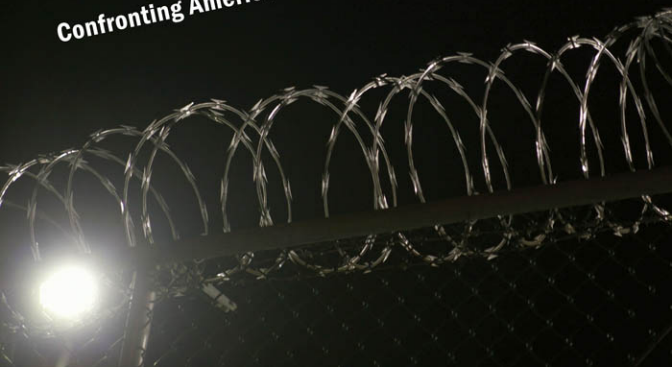
JONATHAN HAFETZ

HABEAS CORPUS AFTER 9/11

Confronting America's New Global Detention System



Habeas Corpus a

after 9/11

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Confronting Amer

New Global Deten

Jonathan Hafetz

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on acid-free paper,
ngth and durability.
suppliers and materials
ur books.

To Martha, Ben, and Sam

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Contents

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Introduction

The U.S. detention center at
Cuba has long been synonymous with
utive power. It has come to epitomize
Created in the name of protecting the
it, undermining America's security as

For too long, however, Guantánam
shadowing other abuses and concealin
security policy since September 11, 20
prison, nor was it hermetically sealed
larger, interconnected global detentio
prisons such as the Bagram Air Base
the transfer of prisoners to other cou
passed even the military detention of
States, whom President George W. Bu
without charge as part of a "war on t
poral bounds. Guantánamo, in short,
U.S. detention operations: the most vis
designed to operate outside the law.

This system grew out of a series of
cials following the terrorist attacks of S
wanted to treat terrorism as an armed
and yet also wanted to avoid the limi
tion and treatment of prisoners during
tion tried to create a category of priso
to justify a state-sanctioned policy of
treatment. In this newly envisioned
held indefinitely, potentially forever, w
ful hearing. The only trials were to be
sions that fell far short of constitutio
system was intended to exist not only

the Guantánamo Bay Naval Base in
torture, secrecy, and the abuse of exec-
e lawlessness in the eyes of the world.
e country, Guantánamo has weakened
well as well as its values.
no has been viewed in isolation, over-
ng broader shifts in America's national
001. Guantánamo was never simply a
d. Rather, Guantánamo was part of a
n system that included other military
in Afghanistan, secret CIA jails, and
ntries for torture. This system encom-
individuals arrested inside the United
sh claimed he could hold indefinitely
errorism" without geographic or tem-
was like an island in an archipelago of
sible example of a larger prison system

decisions by Bush administration offi-
September 11. The Bush administration
d conflict rather than criminal activity
ts that the law imposes on the deten-
g wartime. In addition, the administra-
ners without legal protections in order
torture and other cruel and inhuman
detention system, prisoners could be
ithout charge and without a meaning-
held in jerry-rigged military commis-
nal and international standards. This
beyond the law but also beyond the

reach of any court, as the Bush admin
to prevent judges from examining its
held as "enemy combatants." Its goal w
constraint or scrutiny.

The U.S. government's detention po
the center of many of them was habeas
as the preeminent safeguard of individ
government power by mandating that
before a judge. The use of habeas, hov
ing principally a remedy for prisoner
on constitutional defects at trial. After
tion as a remedy for executive impriso
since 9/11, the United States Supreme
habeas by upholding the right of Guan
including two cases in which Congress
right. In these rulings, the Court rejec
detain prisoners without legal protecti
judicial review simply by imprisoning

These victories, however, were both
Supreme Court rejected the notion tha
America's shores and upheld the right o
pus, it did not guarantee judicial reviev
seas prisons. The Court also did not g
in these cases or in its other "war on te
address who could be detained as an "e
who was captured in Afghanistan whil
allied troops on behalf of Taliban force
president's claim that the entire world w
als who were arrested in civilian settin
took part in hostilities on a battlefield
"combatants" and thereby denied the ri

Other limits were inherent in the
had proved its resilience in securing
tánamo, where the fact of U.S. detent
was less effective where the United S
or control over prisoners, whether by
another nation to detain them on its
limited capacity to obtain judicial rev
other countries for torture and continu

nistration took every possible measure
detention and treatment of prisoners
as to imprison and interrogate without

olicies sparked intense legal battles. At
corpus. Habeas corpus has long served
dual liberty and check against arbitrary
the state justify a prisoner's detention
wever, had changed over time, becom-
rs challenging their convictions based
9/11, habeas resumed its historic func-
nment without trial. In three decisions
e Court vindicated the importance of
tánamo detainees to access U.S. courts,
s had tried to strip the detainees of that
cted the president's claim that he could
ions or hold them indefinitely without
them outside the United States.
limited and incomplete. Although the
at the Constitution necessarily stops at
f Guantánamo detainees to habeas cor-
w of detention operations at other over-
rapple with other important questions
rror" decisions. It did not, for example,
enemy combatant" other than someone
e engaging in hostilities against U.S. or
es. The Court thus failed to take on the
was a battlefield and that even individu-
gs in the United States and who never
(or anywhere else), could be treated as
ight to a criminal trial.
nature of habeas corpus itself. Habeas
court review for prisoners at Guan-
tion was clear and undisputed. But it
tates sought to conceal its custody of
y holding them in secret or enlisting
behalf. Similarly, habeas had shown a
iew over the rendition of prisoners to
ued detention. Habeas had also proved

vulnerable in cases in which a court h
States to be illegal but believed that it
oner's release where release in the Uni
edy since the detainee could not be sa
third country.

The arrival of a new administrati
change. President Barack Obama beg
and ordering the closure of the prison
decisions in the following months sug
small, if not cosmetic, and left the ou
in important respects. For example,
trials and continued the indefinite det
charge, two centerpieces of the Bush ad
also resisted transparency in many cas
access to U.S. courts based on exaggera
served to conceal government miscon
had left Obama no choice but to accep
tánamo. But Obama tried to defend th
elsewhere without judicial review and
had replaced Guantánamo as the Unit
center. In short, even as Obama spoke
law and to return to constitutional pri
decessor's policies, tinkering at the ed
close of his first year in office, Obam
Guantánamo. He had moved to adop
tánamo's key features.

This book describes the rise of the
emerged after 9/11 and the efforts to
examines both the achievements and
lenges and confronts and repudiates a
it advocates other measures necessary
future and to create a rights-respecti
America both safe and free.

The book is divided into four parts. The
ines the rise of the interconnected glo
the origins of this system to a series o
opinions that opened the door to arb
and torture, all without court review.

had found the detention by the United lacked the authority to order the prisited States was the only available remfely returned home or repatriated to a

on offered hope and the promise of an with bold strokes, banning torture at Guantánamo within a year. But the gested that most of these changes were tgoing administration's policies intact Obama revived military commission tention of suspected terrorists without dministration's "war on terror." Obama ses and sought to deny torture victims ated claims of government secrecy that nduct and abuse. The Supreme Court pt habeas corpus jurisdiction at Guane executive's power to hold prisoners continued to do so at Bagram, which ted States' principal offshore detention e about the need to restore the rule of nciples, he preserved many of his preges but leaving the core intact. By the a had not only delayed the closing of pt and institutionalize many of Guan-

U.S.-run global detention system that challenge it through habeas corpus. It the shortcomings of these legal chalrguments for limiting habeas. Finally, y to prevent lawless detentions in the ng national security policy that keeps

e first part (chapters 1 through 4) exambal detention system. Chapter 1 traces f executive branch decisions and legal itrary detention, sham military trials, The system was intended to establish a

new paradigm—the "war on terrorism
facing the nation. This paradigm gave
to detain and interrogate without any

Chapter 2 examines how this new p
charts how Guantánamo grew to embo
by illegal detention, abuse, and secrec
shore U.S. prisons, from the military
Iraq to secret CIA jails or "black site
extraordinary rendition, in which the
sending prisoners to other countries f
cials did not want to conduct themselv
tions in the United States, examining
administration sought to create a lawl
American soil. Although few in numb
cases represented the most far-reach
power in the "war on terrorism."

The second part (chapters 5 and 6
origins of habeas corpus and its deve
5 explains how habeas corpus came t
imprisonment by the executive. It als
wartime and how habeas helps police
authority and prevent arbitrary govern
habeas corpus challenged detentions o
ciples that governed the extraterritori
more generally. It concludes by descr
that the Constitution's protections wer
or to American citizens, a developme
post-9/11 habeas cases.

Part 3 (chapters 7 through 9) turn
themes and an enduring tension. The
how habeas corpus has provided an im
and interrogation in U.S. counterterr
the other hand, how habeas's checking
to undermine it, from congressional
hour machinations by the executive to

Chapter 7 discusses the trio of "ene
Supreme Court in 2004: *Rasul v. Bush*
Padilla. These decisions established im
of Guantánamo detainees to seek habe

"—in the name of meeting new threats
e the president unprecedented powers
restriction, rules, or accountability.
aradigm took shape at Guantánamo. It
ody a prison beyond the law, pervaded
cy. Then chapter 3 describes other off-
detention centers in Afghanistan and
s." The chapter also details the use of
e United States outsourced torture by
for brutal interrogations that U.S. offi-
ves. Chapter 4 looks at military deten-
three seminal cases in which the Bush
less enclave—a new Guantánamo—on
er, these domestic "enemy combatant"
ing assertions of executive detention

) travels back in time to examine the
elopment over the centuries. Chapter
o protect individuals against unlawful
o discusses the role of habeas during
the line between civilian and military
ment action. Chapter 6 examines how
overseas before 9/11 as well as the prin-
al application of constitutional rights
ribing the gradual erosion of the idea
e strictly confined to the United States
ent with significant consequences for

ns to these cases, highlighting several
e chapters illustrate, on the one hand,
portant check against illegal detention
orism operations. They also show, on
g function has led to continual efforts
court-stripping measures to eleventh-
avoid judicial review.
emy combatant" cases that reached the
h, *Hamdi v. Rumsfeld*, and *Rumsfeld v.*
portant principles, including the right
eas corpus review in federal court and

the right of American citizens to a fair h
government, even in time of war. They
be able to exclude the judiciary from th
left open important questions, includi
"enemy combatant" and what protectio

The response by the president and
in chapter 8. The Bush administratio
Supreme Court's ruling in *Rasul* by cre
tribunals intended to ratify prior deter
combatants" and to prevent habeas h
courts, where the administration's alle
Then Congress, at the administration's
Treatment Act of 2005, which purport
jurisdiction over Guantánamo detentio
the landmark Supreme Court ruling tha
rejected this court-stripping measure, i
missions, and concluded that no priso
protections contained in Common Art

Chapter 9 examines the political
new court-stripping legislation, the M
legislation purported to deny habeas
"enemy combatant," not just those hel
the Geneva Conventions, sought to i
of detainees, and revived military con
the Supreme Court's ruling in *Boume*
the Bush administration. In affirming
habeas corpus, the Court decisively r
Constitution was limited to the United
Court left open important questions a
other offshore prisons. The Court als
that a habeas judge could order in a c
zens detained in Iraq that it issued on

The fourth and final part (chapters
line of a legal and sustainable detentio
the singular importance of habeas cor
of prisons beyond the law. It also exp
its potential constrained by a combi
ability and the government's proclivity
rogate without judicial oversight.

hearing when they are detained by their
indicated that the executive would not
e "war on terrorism." But the cases also
ng who exactly could be detained as an
ons such persons could invoke.

Congress to these rulings is discussed
on immediately moved to nullify the
ating a rigged system of military status
rminations that prisoners were "enemy
earings from going forward in federal
gations might be carefully scrutinized.
urging, passed legislation, the Detainee
tedly stripped federal courts of habeas
ons altogether. Chapter 8 also describes
at followed, *Hamdan v. Rumsfeld*, which
nvalidated the president's military com-
ner could be held without the baseline
icle 3 of the Geneva Conventions.

backlash to *Hamdan* that resulted in
ilitary Commissions Act of 2006. This
corpus to any noncitizen held as an
d at Guantánamo. It also undermined
mmunize U.S. officials for past abuse
nmissions. The chapter then examines
diene v. Bush, decided near the end of
the right of Guantánamo detainees to
ejected the executive's claim that the
States or to American citizens. Yet the
about whether habeas corpus reached
o suggested some limits on the relief
decision involving two American citi-
the same day as *Boumediene*.

10 through 13) provides the broad out-
on policy. As its starting point, it takes
pus as a constraint against the growth
lains why habeas alone is insufficient,
nation of practical limits on its avail-
y to seek new ways to detain and inter-

Chapter 10 argues why habeas corp
in U.S. custody, regardless of his or h
explains why this review is necessary
beyond the law. It also explains why t
not interfere with the government's ab
instead provides a safeguard against ill

Chapter 11 explores some of the p
example, it describes the difficulties
executive action, such as proxy deten
role is either concealed or outsource
Chapter 12 continues this discussion.
may extend (as chapter 11 does) but
may consider in adjudicating petitio
opportunity for meaningful judicial
availability of that review does not
and constitutional questions surrounc
authority to detain in counterterror
als without criminal trial in the regu
for restricting that detention authori
practice of prosecuting suspected ter
thus argues against indefinite military
hybrid proposals like national securit
without trial and the use of adjudicato
individual rights.

Chapter 13 summarizes national sec
first year in office. It contrasts the new
Guantánamo's closure and banning to
military commissions and indefinite d
some positive steps, the Obama admi
nuity over change and that key compo
are threatening to become permanent
political discourse.

The book concludes that the Unite
9/11 underscores the continued impor
of individual liberty against illegal gov
habeas remains the single most import
ful detention, torture, and other abuses
without trial, habeas today still promi
death of imprisonment."[1] The threat of

ous should be available to any prisoner
er citizenship or location. The chapter
to help prevent the growth of prisons
his review, properly understood, does
ility to wage war or fight terrorism but
legal detention and other abuses.
potential limits of habeas corpus. For
of challenging more covert forms of
tion and rendition, in which the U.S.
d, and offers some possible solutions.
It focuses not on where habeas corpus
on the questions that habeas courts
ns. While habeas corpus provides the
review of executive action, the mere
by itself resolve the underlying legal
ding the scope of the executive's legal
ism operations or to hold individu-
ular federal courts. Chapter 12 argues
ty by returning to the long-standing
rorists in civilian courts. The chapter
detention, military commissions, and
ty courts that sanction imprisonment
ory tribunals with fewer protections of

curity policy during President Obama's
president's initial moves, like ordering
rture, with his subsequent adoption of
etention. Chapter 13 shows that despite
nistration has largely embraced conti-
nents of the post-9/11 detention system
features of America's legal fabric and

d States' counterterrorism policy since
rtance of habeas corpus as a safeguard
ernment action. Despite its limitations,
tant check against arbitrary and unlaw-
. As it did centuries ago for those jailed
ses "the water of life to revive from the
terrorism, some people believe, makes

the United States' historic commitme
But precisely the opposite is true. The
ernment officials to avoid legal limits a
edly dangerous or suspicious people w
ingful scrutiny, makes habeas corpus a
in the future.

nt to habeas unnecessary and unwise. e pressure that terrorism puts on gov- nd to find new ways to imprison alleg- without charge, due process, or mean- all the more important, both now and

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Part 1

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Laying the Foundati
the "War on Terror"

On the morning of September
most devastating attacks on American
men hijacked four commercial jet air
several U.S. targets. Two planes crash
Center, destroying both towers. A thi
plane was diverted by the passengers a
Nearly three thousand people died in
fered untold trauma and billions of do
sibility had been attributed to al Qaed
Qaeda's ability to orchestrate a compl
shocked the country and seared into
the oceans separating it from the rest
those who sought its destruction.[2]

Vice President Dick Cheney declare
it was the decisions made after that fate
consequences. On September 18, Pres
the Authorization for Use of Military F
tion authorizing him to "use all necessa
nations, organizations, or persons he
mitted, or aided the terrorist attacks
or harbored such organizations or per
addressed a joint session of Congress,
war against our country" and promisi
rorist organization al Qaeda—to justic
the government of Afghanistan, would
and harboring al Qaeda. Bush, howeve
a military conflict of an apocalyptic na
or single terrorist group. "Americans,"

1

on for

r 11, 2001, the United States suffered the
n soil in the nation's history. Nineteen
rliners and attempted to fly them into
ed into New York City's World Trade
rd plane hit the Pentagon. The fourth
and crashed in a field in Pennsylvania.
the attacks, and the United States suf-
llars in damages. Within days, respon-
a and its leader, Osama bin Laden.[1] Al
icated attack within the United States
its collective conscience the fact that
of the world would not protect it from

ed that "9/11 changed everything."[3] But
eful day that had the most far-reaching
ident George W. Bush signed into law
Force (AUMF), a congressional resolu-
ary and appropriate force against those
determines planned, authorized, com-
that occurred on September 11, 2001,
rsons."[4] Two days later, President Bush
condemning the attacks as "an act of
ng to bring the perpetrators—the ter-
e. He also made clear that the Taliban,
l be subject to retaliation for sheltering
r, did not stop there. He also described
ature that extended beyond any nation
he said, "should not expect one battle,

but a lengthy campaign, unlike any oth
be waged against enemies wherever the
terrorist group of global reach has been

Meanwhile, a coterie of high-level
the foundation for sweeping president
terrorism." The group included the th
Gonzales, Cheney's legal adviser and lo
tagon general counsel William J. Hayn
old lawyer in the Department of Justic
office that provides legal advice to the
bind executive agencies.[6] Together, the
tual and legal architecture for this "new

Yoo became one of the most in
sweeping executive power. In a Septe
the president's paramount role in pro
military force. The decision whether
the amount of force to be used, Yoo in
constitutional authority." He claimed l
dition of a strong executive that dated
pointed to more recent precedents in
strikes in response to terrorist attacks:
and Sudan in 1998 and President Ron
maintaining that Congress had given
against terrorism under the AUMF,
inherently possessed this power by vir
under Article II of the U.S. Constituti
could not impose any limits on the pre
defend the nation.[8]

In another OLC memo, Yoo wrote
military against suspected terrorists w
out congressional approval.[9] In doin
not be bound by the Fourth Amendm
hibits searches and seizures without a
amendment does not apply to the m
would thus have unfettered discretion
can city, raid or attack dwellings, use
suspend First Amendment freedoms
tatus Act, on the books since 1878, pro
domestic law enforcement.[10] But Yoo's

er we have ever seen." That battle would
ey were and would "not end until every
n found, stopped, and defeated."[5]
administration officials began laying
tial powers in this new global "war on
nen White House counsel Alberto R.
ongtime aide David S. Addington, Pen-
es II, and John Yoo, a thirty-four-year-
e's Office of Legal Counsel (OLC), the
executive branch and whose opinions
ese men would help create the concep-
w type of war."[7]
mportant—and vocal—proponents of
mber 25, 2001, memo, Yoo described
otecting the nation through the use of
to use armed force abroad, as well as
nsisted, fell within the president's "sole
his theories were grounded in the tra-
back to Alexander Hamilton. Yoo also
which presidents had ordered military
President Bill Clinton in Afghanistan
nald Reagan in Libya in 1986. Besides
n President Bush power to wage war
Yoo also claimed that the president
rtue of his role as commander in chief
on. He further asserted that Congress
esident's power to use military force to

e that the president could deploy the
within the United States, with or with-
g so, Yoo said, the president would
ment to the Constitution, which pro-
warrant or probable cause, since that
ilitary during wartime. The president
n to set up checkpoints in an Ameri-
deadly force against individuals, and
of speech and press. The Posse Comi-
ohibited the military from engaging in
s memo sought to emasculate that act

,

and circumvent limits on using the ar
redefining terrorism broadly as a "mil

Notwithstanding these assertions o
U.S. detention policy remained largel
after September 11. Two high-profile
administration might continue to trea
ecution in civilian court rather than th
first case involved John Walker Lindh
captured in a military raid in Afgha
charged three months later in federal
the death of a CIA officer killed durin
involved Zacarias Moussaoui, initially
"twentieth hijacker"—the person who
in Pennsylvania on 9/11. Moussaoui h
cials in Minnesota in August 2001 and
Virginia four months later.

Congress, meanwhile, had enacted
monly known as the "Patriot Act."[11] Pa
six weeks after 9/11, the Patriot Act ex
investigate and prosecute suspected te
restrictions on electronic surveillance
and-trace devices that identify the sou
Internet communications.[12] It also broa
ters," an administrative subpoena that p
of telephone, e-mail, and financial reco
vision authorized officials to conduct s
pects' homes without notifying them.[13]
the government's authority to obtain pe
that people borrow from libraries or pu
conducting an investigation to obtain
protect against international terrorism
investigative powers, the Patriot Act s
including expanding the reach of existi
port to terrorists and widening the defi
to groups targeting the United States
through threats and coercion.[15] Althoug
cized for curtailing civil liberties, it still
subjected the government to some limi
treat terrorism predominantly as a law

med forces inside the United States by
itary matter."
f virtually limitless presidential power,
y unchanged during the first months
federal cases suggested that the Bush
t terrorism as a crime subject to pros-
rough the president's war powers. The
n, an American citizen who had been
nistan in December 2001. Lindh was
court in Virginia for his alleged role in
g fighting in Afghanistan. The second
believed to be the replacement for the
failed to board the plane that crashed
ad been arrested by immigration offi-
d was indicted on terrorism charges in

new counterterrorism legislation, com-
assing by wide margins in both houses
panded law enforcement's authority to
rrorists. For example, the act loosened
and on the use of pen register or trap-
urce and destination of telephone and
adened the use of "national security let-
ermits the FBI to compel the disclosure
rds without a court order. Another pro-
ecret "sneak and peak" searches of sus-
In addition, the Patriot Act increased
ersonal records, including lists of books
rchase at bookstores, by certifying it was
foreign intelligence information or to
.[14] Besides enhancing the government's
trengthened existing criminal statutes,
ng laws against providing material sup-
nition of "domestic terrorism" to apply
or attempting to influence U.S. policy
gh the Patriot Act has been rightly criti-
operated within a legal framework that
itations and oversight and continued to
enforcement problem.

Nonetheless, a different approach
view. After John Walker Lindh's captu
ney James Brosnahan to represent hi
high-level U.S. officials to inform ther
wanted to meet with him. For the ne
were refused, even though Lindh repe
this while, Lindh was held incommuni
Letters from Lindh's parents to their
folded, tied to a stretcher with duct ta
naked, and deprived of sleep and foo
through force, top Pentagon officials
gloves off."[16] Ultimately, the confessio
tal interrogation sessions served as the
Justice Department attorneys who rai
were ignored or discredited.[17] When
the validity of his confession in open
ute deal that would shield Lindh's abu
plead guilty to one of ten charges an
than face the death penalty.[18] Lindh a
the emotionally charged atmosphere a

Some administration officials belie
criminal justice system should not be
In their view, the problem was that c
ible with secrecy, incommunicado d
and thus were ill suited for the challe
ist threat. Involving lawyers and cour
harsh interrogations, to justify detent
mistakes. A new approach—or "new
it—was needed. That paradigm subs
and possible prosecution in military t
viduals suspected of terrorism or oth
in the regular criminal courts. It also
interrogation methods and spurned
conduct of war, including the Genev
tions, and customary international law
administration made a series of decis
this new paradigm. These decisions he
the way for an unprecedented global d

• •

was taking shape beyond the public's
re, his parents retained defense attor-
m. Brosnahan immediately contacted
n that he was representing Lindh and
ext two months, Brosnahan's requests
eatedly asked to speak to a lawyer. All
cado and interrogated by U.S. officials.
son were blocked. Lindh was blind-
ape, held in a freezing dark cell while
d. In an effort to extract a confession
instructed interrogators to "take the
n extracted from Lindh through bru-
e basis for his prosecution. Meanwhile,
sed concerns about Lindh's treatment
Lindh's lawyers prepared to challenge
court, prosecutors offered a last-min-
se from scrutiny by allowing Lindh to
d serve a twenty-year sentence rather
ccepted, fearful of a jury's response in
fter 9/11.

ved that Lindh's case showed why the
e used to handle suspected terrorists.
riminal prosecutions were incompat-
detention, and coercive interrogation
enges presented by the current terror-
ts made it more difficult to engage in
tion without evidence, and to conceal
paradigm," as President Bush called
stituted indefinite military detention
ribunals for the requirement that indi-
her wrongdoing be charged and tried
embraced torture and other abusive
the rules that had long governed the
va Conventions, U.S. military regula-
v. In late 2001 and early 2002, the Bush
sions laying the legal groundwork for
elped define the post-9/11 era and pave
detention system outside the law.

• •

"

On October 7, 2001, the United States c
dom, launching its first military strikes
paign sought to target al Qaeda and to
harboring it. The United States was aided
Afghan Northern Alliance, an umbrella
bulk of the armed forces on the ground.
Afghanistan resembled past armed conf
President Bush had described in speech
al Qaeda training camps, and Taliban ai
offensive by U.S. and allied troops. Soon
stan departed from these earlier military
tion jettisoned the legal rules that appl
any restrictions on the detention and tre

These rules commonly known as "in
"law of war"), are divided into two bran
bellum, is concerned with the legitimac
ond, *jus in bello*, provides a legal frame
progress. It is derived from internationa
as well as binding customary law. This b
of 1899 and 1907, which address the met
mitigate the harm and violence beyond
goal by, for example, codifying the pri
lawfully attack only targets of military v
ventions. First drafted in Geneva, Switz
the Conventions have been ratified by
enjoy universal acceptance. The Conve
ing the detention, interrogation, and re
Each of the four Conventions provides
ers. The two best known are the Third
the treatment of enemy prisoners of wa
which applies to civilians (or noncomb
tions, a nation can hold enemy soldie
prisoners cannot be mistreated under a
oners of war "must at all times be treate
acts of violence or intimidation."[21] They
without delay after the cessation of act
protections against abuse and mistreatm
tinued detention and the guarantee of a
crimes they commit during the armed c

commenced Operation Enduring Free-
against Afghanistan. This military cam-
punish the Taliban for supporting and
d by other members of NATO and by the
group of mujahideen, who provided the
At first, the U.S.-led military invasion of
flicts more than the new kind of war that
es. It began with air strikes against cities,
r defenses and was followed by a ground
n, however, the intervention in Afghani-
y campaigns when the Bush administra-
ied to armed conflict in order to evade
eatment of those it captured.
nternational humanitarian law" (or the
nches. The first branch, known as *jus ad*
y of the resort to armed force. The sec-
ework for an armed conflict already in
l treaties ratified by individual countries
ranch includes the Hague Conventions
thods and means of warfare and seek to
d that necessary to achieve the military
nciple that military organizations may
alue.[19] It also includes the Geneva Con-
erland, in 1864 and last revised in 1949,
y every country in the world and thus
entions together set forth rules govern-
elease of prisoners by individual states.
rules for a different category of prison-
d Geneva Convention, which regulates
ar, and the Fourth Geneva Convention,
batants).[20] Under the Geneva Conven-
rs for the duration of the conflict, but
ny circumstances. To the contrary, pris-
d humanely" and "protected . . . against
y also must be "released and repatriated
ive hostilities."[22] Civilians enjoy similar
ment as well as restrictions on their con-
a fair trial if they are prosecuted for any
conflict.

The Geneva Conventions recognize
for prisoner-of-war status because, for
armed forces of a party to the conflict,
teer corps that does not operate under a
its weapons openly, have a fixed sign of
war.[23] Article 5 of the Third Geneva Con
uals be treated as prisoners of war unti
tent tribunal, should any doubt arise as
Article 3—so named because it is comm
provides a baseline of treatment for a
status. It prohibits trials that do not me
and bars torture, cruel, humiliating or
Common Article 3 is widely understoo
ary international law, making it bindin
enemy that has not signed the Geneva C
ventions ensure that "nobody in enemy

Before the attacks on September 1
Geneva Conventions, even in those co
also had implemented the Geneva Con
The United States' decades-long adher
not simply the product of idealism; it
by military leaders that the arbitrary c
ers would place U.S. service members
hands and that abusive interrogation
well as immoral.[27]

The Bush administration, however,
work. An ominous sign came on Nov
order calling for the establishment of
ers captured in the "war on terror."[28] T
could prosecute any foreign national i
he "is or was a member of . . . al Qaeda
or conspired to commit" a terrorist act
sions to impose sentences of up to life

Military commissions historically w
tary officers to fill a gap in criminal ju
courts were not open and functioning.
in battlefield situations in which mart
civilian authority existed or in occup
American military commissions were

e that some individuals will not qualify example, they are not members of the , or they are part of a militia or volun- an organized command structure, carry f identification, or adhere to the laws of vention, however, requires that individ- l a determination is made by a compe- to their status.[24] In addition, Common mon to all four Geneva Conventions— all individuals denied prisoner-of-war et internationally recognized standards degrading treatment, and other abuse. d to have attained the status of custom- g on the United States even against an Conventions. In short, the Geneva Con- hands can be outside the law."[25]

1, the United States had followed the nflicts in which the enemy did not.[26] It ventions through internal regulations. rence to the Geneva Conventions was also reflected a pragmatic assessment detention and mistreatment of prison- s at greater risk if they fell into enemy methods were counterproductive as

deliberately scuttled this legal frame- vember 13, 2001, when Bush issued an f military commissions to try prison- The order stated that the commissions f the president had "reason to believe" " or had "engaged in, aided or abetted, t.[29] The order empowered the commis- imprisonment or death.

were ad hoc trials conducted by mili- urisdiction created when the ordinary Commissions were used, for example, tial law had been declared because no pied enemy territory. In fact, the first e used by General Winfield Scott in

"

occupied parts of Mexico to punish u
duct by American troops during the M

The United States had not used mili
and those commissions had come unc
Moreover, those military commission
used against only a handful of individ
By contrast, the new commissions cou
suspected of supporting, aiding, or con
war without geographic or temporal li

U.S. military law also had evolved s
the Uniform Code of Military Justice
all members of the armed services of t
courts-martial system could plausibly
protections to defendants than did the
Bush's order threatened to take milita
integrity and reputation it had gained
providing fair trials for defendants.

The Bush administration's creation
carried out in secret, driven by "a sm
tion officials" wielding "remarkable p
executive branch agencies and Congr
the military's lawyers, the Judge Advoc
eventually become some of the comm
great concern that we were setting u
own ideals," commented John A. Gord
mer deputy CIA director who served
Council staff.[34] Officials from the Justi
criticized the use of military commiss
more capably prosecute terrorism susp
tional principles.[35]

Although Bush's November 13, 200
and fair trial," that promise was illus
safeguards, including the presumptio
government's evidence and cross-exa
appeal to civilian court. The order als
adhere to the Geneva Conventions,
military law. The Defense Departmen
rounded announcement of the presid
sions' procedures. But those reforms f

ndisciplined action and other miscon-
Mexican-American War.[30]
itary commissions since World War II,
der attack as unprincipled and unfair.[31]
s were of limited scope, as they were
uals in a declared war among nations.
uld assert jurisdiction over any person
mmitting terrorism in a loosely defined
mits.
significantly since the establishment of
(UCMJ) in 1951. The UCMJ applies to
the United States. By 2001, the UCMJ's
y boast that it provided more robust
e civilian justice system. But President
ry justice backward, undermining the
through years of reforms dedicated to

n of military commissions was largely
mall core of conservative administra-
ower."[32] These officials excluded other
ess. They also refused to consult with
cate General's (JAG) Corps, who would
missions' harshest critics.[33] "There was
p a process that was contrary to our
lon, a retired air force general and for-
on President Bush's National Security
ce Department's criminal division also
ions, arguing that federal courts could
pects without compromising constitu-

01, order promised defendants "a full
sory. The commissions lacked critical
on of innocence, the right to see the
amine its witnesses, and any right of
so did not guarantee that trials would
the customary laws of war, or U.S.
t tried to quell the criticism that sur-
dent's order by tweaking the commis-
ailed to address critical shortcomings.

The commissions still allowed eviden
defendants the right to be present dur
The commissions also claimed the au
spiracy, that had never been recogniz
foreign citizens could be tried by the
of a permanent second-class justice sy
criminated based on nationality.

President Bush's military commiss
of the emerging detention regime. Th
ing prisoners as "enemy combatants"
indefinitely without trial (whether mi
though the power to detain enemy s
is grounded in the law of war, the ad
dier" was entirely novel. Most prison
resemblance to the legal definition or
batant. They were not members of a
They also had never been on a battle
tilities against the United States or its
trial would become the central featu
condemning prisoners to what one P
sort of purgatory."[37]

A series of secret legal memos issu
ment of prisoners held in the "war on
memos became public. They tell a dist
top Bush administration lawyers and
ers outside the law.

On January 9, 2002, John Yoo and
in the Department of Justice, advised
applicability of international humanit
Yoo and Delahunty concluded that th
to al Qaeda or the Taliban and thus
detention of prisoners or use of milit
also defined the conflict with al Qaeda
Taliban in Afghanistan, thus claiming
terrorist organization whose member
afforded prisoners of war or civilians
the minimal protections of Common A
Qaeda or associated organizations beca
nations, not "international" conflicts w

ce obtained through coercion, denied
ing their trial, and lacked impartiality.
uthority to try offenses, such as con-
zed as war crimes. Furthermore, only
commissions, presaging the creation
ystem for noncitizens that openly dis-

sions, however, formed only one part
he administration also began classify-
and claiming that it could hold them
litary or civilian) if it chose to.[36] Even
oldiers for the duration of a conflict
dministration's concept of "enemy sol-
ers seized after 9/11 bore little, if any,
traditional understanding of a com-
n enemy government's armed forces.
efield nor had they taken part in hos-
allies. In time, imprisonment without
re of the post-9/11 detention system,
Pentagon official called a "Kafkaesque

ued in early 2002 addressed the treat-
terror," and over time, many of these
urbing story of a concerted attempt by
officials to create a category of prison-

Robert J. Delahunty, a special counsel
d William Haynes about the potential
tarian law to the "war on terrorism."[38]
he Geneva Conventions did not apply
s would not constrain the long-term
ary commissions. Yoo and Delahunty
a separately from the conflict with the
legitimacy for a global war against a
s were not entitled to the protections
under the Geneva Conventions. Even
Article 3, they argued, did not cover al
ause it applied only to civil wars within
with terrorist groups.

,

Yoo and Delahunty reached a simil
though Afghanistan had been a party
1956. They contended that Afghanista
had been overrun and was under the
rather than a central government. They
ership were dominated by, and could n
a result, Afghanistan had ceased to be
Taliban members were not entitled to
Nor could Taliban members invoke t
tional law, since those rules did not b
individuals entirely outside any protec

Jay S. Bybee, then the OLC's top la
judge, reached a similar conclusion
pointed out in a memo to both Hayn
Gonzales, did not apply to the detenti
the president could unilaterally "susp
obligations toward Afghanistan or, alt
the Taliban failed to qualify as prisone
the decision whether to afford prisone
ventions was the president's alone to m

These memos helped provide the b
subject to no restriction other than
hallmark of U.S. policy after 9/11, the
and imagery of war to justify extraord
defining the war in such a way as to
those powers. The memos also serv
officials from potential criminal liab
Crimes Act had made it a federal fel
Geneva Conventions (which include
3).[40] The Geneva Conventions require
tion to punish any person who comm
Conventions.[41] The War Crimes Act,
in Congress, was intended to ensure t
war criminals, such as the North Vie
diers during the Vietnam War. After
were concerned about exposing Ame
to liability for violating the Geneva
interrogation of detainees. The determ
did not apply to al Qaeda or the Ta

lar conclusion about the Taliban, even to all four Geneva Conventions since an was a "failed state" whose territory control of a violent militia or faction y claimed that the Taliban and its lead- not be distinguished from, al Qaeda. As a party to the Geneva Conventions, so o any of the Conventions' protections. the protections of customary interna- bind the president, thus placing those tions provided under the law of war.

awyer and now a federal appeals court ."[39] The Geneva Conventions, Bybee nes and White House counsel Alberto ion of al Qaeda prisoners. In addition, pend" America's Geneva Convention ternatively, conclude that members of ers of war under the treaty. Either way, ers protection under the Geneva Con- nake.

building blocks for a detention regime executive say-so. In what became a president would invoke the language dinary powers while at the same time o avoid any limits on the exercise of ed a darker purpose: insulating U.S. ility. A 1996 law known as the War ony to commit a grave breach of the d any violation of Common Article ed state parties to enact penal legisla- itted or ordered a grave breach of the passed by an overwhelming majority that the United States could prosecute tnamese who tortured American sol- 9/11, however, White House officials rican military as well as CIA officials Conventions in their treatment and nination that the Geneva Conventions aliban thus provided a shield against

future criminal liability, since liability fell within the Conventions' zone of p

Alberto Gonzales summarized the dated January 25, 2002.[42] The "war ag a new kind of war," one that placed " mation quickly from detainees to prev the Geneva Conventions' restrictions dered "quaint" the various privileges of war. Gonzales thus urged the presi that the Geneva Conventions did not a determination would not only free i also would create "a reasonable basis not apply and thus "provide a solid de potential harm to America's credibilit ventions, Gonzales said, could be mini "humanely."[43]

Not everyone in the administratio Powell urged the president to follow explained that denying detainees the tions would carry significant costs, re and practice" and "undermin[ing] the troops." It would also deprive the Uni dation for detaining individuals and critical allies. William H. Taft IV, Po concerns.[45]

But Bush rejected their advice. Inste concluded that the Geneva Conventio Qaeda in Afghanistan "or elsewhere th mined that although the Geneva Conv Taliban in Afghanistan, all Taliban det such, Bush said, they failed to qualify also for the baseline protections of C asserted his authority to suspend the necessary.[47] To be sure, Bush said that a "treat detainees humanely and, to the military necessity, in a manner consis But "humane" treatment was a mallea legal obligation, this weak instruction vasive and wholesale abuse of prisoner

y attached only if an abused prisoner
rotection.
se views in a memo to the president
gainst terrorism," Gonzales stated, "is
'a high premium" on obtaining infor-
vent a future attack. It made "obsolete"
s on interrogating detainees and ren-
and protections afforded to prisoners
dent to make a blanket determination
apply to al Qaeda or the Taliban. Such
interrogators to use harsh methods; it
in law" that the War Crimes Act did
efense to any future prosecution." The
y caused by skirting the Geneva Con-
imized by promising to treat detainees

on agreed. Secretary of State Colin L.
w the Geneva Conventions.[44] Powell
protections of the Geneva Conven-
versing "over a century of U.S. policy
e protections of the law of war for our
ited States of the strongest legal foun-
could weaken public support among
owell's top legal adviser, echoed these

ead, on February 7, 2002, the president
ns did not apply to the conflict with al
hroughout the world."[46] He also deter-
entions applied to the conflict with the
ainees were "unlawful combatants." As
not only for prisoner-of-war status but
ommon Article 3. Furthermore, Bush
e Geneva Conventions as he deemed
as a matter of policy, U.S. forces should
extent appropriate and consistent with
stent with the principles of Geneva."[48]
able term and, once severed from any
would do nothing to prevent the per-
rs, especially when pressure to produce

"

actionable intelligence mounted. In ad
ment" never included the CIA, which
constraint.

The themes that Bush had sounded
to assume a tangible form. In the f
sought legal cover for interrogation n
ture and abuse of prisoners by the Un
ods claimed they were necessary to pr
United States was not obligated—mora
rorists any protections.

An important step in the descent in
OLC memo signed by Bybee but repo
tions from Addington and White Hou
memo assessed the permissible stand
statute criminalizing torture.[50] Congre
the United States' obligations under
other Cruel, Inhuman or Degrading T
the treaty in 1988, the United States re
absolute and could not be excused eve
the federal statute, any person who '
mental pain or suffering," other than
sanctions, on a person in his custody
sentenced to up to twenty years in pris
resulted.[52] Thus, even if U.S. officials co
Crimes Act because the Geneva Con
with al Qaeda and the Taliban, as Bush
inally liable under the federal antitortu

The "torture memo," as it is becam
town Law School professor David Lu
the executive branch of the U.S. gove
phrase "specifically intended" in the a
tion of severe pain must be the inte
the interrogator's intent were obtainin
harm, rather than inflicting pain (whi
case), the interrogator would not be li
"severe pain" to mean pain causing "de
age resulting in the loss of significan
mental suffering must be prolonged t
nition was an irrelevant medical ben

ddition, the promise of "humane treat-
remained free from even this minimal

in the first days after 9/11 thus started
ollowing months, the administration
nethods designed to sanction the tor-
nited States. Supporters of these meth-
revent future terrorist acts and that the
ally or legally—to afford suspected ter-

nto lawlessness was an August 1, 2002,
rtedly drafted by Yoo, with contribu-
se counsel Timothy E. Flanigan.[49] The
ards of conduct under a 1994 federal
ess had enacted this law to implement
the Convention against Torture and
Treatment or Punishment.[51] By signing
ecognized that the ban on torture was
n under exigent circumstances. Under
'specifically intended to inflict severe
pain administered pursuant to lawful
y or control could be prosecuted and
son or to death, if death of the prisoner
ould not be prosecuted under the War
ventions did not apply to the conflict
claimed, they still could be held crim-
re statute.
e known, helped create what George-
uban called a "torture culture" within
ernment.[53] The memo interpreted the
ntitorture statute to mean that inflic-
rrogator's "precise objective." Thus, if
g information to prevent some future
ich could almost always said to be the
able. The memo also narrowly defined
eath, organ failure, or permanent dam-
t bodily functions" and asserted that
o be severe.[54] The source for the defi-
efits statute that had no relationship

to established domestic or internatio
conveniently suited the authors' need
technique such as waterboarding—in
prisoner's cloth-covered face to indu
induce extraordinary suffering, it wou

The "torture memo" was not an aca
vacuum. Rather, as a second classified
it was drafted in response to a reque
"enhanced interrogation techniques" t
terrorist suspect.[55] Following his seizur
was taken to a secret CIA prison in T
dah was a high-ranking al Qaeda off
information that could prevent anothe
Zubaydah was not providing.[56] In mid
of General Counsel met with top admi
ney general, the national security adv
discuss the use of "alternative" interrog
place two months later to discuss usi
The OLC was asked to prepare a men
subsequently informed the CIA of its c

Bybee's classified August 1, 2002, m
OLC's legal interpretation of the fede
gation methods. Set forth in painstak
methods not only included waterboard
stuffing detainees in dark, constricted
into walls; and dousing detainees with
while they were clothed in only a dia
use in combination and over long peri
and desperation. Medical and psycho
to monitor the interrogations and ens
trace. As one medical official later to
only because we need you for informat

The memo described the interrogat
terms:

> In this procedure [waterboarding], th
> inclined bench, which is approximat
> vidual's feet are gently elevated. A cl
> eyes. Water is then applied to the clo

nal understandings of torture but that
s. Under this twisted logic, although a
which water is poured over a bound
ce the sensation of drowning—might
ld not constitute torture.

demic exercise, nor was it penned in a
OLC memo from the same day shows,
st for permission to apply a series of
to Abu Zubaydah, a recently captured
e in Pakistan in March 2002, Zubaydah
hailand. The CIA insisted that Zubay-
ficial with valuable and time-sensitive
r attack, information the CIA believed
d-May, attorneys from the CIA's Office
nistration officials, including the attor-
iser, and the White House counsel, to
gation methods. Another meeting took
ing these methods against Zubaydah.
no assessing the methods' legality and
conclusions.[57]

memo (later made public) applied the
ral antitorture law to specific interro-
king and mind-numbing detail, those
ling but also extreme sleep deprivation;
boxes; repeatedly slamming detainees
n cold water for up to twenty minutes
per.[58] The methods were intended for
ods of time to instill helplessness, fear,
ological personnel would be on hand
sure that the suffering did not leave a
ld a detainee, "I look after your body
tion."[59]

tion methods in sterile, almost clinical

he individual is bound securely to an
tely four feet by seven feet. The indi-
loth is placed over the forehead and
th in a controlled manner. As this is

"

> done, the cloth is lowered until it co
> the cloth is saturated and completely
> is slightly restricted for 20 to 40 seco
> This causes an increase in carbon di
> This increase in the carbon dioxide
> breathe. This effort plus the cloth p
> tion and incipient panic," i.e., the pe
> does not breathe any water into his l
> water is continuously applied from
> inches. After this period, the cloth is
> breathe unimpeded for three or four
> ing is immediately relieved by the ren
> then be repeated.[60]

Arbitrary lines were drawn in an ef
waterboarding could be practiced, bu
blood sodium levels within a safe rang
or ceilings to keep them awake, but no
could be stuffed in cramped, dark co
hours at a time. The memo's language
"the precise bureaucratese favored by
detailing

> how to fashion a collar for slamming
> how many days he can be kept withou
> should be told before being locked in
> short of having a jury decide that thes
> and abusive treatment of prisoners.[61]

Language was distorted, logic twiste
provide legal impunity—a "golden shie
it—for state-sanctioned torture.[62] The
White House counsel's office, attorneys
the vice president's office.[63] All of Presi
ers—Vice President Cheney, Nationa
Secretary of Defense Donald Rumsfeld
tor George Tenet, and Attorney Gene
the CIA's use of these "enhanced inter
talking about this in the White Hous

vers both the nose and mouth. Once
covers the mouth and nose, air flow
nds due to the presence of the cloth.
oxide level in the individual's blood.
level stimulates increased effort to
roduces the perception of "suffoca-
rception of drowning. The individual
ungs. During those 20 to 40 seconds,
a height of twelve to twenty-four
lifted, and the individual is allowed to
full breaths. The sensation of drown-
noval of the cloth. The procedure may

ffort to defend the techniques' legality:
t only with a saline solution to keep
e; detainees could be shackled to floors
ot for more than seven days; detainees
ntainers, but not for more than eight
, the *New York Times* later wrote, was
dungeon masters throughout history,"

g a prisoner against the wall, exactly
ut sleep (11), and what, specifically, he
a box with an insect—all to stop just
se acts violate the laws against torture

ed, and morality abandoned in order to
eld," as one former CIA official dubbed
torture memos were approved by the
s at the National Security Council, and
dent Bush's top national security advis-
l Security Adviser Condoleezza Rice,
l, Secretary of State Powell, CIA Direc-
ral John Ashcroft—met and discussed
rrogation techniques."[64] ("Why are we
e? History will not judge this kindly,"

Ashcroft reportedly warned at the tim
heads of the Senate and House intellig
of Four—also were briefed on the tec
and how much they were told remains

In a subsequent March 2003 mem
conclusions of his August 2001 "tortur
Department, which had already been
ods.[67] Although Yoo later described th
memo reiterated his extraordinary a
power.[68] The March 2003 memo not o
side the United States had no constitut
applicability of constitutional protect
States in the "war on terror."[69] Accord
the military to seize people living in
without restriction, and imprison then
he believed they presented a threat to

Yoo also said that criminal prohibiti
not be applied to the military during
president's constitutional power as com
gate terrorist suspects.[70] Yoo thus dire
to legislate on national security issues,
constitutional authority to protect the
interrogation method. "Congress," Yo
president's ability to detain and interr
regulate his ability to direct troop mo
more, any military official accused of
prisoner abuse could properly assert
long as he said he was trying to protec
attacks. In other words, any action wa
security.[72]

U.S. officials had condoned, encou
September 11. American soldiers wat
quash the insurgency that arose after t
from Spain during the Spanish-Amer
government trained and funded param
tortured and brutalized their own peo
routinely beat and mistreated crimin
degree" before legal and judicial reform
mid-twentieth century.[74] But the U.S. g

ne.)[65] The Republican and Democratic
gence committees—the so-called Gang
chniques, although the details of what
s unknown.[66]

o, Yoo sought to extend the logic and
e memo" from the CIA to the Defense
resorting to harsh interrogation meth-
e legal advice as "near boilerplate," the
nd unprecedented vision of executive
nly asserted that foreign nationals out-
tional rights, but it also questioned the
ions to individuals inside the United
ling to Yoo, the president could order
the United States, interrogate them
n without charges, trial, or a hearing if
the country.

ions against abuse in the UCMJ should
wartime and would interfere with the
mander in chief to detain and interro-
ctly questioned Congress's prerogative
suggesting that the executive branch's
country from attack would justify any
oo wrote, "may no more regulate the
rogate enemy combatants than it may
ovements on the battlefield."[71] Further-
violating criminal prohibitions against
a claim of necessity or self-defense as
ct the country against further terrorist
s legal if taken in the name of national

uraged, and engaged in torture before
terboarded Filipinos in attempting to
he United States seized the Philippines
ican War.[73] During the 1980s, the U.S.
nilitary groups in Central America that
ple. And police officers across America
al suspects by giving them the "third
ns started to curb these practices in the
government had never before sought to

"

legalize torture nor to make torture o
had any president previously claimed t
tic and international prohibitions agai
extrajudicial detention regime to enga

The Bush administration maintaine
global terrorist threat, which 9/11 had s
and ability to inflict damage on the Un
istration's approach was shaped by th
by Vice President Cheney: "even if th
unimaginable coming due, act as if it is
ing another terrorist attack at all cost, t
evidence and analysis, licensed circun
secrecy to hide bad conduct and mis
behind major military and foreign pol
sion of Iraq. It also helped create and s
limits. It excused torturing even those
have any relevant information. And it
whether the desired information could

The Bush administration's policies
the legal and political spectrum. Harol
School, called the torture memo "per
opinion" he had ever read.[76] Ruth W
using military commissions, and forme
demned the memo in an op-ed in the
the army's judge advocate general, call
sive."[78] And Harvard Law School profe
OLC from October 2003 until resign
August 2002 and March 2003 memos
ety in their legal analysis" and recom
them.[79]

A Justice Department internal ethic
Yoo and Bybee had committed profes
shod reasoning and by disregarding th
judgment and render thorough, cand
before that, in early 2004, the CIA ins
the agency's interrogation program. S
Department of Justice withdrew the O
setting out the legal defense of "enha
the antitorture statute. But the Decem

fficial U.S. policy in all but name. Nor
he authority to ignore explicit domes-
nst torture or to set up an alternative,
ge in the practice.
ed that its actions were justified by the
shown was unprecedented in its nature
ited States and its citizens. The admin-
e "One Percent Doctrine" articulated
ere's just a one percent chance of the
s a certainty."[75] In the name of prevent-
the doctrine sanctioned action without
nventing the law, and fueled excessive
stakes. The One Percent Doctrine lay
licy decisions, including the U.S. inva-
ustain an interrogation policy without
e who likely were innocent or did not
condoned torture without regard for
d be obtained through lawful means.
sparked sharp criticism from across
d H. Koh, the former dean of Yale Law
haps the most clearly erroneous legal
edgwood, who initially had defended
er CIA director James R. Woolsey con-
Wall Street Journal.[77] Thomas J. Romig,
ed Yoo's conclusions "downright offen-
essor Jack Goldsmith, who headed the
ning the following July, criticized the
for an "unusual lack of care and sobri-
mended that officials stop relying on

s report ultimately concluded that both
sional misconduct through their slip-
eir duty to exercise independent legal
lid, and objective legal advice.[80] Long
spector general raised questions about
Subsequently, in December 2004, the
OLC's unclassified August 2002 memo
nced interrogation techniques" under
mber 2004 OLC opinion that replaced

it continued to define torture narrowl
the various tactics described in the se
Then, in May 2005, the OLC issued th
the CIA's torture program. One explain
August 2002 memo were still legal;[82] ar
were legal even if used in combination
interrogation methods did not contrav
inhuman, or degrading treatment (son

Like the earlier OLC memos, the M
brutal treatment of prisoners in a veil
intricacies of throwing detainees into
and changing their soiled diapers. T
interrogation methods might be impe
criminal investigations or traditional v
tions and U.S. military regulations. B
national security interrogations. The
and virtually anything could be justifie
ment was protecting the country from
terrorism" had become a license for to

The Bush administration's response
obligations and its constitutional her
try viewed the separation of powers b
ment as essential to preserving both li
warned, the "accumulation of all powe
in the same hands . . . may justly be p
anny."[86] Consequently, Madison and
created a system of checks and balance
the executive, from becoming too po
made the president the commander i
sought to limit this power. Alexander
ity, recognized that the commander i
more than the supreme command an
forces."[87] The Constitution also veste
in Congress, including the power to
armed forces, to define and punish o
to make rules concerning the capture a
Supreme Court Justice Robert Jackso
President Harry Truman's seizure of p

ly and did not question the legality of
parate, classified August 2002 memo.[81]
ree more memos aimed at shoring up
ed why the techniques in the classified
nother explained why those techniques
;[83] and a third described why the CIA's
vene even the lower threshold of cruel,
metimes called "torture lite").[84]
lay 2005 memos cloaked the harsh and
of legality even as they discussed the
walls, manipulating their sleep cycles,
The memos acknowledged that these
rmissible under the rules for ordinary
wars governed by the Geneva Conven-
But, the memos explained, these were
normal rules therefore did not apply,
d based on the theory that the govern-
another terrorist attack.[85] The "war on
rture.

to 9/11 flouted both America's legal
ritage. Those who founded the coun-
between the three branches of govern-
berty and security. As James Madison
rs, legislative, executive, and judiciary,
pronounced the very definition of tyr-
others who framed the Constitution
s to prevent any one branch, including
werful. Even though the Constitution
n chief of the nation's armed forces, it
Hamilton, no foe of executive author-
n chief's power "amount[s] to nothing
d direction of the military and naval
d significant control over war powers
declare war, to raise and support the
ffenses against the law of nations, and
and treatment of enemy prisoners.[88] As
n wrote in a seminal case invalidating
privately owned steel mills during the

"

Korean War, the Constitution did not
chief of the country" or give him a "m

Nonetheless, President Bush claime
war power, at least insofar as the "wa
did so under the premise that he had
interpret statutes but to do so indepe
memos contained perhaps the most ch
their assertion that even federal laws p
tutional if read to limit the president's
he saw fit.[90]

This conception of presidential po
theory of the "unitary executive." In its
tive theory maintained that the other t
constitutionally infringe on the distinc
executive's control over administrativ
procedures. But the theory took on a r
administration's battles with Congress
ment, Dick Cheney, then the ranking
mittee investigating the Iran-Contra s
known as the "Minority Report") tha
its constitutional authority by prohibit
the Contras in Nicaragua.[91] Cheney cri
restricting executive power and advo
prerogatives in the area of foreign pol
Cheney, along with David Addington (
mittee's staff), sought to implement the
by claiming that Congress could not r
what he deemed necessary to protec
interrogating prisoners to listening to
citizens without a warrant. In their vie
by Congress and the courts and free
safeguard the nation from terrorism an

The linchpin in the Bush adminis
policy was its effort to avoid all court
America's commitment to judicial pro
that undermined its ability to confron
they believed, might impose constraint
there should be none if the country w
cally, many of these architects were the

t make the president "Commander in
onopoly of 'war powers.'"[89]
ed exclusive executive control over the
r on terrorism" was concerned. Bush
constitutional authority not merely to
endently and unilaterally. The torture
hilling articulations of this theory, with
prohibiting torture would be unconsti-
authority to conduct interrogations as

wer is sometimes associated with the
s initial incarnation, the unitary execu-
two branches of government could not
ct powers of the executive, such as the
e agencies through firing and hiring
more extreme form during the Reagan
s during the 1980s. In a key develop-
g Republican on a House select com-
scandal, commissioned a report (later
t argued that Congress had exceeded
ing President Reagan from supporting
ticized various post-Watergate reforms
cated virtually unlimited presidential
licy and national security.[92] After 9/11,
(who had served on the minority com-
eir expansive vision of executive power
egulate the president's authority to do
t the country, from imprisoning and
the private conversations of American
ew, only a strong executive, unchecked
to act without public scrutiny, could
nd other threats to its security.
stration's detention and interrogation
review. The policy's architects viewed
cess and the rule of law as a weakness
nt the current terrorist threat. Courts,
ts on executive action in a realm where
were to be optimally protected. Ironi-
emselves lawyers.

The desire to avoid judicial review
the growing number of prisoners seize
and elsewhere. By December 2001, th
ers in its custody: thirty-seven were b
Afghanistan, and the rest were on an
ern Arabian Sea. In addition, more
being held by the Northern Alliance a
in Afghanistan.[93] The United States wa
location for continued detention an
2001, the Defense Department disclos
prisoners, it announced, were being
Guantánamo Bay, Cuba.[95] The adminis
volumes about the aims—and contr
policy.

Located in Cuba's southeast corne
four hundred air miles from Miami,
square miles (thirty-one of them on lan
almost half as big as the District of Co
Bay during the Spanish-American Wa
base and coaling station there. A 1903
States created a lease agreement that g
diction and control" over the base whi
eignty" over the territory.[96] A 1934 trea
would continue until both parties agre
agreement made Guantánamo unique
military bases are leased for a specif
the base must be closed or the agree
contrast, would remain under U.S. co
desired.

