely to the detainees. It also left open the possibility, later addressed in *Boumediene*, that congressional action could be trumped if constitutional habeas corpus applied to executive detention of non-citizens outside of the United States. Congress may alter a statute at any time, but, absent constitutional amendment, Congress cannot change the Supreme Court’s interpretation of the Constitution.¹⁷⁴ Because the Court is wary of trumping the democratic process unnecessarily, the Court usually decides cases on narrowest possible grounds.¹⁷⁵ However, the legislative response to *Rasul* led, as we will see, directly to *Boumediene*.

VII. THE EXECUTIVE AND LEGISLATIVE RESPONSE TO *PADILLA, HAMDI AND RASUL*

These three cases are important for the executive branch and legislative branch reactions they triggered in a scramble to save the administration’s carefully constructed law-free interrogation zone. First,

171. U.S. CONST. art. I, § 9, cl. 2.

172. The Bill of Rights came into effect in 1791, two years after the Constitution was ratified in 1789. U.S. CONST. amends. I–X.

173. See, e.g., Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 391–93 (1998).

174. Chief Justice John Marshall famously declared, “[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.” *Marbury v. Madison*, 5 U.S. 87, 111 (1803). The doctrine of judicial review was emphatically reaffirmed as recently as June 28, 2006. *Sanchez-Llamas v. Johnson*, 548 U.S. 331, 354 (2006). In so far as the MCA purports to tell the courts how to interpret the Geneva Conventions, it arguably runs afoul of this doctrine. For a discussion of this debate compare Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT’L L. 322, 337–38 (2007) (arguing that Congress has the power to do this), with Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT’L L. 73, 90–91 (2007) (arguing that Congress lacks this power).

175. See Martin, *supra* note 117, at 346, for a favorable discussion of the Supreme Court’s restraint in these cases.

the Department of Defense narrowly interpreted the scope of the (admittedly ill-defined) hearings required by *Rasul* by setting up Combatant Status Review Tribunals (CSRTs). These featured restrictive rules that, among other things, failed to provide a detainee with sufficient information to defend himself, gave an overly vague definition of “enemy combatant,” and failed to adequately handle accusations of torture. Next, Congress rushed through the Detainee Treatment Act of 2005, which, among other things, purported to strip the federal courts of habeas jurisdiction. Neither the President nor Congress appears to have been anxious to have the courts inquire into the Guantanamo detainee’s cases.

A. *Combatant Status Review Tribunals*

Hamdi required at a minimum some sort of process for detainees at Guantanamo Bay, Cuba. The government’s immediate response was to create Combatant Status Review Tribunals¹⁷⁶ to determine the detainees’ status. The government argued that this responded to the requirement that the government provide detainees with due process. In retrospect, given how these tribunals have worked, this seems to have been another move enabling the Administration to hide what it was doing from the rest of the world.¹⁷⁷ As we will see, the interrelationship between the CSRTs and the MCA would have, but for *Boumediene*, allowed the government to hide outright torture, not just “harsh” interrogation methods or merely cruel, inhuman, and degrading treatment.

The CSRTs allowed for secret evidence, hearings outside of the presence of defense counsel, use of hearsay upon hearsay, and a vague and overbroad definition of “enemy combatant.”¹⁷⁸ Moreover, the

176. Memorandum for the Secretary of the Navy, *Order Establishing Combatant Status Review Tribunal*, July 7, 2004, <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (CSRT Order).

177. The most complete description of problems with the CSRT process is found in JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 160–81 (2006). Margulies outlines problems with overbreadth in covering people forced to work with the Taliban in minor roles, hiding and ignoring of exculpatory evidence (even when overwhelming), secret hearings, use of secret evidence, presumptions in favor of the evidence presented by the military, lack of impartial decision makers, and lack of counsel. “In short, the conclusion is simply inescapable that these tribunals were created for no other purpose than to validate a predetermined result.” *Id.* at 169.

178. Brief for Amnesty International et al. as Amici Curiae Supporting Petitioners, *Boumediene v. Bush*, 128 S. Ct. 2229 (2007) (Nos. 06-1195, 1196).

CSRTs have simply ignored evidence that cleared detainees. A detainee's innocence of any crime, it seems, was irrelevant. Indeed, the record and findings of the hearings were in some cases kept from the detainee and the material classified and thereby effectively hidden from the public. The press reported that the military possessed compelling evidence in 2002 clearing a detainee, Murat Kurnaz. The evidence seemed sufficiently clear by then that a German intelligence officer wrote that the United States considered his "innocence proven" and predicted his quick release. Nonetheless, Kurnaz languished in Guantanamo until 2006 and even after release had to sue to compel release of the classified documents in his case. Even more damaging to the U.S. position, a U.S. district court judge ruled in 2005 that Kurnaz did not receive a "fair opportunity to contest the material allegations against him."¹⁷⁹ The best summary description of the CSRTs comes in an amici brief filed with the Supreme Court in *Boumediene*,

The CSRTs consist of panels of three military officers who are "not bound by the rules of evidence such as would apply in a court of law" and may consider any information—including classified, hearsay, and coerced information—in making their determination as to whether, by a "preponderance of the evidence" the detainee is "properly detained as an enemy combatant". The detainee is not entitled to legal counsel and is not entitled to have access to or know the details of any classified evidence used against him. There is a presumption that the Government Information submitted to the CSRT in support of the detainee's classification as an "enemy combatant" is "genuine and accurate."¹⁸⁰

Furthermore, under the CSRT procedure, a person classified as an "enemy combatant" could be held indefinitely—potentially a life sentence—regardless of whether a military commission ever convicts him of anything.¹⁸¹ The government under the Bush administration justified this by claiming that it was keeping enemy combatants from returning to the battle.

The practice of utilizing repeated hearings until the tribunal finally reaches the desired result remained a serious problem during the Bush administration. In at least three cases, CSRT panels returned "not/no

179. Caitlin Price reports that "[n]ewly declassified court documents" cleared German-born Turkish citizen Murat Kurnaz in 2002, but he was not released until 2006 and had to sue to compel the release of the classified documents. Furthermore, newly declassified portions of the 2005 opinion in, *In re Guantanamo Detainee Cases*, by U.S. District Court Judge Green state that "Kurnaz did not receive a 'fair opportunity to contest the material allegations against him.'" Caitlin Price, *Guantanamo Tribunal Ignored Evidence Clearing German-Born Detainee: WP*, JURIST, Dec. 6, 2007, <http://jurist.law.pitt.edu/paperchase/2007/12/guantanamo-tribunal-ignored-evidence.php#>.

180. Amnesty International et al., *supra* note 178.

181. See *Boumediene*, 128 S. Ct. at 2229.

longer” an enemy combatant determinations.¹⁸² The Department of Defense simply ordered new CSRTs. None of the detainees was told of the first decision. In two cases the government’s second panel found the detainee to be an enemy combatant; in the third case it took three separate panels before the government procured the desired result—a finding that the detainee was an enemy combatant.¹⁸³

Did the new CSRT panels receive new evidence supporting the detainee’s enemy combatant status? Not necessarily. In the case of Abdul Hamid al-Ghizzawi the government appears to have simply taken the “old evidence and then stamped the word *classified* on it.”¹⁸⁴ The next panel again found the evidence insufficient and again found him not to be an enemy combatant.¹⁸⁵ The Department of Defense again sent it back to finally achieve the desired outcome.

One can only surmise why senior military officers did not want to release these people. Were they tortured?¹⁸⁶ Could it be that their stories about their treatment will damage the U.S.? Thomas Sullivan, a former U.S. Attorney who is representing several Saudis at Guantanamo said, “It’s a joke. It’s a sham.”¹⁸⁷

CSRTs facilitated another practice that is, if anything, even more shocking to anyone who values fair trial practices. Recall that *Hamdi* required that detainees be given a fair opportunity to defend themselves from the charge that they were “enemy combatants.” The CSRTs, however, allowed the use of classified and secret evidence that the detainee could not see. So much of the evidence was thus kept from the detainee that he could not make sense of the charges or meaningfully answer or defend. The following comes from the District Court’s opinion

182. The wording, “not/no longer” is interesting in that it seems to suggest that a person might have been properly classified as an enemy combatant but in some ill-defined way no longer merits that status. The implication seems to be that the government correctly detained an individual and properly subjected him to harsh interrogations, even though there was not sufficient evidence to continue to hold him. Thus, detainees are, like Kafka’s Joseph K., “traded . . . without having done anything wrong.” FRANZ KAFKA, *THE TRIAL* 1 (Willa & Edwin Muir trans., 1964).

183. Tom J. Farer, *The Two Faces of Terror*, 101 AM. J. INT’L L. 363, 377 (2007)

184. RON SUSKIND, *THE WAY OF THE WORLD* 99–100 (2008).

185. *Id.* at 224.

186. Whether one considers it torture, Ghizzawi’s treatment seems harsh and degrading, apparently including suffering cold temperatures, being kept naked, made to act like a dog, kept without medical care, threatened with death and rape, bound for hours in excruciating stress positions, and other humiliations. *Id.* at 131.

187. Farer, *supra* note 183 at 371.

in *In Re Guantanamo Detainee Cases*.¹⁸⁸ In reading a list of allegations forming the basis for the detention of Mustafa Ait Idr, a petitioner, the Recorder of the CSRT asserted, “While living in Bosnia, the Detainee associated with a known Al Qaida operative.” In response, the following exchange occurred:

Detainee: Give me his name.

Tribunal President: I do not know.

Detainee: How can I respond to this?

Tribunal President: Did you know of anybody that was a member of Al Qaida?

Detainee: No, no.

Tribunal President: I’m sorry, what was your response? Detainee: No.

Tribunal President: No?

Detainee: No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.

Tribunal President: We are asking you the questions and we need you to respond to what is on the unclassified summary. (citations omitted)

It is difficult to avoid the conclusion that the CSRT process was set up in order to evade to the maximum extent possible Hamdi’s fair hearing requirement. The goal seems to have been to continue to hide the government’s treatment of detainees.

