THE LAW-FREE ZONE AND BACK AGAIN

*Janet Cooper Alexander**

The decade since 9/11 has seen three phases in the government's approach to the legal aspects of detainee policy in the "war on terrorism." First, the Bush administration attempted to create a "law-free zone" in which it could deal with suspected terrorists free of legal restraint or interference by the other branches of government. After every rebuff by the Supreme Court the administration responded by seeking the "least-law alternative" and to that end invented new forms of adjudication: military commissions as substitutes for criminal trials, summary military tribunals to authorize indefinite detention without charge, and short-cut alternatives to traditional habeas procedures.

In the second phase, the Obama administration made significant progress toward its stated goal of returning to the rule of law in the national security arena—in particular, by announcing the closure of Guantánamo, the end of the military commission system, and a commitment to using the federal courts to prosecute terrorists.

The third phase began roughly with the return of the House of Representatives to Republican control in the 2010 elections. Congress employed its appropriations power to limit and then to foreclose the President's ability to transfer detainees from Guantánamo, thus making it impossible to close the controversial detention center or to prosecute detainees held there in federal court, and forcing military commissions to resume. During the same period, the D.C. Circuit issued a series of decisions that effectively reversed the Supreme Court's habeas decisions of 2004 and 2008. The Supreme Court's failure to review these decisions has left detainees with essentially no meaningful opportunity to win release.

This Article reflects on these developments, the Obama administration's often surprisingly effective responses, and where detainee policy is likely to go next.

* Frederick I. Richman Professor of Law, Stanford Law School. I would like to thank Shirin Sinnar, Scott Horton, and participants at a Stanford Law School workshop for their helpful comments. Nicolas Martinez, Daniel Corbett, and Andrew Noll provided indispensable research assistance.

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Battle not with monsters, lest ye become a monster; and if thou gaze long into an abyss, the abyss gazes also into thee.
—Friedrich Nietschze, Beyond Good and Evil Aphorism 146[1]

The decade since 9/11 has seen three phases in the government's approach to the legal aspects of the "war on terrorism." In the first phase, the Bush administration asserted sweeping executive power to use military force, gather intelligence, and detain and punish suspected terrorists free of any legal constraints or interference by the other branches of government. Within a few days of the 9/11 attacks, President Bush declared that the Geneva Conventions did not apply to suspected terrorists captured in Afghanistan or elsewhere; established military commissions by executive order, began bringing those captured to Guantánamo Naval Base and other secret locations outside the United States—where, the Bush administration claimed, the Constitution and laws did not apply—for indefinite detention without charge; detained thousands of people within the United States outside the criminal process through the use of material witness warrants and immigration proceedings; and began a program of secret electronic surveillance within the United States. In short, the administration sought to create a law-free zone[2] in which it could do whatever it chose.

The remainder of the Bush years saw a tenacious battle to protect and preserve this "law-free" approach to detention policy. Opposition by civil liberties and humanitarian advocates achieved substantial, though cautious and incremental, success in the Supreme Court.[3] After every rebuff the Bush administration responded by seeking the "least-law alternative" and to that end invented new forms of adjudication: military commissions as substitutes for criminal trials, summary military tribunals to authorize indefinite detention without charge, and shortcut alternatives to traditional habeas procedures.[4] Repeated efforts to strip the federal courts of jurisdiction to hear challenges by detainees were a key part of this strategy. In each case, the objective was to minimize the legal constraints on executive action, to confine decision making within the executive branch, and to avoid the procedural and substantive pro-

1. Others have found Nietschze's aphorism apt in thinking about the war on terrorism. *See* Joseph L. Falvey, Jr. & Brian D. Eck, *Holding the High Ground: The Operational Calculus of Torture and Coercive Interrogation*, 32 CAMPBELL L. REV. 561, 561 (2010); Evan J. Wallach, *The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and al-Qaeda and the Mistreatment of Prisoners in Abu Ghraib*, 36 CASE W. RES. J. INT'L L. 541 (2004).

2. The earliest use I have found of this now-common descriptor of the Bush Guantánamo policy is Chris Hedges, *Public Lives: Ex-Judge vs. the Government's Law-Free Zone*, N.Y. TIMES, Feb. 6, 2004, http://www.nytimes.com/2004/02/06/nyregion/public-lives-ex-judge-vs-the-government-s-law-free-zone.html (profiling John J. Gibbons, former chief judge of the Third Circuit, who argued *Rasul v. Bush* in the Supreme Court; Gibbons describes a cartoon depicting Guantánamo as a "No Law Zone" and remarks "I am uncomfortable with no-law zones.").

3. Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004).

4. *See* discussion *infra* Part I.A.

tections of U.S. and international law.[5] The creation of these least-law alternatives was justified by the argument that this was "a different type of war,"[6] in which we could not afford the procedural protections of the Constitution, the Geneva Conventions and other treaty obligations, or existing federal statutes.

The second phase began with the inauguration of Barack Obama, who had campaigned on promises to close Guantánamo, end military commissions, and restore the rule of law to detention policy. The Obama administration made significant progress in reestablishing that the government's conduct, even in wartime, is subject to the rule of law, renouncing torture and other mistreatment, closing secret prisons, and moving to try or release as many detainees as possible. At the same time, within a few months of taking office the Obama Department of Justice took legal positions in a variety of legal contexts that appeared substantially identical to widely criticized positions of the Bush administration, such as continuing to assert the state secrets doctrine as a bar to litigation and declining to release detainees who had been cleared of being terrorists by the military's own tribunals.

The third phase began roughly with the return of the House of Representatives to Republican control in the 2010 elections. Congress employed its appropriations power to limit and then to attempt to foreclose entirely the Obama administration's ability to prosecute detainees in federal court or transfer them from Guantánamo, thus making it impossible to close the controversial detention center. A legislative attempt to require noncitizens accused of being terrorists to be tried before military commission rather than in federal court was narrowly defeated, but the inability to bring Guantánamo detainees to the United States for trial forced the Obama administration to resume military commissions for the top terrorist suspects whose criminal trials Attorney General Eric Holder's Justice Department had thought would be its crowning achievement.

Congress also passed legislation requiring suspected members of al-Qaeda or "associated forces" to be held in military custody, again making it difficult to prosecute them in federal court. The bill as passed contained some moderating elements, including the possibility of presidential waiver of the military custody requirement,[7] recognition of the FBI's ability to interrogate suspects,[8] and a disclaimer stating that the statute was not intended to change existing law regarding the authority of the

5. *See* discussion *infra* Part I.A.

6. *See, e.g.*, *Text: Bush on Bringing bin Laden to Justice*, WASH. POST, Sept. 17, 2001, http://www.washingtonpost.com/wp-srv/nation/attacked/transcripts/bush091701.html (transcript of Bush comments at press conference, Sept. 17, 2001) ("I know that an act of war was declared against America, but this will be a different type of war than we're used to. . . . [T]his is a different type of enemy than we're used to. . . . [I]t's a new type of war.").

7. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1022(a)(4), 125 Stat. 1298, 1563 (2011).

8. *Id.* § 1022(d).

President, the scope of the Authorization for Use of Military Force,[9] or the detention of U.S. citizens, lawful residents, or persons captured in the United States.[10] All the while, Republican presidential hopefuls were vying to see who could be the most vigorous proponent of indefinite detention, barring trials in civilian courts, and reinstating a national policy of interrogation by torture.[11]

During the same period, the D.C. Circuit issued a series of decisions that effectively reversed the Supreme Court's habeas decisions of 2004 and 2008.[12] The Supreme Court's failure to review these decisions has left detainees with essentially no meaningful opportunity to challenge their custody.

Thus, a decade that began with the executive branch's assertion of sole and exclusive power to act unconstrained by law or the other branches ended, ironically, with Congress asserting its power to countermand the executive branch's decisions, regardless of detainee claims of legal rights, in order to maintain those law-free policies. And although the Supreme Court had blocked the Bush administration's law-free zone strategy by upholding detainees' habeas rights, the D.C. Circuit has since rendered those protections toothless.

Part I of this Article discusses the Bush administration's effort to create a "law-free zone" for dealing with suspected terrorists, and the battles in the courts and in Congress over that policy. Part II discusses the Obama administration's policies, which began with a sweeping repudiation of many of the most distinctive and controversial Bush policies, but continued some Bush policies, compromised on other questions as a result of opposition to the proposed changes, and took even more stringent positions in some areas. Part III treats the increasing opposition to liberalizing detainee policy in Congress and the virtual dismantling of the Supreme Court's habeas cases by the D.C. Circuit. These developments have shifted control away from the executive branch through legislative restrictions on transfers from Guantánamo and use of the criminal process, and through judicial decisions preventing detainees from obtaining effective relief through habeas. Part IV reflects on where we are now and where we are likely to go next.

9. *Id.* § 1021(d).

10. *Id.* § 1021(e). In May 2012, however, Judge Katherine Forrest of the Southern District of New York held that section "1021 is not merely an 'affirmation' of the AUMF" and enjoined the President's exercise of the indefinite detention power purportedly granted by the 2012 NDAA, holding that the statute is facially unconstitutional under the First Amendment. Hedges v. Obama, No. 12 Civ. 331(KBF), 2012 WL 1721124, at *2 (S.D.N.Y. May 16, 2012); Hedges v. Obama, No. 12 Civ. 331(KBF), 2012 WL 2044565, at *1 (S.D.N.Y. June 6, 2012) (clarifying that the decision enjoins enforcement against anyone, not just the parties before the court).

11. *See, e.g.*, Editorial, *The Torture Candidates*, N.Y. TIMES, Nov. 15, 2011, at A30.

12. *E.g.*, Kiyemba v. Obama, 605 F.3d 1046 (D.C. Cir. 2010); Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010); Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009); *see* discussion *infra* Part III.B.

I. THE BUSH POLICY: A LAW-FREE ZONE

After 9/11 the gloves came off.
—Cofer Black[13]

A. Constructing the Law-Free Zone

From the very first days after the attacks of 9/11, the Bush administration sought to free itself of all legal constraints in its response to those events. Previous terrorist attacks had been treated as crimes, including attacks by al-Qaeda on military targets.[14] President Bush, however, immediately declared that the 9/11 attacks were an "act of war" and announced the "war on terror" as a response.[15] These were not to be narrow or temporary measures: "Our war on terror begins with al-Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."[16]

"Act of war" rhetoric allowed President Bush to assert sole authority as commander in chief to take actions necessary for national security, without interference from the other branches of government. This bold assertion of executive power relied crucially on a novel and extreme interpretation of Article II furnished by lawyers in the Office of Legal Counsel (OLC).[17] Because the enemy was merciless and barbaric, rules

13. *Joint Investigation Into September 11th: Hearing Before the Joint House-Senate Intelligence Comm.*, 107th Cong. (2002) (statement of Cofer Black, Former Chief of the Counterterrorist Center, Central Intelligence Agency), *available at* http://www.fas.org/irp/congress/2002_hr/092602black.html.

14. Previous attacks by al-Qaeda that were prosecuted as crimes included the 1993 bombing of the World Trade Center, the Manila Air (or Bojinka) plot to blow up a dozen jumbo jets, and the 1998 embassy bombings in East Africa. *See* Mary Jo White, *Prosecuting Terrorism in New York*, MIDDLE E. Q., Spring 2001, at 11, *available at* http://www.meforum.org/25/prosecuting-terrorism-in-new-york (last visited Feb. 26, 2013); Christopher S. Wren, *U.S. Jury Convicts 3 in a Conspiracy to Bomb Airliners*, N.Y. TIMES (Sept. 6, 1996), http://www.nytimes.com/1996/09/06/nyregion/us-jury-convicts-3-in-a-conspiracy-to-bomb-airliners.html. Other attacks such as aircraft hijackings and bombings, including the bombing of Pan Am 103 which was carried out by agents of the Libyan government, were also treated as crimes.

15. President George W. Bush, Address to a Joint Session of Congress (Sept. 20, 2001), (transcript available at http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/).

16. *Id.*

17. These OLC opinions were based on an extreme, supposedly originalist interpretation of presidential power initially advanced by John Yoo in a 1996 law review article and later extended in opinions of the OLC and in a series of books. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996) [hereinafter Yoo, *Continuation of Politics by Other Means*]; JOHN YOO, CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH (2009) [hereinafter YOO, CRISIS AND COMMAND]; JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005) [hereinafter YOO, POWERS OF WAR AND PEACE]; JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006) [hereinafter YOO, WAR BY OTHER MEANS]; *see* OLC opinions cited *infra* note 19.

Yoo's interpretation of executive power has been extensively criticized. *See, e.g.*, OFFICE OF PROF'L RESPONSIBILITY, DEP'T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS (July 29, 2009), *available at* http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf [hereinafter OPR REPORT]; Janet

that had been observed domestically and in previous armed conflicts were luxuries the nation could no longer afford. "After 9/11 the gloves came off."[18]

The administration announced that the Taliban and al-Qaeda were not entitled to POW status and that the Geneva Conventions did not apply to suspected terrorists, thus freeing itself from the strictures of international law.[19] At the administration's behest, Congress later passed legislation purporting to deny detainees the protections of the Geneva Conventions.[20] The government began bringing individuals captured in Afghanistan, and later from all over the world,[21] to Guantánamo. There they were held in indefinite detention without charge, in conditions very different from those required by international law.

Guantánamo was chosen to house detainees because the government thought neither the habeas right nor substantive constitutional rights extended to non-citizens outside the United States.[22] Even more broadly, Senator John Kyl declared, "the Great Writ does not apply to terrorists."[23] Without the right to file habeas petitions in federal court,

Cooper Alexander, *John Yoo's* War Powers*: The Law Review and the World*, 100 CALIF. L. REV. 331 (2012); LOUIS FISHER, PRESIDENTIAL WAR POWER (2d ed. 2004); Louis Fisher, *The Law: John Yoo and the Republic*, 41 PRESIDENTIAL STUD. Q. 177 (Mar. 2011); Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L. J. 1199 (2006), Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169 (2004); Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377 (2011); Stuart Streichler, *Mad About Yoo, or, Why Worry About the Next Unconstitutional War?*, 24 J.L. & POL. 93 (2008).

18. *Joint Investigation Into September 11th*, *supra* note 13 (statement of Cofer Black, Former Chief of the Counterterrorist Center, Central Intelligence Agency).

19. Memorandum from Jay S. Bybee, Ass't Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Def., Re: Application of Treaties and Laws to al-Qaeda and Taliban Detainees 1 (Jan. 22, 2002), *available at* http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf; Memorandum from Jay S. Bybee, Ass't Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949, at 1 (Feb. 7, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020207.pdf; Memorandum from John C. Yoo, Deputy Ass't Att'y Gen., and Robert J. Delahunty, Special Counsel, to William J. Haynes, II, Gen. Counsel, U.S. Dep't of Def., Re: Application of Treaties and Laws to al-Qaeda and Taliban Detainees (Jan. 9, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf.

20. *See* Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2602 (codified at 10 U.S.C. § 948b(g)) ("No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.").

21. For example, detainees were brought to Guantánamo from such places as Pakistan, Gambia, Jordan, and Bosnia. *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1070–74 (9th Cir. 2010); Boumediene v. Bush, 553 U.S. 723, 734 (2008) (noting Guantánamo prisoners came from "as far away from [Afghanistan] as Bosnia and Gambia"); Craig Whitlock, *At Guantanamo, Caught in a Legal Trap*, WASH. POST, Aug. 21, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/08/20/AR2006082000660_pf.html.

22. Memorandum from Patrick F. Philbin, Deputy Ass't Att'y Gen., and John C. Yoo, Deputy Ass't Att'y Gen., to William J. Haynes, II, Gen. Counsel, Dep't of Def., Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba 1, 5 (Dec. 28, 2001), *available at* http://www.torturingdemocracy.org/documents/20011228.pdf (stating that federal district court could not exercise habeas jurisdiction over aliens held at Guantánamo).

23. 151 CONG. REC. 25,739 (daily ed. Nov. 10, 2005) (statement of Sen. Kyl in debate over attempted legislative repeal of *Rasul v. Bush* through the Detainee Treatment Act of 2005); *see* Janet

there would be no way for detainees to challenge their detention or treatment. Indeed, their very names were kept secret and the International Red Cross was not given access to them.[24] The government contended that under the laws of war, enemy combatants could be held without charge for the duration of the conflict (that is, until the global fight against terrorism is over), but also that neither international treaties, conventions, and customary international law governing detention during armed conflict nor the Constitution applied to them.[25] In short, the government could hold anyone it chose, under any conditions it wished, simply by labeling them terrorists. Once transferred to Guantánamo, prisoners remained for years, even though from an early stage authorities knew that the great majority of detainees had not in fact been involved in terrorism.[26]

Over 700 individuals were detained at Guantánamo, and thousands were imprisoned in Afghanistan and Iraq.[27] A far-flung network of secret prisons operated by the CIA was set up in countries such as Poland, Romania, Morocco, and Thailand to house and interrogate high value detainees.[28] Some detainees were sent to third countries through a program of "extraordinary rendition," often to be interrogated with U.S. cooperation or direction using methods that were forbidden to U.S. interrogators, including torture.[29]

Rejecting the advice of military lawyers, experienced military interrogators, and even CIA officers,[30] the Bush administration vigorously

Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CALIF. L. REV. 1193, 1233 & n.189 (2007).

24. *See* William Glaberson, *Red Cross Monitors Barred from Guantánamo*, N.Y. TIMES, Nov. 16, 2007, http://www.nytimes.com/2007/11/16/washington/16gitmo.html?_r=0; Steven R. Weisman, *U.S. Rebuffs Red Cross Request for Access to Detainees Held in Secret*, N.Y. TIMES, Dec. 10, 2005, http://www.nytimes.com/2005/12/10/politics/10detain.html.

25. Hamdi v. Rumsfeld, 542 U.S. 507, 510–11 (2004); Rasul v. Bush, 542 U.S. 466, 485 (2004) ("potentially indefinite detention").

26. *See* Tim Golden and Don Van Natta, Jr., *U.S. Said to Overstate Value of Guantánamo Detainees*, N.Y. TIMES, June 21, 2004, at A1 ("In interviews, dozens of high-level military, intelligence and law-enforcement officials in the United States, Europe and the Middle East said that contrary to the repeated assertions of senior administration officials, none of the detainees . . . ranked as leaders or senior operatives of Al-Qaeda. They said only a relative handful—some put the number at about a dozen, others more than two dozen—were sworn Qaeda members or other militants able to elucidate the organization's inner workings.").

27. *See* HUM. RTS. FIRST, FACT SHEET: GUANTÁNAMO BY THE NUMBERS (2012), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Gitmo-Numbers.pdf (last updated Oct. 3, 2012); *Times Topics: Bagram Detention Center (Afghanistan)*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/b/bagram_air_base_afghanistan/index.html (last updated Nov. 19, 2012) (noting that more than 3000 people were detained in Afghanistan); Walter Pincus, *U.S. Holds 18,000 Detainees in Iraq*, WASH. POST, Apr. 15, 2007, at A24, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/04/14/AR2007041401554.html.

28. *See, e.g.*, *Extraordinary Rendition: Mapping the Black Sites*, PBS FRONTLINE/WORLD, http://www.pbs.org/frontlineworld/stories/rendition701/map/ (last visited Feb. 26, 2013). Secret portions of prisons at Guantánamo and in Afghanistan and Iraq were also established. *Id.*

29. *Id.*

30. OPR REPORT, *supra* note 17, at 47, 73–74 (describing how the FBI objected to abusive interrogation techniques and ordered its personnel not to participate); *id.* at 79–80 (describing how Army

employed "enhanced interrogation techniques" approved by complaisant political appointees in the OLC on individuals held outside the United States. The government attempted to immunize itself and its agents for violations of international and domestic law such as the Convention Against Torture, the War Crimes Act, and the Torture Act by securing legal opinions purporting to declare such actions legal.[31] Even if the opinions were later rejected as invalid, they could still form the basis for successful assertions of qualified immunity in subsequent litigation. This strategy has turned out to be successful: although the Bush administration itself later rejected the Yoo torture memos[32] and President Obama revoked all OLC memos relating to interrogations,[33] his administration

JAG Major General Thomas Romig objected to the techniques and to Yoo's legal analysis); Memorandum from Alberto J. Mora, Gen. Counsel of the Navy, to Inspector Gen., Dep't of the Navy, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues 17–20 (July 7, 2004), *available at* http://www.newyorker.com/images/pdf/2006/02/27/moramemo.pdf (describing Mora's repeated and unsuccessful attempts to block the techniques); ALI H. SOUFAN WITH DANIEL FREEDMAN, THE BLACK BANNERS: THE INSIDE STORY OF 9/11 AND THE WAR AGAINST AL-QAEDA (2011). *See generally* MATTHEW ALEXANDER WITH JOHN R. BRUNING, HOW TO BREAK A TERRORIST: THE U.S. INTERROGATORS WHO USED BRAINS, NOT BRUTALITY, TO TAKE DOWN THE DEADLIEST MAN IN IRAQ (2008) (former Air Force interrogator describing his use of non-abusive methods to find Abu Musab al Zarqawi); Matthew Alexander, *Torture's the Wrong Answer. There's a Smarter Way*, WASH. POST, Nov. 30, 2008, at B1 (arguing against the continued use of harsh techniques); Ali Soufan, *My Tortured Decision*, N.Y. TIMES, Apr. 23, 2009, at A27 (former FBI interrogator who interrogated Abu Zubaydah, describing use of traditional methods, the FBI's decision not to participate in abusive interrogation, CIA agents who objected being ordered to continue, and his testimony at classified congressional hearings); GLENN L. CARLE, THE INTERROGATOR: AN EDUCATION (2011) (CIA interrogator describes his interrogation of alleged "bin Laden's banker," refusing to use torture methods, and his efforts to secure his release after determining that Pacha Wazir was not a terrorist); Scott Horton, *Unredacting "The Interrogator,"* HARPER'S MAG., July 5, 2011 [hereinafter Horton, *Unredacting "The Interrogator"*], *available at* http://harpers.org/blog/2011/07/unredacting-the-interrogator/ (book review); Scott Horton, The Interrogator: *Six Questions for Glenn Carle*, HARPER'S MAG., July 5, 2011 [hereinafter Horton, The Interrogator*: Six Questions for Glenn Carle*], *available at* http://harpers.org/blog/2011/07/the-interrogator-six-questions-for-glenn-carle/ (interview).

31. *See* OPR REPORT, *supra* note 17, at 30–70, 226 (detailing the history of the "Bybee Memo" and the "Yoo Memo" and concluding that they "contained seriously flawed arguments" that "did not constitute thorough, objective or candid legal advice"). The Detainee Treatment Act of 2005 attempted to immunize interrogators who relied on such advice. The D.C. Circuit subsequently blocked suits for civil liability for torturous interrogations, Doe v. Rumsfeld, 683 F.3d 390, 393, 397 (D.C. Cir. 2012), and the Ninth Circuit pronounced qualified immunity for Yoo himself, based in part on the lack of "clearly established law" created by his own disingenuous opinions, Padilla v. Yoo, 678 F.3d 748, 758, 768 (9th Cir. 2012).

32. *See* Alexander, *John Yoo's* War Powers, *supra* note 17, at 361–62 (Jack Goldsmith, Jay Bybee's immediate successor at the Office of Legal Counsel, withdrew the two most significant legal opinions, the Torture Memo and the Yoo Memo; Goldsmith's successors, Dan Levin and Stephen Bradbury, also repudiated the memos); DEP'T OF JUSTICE, OFFICE OF PROF'L RESPONSIBILITY, REPORT: INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA ON ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 90 (Dec. 22, 2008) (draft report), *available at* http://judiciary.house.gov/hearings/pdf/OPRFirstReport081222.pdf. *See generally* Alexander, *John Yoo's* War Powers, *supra* note 17, at 361–63.

33. *See* Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009) ("From this day forward, . . . officers, employees, and other agents of the United States Government . . . may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation . . . issued by the Department of Justice between September 11, 2001 and January 20, 2009."). Additionally, the order mandated that "[a]ll executive directives, orders, and regulations inconsistent with this order,

decided against prosecuting anyone who did not go beyond the acts Yoo had declared permissible.[34] Yoo himself was found to be entitled to qualified immunity because—although the court assumed that the "appalling" treatment plaintiff alleged he suffered was in fact torture—it was not "clearly established at the time" that it was torture[35]—largely because of Yoo's own memos.[36]

If government officials did not need to fear later prosecution, then their treatment of detainees was truly free from law. The administration's top law enforcement officers made it plain that they did not care whether evidence obtained through coercion would be inadmissible, because they were interested in "intelligence-gathering rather than prosecution."[37] As former Bush Attorney General Michael Mukasey wrote in criticism of President Obama, "confessions aren't the point. Intelligence is."[38] Jose Rodriguez, director of clandestine operations for the CIA, confirmed that the CIA's "focus" and "ultimate goal" was preventing "the next major terrorist attack" rather than preserving evidence for use in prosecutions.[39] Nevertheless, some detainees were tortured or mistreated without being interrogated.[40]

Not only that, but the administration could have its cake and eat it too. Coercive interrogations that would normally render evidence inadmissible were cost-free in the war on terrorism. It did not matter that prosecutions could be compromised, because alleged terrorists could be held indefinitely without charge and without the possibility of judicial review. Information elicited under torture or other coercive methods could be used as the basis to detain the person who was interrogated or

including but not limited to those . . . concerning detention or the interrogation of detained individuals, are revoked to the extent of their inconsistency with this order." *Id.* at 4893.

34. *See* Press Release, Office of the Press Sec'y, Statement of President Barack Obama on Release of OLC Memos (Apr. 16, 2009), *available at* http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos ("[I]t is our intention to assure those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution.").

35. *Padilla v. Yoo*, 678 F.3d at 768.

36. *Id.* at 752–53.

37. Michael B. Mukasey, *The Waterboarding Trail to bin Laden*, WALL ST. J., May 6, 2011, at A15, *available at* http://online.wsj.com/article/SB10001424052748703859304576305023876506348.html ("It is, however, certain that intelligence-gathering rather than prosecution must be the first priority, and that we need a classified interrogation program administered by the agency best equipped to administer it: the CIA."); *see* discussion in Part II.B.2, *infra*.

38. Michael Hayden & Michael B. Mukasey, *The President Ties His Own Hands on Terror*, WALL ST. J., Apr. 17, 2009, at A13.