Over time, Guantánamo became pa
In 1953, Guantánamo's commander an
practical purposes, is American ter
entirely self-sufficient, with its own wa
tem, entertainment facilities, and fra
bucks to McDonalds.[100] Also, unlike e
there is no Status of Forces Agreemen
ment of civil and criminal jurisdictio
there. Instead, U.S. law applies at Guan
sonnel but also to the third-party nati

quickly gained momentum because of
ed by the United States in Afghanistan
e United States had forty-five prison-
being held at the Kandahar airport in
amphibious assault ship in the north-
than three thousand prisoners were
nd other anti-Taliban forces elsewhere
nted to bring the prisoners to a secure
d interrogation.[94] On December 27,
ed that location: al Qaeda and Taliban
transferred to the U.S. Naval Base at
stration's choice of Guantánamo spoke
adictions—of its emerging detention

r, Guantánamo Bay is approximately
Florida. Guantánamo Bay's forty-five
nd) make it larger than Manhattan and
olumbia. After acquiring Guantánamo
r, the United States established a naval
3 treaty between Cuba and the United
gave the United States "complete juris-
ile recognizing Cuba's "ultimate sover-
aty stipulated that this lease agreement
ed to modify or abrogate it.[97] The lease
e in that all other overseas American
ic term and when that term expires,
ment renegotiated.[98] Guantánamo, by
ontrol for as long as the United States

rt of the United States in all but name.
nnounced that the naval base "for all
rritory."[99] Guantánamo also became
ater plant, schools, transportation sys-
nchise outlets and chains, from Star-
very other U.S. overseas military base,
t at Guantánamo to define the assign-
on over military and other personnel
ntánamo not only to U.S. military per-
onals employed there in various civil-

"

ian capacities.[101] Thus at Guantánamo, only to itself.[102]

So why make Guantánamo the flag A secret December 28, 2001 memo by F. Philbin suggests the answer.[103] Lea shows that the Bush administration c Guantánamo would be beyond the juri immune from judicial review. Withou ine the basis for any prisoner's confine whether the prisoners were entitled to president's determination) or examine not order that the prisoners be provid bers, or to anyone else from the outsid into the prisoners' treatment, thus ins judicial scrutiny.

By bringing prisoners to Guantán to evade one of the most fundamenta Anglo-American legal tradition: the Latin words meaning "you shall pro most celebrated of the English writs th tem. Habeas corpus, whose history a fully in chapters 5 and 6, safeguards i those detained by the state have the o of their imprisonment before a judge. son explained:

> Executive imprisonment has been co John, at Runnymede, pledged that no possessed, outlawed, or exiled save b law of the land. The judges of Englan largely to preserve these immunities f

Habeas corpus not only helped preven out charge or trial, but it was precise were strongest and most important.

The Bush administration neverthele refuse to hear any habeas corpus chall oners at Guantánamo. This calculatio tors: that the prisoners were foreign n

the United States remains accountable

ship prison in the "war on terrorism"?
Yoo and fellow OLC attorney Patrick
ked to the press in 2004, the memo
hose Guantánamo because it believed
isdiction of the federal courts and thus
t jurisdiction, a court could not exam-
ment. It could not, therefore, consider
any legal protections (contrary to the
e the allegations against them. It could
ed access to attorneys, to family mem-
e world. A court also could not inquire
sulating torture and other abuse from

amo, the Bush administration sought
l protections in the Constitution and
writ of habeas corpus. Derived from
duce the body," habeas corpus is the
hat became part of America's legal sys-
and development are described more
ndividual liberty by guaranteeing that
pportunity to challenge the lawfulness
As Supreme Court Justice Robert Jack-

nsidered oppressive and lawless since
free man should be imprisoned, dis-
y the judgment of his peers or by the
d developed the writ of habeas corpus
from executive restraint.[104]

t imprisonment by the executive with-
ely in this context that its protections

ess calculated that federal courts would
enges brought by or on behalf of pris-
n rested primarily on two related fac-
nationals and that they had been cap-

tured and were being held outside the s
Thus, the administration believed, cou
despite the United States' total and exc
was, after all, the same the argument
with some success during the 1990s to
brought tens of thousands of Haitian a
high seas to Guantánamo and detaine
erected tent cities.[105]

Yoo and Philbin did acknowledge th
involved "some litigation risk" from c
that courts would be "reluctant" to in
in the area of military and foreign affa
the administration's effort to create o
Bagram Air Base in Afghanistan and
and Asia, which together helped creat
side the law. The belief that habeas co
sweeping claims of executive power t
to try by military commission, and to
prescient, while the administration's ga
exercise their habeas powers, at least o

sovereign territory of the United States.
urts would deny habeas corpus review
clusive control over Guantánamo. This
t that the U.S. government had made
o try to stave off court review when it
and Cuban refugees intercepted on the
ed them behind barbed wire in hastily

hat bringing prisoners to Guantánamo
detainee lawsuits. But they concluded
nterfere with the president's decisions
irs. The same thinking would underlie
ther offshore detention centers at the
at secret CIA "black sites" in Europe
e a new global network of prisons out-
rpus could provide some resistance to
o detain without charge or a hearing,
interrogate without restriction proved
amble that the courts would decline to
ver Guantánamo, failed.

"

Guantánamo

Microcosm of a Prison beyon

On January 11, 2002, the fir
tánamo after twenty-seven hours or
departed the previous day from the U
Afghanistan. The prisoners were hood
shackled at the arms and legs. They h
the flight and were given only urinal s
one prisoner was forcibly sedated. Mo
transporting prisoners with surgical m
over their eyes, and a "three-piece suit
leg restraints, and a chain around their

Guantánamo's prison population r
number of detainees had swelled to 300
would be detained at Guantánamo.[2] C
brutal. The first prisoners were house
it was possible to see right through i
air cells. Prisoners were given only th
themselves; a thin mat to sleep on, but
as a prayer mat and the other for wash
throughout the night, and detainees w
hours a day, except for two fifteen-min
taken alone, in shackles, to a small pen

In late April 2002, the United State
a new and more permanent facility
expanding prison population. A spra
contained three detention camps (thr
guard towers, interrogation trailers, a
concentric rings of barbed wire. Camp
individual steel-and-mesh cells in boxc

2

nd the Law

st twenty prisoners arrived at Guan-
n an air force cargo plane that had
U.S. Marine Corps base in Kandahar,
ded, wore orange jumpsuits, and were
ad been chained to their seats during
pittoons to relieve themselves. At least
ore flights into Guantánamo followed,
asks over their faces, black-out goggles
" restraint that consisted of handcuffs,
r waists.[1]

ose rapidly, and within a month, the
o. In time, approximately 775 prisoners
Conditions were initially primitive and
ed at Camp X-Ray, so named because
ts six-by-eight-foot, makeshift, open-
e barest essentials: a bucket to relieve
no blanket; and two towels (one to use
ing). Halogen floodlights remained on
ere confined to their cells twenty-four
nute breaks each week when they were
n to exercise.[3]

s moved the detainees to Camp Delta,
constructed to house Guantánamo's
awling complex, Camp Delta initially
ree more were added later) as well as
and a hospital, all surrounded by six
s 1, 2, and 3 consisted of eight hundred
car-style arrangements. Prisoners were

typically confined to their six-foot-eig
hours a day, except for twenty to thirty
followed by a five-minute shower. The
shorts and "comfort items" such as
prayer cap, and Qur'an, all of which co
behavior or at the discretion of the in
provided, even though summer tempe
100 degrees Fahrenheit.[4]

As Guantánamo's prison populatio
States constructed new facilities, each
last. Opened in February 2003, Camp
for more "cooperative" prisoners who
prisoners there wore white instead of
side for up to ten hours a day.[5] They al
for books and movies.[6] The military, h
from Camp 4 to newer, higher-security

The Defense Department describe
that many states [in America] would
Bunker Hill, Indiana, this two-story m
for "higher-level" detainees, considere
Prisoners in Camp 5 were confined
movement monitored through touch-
Camp 5 also contained special interrog
carpets, blue velour reclining chairs w
panic buttons, and open-air, cage-like
of security during long interrogation s

Camp 6, which opened in 2006, is a
modeled on maximum security priso
originally intended to give prisoners
interact during recreation and mealti
that plan.[9] Prisoners at Camp 6 inste
without windows or natural light or a
during which time they had no cont
only opportunity for socialization too
were placed alone in twelve-by-nine-f
mitted to talk to prisoners in adjacent
were held in Camps 5 and 6.[10]

U.S. officials have described Guan
facility,[11] pointing out that Guantánam

ht-inch by eight-foot cells twenty-four
minutes of exercise five days per week
y were given only a T-shirt and boxer
a toothbrush, toothpaste, washcloth,
uld be taken away for "noncompliant"
nterrogators. No air conditioning was
eratures routinely soared to more than

on continued to increase, the United
more modern and permanent than the
4 provided a dormitory-style facility
could eat and exercise together. The
f orange jumpsuits and could be out-
lso were given access to a small library
however, soon began shifting prisoners
y facilities at Camps 5 and 6.[7]
d Camp 5 as a "state-of-the-art prison
envy." Modeled after a state prison in
aximum-security facility was intended
ed to be of greater intelligence value.
alone in solid-wall cells, their every
-screen computers in a control center.
gation cells "outfitted with faux Persian
with an ankle shackle point, monitors,
recreation areas" to create a false sense
essions.[8]
a $39 million, two hundred–cell prison
ns in the United States. Camp 6 was
greater freedom and opportunities to
me, but the military soon abandoned
ad were confined to solid-metal cells
ir for at least twenty-two hours a day,
act with anyone except guards. Their
k place during recreation when they
oot pens for two hours and were per-
t pens. By 2007, most of the prisoners

ntánamo as a "world-class" detention
o has "mature[d] over time" and high-

Law

lighting various "perks" that the detai
of "honey-glazed chicken and rice pila
obscure and distort the underlying rea
eris, no matter how modern or state
Guantánamo's essence does not lie in
another prison but the physical embo
that was created to justify prolonged d
or judicial review.

Bush administration officials compa
enemy soldiers from prior wars: men "c
to prevent them from taking up arms
then White House counsel Alberto R.
combatants, whether soldiers or sabot
of hostilities. They need not be 'guilty'
by virtue of their status as enemy com
former commander Rear Admiral Ha
ing to do here in Guantánamo is simp
field" and prevent them from "go[ing]
at Guantánamo was thus characterized
the detention of thousands of Germa
War II and other enemy soldiers duri
were intended to make Guantánamo
tent with long-standing practice.

But Bush administration officials
tánamo detainees as terrorists. Forme
labeled them as "among the most dan
the face of the earth."[16] Other high-ra
calling the detainees "the worst of the
held many senior al Qaeda operativ
Americans.[17] President Bush continued
"are killers," even though only a handfu
These comparisons painted a very d
detainees, one of hardened criminals
rorist activities rather than soldiers de
preventing their return to the battlefiel

The administration attempted to p
the concepts of "soldier" and "crimi
detainees as "enemy combatants" or "u

nees receive, such as nutritious meals
af."[12] But these superficial comparisons
lity, for Guantánamo remains sui gen-
-of-the-art its facilities have become.
n bricks and mortar. It is not simply
odiment of a new type of prison, one
detention without charge, due process,

red the Guantánamo detainees with
captured on the battlefield" held merely
s against U.S. or allied forces.[13] As the
Gonzales explained, "Captured enemy
eurs, may be detained for the duration
of anything; they are detained simply
nbatants in war."[14] Or as Guantánamo's
arry B. Harris put it, "What we're try-
ply keep [the prisoners] off the battle-
back to the fight."[15] Holding detainees
d as a "simple war measure," much like
n or Japanese prisoners during World
ng prior conflicts. These comparisons
seem normal, acceptable, and consis-

also repeatedly described the Guan-
r Defense Secretary Donald Rumsfeld
gerous, best trained, vicious killers on
anking military officials followed suit,
worst" and claiming that Guantánamo
es involved in terrorist plots against
d to assert that Guantánamo detainees
ul had been charged with any offense.[18]
different picture of the Guantánamo
who should be punished for their ter-
etained for the nonpunitive purpose of
ld.
aper over the contradictions between
inal" by classifying the Guantánamo
unlawful combatants." (It used the two

terms interchangeably.) As combatant
to military detention and did not have
terrorists and other criminals did. But
were not entitled to any protections u
tomary laws of war. In short, the pris
in a legal black hole—without the pro
on the one hand, or to accused crimin
nature of the "war on terrorism"—a c
could be detained for decades, if not fo

At the same time, the administratio
and elastic terms. An important stud
found that only 8 percent of the deta
ized as al Qaeda fighters and 40 percen
Qaeda. The study, which was based sol
percent of the detainees had never com
States or its coalition allies. It furthe
Guantánamo detainees were captured
had been turned over to the United St
forces.[19] A subsequent Seton Hall study
at Guantánamo were identified based
Qaeda. Also, in many of those cases, n
ment had identified the organizations
a person could be detained at Guantá
on an alleged association with an orga
entering the United States if he sought

Guantánamo soon became a collect
dragnet. In total, Guantánamo held citi
Although some prisoners were seized
were captured on a battlefield.[22] Some
of miles from any conflict zone. For ex
other Guantánamo detainees were init
at the request of U.S. officials—as the
Sarajevo after being cleared of any inv
embassy there. Shackled and hooded,
location before being transferred to
Bisher al-Rawi and Jamil el-Banna, we
had traveled on business to set up a n
they were taken to Guantánamo based
Qatada, a radical Islamic cleric from E

s, Guantánamo detainees were subject
e to be charged and tried, as suspected
t unlike soldiers in past conflicts, they
nder the Geneva Conventions or cus-
oners at Guantánamo were being held
otections afforded to prisoners of war,
nals, on the other hand. And given the
onflict with no discernable end—they
or life.
n defined "enemy combatant" in broad
y by Seton Hall Law School in 2006
inees at Guantánamo were character-
nt had no definitive connection with al
dely on government data, found that 55
mitted a hostile act against the United
er determined that only 5 percent of
by the United States, while 86 percent
ates by Pakistani or Northern Alliance
y found that one-third of the detainees
on links to organizations other than al
neither Congress nor the State Depart-
s as a terrorist group. This meant that
namo as an "enemy combatant" based
nization that would not bar him from
admission at the country's borders.[20]
tion point for an unprecedented global
izens of forty-four different countries.[21]
in or near the war in Afghanistan, few
, moreover, were picked up thousands
xample, Lakhdar Boumediene and five
tially seized by Bosnian police—acting
y were being released from prison in
olvement in a plot to blow up the U.S.
, the men were taken to an unknown
Guantánamo.[23] Two British residents,
ere arrested in the Gambia, where they
nobile peanut-processing plant, before
l on their alleged association with Abu
ngland.[24]

Law

The Bush administration did not
sweeping terms; it also denied Guan
show that they did not fall into that ca
circumstances that made the need for

When the United States invaded A
stan was still in the throes of a humar
two decades of civil war and three con
tions and rivalries plagued the count
individuals poured in to provide huma

U.S. and allied forces in Afghanista
siderable confusion, increasing the ch
mistake. The United States exacerbate
financial rewards for the capture of
rounding areas of Pakistan. It went so
Afghanistan and the border area adver
A typical flyer stated:

> Get wealth and power beyond your d
> dollars helping the anti-Taliban forces
> This is enough money to take care o
> for the rest of your life. Pay for livesto
> housing for your people.[27]

Defense Secretary Donald Rumsfe
over Afghanistan "like snowflakes in
deep factionalism in this impoverished
capture program provided an incentiv
vendettas or simply to turn over som
Under the program, many of the indi
United States had been swept up and
President General Pervez Musharraf
over hundreds of individuals to the CI

Army Regulation 190-8 (AR 190-8)
obligations under the Third Geneva Co
erroneous detentions during military o
promptly after capture if there is any do
panel then determines whether the in
of war, detained as a civilian internee
criminal investigation), or "immediatel

merely define "enemy combatant" in
tánamo detainees any fair process to
tegory. It did so, moreover, precisely in
such a process critical.

fghanistan in October 2001, Afghani-
nitarian crisis, the result of more than
secutive years of severe drought.[25] Fac-
ry. Meanwhile, charitable groups and
anitarian assistance.[26]

n thus encountered a situation of con-
ance that people could be swept up by
ed the problem by offering significant
individuals in Afghanistan and sur-
far as to drop thousands of flyers over
rtising its money-for-capture program.

reams. . . . You can receive millions of
s catch al-Qaida and Taliban murders.
f your family, your village, your tribe
ck and doctors and school books and

ld later boasted that such leaflets fell
December in Chicago."[28] Given the
d and war-torn region, the money-for-
e for people to fulfill personal or tribal
neone for money to feed their family.
ividuals eventually turned over to the
d sold for bounty.[29] Indeed, Pakistani
boasted that Pakistanis had handed
A for reward money after 9/11.[30]

, which implements the United States'
onvention, requires hearings to prevent
perations. These hearings must be held
ubt about a prisoner's status. A military
ndividual should be held as a prisoner
(for security concerns or incident to a
ly returned to his home or released."[31]

The United States introduced AR 19
precisely because the nature of the co
whose members often fought withou
identify the enemy and distinguish fr
held AR 190-8 hearings in subsequent
rate detention decisions. During Ope
United States processed 69,822 Iraqi d
conflict with Panama in 1989/1990, th
to determine the status of 4,100 cap
4,000 and granting prisoner-of-war st
Gulf War, 1,196 hearings were held, an
innocent civilians.[34]

Military officials proposed conduc
stan following the U.S. invasion in C
Washington overruled them.[35] Instead
ing process" that lacked the basic pro
regulations, including the opportunity
available evidence before a tribunal pr
used in Afghanistan also allowed for d
"intelligence value"—that is, indefinite
rogation—without any indication tha
a threat to the United States, or met th
law of war. As former Justice Depart
edged, there "was not a real process
combatant."[37]

Prisoners captured in or around Af
appeared into a legal void without an
rounding their capture.[38] Many of thos
of incompetent battlefield vetting" an
the first place, said a former senior Bu
Muhammad, a "partially deaf, shrivele
basic questions and was nicknamed
Hamiduva, an eighteen-year-old Uzb
after the government killed one of his u
who was captured by a tribal leader an
while trying to cross the border from
there had started.[41] Or Hozaifa Parhat
tion in northwestern China for Afghan
to the United States for reward money

90-8 hearings during the Vietnam War
onflict—one against insurgent groups
t uniform—made it more difficult to
iend from foe. The United States also
t armed conflicts to help ensure accu-
ration Desert Storm, for example, the
etainees under AR 190-8.[32] During the
e United States held tribunal hearings
tured individuals, promptly releasing
tatus to the rest.[33] And during the first
d 886 of the detainees were released as

cting AR 190-8 hearings in Afghani-
October 2001. But civilian officials in
, the United States provided a "screen-
tections provided by existing military
y for a detainee to testify and present
omptly after his capture.[36] The process
etention based on a person's suspected
e imprisonment for purposes of inter-
t he had engaged in hostilities, posed
he definition of a combatant under the
tment official Viet D. Dinh acknowl-
for determining who was an enemy

ghanistan after September 11 soon dis-
y opportunity to verify the facts sur-
se taken to Guantánamo were "victims
d should never have been detained in
ush administration official.[39] Like Faiz
ed old man" who was unable to answer
l "al Qaeda Claus."[40] Or Shakhrukh
ek refugee who had fled his country
uncles and jailed his other relatives and
nd sold to the United States for bounty
n Afghanistan after the U.S. bombing
and other Uighurs who fled persecu-
nistan, where they were captured, sold
y, and detained for years, even though

Law

they never had taken up arms against
States.[42] Or Abdul Rahim al-Ginco, a
Emirates who went to Afghanistan in 2
was captured by the Taliban, and was t
and toes and almost drowned in a w
being a spy for Israel and the United St
shopkeeper who was seized near his
Taliban by force and who agreed to d
a nearby police office rather than figh
ings had helped avoid these kinds of
refused to provide them in Afghanist
information at all costs, not to find ou
terrorists, or innocent civilians.

From the beginning, military and i
ings about who the United States was h
Michael Dunlavey, who came to Guan
interrogations, soon discovered that as
no intelligence value. Dunlavey subseq
plain that too many "Mickey Mouse" p
tánamo.[45] A confidential report sent b
2002, and ignored by White House offi
detainees did not belong there.[46] In Oc
Lucenti Jr., the deputy commander at
prisoners "will either be released or tr
"weren't fighting" but rather "were run
mander Major General Jay Hood ackno
the right folks." Nonetheless, detainees
Hood said, because "nobody wants to
Errors became "institutionalized" as g
or unable to correct them, and Guantán

The Bush administration had origin
detainees quickly through the military
ident Bush's November 13, 2001, orde
place because the administration did n
alone convict, most of the prisoners, e
dards and flawed rules. Early on, Defe
gence officers at Guantánamo to comp
certifying the basis for suspecting that
request was made in January 2002. W

or presented any threat to the United
college student from the United Arab
2000 to escape his strict Muslim father,
ortured with electric shocks to his ears
ater tank until he falsely confessed to
tates.[43] Or Gholam Ruhani, an Afghani
hometown and conscripted into the
o menial cleaning and clerical jobs at
t on the front lines.[44] AR 190-8 hear-
mistakes before. But the United States
an because the priority was to gather
t whether prisoners were combatants,

ntelligence officials expressed misgiv-
olding at Guantánamo. Major General
tánamo in February 2002 to supervise
many as half the prisoners had little or
uently traveled to Afghanistan to com-
risoners were being brought to Guan-
y the CIA to Washington in October
icials, reported that most Guantánamo
ctober 2004, Brigadier General Martin
Guantánamo, stated that most of the
ansferred to their own countries" and
nning."[47] As former Guantánamo com-
owledged, "Sometimes we just didn't get
continued to languish at Guantánamo,
be the one to sign the release papers."[48]
government officials became unwilling
namo took on "a life of its own."[49]
nally planned to try most Guantánamo
commissions established under Pres-
r.[50] Those trials, however, never took
ot have enough evidence to charge, let
even under the commissions' lax stan-
nse Department lawyers asked intelli-
lete a one-page form for each prisoner,
they were involved in terrorism. This
Within weeks, intelligence officers indi-

cated that they did not have sufficien
one member of the original military te
put it, "It became obvious to us as we
cases, we had simply gotten the slowe
found guys who had been shot in the
gears, claiming that it could hold priso
out trial as "enemy combatants" in th
United States, "enemy combatant" det
as a trial—incarceration—but since th
be only "temporary" and "nonpunitive
protections and public attention. Mili
target a handful of minor figures and
creating the illusion of a functioning s
Guantánamo held "the worst of the wo

Guantánamo's overriding purpose, ho
gence gathering. America's flagship pri
words, was created and maintained no
to interrogate without restraint. The
torture and other illegal methods sh
tánamo, from the creation of a categor
to the effort to avoid habeas corpus rev

The government's effort to squee
tion from detainees at all costs—even
ligence value and without regard fo
was reliable—quickly descended into
rules to apply, military personnel on
the vacuum by adhering to the Genev
the International Committee of the Re
But Rumsfeld, frustrated by what he
intelligence from the detainees, scuttl
rogators were under increasing pressu
One of the first subjects was a detaine
pected by some to be the "twentieth h
presidential adviser David Addington
Haynes II, CIA acting general counsel
cials traveled to Guantánamo to discu
following week, those officials met wi
Jonathan Fredman, to discuss the use

t evidence to complete the forms. As
eam slated to work on the prosecutions
e reviewed the evidence that, in many
est guys on the battlefield. We literally
butt."[51] So the administration switched
oners at Guantánamo indefinitely with-
he global "war on terrorism."[52] For the
tention would serve the same purpose
at detention was in theory intended to
," it could be achieved with fewer legal
itary commissions, meanwhile, would
pressure them to plead guilty, thereby
ystem and perpetuating the myth that
orst."[53]

owever, was not detention but intelli-
ison in the "war on terrorism," in other
ot to imprison suspected terrorists but
desire to extract information through
aped virtually every aspect of Guan-
y of prisoners without legal protection
view by federal courts.
ze every drop of available informa-
though most detainees had no intel-
r whether the information obtained
gross and systematic abuse. With no
the ground had initially tried to fill
va Conventions and even arranged for
ed Cross (ICRC) to visit Guantánamo.
considered a failure to obtain valuable
ed these efforts.[54] By mid-2002, inter-
ure to use more aggressive measures.[55]
e named Mohammed al-Qahtani, sus-
hijacker." On September 25, 2002, vice
, Pentagon general counsel William J.
John Rizzo, and other high-level offi-
uss the interrogation of detainees. The
th the CIA's associate general counsel,
of "enhanced interrogation methods,"

Law

which the CIA had already begun usi
value detainees. Fredman reportedly g
interrogators had a great deal of latitud
and degrading treatment as long as it
term, he noted, that was "written vag
Torture is "basically subject to percep
dies, you're doing it wrong."[56] Diane Be
(JAG) who attended the meeting, no
deprivation and other highly coercive
had approval—that is, as long as the p
cautioned that interrogators might n
while the ICRC is around."[57] Sleep de
used at Bagram in Afghanistan. But "
being reported officially."[58]

On October 11, 2002, Dunlavey, G
mal plan for al-Qahtani's interrogation
sought approval for nineteen "counte
Field Manual 34-52, which governed
ited "acts of violence or intimidation,
threats, insults, or exposure to unpl
means of or aid to interrogation."[59]

In a memo, Beaver recommended u
to increase psychological manipulatio
three categories. They included perm
selves as citizens of foreign countries l
lation for up to thirty days, stress pos
straight, removal of clothing, putting
hours, and depriving prisoners of lig
using scenarios to convince a prisone
nent for him and his family; exposing
water; and using a wet towel and dripp
focation (category III).[60] A fourth cat
tary to render prisoners to Egypt, Jord
was dropped following protests by FI
constitute crimes.[61] Beaver explained
lines prevented interrogators from doi
'controversial.'"[62] She therefore gave bl
niques and approval for all category II
a "legitimate governmental objective"

ng in its secret jails on so-called high-
ave them the green light. He stated that
le and could engage in cruel, inhuman,
did not rise to the level of torture—a
guely" in federal statutes and treaties.
ption," Fredman said. "If the detainee
eaver, a military judge advocate general
ted that interrogators could use sleep
interrogation methods as long as they
resident had authorized it. Beaver also
eed to "curb" the "harsher operations
privation, she said, was already being
it is not happening" because "it is not

Guantánamo's commander, sent a for-
n up the chain of command. Dunlavey
erresistance techniques" not in *Army*
military interrogations and prohib-
including physical or mental torture,
easant and inhumane treatment as a

using enhanced interrogation measures
on. The techniques were divided into
itting interrogators to identify them-
known to use torture (category I); iso-
itions such as standing for four hours
prisoners in hoods for up to twenty
ht and auditory stimuli (category II);
r that death or severe pain was immi-
prisoners to cold weather or freezing
ping water to induce a sensation of suf-
egory would have permitted the mili-
an, and other countries for torture, but
BI agents that those renditions would
that the ambiguity of existing guide-
ng "anything that could be considered
anket approval for all category I tech-
and III techniques as long as there was
and the techniques were not imposed

for the "specific purpose" of inflicting
gested that even the most brutal tech
pass muster as long as they were ap
maliciously or sadistically for the very
measure, she added that "permission"
advance" via executive branch approva

General James T. Hill of the U.S
saw Guantánamo, questioned Beaver
a memo to General Richard B. Meyer
Staff, expressing his concern that some
violate both the federal antitorture stat
Justice (UCMJ), which prohibited ph
treatment.[66] Hill recommended seeki
said the techniques would likely consti
Officials from the Naval Criminal Inv
working with the FBI to elicit incrim
posed an alternative plan using tra
techniques. But their advice and warni

On November 23, 2002, Major Gene
command authorizing the use of "enha
Qahtani. The interrogation log for that
arrives at the interrogation booth at C
he is bolted to the floor."[69] Four days
memo to Rumsfeld stating that all the
II, and III "may be legally available" an
the eighteen techniques.[70] Less than o
feld approved the fifteen techniques, in
the use of dogs, and extreme sensory d
ited by the *Army Field Manual*. Com
Rumsfeld added, "I stand for 8–10 hou
hours?" Although he did not give adv
techniques, Rumsfeld indicated that th

Interrogations of al-Qahtani conti
this almost two-month period, al-Q
to twenty hours per day. If he fell as
with water. Military dogs were used
interrogator tied a leash around al-Q
dog tricks. Al-Qahtani was forced to
his head. After al-Qahtani started ref

severe pain or suffering.[63] Beaver sug-
niques, such as waterboarding, would
plied "in a good faith effort and not
purpose of causing harm."[64] For good
or "immunity" could be obtained "in
l.[65]

S. Southern Command, which over-
's analysis and conclusions. Hill sent
rs, the chairman of the Joint Chiefs of
e of the interrogation techniques might
tute and the Uniform Code of Military
ysical assault, cruelty, and other mis-
ng additional legal advice. The JAGs
tute crimes and advised against them.[67]
estigative Services (NCIS), which was
inating evidence from detainees, pro-
ditional, nonaggressive interrogation
ings were ignored.[68]

eral Geoffrey D. Miller received a verbal
anced interrogation techniques" on al-
t day reflects the change: "The detainee
Camp X-Ray. His hood is removed and
later, on November 27, Haynes sent a
e proposed techniques in categories I,
d recommending approval of fifteen of
ne week later, on December 2, Rums-
cluding stress positions, forced nudity,
deprivation—all of which were prohib-
menting on one approved technique,
urs a day. Why is standing limited to 4
vance approval to the remaining three
ey were still "legally available."[71]

nued until January 16, 2003. During
ahtani was interrogated for eighteen
leep, interrogators doused al-Qahtani
to frighten and intimidate him. One
ahtani's neck and made him perform
wear a bra and thong underwear on
using food and water, he was forcibly

administered fluids by an intravenous
the bathroom, he was told he could g
tions. After repeating his request, al-Q
On another occasion, the governmen
flight to the Middle East to increase hi
al-Qahtani had to be taken to the hosp
to thirty-five beats per minute.[72] His c
logical specialist was brought in from
medical expert, al-Qahtani's interroga
cal and metabolic symptoms such th
ing" and put him "in danger of dying
interrogation resumed. "We tortured
official overseeing military commissio

Navy General Counsel Alberto J. M
cers to protest the methods used to int
memorandum to Haynes expressing h
the methods were illegal. Haynes ass
the harsh measures. On January 15, 2
ber 2 order, withdrawing support for
approved category III technique. To ap
established a working group to evalu
prisoners in the "war on terrorism." O
tice lawyer John Yoo gave Haynes a m
Defense Department with the same le
"torture memo" had given the CIA a
Mora and others. In essence, the mem
of a particular interrogation measure,
the interrogation of prisoners was wi
commander-in-chief, akin to his pow
battlefield."[75]

The working group was forced to a
plied the "controlling authority" for
report approved thirty-five possibl
extreme isolation, prolonged standin
face and stomach.[77]

On April 16, 2003, Rumsfeld issue
mand to govern interrogations at G
number of the techniques from the w
ing prolonged isolation, dietary and e

drip. When al-Qahtani asked to go to
o only if he answered additional ques-
ahtani was told to urinate in his pants.
t drugged al-Qahtani and simulated a
is fear of further torture. At one point,
ital and revived after his heart rate fell
condition was so critical that a neuro-
off the island. According to an army
tion "contributed to significant physi-
at he required close cardiac monitor-
."[73] When al-Qahtani was revived, the
[al-] Qahtani," a Bush administration
n prosecutions later admitted.[74]
lora was one of the career military offi-
terrogate al-Qahtani. Mora sent a draft
is strong opposition and his view that
ured Mora that Rumsfeld would stop
003, Rumsfeld rescinded his Decem-
all category II techniques and the one
pease Mora and other JAGs, Rumsfeld
ate the armed forces' interrogation of
On March 14, 2003, Department of Jus-
emo that was intended to provide the
egal cover that his earlier August 2002
nd to quash internal opposition from
o argued that if the president approved
, it must be legal, and, moreover, that
thin the president's sole discretion as
wer to "direct troop movements on a

accept Yoo's analysis, which then sup-
its final April 3, 2003, report.[76] That
e interrogation methods, including
g, sleep deprivation, and slaps to the

d a memo to the U.S. Southern Com-
uantánamo. The memo authorized a
orking group's April 3 report, includ-
environment manipulation, and other

tactics designed to exploit a detainee's
accompanied by Pentagon briefings to
on the Justice Department's earlier c
agents could override any legal restrict

Al-Qahtani's interrogation became
ture and abuse at Guantánamo.[78] FBI
Civil Liberties Union and other organi
mation Act detail the type of practic
ing its first years. The documents desc
in a fetal position on the floor for tw
water. They also show prisoners bein
tures: one was found shivering on the
had been turned up so high; another
on the floor, sweltering in more than
had been turned off. Detainees were k
light, causing severe trauma. One det
of a cell with a sheet over his head for
people and hearing voices. Interrogato
wrapped detainees in Israeli flags as
ally humiliated detainees, and engage
ing grabbing detainees' genitals and b
Several detainees reported that they w
rogations, causing them to experience
drowsiness to hallucinations.[80]

Some FBI agents and Justice De
interrogation methods were both ille
Swartz, a criminal division deputy a
questioned their effectiveness at Whit
abuse of detainees would do "grave da
law enforcement record.[81] The NCIS
the ICRC complained (in a report leak
had purposefully used psychological
torture."[83] The warnings, however, we
ing the FBI and NCIS to withdraw the
protest.[84]

Ironically, these interrogation meth
help American soldiers resist torture.
Escape (SERE) program had previousl
other military personnel to withstand

fears and desperation. The report was
o Guantánamo's commander premised
conclusion that the president and his
tions in the name of national security.
emblematic of a larger pattern of tor-
documents obtained by the American
izations through the Freedom of Infor-
es commonly used at the prison dur-
cribe detainees chained hand and foot
venty hours or more, without food or
g forced to endure extreme tempera-
floor naked because the air condition
r was discovered almost unconscious
100-degree heat after the air condition
kept in rooms continually flooded with
ainee was found crouched in a corner
hours at a time, talking to nonexistent
ors also used dogs to terrify detainees,
a form of religious harassment, sexu-
d in wholesale physical abuse, includ-
burning detainees with lit cigarettes.[79]
were forcibly given drugs during inter-
physical effects ranging from extreme

partment officials warned that these
egal and counterproductive. Bruce C.
t the Justice Department, repeatedly
e House meetings, cautioning that the
mage" to the country's reputation and
expressed similar concerns.[82] In 2004,
ked to the press) that the U.S. military
and physical coercion "tantamount to
re largely ignored, ultimately prompt-
eir agents from interrogation rooms in

ods grew out of a program designed to
The Survival, Evasion, Resistance and
ly helped train U.S. Special Forces and
torture and other abuse at the hands of

Law

enemy forces. The SERE program was
methods used by the Chinese Commu
the Korean War to obtain false confes
tion about psychological torture in th
panion, the 1983 *Human Resources E*
secret documents that became public
litigation.[85] The *KUBARK Manual* desc
ing effects:

> The circumstances of detention are a
> ject his feelings of being cut off from
> of being plunged into the strange. .
> ment permits the interrogator to de
> other fundamentals. Manipulating t
> subject becomes disorientated, is ver
> helplessness.[86]

The SERE program was designed to
the event they again faced an enemy th
gram tried to simulate acute anxiety b
uncertainty during harsh interrogation
example, would be hooded, stripped
peratures, and sexually humiliated. Th
and their religious faith desecrated.

The SERE program had never befo
neither its personnel nor anyone in t
(JPRA), which oversaw the program
interrogations or gathering intelligence
istration decided to "reverse-enginee
into a template for the interrogation o
proponents and architects of this reve
chologist, Bruce Jessen, who was hire
tor. In April 2002, Jessen created the
Plan" to instruct inexperienced Guant
tion. He also proposed an "exploitatio
would remain "off limits to non-essen
secret prison within the prison.[87] Tw
the CIA in its interrogation of Abu Z
a CIA black site, while a JPRA team

a response to the brutal interrogation
nists against American soldiers during
sions. The CIA had collected informa-
e 1963 *KUBARK Manual* and its com-
xploitation Training Manual, formerly
during the 1990s following extensive
cribed psychological torture's devastat-

arranged to enhance within the sub-
n the known and the reassuring, and
. . . Control of the source's environ-
etermine his diet, sleep pattern and
these into irregularities, so that the
y likely to create feelings of fear and

prepare American service members in
hat resorted to such methods. The pro-
y creating an environment of extreme
ns by mock interrogators. Trainees, for
of clothing, exposed to extreme tem-
heir sleep patterns would be disrupted

re been used to elicit information, and
the Joint Personnel Recovery Agency
n, had any experience in conducting
e. After 9/11, however, the Bush admin-
er" SERE, transforming the program
f terrorist suspects. One of the leading
rse-engineering was SERE's chief psy-
d by the military as a private contrac-
Guantánamo Bay "Exploitation Draft
tánamo interrogators under his direc-
on facility' at the detention center that
tial personnel," including the ICRC: a
o months later, Jessen began advising
ubaydah, the first detainee tortured at
that included James Mitchell, another

SERE psychologist working as a private
Zubaydah's interrogation.[88] The Justice
in turn, attempted to provide legal cov
dah and other detainees in its classifie

The SERE program was soon rev
Guantánamo. In June 2002, the Be
(BSCT) was formed to help maximize
ing the assistance of mental health pr
tary intelligence personnel from Guan
adviser, traveled to Fort Bragg, North
flagship SERE program. The interroga
by the BSCT and sent up the chain of
program and the input of key SERE p
sen. In December 2002, after Rumsfel
ing harsh interrogation techniques, mi
to provide instruction in SERE meth
based on a chart showing the effects
ing, and exposure to extreme cold that
air force study of the techniques used
false confessions from American pris
quently documented in the interrogati
ing al-Qahtani and Mohamedou Ould
plan modeled on al-Qahtani's was pers
warnings about the use of SERE meth
from several SERE trainers, were ignor

Although these techniques original
ited number of detainees, they quickly
check their growth and no court avail
being detained or how they were being
to the gross mistreatment of prisoners
Afghanistan and Iraq as pressure mo
interrogations.[94] Rumsfeld's approval o
interrogation techniques, for example,
to the interrogation officer in charge a
Defense Department's approval of stre
of military dogs to exploit detainees' fe

These interrogation methods were
cooperated with the government, an
fession's role in the commission of at

e contractor, was dispatched to assist in
Department's Office of Legal Counsel,
er for the CIA's interrogation of Zubay-
d August 1, 2002, torture memo.[89]
verse-engineered for interrogations at
havioral Science Consultation Team
the collection of intelligence by enlist-
ofessionals.[90] In September 2002, mili-
tánamo, including at least one medical
n Carolina, which housed the Army's
tion plans for Guantánamo developed
command relied heavily on the SERE
personnel, including Mitchell and Jes-
d had signed off on the memo approv-
litary trainers traveled to Guantánamo
ods. An entire interrogation class was
of sleep deprivation, prolonged stand-
had been copied verbatim from a 1957
by the Chinese Communists to obtain
oners.[91] SERE techniques were subse-
ons of Guantánamo detainees, includ-
Slahi, for whom a brutal interrogation
sonally approved by Rumsfeld. Internal
ods to interrogate detainees, including
red.[92]
lly may have been intended for a lim-
spread "like a germ," with nothing to
lable to scrutinize why prisoners were
g treated.[93] The techniques not only led
at Guantánamo but soon migrated to
unted "to get tougher" with detainee
of physical and psychologically abusive
, was submitted "virtually unchanged"
t Abu Ghraib and led ultimately to the
ss positions, sleep deprivation, the use
ears, and other brutal tactics in Iraq.[95]
e supported by medical officials who
eerie reminder of the medical pro-
rocities in the past, including in Nazi

Germany. Major General Miller, w
November 2002 to March 2004, calle
nel "essential in developing integrated
interrogation intelligence production
cal records to help facilitate interrogat
cal breach by the American Medical A
of medical ethics" by the ICRC.[97] Alth
tually released a new set of formal eth
"the humane treatment of detainees," t
medical personnel not directly respon
in his interrogations and failed to curb

Not surprisingly, there was a conce
tions in secrecy. Guantánamo remaine
first two years of its operation. Even th
remained largely hidden from the wo
denied the detainees contact with the
refused all outside requests to intervie
whose reports remained confidential)
to resist court review, which it realize
harsh interrogations and invalidate its
Creating a prison beyond the law at Gu
the judicial scrutiny provided by habea

who commanded Guantánamo from
ed the work of these medical person-
interrogation strategies and assessing
."[96] Doctors consulted detainee medi-
tions, a practice denounced as an ethi-
Association and as a "flagrant violation
hough the Defense Department even-
hical guidelines stressing the need for
those guidelines allowed scientific and
nsible for a patient's care to participate
o the abuses.[98]
erted effort to shroud these interroga-
d a virtual black hole for more than the
he names of the Guantánamo detainees
rld. The Bush administration not only
eir families and with lawyers but also
ew the detainees (except by the ICRC,
. Above all, the administration sought
ed could shed light on, if not halt, its
illegal detention of hundreds of men.
uantánamo thus depended on avoiding
as corpus.

Guantánamo beyon

Toward a Global Detention S

On April 10, 2002, Binyam
ing a flight to Zurich from Karachi A
in 1978, Mohamed had been residing
to Afghanistan in the spring of 2001.
stan to escape the London street cultur
country. The U.S. government had a d
weapons training at an al Qaeda camp
training in bomb making before he ar
tapped by al Qaeda's leadership to trav
bomb," a device containing radioacti
these suspicions largely on statement
suspected al Qaeda agent who was cap
secret CIA prison for waterboarding ar

Following his arrest, Binyam Moh
prisons, where he was questioned by
gence, and the FBI. During those inte
threatened. As one FBI agent told hi
me, you're going to Jordan. We can't
can't do exactly what we want them to
sure enough, in July 2002 Mohamed
flown to Morocco on a CIA-operate
Mohamed was imprisoned for eighte
eight men and women, who, among
with a razor, and threatened him wi
never saw a judge or a lawyer. As he
not even once. I never saw any hum
tormentors."[4] Mohamed's captors forc
him, including making him admit un

3

d Guantánamo

System

Mohamed was arrested while board-
Airport in Pakistan. Born in Ethiopia
in London, England, before traveling
Mohamed says he went to Afghani-
re and to experience living in a Muslim
ifferent story: that Mohamed received
in the summer of 2001 and additional
nd American citizen Jose Padilla were
el to the United States to set off a "dirty
ve materials.[1] The government based
ts obtained from Abu Zubaydah, the
tured in March 2002 and rendered to a
nd other torture.[2]

hamed was taken to a series of local
Pakistani intelligence, British intelli-
errogations, Mohamed was repeatedly
im the first day, "If you don't talk to
do what we want here; the Pakistanis
o. The Arabs will deal with you."[3] And
was taken by masked CIA agents and
d Gulfstream jet plane. In Morocco,
en months and tortured by a team of
other things, beat him, cut his penis
th rape and electrocution. Mohamed
e later recalled, "I never saw the sun,
han being except the guards and my
ed him to repeat information they fed
nder threat of torture that he had met

Osama bin Laden and had volunteere
Qaeda.[5]

Binyam Mohamed's journey did n
he was flown on another CIA plane
Afghanistan, known as the "Dark Pri
in total blackness for twenty-four hou
loud enough to perforate an eardrum.
taken in May 2004 to Bagram in Afg
a false confession.[6] Three months lat
charged before a military commission
more than four years without a trial or
illegal detention, the government aba
was involved in a bomb plot, dropped
him to England, where he was released

The case of Binyam Mohamed's a
Jose Padilla, took a different path. On
as he was entering the United States a
port. Padilla was initially detained as
the government's criminal investigati
appointed attorney, Donna R. Newma
challenging the warrant and seeking
Michael B. Mukasey, scheduled a hear
the hearing took place, President Bu
9, 2002, declaring Padilla an "enemy
tary of defense to take him into cus
was "closely associated with al Qaeda
stituted hostile and war-like acts," an
and grave danger" to the United Sta
publicly announced that Padilla—who
met and trained with al Qaeda in A
a "dirty bomb" in the United States a
combatant" had "disrupted an unfold
mention that the allegations against
Mohamed—were based on statements
U.S. prison. Ashcroft also neglected to
tion was necessary to prevent a terro
in federal custody and could have be
criminal statutes based on what the g
the lower court proceedings were ter

d to serve as an operations man for al

ot end in Morocco. In January 2004,
to a secret CIA-run prison in Kabul,
son" because captives there were kept
rs a day while made to listen to music
From the Dark Prison, Mohamed was
hanistan, where he was forced to sign
er, he was flown to Guantánamo and
. He was then held at Guantánamo for
r a hearing. Finally, after seven years of
ndoned the allegations that Mohamed
all charges against him, and returned
d.[7]

alleged accomplice, American citizen
May 8, 2002, the FBI arrested Padilla
at Chicago's O'Hare International Air-
a material witness in connection with
on of the 9/11 attacks. Padilla's court-
an, filed a motion in the district court
Padilla's release. The district judge,
ring for the following week. But before
ush issued a one-page order on June
combatant" and directing the secre-
stody.[8] The order alleged that Padilla
," had "engaged in conduct that con-
d represented "a continuing, present,
tes.[9] Attorney General John Ashcroft
o the government said had previously
fghanistan—was planning to explode
nd that his designation as an "enemy
ling terrorist plot."[10] Ashcroft did not
Padilla—like those against Binyam
s extracted through torture at a secret
mention why Padilla's military deten-
orist attack, since Padilla was already
een prosecuted under any number of
overnment alleged. The following day,
rminated at the government's request,

and Padilla was transferred to the Co
South Carolina, where he would lang
three-and-one-half years in defiance
process and a speedy trial.

Abu Zubaydah, meanwhile, remain
was waterboarded, shackled by his ha
denied food and water, exposed to extr
prolonged sleep deprivation, and threa
The CIA later destroyed video record
up criminal activity by U.S. officials an
helped exonerate the numerous prisc
Zubaydah's coerced statements.[12] Final
transferred Zubaydah from secret CIA
thirteen other "high-value detainees."
restrict Zubaydah's access to the courts
from telling his own lawyers how he h
would reveal classified "sources and m

These three cases illustrate how Gu
of prisons that emerged after the attac
nected global detention system used b
and other abusive interrogation meth
charge, due process, or access to any co
tary detention centers such as Bagram
also encompassed practices like "extra
ers were secretly handed over to other
ment and torture. These detentions be
ing ground for some of the worst abuse
the importance of habeas corpus.

Located on a 6.5-square-mile plot in
Kabul, the Bagram Theater Internment
Afghanistan's recent turbulent history
base of operations for troops and supp
stan in 1979. Control of Bagram then c
decades of civil war that followed the
in 1989. When the United States took
once cavernous machine shop into a d

After its military invasion of Afgh
States began using Bagram as a ten

onsolidated Naval Brig in Charleston, guish in military custody for the next of the Constitution's guarantee of due

ned in secret CIA detention where he ands and feet for weeks while naked, remely cold temperatures, subjected to atened with disappearance and death.[11] ings of those interrogations, covering d eliminating evidence that could have oners who were being held based on ly, in September 2006, President Bush detention to Guantánamo, along with Bush, however, not only continued to s but even sought to prevent Zubaydah ad been tortured on the ground that it ethods."

uantánamo is part of a larger network cks of September 11, 2001, an intercon- y the United States to facilitate torture nods and to hold individuals without ourt. That network included both mili- and secret CIA jails or "black sites." It nordinary rendition," in which prison- governments for continued imprison- yond Guantánamo became the breed- es of the post-9/11 era and underscored

the countryside forty miles north of Facility at the Bagram Air Base reflects . The Soviet Union built Bagram as a olies following its invasion of Afghani- hanged hands several times during the Soviets' withdrawal from Afghanistan over the base in 2001, it remodeled its etention center.[13]

hanistan in October 2001, the United mporary center to screen individuals

before taking them to other prisons fo
The prisoners' journeys to and from E
Bagram to Guantánamo; others were b
some came to Bagram from CIA "bla
Bagram to CIA custody or rendered to
tion.[14] Over time, Bagram became a p
from about 100 prisoners at the start o
2005.[15] More recent estimates put the n

Bagram remained a stark and forsa
tion. For years after 9/11, the prison c
on the first floor, with six large sixty-f
held between fifteen and twenty detai
foot isolation cells on the second floo
wire ceilings. Most of the windows at
Former detainees described sharing c
more than a bucket to serve as a toilet
compared Bagram to a zoo, "where th
rogator called it a dungeon, full of "me
leg shackles and shouts of military pol

The ICRC has reported that prison
gross mistreatment in violation of the G
ers have described abuses similar to th
including being held in solitary confi
time while continuously shackled, sub
and forced to kneel or stand in painfu
former Bagram prisoner who later wa
time at Bagram as "the longest days of

The most notorious cases of abuse a
Two detainees—a twenty-two-year-ol
the brother of a Taliban commander—
the wrists by shackles in isolation cell
the Oscar award-winning documenta
investigation revealed that the two m
tors, deprived of sleep for days, and str
a coroner compared their injuries to
Army investigators later learned that D
in the wrong place at the wrong time
homicides, contradicting the military
died of natural causes.[23]

or further detention and interrogation. Bagram varied: some were taken from brought from Guantánamo to Bagram; ck sites"; and others were taken from o third countries for further interroga- permanent facility. Its population rose f 2004 to as many as 600 by the end of number at approximately 700.[16]

ken place under the Bush administra- ontained an open-plan detention area foot-long cages separated by wire that nees each, and six nine-foot-by-seven- r made of plywood walls and chicken Bagram were broken and boarded up. cages, which often contained nothing for dozens of prisoners. One detainee ney put animals,"[17] and a former inter- edieval sounds" such as the dragging of ice.[18]

ners held at Bagram were subjected to Geneva Conventions.[19] Former prison- hose approved for use at Guantánamo, nement for up to eleven months at a jected to prolonged sleep deprivation, l positions for extended periods. One s taken to Guantánamo described his [his] life."[20]

t Bagram occurred in December 2002. ld taxi driver known as Dilawar and –were both found dead, hanging from s. (Their stories were later depicted in ary *Taxi to the Dark Side*.) An Army en had been brutalized by interroga- ruck so often in the legs by guards that those from being run over by a bus.[21] Dilawar was an innocent man who was e.[22] Both deaths were eventually ruled y's initial assertion that the men had

The Bush administration labeled t
batants," just as it did at Guantánamo.
sweeping terms. While some prisone
connection with hostilities in Afghani
distant as Central Africa and Southea
United States also denied Bagram det
those afforded by the Geneva Conven
tic and human rights law to indivi
crimes. Bagram detainees were simult
Afghan court. They were thus impriso
trial, and without any meaningful op
against them.

The sham military process that t
Bagram worked as follows: After an in
of capture," the detainees' cases were
again every year by a panel of five r
Combatant Review Board (ECRB).[25] T
and lacked the safeguards necessary to
it denied detainees the opportunity to
evidence against them, and to have the
familiar with the process explained, "T
addition, in making its assessments, t
through torture or other coercion. Alt
the average length of detention at Bag
detainees were held there for several
or more.[27]

The United States structured its ope
can enclave without accountability, m
United States has operated Bagram un
Afghanistan. The current lease grant
sive, and permanent control over Bag
rent free, for as long as it wishes and
The lease even allows the United Stat
another nation or organization, a po
does not provide.[28] By disclaiming fo
ever, the United States has sought to p
U.S.-controlled territory. Therefore, th
to give detainees there the protections
them any access to its courts. At the sa

he detainees at Bagram "enemy com-
It also defined "enemy combatant" in
rs at Bagram were allegedly seized in
stan, others were captured in places as
st Asia and brought to Bagram.[24] The
tainees any legal protections, whether
tions or those provided under domes-
duals accused of terrorism or other
taneously denied access to any U.S. or
oned for years without charge, without
portunity to challenge the allegations

he Bush administration instituted at
itial determination made "at the place
reviewed after ninety days and then
military officers known as an Enemy
he ECRB suffered from multiple flaws
achieve accurate results. For example,
be present at the hearings, to see the
e assistance of a lawyer. As one official
The detainee is not involved at all."[26] In
he ECRB could use statements gained
though the United States claimed that
gram was about fifteen months, many
years and, in some cases, for six years

erations at Bagram to create an Ameri-
uch like Guantánamo. Since 2003, the
nder a series of lease agreements with
ts the United States complete, exclu-
gram, allowing it to occupy the land,
without interference by Afghanistan.
tes to assign possession of Bagram to
wer that even the Guantánamo lease
rmal sovereignty over the base, how-
preserve the fiction that Bagram is not
e United States says, it is not obligated
s of its laws or Constitution or provide
me time, the detainees at Bagram have

no rights under Afghan law and no a
U.S.-run legal black hole.