B. The Detainee Treatment Act of 2005¹⁸⁹

The Administration’s second response to the *Padilla, Hamdi*, and *Rasul* trilogy was to seek a congressional override. Congress responded with the Detainee Treatment Act (DTA) effective December 30, 2005. The DTA set up a variety of technical rules for the interrogation of detainees and purports to prohibit torture (although as we will see, torture returns through the backdoor). Moreover, evidence stemming from coercive interrogations conducted before the effective date of the DTA is specifically permitted. Most importantly, it attempted to reverse *Rasul’s* holding that detainees at Guantanamo Bay would have access to

188. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 469 (2005).

189. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2742-43 (amending 28 U.S.C. § 2241 (2005)).

civilian courts through the statutory writ of habeas corpus. The Act attempted to strip habeas jurisdiction from the federal courts and substituted the Defense Department's Combatant Status Review Tribunals, with a limited appeal to the Court of Appeals for the District of Columbia.¹⁹⁰ This appeal was limited to whether the Combatant Status Review Tribunal followed its own procedures and its decision was consistent with any other applicable laws. It provided for a rebuttable presumption in favor of the Government's evidence. Shockingly, but understandably, the government (albeit unsuccessfully) attempted to argue that even on appeal it could withhold exculpatory evidence.¹⁹¹ (The Court of Appeals eventually rejected that extreme assertion).¹⁹² Congress and the Administration were once again trying to head off any civilian review or oversight of Guantanamo Bay's prisoners.

Most importantly, notwithstanding the Act's ban on torture, the President's signing statement¹⁹³ said that the law shall be construed, "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on judicial power." With

190. Review is limited to whether the CSRT proceeding was consistent with its own "standards and procedures," *id.* § 1005(e)(2)(C)(i), and whether those procedures are consistent with the Constitution "to the extent the Constitution and laws of the United States are applicable," *id.* § 1005(e)(2)(C)(ii), while providing that "[n]othing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States." *Id.* § 1005(f). Moreover, the right of appeal is limited to verdicts that impose a sentence of death or a prison term of 10 or more years. Finally, detainees have no ability to seek protection against torture or cruel, inhumane or degrading treatment. *See, e.g.,* Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 107 (2007).

191. Patrick Porter, reported that the Court of Appeals of the District of Columbia ruled that it will not reconsider the order of July 2007 where it ruled that in "enemy combatant" designations the appeals court would review all evidence regarding the detainee. The Court rejected the government's claim that the Pentagon should be able to select which evidence is presented to the court on appeal and leave out evidence that could clear a detainee. Patrick Porter, *Federal Appeals Court Refuses to Reconsider 'Enemy Combatant' Evidence*, JURIST, Feb. 1, 2008, <http://jurist.law.pitt.edu/paperchase/2008/02/federal-appeals-court-refuses-to.php>.

192. *See*, *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), *reh'g denied*, *Bismullah v. Gates*, 501 F.3d 137 (D.C. Cir. 2007), *reh'g en banc denied*, *Bismullah v. Gates*, 514 F.3d 1291 (D.C. Cir. 2008).

193. President's statement on signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Jan. 2, 2006), *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

this statement, President Bush, implicitly but clearly, declared that, notwithstanding the DTA, he had the power to continue to order interrogations that included torture. As professor Martin Lederman put it “[t]ranslation: I reserve the constitutional right to waterboard when it will ‘assist’ in protecting the American people from terrorist attacks.”¹⁹⁴ Thus, even though the DTA claimed to prohibit torture and cruel, inhuman, and degrading treatment, the President claimed the right to continue the practice.

VIII. THE SUPREME COURT REASSERTS ITSELF:
*HAMDAN V. RUMSFELD*¹⁹⁵

The jurisdiction stripping provisions of the Detainee Treatment Act of 2005 were aimed directly at *Rasul*'s holding that detainees at Guantanamo Bay were entitled to statutory habeas review. In a complex and narrow opinion, a bare majority in *Hamdan* concluded that the DTA applied prospectively. Thus, all of the detainees at Guantanamo as of the effective date of the DTA could still maintain petitions for writs of habeas corpus. The Court also held that the procedures set forth in the DTA violated the Uniform Code of Military Justice, which had incorporated the laws of war and thus incorporated the Geneva Conventions into domestic law. This meant that Common Article Three, with its proscription of torture and cruel, degrading, and inhumane treatment, applied to the detainees, and that a federal habeas court could inquire into both their continued detention and their treatment.

However, the Court avoided the two major questions. First, does constitutional habeas apply to Guantanamo's detainees (as opposed to statutory habeas which Congress can change)? Second, *Hamdan* left open the question of whether the Geneva Conventions are self-executing. Do the Geneva Conventions apply to the detainees irrespective of the Uniform Code of Military Justice (which Congress can also change)?

Justice Bryer's concurring opinion (joined by Justices Souter, Ginsburg, and Kennedy) practically invited a legislative response.

The dissenters say that today's decision would 'sorely hamper the President's ability to confront and defeat a deadly enemy.' They suggest that it undermines our Nation's ability to 'preven[t] future attacks' of the grievous sort that we have already suffered. That claim leads me to state briefly what I believe the majority sets forth both explicitly and implicitly at greater length. The Court's conclusion ultimately rests on a single ground: Congress has not issued the Executive a

194. Professor Lederman is a regular commentator on Jack Balkin's Blog. *So Much for the President's Assent to the McCain Amendment*, posting by Marty Lederman to Balkinization, <http://balkin.blogspot.com/2006/01/so-much-for-presidents-assent-to.html> (Jan. 2, 2006, 11:21 EST).

195. *Hamdan v. Rumsfeld* 548 U.S. 557 (2006).

'blank check.' Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary. (citations omitted).¹⁹⁶

Justice Kennedy, however, also concurring, hinted that even with appropriate legislation, the President's powers might not be unlimited. He wrote, "[i]f Congress, after due consideration, deems it appropriate to change the controlling statutes, *in conformance with the Constitution and other laws*, it has the power and prerogative to do so"¹⁹⁷ (emphasis added). Thus, Justice Kennedy hinted that even if the Congress and the President agree, the Constitution could impose limitations.¹⁹⁸ Justices Souter, Breyer and Ginsberg joined Kennedy's opinion. It is this tantalizing hint that made *Hamdan* so important—the legislature might not be completely free to write the president a blank check.

IX. HOW THE MILITARY COMMISSIONS ACT CLOAKED TORTURE

The Congress responded to *Hamdan* with the Military Commissions Act of 2006, which attempted to again cut off all civilian court review for Guantanamo detainees. As one scholar put it, "[w]ith the adoption of the DTA and MCA, Congress has now given the President virtually all that he sought with respect to detention and trial of enemy combatants."¹⁹⁹ If upheld, these two pieces of legislation would have returned detainees to roughly their original position.

Before *Boumediene* there was vigorous debate on whether the Military Commissions Act of 2006 could withstand constitutional scrutiny.²⁰⁰

196. *Id.* at 636 (Breyer, J., concurring).

197. *Id.* at 637 (Kennedy, J., concurring).

198. *See*, Peter E. Quint, *Silences and Peculiarities of the Hamdan Opinions*, 66 MD. L. REV. 772, 784–86 (2007) (for a fuller analysis of what Justice Kennedy might have meant).

199. Stephen A. Saltzburg, *A Different War: Ten Key Questions About the War on Terror*, 75 GEO. WASH. L. REV. 1021, 1026 (2007).

200. Curtis A. Bradley argued, for example, that while the jurisdiction stripping part of the MCA will likely be held not to suspend the constitutional writ of habeas corpus, but that the CSRTs can, with appropriate appellate oversight provide an acceptable substitute for the Great Writ. Bradley, *supra* note 174, at 334. Carlos Manuel Vásquez disagreed, arguing that Congress lacked the power to interpret the Geneva Conventions and the Court may find that the Geneva Conventions are self-executing and cannot be "unexecuted by Congress" and require more rights than the CSRTs and the MCA provide. Vásquez, *supra* note 174, at 73. Michael Greenberger interpreted Justice Kennedy's crucial swing vote as possibly voting to allow habeas corpus to apply to detainees and says on this issue that "[w]hat is clear, then, is that neither *Hamdan* nor the MCA provides the final

There will undoubtedly be continued debate about whether *Boumediene* was correctly decided. However, the burden of this Article is simply to show that one consequence of the MCA, should military commissions resume under it without significant modification, would be to continue to hide torture as well as other coercive and harsh interrogation techniques (and that *Boumediene* undermines that effect).

We turn to seemingly narrow evidentiary issues which, it will be argued, paved the way for hiding torture: the use of secret evidence from which the detainee and his lawyer are excluded, hearsay evidence, including hearsay within hearsay, use of evidence stemming from coercive interrogation techniques, use of non-testimonial evidence stemming from torture—including the use of such to validate or render reliable statements obtained through coercion.

Furthermore, both the CSRTs and the military commissions, staffed completely by the military, became so politicized that the chief prosecutor Colonel Morris Davis resigned, complaining about “political interference with the independence of his office.”²⁰¹ Under these circumstances, it is reasonable to ask how independent these tribunals could ever be and how likely they would be to exercise discretion in favor of a detainee.²⁰²

A. *Interplay Between the Rules of Evidence: A Subtle Way to Hide Torture*

Rule 304 of the Military Commission Rules of Evidence, taken directly from Section 948r of the MCA, comprehensively deals with confessions, admissions, and other statements. On its face it appears to rule out statements obtained by torture. A statement obtained through the use of coercion not rising to the level of torture is admissible if it was taken before December 30, 2005, (the effective date of the Detainee Treatment Act) if it is deemed “reliable and possessing sufficient

thoughts on the treatment of detainees in the war on terror, and it is the Court, not Congress, that will likely have the last word.” Michael Greenberg, *You Ain’t Seen Nothin’ Yet: The Inevitable Post-Hamdan Conflict Between the Supreme Court and the Political Branches*, 66 MD. L. REV. 805, 834 (2007).

