

**CLOSING GITMO DUE TO THE EPIPHANY APPROACH TO
HABEAS CORPUS DURING THE MILITARY COMMISSION
CIRCUS**

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I. INTRODUCTION

In April 2013, with prisoner hunger strikes in Guantánamo Bay capturing global attention, President Obama urged Congress to eliminate the indeterminate detention facility and the extra-judicial tribunal system that were initiated during the Bush Administration.¹ The system evolved from such an erratic interpretation of war powers and was so ensconced in secrecy that it would take five years after detentions began for the Supreme Court to hold that the President did not possess the constitutional authority to unilaterally constitute the tribunals.²

Once tribunals were constituted with congressional authority, foreign governments, scholars, and nongovernmental organizations rebuked the detention and trial system.³ Procedural transgressions ensued because the Bush Administration issued orders that directed interrogation methods that threatened and coerced detainees,⁴

1. Charlie Savage, *Obama Renews Push to Close Prison in Cuba*, N.Y. TIMES, May 1, 2013, at A1.

2. See *infra* Part IV.F.3.

3. John B. Bellinger & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 221 (2011).

4. Katherine Gallagher, *Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture*, 7 J. INT'L CRIM. JUST. 1087, 1091 (2009) (noting that abuses “were the outgrowth, if not the direct and intended result, of US policies, which were reflected in . . . a series of legal memoranda related to detention, interrogation and torture.”); Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2353 (2006); Manfred Nowak, Moritz Birk & Tiphane Crittin, *The Obama Administration and Obligations Under the Convention Against Torture*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 33, 34, 38 (2011) (citing the “flawed ‘torture memos’” and remarking that Bush’s “notorious ‘war on terror’ . . .

imposed prolonged detention and denied individual liberty and human rights protections to foreign detainees without explanation and proof of guilt,⁵ and exploited rhetorical discourse of fear to avoid responsibility for the abusive institution.⁶ Professor Lobel wrote that “the [Bush] administration . . . never advanced any legitimate reason for why you need to try someone for a war crime with these ‘kangaroo’ courts where you can use secret evidence—evidence that’s been obtained by coercion.”⁷ Professor Catherine Powell explained that for seven years, the Bush Administration enacted directives that caused “a disingenuous interpretation of the laws of war, the denial of ordinary legal process, the violation of the most basic rights[,] and the use of unreliable evidence (including secret and coerced evidence).”⁸

undermined the absolute prohibition of torture more than any previous U.S. administration.”); Richard D. Rosen, *America’s Professional Military Ethic and the Treatment of Captured Enemy Combatants in the Global War on Terror*, 5 GEO. J.L. & PUB. POL’Y 113, 140 (2007) (contending that interrogation abuses “severed the moorings of military personnel to their fundamental values, causing what one commentator described as ‘military cultural degradation.’”).

5. THE COMM. ON FED. COURTS, THE INDEFINITE DETENTION OF “ENEMY COMBATANTS”: BALANCING DUE PROCESS AND NATIONAL SECURITY IN THE CONTEXT OF THE WAR ON TERROR 104–05 (2004), available at http://www.nycbar.org/pdf/report/1C_WL061.pdf; David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); John Ip, *Two Narratives of Torture*, 7 NW. U. J. INT’L HUM. RTS. 35, 71 (2009) (based on the example of the French acts in Algeria, noting how the public may be more apt to outcry against torture of nationals but will be less concerned with foreigners); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767 (2002); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273 (2003).

6. Irene Zubaida Khan, *The Rule of Law and the Politics of Fear: Human Rights in the Twenty-First Century*, 14 BUFF. HUM. RTS. L. REV. 1, 3 (2008).

7. Military Commissions Act of 2006, 10 U.S.C. § 949a (2006) (coerced confessions need not necessarily be excluded and “shall not be excluded” if it meets requirements of 10 U.S.C. § 948r (2006)); Brian J. Foley, *Criminal Law: Guantanamo and Beyond: Dangers of Rigging the Rules*, 97 CRIM. L. & CRIMINOLOGY 1009, 1055 (2007) (“Rigged military commissions are ultimately ‘show trials’ or ‘kangaroo courts’ . . .”); Lobel et al., *Presidential Power: Article and Poetry: A Forum on Presidential Authority*, 6 SEATTLE J. SOC. JUST. 23, 62 (2007); Catherine Powell, *Essay: Scholars’ Statement of Principles for the New President on U.S. Detention Policy: An Agenda for Change*, 47 COLUM. J. TRANSNAT’L L. 339, 345 (2009) (“President Obama should immediately suspend all military commission proceedings and then expeditiously dismantle the flawed military commissions and reject any effort to establish similarly flawed, specialized national security (or terror) courts.”); Ellen Yaroshefsky, *Zealous Lawyering Succeeds Against All Odds: Major Mori and the Legal Team for David Hicks at Guantánamo Bay*, 13 ROGER WILLIAMS U. L. REV. 469, 472 (2008) (From *Hamdan v. Rumsfeld*, the Court found that the commissions were fundamentally flawed and that there were “specific flaws of structure and procedure[,] includ[ing] admissibility of hearsay and other evidence gained through coercion, and the fact that the defendant could be barred from hearing all evidence against him or even be barred from his own trial.”).

8. Powell, *supra* note 7, at 340; see also Luis Enrique Cuervo, *The Alien Tort Statute, Corporate Accountability, and the New Lex Petrolea*, 19 TUL. ENVTL. L.J. 151, 161 (2006)

When the military commission system finally heard cases without constitutional challenges interrupting proceedings, only six Guantánamo detainees were convicted through February 2013.⁹

If there is an implicit inverse correlation between the level of collective security required to thwart an alleged peril and the need to temporarily upend human rights protections on detainees who purportedly pose the jeopardy, perhaps there were so few convictions because there was no reasonable interpretation of the balance between exigent circumstance and individual right protections. The Executive could derogate perspicuous law and dodge scrutiny of the tribunal system with national security secrecy and a lack of congressional checks with a unified government.¹⁰ The reactive American judiciary¹¹ may be the only effective institution that can progressively narrow the Executive's insistence of absolute prerogative as cases and controversies progress through the American court system. The judiciary may gradually rebuild human rights protections and reaffirm where they should have resided, but this juncture may only be reached long after the purported necessity expires.

To address why the detention and trial system at Guantánamo Bay should be abolished, this article reflects on the repercussions of the President's detentions, denial of habeas corpus, and guilt determinations. Part II considers detention in Afghanistan, which was

(“Today, for the President of the United States and his deputy secretary of defense, the priority of ‘world security’ has become defeating ‘forces of evil’ as if in Gotham City.”); Mogane Landel, *Proposals for a Truth Commission and Reparations Program for Victims of Torture by US Forces Since 9/11*, 16 ILSA INT’L & COMP L. 115, 116 (2009) (“[T]he George W. Bush presidency . . . has been characterized by violations of human rights such as the use of torture, detention without trial, renditions, and disappearances.”); Jackson Maogoto & Benedict Sheehy, *Torturing the Rule of Law: USA and the Post 9-11 Legal World*, 21 ST. JOHN’S J.L. COMM. 689, 725 (2007) (delineating how the Bush Administration made the United States a “rogue state in international law, defying international bodies, breaching international law conventions and their consequent duties, and even abandoning the Rule of Law.”).

9. JENNIFER K. ELSEA, COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT, 7-5700 R40932, at 10 (2013), available at <http://www.fas.org/sgp/crs/natsec/R40932.pdf>.

10. Robert Bejesky, *Pruning Non-Derogative Human Rights Violations into an Ephemeral Shame Sanction*, 58 LOY. L. REV. 821, 887–90 (2012) [hereinafter Bejesky, *Pruning*] (noting that congressional Republicans provided minimal scrutiny of the President on detention and interrogation matters); Robert Bejesky, *Political Penumbbras of Taxes and War Powers for the 2012 Election*, 14 LOY. J. PUB. INT. L. 1, 35–36 (2012) [hereinafter Bejesky, *Political Penumbbras*] (explaining how Republicans appeased the President through the end of 2006 on the Iraq War when most Americans wanted withdrawal).

11. Robert Bejesky, *The Evolution in and International Convergence of the Doctrine of Specific Performance in Three Types of States*, 13 IND. INT’L & COMP. L. REV. 353, 355–58 (2003).

the location from which most long-term detainees were screened for guilt and transported to Guantánamo Bay. Part III considers the Guantánamo Bay prison system and the process that was eventually instituted to charge some detainees with crimes. Part IV highlights how judicial process and protections for the accused can be subverted when the Executive utilizes national security classification prerogatives to disseminate unproven conclusions about threats, coerces alleged evidence of guilt from detainees, and imposes a tribunal system that reluctantly grants only minimum rights. What unfolds is a separation of powers case study depicting an opposition endeavoring to uphold the integrity of courts and substantive human rights for the accused and a tussle against the heuristics accompanying unchecked political initiatives.

II. DETENTION IN AFGHANISTAN

Congress activates and specifies the conditions for the Commander in Chief's authority under the U.S. Constitution.¹² Congress adopted the Authorization for Use of Military Force (AUMF) on September 18, 2001, to grant the President with the authority to use force against individuals, groups, and states involved with the 9/11 attacks and to prevent abettors to the attacks from committing further acts of terrorism.¹³ One week after Congress passed the AUMF, President George W. Bush addressed Congress and stated: "From this day forward any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime."¹⁴ Based on the congressional grant of authority in the

12. Exceptions include the President's preclusive power to act in imminent defense of the nation and possibly when there is only low-intensity military conflict or strikes from a distance. Robert Bejesky, *War Powers Pursuant to False Perceptions and Asymmetric Information in the "Zone of Twilight,"* 44 ST. MARY'S L.J. 1, 28–36 (2012) [hereinafter Bejesky, *War Powers*]; Robert Bejesky, *Precedent Supporting the Constitutionality of Section 5(b) of the War Powers Resolution*, 49 WILLAMETTE L. REV. 1, 29–30 (2012) [hereinafter Bejesky, *Precedent Supporting*].

13. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (Congress authorizing the President to "use all necessary and appropriate forces against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."); Robert Bejesky, *Cognitive Foreign Policy: Linking Al Qaeda and Iraq*, 56 HOW. L.J. 1, 8–15 (2012) [hereinafter Bejesky, *CFP*] (noting how the AUMF was broadly interpreted).

14. Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1349 (Sept. 20,

AUMF, Bush issued a military order, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, on November 13, 2001.¹⁵ The order permitted the Secretary of Defense to detain any individual who the Administration believed was a member of al-Qaeda, engaged in terrorism against the U.S., or harbored individuals involved in terrorism.¹⁶

Presuming that the culprits who hatched the plan for the 9/11 attacks were present in Afghanistan, the U.S. and its allies attacked Afghanistan, captured the Bagram airfield,¹⁷ and began to detain suspected members of al-Qaeda, the Taliban, and combatants.¹⁸ The Executive assumed *carte blanche* to detain combatants and alleged terrorists.¹⁹ Several weeks into the invasion, the United Nations' Working Group on Arbitrary Detention stated that the Bush Administration should permit inspection of detention sites, provide details about interrogation practices, and grant prisoners a fair trial because prisoners were being held indefinitely, incommunicado, and without charge or determination of guilt or POW status, but the Bush administration did not respond.²⁰ Further urgency arose after media

2001), available at <http://www.gpo.gov/fdsys/pkg/WCPD-2001-09-24/pdf/WCPD-2001-09-24-Pg1347.pdf>.

15. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001).

16. *Id.*

17. Michael R. Gordon, *Securing Base, U.S. Makes Its Brawn Blend In*, N.Y. TIMES, Dec. 3, 2001, at B1.

18. Tung Yin, *Ending the War on Terrorism Bone Terrorist at a Time a Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 159 (2005) (noting that after the invasion of Afghanistan, approximately 10,000 alleged al-Qaeda or Taliban fighters were quickly captured, but most were either detained in Afghanistan or released).

19. The Comm. on Int'l Human Rights et al., *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"*, 60 THE RECORD 13, 25 (2005) (citing Pentagon, Working Group Report on Detainee Interrogation in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Apr. 4, 2003)) (calling detainees subjects of a "Global War on Terrorism" that invoked the President's Commander in Chief authority and specifying that "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."); Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SECURITY L. POL'Y 343, 349 (2010) ("[T]errorist suspects would be tried before military tribunals . . . irrespective of where the suspects were captured. Detention would be based on a person's associations."). Hundreds of alleged terrorists were also arrested inside the U.S. under the Patriot Act. Robert Bejesky, *A Rational Choice Reflection on the Balance Among Individual Rights, Collective Security, and Threat Portrayals Between 9/11 and the Invasion of Iraq*, 18 BARRY L. REV. 31, 34–36, 38–39, 43–47 (2012) [hereinafter Bejesky, *Rational Choice*].

20. Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 321 (2004).

sources began to describe detainee abuses at Bagram prison camp.²¹

Detainees were shackled in chains, shouted at during interrogations,²² told their families would be harmed if cooperation was not forthcoming, isolated in pitch-black cells continuously for several days, beaten and threatened with weapons,²³ placed in painful stress positions for prolonged periods, held in black hoods, deprived of sleep,²⁴ sexually humiliated, stripped naked, kept in extreme temperatures, denied food and water, and threatened with dogs.²⁵ To respond to unruly detainees, an Extreme Reaction Force, comprised of eight or nine guards, was constituted to rush cells, spray prisoners with chemical and pepper sprays, punch and kick detainees, and chain captives down.²⁶

In May 2003, the International Committee of the Red Cross (ICRC) reported over two hundred allegations of prisoner abuse to American authorities, and dozens of other reports were issued in the following months.²⁷ Assessing the psychological impact of the

21. See, e.g., Dana Priest & Barton Gellman, *US Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1; *Enduring Freedom: Abuses by US Forces in Afghanistan*, HUMAN RIGHTS WATCH (Mar. 8, 2004), <http://www.hrw.org/sites/default/files/reports/afghanistan0304.pdf>; Carlotta Gall, *U.S. Examines Death of Afghan in Custody / Pathologist Described It as a Homicide*, N.Y. TIMES (Mar. 4, 2003), <http://www.sfgate.com/news/article/U-S-examines-death-of-Afghan-in-custody-2666028.php>; Kathy Gannon, *Prisoners Released from Bagram Say Forced to Strip Naked, Deprived of Sleep, Ordered to Stand for Hours*, ASSOCIATED PRESS (Mar. 14, 2003), http://www.resonant.org/news/2003/2003.03.15-afghanistan_prisoner_conditions-story.news.yahoo.com-ap.html; Douglas Jehl & David Roche, *Afghan Deaths Linked to Unit at Iraq Prison*, N.Y. TIMES (May 24, 2004), <http://www.nytimes.com/2004/05/24/world/the-struggle-for-iraq-abuse-afghan-deaths-linked-to-unit-at-iraq-prison.html?pagewanted=all&src=pm>.

22. ALFRED W. MCCOY, *A QUESTION OF TORTURE* 125 (2006).

23. HUMAN RIGHTS WATCH, *THE ROAD TO ABU GHRAIB* 22, 26, 31 (2004), available at <http://www.hrw.org/sites/default/files/reports/usa0604.pdf>.

24. Priest & Gellman, *supra* note 21.

25. AM. CIVIL LIBERTIES UNION [ACLU], *ENDURING ABUSE: TORTURE AND CRUEL TREATMENT BY THE UNITED STATES AT HOME AND ABROAD 1* (2006), available at <http://www.aclu.org/national-security/enduring-abuse-torture-and-cruel-treatment-united-states-home-and-abroad-executive> (reporting that “detainees have been beaten; forced into painful stress positions; threatened with death; sexually humiliated; subjected to racial and religious insults; stripped naked; hooded and blindfolded; exposed to extreme heat and cold; denied food and water; deprived of sleep; isolated for prolonged periods; subjected to mock executions; and intimidated by dogs.”); Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge: Abu Ghraib Detainees’ Statements Describe Sexual Humiliation and Savage Beatings*, WASH. POST, May 21, 2004, at A1.

26. HUMAN RIGHTS WATCH, *supra* note 21, at 18; David Rose, *They Tied Me Up Like a Beast and Began Kicking Me*, GUARDIAN (May 15, 2004), <http://www.guardian.co.uk/world/2004/may/16/terrorism.guantanamo>.

27. HUMAN RIGHTS WATCH, *supra* note 23, at 30.

conditions of detention and interrogation, the ICRC medical staff examined conditions of detention and interrogation and discovered that prisoners were suffering from “memory problems, verbal expression difficulties, incoherent speech, acute anxiety reactions . . . and suicidal tendencies.”²⁸ A military intelligence officer informed the ICRC that the interrogation tactics were just “part of the process” and Army officials curtailed the ICRC’s inspections.²⁹

Released detainees have described the abuse. Noor Aghah explained: “Every minute in Gardez [prison] they were beating us. Mostly they kick[ed] me.”³⁰ Tarek Dergoul revealed that he was stripped naked, photographed, witnessed other detainees being beaten for failing to maintain stress positions, interrogated on more than twenty occasions, and was repeatedly and wrongly accused of being an al-Qaeda member.³¹ The CIA brought Omar al-Faruq, who was called Southeast Asia’s foremost al-Qaeda member, to Bagram base where he was “left naked” for three months with his “hands and feet bound,” and subjected to sleep deprivation in a pitch black room with temperatures that fluctuated from 10 to 100 degrees.³² One anonymous Western intelligence official maintained that these conditions were “not quite torture, but were about as close as you can get.”³³

Prisoners were found dead in their cells. In December 2002, a prisoner named Mullah Habibullah died of “blunt force trauma.”³⁴ In another case, the Pentagon initially announced that a 22-year-old named Dilawar had died of a heart attack, but this claim was false.³⁵

28. MCCOY, *supra* note 22, at 141 (citing Report of the Int’l Comm. of the Red Cross 13, 15, 17–18 (Feb. 2004)) (ICRC investigations conducted in Oct. 2003).

29. HUMAN RIGHTS WATCH, *supra* note 23, at 31–32; Douglas Jehl & Eric Schmitt, *Army Tried to Limit Abu Ghraib Access*, N.Y. TIMES, May 20, 2004, at A1.

30. Duncan Campbell & Suzanne Goldenberg, *They Said This is America . . . If a Soldier Orders You to Take Off Your Clothes, You Must Obey*, GUARDIAN (June 22, 2004), <http://www.guardian.co.uk/world/2004/jun/23/usa.afghanistan>.

31. Jeannine Bell, “*Behind This Mortal Bone*”: *The (In)Effectiveness of Torture*, 83 IND. L.J. 339, 347–48 (2008).

32. MCCOY, *supra* note 22, at 120–21.

33. *Id.*

34. Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, Torture*, 81 IND. L.J. 1255, 1265 (2006); Tim Golden, *Army Faltered in Investigating Detainee Abuse*, N.Y. TIMES (May 22, 2005), <http://www.nytimes.com/2005/05/22/international/asia/22abuse.html?pagewanted=all>.

35. HUMAN RIGHTS WATCH, *supra* note 23, at 213; *see also* Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths*, N.Y. TIMES (May 20, 2005), http://www.nytimes.com/2005/05/20/international/asia/20abuse.html?pagewanted=all&_r=0.

A detainee named Parkhudin stated: “They were putting a mask over our heads, they were beating us in Bagram. I think Dilawar died because he couldn’t breathe. For me, it was very difficult to breathe.”³⁶ A later investigation revealed that interrogators killed Dilawar over a five-day period by “destroying his leg muscle tissue with repeated unlawful knee strikes.”³⁷ In March 2003, Jamal Naseer was interrogated and later found beaten to death, but the military team involved originally reported that Naseer died of an infection.³⁸

David A. Passaro, a CIA contract employee and a former Army Special Forces medic who would conduct interrogations,³⁹ beat Abdul Wali to death in June 2003⁴⁰ and became the first U.S. civilian indicted in U.S. federal court for abusing a detainee.⁴¹ Passaro was convicted of assault and sentenced to 100 months in prison.⁴²

The US military death autopsy report indicated that Dilawar died from “blunt force injuries to lower extremities.” HUMAN RIGHTS WATCH, *supra* note 21, at 22. Others have cited a larger pattern of falsified death certificates. Stephen P. Marks, *Branding the “War on Terrorism”: Is There a “New Paradigm” of International Law?*, 14 MICH. ST. J. INT’L L. 71, 111 (2006). Charges were brought two years later against Sergeant James P. Boland, and it was recommended that charges be brought against two-dozen others of the 519th Military Intelligence Battalion, who were reportedly also involved in the murder. MCCOY, *supra* note 22, at 126; *see also* David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 60 (2006).

36. Carlotta Gall & David Rohde, *New Charges Raise Questions on Abuse at Afghan Prisons*, N.Y. TIMES (Sept. 17, 2004), http://www.nytimes.com/2004/09/17/international/asia/17afghan.html?_r=0 (reporting that Parkhudin, a 26-year-old farmer and former soldier, explained that he was chained to a ceiling for eight days, hooded, and placed in isolation).

37. Douglas Jehl, *Army Details Scale of Abuse of Prisoners in Afghan Jail*, N.Y. TIMES (Mar. 12, 2005), <http://www.nytimes.com/2005/03/12/politics/12detain.html> (noting an Army medical examiner’s report stating that if Dilawar had survived, “both legs would have had to be amputated.”).

38. Craig Pyles & Kevin Sack, *Two Deaths Were a ‘Clue That Something’s Wrong,’* L.A. TIMES (Sept. 25, 2006), <http://articles.latimes.com/2006/sep/25/nation/na-torture25>.

39. Gregory P. Bailey, Note, *United States v. Passaro: Exercising Extraterritorial Jurisdiction Over Non-Defense Department Government Contractors Committing Crimes Overseas Under the Special Maritime and Territorial Jurisdiction of the United States*, 58 CATH. U. L. REV. 1143, 1157 (2009).

40. MCCOY, *supra* note 22, at 147.

41. Farah Stockman, *CIA Contractor is Charged in Beating of Afghan Detainee*, BOSTON GLOBE, June 18, 2004, at A1.

42. Bailey, *supra* note 39, at 1157–59 n.102 (noting that the prosecution presented evidence that Passaro had beaten Wali so badly for two days that Wali “begged the soldiers to shoot him in the head.”); E.L. Gaston, Note, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT’L L.J. 221, 229 (2008); Margaret Prystowsky, Note, *The Constitutionality of Court-Martialing Civilian Contractors in Iraq*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 45, 55 (2008). It appears that other CIA interrogators mistreated detainees; *see generally* Scott Shane, *No Charges File on Harsh Tactics Used by the CIA*, N.Y. TIMES (Aug. 30, 2012), <http://www.nyti>

Embracing the utility of interrogations, Michael Scheuer, a retired CIA officer, stated: “All Americans owe a debt of gratitude to the men and women of the agency who executed these presidentially . . . approved operations” and CIA agents now faced being “abandoned and prosecuted when the policy makers refuse to defend their own decisions.”⁴³ Other former detainees described how they had been severely beaten at around the same time.⁴⁴

From the time that the Bagram prison opened and through June 2004, Lt. Gen. David Barno estimated that over two thousand individuals had been detained, and that the facility presently held about four hundred prisoners.⁴⁵ On the day that DePaul University Law Professor M. Cherif Bassiouni, who was also acting as the UN Human Rights Commission expert for Afghanistan, produced a report stating that the American military in Afghanistan violated criminal law protections “by engaging in arbitrary arrests” and that U.S. interrogators were “committing abusive practices, including torture,” Bassiouni was dismissed as the UN Human Rights Commission expert for Afghanistan.⁴⁶ For guilt determinations in Afghanistan, it was later revealed that Detainee Review Boards, with shrouded procedures and standards for detention,⁴⁷ operated for several years after summer 2002,⁴⁸ but several hundred prisoners, some under the

mes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html?pagewanted=all&r=0. But, Passaro’s persona was marked in the media as a bad CIA hire. Bailey, *supra* note 39, at 1157 (noting that before Passaro became a CIA contractor he had a history of “improper official behavior” and was discharged from a Connecticut police department).