39. Amy Davidson, *"I Really Resent You Using the Word 'Torture'": Q. & A. with Jose Rodriguez*, NEW YORKER ONLINE (July 19, 2012), http://www.newyorker.com/online/blogs/closeread/2012/07/jose-rodriguez-on-torture.html#ixzz21Bdkabo2. After 9/11, Rodriguez was appointed chief of staff of the CIA's Counter Terrorism Center, and later its director. Mark Mazzetti, *Uneasy Spotlight for Ex-Official of CIA*, N.Y. TIMES, Dec. 10, 2007, at A8. In 2004 he became head of the CIA's clandestine operations, which he headed until his retirement in 2007. *Id.*

40. *See, e.g.*, David J.R. Frakt, *Closing Argument at Guantánamo: The Torture of Mohammed Jawad*, 22 HARV. HUM. RIGHTS J. 401 (2009), *available at* http://www.law.harvard.edu/news/2009/02/frakt-closing-argument.pdf (annotated argument of Maj. Frakt in military commission trial of Mohammed Jawad).

anyone he implicated, without worrying about admissibility. The only thing left out of this clever plan was the fact that torture does not produce reliable information.[41]

Predictably, however, the Bush administration did later desire to prosecute some detainees who had been mistreated; also predictably, the need to make coerced evidence admissible motivated much of the support for military commissions[42]—though basing such prosecutions on coerced evidence was by no means safe. The convening authority for military commissions declined to charge Mohammed al-Qahtani based on her finding that all of his statements after his arrest must be suppressed because of torture,[43] and Mohammed Jawad's habeas petition was granted based on his mistreatment.[44]

The Bush administration contended that the Constitution and federal law provided no protection to noncitizens held outside the United States and that federal courts had no jurisdiction to entertain habeas petitions challenging the basis for their detention or how they were treated. According to the administration and its lawyers, detainees existed in a legal limbo, unprotected by the laws of war, international treaties, the U.S. Constitution, or federal statutes.[45]

The administration claimed the power to detain persons it designated "enemy combatants" in military custody within the United States as well, even if they were U.S. citizens.[46] Additionally, hundreds of people, primarily noncitizens and Muslims, were rounded up under immigration laws and the material witness statute and held for lengthy periods without charge (and without calling them as witnesses).[47]

By executive order and to much fanfare, President Bush established military commissions by executive order for the trial of suspected terror-

41. *See, e.g.*, Scott Horton, *Torture Doesn't Work, Neurobiologist Says*, HARPER'S MAG. (Sept. 22, 2009, 3:08 PM), http://www.harpers.org/archive/2009/09/hbc-90005768 (summarizing several recent studies by scientists on the efficacy of torture as an interrogation technique).

42. *See* discussion in Part II.B.2, *infra.*

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

44. *See* William Glaberson, *Judge Orders Guantánamo Detainee to Be Freed*, N.Y. TIMES (July 30, 2009), http://www.nytimes.com/2009/07/31/us/31gitmo.html. The Obama administration had conceded that his statements could not be used but sought unsuccessfully to continue his detention based on other evidence.

45. *See* Alexander, *John Yoo's* War Powers, *supra* note 17, at 334–36.

46. Hamdi v. Rumsfeld, 542 U.S. 507, 512 (2004).

47. *See* U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (Apr. 2003) [hereinafter DOJ IG REPORT], *available at* http://www.justice.gov/oig/special/0306/full.pdf; *Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11*, HUM. RTS. WATCH, June 2005, *available at* http://www.aclu.org/national-security/human-rights-abuses-under-material-witness-law-sept-11-2001. Within two months of the attacks, law enforcement had detained more than 1200 citizens and aliens. DOJ IG REPORT, *supra*, at 1. Seven hundred sixty-two persons were detained by the Immigration and Naturalization Service, primarily by FBI-led terrorism task forces. *Id.* at 2, 15. The average length of detention without charge for those who were released was 80 days, and more than 25% were held longer than 3 months. *Id.* at 46, 51.

ists.[48] Both advocates and opponents of military commissions assumed that they would make it easier to obtain convictions and heavy sentences by dispensing with well-established procedural protections applicable in criminal prosecutions—the rules of evidence, an independent judiciary, juries, and constitutional protections such as the right of confrontation and the right to counsel—as well as the lesser but still demanding legal requirements of courts-martial. Additionally, the creation of military commissions offered proof that the country was "at war," providing reassurance that the government was taking the strongest possible action to protect the country as well as furnishing the rationale for the President to operate outside the law.

Yet the symbolic effect of the military commissions has been far more important than their practical results. Though the executive order authorizing military commissions was issued in November 2001, the list of crimes that could be charged was not promulgated until 2003 and no charges were brought until 2004,[49] with the first trial beginning in August 2004.[50] The commission process had to be restarted in 2007 under the Military Commissions Act (MCA) of 2006, after the Supreme Court held in *Hamdan v. Rumsfeld* that the President lacked power to establish military commissions that did not comply with the Geneva Conventions by executive order.[51] Only seven defendants have been convicted by military commissions and only one of these seven convictions was obtained after a full adversarial trial.[52] That conviction has now been reversed by the D.C. Circuit, which held that the offense was not triable to a military commission at all.[53] By contrast, hundreds of defendants have been convicted in federal court of terrorism-related crimes since 9/11 and sen-

48. Military Order of November 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2011).

49. DEP'T OF DEF., MILITARY COMMISSION INSTRUCTION NO. 2 RE: CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION (Apr. 30, 2003), *available at* http://www.defense.gov/news/May2003/d20030430milcominstno2.pdf; *Military Commissions History*, MILITARY COMM'NS, http://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx (last visited Feb. 26, 2013); Neil A. Lewis, *U.S. Charges 2 with War Crimes, Setting Stage for Tribunals*, N.Y. TIMES (Feb. 24, 2004), http://www.nytimes.com/2004/02/24/politics/24CND-GITM.html?hp (Ali Hamza Ahmed Sulayman al Bahlul and Ibrahim Ahmed Mahmoud al Qosi were the first Guantánamo detainees charged before military commissions).

50. Press Release, Dep't of Def., First Military Commission Convened at Guantanamo Bay, Cuba (Aug. 24, 2004), *available at* http://www.defense.gov/releases/release.aspx?releaseid=7667; Neil A. Lewis, *First War-Crimes Case Opens at Guantánamo Base*, N.Y. TIMES (Aug. 25, 2004), http://www.nytimes.com/2004/08/25/national/25gitmo.html.

51. *See* Frakt, *Closing Argument*, *supra* note 40, at 403.

52. *See By the Numbers*, MIAMI HERALD (Nov. 27, 2007) http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html (last updated Dec. 24, 2012) (listing convictions of David Hicks, Ibrahim al Qosi, Omar Khadr, Noor Uthman Mohammed, and Majid Khan, all pursuant to plea bargains; and Salim Hamdan and Ali Hamza al Bahlul, after trial). Al Bahlul refused to cooperate with his trial and "insisted that his lawyer remain mute." William Glaberson, *Detainee Convicted on Terrorism Charges*, N.Y. TIMES, Nov. 4, 2008, at A19.

53. Hamdan v. United States, 696 F.3d 1238 (D.C. Cir. 2012).

tenced to lengthy prison terms, which they are serving in supermax prisons under draconian conditions.[54]

Thus the Bush administration's paradigm for how suspected terrorists would be treated was a law-free zone in which the President would be able to do as he deemed best in furtherance of national security. To opponents of these new powers, the administration argued that this war was so unlike any previous war or threat and so much more dangerous to the very survival of the country—according to the chairman of the Joint Chiefs of Staff, "the most serious security challenge that the United States and its friends and allies around the world probably (have) ever faced"[55]—that existing legal frameworks were inapplicable (as in the case of the Geneva Conventions), inadequate to the task (as in criminal trials in federal court), or positively dangerous (as in the possibility that courts sitting in habeas might interfere with intelligence-gathering or release dangerous terrorists to return to the battlefield).

The development of new procedural institutions—detention without charge, trial by military commission, and alternatives to habeas—reflected this basic preference for no law at all. Each time courts rejected this premise, the government fell back to the "least-law alternative."

B. The Supreme Court, the Constitution, and the Least-Law Alternative

> *It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. . . . [A] state of war is not a blank check for the President . . . .*
>
> —Justice Sandra Day O'Connor, *Hamdi v. Rumsfeld*[56]

54. *See* CTR. ON LAW & SEC., N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2011 (2011) [hereinafter TERRORIST TRIAL REPORT CARD], *available at* http://www.lawandsecurity.org/Portals/0/Documents/TTRC%20Ten%20Year%20Issue.pdf; Scott Shane, *Beyond Guantánamo, A Web of Prisons*, N.Y. TIMES, Dec. 11, 2011, at A1, *available at* http://www.nytimes.com/2011/12/11/us/beyond-guantanamo-bay-a-web-of-federal-prisons.html?_r=1&pagewanted=all. The prisoners are often housed in all-Muslim or nearly all-Muslim units. *Id.*

This is not to suggest that criminal trials should be used because they result in higher conviction rates and harsher sentences—though they do. Some 362 persons convicted of terrorism-related offenses were in federal prison as of December 2011, with 269 of them connected to international terrorism. TERRORIST TRIAL REPORT CARD, *supra*. Additionally, more than 300 persons convicted of material support have completed their sentences and been released. *Id*. Criminal trials are more fair, more legitimate, and more true to American principles.

55. The Chairman of the Joint Chiefs of Staff, Air Force Gen. Richard B. Myers, declared in 2003: "It's a war, though, that is so serious it presents such a threat to those of us who value the freedom that we have and our democracies, that there is no option here but to win this war. . . . I believe it is the most serious security challenge that the United States and its friends and allies around the world probably (have) ever faced." Jim Garamone, *Myers Says Terrorism May be Greatest Threat U.S. Has Faced*, U.S. DEP'T OF DEF. AM. FORCES PRESS SERV. (Sept. 25, 2003), http://www.defense.gov/news/newsarticle.aspx?id=28425.

56. 542 U.S. 507, 532, 536 (2004).

It is well known, if not exactly admirable, that the Supreme Court's major cases affirming civil liberties in wartime are mostly decided after the shooting is over, and that in cases that come up for decision during wartime the Court is more deferential to the executive branch and makes more use of avoidance devices.[57] In 2004, however, the Supreme Court decided two cases that dealt a significant rebuff to President Bush's law-free policy.

In *Hamdi v. Rumsfeld*, the Court held that the Authorization for Use of Military Force (AUMF) authorized the detention of "enemy combatants," whether citizens or noncitizens, "for the duration of . . . hostilities," but that detainees were entitled to an opportunity to challenge their classification as enemy combatants before an independent decision maker.[58] In *Rasul v. Bush,* the Court held that persons detained at Guantánamo had the statutory right to habeas corpus to challenge their detention.[59] In a footnote the Court observed that the *Rasul* petitioners had "unquestionably" alleged unconstitutional treatment.[60]

The administration's response was to establish a new, "least-law" alternative that would subject the government's actions to the least amount of law that seemed likely to satisfy the Supreme Court. First, a system of Combatant Status Review Tribunals (CSRTs), authorized by the Detainee Treatment Act of 2005 (DTA), was established at Guantánamo to determine whether each detainee was an enemy combatant and thus subject to detention.[61] These proceedings were intended to furnish the "independent review" the Supreme Court had required in *Hamdi*.[62] Second, the DTA purported to strip the courts of habeas jurisdiction over challenges, whether by habeas or "any other action" to both detention and military commission proceedings.[63] This was a Gordian knot re-

57. *Compare* Korematsu v. United States, 323 U.S. 214 (1944) (upholding wartime internment of Japanese Americans), *Ex parte* Quirin, 317 U.S. 1 (1942) (denying habeas petition challenging death penalty imposed by military commission on accused German saboteurs, with written opinion issued three months after their execution), *and Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1864) (avoiding deciding constitutionality of military commission in Ohio on ground that court lacked jurisdiction to issue writ of habeas to military commission), *with Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (holding that would-be armed insurrectionists in Indiana could not be tried in military courts so long as civil courts were open). *See generally* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998).

58. 542 U.S. at 521–39.

59. 542 U.S. 466 (2004).

60. *Id.* at 483 n.15. A third case, *Rumsfeld v. Padilla*, raised the question whether a U.S. citizen could be held indefinitely without charge in military custody; this case was essentially dismissed on venue grounds. 542 U.S. 426 (2004).

61. Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, § 1005(a), 119 Stat. 2739, 2740–41 (2005) (codified at 10 U.S.C. § 801 note).

62. 542 U.S. at 535. The CSRT proceedings were intended to provide a minimum level of due process, comparable to that outlined in *Hamdi v. Rumsfeld*, that would qualify as a constitutionally acceptable "alternative" to the habeas recognized in *Hamdi*. *See* Boumediene v. Bush, 553 U.S. 723, 733–34 (2008) (quoting *Hamdi*, 542 U.S. at 533).

63. DTA § 1005(e) (applying to persons in the custody of the Department of Defense at Guantánamo). The DTA also provided a defense to civil and criminal actions against U.S. personnel involved in authorized interrogations. DTA § 1004(a).

sponse to the Supreme Court's decisions: if you think the federal courts might hold that your treatment of detainees violates federal law, simply take away their jurisdiction to hear such cases.

CSRTs are composed of three military officers who need not be lawyers; they are appointed by other military officers.[64] Detainees are not entitled to counsel, to see evidence against them (if they have lawyers, their lawyers are not permitted to see the evidence either), or to know the identity of their accusers. The charges are vague, and the details that are provided to the tribunal are classified and therefore are not available to the detainee. The accused may be given a summary of the charges. Hearsay is permitted,[65] and coerced testimony can be admitted if the hearing officer determines that it is probative and reliable.[66] Indeed, in one case a CSRT determined that an individual was an enemy combatant on the basis of a propaganda video made by the Taliban after it imprisoned and tortured him to obtain a false confession that he was a U.S. and Israeli spy.[67] Determinations are made by majority vote, by a preponderance of the evidence, and with a rebuttable presumption in favor of the government's evidence.[68] Detainees are allowed to testify and to call witnesses who are "reasonably available," though the government has refused to produce other prisoners detained at Guantánamo on the grounds that they are not "reasonably available."[69] The DTA makes CSRT determinations subject to very limited judicial review, exclusively in the D.C. Circuit.[70] Only two questions may be addressed in such appeals: whether the determination was consistent with the Department of Defense's own standards and procedures, and whether the use of such standards and procedures was consistent with the Constitution and fed-

64. *See* DEP'T OF DEF., COMBATANT STATUS REVIEW TRIBUNALS (2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf. The CSRT procedures described in this paragraph are set forth in Memorandum from Gordon England, Sec'y of the Navy, to Sec'y of Def. et al., Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, Enclosure (1) (July 29, 2004) [hereinafter *CSRT Procedures Enclosure*], *available at* http://www.defense.gov/news/jul2004/d20040730comb.pdf. The "process has been largely defunct since 2007," primarily because new detainees have not been brought to Guantánamo. JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FY2012: DETAINEE MATTERS 11 (2012).

65. *CSRT Procedures Enclosure*, *supra* note 64, § G(7) (stating that "[t]he Tribunal is not bound by the rules of evidence such as would apply in a court of law" and "it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances").

66. DTA § 1005(b) (permitting coerced evidence so long as it has probative value).

67. Tim Golden, *Expecting U.S. Help, Sent to Guantánamo*, N.Y. TIMES (Oct. 15, 2006), http://www.nytimes.com/2006/10/15/us/15gitmo.html.

68. *See supra* note 63.

69. *See* MARK DENBEAUX ET AL., SETON HALL UNIV. L. SCH. CTR. FOR POL'Y & RES., NO-HEARING HEARINGS: CSRT: THE MODERN HABEAS CORPUS? AN ANALYSIS OF THE PROCEEDINGS OF THE GOVERNMENT'S COMBATANT STATUS REVIEW TRIBUNALS AT GUANTÁNAMO 25, 28 (2006), *available at* http://law.shu.edu/publications/guantanamoReports/final_no_hearing_hearings_report.pdf ("The detainees who asked for witnesses from inside Guantánamo were successful in producing some witnesses only 50% of the time.").

70. DTA § 1005(e)(2)(b).

eral laws, "to the extent . . . applicable."[71] Detainees may not challenge their detention or treatment through any other method.[72] The CSRT procedures apply only to Guantánamo; persons held in Afghanistan receive even fewer procedural protections in their status determinations.[73]

These procedures are in stark contrast to the panoply of protections available from a federal court sitting in habeas, where the rules of evidence apply, the proceedings are presided over by a judge of an Article III court, and the petitioner has the right to be represented by counsel, to confront the witnesses against him, and to call witnesses in his own behalf, as well as full appellate review.

Of the 558 Guantánamo detainees given a CSRT hearing, all but thirty-eight were determined to be enemy combatants.[74] (Occasionally it was necessary to replace members of the panel and send the case back for another review in order to get a finding that the detainee was properly designated an enemy combatant.)[75] In light of repeated claims that the detainees were "the hardest of the hard core,"[76] "among the most dangerous, best-trained, vicious killers on the face of the earth,"[77]—in short, the "worst of the worst"[78]—it is notable that the government only alleged

71. DTA § 1005(e)(2)(C) (codified at 28 U.S.C. § 2241(e)). Even this broad withdrawal of habeas jurisdiction did not satisfy President Bush, who issued a signing statement defending the unitary executive power. Press Release, Office of the Press Sec'y, President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005), *available at* http://www.georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051230-8.html.

72. The DTA withdrew jurisdiction over "any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba." DTA § 1005(e)(1).

73. *See* Al Maqaleh v. Gates, 604 F. Supp. 2d, 205, 226–28 (D.D.C. 2009) (describing status review process at Bagram); Al-Maqaleh v. Gates, 605 F.3d 84, 96 (D.C. Cir. 2010); ELSEA & GARCIA, *supra* note 64, at 9–10; DAPHNE EVIATAR, HUM. RTS. FIRST, DETAINED AND DENIED IN AFGHANISTAN: HOW TO MAKE U.S. DETENTION COMPLY WITH THE LAW 2 (2011), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/Detained-Denied-in-Afghanistan.pdf (noting that the status review process at Bagram has improved since the Bush years but still "falls short of the requirements of international law").

74. Michael Melia, *U.S. Reviews Gitmo Combatant Hearings*, WASH. POST (Oct. 12, 2007, 12:05 AM), http://www.washingtonpost.com/wp-dyn/content/article/2007/10/11/AR2007101101462_pf.html. An Army lieutenant colonel and a major who had served on CSRT panels publicly criticized the panels for favoring the government. *Id.*

75. *See* DENBEAUX ET AL., *supra* note 69, at 37–39.

76. Interview by AP et al. with Donald Rumsfeld, U.S. Sec'y of Def. (Jan. 15, 2002) (transcript available at http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2132).

77. Gerry J. Gilmore, *Rumsfeld Visits, Thanks U.S. Troops at Camp X-Ray in Cuba*, U.S. DEP'T OF DEF. AM. FORCES PRESS SERV. (Jan. 27, 2002), http://www.defense.gov/news/newsarticle.aspx?id=43817.

78. Secretary of Defense Donald Rumsfeld often used the phrase. *See, e.g.*, Joby Warrick, *A Blind Eye to Guantanamo?*, WASH. POST (July 12, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/07/11/AR2008071102954.html. Its first use has been attributed to "the Marine commander" of Guantánamo, Brig. Gen. Michael Lehnert. Carol Rosenberg, *Guantanamo Prisoners a Curious, Varied Group*, MIAMI HERALD, Jan. 20, 2002, at 1A. It has also been attributed to White House Press Secretary Ari Fleischer. Mark Seibel, *Rumsfeld and Gitmo: Another NYT Correction?*, PLANET WASH. (Nov. 30, 2009, 2:33 PM), http://blogs.mcclatchydc.com/washington/2009/11/more-on-rumsfeld-and-gitmo.html. And it has been attributed to Rear Adm. John D. Stufflebeem, the "Pentagon's primary briefer on operations in Afghanistan." *Id.*; Linda D. Kozaryn, *U.S. Gains Custody of*

that the detainee committed "hostile acts" in forty-five percent of the cases.[79]

The jurisdiction-stripping provisions of the DTA came before the Supreme Court in *Hamdan* v. *Rumsfeld*, a challenge to the military commission system.[80] The Court avoided deciding whether the withdrawal of jurisdiction violated the Constitution by holding that the provisions did not apply to petitions that were already pending when the statute was enacted.[81] The Court went on to decide the merits, holding that the President lacked the power to create military commissions that did not comply with existing statutory requirements found in the Uniform Code of Military Justice (UCMJ), including the requirement that military commissions must conform to the Geneva Conventions.[82] *Hamdan* held that the commissions did not comply with the Geneva Conventions and therefore were invalid.[83] A plurality of the Court would also have held that conspiracy, one of the most common military commission charges, is not a war crime and therefore is not a legally permissible charge in a military commission prosecution.[84]

In response to *Hamdan*, the Bush administration again fell back to the least-law alternative. At the administration's request, Congress passed the Military Commissions Act (MCA) of 2006. The 2006 MCA provided legislative authorization for military commissions and again stripped federal court jurisdiction over habeas petitions and other lawsuits by detainees.[85] It also provided that the Geneva Conventions could not provide a "source of rights" in actions by detainees, and declared that the military commissions satisfied the requirements of the Geneva Conventions.[86] Thus the MCA attempted to remove the Geneva Con-

More Detainees, U.S. DEP'T OF DEF. AM. FORCES PRESS SERV. (Jan. 28, 2002), http://www.defense.gov/news/newsarticle.aspx?id=43813.

79. MARK DENBEAUX ET AL., SETON HALL UNIV. L. SCH. CTR. FOR POL'Y & RES., REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 6–7 (2006). The median number of proofs cited in the government's summary of evidence was two. *Id.* at 7. An example of the government's submission—in its entirety—of the evidence that a detainee *did* commit a hostile act, with a specification of the "hostile act" and a numbered summary of the evidence in support, is: "The detainee participated in military operations against the United States and its coalition partners. 1. The detainee *fled*, along with others, when United States forces bombed their camp. 2. The detainee was captured in Pakistan, along with other Uigher fighters." *Id.* at 12.

80. 548 U.S. 557 (2006).

81. *Id.* at 575–76.

82. *Id.* at 613 ("The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations,'—including, *inter alia*, the four Geneva Conventions signed in 1949." (quoting *Ex parte* Quirin, 317 U.S. 1, 28 (1942))).

83. *Id.*

84. *Id.* at 600–13. See discussion of the subsequent reversal of Hamdan's eventual military commission hearing in Part III.B, *infra*.

85. Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, §§ 3, 7, 120 Stat. 2600 (codified at 10 U.S.C. § 948b et seq. (military commissions) and 28 U.S.C. 2241 (habeas corpus), respectively).

86. *Id.* § 3 (codified at 10 U.S.C. § 948b(g)).

ventions as a limitation on the President's use of military commissions, and to prevent judicial review of claims of unconstitutional detention and treatment.

The jurisdiction-stripping provisions of the 2006 MCA clearly did apply to pending cases.[87] Finally forced to decide the constitutional question, the Supreme Court held in *Boumediene v. Bush* that detainees at Guantánamo had a constitutional, not merely a statutory, right to habeas corpus; that the DTA procedures for review of status determinations by the D.C. Circuit were not an adequate substitute for habeas; and that Congress's attempt to deprive the federal courts of jurisdiction to hear detainees' habeas petitions violated the Suspension Clause.[88]

The election of 2008, occurring just a few months after *Boumediene*, mooted any further attempt by the Bush administration to create yet another least-law alternative, and the way was opened for detainees to pursue habeas petitions in the district court. About fifty habeas cases have been heard in the district court, of which about seventy-five percent resulted in an initial decision for the petitioners.[89]

The Bush administration's insistence on the law-free zone/gloves-are-off approach may help to explain the Supreme Court's detainee decisions. *Hamdi* and *Rasul* were decided in 2004, only a few months after the shocking images of the torture of detainees at Abu Ghraib prison became known,[90] and this may have been at least in the back of the minds of some Justices when they held that Guantánamo was not completely beyond judicial review. Judicial review may have appeared to the Justices as potentially the only restraint on an executive branch that recognized no limits on its power, whether legal or moral. The Court's decisions during the Bush administration undoubtedly restrained many bad practices—both by announcing specific limits and by affirming the availability of judicial review of executive action.

Still, the Court was quite cautious and deferential to the executive branch. Departing from the Framers' understanding and purpose when

87. "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." 28 U.S.C. § 2241(e)(1).

88. Boumediene v. Bush, 553 U.S. 723, 771, 792, 795 (2008). The Court has not decided whether military commissions as constituted under the 2006 MCA were constitutional, whether all of the listed crimes are triable by military commissions, or whether the deviations from the procedures applicable in criminal prosecutions and courts-martial are constitutional. *Id.* at 792; *see* discussion *infra* Part IV.

89. The D.C. Circuit, however, has used government appeals of the decisions granting relief to craft legal standards that make it virtually impossible to find for detainees, *see infra* Part III.B, and the most recent district court decisions have gone overwhelmingly in the government's favor, *see* DENBEAUX ET AL., *supra* note 69.

90. *See, e.g.*, *Chronology of Abu Ghraib*, WASH. POST, http://www.washingtonpost.com/wp-srv/world/iraq/abughraib/timeline.html (noting that CBS's "60 Minutes" broadcast photos on Apr. 28, 2004) (last visited Feb. 26, 2013). *Hamdi* and *Rasul* were decided the following June.

they constitutionalized the right to habeas corpus,[91] the Court held that Congress could authorize preventive detention in wartime of citizens and noncitizens alike, by ordinary legislation, subject only to an opportunity to challenge the factual accuracy of the individual's classification as an "enemy combatant."[92] It held that the AUMF was a sufficiently clear legislative statement to satisfy the Non-Detention Act and permit indefinite detention of U.S. citizens.[93] It gratuitously opined that habeas courts, rather than simply ordering conditional release when the government had not complied with the requirements for detention, should themselves supply the omitted procedural due process and could apply relaxed rules of evidence and burdens of proof, and it indicated that summary military tribunals could constitute an adequate substitute for habeas.[94] In *Boumediene* the Court went out of its way to encourage "innovation in the field of habeas corpus" and "certain accommodations" to reduce "the dangers the detention in these cases was designed to prevent."[95]

The Court also refrained in *Hamdan* from deciding whether conspiracy was a violation of the laws of war and therefore triable before a military commission, though a plurality would have held that it was not.[96] And though the Court held in *Boumediene* that for a statutory substitute for habeas to be constitutionally adequate the court must be able to order the remedy of conditional release,[97] it expressly avoided the question whether habeas is available for claims relating to treatment and conditions of confinement in addition to detention *simpliciter*.

Most importantly, the Court has carefully limited its holdings to the right to "invoke the fundamental procedural protections of habeas corpus," and has scrupulously avoided deciding anything about "the content of the law that governs petitioners' detention."[98] This modest incrementalism has allowed the D.C. Circuit to drive a truck through the seeming

91. *See* Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 906 (2012).