201. Marc Falkkoff wrote, “In September of this year, Davis [the military prosecutor] threatened to resign if anyone tried to intimidate him. He has now done so, stating bluntly that, ‘as things stand right now, I think it’s a disgrace to call it a military commission—it’s a political commission.’” *Politics at Guantanamo: The Former Chief Prosecutor Speaks*, JURIST, Nov. 2, 2007, <http://jurist.law.pitt.edu/forumy/2007/11/politics-at-guantanamo-former-chief.php>.

202. Amnesty International et al. *supra* note 178.

probative value,” and if “the interests of justice” are “best served” by its admission.²⁰³

The line between coercion and torture can cut exceedingly fine. For example, in the case of Salim Ahmed Hamdan (Osama bin Laden’s alleged driver), military defense lawyers alleged that Hamdan’s interrogation included beatings, sexual humiliation, a forced walk in stooped “duck walk” (detainees often also had hands tied behind their back), guards ramming his head into roadside posts repeatedly, each time announcing “again,” denial of medical care for a painful back injury, being touched inappropriately by a female interrogator, and being held for long periods in solitary confinement.²⁰⁴ Plainly, some things such as denial of pain medications can, without more, constitute torture. Moreover, the sum total of this kind of treatment, if found credible, is most certainly torture. Military prosecutors declined comment.

Finally, after years of detention and mistreatment, (and most importantly, after the Supreme Court had decided *Boumediene*) Hamdan faced a military commission. The military judge in that commission had ruled that Hamdan was not entitled to protections under the Fifth Amendment to the Constitution, but barred evidence immediately following his capture. However, the ruling allowed the introduction of Hamdan’s statements made while a prisoner at Guantanamo Bay. This included coercive interrogations that apparently did not amount to torture.²⁰⁵

Prosecutors, who had sought a thirty year sentence, were plainly disappointed in the verdict, which found Hamdan guilty of providing material support for terrorism, and sentenced him to only five and a half years in prison with credit for time served. This meant that Hamdan could be released within 6 months.²⁰⁶ Prosecutors sought to extend his sentence by arguing that the military commission jury improperly gave

203. Military Comm’n R. Evid. 304, *supra* note 6.

204. William Glaberson, *A Legal Filing Alleges a Detainee Was Abused*, N.Y. TIMES, Apr. 5, 2008, at A11.

205. According to the ruling (para. 43) coercive practices apparently included touching his crotch by a female interrogator, solitary confinement, possible withholding of medical care for short periods, and being force fed to end his hunger strike. *United States v. Hamdan*, ruling on Motion To Suppress Statements Based On Coercive Interrogation Practices, July 20, 2008, [http://www.defenselink.mil/news/Ruling%20on%20Motion%20to%20Suppress%2029%20and%20D-044%20Ruling%201%20\(2\).pdf](http://www.defenselink.mil/news/Ruling%20on%20Motion%20to%20Suppress%2029%20and%20D-044%20Ruling%201%20(2).pdf).

206. Devin Montgomery, *Hamdan Sentence Could Mean Fewer Than Six Months in Prison*, JURIST, Aug. 7, 2008, <http://jurist.law.pitt.edu/paperchase/2008/08/hamdan-sentence-could-mean-fewer-than.php>.

him credit for time served.²⁰⁷ Finally, the government, facing up to defeat, arranged to send Hamdan to Yemen before the end of his sentence.²⁰⁸

Hamdan's case might superficially seem to argue that the military commissions worked, albeit slowly, to provide justice. After all, the administration and prosecutors were unhappy with the result. This, however, would be a misreading of this case.

First, this case was tried after the Supreme Court decided *Boumediene*. That case changed the military's calculus by making it much harder for torture to be hidden. One can only speculate about how Hamdan's military commission might have turned out had *Boumediene* not been decided in the way that it was. It clearly could have been much different.

Second, the military judge only barred evidence stemming from the worst mistreatment. He did not bar subsequent evidence that appears to have been coerced. Even this ignores the flow-over effect from the original mistreatment. It is difficult to see how the later coerced statements could be free of taint from the earlier torture-induced evidence. The fruits of the poisonous tree doctrine did not apply in Hamdan's military commission.

Finally, as we will demonstrate, the rules of the military commissions permit the hiding of evidence directly stemming from torture. The fact that excesses were discovered and partially dealt with in this one case does not show that torture would be discovered or dealt with in other cases. Most importantly, it does not show what would have happened had *Boumediene* not been decided as it was.

Moreover, as we show more fully below, Hamdan's lawyers were operating under disabilities that no defense lawyer ought ever to face. Given the obstacles noted below, it seems to be a miracle that he received the short sentence that he did. Apparently the military commission jury simply did not believe that Hamdan was as complicit in terrorist activities as the prosecution tried to make out.

Rule 304 only limits the use of statements obtained using torture. Moreover, under the Military Commissions Act, the President has the unilateral and unreviewable power to establish interrogation methods.²⁰⁹

207. Devin Montgomery, *U.S. Seeking Extended Sentence for Guantanamo Detainee Hamdan*, JURIST, Oct. 20, 2008, <http://jurist.law.pitt.edu/paperchase/2008/10/us-seeking-extended-sentence-for.php>.

208. Josh White & William Branigin, *Hamdan to be Sent to Yemen; Bin Laden Driver Spent 7 Years at Guantanamo*, WASH. POST, Nov. 25, 2008, A1.

209. According to Department of Justice spokesmen, the government could resort to waterboarding or other harsh techniques if the following guidelines are met:

1. the CIA and the Director of National Intelligence would have to determine new method necessary in the war on terror;

If the President formally, by published executive order, says a practice is lawful, then it cannot by definition be torture. Thus, by specifying what practices are lawful, the president could, by negative inference, effectively define what constitutes torture. The MCA also gives the President the power “to interpret the meaning and application of the Geneva Conventions.”²¹⁰ This provision, had it been sustained, further would have constrained the use of grave breaches of the Geneva Conventions as predicates for a prosecution under the War Crimes Act. If the President says that a practice does not violate the Geneva Conventions it would, by that declaration, become lawful and presumably unreviewable by the courts. Thus, Congress, in passing the MCA not only attempted an end-run on the courts, but also on the Geneva Conventions and the Convention Against Torture.²¹¹

Moreover, while eliminating torture-derived statements, as we saw with Hamdan’s military commission, the act does not limit derivative uses; there is no “fruit of the poisonous tree” prohibition.²¹² This rule must be read in tandem with the rules providing for hearsay evidence, and the rules providing for ex parte and in camera proceedings where classified information is used.

Rule 803 allows the admission of hearsay that would otherwise be inadmissible in a civilian court so long as the proponent has given notice to his adversary, or absent notice, the adversary has had a “fair opportunity under the totality of the circumstances” to contest it. The only limitation on hearsay occurs under the MCA if the opponent can demonstrate by a preponderance of the evidence that the proposed hearsay is unreliable. Only then will the judge exclude the evidence. A detainee at Guantanamo Bay must have in hand, or be able to acquire, a preponderance of evidence

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2. the Attorney General would have to conclude use of the method would be lawful (including DTA and MCA and Common Art. 3);
 3. the President would have to personally authorize the technique; and
 4. in the case of waterboarding, Congress and relevant committees would have to be notified.

Brett Murphy, *Waterboarding Not Authorized Under Current Law: DOJ to House Panel*, JURIST, Feb. 14, 2008, at <http://jurist.law.pitt.edu/paperchase/2008/02/waterboarding-not-authorized-under.php>.

210. Military Commissions Act of 2006 Pub. L. No. 109-366, § 6(a)(3), 120 Stat. 2600, 2632.

211. This article addresses *Boumediene’s* probable effect on these issues. See *infra* Part X.

212. Farer, *supra* note 183, at 370–71.

that his hearsay accuser is unreliable. We explore that possibility in more detail below.

Finally, there is the interplay with Rule 505 which privileges classified information and allows for ex parte submissions as well as submissions in camera. While the detainee and his counsel will receive summaries, we have already seen from the CSRT proceedings that the information received may be meaningless and unhelpful to the defense. The example of Canadian Omar Khadr demonstrates the unfairness of this procedure and can help develop an understanding of how secrecy in the proceedings can obscure torture. On October 15, 2007, the military judge in Khadr's case entered a protective order prohibiting defense counsel from disclosing the names of any of the government's witnesses to Khadr or any other witness in the case.²¹³ Thus, defense counsel cannot discuss the names of witnesses with either the client or other witnesses unless they first get permission from the judge, which in turn shifts the burden to the defense and also results in its having to disclose trial strategy.

This raises a fundamental problem. How will counsel even know to ask for relief from the protective order? Often counsel finds things out only after she has discussed the matter fully with witnesses. A discussion with one witness leads to questions for another, and so on. Leads are often discovered serendipitously. One does not know what one does not know. This will hamstring counsel in ways she can only guess at; she may never know the questions to ask.

It also results in a potentially catastrophic dilemma for defense counsel. Suppose defense counsel believes that a witness may have knowledge of exculpatory evidence. She will undoubtedly wish to discuss the possibility with her client (or other witnesses or potential witnesses) before pursuing the matter. Suppose that she goes to the judge and receives permission to discuss the matter. If the lead does not work out, the defense will not be able to produce any evidence. In most ordinary cases before civilian courts, neither the opponent nor the judge would know that the lawyer had followed a blind lead. Here, however, the judge and presumably the prosecutor will know that defense counsel sought and failed to find exculpatory evidence. Not only is trial strategy disclosed, but an adverse inference may be created where none existed before. To the extent that this dilemma prevents defense counsel from properly investigating her case, it also interferes with any possibility of the public learning anything useful about the proceedings. Furthermore,

213. Protective Order #003 Protection of Identities of Witnesses, *in* United States v. Khadr, Oct. 15, 2007, <http://jurist.law.pitt.edu/gazette/2007/12/khadr-military-commission-trial-witness.php>.

one can only imagine the difficulty in preparing for cross-examination when defense counsel cannot use the witnesses' names in order to make inquiries.