Despite the similarities between Gu
ferences between the two prisons. As
was subjected to some judicial process
tion, attorneys gained the right to visi
in court. These legal challenges helped
to maintain a system of unchecked exe
ically, they also caused the governmen
where for a long time detainees rema
mind."[29] As a Defense Department offi
it, "Anyone who has been to Bagram w

If overseas military prisons like Guanta
of the post-9/11 global detention syste
another. Extraordinary rendition gene
ers to another country for possible tor
designated to operate outside the law,
desire to incarcerate and interrogate i
also places a premium on secrecy tha
lenge and more vulnerable to the wors

The origins of extraordinary renditi
Marshals Service first coined the phra
ping fugitives abroad and bringing the
enabled U.S. officials to apprehend wa
countries that lacked an extradition t
for example, FBI and CIA agents lur
Yunis into international waters off th
Yunis was then transferred to the U
convicted for his role in the hijackin
of rendition became known as "rend
has generally been upheld by the cour
defendants are provided due process a
beforehand.[34]

By mid-1980s, the United States
justice" for national security purpose
reportedly authorized U.S. law enforce
suspected terrorists in places where it
dition process would not work.[35] Pres

ccess to Afghan courts. The result is a

uantánamo and Bagram, there are dif-
we shall see, over time Guantánamo
. Through federal habeas corpus litiga-
t the detainees there and to seek relief
l undercut the U.S. government's effort
cutive detention at Guantánamo. Iron-
t to imprison more people at Bagram,
ined largely "out of sight" and "out of
icial who has visited both facilities put
would tell you it's worse."[30]

ánamo and Bagram represent one facet
m, "extraordinary rendition" illustrates
erally describes the transfer of prison-
rture. Like U.S.-run detention facilities
extraordinary rendition is driven by a
ndividuals without legal constraint. It
t makes it both more difficult to chal-
t human rights abuses.
ion date back several decades. The U.S.
ase to describe the process of kidnap-
em to the United States.[31] This practice
anted individuals in "lawless" states or
reaty with the United States.[32] In 1987,
ed a terrorism suspect named Fawaz
he coast of Cyprus and arrested him.
nited States, where he was tried and
g of a Jordanian airliner.[33] This form
lition to justice." Rendition to justice
rts, which ordinarily focus on whether
t trial and not what happened to them

was increasingly using "rendition to
es. In 1986, President Ronald Reagan
ment personnel to covertly apprehend
was thought that the traditional extra-
sident George H. W. Bush authorized

specific rendition procedures, and Pre
gram, making the return of wanted te
ity."[36] Former FBI Director Louis J. Fr
United States "successfully returned"
rorists to face trial in the United Stat
terrorism against U.S. citizens.[37] Despi
remained a law enforcement matter, ar
trial within the civilian justice system,

By the mid-1990s, however, "renc
further from its original focus of bri
Michael Scheuer, the former head of th
the agency had identified and located
them because [it] had nowhere to tak
dition branch in its Counter-Terroris
to track down wanted individuals.[39] S
1990s gave the CIA greater leeway to c
the "authority to use foreign proxies to
having to transfer them to U.S. custody

The 9/11 Commission's interim sta
shift: "If extradition procedures were
States could seek the local country's ass
the fugitive in a plane back to America
main alternative destination was Egyp
oners and one that had outstanding w
rorists. The United States rendered at l
ing Talaat Fouad Qassem, who had bee
for his involvement in the plot to assas
Sadat. Qassem was arrested in Croat
agents for two days on a ship in the Ad
Qassem has never been seen again.[42] H
the United States had started moving
toward a new form of rendition, in wh
ment occurred entirely outside the U.
on bringing a suspect to trial in U.S. co

But these changes were relatively s
9/11 when, as a former FBI agent put
out of control."[43] The program not on
scope but also began operating withou
The concept of "rendition to justice" di

esident Bill Clinton expanded the pro-
rrorists "a matter of the highest prior-
reeh stated that during the 1990s, the
thirteen suspected international ter-
es for plotting or carrying out acts of
te these changes, "rendition to justice"
nd suspects were ultimately brought to
with its guarantees of due process.
lition to justice" had started to drift
nging suspects to trial in U.S. courts.
ne CIA's bin Laden unit, estimated that
al Qaeda leaders but "couldn't capture
e them."[38] The CIA established a ren-
sm Center and assigned case officers
Several secret orders issued in the late
deal with Osama bin Laden, including
detain Bin Laden lieutenants, without
y."[40]
ff report on diplomacy described the
unavailable or put aside, the United
sistance in a rendition, secretly putting
a or some third country for trial."[41] The
t, a country known for torturing pris-
warrants against several suspected ter-
least nine individuals to Egypt, includ-
en sentenced to death in absentia there
sinate Egypt's former president, Anwar
ia, where he was questioned by U.S.
driatic Sea before he was sent to Egypt.
His case illustrates that even before 9/11
away from "rendition to justice" and
hich a suspect's transfer and imprison-
S. legal system and the focus was not
ourts.
mall compared with those made after
it, the rendition program "really went
ly expanded dramatically in size and
t any legal or bureaucratic constraints.
sappeared entirely, as individuals were

placed beyond any form of judicial o
what we know today as "extraordinary

Vice President Dick Cheney set t
explaining on *Meet the Press* that the
dark side," doing things "quietly, with
methods that are available to our inte
dential directive issued on September
ing the power to kill, capture, or deta
the world. The directive also dispense
ing the CIA's legal counsel to approve
expanded from a discrete category of
whom there were already outstandi
vaguely defined class of people suspe
ating with suspected terrorists, or si
program's purpose changed, too, fron
imprisoning people only to question t
ever means deemed necessary. In th
became the rendition program's raison

The documented accounts of extra
from a cold war spy novel: hooded det
and sent in CIA-owned or chartered je
ment and torture. One of the first kno
and Ahmed Agiza, two Egyptians see
Swedish government bypassed its leg
both men deported without a hearin
The security police were acting at the
planning the men's clandestine transf
accompanied by masked CIA agents, t
room at Stockholm's Bromma Airport
rity check." The two men's clothes were
administered sedatives by suppository
orange jumpsuits. Al-Zery and Agiza
cuffs and leg irons, and flown to Cairo
a front company for the CIA, whose a
Once in Egypt, both men were torture
electric charges to their naked bodies i

Agiza was later convicted on terror
five years in prison. Al-Zery was releas
It turned out that he had been render

r legal process. The program became
rendition."
he tone five days after September 11,
United States needed to "work . . . the
out any discussion, using sources and
lligence agencies."[44] A classified presi-
17 increased the CIA's power, includ-
in members of al Qaeda anywhere in
d with the previous practice of requir-
every proposed operation. The focus
individuals—alleged terrorists against
ng arrest warrants—to a broad and
cted of plotting terrorist acts, associ-
mply having useful intelligence.[45] The
n bringing wanted suspects to trial to
hem and extract information by what-
e process, the outsourcing of torture
d'être and driving force.
ordinary rendition read like lurid tales
ainees being spirited away in the night
ets to secret destinations for imprison-
wn cases involved Muhammad al-Zery
eking political asylum in Sweden. The
ally required procedures and ordered
g at the urging of its security police.
behest of U.S. officials, who had been
er to Egypt. Swedish security officers,
ook al-Zery and Agiza into a changing
for what they said was a routine "secu-
e cut into pieces, and they were forcibly
, swaddled in diapers, and dressed in
were then blindfolded, placed in hand-
o aboard a Gulfstream jet registered to
gents operated and manned the flight.
d, including through the application of
in cold underground rooms.[46]
rism charges and sentenced to twenty-
ed after two years without any charges.
ed based on the flimsiest of evidence:

his name had been found on the comp
in London two months earlier for hi
bomb attack but subsequently cleared
just two of the estimated sixty prisone

One of the most infamous renditio
Canadian citizen Maher Arar. Arar's
when he was detained and questioned
Kennedy International Airport during
from a family vacation in Tunisia. Afte
by trade, was taken in chains and shacl
he was held in solitary confinement a
without an attorney. Meanwhile, the In
commenced removal proceedings bas
Arar maintained his innocence and as
officials that he would be tortured if h
fled as a teenager two decades earlier.
to block Arar's access to his lawyer, th
cial redress and enforcing legal safegu
likely torture. An immigration judge
to Syria based on secret evidence. On
where local authorities chained and b
and driving him across the border to S

For the next ten months, Arar was
bling a grave. He was beaten on his pa
inch-thick electric cable, and was told h
"chair," hung upside down in a "tire" f
In a desperate effort to end the suffe
trained with terrorists in Afghanistan,

Syria released Arar in October 20
his behalf. In September 2006, a Can
a three-volume report finding "no ev
mitted any offense or that his activitie
Canada."[49] The commission also deter
relied on inaccurate and misleading in
rorist connections provided by Canad
was tortured while in Syria. The Cana
Arar a formal apology and awarded hi
him for his pain and suffering.[50] The U
ogize for its role in Arar's rendition a

puter of an Egyptian dissident arrested
s suspected involvement in a suicide
of all charges. Al-Zery and Agiza were
rs rendered to Egypt after 9/11.[47]

n cases was that of thirty-six-year-old
ordeal began on September 22, 2002,
l by U.S. officials at New York's John F.
g a layover while returning to Montreal
er two days, Arar, a computer engineer
kles to a federal jail in Brooklyn, where
nd subjected to further interrogation
mmigration and Naturalization Service
sed on Arar's alleged ties to al Qaeda.
sked to be sent to Canada, telling U.S.
e were sent to Syria, a country he had
The government, however, continued
us preventing him from seeking judi-
uards designed to prevent transfers to
subsequently ordered Arar's removal
October 8, Arar was flown to Jordan,
eat him before stuffing him in a van
yria.

kept in a dark, rat-infested cell resem-
lms, hips, and lower back with a two-
e would be placed in a spine-breaking
or beatings, and given electric shocks.
ring, Arar falsely confessed to having
a country he had never even visited.[48]
03 after Canada finally intervened on
adian commission of inquiry released
idence to indicate Mr. Arar has com-
es constitute a threat to the security of
mined that the United States had likely
nformation about Arar's supposed ter-
dian officials and confirmed that Arar
adian government subsequently issued
m more than $9 million to compensate
United States, however, refused to apol-
nd sought to block Arar's civil lawsuit

against the responsible U.S. officials, c
national security if allowed to go forw
over the United States' handling of the
Gonzales admitted that he had not bo
sion's report and was "not aware" that
the United States—unwilling to admit
give Arar any compensation—kept A
vented him from entering the country.

The renditions of Arar, al-Zery, an
of immigration law, which was manip
The rendition of Osama Mustafa Hassa
contrast, occurred entirely outside any
Abu Omar was living with his family
political asylum based on his fear of
radial Islamic organization. On Febru
to his local mosque for midday prayer
him less than a mile from his home.

As Abu Omar later related, Italian
officers sprayed an unknown substanc
ing him into a van and driving him to
van, English- and Italian-speaking in
him repeatedly while questioning him
and about recruiting terrorist volunte
tors then flew him to another milita
to Egypt. On arrival in Egypt, Abu C
headquarters of the secret police. Wh
informer, Egyptian officials took him t
him, including by hanging him upside
his genitals.

The details of Abu Omar's kidnappi
the time of his abduction, Abu Omar
related crimes as part of a broader in
Milan. Italian prosecutors, who had o
part of their investigation, intercepted
Egypt to his wife in Italy after fourteen
by that time released Abu Omar becau
Abu Omar recounted his abduction a
quently rearrested Abu Omar and co
gency detention law until February 20

laiming that the suit would jeopardize
ard. In the face of mounting criticism
e case, former attorney general Alberto
thered to read the Canadian commis-
Arar had been tortured.[51] Meanwhile,
t that it had made a mistake, let alone
rar on a terrorist watch-list that pre-
.[52]

d Agiza all occurred under the guise
ulated and subverted for illegal ends.
an Nasr, also known as "Abu Omar," by
y legal framework. The Egyptian-born
in Milan, Italy, and had been granted
persecution for his membership in a
uary 17, 2003, Abu Omar was walking
s when masked CIA agents kidnapped

-speaking men claiming to be police
e on his mouth and nose before push-
a U.S. air base five hours away. In the
dividuals gagged Abu Omar and beat
about his relation to radical Islamists
ers to fight in Iraq. Abu Omar's cap-
ry base in Europe before taking him
Omar was immediately brought to the
hen Abu Omar refused to work as an
o an underground prison and tortured
e down and applying electric shocks to

ing were uncovered only by chance. At
was under investigation for terrorism-
quiry into Islamic militancy based in
riginally tapped Abu Omar's phone as
a call that Abu Omar had made from
n months of captivity there. Egypt had
se of his failing health. During the call,
nd rendition to his wife. Egypt subse-
ntinued to hold him under an emer-
07, when it finally released him.[53]

Revelation of Abu Omar's abducti
across Europe. Italian prosecutors bro
six CIA agents, including the two top
secret service agents.[54] An Italian co
twenty CIA officers in absentia for t
(The United States refused to extradite
advance of the investigation.)[55] In add
the abduction undermined the origin
Omar and a cell of alleged terrorists in
aging relations with the Muslim comm

These are just a few of the numero
tions that took place after the Septem
Sunday Times of London showed that
operations flew to forty-nine destina
Iraq, Jordan, Libya, Morocco, and Uzb
people subjected to "extraordinary re
to as many as several thousand.[58] And
related renditions. If the Defense De
and Bagram are included, that number

Extraordinary rendition violates th
to send people to places where their l
an obligation known as *non-refoulem*
set forth in the Convention against T
Degrading Treatment or Punishment
signed by the United States and more t
tion against Torture categorically proh
or extraditing a person to another stat
for believing that he would be in dang
treaty's *non-refoulement* obligation is c
to prohibit and prevent torture worldw
Civil and Political Rights (ICCPR), a
the United States is also a party, cont
obligation. It prohibits exposing indiv
but also of cruel, inhuman, or degrad
the ICCPR's *non-refoulement* obligati
Committee, which monitors the trea
that this obligation falls within the tr
other mistreatment and is binding u
tions.[61] Furthermore, human rights law

ion prompted an outcry in Italy and
ought criminal charges against twenty-
CIA officials in Italy and five Italian
ourt ultimately convicted more than
heir role in Abu Omar's kidnapping.
e the defendants, who had fled Italy in
ition to creating political controversy,
al criminal investigation against Abu
n Italy and around Europe while dam-
unity.[56]

ous U.S.-directed extraordinary rendi-
mber 11 attacks. Logs obtained by the
one Gulfstream jet used in rendition
ations, including Afghanistan, Egypt,
bekistan.[57] Estimates of the number of
endition" vary from as few as seventy
d these estimates cover only the CIA-
epartment renditions to Guantánamo
r would be significantly higher.

he United States' legal obligation not
lives or freedom could be threatened,
ent (or non-return). This obligation is
Torture and Other Cruel, Inhuman or
(Convention against Torture), a treaty
than 145 other countries. The Conven-
hibits states from expelling, returning,
e "where there are substantial grounds
ger of being subjected to torture."[59] The
one of a number of measures designed
wide.[60] The International Covenant on
nother human rights treaty to which
ains an even broader *non-refoulement*
viduals to the risk not only of torture
ding treatment or punishment. While
on is not explicit, the Human Rights
ty's implementation, has determined
reaty's prohibition against torture and
nder the treaty's general legal obliga-
w supports construing the *non-refoule-*

ment obligation broadly to encompass
authority or control.[62]

The Bush administration tried to d
necessary and legal. To protect the
United States had "to find those who
out of [the] way."[63] Secretary of State
"Renditions take terrorists out of actio
istration's earlier refusal to apply the
batants," Rice noted that the "war on
that requires new approaches for deali
do not fit easily into traditional system

The Bush administration sought to
on the same theories of unchecked exe
the detention of prisoners at Guantán
Convention against Torture's *non-refou*
territorially and therefore excluded t
insisted that the ICCPR also did not a
rights law more generally did not appl
the "war on terrorism" was subject or
war, the administration maintained, c
combatants" to another government, e
in their torture.[66]

The Bush administration, howeve
defend the legality of extraordinary r
policy was not to transfer prisoners to
January 2005, President Bush told the
acceptable, nor do we hand people ov
three months later, after more details
rendition program had emerged, Bush
"send[s] people to countries where *th*
people."[68] The administration defende
tees from the receiving state—known a
transferred would not be tortured.[69]

Diplomatic assurances were first us
to demands by some countries that th
if extradited to the United States to fa
rendition context where compliance i
transfers are to countries with records
ances also are not subject to any regula

territories and persons under a state's

efend extraordinary rendition as both
American people, Bush asserted, the
o would do harm to us and get them
Condoleezza Rice similarly remarked,
n, and save lives." Echoing the admin-
Geneva Conventions to "enemy com-
terrorism" is a "new kind of conflict"
ing with "captured terrorists . . . [who]
s of criminal or military justice."[64]
justify extraordinary rendition based
ecutive power that it invoked to justify
namo and Bagram. It argued that the
ulement obligation did not apply extra-
ransfers outside the United States. It
pply extraterritorially and that human
ly to extraordinary renditions because
nly to the law of war.[65] And the law of
did not restrict the transfer of "enemy
even if that transfer would likely result

r, also tried to have it both ways: to
rendition while maintaining that U.S.
countries where they faced torture. In
New York Times that "torture is never
ver to countries that do torture."[67] But
of the administration's extraordinary
explained that the United States only
ey say they're not going to torture the
ed this practice by relying on guaran-
as "diplomatic assurances"—that those

sed in death penalty cases in response
he United States not execute a fugitive
ce trial. They translated poorly to the
s difficult to monitor and where most
of official torture.[70] Diplomatic assur-
ations but are completely informal and

ad hoc. One CIA agent went so far as
kidding anyone here," Michael Scheu
knew exactly what that kind of promi
explained, "We don't kick the [expletiv
countries so they can kick the [expletiv

But not all torture was outsourced. In
or capture al Qaeda members anywher
tial directive that jump-started the post
also approved the creation of a netwo
sites."[74] These prisons offered somethin
not: total invisibility. After 9/11, hundre
"black sites," which were located in var
Thailand, Poland, Romania, and Lithua
CIA official said, was researching "how

Prisoners in CIA custody came to
Even the ICRC was denied access to t
would just disappear off the books, an
mer FBI agent. "They were proud of it.
detentions at Guantánamo and Bagram
a similar concept: that the detainees w
"war on terrorism" and therefore had
domestic or international law.

The Bush administration authoriz
extract information. The prisons, in
administration's most abusive interrog
rogation techniques" sanctioned by
memoranda gutting the definition of t
by the president or his agents in the
these techniques was closely monitored
highest levels of the U.S. government.
interrogation protocol described it as
programs of torture ever."[80]

Cases like Khaled el-Masri's show
enly ensnared in this new, law-free de
car salesman, el-Masri was traveling t
Christmas holiday in 2003. On Decem
border crossing between Serbia and
from other tourists. His passport was c
dowless room where his captors accus

s to call them "a farce."[71] "No one was
er said of diplomatic assurances. "We
se was worth."[72] Or as another official
e] out of them. We send them to other
ve] out of them."[73]
n addition to authorizing the CIA to kill
re in the world, the classified presiden-
t-9/11 extraordinary rendition program
rk of secret CIA-run prisons or "black
g even Guantánamo and Bagram could
eds of prisoners were rendered to these
ious countries, including Afghanistan,
ania.[75] The goal in selecting prisons, one
to make people disappear."[76]
be referred to as "ghost detainees."[77]
hem.[78] The CIA "loved that these guys
d never be heard of again," said a for-
"[79] Although more secret than military
n, CIA "black sites" were predicated on
were unlawful combatants in the global
d no rights or legal protection under

zed secret CIA prisons primarily to
turn, served as laboratories for the
gation methods—the "enhanced inter-
executive branch decisions and legal
torture and justifying any action taken
name of national security. The use of
d by CIA lawyers and supervised at the
One outside expert familiar with the
"one of the most sophisticated, refined

how easily people could be mistak-
tention system. A German citizen and
to Macedonia for vacation during the
mber 31, his bus stopped at the main
Macedonia. El-Masri was singled out
confiscated, and he was taken to a win-
sed him of terrorism. That evening, el-

Masri was brought to a hotel room in
and interrogated at gunpoint. After t
captivity, el-Masri was brought to th
CIA agents. Shackled, diapered, and b
Afghanistan. Upon arrival, el-Masri wa
for a secret CIA-run interrogation fa
factory outside Kabul. There, el-Masri
deprived of basic necessities. El-Masri
commenced a hunger strike that cause
Despite evidence that el-Masri was n
Qaeda unit insisted that el-Masri cont
ing" that he was bad.[81] Finally, on May
a roadside hilltop in Albania and depo
el-Masri returned home after five mo
changed so much that the German bor
could not recognize him from the pict

The ordeal of Marwan Jabour prov
detention. Following his arrest in Laho
taken initially to the local station of Pak
days later, he was brought to a clandesti
by Pakistanis and Americans. During h
sleep for days, and kept naked and cha
was tied with a string so that he could
pated in Jabour's interrogations and wa
somewhere and would never see his chi
blindfolded, shackled, and taken to an a
The men were then put on a plane by A
in Afghanistan, where more than thirt
the individuals operating and working
possible exception of the Arab-speaki
painful positions, held in prolonged sol
seeing sunlight for a year-and-a-half. J
the outside world, including the ICRC
Jabour was sent to Jordan and then to
ily in Gaza. During his entire confinem
judge, charged with a crime, or allowed

The U.S. has never acknowledged h
jails around the world. But that numbe
the location of some of these prisoners

Skopje where he was beaten, drugged,
twenty-three days of incommunicado
e airport and turned over to masked
lindfolded, el-Masri was then flown to
as driven to the Salt Pit, the code name
acility located in an abandoned brick
i was again held incommunicado and
's conditions did not improve until he
ed his captors to fear that he might die.
ot a terrorist, the head of the CIA's al
inue to be held based on her "gut feel-
28, 2004, CIA agents took el-Masri to
osited him without explanation. When
nths' of captivity, his appearance had
der guard who checked his documents
ure in his passport.[82]

ides another chilling account of secret
ore, Pakistan, in May 2004, Jabour was
kistan's Inter-Services Intelligence. Four
ne prison in Islamabad operated jointly
is detention, Jabour was beaten, denied
ained to a wall in a cell while his penis
not urinate. American officials partici-
rned him that he could "be taken away
ldren again." After a month, Jabour was
irport along with three other prisoners.
Americans and flown to a secret facility
y other prisoners were being held. All
at the prison were Americans, with the
ing translators. Jabour was chained in
itary confinement, and prevented from
abour was also denied all contact with
and his family. Finally, after two years,
Israel, which released him to his fam-
ent, Jabour was never brought before a
to see a lawyer.[83]

ow many people it detained in secret
r likely exceeds several hundred,[84] and
s still remains unknown.[85]

Guantánamo, Bagram, CIA "blacl
together demonstrate the emergence
system designed to circumvent legal
U.S. detentions in Iraq illustrate a dif
show how the ideas and impulses behi
as a more traditional military operatio
by defining it as another front in the gl

On March 18, 2003, the United State
with the support of smaller continge
the "Coalition of the Willing." The inv
weapons of mass destruction, to end
ism, and to liberate the Iraqi people. E
Minister Tony Blair claimed implicit a
United Nations Security Council. Thre
forces formally occupied Baghdad and
rule. (Hussein was captured that Dece
landed on the aircraft carrier *USS Ab*
proclaiming the "end of major comb
stating "Mission Accomplished" clearl
later Bush appointed L. Paul Bremer II
as head of the Coalition Provisional A
as Iraq's temporary government until
ernment could be established. On Jun
to the newly appointed Iraqi interim
a formal end to the United States' oc
and transitional and permanent gover
political developments, insurgency a
tinued in Iraq, and more than 100,00
there. By June 2005, President Bush v
war on terror."[86]

The U.S.-led invasion and occupati
run detention system in that country.
ing more than 21,000 individuals in I
the Multi-National Force–Iraq (MNF
coalition in postinvasion Iraq.[87] U.S.
sprawled over five facilities, were ult
Camp Bucca in southern Iraq, and C
dad International Airport. In addition

k sites," and extraordinary rendition
of an interconnected global detention
protections and avoid accountability.
fferent but related phenomenon. They
nd that system could warp what began
n, pushing it to operate outside the law
lobal "war on terrorism."

s and United Kingdom invaded Iraq,
ents from other nations that formed
vasion's stated goals were to rid Iraq of
Saddam Hussein's support for terror-
Both President Bush and British Prime
uthorization for the invasion from the
ee weeks after the invasion began, U.S.
d declared an end to Saddam Hussein's
mber.) On May 1, 2003, President Bush
raham Lincoln and delivered a speech
at operations" in Iraq, with a banner
y visible in the background. Five days
II to oversee the reconstruction of Iraq
uthority (CPA), which would function
a democratically elected civilian gov-
e 28, 2004, the CPA transferred power
government and disbanded, marking
cupation of Iraq. Elections were held,
nments were formed. But despite these
nd mounting sectarian violence con-
o U.S. troops remained on the ground
vas calling Iraq "a central front in the

on of Iraq gave rise to a massive U.S.-
By 2008, the United States was detain-
raq, nominally under the authority of
–I), the U.S.-dominated international
detention operations, which initially
imately concentrated in two prisons:
amp Cropper, located near the Bagh-
to U.S. prisoners, by 2008, more than

23,000 people were being held by the
the country.[88]

The legal basis for the MNF–I and
stemmed primarily from several UN
22, 2003, the Security Council passed
States and United Kingdom were occ
command and would administer Ira
accordance with the UN Charter and
five months later, the Security Counc
the MNF–I and authorizing it to take
to the maintenance of security and sta
1483 and 1511 legitimized the occupati
force.[91] The subsequent return of form
alter the situation, and UN Security
MNF–I's mandate to continue comba
particular, that resolution authorized
fied command" of U.S. military office
contribute to the maintenance of sec
detaining individuals where "necessar
The MNF–I's mandate was subsequen
after which point Iraq was expected t
the country.[94] Although the number
the United States continued detainin
into 2010.[95]

The United States did not initially
Iraq outside any legal framework, as it
CIA "black sites." In April 2003, the D
was holding detainees captured in Irac
ventions.[96] Before long, however, U.S
to resemble U.S. detention operation
security-related imprisonments based
intelligence rather than reliable eviden
abuse, and a complete denial of judicia

Faced with an increasingly aggress
intelligence to combat it, U.S. comman
tactics used in the "war on terror." In
category that did not exist under the
familiar at Guantánamo: "unlawful
quently adopted another category that

Iraqi government in jails throughout

for U.S. detention operations in Iraq
Security Council resolutions. On May
Resolution 1483, stating that the United
upying powers acting under a unified
q to restore security and stability in
relevant international law.[89] Less than
il passed Resolution 1511, recognizing
"all necessary measures to contribute
ability in Iraq."[90] Together, Resolutions
on of Iraq under this U.S.-led military
al sovereignty to Iraq in 2004 did not
Council Resolution 1546 extended the
t and detention operations in Iraq. In
the MNF–I, acting under the "uni-
rs, to "take all necessary measures" to
urity and stability in Iraq,[92] including
y for imperative reasons of security."[93]
tly extended through December 2008,
o take over all detention operations in
of prisoners in U.S. custody declined,
g more than five thousand prisoners

claim that it could detain prisoners in
t did at Guantánamo, Bagram, and the
Defense Department announced that it
q in accordance with the Geneva Con-
. detention operations in Iraq started
ns at those other prisons: prolonged
l on vague suspicions and unverified
ce, excessive secrecy, torture and other
l review.
sive insurgency and a need for better
ders in Iraq began turning to the same
May 2003, they introduced a new legal
Geneva Conventions but was already
combatant." U.S. commanders subse-
t did not exist under the Geneva Con-

ventions: "security detainees." Within
ees in Iraq grew to more than 6,300,
held at Abu Ghraib, the dusty and dec
quickly became the United States' m
High-level U.S. officials responsible f
measures at Guantánamo and Bagran
those tactics there.

To denote their "significant intellige
of security detainees were labeled "hig
Meanwhile, the number of detainees
dwindle.[98] "They are not EPWs [ene
senior military commander about pri
are terrorists and will be treated as suc
and sent a message through the ranks
was permissible. "The gloves are comi
intelligence officer said in a widely di
2003.[100] By September 2003, Lieuten
commander of coalition forces in Iraq
tánamo that sanctioned interrogation
use of military dogs, sleep and sensory
temperatures.[101] Because detainees in I
tagon officials reasoned, SERE techni
used against them, just as they were u
and Bagram.[102]

U.S. officials continued to assert
conducted "in the spirit" of the Genev
occupying power establish a "regular
the internment of civilians (or nonpri
ducted by the MNF–I failed to meet t
tant safeguards.[104] Prisoners were rout
nity to see or confront the evidence a
the chance to be present at their re
Convention permits the detention of c
imperative reasons of security" or for
ians picked up in random military sw
highway checkpoints were held for mo
tion and without evidence that their co
imperative reasons of security."[108] As a
MNF–I held detainees "for prolonged

a year, the number of security detain-
more than 3,000 of whom were being
repit compound outside Baghdad that
ain detention center in the country.
or implementing harsh interrogation
n were brought to Iraq to implement

ence or political value," a small number
h-value detainees" and held in secret.[97]
held as prisoners of war continued to
my prisoners of war]," remarked one
soners in U.S. custody in Iraq. "They
h."[99] Such statements sowed confusion
that aggressive treatment, even abuse,
ng off regarding these detainees," a U.S.
stributed email message from August
ant General Ricardo S. Sanchez, the
, had a new policy modeled on Guan-
methods such as stress positions, the
deprivation, and exposure to extreme
Iraq were "unlawful combatants," Pen-
ques could be reverse-engineered and
used against detainees at Guantánamo

publicly that detentions in Iraq were
va Conventions, which require that an
procedure" for the periodic review of
soners of war).[103] But the reviews con-
these requirements and lacked impor-
inely denied any meaningful opportu-
gainst them.[105] They also were refused
view hearings.[106] The Fourth Geneva
civilians only where it is "necessary for
r penal prosecution.[107] But Iraqi civil-
weeps of entire neighborhoods and at
onths, or even years, without prosecu-
onfinement was, in fact, "necessary for
United Nations report explained, the
periods without judicial review of their

cases," and based on administrative re
requirement to grant detainees due pr
ally recognized norms."[109]

The United States also failed to insti
and tracking detainees. Some prisone
Others were deliberately taken off the
names.[111] This practice, known as "gh
tions and human rights law. It allowed
cers to hold prisoners incommunicado
regularly inspects prisons to monitor
tions.[112] Ghosting was also intended to
from Iraq to other countries for interr
Conventions subject to prosecution as
speculated that there may have been a
ees" in Iraq.[114]

U.S. officials argued that the norma
terrorism. Due process, they insisted,
associated with criminal arrests and t
related detentions in Iraq.[115] This argu
astating consequences.

On April 28, 2004, *60 Minutes II*
prison showing the torture and gros
forces. The pictures quickly spread acr
the Internet.[116] They showed U.S. troop
tions, sexual humiliation, beatings, and
depicted a hooded man standing on a
his hands. Another showed the bloodi
lophane and packed in ice. Other pictu
dogs to terrify prisoners, force prisone
humiliate them.[117] A U.S. army investi
headed by Major General Antonio M.
"sadistic, blatant, and wanton crimina
lights and pouring the phosphoric liq
on naked detainees, and beating detain
These abuses, Taguba's report conclude
U.S. Army regulations and the Geneva

The impact of the Abu Ghraib photo
written descriptions of prisoner mistr
widespread public outcry until these i

view procedures that "do not fulfill the rocess in accordance with internation-

tute an effective system for identifying ers simply got lost in the confusion.[110] regular rolls or registered under false osting," violated the Geneva Conven- the CIA and military intelligence offi- and hide them from the ICRC, which compliance with the Geneva Conven- facilitate the CIA's transfer of detainees ogation—a grave breach of the Geneva a war crime.[113] One U.S. Army general s many as one hundred "ghost detain-

l rules did not apply to the war against "is a human rights concept generally rials" and does not apply to security- ment was not only wrong but had dev-

broadcast pictures from Abu Ghraib ss mistreatment of detainees by U.S. oss the globe through print media and s subjecting detainees to mock execu- d other mistreatment. One photograph a box with electrical wires attached to ed body of a prisoner, wrapped in cel- ures displayed American soldiers using ers into painful positions, and sexually igation into the abuses at Abu Ghraib Taguba found numerous instances of l abuses," including breaking chemical uids on detainees, pouring cold water nees with a broom handle and a chair.[118] ed, stemmed from routine violations of Conventions.[119]

graphs cannot be overstated. Although reatment already existed, there was no images of American soldiers torment-

ing Iraqi prisoners were published.[120] atrocities can incite the public in way Ghraib photographs did precisely tha tion's lie that the United States was tre why courts and legislators could not b national security. The photographs als effort to circumvent legal rules and cou damaging America's reputation and u throughout the world.[122]

The abuses were not limited to Ab ons in Iraq, including the infamous C road near the Baghdad International served as a torture chamber for Sadd insurgency intensified in 2004, a U.S. an interrogation center. Camp Nama q ers who were denied access to lawyers side. Prisoners were interrogated in a Room, where the eighteen-inch hook a reminder of the torture inflicted u military unit known as Task Force 6- force that had so grossly mistreated pr responsibility for extracting informati Abu Musab al-Zarqawi. But the task niques intended for "the worst of the Soldiers, for example, beat prisoners their faces. "The reality is, there were official.[124] When some interrogators at lawyers arrived at the base within ho defending the treatment and techniq were not prisoners of war but "securit Abuses continued even after warnings can law enforcement officials. More th 6-26 were ultimately disciplined in son members were convicted of physical as little information to help capture insu it succeeded only in alienating ordina States' mission in that country and its

These abuses may be attributed par American soldiers battling an insurgen

As Susan Sontag explained, images of
s that words alone cannot.[121] The Abu
t. They exposed the Bush administra-
ating prisoners humanely and showed
lindly trust the president in matters of
so illustrated how the administration's
urt review could lead to horrific abuse,
ndermining human rights protections

bu Ghraib but occurred at other pris-
Camp Nama. Located just off a dusty
Airport, Camp Nama had previously
am Hussein's regime. When the Iraqi
Special Operations unit remade it into
quickly became a black hole for prison-
s, courts, relatives, and the world out-
a windowless cell known as the Black
ks hanging from the ceiling served as
nder Saddam Hussein. Members of a
-26—a unit closely related to the task
isoners at Abu Ghraib—were assigned
on about Iraq's most-wanted terrorist,
force ended up using the brutal tech-
e worst" on ordinary Iraqi civilians.[123]
with rifle butts and yelled and spit in
e no rules," commented one Pentagon
Camp Nama raised questions, military
urs to give a PowerPoint presentation
ues on the ground that the detainees
y detainees" or "enemy combatants."[125]
from an army investigator and Ameri-
an thirty-four members of Task Force
ne way for abusing detainees and three
ssault. In the end, Camp Nama yielded
rgents or save American lives. Instead,
ry Iraqis and undermining the United
counterterrorism efforts generally.[126]
tly to the tremendous stress placed on
ncy that continued to grow in strength.

But they also flowed directly from the
cumvent legal rules and embrace tortu
"Shit started to go bad right away," ren
ing back at detainee operations during
in Iraq.[127] The decision to operate outsi
the migration of aggressive interrogati
Afghanistan to Iraq. Major General G
to "Gitmoize" interrogations in Iraq, v
ons, by adopting strategies and technic
Guantánamo's commander.[128] Meanwh
Yoo's March 2003 memo legitimizing
name of national security helped prov
make detention operations in Iraq "an
pave the way for many of the human r

America's failure to implement ad
evasion of the Geneva Conventions'
oners fed off each other. Detainees w
little or no intelligence value swelled th
prisons in Iraq.[130] Detainees were ofte
on superficial examinations and scre
use of abusive interrogation method
failed to notify family members that
imprisoned. Individuals were remove
the night with bags over their heads an
asked where their loved ones were be
Sometimes U.S. troops arrested all ad
ing elderly, handicapped, and sick pe
insulted, and kicked and struck with
thousand to forty thousand Iraqis pass
the first eighteen months of the occup

The United States also resisted rele
clearly innocent. As a military intellige

> People were afraid to take personal
> release of detainees, even when obvi
> lead to condemning statements such
> seven times but is lying because he s
> tion and was therefore uncooperativ
> U.S. custody for the duration of hosti

Bush administration's decision to cir-
re and detention without due process.
narked one infantry team leader, look-
the United States' first crucial months
de the Geneva Conventions facilitated
ion techniques from Guantánamo and
eoffrey D. Miller, in particular, sought
where he supervised all U.S.-run pris-
ques honed while previously serving as
ile, Department of Justice lawyer John
brutal interrogation methods in the
ide legal cover for Miller and others to
enabler for interrogation" and helped
ights violations that followed.[129]
dequate screening procedures and its
prohibition against mistreating pris-
ho presented no threat and who had
e population of Abu Ghraib and other
n held for long periods of time based
ening statements that encouraged the
s.[131] In many cases, the United States
their loved ones had been seized and
d from their homes in the middle of
nd without explanation. When families
ing taken, they were told to shut up.[132]
dult males present in a house, includ-
ople. Iraqi men were pushed around,
rifles.[133] All told, approximately thirty
sed through U.S. detention facilities in
ation.[134]
easing even those prisoners who were
ence officer explained:

> l responsibility [for] recommending
> ously innocent, and often this would
> as "the detainee told the same story
> hould know such and such informa-
> ve. Recommend detainee be held in
> lities."[135]

Major General Taguba's report not
civilian inmates at Abu Ghraib had be
Yet many continued to languish in ja
later told investigators, the prevailing a
wouldn't have detained them if we wa
without charge, without access to a co
process helped lead to the prolonged
glutting of jails, and the growing relia
sures, particularly as the insurgency g
the United States' operations in Iraq
United States was trying to quell.

The case of American citizen Dona
"haphazard system of detention and p
from Chicago, Vance went to Iraq in
When he discovered that the compan
cache of weapons that it was selling to
lent militias and death squads, Vance i
in Baghdad. In return, Vance was arre
tary in Camp Cropper as a security d
very people he had tried to expose. Va
he and other prisoners slept on conc
was only 50 degrees Fahrenheit. Du
Vance's hands and feet, covered his eye
him in a wheelchair.[140] Vance kept tra
on the wall of his cell. Vance was de
military review hearings and was prev
him. The only reason Vance was even a
was because he was an American citi
and detainees from other countries. Va
three months of illegal imprisonment.
to his fiancée in the United States plead
only one arrived, and that letter did n
returned home.[141]

Despite these problems, and despit
people reportedly died in U.S. custody
tions in Iraq received relatively little a
Ghraib. Far more is known about the
tánamo than about the tens of thous
number of detainees in Iraq, the prox

ted that more than 60 percent of the
een deemed not to present any threat.
ail.[136] As one army intelligence official
attitude of U.S. commanders was, "We
nted them released."[137] Holding people
ourt, or without any other meaningful
confinement of innocent people, the
ance on aggressive interrogation mea-
gained strength.[138] It also undermined
by fueling the same insurgency the

ld Vance highlights the United States'
prosecution" in Iraq.[139] A navy veteran
2004 to work as a security contractor.
ny he was working for had a growing
suspicious customers with ties to vio-
nformed the FBI and the U.S. embassy
ested and imprisoned by the U.S. mili-
etainee for having associated with the
ance was confined to a tiny cell, where
rete slabs and where the temperature
ring interrogations, officials shackled
es, placed towels over his head, and put
ck of the days by making hash marks
nied the assistance of a lawyer at his
ented from seeing the evidence against
allowed to be present at those hearings
zen—an opportunity denied to Iraqis
ance was finally released, but only after
Of the ten letters that Vance had sent
ding for help while he was imprisoned,
ot arrive until after Vance had already

e the fact that more than one hundred
y in Iraq and Afghanistan, U.S. deten-
ttention aside from scandals like Abu
e several hundred detainees at Guan-
sands of prisoners in Iraq. The sheer
ximity to ongoing combat operations,

and the fact that the United States pa
tions all contributed to a tendency to
post-9/11 detention system. Yet, Iraq
system. It illustrates how the theories
rorism" could lead U.S. officials to circ
massive detention dragnet without ade
onment and abuse. It also shows how
reaction and a disregard for legal rules
violations and undercutting the Unite
Iraq, in short, shows how a military op
comply with the Geneva Conventions
another Guantánamo."[142] Like Guantá
Iraq highlights the dangers of extraju
habeas corpus.

aid lip service to the Geneva Conven-
o view Iraq separately from the larger
presents an important aspect of that
and impulses behind the "war on ter-
cumvent established rules and spawn a
equate checks against arbitrary impris-
fears of terrorism could prompt over-
s, leading to widespread human rights
d States' ability to counter insurgency.
eration that was originally supposed to
and U.S. law could become "in effect,
namo, Bagram, and CIA "black sites,"
dicial detention and the importance of

Crossing a Constitut

The Domestic "Enemy Comb

After 9/11, the United States i
"enemy combatants" overseas and onl
inside the United States. But those thr
and expansive assertions of executive
ism." In two of them, the Bush admin
crossing of a constitutional Rubicon,
the Bill of Rights and institute a new
ment. In essence, it claimed the powe
residents off the streets of the United
custody, without charge or trial, based
they presented a danger to the nation's

Before 9/11, the United States had p
eral court under the country's crimina
the government had the additional o
from the country under its immigratio
authority to detain depended on pro
the civilian justice system.

The Bush administration manipulat
9/11. Attorney General John Ashcroft
must "think outside the box" and ado
ond" strategy to fight terrorism.[1] The
prevention per se, but the illegal meth
this end. In the United States, the adm
nents. The first was exploiting the civil
governing immigration and material
or even months without charging the
combatant" designations—abandoned

4

tional Rubicon

batant" Cases

mprisoned hundreds of individuals as
y three people as "enemy combatants"
ree cases involved the most aggressive
detention power in the "war on terror-
istration sought nothing less than the
threatening to erase the guarantees of
norm of indefinite military imprison-
r to seize American citizens and legal
States and imprison them in military
solely on the president's assertion that
security.
prosecuted suspected terrorists in fed-
l laws. In the case of foreign nationals,
ption of seeking the person's removal
on power. Either way, the government's
mptly bringing formal charges within

ted and circumvented that system after
explained that the Justice Department
pt a "prevent first, and prosecute sec-
problem with this approach was not
ods the administration used to achieve
inistration's strategy had two compo-
lian justice system—in particular, laws
witnesses—to hold people for weeks
m with a crime. The second—"enemy
d that system altogether by enabling

the president to dispense with a crimi
edented regime of indefinite military d

One way that the Bush administrati
was by misusing immigration law as a
evidence of wrongdoing. After 9/11, fe
750 foreign nationals on immigration
into the World Trade Center and P
"PENTTBOM investigation").[3] The FI
that a subsequent Justice Department
overly general and vague, such as "a lar
an Arab tenant" or a tip that "too mar
store.[4] Typically, people were arrested
variety immigration infractions, which
picions about their associations, activ
They were labeled "of interest" and d
whether they were actually connected

Federal law required that the gove
four hours of an arrest for an immi
Court, moreover, had previously ru
detention for more than forty-eight h
of probable cause.[6] But a new regulati
gration and Naturalization Service (no
rity) to detain foreign nationals withou
period in time" in case of emergency
Under the regulation, immigrants arr
BOM investigation were frequently h
months.

In addition, the government sough
bond (or bail) once charges had finall
eign nationals arrested in the United S
deportation proceedings if immigrati
flight risk or danger to the community
to deny bond to all immigrants arreste
investigation without any individuali
actually dangerous or posed a flight
adopted a "hold until cleared" policy
labeled "of interest" until the release
the FBI's Counterterrorism Division.

nal trial in favor of a new and unprec-
detention.[2]
on exploited the civilian justice system
tool for preventive detention without
ederal authorities detained more than
violations as part of its investigation
entagon bombings (code-named the
BI arrested foreigners based on leads
inspector general's report criticized as
ndlord reporting suspicious activity by
ny" Muslims worked at a convenience
d for visa violations or other garden-
served as a proxy for generalized sus-
ities, or Arab or Muslim background.
etained without any effort to identify
to terrorism.
ernment bring charges within twenty-
gration violation.[5] The U.S. Supreme
led that the Constitution prohibited
ours without a judicial determination
on issued after 9/11 allowed the Immi-
w the Department of Homeland Secu-
ut charge for "an additional reasonable
or other extraordinary circumstance.[7]
ested in connection with the PENTT-
eld without charge for up to several

nt to prevent these persons' release on
y been brought. Previously, most for-
States could obtain bond pending their
on judges found that they were not a
. But after 9/11, the government sought
d in connection with the PENTTBOM
zed assessment of whether they were
risk. Instead, the Justice Department
blocking the release of any detainee
was approved by a section chief in
Only those individuals affirmatively

deemed not "of interest" were exempt
Under the policy, individuals charged
were held for months while the FBI
even if there was no basis to detain th
had voluntarily agreed to leave the c
were also held under highly restricti
treated. Many were held incommunic
in their cells for twenty-three hours a
assistance or contacting their families,

The government also sought to ke
that the entire PENTTBOM investiga
less bits and pieces of information tha
overall information to assess. Althoug
"might appear innocuous in isolation
be used by terrorist groups to help fo
ment's counterterrorism investigation
jeopardizing national security.[10] Disclo
tion hearings, the government claimed
and only executive branch officials co
To implement this policy, the nation's
proceedings in all "special interest" im
secrecy. As a result, the detainees' nam
and their court hearings were closed
the detainees' families.[11]

The government used immigration
power in other ways as well. It issued a
tion prosecutor to automatically freez
release a detainee pending the prosecu
that typically takes months if not mo
prosecutor to show why the detention
program known as the "Absconder App
view, arrest, and deport foreign natio
but who nonetheless remained in the
tify people with a link to terrorism, th
Muslims with no terrorism connecti
long-established community roots.[13] In
the "National Security Entry-Exit Reg
cial registration requirements on fore
Muslim countries who entered or res

from this "hold until cleared" policy.
l with routine immigration violations
completed its criminal investigation,
hem under immigration law and they
ountry.[8] These immigration detainees
ve conditions and often grossly mis-
ado for weeks at a time, locked down
a day, prevented from obtaining legal
and physically and verbally abused.[9]
ep these detentions secret. It claimed
tion consisted of a "mosaic" of count-
t only FBI headquarters had sufficient
gh these bits and pieces of information
," the government argued, they could
orm a "bigger picture" of the govern-
s, revealing sources and methods and
osure of any information in immigra-
l, would compromise national security,
ould assess the dangers of disclosure.
chief immigration judge directed that
migration cases be conducted in total
es did not appear on the public docket,
to the public, including the press and

law to expand its domestic detention
a new regulation allowing an immigra-
ze an immigration judge's decision to
tor's appeal of that decision—a process
re than a year—without requiring the
was necessary.[12] It also implemented a
prehension Initiative" to identify, inter-
nals who had been ordered removed
country. Although intended to iden-
he program largely targeted Arabs and
on at all, including individuals with
addition, the government established
istration System," which imposed spe-
eign nationals from certain Arab and
ided in the United States, including a

es

requirement that such individuals re
tion authorities. Purportedly intended
used to facilitate the arrest, detention,
ties to terrorism whatsoever.[14]

In total, several thousand people w
net, and thousands more were arrested
istration and absconder initiative prog
tion with these measures was charged
Instead, immigration arrests were ofte
Arabs and Muslims based on suspicio
the nation against future terrorist atta
government's credibility and goodwill
nities whose cooperation many law en
ered indispensable to fighting terrorism

The Bush administration also subve
using the material witness statute. Thi
prosecutors to secure the testimony o
to avoid testifying. To arrest and detai
government must show that the witne
proceeding and that it is impracticable
ness's presence at a trial through a subp
witness is entitled to a prompt judicia
basis for detention. In making this det
the witness poses a flight risk and wh
his or her appearance to give testimon
the government must also demonstra
adequately be secured by a deposition

After 9/11, the Justice Department
ity to secure witness testimony by tr
arrest and detain people based on sus
ing to one report, the number of ma
eral government increased 80 percen
seventy material witnesses detained
investigation, approximately half neve
information concerning any criminal
eign nationals on routine immigrati
witnesses served as a pretext for pre
government suspected of criminal ac
or whom the government simply wan

gister periodically with the immigra-
to prevent terrorism, the program was
and deportation of individuals with no

ere arrested in the PENTTBOM drag-
l and detained through the special reg-
grams. Yet, no one arrested in connec-
criminally with any terrorism offense.[15]
n used as a pretext to target and detain
n or innuendo. Rather than protecting
cks, these detentions undermined the
in the very Arab and Muslim commu-
forcement officials and experts consid-
m effectively.[16]
rted the civilian justice system by mis-
s statute's express purpose is to enable
of witnesses who might otherwise flee
in someone as a potential witness, the
ss's testimony is material to a criminal
e for the government to secure the wit-
oena.[17] A person arrested as a material
l hearing to decide whether there is a
ermination, a court considers whether
at conditions of release would ensure
y.[18] Detention remains a last resort, as
te that the witness's testimony cannot
or other alternative means.[19]
misused this limited detention author-
ansforming it into a broad power to
spicion about their activities. Accord-
aterial witnesses arrested by the fed-
t between 2000 and 2002. Yet of the
in connection with the PENTTBOM
er testified, and many had no relevant
activity.[20] Like the mass arrest of for-
ion violations, the arrest of material
ventively detaining people whom the
ctivity but lacked evidence to charge
nted to interrogate without triggering

the legal protections guaranteed to cr
then an assistant attorney general, c
"an important investigative tool in th
kinds of evidence . . . from a witness"
gerprints and hair samples. Mary Jo W
Southern District of New York, simila
the material witness statute to arrest
tion and not, as the statute specifically
sary to secure their testimony.

Many of those arrested on material
or months in jail.[21] They also were routi
cial hearing.[22] Moreover, when those h
in secrecy, which was invoked sweepin
context, to hide bad practices and avoi
legitimate national security concerns.
even told why they were being held o
evidence. One witness described the I
"I kept asking with what am I being ch
being charged with anything. I asked
ness. I said a witness to what? They sai

Material witnesses were held under
were kept in solitary confinement fo
windowless cells, sometimes in units
inmates. They were prevented from ma
rial witnesses were also physically and
detentions, such harsh treatment was u

The Justice Department's misuse of
to the imprisonment of innocent peop
ble example. In May 2004, the FBI ar
in connection with its investigation of
two months earlier that killed almost
Mayfield, the FBI had secretly searche
Mayfield's DNA and listened to his con
believed that Mayfield, a U.S. citizen,
carried out the bombing because his
of detonators found near the bombing
believe that it had enough evidence to
material witness. During his interrog
capital charges and held in solitary c

riminal defendants. Michael Chertoff, described material witness arrests as e war on terrorism" that provided "all " besides his testimony, including fin- White, the former U.S. attorney for the arly defended the government's use of and detain people to obtain informa- y contemplated, because it was neces-

witness warrants after 9/11 spent weeks inely denied the right to a prompt judi- earings were held, they were shrouded gly, as it was in the "enemy combatant" d accountability rather than to protect . In some cases, individuals were not r provided access to the government's Kafkaesque nature of the proceedings: harged. They would respond you're not why I am here. They said I was a wit- d they couldn't tell me."[23]

r maximum security conditions. Many or up to twenty-four hours a day in holding the prison's most dangerous aking legal or family phone calls. Mate- l verbally abused.[24] As in immigration used to help facilitate interrogations.

the material witness law inevitably led ple.[25] Brandon Mayfield's case is a nota- rrested Mayfield as a material witness f the train bombings in Madrid, Spain, two hundred people. Before arresting d his home and office. It had collected nversations without a warrant. The FBI an army veteran, and a Muslim, had fingerprints matched those on a bag g site. Since the United States did not o indict Mayfield, it arrested him as a gations, Mayfield was threatened with confinement. When Spanish authori-

ties first informed the FBI that they w
Mayfield's prints, the FBI neglected to
to detain Mayfield, holding him for se
missed the material witness warrant.
acknowledge that it had made a mistal

In another case, American citizen
FBI at Washington Dulles Internationa
Arabia for graduate work in Islamic
rial witness, during which time he wa
and confined in high-security units. A
the case in which he was detained, an
His detention, which lasted more tha
marriage and job.[27] An appeals court
his release described his treatment as
painful reminder of some of the most
history."[28]

These domestic immigration and
the post-9/11 detention of terrorism sus
viduals were held on vague suspicion,
just as they were at Guantánamo, Bag
were shrouded in secrecy. They also w
less, the immigration and material w
existing legal framework—even thoug
subverted—and thus remained subject
tiny. Immigration and material witnes
and to the courts, even if that access
these detainees were held for much lo
not subjected to the same type of prolo
"enemy combatant" detainees who we
ing "war on terrorism." Nor were they
some "enemy combatants," who were
distinctions, however, disappeared wh
supplant the civilian justice system alt
suspects as "enemy combatants" in the

Jose Padilla was the first person arres
to military detention as an "enemy co
was Ali Saleh Kahlah al-Marri.[29] Altho
some ways his case represented a more

ere concerned that it had mismatched
tell his attorneys. Instead, it continued
veral weeks before a district judge dis-
Only then did the government finally
ke.[26]

Abdullah al-Kidd was arrested by the
l Airport as he prepared to fly to Saudi
studies. Al-Kidd was held as a mate-
s strip-searched on multiple occasions
l-Kidd was never called as a witness in
d he was never charged with a crime.
n two weeks, ultimately cost him his
in the civil suit that al-Kidd filed after
"repugnant to the Constitution, and a
ignominious chapters of our national

material witness detentions resembled
spects overseas in several respects. Indi-
without charge and without evidence,
ram, and CIA "black sites." Their cases
ere often grossly mistreated. Nonethe-
itness detentions remained within an
n that framework was manipulated and
t to some limitations and judicial scru-
s detainees still had access to attorneys
was significantly curtailed. Although
onger than the law allowed, they were
onged and open-ended confinement as
re held year after year in a never-end-
subjected to the same level of abuse as
tortured as part of U.S. policy. These
hen the Bush administration sought to
ogether by treating domestic terrorism
global "war on terrorism."

ted in the United States and subjected
mbatant"; the second, and last to date,
ough al-Marri was not a U.S. citizen, in
e extraordinary power grab and assault

on the Constitution, for he was pendin
dent terminated the proceedings and
"enemy combatant" detention.

A citizen of Qatar, al-Marri arrived
2001, with his wife and five children. H
ter's degree at Bradley University in Pe
obtained his bachelor's degree. That D
as a material witness in connection
investigation and detained him in a M
government indicted al-Marri for cred
added other charges, including makin
on a bank application. Al-Marri pleade
charges at trial. For the next sixteen m
criminal justice system.[30] On Friday, J
month away, the district judge schedu
trial motions, including al-Marri's mo
out a warrant in violation of the Fou
trial never took place. Instead, on the
tors presented the district judge with a
president. The order, identical in subs
in Padilla's case, declared al-Marri an
secretary of defense to take him into m
ernment, al-Marri was an al Qaeda "s
States at the request of senior al Qae
hacking into computer systems to "w
and to facilitate other possible terrorist
ernment's request to dismiss the indict
him. That same day al-Marri was tak
flown to the Navy brig near Charlesto
ernment claimed that al-Marri "must
ing al Qaeda," it never explained why
combatant," as opposed to criminal p
that goal, particularly when al-Marri
awaiting trial.[33]

What made the Padilla and al-Marr
the power claimed by the executive. By
had eliminated core safeguards of the
to be charged promptly, to be tried by
his accusers, and to compel the produ

g trial in federal court when the presi-
condemned him to the legal abyss of

in the United States on September 10,
His stated purpose was to obtain a mas-
eoria, Illinois, where he had previously
ecember, FBI agents arrested al-Marri
with the government's PENTTBOM
Manhattan jail. Two months later, the
it card fraud. A subsequent indictment
g false statements to the FBI and lying
ed not guilty and sought to contest the
onths, his case proceeded through the
une 20, 2003, with the trial less than a
uled a hearing to resolve various pre-
tion to suppress evidence seized with-
rth Amendment. But the hearing and
following Monday morning, prosecu-
one-page redacted order signed by the
stance to the presidential order issued
"enemy combatant" and directed the
ilitary custody.[31] According to the gov-
leeper agent" who came to the United
da officials to explore possibilities for
reak havoc" on U.S. banking records
activities.[32] The judge granted the gov-
ment, ending the criminal case against
en from a jail in Peoria, Illinois, and
n, South Carolina. Although the gov-
be detained to prevent him from aid-
indefinite imprisonment as an "enemy
prosecution, was necessary to achieve
himself was already incarcerated and

ri cases so important was the nature of
the mere stroke of a pen, the president
Bill of Rights: the right of a defendant
y jury, to confront and cross-examine
uction of witnesses in his favor. Gone,

es

too, was the presumption of innocence
justify imprisonment in court. In its p
and unprecedented system of detentio
a person living in the United States co
indefinitely without charge and witho
the detainee, and no judge could exam
executive say-so would replace the ac
the method of imprisoning terrorist su

But Padilla's and al-Marri's desig
intended to accomplish more than
designed to facilitate the use of tort
methods by freeing the government fr
tice system that acted as a check again
and safeguards, such as access to coun
orders declaring Padilla and al-Marri "
rior motive, noting that both men "po
municated to the U.S., would aid U.S.
Secretary of Defense Donald Rumsfeld
ing that the United States wanted "to t
to prevent a future terrorist attack.[34]
even blunter: al-Marri, Ashcroft said,
because he "insisted on becoming a ha
to improve his lot by cooperating with
mation."[35] In other words, suspects wh
could be thrown in a military stockad
threat that was made against other crim

The United Sates held Padilla and a
a year, cutting off access to their famil
the outside world. The reason, accordi
tor of the Defense Intelligence Agen
combatant" detainee access to a lawy
effort to obtain "vital" intelligence in
impede the United States' ability to
yers, Jacoby observed, undermined th
dependency" between a subject and a
ship could take "months, or, even yea
to be held incommunicado. "Even se
asserted, "can have profound psycholo
interrogator relationship."[37]

e and the burden on the government to
lace, the president was erecting a new
n by executive fiat, according to which
uld be seized by the military and held
ut a hearing. No lawyer could speak to
ine the evidence against him. In short,
dversary process of a criminal trial as
spects.
gnation as "enemy combatants" was
detention without trial. It also was
ure and other coercive interrogation
om the constraints of the criminal jus-
nst those abuses through various rules
sel and to the courts. The presidential
enemy combatants" hinted at this ulte-
ssesse[d] intelligence . . . that, if com-
efforts to prevent attacks by al Qaeda."
d suggested a similar purpose, explain-
y to find out everything" Padilla knew
Attorney General John Ashcroft was
was declared an "enemy combatant"
rd case" and "rejected numerous offers
FBI investigators and providing infor-
no did not cooperate and plead guilty
e rather than tried in a court of law—a
minal defendants during this period.[36]
l-Marri incommunicado for well over
ies, their attorneys, and anyone else in
ng to Admiral Lowell E. Jacoby, direc-
cy (DIA), was that giving an "enemy
er would jeopardize the government's
the detainee's possession and thereby
prevent future terrorist attacks. Law-
e necessary "relationship of trust and
n interrogator. Creating that relation-
rs," during which time a detainee had
emingly minor interruptions," Jacoby
gical impacts on the delicate subject-

Jacoby did not describe any parti
ring only obliquely to the administrat
ing detainees in the "war on terroris
those techniques were spelled out in t
and April 2003 working group repo
they included prolonged isolation, ex
sensory deprivation, and threats of v
employed against Padilla and al-Mar
navy brig.[38]

The DIA manipulated virtually ev
confinement to create a sense of hop
imprisoned in six-by-nine-foot cells c
ened metal bed affixed to the wall.[39] Th
was painted over, preventing any natu
from seeing anything outside his con
had no contact with each other the e
more than two years, al-Marri often h
were denied a calendar or a clock, pre
of day or day of the week.[42] They wer
magazines, heightening their disorie
None of these techniques produced an

Padilla's and al-Marri's designatio
zenith of the Bush administration's nev
tion power. Through their cases, the B
the power to suspend the Bill of Rights
against imprisonment without a prom
cause, the right to a speedy trial by a
such as the right to confront and cross
The administration sought to erase th
ian and military jurisdiction and to m
his home in the middle of America th
enemy soldier in a foreign war zone. O
even an American citizen or legal U.S.
fundamental protection in the Constit
out being charged with a crime and tri
these cases thus transcended the two
ing claim of detention power were up
it would open the door to similar de
country in the future. It would also n

cular interrogation techniques, refer-
tion's "robust program" for interrogat-
m." But he did not need to. Many of
he Joint Task Force 170 memorandum
rt for interrogations at Guantánamo;
posure to cold temperatures, extreme
iolence and death, all of which were
ri by interrogators at the Charleston

very aspect of Padilla's and al-Marri's
elessness and despair. Both men were
ontaining only a sink, toilet, and hard-
he only window in their respective cells
ral light from entering or the prisoner
crete cell.[40] (Padilla and al-Marri also
ntire time they were at the brig.) For
ad no mattress or blanket.[41] Both men
eventing them from knowing the time
e also denied books, newspapers, and
ntation and sense of total isolation.[43]
y useful intelligence.
n as "enemy combatants" marked the
v and radical vision of executive deten-
ush administration effectively claimed
s in America, including the prohibition
npt judicial determination of probable
jury, and basic procedural safeguards
s-examine the government's witnesses.
he long-established line between civil-
ake the arrest of a criminal suspect at
he legal equivalent of the capture of an
nce designated an "enemy combatant,"
resident would be stripped of the most
tution: the right not be detained with-
ed in a court of law. The importance of
prisoners. If the president's breathtak-
pheld in Padilla's and al-Marri's cases,
tentions of people arrested inside the
ecessarily bolster the president's claim

es

that he could militarily detain terroris
overseas prisons: if the president had
constitutional protections were strong

The third person held in the Unite
Yaser Hamdi. After traveling to Afgha
was captured by members of the Nort
U.S. military. The United States initial
before transferring him to Guantánam
the United States learned that Hamdi,
Arabia, was an American citizen. Fearf
oning an American citizen at Guantán
transferred Hamdi to the United State
ginia, and then to the navy brig in Cha
and al-Marri were being held.[44]

The government classified Hamdi a
it could continue to hold him witho
Hamdi was detained incommunicado
government also claimed, as it did w
had no right to challenge the governm
argued that the untested hearsay allega
second- and third-hand statements an
ligence reports—were sufficient to imp

Hamdi's case, however, differed fro
respects. Hamdi was not arrested in t
a civilian setting elsewhere. Instead,
was captured on a battlefield in Afgha
Taliban military unit, received weapo
assault rifle, which he surrendered t
capture. Hamdi thus bore some resem
and his detention was tied to the war
opposed to an amorphous global "war
result, subjecting Hamdi to military d
than trying him as a criminal in the re
nal the same dramatic departure from
as the military detention of Padilla and

But the government did not treat
oner it claimed he was.[47] Instead, it der
Conventions and U.S. military regulati
to other prisoners captured in and a

sm suspects at Guantánamo and other
this power in the United States, where
est, he could assert it anywhere.
d States as an "enemy combatant" was
nistan in the summer of 2001, Hamdi
hern Alliance and handed over to the
ly interrogated Hamdi in Afghanistan
o in January 2002. Three months later,
who had lived most of his life in Saudi
ful of the potential fallout from impris-
amo, the Bush administration quickly
es, first to a navy brig in Norfolk, Vir-
rleston, South Carolina, where Padilla

as an "enemy combatant" and claimed
ut charge. Like Padilla and al-Marri,
and denied access to his lawyers.[45] The
ith Padilla and al-Marri, that Hamdi
ment's accusations in court. Instead, it
ations of a Pentagon official—based on
d unexamined summaries of raw intel-
prison Hamdi indefinitely.[46]
m Padilla's and al-Marri's in important
he United States, nor was he seized in
according to the government, Hamdi
anistan, where he had affiliated with a
ns training, and carried a Kalashnikov
o Northern Alliance forces upon his
mblance to soldiers from earlier wars,
against the Taliban in Afghanistan, as
" against a terrorist organization. As a
etention as a wartime prisoner, rather
egular federal courts, did not itself sig-
legal precedent and historical practice
d al-Marri.
Hamdi like the "classic wartime" pris-
nied him the protections of the Geneva
ions, just as it denied those protections
around Afghanistan, who were being

held at Guantánamo and Bagram. Ha
military status hearing under Army I
detention, nor had he been afforded th
all enemy prisoners from abusive int
The government also denied Hamdi a
including the right to due process, eve
and was being imprisoned on America
ingful opportunity to challenge the ac
was not a Taliban fighter, as the goverr
civilian captured while fleeing the war
ern Alliance to the United States for bo

Thus, despite their differences, Ha
all highlighted key features of the po
showed how the Bush administration
the "enemy combatant" label to fit a v
domestic arrest of civilians in the Unit
diers in a foreign combat zone. They a
modus operandi of invoking the law
detention power while disregarding th
on that power. In all three cases, furth
avoid meaningful judicial review and
habeas corpus an empty exercise in w
tive's allegations about the prisoner at

In 2004, Hamdi's case reached the U
lenge by Jose Padilla and a joint chal
ees. These three "enemy combatant" c
opportunity to address the Bush admi
tive power. But before examining thes
in chapters 5 and 6 to look at the m
brought—the writ of habeas corpus—
cial review of executive action at home

amdi had not been given the required Regulation 190-8 to prevent mistaken he binding legal safeguards that shield terrogations and other mistreatment. ny rights under the U.S. Constitution, en though he was an American citizen an soil. In short, Hamdi had no mean- cusations against him: to show that he nment alleged, but instead an innocent in Afghanistan and sold by the North- ounty.[48]

amdi's, Padilla's, and al-Marri's cases ost-9/11 global detention system. They n conveniently bent and manipulated wide array of circumstances, from the ted States to the capture of armed sol- also demonstrated the administration's s of war to claim sweeping executive he limits that the laws of war impose hermore, the administration sought to render access to the courts through which judges had to accept the execu- face value.