92. *Hamdi*, 542 U.S. 507, 531, 533 (2004).

93. *Id.* at 517–21.

94. *Id.* at 533–35, 538.

95. Boumediene v. Bush, 553 U.S. 723, 795 (2008).

96. Hamdan v. Rumsfeld, 548 U.S. 557, 600–13 (2006) (plurality opinion); *see also* Hamdan v. United States, 696 F.3d 1238 (D.C. Cir. 2012) (reversing conviction because conduct was not prohibited as war crime triable to military commission at the time the conduct occurred; until 2006 only violations of the international laws of war were triable to military commissions). Additionally, rather than ruling on the constitutionality of the jurisdiction-stripping provisions of the DTA, the Court concluded as a matter of statutory interpretation that those provisions did not apply to detainees with pending habeas petitions. *Hamdan*, 548 U.S. at 572–84. Similarly, in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the companion case to *Hamdi* and *Rasul*, the Court dodged the significant question of whether U.S. citizens could be detained indefinitely in military custody within the United States by disposing of the case essentially on venue grounds. *Id.* at 433–34, 442–46.

97. *Boumediene*, 553 U.S. at 779.

98. *Id.* at 798.

promise of "meaningful" habeas review, and the Court has meekly acquiesced in this evisceration of *Boumediene* by declining review.[99]

Thus the Court rejected the Bush administration's position that no law applied to its actions in Guantánamo, but its cautious approach, perhaps necessary to hold even a bare majority, left the scope and content of the constitutional limits quite undetermined. Separation of powers concerns may have been foremost in the Justices' minds in deciding these Bush-era cases, in light of that administration's aggressive claims of executive power at the expense of the Court's institutional role. This might help to explain why the Supreme Court has not granted review of cases decided during the Obama administration, which has explicitly grounded its actions on statutory authorization rather than inherent Article II powers.[100]

II. THE OBAMA ADMINISTRATION

[W]e reject as false the choice between our safety and our ideals. Our Founding Fathers, faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man—a charter expanded by the blood of generations.
—Barack Obama, Inaugural Address[101]

A. The Rule of Law

Opposition to the Bush administration detainee policies was a cornerstone of Barack Obama's presidential campaign, and he "told his transition team that the rule of law should be one of the cornerstones of national security in his Administration."[102] On President Obama's first day in office, in keeping with his campaign promises, he issued an executive order banning torture by U.S. officials and revoking all of the Bush administration's executive orders and directives regarding interrogations, including the notorious Torture Memos.[103] The order also established Common Article 3 of the Geneva Conventions as the "minimum baseline" for treatment of individuals detained in "any armed conflict," and explicitly directed that they be treated in accordance with the Torture Act, the Detainee Treatment Act (prohibiting cruel, inhuman, or degrad-

99. *See infra* Part III.B.

100. *See* Linda Greenhouse, *Goodbye to Gitmo*, N.Y. TIMES (May 16, 2012), http://www.opinionator.blogs.nytimes.com/2012/05/16/goodbye-to-gitmo/.

101. President Barack Obama, Inaugural Address (Jan. 20, 2009).

102. Jeh Johnson, Gen. Counsel, U.S. Dep't of Def., National Security Law, Lawyers and Lawyering in the Obama Administration, Speech at Yale Law School (Feb. 22, 2012), *available at* http://www.cfr.org/national-security-and-defense/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448.

103. Exec. Order No. 13,491 §§ 1, 3(c), 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009) ("From this day forward, . . . officers, employees and other agents of the United States Government . . . may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation . . . issued by the Department of Justice between September 11, 2001 and January 20, 2009.").

ing treatment), and the Convention Against Torture.[104] Even more specifically, interrogators were forbidden to use any techniques that are not authorized by and listed in the Army Field Manual.[105] The order also required the closure of all CIA detention sites[106] and directed that the International Committee for the Red Cross be allowed access to all detainees.[107]

On the same day, the President ordered the Guantánamo detention camp to be closed within a year.[108] The order also directed an immediate review of all the remaining detainees' cases to determine whether they could be transferred or released, including release into the United States.[109] The cases of detainees not approved for release or transfer were to be reviewed to determine whether they should be prosecuted, and whether it was feasible to prosecute them in an Article III court.[110] The military commission system was shut down pending this review.[111] The administration also dropped the term "global war on terror" and substituted the term "unprivileged belligerent" for "enemy combatant" to bring the criteria for detention more in alignment with international humanitarian law.[112]

These changes were sweeping in scope, renouncing the Bush approach to detainee policy, reversing the least-law alternatives as fully as could be done by executive order, and presaging the elimination of detention without trial in as many cases as possible in favor of criminal prosecution, transfer to another country, or release. In place of the Bush view that this new enemy was so dangerous that the country could not afford the rule of law, the first among the Obama administration's "basic legal principles" was that: "[I]n the conflict against an *unconventional* enemy such as al-Qaeda, we must consistently apply *conventional* legal principles. . . . Put another way, we must not make it up to suit the moment."[113] As State Department Legal Adviser Harold Koh put it, the administration aspired to "follow[] universal standards, not double standards."[114]

104. *Id.* § 3(a).
105. *Id.* § 3(b).
106. *Id.* § 4(a).
107. *Id.* § 4(b).
108. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).
109. *Id.* §§ 4(a), (c)(2), (5).
110. *Id.* § 4(c)(3).
111. *Id.* § 7.
112. Scott Wilson & Al Kamen, *'Global War on Terror' Is Given New Name*, WASH. POST (Mar. 25, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html; John Floyd & Billy Sinclair, *Is Osama bin Laden a Terrorist or an Unprivileged Belligerent?*, CRIM. JURISDICTION (Nov. 21, 2009, 3:54 PM), http://www.johntfloyd.com/blog/2009/11/is-osama-bin-laden-a-terrorist-or-an-unprivileged-belligerent/.
113. Johnson, *supra* note 102.
114. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, Speech Before the Annual Meeting of the American Society of International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

Policies require implementation, and President Obama also signaled his intention to return to the rule of law by announcing the nomination of civil liberties advocates to key administration positions responsible for detainee policy, including Dawn Johnsen as head of the Office of Legal Counsel, Phillip Carter as Deputy Assistant Attorney General for Detainee Affairs, Gregory Craig as White House counsel, and Harold Koh as Legal Adviser to the State Department.[115] The nominee for Director of National Intelligence, Admiral Dennis C. Blair, testified at his confirmation hearing, "I believe strongly that torture is not moral, legal or effective. . . . Any program of detention and interrogation must comply with the Geneva Conventions, the Conventions on Torture, and the Constitution."[116] He testified that he supported closure of Guantánamo because it has become "a damaging symbol to the world."[117] The contrast with the preceding administration could not have been more complete.

The executive branch's stated commitment to following the standards of international law in detainee matters did not wane during the succeeding years. In March 2011, the President issued Executive Order No. 13,567, stating that the United States would apply Article 75 of Additional Protocol I of the Geneva Conventions of 1949 "out of a sense of legal obligation," and urged the Senate to ratify Additional Protocol II. Thus the government acknowledged the binding nature of international law in connection with the detention of suspected terrorists.[118] The Attorney General announced that Khalid Sheikh Mohammed and four alleged al-Qaeda co-conspirators would be tried in criminal court rather than before military commissions.[119] This was a remarkable step, because the harsh interrogation of Mohammed, who was waterboarded 183 times, surely rendered any statements he made following the waterboarding inadmissible in federal court. Attorney General Holder expressed high

115. *See* Press Release, Office of the President-Elect, President-Elect Obama Announces Key Department of Justice Posts (Jan. 5, 2009), *available at* http://www.change.gov/newsroom/entry/president-elect_obama_announces_key_department_of_justice_posts/; Press Release, Dep't of Defense, Senior Executive Service Appointments/Assignments (May 6, 2009), *available at* http://www.defense.gov/releases/release.aspx?releaseid=12651; Press Release, Office of the President-Elect, Obama-Biden Transition Team Announces More White House Staff (Nov. 19, 2008), *available at* http://change.gov/newsroom/entry/obama_biden_transition_team_announces_more_white_house_staff; Press Release, the White House, President Obama Announces More Key Administration Posts (Mar. 23, 2009), *available at* http://www.whitehouse.gov/the-press-office/president-obama-announces-more-key-administration-posts-3232009.

116. Mark Mazzetti & William Glaberson, *Obama Issues Directive to Shut Down Guantanamo*, N.Y. TIMES (Jan. 21, 2009), http://www.nytimes.com/2009/01/22/us/politics/22gitmo.html. The executive orders were signed on January 21 but are dated January 22.

117. *Id.*

118. *See* Thomas B. Nachbar, *Executive Branch Policy Meets International Law in the Evolution of the Domestic Law of Detention*, 53 VA. J. INT'L L. 201 (2013).

119. Charlie Savage, *U.S. to Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. TIMES, Nov. 14, 2009, at A1. At the same time Holder designated others, including Abd al-Rahim al-Nashiri, for trial by military commission. *Id.*

confidence, however, that there was ample untainted evidence to secure a conviction.[120]

The President and the Attorney General repeatedly declared that waterboarding was torture and was illegal.[121] The use in military commissions of evidence obtained by cruel, inhuman, or degrading treatment was barred by the 2009 version of the MCA—a safeguard that had been part of the McCain Amendment as originally proposed but that did not make it into either the DTA as enacted or the 2006 MCA.[122] New regulations for periodic review of Guantánamo detainees' status provided more procedural protections than under the Bush administration.[123]

Even after Congress prevented the closure of Guantánamo, Deputy National Security Adviser John Brennan emphasized on several occasions that "we will not send more individuals to the prison at Guantánamo."[124] (Additional prisoners have been incarcerated in Afghanistan at the Bagram Detention Center, however, including individuals who were brought there from other countries, such as Thailand.[125] By March 2011 the Bagram facility's population was about 1700, compared to 600 at the end of the Bush administration.[126]) Through March 2012 the Obama administration had released 70 detainees from Guantánamo; 169 re-

120. Holder called the case "one of the most well-researched and documented cases I have ever seen in my decades of experience as a prosecutor." Robert Chesney, *AG Holder's Statement on the Prosecution of the 9/11 Conspirators, and Link to the SDNY Indictment and Nolle Prosequi Filing*, LAWFARE (Apr. 4, 2011 2:28 PM), http://www.lawfareblog.com/2011/04/ag-holders-statement-on-the-prosecution-of-the-911-conspirators-and-link-to-the-sdny-indictment/. For a fuller discussion see text accompanying notes 355–79, *infra*.

121. *See infra* note 189. The focus on waterboarding in the public debate has been unfortunate in that it tended to overshadow the illegality of other aspects of detainee treatment during the Bush administration, including the use of methods such as stress positions, the "frequent flier program" and other sleep deprivation techniques, harsh force-feeding of hunger strikers, and the practice of "extradition to torture." *See, e.g.*, Jamil Dakwar, *Guantánamo's Frequent Flier Program*, ACLU (June 20, 2008, 4:45 PM), http://www.aclu.org/blog/national-security/Guántanamos-frequent-flyer-program; Bradley Graham, *New Limits on Tactics at Prisons: U.S. Commander Bans Some Interrogation Methods*, WASH. POST, May 15, 2004, at A01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A27894-2004May14.html; Greg Miller, *Obama Preserves Renditions As Counter-Terrorism Tool*, L.A. TIMES (Feb. 1, 2009), http://articles.latimes.com/2009/feb/01/nation/na-rendition1.

122. Military Commissions Act of 2009 § 1802, 10 U.S.C. § 948r(a) (2006). For a discussion of the legislative history of the DTA, see Alexander, *Jurisdiction-Stripping*, *supra* note 23.

123. *See* ELSEA & GARCIA, *supra* note 64, at 12.

124. John O. Brennan, Strengthening Our Security by Adhering to Our Values and Laws, Speech at Harvard Law School (Sept. 16, 2011) (transcript available at http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an); *see also* Josh Gerstein, *John Brennan*: *No New Prisoners to Guantanamo Bay*, POLITICO (Sept. 8, 2011, 12:25 PM), http://www.politico.com/news/stories/0911/62990.html#ixzz1XOZMIYFy; Eric W. Dolan, *John Brennan: Obama Still Committed to Closing Guantanamo Bay*, RAW STORY (Sept. 8, 2011, 5:10 PM), http://www.rawstory.com/rs/2011/09/08/john-brennan-obama-still-committed-to-closing-guantanamo-bay/.

125. *See* Al Maqaleh v. Gates, 605 F.3d 84, 87 (D.C. Cir. 2010) (two of the three petitioners alleged that they had been captured in Thailand and Pakistan and transferred to Bagram).

126. *See* EVIATAR, *supra* note 73, at 4, 6. According to Human Rights First, the number of prisoners at Bagram tripled between January 2009 and March 2011. *Id.*

mained,[127] 87 of whom have been cleared for release.[128] By comparison, during the Bush years 532 of the 779 prisoners who had been held at Guantánamo were released.[129] The roughly 240 who remained at the start of the Obama administration presumably were the more difficult cases, either because of evidence against them or problems in finding countries to transfer them to.

Following through on its policy of criminal prosecution rather than military commissions, the Department of Justice has pursued criminal prosecutions against many suspected terrorists, including Ahmed Warsame, who might have been considered a prime candidate for military commission charges. Warsame was identified as a target by U.S. intelligence, was captured by the military in international waters near Yemen, and was interrogated secretly aboard a Navy ship for two months by a team of FBI, CIA, and Defense Department agents before being brought to the United States, turned over to the FBI, and indicted in New York for conspiracy and providing material support to terrorist organizations.[130] Transferring Warsame directly from military custody outside the United States to the FBI in New York enabled the government to avoid legislative restrictions on transfers from Guantánamo to the United States.[131] The Warsame case was criticized from the right (Senator Mitch McConnell asked, "Why is a man who is a known terrorist and enemy of the U.S. being afforded the protection of an American citizen?"[132]) and the left (the *New York Times* criticized the interrogation as "extralegal"[133]). The case demonstrates a strong commitment to trying even for-

127. Adnan Latif was found dead in his cell on Sept. 10, 2012. Latif, who was among the first detainees brought to Guantánamo in January 2002, was ordered to be released by military tribunals in 2006 and 2008 and by a habeas court in 2010, but the D.C. Circuit overturned the district court's decision. Charlie Savage, *Military Identifies Guantánamo Detainee Who Died*, N.Y. TIMES, Sept. 12, 2012, at A20. *See* discussion of Latif v. Obama *infra* Part III.B.5.

128. *Guantánamo by the Numbers*, ACLU, http://www.aclu.org/national-security/guantanamo-numbers (last updated Dec. 27, 2012). Some detainees cannot be returned to their home countries under international law because they might be subject to persecution or torture there; they must be released into other countries. Others have remained at Guantánamo because authorities are not satisfied that their home countries provide adequate assurances that they will not engage in terrorism after their release. Funding restrictions and the D.C. Circuit's *Kiyemba* decision have prevented release into the United States and other countries. *See* Kiyemba v. Obama, 559 U.S. 131 (2010) (per curiam), *vacating and remanding* Kiyemba v. Obama, 559 F.3d 1022 (D.C. Cir. 2009); Nicolas L. Martinez, Note, *Pinching the President's Prosecutorial Prerogative: Can Congress Use Its Purse Power to Block Khalid Sheikh Mohammed's Transfer to the United States?*, 64 STAN. L. REV. 1469, 1469 (2012). It is worth noting that the annual cost for each prisoner at Guantánamo is $800,000. Carol Rosenberg, *Guantánamo: The Most Expensive Prison on Earth*, MIAMI HERALD (Nov. 25, 2011), http://www.miamiherald.com/2011/11/08/2493042/guantanamo-bay-the-most-expensive.html.

129. *Guantánamo by the Numbers*, *supra* note 128.

130. *See* Karen DeYoung et al., *Terror Suspect Detained on Ship*, WASH. POST, July 6, 2011, at A1; *see also* Ken Dilanian, *Terror Suspect Held on Ship for Months*, L.A. TIMES, July 6, 2011, at A1.

131. DeYoung et al., *supra* note 130.

132. *See* Mike Levine & Justin Fishel, *GOP Slams Obama Administration for Bringing Somali Terror Suspect to U.S.*, FOXNEWS.COM (July 6, 2011), http://www.foxnews.com/politics/2011/07/06/gop-slams-obama-administration-for-bringing-somali-terror-suspect-to-us/.

133. The *Times* also used the term "extralegal detention" in its news stories. *See* Colin Moynihan, *Somali Terrorism Suspect Appears in Civilian Court*, N.Y. TIMES, Sept. 9, 2011, at A28.

eign terrorists captured abroad in federal court, despite the difficulties imposed by congressional restrictions on the movement of detainees.

B. Rule of Law Lite

Within its first few months, however, the Obama administration would continue and in some cases expand a number of the Bush administration policies.[134]

1. Continuation and Extension of Bush Administration Legal Positions

The earliest indications of less than full commitment to the campaign promises of transparency, accountability, and conformity to the rule of law came in the Obama administration's adherence to Bush administration litigation positions. For example, in *Mohamed v. Jeppesen Dataplan, Inc.*, the plaintiff sued a civilian military contractor under the Alien Tort Statute for "forced disappearance" and "torture and other cruel, inhuman or degrading treatment."[135] The Bush administration intervened to seek dismissal under the state secrets doctrine, arguing that the existence of the extraordinary rendition program was a state secret—even though the plaintiffs proposed to rely entirely on public information.[136] While the case was on appeal Barack Obama succeeded George W. Bush, and Attorney General Holder "announced new policies for invoking the state secrets privilege."[137] Yet in response to the court's inquiry "[t]he government certified both in its briefs and at oral argument before the en banc court that officials at the 'highest levels of the Department of Justice' of the new administration had reviewed the assertion of privilege in this case and determined that it was appropriate under the newly announced policies."[138] Similarly, in response to a query from Judge John Bates, presiding over the consolidated Guantánamo habeas cases, the new administration affirmed that though President Obama had narrowed the definition of who could be detained, it continued to oppose release in all cases.[139]

Though as a candidate Obama had praised *Boumediene*'s recognition of habeas rights at Guantánamo as a "rejection of the Bush Administration's attempt to create a legal black hole at Guantanamo" and "an important step toward reestablishing our credibility as a nation commit-

134. For a helpful interactive timeline comparing Bush and Obama administration policies, see Cora Currier & Lena Groeger, *Timeline: How Obama Compares to Bush on Torture, Surveillance and Detention*, PROPUBLICA (May 10, 2012, 1:14 PM), http://www.propublica.org/special/obama-vs-bush-on-national-security-timeline (last updated Jan. 30, 2013).

135. 614 F.3d 1070, 1075 (9th Cir. 2010).

136. *Id.* at 1076–77.

137. *Id.* at 1077.

138. *Id.*

139. *See infra* note 162.

ted to the rule of law,"[140] his administration opposed habeas rights in Afghanistan[141] and Iraq,[142] argued against recognition of substantive rights in Guantánamo, opposed certiorari to review detainee habeas cases, continued to treat detainees' knowledge of their own treatment as classified information,[143] and opposed former detainees' access to civil court to challenge their treatment through *Bivens* actions.[144]

In some cases the Obama administration has even gone beyond its predecessor. Despite the campaign's emphasis on transparency in government, the Holder Justice Department has moved aggressively to prevent disclosure of information about government misconduct in the treatment of prisoners. It has brought six prosecutions under the Espionage Act for disclosing classified information to the media; only three such cases had been brought by previous administrations since the Act was passed in 1917.[145] Thomas Drake, a former senior official of the National Security Agency, was charged with espionage for disclosing information about NSA waste and privacy abuses in NSA technology programs to a reporter.[146] The charges, carrying a possible sentence of thirty-five years, were dropped on the eve of trial and Drake pleaded to a misdemeanor of misusing the agency's computer.[147] John Kiriakou, a former CIA operative who led the team that found Abu Zubayda in 2007 was the first government official to confirm the use of waterboarding.[148] He was charged in 2012 with violations of the Espionage Act and other statutes.[149] He pleaded guilty to a lesser charge and was sentenced to

140. Sam Graham-Felsen, *Obama Statement on Today's Supreme Court Decision*, BARACKOBAMA.COM (June 12, 2008, 4:16 PM), http://my.barackobama.com/page/community/post/samgrahamfelsen/gG5Gz5.

141. Al Maqaleh v. Gates, 605 F.3d 84, 97 (D.C. Cir. 2010).

142. *See* Omar v. McHugh, 646 F.3d 13 (D.C. Cir. 2011). Omar was one of the habeas petitioners in *Munaf v. Geren*, 553 U.S. 674 (2008), decided the same day as *Boumediene*.

143. *See* AE013P Protective Order #1, §§ 2(g)(4), (5), 5(f), United States v. Mohammed, Military Comm'ns Trial Judiciary, Guantánamo Bay, Cuba (Dec. 6, 2012) (forbidding disclosure of information concerning defendants' capture, interrogation, and treatment, including "observations and experiences of an accused"), *available at* http://www.lawfareblog.com/2012/12/recent-orders-in-the-911-case/.

144. *See, e.g.*, Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012) (government asserted state secrets privilege to bar *Bivens* action); Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (en banc) (same, in case brought under the Alien Tort Statute).

145. David Carr, *Blurred Line Between Espionage and Truth*, N.Y. TIMES, Feb. 27, 2012, at B1.

146. Jane Mayer, *The Secret Sharer: Is Thomas Drake an Enemy of the State?*, NEW YORKER, May 23, 2011, at 47.

147. Ellen Nakashima, *Ex-NSA Official Thomas Drake to Plead Guilty to Misdemeanor*, WASH. POST (June 9, 2011), http://www.washingtonpost.com/national/national-security/ex-nsa-manager-has-reportedly-twice-rejected-plea-bargains-in-espionage-act-case/2011/06/09/AG89ZHNH_story.html.

148. Carr, *supra* note 145; Joby Warrick & Dan Eggen, *Waterboarding Recounted*, WASH. POST, Dec. 11, 2007, at A1.

149. Charlie Savage, *Ex-CIA Officer Charged in Information Leak*, N.Y. TIMES, Jan. 24, 2012, at A1. Others have been charged for disclosures of classified information, including former CIA officer Jeffrey Sterling, who was charged with ten felonies for leaking information to a *New York Times* reporter. Greg Miller, *Former CIA Officer Jeffrey A. Sterling Charged in Leak Probe*, WASH. POST (Jan. 6, 2011, 10:52 PM), http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604001.html; Charlie Savage, *An Opinion by Judge on Spy Law Creates a Stir*, N.Y. TIMES (Aug. 4, 2011), http://www.nytimes.com/2011/08/05/us/05judge.html?_r=0.

thirty months.[150] Bradley Manning was charged with numerous offenses under the Espionage Act and the Uniform Code of Military Justice for leaking information to WikiLeaks.[151] Prosecutors are seeking a life sentence, and Manning has been held in a military brig under exceptionally harsh conditions.[152] Additionally, the Bush administration forced Jesselyn Radack (a Justice Department lawyer whose advice that John Walker Lindh could not be interrogated because his family had retained a lawyer for him was ignored) from her job, destroyed records of her advice, opened a criminal investigation of her, and referred her for bar disciplinary charges.[153]

By contrast, no one who was involved in waterboarding has been prosecuted.[154] Neither has Jose Rodriguez, the former head of the CIA's clandestine operations, who admits that he destroyed ninety-two videotapes of CIA interrogations, including instances of waterboarding, in violation of a court order.[155] Quite to the contrary, Rodriguez published a best-selling book extolling the use of torture and has been prominent in the media alleging that torture produced valuable intelligence that led to the killing of Osama bin Laden.[156] The CIA did not require Rodriguez to redact any of the information about interrogations disclosed in the book.[157] On the other hand, when Ali Soufan, a former FBI interrogator who was lead investigator of the U.S.S. Cole bombing and questioned several prominent suspects including Abu Zubaydah, wrote a book critical of the CIA's techniques and contesting CIA claims about the efficacy of coercive interrogation, it was extensively redacted by the CIA despite having been cleared by the FBI. The redactions included materials that were publicly available, from sources including congressional testimony and the published memoirs of other former government employees.[158]

150. Scott Shane, *Ex-Officer Is First from C.I.A. to Face Prison for a Leak*, N.Y. TIMES (Jan. 5, 2013), http://www.nytimes.com/2013/01/06/us/former-cia-officer-is-the-first-to-face-prison-for-a-classified-leak.html?pagewanted=all.

151. Charlie Savage, *Soldier Faces 22 New WikiLeaks Charges*, N.Y. TIMES INT'L, Mar. 3, 2011, at A6.

152. Ellen Nakashima, *Manning's Treatment Is 'Stupid,' U.S. Official Says*, WASH. POST, Mar. 12, 2011, at A2.

153. Eric Lichtblau, *Adviser in Lindh Case Sues Justice Dept.*, N.Y. TIMES, Oct. 29, 2004, at A10.

154. *See* Jerry Markon & Peter Finn, *No Charges to Be Filed in Destruction of CIA Tapes*, WASH. POST, Nov. 10, 2010, at A1; Carr, *supra* note 145.

155. Markon & Finn, *supra* note 154.

156. JOSE A. RODRIGUEZ, JR. WITH BILL HARLOW, HARD MEASURES: HOW AGGRESSIVE CIA ACTIONS AFTER 9/11 SAVED AMERICAN LIVES (2012); *Bio: Jose Rodriguez*, PREMIERE SPEAKERS BUREAU, http://premierespeakers.com/jose_rodriguez/bio (last visited Feb. 26, 2013). For criticisms of the factual accuracy of Rodriguez's claims, see Ali H. Soufan, *Will a CIA Veteran's Book Save a Terrorist?*, BLOOMBERG (May 8, 2012, 6:00 PM), http://www.bloomberg.com/news/2012-05-08/will-a-cia-veteran-s-book-save-a-terrorist-.html; Amy Davidson, *Q. and A.: Ali Soufan*, NEW YORKER (May 17, 2012), http://www.newyorker.com/online/blogs/closeread/2012/05/q-a-ali-soufan.html.

157. *See* Greg Miller & Julie Tate, *CIA Probes Publication Review Board over Allegations of Selective Censorship*, WASH. POST, May 31, 2012, http://articles.washingtonpost.com/2012-05-31/world/35455152_1_publications-review-board-harsh-interrogation-cia-critics.