Defense counsel's problems, however, get worse. Even when she knows who the witnesses are, she not only cannot discuss them with her client or other witnesses, but she may not even be able to even talk with the witnesses at all. In the case of detainee Salim Ahmed Hamdan, the U.S. military judge, citing security concerns, ruled that his lawyers could not meet with certain other suspects held at Guantanamo Bay.²¹⁴ His lawyers were, however, permitted to send written questions, which had to be reviewed by an independent security officer, to Khalid Sheik Mohammed and other detainees.²¹⁵ Thus, defense counsel in Hamdan's case could not discuss witnesses with the detainee, could not discuss witnesses' statements with other witnesses, and in some cases could not even conduct face-to-face interviews. This is trial by ambush.

B. A Hypothetical Case Study of What Might Have Been But for Boumediene

Let us imagine a hypothetical detainee named John Smith who made an incriminating statement prior to December 30, 2005,²¹⁶ which the judge has determined was coerced but not the product of torture. (Of course, given the present rules, Smith may well have been waterboarded, or subjected to other treatment that some might regard as being the product of torture,²¹⁷ but we leave that issue aside for the moment). The

214. According to the report, "[l]awyers had hoped that the suspects, including alleged Sept. 11 architect Khalid Sheikh Mohammed, would be allowed to testify that Hamdan was not a devoted member of al-Qaeda and should not be tried as an enemy combatant under the U.S. military tribunal system." Mike Rosen-Molina, *U.S. Military Judge Denies Hamdan Lawyers Access to Top Terror Suspects*, JURIST, Dec. 5, 2007, <http://jurist.law.pitt.edu/paperchase/2007/12/us-military-judge-blocks-hamdan-lawyers.php>.

215. Patrick Porter, *U.S. Military Judge Rules Hamdan Lawyers Can Question Top Terror Suspects*, JURIST, Feb. 15, 2008, <http://jurist.law.pitt.edu/paperchase/2008/02/us-military-judge-rules-hamdan-lawyers.php>.

216. The effective date of the Detainee Treatment Act of 2005 is the cutoff date for using "coerced" statements that have been determined reliable and probative. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(b), 119 Stat. 2741.

217. Of course, it may be that one of the reasons why former Attorney General Mukasey would not admit that waterboarding is torture was in order to preserve it as potential evidence in these military commissions. It also may be that he needs to protect, to the extent he can, those who authorized waterboarding from criminal prosecution under the War Crimes Act. War Crimes Act of 1996, 118 U.S.C. § 2441(d)(1)(A) (2006).

military judge must determine the reliability of that “coerced” statement, and determine whether the “interests of justice would best be served by admission of the statement into evidence.”²¹⁸ If the prosecution meets both tests, the coerced statement will be received into evidence.

Let us assume further that one John Rolfe, under questioning by Syrians, has said that Smith is associated with al-Qaeda. Assuming proper notice, this hearsay is admissible unless Smith can show it to be unreliable. Smith, of course, has been in detention and will likely have no way on his own to prove that Rolfe’s statement is the product of torture or is otherwise unreliable. Assume further that the government has a report in which an *unnamed* agent, from an unnamed agency, states that he was present at Rolfe’s questioning and in his opinion his statements were neither involuntary or coerced, much less the product of torture. Does Rolfe’s statement come in through the unnamed agent? If so, how will Smith or his lawyer ever be able to test it in any way or meet the burden by a preponderance of the evidence to show it to be unreliable?

Lest one think that the military would assist in finding evidence helpful to the detainee, we have the sad case of Hadj Boudella as precedent. Picked up and held for investigation by Bosnian officials and accused of plotting to blow up U.S. and U.K. embassies, the Bosnian Supreme Court ultimately released him because the charges could not be substantiated.²¹⁹ Upon release in Bosnia, Boudella was rendered to Guantanamo Bay. Three years later he was taken before a Combatant Status Review Panel where he sought to introduce the Bosnian Supreme Court opinion. The tribunal advised that they were “unable to locate” a copy.²²⁰ Moreover, even where the government has evidence in hand, defense lawyers cannot get access. Media reports²²¹ suggest that secret

218. Military Comm’n R. Evid. 304, *supra* note 6, at 304(c)(1).

219. Boudella was picked up along with six others including Lakhdar Boumedine. According to BBC News, U.S. officials asked the Bosnian government to pick them up on suspicion of plotting to bomb the U.S. embassy in Sarajevo. The men were arrested, but a three-month investigation in which their apartments, computers and documents were searched turned up no evidence. The Bosnian Supreme Court ordered their release and ruled that they could remain in the country and were not to be deported. On January 17, 2002 they were kidnapped and rendered to Guantanamo. U.N. special rapporteur says of the six that “It’s implausible to say that they were enemy combatants. They were fighters in the Bosnian war, but that ended in 1995. They may be radical Islamists, but they have definitely not committed any crime.” U.S. Secretary of State Condoleezza Rice said that they could not be released because “they still possess[ed] important intelligence data.” BBC NEWS, Dec. 4, 2007, <http://news.bbc.co.uk/2/hi/americas/7120713.stm>.

220. Farer, *supra* note 183, at 371, 377.

221. Michael Melia, *Secret Evidence Bogs Down Gitmo Hearings*, WASH. POST, Feb. 9, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/09/AR2008020900498.html>.

evidence is bogging down the commission hearings, and defense lawyers have complained that prosecutors continue to withhold exculpatory evidence from the defense and the public. Navy Lt. Cmdr. William Kuebler, military defense lawyer for Omar Khadr, says “There’s no openness about this process.”²²² In practice, detainees in MCA and CSRT²²³ proceedings are limited to whatever witnesses are available on Guantanamo Bay.²²⁴ The government, on the other hand, has unlimited resources.

Unlike CSRT proceedings, the detainee will at least have a civilian lawyer available in military commission hearings who may have the resources to conduct some investigation. If the history of the CSRTs is a guide, however, there is little reason to think that the military will go out of its way to find exculpatory evidence. Indeed, it appears that the CIA, over the objections of others in government,²²⁵ has already destroyed evidence of officially sanctioned torture. The *New York Times* reported on December 7, 2007 that the CIA has destroyed the videotapes of at least two interrogations, leading to fears that the agency was covering up evidence that it used torture in its interrogations.²²⁶ Then, on March 2,

222. *Id.*

223. “In 102 CSRTs, the government did not present a single witness against a single detainee. Every request to call an un-detained defense witness was denied. Seventy-four percent of requests to call a detained defense witness were denied. In 96% of the CSRTs, the government did not present any documentary evidence to the detainee prior to the hearing. In 89% of the tribunals, absolutely no evidence was presented on behalf of the detainee.” Amnesty International et al. *supra* note 178, citing Mark Denbeaux et al., *No Hearing Hearings, CSRT: The Modern Habeas Corpus?*, Seton Hall University School of Law, at http://law.shu.edu/news/final_no_hearing_hearings_report.pdf (last visited Dec. 5, 2007).

224. See for example JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006); MICHAEL RATNER, *GUANTANAMO: WHAT THE WORLD SHOULD KNOW* (2004), for accounts of the obstacles faced by lawyers for detainees.

225. Mark Mazzetti, *C.I.A. Was Urged to Keep Interrogation Videotapes*, N.Y. TIMES, Dec. 8, 2007 at A1, available at http://www.nytimes.com/2007/12/08/washington/08intel.html?_r=1&hp&oref=login.

226. The C.I.A. destroyed tapes of interrogations of two al-Qaeda operatives in the agency’s custody. The official reasons given were to protect the agents’ safety and because the tapes were no longer of use. Despite a formal request these tapes were not provided the 9/11 Commission thus leading to charges that the C.I.A. might have obstructed justice. Human rights groups have charged that the destruction was in order to cover up torture. Tom Malinowski, Washington director of Human Rights Watch disputes the official reasoning saying that “[m]illions of documents in C.I.A. archives, if leaked, would identify C.I.A. officers, the only difference here is that these tapes portray potentially criminal activity. They must have understood that if people saw these tapes, they would consider them to show acts of torture, which is a felony offense.” Mark Mazzetti, *C.I.A.*

2009, the Department of Justice disclosed that the CIA had destroyed ninety-two videotapes of interrogations of suspected terrorists.²²⁷ Twelve of these tapes apparently involved enhanced or harsh interrogation techniques.²²⁸ Not only did the 9/11 Commission request this information,²²⁹ but the Center for Constitutional Rights also sought this information under the Freedom of Information Act. The Center claimed (even before the latest revelation concerning the ninety-two tapes) that the CIA “blatantly lied during pending litigation.”²³⁰ This raises the question, “will anybody—lawyers for detainees or human rights activists or congressional investigators or even just bloody-minded opponents of the Bush administration—be able to make a case that the CIA, by destroying the tapes, was destroying evidence?”²³¹

Moreover, prior to President Obama’s suspension of the military commissions²³² the government was going back and re-interrogating detainees at Guantanamo Bay with so-called “clean teams” in order to try to clean up the mess created by the use of illegal interrogation methods.²³³ The idea was to go back to detainees who had provided information under torture and to get the information without the use of torture. Then the government could claim that the evidence was obtained humanely. Smith’s accusers can thus include the hearsay evidence of persons who have been tortured in the past, but who later re-confirmed their accusations in “clean” confessionals. Thus torture evidence may be sanitized and then introduced as reliable hearsay. Smith and counsel may never know and may never be able to attack the foundations of this hearsay evidence.

Destroyed 2 Tapes Showing Interrogations, N.Y. TIMES, Dec. 7, 2007, at A1, available at <http://www.nytimes.com/2007/12/07/washington/07intel.html?hp>.

227. Mark Mazzetti, *U.S. Says C.I.A. Destroyed 92 Tapes of Interrogations*, N.Y. TIMES, Mar. 3, 2009, at A16 (videos of terror suspects depicted harsh methods used to question ‘high value’ Al Qaeda suspects).

228. Devlin Barrett, *CIA Destroyed 12 Harsh Interrogation Tapes*, ASSOCIATED PRESS, Mar. 7, 2009, <http://abcnews.go.com/Politics/wireStory?id=7028547>.

229. *CIA Destroyed Interrogation Tapes*, BBC NEWS, Dec. 7, 2007, <http://news.bbc.co.uk/2/hi/americas/7133579.stm>.