43. MCCOY, *supra* note 22, at 170.

44. HUMAN RIGHTS WATCH, *supra* note 23, at 19–24.

45. Campbell & Goldenberg, *supra* note 30.

46. MCCOY, *supra* note 22, at 176 (citing a report on the situation in Afghanistan by the UN human rights expert). See generally U.N. Comm’n on Human Rights, *Advisory Services and Technical Cooperation in the Field of Human Rights: Report of the Independent Expert on the Situation of Human Rights in Afghanistan, M. Cherif Bassiouni*, http://www.aopnews.com/bassiouni_un_hr_report.pdf; United Nations Economic and Social Council, E/CN. 4/2005/122 (Mar. 11, 2005).

47. Ashley S. Deeks, *Security Detention: The International Legal Framework: Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT’L L. 403, 431 (2009); see also Baher Azmy, *Executive Detention*, Boumediene, and the New Common Law of Habeas, 95 IOWA L. REV. 445, 489–90 (2010) (noting that detainees reportedly were not given counsel or representation, could not access the evidence that purportedly justified detention, and were unable to present rebuttal evidence); Ernesto Hernandez-Lopez, *Guantánamo as a “Legal Black Hole”: A Base for Expanding Space, Markets, and Culture*, 45 U.S.F. L. REV. 141, 143 (2010) (characterizing the Bagram detention facility was labeled a legal “black hole”).

48. Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, 2010 ARMY LAW 9, 16 (2010).

age of sixteen, are still being held at Bagram without a reasonable mechanism to challenge detentions.⁴⁹ A different locale of detention emerged.

III. GUANTÁNAMO BAY

A. *Advantages of Moving Detainees to Guantánamo Bay*

Rather than arranging to imprison several hundred more captives in facilities in Afghanistan or constructing a new facility, the Bush Administration selected a few hundred detainees from Bagram prison, labeled them “unlawful combatants,” and transported them across the Atlantic Ocean to Guantánamo Bay, Cuba.⁵⁰ The first detainees arrived in early January 2002.⁵¹ Secretary of Defense Donald Rumsfeld affirmed that detainees were brought to Guantánamo Bay because it was the “least-worst place we could have selected” after prisoners had been packed onto Navy ships with nowhere to go.⁵² However, a boon to transferring detainees to Guantánamo Bay derived from its “ambiguous legal status”⁵³ in a foreign country where the U.S. had imposed a lease against the will of the Cuban government.⁵⁴ Habeas jurisdiction is generally unavailable when an enemy is captured and held “beyond the territorial jurisdiction of any court of the United States”⁵⁵ and the locale may have even made the Geneva and Hague Conventions less conspicuously binding and the denial of POW status less troublesome.⁵⁶ There may have also been

49. Hernandez-Lopez, *supra* note 47, at 179 n.214, 180 (noting that 645 detainees were held at Bagram as of June 2010).

50. *Secretary Rumsfeld Media Availability after Visiting Camp X-Ray*, U.S. DEP’T OF DEF. (Jan. 27, 2002), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2348> (noting Rumsfeld’s statement that Bagram and Kandahar are locations where the military “sort[s] through these people” to choose transferees for Guantánamo).

51. Seth F. Kreimer, *Rays of Sunlight in a Shadow “War”: FOIA, The Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1164 (2007); see also Peter Jan Honigsberg, *Inside Guantanamo*, 10 NEV. L.J. 82, 82 (2010).

52. MCCOY, *supra* note 22, at 114.

53. Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 306 (2008).

54. *Rasul v. Bush*, 215 F. Supp. 2d 55, 71–73 (D.D.C. 2002) (explaining that since the court considers the U.S. a lessee of the property at Guantánamo Bay, detainees have migrant status).

55. *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950) (recognizing that there is no habeas jurisdiction when an enemy’s capture occurred “beyond the territorial jurisdiction of any court of the United States.”).

56. *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against*

more subtle advantages for the Bush Administration.

These detainees were removed from a war zone, where they might reasonably have been designated POWs if they had openly engaged in military combat, but they were instead vividly portrayed in the media wearing orange suits and shackles at Camp X-Ray, which was an ad hoc facility on Guantánamo Bay, constructed of steel-mesh cages.⁵⁷ The orange-suited detainees may have taken attention off of Afghanistan and the mission that evolved from attacking the country because the Taliban failed to turn over Osama bin Laden and members of al-Qaeda for apparent connections to 9/11 to a broader objective of targeting individuals who could be associated with al-Qaeda or the Taliban or were opposed to occupation.⁵⁸ The detainees may have provided a more palatable justification to employ condemned interrogation methods⁵⁹ if the high-profile and select location further imparted an impression of impending calamity without the administration's use of extraordinary

Terrorism, 66 Fed. Reg. 57,833, 57,833–57,834 (Nov. 13, 2001) (affirming that the target of the Order was a response to “attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States,” denying that it was “practicable” to conduct criminal trials in the U.S., targeting individuals involved in terrorism, and affirming that the Secretary of Defense can choose a detention location outside the U.S.). However, individuals were captured in a war zone and removed from that war zone, and the target of terrorism was commingled with military combatants who were denied a lawful POW combatant status. *See infra* Part IV.B. The assumed status of the accused was the alleged justification for transporting individuals to Guantánamo Bay, a place where law was uncertain, and the label “enemy combatant” served to bypass obligations to provide humanitarian and human rights to the accused. *See infra* Part IV.F.1.

57. PETER IRONS, WAR POWERS 248 (2005) (noting that they were “exposed to searing heat, forced by shackles to crawl on their knees, their heads covered by hoods or helmets that blocked out all light.”); Amann, *supra* note 20, at 271; Leila Nadya Sadat, Symposium: “Torture and the War on Terror”: *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT’L L. 309, 311 (2006).

58. Stephen R. Shalom, *Far From Infinite Justice: Just War Theory and Operation Enduring Freedom*, 26 ARIZ. J. INT’L & COMP. L. 623, 623 (2009) (reporting that the Pentagon initially called the invasion “Operation Infinite Justice” but the name was changed to “Operation Enduring Freedom” because the former was too inflammatory); *Id.* at 626–27 (quoting President Bush before a joint session of Congress) (“[The Taliban must] [d]eliver to United States authorities all the leaders of Al Qaeda . . . or share in their fate.”). As for the evidence of guilt, Secretary of State Powell promised to produce a white paper to connect bin Laden to the events on 9/11, but no such documents was ever provided; and the occupation remained even though al-Qaeda members may have fled before the attack. *Id.* at 631–32.

59. Bejesky, *Pruning*, *supra* note 10, at 823–27 (quoting government officials, scholars, and nongovernmental organizations); *see generally* Bejesky, *CFP*, *supra* note 13, at 21–23 (emphasizing the emotive cognitive reaction when there are purported connections with perpetrators of 9/11).

measures.⁶⁰ Moving detainees to Guantánamo Bay may also have partially diverted attention from the hundreds of detainees held at Bagram prison, the CIA's secret locations,⁶¹ and perhaps even the abundantly more serious act of invading Iraq, which was a war that was unapproved by the Security Council, called illegal,⁶² based on falsities, and controversial to Iraqis.⁶³ Ironically, in retrospect, it is unclear why Gitmo detainees were notably guilty or dangerous, why they were subjected to rigorous interrogation methods, or why detainees were processed through an incarceration system that lacked legal recourse.

B. Standard for Detention and Guilt

1. "Suspected" Terrorists

By mid-2004, the prison at Guantánamo Bay had held over seven hundred people—some of whom were as young as thirteen years of age and others who were elderly—for over two years without due process, access to an attorney, or having formal charges brought against them.⁶⁴ By mid-2005, an estimated 234 detainees had been

60. Bejesky, *Rational Choice*, *supra* note 19, at 36–44 (noting that after 9/11, government sources released information of terror threats, hidden sleeper cells, and terrorists lurking everywhere, and the media amplified the discourse).

61. Diane Marie Amann, *Application of the Constitution to Guantanamo Bay: Abu Ghraib*, 153 U. PA. L. REV. 2085, 2088–89 (2005).

62. Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof*, 38 SYRACUSE J. INT'L L. & COM. 295, 347–50 (2011); Scott Shane, *Torture Versus War*, N.Y. TIMES, Apr. 19, 2009, at WK1 (“What is it about the terrible intimacy of torture that so disturbs and captivates the public? Why has torture been singled out for special condemnation in the law of war, when war brings death and suffering on a scale that dwarfs the torture chamber?”).

63. Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 33–34, 105 (2011) [hereinafter, Bejesky, *Politico*] (noting that the Bush Administration made hundreds of false statements prior to invasion about peril from WMDs that ultimately did not exist, and polls between 2003 and 2009 consistently affirmed that approximately 80% of Iraqis wanted the occupation to end); Robert Bejesky, *Political Penumbras*, *supra* note 10, at 1 (reporting that after the invasion of Iraq, an estimated 60,000 Iraqis per month fled their homes and became refugees and there were several hundred thousand deaths).

64. JAMES CARROLL, CRUSADE: CHRONICLES OF AN UNJUST WAR 33 (2004); IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND 86, 93–94 (Jeremy Brecher et al. eds., 2005); Khan, *supra* note 6, at 4; Eric K. Yamamoto, *Judgments Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties Cases on Their Sixtieth Anniversary: White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 LAW & CONTEMP. PROBS. 285, 315 (2005); *Afghans Tell of Guantanamo Ordeal*, BBC (Oct. 29, 2002), http://news.bbc.co.uk/2/hi/south_asia/2371349.stm; John Steyn, *Guantánamo: A Monstrous Failure of Justice*, INT'L

released, 65 of those released were transferred to other governments,⁶⁵ and more individuals were brought to Guantánamo, keeping the prison population at around six hundred.⁶⁶ There were 250 prisoners held at Guantánamo when President Bush exited office and 215 at the end of President Obama's first year.⁶⁷

From the beginning, the justification for opening this special incarceration facility and jailing hundreds of prisoners was specified in the Bush Administration's public statements. Several days after the first detainees arrived, Rumsfeld called them "very tough, hardcore, well-trained terrorists."⁶⁸ Two days later, Rumsfeld stated that by confining these "committed terrorists" in detention facilities, "[w]e are keeping them off the street and out of the airlines and out of nuclear plants and out of ports across this country and across other countries."⁶⁹ One week later, Rumsfeld called prisoners at Guantánamo Bay "among the most dangerous, best-trained, vicious killers on the face of the earth."⁷⁰ They are the "worst of the worst."⁷¹ Vice President Richard Cheney explained: "They are the worst of a very bad lot. . . . They are very dangerous. They are devoted to killing millions of Americans, innocent Americans, if they can."⁷²

HER. TRIB. (Nov. 28, 2003), <http://www.nytimes.com/2003/1/28/opinion/28iht-a6.html?pagewanted=all>; *U.S.: Guantanamo Kids at Risk*, HUMAN RIGHTS WATCH (Apr. 24, 2003), <http://www.hrw.org/news/2003/04/23/us-guantanamo-kids-risk>.

65. John R. Crook, *United States Confronts Issues Related to Detentions of Thousands of Terrorism Suspects*, 99 AM. J. INT'L L. 707, 709 (2005).

66. Stephen Graham, *US Said to Seek Fewer Prisoners*, ASSOCIATED PRESS (Jan. 4, 2005), http://www.boston.com/news/world/middleeast/articles/2005/01/04/us_said_to_seek_fewer_prisoners/?camp=pm (noting that the US military purportedly took fewer prisoners than expected to avoid harsh complaints); *The Guantánamo Files*, N.Y. TIMES (Apr. 24, 2011), <http://www.nytimes.com/interactive/2011/04/24/world/middleeast/took-up-arms-graphic.html#nyt-g-leftcol>.

67. Hernandez-Lopez, *supra* note 47, at 170 (noting that several months after President Obama ordered the base to close, 240 detainees remained); Judith Resnick, *Detention, The War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 619 (2010).

68. *Secretary Rumsfeld Media Stakeout at NBC*, U.S. DEP'T OF DEF. (Jan. 20, 2002), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2243>.

69. Andy Worthington, *Seven Years of Guantanamo, Seven Years of Torture and Lies*, HUFF. POST (Jan. 11, 2009), http://www.huffingtonpost.com/andy-worthington/seven-years-of-guantanamo_b_156903.html.

70. *Id.*

71. MCCOY, *supra* note 22, at 214; Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499, 560–61 (2008).

72. *Rumsfeld: Afghan Detainees at Gitmo Bay Will Not Be Granted POW Status*, FOX NEWS (Jan. 28, 2002), <http://www.foxnews.com/story/2002/01/28/rumsfeld-afghan-detainees-at-gitmo-bay-will-not-be-granted-pow-status/>.

Bush affirmed: “These are killers. These are terrorists.”⁷³ Nearly two years after the first prisoners arrived, White House Press Secretary McClellan asserted that “these individuals are terrorists or supporters of terrorism.”⁷⁴ These statements were unquestionably unproven.

2. The Identity of Detainees and the Right to Detain

The criteria for selecting which captives in Afghanistan would be transported to Guantánamo Bay, and their identities remained classified⁷⁵ until May 2006, which was after the *Associated Press* filed Freedom of Information Act lawsuits to obtain information on tribunal proceedings and detainee treatment.⁷⁶ Commentary to the Additional Protocols of the Geneva Convention and human rights treaties reference guideline justifications for detainment and general prohibitions,⁷⁷ but the Bush Administration asserted expansive war powers and labeled detainees “unlawful enemy combatants,” instead of POWs.⁷⁸ This type of detainee classification provided only basic protections, set minimal criteria to detain, did not require proof of guilt or establish what made particular detainees a threat, and did not

73. *Bush: Gitmo Bay Captives are ‘Killers,’* ASSOCIATED PRESS (Jan. 29, 2002), <http://www.foxnews.com/story/0,2933,44169,00.html>.

74. *US Defends Guantanamo Policy*, BBC (Oct. 10, 2003), <http://news.bbc.co.uk/2/hi/americas/3182346.stm>.

75. David E. Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 GEO. J. INT’L L. 61, 70 (2005).

76. Kreimer, *supra* note 51, at 1165–68 (noting that the Pentagon responded to the November 2004 and January 2005 lawsuits by contending that the prisoner’s identity and related information would endanger the detainee’s families and violate privacy rights of detainees. But when the prisoners were asked whether they wanted their identities released, only 17 out of 317 objected).

77. Int’l Comm. of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to The Geneva Convention of 12 August 1949* (June 8, 1977), available at <http://www.icrc.org/ihl.nsf/COM/470-750096?OpenDocument> (“Internees will therefore generally be informed of the reason for such measures in broad terms, such as legitimate suspicion, precaution, unpatriotic attitude, nationality, origin, etc. . . .”). Human rights treaties generally mandate that the presumption of innocence be upheld when liberty is deprived. UN Human Rights Comm. (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, Aug. 31, 2001, CCPR/C/21/Rev.1/Add.11, available at <http://www.refworld.org/docid/453883fd1f.html> (stating that to derogate from human rights standards under the Covenant there must be a “public emergency which threatens the life of the nation, as required by article 4, paragraph 1.”).

78. Reply Brief of Petitioner at 13, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 871163 (noting the Bush Administration’s contention that “the capture and detention of enemy combatants is an inherent part of waging war, and the President’s decision whether to detain a person as an enemy combatant is a basic exercise of his discretion to determine the level of force needed to prosecute the conflict.”).

provide procedures for detainees to challenge their detention.⁷⁹

Detainees were not informed why they were labeled unlawful combatants and at times admitted to any accusations to obtain better treatment.⁸⁰ Generally, capturing a combatant in battle would naturally be a reason to justify detention until hostilities ceased. But the process of detaining and releasing captives became so erratic that prison authorities were discharging prisoners and transporting them back to Afghanistan or other countries only after they signed statements attesting that they had been captured in battle, which was frequently untrue.⁸¹ The Executive also released “Guantánamo prisoners on an ad hoc basis, seemingly at the whim of the executive.”⁸² Professor Peter Jan Honigsberg wrote that “prisoners were much more likely to be released because of pressure from their home countries, rather than because of ARB [Administrative Review Board] decisions.”⁸³

79. Powell, *supra* note 7, at 341; Tim Golden & Don Van Natta Jr., *The Reach of War: U.S. Said to Overstate Value of Guantánamo Detainees*, N.Y. TIMES (June 21, 2004), <http://www.nytimes.com/2004/06/21/world/the-reach-of-war-us-said-to-overstate-value-of-guantanamo-detainees.html?pagewanted=all&src=pm> (noting that Pentagon and U.S. intelligence officials acknowledged that there was no effective screening process for detention at Guantánamo Bay and that the identities of those apprehended and transported to Guantánamo Bay were not all known); David Rose, *The Real Truth About Camp Delta*, GUARDIAN (Oct. 2, 2004), <http://www.guardian.co.uk/world/2004/oct/03/bookextracts.usa> (statement of four intelligence officials) (“I’m unaware of any important information in my field that’s come from Gitmo.”).

80. Rhuhel Ahmed et al., *Composite Statement: Detention in Afghanistan and Guantanamo Bay: Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed*, CTR. FOR CONSTITUTIONAL RIGHTS 154, 156 (July 26, 2004), http://ccrjustice.org/files/report_tiptonThree.pdf (noting that released detainees explained: “None of us were ever told why we were in Cuba other than we had been detained in Afghanistan . . . [as] ‘unlawful combatants.’”); Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES (Oct. 24, 2004), <http://www.nytimes.com/2004/10/24/international/worldspecial2/24gitmo.html?pagewanted=1> (reporting that the Pentagon required military intelligence officers to have intelligence officers fill out one-page forms to describe each detainee’s offenses).

81. Ahmed, *supra* note 80, at 80 (stating that Asif and Rhuhel were told “just say you’re a fighter and you’ll go home.”); Ahmed, *supra* note 80, at 81 (“The trouble is once you admitted you were a fighter they then wanted to get you up to the next stage up the chart. So even if you said that you were a fighter to get them off your back, that wouldn’t stop them.”); Duncan Campbell & Suzanne Goldenberg, *Afghan Detainees Routinely Tortured and Humiliated by US Troops*, GUARDIAN (June 23, 2004), <http://www.guardian.co.uk/world/2004/jun/23/usa.afghanistan3> (statement of a former detainee) (“At the end of my time in Guantánamo, I had to sign a paper saying I had been captured in battle, which was not true They told me I would have to spend the rest of my life in Guantánamo if I did not sign it, so I did.”).

82. Maogoto & Sheehy, *supra* note 8, at 704.

83. Honigsberg, *supra* note 51, at 113–14 (noting that Saudi Arabia held a favorable relationship with the U.S. and 121 out of 140 Saudi prisoners were released but only 13 out of

After hundreds of individuals were captured in Afghanistan, transported across the Atlantic Ocean, and imprisoned with little or no information regarding their identity or guilt, not surprisingly it was later revealed that the vast majority of detainees had been innocent civilians.⁸⁴ Using the Pentagon's records, in February 2006, Seton Hall Law School reported that 86% of the prisoners brought to Camp X-Ray were arrested by Afghani and Pakistani mercenaries and not by American forces or the CIA.⁸⁵ Professor Mark P. Denbeaux explained that 92% of those held in Guantánamo were not captured in battle and 60% were not even alleged to be al-Qaeda or Taliban members.⁸⁶ Many captives were rounded up after the Pentagon "air dropped leaflets in Afghanistan inviting the people to 'inform the intelligence service . . . and get the big prize.'" ⁸⁷ U.S. taxpayers funded somewhere between \$3,000 and \$25,000 for each individual captured⁸⁸ in a country where the per capita income is several

111 Yemeni detainees were released from Guantánamo).

84. IRONS, *supra* note 57, at 248; Melissa A. Jamison, *Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of Children*, 9 U.C. DAVIS J. JUV. L. & POL'Y 127 (2005). A CIA analyst interviewed dozens of Guantánamo detainees and stated that "more than half the people there didn't belong there." SEYMOUR M. HERSH, CHAIN OF COMMAND 2 (2004) ("He found people lying in their own feces, including two captives, perhaps in their eighties, who were clearly suffering from dementia.").

85. MCCOY, *supra* note 22, at 214; Adam Curtis, *The Power of Nightmares Part 3: Shadows in the Cave*, BBC (Nov. 3, 2004), <http://www.informationclearinghouse.info/video1040.htm> ("The Northern Alliance did produce some prisoners they claimed were Al Qaeda fighters, but there was no proof of this, and one rumor was that the Northern Alliance was simply kidnapping anyone who looked remotely like an Arab and selling them to the Americans for yet more money."); Mark Denbeaux, *Report on Guantánamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*, SETON HALL LAW 2 (Feb. 8, 2006), http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf (noting that 55% "are not determined to have committed any hostile act" against the U.S. or allies and only 8% "were characterized as al Qaeda fighters"); Corine Hegland, *Who is at Guantánamo Bay*, NAT. J. (Feb. 3, 2006), available at <http://www.informationclearinghouse.info/article11825.htm>.

86. Denbeaux, *supra* note 85, at 2, 7.

87. MCCOY, *supra* note 22, at 214.

88. Honigsberg, *supra* note 51, at 82; Denbeaux, *supra* note 85, at 23 (stating that there was a near \$5,000 reward for those captured). Australian David Hicks reportedly was an al-Qaeda member and was detained by the Northern Alliance and sold to the U.S. for several thousand dollars. Yaroshefsky, *supra* note 7, at 474–75. A senior military official remarked that investigators determined that Pakistanis had been "'sold' for bounties to U.S. forces by Afghan warlords who invented links between the men and al-Qaeda." Gregory M. Huckabee, *The Politicizing of Military Law—Fruit of the Poisonous Tree*, 45 GONZ. L. REV. 611, 670 (2009/2010). Illustrative of another use of taxpayer resources, on September 27, 2001, the CIA began spreading \$70 million in cash to rival tribes across the country to reopen the Afghan civil war. CHALMERS JOHNSON, THE SORROWS OF EMPIRE 181 (2004).

hundred dollars per year, and did so effectively to accord the Bush Administration with the opportunity to dissemble to the American public that detainees were hard-core al-Qaeda terrorists. In fact, bounty captures may have comprised 95% of those transferred to U.S. custody, but at the same time Bush called those at Guantánamo “the worst of the worst.”⁸⁹ An akin state of affairs unfolded in Iraq, where tens of thousands of Iraqis were incarcerated without a justifiable reason,⁹⁰ and U.S. military intelligence officers stated “between 70% and 90% of the persons deprived of their liberty in Iraq had been arrested by mistake.”⁹¹

C. Harsh Treatment

1. Interrogations and Human Rights Abuses

Despite the irrational method of apprehending prisoners and apparent evidentiary guesswork being employed, hundreds of individuals were hooded and shackled, transported to Camp X-Ray on Guantánamo Bay, confined in eight by eight foot chain-link cages, subjected to intolerable conditions,⁹² and interrogated. In January 2002, Rumsfeld announced: “Let there be no doubt, the treatment of the detainees in Guantánamo Bay is proper, it’s humane, it’s appropriate, and it is fully consistent with international conventions.”⁹³ Rumsfeld also contended that the conditions were not imperative due to the guilt of detainees: “I do not feel the slightest

89. John Simpson, *No Surprises in the War on Terror*, BBC (Feb. 13, 2006), http://news.bbc.co.uk/2/hi/middle_east/4708946.stm.

90. Robert Bejesky, *The Abu Ghraib Convictions: A Miscarriage of Justice*, 32 BUFF. PUB. INT. L.J. (forthcoming 2014) (manuscript at 5–10).