158. On Soufan's criticism of CIA techniques, see SOUFAN, *supra* note 30; Ali Soufan, *My Tortured Decision*, N.Y. TIMES, Apr. 23, 2009, at A27; Scott Horton, *The Black Banners: Six Questions for*

Similarly, the CIA redacted about forty percent of Glenn Carle's book about his interrogation of the alleged "bin Laden's banker" using a traditional rapport-building approach after refusing to use harsh methods, and his efforts to get the government to release him after ascertaining that he was not actually a terrorist.[159] It has been widely reported that the Obama administration itself often leaks similar information, such as the successful operation against Osama bin Laden.[160] (In an unusual counterexample, the Senate Intelligence Committee opened an investigation into contacts between the CIA and the makers of the critically acclaimed film *Zero Dark Thirty*; the chair of the committee, Senator Dianne Feinstein, harshly criticized the movie's "grossly inaccurate and misleading . . . suggestion that torture resulted in information that led to the location" of Osama bin Laden.)[161]

2. Plans for Continued Indefinite Detention

Other early actions suggested that President Obama might never have been as committed to the criminal prosecution model as many had supposed. Soon after his inauguration, the administration narrowed the definition of who could be detained, but did not propose releasing any detainees held under the Bush definition. The government continued to hold the position that persons who "substantially supported" the Taliban, al-Qaeda, or "associated forces" could be detained.[162] It appears that there was a struggle within the administration over the scope of detention authority, with State Department legal advisor Harold Koh arguing

Ali Soufan, HARPER'S MAG. (Nov. 1, 2011, 1:04 PM), http://harpers.org/blog/2011/11/_the-black-banners_-six-questions-for-ali-soufan/; Scott Shane, *CIA Fighting Memoir of 9/11 by F.B.I. Agent*, N.Y. TIMES, Aug. 26, 2011, at A1; Lawrence Wright, *The Agent*, NEW YORKER, July 10, 2006, at 62. On the CIA's redactions of Soufan's book, see Horton, *supra*. For a thorough discussion of the disagreement between the FBI and the CIA over the CIA's approval of "harsh" interrogation methods, see OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN, AND IRAQ (May 2008), *available at* http://www.justice.gov/oig/special/s0805/final.pdf.

159. *See* Horton, *Unredacting "The Interrogator," supra* note 30; Horton, The Interrogator: *Six Questions for Glenn Carle*, *supra* note 30.

160. Carr, *supra* note 145.

161. *Senate Panel Opens Investigation into Contacts Between "Zero Dark Thirty" Filmmakers and CIA Officials*, N.Y. DAILY NEWS, Jan. 3, 2013.

162. In response to Judge John Bates's question whether the Obama administration wanted to change the position the Bush Justice Department had taken in the case, the government filed a memorandum and a declaration by Attorney General Holder stating that the President's authority, based on the AUMF rather than Article II of the Constitution, extended to

> persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay 2, *In re* Guantanamo Bay Detainee Litigation, Misc. No. 08-442 (TFH) (D.D.C. Mar. 13, 2009); Charlie Savage, *Obama Team Split on Tactics Against Terror*, N.Y. TIMES, Mar. 29, 2010, at A1.

for a narrow definition based on international law[163] and Defense Department general counsel Jeh Johnson arguing that a broader definition was consistent with the laws of war.[164]

The definition adopted by the Obama administration is broader than the definition of "enemy combatant" the Supreme Court adopted and approved in *Hamdi*.[165] There the Court was careful to approve indefinite detention only under very narrow circumstances (persons who had actively engaged in hostilities against U.S. or allied forces within the Afghanistan-Pakistan theater of war, while the hostilities authorized by AUMF continued).[166] Both Bush and Obama administrations have employed executive detention in far broader circumstances than that definition, however, and the Court has denied certiorari in cases that could have presented the question how much farther the detention power can extend.[167]

In March 2010, before Republicans regained control of the House, State Department legal adviser Harold Koh gave a major speech to the American Society of International Lawyers in which he strongly defended the "detention of enemy belligerents to prevent them from returning to hostilities [as] a well-recognized feature of the conduct of armed conflict," authorized under domestic law by the AUMF.[168] Koh stressed, however, that President Obama based his detention powers on congressional authorization and not on his inherent powers under Article II, and that such powers are "informed by" the international laws of war.[169] The Final Report of the Guantánamo Review Task Force recommended that forty-eight detainees be held indefinitely without charge.[170] In some of those cases, continued detention appears to be based on the fact that the individual cannot be successfully prosecuted either in federal court or before military commissions because of mistreatment during the Bush administration and the consequent lack of admissible evidence.[171] As Presi-

163. For example, Koh argued that detention authority did not extend to persons apprehended away from the battlefield. Savage, *supra* note 162.

164. *Id*. Career Justice Department lawyers handling detainee litigation also reportedly favored a broader definition that would make cases easier to win. *Id.*

165.

> [T]he Government has never provided any court with the full criteria that it uses in classifying individuals as [enemy combatants]. It has made clear, however, that, for purposes of this case, the "enemy combatant" that it is seeking to detain is an individual who, it alleges, was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan *and who "engaged in an armed conflict against the United States" there*. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.

Hamdi v. Rumsfeld, 542 U.S. 507, 516 (plurality opinion) (emphasis supplied). Justices Souter and Ginsburg, who, with the plurality, made up a majority for the judgment, concluded that the AUMF did not authorize detention of such persons.

166. *Id.* at 516–18.

167. *See infra* Part III.B.

168. Koh, *supra* note 114.

169. *Id*.

170. GUANTANAMO REVIEW TASK FORCE, *infra* note 183, at ii.

171. *See infra* Part III.B.4.

dent Obama said in an interview: "[S]ome of the evidence against them may be tainted, even though it's true."[172] As discussed in Part IV.B, the administration appears to be working to obtain sufficient untainted evidence to convict such persons in military commission proceedings, but if that cannot be done it appears that continued detention is to be the outcome.

The commitment to close Guantánamo, coupled with the decision not to release detainees who were not innocent but could not be tried, seems also to have led to a plan to employ indefinite detention within the United States. On December 15, 2009, the President directed the Attorney General to acquire the Thomson Correctional Center, an unused maximum security state prison in Illinois, to house Guantánamo detainees.[173] Although other federal prisoners were also to be housed at the facility, the former Guantánamo detainees were to be held in a separate section, in military custody. On his first day in office the President had ordered a review of the status of all Guantánamo detainees to determine whether they could be released, transferred to other countries, or prosecuted.[174] Unless the expectation was that all detainees would be released, transferred, or prosecuted, the Thomson facility must have been intended to house detainees under indefinite preventive detention as well as those awaiting trial and serving sentences after conviction. The December 15 memorandum thus suggests that a complete end to indefinite detention without trial was not necessarily part of the President's plan.[175]

The plan for a system of preventive detention within the United States would have been controversial (indeed, unheard-of before 9/11), and under existing Supreme Court cases appears to be unconstitutional.[176] The Supreme Court, in fact, granted certiorari in December 2008 to decide the very question whether a noncitizen could be detained indefinitely without charge within the United States.[177] To prevent the Court

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

173. Press Release, Office of the Press Sec'y, Presidential Memorandum—Closure of Dentention [sic] Facilities at the Guantanamo Bay Naval Base (Dec. 15, 2009), *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-closure-dentention-facilities-guantanamo-bay-naval-base.

174. *See supra* note 109.

175. The report of the Guantánamo Task Force recommends that dozens of detainees be held indefinitely without charge. *See infra* note 183.

176. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 508 (1868). McCardle was a United States citizen, but the decision did not rely on that fact, and the Court has not restricted due process protections within the United States to citizens. For an excellent discussion of preventive detention, arguing that "[p]reventive detention is in fact an established part of U.S. law" but that it should be used only where absolutely necessary, see David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 695 (2009).

177. Al-Marri v. Pucciarelli, 534 F.3d 213, 216 (4th Cir. 2008) (en banc), *vacated and remanded sub nom*. Al-Marri v. Spagone, 555 U.S. 1220 (2009). Al-Marri was a citizen of Qatar and a permanent resident of the United States who was arrested in Peoria, Illinois, where he was a student at Bradley University, in 2001. *Id.* at 219. He was initially detained on a material witness warrant and then was charged with credit card fraud. *Id.* In 2003, shortly before his scheduled trial, al-Marri was designated an enemy combatant and held in a Navy brig in South Carolina. *Id.* at 219, 231. The Fourth Circuit

from hearing that case, the Bush administration promptly transferred the prisoner to federal civilian custody for prosecution; the Court then dismissed the petition as moot.[178]

The question of the constitutionality of indefinite detention within the United States did not materialize, because Congress barred the use of funds to acquire the Thomson prison and enacted a series of limitations on transferring detainees from Guantánamo to the United States. But President Obama signed several bills that made indefinite detention *somewhere* a practical necessity, including the 2011, 2012, and 2013 NDAAs,[179] and the current plan seems to be to hold these men forever at Guantánamo.

Current Supreme Court law does permit indefinite detention under the AUMF, at least so long as hostilities continue,[180] and the Obama administration successfully opposed the 2012 NDAA provision that would have enacted a new, and broader, authorization for detention.[181] So to some extent, criticism of continued detention without charge is a quarrel with the Court rather than with the Obama administration. But the Obama administration's decision to continue indefinite detention pursuant to the AUMF makes executive detention a bipartisan policy—and thus makes it far more likely than before that indefinite executive detention will become an accepted aspect of presidential power should a future President so desire.[182]

Moreover, the Final Report of the Guantánamo Review Task Force states that at least thirty persons who had been cleared for release based on a CSRT determination that they do not meet the conditions for deten-

held that he could be tried before a military commission. *Id.* at 318. The Supreme Court granted cert to decide whether a noncitizen could be detained indefinitely without charge within the United States. *Id.* at 216. The petition was dismissed after Al-Marri was transferred to civilian custody and charged in federal court. Al-Marri v. Spagone, 555 U.S. 1220, 1220 (2009).

178. Al-Marri pleaded guilty to conspiracy to provide material support for terrorism in October 2009 and, with credit for time served in military custody, was sentenced to eight years and four months. Carrie Johnson, *Judge Credits Time Served in Sentencing al-Qaeda Aide*, WASH. POST, Oct. 30, 2009, at A6.

179. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-____ § 1641 (2013); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298; Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137, 4351–52.

180. Hamdi v. Rumsfeld, 542 U.S. 507, 516–17 (2004).

181. *See* Charlie Savage, *Obama Drops Veto Threat Over Military Authorization Bill After Revisions*, N.Y. TIMES, Dec. 15, 2011, at A30. Judge Katherine Forrest issued a permanent injunction against enforcement of the 2012 NDAA's authorization of detention of anyone who "substantially supported" al-Qaeda, the Taliban, or associated forces; in fact, the injunction prohibits enforcement of the provision "in any manner, as to any person." Hedges v. Obama, No. 12 Civ. 331 (KBF), 2012 WL3999839 (S.D.N.Y. Sept. 12, 2012). The Second Circuit stayed the injunction pending appeal. Hedges v. Obama, Nos. 12-3176(L), 12-3644 (Con), 2012 WL4075626 (Sept. 17, 2012).

182. President Obama has explicitly declined to base his detention authority on Article II, resting it entirely on the AUMF. *See supra* notes 162, 170 and accompanying text. But the continued detention of the same individuals under a standard that in practice is not substantially different from that in use under President Bush would certainly be cited to bolster broader assertions of power by a future President.

tion, or pursuant to a federal court order, will continue to be held indefinitely, under the same conditions as those who do satisfy the requirements for detention.[183] The decision to continue to detain persons who have been determined *not* to be enemy combatants creates an even worse precedent, because it presumes that the President can detain people with no legal basis simply because he considers their home country unstable and prefers not to release them within the United States. This is not the rule of law. Imprisoning people without legal basis for over a decade would be immoral and unconstitutional under any circumstances, but when the government has created the problem of not having anywhere to release them by bringing them halfway across the world, it is even worse.

C. Failure to Hold Architects of Torture Policies Accountable

> *No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. . . .*
> *Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.*
> —Convention Against Torture, Articles 2, 12[184]

Under the slogan of "looking forward, not backward," President Obama announced that there would be no prosecutions of Bush administration officials except for exceeding the bounds allowed by the Torture Memos.[185] In fact, except for two low-level military personnel, no charges have been seriously considered for such excesses.[186] Calls for a formal in-

183. DEP'T OF JUSTICE ET AL., FINAL REPORT: GUANTANAMO REVIEW TASK FORCE, at ii, 9–10 (2010) [hereinafter GUANTANAMO REVIEW TASK FORCE]. Thirty detainees from Yemen were cleared for release but continue to be held because of a "moratorium" on transfers to Yemen due to security concerns. *Id.* Thirty-seven additional detainees continue to be held because they cannot be returned to their own countries because of "humane treatment concerns" and neither the United States nor a third country has agreed to take them. *Id.* at 11. Additionally, of forty-eight detainees initially referred for prosecution, no final decision has been made as to twenty-four. *Id.*

184. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, arts. 2, 12, Dec. 10, 1984, 1465 U.N.T.S. 85, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.

185. In an interview before his inauguration the President-elect said that if "somebody has blatantly broken the law" they should be prosecuted, but affirmed his "belief that we need to look forward as opposed to looking backwards." David Johnston and Charlie Savage, *Obama Signals His Reluctance to Investigate Bush Programs*, N.Y. TIMES, Jan. 12, 2009, at A1. He repeated the statement several months later. Sam Stein, *Obama on Spanish Torture Investigation: I Prefer to Look Forward*, HUFFINGTON POST (May 17, 2009, 6:12 AM), http://www.huffingtonpost.com/2009/04/16/obama-on-spanish-torture_n_187710.html.

186. *See* Ken Dilanian, *Most CIA Interrogation Cases Won't Be Pursued*, L.A TIMES (June 30, 2011), http://articles.latimes.com/2011/jun/30/nation/la-na-cia-interrogations-20110701. Attorney General Holder announced in 2012, however, that charges would not be filed against these final two CIA interrogators, either. *See* Press Release, Department of Justice, Statement of Attorney General Eric

vestigation or truth commission were also ignored. Even the conclusions of the investigation of the Torture Memos by the Justice Department's Office of Professional Responsibility (OPR), which found that the authors had engaged in unprofessional conduct and recommended referral to state bar disciplinary proceedings, were quashed and reduced to a finding of "poor judgment."[187] The Department of Justice also announced that no charges would be filed against those who destroyed ninety-two videotapes of "harsh interrogation[s]."[188]

Despite declarations by the President and the Attorney General that waterboarding is torture,[189] the failure to hold executive branch officials accountable for illegal conduct will almost certainly be cited by any future administration desiring to engage in similar conduct as evidence that the Bush administration's extreme claims of executive power and immunity from the law have been accepted as a correct interpretation of the Constitution—just as Lincoln's unilateral actions during the Civil War and post-World War II presidential commencement of military operations without congressional approval have been cited by proponents of exclusive presidential warmaking power.[190] Indeed, high Bush administration officials have already bragged publicly of their illegal actions. Former President Bush proudly declared on television that he had authorized waterboarding and disclosed in his best-selling book that he did so with the words "Damn right."[191] Former Vice President Dick Cheney and torture memo author John Yoo have also continued to defend the use of torture, even claiming that waterboarding led to the killing of Osama bin Laden.[192] CIA officer Jose Rodriguez not only destroyed evi-

Holder on Closure of Investigation into the Interrogation of Certain Detainees (Aug. 30, 2012), *available at* http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html.

187. *See* OPR REPORT, *supra* note 17, at 13, 226; Memorandum from David Margolis, Assoc. Deputy Att'y Gen., for the Att'y Gen., Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists 1–2, 68–69 (Jan. 5, 2010), *available at* http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf.

188. *See* Markon & Finn, *supra* note 155.

189. *See, e.g.*, Carrie Johnson, *Waterboarding Is Torture, Holder Tells Senators*, WASH. POST, Jan. 16, 2009, at A2 (reporting Holder's testimony at his confirmation hearing); Johnston & Savage, *supra* note 185; Randall Mikkelson, *U.S. Government Vows Not to Use "Waterboarding,"* REUTERS (Mar. 2, 2009, 1:37 PM), http://www.reuters.com/article/2009/03/02/us-usa-security-waterboarding-idUSTRE5213OE20090302 ("Waterboarding is torture. My Justice Department will not justify it, will not rationalize it and will not condone it.").

190. *See, e.g.*, YOO, CRISIS AND COMMAND, *supra* note 17; YOO, POWERS OF WAR AND PEACE, *supra* note 17; YOO, WAR BY OTHER MEANS, *supra* note 17; Yoo, *Continuation of Politics by Other Means*, *supra* note 17.

191. GEORGE W. BUSH, DECISION POINTS 170 (2010).

192. *See* Jonathan Karl, *Dick Cheney Says 'Obama Deserves Credit' for Osama Bin Laden's Death*, ABCNEWS.COM (May 2, 2011), http://abcnews.go.com/Politics/dick-cheney-osama-bin-ladens-death-obama-deserves/story?id=13509547 ("Cheney has been a harsh critic of Obama's anti-terrorism policies, especially his decision to end the CIA enhanced interrogation program started by President Bush. Even as he praised Obama, Cheney suggested that program, and its aggressive interrogation of terror of detainees like 9/11 mastermind Khalid Sheikh Mohammad, contributed to the ultimate success of the operation against bin Laden."); John Yoo, Op-Ed., *From Guantanamo to Abbottabad*,

dence of interrogations by torture but also wrote a best-seller about it,[193] and continues to argue in the popular media (such as *60 Minutes*, the *New Yorker*, and the White House Correspondents' Dinner) that the actions were "not torture," were legal, and were the primary source of good intelligence playing out many years after the coercive interrogations.[194]

Not only has the government failed to hold responsible officials accountable, as required by the Convention Against Torture, but the courts have also held that individuals subjected to torture by the United States cannot sue their direct torturers or the officials responsible for the decision to torture.[195] Incredibly, the Ninth Circuit—agreeing with the Obama administration's position—held that, even assuming the treatment Jose Padilla was subjected to was not only cruel, inhuman, and degrading, but also constituted torture *as defined at the time*, the responsible officials are entitled to qualified immunity because it was not sufficiently "clear" that it is illegal for the government to torture persons in its custody.[196] The opinion does not mention the Geneva Conventions, the Convention Against Torture, or the Torture Act.

Moreover, the United States has formally opposed efforts by judges in a number of other countries to open investigations of U.S. torture of their nationals, arguing that the United States is investigating those allegations in its own courts.[197] In light of the expressed policy of "looking forward, not backward" and the complete lack of prosecution of responsible policy-making officials, these representations appear hypocritical, indeed deceitful. They compare unfavorably with actions taken by other countries, such as the U.K. and Canada, in response to their governments' participation in U.S. detainee abuses. In response to a lawsuit, the U.K. government disclosed details of what it called the "cruel, inhuman, and degrading treatment" Binyam Mohamed and other U.K. na-

WALL ST. J. (May 4, 2011), http://online.wsj.com/article/SB10001424052748703834804576301032595527372.html (killing of bin Laden "vindicate[d]" the "tough interrogations" of Khalid Sheikh Mohammad and Abu Faraj al-Libi; "President George W. Bush, not his successor, constructed the interrogation and warrantless surveillance programs that produced this week's actionable intelligence.").

193. *See* RODRIGUEZ, *supra* note 156.

194. *60 Minutes: Hard Measures* (CBS television broadcast Apr. 29, 2012) (transcript and video available at http://www.cbsnews.com/8301-18560_162-57423533/hard-measures-ex-cia-head-defends-post-9-11-tactics/); *see* Davidson, *supra* note 39 (interview with Rodriguez in THE NEW YORKER).

195. Padilla v. Yoo, 678 F.3d 748, 775 (9th Cir. 2012) (official entitled to qualified immunity); Al-Zahrani v. Rodriguez, 669 F.3d 315, 318–19 (D.C. Cir. 2011) (2006 MCA withdrew jurisdiction to hear action); Ali v. Rumsfeld, 649 F.3d 762, 771 (D.C. Cir. 2011) (qualified immunity); Arar v. Ashcroft, 585 F.3d 559, 571–73 (2d Cir. 2009) (en banc) (declining to recognize *Bivens* action for extraordinary rendition and upholding dismissal of claim under Torture Victim Protection Act). *But see* Vance v. Rumsfeld, 653 F.3d 591, 594 (7th Cir. 2011) (action by civilian U.S. citizen for torture by U.S. military in Iraq not barred).

196. *See Padilla*, 678 F.3d at 767–68.

197. *See, e.g.*, Ian Fisher, *Italy Prosecutes CIA Agents in Kidnapping*, N.Y. TIMES (June 9, 2007), http://www.nytimes.com/2007/06/09/world/europe/09italy.html; Marjorie Miller, *Spain Considers Prosecuting U.S. Officials for Torture*, L.A. TIMES (May 6, 2006), http://articles.latimes.com/2009/may/06/opinion/oe-miller6.

tionals were subjected to at Guantánamo and agreed to pay them "tens of millions of dollars" in compensation.[198] Similarly, Canada conducted an investigation of its officials' participation in the illegal extraordinary rendition of Maher Arar from JFK Airport to Egypt, where he was extensively tortured. The Canadian government cleared Arar of all terrorism charges, issued a formal apology, and paid him nearly $9.8 million.[199]

As journalist Dahlia Lithwick put it: "Doing nothing about torture is, at this point, pretty much the same as voting for it. We are all waterboarders now."[200]

III. RETURN TO THE LAW-FREE ZONE

The second half of the first Obama term was marked by a turn back toward the law-free treatment of detainees envisioned by the Bush administration, but this time initiated and imposed by Congress and the courts. In response to the Obama administration's attempts to move detention and trial away from the military model and toward the rule of law, Congress has taken a series of increasingly bold steps to limit the executive branch's ability to release detainees or try them in the criminal courts, and to assert legislative control over day-to-day decisions that would normally be considered within the prosecutorial discretion of the Justice Department or the diplomatic authority of the executive branch. At the same time, the D.C. Circuit has accomplished the almost complete dismantling of *Boumediene*'s holding that detainees must be given a "meaningful opportunity" to contest the basis for their detention.

A. Congress Takes the Wheel

> *In a strange twist of history, Congress, through its control of government funds, is now imposing curbs on the very executive powers that the Bush administration invoked to establish the camps at Guantánamo in the first place.*
> —Carol Rosenberg[201]

Congressional action to limit presidential discretion in detainee matters has focused on attempts to militarize detention and trial. Ironically, these attempts have sought essentially to require the President to follow the extreme policies of President Bush, which he justified on the basis of exclusive presidential power under Article II. Even more ironi-

198. *Times Topics, Binyam Mohamed*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/m/binyam_mohamed/index.html?8qa (last updated Sept. 9, 2010); Editorial, *Accountability for Torture in Britain*, N.Y. TIMES, Nov. 17, 2010, at A32.

199. Editorial, *No Price to Pay for Torture*, N.Y. TIMES, June 16, 2010, at A30.

200. Dahlia Lithwick, *Interrogation Nation*, SLATE (Nov. 10, 2010, 6:24 PM) http:/slate.com/id/2274412/.

201. Carol Rosenberg, *Why Obama Can't Close Guantanamo*, FOREIGN AFF. (Dec. 14, 2011), http://www.foreignaffairs.com/articles/136781/carol-rosenberg/why-obama-cant-close-guantanamo.

cally, both President Bush and Republican presidential nominee John McCain advocated closing Guantánamo during the 2008 election, and Senator McCain pledged to transfer the detainees to a federal prison in Kansas.[202] After President Obama's election, however, McCain voted for legislation to prevent transfers from Guantánamo to the United States and to bar spending on facilities to house detainees in the United States.[203] Reflecting the increasingly hard-line approach of congressional Republicans following the 2010 mid-term elections, Senator Lindsey Graham opposed legislation requiring military trials in 2010 but supported it in 2011.[204]

During the Bush administration, criminal prosecutions outnumbered military commission trials by more than 100 to 1.[205] As Professor Robert Chesney observed, "In the Bush years, there was little complaint from the right about keeping both civilian and military options—least of all for persons captured in the U.S. But now the Congressional Republican consensus is moving toward a monolithic military approach, to the point where things Bush did would today be denounced as weak."[206]

The announcement that Khalid Sheikh Mohammed and other 9/11 conspirators would be tried on capital charges in New York City provided a convenient early focus for opposition. After initially supporting holding a trial at the place of the crime, Mayor Michael Bloomberg opposed it on grounds of cost and inconvenience.[207] Others objected to giv-

202. Charlie Savage, *G.O.P. Takes Hard Line in Pushing Military Trials for All Terrorism Suspects*, N.Y. TIMES, Oct. 28, 2011, at A4.

203. *See John McCain on Guántanamo Bay*, POL. GUIDE, http://www.thepoliticalguide.com/Profiles/Senate/Arizona/John_McCain/Views/Guantanamo_Bay/ (last visited Feb. 26, 2013). McCain was a prime sponsor of the Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, S. 3081, 111th Cong. (2010), which would have required suspected noncitizen terrorists to be held in military custody, permitted indefinite detention of such persons through the duration of hostilities, and required prosecutions to be brought before military tribunals rather than civilian courts. *Id.* §§ 2, 4–5. The bill did not pass in the form it was introduced; see discussion of 2012 NDAA, *infra* notes 222–54.

204. *Compare* Jonathan Weisman & Evan Perez, *Deal Near on Gitmo, Trials for Detainees*, WALL ST. J. (Mar. 19, 2010), http://online.wsj.com/article/SB10001424052748703523204575130063862554420.html (describing Senator Graham's work with the White House on a compromise with the Obama administration that would provide for trial of some detainees in the United States), *with* Charlie Savage, *Senate Approves Requiring Military Custody in Terror Cases*, N.Y. TIMES (Nov. 29, 2011), http://www.nytimes.com/2011/11/30/us/politics/senate-approves-military-custody-for-terror-suspects.html, *and Graham Says Keep "Crazy Bastards" at Guantanamo Bay*, FOXNEWS.COM (Nov. 30, 2012), http://www.foxnews.com/politics/2012/11/30/graham-says-crazy-bastards-at-guantanamo-not-wanted-at-us-detention-centers/ (quoting Senator Graham as stating, "[s]imply stated, the American people don't want to close Guantanamo Bay, which is an isolated, military-controlled facility, to bring these crazy bastards that want to kill us all to the United States").

205. *See* TERRORIST TRIAL REPORT CARD, *supra* note 54, at 1 (listing 523 convictions as of September 1, 2009). By comparison there were only three convictions by military commissions during the Bush administration (Hicks, Hamdan, and al-Bahlul). *See supra* note 52 and accompanying text. Hamdan's conviction has since been reversed, *see supra* note 104.