230. Adam Brooke, *CIA Chief Faces Credibility Test*, BBC NEWS, Dec. 7, 2007, <http://news.bbc.co.uk/2/hi/americas/7133579.stm>.

231. *Id.*

232. Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of the Detention Facilities, Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4899 (Jan. 22, 2009), available at http://www.aclu.org/pdfs/safefree/gitmo_final_exec_order.pdf.

233. Marjorie Cohn, Op-Ed., *Injustice at Guantanamo: Torture Evidence and the Military Commissions Act*, JURIST, Feb. 15, 2008, <http://jurist.law.pitt.edu/forumy/2008/02/injustice-at-guantanamo-torture.php>.

Smith and his lawyer will have to collect such rebuttal evidence as they can without help from the government. Indeed, given what has in fact happened, the inference drawn must be that the government will actively resist providing helpful evidence and that it may even destroy or secretly sanitize evidence.

Under the MCA the evidence against Smith could get worse. Suppose an unnamed terrorist was tortured, perhaps in Egypt. Suppose further, he says that Smith is a terrorist. That statement, of course, is inadmissible. Suppose, in addition to a statement, he tells about a safe deposit box that agents then search only to find a shard of paper with Smith's name and telephone number on it. It does not matter that it was torture-derived evidence. Since it is not itself a statement, it may come into evidence to demonstrate the reliability of Smith's "coerced" statement. It also does not matter that the sources and methods of collecting this document are classified and never made known to Smith or even his counsel. It also is of little significance that the evidence so seized is ambiguous.²³⁴ Smith can argue, if he wishes, that many people had his telephone number precisely because they may need his lawful services. The evidence enhances the reliability of the coerced statement and may come into evidence. The point here is that evidence can be obtained through torture that is obscured through the lens of hearsay evidence. This is in part because the hearsay evidence may itself come from a classified and unnamed source, whose credibility and accuracy cannot be tested in any way. Moreover, even where torture can be proved, evidence derived therefrom may still be admissible so long as the statement is not itself used.

Smith can be "convicted" on a coerced statement that is deemed reliable because of hearsay that supports the coerced statement, because of secret evidence that Smith will never see (and his lawyer cannot discuss with him to find out if there is any rebuttal evidence), and even because of evidence unquestionably derived from torture. So, what about the nature of Smith's "coerced" statement? What might that coercion look like? Might it look to some as if it came from torture?

234. This is not as far-fetched as one might think. The evidence against Abdul Hamid al-Ghizzawi, included "a tiny square of paper" containing the telephone number of another detainee, allegedly found in al-Ghizzawi's pocket and for which he could "offer 'no explanation.'" Apparently no one had ever asked al-Ghizzawi for an explanation, and because of chain of custody problems it is not even certain that the shard of paper was actually in his pocket. Suskind, *supra* note 184, at 224–25.

The case of Al Qahtani, whose interrogation the Pentagon defended,²³⁵ provides a window on at least some of the military's thinking. *Time Magazine* broke the story and in a later article summarized his treatment:²³⁶ "U.S. interrogators [used] a wide range of tactics to get him to talk, including sleep deprivation, exposure to cold, forced standing, denial of bathroom breaks, denial of clothing and all manner of emotional manipulations." After "more than three months of 'intense isolation' Al Qahtani 'was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a cell covered with a sheet for hours on end).'"²³⁷

That was before the military began to really bear down. According to the military's own logs, as reported by *Time*,²³⁸ Secretary of Defense Donald Rumsfeld approved stress strategies like standing for prolonged periods, isolation for as long as 30 days, removal of clothing, forced shaving of facial hair, playing on 'individual phobias' (such as dogs) and 'mild, non-injurious physical contact such as grabbing, poking in the chest with the finger and light pushing.' At one point Al Qahtani's condition deteriorated to the point where he became seriously dehydrated and was given an IV drip. According to *Time*, Al Qahtani's heart dropped to 35 beats a minute and he was hospitalized. The article goes on to point out the FBI's concerns over the "highly aggressive interrogation techniques" used on Al Qahtani. While it is true that charges were brought then later dropped²³⁹ against Al Qahtani, it was without prejudice and subject to reinstatement should military commissions ever regain their footing.²⁴⁰ Moreover, his indefinite detention as an alleged enemy combatant remained unchanged. The military initially denied that al-Qahtani was tortured claiming that no physical pain was involved.²⁴¹ However, Susan J. Crawford, the convening authority, has publicly said that the reason she refused to allow the prosecution to go forward was

235. Joseph Margulies, who represented detainees at Guantanamo Bay, writes "the Pentagon defended the professionalism of Al Qahtani's interrogators." MARGULIES, *supra* note 177, at 88.

236. Adam Zagorin, *One Life Inside Gitmo*, TIME, Mar. 13, 2006, at 20.

237. MARGULIES, *supra* note 177, at 86.

238. Adam Zagorin & Michael Duffy, *Inside the Interrogation of Detainee 063*, TIME, June 20, 2005 26, 28-33.

239. His lawyer alleges that al-Qahtani was so upset at the charges, which carried a potential death penalty that before the charges had been dropped, he attempted suicide. Mike Rosen-Molina, *Guantanamo Detainee Attempted Suicide over DOD Charges Later Dropped: Lawyer*, JURIST, May 20, 2008, <http://jurist.law.pitt.edu/paperchase/2008/05/guantanamo-detainee-attempted-suicide.php>.

240. Andrew Gilmore, *U.S. military drops charges against so-called '20th Hijacker'*, JURIST, May 13, 2008, <http://jurist.law.pitt.edu/paperchase/2008/05/us-military-drops-charges-against-so.php>.

241. *Id.*

because, in her assessment, he had been tortured.²⁴² Our knowledge of al-Qahtani's mistreatment was entirely fortuitous. One might reasonably ask what might have happened had the evidence of his treatment not somehow publicly surfaced. Thus, even as Al Qahtani's case shows the kind of torture that some detainees faced, it also demonstrates the fortuity of discovery. Plainly, the Bush administration proved unable to hide all evidence of torture. Just as plainly, they scrambled to hide as much as they could.

In our hypothetical, Smith's "coerced" statement in this instance may appear to be indistinguishable from one procured through torture. Whether we call it torture, or torture "lite," or just coercion, it is no wonder in our hypothetical that Smith talked. The question one ought to ask is how reliable his statement really is, even if supported by other evidence lawfully before the military commission. One ought also to ask, irrespective of reliability, whether the United States should be engaging in such practices.

Finally, there is the matter of Smith's appellate rights. Until *Boumediene* reversed the MCA's jurisdiction stripping provisions, the MCA divested the federal district courts of habeas corpus jurisdiction. This is important because a federal habeas court would be the only civilian court to have the power to make a factual record. Thus, prior to *Boumediene*, detainee Smith would have had to rely on the record made by the CSRT or the military commission operating under the rules described above for any appeal. This is the first and a critical obstacle to any appeal. What kind of record does the appellant have to work with to generate the questions and arguments for an appeal? One can reasonably ask whether Smith will have any credible evidence on the record other than his own self-serving testimony (no doubt contradicted by military witnesses, named and unnamed) that torture played a role in the evidence before the court.

Beyond that hurdle, the rules on the appeal (absent a writ of habeas corpus) were not promising from Smith's perspective. The first level appeal would have been to a Court of Military Commission Review and then to the Circuit Court of Appeals for the District of Columbia.²⁴³ The Court of Military Commission Review was then limited to acting "only

242. Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, at A1.

243. The Court of Appeals for the District of Columbia has ruled in *Bismullah v. Gates*, that as a result of *Boumediene* it lacks jurisdiction to hear detainees appeals under the DTA. *Bismullah v. Gates*, 551 F.3d 1068 (D.C. Cir. 2009).

with respect to matters of law.” How likely is it that they will discover and reverse a discretionary evidentiary ruling that has the effect of obscuring or hiding torture? The appeal to the Court of Appeals is similarly limited to whether the military commission followed its own “standards and procedures” and “to the extent applicable, the Constitution and the laws of the United States.”²⁴⁴ Clearly Congress, from its use of the language “to the extent applicable,” sought to leave open the government’s argument that a detainee at Guantanamo Bay has no constitutional rights.²⁴⁵ In any event, Congress plainly sought to limit the appeal to the narrowest possible scope. It seems unlikely that this limited appeal will discover, much less disclose, evidence of any torture. The only bright spot in all of this is that the Circuit Court of Appeals for the District of Columbia held firm to the demand that the Pentagon supply all evidence pertaining to an “enemy combatant” and not just the evidence that the Pentagon selects to present to the court.²⁴⁶ This left open the possibility that the appeals court might discover and act upon exculpatory evidence not presented to the CSRT or military commission.²⁴⁷ However, appellate courts are ill equipped to perform the role of advocate, and one should not expect judges (or even their clerks) to perform the kind of searching inquiry that skilled counsel would ordinarily provide. Moreover, the CSRT appellate process left no room for use of after-discovered evidence of innocence (no matter how compelling).²⁴⁸ One could be conclusively discovered to have been consorting with penguins in the Antarctic at the time of the alleged crime and it would not matter; there would be no power to rectify the mistake other than to

244. 10 U.S.C. § 950(g) (2006) (Military Commissions Act).

245. *Boumediene* rejected that position. *Boumediene*, 128 S. Ct. at 2229.

246. Patrick Porter, *Federal Appeals Court Refuses to Reconsider ‘Enemy Combatant’ Evidence Ruling*, JURIST, Feb. 1, 2008, <http://jurist.law.pitt.edu/paperchase/2008/02/fed-Peral-appeals-court-refuses-to.php>.

247. The government filed a petition for writ of certiorari in *Gates v. Bismullah* and has requested expedited review and a stay pending the Supreme Court ruling. Jaime Jansen, *U.S. Government Appeals ‘Enemy Combatant’ Evidence Ruling to Supreme Court*, JURIST, Feb. 15, 2008, <http://jurist.law.pitt.edu/paperchase/2008/02/us-government-appeals-enemy-combatant.php> (*Boumediene* presumably obviates that petition).