91. Int’l Comm. of the Red Cross, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation* (Feb. 2004), available at <http://cryptome.org/icrc-report.htm>.

92. Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1, 10 (2002). Poor conditions were frequently reported. Neil A. Lewis, *Red Cross Criticizes Indefinite Detention in Guantánamo Bay*, N.Y. TIMES, Oct. 10, 2003, at A1; Carlotta Gall & Neil A. Lewis, *Threats and Responses: Captives; Tales of Despair from Guantánamo*, N.Y. TIMES (June 17, 2003), <http://www.nytimes.com/2003/06/17/world/threats-and-responses-captives-ales-of-despair-from-guantanamo.html>; *Prisoners ‘Killed’ at US Base*, BBC (Mar. 6, 2003), http://news.bbc.co.uk/2/hi/south_asia/2825575.stm; Priest & Gellman, *supra* note 21, at A1.

93. Kreimer, *supra* note 51, at 1187 (statements of military officials) (“[T]hese are potentially very dangerous people . . . [W]e don’t torture them . . . We keep them warm, we keep them fed, [and] we keep the rain off their heads.”); Maogoto & Sheehy, *supra* note 8, at 722.

concern at their treatment. They are being treated vastly better than they treated anybody else.”⁹⁴ Professing that no detainees were injured or mistreated, Rumsfeld stressed that “the numerous articles, statements, questions, allegations, and breathless reports on television are undoubtedly by people who are either uninformed, misinformed, or poorly informed.”⁹⁵

American agents interrogated detainees at Guantánamo Bay, but because milder interrogation techniques were not yielding incriminating information, top officials approved of the use of more severe methods.⁹⁶ In the period preceding this request, commandants at Guantánamo Bay were apparently not exceptionally eager to implement harsh interrogation practices. Brigadier General Michael Lehnert, who provided reasonable conditions and complied with ICRC requests,⁹⁷ was replaced by Brigadier General Rick Baccus in March 2002, but Baccus was also dismissed because he disciplined abusive guards, was “too soft” on inmates, and even publicly expressed that military officers were concerned that prisoners should be called POWs and not enemy combatants.⁹⁸ Major General Michael Dunlavey, the operational commander at Guantánamo Bay, disagreed with Baccus over interrogation policy but also chastised the military’s poor detention decisions, and left his position in October

94. *US Defends Captives’ Conditions*, BBC (Jan. 15, 2002), <http://news.bbc.co.uk/2/hi/americas/1762529.stm>.

95. Maogoto & Sheehy, *supra* note 8, at 722.

96. S. ARMED SERV. COMM., 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY 66 (2008), *available at* <http://www.gpo.gov/fdsys/pkg/CPRT-110SPRT48761/pdf/CPRT-110SPRT48761.pdf> (reporting that on October 25, 2002, General James T. Hill, U.S. SOUTHCOM commander, addressed a letter to Joint Chiefs of Staff Richard Myers and requested that more aggressive interrogation approaches be authorized because “some detainees have tenaciously resisted our current interrogation methods.”); Memorandum from William J. Haynes II, Gen. Counsel, Dep’t of Def., to the Sec’y of Def., on Counter-Resistance Techniques (Nov. 27, 2002), *available at* http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/additional_detainee_documents/07-F-2406%20doc%201.pdf; Memorandum for Commander, Task Force 170, Dep’t of Def., Request for Approval of Counter-Resistance Strategies 1 (Oct. 11, 2002), http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/additional_detainee_documents/07-F-2406%20doc%201.pdf.

97. Karen J. Greenberg, *When Gitmo Was (Relatively) Good*, WASH. POST, Jan. 25, 2009, at B01.

98. JOHNSON, *supra* note 88, at 42; *‘Too Nice’ Guantanamo Chief Sacked*, BBC (Oct. 16, 2002), <http://news.bbc.co.uk/2/hi/americas/2332719.stm> (reporting that Baccus clashed with “other senior officers at the camp” for being too nice to prisoners and that Baccus told journalists that “uniformed officers were concerned that the inmates continued to be considered as ‘enemy combatants’ rather than ‘prisoners of war,’ a designation which would give them extra rights.”).

2002.⁹⁹ General Geoffrey Miller replaced Baccus in November 2002.¹⁰⁰ Perhaps implementing policies that sparked so much tension among four generals in eight months should have served as a warning to the White House and Rumsfeld.¹⁰¹

In addition to maintaining that a humane, model interrogation system was implemented at Guantánamo Bay,¹⁰² the Bush Administration also later contended that a scripted al-Qaeda publicity campaign created the perception of human rights violations inside U.S. detention facilities to raise torture cases in various forums and tarnish the image of the United States.¹⁰³ Al-Qaeda's efforts were not needed to tarnish the United States' image.¹⁰⁴ From their

99. KAREN GREENBERG, *THE LEAST WORST PLACE: GUANTANAMO'S FIRST 100 DAYS 199–201* (2009) (noting disagreements between Dunlavey and Baccus); Douglas A. Pryer, *The Fight for the High Ground: The U.S. Army and Interrogation During Operation Iraqi Freedom I*, May 2003 – April 2004, at 42, 46 (2009) (unpublished Masters of Military Art and Science thesis, U.S. Army Command and General Staff College) (on file with College), *available at* <http://www.dtic.mil/dtic/tr/fulltext/u2/a502354.pdf> (Dunlavey “express[ed] concern about insufficient intelligence production” on several occasions and requested “approval for techniques that derived from ‘U.S. military interrogation resistance training’”); Greg Miller, *Many Held at Guantanamo Not Likely Terrorists*, L.A. TIMES (Dec. 22, 2002), <http://articles.latimes.com/2002/dec/22/nation/la-na-gitmo22dec22> (noting Dunlavey went on a “fact-finding” mission to Afghanistan and criticized officers making transfer decisions that sent “too many ‘Mickey Mouse’ detainees . . . to the already crowded facility”); *‘Too Nice’ Jail Commander is Fired*, SYDNEY MORNING HER. (Oct. 17, 2002), <http://www.smh.com.au/article/s/2002/10/16/1034561210959.html>.

100. Bill Dedman, *Gitmo Interrogations Spark Battle Over Tactics*, MSNBC (Oct. 23, 2006), <http://www.nbcnews.com/id/15361458/#.UVIOYDe9uSo>; FRONTLINE, *The Torture Question: Interview Thomas Berg*, PBS (July 18, 2005), <http://www.pbs.org/wgbh/pages/frontline/torture/interviews/berg.html>.

101. Federal law prevents any commissioned officer in the military from being dismissed unless they are court-martialed, “in commutation of a sentence of a general court-martial,” or “in time of war, by order of the President.” 10 U.S.C. § 1161, § 804(a) (2012). There is nothing that would prevent the president or military hierarchy from moving military personnel to new assignments.

102. Linda M. Keller, *Is Truth Serum Torture?*, 20 AM. U. INT’L L. REV. 521, 523–24 (2005) (statement by General James T. Hill, who was commander of U.S. Southern Command (SOUTHCOM) from 2002 to 2004).

103. DEP’T. OF DEF., *THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5* (2005) (“Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.”); Michael J. Lebowitz, *Lawfare and the War on Terror: The Value of Claiming Torture: An Analysis of al-Qaeda’s Tactical Lawfare Strategy and Efforts to Fight Back*, 43 CASE W. RES. J. INT’L L. 357, 360–63, 383–84 (2010); Vikram Dodd, *Torturing the Truth*, THE GUARDIAN (Jan. 14, 2009), <http://www.theguardian.com/commentisfree/cifamerica/2009/jan/14/guantanamo-torture> (“For years the Bush administration said it was not true, that those who claimed that torture was taking place at Guantánamo Bay, were in fact suckers for al-Qaida propaganda.”).

104. ANTHONY R. JONES & MG GEORGE R. FAY, *ARMY REGULATION 15-6*

investigations, Amnesty International,¹⁰⁵ the FBI,¹⁰⁶ and international experts agreed that the interrogation methods and conditions were appalling.¹⁰⁷ Moreover, several investigations revealed that interrogations did not produce useful intelligence information,¹⁰⁸ but this should not be surprising when investigations verified the innocence of a high percentage of detainees.¹⁰⁹

Accounts of abuse included that detainees had been chained

INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND THE 205TH MILITARY INTELLIGENCE BRIGADE 135 (2004) (U.S. officers used coercion to extract information in Iraq); Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A1 (reporting that the ICRC submitted a report contending that the “American military has intentionally used psychological and sometimes physical coercion ‘tantamount to torture’ on prisoners at Guantánamo Bay.”).

105. Sadat, *supra* note 57, at 311 (stating that from its investigations, in 2005, Amnesty International called the Guantánamo Bay facility the “gulag of our times.”). This pales in comparison to atrocities committed by other regimes. Charles H. Brower II, *Nunca Mas or Déjà vu?*, 47 VA. J. INT’L L. 525, 526–27 (2007) (noting that the Argentine junta during the Dirty Wars from 1976 to 1979 tortured and killed some ten thousand).

106. Kreimer, *supra* note 51, at 1191, 1197 (stating FBI complained about abuses at Guantánamo Bay and confirmed the ICRC’s reasons for criticism as early as late 2002 and again in late 2003); *see also* Pearlstein, *supra* note 34, at 1264–65, 1283; Christopher Andres, *ACLU Interested Persons Memo on FBI Document Concerning Detainee Abuse at Guantánamo Bay*, AM. CIVIL LIBERTIES UNION (July 12, 2005), <http://www.aclu.org/national-security/aclu-interested-persons-memo-fbi-documents-concerning-detainee-abuse-guantanamo-ba> (noting that the FBI documented abuses dating back to November 2002, but the Justice Department classified records of objection and misdeeds continued).

107. Amann, *supra* note 20, at 319–48; Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 10 (2002).

108. HERSH, *supra* note 84, at 2 (“The interrogations at Guantánamo were a bust. Very little useful intelligence had been gathered, while prisoners from around the world continued to be flown into the base and the facility constantly expanded.”); Stephen Budiansky, *Truth Extraction*, THE ATLANTIC MONTHLY (June 1, 2005), <http://www.theatlantic.com/magazine/archive/2005/06/truth-extraction/303973/> (reporting that FBI investigations determined that torture produced minimal advantageous information and James Corum, a professor at the Army Command and General Staff College, stated: “The torture of suspects did not lead to any useful intelligence information being extracted. . . . The abusers couldn’t even use the old ‘ends justify the means’ argument, because in the end there was nothing to show but a tremendous propaganda defeat for the United States.”); Philippe Sands, *The Green Light*, VANITY FAIR (May 2008), <http://www.vanityfair.com/politics/features/2008/05/guantanamo200805> (“Planeloads of detainees were being delivered on a daily basis, though Dunlavy soon concluded that half of them had no intelligence value.”).

109. *See supra* Part III.B. Ostensibly adumbrating that it was not the interrogations or that innocent individuals were detained, White House Press Secretary Scott McClellan maintained that “terrorists that are being kept at Guantánamo Bay . . . are trained to provide false information, and al Qaeda training manuals talk about ways to disseminate false information.” Press Briefing, Scott McClellan, White House Press Sec’y (Feb. 16, 2006), <http://georgewbush-whitehouse.archives.gov/news/releases/2006/02/20060216-1.html>.

down and denied food and water,¹¹⁰ urinated on,¹¹¹ strangled, beaten, placed in stress positions, had cigarettes lit and stuck into ear openings,¹¹² sexually humiliated,¹¹³ stripped naked, and forced to watch other prisoners sodomize each other.¹¹⁴ There were hospitalizations and long-term psychological damage due to abuse.¹¹⁵ In *Al-Zahrani v. Rumsfeld*, the families of Yasser-Al-Zahrani and Salah Ali Abdullah, two prisoners held at Guantánamo Bay from 2002 until their deaths on June 10, 2006, alleged that sleep deprivation and torture induced the two detainees to hang themselves.¹¹⁶ Four detainees reportedly committed suicide through June 2007,¹¹⁷ and attempted suicides were extremely common.¹¹⁸

110. 151 CONG. REC. S6593 (daily ed. June 14, 2005) (Sen. Richard Durbin quoting from the statement of FBI agents during investigations) (“On a couple of occasions I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. . . . Most times they had urinated or defecated on themselves and had been left there for 18 to 24 hours or more.”); see also *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 474 (D.D.C. 2005), *vacated and dismissed*, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 549 U.S. 1328 (2007), *rev’d* 553 U.S. 723 (2008).

111. MARK DANNER, TORTURE AND TRUTH 240, 248 (2005).

112. MCCOY, *supra* note 22, at 158.

113. *Id.* at 130 (noting that sexual abuse may have been due to official programs that use studies in the sexual sensitivity of Arabs); Jamie O’Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT’L L.J. 295, 312 (2005).

114. Evan J. Wallach, *War Crimes Research Symposium: “Terrorism on Trial”: 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*, 37 CASE W. RES. J. INT’L L. 541, 603 (2005). Similarly, knowing the Arab dislike toward dogs, Guantánamo guards explained in their December 20, 2002, entry that they taught prisoners “lessons such as stay, come and bark to elevate [their] social status up to that of a dog.” MCCOY, *supra* note 22, at 128.

115. HUMAN RIGHTS WATCH, LOCKED UP ALONE: DETENTION CONDITIONS AND MENTAL HEALTH AT GUANTANAMO 24–40 (June 2008), http://www.hrw.org/sites/default/files/reports/us0608_1.pdf (reporting on prisoners suffering from serious mental conditions). FBI accounts reported that a prisoner “subjected to intense isolation for over three months was evidencing behavior consistent with extreme psychological trauma (talking to nonexistent people, reporting hearing voices . . .).” IN THE NAME OF DEMOCRACY, *supra* note 64, at 70–73. Similarly, another “detainee was almost unconscious on the floor, with a pile of [his own] hair next to him” that he had been pulling out. *Id.*; see also JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 86, 88 (2006) (stating al-Qahtani was so abused that he suffered extreme psychological trauma, including hearing voices).

116. *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 105, 107 (D.D.C. 2010).

117. Honigsberg, *supra* note 51, at 96.

118. Foley, *supra* note 7, at 1054 (stating that there were many suicide attempts at Gitmo); Charlie Savage, *Detainees Attempted to Hang Selves*, BOSTON GLOBE, Jan. 25, 2005, at A1 (noting that human rights abuses have been so bad that more than twenty detainees tried to commit suicide over a period of eight days in 2003).

Navy lawyers at Guantánamo Bay objected to the misconduct in December 2002, which led Alberto J. Mora, the Navy's general counsel, to complain to senior counsel William J. Haynes and other Pentagon superiors that the interrogation methods were "unlawful and unworthy of military service" and cautioned that those complicit were in danger of criminal prosecution.¹¹⁹ Similarly, after learning of the White House and Pentagon decision to intensify interrogation practices with methods that qualified as abuses of human rights, a group of senior military lawyers believed that their professional obligation was to serve as whistleblowers and report the atrocities to the New York State Bar Association.¹²⁰

Chain of command directives confirm that interrogators believed they were following Rumsfeld's orders by conducting interrogations at Guantánamo Bay.¹²¹ Moreover, there was a related scandal in Iraq because Rumsfeld dispatched General Miller, the commander who implemented Rumsfeld's interrogation orders at Guantánamo, to Iraq and directed him to have the military implement "extreme" interrogation practices due to Rumsfeld's "anger and frustration"

119. MCCOY, *supra* note 22, at 128.

120. IN THE NAME OF DEMOCRACY, *supra* note 64, at 12 (reporting abuses in May 2003 and October 2003); MCCOY, *supra* note 22, at 131.

121. IN THE NAME OF DEMOCRACY, *supra* note 64, at 2, 110 (stating that critics labeled Rumsfeld a "war criminal"); MCCOY, *supra* note 22, at 131 (reporting that Jamie Fellner of Human Rights Watch accentuated that "the memo [sanctioning interrogation methods] shows that at the highest levels of the Pentagon, there was an interest in using torture as well as a desire to evade the criminal consequences of doing so."). John Dean, a former counsel to Richard Nixon, maintained that this was a cover-up much "worse than Watergate." IN THE NAME OF DEMOCRACY, *supra* note 64, at 18. There are many similarities between Watergate and the Bush Administration cover up. The Nixon-Kissinger foreign policies were covertly arranging coups (or sitting idly by) that led dictators to come to power in countries such as Chile and the Philippines, and expanding the Vietnam War into Laos and Cambodia. STAFF OF S. COMM. ON FOREIGN RELATIONS, 98D CONG., KOREA AND THE PHILIPPINES: NOVEMBER 1972, at 45 (Comm. Print 1973) ("[D]etente and stability (and more F-5's for Vietnam), in Korea, and military bases and a familiar government in the Philippines, are more important than the preservation of democratic institutions which were imperfect at best."); Robert Bejesky, *Currency Cooperation and Sovereign Financial Obligations*, 24 FLA. J. INT'L L. 91, 135-36 (2012); Robert Bejesky, *From Marginalizing Economic Discourse with Security Threats to Approbating Corporate Lobbies and Campaign Contributions*, 12 CONN. PUB. INT. L.J. 1, 26-27 (2012) [hereinafter Bejesky, *From Marginalizing*]. Nixon was defamed, effectively "self-punished," and resigned after repeatedly lying and trying to cover up the Watergate break-in. Robert Bejesky, *National Security Information Flow: From Source to Reporter's Privilege*, 24 ST. THOMAS L. REV. 399, 427-29 (2012). In the post-9/11 world, there was national exposure on illegalities surrounding a cover-up of torture, but insufficient attention was focused on the large percentage of innocent suspects who should never have been detained.

about “poor intelligence” in Iraq.¹²²

2. Lack of Evidence of Guilt and No Legal Recourse

Some Bush Administration officials specified that enhanced interrogation methods did jar valuable information from detainees, but investigators and commentators explained that harsh interrogations did not produce significant evidence of security threats,¹²³ thereby making the interrogations ineffective for their underlying purpose. A *New York Times* investigation—relying on dozens of interviews of high-level American, European, and Middle Eastern intelligence, law enforcement, and military officials—reported that “government and military officials have repeatedly exaggerated both the danger the detainees posed and the intelligence they have provided[,]” and concluded “that contrary to the repeated assertions of senior [Bush] administration officials, none of the detainees at . . . Guantánamo Bay ranked as leaders or senior operatives of al-Qaeda.”¹²⁴ Lt. Col. Anthony Christino, a twenty-year military intelligence officer, spent six months reviewing Guantánamo interrogation records, finding that top government officials made “wildly exaggerated” claims about the value of interrogations, it was doubtful that Guantánamo prisoners possessed any valuable information, and it was likely that detainees fabricated stories of terror plots and involvement in terrorism to succumb to interrogators and avoid harsh treatment.¹²⁵

122. *Getting Away With Torture?: Command Responsibility for U.S. Abuse of Detainees*, 17(1)(G) HUMAN RIGHTS WATCH 1, 40 (2005), available at <http://www.hrw.org/reports/2005/us0405/us0405.pdf>; see generally ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 7–8, 15 (2004), available at http://www.npr.org/iraq/2004/prison_abuse_report.pdf.

123. Robert Bejesky, *The Utilitarian Rational Choice of Interrogation from Historical Perspective*, 58 WAYNE L. REV. 327, 335–47 (2012) [hereinafter Bejesky, *Utilitarian Rational Choice*] (citing scholars who contend that torture will not provide accurate intelligence and that the Bush Administration’s interrogation directives were unsuccessful); Martin Bright, *Guantanamo Has Failed to Prevent Terror Attacks*, GUARDIAN (Oct. 2, 2004), <http://www.guardian.co.uk/uk/2004/oct/03/world.guantanamo> (stating that “guards have been accused of brutality and torture” and noting Lt. Col. Anthony Christino affirmed that Bush and Rumsfeld have “‘wildly exaggerated’ their intelligence value,” and that interrogations “have not prevented a single terrorist attack”); Rose, *supra* note 79 (stating that Bush Administration contended that there was high intelligence emerging from Guantánamo, but “deliberately misled” the public and the ICRC about both the value of interrogations and the harmful impact on detainees).

124. Golden & Van Natta Jr., *supra* note 79.

125. Bright, *supra* note 123; The Editorial Board, *Indisputable Torture*, N.Y. TIMES, Apr. 16, 2013, at A22 (stating that a recent “independent, nonpartisan panel’s examination of

Despite the evidence that a significant percentage of detainees were innocent and would therefore be unable to disclose valuable intelligence, they were still subjected to human rights violations during interrogations¹²⁶ and held with an effective presumption of guilt because captives lacked recourse to prove their innocence.¹²⁷ In some cases, individuals falsely confessed during interrogations due to coercion,¹²⁸ and in other cases, individuals signed confessions to be released.¹²⁹ Yet from the beginning, the assumption in bringing the captives to Guantánamo Bay was that the Bush Administration had a system instituted to fairly assess the guilt of detainees. There was no such system, and once a tribunal was instituted, it failed miserably.

the interrogation and detention programs” implemented by the Bush Administration found them in violation of international law and stated that there was “no firm or persuasive evidence’ that they produced valuable information that could not have been obtained by other means.”).

126. See *supra* Parts III.B., III.C.1.

127. Azmy, *supra* note 47, at 447–48 (reporting that Murat Kurnaz had been detained for over two years, but he learned for the first time why he was brought to Guantánamo Bay during a CSRT hearing in September 2004, which was that a hometown friend, Selcuk Bilgin, who he had not seen in several years, engaged in a suicide bombing, but the information was mistaken because Bilgin was living in Germany free from suspicion of any criminal act, and Kurnaz was eventually released). Ahmed, Iqbal, and Rasul explained that they were captured in Afghanistan in December 2001 and during two years of imprisonment at Guantánamo Bay, they were subjected to torturous treatment, half-day long interrogations, denied food and water for several days, humiliated, blindfolded, attacked with guard dogs, were recorded making false confessions without charges being levied, dragged on the ground with shackled arms and legs, and held with dozens of other prisoners inside barbed wire fences. Ahmed et al., *supra* note 80, at 2–12, 15, 21, 26–27. Ahmed, Iqbal, and Rasul stated that “official policies and orders” authorized interrogation techniques, but that those orders were being exceeded. There is evidence that soldiers sometimes engaged in abuses, but also that they may have feared the possibility of punishment. HERSH, *supra* note 84, at 12 (reflecting a Marine’s experience at Guantánamo) (“We tried to fuck with them as much as we could—inflict a little bit of pain There were always newspeople there That’s why you couldn’t send them back with a broken leg or so. And if somebody died, I’d get court-martialed.”).

128. Ahmed et al., *supra* note 80, at 36, 65, 69 (noting that detainees were shown an apparent video of Osama bin Laden and Mohammed Atta from August 2000 and were coerced into confessing that they were also in the video, and they were falsely presented in the global media as connected to 9/11). The British government later verified that Rasul and Iqbal were in Britain at the time the supposed August 2000 video was filmed. David Rose, *How We Survived Jail Hell, Part Two*, GUARDIAN (Mar. 13, 2004), <http://www.guardian.co.uk/uk/2004/mar/14/terrorism.afghanistan1>.