206. Savage, *supra* note 202.

207. *See* Scott Shane & Benjamin Weiser, *Administration Considers Moving Site of 9/11 Trial*, N.Y. TIMES (Jan. 28, 2010), http://www.nytimes.com/2010/01/29/us/29terror.html (quoting Mayor Bloomberg as stating that "'there are places that would be less expensive for the taxpayers and less disruptive' than New York City").

ing alleged terrorists "the same rights as American citizens."[208] Congress responded with legislation restricting the executive branch's ability to transfer detainees from Guantánamo to the United States.[209] This legislation, together with the opposition of local politicians, made it impossible as a practical matter to try Mohammed in New York City, and the administration was unsuccessful in finding another location for the trial.[210]

Congress also blocked the use of federal funds to acquire or renovate the federal prison in Thomson, Illinois, to house detainees and prohibited the use of federal funds to transfer prisoners from Guantánamo for criminal prosecution or any other purpose. These restrictions effectively put an end to the proposal to close Guantánamo as well as efforts to try any Guantánamo detainees in federal court.[211]

Senate Republicans blocked the nomination of Dawn Johnsen as head of the Office of Legal Counsel, and in 2011 she finally asked that her nomination be withdrawn.[212] Philip Carter and Gregory Craig also left the administration after it became clear that Guantánamo would not be closed.[213] Thus several of the strongest supporters within the administration of the early policies on detention and criminal prosecution were no longer in a position to press for these policies. Instead, former Chief of Staff Rahm Emanuel, who brought an intensely campaign-oriented fo-

208. *See, e.g.*, Press Release, Congressman Hal Rogers, Rogers: Terrorists Should Not be Given Constitutional Rights (Jan. 26, 2010), *available at* http://halrogers.house.gov/news/documentsingle.aspx?DocumentID=167835 ("I am outraged that we are giving terrorists who seek to destroy our nation the same rights as American citizens . . . . We lose valuable intelligence when we allow known terrorists to be given Miranda Rights and try them in civilian courts. I see no reason why we should afford our enemies the same constitutional rights as American citizens or the same due process as criminal defendants.").

209. *See, e.g.*, Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103(c), 123 Stat. 1859, 1920 (preventing funds from being used to transfer detainees from Guantánamo to the United States for trial after June 24, 2009); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 9011, 123 Stat. 3409, 3466–68 (2009); Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351 (stating "[n]one of the funds authorized to be appropriated by this Act for fiscal year 2011 may be used to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions of Khalid Sheikh Mohammed or any other detainee"). *See generally* Martinez, *supra* note 128, at 1474–78; Alexander, *Military Commissions*; *infra* notes 364, *et seq.*

210. Attorney General Holder and the administration eventually opted to file charges in the military commissions, instead. *See* Press Release, Eric H. Holder, Jr., U.S. Att'y Gen., Statement of the Attorney General on the Prosecution of the 9/11 Conspirators (Apr. 4, 2011), *available at* http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html (announcing that Khalid Sheikh Mohammed and others would be tried by military commission).

211. For a careful account of Congress's use of the spending power to thwart President Obama's announced detainee policies and to force him to continue the policies of the previous administration, see Martinez, *supra* note 128.

212. Charlie Savage, *Long After Nomination, an Obama Choice Withdraws*, N.Y. TIMES, Apr. 10, 2010, at A16.

213. Carter and Craig cited personal reasons for their actions. *See* Elisabeth Bumiller, *Defense Official Responsible for Closing Guantánamo Quits*, N.Y. TIMES, Nov. 25, 2009, at A20 (describing Carter's departure because of "personal issues"); Jeff Zeleny, *White House Counsel Said to Be Planning Resignation*, N.Y. TIMES, Nov. 13, 2009, at A21.

cus to policy matters and was known to believe that detainee policy was a vote-losing distraction, consolidated his position.[214]

In November 2009, Attorney General Holder designated five detainees for criminal prosecution on charges related to the 9/11 attacks,[215] and five for trial before military commissions. Congress, still with a Democratic majority, passed a new Military Commissions Act that provided additional procedural protections such as tightened hearsay rules and barring the use of testimony obtained by cruel, inhuman, or degrading treatment, and increased resources for the defense.[216]

Opposition to the criminal prosecution of foreign terrorists intensified with the trial of Ahmed Ghailani, who was charged as a conspirator in the 1998 bombings of the U.S. embassies in Kenya and Tanzania but was convicted in November 2010 on only one of 285 counts,[217] and the arrest of Faisal Shahzad, the "Times Square bomber," who was taken into custody and interrogated by the FBI after being Mirandized.[218] The facts that Ghailani received a life sentence and that Shahzad, like most arrestees, talked freely after the Miranda warnings[219] and also received a life sentence[220] did not decrease the clamor for militarizing the treatment of suspected terrorists, even those apprehended within the United States.[221]

In late 2010, Congress passed the first blanket restrictions on using federal funds to transfer detainees from Guantánamo to the United

214. Peter Baker, *The Limits of Rahmism*, N.Y. TIMES MAG. (Mar. 8, 2010), http://www.nytimes.com/2010/03/14/magazine/14emanuel-t.html?pagewanted+1.

215. Eric Holder, Attorney General Announces Forum Decisions for Guantanamo Detainees (Nov. 13, 2009) (transcript available at http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html). Military commission charges against a sixth alleged 9/11 conspirator, Mohammed al Qahtani, accused of being the "20th hijacker," had been dismissed in November 2008 after Susan Crawford, the convening authority for the commissions in the Bush administration and a former judge of the U.S. Court of Appeals for the Armed Forces, found that he had been tortured. Woodward, *supra* note 172.

216. Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, 2607–09. The statute also replaced the provision that the Geneva Conventions could not be used as a source of rights in any habeas or other civil action by any person against the government, 2006 MCA § 5(a), with a provision that the Conventions do not create a cause of action.

217. Benjamin Weiser, *U.S. Jury Acquits Former Detainee of Most Charges*, N.Y. TIMES, Nov. 18, 2010, at A1. Ghailani's prosecution was hampered by the (apparently unexpected) exclusion of evidence as fruit of the poisonous tree of torture.

218. *See infra* notes 220–21 and accompanying text.

219. John Brennan, the President's chief counterterrorism adviser, among others, has stressed that *Miranda* plays an important role in the criminal justice system and that suspected terrorists, like criminal suspects, talk to interrogators even after *Miranda* warnings. *See* Brennan, *supra* note 124.

220. Shahzad, a naturalized U.S. citizen, pleaded guilty "100 times over," Benjamin Weiser, *A Guilty Plea in Plot to Bomb Times Square*, N.Y. TIMES, June 22, 2010, at A1, and was sentenced to a mandatory life term. Michael Wilson, *Judgment Day in Two High-Profile Cases*, N.Y. TIMES, Oct. 6, 2010, at A25.

221. The controversy over the Shahzad case led the Justice Department to consider seeking legislation to expand the public safety exception to the *Miranda* rule and to extend the time required for presentment. Charlie Savage, *Proposal Would Delay Hearings in Terror Cases*, N.Y. TIMES, May 15, 2010, at A11.

States for trial.[222] Even stricter restrictions were contained in proposed legislation the following year as part of the 2012 National Defense Authorization Act (2012 NDAA), which would have expanded the funding restrictions to include *all* non-American detainees held abroad by the Department of Defense, not just those incarcerated at Guantánamo.[223] The House passed Subtitle D of the 2012 NDAA in May 2011,[224] and the Senate passed its version in December 2011.[225] The bills contained several controversial provisions relating to detainees. First, the House bill would have expanded and extended the 2001 AUMF, "affirm[ing]" the existence of an armed conflict with "al-Qaeda, the Taliban, and associated forces" and the President's authority to use military force, and would for the first time have explicitly authorized indefinite military detention.[226] The Senate bill, for its part, would have expanded the scope of detention authority beyond the Supreme Court's fairly limited definition in *Hamdi*,[227] as well as previous executive branch claims.[228] The Senate's version contained no exception for U.S. citizens.

Second, the Senate bill would have required (not merely permitted) individuals to be held in military custody if they were "a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda" and participated in an attack on the United States or its allies.[229] This provision did not apply to all persons who were permitted to be detained as "covered persons" under section 1031 of the Senate version, but only to those captured during the

222. Full-Year Continuing Appropriations Act, 2011, H.R. 3082, 111th Cong. § 1116 (as passed by House, Dec. 8, 2010). President Obama signed these restrictions into law on January 7, 2011. *See* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351 (2011); Martinez, *supra* note 128, at 1471.

223. National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1039 (as passed by House, May 26, 2011) [hereinafter H.R. 1540].

224. *Id.* §§ 1031–1046.

225. National Defense Authorization Act for Fiscal Year 2012, S. 1867, 112th Cong. §§ 1031–1037 (as passed by Senate, Dec. 1, 2011) [hereinafter S. 1867].

226. H.R. 1540, *supra* note 223, § 1034. *See* Benjamin Wittes & Robert Chesney, *NDAA FAQ: A Guide for the Perplexed*, LAWFARE (DEC. 19, 2011, 3:31 PM), http://www.lawfareblog.com/2011/12/ndaa-faq-a-guide-for-the-perplexed/.

227. Hamdi v. Rumsfeld, 542 U.S. 507 (2004). *Hamdi* held that the AUMF explicitly authorized detention for the duration of hostilities of persons who were "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan, and who 'engaged in an armed conflict against the United States' there." *Id.* at 516 (quoting Brief for Respondents at 3, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696)).

228. S. 1867, *supra* note 225, § 1031. The bill would have authorized detention of persons who were "part of or substantially supported, Taliban or al-Qaida forces, or associated forces that are engaged in hostilities against the Untied States or its coalition partners," and those who have "engaged in" or "directly supported" hostilities, apparently without regard to citizenship. *See* JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R41920, DETAINEE PROVISIONS IN THE NATIONAL DEFENSE AUTHORIZATION BILLS 6 (2011).

229. S. 1867, *supra* note 225, § 1032. The House bill, moreover, would also have required changes in the periodic review process that would have lessened detainees' procedural protections, and would have substantially revamped the review process. H.R. 1540, *supra* note 223, § 1036; *see* ELSEA & GARCIA, *supra* note 228, at 17–19.

course of hostilities who met certain criteria.[230] It expressly excluded U.S. citizens from its reach, although it applied to U.S. resident aliens "to the extent permitted by the Constitution of the United States."[231]

Third, the House bill would have required that certain noncitizens accused of engaging in terrorist attacks be tried only in military commissions.[232] The Obama administration vigorously opposed this provision, and threatened to veto the entire 2012 NDAA if it remained part of the proposed law. It was ultimately removed during the conference between the House and Senate.[233]

Fourth, the House bill forbade the use of federal funds to build detention facilities in the United States[234] or to transfer or release detainees into the United States.[235] Detainees could not be transferred to other countries without a certification by the Defense Department that they would not become involved in terrorism,[236] in terms that would make it virtually impossible to provide such assurances. These provisions would effectively bar future criminal prosecutions and releases.

Many top current and former law enforcement and intelligence officials publicly criticized the provisions or testified against the legislation, including Robert Mueller III, the Director of the FBI under both President Bush and President Obama; James Clapper, the National Intelligence Director; Leon Panetta, the Secretary of Defense and former head of the CIA; and Lisa Monaco, the Assistant Attorney General for National Security;[237] as did former federal judges, one of whom was FBI director during the Reagan administration.[238]

The Senate defeated an amendment proposed by Senator Mark Udall to remove the detention provisions from the bill and replaced them with a requirement that the President notify Congress of current detention policies,[239] as well as amendments by Senator Dianne Feinstein that would have limited the detention provisions to terrorism suspects captured "abroad"[240] and prevented holding U.S. citizens indefinitely.[241]

230. S. 1867, *supra* note 225, §§ 1031–1032.

231. *Id.* § 1032.

232. H.R. 1540, *supra* note 223, § 1046.

233. Savage, *supra* note 181.

234. H.R. 1540, *supra* note 223, § 1037.

235. *Id.* § 1039.

236. *Id.* § 1040. The Senate bill also contained transfer restrictions. *See* S. 1867, *supra* note 225, §§ 1033–1034.

237. *See* Editorial, *Hobbling the Fight Against Terrorism*, N.Y. TIMES, Dec. 8, 2011, at A38, *available at* http://www.nytimes.com/2011/12/08/opinion/hobbling-the-fight-against-terrorism.html.

238. Abner Mikva, William S. Sessions, & John J. Gibbons, *Beyond Guantanamo*, CHI. TRIB., Oct. 7, 2011 § 1, at 25 (Mikva is the former chief judge of the D.C. Circuit; Sessions is the former director of the FBI and the former chief judge of the Western District of Texas; Gibbons is the former chief judge of the Third Circuit).

239. S. Amend. 1107, S. 1867, *supra* note 225 (as proposed by Senator Udall, Nov. 17, 2011) (failed 38-60).

240. S. Amend. 1125, S. 1867, *supra* note 225 (as proposed by Senator Feinstein, Nov. 17, 2011) (failed 45-55); *see* Raffaela Wakeman, *Feinstein Amendment Rejected 45-55*, LAWFARE (Dec. 1, 2011, 4:21 PM), http://www.lawfareblog.com/2011/12/feinstein-amendment-rejected-45-55/.

The tenor of the debate is fairly captured by Senator Lindsey Graham's statement that it would be "crazy" to exempt U.S. citizens: "And when they say, 'I want my lawyer,' you tell them, 'Shut up. You don't get a lawyer. You are an enemy combatant, and we are going to talk to you about why you joined Al-Qaeda.'"[242]

Senator Feinstein finally secured passage of a compromise amendment stating that the new provision authorizing detention does not "affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens . . . or any other persons who are captured or arrested in the United States."[243] The amendment, intended to "declare a truce" between those who believed that current law already authorized indefinite detention of U.S. citizens arrested inside the United States and those who believed it did not, passed by a vote of ninety-nine to one.[244]

President Obama threatened to veto the Senate bill on the ground that it would "tie [the President's] hands" in protecting national security and would interfere with law enforcement and counterterrorism efforts.[245] The bill as it emerged from the House-Senate Conference did not include some of the most extreme provisions from the House and Senate bills, such as the ban on criminal prosecutions, the expansion of funding restrictions to all foreign-held detainees (not just those held at Guantánamo), and the extension of the AUMF. It did include authorization to detain suspected members of al-Qaeda and its allies and those

241. S. Amend. 1126, S. 1867, *supra* note 225 (as proposed by Senator Feinstein, Nov. 17, 2011) (failed 45-55); *see also S. 1867: All Congressional Actions with Amendments*, LIBRARY OF CONG., http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN01867:@@@S (last visited Feb. 26, 2013). Senator Feinstein said, "This constant push that everything has to be militarized . . . I don't think that creates a good country. Because we have values. And due process of law is one of those values." Michael McAuliff, *Senate Kills Effort to Ban Indefinite Military Detentions of U.S. Citizens*, HUFFINGTON POST (Dec. 1, 2001, 8:24 PM), http://www.huffingtonpost.com/2011/12/01/military-detention-us-citizens_n_1124534.html.

242. Charlie Savage, *Senate Declines to Clarify Rights of American Qaeda Suspects Arrested in U.S.*, N.Y. TIMES, Dec. 2, 2011, at A28.

243. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(e), 125 Stat. 1298, 1562 (2011); Savage, *supra* note 242.

244. 157 CONG. REC. S8122 (daily ed. Dec. 1, 2011) (statement of Sen. Feinstein). Commentators have pointed out further ambiguities in section 1021. *See, e.g.*, Robert Chesney, *The Conference Version of the NDAA: Lingering Ambiguity as to Citizens*, LAWFARE (Dec. 13, 2011, 10:28 AM), http://www.lawfareblog.com/2011/12/the-conference-version-of-the-ndaa-lingering-ambiguity-as-to-citizens/ (stating that final version is ambiguous as to whether it prohibits indefinite detention of U.S. citizens and resident aliens wherever they are captured); Steve Vladeck, *The Problematic NDAA: On Clear Statements and Non-Battlefield Detention*, LAWFARE (Dec. 13, 2011, 12:06 PM), http://www.lawfareblog.com/2011/12/the-problematic-ndaa-on-clear-statements-and-non-battlefield-detention/ (ambiguity depends on how clear a statutory statement is required to satisfy the Non-Detention Act, 18 U.S.C. § 4001).

245. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: S. 1867 – NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2012 (2012), *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf.

who "substantially support[]" them;[246] a requirement that prisoners suspected of being part of al-Qaeda be held in military custody (but with expanded presidential authority to make exceptions and a provision stating that the law would not affect existing FBI authority);[247] and a requirement that the executive branch certify that security conditions would be met before transferring any detainee related to al-Qaeda from Guantánamo to another country.[248] The President signed the revised bill. Senator Feinstein continued her efforts to protect U.S. citizens from indefinite detention by introducing legislation to require an express congressional statement in order for an authorization for the use of force to include authority to detain U.S. citizens without charge.[249] Neither that proposal nor a similar amendment to the 2013 NDAA, co-sponsored by a Tea Party Republican and a Democrat from Washington, passed.[250]

Thus, the 2012 NDAA did impose additional restrictions on presidential authority over detention and prosecution of terrorists, but the legislation as finally passed was substantially weaker than the House version passed in May 2011. For example, the House provision that would have required military commissions for certain terrorism cases (section 1046) was dropped, and the provision prohibiting the transfer of terrorism suspects to the United States for trial (section 1039) was modified to apply only to those held at Guantánamo.[251] The Feinstein Amendment language clarifying that the statute was not intended to modify existing law was retained, and a statement was added confirming that the legislation does not affect the criminal or national security authority of the FBI and other domestic law enforcement agencies, even as to individuals in military custody.[252] Finally, the provision allowing for waiver of the military custody requirement was retained and transferred to the President rather than the Secretary of Defense.[253] The most hysterical reaction to the Shahzad ("Times Square bomber") case, a proposal by Senators Joe

246. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b), 125 Stat. 1298, 1562 (2011).

247. *Id.* § 1022.

248. *Id.* § 1028.

249. *See* Carolyn Lochhead, *Feinstein Aims to Blunt Provisions of Detainee Law*, S.F. CHRON. (Feb. 28, 2012, 4:00 AM), http://www.sfgate.com/politics/article/Feinstein-aims-to-blunt-provisions-of-detainee-law-3368364.php. S. 2003, the Due Process Guarantee Act of 2011 would provide that "[a]n authorization to use military force, a declaration of war, or any similar authority shall not authorize the detention without charge or trial of a citizen or lawful permanent resident of the United States apprehended in the United States, unless an Act of Congress expressly authorizes such detention." It would apply to "an authorization to use military force, a declaration of war, or any similar authority enacted before, on, or after" the date of enactment of the bill. Due Process Guarantee Act of 2011, S. 2003, 112th Cong. § 2 (2011).

250. Jonathan Weisman, *House Rejects an Effort to Limit Indefinite Detentions*, N.Y. TIMES, May 19, 2012, at A14.

251. *Compare* National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA), Pub. L. No. 112-81, § 1022(a)(4), 125 Stat. 1298 (2011), *with* National Defense Authorization Act of Fiscal Year 2012, H.R. 1540, 112th Cong. §§ 1046, 1039 (as passed by House, May 26, 2011).

252. ELSEA & GARCIA, *supra* note 64, at 2.

253. 2012 NDAA § 1022; *see* ELSEA & GARCIA, *supra* note 64, at 2.

Lieberman and Scott Brown to permit the State Department to revoke the citizenship of persons who provide support to terrorism—without any judicial determination—reassuringly went nowhere despite positive initial responses by officials including Secretary of State Hillary Clinton and then-Speaker of the House Nancy Pelosi (Republican House leader John Boehner, however, found its constitutionality dubious).[254] Renewed attempts to limit the President's authority to transfer detainees in the 2013 NDAA had a lower profile, overshadowed by the presidential election and negotiations over the "fiscal cliff," but did result in further constraints. The 2013 NDAA imposed additional restrictions on the President's ability to transfer detainees to Yemen and similar high-conflict nations, and for the first time limited the government's ability to transfer non-Afghan citizens being held in Afghanistan[255]—a provision that had been defeated in the prior year.[256] President Obama threatened to veto the provisions but ultimately signed the bill, issuing a signing statement in which he objected to certain provisions and asserted his constitutional authority to override them if he believes they are interfering with his Article II powers.[257] Moreover, the final bill dropped a provision in the Senate-passed bill that would have explicitly forbidden indefinite detention of U.S. citizens and permanent residents.[258]

B. The D.C. Circuit Overrules Boumediene

> *One need imply neither bad faith nor lack of incentive nor ineptitude on the part of government officers to conclude that [redacted] compiled in the field by [redacted] in a [redacted] near an [redacted] that contain multiple layers of hearsay, depend on translators of unknown quality, and include cautionary disclaimers that [redacted] are prone to significant errors . . . .*
> —Judge David S. Tatel[259]

> *War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has*

254. Charlie Savage & Carl Hulse, *Bill Targets Citizenship of Terrorists' Allies*, N.Y. TIMES, May 7, 2010, at A12. Shazad was a naturalized U.S. citizen. *Id.*

255. *See* Charlie Savage, *Signing Defense Bill, Obama Challenges Detainee Provisions*, N.Y. TIMES (Jan. 3, 2013), http://www.nytimes.com/2013/01/04/us/politics/obama-signs-defense-bill-with-conditions.html.

256. *See supra* notes 232–33 and accompanying text.

257. *Id.* The President objected to provisions limiting his ability to transfer prisoners from Guántanamo and Afghanistan to the United States or to foreign nations, and to other requirements for congressional involvement in detainee and security matters.

258. Charlie Savage, *Congressional Negotiators Drop Ban on Indefinite Detention of Citizens, Aides Say*, N.Y. TIMES, Dec. 18, 2012, *available at* http://www.nytimes.com/2012/12/19/us/politics/congressional-committee-is-said-to-drop-ban-on-indefinite-detention-of-citizens.html.

259. Latif v. Obama, 666 F.3d 746, 774 (D.C. Cir. 2011) (Tatel, J., dissenting).

> *placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written.*
> —Judge Janice Rogers Brown[260]

> Boumediene*'s airy suppositions have caused great difficulty for the Executive and the courts.*
> —Judge Janice Rogers Brown[261]

> *[I]t is hard to see what is left of the Supreme Court's command in* Boumediene . . . .
> —Judge David S. Tatel[262]

The only court in which Guantánamo detainees can file habeas petitions is the district court for the District of Columbia.[263] The series of cases in which the Supreme Court ruled in favor of the rights of noncitizen detainees—*Rasul*, *Hamdan*, and *Boumediene*—were all reversals of decisions by the D.C. Circuit. The D.C. Circuit, for its part, has stubbornly resisted the recognition of detainee rights, harshly criticizing the Supreme Court's detainee habeas cases, interpreting them as narrowly as possible, and daring the Court to overrule the Circuit again. *Boumediene*, for example, was the *Rasul* habeas case on remand, which made its way back to the Supreme Court four years after the detainees won the right to statutory habeas. Some of the same detainees came before the Court again in the *Latif* case.

In *Boumediene v. Bush* the Supreme Court held that Guantánamo detainees have the constitutional right to meaningful habeas review unless Congress validly suspends the privilege of the writ.[264] The Court had previously indicated, in *Rasul v. Bush*, that the detainees have substantive constitutional rights and that they had successfully alleged violations of those rights, though it has not specified exactly what those rights are.[265] After the district courts were opened to habeas petitions, they heard approximately fifty petitions, and the detainees prevailed in about three-quarters of these cases.[266]

260. Al-Bihani v. Obama, 590 F.3d 866, 882 (D.C. Cir. 2010) (Brown, J., concurring in her own majority opinion).

261. *Latif*, 666 F.3d at 764 (majority opinion).

262. *Id.* at 779 (Tatel, J., dissenting).

263. *See* Boumediene v. Bush, 553 U.S. 723, 795–96 (2008) (suggesting that the D.C. Circuit is the only proper venue); *see also* Bush v. Gherebi, 542 U.S. 952 (2004) (vacating and remanding the case to the Ninth Circuit for reconsideration in light of *Padilla*, which the Ninth Circuit then transferred to the D.C. Circuit, Gherebi v. Bush, 374 F.3d 727 (9th Cir. 2004)); Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451, 1451–52 (2011).

264. *Boumediene*, 553 U.S. at 732.

265. Rasul v. Bush, 542 U.S. 466, 485 (2004).

266. Federal district courts in the District of Columbia have rendered judgments in forty-four habeas cases, finding for the petitioners in thirty-three cases. Twelve cases are on appeal, eight by detainees and four by the government. Some of these detainees have been released to other countries, while others continue to be held on the ground that no country can be found to take them. *See Guan-*

The D.C. Circuit, however, led by four ideologically extreme judges[267] who frequently refer contemptuously to the Supreme Court's detainee habeas holdings, has ruled against the detainee in every case that has come before it, in some cases going even farther than the government had requested.[268] This is not just a fluke of particularly conservative panel assignments. There have been seventeen cases on appeal, and in all but one the decision was unanimous.[269] The circuit court has eviscerated *Boumediene* through a series of decisions that categorically deny detainees any substantive rights whatsoever and erect insurmountable procedural barriers to their petitions. The Supreme Court has steadfastly failed to grant review despite the pleas of numerous amici. Thus the D.C. Circuit's aggressive decisions, coupled with the lack of any other forum (and the consequent inability to create a circuit split), have rendered the habeas rights established in *Rasul* and *Boumediene* illusory.

1. The Habeas Court's Power to Order Release

Kiyemba v. Obama was a habeas action by seventeen ethnic Uighurs who had been captured in Afghanistan and transferred to Guantánamo, where they were determined not to be enemy combatants and were cleared for release.[270] Because they reasonably feared that they would be tortured if they were returned to China, their country of origin, the government agreed that they could not be repatriated.[271] The government, however, was unable to find another country willing to accept

tánamo Habeas Scorecard, CTR. FOR CONST. RTS., http://ccrjustice.org/GTMOscorecard (last updated May 30, 2012).

267. For example, Judge Janice Rogers Brown has long been an outspoken fan of Lochner v. New York, 198 U.S. 45 (1905). In a speech to the Federalist Society she declared that Marxism:

> became manifest in 1937 . . . . The New Deal . . . inoculated [*sic*] the federal Constitution with a kind of underground collectivist mentality. The Constitution itself was transmuted into a significantly different document. In his famous . . . dissent in *Lochner*, Justice Holmes . . . was simply wrong. . . . 1937 . . . marks the triumph of our own socialist revolution.