U.S. Supreme Court, along with a chal- lenge by several Guantánamo detain- cases gave the Supreme Court its first inistration's sweeping claims of execu- se challenges, we shall go back in time eans by which those challenges were and related principles governing judi- e and abroad.

Part 2

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ionally left blank

Habeas Corpus and Challenge Unlawful

The writ of habeas corpus f
early thirteenth century as a mechan
court.[1] Of the several forms of the wr
ad subjiciendum, enabled a court to
basis for a prisoner's confinement by c
prisoner and the cause for his commit
was initially used by the king's comm
of local and rival central courts, such
ecclesiastical and admiralty matters.[2] I
stood, as it is now, as a guarantee of
means for the king to ensure just cau
subjects.

By the 1600s, habeas corpus starte
against the arbitrary power of the Crow
with the *Five Knights* case (also known
imprisoned a number of men for ref
money for a war with France and Spa
the men sought writs of habeas corpu
demanding release on bail. Without t
onment shall not continue for a time,
kingdom may be restrained of their
the Magna Carta's guarantee of due p
ert Heath responded on behalf of the
tive to imprison by his "special comm
nor timely" for the ordinary process
insisted that the judges defer to the ki
necessary to protect "a conspiracy-thr
and not "inquire further" into matters

5

the Right to Imprisonment

first emerged in England around the ism to ensure a person's presence in rit that developed, one, *habeas corpus* examine whether there was a lawful ordering the jailer to produce both the tment. *Habeas corpus ad subjiciendum* on law courts to limit the jurisdiction as the specialized courts that decided Habeas was thus not originally under- civil or human rights but, rather, as a se for the imprisonment of any of his

ed to become viewed "as a safeguard vn itself."[3] An important shift occurred n as Darnel's case). King Charles I had using to contribute to a loan to raise ain. No charges were filed, and five of s challenging their imprisonment and formal charges, they argued, "impris- , but for ever; and the subjects of this liberties perpetually" in violation of rocess of law.[4] Attorney General Rob- Crown that it was the king's preroga- and" for "a matter of state . . . not ripe of formal accusation and trial. Heath ng's judgment about what means were reatened commonwealth" from danger of state.[5]

Although the king won this partic
over the Crown's prerogative. After th
Parliament responded with the Petitio
Crown to imprison based on royal co
Responsible government, the Petition
such sweeping claims to emergency p
the king continued to imprison indiv
ment enacted the Habeas Corpus Act
writs of habeas corpus on behalf of pri
the Star Chamber, which had become
power and other abuses.[7] In 1679, Pa
pus act to remedy the perceived looph
prisoners would not languish in jail w
into the cause of their commitment.[8]
act as a "second magna carta and stab
the development of the judicial exerci
opposed to statutory intervention by
the writ's emergence as a guarantee of i
became willing to uphold challenges to
the exercise of their habeas corpus juri
the late 1600s, for example, the King's
petitions involving accusations of tre
tion, often finding that there was no ba
become, and would thereafter remain
manner of illegal confinement."[12]

Even so, there remained one lawf
Great Writ's protections: suspensio
Through suspension acts, Parliament
adjudicate accusations by Crown offici
tion in matters affecting the security o
the first suspension act amid armed
James II would try to regain the thro
the Glorious Revolution.[14] Other susp
detention of suspected enemies of sta
did not suspend habeas corpus itself,
writ to test the government's allegatio
contained an expiration date, which w
of their passage.[17] Prisoners also coul
they fell within the parameters of the g

ular battle, he lost the larger struggle
e court denied relief to the prisoners,
n of Right, proclaiming it illegal for the
ommand and without formal charges.
of Right stated, could not coexist with
owers of arrest and detention.[6] When
iduals without charge or trial, Parlia-
of 1641, requiring the courts to issue
isoners "without delay" and abolishing
associated with arbitrary exercises of
rliament enacted another habeas cor-
oles in existing law and to ensure that
without a prompt judicial examination
William Blackstone praised the 1679
le bulwark of our liberties."[9] Yet it was
ise of common law habeas powers (as
Parliament) that was most crucial to
individual liberty.[10] Judges increasingly
o detention by Crown officials through
sdiction. Amid the political turmoil of
s Bench adjudicated numerous habeas
eason, treasonous practices, and sedi-
asis to hold the prisoner.[11] The writ had
, "the great and efficacious writ, in all

ul means to deprive prisoners of the
n of habeas corpus by Parliament.
deprived courts of their authority to
als and asserted its control over deten-
f the state.[13] In 1688, Parliament passed
conflict abroad and fears that King
ne after his ouster earlier that year in
pension acts followed, authorizing the
te without judicial inquiry.[15] The acts
however, but the right secured by the
ns in court.[16] Suspension acts generally
as usually a year or less from the time
d still seek judicial review of whether
given suspension legislation.[18] So, while

suspending habeas corpus gave "extre
powers were specifically bound by the
remained "distinctly limited by law."[19]

Unless suspended, habeas corpus
prisoners in the custody of the Crown,
by common thieves and alleged ene
corpus did not turn on where a priso
Indeed, one of the most celebrated h
involved a slave who had been purch
in England while awaiting voyage to
and ordered the slave released becau
In another case involving two men h
court not only rejected the governme
as foreigners disqualified them from
ordered them discharged.[22] The questi
whether the individual was properly
ity, not whether he was a subject in
put another way, the focus was less on
wrongs committed by the jailer.[24]

Once presented with a habeas co
to exercise independent judgment al
the law asserted in the jailer's respo
factual inquiry could include scrutini
ing disputed contentions, by either e
ing.[25] Judges were not bound by a
instead could probe the evidence an
in response, known as the *traverse*.[26]
the detention had a basis in statute or
render decisions independently, grou
inferences and understandings" and
ment officials responsible for the det
afford "full and speedy justice."[29] Thi
prisoner's habeas corpus petition and
lawful basis to hold him.[30]

The nature and scope of habeas rev
cases of criminal confinement, for exa
the prisoners either had been or soon
with common law due process. Judge
role by conducting trials in habeas c

me powers . . . to the executive," those
emergency that necessitated them and

has traditionally been available to all
, and its protections have been invoked
mies of state alike. Access to habeas
ner had been born or his nationality.[20]
abeas cases of the eighteenth century
ased in Virginia and detained briefly
Jamaica. The court granted the writ
se slavery was not legal in England.[21]
eld as "alien enemies and spies," the
nt's argument that the prisoners' status
the benefits of habeas corpus but also
on in a habeas corpus proceeding was
within the Crown's detention author-
the modern sense of citizenship.[23] Or
the rights of the prisoner than on the

rpus petition, a judge was supposed
bout the sufficiency of the facts and
nse, known as the *return*. The judge's
zing opposing allegations and resolv-
xamining affidavits or holding a hear-
jailer's statements in the return but
d arguments submitted by prisoners
Judges also had to determine whether
the common law.[27] Their duty was to
nding their judgment on their "own
not on the conclusions of the govern-
tention.[28] Judges also were obliged to
s meant both promptly examining a
l ordering his release if there was no

iew varied with the circumstances. In
mple, the review was narrower because
would be tried by a jury in accordance
s thus did not wish to usurp the jury's
orpus proceedings.[31] But for prisoners

held for noncriminal matters, habeas
cases of executive detention without
gest, for it was here that the danger o
was greatest.[32]

Habeas corpus review continued ev
properly held as enemy aliens or prison
custody, they still could avail themselv
did not fall within those categories a
For example, a court considered a pe
the Seven Years War (between Great
tive allies between 1756 and 1763), in v
not lawfully be detained because he v
thus not a prisoner of war. The court u
considering the sailor's legal argume
conducted similar inquiries in other c
at least a limited opportunity to show

Habeas corpus also had a broad ter
Paul D. Halliday and G. Edward Whit
as's origins as a prerogative writ by wh
judges of the King's Bench at Westmin
detention by any Crown official or by a
issued writs to jailers throughout the
to so-called exempt jurisdictions that
were otherwise exempt from oversight
of ancient privileges predating their a
issued habeas writs to dominions beyo
a lawful basis for a prisoner's confin
corpus must "run into all parts of th
all times entitled to have an account,
is restrained, *wherever* that restraint n
of the British Empire, habeas corpus a
local courts in Crown-controlled terri
detaining an individual, and thus ex
habeas court could inquire into the l
where that detention took place.[41]

The famed jurist Lord Mansfield cit
mal constructs like political sovereign
the writ's reach. There was "no doubt,"
writs of habeas corpus to every one of

s review was more searching. And in
trial, habeas's protections were stron-
f the arbitrary exercise of state power

ven in time of war. Although prisoners
ners of war had no right to release from
ves of habeas corpus to show that they
nd thus were not properly detained.[33]
tition by a Swedish sailor filed during
Britain and France and their respec-
which the sailor claimed that he could
was a national of a neutral nation and
ltimately disagreed, but not before first
nts and factual submissions.[34] Courts
ases, providing wartime captives with
there was no basis to hold them.[35]
ritorial reach. This reach, as Professors
e have explained, was rooted in habe-
hich the Crown, through common law
ster, could inquire into the legality of a
another court or tribunal.[36] Judges thus
realm of the British Crown, including
maintained their own local courts and
t by the central English courts because
cquisition by the Crown.[37] Judges also
ond the realm to ensure that there was
ement.[38] As Blackstone noted, habeas
e king's dominions; for the king is at
why the liberty of any of his subjects
ay be inflicted."[39] With the expansion
lso became available in newly formed
tory.[40] As long as Crown officials were
ercising power in the king's name, a
egality of the detention, regardless of

ted authority and control, and not for-
nty, as the main principles governing
" he said, of the court's power to issue
the king's dominions "where the place

is under the subjection of the Crown,"
realm.[42] Although England may have
Crown-controlled territories in which
eignty did not determine whether a
review. Instead, habeas review turned
and nature of the jurisdiction or domi
As a practical matter, the availability
on whether a court could "judge of the

The development of habeas corpu
In the late 1600s, the British East Indi
panies established a string of "factorie
India under grants of authority from t
the East India Company had become a
control over large swaths of land.[46] In
the company's territories, and a supre
the first of several courts in English-co
the English Crown delayed assertions
India Company's territories for more
lish courts issued writs of habeas corp
and native Indians to remedy arbitra
power by company officials.[48] The jud
of habeas review as part of their comm
was just cause for a prisoner's confine
the territory in which the prisoner was
himself.[49] Judges continued to exerci
enacted legislation attempting to curb

Given the robust protections that ha
imprisonment, there were repeated ef
its reach. This practice proved highly c
common law judges protested when C
secret and distant prisons to circumv
Clarendon was impeached and charg
judicial exercise of habeas corpus by s
against the law in remote islands, garr
them from the benefit of law."[52] The
separate offense to remove prisoners t
Tangier, or into Parts, Garrisons, Isla
are or at any time hereafter shall be w
Majesty."[53]

' even if the territory were outside the exercised sovereignty over the various n habeas corpus was available, sover- court could or would exercise habeas on an assessment of "the exact extent nion exercised in fact by the Crown."[43] of habeas corpus thus often depended e cause" and "give relief upon it."[44] s in India illustrates these principles. a Company and other merchant com- es" or trading posts along the coast of he English Crown.[45] By the mid-1700s, a substantial military power, exercising n 1773, English law was introduced in me court was established in Calcutta, ontrolled territories in India. Although s of formal sovereignty over the East than four decades,[47] these local Eng- pus on behalf of both British subjects ry imprisonment and other abuses of ges in these cases viewed the exercise mon law authority to ensure that there ment, regardless of the formal status of s held or the nationality of the prisoner se that review even after Parliament their power to issue habeas writs.[50] beas corpus provided against unlawful fforts by government officials to evade ontroversial. As early as 1591, England's rown officials transported detainees to ent their review.[51] In 1667, the Earl of ed with attempting to undermine the sending individuals "to be imprisoned risons, and other places . . . to prevent Habeas Corpus Act of 1679 made it a o "Scotland, Ireland, Jersey, Guernsey, nds or Places beyond the Seas, which ithin or without the Dominions of his

The importance of habeas corpus w
to America.[54] Influenced by the writi
and William Blackstone, colonial lead
nent safeguard of physical liberty, a
kind.[55] Alexander Hamilton, for exam
tant protection against arbitrary gover
was available in all thirteen American

The framers of the U.S. Constitu
writ's protections in their own republi
executive imprisonment. King Georg
was expressly cited as one of the griev
dence.[58] And the colonists remembere
ing habeas corpus during the America
only habeas's significance but also its b
available overseas, there would have be
to restrict the new national governmen
controversial.[60] The first proposal to
tutional Convention of 1787 stipulate
suspended only "upon the most urgen
a limited period of time. Even this pro
from those who believed that suspens
circumstances.[61] The compromise ver
suspension but limited it to truly exce
lion or invasion," when "the public saf

This provision—known as the "Sus
most important human right in the
detained by the government have acc
makes possible "the full realization" o
for example, a person imprisoned on
no way to seek review before a judge,
and of the press secured by the First A
ingless. The Suspension Clause also se
under the Constitution's separation of
erful check against executive overreach

The U.S. Supreme Court first inter
the backdrop of the upheaval in Ame
dential election of 1800 and the rift
and his former vice president, Aaron
to sever recently acquired territories i

vas not lost on the colonists who came
ngs of famed jurists Sir Edward Coke
lers saw habeas corpus as the preemi-
natural and inalienable right of man-
ple, deemed the writ the most impor-
nment power.[56] By 1776, habeas corpus
colonies.[57]

ution naturally sought to secure the
c to ensure an adequate check against
e III's abuse of royal detention power
vances in the Declaration of Indepen-
d well the acts by Parliament suspend-
n rebellion—acts that underscored not
road reach (for if habeas had not been
een no need to suspend it).[59] The desire
t's power to suspend habeas was never
mention habeas corpus at the Consti-
d that the writ's protections could be
t and pressing occasions" and only for
oposal, however, prompted opposition
sion should not be allowed under any
sion that finally emerged allowed for
ptional circumstances: "cases of rebel-
ety may require it."[62]

pension Clause"—has been called "the
Constitution."[63] It requires that those
cess to the courts and, in the process,
f other constitutional guarantees.[64] If,
account of his political opinions had
, the guarantees of freedom of speech
Amendment could be rendered mean-
erves an important structural function
powers by giving the judiciary a pow-
ning.

preted the Suspension Clause against
erican politics that followed the presi-
between President Thomas Jefferson
Burr. Burr was suspected of plotting
n the West from their allegiance to the

United States. In December 1806, the U
seized two of Burr's co-conspirators, E
and took them on a warship to Baltim
olina. In the process, the commander
had been issued on the prisoners' beh
and Charleston. President Jefferson r
deny the prisoners access to the courts
supporters introduced legislation in C
months. But the bill failed in the Hous
to file formal charges of treason again
then sought relief in the circuit court
habeas petition and remanded them f
habeas corpus from the Supreme Cour

In his decision for the Court, Chie
the power to suspend habeas corpus b
reflected both historical practice and th
other legislative powers in Article I of
cussed the interplay between the Susp
1789. That statute had not only created
had also specified that judges could is
of prisoners "in custody, under or by
States."[67] The Supreme Court thus ap
writs of habeas corpus under the terms
ten four years earlier in *Marbury v. M*
or subtract from the Supreme Court's
of the Constitution, which specifies the
can hear in the first instance as origin
To resolve this tension, Marshall deter
hear the prisoners' petition because ha
since the Court was reviewing an "app
remanding the prisoners to custody.[6
dence on both sides, the Court discha
that there was insufficient proof to hol

Another question, however, linger
gress had not specifically authorized
habeas corpus in the Judiciary Act? Di
tee habeas corpus, or did it merely pro
invasion once Congress had first statut
writs? Chief Justice Marshall's opinion

U.S. Army commander in New Orleans
Erick Bollman and Samuel Swartwout,
more by way of Charleston, South Car-
r ignored writs of habeas corpus that
half by federal judges in New Orleans
recognized that the only legal way to
s was to suspend habeas corpus. So his
Congress to suspend habeas for three
se, prompting the U.S. attorney general
nst the men. Bollman and Swartwout
t. After the circuit court denied their
for trial, the prisoners sought a writ of
rt.[65]

f Justice John Marshall explained that
elonged solely to Congress, a view that
he Suspension Clause's placement with
f the Constitution.[66] Marshall also dis-
ension Clause and the Judiciary Act of
the federal trial and circuit courts but
ssue writs of habeas corpus on behalf
colour of the authority of the United
peared to have the authority to issue
s of this statute. But Marshall had writ-
adison that Congress could not add to
original jurisdiction under Article III
e types of cases that the Supreme Court
nal, as opposed to appellate, matters.[68]
mined that the Court had the power to
abeas review was "appellate" in nature,
peal" of the lower court's prior decision
[69] After carefully considering the evi-
rged Bollman and Swartwout, finding
d them for the crime of treason.[70]

ed beneath the surface: What if Con-
courts and judges to issue writs of
d the Suspension Clause itself guaran-
hibit its suspension absent rebellion or
torily authorized courts to issue habeas
n was not entirely clear on the subject.

On the one hand, *Bollman* might be re
habeas writs must be provided by posi
sibility that the Suspension Clause co
gressional inaction, making habeas c
efits like Social Security that require
explained that the Suspension Clause
to make the writ available, indicating
compelled by the Constitution.[71] Altho
intentions, the conclusion that federal
mandated is closer to framers' underst
with the writ's purpose as well as later

Some commentators have also sug
sion Clause was originally intended to
guarantee of habeas corpus secured by
theory posits that the Suspension Clau
against unlawful detention by federal c
courts. Whether historically accurate,
ated by later Supreme Court decisions
Slave Act of 1850, the Court ruled that
the release of prisoners held in federal
Civil War.[75] Thus, reading the Suspen
court remedy would create a legal voi
in federal custody and leaving execut
unchecked.[76]

For more than two centuries, thes
because habeas corpus was available
Judiciary Act.[77] In fact, the federal hab
cover new categories of prisoners. In 1
resistance to federal revenue policies,
officers confined by state officials to s
1842, Congress again changed the stat
over the habeas petitions of foreign na
foreign nationals claimed to act under
significantly, in 1867, Congress autho
habeas corpus to any state prisoner h
federal law, thereby paving the way for
and best-known use: as a remedy for
criminal convictions and sentences.[80]
courts have cut back significantly on f

ead to suggest that jurisdiction to issue
tive legislation. This left open the pos-
uld be rendered a dead letter by con-
orpus equivalent to government ben-
positive legislation. But Marshall also
imposed an "obligation" on Congress
g that federal habeas jurisdiction was
ough scholars have debated Marshall's
habeas jurisdiction is constitutionally
anding of the writ[72] and is more in line
Supreme Court decisions.[73]
gested that the Constitution's Suspen-
limit Congress's ability to suspend the
individual states.[74] In other words, this
use was designed to protect individuals
officers through judicial action by state
this theory confronts a problem cre-
. During controversy over the Fugitive
state courts lacked the power to order
custody, a ruling it reaffirmed after the
sion Clause as protecting only a state
d, denying habeas corpus to prisoners
ive detention by the U.S. government

se debates remained largely academic
to federal prisoners under the 1789
eas statute had expanded over time to
1833, Congress, prompted by Southern
amended the statute to allow federal
seek relief in lower federal courts.[78] In
tute to provide for federal jurisdiction
tionals held in state custody when the
the authority of a foreign state.[79] Most
rized federal courts to issue writs of
eld in violation of the Constitution or
what became the writ's most common
r prisoners seeking to challenge their
In recent decades, Congress and the
federal habeas corpus as a postconvic-

tion remedy through the imposition o
tiary burdens, bars on successive peti
But before 9/11, Congress had never so
tory guarantee of habeas corpus for in
ernment without prior judicial process

Moreover, the limited authority pro
porarily suspend habeas corpus was
pension occurred during the Civil Wa
of Fort Sumter, President Abraham
suspend habeas corpus when necessar
pended along the military line betwe
suspension was later extended to plac
the outbreak of war, Lincoln feared t
would destroy the railways and bridg
ton and ultimately overrun the capita
John Merryman, an ardent secessioni
in Baltimore on suspicion of aiding t
at Fort McHenry. When Merryman fi
Chief Justice Roger B. Taney, sitting as
Merryman's military jailers to produc
said, had no authority to suspend hab
ignored the instruction. As he later
sion when he suspended habeas corp
plainly made for a dangerous emerg
should not have to wait for the dang
gressional approval. To delay under th
said in defense of emergency executi
but one, to go unexecuted, and the go
one be violated."[86] In March 1863, C
Lincoln's prior suspension, long after
pension of habeas corpus, more than
imprisoned without charge or trial in
including newspaper editors and ot
Confederate cause.[88]

Habeas corpus was suspended on
Each time, the suspension was author
area, and restricted in duration to th
1871, Congress authorized President U
pus in southern States where post–Ci

of filing deadlines, heightened eviden-
tions, and other procedural hurdles.[81]
ought to eliminate altogether the statu-
dividuals detained by the federal gov-
s.

ovided under the Constitution to tem-
exercised only rarely.[82] The first sus-
ar. On April 27, 1861, following the fall
Lincoln authorized army generals to
ry "for the public safety." Initially sus-
en Philadelphia and Washington, the
ces as far north as Maine.[83] Following
that the advancing Confederate army
ges connecting Maryland to Washing-
l.[84] The suspension was challenged by
st who had been arrested at his home
he Confederacy and then imprisoned
led a habeas petition, Supreme Court
s a circuit judge in Baltimore, ordered
ce him in court. The president, Taney
beas corpus on his own.[85] But Lincoln
explained, Congress was not in ses-
us. Since the Suspension Clause "was
gency," Lincoln argued, the president
ger to "run its course" to obtain con-
hese circumstances, Lincoln famously
ive action, would allow "all the laws,
overnment itself go to pieces, lest that
Congress enacted legislation ratifying
the fact.[87] As a result of Lincoln's sus-
n thirteen thousand individuals were
n military jails during the Civil War,
thers considered sympathetic to the

ly three other times in U.S. history.
ized by Congress, limited to a specific
he emergency that necessitated it. In
lysses S. Grant to suspend habeas cor-
vil War violence by the Ku Klux Klan

had made it impossible to dispense jus
authority in nine counties in South C
suspects without ordinary criminal pr
islation authorizing the governor of
habeas corpus where necessary to co
sion.[90] Acting under this authority, th
in two provinces for approximately ni
by organized gangs that had created
among the people."[91] The final suspens
War II. Congress had previously auth
habeas corpus in the Hawaiian Terri
or invasion.[92] After Japan attacked Pe
governor invoked this emergency susp
under military government until 194
and martial law ended.[93]

As in England, habeas corpus in th
able to individuals regardless of citize
ing, foreign nationals have invoked ha
1797, for example, a circuit court gra
prisoner, finding that he could not be
mitted abroad, since he had never be
case, Supreme Court Justice Joseph S
arrest of a group of Portuguese sailo
by any law or treaty.[97] Even the broa
the Alien Enemies Act of 1798, whic
relocate, and deport aliens of a natio
war, remained subject to habeas revi
tice Marshall, sitting on circuit, orde
habeas because he had been detained
required by the controlling regulation
this practice.[100] Thus, although the Sup
power to detain enemy aliens during a
to remove them from the country, it a
enemy aliens can challenge the valid
corpus.[101]

The history of immigration law s
habeas corpus is not limited to An
wrote in 1885 amid efforts to exclude
States,

stice. Grant subsequently invoked that Carolina, leading to the mass arrest of ocess.[89] In 1902, Congress enacted leg- the Philippines Territory to suspend mbat rebellion, insurrection, or inva- he governor suspended habeas corpus ne months to suppress armed violence "a state of insecurity and terrorism sion occurred in Hawaii during World horized Hawaii's governor to suspend tory to confront a threat of rebellion earl Harbor on December, 7, 1941, the pension power. Hawaii thus remained 4, when habeas corpus was restored

e United States has always been avail- enship,[94] and since the nation's found- abeas to challenge their detention.[95] In nted the habeas petition of a Spanish prosecuted for treason for acts com- en properly naturalized.[96] In another tory, sitting on circuit, found that the ors for desertion was not authorized ader executive powers granted under h authorized the president to detain, n with which the United States was at ew.[98] In 1813, for example, Chief Jus- red the release of an enemy alien on without an opportunity to relocate, as s.[99] Modern precedents have followed preme Court has upheld the president's declared war against an enemy nation also has made clear that those held as ity of their detention through habeas

similarly demonstrates that access to merican citizens. As a federal judge Chinese immigrants from the United

> If the denial . . . to the petitioner of t
> ship into his prison-house, to be follo
> to a foreign country, be not a restrai
> of the habeas corpus act, it is not eas
> within its provisions.[102]

Courts thus consistently reviewed th
cials to remove or exclude foreign na
immigration statutes.[103] And while the
tive decisions on the merits, they did
interpretation of a ground for an alie
also helped enforce rudimentary due
immigrants be provided notice and an
ernment official could order their dep
executive retain wide latitude to establi
become known as the "plenary power
grounds for admission to and remova
still reviewed the exercise of that po
habeas corpus jurisdiction.[106]

In 1996, Congress enacted two statu
court review of deportation orders for
tain crimes. Following years of litigati
St. Cyr in June 2001 that eliminating
stitutional questions" and might violat
jurisprudential doctrine of "constituti
constitutional questions unnecessarily
rowly and concluded that they did n
tory habeas jurisdiction.[108] Although
statutory, as opposed to constitutional
enduring commitment to habeas corp
action affecting the liberty of the indiv

Habeas has also historically played
boundaries of military authority. In a c
a New York state court considered the
had been detained as a spy and traito
an area that both sides viewed as crit
captured shortly after British troops ha
control of Sackets Harbor. American n
the near loss of this critical military p

the right to land, thus converting the
owed by his deportation across the sea
int of his liberty within the meaning
y to conceive any case that would fall

ne decisions of executive branch offi-
ationals from the United States under
courts often upheld those administra-
sometimes reject the executive's broad
n's deportation or exclusion.[104] Courts
e process requirements, ordering that
opportunity to be heard before a gov-
ortation.[105] So while Congress and the
ish immigration policy under what has
" doctrine, and thus to determine the
al from the United States, courts have
wer in individual cases through their

utes purporting to eliminate all federal
aliens who had been convicted of cer-
on, the Supreme Court ruled in *INS v.*
this review would raise "serious con-
te the Suspension Clause.[107] Under the
ional avoidance" (i.e., of not reaching
y), the Court read the 1996 laws nar-
ot eliminate the federal courts' statu-
the Court thus resolved the issue on
grounds, its decision underscored the
pus as a check against illegal executive
vidual.[109]

a checking role by policing the proper
case from the War of 1812, for example,
e habeas petition of Samuel Stacy, who
r at Sackets Harbor on Lake Ontario,
tical to the war effort. Stacy had been
ad landed in the area and nearly taken
military commanders blamed Stacy for
ost. In response, Stacy claimed he was

exempt from military jurisdiction base
issued a writ of habeas corpus comm
When the officer refused, New York's
sought enforcement, explaining that
ing criminal jurisdiction over a private
confinement, and contemning the civ
subsequently released by the secretary
tary lacked any power over him.[111]

Habeas corpus petitions frequently
enlistment in the military. Courts, for
vidual knowingly joined the armed fo
voluntary.[112] Habeas also provided for
martial. To be sure, the scope of this
would not use habeas corpus petitions
or guilt but instead generally deferre
ings.[113] This deference reflected the id
rate community whose need for obedi
autonomy over the application of mili
theless, habeas corpus still remained
remained within its "special and limit
whether a defendant was properly su
compliance with prescribed statutory p
given sentence was authorized by law.[1

By the middle of the twentieth cen
possible expansion of habeas review
impetus and need for such review less
orate, rights-protective adversary proc
form Code of Military Justice (UCMJ
grown more rigorous over time. Tod
courts-martial may be explained partl
tains safeguards for defendants that a
more robust than—those provided in
for appellate review by civilian judge
corpus.[117]

In addition, habeas corpus has p
decisions by military commissions, th
American history to try enemy soldie
celebrated cases of American history
habeas challenge of a prisoner in mil

ed on his U.S. citizenship, and the court
nanding the military to produce him.
chief justice, Chancellor James Kent,
"a military commander" was "assum-
e citizen . . . holding him in the closest
vil authority of the state."[110] Stacy was
of war, who recognized that the mili-

y challenged the legality of a person's
example, examined whether an indi-
orces and whether his enlistment was
review of decisions by military courts-
review was relatively narrow. Courts
s to reexamine questions of innocence
d to the courts-martial's factual find-
ea that the armed forces was a sepa-
ence and discipline justified granting it
itary law to service members.[114] None-
available to ensure that the military
ed jurisdiction." Courts thus reviewed
ubject to military authority, enforced
procedures, and determined whether a
[115]

ntury, the Supreme Court suggested a
of courts-martial decisions.[116] But the
ened with the development of an elab-
cess for courts-martial under the Uni-
), which was enacted in 1950 and has
ay, the more hands-off stance toward
y by the fact that the UCMJ now con-
re similar to—and, in some respects,
federal court. The UCMJ also provides
s, a role previously served by habeas

rovided a mechanism for reviewing
e ad hoc tribunals periodically used in
rs for war crimes. In one of the most
, the Supreme Court considered the
itary custody in the immediate after-

math of the Civil War. Lambdin P. Mi
the Sons of Liberty, a secret paramilit
thizers in the border state of Indiana
overthrow the Union government, cor
ing to seize munitions, liberate prison
acts in an area under constant threa
Milligan and detained him without c
habeas corpus. President Lincoln ther
to trial by military commission for vi
convicted and sentenced to death, Mil
circuit court denied the petition, Mill
The government argued that the presi
tarily with dangerous men like Milliga
ligan stood accused of committing "an
at a place "within . . . the theater of mi
invasion by the enemy.[119] But it ruled
civilian, not a combatant, and that th
he be tried in the regular courts as lon
tioning. The president, the Court expl
criminal justice system because an al
even at a time when the nation's surv
Davis declared for the Court's major
States is a law for rulers and people, e
with the shield of its protection all cl
all circumstances."[121] The Court order
had been detained without criminal c
under the 1863 suspension act. Four ot
result, but not its reasoning. As explai
Justice Salmon Chase, those justices fo
rized Milligan's military trial without
done so.[122]

The Supreme Court's decision in
importance of habeas corpus in help
military authority. It also highlights th
and the vindication of a defendant's
tutional safeguards against wrongful
great landmarks in th[e] Court's histo
can prevent the government from sup
justice system with military detention

illigan was a high-ranking member of tary organization of Southern sympa-. Milligan was accused of plotting to mmunicating with the enemy, conspir-ners of war, and commit other violent t of invasion.[118] The military arrested charge under the 1863 act suspending n issued an order subjecting Milligan iolating the laws of war. After he was ligan sought habeas review. When the ligan appealed to the Supreme Court. dent must have the power to deal mili-an. The Court acknowledged that Mil- *enormous* crime" in "a period of war" ilitary operations" and under threat of that Milligan nonetheless remained a e Constitution therefore required that g as those courts were open and func-ained, could not simply opt out of the lleged offender posed a grave danger, vival was at stake.[120] As Justice David rity, "The Constitution of the United qually in war and in peace, and covers lasses of men, at all times, and under ed that Milligan be released, since he harge beyond the allowable time limit ther justices agreed with the majority's ned in a concurring opinion by Chief ound that Congress could have autho-violating the Constitution but had not

Ex parte Milligan demonstrates the ing maintain the proper boundary of he crucial link between habeas review right to a jury trial and other consti-imprisonment. Hailed as "one of the ory,"[123] *Milligan* illustrates how habeas planting the guarantees of the civilian or trial.

Milligan, however, did not end mili
use during the military occupation of t
Military commissions also were revive
lenges to these later commissions prom
decisions addressing the reach of habe

In the summer of 1942, eight Nazi sabo
citizen, landed on beaches in Long Is
aboard German U-boats. Acting unde
ment, the men changed from their m
Armed with crates of explosives, they
targets in the United States. But one o
all eight were apprehended.[124] Preside
charge the men in the regular civilian c
at the time authorized the death penalty
wanted the saboteurs tried and execu
issued an order establishing a military
violations of the laws of war and offense
cessor of the UCMJ). The order made
and denied the defendants access to th
told Attorney General Francis Biddle th
over to any United States marshal arme

Three weeks into the trial, the sab
habeas corpus petitions in federal dist
sion lacked legal authority to try the
Milligan as well as other precedents.
the Supreme Court agreed to conside
Oral arguments took place over two
31, the Court issued a short order uph
the men by military commission and i
reasoning would follow.[129] The trial re
with convictions for all the defendants
impose death by electrocution. By the
decision in *Ex parte Quirin* on Octob
been executed. Roosevelt commuted
defendants to life imprisonment.[130]

Another United States military c
involved the trial of Japanese general T
of the war, Yamashita was put before

itary commissions, which remained in
he South in the Reconstruction period.
d during World War II. The legal chal-
pted several important Supreme Court
as corpus and the role of the courts.

oteurs, including at least one American
sland and Florida after traveling there
r the direction of the German govern-
ilitary uniforms into civilian clothes.
y planned to destroy various military
f the saboteurs tipped off the FBI, and
nt Franklin D. Roosevelt chose not to
ourts. No criminal statute on the books
y in these circumstances, and Roosevelt
ted quickly.[125] So, on July 2, Roosevelt
commission to try the defendants for
es under the Articles of War (the prede-
Roosevelt the final reviewing authority
e civilian courts.[126] Privately, Roosevelt
at he would not "hand [the defendants]
d with a writ of habeas corpus."[127]
oteurs' military defense counsel filed
trict court, claiming that the commis-
defendants and contravened *Ex parte*
After the district court denied relief,
er the case on an expedited schedule.
days and lasted nine hours.[128] On July
olding the president's authority to try
ndicating that a decision explaining its
sumed and concluded three days later
and a recommendation that Roosevelt
time the Supreme Court issued its full
er 29, six of the saboteurs had already
the sentences of the two remaining

ommission case from World War II
omoyuki Yamashita. At the conclusion
a military commission in the Philip-

pines for atrocities committed by troo
Manila massacre, which resulted in the
civilians. Yamashita was convicted. A
pines affirmed the conviction, Yamash
U.S. Supreme Court. He claimed that t
that the charges did not allege violation
procedures failed to meet the standard
the Geneva Conventions, and the U.
granted Yamashita's request for review
finding that the tribunal was properly
limits.[131] On February 23, 1946, Yamash
miles south of Manila.

Both *Quirin* and *Yamashita* have b
erations in *Quirin*, Justice Felix Frank
getting bogged down in legal niceties
later, Frankfurter expressed regrets, ex
precedent."[132] Chief Justice Harlan Fisk
opinion—issued after the Court's sente
"a mortification of the flesh" and ackn
authority to support the commission's
marred by flaws. None of the five Ame
ington, D.C., to preside over Yamashita
ence.[134] The army officers appointed to d
to prepare for trial, and 59 of the 123 ch
same day the trial began. Even so, the
prepare was denied.[135] Much of the ev
hearsay. Nonetheless, Yamashita himse
dence that the troops who committed
mand, a key issue in the case.[136] As Sup
in his dissenting opinion, Yamashita w
charge" and "given insufficient time to
separate dissenting opinion, Justice W
commission as lacking "any semblance

But despite their flaws, both *Quiri*
ience of habeas corpus as a mechanis
time of war. In *Quirin*, President Roo
eral courts altogether. But the Suprem
of Roosevelt's order establishing a mil
special session to do so because of th

ops under his command, including the
e deaths of more than 100,000 Filipino
fter the Supreme Court of the Philip-
ita sought habeas corpus review in the
he tribunal was not legally authorized,
ns of the laws of war, and that the trial's
ds required under the Articles of War,
.S. Constitution. The Supreme Court
but rejected his claims on the merits,
authorized and operated within legal
ita was hanged at a prison camp thirty

been sharply criticized. During delib-
kfurter warned his colleagues against
during the middle of a war. But years
xplaining that *Quirin* was not "a happy
ke Stone, described writing the *Quirin*
ence had already been carried out—as
nowledged that there was only meager
constitutionality.[133] *Yamashita* also was
rican generals hastily sent from Wash-
a's trial had any legal or combat experi-
defend Yamashita had only three weeks
harges against Yamashita were filed the
defense's request for a continuance to
idence against Yamashita consisted of
elf was prevented from putting on evi-
the atrocities were not under his com-
reme Court Justice Frank Murphy said
was "rushed to trial under an improper
prepare an adequate defense."[137] In his
Wiley Blount Rutledge denounced the
e of trial as we know that institution."[138]
n and *Yamashita* reaffirmed the resil-
m of securing judicial review even in
osevelt had sought to exclude the fed-
e Court not only reviewed the legality
itary commission but also convened a
e "public importance of the questions

raised" and "the duty which rests on t
time of peace, to preserve unimpaired
liberty."[139] *Yamashita* similarly demon
nings of habeas review. Unless Cong
Court said, the executive could not "wi
duty" to inquire into the legal author
mine whether a prisoner fell within
decisions upheld the president's claim
(thus siding with the executive on the n
that habeas corpus could provide judi
ing trial by the military during wartim

Quirin and *Yamashita* did not, how
corpus for prisoners detained and trie
United States. The German saboteurs i
ecuted by a military commission insid
tried by an American tribunal in the
still U.S. territory. The Supreme Cour
als arrested and detained outside the U
in two other World War II–era militar
trager and *Hirota v. MacArthur*.

In *Eisentrager*, twenty-one German
had been tried for war crimes by an
lowing their convictions, the prisoner
U.S. military base in Allied-occupied I
sentences. The prisoners challenged t
pus petitions in federal district court i
their imprisonment was illegal becaus
and because the military commission

The district court dismissed the pet
decision in *Ahrens v. Clark*, handed d
a habeas corpus challenge by more
detained at Ellis Island, New York, p
under the Alien Enemies Act. The peti
in federal district court in Washingto
the district court lacked jurisdiction b
ute granting courts the power to issu
dictions" required the prisoner's physi
territorial jurisdiction.[143] That meant t
for relief in federal district court in Ne

he courts, in time of war as well as in
d the constitutional safeguards of civil
nstrated the constitutional underpin-
ress properly suspended the writ, the
ithdraw from the courts the power and
ity of the military tribunal and deter-
its jurisdiction.[140] Thus, even as these
ed power to employ military tribunals
nerits), they nonetheless demonstrated
cial review to those detained and fac-
e, regardless of their citizenship.

ever, address the availability of habeas
d outside the sovereign territory of the
n *Quirin* were arrested, held, and pros-
le the country; General Yamashita was
Philippines when the Philippines was
t did address whether foreign nation-
United States had habeas corpus rights
y commission cases: *Johnson v. Eisen-*

n soldiers captured in Nanjing, China,
American military commission.[141] Fol-
rs were transferred from Nanjing to a
Landsberg, Germany, to serve out their
heir convictions by filing habeas cor-
n Washington, D.C. They claimed that
se they did not violate the laws of war
lacked jurisdiction to try them.

titions, relying on the Supreme Court's
own just months earlier.[142] *Ahrens* was
than one hundred foreign nationals
ending their deportation to Germany
itioners in *Ahrens* brought their action
n, D.C. The Supreme Court ruled that
ecause the federal habeas corpus stat-
e writs "within their respective juris-
cal presence within the district court's
that the *Ahrens* petitioners had to sue
ew York, where they were being physi-

cally held, not Washington, even thou
order the petitioners' release. The Cou
could exercise review under the habea
by the United States outside the terri
as might be the case when a prisoner
not, as Justice Rutledge warned in hi
might be no remedy at all for illegal de

The court of appeals in *Eisentrag*
meant that prisoners in Landsberg, Ge
under the federal habeas corpus statu
"jurisdiction" of any U.S. district cou
tion. The right to habeas corpus, it sa
tals."[146] If the government was correct,
U.S. citizens could be denied habeas c
from that conclusion" would be to dra
nationals with only the former receivi
distinction, however, was impermissi
apply directly to acts of Government,
conditioned upon persons or territory
the case and thus to address whether fo
missions could seek habeas relief in a
and trial all took place outside the Uni

Justice Robert Jackson wrote the o
Court. Jackson, who had previously se
Nuremberg Trials, began by describin
legal rights, with citizens at the top a
them. "Citizenship as a head of jurisd
old when Paul invoked it in his appea
that an American citizen was entitled t
own government no matter where that
acknowledged, also enjoyed the Cons
as they were present in or had a suffi
Enemy aliens captured and detained o
did not necessarily enjoy those prote
noted that "in extending constitutiona
[Supreme] Court has been at pains to
ence within its territorial jurisdiction t
Thus, he said, alien enemies whose of
the United States do not have a right o

ugh officials there had the authority to
rt reserved decision on whether judges
as statute where the prisoner was held
orial jurisdiction of any district court,
was detained abroad.[144] If they could
s dissenting opinion in *Ahrens*, there
etentions overseas.[145]

er reversed. Recognizing that *Ahrens*
ermany, had no right to judicial review
te (because they were held outside the
rt), the court looked to the Constitu-
aid, "stem[s] directly from fundamen-
the appeals court explained, then even
orpus if held abroad. The "only escape
aw a line between citizens and foreign
ng the Constitution's protections. That
ble, since "constitutional prohibitions
or Government officials, and are not
."[147] The Supreme Court agreed to hear
oreign nationals tried by military com-
federal court if their arrest, detention,
ted States.

pinion for a closely divided Supreme
rved as the chief U.S. prosecutor at the
g a descending scale of entitlement to
nd foreign nationals, or aliens, below
iction and a ground of protection was
l to Caesar," Jackson wrote, suggesting
to habeas corpus when detained by his
detention occurred.[148] Aliens, Jackson
titution's protections, but only as long
cient connection to the United States.
utside the United States, he continued,
ections. Surveying past cases, Jackson
l protections beyond the citizenry, the
point out that it was the alien's pres-
that gave the Judiciary power to act."[149]
ffense, capture, and trial occur outside
f access to U.S. courts.

Jackson also expressed separation c
fering with the executive's war-making
to individuals detained in connection
the German soldiers in *Eisentrager*, h
"produce the body" and transfer priso
world for hearings in federal courts. In
operations in a theater of war, Jackson
field commanders and divert "attentio
to the legal defensive at home."[150] Jack
habeas corpus and other constitutiona
a prisoner's citizenship and the locatio

Justice Hugo Black charted a differ
expressing a view that would seem pre
strict territorial limits on habeas corpu
Constitution, Black insisted, should n
or to aliens within the United States
since been described as a responsibil
approach to the Constitution. This ap
limits on government power toward
constrained by law, regardless of tha
cal location.[151] If one purpose of the C
unlawful exercises of executive power
individual habeas corpus relief becaus
rather than inside the country, or beca
an American citizen. To deny habeas c
tions based on such distinctions woul
ciple," Black explained.[152] Instead, Blac
available "whenever any United States
in any land we govern."[153] Black thus a
than Jackson did, one that saw habe
shores and its citizenry, possibly to w
power to imprison. It was a vision th
habeas corpus as a guarantee of indivi
tive power. If, as Chief Justice Marsha
action is "what authority has the jailo
prisoner happens to be held does not i

A different but potentially significa
another military commission case, *H*
before *Eisentrager*. Baron Kōki Hirota

of powers concerns about courts inter-
g role. Affording habeas corpus review
with overseas military operations like
ne said, would require the military to
oners and witnesses halfway across the
ojecting courts and judges into military
believed, would improperly encumber
on from the military offensive abroad
kson thus appeared to accept limits on
l protections during wartime based on
n of his capture and detention.

rent course in his dissenting opinion,
scient after 9/11. Black refused to place
us and other constitutional rights. The
not be confined to American citizens
s. Instead, Black articulated what has
ity-based, rather than a rights-based,
pproach maintains that the exercise of
any person in U.S. custody must be
t person's citizenship status or physi-
onstitution is to prevent arbitrary and
, it is just as impermissible to deny an
se he was arrested or detained abroad,
use he is a foreign national rather than
corpus and other constitutional protec-
d adopt a "broad and dangerous prin-
k urged that habeas corpus should be
official illegally imprisons any person
rticulated a different vision of the writ
as corpus reaching beyond America's
herever the United States claimed the
at more closely embodied the idea of
dual liberty and a limitation on execu-
ll had put it, the question in a habeas
r to detain [the prisoner]," where that
tself provide the answer.[154]

nt limit on habeas corpus surfaced in
Hirota v. MacArthur, decided the year
had served as Japan's prime minister

and foreign minister during the first st
war, Hirota and other Japanese citizer
tribunal, formally known as the Inter
East (IMTFE).[155] The tribunal had b
MacArthur, the Supreme Commande
Hirota was convicted and sentenced t
aggression" in violation of internatio
to take adequate steps to prevent atro
Nanjing, a six-week-long massacre tha
and prisoners of war.[156]

Following his conviction, Hirota file
directly in the U.S. Supreme Court.[157]
nal" habeas petitions filed in the Supre
of war crimes by American or Allied r
have been barred from seeking habea
under *Ahrens*, since they were not con
of any district court.[158] The Supreme Co
"original" habeas petition during this
ion, typically by a four-to-four vote,
because of his prior service at the Nur

This time, however, Jackson agree
appeal, although he then recused him
proceedings.[160] Three days after hearin
issued a short unsigned opinion den
opinion explained that because the t
tenced Hirota and the other prisone
States," a U.S. court had "no power
aside or annul the judgments and se
lishing the tribunal that had senten
MacArthur had acted as "the agent
court did not have jurisdiction to he
not address such basic questions as w
ity over the prisoners and their offen
lawfully constituted.[162] Hirota was ha
days after the Supreme Court's deci
other challenges to the IMTFE, and
habeas petitions challenging convictio
at Nuremberg.[163]

• •

ages of World War II in Asia. After the
ns were tried by the Tokyo war crimes
national Military Tribunal for the Far
been established by General Douglas
r of the Allied Powers in the Far East.
o death for his role in waging "wars of
nal law and for disregarding his duty
cities, including the so-called rape of
t left dead more than 200,000 civilians

ed a petition for a writ of habeas corpus
Hirota's was one of hundreds of "origi-
me Court by Axis prisoners convicted
military tribunals—all of whom would
as review directly in the lower courts
fined within the territorial jurisdiction
ourt had previously denied every other
period without argument or an opin-
with Justice Jackson recusing himself
emberg Trials.[159]

d that the Court should consider the
nself from participating in any further
ng oral argument, the Supreme Court
nying the applications for relief. The
tribunal that had convicted and sen-
rs was "not a tribunal of the United
or authority to review, to affirm, set
entences [it had] imposed." In estab-
ced the prisoners, the Court added,
of the Allied Powers."[161] Thus, a U.S.
ar the prisoners' challenge and could
whether the IMTFE had legal author-
ses or whether the tribunal itself was
nged at Tokyo's Sugamo Prison three
sion. The Court did not decide any
the following year it refused to hear
ons handed down by war crimes trials

• •

The Bush administration would rely he
after 9/11. *Quirin* and *Yamashita*, the a
ing alleged terrorists indefinitely as "e
military commissions rather than th
ways, *Eisentrager* and *Hirota* both se
"enemy combatants" access to the cou
istration argued, meant that foreign n
the United States had no right to habea
had no access to habeas corpus if his d
"source of authority," such as a UN Se
prisoner was under the United States' j

Whether federal courts could exerc
as *Eisentrager* and *Hirota* reflected a
constitutional rights outside the Unite
stitutional guarantees, such as habeas
tion under law, constrain U.S. action a
ited to the United States, at least insofa
Eisentrager and *Hirota* addressed onl
that would be pivotal in resolving legal
ers in the "war on terrorism" and to th
the post-9/11 global detention system.

eavily on these World War II–era cases
dministration argued, justified detain-
enemy combatants" or trying them in
e regular federal courts. In different
rved as the basis for denying alleged
rts altogether. *Eisentrager*, the admin-
ationals arrested and detained outside
as corpus; *Hirota* meant that a prisoner
etention was based on an international
ecurity Council resolution, even if the
power and control.
ise habeas corpus review in cases such
larger debate over the application of
d States. In other words, did basic con-
corpus, due process, and equal protec-
broad? Or were those guarantees lim-
r as foreign nationals were concerned?
y part of this larger debate—a debate
l challenges to the treatment of prison-
e role of habeas corpus in confronting

The Seeds of a Globa

At the time the United States
to whether the Constitution applied
stitution's framers focused inward on
form of government.[1] Although they
tary action overseas, they did not en
military power, let alone its political
would be projected beyond the countr
Nor could they foresee how law enfor
take international operations in area
terrorism.