129. See generally *supra* Part III.B.2.

IV. MILITARY TRIBUNALS & SUPREME COURT DECISIONS

A. *An Obscure System*

Not only was there no reasonably persuasive precedent to substantiate the Bush Administration's unilateral detention and envisioned tribunal system,¹³⁰ but the military tribunal that was eventually implemented was ultimately based on the September 2001 AUMF that sanctioned a military response against those connected to 9/11.¹³¹ The President's derivative Executive Order (November 13, 2001) required detention and a military trial for noncitizens "at an appropriate location designated by the Secretary of Defense outside or within the United States . . . [when] there is reason to believe that such individual" is a member of al-Qaeda or had "engaged in [or] aided . . . acts of international terrorism" intended to produce "injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy."¹³² Human rights groups condemned the order immediately after it was issued and demanded that it be revoked¹³³ because it called for a *de novo* presidential tribunal system outside the U.S. criminal justice and military court

130. THE COMM. ON FED. COURTS, *supra* note 5, at 115 (affirming that "there is no specific case support for unilateral executive detentions in the United States" and the precedent supporting expansive presidential authority in the case of detention, "such as *the Prize Cases*, *Korematsu*, and *Quirin*, were decided in the very different 'total war' circumstances of the Civil War and World War II."); Azmy, *supra* note 47, at 453 ("[W]here Congress authorizes executive actions (as the plurality believed in *Hamdi*) executive power is at its zenith, but where Congress expressly or implicitly denies such action (as in *Hamdan* and *Rasul*) executive power is at its lowest ebb."); Bejesky, *War Powers*, *supra* note 12, at 14–15, 43–44 (noting that if the circumstances are not analogous, and Congress has not acted, the President's authority might fall within the "zone of twilight").

131. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)); Bejesky, *CFP*, *supra* note 13, at 8–17 (noting that the AUMF was expansively and controversially interpreted).

132. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001).

133. Kenneth Roth, *U.S.: New Military Commissions Threaten Rights, Credibility*, HUMAN RIGHTS WATCH (Nov. 16, 2001), <http://www.hrw.org/news/2001/11/15/us-new-military-commissions-threaten-rights-credibility> (issuing a letter to the president, condemning the order because it sacrificed "fundamental rights to personal liberty and to a fair trial that go far beyond what is permitted even in time of crisis."); *Pursuing Justice, Not Revenge: Amnesty International's Position on Bringing to Justice Those Responsible for the Crimes of 11 September and For Abuses Committed in Afghanistan*, AMNESTY INT'L 1 (Dec. 11, 2001), <http://www.amnesty.org/en/library/asset/ACT30/068/2001/en/f6fdec7c-d8b1-11dd-ad8c-f3d4445c118e/act300682001en.pdf> (condemning the November 2001 order and stating that the military commission system was a violation of "fundamental safeguards for fair trial provided for in international law," and urged that the presidential order be revoked).

systems.

Given that military courts and related tribunals have not always been praised as effective,¹³⁴ and the Bush Administration's tribunal processes were inferior to a military court system,¹³⁵ another possibility would have been to permit perfectly competent federal courts to hear the cases.¹³⁶ But if precedent is any indication, transporting detainees to the U.S. would have been inconvenient to the administration. Under the Antiterrorism and Effective Death Penalty Act of 1996, two dozen Arabs were incarcerated for two to four years,¹³⁷ and the federal courts held that it was unconstitutional to use classified evidence to justify continued detention, which was sapient because when evidence was "unclassified or disclosed, it became evident that the government's 'terrorist' claims were based on unprovable hearsay and biased sources."¹³⁸ The Judiciary, an institution foremost designed to protect human and fundamental

134. Jules Lobel, *Preventative Detention and Preventative Warfare: U.S. National Security Policies Obama Should Abandon*, 3 J. NAT'L SECURITY L. & POL'Y 341, 354 (2009); Daryl A. Mundis et al., *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT'L L. 320 (2002) (noting that even the military court system has been criticized for escaping constitutional protections afforded to civilians); see also William C. Westmoreland & George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J.L. & PUB. POL'Y 1, 61–66 (1980).

135. *Hamdan v. Rumsfeld*, 548 U.S. 557, 587–88 (2006) (finding that the rules departed from the courts-martial proceedings without adequate reason); Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1422 (2008) (noting that military attorneys were not involved in the system and attempts to provide advice were ignored by the Bush administration).

136. Lobel, *supra* note 134, at 354 (reporting that in assessing over 100 terrorism cases over the past fifteen years, a recent Human Rights First report noted that "contrary to the view of some critics, the court system is generally well equipped to handle most terrorism cases."); O'Connell, *supra* note 19, at 366 (maintaining that the British response against the Irish Republican Army, the "Spanish against al Qaeda after the March 2004 Madrid train bombing, as well as the U.S. success after the 2000 attack on the Cole and the 1993 World Trade Center bombing, all support the conclusion that the best way to deal with terrorism is through the criminal law and police methods"). Another alternative in mid-2007 was to create a National Security Court to try suspected terrorists. David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 197 (2008).

137. Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After Sept. 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 321–22 (2002).

138. Susan M. Akram & Maritza Karmelely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction with a Difference?*, 38 U.C. DAVIS L. REV. 609, 618–19 (2005) (noting also that "most troubling, were motivated by U.S. foreign policy considerations.")

rights¹³⁹ and enforce statutes that endow individual protections,¹⁴⁰ assuredly cannot permit the Executive to hold suspects on American soil indefinitely based upon pledges of the existence of extraordinary hidden evidence or subject detainees to interrogations that violate human rights and the Eighth Amendment in an effort to unearth evidence.

Instead, the Bush Administration affixed a novel label on prisoners that imputed guilt, denied POW status, and supplanted the possibility of holding criminal trials in the American court system. It was not unprecedented for the U.S. Executive to institute a military commission system (with the last tribunal being used in 1951),¹⁴¹ but what was unprecedented was the mingling of alleged terrorists, based on the target enumerated in the September 2001 AUMF, with combatants captured in war zones.¹⁴²

139. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810) (explaining that judicial tribunals “are established . . . to decide on human rights.”). Human rights law treats personal liberty as a fundamental right. U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 10, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988); International Covenant on Civil and Political Rights, art. 9(1), Dec. 19, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), art. 5(1), Nov. 4, 1950, 213 U.N.T.S. 221; Universal Declaration of Human Rights, art. 3, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

140. Non-Detention Act, 18 U.S.C. § 4001(a) (2012) (“No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”). A temporary bridge measure for detention in the U.S. derived from the Patriot Act, which permitted detaining foreigners for immigration violations. 8 U.S.C. § 1226a (2001).

141. Henry Wager Halleck, *Military Tribunals and Their Jurisdiction*, 5 AM. J. INT’L L. 958, 965–66 (1911) (noting that military tribunals “are established by the President by virtue of his war power as commander-in-chief, and have jurisdiction of cases arising under the laws of war”); Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution*, 16 TUL. J. INT’L & COMP. L. 419, 420 (2008); Anne-Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. TIMES, Nov. 17, 2001, at A23.

142. As of 2007, and for purposes of detention at Guantánamo, an enemy combatant was defined as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001) (late 2001 order for detention and trial targeted suspected terrorists); DEP’T OF DEF., GUANTANAMO DETAINEE PROCESS 2 (2007), <http://www.defense.gov/news/Sep2005/d20050908process.pdf>; see *infra* Part IV.B. (explaining the controversy that erupted over classifying combatants taken within a war zone, Geneva Convention protections, and previous U.S. treatment).

B. Combatant Status

A combatant captured during a conflict can be classified as a POW (which is a privileged combatant), an unprivileged belligerent, or a civilian.¹⁴³ The designation is important because noncombatants can only be temporarily detained in administrative detention and should not be arrested and subjected to prolonged incarceration,¹⁴⁴ which would be wrongful imprisonment. A privileged combatant can be detained but must be released after hostilities cease and cannot be tried.¹⁴⁵ If individuals had engaged in combat, then the question is whether they should be treated as a lawful combatant, entitling them to POW status. Alternatively, if combatants engage in violations of war, they lose their privileged status and can be tried.¹⁴⁶

Politically appointed legal advisors wrote a series of distinctly partial legal memoranda providing the alleged justification for detaining and transporting those captured in Afghanistan to Guantánamo Bay, and for indefinitely confining and interrogating prisoners. Core arguments offered to deny that the Geneva Convention was binding included that the Taliban was not the lawful government in control, that Afghanistan was a failed state, that the Taliban did not wear uniforms or exercise typical hierarchal military

143. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 50, June 8, 1977, 1125 U.N.T.S. 3 (“A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A)(1), (2), (3), and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be a civilian.”) Barry C. Scheck, *The ‘New Paradigm’ and Our Civil Liberties*, 28 CHAMPION 4 (Aug. 2004). *But see* Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004) (plurality opinion) (“[An] enemy combatant [is] [o]ne who takes up arms against the United States in a foreign theater of war . . .”).

144. Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and other Situations of Violence*, 87 INT’L REV. OF THE RED CROSS 375, 380–81 (2005) (stating that security detention, such as during an occupation, can only be an exceptional measure and must cease when the reasons for detention no longer exists).

145. Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 135; Yin, *supra* note 18, at 171.

146. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 28–29 (2004) (noting that a combatant who hides among civilians can lose the privileged status, and a civilian can become a combatant and a combatant can become a noncombatant); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 773 (2d ed. 1920); *see also* 2 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, B, 271 (1949) (recognizing disagreement between the Soviet and Dutch representatives with the former contending that if a “person is not recognized as a prisoner of war,” then the person will be a civilian and receive protections, and the latter stating that the Civilian Convention will not protect civilians who take up arms in the battlefield).

control under Geneva Article 4(A)(1), and that suspected Taliban and al-Qaeda members were not lawful combatants who should be granted POW status.¹⁴⁷ Providing commentary on the Geneva Conventions, the Red Cross stated: “Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention,” or a medical professional of the military “who is covered by the First Convention,” but “[t]here is no intermediate status; nobody in enemy hands can be outside the law.”¹⁴⁸ Twisting the labels “belligerent” and “combatant” with adjectives cannot evade the laws of war¹⁴⁹ because all categories have rights,¹⁵⁰ and generally applicable human rights law requires humane treatment even if the Geneva Convention is inapplicable.¹⁵¹

Yet, the unlawful enemy combatant designation did take selected individuals outside the law by confusing the categories¹⁵² with a concept the U.S. Supreme Court had previously employed for a distinct context. In *Ex parte Quirin*, the Supreme Court called six German saboteurs caught on U.S. shores during World War II

147. Robert Bejesky, *How the Commander in Chief’s “Call for Papers” Veils a Path Dependent Result of Torture*, 40(1) SYRACUSE J. INT’L L. & COM. (forthcoming Fall 2013) [hereinafter Bejesky, *Call for Papers*].

148. Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Commentary, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV], available at <http://www.icrc.org/ihl.nsf/COM/380-600007>.

149. Joan Patrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345, 347–48 (2002); Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503, 513 (2003).

150. Mary Ellen O’Connell, *Responses to the Ten Questions*, 36 WM. MITCHELL L. REV. 5127, 5132 (2010) (“[A]ll persons caught up in armed conflict have the protections of the Geneva Conventions—all persons.”); Jordan Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1351 (2004) (“Under the Geneva Conventions . . . [a]ny person detained, whether a prisoner of war, unprivileged belligerent, terrorist, or noncombatant, has at least minimum guarantees ‘in all circumstances’ ‘at any time and in any place whatsoever’ under common Article 3. Such rights include the right to be ‘treated humanely,’ freedom from ‘cruel treatment and torture,’ and freedom from ‘outrages upon personal dignity, in particular, humiliating and degrading treatment.’”).

151. Shannon M. Roesler, *The Ethics of Global Justice Lawyering*, 13 YALE HUM. RTS. & DEV. L.J. 185, 208 (2010) (noting that an egalitarian understanding of law mandates that all human beings be regarded with equal worth).

152. Honigsberg, *supra* note 51, at 94 (noting that enemy combatant was not a legitimate legal term before 9/11); David Wippman, *Comment on Richard Arneson’s Just Warfare Theory and Noncombatant Immunity*, 39 CORNELL INT’L L.J. 699, 702 (2006) (stating that the proper term should have been “unprivileged belligerent”).

unlawful enemy combatants.¹⁵³ The Court noted that the detainees were saboteurs associated with a country at war with the U.S. and stated that POWs cannot be those who, “during time of war[,] pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts.”¹⁵⁴ Thus, the Supreme Court used the term to describe those who unlawfully enter U.S. territory during a time of war¹⁵⁵ with an intention to commit terrorism, but the Bush Administration extrapolated the term to apply to those captured inside a foreign country that the U.S. invaded.¹⁵⁶

Under the unlawful enemy combatant term as the criterion for assessing whether detainees could continue to be held at Guantánamo Bay, more than five hundred detainees remained, sometimes for over three years, without being granted an official legal process or even a hearing.¹⁵⁷ Federal Judge Green further denoted that the military relied predominantly on detainee confessions to admit enemy combatant status,¹⁵⁸ which is quite astounding when the U.S. signed the Geneva Convention and related conventions promising to treat POWs with dignity, to not torture, and to not physically mutilate or intimidate.¹⁵⁹ Confessions were determining status, but the U.S. military had already transported detainees to Guantánamo Bay, presuming prisoners met this category of wrongdoer,¹⁶⁰ and had been

153. *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

154. *Id.* at 30–31, 35.

155. *Id.* at 31 (defining an “unlawful enemy combatant” as a “spy who secretly and without uniform passes the military lines of a belligerent in [a] time of war, seeking to gather military information and communicate it to the enemy.”) (alteration in original).

156. JOHNSON, *supra* note 88, at 42 (stating that the term “unlawful combatant” is rather novel outside of the context of *Ex parte Quirin*). *But see* Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT’L L. 1025, 1026 (2004) (“[T]he concept of unlawful combatants, expressed in a variety of ways, has been around for as long as there have been laws of war.”). Perhaps recognizing the arbitrariness of the label, in 2006, a new U.S. Army Field Manual eliminated classifications between Prisoners of War and enemy combatants and provided that the Geneva Conventions apply to all detainees. Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT’L L. 1, 14 (2010).

157. Mark A. Drumbl, *Guantánamo, Rasul, and the Twilight of Law*, 53 DRAKE L. REV. 897, 898, 901 (2005) (stating that an early review of 558 detainees found that thirty-three detainees were improperly labeled enemy combatants and five were released).

158. Carol D. Leonnig, *Judge Rules Detainee Tribunals Illegal*, WASH. POST, Feb. 1, 2005, at A01.

159. DOCUMENTS ON THE LAWS OF WAR 243–44, 250, 278–80, 361–62, 368 (Adam Roberts & Richard Guelff eds., 2000).

160. *See* Thomas J. Bogar, *Unlawful Combatant or Innocent Civilian? A Call to Change the Current Means for Determining Status of Prisoners in the Global War on Terror*, 21 FLA. J.

asking detainees to sign confession statements affirming that they were engaged in fighting.¹⁶¹

By classifying detainees as unlawful enemy combatants, the indefinite detentions and characteristics of military tribunals arguably violated the Geneva Conventions and customary international law.¹⁶² The Bush White House contended that it could detain individuals indefinitely without a trial,¹⁶³ but human rights groups and European governments demanded that the Bush Administration either try Guantánamo detainees or release them.¹⁶⁴ Curious detention procedures and labels resulted in the imprisonment of individuals at Guantánamo Bay when due process guarantees should have been provided under international law and potentially U.S. law.

C. Due Process Under U.S. and International Law

Due process under the U.S. Constitution protects life and liberty,¹⁶⁵ and the Constitution's Suspension Clause states: "[The]

INT'L L. 29, 82 (2009) ("It is hard to imagine how a tribunal comprised of military officers could be impartial when its task is to challenge the decision to designate a prisoner as an enemy combatant, particularly when that designation has come from the officer's superiors, including the Secretary of Defense and the President of the United States.").

161. See Ahmed et al., *supra* note 80, at 80; Campbell & Goldenberg, *supra* note 81.

162. Bejesky, *Call for Papers*, *supra* note 147, at 40–49 (discussing potentially applicable standards); Elizabeth M. Iglesias, *Article II: The Uses and Abuses of Executive Power*, 62 U. MIAMI L. REV. 181, 182–83 (2008); Koh, *supra* note 4, at 2354 ("[T]he [Bush] Administration oppose[d] judicial efforts to incorporate international and foreign law into domestic legal review so as to insulate the U.S. government from charges that it [was] violating universal human rights norms in favor of double standards.").

163. Jennifer Van Bergen & Douglas Valentine, Symposium, "*Torture and the War on Terror*": *The Dangerous World of Indefinite Detentions: Vietnam to Abu Ghraib*, 37 CASE W. RES. J. INT'L L. 449, 452 (2006); O'Connell, *supra* note 19, at 353 (author reporting that when she asked Bush Administration officials when detainees would be released, she was told that "Guantánamo detainees would not be released until every terrorist in the world was killed or captured, or when every member of al Qaeda was killed or captured"); see also Steven Kull, *American and International Opinion on the Rights of Terror Suspects*, WORLDPUBLICOPINION.ORG 9 (July 17, 2006), http://www.worldpublicopinion.org/pipa/pdf/jul06/TerrSuspect_Jul06_rpt.pdf (poll finding that 63% of Americans believed that foreigners should be protected with the same rights as American detainees).

164. Tung Yin, *Distinguishing Soldiers and Non-State Actors: Clarifying the Geneva Convention's Regulation of Interrogation of Captured Combatants Through Positive Inducements*, 26 B.U. INT'L L.J. 227, 233 (2008); Warren Hoge, *Investigators for U.N. Urge U.S. to Close Guantánamo*, N.Y. TIMES, Feb. 17, 2006, at A6; Kenneth Roth, Letter to the Editor, "*Enemy Combatants, or Prisoners of War?*", N.Y. TIMES, Aug. 16, 2004, at A14 (Director of Human Rights Watch explaining that the government admitted that "the Taliban has pretty much been decimated[, thus] . . . all the Taliban detainees now held at Guantánamo Bay, Cuba, should also be released.").

165. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹⁶⁶ The writ of habeas corpus is a “bulwark” of individual liberty¹⁶⁷ that provides a procedural device by court petition to question whether the government’s detention of an individual is in compliance with the law.¹⁶⁸ Foundational constitutional principles are also found in the military justice system, which requires due process, fairness, and balance with military objectives.¹⁶⁹ The extent to which the U.S. Constitution should have applied to detainees at Guantánamo Bay would remain a foundational question for several years, but it should have been initially known that international law requires due process guarantees.

Under international law, no one can be deprived of liberty irrespective of nationality, statelessness, or status, and there is a right to challenge confinement during war or occupation and under domestic criminal law processes.¹⁷⁰ The Geneva Convention,¹⁷¹ the International Covenant on Civil and Political Rights (ICCPR),¹⁷² and the Universal Declaration of Human Rights¹⁷³ all require that a state denying liberty to an individual must promptly provide notice of the

166. U.S. CONST. art. I, § 9, cl. 2.

167. *In re Kaine*, 55 U.S. 103, 147 (1852) (Nelson, J., dissenting); THE FEDERALIST NO. 83 (Alexander Hamilton), available at http://avalon.law.yale.edu/18th_century/fed83.asp (stating that the writ of habeas corpus is a “bulwark” from government abuse).

168. See 28 U.S.C. § 2241(a) (2012) (“Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.”); *Boumediene v. Bush*, 553 U.S. 723, 744 (2008); *Fay v. Noia*, 372 U.S. 391, 401 (1963).

169. Westmoreland & Prugh, *supra* note 134, at 6.

170. U.N. Secretary-General, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 131–32, 140, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004), available at [http://www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf).

171. Geneva IV, *supra* note 148, art. 43.

172. ICCPR, *supra* note 139, art. 9(4) (“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide on the lawfulness of his detention and order his release if the detention is not lawful.”); see also ICCPR, *supra* note 139, art. 14(2); Bellinger & Padmanabhan, *supra* note 3, at 210 (stating that the legitimacy of a security detention must be determined by judicial review and the Fourth Geneva Conventions requires at least an Administrative review). The ICCPR was adopted by the General Assembly in December 1966, was signed by President Carter in 1977, and was ratified by the U.S. Senate in 1992. Kristina Ash, Note and Comment, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW U. J. INT’L HUM. RTS. 7, 8–11 (2005).

173. UDHR, *supra* note 139, art. 11(1) (“Everyone charged with a [criminal] offense shall have the right to be presumed innocent until prove[n] guilty according to law.”).

reason for a detention and a right to challenge the detention before an administrative tribunal or court.¹⁷⁴ Consequently, even alleged al-Qaeda and Taliban members are covered under international law and have a right to prove their innocence. In May 2006, the United Nations Committee Against Torture affirmed that incarcerating detainees indefinitely “at Guantánamo, without sufficient legal safeguards and without judicial assessment of the justification for their detention” violates the Convention Against Torture.¹⁷⁵

D. Due Process Afforded at Guantánamo

In addition to violations of international law, there were other problems with denying due process rights at Guantánamo Bay. First, as applicable to those detained inside the U.S. and to the extent that the Constitution might apply to detainees outside U.S. borders, habeas corpus cannot be suspended because the U.S. was not in danger of “Rebellion or Invasion” under the Constitution’s Suspension Clause.¹⁷⁶ There is no reason to assume that the circumstances during the post-9/11 world were analogous to the American Civil War, which was the last time habeas corpus was suspended with widespread effect.¹⁷⁷

Second, the tribunal was constituted based on a three-page executive order, but under the U.S. Constitution, only Congress has the authority to establish judicial organs, institute right protections, and enact court procedures, while the judiciary is the guarantor of

174. See Tyler Davidson & Kathleen Gibson, *Security Detention: Experts Meeting on Security Detention Report*, 40 CASE W. RES. J. INT’L L. 323, 338 (2009) (noting that because individuals have a right to be individually informed of the reasons for detention and to challenge the detention, it seems unlikely that broad, collective detainment orders would be reasonably permitted under human rights law); Pejic, *supra* note 144, at 381. International human rights law requires that an “independent and impartial” body determine the lawfulness of detention. See Geneva IV, *supra* note 148, art. 43. Amnesty International explains: “The right to challenge the lawfulness of one’s detention before a competent, independent and impartial tribunal is a cornerstone of international human rights law.” Brief for Amnesty International et al. as Amici Curiae Supporting Petitioners, at 1–2, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1195), 2007 WL 2441589; see also Joseph Anzalone, *Extraordinary Times Demand Extraordinary Measures: A Proposal to Establish an International Court for the Prosecution of Global Terrorists*, 16 U.C. DAVIS J. INT’L L. & POL’Y 273, 301 (2010).

175. U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, at 6, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006), available at [http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf).

176. See Lobel et al., *supra* note 7, at 63, 66.

177. *Id.* at 63.

rights and adjudicator of guilt.¹⁷⁸ Instead, Bush issued himself and his appointees the authority to decide which defendants would be tried by a military commission and Rumsfeld was assigned to appoint panels, establish rules and procedures, and determine the level of proof needed to convict a defendant.¹⁷⁹ Rumsfeld's Military Commission Order No. 1 enacted the new commission law, and the order permitted the tribunal to assess the guilt of detainees outside civilian and Uniform Code of Military Justice court rules, structure, and evidentiary rules.¹⁸⁰ U.S. international law obligations require a competent and equitable tribunal, fair procedures to protect innocence, and appeal processes,¹⁸¹ which make special military tribunals with secretive trials and no right to legal representation immediately suspect.¹⁸² Nonetheless, Bush and Rumsfeld endowed themselves with the power of policeman, legislator, prosecutor, judge, appellate court, and executioner.¹⁸³

Third, habeas corpus rights ensure that the state has the burden of proving (before a competent and independent arbiter) a confinement is justified within a reasonable period of time. Bush and Rumsfeld did not institute such a system and instead indiscriminately called the hundreds who were brought to Guantánamo “terrorists” and the “worst of the worst” in the media. But, this was not true because managers of the detention facility often acknowledged that they did

178. Kathleen Clark, *President Bush's Order on Military Tribunals of Non-Citizens: Beyond His Constitutional or Statutory Authority*, CTR. FOR NAT'L SEC. STUDIES (Nov. 19, 2001), http://www.cnss.org/data/files/DetentionDue_Process/Military_Commissions/Clark_Memo_re_mil_commissions_authority.pdf.

179. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834–57,835 (Nov. 13, 2001); Amann, *supra* note 20, at 269–70.

180. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,833 (Nov. 13, 2001) (affirming that the system changed the normal rules of “law and rules of evidence.”); MCCOY, *supra* note 22, at 214–15.

181. *United States: Guantanamo Two Years On*, HUMAN RIGHTS WATCH (Jan. 9, 2004), <http://www.hrw.org/legacy/english/docs/2004/01/09/usdom6917.htm>. The US is a party to the ICCPR, which provides applicable standards. ICCPR, *supra* note 139.

182. U.N. Secretary-General, *supra* note 170, at 136.

183. Dep't of Def. Military Comm'n Order No. 1, at 6(H)(2)(4) (Mar. 21, 2002); Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001); Mundis et al., *supra* note 134, at 321–22; Johannes van Aggelen, *The Bush Administration's War on Terror: The Consequences of Unlawful Preemption and the Legal Duty to Protect the Human Rights of Its Victims*, 42 CASE W. RES. J. INT'L L. 21, 37–38 (2009); HUMAN RIGHTS WATCH, *supra* note 181 (“Under the rules, the president, through his designees, serves as prosecutor, judge, jury, and potentially, executioner.”).

not know who was held at Guantánamo Bay,¹⁸⁴ and conceded that some percentage of detainees were completely innocent.¹⁸⁵

Fourth, the detention system did not exclude confessions resulting from torture, human intelligence accounts, and other forms of hearsay, meaning that unverified information was used to indefinitely hold captives on vague conspiracy charges.¹⁸⁶ Utilizing coercive conditions and harsh interrogations to gather incriminating information¹⁸⁷ by using excessive abuse or torture violates customary international law, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Common Article 3, and the ICCPR.¹⁸⁸ There is also nothing to prevent information gathered under torture from being used to capture someone else.

Appointed lawyers within the Bush Administration advised that torture statutes do “not apply to the conduct of U.S. personnel at Guantanamo” because the President was conducting “detention and interrogation of enemy combatants under his Commander-in-Chief authority.”¹⁸⁹ A party cannot invoke internal law as a justification for violating a treaty,¹⁹⁰ and even though treaties and federal laws are subordinate to the Constitution under the Supremacy Clause of

184. Golden & Van Natta Jr., *supra* note 79 (quoting General Hill in June 2004) (“We weren’t sure in the beginning what we had; we’re not sure today what we have. There are still people who do not talk to us.”).

185. See Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2088 (2005); Tim McGirk, *The Long Way Home*, TIME (Oct. 28, 2002), <http://content.time.com/time/magazine/article/0,9171,384884,00.html>; see *supra* Part III.B. (discussing Administration allegations and bounty captures). The Pentagon required military intelligence to have detainees acknowledge offenses. Golden, *supra* note 80; Randall Mikkelsen, *Guantanamo Trials Called Tainted by Coercion*, REUTERS (Mar. 10, 2008), <http://www.reuters.com/article/2008/03/10/us-security-us-a-guantanamo-idUSN1047618420080310>.

186. MCCOY, *supra* note 22, at 215.

187. Bejesky, *Utilitarian Rational Choice*, *supra* note 123, at 330–32, 335–36; Tania Branigan & Vikram Dodd, *The Bitterest Betrayal*, GUARDIAN (July 18, 2003), <http://www.guardian.co.uk/world/2003/jul/19/usa.guantanamo> (quoting Red Cross spokeswoman Antonella Notaria’s remarks about pressures upon inmates) (“A lot of [inmates] are pushed to despair. It is a clear indication that these people are under extreme stress and anxiety.”).

188. David Weissbrodt & Andrea W. Templeton, *Fair Trials? The Manual for Military Commissions in Light of Common Article 3 and Other International Law*, 26 LAW & INEQ. 353, 381–82 (2008).

189. Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1243 (2005) (citing Memorandum from the Office of the Sec’y of Defense to the Gen. Counsel of the Dep’t of Defense, Re: Detainees Interrogations (Jan. 15, 2003, declassified June 21, 2004)).

190. Matthew J. Jowanna, *Torture, American Style: A Recipe for Civil Tort Immunity*, 42 MCGEORGE L. REV. 243, 269 (2011).

Article VI,¹⁹¹ there is nothing in the U.S. Constitution or the Commander-in-Chief's authority that can reasonably be interpreted to permit discretion to commit acts of torture or to discontinue habeas corpus, except under the Suspension Clause. The existence of the Suspension Clause is one reason those detainees with clearer constitutional rights—U.S. citizens—were afforded more protections than foreigners.¹⁹²

E. Procedures Applicable to U.S. Citizens

1. Three American Detainees

American citizens—Yaser Hamdi, Jose Padilla, and John Walker Lindh—were associated with the Taliban and had due process rights marginalized during detentions, but they were all ultimately tried in American courts.¹⁹³ The precedent is largely consistent with *Ex parte Milligan*, in which Lamdin Milligan, an American citizen, was charged with seditious acts and was subject to military detention and trial. The Supreme Court held:

All . . . persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty.¹⁹⁴

American John Walker Lindh supported the Taliban and was captured in Afghanistan.¹⁹⁵ The U.S. District Court in Alexandria,

191. U.S. CONST. art. VI.

192. *Hamdi v. Rumsfeld*, 542 U.S. 507, 582 (2004) (Thomas, J., dissenting) (explaining that courts should not be involved in political questions that invoke the president as “the Nation’s sole organ for foreign affairs,” an intelligence information that must be held secret under national security); *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 477 (S.D.N.Y. 2004) (“[A] state of war is not a blank check for the President when it comes to the rights of the nation’s citizens.”).

193. Yamamoto, *supra* note 64, at 313–14.

194. *Ex Parte Milligan*, 71 U.S. 2, 6–8, 123–24 (1866).

195. *U.S. v. Lindh*, 227 F. Supp. 2d 565, 567 (E.D. Va. 2002). Lindh was labeled the “American Taliban.” Jesselyn Radack, *Discussing a Taboo—A Review of Torture: A Collection*, 14 TEMP. POL. & CIV. RTS. L. REV. 609, 609 (2005).

Virginia, convicted Lindh of assisting the Taliban and committing a felony,¹⁹⁶ but the case confronted some procedural difficulties. Jesselyn Radack, a former legal advisor for the Justice Department's Professional Responsibility Advisory Office, was a high-profile whistleblower and reported that the FBI had violated Lindh's right to an attorney, covered up the denial of his retained lawyer, and "interviewed" him without constitutional safeguards while in custody.¹⁹⁷

Jose Padilla, a U.S. citizen, was arrested at the Chicago O'Hare airport.¹⁹⁸ Unlike Lindh, Padilla was not captured in Afghanistan and the District Court held that it would uphold the enemy combatant designation if "the President had some evidence to support his finding that Padilla was an enemy combatant."¹⁹⁹ Rather than offer such proof, the Bush Administration mooted Padilla's habeas challenge by transferring Padilla from U.S. military custody to the Justice Department, and he faced a federal court trial in Florida.²⁰⁰ Thus, while Padilla was originally accused of plotting to detonate a "dirty bomb," labeled an enemy combatant, detained inside the U.S. for 1,307 days, and kept for prolonged periods in solitary confinement, he was ultimately convicted on general criminal charges for attending an al-Qaeda training camp in Afghanistan.²⁰¹

Yaser Hamdi was captured by the Northern Alliance in

196. Plea Agreement at 1, *United States v. John Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002) (Crim. No. 02-37A).

197. Radack, *supra* note 195, at 610–12 (further explaining how she was subject to bogus performance evaluations and that her inquiry letters regarding the conditions of Lindh's detention were requested by Judge Ellis, but her email and hard drive copies of over a dozen letters regarding the matter had been purged); *see also* Radack, *supra* note 195, at 611–12; Ty S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 VT. L. REV. 407, 427 (2005) (noting that the Department of Justice typically called detainment of thousands of Arab or Muslim men designed to conduct "'voluntary' interviews").

198. *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004).

199. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 570 (S.D.N.Y. 2002).

200. John J. Gibbons, *Commentary on the Terror on Trial Symposium*, 28 REV. LITIG. 297, 306 (2008). On appeal, the Second Circuit held that Padilla's detention went against the will of Congress and was outside of the president's authority. *Padilla v. Rumsfeld*, 352 F.3d 695, 721 (2d Cir. 2003), *rev'd* 542 U.S. 426 (2004).

201. Leila Nadya Sadat, *The Unlawful Enemy Combatant and the U.S. War on Terror*, 37 DENV. J. INT'L L. & POL'Y 539, 547 (2009). Padilla sought retribution for abuse. *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1019 (N.D. Cal. 2009) (holding that a detainee could bring an action against legal advisor John Yoo for his legal advice that led to abuse); *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012) (dismissing the case without addressing the merits because the court held that Yoo was entitled to qualified immunity).

Afghanistan, called an enemy combatant, and brought to Guantánamo Bay, but military officials transported him to the naval base in Norfolk, Virginia, after they realized he was an American citizen.²⁰² Both Padilla and Hamdi were held without access to legal counsel for over a year.²⁰³ The U.S. Court of Appeals for the Fourth Circuit ruled that it was not necessary to grant Hamdi a hearing because he was captured in a zone of combat,²⁰⁴ but the Supreme Court reversed by balancing the government's interest in keeping belligerents out of a zone of combat, Executive discretion over national security concerns, and the difficulties of affording unabridged procedural protections with Hamdi's fundamental interest in freedom.²⁰⁵ Six Justices determined that Hamdi was entitled to "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker" under the Fifth Amendment.²⁰⁶

2. Noncitizen Detainees

Precedent from *Hamdi*, *Padilla*, and *Lindh* indicates that U.S. citizens who were arrested and called enemy combatants do have constitutional protections although detention procedures compromised full due process rights. Alternatively, non-U.S. citizens held at Guantánamo Bay were afforded only nominal due process protections while they were detained for many years, which was more akin to the discretion that the Court has granted to executive actions vis-à-vis individual rights for those captured in war zones.

The U.S. Supreme Court denied habeas petitions of individuals who were convicted by U.S. military tribunals in U.S. occupied Germany in *Eisentrager* and Japan in *Hirota*²⁰⁷ and also upheld the

202. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509–10 (2004); *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 529–30 (E.D. Va. 2002); John Ip, *The Supreme Court and House of Lords in the War on Terror: Inter Arma Silent Leges?*, 19 MICH. J. INT'L L. 1, 16–17 (2010); Benjamin J. Priester, *Terrorist Detention: Directions for Reform*, 43 U. RICH. L. REV. 1021, 1032 (2009) (Hamdi was given "no process within the executive branch, but only a presidential order declaring him an enemy combatant.").

203. THE COMM. ON FED. COURTS, *supra* note 5, at 41, 53; Maogoto & Sheehy, *supra* note 8, at 697 (noting that Hamdi was held for three years and was required to provide witnesses and evidence in Afghanistan for his defense).

204. *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002).

205. *Hamdi*, 542 U.S. at 531–33, 539.

206. *Id.* at 533.

207. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[It is] well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders."); *Johnson v. Eisentrager*, 339 U.S. 763, 765–66, 778 (1950) (holding that nineteen alien petitioners, who were convicted by a U.S. military commission for

constitutionality of the ad hoc military tribunal system that convicted the German saboteurs arrested in the U.S. during World War II in *Ex parte Quirin*.²⁰⁸ But a noncitizen's rights can increase when a foreign national "increases his identity with American society" and U.S. institutions and culture, such as when there is a physical presence inside the U.S.²⁰⁹ Distinctions with Guantánamo plaintiffs are that the petitioners in *Eisentrager* and *Hirota* had gone through military commissions that permitted those convicted to have counsel and rebut accusations, evidence, and witnesses,²¹⁰ whereas bounty hunters captured initial Guantánamo detainees, who were then systematically rounded up based on minimal evidence,²¹¹ involuntarily transported across an ocean to a location with which they had no connection, and held without being charged.²¹² Nonetheless, the Bush Administration fought to deny habeas corpus rights.

F. Habeas for Noncitizens at Guantánamo Bay

1. Initiating the Combat Status Review Tribunal

Debate over whether the U.S. Constitution applied to noncitizen

taking hostile actions against the U.S. in China and were currently being held in a German prison, were not protected under the Constitution as an American citizen abroad would be protected); *id.* at 779 ("It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home."); *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948) (*per curiam*) (denying habeas relief under the Supreme Court's original jurisdiction to Japanese officials who were convicted by the U.S. military tribunal in Japan, despite that the U.S. occupied and effectively controlled Japan); *Khalid v. Bush*, 355 F. Supp. 2d 311, 320–23 (D.D.C. 2005) (holding that nonresident aliens seized and detained outside U.S. borders do not have constitutional rights).

208. *Ex parte Quirin*, 317 U.S. 1, 48, 45 (1942) (referring to the term "unlawful belligerent" to refer to Milligan, who claimed he was an American).

209. *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (holding, outside a wartime period, that aliens are not "entitled to Fifth Amendment rights outside the sovereign territory of the United States."); *Eisentrager*, 339 U.S. at 770, 777–78.

210. Ernesto Hernandez-Lopez, Boumediene v. Bush and Guantánamo, Cuba: Does the "Empire Strike Back"?, 62 SMU L. REV. 117, 180 (2009).

211. *See supra* Part III.B.

212. *Eisentrager*, 339 U.S. at 765–66; *id.* at 776, 785 (court not precluding nonresident aliens from having constitutional rights); *Ex Parte Quirin*, 317 U.S. at 18–23; *In re Territo*, 156 F.2d 142 (9th Cir. 1946); Amann, *supra* note 20, at 293–94 (noting that even during times of national emergency, courts have played an active role in guarding individual rights). These cases occurred *before* there was a significant expansion in fundamental rights and interests for individuals inside the U.S. during the 1960s and 1970s.

detainees at Guantánamo Bay was unsurprising,²¹³ but appointed Bush Administration legal advisers were quite assured that “the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at GBC [Guantánamo Bay, Cuba].”²¹⁴ Early U.S. court decisions exposed reluctance to conduct a detailed review of petitions as a convention of deference to the Executive on foreign policy-related circumstances,²¹⁵ but a turning point emerged with *Rasul v. Bush*. Rasul argued that being “held in Executive detention for more than two years . . . without access to counsel and without being charged with a crime” is holding someone in “violation of the Constitution or laws or treaties of the United States.”²¹⁶ The Supreme Court agreed.²¹⁷

Rasul can be distinguished from precedent.²¹⁸ Even aliens outside U.S. borders should be afforded some protection from the acts of U.S. officials,²¹⁹ and a key distinction with the precedent is that the so-called “war on terrorism” was not a real war but a persuasive

213. *Verdugo-Urquidez*, 494 U.S. at 277 (citing *Reid v. Covert*, 354 U.S. 1, 74 (Harlan, J., concurring)) (“[It is] not that the Constitution ‘does not apply’ overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place.”) (emphasis in original); *Reid*, 354 U.S. at 7–9 (1957) (recognizing the rights of U.S. citizens abroad).

214. Fisher, *supra* note 189, at 1241 (citing Memorandum from Patrick F. Philbin and John C. Yoo, Office of Legal Counsel, U.S. Dep’t of Justice, to William J. Hayes, II, Gen. Counsel, Dep’t of Def., Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba, at 1 (Dec. 28, 2001)).

215. *Rasul v. Bush*, 542 U.S. 466, 466 (2004); Brief for the Respondents at 42–44, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343) (Solicitor General maintaining that permitting judicial review of the plaintiff’s habeas challenges would invoke “grave constitutional problems” because it “would directly interfere with the Executive’s conduct of the military campaign against al Qaeda and its supporters.”); Amann, *supra* note 20, at 265 n.1 (enumerating cases in support).

216. *Rasul*, 542 U.S. at 484 n.15 (quoting 28 U.S.C. § 2241(c)(3) (2000)); Anzalone, *supra* note 174, at 299.

217. *Rasul*, 542 U.S. at 485.

218. *Id.* at 479–81 (Kennedy, J., concurring) (noting that *Eisentrager* controls but distinguishing the present case by noting that there was no involvement in hostilities).

219. *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (“All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant.”); *Reid v. Covert*, 354 U.S. 1, 6 (1957) (Black, J.). James Madison stated that “independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights [enshrined in the Bill of Rights, and] they will be an impenetrable bulwark against every assumption of power in the legislative or executive.” James Madison, *Speech to House of Representatives*, THE FOUNDERS CONSTITUTION (June 8, 1789), <http://press-pubs.uchicago.edu/founders/documents/v1ch14s50.html>.

rhetorical device.²²⁰ The International Commission of Jurists concluded an investigation and stated that the “war on terror” was misconceived and could not permit renegeing on international humanitarian rights law, that real courts should hold jurisdiction over terrorism cases because acts of terrorism are criminal acts, and that the Bush Administration’s commingling of laws of war with alleged acts of terrorism was illogical, illegal, and venturing to set improper precedent.²²¹

Moreover, even if the so-called war on terror could be viewed analogously to other wartime circumstances justifying the detention of POWs or trying of war criminals, Judge Stephen Henley befittingly pointed out that “[t]he government has not cited any persuasive authority for the proposition that acting as an unlawful enemy combatant, by itself, is a violation of the laws of war[,] . . . [and the] case must be based on the nature of the act, not simply on the status of the accused.”²²² Indeed, military tribunals are instituted to actually prosecute “acts” that are war crimes, but the lacuna was that there were no trials at Guantánamo Bay. At the time *Rasul* was decided, 650 foreigners were held at Gitmo while only one or two had been charged with offenses.²²³ But most of the detainees had been held for

220. *Rasul*, 542 U.S. at 471–72 (Justice Stevens noting in the present case that the individuals were not at war with the U.S.); BRUCE ACKERMAN, BEFORE THE NEXT ATTACK 58 (2006) (stating that the conflict was a form of emergency rather than a war); Hassan Abbas, *Engaging the Muslim World*, 34 FLETCHER F. WORLD AFF. 9, 11 (2010) (the phrase “war on terror” is particularly unpopular in the Middle East); Charles H. Brower II, *The Lives of Animals, the Lives of Prisoners, and the Revelations of Abu Ghraib*, 37 VAND. J. TRANSNAT’L L. 1353, 1375 (2004) (“the so-called ‘war on terror’”); Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT’L L. 241, 249 (2003) (expressing that one perception is that “war rhetoric” is merely metaphorical); Gallagher, *supra* note 4 (referencing the “so-called ‘war on terror’”); Jonathan Ulrich, Note, *The Globes Were Never On: Defining the President’s Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT’L L. 1029, 1030 (2005) (the “so-called ‘war on terror’”). The euphemism “war on terror” was not the first time that Republicans have used word play for political agendas. Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate*, 31 CARDOZO L. REV. 45, 77 (2009) (Frank Luntz has been a Republican strategist known for re-coining phrases for political effect, such as modifying “‘tax cuts’ to ‘tax relief,’ ‘undocumented workers’ to ‘illegal aliens,’ ‘private school vouchers’ to ‘parental choice,’ ‘global warming’ to ‘climate change,’ ‘late-term abortion’ to ‘partial-birth abortion,’ ‘healthcare reform,’ to ‘government takeover of healthcare,’ . . . [and] ‘kidnapping’ [to] ‘extraordinary rendition.’”).

221. INT’L COMM’N OF JURISTS, EMINENT PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, ASSESSING DAMAGE, URGING ACTION 14–15, 34, 49–50 (2009), available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_02_09_ejp_report.pdf.

222. van Aggelen, *supra* note 183, at 46–47.

223. Brief for the Respondents at 6–7, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-

over two years without due process, a hearing, or an attorney.²²⁴ Human rights treaties require that pre-trial detention be limited and that there be “the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention.”²²⁵

Shortly after the U.S. Supreme Court decided *Rasul* and held that detainees at Guantánamo Bay were entitled to habeas corpus review and due process of law,²²⁶ Deputy Secretary of Defense Paul Wolfowitz signed an order establishing a Combatant Status Review Tribunal (CSRT) to determine which detainees should be labeled enemy combatants—as supporters of the Taliban or al-Qaeda or participants in hostilities against the “Coalition.”²²⁷ Those not classified as an enemy combatant would be released.²²⁸

The three-judge tribunal held secret proceedings over a six-month period and released three out of 558 detainees for not being enemy combatants, which is predictable because each detainee was given the burden of proving his innocence²²⁹ during a three-hour hearing that was conducted thousands of miles from the location

334, 03-343); Amann, *supra* note 20, at 267 (stating that the Guantánamo population exceeded 700, but by late 2003, the population was about 660); Glazier, *supra* note 136, at 158 (stating that the Administration took only minimal steps to justify detention or bring charges against detainees who could be held indefinitely without recourse and that Rumsfeld appointed Paul Wolfowitz to run the system, but Wolfowitz did not seem committed to carrying out the trials, so he replaced Wolfowitz with retired Army Major General John D. Altenburg, Jr. in December 2003).

224. *Rasul*, 542 U.S. at 483–84 n.15 (quoting 28 U.S.C.A. § 2241(c)(3) (2008)); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 447 (D.D.C. 2005).

225. U.N. Human Rights Comm., *supra* note 77, at 7.

226. *Rasul*, 542 U.S. at 466; Editorial, *Reaffirming the Rule of Law*, N.Y. TIMES (June 29, 2004), <http://www.nytimes.com/2004/06/29/opinion/reaffirming-the-rule-of-law.html?src=pm>.

227. *Boumediene v. Bush*, 583 F. Supp. 2d 133, 134 (D.D.C. 2008) (addressing the definition of the term enemy combatant, which included supporters of the Taliban, al-Qaeda, or anyone who has engaged in hostilities or aided in hostilities against the U.S. under the Military Commissions Act); Memorandum from the Deputy Sec’y of Defense for the Sec’y of the Navy 1, 3 (July 7, 2004), *available at* <http://www.pentagon.mil/news/Jul2004/d20040707review.pdf>.

228. Memorandum from the Deputy Sec’y of Def. for the Sec’y of the Navy, *supra* note 227, at 3–4; John Mintz, *Pentagon Sets Hearings for 595 Detainees*, WASH. POST, at A1 (July 8, 2004) (stating that since early 2002, human rights activists pointed out that the Bush Administration was obligated to hold hearings, but the government refused, “saying the detainees did not deserve such rights because they are terrorists”).

229. The detainee was not given the burden of creating “reasonable doubt.” Alec Walen & Ingo Venzke, *Detention in the “War on Terror”: Constitutional Interpretation Informed by the Law of War*, 14 ILSA J. INT’L & COMP. L. 45, 49 (2007) (noting that there was a “preponderance of the evidence” standard employed to deem a detainee an enemy combatant and a rebuttable presumption that the government’s evidence was “genuine and accurate.”).

where the accused was captured.²³⁰ Detainees claimed that statements acknowledging or implying guilt were used against them, including when those statements were involuntarily made or were made while being subject to torture.²³¹ Detainees could not inspect the evidence brought against them and had no lawyers, but they were given a “personal representative” military officer.²³²

The CSRT process was challenged, and U.S. District Judge James Robertson called the CSRT procedures illegal, as a violation of self-executing Geneva Convention provisions, and bluntly summarized that “the president is not a tribunal.”²³³ Indeed, the President was arrogating dominion to establish military commissions, determining the criteria for calling detainees enemy combatants, insisting that courts had no review authority, setting evidentiary standards that assumed the validity of information derived from interrogations, denying the assistance of attorneys, defining the interrogation procedures,²³⁴ and imposing coercion to impel detainees to incriminate themselves. Federal court challenges were

230. Alexandra Olson, *Detainee Has Last Guantanamo Panel Review*, ASSOCIATED PRESS (Jan. 22, 2005), <http://www.kuwaitifreedom.org/media/pdf/Detainee%20Has%20Last%20Guantanamo%20Panel%20Review.pdf> (stating that defense attorneys and human rights groups called the “review tribunals shams, in part because prisoners are not allowed to have lawyers present and are only told unclassified portions of the allegations against them”); Richard A. Serrano, *Guantanamo Bay Justice: 3 Hours Behind Closed Doors*, L.A. TIMES (Nov. 7, 2004), <http://articles.latimes.com/2004/nov/07/nation/na-tribunals7>.