Janice Rogers Brown, Assoc. Justice, Calif. Supreme Court, "A Whiter Shade of Pale": Sense and Nonsense—the Pursuit of Perfection in Law and Politics (Apr. 20, 2000) (transcript available at http://ejournalofpoliticalscience.org/janicerogersbrown.html); *see also* Hettinga v. United States, 677 F.3d 471, 480 (D.C. Cir. 2012) (Brown, J. concurring) (voicing "an ugly truth: America's cowboy capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic interests antithetical to competitors and consumers. And the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s.").

268. *See* Latif v. Obama, 666 F.3d 746 (D.C. Cir. 2011). In some cases where the district court granted habeas relief, the government did not appeal but released the detainee to another country. For a discussion of the conflict between the D.C. Circuit and the D.C. district courts, see Stephen I. Vladeck, *Al-Bihani and the Ongoing Clash Between the D.C. District Court and the D.C. Circuit*, ACSBLOG (Sept. 7, 2010), http://www.acslaw.org/acsblog/al-bihani-and-the-ongoing-clash-between-the-dc-district-court-and-the-dc-circuit.

269. Judge David Tatel dissented in *Latif*, 666 F.3d at 770 (Tatel, J., dissenting).

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

271. The Convention Against Torture forbids transferring persons to countries where they have a reasonable fear that they will be tortured. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 184, art. 3.

them.[272] The district court granted the Uighurs' petition for an order releasing them into the United States, but the D.C. Circuit reversed, holding that the power to exclude aliens was inherent in sovereignty and within the exclusive authority of the political branches; thus the habeas court had no power to order release into the United States even if the Uighurs could not lawfully be held and there was nowhere else to send them.[273] The Supreme Court granted certiorari[274] on the question whether a habeas court could order release into the United States where there was no legal authority for continued detention and there was no other effective remedy, but later vacated and remanded because the government had been able to offer the Uighurs resettlement in other countries, which all but five had accepted; that is, the case was vacated and remanded essentially on mootness grounds.[275]

In the meantime, the D.C. Circuit had decided *Kiyemba II*, in which it reversed a district court order that the government must give notice to the court and the petitioners before ordering their transfer to a country where they feared persecution.[276] The district judge found that notice of impending transfers was necessary to permit detainees to challenge them, because once they were transferred to another nation's custody, the district court's habeas jurisdiction would vanish.[277] *Kiyemba II* held that the courts cannot second-guess the executive branch's decision to transfer a detainee anywhere in the world, even if the transfer would prevent the court from deciding a pending habeas case and even if the detainee fears he may be tortured or persecuted after transfer.[278] The government's decision that the transferee country is "appropriate" is not, according to *Kiyemba II,* subject to judicial review.[279] The detainee is not even entitled to notice and an opportunity to be heard.[280] When *Kiyemba I* re-

272. *Kiyemba I*, 555 F.3d at 1024.

273. *Id.* at 1025.

274. Kiyemba v. Obama, 130 S. Ct. 458 (2009).

275. Kiyemba v. Obama, 130 S. Ct. 1235 (2010) (per curiam). The five remaining Uighurs had received offers of resettlement in Palau, a tropical island nation in the Pacific Ocean of less than 200 square miles with a population of approximately 20,000. *Palau*, CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/ps.html (last updated Feb. 5, 2013). The only Uighurs in Palau are the six prisoners transferred from Guantánamo in 2009. Of the seventeen original *Kiyemba* petitioners, four were transferred to Bermuda, six to Palau, and two to Switzerland. According to the government's brief on remand from the Supreme Court, these five had also received an offer of resettlement in "another country." Respondents' Opposition to Petitioners' Motion to Govern and for Remand and Cross-Motion for Reinstatement of Judgment at 9–10, Kiyemba v. Obama, 130 S. Ct. 1235 (2010) (Nos. 08-5424–5429), *available at* http://www.scotusblog.com/wp-content/uploads/2010/03/US-opp-re-Kiyemba-I-remand.pdf.

276. Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509, 516 (2009). In *Kiyemba II* the Uighur petitioners were joined by detainees from other countries, including Ahmed Belbacha, who had been cleared for release three years earlier and sought to challenge his impending repatriation to Algeria based on a fear of torture. *See* Lyle Denniston, *A Sequel to* Kiyemba II*?*, SCOTUSBLOG (Mar. 21, 2010, 9:31 PM), http://www.scotusblog.com/2010/03/a-sequel-to-kiyemba-ii/.

277. *Kiyemba II*, 561 F.3d at 511.

278. *Id.* at 516.

279. *Id.*

280. *Id.*

turned to the D.C. Circuit on remand from the Supreme Court, the circuit court rejected the remaining detainees' request for an evidentiary hearing on whether offers to resettle them in Palau were "appropriate."[281] The court reiterated its holding in *Kiyemba II* that courts could not review the government's transfer decision.[282]

To be clear, *Kiyemba I* and *II* hold that even if a court or CSRT determines that there is no legal basis whatsoever to detain a person, the executive branch can continue to imprison him indefinitely—some have been held for over a decade—simply by refusing to approve their release into the United States (as with the Uighurs) or their country of origin (as with sixty-six Yemenis approved for release or conditional detention),[283] or by stating that no "appropriate" country is willing to accept them.[284] Moreover, the government can transfer the detainee to any country it deems "appropriate" without any form of habeas review, and such a transfer would destroy the court's habeas jurisdiction.[285]

U.S. and international law forbid transfers to countries where the detainee may be tortured.[286] Nevertheless, the Bush administration had a well-established program of transferring suspected terrorists captured in one foreign country to another where they could be tortured (or subjected to "harsh interrogation methods").[287] Maher Arar and others were turned over to authorities in third countries such as Egypt, Syria, or Jordan where they were interrogated under torture.[288] The CIA's network of "black sites" in countries such as Poland, Romania, Thailand, and Morocco was also used to enable coercive interrogations.[289] Khalid Sheikh Mohammed was waterboarded 183 times in a month at a secret location in Poland; Abu Zubaydah, who was waterboarded eighty-three times, was interrogated in Thailand;[290] and a German citizen, Khaled al-Masri,

281. Kiyemba v. Obama, 605 F.3d 1046, 1047–48 (D.C. Cir. 2010) (per curiam).

282. *Id.* at 1048.

283. *Id.* at 1052.

284. *Id.* at 1049.

285. *Kiyemba II*, 561 F.3d at 511.

286. The Convention Against Torture and the FARR Act forbid transferring persons to countries where they have a reasonable fear that they will be tortured. *See* Foreign Affairs Reform and Restructuring Act of 1998 § 2242, Pub. L. No. 105-277, 112 Stat. 2681-761 (codified as amended in scattered sections of 8 and 22 U.S.C.) (section § 2242(a), stating that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture" is appended as a note to 8 U.S.C. § 1231); Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 23 I.L.M. 1027 (entered into force June 26, 1987; ratified by the United States, Oct. 21, 1994), *available at* http://www2.ohchr.org/english/law/cat.htm.

287. *See* The United States' "Disappeared", Annex VII, HUM. RTS. WATCH, Oct. 2004, *available at* http://www.hrw.org/legacy/backgrounder/usa/us1004/7.htm.

288. Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST (Dec. 4, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/12/03/AR2005120301476_pf.html

289. *See* note 28, *supra.*

290. *See* Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. TIMES (April 19, 2009), http://www.nytimes.com/2009/04/20/world/20detain.html?_r=0.

was kidnapped in Macedonia, in a case of mistaken identity, and flown to Afghanistan where he was tortured before being released.[291]

While there is no reason to believe that the current administration would revive this program of "rendition to torture," even a good-faith judgment that a detainee probably will not be tortured can be wrong, and preparing to challenge a transfer takes time. *Kiyemba II* takes away the courts' authority to enter orders allowing time to prepare challenges to transfers to other countries.[292] Moreover, the inability of courts to require notice allows the government to transfer detainees beyond the reach of habeas in order to get rid of their pending habeas suits. This has happened on a number of occasions since *Kiyemba II*, in which the government has mooted pending habeas actions by transferring the petitioners before the Supreme Court could act on their certiorari petitions.[293] In January 2011 the D.C. Circuit declined to revisit *Kiyemba II*, denying en-banc review in thirty-one pending cases raising the issue.[294] As a result, no habeas court can order the release of a detainee over the objection of the executive branch; nor may a habeas court issue an order to prevent the government from transferring a detainee beyond the reach of its habeas jurisdiction.

2. Detainees' Substantive Rights Under the Constitution

Kiyemba I also held that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States."[295] To the argument that the Great Writ has always been understood to include the power to order release if the petitioner is being held unlawfully, the court responded that petitioners were not seeking "simple release," but an order compelling the government to release them into the United States outside the framework of the immigration laws, and this was beyond judicial power.[296]

In *Rasul v. Myers*, the D.C. Circuit expanded on *Kiyemba I*'s statement that Guantánamo detainees had no due process rights.[297] There the circuit court ordered a civil *Bivens* action alleging Fifth and Eighth Amendment violations dismissed on qualified immunity grounds.[298] The court reasoned that prior to *Boumediene*, "[N]o reasonable government

291. Priest, *supra* note 288. Al-Masri's civil suit over his mistreatment was dismissed in 2006 under the state secrets doctrine. Jerry Markon, *Lawsuit Against CIA Is Dismissed*, WASH. POST (May 19, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/05/18/AR2006051802107.html.

292. Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509, 516 (2009).

293. *E.g.*, Mohammed v. Obama, No. 10-5218, 2010 U.S. App. LEXIS 16023 (D.C. Cir. July 8, 2010) (per curiam); *see* Benjamin Wittes, *Another Cert Petition to Get* Munaf *and* Kiyemba II *Before the Justices*, LAWFARE (Sept. 23, 2011, 5:29 PM), http://www.lawfareblog.com/2011/09/another-cert-petition-to-get-munaf-and-kiyemba-ii-before-the-justices/.

294. Abdah v. Obama, 630 F.3d 1047 (D.C. Cir. 2011).

295. Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022, 1026 (D.C. Cir. 2009).

296. *Id.* at 1028.

297. Rasul v. Myers (*Rasul II*), 563 F.3d 527, 529–31 (D.C. Cir. 2009) (per curiam).

298. *Id.* at 532.

official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights."[299] The court apparently did not consider it important that government officials are required to know that torture is a war crime as well as a violation of the Torture Act[300] and the Convention Against Torture,[301] or that they should reasonably know that torture on a U.S. Navy base would therefore be unlawful.

The Supreme Court's opinion in *Boumediene* did not discuss whether the detainees had any substantive rights to assert because its decision was limited to the jurisdictional issue. The Court's opinion endorsed a "functional" test for determining extraterritoriality, however, observing that a formalistic approach could undermine the role of habeas in "monitoring the separation of powers."[302] The Court found "a common thread" in its earlier cases, namely "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[303] The opinion links the detainees' habeas claims to "freedom's first principles," "[c]hief among [which] are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."[304] This does not sound like a Court that thought Guantánamo detainees have no substantive rights.

The D.C. Circuit adopted a crabbed, indeed recalcitrant, interpretation of *Boumediene*, however. In *Rasul* it read *Boumediene*'s remark that the decision "does not address the content of the law that governs petitioners' detention"[305] to mean that the Court did not intend "to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause."[306] Thus the D.C. Circuit said it was entitled—indeed, required—to continue to abide by its interpretation of *Johnson v. Eisentrager*[307] in the vacated *Kiyemba I* decision, as well as the reasoning of *Kiyemba I* itself.[308] The circuit court went so far as to reaffirm its holding in *Al Odah v. United States*[309]—a case that was part of, *and reversed by*, *Rasul v. Bush*—that "basic constitutional protections are not" "made available to aliens abroad."[310]

In short, while *Boumediene* held that detainees have a constitutional right to habeas, and *Rasul v. Bush* stated that those detainees had "unquestionably" pleaded constitutional violations, according to the D.C.

299. *Id.* at 530.
300. 18 U.S.C. § 2340A (2006) (implementing the Convention Against Torture).
301. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 184.
302. Boumediene v. Bush, 553 U.S. 723, 764–66 (2008).
303. *Id.* at 764.
304. *Id.* at 797.
305. *Id.* at 798.
306. Rasul v. Myers, 563 F.3d. 527, 529 (D.C. Cir. 2009).
307. Johnson v. Eisentrager, 339 U.S. 763 (1950).
308. Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022, 1026 (D.C. Cir. 2009).
309. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).
310. 563 F.3d at 531.

Circuit the only constitutional right they have is the right simply to file a habeas petition.[311] They cannot argue in their habeas petitions that their detention or treatment violated Due Process or the Cruel and Unusual Punishment Clause, nor do they have any other substantive constitutional rights on which they could base a habeas or *Bivens* claim. The only challenge they can raise is to the factual sufficiency of their classifications.

The 2006 MCA bars civil claims by detainees against the United States or its employees, which provides that "no court, judge, or justice" shall have jurisdiction over habeas petitions or "any other action" relating to a detainee's detention or treatment.[312] The D.C. Circuit has upheld the constitutionality of this instance of jurisdiction-stripping.[313] The D.C. Circuit went even further in *Saleh v. Titan*, a class action suit by former Abu Ghraib prisoners against private contractors who provided interrogation and translation services at the prison.[314] The plaintiffs asserted state law claims against the defendants, who they alleged had tortured them.[315] The jurisdiction-stripping provisions that bar suit against the government do not apply to suits against private contractors.[316] But *Saleh* held that the state-law claims were preempted by federal common-law immunity.[317]

The Fourth Circuit initially followed *Saleh* in two other cases brought by Abu Ghraib prisoners, *Al Shimari v. CACI*[318] and *Al Quraishi v. L-3 Services, Inc.*,[319] holding that federal common-law immunity preempted state law claims against contractors who were involved in "combatant activities."[320] Notably, when the U.S. government (which is not a party to the suit) was asked for its views in *Al Shimari*, it recommended that the suit be allowed to proceed "to the extent that a contractor has committed torture" (but said a statute passed afterward would prevent such claims in the future).[321] The Fourth Circuit granted en banc

311. *Id.* at 529.

312. *See supra* note 122.

313. Al-Zahrani v. Rodriguez, 669 F.3d 315, 319–20 (D.C. Cir. 2012); *see* Al Janko v. Gates, 831 F. Supp. 2d 272, 278 (D.D.C. 2011). Al Janko was discovered in an abandoned prison in Afghanistan in 2002 and was sent to Guantánamo. *Id.* at 275. In fact, he had been tortured by al-Qaeda into confessing, falsely, that he was a U.S. spy and had been held prisoner by al-Qaeda. *Id.* Al Janko was found to be an enemy combatant by CSRTs, but Judge Richard Leon granted his habeas petition and he was released in 2009. *Id.* at 276. He then sued the United States and various individuals for injuries from "abusive interrogation" in Afghanistan and Guantánamo. *Id.* at 276–77. Judge Leon dismissed the suit for lack of jurisdiction under the 2006 MCA. *Id.* at 278, 281.

314. Saleh v. Titan Corp., 580 F.3d 1, 2 (D.C. Cir. 2009).

315. *Id.*

316. *Id.*

317. *Id.* at 16; *see* Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

318. Al Shimari v. CACI Int'l, Inc., 658 F.3d 413, 415 (4th Cir. 2011).

319. Al-Quraishi v. L-3 Servs., Inc., 657 F.3d 201, 203 (4th Cir. 2011).

320. *Id.*; *Al Shimari*, 658 F.3d at 415.

321. Brief for the United States as Amicus Curiae at 9, 24, Al Shimari v. CACI Int'l, Inc., 658 F.3d 413 (4th Cir. 2011) (Nos. 09-1335, 10-1891, 10-1921), 2012 WL 123570, at *3, *18. In *Saleh*, by contrast, briefing in the D.C. Circuit was complete before President Obama's inauguration. *See* Corrected Final

review of *Al Shimari* and *Al Quraishi* and in May 2012 dismissed the appeals for lack of jurisdiction under the collateral order doctrine.[322] This opened the way for the suit to go forward at the trial court level, at least to discovery. L-3 then settled with the plaintiffs for $5.28 million.[323] The case against CACI continued in the district court.[324]

Thus, under the law announced by the D.C. Circuit, detainees cannot assert *any* substantive rights through habeas, nor do they have any substantive rights that could be vindicated by civil damages actions against the government or private contractors. The Fourth Circuit has not gone so far, but it is not yet clear what position it will take.

3. International Law As a "Source of Authority in U.S. Courts"

Forging ahead with its agenda to re-create a law-free zone at Guantánamo, the D.C. Circuit held in *Al-Bihani v. Obama*, in an opinion by Judge Janice Rogers Brown, that international law does not apply to detainees.[325] The court reasoned, first, that "[t]he international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts."[326] Second, even if Congress had adopted international law, it was free "to authorize the President . . . to exceed those bounds."[327] Third, the court held, without analysis, that "any person subject to a military commission trial [under the MCA] is also subject to detention."[328]

Authority to detain and amenability to trial by military commission are actually two logically separate issues. The MCA defines the class of persons who can be tried by military commissions if they commit the offenses listed in the act.[329] Whether a person is subject to indefinite deten-

Brief of Defendant-Appellee Titan Corporation, Saleh v. Titan Corp., 580 F.3d 1 (2009) (Nos. 08-7008, 08-7009), 2008 WL 5417422. On petition for writ of certiorari, the Supreme Court invited the Solicitor General's views, who responded that certiorari should be denied to allow the issue to "percolate" in the lower courts. Brief for the United States as Amicus Curiae at 7, 19, Saleh v. Titan Corp, 131 S. Ct. 3055 (2011) (No. 09-1313), *available at* http://www.justice.gov/osg/briefs/2010/2pet/6invit/2009-1313.pet.ami.inv.pdf ("Further percolation with respect to the novel and complex issues raised by this and other similar cases is needed . . . .").

322. Al Shimari v. CACI Int'l, Inc., 679 F.3d. 205 (4th Cir. 2012).

323. Pete Yost, *APNewsBreak: $5M Paid to Iraqis Over Abu Ghraib*, YAHOO! NEWS (Jan. 8, 2013), http://news.yahoo.com/apnewsbreak-5m-paid-iraqis-over-abu-ghraib-230313543--politics.html.

324. *See Our Cases: Al-Shimari v. CACI et al.*, CTR. FOR CONST. RTS., http://ccrjustice.org/our cases/current-cases/al-shimari-v-caci-et-al.

325. Al-Bihani v. Obama, 590 F.3d 866, 874–75 (D.C. Cir. 2010).

326. *Id.* at 871.

327. *Id.*

328. *Id.* at 872. On a petition for rehearing en banc, the full court denied rehearing but seven of the nine active judges stated that a decision on the applicability of international law was unnecessary to the result. *See* Al-Bihani v. Obama, 619 F.3d 1, 1 (D.C. Cir. 2010) (en banc) and discussion *infra* notes 347–50.

329. Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 948d, 120 Stat. 2600 (codified at 10 U.S.C. § 948d) ("A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful ene-

tion, however, depends on whether the requirements of the AUMF and other statutes, the Supreme Court's decisions in *Hamdi* and *Rasul*, and the laws of war are met. The panel decision mixed those distinct questions together and held that Congress's definition of military commission jurisdiction automatically subjected those persons to indefinite detention, without regard to international law or the much more limited definition that had been accepted by the Supreme Court in *Hamdi*.

Additionally, the panel relied—again without analysis—on the language of the 2006 MCA precluding detainees from relying on the Geneva Conventions as a source of rights, thus implicitly holding that the provision was valid.[330]

The D.C. Circuit as a whole drew the line at this extreme position. The court denied rehearing en banc but seven of the nine active judges signed a "statement . . . concurring in the denial of rehearing en banc" that said, "We decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because . . . the panel's discussion of that question is not necessary to the disposition of the merits."[331] The position that international law does not apply to the treatment of detainees thus has been labeled dictum, but it remains to be seen how a future three-judge panel may decide the issue. After all, despite the 113 pages of opinions on the petition for en banc hearing, the court pointedly did not actually take the case en banc.[332] Judges Brown and Kavanaugh (as well as Randolph, Silberman, and all the other judges of the court) are free to write exactly the same opinion in a later case.

4. Habeas Rights of Bagram Detainees

In May 2010, the D.C. Circuit held that habeas rights do not extend to prisoners held in Afghanistan, in part because "the entire nation of Afghanistan, remains a theater of war."[333] This was so even though the petitioners alleged that they were seized outside Afghanistan (two were captured in Thailand and Pakistan, respectively), outside the theater of war, and taken to Afghanistan for detention.[334] Thus, even though Guantánamo detainees have habeas rights (even if those rights are largely empty), the government could simply take detainees from anywhere in the world to Bagram and avoid habeas litigation. The continued availability of this option in the event of withdrawal of U.S. troops from Afghanistan may depend on whether "support" troops that remain will con-

my combatant before, on, or after September 11, 2001."); *id.* § 950v (codified at 10 U.S.C. § 950v) (setting forth the crimes triable by military commissions).

330. *Al-Bihani*, 590 F.3d at 875.

331. *Id.* at 1.

332. *Id.*

333. Al Maqaleh v. Gates, 605 F.3d 84, 97 (D.C. Cir. 2010).

334. *Id.* at 87.

tinue to operate the facility or, as in Iraq, turn it (and possibly the prisoners) over to the Afghan government.

5. The Ability to Challenge the Government's Evidence

Boumediene held that detainees must have a meaningful opportunity to challenge the factual basis for their detention. The first opportunity for such a challenge is in the CSRT proceedings.[335] As discussed above, the detainee's ability to contest his custody in the CSRT is severely limited. The government's evidence is largely in the form of summaries of interviews of the detainee and perhaps others. These summaries are usually labeled "protected," and therefore the detainee cannot see them. His lawyer cannot see the raw sources of the summaries, including knowing the identities of the witnesses whose statements have been summarized. The detainee does not have the right to call witnesses on his behalf without the permission of the prosecution, and such permission is routinely denied, even when the witness is also a Guantánamo detainee. Thus the primary evidence on which detainees must rely to challenge their status as unprivileged enemy belligerents is the detainee's own statement and such corroborating evidence as can be obtained independently (for example, from his family).

The same evidentiary limitations apply in habeas proceedings challenging the legality of detention. The government relies on summaries of interrogation reports, and the detainee relies on his own testimony and whatever corroborating evidence he can produce.[336] Even so, detainees were able to prevail in the district court in about three-quarters of the habeas cases, often by challenging the reliability of the government's evidence.[337]

In *Latif v. Obama*, the D.C. Circuit put an end to that by holding that in the habeas proceedings, the government's evidence is entitled to a presumption of accuracy.[338] In a bold extension of what is essentially the business records doctrine, the court held that the military maintains records of interrogations as part of its regular activity, and that these records are entitled to a presumption, not just of regularity, but of accuracy.[339] The district court had found the government's evidence against

335. *See* discussion *supra* notes 61–73 and accompanying text.

336. *See, e.g.*, Latif v. Obama, 666 F.3d 746 (D.C. Cir. 2011). Latif was able to present only his own declaration providing an alternative story of his intentions in Afghanistan, capture, and detention. *Id.* at 747–48. However, the circuit court found the story "hard to swallow" and "intrinsic[ally] implausib[le]," *id.* at 760, despite the fact that the district court had found the story corroborated by other documentary evidence presented. *See id.* at 771 (Tatel, J., dissenting).

337. *See supra* note 266 and accompanying text.

338. *Latif*, 666 F.3d 746. The unclassified version of the decision is redacted to an almost laughable extent, which is fairly captured in the excerpt quoted *supra* note 259. Although the D.C. Circuit released a more complete version of the opinion in April 2012, which aimed to clarify the majority's rationale for finding a presumption of regularity in the government's main report, the opinion is still rife with redactions. Latif v. Obama, 677 F.3d 1175 (D.C. Cir. 2012).

339. *Latif*, 666 F.3d at 749.

Latif to be unreliable.[340] The D.C. Circuit reversed on the basis of the presumption of accuracy, without even bothering to find that the district court's factual finding was clearly erroneous.[341]

This means that although interrogations are conducted through interpreters and under often difficult conditions, the accuracy of the report cannot be questioned, and the habeas court must accept that the subject of the report made the statements attributed to him. The detainee cannot question the ability of the interpreter. Nor can he question whether the interpreter correctly understood what the interrogator was asking, whether the interpreter correctly translated the question to the detainee, how the detainee understood the question, whether the interpreter correctly translated the answer to the interrogator, or whether the interrogator correctly understood the answer. With respect to his own statement, the detainee cannot deny that he said what the report says he said.

The majority maintained that its rule was reasonable because it did not hold that the court must presume the truth of the contents of the report, but merely the accuracy of the government's report of the statement and that it was made by the person identified in the report.[342] This rule seems deceptively modest. But it presumes that the three-way translation has gone flawlessly in all directions, and that, in particular, the detainee himself said exactly what the report says he said. If the detainee misunderstood the question or the interpreter misunderstood either the question or the answer, that is all lost in the presumption.

Latif, for example, maintained that he had traveled to Afghanistan for medical treatment for a head injury sustained in a car accident.[343] One can deduce from the slightly less redacted version of the opinion released after the petition for certiorari was filed that the document in question is a field interrogation report made at the time of his capture and that the field report states that Latif said he had a "hand injury."[344] The government argued that his report of a "hand injury" did not support his habeas claim and that the inconsistency between the field report and his habeas defense demonstrated that he was lying in the habeas

340. Abdah v. Obama, No. 04-1254 (HHK), 2010 WL 3270761, at *9 (D.D.C. Aug. 16, 2010) ("The evidence upon which respondents primarily rely, [Redacted] is not sufficiently reliable to support a finding by a preponderance of the evidence that Latif was recruited by an Al-Qaeda member or trained and fought with the Taliban.").

341. *Latif*, 666 F.3d at 759 ("A habeas court's failure to [view the Government's evidence holistically] is a legal error that we review *de novo*, separate and apart from the question of whether the resulting findings of fact are clearly erroneous in themselves.").

342. *Id.* at 750 ("The presumption of regularity pertains only to the second: it presumes the government official accurately identified the source and accurately summarized his statement, but it implies nothing about the truth of the underlying non-government source's statement.").

343. *Id.* at 747.

344. Latif v. Obama, No. 10-5319 (D.D.C. Oct. 14, 2011) at 3–4. This less-heavily redacted version is available at http://www.lawfareblog.com/wp-content/uploads/2012/04/New-Latif.pdf. The word "Report" is now unredacted, and details regarding the discrepancy over the injuries are now included in the opinion.

proceedings.[345] The district judge, after exhaustively considering the evidence, found that Latif's version, supported by medical records which he had with him when he was captured, was at least as plausible as the government's story, and that the government had offered no other persuasive evidence of terrorist activity.[346] The circuit court majority, however, upheld the government's position, based on its presumption that the field report that Latif had claimed a hand injury rather than a head injury was accurate.[347] Thus, under *Latif* there is no room for the detainee to argue that there was a mistake somewhere in the chain of translation.