248. 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. *Boumediene*, 128 S. Ct. at 2273. In other contexts, *e.g.*, in post-trial habeas cases where the prisoner already has had a full and fair opportunity to develop the factual predicate of his claims, similar limitations on the scope of habeas review may be appropriate. *See*, *Williams v. Taylor*, 529 U.S. 420, 436–37 (2000) (noting that section 2254 “does not equate prisoners who exercise diligence in pursuing their claims with those who do not”). In this context, however, where the underlying detention proceedings lack the necessary adversarial character, the detainee cannot be held responsible for all deficiencies in the record.

appeal to the unreviewable discretion of the Deputy Secretary of Defense to convene a new CSRT.²⁴⁹

Let us assume, against all odds, that the military commission acquitted Smith. As we have already seen, the administration prior to *Boumediene* claimed the right to hold him indefinitely and potentially for the rest of his life.²⁵⁰ Even if he were, by any reasonable definition of the term, tortured, would he be free and able to tell his story? He certainly would not be able to tell about torture or coercion-derived evidence of which neither he nor his lawyers ever knew. Who would tell Smith's story? Who would know? How would anyone, absent an Article III habeas court, begin to piece it together?

X. *BOUMEDIENE* CHANGES THE CALCULUS

Justice Kennedy's majority opinion in *Boumediene* features a modestly limited holding, purporting to invalidate a single subsection of one law—the habeas jurisdiction stripping portions of the MCA:

Our decision today holds only that the petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that the petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court. *The only law we identify as unconstitutional is MCA § 7, 28 U.S.C. A. § 2241(e) (Supp. 2007).* Accordingly, both the DTA and the CSRT process remain intact.²⁵¹

However, the ramifications of providing the Great Writ to alien detainees held outside U.S. territory reaches far more than this unassuming claim suggests. Not only does independent review by civilian courts give detainees a better (and quicker) opportunity for release, it also creates a greater likelihood of forcing disclosure of torture or cruel, inhuman, or degrading treatment (CIDs). Moreover, it undermines the authority granted the President to make unreviewable legal determinations about the legal scope of the Geneva Conventions, the War Crimes Act, and through it, the Convention Against Torture. It adds to the pressure to close the detention facility at Guantanamo Bay. Finally, and perhaps most importantly, by bringing the U.S. closer to compliance with international human rights norms, it will almost certainly lessen the level

249. *Boumediene*, 128 S. Ct. at 2271.

250. *See Boumediene*, 128 S. Ct. at 2238.

251. *Boumediene*, 128 S. Ct. at 2275 (emphasis added).

of criticism directed at the United States internationally.²⁵² The facts of the case derive from the executive and legislative reactions to the *Hamdi*, *Rasul*, and *Hamdan* cases described above.

In *Boumediene*, non-citizen aliens captured abroad in Afghanistan and elsewhere in the war on terror had been detained for up to six years (since 2002) as enemy combatants at Guantanamo Bay. Recall that the Court in *Hamdi v. Rumsfeld* held that alleged enemy combatants were entitled to minimum due process requirements and thereafter the DOJ created Combatant Status Review Tribunals (CSRTs) in order to comply with this holding.²⁵³ All detainees then held by the DOJ were thereafter designated enemy combatants under these newly created CSRTs. None had review applications heard on the merits, each denies that he is a member of Al-Qaeda or the Taliban, and none are citizens of a nation at war with the U.S.

Each detainee sought habeas corpus, and the Supreme Court in *Rasul v. Bush* held that the statutory writ of habeas corpus applied to detainees at Guantanamo Bay and that they were covered by the Geneva Conventions.²⁵⁴ Their cases went back to the District Courts, which reached inconsistent results as to whether detainees had rights that could be vindicated in a habeas action.

While appeals were pending, Congress passed the DTA of 2005 that stripped courts of habeas jurisdiction. *Hamdan v. Rumsfeld* held that the DTA applied prospectively only, and that the detainees at Guantanamo Bay could still avail themselves of the writ. Congress then passed the MCA of 2006, which, among other things, plainly attempted to strip the courts of habeas corpus jurisdiction retrospectively.²⁵⁵ The D.C. Court of Appeals confirmed that the MCA stripped constitutional habeas jurisdiction from the courts and further held that petitioners are not

252. A major international poll conducted by the Pew Research Center showed deepened Anti-American sentiments, particularly in Europe and the Muslim world. Meg Bortin, *Global Poll Shows Wide Distrust of the United States*, INT'L HERALD TRIBUNE, June 27, 2007, <http://www.iht.com/articles/2007/06/27/news/pew.php?page=1>. On the other hand, a more recent poll states that “[a]fter years of becoming progressively more negative, public views of the United States have begun to improve.” Steven Kull, said of the poll, “[i]t may be that as the U.S. approaches a new presidential election, views of the U.S. are mitigated by hope that a new administration will move away from foreign policies that have been so unpopular in the world.” Steven Kull, *Global Views of USA Improve*, BBC News, Apr. 2, 2008, http://www.globescan.com/news_archives/bbcntryview08/.

253. *Hamdi*, 542 U.S. 507 (2004).

254. *Rasul*, 542 U.S. 466 (2004).

255. *Hamdan*, 548 U.S. 557 (2006).

entitled to protections of the Constitution's Suspension Clause.²⁵⁶ Because it found habeas jurisdiction lacking, the Court of Appeals found it unnecessary to consider whether the DTA provided an adequate and effective substitute for habeas.

The detainees faced three main hurdles in appealing to the U.S. Supreme Court (albeit with various sub-issues). First, (and most importantly) does the Constitutional writ of habeas corpus apply to aliens captured abroad and held at Guantanamo Bay, Cuba, an area where the U.S. does not have de jure sovereignty but exercises de facto sovereignty? On this the Court reversed the lower court, holding that constitutional habeas corpus applies to the detainees at Guantanamo. It reasoned that the MCA does not purport to suspend the writ, and the protections of the Suspension Clause do operate on non-citizens captured abroad and detained as enemy combatants in a place where the U.S. lacks formal sovereignty but has complete jurisdiction and control. Thus, the MCA acts as an unconstitutional suspension of the writ. It is this narrow slice of the law that the Court struck down.

However, merely holding that the constitutional writ of habeas corpus extends to detainees at Guantanamo does not, by itself, provide relief to the detainees. Congress had passed, and the Administration had signed into law, alternative remedies. Were they an adequate substitute remedy for the writ of habeas corpus? The Court answered no. The majority found many deficiencies in the CSRT process, including the inability to consider after-acquired evidence of innocence that led to the conclusion that the DTA is not an adequate substitute for habeas corpus. The majority said "the procedural protections afforded to the detainees in the CSRT hearings . . . fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."²⁵⁷

Finally, do these prisoners have to exhaust their remedies before seeking habeas corpus? The Court held, no. These detainees have been held for as many as six years without meaningful hearings and "the costs of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing."²⁵⁸

256. "[T]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

257. *Boumediene*, 128 S. Ct. at 2283.

258. *Boumediene*, 128 S. Ct. at 2275.

The implications of this decision are far-reaching. They include the following seven points, the last in the form of a remaining question:

A. *Torture will be Harder to Hide*

As fleshed out above, the MCA Rules of Evidence permit (and perhaps encourage) hiding evidence that some interrogations used torture and other abusive techniques to gain evidence or confessions. The members of the former Bush administration can no longer be confident that the military commissions will be able to screen evidence of interrogations that use coercive methods or torture from public view.

The political changes wrought by the presidential election only serve to accentuate this point. No matter how the election might have turned out, *Boumediene* made hiding torture more difficult. The current administration cannot be justly criticized for actions that expose detainees to the U.S. Court system because *Boumediene* made that inevitable in any event. It is true that whoever won the presidential election would have some discretion, but *Boumediene* significantly narrowed that discretion and constrains action by pushing in the direction of openness.

Habeas courts are far more likely than military commissions to hear allegations and to consider evidence that detainees were tortured, and such evidence is more likely to become a matter of public record.²⁵⁹ In any event, the Obama administration moved only one day after inauguration to suspend the military commission system.²⁶⁰ It may be that the Obama administration will ultimately reopen military commissions, at least for a few “high value” detainees: first, evidence obtained through coercion will likely face significant hurdles in any federal district court and second, hearsay evidence may present a significant problem in these

259. See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (2005); *vacated and dismissed*, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 549 U.S. 1328 (2007) (much evidence came out through this case that might well have been hidden from the public but for the fact that the matter came before a civilian court rather than a military commission).

260. See, e.g., Merle D. Kellerhals Jr., *Obama Asks for 120-Day Delay for Guantánamo Trial System: Military judge Halts Detainee Proceedings*, AMERICA.GOV, Jan. 21, 2009, <http://www.america.gov/st/peacesec-english/2009/January/20090121153052dmslahrellek0.3931238.html>; Posting of John Nichols, *Obama Acts “In the Interest of Justice” to Halt Tribunals*, to NATION, http://www.thenation.com/blogs/state_of_change/399981/obama_acts_in_the_interest_of_justice_to_halt_tribunals?rel=emailNation (Jan. 21, 2009, 08:45); Jaclyn Belczyk, *Guantanamo Judges Grant Obama Motions to Suspend Military Commission Proceedings*, JURIST, Jan. 22, 2009, <http://jurist.law.pitt.edu/paperchase/2009/01/military-judges-grant-obamas-motion-to.php>; Lucas Tanglen, *Obama Directs Prosecutors to Seek Guantanamo Military Commissions Delay*, JURIST, Jan. 21, 2009, <http://jurist.law.pitt.edu/paperchase/2009/01/obama-directs-prosecutors-to-put.php>.

cases.²⁶¹ *Boumediene's* extension of the writ of habeas corpus to these detainees makes it unlikely that the military commissions, if reformed, would operate in the same way as previously. Thus, *Boumediene* will change how detainees' trials or commissions will proceed, and it will give detainees access to federal courts through the writ of habeas corpus.