History, however, also provides su
the Constitution. The Constitution's
protecting individual liberty from arb
Consequently, they established the Bil
Louis Henkin has called a "universal
that ideology was far from its full rea
and non-property-owning males did
civil society.[2] James Madison, for exa
Rights "expressly declare the great rig
ing an "us" versus "them" dichotomy.[3]
suspicious of executive power. Having
wanted to protect against the exercise
system of government that they were
individual liberty and checks on gov
inclusion of a habeas corpus guarante
tations on its suspension. They simil
of Rights, which helped secure such b
deprived of life, liberty, or property wi
to a speedy trial by jury for alleged cri
on a person's citizenship status or loca

6

al Constitution

was founded, little thought was given outside its territory. Instead, the Con- developing and securing a republican contemplated the possibility of mili- vision the extent to which America's , commercial, and cultural influence, y's shores over the next two centuries. cement would one day have to under- s from narcotics trafficking to global

pport for a more expansive vision of framers were driven by the ideal of itrary and lawless government action. ll of Rights to embody what Professor human rights ideology," even though alization in 1789 when women, slaves, not share equally in political power or mple, insisted that his proposed Bill of nts of mankind," thus implicitly reject- Madison and others also were deeply just thrown off the yoke of a king, they e of monarchical authority in the new creating. Their desire to ensure both vernment power helped motivate the ee in the Constitution as well as limi- arly inspired the inclusion of the Bill asic protections as the right not to be thout due process of law and the right mes.[4] None of these protections turned tion.[5]

The first skirmish between competi
of noncitizens (or "aliens") took place
lution and ensuing war in Europe ha
and the divisions were growing incr
the importation of radical Jacobin ide
In response to these fears, Congress e
Adams's administration giving the pre
in the United States. The Alien Ener
detain and expel aliens who were citiz
nation with which the United States w
Act swept more broadly, authorizing
alien he deemed "dangerous to the pea
third statute, the Sedition Act, made it
and malicious writing" against the gov

The Alien Friends and Sedition a
Federalists who supported the Alien
the social compact (citizens) could de
bers (aliens) who did not enjoy the c
only protections that aliens could clain
international law of nations afforded.[8]
licans vigorously opposed the acts, c
Kentucky resolutions as unconstitution
and statesman Edward Livingston wr
us, are entitled to the protection of ou
they owe a temporary allegiance to c
accused of violating this allegiance, Li
interpose in the case of a citizen mu
tion, and if found guilty [aliens] are li
Madison incorporated these ideas of
the Virginia legislature defending the
between an alien's allegiance to the U
entitlement to the protection of its law
be parties to the Constitution as citizen
them from its coverage.[11] "If aliens had
might not only be banished," he wrote,
a jury or the other incidents to a fair tr

The Alien Friends Act expired in 1
ther was ever renewed. By contrast,
rights protecting individuals from arbi

ing visions of the constitutional rights
e during the 1790s. The French Revo-
ad split America along partisan lines,
easingly bitter. The Federalists feared
eas and a possible invasion by France.
enacted several measures during John
esident broad powers over noncitizens
mies Act authorized the president to
ens, subjects, or residents of an enemy
vas at war. The so-called Alien Friends
the president to detain or expel any
ace and safety of the United States."[6] A
t a crime to publish "false, scandalous,
vernment or its officials.[7]

cts provoked heated debate. Leading
Friends Act argued that members of
efine and limit the rights of nonmem-
compact's protections or benefits. The
n, they maintained, were those that the
On the other side, Jeffersonian Repub-
ondemning them in the Virginia and
nal.[9] As the prominent American jurist
ote, "Alien friends . . . residing among
ur laws, and . . . during their residence
our Government." If alien friends are
vingston added, "the same laws which
st determine the truth of the accusa-
able to the same punishment."[10] James
equal treatment in his 1800 report for
e resolutions. He emphasized the link
nited States, on the one hand, and his
ws, on the other. That aliens might not
ns were, Madison said, did not exclude
no rights under the Constitution, they
, "but even capitally punished, without
rial."[12]

800, along with the Sedition Act; nei-
Madison's belief that constitutional
trary and unlawful government action

do not necessarily depend on an indi
the political community gathered supp
by the Supreme Court to varying de
in response to an anti-immigrant bac
noncitizens were entitled to equal pro
crime, to a jury trial under the Fifth a
tution.[14] Over time, the Court has also
States are entitled to other constitution

The separate question of whethe
America's borders first arose in the ni
westward expansion. The debate cent
for newly acquired territories, proced
nal justice, and the hotly contested is
an approach based on membership in
tion was created by the people of the
not extend beyond the states.[17] But th
vision disagreed. John Marshall, for ex
tion applied throughout the "America
over which the United States exercised
sions before the Civil War, the Supreme
applicability to newly acquired western
of Columbia, where the Constitution
power without conferring statehood.[2
sion in this regard was the ignominio
case"), in which the Court ruled that
protected a slave owner's right to his p

When America began to acquire an
century, the courts had to address wh
action abroad. In general, courts ach
constitutional rights even when U.S.
affirmed the application of certain fun
United States' overseas colonial posses

In 1891, for example, the Supreme
American seaman who had been tried
in Japan for a murder committed abo
harbor. The seaman, John M. Ross, fil
ing the conviction following his retur
been brought to serve out his sentence
constitutional rights by denying him a

vidual's citizenship or membership in
port over time and was later endorsed
grees. In the late nineteenth century,
cklash, the Supreme Court ruled that
tection of the law[13] and, if accused of a
nd Sixth Amendments to the Consti-
o made clear that aliens in the United
nal protections as well.[15]
er the Constitution applied beyond
neteenth century during the period of
tered on the structure of government
dural components of civil and crimi-
sue of slavery.[16] Those who advocated
n the polity argued that the Constitu-
states for the states and therefore did
ose who espoused a more nationalist
xample, maintained that the Constitu-
an empire," extending to any territory
d sovereign power.[18] In a series of deci-
he Court recognized the Constitution's
n territories,[19] as well as to the District
had granted Congress full legislative
[20] Ironically, the most important deci-
ous *Scott v. Sandford* (the "Dred Scott
the Constitution's Due Process Clause
roperty in the territories.[21]
overseas empire in the late nineteenth
ether the Constitution applied to U.S.
knowledged territorial limitations on
citizens were in foreign countries but
ndamental constitutional rights in the
sions.
e Court considered the appeal of an
and convicted by an American consul
oard an American ship in a Japanese
ed a habeas corpus petition challeng-
rn to the United States, where he had
. Ross argued that the trial violated his
grand jury indictment and a jury trial.

The Supreme Court rejected his claim
re Ross, Justice Stephen Johnson Field
ited to the United States and "can have
a result, he said, the Constitution's pro
others within the United States, or wh
offenses committed elsewhere, and no
abroad."[22] Ten years later, the Court u
citizen to Cuba to face trial for embe
military occupation of Cuba after the
Cuban law did not guarantee him the
tion. The Court explained that Americ
relation to crimes committed without
against the laws of a foreign country."[23]

Cases like *Ross* and *Neely* were the
and expanded military presence in fore
acquiring new possessions for itself d
troops helped overthrow the Hawaiian
controlled provisional government tha
tion five years later.[24] In addition, the U
of Spain's colonial empire, including P
following the conclusion of the Spani
also obtained control over Guantánam
for terminating its occupation of Cu
imperial power, questions soon aros
States' Constitution would apply to its

The Supreme Court addressed this
lectively known as the "Insular Cases."
Court's 1901 decision in *Downes v. Bidw*
on oranges imported from Puerto Ric
ing the Court to address whether Con
requirement of uniform taxation in P
the tax, members of the Court staked
The controlling opinion by Justice He
plurality but not a majority of the Cou
by the Constitution in taxing Puerto R
bership approach from the debate ove
lier, Brown explained that the Constitu
United States, as a union of States, to
of the states."[27] Puerto Rico, he said, wa

. Writing for a unanimous Court in *In*
stated that the Constitution was lim-
e no operation in another country." As
tections extended "only to citizens and
o are brought there for trial for alleged
t to residents or temporary sojourners
pheld the extradition of an American
zzlement during America's temporary
Spanish-American War, even though
same protections as the U.S. Constitu-
ca's constitutional guarantees have "no
t the jurisdiction of the United States
[3]

product of America's growing empire
eign countries. But America also began
during this period. In 1893, American
government and establish a new U.S.-
at paved the way for Hawaii's annexa-
United States acquired significant parts
uerto Rico, the Philippines, and Guam
ish-American War. The United States
no Bay during this period, in exchange
ba.[25] As the United States became an
e over whether and how the United
newly acquired territories.

question in a series of decisions col-
" The first and most important was the
well.[26] *Downes* involved a duty imposed
o by a merchant in New York, requir-
ngress was free from the constitutional
uerto Rico. In assessing the legality of
d out three broadly defined positions.
enry Billings Brown, which attracted a
urt, held that Congress was not bound
Rico. Embracing the logic of the mem-
r the Alien Friends Act a century ear-
ution was "created by the people of the
be governed solely by representatives
as a territory "appurtenant and belong-

ing to the United States, but not a par
held out the possibility that by legislat
benefits of membership to newly acqu
no force in those territories until Cong

The elder Justice John Marshall H
maintained that whenever the United
ritory, the Constitution followed, rega
believed that as "the supreme law of t
all peoples, whether of States or territ
of the United States."[29] If the United Sta
jurisdiction over it, the Constitution
there, regardless of whether there had
branches to accord statehood to that te
the popular credo "The Constitution fo

The third position, staked out by Jus
a compromise. White divided territori
Congress had made part of the Unite
states or incorporating them as U.S.
had not incorporated. The Constituti
to admitted or incorporated territori
held a different status. Although the
tories (including unincorporated terri
Constitution's provisions applied every
explained, the application of a particul
corporated territory required an inqu
and its relation to the United States."[3
constitutional restrictions were of "so f
be transgressed."[31] White's view ultimat
and served as the basis for a series of
addressed the application of particular
porated territories.[32]

The Insular Cases have been criti
toward "native islanders" whom Unit
ciate American values and institution
cited Puerto Rico's different origins,
extend the constitutional right to a jur
the Insular Cases also embodied the id
abroad must be constrained by certai
Insular Cases thus did not hinge the

t of the United States."[28] While Brown
tive action, Congress could extend the
uired territories, the Constitution had
gress did so.
Harlan took the opposite position. He
States acquired sovereignty over a ter-
rdless of that territory's status. Harlan
he land," the Constitution applied "to
ories, who are subject to the authority
ates governed a territory and exercised
accordingly applied to all the people
been a determination by the political
erritory. This view was encapsulated by
ollows the flag."
stice Edward Douglass White, reflected
ies into different categories: those that
ed States by either admitting them as
territories, and those that Congress
ion's full protections, he said, applied
es, while "unincorporated territories"
Constitution applied to all U.S. terri-
tories like Puerto Rico), not all of the
ywhere and at all times. Instead, White
ar constitutional provision to an unin-
iry "into the situation of the territory
[30] White also pointed out that certain
fundamental a nature that they cannot
tely captured the majority of the Court
decisions in the coming decades that
r constitutional provisions to unincor-

icized for sanctioning racist attitudes
ed States considered unable to appre-
s.[33] The Supreme Court, for example,
culture, and language in refusing to
y trial to the island's inhabitants.[34] But
dea that America's projection of power
n basic constitutional principles. The
Constitution's extraterritorial applica-

tion on formal constructs such as citi
actual relationship between the United
determine which constitutional provis

While the Insular Cases endorsed
beyond America's shores, they addr
United States possessed and governe
ment in *Ross*—that the Constitution h
remained on the books. But by the en
riality rule seemed increasingly archai
with military forces, corporations, an
world. The type of colonial arrangeme
ist era of the late nineteenth and early
other, more subtle forms of control an
enduring global presence, including its
bases and service members, had create
protections abroad.[35]

In 1957, the Supreme Court revisit
application in foreign territory. In *Re*
vicemen challenged the legality of th
murdering their husbands in England
that they were bound by *In re Ross* but
a plurality of four, Justice Hugo Black
the defendants could not be subject t
tried by a jury of their peers, as the Fif
stitution required. Black rejected the
ited strictly to U.S. territory. "The Un
Constitution," he explained. "Its powe
It can only act in accordance with all t
tution."[37] Black also rejected the sugg
judges could limit the Constitution's a
"fundamental."[38] "When the Governme
is abroad," Black said, "the shield whic
the Constitution provide to protect his
away just because he happens to be in
first articulated by Madison and other
early years of the republic, Black beli
subject defendants to its criminal laws
protections that accompany enforcem
were located in a foreign land.[40]

izenship. Instead, they focused on the
l States and the territory in question to
ions applied under the circumstances.
the extension of constitutional rights
essed only those territories that the
d. The Supreme Court's earlier state-
had no force in foreign territory—still
d of World War II, *Ross*'s strict territo-
c. America had become a superpower,
d other institutions spread across the
nts that prevailed during the imperial-
twentieth centuries had given way to
d influence. America's expanding and
s growing number of overseas military
d new reasons to extend constitutional

ted the question of the Constitution's
eid v. Covert, two widows of U.S. ser-
heir convictions by courts-martial for
and Japan.[36] Six justices refused to find
divided in their reasoning. Writing for
said that as U.S. citizens and civilians,
o court-martial but instead had to be
th and Sixth Amendments to the Con-
notion that the Constitution was lim-
ited States is entirely a creature of the
r and authority have no other source.
the limitations imposed by the Consti-
estion made in the Insular Cases that
pplicability to provisions they deemed
ent reaches out to punish a citizen who
ch the Bill of Rights and other parts of
life and liberty should not be stripped
another land."[39] Building on concepts
framers of the Constitution from the
eved that the United States could not
while denying them the constitutional
ent of those laws, simply because they

Justice Felix Frankfurter and the sec
grandson of the elder Justice Harlan fi
curring opinions. Both agreed that th
territory. But, they said, that does no
necessarily apply when the United St
and Harlan advanced a more contex
explained, was not whether the Cons
everywhere) but whether the applicati
was "impracticable" or "anomalous" u
Law School professor Gerald Neuman
the possibility of more widespread co
viously been afforded but at the cost
the idea that citizenship necessarily d
tion abroad, since in many instances
anomalous to apply a particular cons
to an American citizen. On the other h
can citizen might not always be able t
of Rights when outside the United Sta
constitutional provisions would depen

In subsequent decisions, the Supre
jury trial guarantee to civilian deper
prosecuted for noncapital crimes and
forces overseas, again rejecting the id
constitutional rights.[43] Lower courts, i
tional safeguards applied abroad.[44] Bu
can citizens, they did not address wh
tution extended to foreign nationals
presented in World War II era cases lik

The opportunity to address that ques
those involving territories where the Un
jurisdiction but not formal sovereignty
ment actions in foreign countries and o
in these cases did not provide a definiti
port for the proposition that, at minim
applied outside the United States to citi

After World War II, the United States c
eral territories without political sover
federal courts built on the logic of the

cond Justice John Marshall Harlan (the rom the Insular Cases) each filed con- e Constitution was not limited to U.S. ot mean all constitutional protections ates acts abroad. Instead, Frankfurter ctual approach. The question, Harlan titution applied abroad (for it applied ion of a particular constitutional right nder the circumstances.[41] As Harvard has observed, this approach "held out onstitutional protection than had pre- of diluting its content."[42] It undercut letermined the Constitution's applica- it would be no more impracticable or stitutional protection to an alien than hand, it suggested that even an Ameri- o claim the full protections of the Bill tes, since the application of particular d on the circumstances.

me Court extended the Constitution's ndents of military members overseas d to civilian employees of the armed dea of strict territorial limitations on n turn, recognized that other constitu- t because these cases involved Ameri- ether, and to what extent, the Consti- outside the United States—the issue ke *Eisentrager* and *Hirota*.

stion instead arose in two types of cases: nited States exercised actual control and ; and those involving U.S. law enforce- n the high seas. Although the decisions ive resolution, they offered further sup- num, fundamental constitutional rights zens and noncitizens alike.

continued to exercise control over sev- reignty. In resolving various disputes, Insular Cases to find that fundamental

constitutional rights applied to nonciti
these territories were not formally par

The Panama Canal Zone provides
States acquired control of the ten-mi
between the United States and the ne
States permanent, exclusive, and tota
ultimate sovereignty over the territo
States with "all the rights, power and
the United States would possess and e
territory [of the Canal Zone] . . . to the
Republic of Panama of any such sover
treaty created a U.S. enclave to serve a
ing and maintaining a canal across the
exercised jurisdiction over the Canal Z
was returned to Panama.[47]

Early on, Congress created a distric
and criminal cases, with review to a f
provided for a bill of rights that was n
the Bill of Rights in the U.S. Constitu
court and the appeals court were sul
Canal Zone to scrutiny under the Co
States' territorial control over the Cana
of the affected individual, judges consi
tal constitutional protections, includi
under law, applied to both American c
U.S. Court of Appeals for the Fifth Cir
tion over the Canal Zone, explained, "
Zone and not the citizenship of the de

Judicial decisions arising from the
Territory of the Pacific Islands in Mi
that fundamental constitutional gua
control, regardless of the nature of th
that control was exercised. After libera
during World War II, the United States
Micronesia. Here, the operative agreem
ship granting the United States "full
and jurisdiction over the Territory"
degree of control similar to the Canal
Department of the Interior, which as

zens as well as to citizens, even though
t of the United States.
s an instructive example. The United
le-wide Canal Zone in 1903. A treaty
w republic of Panama gave the United
l control but reserved the host state's
ry.[45] The treaty provided the United
authority within the zone . . . which
exercise, if it were the sovereign of the
e entire exclusion of the exercise by the
reign rights, power or authority."[46] The
a strategic national interest: construct-
Isthmus of Panama. The United States
Zone until 1979, when the Canal Zone

t court in the Canal Zone to hear civil
federal appeals court.[48] Congress later
modeled on, although not identical to,
ution.[49] By the 1940s, both the district
bjecting U.S. actions and laws in the
onstitution.[50] Emphasizing the United
al Zone rather than the personal status
istently acknowledged that fundamen-
ng due process and equal protection
citizens and foreign nationals.[51] As the
rcuit, the appellate court with jurisdic-
It is the territorial nature of the Canal
fendant that is dispositive."[52]
United States' governance of the Trust
cronesia reflected the same principle:
rantees accompanied U.S. territorial
he political arrangement under which
ating the islands from Japanese control
s sought to retain strategic control over
nent took the form of a special trustee-
powers of administration, legislation,
without ceding formal sovereignty: a
Zone and Guantánamo Bay.[53] The U.S.
ssumed control over Micronesia from

the U.S. Navy in 1951, exercised execu
appointed judges for the trust territor
appeals in Washington, D.C.[54] In 198
Northern Mariana Islands became a
islands chose to become independen
with the United States.[55]

Before the trusteeship ended, cou
tal constitutional rights applied both
the Trust Territory, even though the
U.S. administration. In one case, for e
the District of Columbia Circuit in W
tion over cases from the Trust Territo
an inhabitant to a valuation of his p
its destruction. The appeals court rul
Claims Commission, established to ad
constitutional requirements of due pr
Insular Cases, the court found that fun
equally to foreign nationals in the Tru
subject to U.S. governing power than
tled," the court said, that "there cann
governmental authority untrammeled
law."[57] Other courts reached the same
lenges, finding, for example, that inha
sessed by nuclear weapons testing at
covered by the Constitution's takings
private property for public use withou

The question of the Constitution's
ereign U.S. territory also arose at the
during the early 1990s when the Unit
detain asylum seekers from Haiti inte
the United States did not summarily
fleeing persecution, were brought to
ated "tent cities" encircled by rolls of
ers—men, women, and children—we
courts. Later, when thousands were
1990s, the United States took them
behind barbed wire in "safe-haven"
erecting similar camps elsewhere in
Canal Zone.[59]

tive and legislative authority and also
y, with review in the federal court of
6, the trusteeship formally ended: the
U.S. commonwealth, and three other
t while remaining in free association

rts consistently ruled that fundamen-
to U.S. citizens and to noncitizens in
territory was a foreign country under
xample, the U.S. Court of Appeals for
Washington, D.C., which had jurisdic-
ry, considered a challenge brought by
roperty made to compensate him for
ed that the locally based Micronesian
judicate such claims, was bound by the
ocess.[56] Applying the reasoning of the
damental constitutional rights applied
st Territory because they were no less
the American citizens there. "It is set-
ot exist under the American flag any
by the requirements of due process of
conclusion in adjudicating legal chal-
bitants of the Marshall Islands dispos-
Bikini Atoll and Enewetak Atoll were
clause, which prohibits the taking of
t just compensation.[58]
application to noncitizens in nonsov-
U.S. Naval Base at Guantánamo Bay
ed States began using Guantánamo to
rcepted on the high seas. Those whom
return to Haiti, from where they were
Guantánamo and held in newly cre-
razor-barbed wire. The asylum seek-
re denied attorneys and access to U.S.
intercepted fleeing Cuba in the mid-
to Guantánamo and confined them
camps. The United States also began
the region, including in the Panama

Lawsuits challenging America's int
and New York. Since the asylum seek
held outside the United States, the go
enforceable in any court. The U.S. Cou
agreed and rejected the Florida-based
could not challenge their interdiction
procedures.[60] Adopting a line of reaso
9/11, the appeals court said that becaus
foreign nationals outside the United St
are cognizable in the courts of the Un
solely on "the American tradition of
for their protection and safety.[61] The N
ter. The U.S. Court of Appeals for the
tion over those challenges, affirmed a
be provided access to counsel before b
ernment's contention that the refugee
protections, the court emphasized Am
tánamo, finding that it would be neith
accord them fundamental constitution

The Supreme Court ultimately uph
direct return policy, finding that the
Status of Refugees and the Immigratio
the United States from summarily ret
the high seas without first determining
status.[63] The Supreme Court, however
application of statutory and treaty-ba
and interdicted on the high seas; it
held indefinitely by the United States a
ons under its control, where they had
detention and interrogation, could inv

The United States' decision to interc
vated partly by concerns about the dom
ing refugee crisis. The United States r
denied individuals any legal protection
to prolonged detention without a fair p
also embraced a legal position without
Johnson Jr. underscored the position's i
Haitian refugees could not be detained
to be released: "If the Due Process Cla

terdiction policy were filed in Florida
kers were foreign nationals seized and
overnment argued, they had no rights
urt of Appeals for the Eleventh Circuit
d challenges, finding that the refugees
or the government's asylum screening
ning that would become familiar after
se aliens detained at Guantánamo were
tates, they "are without legal rights that
nited States" and must instead depend
humanitarian concern and conduct"
New York–based challenges fared bet-
e Second Circuit, which had jurisdic-
lower court's ruling that the refugees
being repatriated. In rejecting the gov-
es had no judicially enforceable legal
nerica's "exclusive control" over Guan-
er "impracticable" nor "anomalous" to
nal rights.[62]

eld the United States' interdiction and
1951 UN Convention Relating to the
on or Nationality Act did not prohibit
turning to Haiti individuals seized on
g whether they were entitled to refugee
r, focused only on the extraterritorial
sed protections to those fleeing Haiti
did not consider whether individuals
at Guantánamo or other offshore pris-
been brought by the United States for
oke the Constitution's protections.

ept those fleeing persecution was moti-
mestic and political effects of a worsen-
esponded with extreme measures that
ns or access to U.S. courts and that led
process as well as to cruel treatment. It
limits. New York district judge Sterling
mplications in ruling that HIV-infected
d indefinitely at Guantánamo and had
ause does not apply to the detainees at

Guantánamo," he said, the governmer
to starve or beat them, to deprive ther
without process to their persecutors, or
the color of their skin."[64] Johnson's war
the United States would exercise its "
law-free zones to imprison people in se
to the courts, and subject them to tortu

The extraterritorial application of the
gation in connection with expanding U
high seas and in foreign countries. By
law had become increasingly global i
on combating the narcotics trade and
Increased surveillance, searches, and a
ca's borders raised the question of whet
the constitutional limitations that appl
and its progeny demonstrated that An
Constitution when abroad, the Supre
these rulings to foreign nationals, and
decisions on the Constitution's extrat
This issue came before the Supreme C
of Mexican drug dealer Rene Martin V

Verdugo-Urquidez's case began w
violations of U.S. law and transferred
the U.S.-Mexico border. The followin
detained in San Diego, agents from t
with Mexican police, searched Verdug
a warrant and found evidence of ma
brought criminal charges against Verd
California. Verdugo-Urquidez moved
his home and to prevent its introduc
dence had been seized in violation of
against unreasonable searches and seiz

In *United States v. Verdugo-Urquid*
that the Fourth Amendment did not
dugo-Urquidez's claim. Writing for a
of a majority), Chief Justice William
nationals did not have any Fourth An
government action abroad.[68] Imposing

nt "would have discretion deliberately
n of medical attention, to return them
r to discriminate among them based on
rning would prove prescient: after 9/11,
'discretion" at Guantánamo and other
ecret, deny them due process and access
ure and other abuse.

Constitution was also the focus of liti-
U.S. law enforcement operations on the
the 1970s and 1980s, federal criminal
n scope as the United States focused
l other international criminal activity.
arrests by U.S. officials beyond Ameri-
ther those officials were constrained by
lied domestically. While *Reid v. Covert*
merican citizens were protected by the
me Court had never clearly extended
lower courts had rendered conflicting
erritorial application to noncitizens.[65]
Court in 1990 through the prosecution
Verdugo-Urquidez.[66]

when Mexican police seized him for
him to the custody of U.S. officials at
ng day, while Verdugo-Urquidez was
the Drug Enforcement Agency, along
go-Urquidez's home in Mexico without
rijuana smuggling. The United States
ugo-Urquidez and transported him to
to suppress the evidence taken from
tion at trial. He claimed that the evi-
the Fourth Amendment's prohibition
zures.[67]

ez, however, the Supreme Court ruled
apply to the search and rejected Ver-
a plurality of four justices (one short
H. Rehnquist maintained that foreign
mendment rights with respect to U.S.
g constitutional restraints on how U.S.

officials treat foreign nationals outside
would have "significant and deleterio
in conducting activities beyond its bo
he said "we live in a world of nation-s
be able to function effectively in the
passage that foreshadowed the argum
Guantánamo detainees and other fo
remarked that any constraints on U.
must come from the political branche
treaty, or legislation, and not from the
of constitutional safeguards.[71] Rehnqu
to membership theories of constitutio
law enforcement and military operatio
which he believed should be conducte

Justice William J. Brennan Jr. took
opinion joined by Justice Thurgood Ma
the United States acted to enforce its c
nationals to its pains and penalties, the
accompany that extraterritorial exerci
prosecute and punish Verdugo-Urqui
had "treated him as a member of our c
ally, one of the governed."[73] Brennan vi
constitutional rights as essential not o
embodied in the Bill of Rights but also
of law. How, Brennan questioned, coul
ernments for acting lawlessly when it
of its own Constitution merely becaus

Justice Anthony M. Kennedy cast
positioning himself between these tw
nedy emphasized that no "rigid and
tion's operation abroad. He instead dr
explaining that in determining the e
rights, a court must ask whether the
tional provision is "impracticable" or "
The absence of local judges or magistr
with foreign officials, made it impracti
to the search of a nonresident alien's
cautioned, other constitutional prote
depending on the circumstances. In t

e the United States, Rehnquist warned,
us consequences for the United States
oundaries."[69] "For better or for worse,"
states in which our Government must
company of sovereign nations."[70] In a
nents against habeas corpus rights for
reign nationals after 9/11, Rehnquist
.S. action against noncitizens abroad
es, through diplomatic understanding,
e courts through judicial enforcement
uist's approach looked both backward
onal rights and forward to expanding
ons beyond the United States' borders,
d free of constitutional constraints.
the opposite approach in a dissenting
arshall. Brennan maintained that when
riminal law abroad, subjecting foreign
e protections of the Constitution must
se of American power.[72] By seeking to
idez, Brennan said, the United States
ommunity" and made him "quite liter-
ewed the extraterritorial application of
nly to the idea of fundamental fairness
o to America's commitment to the rule
d the United States criticize other gov-
refused to adhere to the requirements
e it was acting outside its borders?[74]
t the pivotal fifth and deciding vote,
o poles in a concurring opinion. Ken-
abstract rule" governed the Constitu-
ew on Justice Harlan's opinion in *Reid*,
xtraterritorial reach of constitutional
application of a particular constitu-
"anomalous" under the circumstances.
ates, along with the need to cooperate
cable to apply the Fourth Amendment
s property in Mexico.[75] But, Kennedy
ections might apply extraterritorially
his important opinion, Kennedy thus

signaled his resistance to bright-line r
ible, case-by-case approach designed
particular constitutional safeguard to a

Whether, and to what extent, the C
als outside the United States became
reaching ramifications for U.S. dete
Habeas corpus actions challenging the
combatants" would spark intense lega
Supreme Court decisions. Those actio
United States could deny individuals
Constitution by holding them beyond
tions about the scope of the presiden
nitely without charge, to use military c
for war crimes, and to engage in tortu
challenges in part 3.

rules and his support for a more flex-
to weigh the feasibility of applying a
a particular situation.[76]

Constitution applied to foreign nation-
a critical question after 9/11, with far-
ntions at Guantánamo and beyond.
military detention and trial of "enemy
l battles and produce three landmark
ons would ask, at bottom, whether the
the basic protections of its laws and
its shores. They would also raise ques-
t's power to detain individuals indefi-
commissions to try suspected terrorists
ure and other abuse. We turn to those

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Part 3

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A Modest Judicial In

The First Supreme Court "Enemy Combatant" Decisio

On April 20, 2004, the Supr
v. Bush, the first Guantánamo detain
a week later, on April 28, the Court h
"enemy combatants" Yaser Hamdi and
Minutes II broadcast the first pictures
menting the torture and other mistreat
The pictures validated the concern th
Hamdi's argument that morning: that
ing claims of executive power from ha
insulate the worst forms of illegal deter
The U.S. solicitor general, Paul D. Cle
cern, explaining that the "judgment o
interrogation of prisoners is that "the
somebody or try to do something alon
Ghraib, however, told a different stor
scored the potential dangers of blindly
the importance of habeas corpus as a c

Rasul consisted of two separate acti
lower courts. One, *Al-Odah v. United S*
als; the other, *Rasul v. Bush*, involved
lian citizen.[4] Although of different nati
facts in common: all had been impriso
all were being held incommunicado; a
a lawyer and to the courts. Their hab
innocent of any wrongdoing and that
unlawfully. The Kuwaitis' habeas petit
to Afghanistan and Pakistan as volunt

7

ntervention

ns

reme Court heard argument in *Rasul* ee case to reach the Court.[1] Just over eard argument in the cases of alleged d Jose Padilla.[2] That same evening, *60* from Iraq's Abu Ghraib prison docu- ment of prisoners by the United States. hat several justices had voiced during t by exempting the president's sweep- abeas corpus review, the Court would ntion and abuse from judicial scrutiny. ment, had sought to assuage this con- f those involved" in the detention and e last thing you want to do is torture ng those lines."[3] The pictures from Abu y and told it graphically. They under- y trusting the executive and reinforced check on illegal government action.

ions that had been consolidated in the *States*, involved twelve Kuwaiti nation- two British citizens and one Austra- ionalities, the detainees had important oned at Guantánamo since early 2002; and all had been denied any access to beas petitions asserted that they were the United States was detaining them tions said that the detainees had gone teers to provide humanitarian aid and

had been seized by local villagers in e
to the United States. The British detai
had traveled to Pakistan to attend a r
continue their computer education.

The issue before the Supreme Cou
allegations against the men were tru
courts have the power to consider the
mine whether there was a legal basis f
would control the outcome not only fo
but also for the more than six hundr
Guantánamo without judicial process.
any, of the federal courts in reviewing
offshore prisons.

Both the district and appellate co
adopting the government's argument t
sovereign territory of the United States
constitutional protections. The lower
government's argument that the detain
or the Geneva Conventions. But they d
role in reviewing those detentions or e
prisoners might have. Instead, they sa
prisoners at Guantánamo remained a
not the courts, to decide.

The Bush administration relied p
arguing that it established a categoric
corpus review over the detention of a
abroad.[5] The fact that U.S. control ove
as one Supreme Court justice noted, "e
tected, made no difference because Gu
U.S. territory and thus foreign nation
courts.[6]

Eisentrager, however, differed from
important respects. The prisoners in
lished and limited category of "enem
of an enemy nation at war with the Un
about their enmity" because they all a
German government.[7] By contrast, mo
from allied or neutral nations. Furthe
the detainees maintained that they w

xchange for bounties and turned over
nees' petitions explained that the men
marriage ceremony, visit relatives, and

rt was not whether the government's
e. It was more basic: did the federal
eir habeas corpus petitions and deter-
or imprisonment? The Court's answer
r the detainees in the case before them
ed other prisoners then being held at
. It would also affect the future role, if
challenges to U.S. detentions at other

urts had ruled against the detainees,
that foreign nationals held outside the
had no right to habeas corpus or other
courts did not expressly endorse the
nees had no protections under U.S. law
did conclude that federal judges had no
nforcing any legal protections that the
id that the detention and treatment of
matter for the political branches, and

rincipally on *Johnson v. Eisentrager*,
al rule barring the exercise of habeas
ny foreign national captured and held
er Guantánamo was so extensive that,
even . . . the Cuban Iguana[s]" are pro-
antánamo remained outside sovereign
nals there had no right to access U.S.

n the Guantánamo detainee cases in
Eisentrager fell within the well-estab-
y aliens"—that is, citizens or subjects
nited States. There also was "no fiction
dmitted to actively serving the enemy
ost of the Guantánamo detainees came
rmore, the overwhelming majority of
were innocent of any wrongdoing and

were not hostile to the United States or
was the very fact in dispute. In additio
trager prisoners were held, differed fr
ated by the United States, Landsberg
Guantánamo by contrast, was located
exclusive jurisdiction and control of th
over, the courthouse doors were not
the Supreme Court went on to conside
tary commission was illegal, ultimately

There was still another important
ers had been captured during a con
the enemy was clearly defined, the bat
cernable. *Eisentrager* was thus rooted
according to defined parameters in te
how long. By contrast, at Guantánamo
to imprison people in a "war" withou
loosely defined enemy. As long as the
had some connection to al Qaeda, the
ever tenuous, that person could be hel
trial, and without a hearing. There w
armistice to mark the end of this new
flicts. Instead, the "war on terrorism"
said it was over, and the president wa
detentions it justified—would last for g

These differences influenced the S
highlighting the importance of habeas
utive action. Yet the Court ultimately
grounds rather than overruling it or g
constitutional questions it raised. *Eisen*
the Court's earlier decision in *Ahrens*
pus statute required the prisoner's pr
ritorial jurisdiction.[9] *Ahrens*, however
v. 30th Judicial Circuit Court of Kentuc
the habeas statute to require only the
court's territorial jurisdiction, and not
held that because the writ of habeas c
by commanding him to justify the pr
prisoner himself, a district court acts
under the habeas statute as long as the

r its allies. In other words, their enmity
on, Landsberg Prison, where the *Eisen-*
om Guantánamo Bay. Although oper-
g was located in occupied Germany;
in territory under the long-term and
he United States. In *Eisentrager*, more-
entirely closed to the prisoners, since
er their claim that trying them by mili-
y rejecting it on the merits.[8]
t distinction. The *Eisentrager* prison-
flict between nation-states, in which
ttlefield recognizable, and the end dis-
in a world in which the military acted
erms of whom it could detain and for
o, the United States claimed the power
ut spatial or temporal limits against a
e president asserted that an individual
Taliban, or an "associated" force, how-
d indefinitely without charge, without
would be no cessation of hostilities or
war, as there had been in earlier con-
" would end only when the president
s saying that this war—and hence the
generations.
Supreme Court's decision in *Rasul* by
s corpus as a check against illegal exec-
distinguished *Eisentrager* on statutory
grappling directly with the underlying
ntrager, the Court explained, rested on
s v. Clark that the federal habeas cor-
resence within the district court's ter-
, had since been overruled by *Braden*
ky and other decisions that interpreted
e jailer's physical presence within the
t the prisoner's.[10] In *Braden*, the Court
orpus acts on the prisoner's custodian
risoner's detention, and not upon the
s "within [its] respective jurisdiction"
e custodian has a sufficient connection

to the district and can be reached by s
involved circumstances different from
and detained by the military overseas.
criminal sentence in Alabama and ha
district court the detainer that Kentuc
his handover to Kentucky authorities
his Alabama sentence. But *Braden* also
courts exercised jurisdiction over habe
members confined in Guam and Kore
of the jurisdictional principles it artic
tration correctly noted that these pr
not foreign nationals, the language o
such distinctions. Thus, these precede
habeas statute extended to any prison
he or she was located, as long as the co
prisoner's jailer.

Applying the *Braden* rule, the Co
detainees could seek review under the
cial with the power to order their relea
Washington, D.C.—was subject to the j
Accordingly, there was no need to reso
in *Eisentrager*, since Guantánamo deta
statute as the basis for federal court ju

Rasul's implications transcended G
sized the nature and extent of U.S. cor
its analysis suggested the possibility o
other overseas prisons, since a court's
the prisoner's ultimate custodian (lo
than on the location of the prisoner h
this prospect with foreboding, criticiz
ion for "boldly" extending the reach
of the earth" and inviting unprecedent
time of war. Scalia also attacked the
president who had assumed, in light o
government could detain foreign nat
as they remained outside the United S
had intentionally brought prisoners to
based on an understanding of the exis
for the Court to change the rules mi

service of process.[11] *Braden,* to be sure, cases in which the prisoner is captured The prisoner in *Braden* was serving a ad sought to challenge in a Kentucky cky had lodged against him, requiring for prosecution upon completion of relied on precedents in which federal eas petitions filed by American service- a, suggesting the broader applicability culated.[12] Although the Bush adminis- ecedents involved American citizens, f the habeas corpus statute drew no nts supported the conclusion that the er in U.S. custody, regardless of where urt could exercise jurisdiction over the

ourt held in *Rasul* that Guantánamo federal habeas statute because the offi- ase—the secretary of defense, based in jurisdiction of the district court there.[13] rt to constitutional "fundamentals," as inees could rely directly on the habeas risdiction and as a source of rights.[14] uantánamo. While the Court empha- ntrol over the Guantánamo naval base, f habeas review of U.S. detentions at jurisdiction turned on its power over ocated in Washington, D.C.), rather himself. Justice Antonin Scalia viewed zing the Court in his dissenting opin- of habeas corpus "to the four corners ted interference with the executive in Court for "spring[ing] a trap" on the f precedents like *Eisentrager*, that the ionals without habeas corpus as long tates.[15] The president, Scalia observed, Guantánamo to avoid judicial review sting legal landscape, and it was unfair dstream. While Congress was free to

pass a law creating habeas corpus rev
Scalia said, nothing in the habeas sta
that review now.

Justice Anthony Kennedy issued a
judgment. He agreed that Guantánamo
pus, but he declined to adopt the majo
ute. Instead, Kennedy opted for a conte
on his earlier opinion in *Verdugo-Urqu*
first examine the particular circumsta
challenge fell "within the proper reali
realm of political authority over militar
not enter."[16] In some instances, this ca
involvement, as in *Eisentrager*, in whic
have had a clear harmful effect on the
might permit, if not invite, judicial sup
situation at Guantánamo, where prison
out charge and without an adequate pr
place that was "in every practical respe

Rasul left open important questions
ceeding look like, and what other rights
once they were before a federal judge
habeas corpus extend to prisoners held
whether at Bagram, at CIA "black sit
right dependent on federal statute and
by Congress, or was it instead ground
immune from legislative interference,
the writ? Notwithstanding these ques
It struck at a central pillar of the "wa
evade judicial review simply by impris
Major legal battles remained. But with
habeas corpus jurisdiction, Guantána
the law were over.

The same day that it issued *Rasul*, the
sion in *Hamdi v. Rumsfeld*.[19] The habeas
submitted by Hamdi's father as "next f
incommunicado and thus could not pe
Hamdi, an American citizen, had trav
2001 to do relief work and became trap

view over detentions at Guantánamo,
tute or the Constitution provided for

separate opinion, concurring in the
detainees were entitled to habeas cor-
rity's interpretation of the habeas stat-
xtual, case-by-case approach, building
idez. In Kennedy's view, judges should
ances to determine whether a habeas
m of the judicial power" or within "a
ry affairs where the judicial power may
lculus could foreclose further judicial
ch "the existence of jurisdiction would
Nation's military affairs."[17] In others, it
pervision. That, Kennedy said, was the
ners were being held indefinitely with-
rocess to challenge their detention in a
ect a United States territory."[18]
ns. What would a habeas corpus pro-
ts could Guantánamo detainees assert
e? Looking beyond Guantánamo, did
d elsewhere outside the United States,
tes," or in Iraq? And was the habeas
l thus potentially subject to restriction
ded in the Constitution and therefore
at least without a valid suspension of
stions, *Rasul* marked a turning point.
r on terror": that the president could
oning people beyond America's shores.
n the Court's ruling upholding federal
mo's days as a prison entirely beyond

Supreme Court handed down its deci-
s petition in *Hamdi* had originally been
friend" because Hamdi was being held
etition the court himself. It alleged that
veled to Afghanistan in the summer of
pped there once fighting broke out. The

petition disputed that Hamdi had rec
that he be provided access to a lawyer
tion's requirements of due process.[20] T
page affidavit signed by Michael Mob
the under secretary of defense for pol
affiliated with a Taliban military unit a
arrival in Afghanistan. Mobbs also cl
Taliban unit after the 9/11 attacks and t
the Northern Alliance. When Hamdi's
was forced to hand over his Kalashni
not base any of these allegations on fir
his review of unspecified records and
interrogations by his captors, all of whi
which the United States had refused to
own military regulations on the treatm
ment contended that federal court rev
and stopped with the Mobbs affidavi
bare-bones minimum of "some eviden
nation that Hamdi was an "enemy com
a court had to dismiss Hamdi's habeas
without ever hearing from Hamdi him

Robert G. Doumar, the Virginia dis
been assigned, refused to countenance
Doumar criticized the generic and hear
ing it "little more than the governmen
Defense Department to give Hamdi acc
ernment to turn over, for the court's rev
statements of the Northern Alliance
documents bearing on the legality of
exercised his habeas corpus powers to
could determine whether there was a le

Before any hearing could go forwar
protesting the district court's interfere
ers. The U.S. Court of Appeals for the F
and reversed. The Fourth Circuit rule
did not immunize him from military
his country and its allies in a foreign t
found that Hamdi was not entitled to t
citing the burdens on the military of

eived military training and demanded
and a hearing that met the Constitu-
he government responded with a two-
bbs, a self-identified special adviser to
licy. According to Mobbs, Hamdi was
nd received weapons training after his
aimed that Hamdi remained with his
hat his unit engaged in combat against
unit surrendered, Mobbs said, Hamdi
ikov assault rifle. Notably, Mobbs did
rsthand knowledge but relied solely on
reports, including reports of Hamdi's
ich had been compiled in a situation in
o follow the Geneva Conventions or its
ment of enemy prisoners.[21] The govern-
iew of Hamdi's habeas petition started
t. As long as the affidavit provided a
ce" to support the president's determi-
mbatant," the government maintained,
s petition without further inquiry and
self.
strict judge to whom Hamdi's case had
such blind deference to the executive.
rsay nature of the Mobb's affidavit, call-
t's 'say so.'"[22] He therefore directed the
cess to his lawyers and ordered the gov-
iew, records of Hamdi's interrogations,
regarding Hamdi's capture, and other
Hamdi's detention. Doumar, in short,
create a meaningful process so that he
egal and factual basis to hold Hamdi.
d, however, the government appealed,
nce with the executive's wartime pow-
ourth Circuit agreed to hear the appeal
ed that Hamdi's American citizenship
detention for taking up arms against
heater of war.[23] The appeals court also
alk to a lawyer or to a hearing in court,
litigating the circumstances of battle-

field captures before a federal judge h
court limited its decision to what it des
American citizen in a combat zone ov
court stressed that Hamdi's continued
our historical concepts of war,"[26] a fun
cumstances of Hamdi's capture, as Juc
dissenting opinion, were not "undisp
given an opportunity to explain what
to a judge or to a properly constituted
in short, had never provided any legi
Hamdi was, in fact, a combatant who t
and its allies with a Taliban regiment i
cent aid worker in the wrong place at t

Judge Motz's analysis ultimately p
Supreme Court narrowly upheld the pr
"enemy combatant" a person allegedly
fighting alongside enemy government
allies—a person, that is, whose detent
clearly established and long-standing
resoundingly rejected the proposition
nitely without due process and therefo
cial hearing through his habeas corpu
against him.

Justice Sandra Day O'Connor wrot
ity of four justices. She determined th
dent to detain Hamdi as an "enemy c
Authorization for Use of Military For
him were true. O'Connor cited the Sup
Ex parte Quirin for the proposition tha
from military capture and detention w
own government on behalf of an ene
saboteurs in *Quirin* had been an Ame
the government's invitation to read th
Hamdi's detention as part of a global
the government's legal authority to de
in the armed conflict in Afghanistan w
open the possibility that the definition
pass other situations and fact patterns,
in *Hamdi* to individuals who were "par

alfway across the globe.[24] The appeals scribed as the undisputed capture of an erseas.[25] But no matter how much the military detention fell "neatly within damental problem remained. The cir- dge Diana Gribbon Motz noted in her puted," since Hamdi had never been he was doing in Afghanistan, whether d military tribunal.[27] The government, itimate process to determine whether took up arms against the United States n Afghanistan or instead was an inno- the wrong time.

prevailed. In its *Hamdi* decision, the resident's legal authority to detain as an captured on a battlefield where he was forces against the United States and its tion the Court said was supported by law-of-war principles. But the Court that Hamdi could be detained indefi- ore mandated that he be given a judi- us petition to challenge the allegations

e the controlling opinion for a plural- at Congress had authorized the presi- combatant" under its September 2001 rce (AUMF) *if* the allegations against preme Court's World War II decision in at American citizens were not immune when they took up arms against their emy nation. (At least one of the Nazi rican citizen.) But O'Connor declined he AUMF more broadly by endorsing "war on terrorism." Instead, she based etain on Hamdi's alleged participation with the Taliban. While O'Connor left n of "enemy combatant" might encom- she limited the definition of that term rt of or supporting forces hostile to the

United States or its coalition partners i
armed conflict against the United Sta
sized that Hamdi could not be detaine
gation, thus rejecting one of the gover
him.[29]

O'Connor, however, saved her sha
contention that it could imprison Ham
vit. A "state of war," she said, "is not a
comes to the rights of the Nation's citi
of habeas corpus could vest the exec
Unless Congress took that momento
citizen could not be detained without
minimum included a meaningful op
allegations before a neutral decision m
prisoner be provided access to his law
not allowed Hamdi until shortly befor
in his case and only then as a matter of
access could be revoked at any time.[31]

O'Connor also identified some poss
antees in order to accommodate the
of having to litigate an overseas battl
Hearsay, she said, might be the most "m
itary officers would not necessarily ha
to testify during a war.[32] O'Connor al
and properly constituted military tri
of due process for battlefield captures
was provided promptly and in the m
regulations and international law.[33] Bu
provided in the first instance by such a
court must supply an adequate proces
ing in federal court.

Two other opinions staked out broa
ernment's claim that Hamdi could be h
batant," even assuming that the allega
those opinions, Justice David Souter, al
found that the AUMF lacked the clea
indefinite detention of an American c
the mass internment of Japanese Amer
found no reason why Congress would

in Afghanistan and who engaged in an
tes there."[28] O'Connor further empha-
ed indefinitely for purposes of interro-
nment's main justifications for holding

arpest language for the government's
mdi based solely on the Mobbs affida-
blank check for the President when it
izens."[30] Only a suspension of the writ
utive with such extraordinary power.
us step, O'Connor said, an American
t due process, which at its irreducible
portunity to rebut the government's
maker. Due process also meant that a
wyers, something the government had
re the Supreme Court heard argument
f executive grace, which meant that the

sible limits on these due process guar-
potential burdens on the government
efield capture in a U.S. district court.
reliable available evidence" so that mil-
ave to travel halfway across the world
so suggested that a legally authorized
bunal might satisfy the requirements
s like Hamdi's, as long as the tribunal
anner required by applicable military
ut when the required hearing was not
a tribunal, as in Hamdi's case, a federal
ss itself through a habeas corpus hear-

ader positions, each rejecting the gov-
held by the military as an "enemy com-
tions against him were true. In one of
long with Justice Ruth Bader Ginsburg,
r statement necessary to sanction the
citizen held on U.S. soil.[34] Souter cited
rican citizens during World War II and
d have seen any need to expand exec-

utive power to deal with allegedly da
given the array of existing federal cri
tion of those suspected of plotting, s
Souter acknowledged that the AUM
military detention of soldiers captured
on customary law of war principles.
detention as an "enemy combatant" b
those very principles by holding Ham
the required military hearing, conduc
capture, to show that he was entitled t
an innocent civilian.[36] Souter, in short
the laws of war to augment his power
ately avoiding the constraints that the
that power. Or, put another way, what
habeas hearing in district court, Soute
authority for Hamdi's military detentio

The most sweeping rejection of th
came from Justice Scalia, ordinarily
jurists. Scalia's opinion, which was joi
of the Court's most liberal jurists, con
rize the military detention of an Amer
out suspending habeas corpus. Scalia's
from O'Connor's in the following resp
ply guarantee a prisoner a meaningfu
detention. Instead, habeas corpus secu
trial under the Bill of Rights unless C
suspending it.

The Constitution, Scalia said, perm
cess in only a few well-recognized in
the mentally ill and the wartime dete
precedent or basis for dispensing wi
Hamdi's case, in which the prisoner
suspicion of dangerousness. To the
enemies of state had traditionally bee
treason or other criminal offenses.[37] T
from that norm after the September 11
individuals indefinitely without trial
"enemy combatants." No longer wou
tested through the criminal process.

ngerous citizens in the United States, minal laws designed for the prosecu- upporting, or committing terrorism.[35] F could be interpreted to permit the l on a battlefield during wartime based But he refused to sanction Hamdi's ecause the administration had flouted ndi incommunicado and denying him ted close in time and place to Hamdi's o prisoner of war status or to release as t, criticized the president's reliance on as commander in chief while deliber- laws of war imposed on the exercise of O'Connor sought to remedy through a r sought to nullify by denying any legal on altogether.

he administration's position, however, one of the Court's most conservative ned by Justice John Paul Stevens, one cluded that Congress could not autho- rican citizen in the United States with- s conception of habeas corpus differed pect. Habeas, Scalia said, did not sim- l judicial inquiry into the basis for his ured the protections of a full criminal Congress took the momentous step of

nitted detention without criminal pro- stances, such as civil commitment of ention of enemy aliens. There was no th that constitutional requirement in was being held without trial based on contrary, Scalia explained, suspected en subject to criminal prosecution for The Bush administration had deviated attacks by claiming the power to hold as long as the president labeled them uld the government's accusations be Henceforth, suspects could simply be

incarcerated under the AUMF rather
their alleged crimes. Thus, whereas O
concerns of liberty and national secu
hearings to challenge their military de
rejecting the possibility of detention w
pus Suspension Clause, he said, provi
the executive from holding Hamdi wit
Congress exercised its emergency pow

Yet Scalia's opinion was also exceed
ican citizens in the United States. It
detained overseas, prompting O'Conn
a "perverse incentive" to keep Americ
them to the United States when captu
tant, Scalia's opinion did not apply to f
ace to the thousands of foreign natio
charge or due process at Guantánamo,
The right to be free from unlawful de
not a human right but a right that de
location. This right, therefore, not on
of people but also remained subject t
controlled where a prisoner would be

Clarence Thomas was the only jus
tion's position.[40] He called for a hands-
ing wartime, even when the detainee
in the United States. In his view, hab
whether the president had legal autho
combatant" and did not afford any r
tions. Thomas thus envisioned only th
Judges, he said, could not "second-gu
dent" in the "war on terrorism"[41] Tho
port on the Court. And although *Ham*
unaddressed, it repudiated the Bush a
executive detention power and reaffir
as a check against arbitrary and illegal

The third "enemy combatant" case b
Rumsfeld v. Padilla, involved the bolde
indefinite military detention of an A
States. The Court, however, avoided

than charged, tried, and punished for
'Connor sought to balance competing
rity by giving prisoners habeas corpus
tention, Scalia drew a line in the sand,
ithout trial altogether. The habeas cor-
ded the basis for that line and barred
hout charging him with a crime unless
er of suspending the writ.
ingly narrow. It applied only to Amer-
did not apply to American citizens
or to criticize the opinion for creating
an citizens abroad instead of bringing
ed outside the country.[38] More impor-
oreign nationals. It thus offered no sol-
nals held by the United States without
Bagram, and other offshore prisons.[39]
etention, under Scalia's reasoning, was
epended on a person's citizenship and
ly was confined to a limited category
o manipulation by the executive who
held.
stice to endorse the Bush administra-
off policy in reviewing detentions dur-
was an American citizen imprisoned
eas corpus guaranteed review only of
rity to hold the prisoner as an "enemy
eview of the president's factual asser-
e most minimal judicial involvement.
ess determinations made by the Presi-
mas's view, however, garnered no sup-
di, like *Rasul*, left important questions
dministration's claim of unreviewable
med the importance of habeas corpus
government action.

before the Supreme Court that term,
est assertion of presidential power: the
merican citizen arrested in the United
deciding whether Padilla's detention

was legal. Instead, it resolved the case
Padilla (or, more precisely, Padilla's l
incommunicado at the time) had filed
person and in the wrong court. Writi
Rehnquist said that a prisoner must n
his immediate custodian and in the ju
For Padilla, that meant suing the com
imprisoned (not the secretary of defe
federal district court in South Caroli
(not in New York where Padilla was c
batant"). Rehnquist acknowledged an
neither the prisoner's immediate cus
was within the jurisdiction of any dist
Court confronted in *Rasul*, in which
their physical jailers were located out
federal court. But Rehnquist refused
combatants" held inside the United St
all over again by filing a new habeas
al-Marri, whose case was pending revi
Like Padilla, al-Marri had filed his h
where he had originally been declared
case, the Central District of Illinois) ra
subsequently confined following his t
trict of South Carolina).[43] The *Padilla*
ment would be able to litigate these tw
domestic military detention power in
South Carolina and which was widely
servative federal circuit in the countr
tion of this most extraordinary asserti
one that habeas corpus was designed t
delayed as the two cases had to work
once again.

Rehnquist's decision prompted a sha
three other justices (Souter, Ginsburg
criticized the Court for mechanically
actions should be brought against the
of confinement—to a situation that c
had relaxed this rule before, and the
so again to fulfill the writ's historic pu

on narrow and technical grounds: that
awyers, since Padilla was being held
the habeas petition against the wrong
ng for a majority of five, Chief Justice
ormally bring a habeas action against
udicial district where he was confined.
mander of the navy brig where he was
nse or the president) and filing suit in
na, where the navy brig was located
riginally detained as an "enemy com-
exception to this general rule when
stodian nor his place of confinement
trict court—the very situation that the
both the Guantánamo detainees and
side the territorial jurisdiction of any
to relax that rule for alleged "enemy
tates.[42] As a result, Padilla had to start
petition in South Carolina. So did Ali
iew by the Supreme Court at the time.
abeas corpus petition in the district
d an "enemy combatant" (in al-Marri's
ather than in the district where he was
transfer to military custody (the Dis-
decision thus meant that the govern-
o test cases challenging the president's
n the Fourth Circuit, which included
y considered the most politically con-
y. It also meant that definitive resolu-
ion of executive detention authority—
o remedy promptly—would be further
their way through the federal courts

arp dissent from Justice Stevens, which
, and Stephen Breyer) joined. Stevens
applying a general rule—that habeas
jailer in the prisoner's present district
ried out for an exception. The Court
facts of Padilla's case demanded it do
rpose of affording relief from unlawful

confinement. "At stake," Stevens insiste
free society."[44] Stevens focused his ang
nations and circumvention of the leg
tration for secretly whisking Padilla f
then using that transfer to delay judici
that Padilla's lawyer had filed the habe
also rebuked the government for hold
information, warning that America "n
to resist an assault by the forces of tyra

When Padilla refiled his habeas pe
entitled to at least the same judicial
ordered for Hamdi, who had been seize
in the United States. Padilla thus woul
some opportunity to present facts in
legal question of whether Padilla cou
based on his alleged criminal activity-
president's detention powers in the "w

d, "is nothing less than the essence of a
er on the Bush administration's machi-
al process. He chastised the adminis-
rom New York to South Carolina and
ial review of his detention by claiming
as petition in the wrong court. Stevens
ing Padilla incommunicado to extract
nust not wield the tools of tyrants even
nny."[45]

tition in South Carolina, he would be
process that the Supreme Court had
ed in an overseas war zone, not arrested
d be granted access to his counsel and
his defense. But the critical, threshold
ld be subject to military confinement
—a question that cut to the core of the
ar on terror"—remained unresolved.[46]

The Battle for Habeas Corpus Con

On October 5, 2004, District ultimatum. Yaser Hamdi's case had ju Court. Under the Court's decision, the Hamdi as an "enemy combatant" only Taliban soldier who had fought against government and Hamdi's lawyers had they were negotiating an agreement fo Doumar was growing impatient with t the following week and, in advance of to turn over various documents to H allegedly made by Hamdi during his have a fair chance to rebut the accusati

The day before the hearing was sc aircraft carrying Hamdi landed in Sa mercial flight to a city on Saudi Arabia with his family. In exchange for his re American citizenship and not to travel to the United States for ten years. The that Saudi Arabia detain him. To the "considerations of United States natio continued detention." After brief ques his arrival, Hamdi was released.[2]

The resolution of Hamdi's case illu pus. For nearly three years, the Bush posed such a grave danger to the Uni without charge and without access t tion had said Hamdi was so dangero Hamdi's indefinite detention without

8

tinues

t Judge Robert G. Doumar issued an
ust been remanded from the Supreme
e government could continue to detain
if it proved that Hamdi was, in fact, a
t the United States in Afghanistan. The
d already notified Judge Doumar that
or Hamdi's return to Saudi Arabia. But
he delay. So he scheduled a hearing for
that hearing, ordered the government
Hamdi's lawyers, including statements
interrogations so that Hamdi would
ions against him.[1]
heduled to take place, a U.S. military
udi Arabia. Hamdi then took a com-
a's eastern coast where he was reunited
elease, Hamdi agreed to renounce his
l outside Saudi Arabia for five years or
agreement did not require or request
contrary, the government stated that
nal security do not require [Hamdi's]
tioning by Saudi authorities following

strated the importance of habeas cor-
n administration had claimed Hamdi
ited States that he had to be detained
to a lawyer. Indeed, the administra-
us that a federal judge must approve
even giving Hamdi himself a chance

to be heard. Hamdi's release suggests
most was not Hamdi but a hearing be
evidence and inquire into Hamdi's tre
release Hamdi to avoid that hearing ra
strength of its evidence that Hamdi wa
against the United States in Afghanis
dreds of similarly situated prisoners
based on untested and unexamined he
lighted the government's fear that its a
and exposed. The government respond
to prevent the habeas petitions from
meaningful judicial inquiry.