231. John Hendren, *Guantanamo Detainees Expected to Claim Torture*, L.A. TIMES (Aug. 18, 2004), <http://articles.latimes.com/2004/aug/18/nation/na-gitmo18>.

232. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 450 (2005); see Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1281 (2002) (noting that the earlier screening proceedings were also problematic).

233. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004); Carol D. Leonnig & John Mintz, *Judge Says Detainees’ Trials Are Unlawful*, WASH. POST, Nov. 9, 2004, at A1; Toni Locy, *Tribunal Halted After Judge Rules System Unlawful*, USA TODAY (Nov. 8, 2004), http://usatoday30.usatoday.com/news/world/2004-11-08-gitmo-court-halt_x.htm.

234. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 144 (2007) (legal analysis of John Yoo) (“[A]ny effort by Congress to regulate the interrogation of battlefield detainees would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President . . . [It] has no foundation in prior OLC opinions, or in judicial decisions, or in any other sources of law.”); Amann, *supra* note 20, at 295 (stating that “the policy sprung solely from the head of an executive that purports to act as warrior and warden, prosecutor and peacemaker, adjudicatory and appellate court.”); Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 BROOK. L. REV. 871, 872 (2007). Moreover, unilateralist executive power was asserted in other areas that had nothing to do with national security, such as in insisting on “executive preemption” to displace state law and bypassing Congress in areas that require legislative approval for authority and in confirmation processes. *Id.* at 872–73.

consolidated in *In re Guantanamo Detainees Cases*, and Judge Joyce Hens Green for the U.S. District Court for the District of Columbia rendered a similar ruling two months later.²³⁵ Judge Green held that the Geneva Conventions were self-executing, the detainees' fundamental right of due process under the Fifth Amendment had been deprived, the CSRT process fell short of the *Hamdi* requirement that the detainee "must receive notice of the factual basis for his classification and a fair opportunity to rebut the government's factual assertions before a neutral decision maker," and that determinations of guilt were apparently contingent on coerced confessions.²³⁶

2. Congressional Action

With courts defying the President's tribunal system and 160 habeas corpus challenges filed in federal courts,²³⁷ the Republican-controlled Congress pushed for and enacted the Detainee Treatment Act of 2005, which set forth: (1) interrogation standards, (2) prohibitions on using cruel and inhumane treatment,²³⁸ (3) exemptions for U.S. military personnel from being prosecuted for harsh interrogations,²³⁹ and (4) the right to strip federal court jurisdiction over habeas claims.²⁴⁰ Debate over the habeas stripping provision was particularly vexatious with critics contending that

235. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 443; Carol D. Leonnig, *Guantanamo Bay Tribunals Ruled Illegal*, WASH. POST, Jan. 31, 2005, at A1.

236. *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (plurality distinguishing between "initial captures on the battlefield" from those who were continually detained, with the latter having a right to review); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 444, 473–74.

237. MCCOY, *supra* note 22, at 216, 218 (reporting that habeas corpus challenges and cases were pending to release hundreds of innocent detainees, challenge the appalling conditions of detainment, and thwart the use of coerced confessions, but Attorney General Gonzales would later demur after the Detainee Treatment Act of 2005 was enacted, noting that the new law only banned "severe" psychological or physical pain, and stating that he would be notifying federal judges and seeking dismissal of all habeas corpus cases that had been filed).

238. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(a), 119 Stat. 2680, 2739 (2005) (codified as 42 U.S.C. § 2000dd (2006)). Also, as an earlier initiative, in October 2005, Congress passed a new law by a vote of 90 to 9 to demand that Bush stop authorizing the use of torture. Editorial, *Binding the Hands of Torturers*, N.Y. TIMES, Oct. 8, 2005, at A14. The White House and the CIA lobbied to exempt the CIA from the restrictions. Eric Schmitt, *House Delays Vote on U. S. Treatment of Terrorism Suspects*, N.Y. TIMES, Nov. 4, 2005, at A25.

239. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1002–06, 119 Stat. 2680, 2739–44 (2005).

240. *Id.* § 1005(e)(1) (stating that "no court, justice, or judge" can accept jurisdiction over "an application for a writ of habeas corpus filed by or on behalf of an alien detained . . . at Guantánamo Bay, Cuba.").

detainees would be without a remedy in the face of indefinite incarceration without cause²⁴¹ and advocates maintaining that detainees were “clogging the Federal courts” and undermining national security.²⁴² Concerning the interests of justice, if American courts did have jurisdiction and the U.S. Bill of Rights applied—either via the U.S. Constitution directly or by incorporation through the ICCPR—denying legal representation²⁴³ and using coerced confessions²⁴⁴ from interrogations and self-incriminating evidence²⁴⁵ would violate long-established and fundamental principles of due process. The implicit balance among prosecutorial processes, court interests in ascertaining the truth and rendering justice, and the rights of the accused could be addressed by challenging the essential

241. U.N. Comm. Against Torture, *supra* note 175, at 6 (noting that the Committee was appalled that the Detainee Treatment Act of 2005 sought to withdraw habeas corpus petitions and stated that the U.S. “should cease to detain any person at Guantánamo and close the detention facility, permit access by the detainees to judicial process or release them as soon as possible.”).

242. 151 CONG. REC. S12, 663 (daily ed. Nov. 10, 2005) (statement of Sen. Graham) (“[I]f we do not rein in legal abuse by prisoners, we are going to undermine our ability to protect ourselves.”); *id.* at S12, 659–60 (statement of Sen. Kyl) (“[W]hat we have gotten rid of are these hundreds of habeas petitions that will be clogging the Federal courts Do we want our Federal courts clogged with terrorists making these kinds of petitions? No.”).

243. U.S. CONST. amend. VI states: In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” The right attaches at the initiation of legal proceedings. *Brewer v. Williams*, 430 U.S. 387, 398 (1977). This can arise when law enforcement authorities or interrogators deliberately sought to elicit incriminating information unless the right is validly waived. *United States v. Henry*, 447 U.S. 264 (1980); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Massiah v. United States*, 377 U.S. 201 (1964).

244. U.S. jurisprudence has long prohibited involuntary confessions made under conditions of physical or emotional abuse and emotional pressure from being introduced as evidence in court under the due process clauses of the Fifth and Fourteenth Amendments. *Dickerson v. United States*, 530 U.S. 428, 434 (2000); *Spano v. New York*, 360 U.S. 315, 320 (1960); *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936); *Bram v. United States*, 168 U.S. 532, 542–43 (1897). Repeated interrogations over sixteen days have been excluded. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). Confessions have been excluded of a defendant subjected to denial of food and clothing. *Brooks v. Florida*, 389 U.S. 413, 413–14 (1967). The Supreme Court has excluded such statements not only because communications are apt to be unreliable, but also because U.S. criminal law is premised on “an accusatorial . . . system in which the State must establish guilt by evidence independently and freely secured,” rather than by coercion that begets self-incrimination. *Rogers v. Richmond*, 365 U.S. 534, 540–41 (1961).

245. U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself”); *Miranda*, 384 U.S. at 436; Paul G. Cassel & Richard Fowless, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda’s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1988); Michael Wald et al., *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967).

separation of powers deficit.

3. *Hamdan v. Rumsfeld*

Several months later, the Supreme Court decided *Hamdan v. Rumsfeld* and held that the President did not possess unilateral authority under the AUMF or another power to constitute the tribunals, Congress did not authorize the commissions through any legislation,²⁴⁶ and the tribunals violated Common Article 3 of the Geneva Conventions.²⁴⁷ On the facts, the Court also held that Yemini Salim Ahmed, who was reportedly Osama bin Laden's driver and was apprehended by the Northern Alliance and brought to Guantánamo in June 2002,²⁴⁸ had not been charged with an offense that would warrant a military commission to assert jurisdiction.²⁴⁹ Reacting to the *Hamdan* decision, Bush remarked: “[T]he Supreme Court’s recent decision has impaired our ability to prosecute terrorists through military commissions and has put in question the future of the CIA program” that is crucial for “questioning terrorists” and “getting life-saving information.”²⁵⁰ “Questioning” has nothing to do with kidnapping, torturing, and holding hundreds of individuals under a hyper-sensitive risk perception that assumes detainees are terrorists when it is courts that assess guilt.

After the Supreme Court decided *Hamdan*, Bush addressed Congress: “I’m asking that Congress make explicit that by following standards of the Detainee Treatment Act, our personnel are fulfilling America’s obligations under Common Article Three of the Geneva Conventions.”²⁵¹ Rather than having allegiant appointees issue legal opinions that explicated how the law could be manifestly circumvented,²⁵² Bush might have considered either listening to

246. *Hamdan v. Rumsfeld*, 548 U.S. 557, 625 (2006) (majority opinion); Koh, *supra* note 4, at 2361; Linda Greenhouse, *Justices, 5–3, Broadly Reject Bush Plan to Try Detainees*, N.Y. TIMES, June 30, 2006, at A1.

247. *Hamdan*, 548 U.S. at 557 (holding that the military tribunals for detainees “violate both the [Uniform Code of Military Justice] and the four Geneva Conventions signed in 1949.”); John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1178–79 (2007).

248. *Hamdan*, 548 U.S. at 566, 570; Sadat, *supra* note 201, at 548.

249. *Hamdan*, 548 U.S. at 593–613 (plurality opinion).

250. *Remarks on the War on Terror*, 42 WEEKLY COMP. PRES. DOC. 1569, 1574 (Sept. 6, 2006).

251. *Id.* at 1570.

252. Benjamin G. Davis, *Refluat Stercus: A Citizen’s View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture*

experts and human rights groups at some point over the preceding five years about international law violations or actually reading one sentence in Article Three of the Geneva Convention, which states that “a regularly constituted court” must “afford[] all the judicial guarantees which are recognized as indispensable by civilized peoples.”²⁵³ Thus, if there is a reason to detain and indict individuals, there are commonly understood judicial guarantees that are applicable to the language of Common Article 3. Fair trial rights of “civilized peoples” include:

1. The presumption of innocence, 2. The right to counsel of choice before and after trial, 3. The right of defendants not to testify against themselves or to confess their guilt, 4. The right to a speedy trial, including the right to be promptly informed of charges or reasons for detention, 5. The defendant’s right to confront evidence and witnesses, including the defendant’s right (a) to be present at proceedings, (b) to call witnesses, and (c) to examine witnesses against him/herself, 6. The right to a public forum, most importantly a public judgment, and 7. The right to an appeal, in the form of (a) a challenge to the legality of detention, and (b) the right to review by a higher court.²⁵⁴

G. *Military Commissions Act of 2006*

Senator Leahy called the *Hamdan* decision a “triumph for our constitutional system of checks and balances,”²⁵⁵ but Republicans still controlled Congress, succored the president, and dismantled *Hamdan*²⁵⁶ by adopting the Military Commissions Act of 2006

and Cruel, Inhuman or Degrading Treatment, 23 ST. JOHN’S J.L. COMM. 503, 578–79 (2008) (noting that the President’s directives were repudiated by the Supreme Court) (“All of these internal to the United States machinations, from the external perspective appear to be a failed effort by the President and those who advise him to extract the United States from its international obligations [of Common Article 3] through artful dodger analysis.”); Diller, *supra* note 53, at 307 (“[The] executive branch alone—with no express input from Congress—made all of these important initial decisions regarding the treatment of ‘war-on-terror’ detainees.”).

253. Geneva Convention, *supra* note 145, art. 3.

254. Weissbrodt & Templeton, *supra* note 188, at 365–67.

255. Diller, *supra* note 53, at 314.

256. Republican House of Representatives member Duncan Hunter of California, the chairman of the Armed Services Committee, explained that congressional Republicans would “do what the President wants.” Diller, *supra* note 53, at 316; Ip, *supra* note 202, at 19 (“[The Military Commissions Act] undid the *Hamdan* decision; [the new legislation] explicitly authorized the use of military commissions, albeit while making some procedural improvements.”).

(MCA),²⁵⁷ which established a tribunal process that was touted as consistent with the Geneva Conventions. The MCA provided jurisdiction “to try any offense made punishable by this chapter or the law of war when committed . . . before, on, or after September 11, 2001.”²⁵⁸ American courts were explicitly prohibited from exercising habeas jurisdiction and from enforcing international law.²⁵⁹

The American Civil Liberties Union called the MCA “one of the worst civil liberties measures ever enacted in American history.”²⁶⁰ Amnesty International stated that “the United States Congress has, in effect, given its stamp of approval to human rights violations.”²⁶¹ The *New York Times* called the MCA “a tyrannical piece of legislation that will be ranked with the low points in American democracy.”²⁶² Bush interpreted the MCA differently by affirming that “our intelligence professionals need to continue questioning terrorists and savings lives. This bill provides legal protections that ensure our military and intelligence professionals will not have to fear lawsuits filed by terrorists simply for doing their jobs.”²⁶³

Republican Senator Arlen Specter, the Judiciary Committee

257. Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. §§ 948a–950w and other sections of titles 10, 18, 28, and 42); 152 CONG. REC. H7535 (2006).

258. 10 U.S.C. § 948d(a) (2006); HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW* 350–51 (2005) (noting that the MCA inclusively punished “material support” for terrorism).

259. 10 U.S.C. §§ 948a–950t (2006); 28 U.S.C. § 2241(e) (2006) (“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 property detained as an enemy combatant or is awaiting such determination.”); 28 U.S.C. § 2241 (2006) (“[N]o person may invoke the Geneva Conventions . . . in any habeas corpus or other civil action or proceeding to which the United States . . . is a party as a source of rights in any court of the United States.”).

260. *President Bush Signs Un-American Military Commissions Act, ACLU Says New Law Undermines Due Process and the Rule of Law*, AM. CIVIL LIBERTIES UNION (ACLU) (Oct. 17, 2006), <http://www.aclu.org/safefree/detention/27091prs20061017.html>.

261. *Rubber Stamping Violations in the ‘War on Terror’: Congress Fails Human Rights*, AMNESTY INT’L (Sept. 29, 2006), <http://www.amnesty.org/en/library/asset/AMR51/15/5/2006/en/4556e28b-d3eb-11dd-8743-d305bea2b2c7/amr511552006en.html>; see FREDERICK A. O. SCHWARZ, JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* 92 (2007) (critiquing Bush’s positive statement about the MCA (“[T]his was the Administration that for four years had used a standard of ‘humane treatment’ that lacked any definition whatsoever. Rather than clarity, the Administration sought license to torture.”)).

262. Khan, *supra* note 6, at 6.

263. *Remarks on Signing the Military Commissions Act of 2006*, 42 WEEKLY COMP. PRES. DOC. 1832 (2006).

chair, voted for the MCA, but called § 7, the habeas denial provision, “patently unconstitutional,” and stated that the judiciary would “clean it up.”²⁶⁴ This is a curious assertion because the Supreme Court ordinarily accords deference by presuming that congressional laws are constitutional.²⁶⁵ Also, passing an admittedly unconstitutional bill, evidently to appease the president of the same party that holds a majority in Congress, would seem to contravene the congressional oath of office that certifies members are “bound by Oath or Affirmation to support this Constitution.”²⁶⁶ After Democrats took control of both Houses of Congress, the Senate introduced the Habeas Corpus Restoration Act of 2007, which sought to grant habeas review for enemy combatants, but the bill failed because an affirmative vote from 60 Senators was required to amend the legislation, and there were only 56 Senators voting in favor.²⁶⁷

H. Initiating Military Commission Hearings in 2007

1. The Context

When the process of detention originated, a legitimate tribunal system was supposed to exist. The beginning of the title of the President’s order, adopted on November 1, 2001, was “*Detention, Treatment, and Trial*.”²⁶⁸ But trials were not being held at

264. Diller, *supra* note 53, at 283, 305 (Section 7’s “habeas-stripping provision—is the most prominent recent example of an intentionally unconstitutional law.”); *id.* at 318–20 (congressional debates centered on whether it was constitutional, and Republicans wholeheartedly supported it and Democrats did not); O’Connell, *supra* note 150, at 5136 (“[T]he Act puts us in violation of our obligations under the Geneva Conventions.”). Senator John McCain stated that the Executive is required to comply with the Geneva Conventions and that with the adoption of the MCA that “there is no doubt that the integrity and letter and spirit of the Geneva Conventions have been preserved.” 152 CONG. REC. S10414 (daily ed. Sept. 28, 2006) (statement from Senator McCain); R. Jeffrey Smith & Charles Babington, *White House, Senators Near Pact on Interrogation Rules*, WASH. POST, Sept. 22, 2006, at A1 (statement from John McCain).

265. *United States v. Morrison*, 529 U.S. 598, 606–07 (2000); Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1254 (2000); Ruth Coker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 121 (2001).

266. U.S. CONST. art. VI; Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609–10 (1983) (noting that Congress “infrequently demonstrat[es] a concern for constitutional limitations.”).

267. Habeas Corpus Restoration Act of 2007, S. 185, 110th Cong. (2007) (see Roll Call Vote for S. 185); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008).

268. *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against*

Guantánamo Bay.²⁶⁹ Rather than instituting a tribunal system to determine guilt and certify whether ongoing detention is warranted, over a thousand detainees were presumed guilty based on coerced testimony, hearsay, and classified information that was not produced publicly or for captives, which resulted in detentions of various lengths.²⁷⁰ The military commission system was illegitimate from the beginning, but rather than observe the warning of federal courts and public opinion, the Bush Administration disregarded opposition²⁷¹ and marched on to institute what lawyers called a spontaneous, lawless system of “kangaroo courts” that evolved based on exigency.²⁷² What transpired next is perhaps most extraordinary.

The present military commissions may have been more akin to past military tribunals that were situated in active combat zones where adhering to evidentiary rules and authentication requirements was more onerous, even though the present system was located in a secure compound at Guantánamo Bay.²⁷³ In September 2006, Bush announced that secret CIA prisons holding suspected terrorists existed²⁷⁴ and stated that those facilities were being closed and that fourteen key al-Qaeda suspects were being transferred from secret prisons to Guantánamo Bay.²⁷⁵ To justify Gitmo, the Bush Administration had for five years contended that this special detention facility was necessary to incarcerate the “worst of the worst” and a

Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001).

269. Erwin Chemerinsky, *An Unprecedented Threat to Civil Liberties: An Essay in Honor of Nadine Strossen*, 41 TULSA L. REV. 625, 633 (2006); Gregory E. Maggs, Symposium, *Enemy Combatants After Hamdan v. Rumsfeld: Foreward*, 75 GEO. WASH. L. REV. 971, 972 (2007); John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL OF RTS. J. 765, 774 (2007).

270. MCCOY, *supra* note 22, at 221.

271. Victor Hansen, *What We Can Learn About Evidence Rules from the Government’s Most Recent Efforts to Construct a Military Commissions Process*, 35 WM. MITCHELL L. REV. 1480, 1509 (2009).

272. Yaroshefsky, *supra* note 7, at 469, 482.

273. Hansen, *supra* note 271, at 1505.

274. Naureen Shah, *Knocking on the Torturer’s Door: Confronting International Complicity in the U.S. Rendition Program*, 38 COLUM. HUMAN RIGHTS L. REV. 581, 586–87 (2007).

275. *Remarks on the War on Terror*, 42 WEEKLY COMP. PRES. DOC. 1569, 1573 (Sept. 6, 2006); JEFFREY T. RICHELSON, THE U.S. INTELLIGENCE COMMUNITY 308 (2012) (noting a report of about thirty-six detainees at black sites per year); Powell, *supra* note 7, at 348–49 (stating that when Bush “announced that he was transferring over a dozen detainees from secret prisons run by the CIA overseas to Guantánamo, he failed to end the program of incommunicado CIA detention entirely.”); Shah, *supra* note 274, at 587.

very “dangerous” group,²⁷⁶ which was clearly untrue.²⁷⁷ Fourteen new, formerly secretly held, “worst of the worst” detainees were transported to Guantánamo Bay, classified as enemy combatants,²⁷⁸ and lined up as the first defendants in the Military Commissions trials,²⁷⁹ but the new prisoners were also combined in status with over five hundred other detainees who were predominantly taken from Afghanistan, abused, and detained without charge.²⁸⁰ This move seemed to deviously justify both Guantánamo Bay’s existence as a legitimate prison facility and the Military Commissions system.

2. New Proceedings

Senators Carl Levin and Bob Graham watched the Khalid Shaikh Mohammed (KSM) hearing from Guantánamo Bay on a closed circuit television.²⁸¹ Levin and Graham did not observe the other thirteen cases, but reported to Congress a week later that they watched the entire tribunal procedure, which consisted of “three military officers, . . . KSM, a personal representative, who was not a lawyer, . . . a recorder[,] and an interpreter.”²⁸² The Senators remarked that during the proceedings, “a lengthy statement was read by the personal representative on KSM’s behalf detailing his leadership in planning the 9/11 terrorist attacks, personal involvement in executions, and

276. MCCOY, *supra* note 22, at 214; Denbeaux, *supra* note 85, at 2.

277. Nagwa Ibrahim, Comment, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E. L. 121, 145 (2008/09) (noting that a CIA report acknowledged that Guantánamo detainees were not dangerous or the “the worst of the worst”); *see generally* Yamamoto, *supra* note 64, at 295 (listing a number of books and journalist accounts and affirming that “White House dissembling ranges from white lies, to the apparent fabrication of ‘facts’ so as to label people ‘terrorists’ and thus justify either criminal prosecutions or indefinite incarcerations”; and providing other examples such as “denials of racial profiling in terror investigations and post-9/11 immigration policy, to misrepresenting terror information to a fearful public to maintain support for flagging national security policies, and to disinformation about weapons of mass destruction in order to legitimate what can no longer be called a ‘pre-emptive’ attack on Iraq.”).

278. *Combatant Status Review Tribunals/Administrative Review Boards*, U.S. DEP’T OF DEF, http://www.defense.gov/news/combatant_Tribunals.html. (last visited Sept. 20, 2013)

279. Parry, *supra* note 269, at 777.

280. Van Bergen & Valentine, *supra* note 163, at 458–59 (noting that of the approximately 550 detainees held at Guantánamo, fifteen were determined to meet the criteria for the military tribunal trials).

281. Press Release, Senator Carl Levin, *Statement of Levin and Graham on Trip to Guantanamo Bay* (Mar. 16, 2007), *available at* <http://www.levin.senate.gov/newsroom/press/release/?id=9da5678d-0bbb-4dad-98df-aeb44917ab15>.