While it is not clear from Justice Kennedy's majority opinion just how far habeas courts can go, their procedures will undoubtedly be more detainee friendly than was the case with CSRTs and military commissions under the Bush administration. Justice Roberts' protestations to the contrary,²⁶² there would be little reason to hold habeas hearings that were identical to the hearings and appeals they supplant. The Court of Appeals for the District of Columbia has since ruled that review of Combatant Status Review Tribunals should proceed only under petitions for writs of habeas corpus and not under the DTA. That court ruled that habeas corpus is the detainees' sole remedy for being held erroneously as enemy combatants.²⁶³ Thus, unless the Supreme Court reverses, Justice Roberts' prediction cannot hold.

The habeas cases thus far suggest that habeas will result in the release of some detainees who were being held pursuant to Combatant Status Review Tribunals.²⁶⁴ Thus habeas courts already appear to provide a more hospitable forum for detainees. It also seems reasonable to assume that they will be more open to allegations that a detainee's evidence was tainted by torture. Finally, habeas courts will publish at least parts of

261. William Glaberson wrote in *The New York Times* that the administration is rethinking the issue and is moving towards reviving military commissions because of the problems of prosecution in federal district court arising from the brutal treatment of some detainees and from the hearsay evidence gathered by intelligence agencies. Attorney General Holder has said: "It may be difficult for some of those high-value detainees to be tried in federal court." William Glaberson, *U.S. May Revive Guantánamo Military Courts*, N.Y. TIMES, May 2, 2009, at A1, available at <http://www.nytimes.com/2009/05/02/us/politics/02gitmo.html?em>.

262. Justice Roberts, joined by Justices Scalia, Thomas, and Alito, argues:

How the detainees' claims will be decided now that the DTA is gone is anybody's guess. But the habeas process the Court mandates will most likely end up looking a lot like the DTA system it replaces, as the district court judges shaping it will have to reconcile review of the prisoners' detention with the undoubted need to protect the American people from the terrorist threat—precisely the challenge Congress undertook in drafting the DTA. All that today's opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.

Boumediene, 128 S. Ct. at 2280.

263. *Bismullah v. Gates*, 551 F.3d 1068 (2009).

264. *See supra* notes 15–18 and accompanying text.

their opinions (even as they may redact sensitive or classified material). Thus, it will be easier for journalists, historians, legal scholars, and others to access and evaluate that evidence. Habeas courts cannot help but to open up, speed up, and make more transparent a hitherto opaque, glacial process.

Ironically, by improving the access to information on the past administration's torture practices, Boumediene somewhat improves the possibility of future prosecutions, domestic or international. A caveat is in order, however, for war crimes prosecutions will remain unlikely notwithstanding Boumediene. We have already pointed out that the MCA partially and retroactively insulates officials from domestic prosecution. President Obama's disinclination to pursue war crimes prosecutions against former members of the Bush administration is likely motivated by further legal difficulties as well as political considerations.²⁶⁵ As argued earlier in the introduction, these sorts of prosecutions would be very difficult, and it is unlikely that such prosecutions would succeed.²⁶⁶ And as previously noted, this reasoning applies as well to international prosecutions exercising universal jurisdiction. Thus, some foreign court may well proceed at some point, but it remains questionable whether they will result in substantive convictions.²⁶⁷

The fact that the National Security Council in formal session, (with the then Attorney General present and agreeing that what they did was lawful) and with the explicit approval of the President, micromanaged the details of the CIA's "alternative interrogation techniques" right down to the amount and details of waterboarding, renders it politically unlikely that anyone following such orders would be held to have followed a "manifestly unlawful" order. Thus, while Boumediene makes exposure more likely than otherwise might have been the case, it does not automatically mean that there will be prosecutions of administration officials or government agents, much less successful prosecutions.²⁶⁸

265. Even before Obama was inaugurated, his nominee for CIA Director, Leon Panetta said that the Obama administration would not prosecute officials who used or participated in harsh interrogations because, "[i]t was my opinion we just can't operate if people feel even if they are following the legal opinions of the Justice Department" they could be in danger of prosecution. Pamela Hess, *Panetta: No Prosecution for CIA Interrogators*, ASSOCIATED PRESS, Feb. 6, 2009, <http://www.google.com/hostednews/ap/article/ALeqM5iNqjrsQ96LSw38bHitcinzS QAWgD96684PO1>.

266. See, e.g., Clarke, *supra* note 32, at 1.

267. Paust, *supra* note 33.

268. "[I]t seems certain that those who designed, approved, and perpetrated the worst abuses will not face any criminal charges. Whether disgrace suffices remains an open question." Clarke, *supra* note 32, at 50. While many scholars such as Paust, Balkin and Horton have argued for such prosecutions, they seem quite unlikely. *Id.* at 42–50.

The fate of civil lawsuits against those who ordered harsh interrogation techniques remains open and could potentially result in disclosure of harsh interrogation techniques,²⁶⁹ notwithstanding the continued assertion of the state secrets privilege by the present administration.²⁷⁰

B. Release from Detention for Some Detainees

Because a habeas court will not be bound by the MCA's rules of evidence and can create its own record, it will be easier for a detainee to establish innocence and secure release. Moreover, the decision will likely spur the administration into finding some way to release those whom it no longer considers dangerous. Habeas courts are already releasing some detainees,²⁷¹ and the new administration is scrambling to try to find ways to deal with the rest.²⁷²

C. Boumediene, Not the Election, Made Guantanamo's Closure Inevitable

Boumediene, not politics or the election, made the end of Guantanamo Bay inevitable. Even before the Obama administration decided to close the detention center at the Guantanamo Naval Base,²⁷³ it was clear that whoever won the election would have to close the base.

Even former administration officials were saying shortly after *Boumediene* had been decided that now the reason for its existence (that is, the creation of a law-free zone away from the jurisdiction of federal courts) has ended, it likely would be closed. Charles "Cully" D. Stimson, who oversaw detainee affairs for the Pentagon until early 2007, said that the

269. The Supreme Court vacated and remanded for reconsideration in light of *Boumediene*, a lawsuit against Bush administration officials for the alleged abuse of detainees. *Rasul v. Myers*, 129 S. Ct. 763 (2008).

270. See *supra* Part IX.

271. See *supra* notes 15–18 and accompanying text.

272. Peter Finn, *4 Cases Illustrate Guantanamo Quandaries: Administration Must Decide Fate of Often-Flawed Proceedings, Often Dangerous Prisoners*, WASH. POST, Feb. 16, 2009, at A1 (sixty detainees cleared for release by the Bush administration remain at the camp, while twenty-one more were facing military commissions with hearings to come before federal habeas courts. Some more will undoubtedly be prosecuted while the fate of others remains unclear).

273. See, Exec. Order No. 13,492, 74 Fed. Reg. (Jan. 22, 2009) (required that Common Article 3 of the Geneva Conventions would apply to all detainees captured by the U.S. in the war against terror, and ordered the closure of the base at Guantanamo Bay within one year of the effective date of the executive order).

Bush administration has several options on Guantanamo—but that almost all of them end in the facility’s closure. He said Bush could run out the clock and leave such decisions to the next president, or he could take the “bold move” of immediately ordering Guantanamo’s safe and secure closure. “The legal rationale underlying the establishment of Guantanamo has been eviscerated by this decision,” said Stimson, now at the Heritage Foundation. “The question is not if Guantanamo will close; it’s when.”²⁷⁴

Before the election both presidential candidates advocated closing the Guantanamo detention facility.²⁷⁵ *Boumediene* thus made the order to close the base much easier politically. *The Wall Street Journal* succinctly summarized the situation after *Boumediene*.²⁷⁶ “[L]ast week’s *Boumediene* decision makes it all but certain that Gitmo will soon be shutting (or should we say opening) its doors. . . . [T]he U.S. military is likely to transfer an increasing number of captured terrorists to local prison authorities, if only to avoid the endless judicial landmines it can expect trying to win convictions in U.S. court. . . .”²⁷⁷ Guantanamo’s closure will itself result in exposing detainee abuse and torture in two ways. First, released detainees will be able to tell their stories to the press. Second, many detainees may undergo medical examinations, which may well document objective evidence of abuse. Medical examinations of former terrorism suspects has already “found proof of physical and psychological torture resulting in long term damage” according to a report by Physicians for Human Rights.²⁷⁸

D. *The President Lost Sole Power to Interpret Geneva Conventions*

The MCA purported to give the President the final authority to determine the meaning and application of the Geneva Conventions. This, had it held, would have excluded courts from what has heretofore

274. Michael Abramowitz, *Critics Study Possible Limits to Habeas Corpus Ruling*, WASH. POST, June 14, 2008, at A5.

275. See, e.g., *Administration Overreaching Blamed for SCOTUS Gitmo Ruling*, BULLETIN’S FRONTRUNNER, June 16, 2008, available at Lexis News Library, Wire Serv. Stories File.

276. *Id.* (quoting Editorial, *Taliban Habeas Corpus*, WALL ST. J., June 16, 2008, (editorial was not a fan of the opinion going on to say, “to the extent that the Supreme Court has made secure detentions more difficult, it has made the task of our troops more dangerous”).

277. *Id.*

278. Deborah Charles, *Exams Show Torture of U.S.-Held Detainees-Report*, REUTERS, June 18, 2008, <http://www.reuters.com/article/latestCrisis/idUSN18187793>.

been a quintessential legal question—the meaning and application of a particular kind of law—treaty law.²⁷⁹

The Supreme Court has, since *Marbury v. Madison*²⁸⁰ in 1803, consistently held that it is the province of the courts to say what the law is. Indeed, the majority in *Boumediene* mentioned this well-established principle.²⁸¹ The rule that the courts are the final arbiters of what the law is applies to construction of treaties.²⁸² The courts are, therefore, unlikely to cede the sole power of treaty interpretation in the case of an important treaty such as the Geneva Conventions. The availability of habeas corpus gives the courts a mechanism by which a question concerning the construction of the Geneva Conventions could potentially come before the courts.