On July 7, 2004, just days after the
Deputy Secretary of Defense Paul Wo
Combatant Status Review Tribunal (C
CSRT purported to provide detainees
as "enemy combatants" before three
But the CSRT's real purpose was to cr
rubber-stamping earlier decisions by t
were "enemy combatants," decisions t
multiple levels of review by officers of
the CSRT presumed were "genuine and

The CSRT lacked every element o
shackled hand and foot for the entire
tunity to see most of the allegations ag
or to confront their accusers. They also
tance. Instead, they were provided with
proved worse than no representative
representatives met with a detainee or
week before the detainee's CSRT hearin
was spent discussing the nature of the
role rather than the facts of the case
CSRT hearings, the personal represent
and, in more than half the cases in wh
stantive comments, he or she advocate

The CSRT hearings amounted to n
not produce a single witness at any of t
failed to provide any documentary e
hearings in 96 percent of the cases. I

s that what the administration feared
efore a judge who would scrutinize its
eatment. The government's decision to
ised serious doubts not only about the
s a member of the Taliban who fought
tan but also its evidence against hun-
at Guantánamo who were being held
earsay allegations. In addition, it high-
abuse of detainees would be examined
ded in the Guantánamo cases by trying
going forward and thus avoiding any

Supreme Court issued *Rasul v. Bush*,
lfowitz announced the creation of the
CSRT) for Guantánamo detainees. The
a chance to contest their designation
-member panels of military officers.[3]
eate the appearance of a process while
he executive branch that the detainees
that had already been made "through
f the Department of Defense" and that
d accurate."[4]
of a fair process. Detainees remained
hearing. They were denied the oppor-
gainst them, which remained classified,
were denied all legal advice and assis-
n "personal representatives," who often
at all. In most cases, these personal
nce for no more than ninety minutes a
ng. The bulk of the meeting, moreover,
CSRT process and the representative's
itself. In more than one-third of the
tative made no substantive comments,
hich the representative did make sub-
d *against* the detainee.[5]
mini–show trials. The government did
the hundreds of CSRT hearings. It also
vidence to the detainees before their
nstead, the government relied almost

exclusively on unreliable hearsay, whi
by one detainee against another in or
The detainees, meanwhile, could not p
the tribunal deemed it "reasonably ava
tunity to present any evidence at all. T
to produce evidence showing their inn
ing every request to produce a witness
Other requests included contacting a
verify a detainee's story; locating a d
whereabouts; obtaining medical recor
ments from court proceedings that exc

In one case, the prisoner, Haji Bis
brother, an Afghan government spok
brother would verify that he had fough
the Taliban and had served as a local
in Afghanistan. The CSRT acknowledg
would be relevant but claimed that he
failed to consider letters and petitions
officers from Afghan government off
the government's claim that Bismullah

The CSRT frequently relied on ev
other coercion. Not only is such evide
justice,"[8] but it is inherently unreliable
distort the truth to stop their suffering
rogations explains, the "use of torture
technique that yields unreliable result
efforts, and can induce the source to
wants to hear."[10] Nonetheless, the CSR
that they had made statements unde
check or verify available evidence suc
confirmed the use of harsh interrogati
reliability of the statements on which i
ish detainees falsely confessed under
Osama bin Laden. One technique use
shackling." As the men explained, "W
with our hands chained between our l
over, the chains would cut into our ha
to establish the veracity of the confes
gence later determined was false.[12]

ch often consisted of statements made
rder to curry favor with interrogators.
resent evidence in their defense unless
ilable." Typically, this meant no oppor-
he CSRT denied requests by detainees
nocence 74 percent of the time, includ-
s who was not already at Guantánamo.
close family member by telephone to
etainee's passport to demonstrate his
rds from a hospital; and getting docu-
onerated the prisoner.[6]
mullah, asked the CSRT to locate his
esman. Bismullah maintained that his
nt alongside the United States to defeat
official in the transitional government
ged that Bismullah's brother's testimony
e could not be located. The CSRT also
s sent to U.S. military and diplomatic
ficials and community elders refuting
was an enemy combatant.[7]
vidence secured through torture and
ence "offensive to a civilized system of
because prisoners tend to fabricate or
g.[9] As the *Army Field Manual* on inter-
e and other illegal methods is a poor
ts, may damage subsequent collection
say what he thinks the [interrogator]
RT routinely ignored detainees' claims
er duress. The CSRT refused even to
h as medical records that would have
on methods and thus undermined the
it was relying.[11] In one case, three Brit-
torture that they were "affiliated with"
ed against them was known as "short
e were forced to squat without a chair
egs and chained to the floor. If we fell
nds." The CSRT, however, did nothing
sion—a confession that British intelli-

The CSRT also routinely relied on s
through torture and abuse. Mohamm
the most abusive interrogation tactics
thirty other detainees.[13] None of thos
al-Qahtani had named them or had an
accusations were false. The CSRT sir
from prisoners tortured at CIA "bla
chance to examine or rebut the allegat

The CSRT's procedural shortcomin
erbated by its embrace of sweeping c
defined "enemy combatant" far more
done in *Hamdi* or than the law of war c
dent's authority to detain a soldier ca
alongside Taliban forces fighting agains
the government had itself previously de
The CSRT, however, broadly authorize
was part of or who supported al Qaeda,
where in the world.[16] This support, mo
Under the CSRT, the president could c
land who writes checks to what she th
Afghanistan but [what] really is a front

The U.S. government insisted that
ants" to prevent them from "returning
the battlefield often bore little relation
own unclassified data estimated that o
detainees had actually fought on a batt
defined "returning to the battlefield"
who had "returned to militant activit
their mistreatment after leaving Guant
New York Times criticizing the United

The evidence to support the gover
"enemy combatant" was often shockin
of vague assertions, hearsay statemen
of raw, unverified intelligence reports
on to defend its allegations, the govern
say that the allegations must be true
ultimately prompting one incredulous
The Hunting of the Snark: "I have said
true."[21] The CSRT thus helped institut

statements of other prisoners obtained
ed al-Qahtani, the victim of some of
at Guantánamo, reportedly implicated
se detainees, however, ever knew that
opportunity to show that al-Qhatani's
milarly relied on statements obtained
ck sites" without giving detainees a
ions.[14]

gs and reliance on torture were exac-
detention authority. Wolfowitz's order
broadly than the Supreme Court had
contemplated. *Hamdi* upheld the presi-
ptured on a battlefield in Afghanistan
st the United States and its allies—what
escribed as "classic wartime detention."[15]
d the detention of any individual who
the Taliban, or "associated forces" any-
oreover, did not have to be intentional.
letain even "a little old lady in Switzer-
inks is a charity that helps orphans in
to finance al-Qaeda activities."
it needed to detain "enemy combat-
g to the battlefield."[17] But its concept of
to reality. A study of the government's
nly a small percentage of Guantánamo
tlefield.[18] The Bush administration also
so broadly that it included detainees
ties" by speaking out publicly against
tánamo[19] or publishing an op-ed in the
States' detention policy.[20]

rnment's claim that a detainee was an
ngly weak, sometimes consisting only
ts of other detainees, and summaries
of questionable accuracy. When called
nment frequently did no better than to
since the government said they were,
judge to invoke Lewis Carroll's poem
it thrice: What I tell you three times is
tionalize an open-ended, extrajudicial

global detention system that dispense
dence or the costs of its own errors.

The Defense Department conduct
2004. In most cases, the tribunal reac
hearing began. Within two months, n
completed.[22] The CSRT found all exc
whose cases it considered to be "enen
eight cases, the CSRT concluded that
combatants," that is, that they had ceas
an error had been made in classifying
mistake were not in the CSRT's vocabu

The Defense Department also insti
dure: the Administrative Review Boar
remedy the CSRT's flaws. The ARB pro
whether those determined to be "enem
tody.[25] The ARB thus did not determi
combatant" but, rather, assumed the de
decided only whether release was app
practice, the ARB had little, if any, impa
a decision that typically turned on pol
by the detainee's home government ra
ment of the detainee himself. Thus, n
tánamo after ARB hearings continued
ens of detainees who were returned to
eligible to leave were never cleared thr
of those detainees purportedly cleared
show up for their ARB hearings.[26]

In addition to creating bogus pro
Bush administration undermined the C
corpus by resisting their access to cou
tration said, was a privilege. As such, it
and discretion" and was subject to wh
fit to impose.[27] Those limitations, the a
audio and visual monitoring and revi
mail: flagrant violations of the attorney
impede the development of attorney-c
tive representation.[28] "We were just th
of implementing the *Rasul* decision," a
government's tactics.[29]

ed with any concern for credible evi-

ted its first CSRT hearing in August
ched a decision the same day that the
nearly all the CSRT hearings had been
cept thirty-eight of the 558 detainees
ny combatants."[23] And in those thirty-
the detainees were "no longer enemy
sed to be "enemy combatants," not that
them as such. Words like *innocent* and
ulary.[24]
tuted a second internal review proce-
d (ARB). But the ARB did nothing to
ovided an annual hearing to determine
my combatants" should remain in cus-
ne whether a detainee was an "enemy
etainee was an "enemy combatant" and
ropriate at that particular juncture. In
act on whether a prisoner was released,
itical factors and the pressures exerted
ther than on an individualized assess-
many detainees cleared to leave Guan-
to remain in custody. Meanwhile, doz-
their home countries or were declared
rough the ARB process. Indeed, many
d for release by the ARB failed even to

cedures like the CSRT and ARB, the
Guantánamo detainees' right to habeas
nsel. Talking to a lawyer, the adminis-
t existed at "the Government's pleasure
atever limitations the government saw
dministration said, included real-time
iew of the contents of detainees' legal
y-client privilege that were intended to
client relationships necessary for effec-
hrowing up these obstacles in the way
a former navy lawyer remarked of the

Federal district judge Colleen Kol
proposed limits on attorney-client co
sistent with the requirements of hab
ruled that Guantánamo detainees ha
right meant anything, Kollar-Kotelly
ingful access to a lawyer. She emphas
function of habeas: enabling prisoners
tion, including by providing them a "
court.[30]

In September 2004, the first civili
since the government started bringing
one-half years earlier.[31] Over time, hu
from the United States to Guantánam
the detention center by shedding lig
been shrouded in secrecy. No longe
only source of information about Gu
help provide an alternative—and dra
was at Guantánamo, why they were
being treated.[32] Media, human rights a
law enforcement, military, and intelli
tant role in making the pervasive abu
released, a number of detainees spok
lawyers remained the only nongover
those still detained at Guantánamo, as
the requests of international bodies an
ers.[34] Lawyers' accounts, made possible
alter public perception, exposing the li
"worst of the worst" and that its prison

Lawyers, however, also operated
ing their ability to communicate with
restrictions were codified in a protec
judges in every Guantánamo detainee
tective order provided for unmonitore
established procedures for attorneys to
thing attorneys learned from their cli
had to be submitted to and reviewed by
it could be made public.[35] Consequent
meetings had to be submitted for rev
over the United States, had to view any

lar-Kotelly rejected the government's
ommunications, finding them incon-
eas corpus. The Supreme Court had
d the right to habeas corpus. If that
asserted, detainees must have mean-
sized that lawyers helped fulfill a core
s to challenge the basis for their deten-
full opportunity" to present facts to a

ian attorney traveled to Guantánamo
g prisoners there more than two-and-
undreds of lawyers made the journey
mo, and their visits helped transform
ght on practices that had previously
r would the U.S. government be the
antánamo. Lawyers would henceforth
amatically different—account of who
being detained, and how they were
advocates, and others, including some
gence officials, also played an impor-
ses at Guantánamo public. And once
e out about their mistreatment.[33] But
rnment source of information about
s the United States continued to refuse
nd organizations to meet with prison-
e by the habeas corpus process, helped
e that Guantánamo contained only the
ners were all being treated "humanely."
under significant restrictions, limit-
and advocate for their clients. These
ctive order entered by federal district
habeas corpus case. Although the pro-
d attorney-client communications and
o visit detainees, it also stated that any-
ients was presumptively classified and
y a government "privilege team" before
ly, attorneys' notes taken during client
view, and lawyers, who were based all
materials not approved for public dis-

closure at a secure facility near Washi
cal obstacles to effective representatio
lawyers from sharing any classified in
the very information the government

These restrictions, however, paled
other efforts to shut down the habeas
Bush administration moved to dismi
had been filed in federal court, argui
enforce and that, in any event, the C
essence, the government took the po
habeas corpus meant nothing more th
court; once the clerk stamped it "rece
dismiss it, without conducting any inq
In January 2005, two district judges i
rulings on the basic issue of whether
play.

In one decision, District Judge Rich
position. All the Supreme Court had
Guantánamo detainees could file hab
habeas statute. The Supreme Court,
tánamo detainees had any rights to e
fact, Guantánamo detainees did not h
because they were aliens captured an
thermore, he maintained, any rights t
national law, including the Geneva Co
the political branches, and not by the
CSRT's broad definition of "enemy c
could seize individuals anywhere in th
based on their alleged involvement in

Judge Joyce Hens Green reached t
issued just days later.[39] "It is clear," she
considered the equivalent of a U.S. te
tutional rights apply."[40] Drawing on th
Rasul, Judge Green concluded that "th
flag any governmental authority untr
process of law."[41] The only question the
fair hearing that the Constitution req
years in a U.S. enclave like Guantána
no: the CSRT relied primarily on cla

ngton, D.C., creating enormous logisti-
n. The protective order also prohibited
formation with their clients, including
was relying on to detain them.[36]
in comparison with the government's
corpus litigation. In October 2004, the
ss all the habeas corpus petitions that
ng that the detainees had no rights to
CSRT satisfied any rights they had. In
sition that for Guantánamo detainees,
han the right to file a piece of paper in
eived," the judge had no choice but to
uiry into the government's allegations.
n Washington, D.C., issued conflicting
the courts had any meaningful role to

ard J. Leon endorsed the government's
decided in *Rasul*, Leon said, was that
eas corpus petitions under the federal
he reasoned, did not say that Guan-
nforce. Leon then determined that in
ave any rights under the Constitution
d held outside the United States. Fur-
the detainees might have under inter-
onventions, could be enforced only by
e courts.[37] Judge Leon also ratified the
ombatant," finding that the president
he world and detain them indefinitely,
or association with terrorism.[38]
he opposite conclusion in an opinion
e said, "that Guantánamo Bay must be
erritory in which fundamental consti-
he logic of both the Insular Cases and
here cannot exist under the American
ammeled by the requirements of due
en was whether the CSRT provided the
uired be given to individuals held for
mo. And her answer was an emphatic
ssified evidence that a detainee could

not see or challenge, denied detainees considered evidence gained by torture Green found that the CSRT's definit broadly, sanctioning detention based o of direct involvement in hostilities or i

Judge Green pointed to the hearing trate the CSRT's Kafkaesque nature. "associat[ing] with a known Al Qaida Idr protested, could he possibly refute to tell him the operative's name? As Id

> Maybe I knew this person as a friend with me. Maybe it was a person that this person is Bosnian, Indian or wha can respond and defend myself again

But the government gave Idr no inform himself, relying instead on secret evid rebut.

The plight of another detainee, M The United States said that Kurnaz w attended a mosque in Bremen, Germa al-Tabliq, a missionary organizatio organizations. It also claimed that Ku bomber and had traveled to Pakistan t the United States never alleged that K bomber or that he directly supported ity. The government nevertheless soug documents that he never had an oppor only found this one-sided proceeding sified material herself, stated that the question the nature and thoroughnes that Kurnaz was an "enemy combatant

Portions of those classified docume to a Freedom of Information Act law that in 2002 German and American i between Kurnaz and terrorist cells or his release. They also revealed that as eral of the Pentagon's Criminal Invest

s the assistance of a lawyer, and freely
and other coercion. In addition, Judge
ion of "enemy combatant" swept too
on mere association without any proof
ndividual guilt.[42]
g transcript of Mustafa Ait Idr to illus-
The United States had accused Idr of
operative" while living in Bosnia. How,
that accusation if the tribunal refused
r explained:

> l. Maybe it was a person that worked
> was on my team. But I do not know if
> atever. If you tell me the name, then I
> st the accusation.[43]

nation that would enable him to defend
dence that Idr had no chance to see or

Murat Kurnaz, is similarly instructive.
as an "enemy combatant" because he
any, which housed a branch of Jama'at-
n that allegedly supported terrorist
urnaz had been friends with a suicide
o attend a Jama'at-al-Tabliq school. But
Kurnaz himself planned to be a suicide
, let alone engaged in, terrorist activ-
ht to detain Kurnaz based on classified
rtunity to see or rebut. Judge Green not
g unfair but, after examining the clas-
secret evidence "call[ed] into serious
s" of the government's determination
."[44]
nts were later made public in response
vsuit. The disclosed portions revealed
ntelligence officers had found no link
enemy fighters and had recommended
s early as 2003, the commanding gen-
igation Task Force found no evidence

of terrorist activity by Kurnaz. Nonet
at Guantánamo for three more years
relied on the flimsiest of evidence. By v
a U.S. brigadier general's statement th
U.S. national anthem was sung in the p
ketball rim was" in the prison yard, wh
to escape.[45]

Reliance on secret evidence, Judge
flaw. The tribunal also accepted evic
coercion. In one case, an Egyptian-b
douh Habib claimed that a false conf
Egypt, where he had been rendered fo
described being beaten routinely to th
a room and forced to stand for hours
with water to a level just below his hea
feet resting on the side of a large elec
to choose between the pain caused b
shocks to his feet.[46] Even so, the CSR
without conducting any further inqu
Habib's allegations of torture was part
Department had repeatedly criticized
Finally, after Habib filed a habeas corp
a federal judge might actually examin
United States quickly sent Habib back

Judge Green's ruling offered the pron
did not take place. Instead, a few days
ment's application to stay the proceed
habeas cases followed suit, issuing stay
had an opportunity to address the gov
corpus a dead letter.[50] In the meantime,
went unexamined. By February 2005,
tion had come to a virtual standstill an
and-one-half years while the executi
fought tooth-and-nail to deny detainee

Although most Guantánamo detainees
or trial, President Bush sought to prose
ers in the military commissions he ha
utive order. One of those prisoners w

theless, Kurnaz remained behind bars based on a CSRT determination that way of example, that evidence included hat Kurnaz had once prayed while the prison and had "asked how tall the bas- hich the general said suggested a desire

Green found, was not the CSRT's only dence procured by torture and other born Australian citizen named Mam- fession had been wrung from him in llowing his seizure in Pakistan. Habib he point of unconsciousness, locked in s while the room was gradually filled d, and suspended from a wall with his ctrified cylindrical drum, forcing him y hanging from his arms and electric T simply relied on Habib's confession uiry. The CSRT's refusal to examine ticularly shocking, since the U.S. State Egypt for engaging in the practice.[47] pus petition, and when it seemed that he Habib's claims of mistreatment, the to Australia to avoid scrutiny.[48] mise of fair hearings. But those hearings later Judge Green granted the govern- ings pending appeal.[49] Judges in other s in their cases until the higher courts ernment's latest effort to render habeas the detention of hundreds of prisoners the Guantánamo habeas corpus litiga- d remained that way for almost three- ve branch, soon joined by Congress, s meaningful access to the courts.

s continued to languish without charge ecute a handful of Guantánamo prison- d created in his November 2001 exec- as Salim Ahmed Hamdan. A Yemeni

citizen with a fifth-grade education, H
1996. Attracted by the idea of jihad, h
Osama bin Laden. According to his la
man from an impoverished backgrou
that al Qaeda paid him for working as
ally remained in the dark about the o
9/11, Hamdan fled and was seized by A
Pakistan border. They tied Hamdan
later, handed him over to the Americ
six months, the United States held Ha
he was grossly mistreated, before tra
2002.[52]

In July 2003, Bush announced his i
Guantánamo detainees for violation
ber, Lieutenant Commander Charles
appointed to represent Hamdan.[54] Swi
were to negotiate a deal, not to advoca
yers were bound and trained to do.
ately chosen for prosecution detainee
and thereby give some legitimacy to
the Guantánamo detention system gen
ing that Hamdan be afforded the righ
Code of Military Justice (UCMJ). Wh
authority for the commissions refused
eral courts. In April 2004, they filed a
the legality of the military commissio

The government moved to dismiss
courts lacked jurisdiction to hear it. T
two months later made clear that fe
petition under the habeas statute. So t
ing to move forward with Hamdan's
challenge could be resolved. In July
Hamdan, claiming that he had consp
commit murder, and engage in terroris
Hamdan had acted as Osama bin Lad
had transported weapons on al Qaed
training at an al Qaeda sponsored cam
ing any command responsibilities, pla
terrorist acts. Instead, the indictment

Hamdan had traveled to Afghanistan in
e had gravitated toward al Qaeda and
wyers, Hamdan was a simple-minded
und who was thankful for the money
a driver and mechanic but who gener-
rganization's terrorist activities.[51] After
Afghan warlords near the Afghanistan-
with electrical wire and, a few days
ans for a $5,000 bounty. For the next
mdan at Bagram and Kandahar, where
nsferring him to Guantánamo in May

ntention to try Hamdan and five other
s of the laws of war.[53] That Decem-
D. Swift, a navy defense lawyer, was
ft's instructions from superior officers
te zealously for his client, as JAG law-
The Bush administration had deliber-
s who, it believed, would plead guilty
the military commission process and
erally. But Swift fought back, demand-
t to a speedy trial under the Uniform
hen the legal adviser to the convening
l, Hamdan's lawyers turned to the fed-
petition for habeas corpus challenging
n process itself.[55]
Hamdan's petition, claiming that the
The Supreme Court's decision in *Rasul*
deral courts had jurisdiction over the
he administration changed tactics, try-
military trial quickly before his habeas
2004, the president formally charged
ired with al Qaeda to attack civilians,
sm. The indictment further alleged that
den's "bodyguard and personal driver,"
da's behalf, and had received weapons
mp.[56] It did not accuse Hamdan of hav-
ying a leadership role, or planning any
charged only the offense of conspiracy,

es

an offense historically prosecuted in
law, not in military tribunals under the

Hamdan's habeas petition did not
but something more basic: that the mi
idential edict did not comply with fe
and thus lacked the power to try him.
self a former naval officer, agreed.[57] In
military commission proceedings in H
mission was invalid because there had
tent tribunal that Hamdan was subje
determination required under the Thi
a determination, Robertson insisted, I
prisoners of war and therefore could b
tem the United States used to try its o
ther concluded that even if a compete
gible for trial by a military commission
him because it lacked important safeg
be present at his own trial.[59]

In July 2005, a three-judge panel
District of Columbia Circuit reversed
court adopted a far more deferential v
tary commissions and his interpretat
judges ruled that the Geneva Convent
"war on terrorism," endorsing Preside
was free to treat suspected terrorists a
neously denying them any protection
make up the laws of war.[60] The third
ruling but disagreed in one notable re
Article 3 of the Geneva Conventions
Qaeda even if other provisions of the
this provision explicitly prohibited tr
court affording all the judicial guara
pensable by a civilized people." Yet W
ment of Common Article 3 must be
the courts, and thus joined the panel's
challenge.[61]

Hamdan petitioned the Supreme
2005, the Court agreed to hear his ca
in Congress sprang into action. The

civilian courts under federal criminal
e laws of war.
argue questions of guilt or innocence
litary commission established by pres-
deral statutes or international treaties
District Judge James Robertson, him-
November 2004, Robertson enjoined
Hamdan's case. He ruled that the com-
d been no determination by a compe-
ct to trial by military commission—a
rd Geneva Convention. Without such
Hamdan must be treated like all other
e tried only by court-martial, the sys-
wn service members.[58] Robertson fur-
ent tribunal were to find Hamdan eli-
, Bush's commission still could not try
uards, including a defendant's right to

of the U.S. Court of Appeals for the
Judge Robertson's ruling. The appeals
iew of the president's creation of mili-
ion of the Geneva Conventions. Two
tions did not apply to al Qaeda or the
nt Bush's earlier determination that he
as "enemy combatants" while simulta-
s under the treaties and customs that
l judge, Stephen Williams, joined the
espect. Williams found that Common
applied to the armed conflict with al
Geneva Conventions did not and that
ials except by "a regularly constituted
ntees which are recognized as indis-
Williams also concluded that enforce-
left to the political branches, not to
s decision to dismiss Hamdan's habeas

Court for review, and in November
se.[62] The administration and its allies
e following month Congress enacted

legislation threatening to deprive the
appeal. The new law, entitled the Deta
the federal habeas statute to eliminate
Guantánamo.[63]

Only once before had Congress tri
power to hear a habeas corpus appeal
gress's withdrawal of its appellate juris
sider a habeas challenge brought by a
federate soldier who had been jailed
South. The Court, however, left open th
by another means: an "original" habeas
Act.[64] This time, however, there was no
relief. Instead, Congress instituted a
under the DTA that excluded, for e
determinations by the military comm
ance with international law. Moreover,
could take place only after the militar
The DTA would thus prevent precisel
sought to bring and that habeas corpu
power of a military commission to try
since only those detainees sentenced t
or more had the right to invoke the D
sentenced to lesser terms could be den

The DTA also threatened to termin
hundreds of other prisoners at Guant
charge. By recognizing Guantánamo
had sought to ensure a meaningful ju
eliminate that process and replace it wi
appeals court of the sham CSRT hearing
Circuit Court of Appeals to consider o
own standards and procedures and wh
were constitutional. The appeals court t
court could do on habeas corpus: hold
by both sides, and rule on disputed fac
appeals court even had the power to o
detention, traditionally a *sine qua non* c
DTA, no prisoner could challenge his
ment. Nor could he seek review of his
country, even if he faced a substantial r

Court of its power to hear Hamdan's
ainee Treatment Act (DTA), amended
e habeas corpus rights for detainees at

ied to take away the Supreme Court's
. In that case, the Court upheld Con-
sdiction under an 1867 statute to con-
newspaper publisher and former Con-
by the military in the Reconstruction
he possibility of Supreme Court review
s petition filed under the 1789 Judiciary
o alternative avenue for seeking habeas
more limited form of judicial review
xample, consideration of any factual
nission and the commission's compli-
, the DTA said that this limited review
ry commission trial had taken place.[65]
ly the type of challenge that Hamdan
us had long secured: a challenge to the
y a person in the first instance.[66] Also,
o a term of imprisonment of ten years
TA's limited review mechanism, those
ied all court review.[67]
nate the habeas corpus petitions of the
tánamo who were being held without
detainees' habeas corpus rights, *Rasul*
dicial process. The DTA purported to
th an inferior one: narrow review by an
gs. As written, the DTA allowed the D.C.
nly whether the CSRT had followed its
nether those standards and procedures
therefore could never do what a district
a hearing, consider evidence presented
cts. Indeed, it was unclear whether the
rder a prisoner's release from unlawful
of habeas corpus. In addition, under the
mistreatment or conditions of confine-
transfer from Guantánamo to another
isk of torture in that country.

es

In short, the DTA sought to preven
ingful role in reviewing the detention,
ers at Guantánamo. And while the D
only to Guantánamo, it implicitly bol
that foreign nationals held elsewhere
ritory over which the United States' co
than at Guantánamo—had no habeas

The debate over the DTA helped e
at the heart of the "war on terror." Lea
stripping amendment, such as U.S. Sen
Kyle (R-AZ), alternatively characteriz
sic military combatants, on the one h
other. The detainees, Graham and othe
soldiers from past wars. If the tens o
prisoners of war in the United States d
during World War II, they reasoned, w
enjoy such access? "Never in the histo
enemy combatant, irregular componen
ian court systems to question militar
Graham remarked, referring to the Su
the same time, Graham and other sup
Guantánamo detainees were terrorists
deeds, thus likening them not to soldi
charged and tried in the regular civilia

But wartime prisoners had not alw
cases like *Quirin* and *Milligan* showe
previously limited the military deten
with nation-states. Thus, not only was
as "combatants" entirely new, but the
category was incredibly broad and ela
which Graham and others referred typ
factual disputes over who could be det
defined, and soldiers wore uniforms a
military status. In more recent conflic
tell friend from foe, such as the Vietna
additional safeguards to help prevent
had a clear ending point: the cessation
treaty between governments. By contr
difficulty of determining the enemy, t

nt federal courts from playing a mean-
treatment, trial, or transfer of prison-
TA's court-stripping provision applied
stered the administration's contention
outside the United States—and in ter-
ontrol was less permanent or complete
rights.

expose the falsehoods and distortions
ading supporters of the DTA's habeas-
nators Lindsey Graham (R-SC) and Jon
ed the Guantánamo detainees as clas-
nand, and hardened terrorists, on the
r lawmakers said, were just like enemy
f thousands of German and Japanese
id not have access to the federal courts
hy should today's "enemy combatants"
ory of the law of armed conflict has an
nt, or POW been given access to civil-
y authority and control, except here,"
upreme Court's decision in *Rasul*.[68] At
pporters of the DTA observed, all the
who had to be punished for their mis-
ers but to alleged criminals ordinarily
n courts.

ways been barred from U.S. courts, as
d.[69] The United States, moreover, had
tion of combatants to those affiliated
the effort to detain suspected terrorists
definition of the "enemy combatant"
stic. Furthermore, the past conflicts to
ically did not involve the same type of
ained. Battlefields were geographically
nd carried arms openly to signify their
ts in which it became more difficult to
m War, the United States implemented
t errors. In addition, wars previously
of hostilities or the signing of a peace
ast, the very nature of terrorism—the
he absence of defined battlefields, and

the potentially permanent nature of t
hood and the costs of mistaken dete
greater process, not less, and a more r

In addition, characterizing Guantá
that they all had been found guilty
detainees had ever been charged with
been charged in the inferior military
courts or military courts-martial. So
that the detainees were combatants he
venting their "return to battlefield." Su
words like *combatant* and *terrorist* to
dispensing with the protections of bo
laws of war.

Assuming that all the Guantánamo
critical question presented by the hab
in fact, who the government said the
that the Guantánamo detainees' hab
about conditions of confinement was
were challenging their treatment were
and mail delivery but were challengi
and other gross mistreatment. And all
were contesting the right of the govern

On November 10, 2005, Graham's
jurisdiction over Guantánamo detain
Senate and was added to the Defense
makers voiced concerns about the am
cases, Senators Graham, Kyl, and C
amendment altering the provision's ef
President Bush signed the Detainee
habeas-stripping Graham-Kyl-Levin a

Ironically, an original impetus beh
protections against detainee abuse. R
Ghraib, Bagram, secret CIA prisons,
cerns among lawmakers, including Se
torture victim, that the Bush adminis
as a lacuna in the law. The administra
nal law prohibited torture (which it d
interrogation techniques" like waterbo
of abuse known as cruel, inhuman, or

he conflict—increased both the likeli-
ntion. Terrorism, in short, demanded
obust judicial role.

namo detainees as terrorists suggested
of a crime. In fact, only a handful of
an offense, and those detainees all had
commissions, not the regular civilian
the government alternatively claimed
ld for the nonpunitive purpose of pre-
pporters of the DTA thus manipulated
justify eliminating habeas corpus and
th the criminal justice system and the

detainees were terrorists also begged a
eas cases: whether the detainees were,
y were. Graham and Kyl's suggestion
beas petitions raised frivolous claims
s simply false.[70] Those prisoners who
not complaining about Internet access
ng their torture, prolonged isolation,
the prisoners who sought habeas relief
ment to detain them in the first place.
amendment to eliminate federal court
ee habeas corpus petitions passed the
Authorization Act.[71] When several law-
endment's impact on pending habeas
arl Levin (D-MI) sponsored another
ffective date.[72] On December 30, 2005,
Treatment Act into law, including the
mendment.

ind the DTA had been to strengthen
evelations about mistreatment at Abu
and Guantánamo had prompted con-
enator John McCain (R-AZ), a former
tration was exploiting what it viewed
tion had argued that while U.S. crimi-
efined narrowly to exclude "enhanced
arding), no law barred the lesser forms
degrading treatment (CID) if commit-

ted against foreign nationals held abr
existing prohibitions against CID in h
vention against Torture and the Interr
cal Rights, did not apply to Guantána
the United States. At the same time, th
the Guantánamo detainees were "unl
protections under the Geneva Conve
which prohibited even a broader rang
tion against Torture. To remedy this p
"cruel, inhuman, or degrading treatm
U.S. custody or control, "regardless of

But the DTA's prohibition on CID d
of habeas corpus and the ability of c
abuse. Moreover, the DTA's ban on CI
DTA, for example, failed to bar the us
and other mistreatment. It said that in
must determine whether statements d
as a result of coercion" and must assess
statements. Those future tribunals, hov
had been gained through coercion onl
still rely on such coerced evidence if t
ment also did not apply to the CSRT h
ducted for the hundreds of prisoners
of detention based on evidence gaine
thus remained firmly in place.

In addition, the Bush administration
CID. The DTA defined CID by incorp
Clause of the Fifth Amendment to th
the particular conduct in question "sho
tion continued to maintain that an int
conscience" unless undertaken for the
opposed to gathering information to
theory, officials could continue to jus
brutal. This was precisely the view en
in May 2005 by the Office of Legal Co
create a permanent loophole around
president's latitude to interrogate priso
preclude liability for past abuse.[76] If th
statement when he signed the DTA in

oad. The administration asserted that uman rights treaties, such as the Con- national Covenant on Civil and Politi- amo or to any other territory outside e administration claimed that because lawful combatants," they also had no ntions, including Common Article 3, ge of mistreatment than the Conven- perceived gap, the DTA prohibited the ent or punishment" of any prisoner in nationality or physical location."[73]

came at a high price: the elimination ourts to remedy illegal detention and ID was weakened in several ways. The se of evidence gained through torture n future Guantánamo cases, the CSRT erived from a detainee were "obtained s the "probative value (if any)" of those wever, would inquire whether evidence y "to the extent practicable" and could they chose to.[74] This minimal require- hearings that had previously been con- at Guantánamo. The post-9/11 system d through torture and other coercion

n took steps to nullify the DTA's ban on orating the test under the Due Process he Constitution, which asked whether ocks the conscience."[75] The administra- errogation tactic would not "shock the e specific purpose of inflicting pain, as prevent a terrorist attack. Under this tify almost any tactic, no matter how mbraced by two secret memos drafted unsel, before the DTA was enacted, to any effort by Congress to restrict the oners in the "war on terrorism" and to is were not enough, Bush also issued a to law that said he would interpret the

DTA's ban on CID in light of his "const
unitary executive branch and as Com
the constitutional limitations on judic
one of many that Bush issued—reflec
override federal laws if he believed it n

The detention and treatment of pr
meaningful judicial review. Yet the DT
by eliminating habeas corpus. The DT
vulnerable to continued manipulation
circumvent it. Congress had taken one

If court-stripping legislation was one
tiny, eleventh-hour action by executive
Hamdi's case, this meant abruptly rel
corpus hearing. In Jose Padilla's case, it
three and one-half years of military in
review of the president's claim of swee

Previously, the Supreme Court ha
Padilla's challenge because it ruled tha
a federal court in New York rather than
fined as an "enemy combatant." Padill
in South Carolina and argued once ag
him without criminal charge and trial
with Padilla.[80] The U.S. Court of Appe
decision, upholding the president's p
custody as an "enemy combatant."

Judge Michael Luttig's opinion for t
ing the "exceedingly important questi
nite military detention of an American
Judge Luttig explained that the presid
"enemy combatant" because, before c
in terrorism, Padilla had fought in Af
Qaeda. (This was a newly minted alleg
the first go-round in the Supreme Cou
seem more like a traditional soldier a
Consequently, Luttig said, Padilla coul
tilities "to prevent his return to the batt
arrested at Chicago's O'Hare Internati
a battlefield in Afghanistan, did not a

titutional authority . . . to supervise the
mander in Chief and consistent with
cial power."[77] This signing statement—
cted his view that the president could
ecessary for national security.[78]
risoners at Guantánamo cried out for
A threatened to emasculate that review
'A's ban on CID, meanwhile, remained
n by an administration determined to
e step forward and two steps back.

way to avoid meaningful judicial scru-
e branch officials was another. In Yaser
easing the prisoner to avoid a habeas
meant bringing criminal charges after
mprisonment to avoid Supreme Court
ping domestic detention power.
ad declined to address the merits of
t he had mistakenly sought relief from
n in South Carolina where he was con-
a promptly refiled his habeas petition
ain that the president could not detain
.[79] This time, the district judge agreed
als for the Fourth Circuit reversed that
ower to imprison Padilla in military

he Fourth Circuit began by emphasiz-
on" presented by the case: the indefi-
citizen arrested in the United States.[81]
ent had authority to hold Padilla as an
oming to the United States to engage
ghanistan alongside the Taliban and al
gation that the government added after
rt to bolster its case by making Padilla
nd his military detention less radical.)
ld be detained for the duration of hos-
lefield."[82] The fact that Padilla had been
onal Airport, rather than captured on
lter the president's power to hold him

es

as an "enemy combatant." Instead, Jud
the German saboteurs from *Quirin*, v
New York and tried by a military cor
The fact that Padilla was being detain
conflict against al Qaeda and other ter
against another nation, as in *Quirin*, m

Padilla sought Supreme Court rev
to Padilla's certiorari petition was du
was indicting Padilla on terrorism-rela
Those charges did not contain any of t
had relied in detaining Padilla as an "en
ment placed Padilla at the fringe of a
to provide support for Muslim struggl

In announcing the indictment,
referred only obliquely to Padilla's pri
case began as a "classic intelligence in
tice system represented "one of the to
posal to combat terrorism. Gonzales n
decided to employ that "tool" only whe
of considering the legality of its other
But Gonzales did not need to say anyth
that the Court would reject its positio
its post-9/11 detention regime: the au
in the world and hold them indefinitel
global "war on terror."

Gonzales also failed to mention wh
most serious accusations against Pad
istration officials, however, acknowled
derived from statements by al Qaeda
Sheikh Mohammed, both of whom h
ons. Unlike in a CSRT or military co
simply launder coerced evidence in a
indictment's timing showed the lengt
go to avoid judicial review of its "ener
highlighted how thoroughly these dete
other abuse.

The administration's gamesmanshi
After charging Padilla, the governme
Padilla's transfer from military to civ

ge Luttig asserted, Padilla was just like who had been arrested in Florida and mmission rather than a civilian court. ed in connection with a global armed rrorist organizations rather than a war nade no difference.

iew. But two days before its response e, the government announced that it ated charges in federal court in Miami. he accusations on which the president nemy combatant." [83] Instead, the indict- nebulous conspiracy during the 1990s es in Bosnia, Kosovo, and Chechnya.[84] Attorney General Alberto Gonzales ior military detention, noting that the vestigation" and that the criminal jus- ools" that the president had at his dis- ever explained why the administration en the Supreme Court was on the verge r "tool": indefinite military detention. ning. The administration clearly feared on and thus undercut a main pillar of thority to seize individuals anywhere y without charge or trial as part of the

y the United States did not include the illa in the indictment. Other admin- dged that those accusations had been suspects Abu Zubaydah and Khalid had been tortured at secret CIA pris- mmission, the government could not federal criminal prosecution.[85] If the ns to which the administration would my combatant" detentions, its content entions were permeated by torture and

ip did not please the Fourth Circuit. nt asked the appeals court to approve ilian custody to clear the way for his

prosecution. The Fourth Circuit refuse
Luttig criticized the government for cr
erately circumventing Supreme Court r
with such tremendous public importar
actions all the more troubling. How c
"imperative" to America's security to l
for three and one-half years, only to br
highest court was finally poised to r
agreed with the government's underly
that the government's conduct tarnishe

Although the Supreme Court quickl
custody, the Court took more than fo
review of the legality of his military d
circumstances would have provided a
Padilla had effectively received the relie
the right not to be detained without cr
that the Supreme Court should still he
insisted that he could redesignate Pad
acquitted at trial and that he could co
"enemy combatants" in the future. The
hear Padilla's case. Three justices (Rob
ever, take the unusual step of issuing
the changes in Padilla's custody status, w
burg, and Souter) said that the Court s
are required for a grant of certiorari.).[88]
end Padilla's military imprisonment, it
to the underlying question about the sc

The federal criminal prosecution c
August 2007, the jury returned a ver
fendants of all counts, including con
outside the United States and providi
trict Judge Marcia G. Cooke sentence
months in prison. Cooke, however, rej
Padilla should be given a life sentence,
linking Padilla and the other defendar
also gave Padilla credit for the time he
the government's objection.[89]

The Bush administration touted P
detention policy. But the conviction hi

ed. In a sharply worded opinion, Judge eating the impression that it was delib- review.[86] That Padilla's case was imbued nce, Luttig said, made the government's ould the government claim that it was hold Padilla as an "enemy combatant" ing criminal charges when the nation's ule on the matter?[87] Even those who ing position, as Luttig did, recognized ed the integrity of the judicial process. ly approved Padilla's transfer to civilian ur months to decide whether to grant etention. Ordinarily, such a change in a strong reason to deny review, since ef he had sought in his habeas petition: riminal charge. But Padilla maintained ear his challenge because the president dilla an "enemy combatant" if he were ontinue to detain others like Padilla as Supreme Court ultimately declined to erts, Stevens, and Kennedy) did, how- an opinion expressing concerns about while three other justices (Breyer, Gins- should have heard the case (Four votes Thus, while habeas corpus had helped had not produced a definitive answer cope of the president's detention power. of Padilla went forward in Miami. In dict convicting Padilla and his code- spiring to commit illegal violent acts ng material support to terrorists. Dis- ed Padilla to seventeen years and four jected the government's argument that noting that that there was no evidence nts to specific acts of terrorism. Cooke e had spent in military detention, over

adilla's conviction as a victory for its ghlighted the policy's flaws. It demon-

strated, once again, that federal courts
and punish those who planned or con
without sacrificing the rights central
The criminal justice system, though n
capable of handling even the most cha
"new paradigm" of indefinite military
trast, seemed increasingly like smoke a

While the Bush administration succee
in Padilla's case, it failed to do so in
issued its five-to-three ruling in *Hamd*
commissions established under Bush's
affirmed right of Guantánamo detain
show why that right mattered.

In an opinion by Justice Stevens, the
tention that the DTA had stripped it o
concluded that Congress had repeale
corpus cases, not habeas cases pending
as Hamdan's. This determination was
promise Graham-Kyl-Levin amendm
tive date. It also reflected the more ge
interpreting statutes to repeal habeas
reading is fairly possible. While the C
the power to eliminate habeas corpus
indicated that Congress would have to
plish that momentous end. As Justice S
the Court would not assume Congress
suspending habeas corpus in enacting
the most stupendously significant act
can take."[91]

Turning to the merits of Hamdan's
dent's military commissions suffered f
sions deviated impermissibly from co
denying defendants the right to be pre
ing the use of unreliable hearsay state
through coercion.[93] There was neither
Court said, for creating a separate ad h
that lacked the established safeguard
the commissions violated Common

could successfully prosecute, convict,
mmitted terrorist acts and could do so
to America's Constitution and values.
ot perfect, still proved highly effective,
llenging cases. The claimed need for a
detention to fight terrorism, by con-
and mirrors.

ded in avoiding Supreme Court review
Hamdan's. In June 2006, the Court
dan v. Rumsfeld, invaliding the military
s November 2001 order.[90] If *Rasul* had
ees to habeas corpus, *Hamdan* helped

e Court rejected the government's con-
f its power to hear Hamdan's appeal. It
d jurisdiction only over future habeas
g at the time of the DTA's passage, such
based on a close reading of the com-
ent, which had altered the act's effec-
neral principle that courts must avoid
corpus jurisdiction as long as another
ourt did not say that Congress lacked
s review for Guantánamo detainees, it
speak in the clearest terms to accom-
Souter remarked during oral argument,
s "inadvertently" took the grave step of
the DTA, which would be "just about
that the Congress of the United States

appeal, the Court found that the presi-
rom two fatal flaws. First, the commis-
urts-martial procedures, including by
esent at their own trial[92] and by allow-
ements, including statements obtained
any principled basis nor any need, the
hoc trial system for terrorism suspects
s of military courts-martial. Second,
Article 3 of the Geneva Conventions,

which requires that all trials be condu
affording all the judicial guarantees wh
civilized peoples."[94] Because the Unite
tary courts are courts-martial, and bec
short of courts-martial standards, the
Common Article 3.[95] Four justices fou
the offense with which Hamdan had b
war and thus could not be prosecuted
commission's procedures had been fai

Hamdan was an important decision
metrical use of the law of war to asse
terrorism cases while avoiding the res
the trial and treatment of detainees. *H*
stitutional system of checks and balan
time the president cannot "disregard li
exercise of its own war powers, place
Congress in the UCMJ had required t
largely to courts-martial procedures.
the judiciary's role in that system, sho
wark against illegal executive action by
As Justice Stevens wrote in striking d
"the Executive is bound to comply wit
jurisdiction."[98]

By finding that all detainees were
Court also dealt an important blow
detention system. That system had ass
combatants" in the "war on terrorism"
their treatment remained a matter o
opened the door to the torture and
through lawless enclaves from Guantá
dan helped halt that virus's spread by
tody was beyond the law. At a minim
3 applied to all prisoners in U.S. custo
only unfair trials by military commiss
dignity," including "humiliating and
ally saying so, the Supreme Court ha
methods—including those that did no
gal and that any official who engaged
prosecution under the War Crimes Ac

ıcted by a "regularly constituted court
hich are recognized as indispensable by
ed States' "regularly constituted" mili-
cause the military commissions fell far
Court said, the commissions violated
nd an additional problem: conspiracy,
een charged, did not violate the law of
by a military commission, even if the
r.[96]

on several levels. It rejected the asym-
rt sweeping military jurisdiction over
trictions that the law of war places on
amdan also bolstered the broader con-
ces, cautioning that even during war-
mitations that Congress has, in proper
d on [the president's] powers."[97] Here,
hat any military commission conform
Just as important, *Hamdan* vindicated
wing how courts could serve as a bul-
exercising their habeas corpus review.
own the president's military tribunals,
th the Rule of Law that prevails in this

protected by Common Article 3, the
to the United States' post-9/11 global
sumed that individuals held as "enemy
" had no rights and, consequently, that
f executive discretion. This, in turn,
other abuse that spread like a virus
namo to secret CIA "black sites." *Ham-*
reaffirming that no person in U.S. cus-
um, the Court said, Common Article
ody during wartime. It prohibited not
ions but also "outrages upon personal
degrading treatment."[99] Without actu-
d made clear that harsh interrogation
t rise to the level of torture—were ille-
in them exposed himself to criminal
t.[100]

es

Hamdan, however, had several lir
apparent. It had invalidated Bush's pow
military commissions, but not his po
out charge. Since only a handful of Gu
charged before a military commissior
that any prisoner be charged or tried a
cumvent *Hamdan* simply by continuin
Guantánamo's commander explained,
to detain people as "enemy combatan
be "negligible."[101]

Hamdan also rested on the preside
rization from Congress. It therefore
new military commissions in the futu
that the DTA had not eliminated hab
detainee cases, the Court did not say th
inate this review through new legislat
rather than constitutional grounds, th
legislative battle. Once again, the Bus
sional approval for broad powers to c
out habeas corpus. This time, however
more far-reaching.

mitations, all of which soon became
ver to try terrorist suspects through his
wer to detain them indefinitely with-
antánamo prisoners had actually been
n and since there was no requirement
t any point, the government could cir-
g to hold prisoners without charge. As
as long as the military could continue
ts," *Hamdan*'s practical impact would

ent's failure to seek appropriate autho-
did not bar Congress from creating
re. Similarly, although the Court ruled
beas corpus review over Guantánamo
hat Congress lacked the power to elim-
tion. In resting its ruling on statutory
e Court thus set the stage for another
h administration would seek congres-
detain and try terrorist suspects with-
r, the powers it claimed would be even

Tackling Prisons bey

Guantánamo Revisited

On September 6, 2006, Presi
vised speech describing the current st
by recalling the tragic events that had
and reiterating his promise to do ever
America's laws"—to prevent another te
licly acknowledged for the first time t
gram" of secret imprisonment, althou
widely reported for years. The preside
called high-value detainees like Abu Z
(KSM), and Ramzi bin al-Shibh. He al
these men through the CIA's secret d
terrorist attacks and saved American
been completed, Bush explained, the
ers could be moved "into the open."
tánamo and brought "to justice." The p
interrogation methods had been used.
"the United States does not torture. It'
values."[1]

The president then told the country
Hamdan v. Rumsfeld had imposed con
confront terrorism and put the nation
sending new legislation to Congress t
fighting the war on terror." This legisla
itary commissions but also would rei
under the Geneva Conventions to allo
CIA detention program without fear o
ity. And the legislation would seek—o
rights for those the administration des

9

ond the Law

dent Bush delivered a nationally tele-
ate of U.S. detention policy. He began
occurred almost five years to the date
ything within his power—and "within
errorist attack. The president then pub-
hat the CIA operated a "separate pro-
ugh the program's existence had been
ent said that the program targeted so-
Zubaydah, Khalid Sheikh Mohammed
so said that information wrested from
etention program had helped prevent
lives. Now that the questioning had
program's remaining fourteen prison-
They would be transferred to Guan-
resident acknowledged that aggressive
But, he assured the American public,
's against our laws, and it's against our

y that the Supreme Court's decision in
straints on the United States' ability to
at risk. So Bush announced that he was
o "clarify the rules for our personnel
tion not only would establish new mil-
nterpret the United States' obligations
w the government to resume the secret
of exposing officials to criminal liabil-
nce again—to eliminate habeas corpus
signated as "enemy combatants."[2]

As political propaganda, the pres
stroke, he put opponents on the defe
fight against terrorism and telling the
ing both its values and its safety. Sec
methods, he suggested, not only were
were legal. The United States did not e
sive tactics that were necessary to pr
remained within the letter, if not the s
to Guantánamo the handful of detain
attacks, such as KSM, Bush breathed n
ers at Guantánamo were dangerous ter

But Bush's speech was inaccurate a
"bring prisoners to justice." Of the n
there since 2002, only a handful had e
most would never be brought to trial
forum. Also, even based on the govern
prisoners were not dangerous terrorist

The speech also misled the Amer
gested that the government needed to
secret"; otherwise, terrorists would "le
United States' use of waterboarding, co
already widely known. The real reason
duct that was not only embarrassing b

In addition, the speech created the
istration had terminated the secret C
before Bush's speech, the Justice Depar
concluding that the conditions of confi
both federal law and Common Articl
the president reserved the right to co
ued to defend as "small, carefully run,
use "enhanced interrogation technique

The Bush administration, in short,
an opportunity to justify to the Am
military commissions, and torture a
through new legislation. Following Bu
Hill, as lawmakers began to debate the
habeas corpus, establish new military
gations under the Geneva Conventio
from liability for past abuses. On Sep

ident's speech was a success. In one
nsive, seizing the high ground in the
American public that he was protect-
ret detention and harsh interrogation
vital to the nation's security; they also
ngage in torture but merely in aggres-
roduce valuable information and that
spirit, of the law. Also, by transferring
nees allegedly responsible for the 9/11
ew life into the myth that most prison-
rrorists.

and misleading. Guantánamo did not
early eight hundred men imprisoned
ever been charged with any crime, and
in any court, let alone in a legitimate
ment's own untested allegations, most
s, and many were wholly innocent.

ican people about torture. Bush sug-
keep "specific [interrogation] methods
arn how to resist questioning." But the
old cell, and other forms of torture was
n for the secrecy was to cover up con-
ut potentially criminal.

false impression that the Bush admin-
CIA detention program. But just days
rtment had issued secret legal opinions
inement in CIA prisons complied with
e 3 of the Geneva Conventions.[3] And
ntinue the program, which he contin-
lawful, and highly productive," and to
es" in the future.[4]

transformed its defeat in *Hamdan* into
erican public extrajudicial detention,
nd to institutionalize those practices
sh's speech, the focus shifted to Capitol
e administration's proposals to restrict
commissions, rewrite America's obli-
ns, and insulate government officials
tember 29, Congress passed the Mili-

tary Commissions Act (MCA), and th
bill into law.[5]

The MCA resurrected military co
the "war on terror," providing the co
Court in *Hamdan* had said was lackir
rized to try a wide range of offenses
criminal offenses and not war crimes,
port" for terrorism.[6] The MCA did ir
for example, by giving a defendant a
and by affording him a greater oppor
government's evidence.[7] But the comm
that undermined their fairness and
sions still limited a defendant's access
allowed for the admission of coerced
by cruel, inhuman, or degrading tre
obtained before the passage of the D
cisely the period during which the wo
even though the commissions now fo
torture, the Bush administration cont
to render that prohibition all but mea
detainees by means of physical and r
through lax evidentiary rules or could
as intelligence "sources" or "methods."

The MCA, however, did more than
to legitimize and institutionalize othe
detention system. While the MCA p
Geneva Convention obligations, it gav
interpret the conventions while hinder
prohibiting individuals from invoking
cial proceedings.[11] The MCA also sou
for past breaches of the Geneva Conv
ecutions in the future by confining lia
specific list of "grave breaches" of Con
tion. Even though that list included cr
torture, the MCA limited the definiti
caused substantial risk of death, phys
impairment. It also excluded degradin
The Bush administration, meanwhile,
tion methods such as stress positions,

e next month the president signed the

mmissions to try foreign nationals in
ngressional sanction that the Supreme
ng. The new commissions were autho-
that traditionally had been treated as
such as conspiracy and "material sup-
mprove on the previous commissions,
partial right to be present at his trial
tunity to examine and respond to the
nissions continued to suffer from flaws
integrity. For example, the commis-
to exculpatory information.[8] They also
evidence, including evidence gained
atment, as long as the evidence was
etainee Treatment Act of 2005—pre-
rst abuses had occurred.[9] Furthermore,
rmally prohibited evidence gained by
inued to define torture so narrowly as
ningless. Statements wrung from other
mental abuse also could be laundered
escape scrutiny altogether if classified
10

revive military commissions; it sought
er key features of the post-9/11 global
paid lip service to the United States'
ve the president unilateral authority to
ring their enforcement in the courts by
them in habeas corpus or other judi-
ght to foreclose criminal prosecution
ventions and to limit the risk of pros-
ability under the War Crimes Act to a
mmon Article 3 set forth in the legisla-
ruel and inhuman treatment as well as
on of such treatment to conduct that
sical disfigurement, and organ loss or
g and humiliating treatment entirely.[12]
continued to maintain that interroga-
religious and sexual humiliation, and

sleep deprivation did not violate Com
prepare the groundwork for a subsequ
tiated the CIA's secret detention progr
of highly coercive interrogation meth
ment supplied legal cover, concluding
interrogation techniques," including p
ninety-six hours), dietary manipulatio
Common Article 3 or the War Crimes

The MCA also sought to eliminate l
the single most effective check against
the DTA, however, the MCA did not li
Instead, it purported to eliminate habe
president designated an "enemy comb
sequently interpreted the repeal in th
that its bar on habeas jurisdiction ext
Guantánamo and other prisons outsi
arrested and detained inside the count
immigrant could be seized by the mil
place of work and be imprisoned with
president determined that he or she w
the MCA barred "any other action" b
preventing detainees from receiving a
or torture they had suffered in the past

Lawmakers once again justified t
distorting the truth. They portrayed t
"captured on the battlefield," even tho
or near a battlefield.[18] The familiar rhe
government resources and interfering
military attempted to mask a much d
had no place in "war on terrorism" an
tered power to detain and interrogate
as one senator candidly explained, the
lawyers out of Guantánamo Bay."[20]

Opponents denounced the MCA a
Senator Russ Feingold (D-WI) lamen
the MCA as "a stain on our nation's h
"our generation's version of the Alien
passage, several bills were introduced
of the act eliminating habeas corpus.

mon Article 3.[13] The MCA thus helped
uent presidential order that both reini-
ram and sanctioned the continued use
ods.[14] Once again, the Justice Depart-
that the CIA's use of various "enhanced
prolonged sleep deprivation (of up to
on, and physical force, did not violate
Act.[15]

habeas corpus, which had proved to be
arbitrary detention and abuse. Unlike
mit the habeas repeal to Guantánamo.
eas corpus for any foreign national the
atant."[16] The Bush administration sub-
he broadest manner possible, arguing
ended not only to foreign nationals at
de the United States but also to those
ry. In the administration's view, a legal
itary at home, at school, or his or her
out access to a lawyer or a court if the
as an "enemy combatant." In addition,
y an alleged "enemy combatant," thus
ny compensation for illegal detention
t.[17]

he restrictions on habeas corpus by
the Guantánamo prisoners as soldiers
ough many had not been captured on
etoric about legal proceedings wasting
with the "day-to-day operation" of the
darker theme: that courts and lawyers
nd that the president must have unfet-
in the name of national security.[19] Or
e purpose of the MCA was "to get the

as a violation of cherished principles.
ted that America would look back on
istory."[21] The *New York Times* called it
and Sedition Acts."[22] After the MCA's
in Congress to repeal the provisions
But none gained sufficient support to

overcome an expected filibuster or a p
again to the courts.[23]

The first four years after the 9/11 att
branch against the judiciary in the ba
tutional safeguards, and America's co
Detainee Treatment and Military Cor
By 2006, majorities in Congress had t
9/11 detention regime. Some supporte
was the Supreme Court, and not the e
ning power grab," which Congress re
president's command over the conduc
ous Supreme Court decisions like *Ra*
president's unilateral action in defian
lenges would have to take on Congre
both branches had exceeded the limits
respective powers.