282. *Id.*

many other terrorist activities.”²⁸³ Other than Osama bin Laden, no other person in the world could have been a better showcase defendant because KSM’s culpability had been assumed in media reports for several years, and according to the 9/11 Commission Report, he was even the alleged mastermind behind 9/11, but his confessional during proceedings was apparently also accompanied by outlandish admissions of guilt to a cornucopia of unproven allegations.²⁸⁴ KSM’s written statement alleged mistreatment, but he stated “that his testimony was accurate, truthful, and voluntary,” and Levin and Graham affirmed that “the true test of the CSRT process is not a case in which the detainee admits the allegations against him, it is a case in which the detainee disputes those allegations.”²⁸⁵

For the fourteen “high value” detainees, transcripts of the secretive proceedings were purged and only a portion of the testimony was declassified and made public, but allegations of torture were extracted from proceeding records.²⁸⁶ From the purged two-page or three-page transcripts, five detainees voluntarily admitted to some level of guilt involving terror charges, two detainees denied charges, and seven prisoners remained silent, did not attend the hearings, or claimed to have been tortured during their incarceration.²⁸⁷

Many of the same failings the Supreme Court cited in *Hamdan*—including that the military commissions held secret proceedings, excluded the defendant for “national security interests,” permitted a two-third majority of the judges to convict, had weak appeal procedures, and prevented defendants from seeing the evidence against them²⁸⁸—went uncorrected or were not substantially

283. *Id.*

284. Former CIA agent Robert Baer explained: “It’s also clear he is making things up,” which “raises the question of just what else he has exaggerated, or outright fabricated.” Robert Baer, *Why KSM’s Confession Rings False*, TIME (Mar. 15, 2007), <http://www.time.com/time/world/article/0,8599,1599861,00.html>. CIA official John Brennan made similar statements. Jane Mayer, *The Black Sites*, NEW YORKER (Aug. 13, 2007), http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer?currentPage=all (“[KSM,] like virtually all the top Al Qaeda prisoners held by the C.I.A., has claimed that, while under coercion, he lied to please his captors.”).

285. Press Release, *supra* note 281.

286. Davis, *supra* note 252, at 512.

287. U.S. DEP’T OF DEF., *supra* note 278.

288. *Hamdan v. Rumsfeld*, 548 U.S. 557, 613–14 (2006) (stating that the commission could admit “any evidence that, in the opinion of the presiding officer, ‘would have probative value to a reasonable person.’”). This could presumably permit classified information or even coerced admissions. See also Miles P. Fischer, *Essay: Applicability of the Geneva Conventions to “Armed Conflict” in the War on Terror*, 30 FORDHAM INT’L L.J. 509, 533–34

improved. In the new proceedings, defendants were prohibited from retaining a lawyer,²⁸⁹ but they could have a personal representative, who was a member of the military.²⁹⁰ Detainees had no guaranteed right to present a witness, but if they were granted the right, the witnesses needed to appear at their own expense, or might be permitted to appear by some long-distance means.²⁹¹ Experts “harshly criticized the CSRTs [for being] . . . shrouded in secrecy, [and] denying detainees the ability to hear and contest the evidence against them,”²⁹² which seems to violate due process unless the denial was only for the most highly sensitive information.²⁹³ The defendant could be barred from viewing the evidence, the personal representative could not discuss the evidence with the detainee,²⁹⁴ hearsay could be used against the accused, and the accused could not per se confront witnesses providing evidence.²⁹⁵

(2007) (“Military commissions are back on track. While their procedures do not conform to court martial procedures as some had hoped, they are subject to improved rules including change of the provision that most troubled the *Hamdan* plurality, the ability of defendants to see the evidence against them.”).

289. See *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (holding that erroneous failure to permit the accused to retain counsel of choice is an automatic ground to overrule a conviction). Denying legal counsel was a past problem. Guantánamo defense attorney Clive Stafford Smith explained that some trickery involved denying counsel, limiting the lawyer’s ability to meet with the detainees, telling detainees that their lawyers are Jewish or homosexual, or having interrogators pretend to be lawyers. James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 363 (2009). In another case Australian David Hicks, who was detained in Afghanistan and kept at Guantánamo for two years, was finally given counsel because the government believed that a lawyer could assist in attaining a guilty plea. Yaroshefsky, *supra* note 7, at 469, 474–75. Hicks claimed he had been brutally beaten and tortured in U.S. custody. *Id.* at 475.

290. DEPUTY SEC’Y OF DEFENSE, COMBATANT STATUS REVIEW TRIBUNAL PROCESS 4 (2006), available at <http://www.defense.gov/news/Aug2006/d20060809CSRTProcedures.pdf> [hereinafter CSRT Process].

291. *Id.* at 1, 6, 8.

292. Diller, *supra* note 53, at 310; Lobel et al., *supra* note 7, at 62 (“[The] administration has never advanced any legitimate reason for [the] use of secret evidence—evidence that’s been obtained by coercion.”).

293. *Gates v. Bismullah*, 554 U.S. 913 (2008) (vacating and remanding case to D.C. Circuit due to *Boumediene*); *Bismullah v. Gates*, 501 F.3d 178, 180 (D.C. Cir. 2007) (holding that to have a reasonable review of a detention, the detainee’s counsel must have access to classified information, other than “certain highly sensitive information.”).

294. CSRT Process, *supra* note 290, at 1, 4–6 (noting an “opportunity to review unclassified information”).

295. MCA, 10 U.S.C. §§ 949a(b)(2)(E), 949a(b)(3)(D) (2006).

3. Critiques of the Proceedings

Experts called the new proceedings “kangaroo courts”²⁹⁶ that “allowed for political manipulation of nearly all aspects of the trial.”²⁹⁷ Emphasizing that “statements of fact lacked even the most fundamental earmarks of objectively credible evidence,” Colonel Stephen Abraham explained that:

The information used to prepare the files to be used . . . frequently consisted of finished intelligence products of a generalized nature—often outdated, often “generic,” rarely specifically relating to the individual subjects of the CSRTs or to the circumstances relates to those individuals’ status.²⁹⁸

As further testament that this position continued, in October 2007, Department of Defense General Counsel William J. Haynes, one of the four main advisers who was criticized for providing legal advice with expansive presidential power and authorizing harsh interrogation methods,²⁹⁹ was appointed to head the military prosecutions at Guantánamo Bay.³⁰⁰ Shortly after the appointment, lead prosecutor Air Force Colonel Morris Davis resigned, stating that classified information was employed to taint trials and that the process “had become deeply politicized” with rigged proceedings because Haynes wanted no acquittals.³⁰¹ Professor Marc Falkoff,

296. Lobel et al., *supra* note 7, at 62.

297. van Aggelen, *supra* note 183, at 46 (discussing the works of Professor Gregory McNeal).

298. *Al Odah v. United States*, 551 U.S. 1161 (2007) (what were allegedly specific statements actually lacked credible evidence and there was no basis to conclude the individual should be classified as an enemy combatant); Declaration of Lieutenant Colonel Stephen Abraham, Reply to Opposition to Petition for Rehearing of Denial of Certiorari App. at 8, 22–23, *In re Guantanamo Bay Detainee Litigation*, 577 F. Supp. 2d 312 (D.D.C. 2008) (1:2008mc00442), available at <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2008mc00442/131990/1061/1.pdf>.

299. Bejesky, *Call for Papers*, *supra* note 147, at 5.

300. Scott Horton, *Jim Hayne’s Long Twilight Struggle*, HARPERS (Feb. 8, 2008), <http://harpers.org/blog/2008/02/jim-hayness-long-twilight-struggle/> (“[Haynes] wanted to assume control over the decisions and actions of the prosecution and to manipulate the conduct of the convening authority as well.”).

301. *Id.*; Ross Tuttle, *Rigged Trials at Gitmo*, THE NATION (Mar. 3, 2008), <http://www.thenation.com/article/rigged-trials-gitmo>; Josh White, *Ex-Prosecutor Alleges Pentagon Plays Politics*, WASH. POST (Oct. 20, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/20/AR2007102000179.html> (Davis remarking that “I felt pressured to do something less than full, fair and open.”).

who also represented Guantánamo inmates, remarked:

[Davis's resignation and revelations] may finally signal to the American public that politics rather than principles reign at Guantánamo, and that decisions about the administration of justice at the camp are being made—largely outside of public view and without accountability—by political actors for nakedly political reasons.³⁰²

At the risk of career advancement,³⁰³ military officials involved in or familiar with proceedings provided early warnings of these problems to the Bush Administration, but problems perpetuated and still existed in the proceedings of the hand-selected fourteen high value detainees. In *Rasul v. Bush*, five JAG attorneys filed an Amicus Curiae brief for the Supreme Court and contended that the tribunals were open to politicization and did not uphold international law or just standards.³⁰⁴ Navy Lt. Commander Charles Swift, who prevailed in *Hamdan* before the Supreme Court in 2004, explained: “[I] had a client who was sitting in solitary confinement, going slowly insane, and every request I had made for relief had fallen on deaf ears.”³⁰⁵ Swift expressed that he was only given access to his client on the condition that Hamdan would plead guilty.³⁰⁶ In testimony before the House Armed Services Committee, General James C. Walker stated: “I’m not aware of any situation in the world where there is a system of jurisprudence that is recognized by civilized

302. Marc Falkoff, *Politics at Guantanamo: The Former Chief Prosecutor Speaks*, JURIST (Nov. 2, 2007), <http://jurist.org/forum/2007/11/politics-at-guantanamo-former-chief.php> (noting also that Lieutenant Colonel Colby Vokey called the Guantánamo legal system “disgraceful” and a “sham”).

303. Nina Totenberg, *Detainees' Military Lawyers Forced Out of Service*, NPR (Oct. 12, 2006), <http://www.npr.org/templates/story/story.php?storyId=6256039> (Navy Lt. Commander Charles Swift believed that he was taking career risks by taking the case and explained that he resigned from the military in October 2006 after being passed over for promotion a second time because taking the case “took [himself] out of the normal progression path.”); *Army Officer: Guantanamo Hearings are Flawed*, ASSOCIATED PRESS (Aug. 6, 2007), <http://www.today.com/id/19375738/ns/today/#.UVn4CTe9uSo> (noting that Abraham first raised concerns to the Defense Department in September 2004, but was ignored; and that he continued to object as his “duties as a citizen” even though he believed that he jeopardized his future in the military).

304. Military Commissions as Amicus Curiae in Support of Neither Party at 2, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334), 2004 WL 96765; Lobel et al., *supra* note 7, at 73.

305. Totenberg, *supra* note 303.

306. *Countdown with Keith Olbermann*, (NBC television broadcast Oct. 18, 2006), transcript available at <http://www.nbcnews.com/id/15331093/>.

people where an individual can be tried and convicted without seeing the evidence against him.”³⁰⁷ Offering his impressions, Morris Davis, the Chief Prosecutor for the military commissions, testified that Salim Hamdan’s war crime trial may have been rigged, and that he had “significant doubts about whether [the commission system would] deliver full, fair[,] and open hearings.”³⁰⁸

On June 15, 2007, Lt. Col. Stephen Abraham, a 26-year veteran of military intelligence who participated in proceedings at Guantánamo Bay, became the first officer to emerge with an affidavit under oath of perjury, admitting that “[s]tatements of interrogators presented to the panel offered inferences from which we were expected to draw conclusions favoring a finding of ‘enemy combatant[,]’” and that CSRT participants were required to rely on the often generic and outdated “finished intelligence products” provided by intelligence organizations.³⁰⁹ Participants in the tribunal process were required to affirm to the CSRT board members, who made the enemy combatant determinations, that this was the entire relevant record (including “exculpatory information”) even though participants were denied access to the record.³¹⁰ Defense attorney David Cynamon, who represented defendants in the tribunal, commented that Abraham’s affidavit “proves what we all suspected, which is that the CSRTs were a complete sham.”³¹¹ Ostensibly agreeing, Joseph Margulies, lead attorney in *Rasul v. Bush*, remarked that:

[T]he conclusion is simply inescapable that these tribunals were created for no other purpose than to validate a predetermined result. For years, the Administration had told the world that the prisoners at the base were “enemy combatants,” and now a

307. MCCOY, *supra* note 22, at 222 (citing House Armed Services Committee, Press Release, *Chairman Hunter Opening Statement, Hearing on Military Commission and Standards Utilized in Trying Detainees*, Sept. 7, 2006); Van Bergen & Valentine, *supra* note 163, at 482 (being labeled unlawful enemy combatants prohibited Guantánamo detainees from being able to defend themselves or offer exculpatory evidence for the record).

308. Foley, *supra* note 7, at 1012 (believing that the CSRT process could not be relied on for accurate results); Honigsberg, *supra* note 51, at 115–16.

309. 153 CONG. REC. S24624-25 (Sept. 18, 2007) (citing Exhibit 1: Declaration of Stephen Abraham Lieutenant Colonel, United States Army Reserve, ¶¶ 8–10, 22); Joint Appendix at 103, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No 06-1196), 2007 WL 2437046; *Army Officer: Guantanamo Hearings are Flawed*, *supra* note 303.

310. 153 CONG. REC. S24624-25 (Sept. 18, 2007) (citing Exhibit 1: Declaration of Stephen Abraham Lieutenant Colonel, United States Army Reserve, ¶¶ 10–12).

311. *Army Officer: Guantanamo Hearings are Flawed*, *supra* note 303.

“hearing” will come to precisely that conclusion.³¹²

4. Trying Other Detainees

After the initial proceedings against the fourteen high value detainees and with 380 remaining prisoners, charges were brought against Yemini Salim Ahmed Hamdan and Canadian Omar Khadr, the latter of whom was only fifteen-years old when he was confined at Guantánamo.³¹³ Hamdan was charged with “chauffeuring” Osama bin Laden, and Khadr reportedly killed an American soldier in Afghanistan.³¹⁴ In June 2007, the military judge dismissed the cases, claiming that Congress only gave the tribunal the authority to try unlawful enemy combatants but both Khadr and Hamdan lacked the “unlawful” designation.³¹⁵ Hamdan was later convicted of abetting terrorism in a two-week military commission trial in 2008 and was given a short five-year sentence because he had been held since 2002.³¹⁶

The Bush Administration chose to hold Ali al-Marri at a military base in South Carolina, and he was the only known foreign enemy combatant held on U.S. soil, but one week after the Hamdan and Khadr cases were dismissed, federal appeals court Judge Diana Gribbon Motz ordered the military to release him.³¹⁷ Al-Marri was first arrested in 2001, but shortly after the order to release, prosecutors finally brought charges and al-Marri was convicted in April 2009 after pleading guilty to an assortment of charges related to planning terror attacks.³¹⁸

312. MARGUILES, *supra* note 115, at 169.

313. *Charges Against Gitmo Prisoner Dropped*, ASSOCIATED PRESS (June 4, 2007), <http://www.military.com/NewsContent/0,13319,138030,00.html> (also reporting that the Pentagon expected to charge another 80 of the remaining prisoners).

314. *Id.*

315. William Glaberson, *Military Judges Dismiss Charges for 2 Detainees*, N.Y. TIMES (June 5, 2007), http://www.nytimes.com/2007/06/05/world/americas/05gitmo.html?_r=0; Suzanne Goldenberg, *Guantánamo Trials in Chaos After Judge Throws Out Two Cases*, GUARDIAN (June 4, 2007), <http://www.guardian.co.uk/world/2007/jun/05/usa.guantanamo1> (noting that none of the 385 detainees had been found to have the “unlawful” enemy combatant designation).

316. William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. TIMES, Aug. 7, 2008, at A1; Josh White & William Branigin, *Hamdan to Be Sent to Yemen; Bin Laden Driver Spent 7 Years at Guantanamo*, WASH. POST, Nov. 25, 2008, at A1.

317. Adam Liptak, *Judge Says U.S. Can't Hold Man as 'Combatant'*, N.Y. TIMES (June 12, 2007), <http://www.nytimes.com/2007/06/12/washington/12combatant.html?pagewanted=all>.

318. Phil Hirschorn, *Who is Ali al-Marri?*, CBS NEWS (Apr. 8, 2010), <http://www.cbs>

In June 2008, a federal appeals court overturned a Defense Department determination that Huzaifa Parhat was an enemy combatant, stating that they did not believe that a member of a minority group in western China was somehow “associated” with al-Qaeda or the Taliban as was asserted in classified documents.³¹⁹ Four months later, the federal court ordered the release of seventeen other detainees of the Uighur Muslim minority of western China who had been held at Guantánamo Bay since 2002.³²⁰ Judge Urbina stated that the men were not a security threat and did not fight the United States and that the Bush Administration was wrong when it contended that the federal court lacked the power to release the men.³²¹

An example of the continuing aggravation over the use of “evidence” procured from human rights abuses emerged in January 2009 when Susan Crawford, the Convening Authority of the U.S. Military Commissions, dropped charges against Mohamed al-Qahtani and stated that “we tortured Qahtani His treatment met the legal definition of torture. And that’s why I did not refer the case for prosecution.”³²² Crawford stated that “[t]he techniques . . . [the interrogators] used were all authorized, but the manner in which they applied them was overly aggressive . . . [and] that hurt his health.”³²³

I. Guantánamo and Territorialism

For several years, foreign countries, human rights groups, and the ABA called detainment at Guantánamo Bay a “legal black

news.com/8301-503543_162-20002094-503543.html.

319. Parhat v. Gates, 532 F.3d 834, 836 (D.C. Cir. 2008) (“The Tribunal’s determination that Parhat is an enemy combatant is based on its finding that he is ‘affiliated’ with the Uighur independent group, and the further finding that the group was ‘associated’ with al Qaida and the Taliban.”); William Glaberson, *Evidence Faulted in Detainee Case*, N.Y. TIMES (July 1, 2008), http://www.nytimes.com/2008/07/01/washington/01gitmo.html?_r=0 (statement of Marc D. Falkoff, lawyer for detainees) (“[T]he evidence against many of the 270 men now at Guantánamo was similar to that in the Parhat case.”).

320. William Glaberson, *Judge Orders 17 Detainees at Guantánamo Freed*, N.Y. TIMES (Oct. 7, 2008), <http://www.nytimes.com/2008/10/08/washington/08detain.html?pagewanted=all>.

321. *Id.*; Louisa Lim, *Tiny Island To Take 17 Guantanamo Detainees*, NPR (June 10, 2009), <http://www.npr.org/templates/story/story.php?storyId=105188932> (reporting that the island of Palau accepted the 17 Uighurs).

322. Bob Woodward, *Detainee Tortured, Says U.S. Official; Trial Overseer Cites “Abusive” Methods Against 9/11 Suspect*, WASH. POST, Jan. 14, 2009, at A1.

323. *Id.* (noting that “[f]orty-eight of 54 consecutive days of 18-to-20-hour interrogations” and other abuses required him to be hospitalized twice).

hole”³²⁴ because of the Bush Administration’s failure to accept legal obligations consistent with effective control. The U.S. Constitution and the full Bill of Rights applies when there is a U.S. government action on a U.S. citizen in a foreign country,³²⁵ but the applicability of the U.S. Constitution is less clear when there is U.S. government action on a non-U.S. citizen in a location where the U.S. holds anything less than *de jure* sovereignty.³²⁶ Had Guantánamo Bay’s status been resolved in earlier detention cases,³²⁷ much of the cognitive³²⁸ and legal uncertainty might have been averted.³²⁹ Instead, appellate processes on specific issues and stonewalling on court procedures stalled any definite determination on the U.S.

324. Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 557 (2004); Richard Wilson, *United States’ Detainees at Guantánamo Bay: The Inter-American Human Rights Commission Responds to a “Legal Black Hole,”* 10 HUM. RTS. BRIEF 2 (2003); Jonathan D. Glater, *A.B.A. Urges Wider Rights in Cases Tried by Tribunals*, N.Y. TIMES, Aug. 13, 2003, at A18 (reporting that the ABA’s House of Delegates passed a resolution criticizing the Bush Administration’s denial of fundamental criminal law and procedure rights).

325. *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (plurality opinion).

326. *Boumediene v. Bush*, 553 U.S. 723, 746 (2008) (holding that noncitizens only clearly have habeas rights under the U.S. Constitution inside a territory where the U.S. unequivocally has sovereign jurisdiction).

327. *Rasul v. Bush* 512 F.3d 644, 644 (D.C. Cir. 2008) (holding that the “text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba—not the United States—has sovereignty over Guantánamo Bay”), *vacated*, *Rasul v. Myers*, 555 U.S. 1083, 1083 (2008) (remanding to D.C. Circuit due to *Boumediene*); *Rasul v. Bush*, 542 U.S. 466, 466 (2004) (holding that the U.S. had plenary and exclusive jurisdiction over Guantánamo); Paust, *supra* note 150, at 1348–49 (Cuba has “ultimate sovereignty” and the U.S. has “complete jurisdiction and control” over the Guantánamo territory). Lt. Cmdr. Charles D. Swift, who represented Hamdan, defended against the Administration’s arguments that “Guantanamo Bay belongs to Cuba for the purposes of protecting the U.S. government against lawsuits for human rights violations.” Lobel et al., *supra* note 7, at 33; Koh, *supra* note 4, at 2361 (“[T]he government claimed, in effect, that Hamdan was a person outside the law, held in an extralegal zone (Guantánamo), who could be subjected to the jurisdiction of a non-court.”).

328. For example, capturing and detaining individuals inside Afghanistan may have given the impression that those held inside a foreign war zone had more of a nexus to that locale of combat, whereas those who were captured in Afghanistan but transported to Guantánamo Bay may have suggested more of an association to international terrorism. Moreover, if Geneva Convention rights were not being applied at Guantánamo Bay, perhaps the Geneva Convention appears less applicable to those held in Afghanistan because of the common location of the capture. There were no elegant demarcations with the unlawful enemy combatants category.

329. Ronald Dworkin, *Why It Was a Great Victory*, N.Y. REV. BOOKS, Aug. 14, 2008, at 18 (“The Supreme Court has now declared [in *Boumediene*] that this shameful episode in our history must end.”).

Constitution's applicability.³³⁰

Territorial control is a critical factor when assessing whether the U.S. Constitution applies to a location in question. A judicial assessment will not normally inquire into nuances of U.S. foreign policy, as adopted and discharged by the executive and legislative branches³³¹ or determine de jure sovereignty over territory because those are political questions,³³² but will apply the Supreme Court's precedent in the "territorial incorporation" cases to make "an inquiry into the situation of the territory and its relations with the United States."³³³ For Guantánamo Bay, the U.S. held control over all of Cuba following the Spanish-American War in 1898.³³⁴ In 1901, Congress enacted the Platt Amendment, which defined jurisdiction and required Cuba to lease or sell property for an American military base on the island.³³⁵ The terms of the 1903 lease endowed the U.S. with full control over Guantánamo Bay, but affirmed Cuban sovereignty over the island.³³⁶ The U.S. maintained informal imperial

330. *Gherebi v. Bush*, 262 F. Supp. 2d. 1064, 1073 (2003) (noting that after fifteen months and hundreds being detained at Guantánamo, "[n]ot one military tribunal has actually been convened" and detainee protections have not been provided, which "is not consistent with some of the most basic values our legal system has long embodied."); *Azmy*, *supra* note 47, at 528 (noting that during these habeas proceedings, the Bush administration had "resisted every single discovery request propounded by the petitioners, no matter how relevant or routine; and in a number of cases, judges have expressed genuine exasperation at the level of (non)compliance with standard discovery obligations."); *Hamdi Voices Innocence, Joy about Reunion*, CNN (Oct. 14, 2004), http://www.cnn.com/2004/WORLD/meast/10/14/hamdi/index.html?_s=PM:WORLD (describing Hamdi's prolonged process).

331. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983).

332. *Boumediene v. Bush*, 553 U.S. 723, 753 (2008); *Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question, the determination of which by the legislation and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government.").

333. *Downes v. Bidwell*, 182 U.S. 244, 291–93 (1901) (holding that the Constitution pertains only to those territories that Congress formally incorporated into the United States, and maintained that only fundamental liberties apply to "unincorporated" territories); JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 62–84 (1985).

334. *See Treaty of Peace, U.S.-Spain*, art. I, Dec. 10, 1898, 30 Stat. 1754 ("Spain relinquishes all claim of sovereignty over and title to Cuba."); *Hernandez-Lopez*, *supra* note 47, at 168 (explaining that the U.S. also exercised authority over Guam, Puerto Rico, Cuba, and the Philippines).