The government can rely on a single interrogation report of an interview of the detainee—a report prepared, in the words of the dissent, in the "fog of war"[348] and conducted through an interpreter. If the detainee contests the facts stated in the report, the presumption of accuracy means that he is now saying something different from what he said before and must attack the credibility of the subject of the report—himself. He cannot dispute that he said what he is reported to have said; he can only argue that the statement was false, thereby impugning his own credibility.

The majority in *Latif* used this reasoning as a basis for distrusting the detainee's credibility and to discount his version of events, even though the district court had found his version plausible.[349] The detainee has scant resources and very little ability to obtain evidence to challenge the government's report (he will not be able, for example, to cross-examine the interrogator or the interpreter), and the majority's rule essentially places the burden of persuasion on him.

Moreover, just in case the government's burden still wasn't light enough, the majority drew attention to a previous case in which the D.C. Circuit said it "doubt[ed] . . . that the Suspension Clause requires the use of the preponderance standard."[350] That is, perhaps the government should not even have to show that it was more likely than not that an in-

345. *Id.* at 27–28 ("For example, Ibrahim could have promised Latif the medical treatment he needed to induce him [to] join the Taliban. Such a recruiting tactic (or cover story) would fit the *modus operandi* of the man who recruited many of the detainees whose interrogation reports appear in the record."); *id.* at 33 (noting that the district court "rejected the Government's 'contention that Latif *must* be lying'" (citation omitted)).

346. Abdah v. Obama, No. 04-1254 (HHK), 2010 WL 3270761, at *9 (D.D.C. Aug. 16, 2010) (stating that "Latif's story . . . is supported by corroborating evidence provided by medical professionals and it is not incredible" and that the government's evidence provides "no corroborating evidence for any of the incriminating statements").

347. Latif v. Obama, No. 10-5319 (D.D.C. Oct. 14, 2011) at 24 (noting that a "note-taker in the field could easily have misheard the translator and written 'hand' instead of the similar-sounding monosyllable 'head'" but nevertheless holding that "[w]e need not consider whether the district court's speculation was clearly erroneous, because neither a grammatical ambiguity nor a tangential transcription error is the sort of fundamental flaw sufficient to overcome the presumption of regularity").

348. Latif v. Obama, 666 F. 3d 746, 772 (D.C. Cir. 2011) (Tatel, J., dissenting).

349. *Id.* at 758–61 (discussing inconsistencies between Latif's initial stories in the field report and prior hearings and his most recent declaration).

350. *Id.* at 748 (quoting Al-Adahi v. Obama, 613 F.3d. 1102, 1105 (D.C. Cir. 2010)).

dividual is an enemy combatant to keep him a prisoner for the rest of his life.

This result is, again, contrary to the intent of *Boumediene*. The Supreme Court noted that one reason the CSRTs fell short of the standard of habeas proceedings was that they gave the government's evidence a presumption of validity.[351] Since there is no practical way for a detainee to rebut the presumption of accuracy in a report of his own statement, the most common form of evidence in the habeas proceedings, the presumption of accuracy amounts to a presumption of validity, contrary to *Boumediene*. *Latif* makes it essentially impossible for detainees to challenge the factual basis for their classification as unprivileged belligerents. Since according to the D.C. Circuit they have no other substantive rights to assert, they must from now on inevitably lose their habeas petitions.

Despite numerous amicus briefs urging the Court to grant certiorari in *Latif* and six other detainee habeas cases from the D.C. Circuit, the Supreme Court in June 2012 denied review without even a single dissenting opinion.[352] The Court has not granted any detainee petitions since *Kiyemba I*, which was dismissed essentially on mootness grounds.[353] In the words of Linda Greenhouse, the Court has "permitted the Guantánamo issue to be outsourced."[354]

C. Resumption of Military Commissions

The apparently unanticipated (by the Obama administration) political opposition to Attorney General Holder's announcement that the five 9/11 defendants would be brought to trial in New York, followed by congressional restrictions on transferring detainees to the United States, made criminal trials impossible in the foreseeable future for any of the Guantánamo detainees. Accordingly, the 9/11 detainees were charged in the revised military commission system, and formal proceedings began in the summer of 2012. The Guantánamo Review Task Force had also designated six detainees for military commission trials, and a total of forty-four for prosecution either in federal court or military commissions. Military commission trials resumed in August 2010.

The resumed military commissions got off to a rocky start with the trial of Omar Khadr, a fifteen-year old child soldier, but the Obama administration eventually worked its way to a strategy that emphasized plea bargains over trials and traded sentencing consideration for agreements

351. Boumediene v. Bush, 553 U.S. 723, 767 (2008) (holding that "the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review" including the fact that "[t]he Government's evidence is accorded a presumption of validity").

352. Latif v. Obama, 132 S. Ct. 2741 (2012) (mem.).

353. Kiyemba v. Obama, 131 S. Ct. 1631 (2011) (opinion of Breyer, J.) (joining denial of certiorari).

354. Linda Greenhouse, *Opinionator: Goodbye to Gitmo*, N.Y. TIMES (May 16, 2012, 9:00 PM), http://opinionator.blogs.nytimes.com/2012/05/16/goodbye-to-gitmo/.

to testify in future trials. At the same time, the legal flaws at the heart of the attempt to substitute military commissions for criminal trials (which had been one reason the Obama administration had pressed to try accused terrorists in federal court) became even more apparent.

1. Military Commission Proceedings Under the Obama Administration

It would have been difficult to select a worse case for demonstrating a commitment to the rule of law than the first case to come to trial during the Obama administration, and the administration itself was aware of the problem.[355] Omar Khadr was a child soldier (he was fifteen at the time of his capture) who had been severely injured during capture.[356] For many years the United States has urged other nations to seek rehabilitation rather than retribution for child soldiers,[357] and the government was criticized for bringing the case at all.[358] Khadr was charged with throwing a grenade in a firefight with U.S. troops, which resulted in the death of one U.S. soldier and the blinding of another. The evidence included his self-incriminating statements that were alleged to have been obtained through threats;[359] moreover, there was considerable uncertainty whether Khadr actually threw the (American-made) grenade he was charged with throwing.[360] Khadr's lawyers argued that the offenses he was charged with were not violations of the law of war and therefore were not triable to a military commission.[361] After the trial had begun, Khadr pleaded guilty to all charges in a secret plea agreement that provided he would serve no more than fourteen years and would be eligible to be released into Canadian custody after a year.[362]

The government's willingness to agree to relatively short sentences with Khadr and two other detainees who had initially been charged dur-

355. Administration officials were reported to have preferred not to have Khadr's case be the first to trial, but hesitated to take any action for fear of the appearance of undue command influence. Charlie Savage, *U.S. Is Wary of First Case for Tribunal*, N.Y. TIMES, Aug. 28, 2010, at A1.

356. *Id.*

357. *See* Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiciton Under the MCA in Regard to Juvenile Crimes of a Child Soldier 5–6, United States v. Khadr (Military Comm'n Apr. 30, 2008), *available at* http://www.defense.gov/news/d20080430Motion.pdf.

358. *See, e.g.*, Andy Worthington, *Prosecuting a Tortured Child: Obama's Guantánamo Legacy* (May 3, 2010), ANDYWORTHINGTON.CO.UK, http://www.andyworthington.co.uk/2010/05/03/prosecuting-a-tortured-child-obamas-guantanamo-legacy/.

359. Savage, *supra* note 355.

360. *See* Stephen N. Xenakis, *An Un-Dangerous Mind*, N.Y. TIMES (Oct. 12, 2012), http://www.nytimes.com/2012/10/11/opinion/some-guantanamo-detainees-are-security-threats-omar-khadr-isnt-one-of-them.html.

361. Savage, *supra* note 355; Defense Response to Government's Request for Finding's Instruction on Charges I, II and III (As It Pertains to Murder in Violation of the Law of War) and Defense Cross-Motion to Dismiss and Strike at 2, United States v. Khadr (Military Comm'n Nov. 28, 2008), *available at* http://www.defense.gov/news/AE-295-AE295-E(P009).pdf.

362. *See* Paul Koring, *Despite Plea-Bargain Deal, Omar Khadr to Spend His Tenth New Year's in Guantanamo*, GLOBE & MAIL (Dec. 22, 2011, 8:21 AM), http://www.theglobeandmail.com/news/world/worldview/despite-plea-bargain-deal-omar-khadr-to-spend-his-tenth-new-years-in-guantanamo/article2280409/.

ing the Bush administration[363] suggested that it was not eager to pursue military trials. During the Obama administration, new military commission charges have been filed against only a small number of detainees.[364] The administration may be preserving its flexibility with regard to the charges to be filed. The procedures under the 2009 MCA are untried, and those responsible for administering the proceedings in the 9/11 case are proceeding cautiously.[365] Delaying the filing of additional charges allows the procedures to be worked out pragmatically while avoiding the appearance of a backlog of cases. The wisdom of such a strategy was illustrated by the D.C. Circuit decision, discussed below, holding that the offense of material support to terrorism is not triable to a military commission. The fact that most detainees designated for trial had not yet been charged spared the government having to dismiss the charges.

The government may also be pursuing a strategy of plea bargaining for testimony to strengthen cases against the most important defendants. The first military commission case to be brought entirely during the Obama administration was that of Majid Khan, a high-value detainee who was held in the CIA's secret prisons from 2003 to 2006, when he was transferred to Guantánamo.[366] Khan, a native of Pakistan who had held a U.S. green card and graduated from a suburban Baltimore high school, was accused of "murder, attempted murder, spying, and providing material support for terrorism."[367] He allegedly worked closely with Khalid Sheikh Mohammed and plotted to assassinate former Pakistani President Pervez Musharraf and to commit other terrorist acts.[368]

Eight days after announcing the charges, the Pentagon announced that Khan had agreed to plead guilty and testify in other military com-

363. In addition to Khadr, those detainees are Ibrahim al-Qosi and Noor Uthman Muhammed. *See* Savage, *supra* note 355; Charlie Savage, *Guantánamo Detainee Pleads Guilty in Terrorism Case*, N.Y. TIMES, July 8, 2010, at A15; Tyler Cabot, *Noor Uthman Muhammed's Day in Court*, ESQUIRE POL. BLOG (Feb. 16, 2012, 1:02 PM), http://www.esquire.com/blogs/politics/guantanamo-bay-trial-5245535.

364. *See* Janet Cooper Alexander, *Military Commissions: A Place Outside The Law's Reach*, 56 ST. LOUIS U. L.J. 1115, 1148–51 (2012).

365. The arraignment of Khalid Sheik Mohammed and his co-defendants was lengthy and a significant amount of unconventional behavior was tolerated by the presiding judge. *See* Benjamin Wittes & Wells Bennett, *9/11 Arraignment #14: Wherein We Actually Have an Arraignment*, LAWFARE (May 6, 2012, 1:20 PM), http://www.lawfareblog.com/2012/05/911-arraignment-13-wherein-we-actually-have-an-arraignment/. Lawfare carried a self-described "neurotically-detailed" live blog of the proceedings. Wells Bennett, *A Note on Commissions Coverage*, LAWFARE (July 12, 2012, 2:46 PM), http://www.lawfareblog.com/2012/07/a-note-on-commissions-coverage/.

366. Carol Rosenberg, *Pentagon Charges Former U.S. Resident at Guantantámo in Terror Plot, From Baltimore to Guantánamo Trial*, MIAMI HERALD (Feb. 14, 2012), http://www.miamiherald.com/2012/02/14/2641868_p2/pentagon-charges-former-us-resident.html. Khan is also accused of serving as an al-Qaeda courier and conspiring to blow up gasoline stations in the United States. He faces a maximum sentence of life in prison. *Id.*; *see also* Carol Rosenberg, *Alleged 9/11 Facilitator Makes New Bid to Avert Death Penalty Trial*, MIAMI HERALD (Feb. 17, 2012), http://www.miamiherald.com/2012/02/17/2647385/alleged-911-facilitator-makes.html.

367. Peter Finn, *High-Value Guantanamo Bay Detainee Reaches Plea Agreement*, WASH. POST, Feb. 23, 2012, at A7.

368. *Id.*

mission trials for the next four years, after which he would be eligible for transfer to Pakistan.[369] Khan pleaded guilty to five charges, each carrying a possible life sentence.[370] Under the plea agreement, he will receive a maximum sentence of twenty-five years.[371] Sentencing will be deferred for four years, after which, if he cooperates, he will receive a sentence "not to exceed 19 years."[372] Khan stipulated and allocuted to conspiring with Khalid Sheikh Mohammed to assassinate the then-president of Pakistan, poison water reservoirs, explode underground gasoline storage tanks, and serve as an al-Qaeda sleeper agent,[373] and to conspiring with Ali Abdul al-Aziz Ali, another alleged 9/11 conspirator charged along with Mohammed,[374] and Aafia Siddiqui, who was convicted of attempting to murder her interrogators in Afghanistan and sentenced to eighty-six years.[375] Presumably Khan will testify at the trials of Mohammed, Ali, and perhaps other alleged 9/11 conspirators.[376] Offering plea bargains in exchange for testimony against other detainees not only makes additional admissible evidence available; it also moves more detainees from the "detained" and "designated for military commission" columns into the "convicted and serving sentence" column. From the detainees' point of view, plea bargains may be attractive because conviction seems to be the only thing that makes eventual release possible.

The announcement of Khan's guilty plea stressed that his conviction had been secured solely with evidence that would have been admissible in court.[377] The agreement to testify against others, presumably including some of the top al-Qaeda defendants, should strengthen the case against Khalid Sheikh Mohammed, which Holder has already characterized as "one of the most well-researched and documented cases I have ever seen in my decades of experience as a prosecutor," based entirely on admissible evidence.[378] Nothing Congress does can force the administration to

369. *Id.*

370. Charlie Savage, *"High Value" Detainee Is Said to Reach Tentative Plea Deal*, N.Y. TIMES (Feb. 22, 2012), http://www.nytimes.com/2012/02/23/us/majid-khan-a-guantanamo-detainee-is-said-to-reach-a-plea-deal.html.

371. Offer for Pretrial Agreement app. A para. 1, United States v. Khan, ISN 10020 (Feb. 13 2012), *available at* http://www.lawfareblog.com/2012/02/majid-khan-plea-agreement-documents/.

372. *Id.* para. 3.

373. Stipulation of Fact paras. 12, 28–48, 59, United States v. Khan, ISN 10020 (Feb. 13, 2012), *available at* http://www.lawfareblog.com/2012/02/majid-khan-plea-agreement-documents/.

374. *Id.* paras. 43, 58, 66–67, 72, 77–78, 94–98.

375. *Id.* paras. 94–97; Benjamin Weiser, *Scientist Gets 86 Years for Firing at Americans*, N.Y. TIMES (Sept. 23, 2010, 1:08 PM), http://cityroom.blogs.nytimes.com/2010/09/23/scientist-gets-86-years-for-firing-at-americans/.

376. *But see infra* note 416 (Majid Khan's lawyers may seek vacation of conviction and dismissal of charges following decision in *Hamdan II*).

377. Donna Miles, *High-Value Guantanamo Detainee Pleads Guilty in Deal*, U.S. DEP'T OF DEF. AM. FORCES PRESS SERV. (Feb. 29 2012), http://www.defense.gov/news/newsarticle.aspx?id=67376 (stating "[t]he case against Khan was based on 'irrefutable and lawfully obtained evidence'").

378. The statement is quoted in its entirety in Robert Chesney, *AG Holder's Statement on the Prosecution of the 9/11 Conspirators, and Link to the SDNY Indictment and Nolle Prosequi Filing*, LAWFARE (Apr. 4, 2011, 2:28 PM), http://www.lawfareblog.com/2011/04/ag-holders-statement-on-the-prosecution-of-the-911-conspirators-and-link-to-the-sdny-indictment/.

base military commission prosecutions on evidence that would not be admissible in a criminal trial—and indeed, the 2009 MCA prohibits the use of evidence obtained by cruel, inhuman, or degrading treatment.[379] The President can avoid some of the harm of military commissions by applying the same standards that would be required in a criminal prosecution. And by demonstrating that convictions can be obtained under those standards, he would strengthen his argument for ending military commissions if political conditions become more favorable.

Another part of the new strategy may be to avoid subjecting any new detainees to military commissions. The President may be able to avoid military commission trials for people who are captured from now on. Ahmed Abdulkadir Warsame provides a case in point.[380] Warsame was captured abroad through an intelligence operation rather than on the battlefield.[381] He was taken directly to the United States and turned over to the FBI rather than being taken to Guantánamo.[382] His case was thus not subject to the ban on transferring detainees to the United States. By avoiding taking new detainees to Guantánamo in the first place, the government can avoid Congress's system for preventing criminal prosecutions.

Moreover, the 2012 NDAA allows the President to waive the prohibition on transfers in certain cases.[383] The end of the war in Iraq and the projected withdrawal of troops from Afghanistan by 2014 mean that the United States will not be taking many more fighters into custody. Those who are captured in Afghanistan will be turned over to the government there. Military and intelligence operations such as those that resulted in the killing of Osama bin Laden and the capture of Warsame may lead to the capture of other alleged al-Qaeda leaders, but their numbers may be few enough that the President might be able to exercise the statutory exceptions to treat them similarly to Warsame (interrogated abroad and then brought to the United States and indicted), or to Umar Farouk Abdulmutallab, the "underwear bomber," (captured in the United States in the attempted commission of a terrorist act, interrogated by the FBI and, again, indicted).[384] Warsame, for example, was interrogated while in military custody by a team including agents from the FBI, CIA, and the Department of Defense.[385] The national security interest in con-

379. 10 U.S.C. § 948r (2006).

380. DeYoung et al., *supra* note 130.

381. *Id.*

382. *Id.*

383. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1022(a)(4), 125 Stat. 1298, 1563 (2011) (permitting waiver of transfer to military custody where "the President submits to Congress a certification in writing that such a waiver is in the national security interests of the United States"). *See generally* ELSEA & GARCIA, *supra* note 64.

384. *See* Monica Davey, *Would-Be Plane Bomber Pleads Guilty, Ending Trial*, N.Y. TIMES (Oct. 12, 2011), http://www.nytimes.com/2011/10/13/us/umar-farouk-abdulmutallab-pleads-guilty-in-plane-bomb-attempt.html.

385. *See* DeYoung et al., *supra* note 130; Dilanian, *supra* note 130.

tinuing such a joint operation should provide a convincing case for waiver under the NDAA.

Another foreign detainee may present a different set of issues. Ali Musa Daqduq, a Lebanese man accused of being a Hezbollah operative, "was the last detainee held by American forces in Iraq."[386] When U.S. combat troops were withdrawn in December 2011, Daqduq was turned over to the Iraqis.[387] Military commission charges, including perfidy (a recognized war crime), murder, terrorism, and espionage, committed in Iraq against U.S. servicemembers, have been filed against him.[388] This is the first time military commission charges have been filed against a defendant who has never been held at Guantánamo and who is not alleged to have been associated with al-Qaeda or the Taliban.[389]

Assuming that the United States is able to negotiate an agreement with Iraq to turn him over, many difficult issues will be raised. The Obama administration has maintained that it will not bring any more detainees to Guantánamo,[390] and Iraq will not turn him over if he is to be transferred there. A spokesman for the National Security Council commented, "To be blunt, a transfer to Gitmo was a non-starter for the Iraqi government."[391] The government considered holding a military commission hearing at the naval base in Charleston, South Carolina.[392] But no military commission has been convened within the United States since World War II, and surely a defendant would argue that persons tried within the United States must be tried in federal courts, even for charges that are triable before military commissions.[393] At a minimum, a decision to try Daqduq before a military commission would guarantee years of litigation. Furthermore, Republican legislators oppose convening a military commission for Daqduq within the United States. Senator Lindsey Graham, for example, stated, "Mr. Attorney General, if you try to bring this guy back to the United States and put him in civilian court, or use a military commission inside the United States, holy hell is going to break out."[394]

386. Charlie Savage, *Man Tied to Hezbollah Faces Military Charges*, N.Y. TIMES INT'L, Feb. 24, 2012, at A12.

387. *Id.*

388. *Id.*

389. Presumably the Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3, 116 Stat. 1498, 1501 (2002), would be interpreted to include authorization to detain, similarly to the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001). *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (interpreting the 2001 AUMF, which is the legal basis for holding the detainees at Guantánamo and Bagram, to authorize indefinite detention as an incident to the use of military force).

390. Charlie Savage, *U.S. Transfers Last Prisoner to Iraqi Custody*, N.Y. TIMES INT'L, Dec. 17, 2011, at A11.

391. *Id.*

392. *Id.*

393. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 122 (1866); Milligan, however, was a citizen of the United States. *Id.* at 107.

394. Charlie Savage, *Detainee in Iraq Poses a Dilemma as U.S. Exit Nears*, N.Y. TIMES, Dec. 12, 2011, at A1.

The problems in trying Daqduq may be entirely theoretical, however, as it has been reported that he was released by the Iraqi government, pursuant to an order of an Iraqi court, "despite the entreaties of the Obama administration."[395]

2. Still Illegal After All These Years

Despite the significant improvements made by the Military Commissions Act of 2009 in the procedural protections afforded to defendants, including evidentiary rules, as well as the Obama administration's measured strategy with regard to instituting charges, the military commission system as it presently exists is still deeply flawed. Here I will discuss just one aspect of the problem. The most common charges under the current system are providing material support to terrorism and conspiracy. In fact, every person who has been charged under the current system has been charged with one or both of these offenses. But those offenses are not legally triable to military commissions, because they are not violations of the law of war.

Justice Stevens, speaking for a majority in *Hamdan v. Rumsfeld,* explained that military commissions were "born of military necessity," to try offenses under the law of war.[396] The Court held that in what is now Article 21 of the Uniform Code of Military Justice, Congress expressly provided that military commissions must comply with the law of war; and the Court further held that neither the AUMF nor the DTA expanded the President's power to convene military commissions.[397] Justice Stevens went on to say, writing for a plurality, that law-of-war commissions can only try "[i]individuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the law of war," for offences that are "[v]iolations of the laws and usages of war," committed within the theater of war, during the period of the war.[398] The plurality opinion concluded that Congress had not "positively identified 'conspiracy' as a war crime," and that "[a]t a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission *is acknowledged to be* an offense against the law of war,"[399] and that conspiracy is not a violation of the law of war.[400]

Every person who has been charged in the current military commission system has been charged with conspiracy or providing material sup-

395. Michael R. Gordon, *Against U.S. Wishes, Iraq Releases Man Accused of Killing Amerian Soldiers*, N.Y. TIMES, Nov. 17, 2012, at A10.

396. 548 U.S. 557, 590 (2006). Most military commissions from the Civil War onward have had a dual function, as law-of-war commissions and also as courts of occupied territories. But trials of terrorism detainees must be justified solely as law-of-war commissions. *Id.* at 592.

397. *Id.* at 594.

398. *Id.* at 597–98 (internal quotations omitted).

399. *Id.* at 601–02, 604 (emphasis added).

400. *Id.* at 604–11.

port to terrorism, or both; and every person who has been convicted at trial or by plea has been convicted of one or both of those offenses. But, as the plurality noted, conspiracy is not a violation of the law of war; and *a fortiori*, neither is providing material support to terrorism. Those offenses are federal crimes for which the individuals could be tried and convicted in federal court. But they are not offenses that can be tried to a military commission. Not only are military commissions convened to hear such charges invalid; it is also fundamentally incorrect to suggest, as Attorney General Holder's original announcement of the current round of charges does, that federal court and military commissions are fungible and the government can pick and choose which forum to use based on considerations such as whether there is sufficient admissible evidence to convict in federal court. As the Court held in *Hamdan,* military commissions are "of necessity."[401] If federal court is available, there is no military necessity for a military commission; and if the offense is not a violation of the law of war, a military commission is not even a permissible forum.

This last point—that the most common charges before the military commissions are not, in fact, violations of the law of war—received emphatic confirmation from an unexpected source. In October 2012 the D.C. Circuit, speaking through Judge Kavanaugh, reversed Salim Hamdan's military commission conviction.[402] Hamdan had been convicted of "material support for terrorism," defined as a war crime by the 2006 MCA.[403] The court held—consistent with the plurality opinion in *Hamdan*—that until the passage of the 2006 MCA, military commissions were limited to trying violations of the (international) "law of war"[404] and—as the government had conceded—providing material support to terrorism is not a violation of the law of war.[405] Employing the principle of constitutional avoidance because of the ex post facto problem posed by retroactive punishment of newly defined crimes, the court interpreted the MCA as not intending to subject pre-enactment conduct to the new definitions.[406] The charges against Hamdan involved pre-2006 conduct which was not, at the time, subject to trial by military commission, and the court therefore directed that his conviction be vacated.[407]

401. *Id.* at 624.

402. Hamdan v. United States (*Hamdan II*), 696 F.3d 1238 (D.C. Cir. 2012) (on appeal from the Court of Military Commission Review).

403. *Id.* at 1240.

404. *Id.* at 1240, 1245; *see* 10 U.S.C. § 821.

405. *Id.* at 1241, 1248–51; *see supra* notes 341–47 and accompanying text.

406. *Id.* at 1241, 1247–48. The court declined to decide Hamdan's contention that Congress's ability to proscribe war crimes is limited by the Define and Punish Clause of Art. I, § 8 to offenses recognized under the international law of war. *Id*. at 1246–47. Writing separately in a footnote, Judge Kavanaugh would have held that the Define and Punish Clause is not limited by international law. *Id.* at n.6. The court also noted that it did not decide whether individuals could be tried before military commissions for providing material support of conduct taking place after 2006.

407. *Id.* at 1241, 1247, 1252.

Hamdan II obviously would make it difficult to pursue military commission charges against most of the remaining detainees, because few of the charges that have been considered constitute actual war crimes under international law. Charges of conspiracy and material support are the most vulnerable as they are not generally regarded as war crimes under existing international law.[408] All of the individuals who have been convicted by military commissions thus far were convicted of material support, some only of that charge. Ali al-Bahlul's appeal is pending before the D.C. Circuit, and in response to a request by the court, the Justice Department stated that *Hamdan II* would also require reversal of Bahlul's convictions for conspiracy and providing material support.[409] Majid Khan, who pleaded guilty to providing material support to terrorism but has not yet been sentenced, is said to be considering requesting dismissal of the charges against him, and his convictions, at his sentencing hearing.[410] Most significantly, the chief prosecutor in the proceedings against Khalid Sheikh Mohammed and the other alleged 9/11 plotters announced he would drop the conspiracy charges in that case.[411] (Other charges that do constitute war crimes would not be affected.) At least one of the defendants reportedly had already filed a motion to dismiss under *Hamdan II*.[412]

Hamdan II and the government's decision to drop the conspiracy charge in the 9/11 trial are positive steps away from the law-free zone. To begin with, the decision is correct (at least with respect to pre-2006 conduct).[413] All of the offenses specified in the 2006 MCA are also federal crimes and could be prosecuted in federal court. Law-of-war military commissions should be reserved for their only legally valid purpose, trying actual war crimes.