As lawyers for the government an
legal showdown, the situation at Guar
ers increasingly turned to hunger strik
inhumane living conditions, isolation,
treatment. One strike in mid-2005 inv
ees, approximately fifty of whom were
dration. The government responded w
strapping detainees into restraint cha
nasal tube insertions, placing them in
isolation cells, and withholding "comfo

In June 2006, Guantánamo experie
the Bush administration announced t
selves from the mesh walls of their c
The three detainees had been on hung
article later published in *Harper's* que
account, describing how the men hac
a secret prison within Guantánamo ca
exist) and explaining how the governm
been a cover-up.[26] Another detainee
lowing year. By 2007, twenty-five diff
forty suicide attempts.[27]

presidential veto, and the focus shifted

tacks had largely pitted the executive
attle over habeas corpus, other consti-
ompliance with international law. The
mmissions Acts altered that dynamic.
wice approved key aspects of the post-
ers of that regime even argued that it
executive, that had engaged in a "stun-
ectified in the MCA by restoring the
ct of the "war on terrorism."[24] If previ-
sul and *Hamdan* had emphasized the
ce of Congress, post-MCA legal chal-
ess and the executive by showing that
s that the Constitution placed on their

d the detainees prepared for another
ntánamo continued to worsen. Prison-
es to protest the denial of due process,
religious degradation, and other mis-
volved more than two hundred detain-
given intravenous treatment for dehy-
ith heavy-handed measures, including
irs to facilitate force-feeding through
n uncomfortably cold air-conditioned
ort items" like blankets and books.[25]
nced its first reported prisoner suicide:
hat three detainees had hanged them-
ells with nooses made of bed sheets.
ger strikes and had been force-fed. An
stioned the truth of the government's
d been moved after their deaths from
alled "Camp No" (as in "No," it doesn't
ment's investigation into the deaths had
reportedly committed suicide the fol-
ferent prisoners had made more than

The Bush administration denied a
situation at Guantánamo. Instead, it s
his own life was committing an act of
relabeled "PR stunts" intended to crea
ees,[28] and attempted suicides were dis
behavior."[29] The administration comp
detention system in which individuals
cess, subjected to torture and other ab
world, including from their own famil

Public criticism of Guantánamo, n
president of the ICRC took the unp
United States for imprisoning indivi
adequate process.[31] Amnesty Internat
of our time."[32] Calls to close Guantána
allies. Lord Steyn, a justice on Britain's
as a "monstrous failure of justice."[33] By
the Bush administration, including
were pressing for the prison's closure
declared, was "an image throughout t
reputation."[34] The Bush administratio
rorism" had become a political and pu
any benefits it provided.[35]

Simply closing Guantánamo and mo
however, would not address the unde
trial or the use of second-class tribuna
it would only replicate Guantánamo w
do nothing to address the continued p
America's shores, whether at other m
CIA "black sites." Indeed, simply clos
the larger detention system Guantána
ernment's incentive to bring prisoners
render them to foreign governments t

Guantánamo's future thus remaine
detention policy. At the same time, if
fundamental constitutional safeguard
where the United States had long exer
nent control, it could not be won at
and over which U.S. control might be

ny responsibility for the deteriorating
said a detainee who attempted to take
"asymmetrical warfare." Suicides were
te support for the plight of the detain-
missed as "manipulative, self-injurious
pletely ignored its role in creating a
s were held for years without due pro-
ouse, and isolated from the rest of the
ies.
neanwhile, continued to mount.[30] The
precedented step of condemning the
duals for years without charge or an
ional labeled Guantánamo "the gulag
amo also came from America's closest
highest court, castigated Guantánamo
2007, some high-level officials within
Defense Secretary Robert M. Gates,
. Guantánamo, Senator John McCain
the world which has hurt [America's]
n's flagship prison in the "war on ter-
ublic relations liability that outweighed

oving the prisoners to the United States,
erlying problem of detention without
als like military commissions. Instead,
within the United States. It also would
otential for lawless detentions beyond
nilitary prisons like Bagram or secret
ing Guantánamo without confronting
mo embodied could increase the gov-
s to other U.S.-run offshore jails or to
o avoid scrutiny and accountability.
d linked to the United States' broader
the battle for habeas corpus and other
s could not be won at Guantánamo,
rcised complete, exclusive, and perma-
prisons farther from America's shores
less clear or complete.

The legal challenge to the latest co
the Supreme Court laden with signific
Court almost never heard it.

In February 2007, a federal appeal
the MCA's elimination of habeas corpu
determined that the Guantánamo det
pension Clause or any other provision
foreign nationals held outside the Un
Judge A. Raymond Randolph contend
available to enemy aliens detained ab
was written, it would "not have been
military base leased from a foreign gov
thermore, Randolph said, the Suprem
trager foreclosed any claim of a constitu
prisoners at Guantánamo because it es
the Suspension Clause's reach to nonc
The Court's more recent decision in *Ra*
tánamo detainees' statutory right to hal
to revoke, as it had done twice since *I*
through the MCA.[38] Randolph also dis
that these decisions involved territory
political sovereignty—a *sine qua non* fo
tions to noncitizens abroad, no matter
States' control over the territory or pris
did not merely affirm the denial of hab
It also endorsed a central premise of
that at least with respect to noncitizens
the Constitution as long as he acted ou

The habeas petitioners who had bro
mately thirty Guantánamo detainees
the Court declined to hear the case, as
four votes necessary to grant certiorari
Stevens and Anthony M. Kennedy issu
deny certiorari. "Despite the obvious
said, the Court should adhere to its u
adjudication of constitutional questio
available remedies as a precondition t
tions for the writ of habeas corpus."[40] T
first had to seek review of their respec

urt-stripping measure thus headed to
cance. Ironically, though, the Supreme

ls court in Washington, D.C., upheld
us. In a two-to-one decision, the court
ainees were not protected by the Sus-
of the Constitution because they were
ited States.[36] Writing for the majority,
ed that habeas corpus had never been
road and that when the Constitution
available to aliens held at an overseas
vernment" such as Guantánamo.[37] Fur-
e Court's decision in *Johnson v. Eisen-*
utional entitlement to habeas corpus by
tablished a bright-line rule prohibiting
citizens held outside the United States.
asul, he said, addressed only the Guan-
beas corpus—a right Congress was free
Rasul, first through the DTA and then
stinguished the Insular Cases, arguing
over which the United States exercised
or extending the Constitution's protec-
how extensive or complete the United
soner in question.[39] Randolph's opinion
beas corpus for Guantánamo detainees.
the post-9/11 global detention system:
s, the president was not constrained by
tside the borders of the United States.
ought the appeal—a group of approxi-
—sought Supreme Court review. But
the petitioners fell one vote shy of the
. In an unusual step, Justices John Paul
ued an opinion explaining their vote to
importance of the issues raised," they
sual practice of avoiding unnecessary
ns and of requiring the "exhaustion of
o accepting jurisdiction over applica-
That meant the Guantánamo detainees
ctive Combatant Status Review Tribu-

nal (CSRT) findings in the D.C. Circu
that had just ruled that they had no co
cedure Congress created in the DTA
procedure's manifest shortcomings.[41] T
remain imprisoned without a meaning
seemingly futile review process, even
their sixth year of confinement.

The detainees asked the Supreme C
rehearing petitions are invariably den
approximately forty years. But this tim
and agreed to hear the case.[42] Although
suspected that Justice Kennedy—the cr
a new and devastating critique of Gua
the military itself.

In a sworn declaration provided to
petition, Lieutenant Colonel Stephen
of military intelligence, offered an ins
functioned.[43] Abraham had previously
tive Review of the Detention of Enemy
of the Defense Department responsib
process. Abraham's description shatte
cess had to legitimacy. The OARDEC
gence-gathering capabilities. Instead,
arbitrary and incomplete requests to c
particular detainees. In turn, those ag
exculpatory evidence about the detain
EC's staff lacked training and experien
information and was under tremendou
of CSRTs within four months. Another
CSRT panels provided additional deta
tribunal's officers, for example, did no
conclusory statements, which constitu
and actual evidence.[44]

As Abraham explained, detention
maries of interrogations and boilerp
than carefully assessing the evidence (
bers would "cast broad nets for any inf
matter how tenuous, no matter how da
how dubious the source, so long as it

uit Court of Appeals—the same court
onstitutional rights— through the pro-
to replace habeas corpus, despite that
The Guantánamo detainees would thus
gful hearing while they exhausted this
though many were already well into

Court to reconsider its decision. Such
ied; the Court had not granted one in
ne, the Supreme Court reversed course
n the Court gave no explanation, many
ritical swing vote—had been moved by
antánamo's CSRT process from within

the Supreme Court with the rehearing
Abraham, a twenty-six-year veteran
ide account of how the CSRT actually
y served in the Office for Administra-
y Combatants (OARDEC), the division
ble for implementing the CSRT-ARB
red any remaining pretense this pro-
C, Abraham explained, had no intelli-
its efforts were confined to making
outside agencies for information about
gencies could, and often did, withhold
ees in question. Moreover, the OARD-
nce in collecting and using intelligence
us time pressure to complete hundreds
r military official who sat on forty-nine
ails about the CSRT's inadequacy. The
ot understand the difference between
ted the bulk of the material presented,

decisions were instead based on sum-
plate intelligence information. Rather
or lack thereof), the OARDEC's mem-
formation, no matter how marginal, no
ated, no matter how generic, no matter
could be connected to the detainee."[45]

That information would be "cut and p
panels, without any critical assessmen
no information about a detainee was
search would shift to broad-brushed
which the detainee came, his ethnic gr
nization with which the detainee was
CSRT would then label the detainees "
hazard and incomplete collection of g
the most fundamental earmarks of obj

Command influence exacerbated
sions that a CSRT panel determined
an "enemy combatant," Abraham said
director questioned the validity of the
hearing be conducted to allow for th
only "new" information presented at
"a different conclusory intelligence fi
underlying evidence."[49] If the panel fa
DEC would conduct an inquiry into
like Abraham's made the point more
Guantánamo detainees had been imp
that was rotten to the core, and they s
the Supreme Court to decide whethe
under the Constitution.

In December 2007, the Supreme
tánamo detainees' challenge to the M
issued its decision in *Boumediene v. B*
ees had a constitutional right to habea
president nor Congress could deprive
pus without a valid invocation of the
under the Suspension Clause. The Co
nism the Bush administration and Co
corpus—limited appellate review of C
provide a constitutionally adequate s
dated the MCA's elimination of habeas
conduct prompt hearings into the lega

The Court's ruling in *Boumediene* t
of the approximately 265 detainees w
decision. Above all, the Court rejected
ment—that formal constructs like pol

asted" into documents given to CSRT
t of its accuracy or reliability.[46] When
s available, as was often the case, the
categories, such as the region from
roup or country of origin, or the orga-
alleged to have been associated.[47] The
enemy combatants" based on this hap-
generic information that "lacked even
ectively credible evidence."[48]
these problems. On the few occa-
a detainee should not be classified as
l, the OARDEC's director and deputy
finding. They ordered that a new CSRT
he presentation of new evidence. The
these do-over hearings, however, was
nding, which was not justified by the
iled to alter its conclusion, the OAR-
"what went wrong."[50] Insider accounts
powerfully than any legal brief could:
risoned for years based on a process
should not have to wait any longer for
r they were entitled to habeas review

Court heard argument in the Guan-
MCA. The following June, the Court
Bush, ruling that Guantánamo detain-
s corpus.[51] This meant that neither the
Guantánamo detainees of habeas cor-
e limited emergency powers provided
ourt also determined that the mecha-
ongress had created to replace habeas
SRT decisions via the DTA—failed to
ubstitute. As result, the Court invali-
s corpus and directed district judges to
lity of the prisoners' confinement.
transcended Guantánamo and the fate
ho remained there at the time of the
the proposition—urged by the govern-
itical sovereignty determined whether

the habeas corpus Suspension Clause
extended to foreign nationals held bey
bright-line rule, the Court adopted a f
the prisoner's citizenship but also the n
circumstances, and the adequacy of th
determining whether a given constitut
this test did not guarantee habeas corp
a prisoner, it nonetheless rejected the id
cial review simply by choosing to hold

Justice Kennedy's opinion for the
habeas corpus in America's Constitut
Framers," Kennedy explained, "viewed
fundamental precept of liberty, and th
pus as a vital instrument to secure that
out, not only protects individuals from
state power; it also serves as "an essen
separation-of-powers."[53]

Kennedy looked to English history
common law precedents, detainees he
tánamo would have had access to habe
no direct analogies, Kennedy said, it a
argument that habeas corpus was ava
executive exercised political sovereig
tive, the fact that Cuba retained form
at Guantánamo offered "scant support
this territory was necessarily beyond t
sion Clause.[54]

Kennedy next examined the Court'
stitution's extraterritorial application.
history, he noted, there was no need t
States extended its laws and Constituti
westward expansion. The question of w
the flag to territories that were not in
arose after the United States began acq
nineteenth century. In the Insular Case
Court ruled that the Constitution had
unincorporated territories even if Con
sion to extend its protections there.
Cases also recognized some potential

e and other constitutional protections
ond America's borders. In place of any
functional test that examined not only
ature of the detention, the surrounding
e process the prisoner had received in
tional provision applied abroad. While
us wherever the United States detained
dea that the president could avoid judi-
that prisoner outside the country.
Court emphasized the critical role of
tion and system of government. "The
l freedom from unlawful restraint as a
ey understood the writ of habeas cor-
freedom."[52] Habeas corpus, he pointed
the arbitrary and unlawful exercise of
tial mechanism in the [Constitution's]

to determine whether under English
eld in circumstances similar to Guan-
eas corpus. Although history provided
also did not support the government's
ilable only in territory over which the
nty. Thus, from a historical perspec-
al ownership over the U.S. naval base
" for the government's contention that
he reach of the Constitution's Suspen-

's own precedents addressing the Con-
During the first century of the nation's
to address this issue, since the United
on to new territory acquired during its
whether the Constitution also followed
corporated into the United States first
quiring overseas possessions in the late
es, discussed in chapter 6, the Supreme
d independent force in these so-called
ngress had not made the political deci-
But, Kennedy observed, the Insular
obstacles to applying the Constitution

in its entirety and displacing the exis
The question, therefore, was not *wheth*
of its provisions were applicable by w
executive and legislative power in dea
ments."[55] And the answer turned not o
ereignty" but on other, more pragmati

The Supreme Court, Kennedy said
half century later in *Reid v. Covert*.[57]
opinion in *Reid* focused on U.S. citizen
tion's jury trial guarantee applied to An
military court in a foreign country, Jus
Frankfurter's concurring opinions emp
erations related to the place of the pri
dy's reading of *Reid* aligned the Court
furter position. Citizenship, Kennedy s
in *Reid* in determining whether the ri
torially. If this diminished the importa
the idea that the Constitution could ex
in U.S. custody, regardless of location.
idea that freedom from arbitrary and
and not just a right of American citize

Justice Kennedy also distinguished
II–era decision that had been the linch
habeas corpus review for Guantánam
Eisentrager did not in fact establish
for determining the reach of the Sus
turned on its unique factors, includin
over Landsberg Prison in Germany,
total, exclusive, and permanent U.S. c
thus did not mean what the Bush adm
first Guantánamo habeas petitions w
deny prisoners access to its courts by d

Boumediene thus turned the govern
on its head. In recognizing that Guant
right to habeas corpus protected by
was not interfering with executive pre
manipulation of the judiciary and the
ernment's political sovereignty test me
will and without constraint whenever i

ting legal systems in these territories. *er* the Constitution applied but "*which* way of limitation upon the exercise of ling with new conditions and require- n formal constructs like "political sov- c considerations.[56]

l, had employed a similar approach a While Justice Hugo Black's plurality nship in concluding that the Constitu- merican civilians tried by an American stices John Marshall Harlan's and Felix phasized other, more practical, consid- soners' confinement and trial. Kenne- t more closely with the Harlan-Frank- said, was merely one factor considered ght to a jury trial extended extraterri- nce of citizenship, it also strengthened xtend more widely to foreign nationals It thus moved the Court closer to the unlawful detention was a human right ns.

Johnson v. Eisentrager, the World War pin in the government's effort to resist no detainees. As Kennedy explained, "a formalistic, sovereignty-based test pension Clause."[58] *Eisentrager* instead g the absence of plenary U.S. control which Kennedy contrasted with the control over Guantánamo. *Eisentrager* inistration had been arguing since the ere filed: that the United States could detaining them beyond its borders.

ment's separation of powers argument tánamo detainees had a constitutional the Suspension Clause, the judiciary rogative but was preventing executive Constitution itself. Accepting the gov- eant that the United States could act at it exercised power outside the country.

And if the United States could do this
under its permanent, total, and exclu
beyond its shores. *Boumediene* rejected
The actions of the United States, the C
constitutional constraints, even when t
and occur abroad. The political branch
Constitution on or off at will" by alterin
determining the scope of [the Suspens
be subject to manipulation by those wh

In place of formal constructs like
forth a multifactored test to determin
sion Clause applied abroad. In additio
test also factored in the adequacy of a
received, the nature of the sites where
place, and the practical obstacles inher
writ.[61] Applying this test, the conclusio
Guantánamo was a virtual slam dunk
citizens, the Guantánamo detainees ha
determination by the woefully inadeq
they were held was under the total and
And the government had presented "n
mission at Guantánamo would be com
jurisdiction to hear the detainees' clain

The question remained, however,
DTA could cure the problem by provi
corpus. If so, there would be no const
would effectively be receiving what h
different name. The Supreme Court,
substitute for habeas. Instead, in enacti
sought to create an inferior remedy fo
right to habeas in the first place.[63] Cong
Guantánamo detainees thus differed s
to the federal habeas corpus statute, w
remedy in a different forum, for exam
challenge their criminal convictions in
rather than in the jurisdiction where th
More important, the Court concluded
inferior remedy. It highlighted three p
the court's role is most important in

at a place like Guantánamo, a territory
sive control, it could do so anywhere
d this argument in no uncertain terms.
ourt maintained, are always subject to
hose actions concern foreign nationals
es did not have the power to "switch the
ng the locus of detention.[59] "The test for
ion Clause]," the Court said, "must not
ose power it is designed to restrain."[60]
political sovereignty, *Boumediene* set
e whether the habeas corpus Suspen-
n to the citizenship of the detainee, the
any previous process the detainee had
his apprehension and detention took
rent in resolving his entitlement to the
on that the Suspension Clause reached
k. Although they were not American
ad been detained for years based on a
uate CSRT process. The prison where
exclusive control of the United States.
o credible arguments that the military
mpromised if habeas corpus courts had
ms."[62]
whether appellate review under the
ding an adequate substitute for habeas
itutional violation, since the detainees
abeas guaranteed them, only under a
however, found that the DTA was no
ng the DTA, Congress had deliberately
or individuals who it believed had no
gress's elimination of habeas corpus for
significantly from earlier amendments
which were intended to create a similar
mple, by requiring federal prisoners to
the district court that sentenced them
ey were imprisoned after sentencing.[64]
d that Congress had in fact created an
points about habeas corpus: first, that
cases of executive detention without

prior judicial review; second, that habe
underlying process lacks rigorous safe
a flexible remedy that can be adapted
achieve its underlying purpose: relief f

Measured in light of these standar
short. The CSRT was patently deficien
ment: it denied detainees access to a la
limited detainees' ability to present ev
the evidence against them, and contai
of hearsay. Such a "closed and accusat
ries "considerable risk of error"—a "ri
potential length of the prisoners' conf
could last a generation or more.[65] And
not compensate for these deficiencies.
flaw of the DTA could not be overcom
was read: the absence of any meaning
the allegations against him. The DTA,
sidering new evidence or conducting a
around which so many cases turned.
Court said, was the authority it gave a
of both the cause for detention and t
DTA substantially curtailed that autho
to correct errors, a power that was ever
fest flaws. In brief, no substitute for ha
be locked away—potentially for life—
opportunity to test the legal and factu
tral decision maker.

But even though the victory was
resting on a five-to-four vote. Chief Jus
Scalia each filed dissenting opinions,
Samuel Alito joined. "The Court," Rob
the most generous set of procedural pr
by this country as enemy combatants."
contradicts previous statements in *H*
coupled with judicial review, could sat
due process—precisely what the Bush
ated via the DTA-CSRT review scheme
failing to defer to this alternative pro
judgment of the political branches.[68]

eas review is more searching where the
eguards; and third, that habeas is itself
l to the circumstances and tailored to
from unlawful imprisonment.
ds, DTA review of CSRT hearings fell
t as a remedy for executive imprison-
wyer, relied largely on secret evidence,
vidence in their favor and to confront
ned virtually no restrictions on the use
orial" proceeding, the Court said, car-
sk too significant to ignore" given the
inement, which the Court recognized
appellate review under the DTA could
As the Supreme Court explained, one
e no matter how creatively the statute
ful opportunity for a detainee to rebut
for example, barred courts from con-
hearing to resolve the factual disputes
A *sine qua non* of habeas corpus, the
judge to "conduct a meaningful review
he Executive's power to detain."[66] The
ority and undermined a judge's power
n more critical given the CSRT's mani-
abeas corpus could allow a prisoner to
unless it provided him a meaningful
al basis for his detention before a neu-

momentous, the margin was narrow,
stice John Roberts and Justice Antonin
which Justices Clarence Thomas and
berts said, "strikes down as inadequate
otections ever afforded aliens detained
[67] Its decision, Roberts continued, also
Hamdi that a military status tribunal,
isfy even an American citizen's right to
administration and Congress had cre-
e. Roberts thus chastised the Court for
cess and undercutting the considered

But Roberts ignored both the larg
tions and the specific flaws of the D
oners of war from past conflicts, Gua
connection with a loosely defined arm
under a definition of "enemy combata
military detention authority in its bre
in *Hamdi* had referred to a legally san
pursuant to Army Regulation 190-8 an
ing the process Hamdi had failed to r
als seized on a battlefield where they
forces (in Hamdi's case, the Taliban). *
tribunals could be used to justify the
many of whom were seized outside any
on their suspected affiliation with, or
nization. *Hamdi* also assumed that hab
rect errors when the regular military
first instance. Moreover, Roberts look
not how it functioned in practice, and
CSRT's excessive reliance on secret ev
ence, and its kangaroo-court style "h
tioned potentially lifelong detention;
than a person in the United States ord
ing ticket.

Whereas Roberts focused on the I
habeas review, Scalia denied that an
Guantánamo detainees had no const
place. Building on his dissent in *Ras*
sion Clause to its original meaning, wh
protections foreign nationals seized a
The Suspension Clause's unprecedente
Scalia insisted, not only contradicted t
but also undermined the separation o
ity to judges.[69] What the Court's majo
bringing prisoners to Guantánamo to
unwarranted judicial interference with
detain alien prisoners seized abroad w
the territorial reach of the writ by the
as much a threat to the proper separat
Executive."[70]

er context of the Guantánamo deten-
TA-CSRT review scheme. Unlike pris-
ntánamo detainees were being held in
ned conflict of perpetual duration and
nt" that vastly exceeded all recognized
adth and scope. To be sure, the Court
ctioned military status tribunal acting
d the Geneva Conventions in describ-
eceive. But it did so only for individu-
were fighting alongside enemy armed
Hamdi never considered whether such
prolonged detention of individuals—
y battlefield or hostilities—based solely
activity on behalf of, a terrorist orga-
beas corpus would be available to cor-
process had not been provided in the
ed only at the CSRT process on paper,
ignored the unrefuted evidence of the
vidence, its pervasive command influ-
earings." CSRT determinations sanc-
yet, they provided fewer protections
linarily receives in contesting a speed-

DTA-CSRT scheme as a substitute for
y substitute was necessary, since the
titutional right to habeas in the first
ul, Scalia sought to limit the Suspen-
hich, he maintained, excluded from its
nd detained outside the United States.
d extension to Guantánamo detainees,
he intent of the Constitution's framers
f powers by ceding too much author-
rity saw as executive manipulation in
avoid habeas corpus, Scalia viewed as
the president's wartime prerogative to
ithout court review. "'Manipulation' of
Judiciary," Scalia charged, "poses just
ion of powers as 'manipulation' by the

Scalia, however, misunderstood th
Power and control over the jailer and
command, not formal notions of sover
minations about the writ's territorial r
also had never turned on a prisoner'
contradicted the writ's role as a safe
executive action. Elevating citizenship
line rule or "litmus test" was a modern
mately could not be reconciled with a
the idea of checks and balances and c
tánamo itself demonstrated how tethe
constructs like political sovereignty op
less enclaves, arbitrary detention, and

Boumediene thus rejected one of th
global detention system: that prisone
corpus review as long as they were he
to habeas corpus secured by the Suspe
limited to American citizens or the ma
apply to any U.S. detention anywhere i
the Court found it applied) to Bagram
(where the Court might one day reach

Yet *Boumediene* also contained s
Supreme Court did not rule that the S
all prisoners held by the United States
implicitly recognized that some priso
corpus and left open exactly where t
tánamo. The Court acknowledged th
detained abroad by the Executive, it li
unprecedented extension of judicial
would be available at the moment the
reinforced the idea that there remaine
torial detention—temporally, if not sp
reach. Furthermore, the Court caution
right applied, "proper deference can l
for screening and initial detention u
confinement and treatment for a reaso
quate military process might delay or f
Court's functional test also meant that
depended partly on an individual judg

he tradition and precedents he cited. d a judge's ability to enforce the writ's reignty, had traditionally guided deter- each. The availability of habeas corpus s citizenship status—a limitation that guard against arbitrary and unlawful or territorial sovereignty to a bright- invention. Such a rule, moreover, ulti- a system of government predicated on commitment to the rule of law. Guan- ring the Constitution's reach to formal pened the door to the creation of law- torture.

e animating ideas behind the post-9/11 rs could necessarily be denied habeas ld beyond America's shores. The right ension Clause, the Court said, was not ainland United States. Instead, it could n the world, from Guantánamo (where n in Afghanistan and CIA "black sites" the same conclusion).

several important qualifications. The Suspension Clause necessarily reached s abroad. *Boumediene*'s functional test ners would not have a right to habeas the writ might extend beyond Guan- at in "cases involving foreign citizens kely would be both an impractical and power to assume that habeas corpus prisoner is taken into custody."[71] This d some undefined realm of extraterri- atially—that habeas corpus would not ned that in assessing where the habeas be accorded to reasonable procedures nder lawful and proper conditions of onable period of time."[72] Thus, an ade- foreclose habeas review altogether. The where and when habeas was available e's assessment of what was appropriate

and practicable—an assessment that w
leable. How long was too long? How m
control over the detention site or the p
detention of several hundred individu
based solely on a determination by a t
provided a relatively easy answer. B
U.S. control over the territory was les
shorter and the military process more
nearer to a theater of armed conflict—
ene thus not only created future uncer
cal branches could still act in some pla
tension with the decision's stated purp

A sign of *Boumediene*'s potential reach
came in litigation challenging U.S. de
district judge handed down a decision
dictional ruling in a Bagram habeas
four prisoners, at least three of whom
including in places as distant as Tha
imprisoned at Bagram as "enemy comb

The district judge, John D. Bates, re
Boumediene to Guantánamo, finding
tively rejected any bright-line test for d
and other constitutional protections. A
Bates instead looked at the nature and
the adequacy of the process afforded
obstacles, if any, to habeas review. He
control over Bagram was not as com
and that Bagram was located in an ac
that the degree of U.S. control at Bagra
that at Guantánamo and was "practic
greater than U.S. control over Lands
II Germany, when the Supreme Cou
Bates found that ongoing military op
ent a significant obstacle to habeas re
such review were "largely of the Exec
had been apprehended elsewhere and
that the process used to determine th
short" of the process that the Supreme

was, by its nature, subjective and mal-
much process was enough? How much
prisoner was necessary? The prolonged
uals at a U.S. enclave like Guantánamo
tribunal as deeply flawed as the CSRT
But other overseas detentions—when
s complete, when the detentions were
robust, and when the prison was in or
—might present a closer call. *Boumedi-*
rtainty but also implied that the politi-
ces without legal constraint, a result in
ose.

as well as its potential limitations first
etentions at Bagram. In April 2009, a
in *al-Maqaleh v. Gates*, the first juris-
corpus case.[73] The challenge involved
had been seized outside Afghanistan,
ailand and Dubai. All four had been
batants" for more than six years.
ejected the government's effort to limit
that the Supreme Court had defini-
letermining the reach of habeas corpus
Applying *Boumediene*'s functional test,
d degree of U.S. control over Bagram,
the detainees there, and the practical
acknowledged that the United States'
plete as its control over Guantánamo
ctive theater of war. But he also found
am was not appreciably different from
ally absolute." It also was significantly
sberg Prison during post–World War
rt decided *Eisentrager*.[74] In addition,
erations in Afghanistan did not pres-
view and that any practical barriers to
cutive's choosing" where the prisoners
d brought to Bagram.[75] He also found
e status of Bagram detainees fell "well
e Court had declared unconstitutional

at Guantánamo and failed to provide r
evidence, an opportunity to be heard,

Judge Bates therefore ruled that th
a constitutional entitlement to habeas
rights for the fourth prisoner on the g
Bates explained that for Afghan nati
hended in Afghanistan, the balance of
focused on the possible friction with t
ing to the United States, a significan
Bagram were expected to be transferr
arise, he said, if a U.S. court were to
petition and reach a different result th
by ordering the detainee's release.[77] B
apprehended inside Afghanistan, ther
to habeas review because of the ongoi

On the one hand, *al-Maqaleh* show
of categorical limits on habeas jurisdi
of "new Guantánamos" in other parts
to transport prisoners across geograph
other hand, *al-Maqaleh* highlighted *B*
trict court's application of the Suprem
afforded habeas rights to only some B
ruling, prisoners brought to Bagram fr
detention in U.S. courts (at least if the
inside Afghanistan—the overwhelmi
could not, even though their detentio
evidence, the same inadequate milita
definition of "enemy combatant." Fu
United States transfer any prisoner to
fer, which could take years to be carri
prisoner had no access to Afghan or U

Boumediene's potential limitations
ernment's appeal of Judge Bates's deci
habeas rights. The three-judge panel—
Tatel and Harry T. Edwards—ruled th
access to habeas corpus and ordered th
Circuit panel acknowledged that the S
line test for determining the applicatio
constitutional rights outside the Unit

meaningful access to the government's
or a neutral decision maker.[76]
ree of the petitioners before him had
s review. However, he rejected habeas
round that he was an Afghan national.
onals, as well as for detainees appre-
f factors cut against habeas review. He
the Afghan government, since accord-
nt percentage of Afghan detainees at
ed to Afghan custody. Tensions could
entertain an Afghan detainee's habeas
han an Afghan court did, for example,
ates also suggested that for detainees
e might be greater practical obstacles
ng military hostilities there.
ed how the Supreme Court's rejection
iction could help prevent the creation
s of the world, with the executive free
nic lines to avoid court review. On the
oumediene's potential limits as the dis-
e Court's malleable, multifactored test
Bagram detainees. Under Judge Bates's
om other countries could contest their
ey were not Afghans), but those seized
ng majority of detainees at Bagram—
n might be based on the same flimsy
ary hearing, and the same overbroad
rthermore, nothing required that the
Afghan custody, and until such trans-
ed out (if ever carried out at all), that
.S. courts.
became more apparent in the gov-
sion granting some Bagram detainees
which included liberal judges David S.
at none of the petitioners should have
hat their cases be dismissed.[78] The D.C.
upreme Court had rejected any bright-
on of the Suspension Clause and other
ed States and had refused to limit its

decision in *Boumediene* to territories o
de facto sovereignty, such as Guantán
factored test, the panel also agreed w
cess that the Bagram detainees had re
process used for Guantánamo detain
that Bagram's location in an active the
to habeas review over detentions ther
diction.[80] Notably, the Court said it w
States had brought prisoners from othe
corpus review, even though it appear
Supreme Court's decision in *Rasul*, t
prisoners at Bagram rather than bring
this reason.[81] The panel also pointed to
friction with Afghanistan, even thoug
Afghan law, which does not authoriz
and which prohibits detention without

The D.C. Circuit's decision in *al-Ma*
of the *Boumediene* test was both a stre
the possibility that extraterritorial det
subject to habeas review, it by no me
trary, it gave judges wide discretion t
to exercise jurisdiction based on what
Without a reversal of *al-Maqaleh*, no
to habeas corpus, no matter how long
the process he had received, at least w
been brought to Bagram deliberately t

The same day that it issued *Boumedie*
Munaf v. Geren, which involved habea
two American citizens detained in Ir
and Shawqi Omar—had been seized b
run facilities there for more than two
tion, thus grappled with the lurking iss
Guantánamo. It also raised the questi
U.S. detentions conducted as a part o
as part of the Multi-National Force-Ir
authority. While the Supreme Court r
diction to review the two petitions, it
the scope and intensity of that review.

over which the United States exercised
amo. In applying *Boumediene*'s multi-
ith Judge Bates that the military pro-
ceived was even more flawed than the
ees.[79] But the panel nevertheless held
eater of war and the practical obstacles
re trumped the factors favoring juris-
vas only "speculation" that the United
er countries to Bagram to avoid habeas
ed that, at least from the time of the
he United States had been confining
ing them to Guantánamo for precisely
a risk that habeas review might cause
gh U.S. detentions at Bagram violated
e indefinite detention without charge
t due process.[82]

aqaleh made clear that the malleability
ength and a weakness: while it created
entions by the United States would be
eans ensured that review. To the con-
o balance various factors and decline
t they perceived as practical concerns.
Bagram detainee would have access
g he had been held or how inadequate
ithout additional evidence that he had
o avoid habeas review.

ene, the Supreme Court handed down
as corpus challenges filed on behalf of
raq.[83] Both men—Mohammad Munaf
y U.S. forces in Iraq and held at U.S.-
years. *Munaf*, like the Bagram litiga-
sue of U.S. overseas detentions beyond
on of whether habeas corpus reached
f an international force—in this case,
raq (MNF–I)—but answerable to U.S.
uled that the federal courts had juris-
placed potentially significant limits on

In upholding habeas jurisdiction, t
Arthur, the World War II–era case ir
sentenced by the International Militar
Supreme Court had ruled that the trib
States" and that "the courts of the Uni
to review, to affirm, set aside or annul
government invoked *Hirota* in *Munaf* j
Guantánamo detainee litigation: as a c
argued that the international characte
character of the tribunal in *Hirota*, me
States entity subject to habeas."[85] But *H*
from *Munaf*. It involved enemy alien
the tribunal that convicted and senter
clearly subject to U.S. authority. *Mun*
could reach U.S. detentions overseas a
judicial scrutiny simply by acting as p
ant to an international source of auth
Resolution.

The Supreme Court nevertheless als
petitions should be dismissed because
As framed by the Court, *Munaf* concer
over individuals detained by the Unite
nal prosecution under the laws of that
the actual exercise of habeas review ag
jurisdiction of [a] nation within its ow
absolute."[87] A host country may cede
the Court reasoned, through measure
give a foreign government primary ju
its troops stationed in the host countr
ing jurisdiction to the foreign governm
lute right to enforce its criminal law wi
ciples, the Court concluded that "pru
the orderly administration of criminal
its usual inquiry when the United Stat
tion by the host state.[88]

The Supreme Court also rejected t
their threatened transfer to Iraqi jai
rization and impermissibly exposed
acknowledged that habeas corpus jur

he Court distinguished *Hirota v. Mac-*
nvolving war criminals convicted and
y Tribunal for the Far East. There, the
unal was "not a tribunal of the United
ted States ha[d] no power or authority
l [its] judgments and sentences."[84] The
ust as it had invoked *Eisentrager* in the
ategorical bar to habeas jurisdiction. It
r of the MNF–I, like the multinational
ant that the MNF–I was "not a United
irota, the Supreme Court said, differed
s, not U.S. citizens. More important,
nced the petitioners in *Hirota* was not
af thus confirmed that habeas corpus
nd that the executive could not evade
art of a multinational force or pursu-
ority, such as a UN Security Council

so concluded in *Munaf* that the habeas
a U.S. judge could provide no relief.[86]
rned the exercise of habeas jurisdiction
ed States in another country for crimi-
country. The Court therefore evaluated
gainst the long-standing rule that "the
n territory is necessarily exclusive and
that jurisdiction in certain instances,
s like status-of-forces agreements that
risdiction over offenses committed by
y. But without such provisions allocat-
ment, the host nation retains an abso-
thin its territory. In light of these prin-
dential concerns," such as comity and
justice, require a habeas court to forgo
es is detaining a prisoner for prosecu-

the petitioners' alternative claim, that
lers lacked the requisite legal autho-
them to a risk of torture. The Court
risdiction can provide for review of a

prisoner's transfer from U.S. custody t
cases, for example, such transfers requ
and habeas courts routinely review th
ance with the treaty's terms and with a
when the transfer occurs solely within
purposes of criminal prosecution, the
is necessary. To the contrary, without
the transfer, the executive is free to ha
ernment for prosecution under the ho

The Court thus approved Munaf's
without a hearing, even though both
faced possible torture there. The Court
ferring American citizens in Iraq to
"is not suited to second-guess such
would require federal courts to pass ju
undermine the Government's ability t
The Court's decision, however, did not
ture claims. It left open the possibility
against Torture through the Foreign A
Congress had authorized the courts to
Souter suggested another important c
He insisted that a judge could prohibi
ability of torture is well documented,
edge it."[93]

Munaf, together with *Boumedien*
habeas corpus and its ability to reach
absence of American citizenship and
habeas jurisdiction in *Boumediene*,
operation did not preclude habeas revi
review was so circumscribed in *Mun*
prisoners were subject to criminal pro
foreign nation (Iraq) where they had b
the prisoners were instead being held
ued detention by the United States for
for prosecution by the host nation, h
this limitation.

But *Munaf* also suggested that th
restrictions on habeas corpus. The Co
be dismissed without any factual inq

to another government. In extradition
ire legal authorization, such as a treaty,
e prisoner's transfer to ensure compli-
pplicable statutory requirements.[89] But
the territory of a host government for
Court stated, no specific authorization
a law, treaty, or agreement restricting
and the prisoner over to the host gov-
st government's laws.[90]
and Omar's transfer to Iraqi custody
men had presented evidence that they
t pointed to a U.S. policy against trans-
likely torture. "The Judiciary," it said,
determinations—determinations that
dgment on foreign justice systems and
o speak with one voice in this area."[91]
t foreclose all review of transfer-to-tor-
that in implementing the Convention
Affairs Reform and Restructuring Act,
o consider such claims.[92] Justice David
qualification in a concurring opinion.
t a prisoner's transfer when "the prob-
even if the Executive fails to acknowl-

e, demonstrates the broad ambit of
n U.S. detentions overseas. Just as the
political sovereignty did not foreclose
U.S. participation in a multinational
iew in *Munaf*. And the reason that this
af, the Court explained, was that the
osecution for violating the laws of the
een seized and were being detained. If
for other purposes, such as for contin-
r its own security interests rather than
abeas review would not be subject to

here might be other, more signifcant
ourt ordered that the habeas petitions
quiry into the basis for the prisoners'

detention or the risk of torture follow
United States avoided this scrutiny in
the prisoners' cases as U.S. detention
the host government whose crimina
enforce, and not continued U.S. dete
ritorial U.S. enclave. Yet this rationa
the case and underscored the risk tha
cumvent habeas review by invoking th
process to shield its own detentions
cases, Iraqi criminal proceedings were
been sought from a U.S. court. Furth
United States suggested that it could
were acquitted by Iraqi courts, based
security detainee subject to criminal
"enemy combatant" in America's glob
detention interest was shielded, howev
of Iraqi proceedings.

Munaf's impact was soon felt in
oner transfers. Relying on *Munaf*, a
Circuit Court of Appeals subsequent
had no right to contest their transfer
executive could point to a policy forb
appeals court said, a judge could not
to transfer a particular prisoner. Nor,
examine a prisoner's claim that he wa
further detention in the receiving cou
to another sovereign's laws, a U.S. cou
inquire whether the continued detenti
the dissent correctly noted, the panel'
because it allowed transfers intended
reach by handing the prisoner over
Court, however, declined to hear the p
leaving that decision in place.[96]

Boumediene and *Munaf* were the S
rorism" decisions during Bush's presid
administration's effort to avoid habe
bright-line tests: political sovereignty
and U.S. participation in a multination
demonstrated that habeas corpus rem

wing transfer to Iraqi authorities. The *Munaf* by successfully characterizing ns for the purpose of prosecution by l laws the United States was helping ention without charge in an extrater- le was in tension with the record in at the United States could simply cir- he specter of another nation's criminal from review. In Munaf's and Omar's e initiated only after habeas relief had hermore, at least in Omar's case, the still detain the petitioner even if he on the theory that he was not only a prosecution by Iraq but was also an al "war on terrorism." This U.S.-based ver, from habeas review by the specter

other habeas cases challenging pris- divided three-judge panel of the D.C. tly ruled that Guantánamo detainees to another country.[94] As long as the bidding transfers to likely torture, the second-guess the executive's decision the appeals court said, could a judge s being transferred for the purpose of ntry. If the prisoner was held pursuant urt could not question the decision or on was at the United States' behest. As s decision undermined habeas corpus to remove a prisoner from the court's to another sovereign.[95] The Supreme risoners' appeal of the panel decision,

Supreme Court's last two "war on ter- ency. Both decisions rejected the Bush as review by invoking formalistic or and citizenship status in *Boumediene* al force in *Munaf*. *Boumediene* further ained an important means of cutting

through sham proceedings like the CS
ination of the basis for a prisoner's con

The decisions, however, also poin
habeas corpus: *Boumediene* employed
left open the possibility that at least
remain beyond judicial review; *Munaf*
habeas review itself could be exceedi
States successfully tied the prisoner's d
tion by another state. Moreover, habe
mine the permissible scope of the pre
ability of habeas thus did not resolve
United States could imprison an indi
prosecute that person in a military c
federal courts. Nor did it determine w
a detainee might claim in challenging
a vehicle for courts to address these q
jurisdiction over individual cases. Bu
review of important legal questions, su
tary detention power, could be avoid
the executive through the transfer or r
those questions unresolved and the g
unlawful conduct again in the future.

The availability of habeas corpus als
remedy a court could order if it found
the prisoner could not be safely retu
not be repatriated to a third country.
Washington, D.C., order the prisoner's
what could the court do to remedy ill
and other issues.

RT and providing a meaningful exam-
nfinement.
ted to some potential limitations on
d a malleable and functional test that
some overseas U.S. detentions would
, in contrast, served as a reminder that
ngly narrow, especially if the United
detention to possible criminal prosecu-
eas corpus review did not itself deter-
sident's detention authority. The avail-
e the circumstances under which the
ividual indefinitely without charge or
ommission rather than in the regular
hat other constitutional or legal rights
his confinement. Habeas did provide
questions through the exercise of their
t as recent history has shown, habeas
uch as the scope of the president's mili-
ed by eleventh-hour machinations by
release of the prisoner, thereby leaving
overnment free to engage in the same

so did not answer the question of what
l the prisoner's detention unlawful but
rned to his home country and could
Could, for example, a habeas court in
s release into the United States? If not,
egal detention? Part 4 addresses these

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Part 4

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Toward a Better Und
of Habeas Corpus

Individual Rights and the Ro
the Judiciary during Wartim

Centuries ago, the king decl
locked them away in the Tower of Lon
2001, the president called them "enen
at Guantánamo and other offshore pr
pus emerged as a critical check agains
review.

Some people have claimed that
against terrorism and jeopardizes Am
ics have even accused the detainees' at
defending a person deprived of his li
against the United States.[1] Those wh
detainees held in connection with th
legislators, and the public should inst
about whom to imprison and for how
ment of prisoners, including the meth
solely for the executive to decide. But
the pressures it can exert on even well
legal limits in the name of security that
Supreme Court Justice Louis Brandeis
gers to liberty lurk in insidious encroa
but without understanding."[2]

By rejecting bright-line categories s
torial sovereignty as the basis for habe
limit the possibility of detentions outsi
v. Bush, as Professor Gerald Neuman

10

derstanding

ole of
e

ared people enemies of the state and
don. After the attacks on September 11,
ny combatants" and imprisoned them
risons. In both instances, habeas cor-
st executive detention without judicial

habeas corpus undermines the fight
erica's security. The most extreme crit-
torneys of waging "lawfare," as though
berty in court was a form of combat
o oppose extending habeas rights to
he "war on terror" argue that judges,
tead defer to the president's decisions
long. They also contend that the treat-
nods of their interrogation, is a matter
it is the very nature of terrorism and
l-intentioned public officials to exceed
t make habeas corpus so important. As
cautioned long ago, "The greatest dan-
achment by men of zeal, well-meaning

uch as a detainee's citizenship or terri-
as rights, the Supreme Court sought to
ide the law. Its decision in *Boumediene*
has explained, serves as an important

protection to "security detainees who
extraterritorial arrests."[3] It also alters "
ity, and rights in the globalized world
At a minimum, *Boumediene* ensures th
place in the shadow of potential fede
sibility of habeas review envisioned b
plining effect on the executive by cau
consideration to the dangers of arbitr
direct judicial intervention.[5]

But *Boumediene* does not go far
detention and secure adherence to the
malleability of *Boumediene*'s jurisdict
the extension of a particular right is '
the circumstances, allows courts to av
detention challenges that they deem t
It also implicitly contemplates the pos
The Supreme Court instead should h
available to all individuals detained by
they are held, without a valid suspens
prerequisite for habeas jurisdiction sh
tion of, the United States. Where a pr
under which he is captured and deta
inquiry, the substantive law that guid
mately reaches. But it should not det
whether the detention is legal.

Extending habeas corpus to all U.S. c
itably raises difficult questions, especi
basis for this assertion of jurisdiction,
understandings of the writ's applicatio
practice when a prisoner is captured a
tions halfway across the world—a co
decisions like *Johnson v. Eisentrager*?[6]
second-guess military decisions and m
the bench? Would the courts themselv
on behalf of prisoners in military custo

Previously, foreign nationals captu
States were thought to be excluded f
however, the Supreme Court rejected
zenship and location necessarily dete

have been the innocent victims of . . .
conceptions of sovereignty, territorial-
," as Professor David Cole has noted.[4]
hat future overseas detentions will take
ral court intervention. The mere pos-
y *Boumediene* will likely have a disci-
sing it to act in ways that give greater
rary detention in order to avoid more

enough to protect against unlawful
rule of law. As we have seen, the very
ional test, which focuses on whether
"impracticable" or "anomalous" under
void assuming jurisdiction over future
oo complicated or politically sensitive.
ssibility of detentions beyond the law.
ave made clear that habeas corpus is
the United States, regardless of where
sion of the writ by Congress. The sole
hould be detention by, or at the direc-
risoner is held and the circumstances
ined may affect the scope of a court's
des its analysis, and the result it ulti-
ermine the court's power to consider

detentions, regardless of location, inev-
ally during wartime. What is the legal
and how does it square with previous
n? How would habeas review work in
nd held in a theater of military opera-
ncern raised in prior wartime habeas
Would it cause courts to improperly
nicromanage wartime operations from
es be inundated by petitions filed by or
ody?
ured and detained outside the United
rom the writ's reach. In *Boumediene*,
the proposition that a prisoner's citi-
rmined the availability of habeas cor-

pus. Instead, the Court stated that c
the factors to consider in determinin
sion Clause guaranteed habeas reviev
The Court's ruling accorded with hab
rejected any bright-line or categorical

Historically, habeas corpus was ava
citizenship. It also had a broad territor
of reaching any jailer under the Crow
occasionally sought to transport prisc
reforms were enacted to curb the prac
pus was similarly understood as a vit
ful executive confinement. Since 1789
grant writs of habeas corpus to any p
of the authority of the United States"
location—a provision that remained i
the Detainee Treatment Act of 2005 a
2006.[7] Even more important, the Cor
pension of habeas corpus except in na
reference to a prisoner's citizenship or

Territorial and citizenship-based lir
writ's purpose. Habeas corpus does n
gal confinement; it also helps ensure t
lawfully. Restricting habeas corpus bas
principle of equal protection under law
detentions are arbitrary and lawless. C
to determining the government's autho
Immigration law, for example, may a
eign nationals pursuant to their remov
Alien Enemies Act of 1798, with respe
government in time of war.[9] But citiz
a person's detention is lawful, nor doe
address that question. Thus, even wher
tial element of a given detention, as in
texts, habeas review remains available
law.[10]

Conditioning habeas corpus on a pr
of the type of arbitrary and lawless exe
Terrorism today is global, and an effec
on transnational action by law enforc

citizenship and location were among
g whether the Constitution's Suspen-
w over a particular detention abroad.
eas's history and purpose insofar as it
limits on its availability.

ilable to individuals regardless of their
rial ambit under common law, capable
n's command. When the king's jailers
oners overseas to avoid habeas review,
ctice. In the United States, habeas cor-
al check against arbitrary and unlaw-
, federal law had authorized judges to
person "in custody under or by color
without regard to citizenship status or
n effect until Congress amended it in
and the Military Commissions Act of
nstitution expressly prohibits the sus-
rrowly defined circumstances, without
location.[8]

mitations similarly are at odds with the
ot just protect individuals against ille-
that the power of the state is exercised
sed on citizenship not only violates the
w but also creates a perception that U.S.
Citizenship, to be sure, can be relevant
ority to detain in a particular situation.
uthorize the detention of certain for-
val from the United States. So may the
ect to citizens or subjects of an enemy
enship itself does not resolve whether
s it determine the power of a court to
n a person's noncitizenship is an essen-
the immigration and alien enemy con-
to ensure the detention comports with

risoner's location also increases the risk
ecutive action that took place after 9/11.
ctive counterterrorism policy depends
cement, intelligence agencies, and the

military, sometimes in combination
involves the seizure of terrorist suspe
power overseas in ways not contempl
in prior military conflicts. An effective
gathering information to prevent futu
corpus depends on where a prisoner
for the government to find new locat
rogate without a judicial check—prec
the Bush administration to create a n
For habeas corpus to fulfill its checki
law enforcement and military operatio
ceived than in the past. The global rea
rorism, in short, begets a broader conc
that this power is exercised lawfully—
historic purpose as a bulwark against w

War poses a more difficult challeng
Relatively few precedents involve com
challenged their detention or military
cessfully or unsuccessfully. The Unite
judges on the sidelines conducting h
every person whom American forces c
during wartime risks injecting judges
expertise and competence and interfe
does not mean courts have no role to
drifts from clear and well-defined lega
judicial role must be.

Take the supposed problem of num
tleground over habeas rights after 9/1
oners in total. Given the tens of thousa
decided by the courts every year, mar
for murder and other violent crimes,
habeas actions has always been relativ
whelming the courts. The question th
during this litigation was where else
were recognized at Guantánamo. Wo
the hundreds of U.S. detainees in Afg
the United States held in Iraq, and a
might capture and detain abroad in fu
would habeas rights have extended to

n. Counterterrorism thus potentially
ects abroad and the projection of U.S.
ated either at the nation's founding or
e counterterrorism policy also requires
re attacks. As long as access to habeas
is detained, there will be an incentive
ions where it can imprison and inter-
isely the dynamic that helped prompt
network of overseas prisons after 9/11.
ng function in an age of transnational
ons, it must be even more broadly con-
ch of U.S. detention power to fight ter-
ception of habeas rights to help ensure
a conception that aligns with habeas's
wrongful imprisonment.
ge to the idea of global habeas corpus.
batants detained during wartime who
trial by habeas corpus, whether suc-
ed States has never fought a war with
earings in federal court on behalf of
capture during combat. Habeas review
and lawyers into matters beyond their
ring with military operations. But that
play, and the further the United States
al boundaries, the more aggressive the

mbers. Guantánamo, the principal bat-
1, held fewer than eight hundred pris-
nds of postconviction habeas petitions
ny brought by individuals imprisoned
the number of Guantánamo detainee
ely small and posed little risk of over-
hat always loomed in the background
habeas rights might apply once they
uld, for example, the writ also reach
ghanistan, the thousands of prisoners
ll the others whom the United States
ture armed conflicts? Or looking back,
o the more than one million German,

Powers

Italian, and Japanese soldiers the Unit
II, including the 400,000 prisoners o
Where and how should the courts dra
citizenship do not justify restricting a
the realities of war do.

A closely related concern is the in
could have on the military. The gove
Guantánamo litigation that affording
would jeopardize military operations a
ror."[12] In *Boumediene*, the Supreme Co
petitions from enemy prisoners coul
Germany, where the United States bec
in an occupation zone encompassing
a population of 18 million. The D.C.
interfering with military operations i
missal of habeas petitions filed on beh
stan on the ground that Bagram was lo

In addition to these practical consi
raises questions about maintaining th
the branches of government. The Co
shared between Congress and the exec
ple, the power to declare war, to raise a
rules concerning military captures.[13] T
president shall be the commander in
ing and scope of the Constitution's c
center of many of the debates over the
tion policies, from declaring prisoners
military commissions. The Bush admi
chief clause to support far-reaching cl
ing the power to ignore laws that the
cretion to define and to wage war as he
administration lawyers argued, must y
military necessity and national securit
in chief exceeded his constitutionally
proper scope of that power for future
the judiciary's appropriate role in revi
time. Indeed, it is possible that courts
and excesses of one administration
beyond their proper sphere and compe

ted States captured during World War
f war held inside America's borders?[11]
w the line? If a prisoner's location and
access to habeas corpus, then perhaps

mpact that so many habeas petitions
rnment repeatedly argued during the
habeas rights to "enemy combatants"
nd decision making in the "war on ter-
urt noted the interference that habeas
d have caused in post–World War II
ame responsible for maintaining order
more than 57,000 square miles with
Circuit raised similar concerns about
n *al-Maqaleh* when ordering the dis-
alf of prisoners at Bagram in Afghani-
cated in an active theater of war.
derations, wartime habeas review also
e proper separation of powers among
nstitution envisions the war power as
cutive. It grants to Congress, for exam-
nd support armed forces, and to make
he Constitution also stipulates that the
chief of the armed forces.[14] The mean-
ommander-in-chief clause was at the
Bush administration's post-9/11 deten-
"enemy combatants" to trying them in
nistration invoked the commander-in-
aims of presidential authority, includ-
president said encroached on his dis-
e saw fit. Even laws prohibiting torture,
ield before the president's assertions of
y. Yet merely because one commander
delegated power neither resolves the
presidents nor settles the question of
ewing military detentions during war-
could overcompensate for the abuses
by inserting themselves into matters
etence.

These concerns, although understa
about the nature of habeas corpus rev
in modern transnational counterterro
habeas corpus does not interfere w
executive functions. Instead, habeas h
government detains prisoners, those
requirements. While this more expan
inevitably lead to greater judicial revi
past, that is a consequence of the mili
rorism, the different legal framework
traditional state-versus-state context, a
by national security detentions withou

The potential volume of wartime
ily mean that courts would be overwl
of prisoners *could* seek habeas relief
especially once it became clear that th
if the courts were somehow flooded
prisoners seized during wartime milit
dle the volume because of the nature
can vary significantly depending, for e
the breadth of the government's clai
dures and protections provided to th
extremely limited, even *pro forma*, in
ever, it might be appropriately robust
inquiry into legal and factual basis for

In an armed conflict between two
national armed conflict"—habeas rev
ment demonstrates that it is adherin
and other applicable legal requirement
miss a habeas petition. If the governm
lished legal requirements, however, a c
ordering that the process used to dete
the Geneva Conventions. Thus, althou
as World War II, have traditionally in
ers, it is precisely in this context that h

The limited but important function
flicts is to demand that the governme
conducted under the proper legal fra
with the required hearings and other

ndable, are rooted in misconceptions
iew and the importance of that review
rism operations. Properly understood,
ith legitimate military operations or
elps ensure that to the extent the U.S.
detentions adhere to applicable legal
nsive conception of habeas rights will
ew of military detentions than in the
tary's increased role in combating ter-
governing armed conflicts outside the
and the heightened risk of error posed
t criminal process.

habeas petitions does not necessar-
helmed. The mere fact that thousands
does not mean that they *would* do so,
ere was no prospect of relief. But even
with lawsuits filed by or on behalf of
ary operations, judges could still han-
and flexibility of habeas review, which
example, on the nature of the conflict,
med detention power, and the proce-
e prisoner. Thus that review might be
some circumstances. In others, how-
, with a court conducting a searching
a prisoner's detention.

or more nations—known as an "inter-
iew is narrow as long as the govern-
g strictly to the Geneva Conventions
s.[15] If it does, a court can promptly dis-
ent fails to adhere to those well-estab-
ourt can remedy the failure, such as by
ermine a prisoner's status comply with
gh international armed conflicts, such
volved the greatest number of prison-
abeas review is most circumscribed.

of habeas in international armed con-
ent show that its detentions are being
mework, that it is providing prisoners
protections to prevent error, and that

it is complying with the rules manda
ing torture and other forms of abuse. T
would not have to present live testimo
by a high-level official describing how
conflict and confirming that the same
applied to the particular prisoner in qu

Some habeas petitioners might cla
take in their particular case. For exan
was improperly denied prisoner-of-w
Geneva Convention. Another might
port to the enemy army and was impr
Fourth Geneva Convention. But for in
armed conflict and held in accordance
need not conduct an individualized in
Instead, a court could defer to the find
tribunal that assessed the detainee's st
authorized (i.e., that the category of
correctly defined as prisoner of war o
determination through the required p
(i.e., a hearing conducted in accordan
Convention and applicable military
diers in the field would neither have t
court nor rebut the specific allegation
tody who filed a petition challenging l
would always retain the power to pr
confronted with egregious or widespr
abuse, the ordinary rule would be sum
international armed conflicts.