335. Platt Amendment, § 7, ch. 803, 31 Stat. 897, 897–98 (1901); *Hernandez-Lopez*, *supra* note 47, at 168.

336. *Lease of Lands for Coaling and Naval Stations, U.S.-Cuba*, art. III, Feb. 16-23, 1903, T.S. No. 418.

control over Cuba from 1898 to 1934,³³⁷ which effectively meant that the acquisition of the base and long-term presence in Cuba derived from colonialism and U.S. naval superiority in the Caribbean.³³⁸ In 1934, Cuba and the U.S. consummated another agreement that stated that the lease would remain in effect “so long as the United States of America shall not abandon the said naval station.”³³⁹ The base remained even though the communist government has ruled the island for over fifty years.

In *Boumediene v. Bush*, the Supreme Court held that all Guantánamo detainees, including noncitizens, have a constitutional right to challenge detention with a writ of habeas corpus because the U.S. has “complete jurisdiction and control” over the Guantánamo base and the detention facilities,³⁴⁰ which amounts to *de facto* or “practical sovereignty.”³⁴¹ A higher level of U.S. control over the foreign location can invoke the applicability of the Suspension Clause because courts have recognized jurisdiction in cases where there is not pure territorial sovereignty, but where there is effective control.³⁴² *Boumediene* was the first time the Court expanded constitutional protections to aliens in a foreign country, and it did so without regard to the petitioner having any other connection to the U.S.³⁴³ Consequently, the MCA unconstitutionally suspended the writ of habeas corpus because the Suspension Clause of Article I, Section 9, Clause 2 states that “the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion.”³⁴⁴

337. Hernandez-Lopez, *supra* note 210, at 138.

338. *Id.* at 127, 130–31; *id.* at 121 (offering a relevant historical generalization by explaining that there have been four legal objectives that are apparent in U.S. influence overseas that are also apparent with the 1903 Platt Amendment: “[T]he United States avoids sovereignty abroad, limits incidents of sovereignty for foreign states, avoids constitutional limits for its overseas authority, and protects strategic overseas interests (geopolitical, economic, and legal.”).

339. See Treaty Between the United States and Cuba Defining Their Relations, U.S.-Cuba, art. 3, May 29, 1934, 48 Stat. 1682.

340. *Boumediene v. Bush*, 553 U.S. 723, 753 (2008); *Rasul v. Bush*, 542 U.S. 466, 480 (2004) (the U.S. had “complete jurisdiction and control” over Guantánamo).

341. *Boumediene*, 553 U.S. at 753–55.

342. Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 15–34 (2004).

343. *Boumediene*, 553 U.S. at 751.

344. U.S. CONST. art I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); *Boumediene*, 553 U.S. at 723–24, 765–71; Anthony J. Colangelo, “*De facto Sovereignty*”: *Boumediene and Beyond*, 77 GEO. WASH. L. REV. 623, 623 (2009).

The Court also held that being under U.S. control in the foreign country is critical to the habeas review inquiry. On the same day *Boumediene* was decided, the Court also decided *Munaf v. Geren* and held that U.S. federal courts have jurisdiction to hear habeas petitions of U.S. citizens in Iraq if the American citizen is held “subject to an American chain of command”³⁴⁵ rather than by non-American forces.³⁴⁶ But the Court would not grant relief on the merits because the petitioners requested a preliminary injunction to prevent being transferred to Iraqi authorities and the Iraqi court system, which invoked comity concerns because Iraqi courts had jurisdiction to prosecute the detainees.³⁴⁷

The right of foreigners to seek habeas review in foreign detention facilities other than Guantánamo Bay, which could involve many times more detainees,³⁴⁸ was denied. In *Maqaleh v. Gates*, District Court Judge John D. Bates held that detainees imprisoned in Bagram prison in Afghanistan could challenge their detention through habeas corpus proceedings in U.S. courts³⁴⁹ under *Boumediene*

345. *Munaf v. Geren*, 553 U.S. 674, 679, 686–704 (2009).

346. The case involved two plaintiffs, who purportedly committed crimes in Iraq and were detained by the Multinational Force-Iraq (MNF-Iraq) but they would not have been entitled to habeas relief if the International Military Tribunal had been under international and not U.S. control. *Id.* at 686–89. This outcome would have been more consistent with *Hirota v. MacArthur*, which denied habeas relief to Japanese citizens because *Hirota* involved a broken chain of command. *Hirota v. MacArthur*, 338 U.S. 197, 198 (1949) (per curiam) (“The courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners . . .”). In *Munaf*, the unit detaining the petitioners was under complete U.S. control. *Munaf*, 553 U.S. at 686 (“[T]he Government concedes, ‘it is the President and the Pentagon, the Secretary of Defense, and the American commanders that control . . . what American soldiers do.’”); MOSHE HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES: SOME BASIC PRINCIPLES 64 (1995) (as a general international law standard, “the entity which exercises effective control over the individual who commits the wrongful act—either the organization or the contributing state—will be held internationally responsible.”). The MNF-Iraq involved 26 countries on paper, but it was run by and consisted of over 90% U.S. military personnel. Margaret E. McGuinness, *Multilateralism and War: A Taxonomy of Institutional Functions*, 51 VILL. L. REV. 149, 150–51 (2006); Joseph A. Christoff, *Stabilizing and Rebuilding Iraq: Coalition Support and International Donor Commitments*, U.S. GOV’T ACCOUNTABILITY OFFICE (May 9, 2007), <http://www.gao.gov/new.items/d07827t.pdf> (noting that during the occupation “coalition countries represent about 8 percent of multinational forces in Iraq”).

347. *Munaf*, 553 U.S. at 693–97; *id.* at 688 (stating that courts are likely to observe principles of comity and are unlikely to exercise jurisdiction for acts that transpired in a foreign country and were not under the control of U.S. government officials).

348. *Rasul v. Bush*, 542 U.S. 466, 501 (2004) (Scalia, J., dissenting) (expressing apprehension over the possibility of broadly extending habeas review beyond Guantánamo Bay).

349. *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 235 (D.D.C. 2009) (noting that this

because the U.S. held an “objective degree of control” at Bagram.³⁵⁰ But the D.C. Court of Appeals reversed the decision, holding that there were more fairness concerns over the review proceedings at Bagram in comparison to the CSRT process at Guantánamo Bay, but Bagram was only a temporary facility where the U.S. did not even possess *de facto* sovereignty and Bagram was located in an active zone of combat.³⁵¹ Under *Boumediene*, courts review “objective factors and practical concerns” relating to U.S. functional control,³⁵² which involved “total military and civil control” and *de facto* control at Guantánamo Bay’s lease area³⁵³ for over a century, while the U.S. obtained a lease over the Bagram facility from the Afghan government in September 2006.³⁵⁴

J. Scrubbing Up a Mess

After several years of the Bush Administration’s system of capturing and imprisoning individuals under questionable evidence, using interrogations, and employing an invented unlawful enemy combatant label that applied to those involved in fighting in Afghanistan or to alleged terrorists captured anywhere in the world, President Obama did make some significant changes to the process of detention and interrogation of alleged members of terrorist groups.³⁵⁵ For example, twelve retired generals and admirals met with President-elect Obama’s transition team and requested that he reject the Bush Administration’s authorization to engage in torture and renditions.³⁵⁶

meant that the MCA was unconstitutional with regard to the jurisdiction stripping provision because certain aliens transferred to the Bagram detention facility were entitled to Suspension Clause protection).

350. *Gates*, 604 F. Supp. 2d at 214, 221, 223–24 (stating that the U.S. military had absolute control over the Bagram facility, but very limited control over the rest of the country of Afghanistan).

351. *Al Maqaleh v. Gates*, 605 F.3d 84, 96–99 (D.C. Cir. 2010); *id.* at 84 (holding that there are practical obstacles to granting relief when Afghanistan was still in a state of war); *id.* at 92 (interpreting that it “read *Eisentrager* as holding that constitutional habeas rights did not extend to any aliens who had never been in or brought out into the sovereign territory of the United States.”).

352. *Boumediene v. Bush*, 553 U.S. 723, 764 (2008).

353. *Boumediene*, 553 U.S. at 747, 755.

354. Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield Between the Islamic Republic of Afghanistan Represented by His Excellency General Abdul Rahim Wardak Minister of Defense of the Office of the Ministry of Defense and the United States of America, U.S.-Afg., 4, Sept. 28, 2006.

355. Bejesky, *Pruning*, *supra* note 10, at 890–91.

356. Randall Mikkelsen, *Generals to Urge Quick Action on Torture by Obama*,

Congress amended the MCA in 2009,³⁵⁷ and one significant change required that detainee statements be made voluntarily and not while subject to cruel, inhuman, or degrading treatment.³⁵⁸ Because there was more evidentiary legitimacy, restoration of the writ of habeas corpus for “foreign nationals, apprehended and detained in distant countries,” and an assurance that the government bears the burden of proof in justifying the detention³⁵⁹ within a reasonable period of time,³⁶⁰ the consternation over arbitrary Executive detention methods ostensibly receded.³⁶¹

A new administration, congressional will, and court decisions that undid many of the right-violating detention procedures resulted in human rights protections for detainees reverting closer to where one might expect them to reside “but for” the Bush Administration’s use of threat discourse, secrecy, and assumption of ongoing peril from the presumably guilty detainees. Consequently, because the *Boumediene* decision found Section 7 of the MCA unconstitutional,³⁶² the 270 remaining foreign detainees at Guantánamo Bay had a right to challenge their indefinite detentions,³⁶³ and district courts heard dozens of habeas cases.³⁶⁴ But as of February 2013, “there have been six convictions of Guantánamo detainees by military commissions, four of which were procured by plea agreement.”³⁶⁵ In March 2013, 166 prisoners remained at Guantánamo.³⁶⁶ What makes this gulf between the low number of convictions and the multitudinous

REUTERS (Dec. 2, 2008), <http://www.reuters.com/article/2008/12/02/us-usa-obama-torture-id-USTRE4B18UY20081202> (twelve retired generals and admirals met with President-elect Obama’s transition team and requested that he reject the Bush administration’s authorization to engage in torture and renditions).

357. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190 (2009).

358. 10 U.S.C. § 948r(a) (2009).

359. *Boumediene v. Bush*, 553 U.S. 723, 732, 746, 787 (2008) (“The extent of the showing required of the government in these cases is a matter to be determined.”).

360. *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 216 (D.D.C. 2009).

361. *Boumediene*, 553 U.S. at 793–94.

362. *Id.* at 732.

363. Michael P. Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT’L L. 389, 406 (2010).

364. Hernandez-Lopez, *supra* note 47, at 175 (citing the Center for Constitutional Rights).

365. ELSEA, *supra* note 9, at 10.

366. Amy Goodman, *Prisoner Protest at Guantánamo Bay Stains Obama’s Human Rights Record*, GUARDIAN (Mar. 14, 2013), <http://www.guardian.co.uk/commentisfree/2013/mar/14/prisoner-protest-guantanamo-stains-obama>.

detainees who were held indefinitely under an assumption of guilt³⁶⁷ less palatable are the similarities with the precedent that materialized during World War II and that this precedent developed long before there was an expansion in human rights that would cover virtually every location of possible detention.

K. Japanese Internment during World War II

There are shameful similarities between the Bush Administration's orders after 9/11 and the Roosevelt Administration's internment of Japanese-Americans during World War II.³⁶⁸ Similarities include using racial profiling to prevent anticipated acts of terrorism and espionage,³⁶⁹ deprivation of human rights during overly-zealous roundups of alleged wrongdoers premised upon postulated threat scenarios that were ultimately devoid of substantiation,³⁷⁰ and the use of labels to stereotype guilt.³⁷¹ Distinctions between the two cases were that the Bush Administration mingled alleged terrorists and combatants captured in war zones and detained the purported "worst of the worst" at Guantánamo Bay, but Japanese detainees were all innocent civilians held inside the U.S.

In February 1942, General John DeWitt provided a

367. Of those held at Guantánamo Bay under the original targeted wrong—terrorism—there was strong evidence against a few, specious evidence against a small percentage, and mere suspicion of association to terror groups for the vast majority of detainees. Moreover, prisoners were virtually all captured outside the U.S., making one curious at what point assumption of guilt for a "plan of terrorism" could have been set in motion to assume guilt and justify detention.

368. Michael Ratner, *Moving Away From the Rule of Law: Military Tribunals, Executive Detentions and Torture*, 24 CARDOZO L. REV. 1513, 1521–22 (2003) ("Someday in the future, we will look back on the actions of the Bush Administration and see them as we now view the actions of the Roosevelt administration in establishing internment camps for the Japanese—as one the most shameful episodes of United States history.").

369. Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1201 (2003).

370. JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR* 34–35 (2007) (noting that Bush Administration directives kept thousands of U.S. residents detained in secret locations within the U.S.); Bejesky, *Rational Choice*, *supra* note 19, at 43–47 (discussing how rights were deprived after 9/11, that broadcasts of alleged terror plots were not confirmed, that dragnet sweeps were taking place, and individuals were released as innocent).

371. Amann, *supra* note 20, at 268 (explaining that operations outside the U.S. commenced in November 2001 when Bush ordered Secretary of Defense Rumsfeld to detain individuals who could be complicit in "acts of international terrorism" that would be harmful to "the United States, its citizens, national security, foreign policy, or economy," and Bush used the same label that the Roosevelt Administration applied to Japanese-Americans, who were called "enemy aliens.").

recommendation to President Franklin Delano Roosevelt and contended: “The Japanese race is an enemy race, and while many second and third generation Japanese born on American soil” possess U.S. citizenship, “the racial strains are undiluted.”³⁷² With no analysis or investigation, President Roosevelt accepted Dewitt’s report and issued Executive Order 9066.³⁷³ All three branches of government, with the support of the media, accepted the ethnological and threat premises³⁷⁴ that placed 120,000 Japanese–American citizens and residents, two-thirds of whom were born in the U.S., in internment camps for two years behind barbed wire fences for “looking like” the Japanese even though no evidence indicated that any detainees rebelled against the American government or harshly criticized the U.S. war policy,³⁷⁵ and none were charged with espionage or any security-related offense.³⁷⁶ Only three Japanese challenged the internment orders and they were sentenced to prison terms,³⁷⁷ which is probably why there was virtually uniform compliance with accepting the internment. An additional privation was that the government left those subject to the order with the option of either quickly selling homes, businesses, and possessions, or abandoning real property, which was often foreclosed by banks when

372. COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, 102, D CONG., PERSONAL JUSTICE DENIED 66 (1982) (quoting General DeWitt); see IRONS, *supra* note 57, at 134; Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23, 37–38 (2002); Yamamoto, *supra* note 64, at 288. Germans and Italians were also placed under a curfew order. DEBORAH GESENSWAY & MINDY ROSEMAN, BEYOND WORDS: IMAGES FROM AMERICA’S CONCENTRATION CAMPS 42 (1987) (noting that perhaps a rationale that could have justified temporary relocation is that if there was evidence that there were nongovernment zealots who endangered Japanese–Americans); IRONS, *supra* note 57, at 135. The possibility of endangerment to Japanese–Americans as a justification is merely hypothetical because freedom was denied by a government report stating that racial characteristics made Japanese disloyal to the U.S.

373. IRONS, *supra* note 57, at 148.

374. 7 Fed Reg. 1407 (Feb. 25, 1942); Scharf, *supra* note 220, at 66 (Herb Wexler was an attorney at the Justice Department and he was bothered by the misrepresentations in the Japanese internment cases). Nonetheless, it appears that legal counsel did not thwart the internment.

375. IRONS, *supra* note 57, at 132–33; Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. KAN. L. REV. 307, 315 (2006); Ip, *supra* note 202, at 7.

376. HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES, 1492–PRESENT 416 (5th ed. 2003) (Japanese internment “came close to direct duplication of Fascism.”); Chemerinsky, *supra* note 269, at 626 (“[N]ot a shred of evidence that the unprecedented invasion of rights accomplished anything useful.”).

377. IRONS, *supra* note 57, at 136.

the property was subject to a mortgage,³⁷⁸ making one wonder whether many Japanese–Americans had much to return to after being released.

In 1983, the American government constituted a commission that interviewed 750 former detainees and produced a 467-page report that finally recognized the “wartime hardships and lingering pain” of Japanese-Americans.³⁷⁹ Fred Korematsu remarked: “Forty years ago I came into this courtroom in handcuffs and I was sent to a camp. . . . The camp was not fit for human habitation. Horse stalls are for horses, not for people.”³⁸⁰ But this was not the theme presented to Americans in the Office of War Information’s (OWI) propaganda films. The OWI produced films after the camps were closed and portrayed the Japanese–Americans as patriots eagerly motivated to pursue a noble cause in light of a mere inconvenience.³⁸¹

The later investigation affirmed that DeWitt had lied in his report about Japanese–Americans engaging in acts of sabotage and espionage, which were the allegations that served as the justification for the imprisonment and the public record that the U.S. Supreme Court adopted.³⁸² Records also indicated that Justice Department lawyers knew of this misrepresentation and chose not to inform the Supreme Court of the fact that there was no military necessity to institute the sweeping internment program, but the Justice Department chose to participate in deliberate “suppression of evidence”³⁸³ so that the alleged espionage and terrorism served as the basis for a military

378. YASUKO I. TAKEZAWA, *BREAKING THE SILENCE: REDRESS AND JAPANESE AMERICAN ETHNICITY* 30–31 (1995); *Bob Fletcher Dies at 101; Saved Farms of Interned Japanese Americans*, L.A. TIMES (June 3, 2013), <http://articles.latimes.com/2013/jun/03/local/la-me-bob-fletcher-20130604> (“[T]he U.S. government forced Japanese immigrants and Americans of Japanese descent to report to barbed-wire camps in 1942. Many lost their homes to thieves or bank foreclosures.”).

379. IRONS, *supra* note 57, at 146–47 (citing REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CITIZENS 18 (1982)).

380. Twibell, *supra* note 197, at 417.

381. Taunya Lovell Banks, *Outsider Citizens: Film Narratives About the Internment of Japanese Americans*, 42 SUFFOLK U. L. REV. 769, 769, 771 (2009).

382. IRONS, *supra* note 57, at 147.

383. *See* *Korematsu v. United States*, 584 F. Supp 1406, 1410, 1420 (N.D. Cal. 1984); Yamamoto, *supra* note 64, at 287 (noting that “the executive and military knew then that there had been no national security necessity for the mass racial incarceration and had lied about it to the public and the courts.”); Eric K. Yamamoto, Susan K. Serrano, & Michelle N. Rodriguez, *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1274 (2003).

necessity.³⁸⁴ Federal courts in 1983 and 1984 vacated the three criminal cases on the basis of government misconduct.³⁸⁵ One judge noted: “The judicial process is seriously impaired when the government’s law enforcement officers violate their ethical obligations to the court.”³⁸⁶

With a report produced four decades after the wrongdoing, the federal government awarded \$20,000 to sixty thousand of the internment camp survivors.³⁸⁷ It took forty years for the truth to become publicly accepted and U.S. government responsibility to be finally acknowledged as hundreds of U.S. government officers were involved in detaining over a hundred thousand Japanese–Americans without legitimate cause. Until some top government official with authority initiates action and acknowledges wrongdoing perpetrated by former officials, nothing happens. In this case, inaccurate chronologies provided by former officials four decades earlier and OWI propaganda films likely remained as the perceived truth.

V. CONCLUSION

Five years before the Supreme Court decided *Boumediene*, the federal appeals court in San Francisco heard *Gherebi v. Bush* and astutely summarized the premises inherent to detentions at Guantánamo Bay and ruled that prisoners do have a right to federal court review:

[U]nder the government’s theory, it is free to imprison Gherebi indefinitely along with hundreds of other citizens of foreign countries, friendly nations among them, and to do with Gherebi and these detainees as it will, when it pleases, without any compliance with any rule of law of any kind. . . . Indeed, at oral argument, the government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees. . . . [I]t is the first

384. Chris K. Iijima, *Shooting Justice Jackson’s “Loaded Weapon” at Ysar Hamdi: Judicial Abdication at the Convergence of Korematsu and McCarthy*, 54 SYRACUSE L. REV. 109, 123–25 (2004).

385. See *Korematsu*, 584 F. Supp. at 1406; Eric K. Yamamoto, *Friend, Foe or Something Else: Social Meanings Of Redress and Reparations*, 20 DEN. J. INT’L. L. & POL’Y. 223, 229 (1992).

386. PETER IRONS, *A PEOPLE’S HISTORY OF THE SUPREME COURT* 363 (1999).

387. IRONS, *supra* note 57, at 147; see George T. Yates III, *State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era*, in *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURY TO ALIENS* 213, 248 (R. Lillich ed., 1983).

time that the government has announced such an extraordinary set of principles—a position so extreme that it raises the gravest concerns under both American and international law.³⁸⁸

Despite the court's sagacity, the rights violating detention system remained. The first reason the flagitious system perdured was due to a false reality. Detentions commenced with the Bush Administration blindly usurping authorities from other branches of government simply to be "unilateralist,"³⁸⁹ while expressly or impliedly persuading Americans to believe that those captured, transported across the Atlantic Ocean, and imprisoned had some association to 9/11 or endangered America even though only questionable evidence was ultimately presented against a small fraction of detainees, and most of the original detainees were captured by bounty hunters, rewarded with American tax dollars.³⁹⁰ The ambiguous legal status at Guantánamo Bay and the invented unlawful enemy combatant category merged alleged combatants, Taliban, and al-Qaeda members in a system toilsome to challenge because of stonewalling and delays.

Once the improved military commission procedures were implemented in 2007, charges were brought against fourteen high value detainees who had only recently been brought to Guantánamo Bay, seemingly to portray legitimacy to the Guantánamo facility where hundreds of others had been held for several years.

388. *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), *vacated*, 542 U.S. 952 (2004). The pattern of employing indefinite detention without charge seems to have originated with the Patriot Act, which permitted the attorney general to detain aliens indefinitely if "the alien will threaten the national security of the United States." USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

389. Neil Kinkopf, *Is it Better to be Loved or Feared? Some Thoughts on Lessons Learned From the Presidency of George W. Bush*, 4 DUKE J. CONST. LAW & PUB. POL'Y 45, 46 (2009) ("The President followed the unilateral model not simply to establish the kinds of military commissions he wanted, but . . . to vindicate his broad theory of unilateral presidential power.").

390. *See generally supra* Part IV.B. (discussing the lack of evidence against detainees). The perceived threat may be less related to real danger and more correlated with the political leadership that chooses to shepherd discourse, such as with frequent speeches about dangers from terrorism. Bejesky, *Rational Choice*, *supra* note 19, at 43–54 (discussing the threat aura inside the US, which also was not verified); Bejesky, *Politico*, *supra* note 63, at 91–95, 100–01 (noting how the Bush Administration emphasized a security threat atmosphere); Bejesky, *From Marginalizing*, *supra* note 121, at 23–25 (explaining a similar progression occurred with the Supreme Court's cases during the ten years of McCarthyism, where court decisions more fully protected rights after the threat aura subsided and was recognized as an overreaction to communism); Susan F. Hirsch, *Fear and Accountability at the End of an Era*, 42 LAW & SOC'Y REV. 591, 593 (2008) (expecting that the "era of fear" could be ending in 2008).

Nonetheless, the tribunal convicted only six Guantánamo detainees through February 2013.³⁹¹ As the Supreme Court periodically visited detainee appeals, prisoners progressively attained more rights, but the Court was only finally able to address the issue head-on in 2008 when it found that the U.S. held “effective control” over Guantánamo Bay, that the existing Military Commissions process was unconstitutional, and that habeas rights under the U.S. Constitution applied. Perhaps the Court’s eventual reversal makes the questionable period appear less abusive for posterity even though the wrongs are irreversible and generally are not civilly remedied. President Obama should serve justice and persuade all involved government actors to abolish the outrageous detention and tribunal system at Gitmo.

391. ELSEA, *supra* note 9, at 10.