Thus, in a proper case, a federal habeas court could review the President's determination of the meaning or application as a matter of law of the Geneva Conventions, and that issue could percolate on to the appellate courts and finally the Supreme Court. Thus, notwithstanding the *Boumediene* Court's statement that it was only overruling the habeas stripping portions of the MCA, the opinion calls into question, and arguably overrules *sub silentio* the grant of exclusive authority on the part of the President to determine the meaning and application of the Geneva Conventions. The administration by reinstating Common Article 3 of the Geneva Conventions thus avoids a potential confrontation with the courts. Again, *Boumediene* provided political and legal cover.

Moreover, because of *Boumediene*, any president will be less likely to provide aggressive interpretations of the Geneva Conventions. If *Boumediene* acts as a deterrent to odd or overly restrictive interpretations of these international treaties, it may have succeeded in bringing the U.S. into line with international opinion without any confrontation with the courts.

279. That a treaty constitutes law is found directly in the Constitution:

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; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

280. *Marbury v. Madison*, 5 U.S. 137 (1803).

281. *Boumediene*, 128 S. Ct. at 2235–36.

282. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346–47 (2006).

E. *President Loses the Exclusive Power to Define Torture*

The MCA also gave the President the unilateral and unreviewable power to establish interrogation methods. As pointed out above, under the DTA the President can effectively define, by negative inference, what constitutes torture. *Boumediene* calls this into question. Is what constitutes torture a legal question? Presumably, the War Crimes Act makes this a legal question, and if this is true then presumably a court could hold, in an appropriate case, that presidentially approved interrogation methods constitute torture as a matter of law, thus rendering evidence or a confession inadmissible. Granted, a court would give great weight to presidential determination,²⁸³ but that determination would not be dispositive. *Boumediene*, then, without mentioning the issue, potentially negates this part of the MCA. This again is likely to result in mollifying world opinion that, for the most part, has reacted negatively to U.S. use of torture in the war on terror.²⁸⁴ It also plainly provides additional political cover to the decision to abjure torture in favor of more humane interrogation techniques²⁸⁵

F. *Importance of the Case Internationally*

International pressure had, even before *Boumediene*, already embarrassed the U.S. and made Guantanamo's closure desirable. Now the reason for its existence is gone. Contrary to the OLC's arguments it is not a law-free zone devoid of the U.S. Constitution, the primary reason for sending alien "enemy combatants" to a place beyond the reach of U.S. courts has evaporated. Its closure will do much to mute international criticism and will bring the U.S. closer to international consensus on international human rights law and international humanitarian law. Moreover, international opinion played a role in Bush's political weakness in that many Americans are aware of world opinion and the problems that this creates for the U.S. This in turn undercut the impetus for many of the positions advocated by the Bush Administration and arguably hurt his case. International pressure may have played an unacknowledged role in *Boumediene*.

Furthermore, international legal opinion played a role in *Boumediene*. Many international scholars participated in amicus briefs, some of which appeared to be highly influential. The majority opinion specifically mentions the Brief of Legal Historians (which includes international

283. *Boumediene*, 128 S. Ct. at 2252.

284. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d. at 465–66.

285. See sources cited *supra* note 224.

scholars) saying their “expertise in legal history the Court has relied upon in the past.” Like it or not, (and there are some that bridle at any international influence on U.S. law) international legal scholarship is likely to play an increasingly important role in U.S. jurisprudence.

While this case did not go so far as to address the issue of whether the Geneva Conventions are self-executing, it does have the effect of avoiding the necessity of determining that issue. It leaves in place *Rasul v. Bush*'s holding that the Geneva Conventions apply to Guantanamo detainees through the Uniform Military Code of Justice. Although international law was not mentioned in the majority opinion, it is increasingly playing a background role in Justice Kennedy's thinking.²⁸⁶ *Boumediene* neatly obviates the necessity for determining whether the Geneva Conventions are self-executing while undercutting the President's ability to define its protections away. Thus, *Rasul*'s holding that the Geneva Conventions apply continues, unless expressly overridden by Congress, and the extension of the writ of habeas corpus gives the courts the opportunity to police those issues. This returns the U.S. to potentially full compliance with international law. Given Justice Kennedy's well-known sensitivity to these sorts of issues²⁸⁷ it seems plausible that international law played an unacknowledged role in *Boumediene*.

G. Does *Boumediene* Apply More Broadly Than *Guantanamo Bay, Cuba*?

On April 2, 2009 District Judge John D. Bates ruled in *Maqaleh v. Gates*²⁸⁸ that *Boumediene* applies to at least some detainees in U.S. custody at Bagram Air Force Base in Afghanistan. He concluded that the Constitution's suspension clause applied to those detainees at Bagram who did not have Afghan citizenship or who were not captured there. Moreover, the judge felt that the record was insufficiently

286. Justice Kennedy has long had a strong connection to judges and lawyers internationally and Jeffrey Toobin describes him as having a “passion for foreign law.” *Swing Shift*, NEW YORKER, Sept. 12, 2005, lawhttp://www.newyorker.com/archive/2005/09/12/050912fa_fact. He has taught at the Salzburg International Study program and he also teaches in the summers at the McGeorge School of Law's summer sessions in Salzburg. His opinion in *Roper v. Simmons*, 543 U.S. 551 (2005) is noted in part for its invocation of international law.

287. See *Atkins v. Virginia*, 536 U.S. 304 (2003); *Roper v. Simmons*, 543 U.S. 551, 576 (2005).

288. *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 208 (D.D.C. 2009).

developed to determine whether the fourth petitioner—an Afghan citizen—might also be entitled to the remedy of habeas corpus on other grounds. The Obama administration has announced its intention to appeal,²⁸⁹ and it is too soon to know whether *Boumediene* will extend beyond Guantanamo Bay’s special circumstances. If it turns out that detainees have limited rights to constitutional habeas corpus anywhere in the world, then *Boumediene* becomes even more important as it then potentially affects future conflicts.

XI. CONCLUSION

The CIA has destroyed videotapes of interrogations.²⁹⁰ We know that military judges have already classified witness names wholesale, without specific evidence of necessity, and that defense lawyers have been denied access to available witnesses already in custody at Guantanamo. We have seen political influence repeatedly distort the process and Combatant Status Review Tribunals convened and reconvened and reconvened until they at last return the “correct” verdict. We know what coerced statements “not rising to the level of torture” look like to the CIA and even to the U.S. military.

How unlikely, given this unpromising history, would our hypothetical scenarios be absent *Boumediene*’s extraordinary holdings? Would the hearsay rule, allowing double, triple, or even quadruple hearsay combine with ex parte and in camera proceedings and the derivative use of torture evidence to cloak interrogations using torture? Duke professor Curtis Bradley,²⁹¹ along with the Chief Justice Robert’s dissent in *Boumediene*, appears to believe that the Court of Appeals for the D.C. Circuit could have sorted these issues out and that this process adequately substitutes for habeas corpus. Other scholars questioned that assumption,²⁹² and the Supreme Court majority agrees that the CSRT process is fatally flawed.

Contrary to the views of Professor Bradley and Chief Justice Roberts, it does not appear that justice would have been served, or that truth would have been revealed by the system devised by Congress. Instead, what we see was an Administration determined to cloak its misdeeds. We

289. Andrew Gilmore, *Obama administration to appeal Bagram detainees habeas ruling*, JURIST, Apr. 11, 2009, <http://jurist.law.pitt.edu/paperchase/2009/04/obama-administration-to-appeal-bagram.php>.

290. See *supra* notes 147–1151 and related text.

291. See generally, Bradley, *supra* note 174.

292. See, e.g., Farer, *supra* note 183, at 363; Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterrorism Operations*, 101 AM. J. INT’L L. 56 (2007); Martin, *supra* note 117, at 322; Guénaél Mettraux, *Comparing the Comparable: 2006 Military Commissions v. the ICTY*, 1 J. INT’L CRIM. J. 59 (2007); Greenberger, *supra* note 200, at 805; Vázquez, *supra* note 174, at 73 (2007).

also saw governmental agencies including the military, the intelligence services, and the Department of Justice caving in to political pressure and assisting in evading the truth even at the expense of detainees, at least some of whom were wholly innocent yet indefinitely incarcerated, and none of whom deserved to be tortured or subjected to cruel and inhumane treatment. Most importantly, the government had rules in place that made it very easy for the government to hide torture. Congresses' solution to the detainee problem could not have sorted itself out, and could not have reached just resolutions in individual cases, without help from the Supreme Court in *Boumediene*.

The MCA has the effect of directing lower-level administrators and military personnel not only to hide these unpleasant truths from the public but from themselves as well. It would be very easy for a bureaucrat with a narrow perspective to miss the "torture culture" completely, to see a limited and seemingly benign part. People of good faith would run the system, oblivious, for the most part, to its ugly consequences.

Even those who do the actual torturing tend to minimize and rationalize the system as it is. As both Stanley Milgram²⁹³ and Phillip Zimbardo's²⁹⁴ experiments have taught, otherwise normal people can, given the situation, do some surprisingly harsh things. The prison guards in Zimbardo's *Stanford Prison Experiment* were well on their way to constructing a "torture culture" before the experiment was ended as a result of ethical concerns. These were normal students, indistinguishable from each other, picked by a completely random process. They were no different from young people who join the military, the police, or our intelligence services everyday.

Abusive practices start at the top and become a part of a culture that pulls in ordinary people. People caught up in such cultures do things that they would never have thought themselves to be capable of. Until *Boumediene*, the MCA helped to create and continue at Guantanamo Bay just this sort of situation; it perpetuates itself by blinding most of its participants from its consequences, while co-opting a sufficient number to make the "torture culture" work. The MCA created an impenetrable

293. STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (2004).

294. PHILLIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2007).

cloaking device that only civilian courts, with the power to admit evidence from a variety of sources, can pierce.

The prison experiment at Stanford quickly created great anguish. Zimbardo ended it after six days. Detainees have been at Guantanamo nearly six years, without so much as one full hearing on the merits. How much longer will they wait for the “torture culture” to end? Well before the presidential election *Boumediene* foreshadowed an end to the U.S. torture culture. It also provided political and legal cover and made inevitable that which many in the human rights and international communities had been advocating—a return to the rule of law and a forswearing of torture and other harsh interrogation practices.