408. *See* Michael McAuliff, *Salim Hamdan Dismissal Jeopardizes Remaining Guantanamo Military Trials*, HUFFINGTON POST (Oct. 16, 2012, 7:07 PM), http://www.huffingtonpost.com/2012/10/16/salim-hamdan-dismissal-guantanamo_n_1971994.html.

409. Pete Yost, *Govt: Reverse Terror Convictions—for Now*, DENVER POST (Jan. 9, 2013), http://www.denverpost.com/politics/ci_22340906/govt-reverse-terror-convictions-mdash-now. A link to the government's brief is available at Steve Vladeck, *The Government's Supplemental Brief in Al-Bahlul*, LAWFARE (Jan. 9, 2013, 3:33 PM), http://www.lawfareblog.com/2013/01/the-governments-supplemental-brief-in-al-bahlul/.

410. *See* Carol Rosenberg, *Military Lawyer Cites Civilian Decision to Seek Dismissal of Guantánamo 9/11 Tribunal*, MIAMI HERALD (Nov. 6, 2012), http://www.miamiherald.com/2012/11/06/3084572/military-lawyer-cites-civilian.html; *see also* text accompanying notes 448–58, *supra.*

411. Charlie Savage, *U.S. to Press Fight of Detainee's Appeal*, N.Y. TIMES, Jan. 10, 2013, at A14 [hereinafter Savage, *U.S. to Press Fight*]; *see* Charlie Savage, *U.S. Legal Officials Split Over How to Prosecute Terrorism Detainees*, N.Y. TIMES, Jan. 8, 2013, at A13 (noting that terminating the al-Bahlul case would also require dropping the conspiracy charges in the 9/11 case).

412. *See* Rosenberg, *supra* note 410.

413. For an incisive analysis of why the legal precedents overwhelmingly support the view that prior to the 2006 MCA, military commissions could only try violations of the (international) law of war, see Steve Vladeck, *The Merits of DOJ's Supplemental Brief in* Al Bahlul, LAWFARE (Jan. 10, 2013, 9:06 AM), http://www.lawfareblog.com/2013/01/the-merits-of-dojs-supplemental-brief-in-al-bahlul/.

Furthermore, despite campaign rhetoric favoring *Boumediene* and opposing military commissions, the Obama administration is now fighting every decision that goes in favor of the detainees—even a decision by a staunch conservative like Judge Kavanaugh, tracking an opinion joined by the liberal wing of the Supreme Court. Overruling the advice of the Solicitor General and the top lawyers for the Pentagon and State Department, the Attorney General has apparently resolved to try to have the decision reversed. The only way to achieve this result would be to set one or both of two dangerous precedents: that Congress can define anything it pleases as a war crime, and thereby take away the right to a jury and a trial in federal court; or that the Ex Post Facto Clause has no operation when the charge involves terrorism, and Congress can punish past conduct through military trials that was not triable to a military commission when it occurred.

Even if the Define and Punish Clause permits Congress to recognize new or emerging violations of the law of war, that should only be to allow the United States to be a leader in the development of that law, not to allow it to define its own, idiosyncratic "domestic law of war" in complete opposition to the rest of the international community. Otherwise the political branches could simply define any relatively minor offense, such as the current definition of material support, as a war crime in their (probably futile) effort to avoid the guarantees of fairness to the accused that obtain in federal court. As the Court said in a slightly different context in *Boumediene*, such "formalism" would give "the political branches . . . the power to switch the Constitution on or off at will" and make it "subject to manipulation by those whose power it is designed to constrain."[414]

As the government has emphasized, the 9/11 defendants are charged with other offenses that are war crimes.[415] Dismissing the conspiracy and material support charges should actually strengthen the government's case, by taking away the strongest argument that the proceedings are illegitimate. And if other detainees cannot be brought before military commissions for such offenses, that might strengthen the argument that Congress should remove the restrictions on trying them for federal crimes. (Of course, so long as they can be detained indefinitely without any charges, the inability to try them before military commissions will be a weak incentive.)

On the other hand, it is not clear that striking down military commissions for material support and conspiracy will be to the benefit of detainees. It is unlikely that Congress will relent and permit criminal trials even if military commissions are not permitted, because the option of indefinite detention remains. As Trevor Morrison has pointed out, most detainees who were tried before military commissions received relatively

414. Boumediene v. Bush, 553 U.S. 723, 765–66 (2008).
415. *See* Savage, *U.S. to Press Fight*, *supra* note 411.

short sentences and have been released.[416] Those who were not tried remain in indefinite detention, many of them for over a decade.

But it is not at all clear that *Hamdan II* will stick. While the government acknowledged that the charges against Bahlul could not survive under *Hamdan II*, it will seek further judicial review.[417] In doing so, the Attorney General rejected the recommendation of the Solicitor General, as well as the chief prosecutor of the military commissions system and the top lawyers for the Defense and State Departments, who argued that continuing to maintain a position that had already been rejected by a strongly conservative judge would undermine the legitimacy of the military commissions.[418] The Attorney General is apparently betting that either the D.C. Circuit en banc or the Supreme Court will reverse Judge Kavanaugh. This position guarantees that there will be a long time in which the validity of the commissions and pending cases are in doubt, with the possibility that *Hamdan II* will be reversed in the end. Even more importantly, it marks another instance in which the Obama administration had a chance to walk back from the law-free zone toward the rule of law and did not do so. Unlike previous such occasions such as the debate over criminal trials for the 9/11 defendants, when Attorney General Holder was firmly in the rule of law camp, this time he is on the other side.

IV. LOOKING FORWARD

More than a decade has elapsed since September 11, 2001. Osama bin Laden has been killed, and his top lieutenants have either been killed or are in U.S. custody. The war in Iraq has been officially declared over, and U.S. combat troops have been withdrawn.[419] The President has declared that in Afghanistan "the tide of war is receding," and the government plans to end the U.S. combat role in Afghanistan by 2014.[420] In this context, and with Congress and the President having staked out utterly opposed positions, what is next for detainee policy?

A. The D.C. Circuit and the Rights of Detainees: Waiting for Godot

As to the courts, it appears that the protections afforded to detainees in *Rasul* and *Boumediene* have, as a practical matter, been almost entirely wiped away by the D.C. Circuit. Its decisions have stripped away detainee habeas rights to such an extent that the federal court proceed-

416. Trevor Morrison, *Thoughts on* Hamdan II, LAWFARE (Oct. 19, 2012, 11:56 AM), http://www.lawfareblog.com/2012/10/thoughts-on-hamdan-ii/.

417. Savage, *U.S. to Press Fight*, *supra* note 411.

418. *Id.*

419. Thom Shanker et al., *In Baghdad, Panetta Leads Uneasy Moment of Closure to a Long Conflict*, N.Y. TIMES, Dec. 16, 2011, at A19.

420. Mark Landler & Helene Cooper, *Obama Will Speed Military Pullout from Afghan War*, N.Y. TIMES, June 23, 2011, at A1.

ings that go under the name of habeas in the District of Columbia no longer satisfy the minimum constitutional requirements set forth in *Boumediene*.

The D.C. Circuit has refused to apply the functional constitutional test adopted in *Hamdan* and *Boumediene* and has declared itself not only free to return to its own holdings that were vacated or reversed by the Supreme Court, but in fact bound to do so. It has held that noncitizens detained outside the United States have no substantive rights—even though *Rasul*'s and *Boumediene*'s recognition of detainees' right to habeas would be trivial if they had no substantive rights for the courts to enforce, and despite the Court's observation that the *Rasul* petitioners had "unquestionably" stated violations of their rights (not just misclassification of their status). The holding in *Rasul* that detainees must have a meaningful opportunity to contest the factual basis for detention has been effectively overruled by *Latif*, which requires the court to presume the accuracy of the government's evidence. And *Kiyemba* has effectively overruled *Boumediene*'s holding that the Constitution requires, at a minimum, that the habeas court must be able to order conditional release if the petition is sustained.

Thus, the D.C. Circuit's decisions have stripped away the minimum protections that the Supreme Court has held are essential to habeas jurisdiction: a meaningful opportunity to challenge the basis for custody; the power to order conditional release if the factual basis for detention is lacking; and an impartial and independent decision maker. Although the detainees still have a constitutional right to habeas, the procedure that they receive in their only available forum, the District Court for the District of Columbia, does not satisfy minimum constitutional requirements. As a result, eighty-six men who have been cleared for release by habeas courts or the government's own military tribunals after being determined not to be enemy combatants remain at Guantánamo, and the D.C. Circuit says that the decision not to release them to another country or the United States is within the unreviewable discretion of the President.[421] Some of these men have been held since 2002, and no end to their unlawful confinement is in sight.

The D.C. Circuit has been empowered (one might say emboldened) to undermine what seemed to be the clear commands of the Supreme Court's Guantánamo cases by the Court's failure to hear any detainee cases since *Boumediene* and *Munaf*. The detainees cannot obtain review in another court so as to set up a conflict among the circuits, nor do they have any ability to force the Court to review the D.C. Circuit's decisions. Yet the Court's refusal to grant certiorari in a parade of significant detainee cases suggests that it no longer views detainee issues as important enough to merit review—or that between the Justices who dissented in

421. *See* GUANTANAMO REVIEW TASK FORCE, *supra* note 183, at ii; David Remes, *Guantanamo Detainee Numbers*, September 30, 2012 (copy on file with author).

Boumediene and those who fear that if the Court does grant review it will retreat from or overturn its earlier cases, there are not four Justices who will vote to grant certiorari even when the lower court blatantly disregards Supreme Court precedents. If the Court does not grant review over some detainee case raising these issues, the D.C. Circuit will have effectively overruled important constitutional decisions of the Supreme Court.

B. Congress's Attempt to Militarize Detainee Policy

Congress's attempt to force the President to hold all noncitizens suspected of terrorism in military custody and try them before military commissions is rightly considered by many advocates to be unacceptable from a constitutional and human rights perspective. Even after the 2009 MCA, military commissions are still not equal to courts-martial under the Uniform Code of Military Justice, still less to criminal trials; and indefinite detention without charge is, in my view, unconstitutional and profoundly anti-American. Yet the state of detainee policy is not completely gloomy. There is reason to believe that the Obama administration is pursuing a quiet, but fairly effective resistance to militarization in at least some areas of detainee policy.

1. Military Commissions: Not As Bad As It Seems

The proponents of military commissions have insisted on them on the grounds that regular trials "won't work" because evidence obtained by coercion or torture is inadmissible, because juries are unpredictable, or because regular trials are not harsh enough or dignify terrorists too much by affording them the same rights as citizens. It is difficult to credit the arguments for using military commissions, and using them exclusively, for offenses that are also federal crimes. Hundreds of terrorism-related criminal convictions have been obtained in federal court, including well-known cases against John Walker Lindh, Zacharias Moussaoui, Richard Reid, Umar Farouk Abdulmutallab, and Ahmed Khalfan Ghailani, the latter of whom was convicted of the 1998 U.S. embassy bombings. Contrary to the fearmongering over the impossibility of bringing successful prosecutions in federal court because of difficulties with classified information, befuddled juries, or terrorist-sympathizing judges, from 2001 to 2009, the Justice Department brought roughly 850 terrorism-related prosecutions in federal court, obtaining 523 convictions. There was no need to invent and litigate new procedures for such cases.

Because Congress has used the spending power to thwart presidential policies concerning military affairs and criminal prosecutions,[422] however, the only prosecutions of individuals now held at Guantánamo are likely to be before military commissions. Beyond the six defendants already facing charges,[423] it is unclear how many military commission trials there will be.[424] The number of newly apprehended detainees subject to military commissions will probably be negligible under this President. The U.S. combat role in Afghanistan and Iraq is winding down, and new prisoners captured there are being held by those countries' forces rather than by Americans.[425] The administration has stated that it will not bring any more prisoners to Guantánamo.[426] Unlike the previous administration, the current one is not kidnapping people off the streets of Milan, Sarajevo, or Thailand. Noncitizens captured outside the United States will probably either be turned over to local officials or, like Ahmed Warsame, brought directly to the United States for prosecution.

Nevertheless, thirty-six detainees remain at Guantánamo and are designated to be tried by military commission or in federal court. Such trials will remain in violation of multilateral treaties, customary international law, and U.S. law. With the decision of the D.C. Circuit that military commissions cannot hear charges of conspiracy based on conduct occurring before 2006 and the government's concession that the decision would also invalidate material support charges, it has become a practical possibility that further military commission trials—other than those of al-Nashiri and the 9/11 defendants—will not take place. It would require reversal by the D.C. Circuit sitting en banc or a rare grant of review by the Supreme Court to put the commission trials for conspiracy and material support back on track.

422. *See* discussion of Congress's opposition to transfer, *supra* notes 209–11 and accompanying text. *See generally* Martinez, *supra* note 128.

423. *By the Numbers*, *supra* note 52 (the five 9/11 defendants and Abd al-Rahim al-Nashiri, charged with the attack on the U.S.S. Cole).

424. *See* GUANTANAMO REVIEW TASK FORCE, *supra* note 183, at ii (noting 44 detainees "were referred for prosecution either in federal court or a military commission"), 11 (noting 6 of these detainees will be tried in military commissions, and the choice of forum for 24 more remains undetermined). As of December 24, 2012, 36 of these remained at Guantánamo, 3 of whom had pleaded guilty, leaving a maximum of 33 to be tried. *By the Numbers*, *supra* note 52.

425. *See* Rod Nordland, *Detainees Are Handed Over to Afghans, but Not Out of Americans' Reach*, N.Y. TIMES, May 30, 2012 at A4, *available at* http://www.nytimes.com/2012/05/31/world/asia/in-afghanistan-as-bagram-detainees-are-transferred-united-states-keeps-its-grip.html?pagewanted. Under the Supreme Court's decision in *Munaf v. Geren*, detainees who are transferred to the custody of another nation are not within the habeas jurisdiction. *See* 553 U.S. 674 (2008) (holding that Court had no habeas jurisdiction over individuals held for Iraq, to be tried for criminal charges under Iraq's sovereign powers). The process of turning detainees held in Afghanistan over to the Afghan government was slowed somewhat by the difficulty in assuring that they would be treated humanely, and by the Afghan government's view that its constitution does not permit preventive detention. Nordland, *supra*; Azam Ahmed & Habib Zahori, *Afghanistan Frees Detainees in Show of Sovereignty Before Karzai Visits U.S.*, N.Y. TIMES (Jan. 4, 2013), http://www.nytimes.com/2013/01/05/world/asia/afghanistan-releases-detainees-ahead-of-trip-by-karzai-to-washington.html.

426. *See* Brennan, *supra* note 124; Gerstein, *supra* note 124; Dolan, *supra* note 124.

The charges against al-Nashiri, Khalid Sheikh Mohammed, and the other 9/11 defendants will proceed, very slowly. The government plans to use only evidence that would be admissible in federal court, and with convictions the Obama administration would be able to say that it had brought all of al-Qaeda's 9/11 conspirators to justice. At that point, there would be no immediate reason to pursue further trials because the defendants can already be held indefinitely.

Whether or not any additional charges are brought, the military commission system established under President Bush and continued under President Obama will stand as a precedent for the future. The prosecutions of Nashiri and the 9/11 defendants can be cited to support instituting military commissions for noncitizens even when the conduct is a federal crime and the federal courts are open. The decision first to indict the 9/11 defendants in federal court and then to try them before military commissions is precedent for the notion that military commissions and Article III courts are options of equal status, and the President can choose the forum based on considerations such as popular politics and looser evidentiary rules in military commissions. Even if *Hamdan II* stands, it leaves the way open to prosecute post-2006 conduct under whatever offenses Congress chooses to label war crimes under the "domestic law of war." Despite the promise of a new era in detention policy after President Obama's 2008 election, the military commissions established by his predecessor remain "outside the law's reach."[427]

2. Indefinite Detention: Almost Exactly As Bad As It Seems

The situation is bleaker with respect to indefinite detention. The Supreme Court has approved indefinite detention of "enemy combatants" under the AUMF, and both the Bush and Obama administrations have adopted a broader definition than the Supreme Court of those who may be detained without prompting the Court to intervene. Scores of prisoners who have been cleared for release based on findings that they do not constitute a terrorist threat are still being held at Guantánamo because of either security concerns or possible persecution in their home countries and because there is no other "appropriate" country that will take them. As a political matter Congress would not permit them to be released into the United States, and the Obama administration has not sought to do so. The D.C. Circuit has held that if the government does not want to allow them into the United States they can be held indefinitely regardless of whether there is legal justification to do so, and the Supreme Court has declined review.

427. "We have turned our backs on law, and created what we believed was a place outside law's reach." Ed Vulliamy, *Ten Years On, Former Chief Prosecutor at Guantanamo Slams 'Camp of Torture,'* OBSERVER, Oct. 30, 2011, at 29 (quoting Colonel Morris D. Davis, former chief prosecutor of the Guantánamo military commissions), as quoted in Alexander, *supra* note 364, at 1115.

Another forty-eight prisoners have been found by the Guantánamo Review Task Force to be too dangerous to release, but impossible to try either in federal court or before military tribunals, for most because the evidence against them was obtained through torture.[428] Here again, the Obama administration seems willing to continue their indefinite detention, Congress agrees, and the courts do not seem inclined to intervene. It is possible that some of the "cleared but can't be released" detainees might eventually become "too dangerous to be released" under a theory government prosecutors urged against Omar Khadr: that he had "marinated" in jihadist thinking at Guantánamo and thus had become a national security threat.[429]

The situation is somewhat less gloomy with respect to persons detained elsewhere—at least from the U.S. government's point of view. The war in Iraq has been declared over, combat troops have been withdrawn, and all prisoners who were in U.S. military custody have been turned over to the Iraqi government. The government has begun withdrawing troops from Afghanistan and scaling back combat operations, has set a target date of 2014 for withdrawal, and is in the process of turning over prisoners held by the U.S. military to the Afghan government.[430] Although prisoners have been brought from third countries such as Thailand, Pakistan, and Indonesia to U.S. detention facilities in Afghanistan, this is not likely to be a continuing practice as the United States attempts to wind down the war, especially if the facilities are under the control of another government. And as to individuals suspected of actual terrorist activity who were captured abroad, the administration has brought them directly to the United States for trial, avoiding any need to hold them in Guantánamo or subject itself to the restrictions on transfer to the United States for trial.

Therefore, the problem of indefinite detention may be limited to the prisoners at Guantánamo, at least during an Obama administration, assuming that withdrawal from Afghanistan proceeds as planned and barring new military operations. That is hardly news worth celebrating as scores of people, including many whom the government concedes are not terrorists, complete a full decade of detention without charge. And current practices provide precedent for a continued system of preventive detention well into the future.

428. *See* GUANTANAMO REVIEW TASK FORCE, *supra* note 183, at ii; *By the Numbers*, *supra* note 52 (46 detainees remaining at Guantánamo in this category).

429. Xenakis, *supra* note 360. The author is a retired brigadier general in the U.S. Army and psychiatrist who spent "hundreds of hours" with Khadr performing a psychiatric evaluation. *Id.*

430. Landler & Cooper, *supra* note 420. There have been some issues concerning these transfers, particularly in Afghanistan, because of human rights abuses. Alissa J. Rubin, *After a Reassessment, NATO Resumes Sending Detainees to Afghanistan Jails*, N.Y. TIMES INT'L, Feb. 16, 2012, at A10. NATO suspended transfers to Afghan force in fall 2011 after a United Nations report found routine human rights abuses and torture at Afghan jails; the Convention Against Torture prohibits transferring prisoners under these conditions. As U.S. troops are withdrawn, oversight of conditions in Afghanistan jails will become more difficult. *Id.*

Jennifer Daskal has argued persuasively from a human rights perspective that the current detainees are better off at Guantánamo than if the camp were closed and the detainees brought to the United States. Their conditions of confinement are more humane than they would be in a maximum security prison in the United States, and keeping them at Guantánamo preserves the issue of continued authority to detain for the time when hostilities in Afghanistan will have ceased and detention authority arguably expires.[431] This is a timely question, as Senator Dianne Feinstein has released a GAO report on the feasibility of moving the detainees to U.S. prisons and thus may intend to renew efforts to close Guantánamo.[432]

There remains the question, how long can indefinite detention extend, whether at Guantánamo, in Afghanistan or other foreign countries, or in the United States. The Supreme Court has said, as long as hostilities continue. Jeh Johnson, General Counsel of the Defense Department, gave a speech in November of 2012 in which he foresaw that the current war would end, not with a surrender or a negotiated peace, but when events reached a "tipping point" when al-Qaeda's capabilities are so degraded that it is "no longer able to attempt or launch a strategic attack against the United States" and thus is "effectively destroyed."[433] Noting that "in general," the military's authority to detain ends with the "cessation of active hostilities," Johnson said that "all I can say today is that we should look to conventional legal principles to supply the answer."[434]

The Johnson speech opens the door to a discussion of when detention authority might expire. Perhaps "conventional legal principles" would identify an earlier point. If the U.S. withdraws "combat forces" from Afghanistan in 2014 as planned, will hostilities there have ceased, even if there is still an insurgency against the Afghan government, and U.S. "advisers" are assisting Afghan forces? Will targeted drone attacks in various countries against people who have no Americans to shoot at be enough to constitute hostilities? More pointedly, can the United States continue to detain without charge people who were captured in

431. Jennifer Daskal, Op.-Ed., *Don't Close Guantánamo*, N.Y. TIMES, Jan. 11, 2013, at A23.

432. Press Release, Feinstein Releases GAO Report on U.S. Alternatives to Guantánamo Prison (Nov. 28, 2012), *available at* http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=617e2735-349d-447c-8fc6-78d2a3a00bc5; Carol Rosenberg, *GAO Report Says Moving Guantánamo Detainees to U.S. Prisons Is Feasible*, MIAMI HERALD (Nov. 29, 2012), http://www.miamiherald.com/2012/11/29/3119362/gao-report-says-moving-guantanamo.html; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-31, GUANTÁNAMO BAY DETAINEES: FACILITIES AND FACTORS FOR CONSIDERATION IF DETAINEES WERE BROUGHT TO THE UNITED STATES (Nov. 2012), *available at* http://www.gao.gov/products/GAO-13-31.

433. Jeh Johnson, Gen. Counsel, U.S. Dep't of Def., "The Conflict with Al-Qaeda and Its Affiliates: How Will It End?," Speech at Oxford Union (Nov. 30, 2012), *available at* http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/. Johnson emphasized that the U.S. is not at war with "an idea, a religion, or a tactic [terrorism]," but with "an organized, armed group." *Id.*

434. *Id.*

Afghanistan or adjacent areas of Pakistan in 2002 after combat operations cease there, so long as al-Qaeda or groups the government regards as its "affiliates" are operating somewhere in the world and remain capable of attempting to attack the United States?

The Supreme Court in *Hamdi* appeared to say that the relevant event is the cessation of hostilities in the geographic area or theater of war in which the detainee was captured. But Johnson noted that the United States continued to hold Nazi prisoners of war for a period of time after hostilities ceased, suggesting that detention might continue, at least for a time, after the conflict ends.[435] Others have suggested that authority to detain, even under the AUMF, might continue based on "hostilities" in places such as Somalia or Syria involving al-Qaeda "affiliates."[436] Would that be enough to bring such fighters to Guantánamo for indefinite detention? Would it be enough to justify continuing to hold Afghanis or Yemenis found to have "substantially supported" the Taliban in 2002? Perhaps if that day came, Congress would pass a new authorization for detention, as it nearly did in 2011 and 2012. It has been reported that the administration is considering requesting a new AUMF for Africa.[437] But might it be unconstitutional for Congress to authorize indefinite detention by the United States of noncitizens, captured abroad, who were not fighting Americans or planning attacks on the United States?

Eric Posner has argued for indefinitely extending the militarization of counterterrorism, stating that "al-Qaida affiliates will be around as long as radical Islam is," and that neither the President nor Congress will relinquish the use of military powers against terrorism.[438] In sum, "the war on terrorism will be ever with us" and "to protect the country . . . [t]hese changes will remain with us as long as the threat does."[439] By contrast, commentators such as Raha Wala, surveying the same post-war landscape, argue that it will become more difficult to support the notion that the United States is in an armed conflict against groups with primarily local objectives, and advocates a greater concentration on intelligence gathering and law enforcement.[440]

These are important and difficult issues that are critical not only to the conduct of national security policy, but also to our conception of the kind of nation we are. They are not only policy and philosophical ques-

435. *Id.*

436. *See* Jack Goldsmith, *Hard Issues Raised by Jeh Johnson's Speech*, LAWFARE (Dec. 1, 2012, 9:36 AM), http://www.lawfareblog.com/2012/12/hard-issues-raised-by-jeh-johnsons-speech/.

437. *See* Jack Goldsmith, *New AUMF for Africa?*, LAWFARE (Dec. 8, 2012), http://www.lawfareblog.com/2012/12/new-aumf-for-africa/.

438. Eric Posner, *The War on Terror Will Be Ever with Us*, SLATE (Dec. 11, 2012, 11:56 AM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/12/jeh_johnson_is_wrong_the_fight_with_al_qaida_continues.html.

439. *Id.*

440. Jack Goldsmith, *Raha Wala on Jeh Johnson's Oxford Speech*, LAWFARE (Dec. 7, 2012, 10:28 AM), http://www.lawfareblog.com/2012/12/raha-wala-on-jeh-johnsons-oxford-speech/.

tions, however, but legal ones as well. Sadly, it appears that the Supreme Court is unlikely to speak on these issues, even if they present themselves in a legal form. The Court appears to have reached a point where—whether because it thinks the D.C. Circuit's decisions are correct, because it is too fractured to be able to summon a majority, or it is experiencing executive detention fatigue—it is content to just let things stay as they are and is unwilling to grant certiorari in a detainee habeas case no matter what the issue or what the opinion says. It reminds me of the *New Yorker* cartoon in which the defense lawyer says to his incarcerated client words to the effect of, "Of course, if this doesn't work you'll be executed, but that's just the chance we'll have to take." A hundred or so Muslim men, many of whom have been cleared of any involvement in terrorism, having to spend decades imprisoned thousands of miles from home, with no contact with friends or families, is just the price we have to pay for the United States' botched response to 9/11.