There are sound reasons for cabini
stances. The military detention of co
enemy nations is firmly rooted in bot
tion, which grants Congress the power
erning the capture of prisoners[16] and
to prosecute the war as commander
Constitution's framers understood wa
states.[18] War might vary in its magnit
ence between "perfect" and "imperfe
existed only between two or more go
after the country's founding. During th

ting humane treatment and prohibit-
To make this showing, the government
ny but could submit a sworn statement
it was treating prisoners seized in the
standards and procedures were being
uestion.
im that military officials made a mis-
mple, a petitioner might claim that he
ar status under Article 4 of the Third
argue that she never provided sup-
operly interned as a civilian under the
dividuals captured in an international
with the Geneva Conventions, a court
nquiry into each detainee's allegations.
lings of a properly constituted military
tatus as long as that status was legally
persons who could be detained was
r civilian) and the tribunal reached its
process to minimize the risk of error
ce with Article 5 of the Third Geneva
regulations). Commanders and sol-
o testify at habeas hearings in federal
s made by every prisoner in U.S. cus-
his or her detention. Although a court
obe further on habeas, particularly if
read evidence of illegal detention and
mary dismissal of wartime petitions in

ng habeas review under these circum-
mbatants during armed conflicts with
h international law and the Constitu-
r to declare war and to make rules gov-
which gives the president the power
in chief.[17] As an original matter, the
ar as existing only between sovereign
tude and intensity—hence, the differ-
ct" wars—but war, in the legal sense,
overnments.[19] This view persisted long
he Civil War, for example, when Presi-

dent Abraham Lincoln commissioned
usages of war, he defined public war
sovereign nations or governments."[20] S
administration leaned most heavily a
tary detention of suspected terrorists
and *Quirin*—understood war as existi
the Constitution recognizes broad exe
ing the extraordinary power to detai
it also contemplates that power as op
parameters.

In an international armed conflict,
detained, both legally and factually. N
(i.e., prisoner of war or civilian), but th
tus hearing conducted close to captur
meaningful safeguard against mistake
conflicts, in which combatant status i
government's armed forces and that st
because soldiers wear uniforms and
Conventions' more streamlined proc
sufficient to prevent error. At the san
able temporal limits of such conflicts
cease), the costs of mistaken detentio
these circumstances is thus best under
than a permanent abrogation of, ordi
context, military procedures, impleme
Conventions and U.S. military regulat
an adequate substitute for habeas corp

By contrast, military detention outs
a constitutional foundation or pedigr
tains a number of examples in which
state actors, such as pirates and slave t
operations against nonstate actors we
law, not held as prisoners of war or oth
from the ordinary requirement of c
exception—a civil war—is more a va
in opposition claims and exercises the
governmental structure, organized arm
American Civil War.[22] Thus, the very
outside the strictures of an internatio

d the first codification of the laws and as a "state of armed hostility between Similarly, the cases on which the Bush fter 9/11 to defend its indefinite mili- as "enemy combatants"—*Eisentrager* ng between nation-states. Thus, while cutive power during wartime—includ- n without criminal charge and trial—erating within fixed and well-defined

, it also is generally clear who may be Not only are the legal categories clear he fact-finding process—a military sta- re in both time and place—provides a es. Put simply, in international armed s based on membership in the enemy tatus is ordinarily easy to discern (e.g., carry weapons openly), the Geneva ess of Article 5 hearings is generally me time, given the finite and discern- (i.e., when hostilities between nations n are less severe. Military detention in rstood as a limited exception to, rather nary due process requirements. In this ented in accordance with the Geneva tions, can also be viewed as providing us.

side international armed conflict lacks ee. To be sure, American history con- military force was used against non- traders. But those captured in military re generally prosecuted under civilian erwise treated as "combatants" exempt riminal charge and trial.[21] The main riation than a departure, as the party e functions of a sovereign state (e.g., a ny), as the Confederacy did during the notion of indefinite military detention nal armed conflict or a conflict against

a de facto state in a civil war raises s
United States can effectively treat the
and other terrorist organizations anyw
perpetual war, what are the limits? Can
without trial be employed against an i
government views, rightly or wrongly,
itary detention in these circumstances
but also raises concerns about militar
criminal law enforcement.

Armed conflicts that are not betw
noninternational armed conflicts. Sinc
developed to address conflicts that d
states. The rational behind these develo
ing state's power or to avoid legal cons
after 9/11 by selectively invoking and r
is to ensure that all individuals seized
tection against arbitrary detention ar
armed conflicts, however, there is a pre
state in which the detention occurs w
detained will be prosecuted under that
the fact that civilians who engage in ho
erents) have no status in international
two or more sovereigns, and seeks to
to treat insurrection, insurgency, or te
under its laws.[23] In noninternationa
also requires adherence to the due pr
including meaningful access to a court
flicts, many of these guarantees are ad

In addition, the risk of mistaken d
noninternational armed conflicts tha
is precisely because insurgents, guerri
always wear uniforms, bear arms ope
themselves from the civilian populati
those subject to detention in a noninte
whereas in international armed conflic
tainty about the enemy, in nonintern
some, if not a great deal, of factual unc
when, as the United States did after 9
of a global "war on terrorism," people

erious constitutional questions. If the
e members or supporters of al Qaeda
where in the world as combatants in a
n the same power to detain indefinitely
inner-city gang or drug cartel that the
as endangering the public safety? Mil-
not only threatens individual liberties
y intrusion into the civilian sphere of

ween nation-states are referred to as
ce World War II, international law has
o not involve two or more opposing
opments is not to maximize the detain-
traints, as the Bush administration did
manipulating the law of war. Rather, it
during armed conflict have some pro-
nd mistreatment. In noninternational
esumption that the domestic law of the
vill continue to govern and that those
t state's laws. This presumption reflects
ostilities (also called *unprivileged belligerency*
law, since there is no conflict between
avoid interference with a state's right
errorism within its borders as a crime
l armed conflicts, international law
ocess guarantees of human rights law,
t, whereas in international armed con-
dressed by the Geneva Conventions.[24]
detention is generally much greater in
n in international armed conflicts. It
llas, and other nonstate forces do not
enly, or otherwise seek to distinguish
on that it is more difficult to identify
ernational armed conflict. Accordingly,
t, there is generally little factual uncer-
national armed conflict, there is often
certainty. This uncertainty is multiplied
9/11, a country seeks to detain, as part
who were never present on or near a

battlefield, who never engaged in hosti
no connection to armed conflict at all.

At the same time, the cost of erro
potentially extended duration of a no
insurgents, terrorists, or other nonstat
ple, maintains that it is engaged in an
"associated" terrorist organizations th
generational in duration. Both the ris
tion in such a conflict are thus far grea
nations, in which under the Geneva Co
released and repatriated at the end of h

For these reasons, detention in non
broader habeas review. A court must
government is complying with the Gen
ants as prisoners of war, as it would do
noninternational armed conflict, in wh
basis for detention, a court must addres
tion without charge: that is, the category
confinement or administrative detentio
criminal courts. A court must also dete
is himself detainable. In other words, ev
rized to detain a limited category of per
organized military force of a nonstate a
or allied forces in a theater of war), a cou
ally falls into that category as a factua
fact-finding inquiry itself or ensuring th
cess to make that determination. Any su
required by human rights and customar
an independent and impartial body and

Habeas review is especially critical in
ment fails to follow the laws of war and
of prisoners seized during armed confl
is extended beyond the bounds of arm
occurred after 9/11 in the United States

These detentions, to be sure, trade
the enemy's soldiers to prevent their "
to afford prisoner-of-war status to tho
units and do not adhere to the laws

lities, and who, in some instances, had

or is greater, given the uncertain and
oninternational armed conflict against
e groups. The United States, for exam-
n armed conflict against al Qaeda and
at is not only global in scope but also
sks and the costs of erroneous deten-
ater than in an armed conflict between
onventions prisoners must be promptly
ostilities.[25]
ninternational armed conflict warrants
do more than simply confirm that the
neva Conventions and holding combat-
in an international armed conflict. In a
ich international law does not supply a
s who may properly be subject to deten-
of persons—if any—subject to military
n rather than prosecution in the regular
ermine whether the individual prisoner
ven if the government is properly autho-
rsons militarily (such as members of an
ctor engaging in hostilities against U.S.
rt must determine that a prisoner actu-
l matter—whether by conducting that
hat there is an adequate alternative pro-
uch process must contain the safeguards
ry international law, including access to
l to a legal representative.[26]

two circumstances: when the govern-
d other applicable rules in its treatment
ict and when wartime detention power
med conflict itself. Both circumstances
s' detention of "enemy combatants."
d on familiar concepts: incapacitating
"return to the battlefield" and refusing
ose who fight outside regular military
of war.[27] The notion that individuals

could engage in hostile acts without th
members of an enemy armed force h
wrote one of the first codifications o
American Civil War and helped lay th
Hague Conventions defining rights an
the differing levels of protection that m
men who did not obey the rules and cu
Geneva Conventions distinguish betwe
erents by giving combatant immunity
out for special treatment spies, sabote
ardize the security of an occupying po
domestic law for taking up arms.[29]

Modern developments have incre
belligerency, with the traditional mod
against one another in rank-and-file fo
wide-ranging methods of warfare in w
partisans, spies, or saboteurs.[30] Terro
Terrorists do not wear uniforms or op
instead try to blend in with the ordin
nately target civilians.[31]

The Bush administration, however,
executive power and avoid all legal c
ists were just like the spies, saboteurs,
in warlike acts without adhering to t
tion stated, made them "unlawful com
involvement—even the mere provision
ated group"—could justify a person's in
war crimes before a military commiss
of the regular civilian courts or milit
istration thus claimed the power to fi
and infinite duration against an enem
be treated as combatants in order to e
requirements but who had no privileg
erwise lawful acts of war a war crime,
trary detention and abuse.

This approach was deeply flawed. Fi
context of international armed conflic
connection to an enemy nation's armed
that of the ICRC, which monitors co

he protected status afforded to regular as a long history. Francis Lieber, who f the laws of land warfare during the he groundwork for the 1899 and 1907 nd duties during armed conflict, cited ight apply to irregular bands of armed ustoms of warfare.[28] Likewise, the 1949 een privileged and unprivileged belligonly to prisoners of war and singling eurs, and others whose activities jeopwer and who can be prosecuted under

eased the challenges of unprivileged del of uniformed armies squaring off rmation giving way to amorphous and which individuals can act as guerrillas, orism presents additional challenges. penly acknowledge their identities but ary population. They also indiscrimi-

exploited these challenges to maximize constraints. It maintained that terror- and others before them who engaged he laws of war. This, the administranbatants," and meant that any level of n of support to al Qaeda or an "associndefinite military detention or trial for sion that failed to meet the standards tary courts-martial. The Bush adminght an armed conflict of global scope y whose members and affiliates could xempt them from regular due process ge of belligerency, rendering even oth- and no legal protections against arbi-

irst, combatant status developed in the ct and has long been tied to a person's d forces. The prevailing view, including mpliance with the 1949 Geneva Con-

ventions, was that no wartime prison
outside the category of combatants un
civilians under the Fourth Geneva Con
Geneva Conventions was to be a pris
who, if they took a direct part in hosti
and could be prosecuted criminally un
words, no separate category of "unlaw
was a combatant in the first instance h
included taking up arms against the e
tary targets with legal impunity. That
nal sanctions for violating the laws of w
rin who committed perfidy by removi
entering the United States to attack m
belligerency unlawful. All other perso
civilians) and did not have the comb
armed conflict.[34]

Civilians who engage in hostilities
accurately described as "unprivileged b
ants." Although unprivileged belligere
when they are directly participating i
purposes of detention and trial. This d
punishment. To the contrary, unprivi
for murder or related offenses under d
thus deviated from long-standing rul
to treat those who allegedly were con
associated organizations as combatant
tion or military prosecution as war cri
to criminal prosecution under domest

The Bush administration also man
to create a category of prisoners witho
law, civilian or military, domestic or in
custody during armed conflict, even if
entitled to protections against arbitra
provisions of the Geneva Conventions
noninternational armed conflicts, inte
much of the post–World War II deve
ian law was intended to ensure that
armed conflict outside the traditiona
Geneva Conventions—is beyond the l

er in international armed conflict fell
nder the Third Geneva Convention or
nvention. To be a combatant under the
soner of war; all others were civilians
ilities, were "unprivileged belligerents"
der domestic law.[32] There was, in other
wful combatant."[33] Only a person who
ad the privilege of belligerency, which
nemy's soldiers and attacking its mili-
person could expose himself to crimi-
war, as did the German soldiers in *Qui-*
ing their uniforms and surreptitiously
ilitary targets, thereby rendering their
ns, however, were noncombatants (i.e.,
batant's privileged status to engage in

—including terrorists—are thus more
belligerents" than as "unlawful combat-
nts may be targeted with military force
n hostilities, they remain civilians for
does not mean they are immune from
leged belligerents may be prosecuted
lomestic law. The Bush administration
es and customary practice by seeking
nected to or supported al Qaeda and
ts subject to indefinite military deten-
minals rather than as civilians subject
ic law.
ipulated the "enemy combatant" label
out legal protection under any body of
nternational. All individuals taken into
denied prisoner-of-war status, are still
ary detention and abuse under other
s, customary international law, and, in
ernational human rights law.[35] Indeed,
elopment in international humanitar-
no prisoner in armed conflict—even
l state-based framework of the 1949
aw. Nonetheless, the Bush administra-

tion sought to treat the fight against te
to deny the prisoners that it captured
courts by labeling them "enemy comba

The administration thus extended t
ters of a conflict against another natio
any country or theater of operations w
tilities. There was no material differenc
seized during combat against U.S. forc
a student arrested at his home in Peor
providing support to a terrorist organi

The troubling implications of this
Marri and *Padilla* cases, in which the
military to seize and detain citizens
States as part of the global "war on te
the United States was not just impriso
operations in Afghanistan and Iraq ou
rights law, and the Constitution. It als
detention power inside the country,
against detention without charge or tri

Finally, the Bush administration d
cess to challenge their detention. Du
in Afghanistan (i.e., from the U.S.-led
until the fall of the Taliban regime tha
a new government in June 2002), the
the required military process—Article
tions—to determine whether Taliban
mand were entitled to prisoner-of-w
given individuals the opportunity to t
call witnesses if reasonably available,
dicatory panel, while also prohibiting
or other coercion, whether physical or
the hearings would have been held c
er's capture to maximize accuracy.[37] T
international law during the subseque
Afghanistan (i.e., when the United St
fighting the Afghan regime but assist
the country), by detaining individuals
review. In addition, the administration
vide any meaningful process to those s

rrorism as a global armed conflict and
any legal protections or access to the
atants."
he concept of war beyond the parame-
n-state and also beyond the confines of
where U.S. forces were engaged in hos-
ce, it argued, between an armed soldier
ces on a battlefield near Kandahar and
ia by the FBI on suspicion that he was
zation or plotting a terrorist crime.
argument were highlighted by the *al-*
president claimed he could order the
and legal residents inside the United
errorism." These cases made clear that
oning people captured during military
tside the Geneva Conventions, human
so was applying its unbridled military
threatening fundamental safeguards
al.[36]
denied prisoners any meaningful pro-
ring the international armed conflict
invasion that began in October 2001
at December and the establishment of
Bush administration failed to provide
5 hearings under the Geneva Conven-
soldiers and militia under their com-
ar status. These hearings would have
testify, to attend open sessions, and to
all before a neutral three-officer adju-
the use of evidence gained by torture
mental. Although summary in nature,
lose in time and place to the prison-
The United States also failed to follow
ent noninternational armed conflict in
tates and allied forces were no longer
ing that regime against insurgents in
without charge, due process, or court
failed to bring charges against or pro-
seized outside Afghanistan and held in

connection with the global "war on ter
and Bagram, where some prisoners w
in other countries. Instead, it compou
ture and other coercive interrogation t
the information it obtained as the basi

In short, the United States tried to
war without limit. The costs of this
far-reaching. Individuals were swept u
imprisoned for years without a fair
correcting errors. Stripped of any leg
recourse to the courts, a system of to
took hold and festered.

Habeas corpus does not guarantee th
cedures will adhere to legal requirem
standards and procedures to an ind
prospect of habeas review also means
to define the scope of its detention po
limit military confinement to appropr
adequate process of error correction u
expansive judicial involvement later.

Federal habeas corpus jurisdiction
location, would undoubtedly lead to
action during wartime. But following *
line limitations on the Constitution's e
tion is inevitable. As long as the Unite
in counterterrorism operations overse
such basic issues as who may be deta
and what procedures the government
ful imprisonment. But whereas jurisdi
all sides benefit from clear detention
court to adjudicate whether the standa
States at Bagram meet applicable legal
for a court to say it has no power to
power to remedy potentially illegal de
should not be in dispute: as long as
should have the power to review the la

Habeas review also does not requ
for every person captured by U.S. force

ror" at Guantánamo, CIA "black sites,"
ere rendered after having been seized
nded the problem by engaging in tor-
actics and then relying on the fruits of
s for the detentions.
wage war without rules and to extend
legal breakdown were profound and
up by mistake or sold for bounty and
hearing and without any process for
gal protections and without any clear
orture, arbitrary detention, and abuse

at U.S. detention standards and pro-
ents. But it does at least subject those
dependent checking mechanism. The
s that the United States is more likely
wer more carefully and responsibly, to
iate circumstances, and to institute an
up front to minimize the risk of more

over all U.S. detentions, regardless of
increased judicial review of military
Boumediene and its rejection of bright-
xtraterritorial application, more litiga-
ed States continues to detain prisoners
as, courts will be called on to address
ined, what rights they must be given,
must employ to protect against wrong-
ictional litigation is a deadweight loss,
rules. So, for example, it is better for a
rds and procedures used by the United
and constitutional requirements than
make that determination and thus no
etentions. Jurisdiction, in other words,
a prisoner is in U.S. custody, a court
wfulness of his confinement.
ire an individualized judicial hearing
es during military operations. In many

cases, it may not require any such hea
ordinarily require such a hearing in a
conducted in accordance with the Ge
in theory could have exercised habeas
viduals held as prisoners of war durin
have been summarily dismissed on th
clearly lawful.

Under U.S. law, habeas also may n
prisoners seized in a noninternationa
standard for detention is properly limi
ing before an impartial and independe
and is subject to judicial review. As th
it is possible that a properly constitute
a battlefield detainee's status. Similarl
that when an adequate military proces
wrongful detention, a habeas judge m
vided that the military is acting within
made clear that without a meaningful
tions, habeas corpus must be available

Even when courts supply a fact-fin
mean that judges will necessarily co
itself has evolved over the centuries so
terms) no longer has to produce the
tify the prisoner's detention. Courts
to receive evidence, from admitting a
audio or video links. When necessary
special masters or magistrates to assist

In addition, this type of individual
unnecessary if the United States prov
which the detention occurs. Thus at
States provided prisoners seized in Afg
in accordance with international law–
part of the International Security Ass
ferring prisoners to Afghan custody
rather than detaining them indefinitel
be circumscribed because the detentio

Viewing increased litigation and na
sum game is a mistake. Guantánamo
sites" have undermined, not enhance

ring at all. Most important, it does not
n international armed conflict that is
neva Conventions. Thus, while courts
jurisdiction over the detention of indi-
g World War II, those petitions would
ne merits because the detentions were

ot require a judicial hearing for some
l armed conflict—as long as the legal
ted and the prisoners are given a hear-
nt body that comports with due process
e Supreme Court explained in *Hamdi*,
d military tribunal can fairly determine
y, in *Boumediene*, the Court observed
ss has been provided to protect against
ay be able to defer to its findings, pro-
n its proper sphere. But the Court also
process to test the government's allega-
to supply such a process directly.
ding process, moreover, that does not
nduct live hearings. Habeas practice
that the jailer (or custodian, in habeas
body of the prisoner in court to jus-
now have at their disposal other tools
affidavits to taking testimony through
y, there also is the possibility of using
judges in adjudicating cases.
lized review by a U.S. court would be
vided access to a court in the state in
Bagram, for example, if the United
ghanistan with access to Afghan courts
—as other countries operating there as
sistance Forces normally do by trans-
within ninety-six hours of their arrest
y—a U.S. habeas court's review would
n would be pursuant to Afghan law.[38]
tional security as opponents in a zero-
, Abu Ghraib, and secret CIA "black
d, America's safety because they have

created a perception of lawlessness. L
and the United States disregards them
example, that the *U.S. Army–Marine C*
lights the harmful strategic impact of
use of power without authority," inclu
punishment without trial."[40] Successful
waged against insurgents or others wh
on a perception that the state—or ano
bound by the rule of law. As the Supre
subsists, too, in fidelity to freedom's fir
"freedom from arbitrary and unlawful
is secured by adherence to the separat
promote this fidelity by requiring a ja
treatment of prisoners in his custody c

Finally, greater judicial involvemen
military and intelligence agencies into
raises. Detention in a "war on terroris
nite. It also is not based on clear indic
nation's armed forces) or narrowly ci
a battlefield or in a theater of operati
hostilities). Instead, it turns on an asse
based on his perceived dangerousness
he might provide information about o
detention jeopardizes both the presum
tion's prohibition against imprisonme
Increased litigation is unavoidable as
the judiciary to fulfill its required role
individuals against arbitrary and unlaw

egal norms have great strategic value, n at its peril.[39] It is for this reason, for *Corps Counterinsurgency Manual* high- "illegitimate actions . . . involving the ding "unlawful detention, torture, and military operations, particularly those o contest the state's legitimacy, depend ther state that detains on its behalf—is me Court recently explained, "Security st principles," chief among them being restraint and the personal liberty that tion of powers."[41] Habeas corpus helps ailer to account for the detention and or control.

t is the natural result of expanding the o new areas and the novel questions it sm" not only is prolonged and indefi- cators of status (e.g., membership in a rcumscribed (e.g., taking up arms on ions where U.S. forces are engaged in essment of a person as a "security risk" or associations or simply a belief that thers. In these circumstances, military mption of innocence and the Constitu- nt without trial for suspected crimes. well as appropriate because it enables e under the Constitution by protecting wful executive action.

The Elusive Custodia

Some Potential Limits of Hab

The enduring strength of hab
to justify a prisoner's detention befo
power to find the detention illegal an
that strength lies a weakness: the incen
its detention operations to avoid habe
court's ability to grant an effective rem
larly strong in matters affecting nation

Actions taken after the September
the Bush administration's decision to
early 2002 to Congress's twice enactin
corpus and overturn Supreme Court d
detainees' right to the writ. The desire
the Bush administration's decision to
and secret offshore prisons, from milit
ated "black sites."

Even though the Bush administrat
avoid habeas corpus, it was not the fi
istration to try to escape accountabil
potential both to inflict death and de
public officials to err on the side of se
and transparency. This is why recogni
individuals in U.S. custody, regardless
to preventing the creation of more pr
tánamos." But habeas corpus will alw
to circumvent it. Future administratio
judicial review if they believe it is nece
responsibility is to claim that the pris
another government. Another is to av

11

an

beas Corpus

beas corpus is that it requires the state
re an independent court that has the
nd order the prisoner's release. But in
ntive it creates for the state to structure
eas corpus altogether or to curtail the
nedy, an incentive that can be particu-
al security.
11 attacks illustrate this paradox, from
transfer prisoners to Guantánamo in
ng legislation seeking to repeal habeas
decisions recognizing the Guantánamo
to avoid habeas corpus also influenced
detain people at other, more remote
ary facilities like Bagram to CIA-oper-

tion went to extraordinary lengths to
rst, and it will not be the last, admin-
ity. The nature of terrorism, with its
estruction and to instill fear, can lead
ecurity and secrecy rather than liberty
izing that habeas corpus applies to all
of where they are detained, is essential
risons beyond the law or "new Guan-
ays be vulnerable to those who want
ns will seek to find new ways to avoid
essary to do so. One way of concealing
soner is in the custody and control of
void detaining the prisoner altogether

and rendering him to another countr
tion. Both were done after 9/11 and
into a shell game in which prisoners w
escape judicial scrutiny.

For a federal court to exercise hab
must be in the custody or control of
corpus statute authorizes courts to iss
an individual is "in custody under or
States" or "in violation of the Constitu
States."[1] Habeas was not meant to ad
government, and a U.S. judge has no
release a prisoner, not even an Amer
does not make U.S. courts the world's
Instead, it is directed at imprisonment
state government officials, as the case

Detentions in the "war on terroris
lenges to habeas corpus review, not or
outside the United States, but also be
conceal their role. In the CIA's "black
detained prisoners in secret. In the
and military intelligence detained pris
facilities, such as Bagram in Afghanis
the detainees' existence, even from t
more subtle way that the United States
United States does not exercise formal
but instead exercises varying degrees
intermediary of a foreign state. In so
custody is shared by the United States
the United States may direct the det
ment at all. And in the closely relate
the United States "outsources" the de
country, typically one that has both a
agencies and a record of torture.[2]

Secret detention and extraordinary
pearance. They rank among the wors
the United States after 9/11 and were ce
gram of state-sanctioned torture. Para
extraordinary rendition, as well as pr
significant challenges to habeas corpus

y for further detention and interroga-
helped transform overseas detentions
were moved from one jail to another to

eas corpus jurisdiction, an individual
a U.S. official. The text of the habeas
sue writs of habeas corpus only when
by color of the authority of the United
ution or laws or treaties of the United
dress unlawful detentions by another
authority to order a foreign official to
rican citizen. Habeas, in other words,
policemen for human rights violations.
by, or at the behest of, U.S. officials (or
may be).
sm" have thus posed significant chal-
nly because they have largely occurred
cause U.S. officials have often tried to
sites," for example, the United States
elated practice of "ghosting," the CIA
soners at known Defense Department
stan and Abu Ghraib in Iraq, but hid
he ICRC. Proxy detention is another,
has masked its involvement. Here, the
or exclusive control over the prisoner
of control and influence through the
me forms of proxy detention, physical
s and a foreign government; in others,
ention without any physical involve-
d practice of extraordinary rendition,
tention and interrogation to a foreign
close relationship with U.S. intelligence

rendition are forms of forced disap-
st human rights abuses committed by
ntral to the Bush administration's pro-
doxically, though, secret detention and
oxy detention, pose some of the most
s because they deliberately seek to con-

ceal or minimize the United States' ro
establish the necessary prerequisite to
finding that the prisoner is in U.S. cust

A brief discussion of the meaning o
clearer its implications for habeas rev
requirement has traditionally been in
purpose. At common law, custody wa
illegal confinement."[3] The federal habe
these common law principles, eschew
on the writ's scope.[4] The original 178
custody, under or by colour of the au
just those in physical U.S. custody.[5] T
which extended federal habeas jurisdic
similarly broad, encompassing any pr
Constitution or laws or treaties of the

Courts, in turn, have liberally inte
larger purpose. "The custody requi
"is designed to preserve the writ of h
restraints on individual liberty."[7] Jud
jurisdiction in a variety of situations i
jailer's actual physical custody in ord
on the petitioner's liberty was lawful.[8]
tody," for example, courts have consid
imprisoned in one state and subject to
ers in federal or state prisons and subje
removal from the United States unde
but nonetheless restrained by the co
eign nationals seeking review of a deci
States, even though they were free to
cases, the habeas statute's "in custody
federal or state government official wa
on the petitioner's freedom, even if th
tangible form.[13]

It is true that none of these situ
other forms of confinement in which
of a foreign government. But the basi
U.S. officials exercised through or in c
should be considered detention by the
jurisdiction. Indeed, proxy detention

ole and thus make it more difficult to
o the exercise of habeas jurisdiction: a
tody or control.
of the "in custody" requirement makes
view of these forms of detention. This
terpreted flexibly to achieve the writ's
as understood to reach "all manner of
eas corpus statute, which incorporated
ved narrow and formalistic limitations
9 statute referred to any prisoner "in
uthority of the United States," and not
The 1867 amendments to this statute,
ction to prisoners in state custody, was
risoner in custody "in violation of the
United States."[6]
erpreted custody to achieve the writ's
irement," the Supreme Court wrote,
habeas corpus as a remedy for severe
dges have thus found habeas corpus
n which the petitioner was not in the
er to determine whether the restraint
Under a theory of "constructive cus-
lered challenges by habeas petitioners
o a detainer in another state;[9] petition-
ect to a deportation order seeking their
er immigration law;[10] those on parole
nditions imposed on them;[11] and for-
sion denying them entry to the United
o go to another country.[12] In all these
" requirement was satisfied because a
as responsible for significant restraints
hose restraints did not take a direct or

ations addressed proxy detention or
a prisoner is in the physical custody
ic principle is the same. Detention by
conjunction with another government
e United States for purposes of habeas
and related forms of secret imprison-

ment present a particularly compellin
are a deliberate and calculated attemp
modern version of the age-old attem
seas—an abuse that prompted landm
centuries ago.[14] Preventing the goverr
jurisdiction by moving prisoners arou
Court's main justifications for upholdi
tánamo detentions. To deny jurisdictio
rather than actual would frustrate th
ate a loophole for the United States t
detention.

A broad view of constructive custod
that apply even in a noninternational
other terrorist organizations. Human
tional law prohibit detention without
both of which lie at the heart of secret
dinary rendition. The International C
(ICCPR) prohibits arbitrary arrest an
judicial review when an individual is d
has been interpreted to contain a *non*
fers when the risk of torture or other
ment or punishment is significant.[16]
Torture and Other Cruel, Inhuman or
(CAT) contains an explicit and absolu
applies even in a state of war or a time

Although the ICCPR has been
means that Congress must enact s
individuals to enforce its protections
some courts have suggested that the
through the federal habeas corpus st
to prisoners would raise serious probl
sion Clause.[19] The ICCPR also can hel
laws to avoid violating individual righ
through legislation and regulations, alt
whether its provisions may be enforce
context of immigration removal proce
non-refoulement obligation by requirin
ances," the representations made by a
prisoner will not be tortured or abused

g case for habeas review because they
t to circumvent the writ. They are the
pt to transport prisoners beyond the
ark habeas legislation more than four
nment from being able to manipulate
und was, after all, one of the Supreme
ng habeas jurisdiction over the Guan-
on because the custody is constructive
e purpose of habeas corpus and cre-
o continue a practice of extrajudicial

dy is reinforced by human rights norms
armed conflict against al Qaeda and
rights treaties and customary interna-
due process and transfers to torture—
prisons, proxy detention, and extraor-
Covenant on Civil and Political Rights
d detention while mandating prompt
eprived of his liberty.[15] The ICCPR also
-refoulement obligation barring trans-
cruel, inhuman, and degrading treat-
Furthermore, the Convention against
Degrading Treatment or Punishment
te ban against transfers to torture that
of public emergency.[17]
deemed "non-self-executing"—which
eparate implementing legislation for
affirmatively in domestic litigation[18]—
e treaty's protections can be invoked
atute and that denying its protections
lems under the Constitution's Suspen-
lp inform the interpretation of federal
nts.[20] The CAT has been implemented
though there is continuing debate over
d directly by courts outside the limited
edings.[21] The CAT also strengthens the
ng judicial review of "diplomatic assur-
receiving country that the transferred
,"[22] and by prohibiting reliance on those

assurances when the receiving countr
in torture.[23]

Human rights bodies have interpr
underlying purpose, rejecting the sug
system for illegal actions taken outsid
does, however, take the contrary vie
U.S. action abroad.) The Human Rig
implements the ICCPR, has constru
apply extraterritorially to situations in
effective control over the territory of
sonal control over the prisoner withou
against Torture, which is responsible
CAT, has similarly applied that treaty
tory under a state's effective control.[2
indicates that this obligation should a
reason, is in danger of being subjected
country . . . [and] cover *all measures*
ferred to another State."[26]

Regional human rights bodies ha
instance, the European Court of Hum
can be held responsible for violating t
or detain, even when those officials ac
mission on Human Rights likewise
inhere simply by virtue of a person's
not on the presumed victim's nationa
area, but on whether, under the spec
the rights of a person subject to its aut

Thus, an important principle unde
tomary norms is that a state must res
of all persons in its custody or effectiv
detained without due process or to be
abuse. That principle covers an array
government in the "war on terrorism
tion centers, like the CIA "black sites"
abduction of individuals, like the kidn
Milan (effective control over a person)
standing of habeas corpus: that a co
against the jailer, regardless of where
order to ensure that there is a lawful ba

y systematically or repeatedly engages

eted these provisions to achieve their
ggestion that there is a lacuna in the
e a state's territory. (The United States
w that the ICCPR does not apply to
ghts Committee, which monitors and
ed the *non-refoulement* obligation to
which one government either retains
another government or exercises per-
ut territorial control.[24] The Committee
for monitoring and implementing the
's *non-refoulement* obligation to terri-
[25] Notably, the CAT's drafting history
pply to "any person who, for *whatever*
d to torture if handed over to another
by which a person is physically trans-

ave reached similar conclusions. For
an Rights has ruled that state officials
he rights of individuals that they seize
ct abroad.[27] The Inter-American Com-
has explained that "individual rights
humanity . . . [and] the inquiry turns
ality or presence within a geographic
ific circumstances, the State observed
hority and control."[28]
erlying international treaties and cus-
spect and guarantee the human rights
e control, including the right not to be
e transferred to likely torture or other
of extraterritorial actions by the U.S.
," from the operation of secret deten-
(effective control over a place), to the
apping of Abu Omar off the streets of
). It also mirrors the traditional under-
urt has authority to enforce the writ
the custody or control is exercised, in
asis for the prisoner's detention.

The case of Ahmed Abu Ali illustr
custody can be applied to overseas c
was a twenty-four-year-old American
Saudi Arabia to study after completing
grown up. Saudi officials arrested Abu
his final exams at the university, and c
to counsel.[29] Approximately five days a
same time that FBI agents raided Abu
ited the Saudi prison where Abu Ali w
rogation.[30] In the following months, F
interrogated Abu Ali directly while he
Saudi Arabia's state security service,
Abu Ali later told his mother that the
Abu Ali an "enemy combatant" and s
cooperate.[31] In the meantime, Abu Al
ment officials to help him.

In June 2004, more than a year af
as "next friend," filed a habeas corpus
trict court in Washington, D.C. The p
was violating Abu Ali's constitutional r
and demanded that he be returned to
crime, or released.[32] The petition pres
and not Saudi Arabia, was directing
included statements from Saudi gover
tion of charging Abu Ali, that they wer
United States was "behind the case," an
Abu Ali to American authorities if the
The petition also presented evidence
witness said Abu Ali was in so much
up a pen to sign documents, and a fede
Abu Ali "doesn't have to worry about c
government did not produce any evid
that a federal judge was precluded fr
Abu Ali was in the custody of a foreign
of actual custody by a U.S. official prec

The district judge rejected the gov
District Judge John D. Bates said, all
right to be free from arbitrary detenti
within the heartland of habeas corpu

rates how the concept of constructive counterterrorism detentions. Abu Ali citizen who traveled to a university in high school in Virginia, where he had Ali in June 2003, when he was taking detained him without charge or access after Abu Ali's arrest, and at about the Ali's home in Virginia, FBI agents vis- was being held and observed his inter- BI agents traveled to Saudi Arabia and was being detained by the Mubahith, widely believed to engage in torture. FBI agents had threatened to declare end him to Guantánamo if he did not i's family began to press U.S. govern-

ter his arrest, Abu Ali's family, acting s petition on his behalf in federal dis- petition claimed that the United States rights by detaining him without charge the United States and charged with a ented evidence that the United States, g Abu Ali's detention. That evidence nment officials that they had no inten- e instructed to "stay away" because the d that the Saudi officials would release United States made a formal request.[33] that Abu Ali had been tortured. One pain that he was not even able to pick eral prosecutor allegedly remarked that clipping his fingernails anymore."[34] The ence to the contrary. Instead, it argued om inquiring into the matter because n government and because the absence cluded habeas corpus review.

ernment's argument. The petition, the eged a violation of the constitutional ion by the executive and therefore fell s.[35] While Judge Bates did not deter-

mine that Abu Ali was in the custody
petition presented sufficient evidence
fact-finding demonstrated that Abu
Bates said that he would exercise jurisc
detention was unlawful and, if so, orde

In the end, this inquiry—known
took place. The U.S. government avoic
detention by bringing criminal charge
indictment, filed in the Eastern Distric
plotted to assassinate President Bush
Ali was subsequently convicted and s
ing the conviction, the government rel
Ali's interrogations in Saudi Arabia, wh
dence after finding that the confession

At first glance, Judge Bates's decisic
Abu Ali's case might seem to have lir
confined to American citizens. Americ
the protection of habeas corpus wher
ment, even when that detention occu
Boumediene, in which the Supreme C
tion can also encompass foreign nati
Read together, *Boumediene* and *Abu A*
proxy detention and other forms of se
America's shores and in collusion with
prisoner's citizenship.

In this context, the challenge to
corpus is as much practical as legal:
detained in secret or by proxy and ol
pierce the veil of non-U.S. involveme
unusual. His family had managed to o
can and Saudi officials that the United
his detention. This type of evidence
more difficult to obtain in other cases
authorize some discovery and probe b
nature of the Unites States' role. In so
oner itself may be unknown, as with i
other instances, the location may be kr
ment may be more circumstantial, as
ers held in Pakistan after 9/11.[39] A dist

of the United States, he ruled that the to warrant further fact-finding. If that Ali was in constructive U.S. custody, diction to determine whether Abu Ali's er appropriate relief.[36]

as "jurisdictional discovery"—never ded further scrutiny of Abu Ali's proxy es and returning him to America. The ct of Virginia, alleged that Abu Ali had and hijack commercial airliners. Abu entenced to life in prison.[37] In obtain- ied on confessions elicited during Abu hich the district court allowed into evi- s were voluntary.[38]

on to order jurisdictional discovery in mited relevance, since it was explicitly can citizens, Bates observed, can claim n they are held by their own govern- urs overseas. But this ruling predated ourt made clear that the same protec- ionals held outside the United States. *li* suggest that habeas corpus can reach cret imprisonment carried out beyond n other governments, regardless of the

accessing the courts through habeas discovering the existence of someone btaining the information necessary to nt. In many ways, Abu Ali's case was btain extensive evidence from Ameri- d States was pulling the strings behind has been—and will continue to be— s, however, unless a court is willing to eneath the surface to examine the true me instances, the location of the pris- individuals held in secret CIA jails. In nown, but the evidence of U.S. involve- was the case with hundreds of prison- trict judge can—and should—conduct

the same kind of limited inquiry into
detention whenever there is a good-fai
ever, courts may be reluctant to engage
executive branch officials' objections
with the internal affairs of another sov
tive foreign policy concerns.

The transfer of detainees between go
der the exercise of habeas jurisdiction
vided for review of some international
typically taken place when custodial c
best example is extradition cases. Ther
country requests the return of a fugitiv
mencing a formal legal process that res
the fugitive is located ordering the fug
Although habeas review in extradition c
for judicial review of whether there is a
review of prisoner transfers is compro
is fluid, the transfer secret, and the pro
judicial. Simply put, it is more difficul
of a transfer when prisoners are move
Ultimately, some of those prisoners ma
others did following their eventual tra
review more feasible. But that review c
illegal detention, and after the worst ab

The fact that proxy detention is m
corpus makes it an attractive optio
accountability, as the following case
States launched two air strikes at susp
strikes were not an isolated occurrenc
terterrorism operations in the Horn
the strikes received wide publicity, le
can officials in the secret detention, in
seized following the renewed violence
violence there, only to become ensnar
was a twenty-four-year-old American
Mohamed Meshal.[40]

In late 2006, Meshal had traveled to
purposes, drawn by the effort to crea
Somalia was enjoying a period of rela

the United States' role in an overseas
th basis to support it. In practice, how-
e even in preliminary fact-finding over
that any such inquiry would interfere
vereign nation and encroach on sensi-

overnments and countries also can hin-
n. Historically, habeas corpus has pro-
prisoner transfers. But that review has
control is officially acknowledged. The
e, habeas review is triggered when one
ve from another country, thereby com-
sults in a judge from the country where
itive's return to the requesting country.
cases is relatively narrow, it does provide
a legal basis for the transfer. But habeas
omised whenever the custodial control
ocess intentionally extralegal and extra-
t for courts to examine the lawfulness
d around the globe and held in secret.
ay resurface, as Binyam Mohamed and
ansfer to Guantánamo, making habeas
omes only after months, if not years, of
uses have likely occurred.
ore difficult to reach through habeas
n when U.S. officials want to avoid
illustrates. In early 2007, the United
ected al Qaeda targets in Somalia. The
e but were part of ongoing U.S. coun-
of Africa since the late 1990s. While
ss is known about the role of Ameri-
terrogation, and rendition of civilians
in Somalia. One prisoner who fled the
ed in a U.S.-backed detention dragnet,
citizen from New Jersey named Amir

o Somalia for educational and religious
te an Islamic state there. At the time,
ative tranquillity after years of unrest.

But shortly after Meshal's arrival, figh
Ethiopian forces bombed the airport i
ing for their safety, Meshal and other
January 2007, Meshal was seized by Ke
border, stripped of his possessions,
detained without charge. Although n
was repeatedly interrogated by Ameri
fied themselves as FBI agents. For sev
jail and took him to a small hotel in a
grilled him for more than six hours a
agents threatened Meshal, warning hi
and that if he did not cooperate and c
they would send him to Israel or to Eg
while, a Kenyan human rights group
seized fleeing the violence in Somali
without charge by filing habeas corpus
the courts could act, Meshal and othe
Somalia, where they were detained in
ber of other prisoners were then taken

In Ethiopia, Meshal was detained i
other prisoners at the jail came fro
included women and children. Like M
Somalia. For the next three months,
by American officials. U.S. officials al
Ethiopian secret jail. "I was kept in
shackled ankle and feet, night and day,
had traveled to Somalia to do charity
for almost five months. "The Ethiopia
me and drive to some apartment in A
would be there waiting behind a desk,
rorist connections."[42]

During the months they were held i
oners were never brought before a jud
evidence (if any) against them. Instea
ing before a secret military tribunal.
no rights because they had been declar
"Africa's Guantánamo," as it become k
metaphorical. At least one of the detai
Abdul Malik, was taken by the United

ting again erupted in the country and in the capital city of Mogadishu. Fear- s tried to flee Somalia by land. In late enyan soldiers near the Somalia-Kenya and taken to Nairobi, where he was nominally in Kenyan custody, Meshal ican officials, several of whom identi- eral days, the agents came to Meshal's residential neighborhood where they t a time. During those interrogations, im that he was in a "lawless country" confess to involvement with al Qaeda, ypt, where he would disappear. Mean- was protesting the treatment of those a and had challenged their detention petitions in Kenyan courts. But before er prisoners were secretly rendered to makeshift camps. Meshal and a num- to Ethiopia.[41]

n a secret jail near Addis Ababa. The m more than a dozen countries and Meshal, many had fled the violence in , Meshal was interrogated repeatedly so interrogated other prisoners at this solitary [confinement] for a month, ," said a South African accountant who work and was imprisoned in Ethiopia ans would come collect me, blindfold ddis [the capital]. And the Americans asking me over and over about my ter-

n Ethiopia, Meshal and his fellow pris- lge or permitted to see a lawyer or the d, they received only a cursory hear- The tribunal told them that they had red "enemy combatants"—prisoners in nown locally. The link was not merely nees swept up in Somalia, Mohammed States to Guantánamo.[43]

Meshal was eventually released in
United States in the face of mounting
however, highlights some of the pot
detentions through habeas corpus u
conduct jurisdictional discovery broa
entirely secret. And even when a new
being held in Kenya and then in Eth
tion and the United States' role in it
States directing or conspiring with Ke
Meshal? Were U.S. officials hiding be
that they could interrogate Meshal v
they would have had to provide to h
in U.S. custody? Did U.S. officials ord
Kenya so that he could be further deta
despite the grave risk of harm to him
could have prompted a judicial inquiry
Ali's case and assessed whether the Un
Meshal. But it also is possible that a c
petition for failing to demonstrate U.S
tive), leaving Meshal without a judicia
his illegal detention.

The case of Naji Hamdan exempli
and proxy detentions, although its o
affect those detentions even when a c
Hamdan, a U.S. citizen and businessn
United Arab Emirates (UAE) with hi
Hamdan was interrogated at the U.S.
who had flown from Los Angeles to q
dan was arrested by UAE police at his
hands of Emirati security forces, whic
and tried to coerce a confession from
tody, there was evidence that Hamda
request, including a statement from an
States was responsible for Hamdan's de
a habeas corpus petition on his behal
ton, D.C., Hamdan was transferred by
ecution in Abu Dhabi.[44] Hamdan's hab
ground that he had been charged in th
no longer in U.S. custody, if he had ev

n late May 2007 and returned to the public and political pressure. His case, tential obstacles to addressing proxy nless judges view their authority to adly. Initially, Meshal's detention was spaper later reported that Meshal was iopia, critical details about his deten- remained unknown. Was the United enyan and Ethiopian officials to detain hind the fiction of foreign custody so without affording him the guarantees im if they acknowledged that he was er or approve Meshal's rendition from ained and interrogated outside the law, n? It is possible that a habeas petition y similar to the inquiry ordered in Abu ited States was exercising custody over ourt would simply have dismissed the . custody (whether actual or construc- l remedy for the United States' role in

fies similar problems posed by secret utcome suggests that habeas can still court declines to exercise jurisdiction. nan from California, was living in the s wife and children. In August 2008, embassy in Abu Dhabi by FBI agents uestion him. A few weeks later, Ham- s home and then disappeared into the ch held him virtually incommunicado him. Although nominally in UAE cus- n was being held at the United States' Emirati official stating that the United etention. But when Hamdan's wife filed f in federal district court in Washing- the state security forces to face pros- eas petition was then dismissed on the he UAE for a criminal offense and was er been.[45] Hamdan was later convicted

s

by a UAE court of terrorism charges
prison. Even though Hamdan's habeas
his legal limbo by prompting the filing
his conviction).

Another example of proxy detenti
influence over prisoners who have be
U.S. detention at Guantánamo and Bag
returned to Afghanistan. In 2005, the
a joint declaration providing for the
to the exclusive custody and control
of the agreement, the United States s
an Afghan prison block and help equ
Accordingly, the United States spent m
new high-security Afghan National De
Pul-i-Charki prison on the outskirts o
to persuade Afghanistan to adopt a G
the indefinite detention of "enemy com
als at "Block D," as the ANDF is know
the two countries agreed that former
the ANDF would be detained and pro
As of April 2008, more than 250 Gu
been transferred to Block D,[51] which h
oners in its 350 cells.[52]

The transfer of prisoners from U.S.
to Afghan detention at the ANDF, how
trol or influence. The United States, f
of "soft" control by requiring that Af
tion with U.S. officials, conduct surveil
following their release.[53] The United
of control, such as preventing Afghan
their clients.[54] As the chairman of the
zation commented in 2007 on the co
knows who's really in control. They jus

Habeas corpus is not the only reme
suits also provide an opportunity for
the possibility of compensation for th
oned and mistreated. In addition, they
putting officials on notice that they m
rights violations. But damages action

and sentenced to eighteen months in
petition failed, it may have helped end
g of criminal charges (albeit leading to

on is the continued U.S. control and
en repatriated to other countries from
gram. Take the case of Afghan prisoners
United States and Afghanistan signed
"gradual transfer of Afghan detainees
of the Afghan Government."[46] As part
aid it would finance the rebuilding of
ip and train an Afghan guard force.[47]
nore than $30 million constructing the
etention Facility (ANDF) located in the
of Kabul.[48] The United States also tried
uantánamo-like model that permitted
nbatants" and military commission tri-
n locally.[49] When Afghanistan refused,
Guantánamo and Bagram prisoners at
osecuted under Afghan criminal law.[50]
antánamo and Bagram detainees had
ad the capacity to hold up to 700 pris-

detention at Guantánamo and Bagram
vever, did not necessarily end U.S. con-
or example, implemented some forms
fghanistan share intelligence informa-
llance, and restrict the prisoners' travel
States also exerted more direct forms
defense attorneys from meeting with
e Afghanistan Human Rights Organi-
ntinuing U.S. involvement, "Everyone
t won't say it."[55]
edy for illegal detention. Civil damages
redress. Most important, they hold out
ose who have been unlawfully impris-
can help deter abuses in the future by
ay be held liable for human and civil
s also face hurdles of their own even

when the plaintiff has solid evidence t
United States has invoked the "state se
tims of torture and extraordinary rend
would reveal sensitive national secur
affirmative defenses like qualified imr
cials from liability for violating cons
established at the time they were com
have an inherent limitation: unlike h
remedy past wrongs, not to obtain rele

Other safeguards can help decrease
renditions. One possibility is legislati
CIA or any other agency and preven
in proxy detention. Such legislation co
States from entering into a formal or ir
ernment to detain a person on behalf
restrictions on U.S. interrogations of ir
compliance with due process require
from outsourcing detention to avoid
make explicit that it was implementi
obligation in domestic law with respe
transfers made from outside the Un
against Torture prohibits transfers to
pattern of engaging in torture, regard
might provide in an individual case.

In addition, federal agencies could
transferring prisoners from U.S. cust
accountable and to facilitate habeas r
mulgated regulations for extradition
land Security has issued regulations for
ing subject those decisions to review f
non-refoulement obligations under t
implementing legislation.[58] Extraditio
involve transfers from the United State
relevant federal agencies has issued f
ritorial prisoner transfers, the context
cally occurs. The Defense Department
transfers from Guantánamo but has ne
clear what policies govern prisoner t
while, the CIA, the agency principally

o support his claims: for example, the
ecrets" privilege to bar lawsuits by vic-
lition on the ground that any litigation
ity information;[56] it also has asserted
munity that insulate government offi-
titutional rights that were not clearly
mitted.[57] Damages actions, moreover,
abeas petitions, they are intended to
ease from continued detention.

the risk of extrajudicial detention and
on outlawing secret detention by the
ting the United States from engaging
ould, for example, prohibit the United
nformal agreement with a foreign gov-
of the United States as well as impose
ndividuals in foreign custody to ensure
ments and to discourage U.S. officials
l accountability. Congress could also
ng the United States' *non-refoulement*
ct to any prisoner transfer (including
ited States) and that the Convention
countries that have a demonstrated
less of any assurances those countries

be required to issue formal rules for
ody in order to make those agencies
eview. The State Department has pro-
cases, and the Department of Home-
immigration removal decisions, help-
for compliance with the United States'
he Convention against Torture and
n and immigration removal, however,
es to another government. None of the
ormal regulations governing extrater-
in which extraordinary rendition typi-
has described its policies on prisoner
ither issued any formal rules nor made
ransfers outside Guantánamo. Mean-
y responsible for extraordinary rendi-

tion, has never disclosed what, if any, r
other governments. Requiring agencie
vide more concrete and transparent pr
assuming those agencies continued to
facilitate pretransfer review through ha
United States is complying with its *no*
the secret handover of prisoners with a

This chapter has focused on some prac
the detention is secret (CIA "black
another government (proxy detention
oner's impending transfer to another g
But another potential limitation of h
courts exercise habeas jurisdiction b
habeas itself.

Habeas corpus requires that the ja
court. But the mere availability of habe
rect outcome. Habeas does not, for exa
lyze various precedents, statutes, and
facts of the case before it. Nor does it a
the proper scope of the military's dete
held as an "enemy combatant" or pro
for war crimes. Habeas instead provid
judiciary to supply its answer to those
cess for the detainee to challenge the
The availability of habeas also does not
instance, when there is no lawful basi
returned to his home country. As a res
ees have been held for years even afte
"enemy combatants" because the Unite
repatriate them to another country an
had the power to order their temporar

The force of habeas corpus can thu
misapplies the law, if the underlying la
executive or licenses arbitrary action,
ity to grant an effective remedy. Inde
the very abuses that it is meant to pre
a judicial stamp of approval. We need
sions upholding challenges to the int

rules govern its transfer of prisoners to
s to promulgate rules would help pro-
rocedures for extraterritorial transfers,
o engage in the practice. It would also
abeas corpus to determine whether the
n-refoulement obligations by replacing
a more formal legal process.

ctical obstacles to habeas review when
sites"), carried out in collusion with
n), or temporary because of the pris-
government (extraordinary rendition).
abeas review will persist even when
ecause that limitation is inherent in

iler justify a prisoner's detention to a
eas corpus does not itself ensure a cor-
mple, determine how a court will ana-
legal doctrines and apply them to the
nswer threshold questions concerning
ention authority—that is, who may be
secuted before a military commission
des a mechanism and a forum for the
e and other questions, as well as a pro-
government's allegations against him.
dictate the remedy in all situations, for
s to detain but the prisoner cannot be
sult, a number of Guantánamo detain-
r it was established that they were not
ed States could not send them home or
d because judges did not believe they
y release into the United States.
us be diminished if a reviewing court
aw itself grants too much power to the
or if the court misconstrues its abil-
ed, habeas review can even legitimize
event by giving illegal executive action
only recall the Supreme Court's deci-
ternment of 120,000 Japanese Ameri-

cans during World War II to realize th
ensure justice or vindicate constitution

In the next chapter, therefore, we
a habeas corpus petition can ask but
answer—questions that go to the hear
tion policy. Central among them is wh
jected to indefinite military detentio
commissions or whether they instead
regular federal courts.

at judicial review does not necessarily
nal rights.[59]
return to questions raised earlier that
that the law of habeas itself does not
t of current debates about U.S. deten-
nether suspected terrorists can be sub-
n and/or prosecuted before military
d should be charged and tried in the

s

Terrorism as Crime

Toward a Lawful and Sustai

As the Bush presidency neare
were still being held at Guantánamo,
in Iraq, and an undefined number in
was still being detained as an "enemy
For more than five and a half years, A
out criminal charge or trial at a navy b
Marri had been detained by the milit
traditional or legal definition of a co
armed forces of an enemy state; he ha
allied forces; and he was not seized on
military activity. Instead, al-Marri hac
Illinois, by FBI agents and then prose
dent declared him an "enemy combata
on the eve of a hearing to suppress the

Could the president deprive al-M
criminal trial based on the allegation
the United States and imprison him
answer to that basic—but critical—q
2007, a three-judge panel of the U.S. C
which sits in Richmond, Virginia, hac
tion was illegal.[1] The full appeals cou
and then reversed the panel's judgmer
decision. The full court ruled, by a fiv
legal authority to detain al-Marri as ar
ment alleged, he had come to the Uni
ties on behalf of al Qaeda. The court's
for Use of Military Force (AUMF), e
aftermath of the September 11 attacks

12

nable Detention Policy

ed its end, approximately 250 prisoners hundreds more in Bagram, thousands secret or proxy detention. One person combatant" inside the United States. li al-Marri had been imprisoned with- brig in Charleston, South Carolina. Al- ary even though he did not meet any mbatant: he was not a member of the d never taken up arms against U.S. or a battlefield or in connection with any d been arrested at his home in Peoria, cuted in federal court until the presi- ant" less than a month before trial and evidence against him.

Marri of his constitutional right to a that he was plotting terrorist acts in indefinitely in military custody? The question remained uncertain. In June ourt of Appeals for the Fourth Circuit, d ruled that al-Marri's military deten- rt, however, agreed to rehear the case nt in a narrowly divided and fractured ve-to-four vote, that the president had n "enemy combatant" if, as the govern- ted States to engage in terrorist activi- s decision rested on the Authorization nacted by Congress in the immediate s. The court also ruled, however, by a

different five-to-four majority, that al
tions than the district court had affo
tions and remanded the case to the dis

Judge Diana Gribbon Motz wrote b
opinion for the four judges who voted
tion.[3] Judge Motz looked to the laws o
military detention power the AUMF
According to the Supreme Court's dec
tion of a "combatant" had always reste
tary arm of an enemy nation.[4] In *Ham*
cautioned against stretching the AUM
beyond long-standing law-of-war pri
arms on a battlefield alongside enemy
ported treating al-Marri as a combata
a terrorist group and thereby imprison
Bill of Rights. Instead, Motz said, al-M
stitution, civilians must be charged an
ordinary courts as long as those cour
ciple embodied by Supreme Court dec

Judge Motz also observed that Co
detention of domestic terrorism suspe
the AUMF. In the Patriot Act, Congre
to investigate and prosecute suspected
ney general's authority to detain alien
States. But Congress also cabined that
alien terrorists had to be charged wit
the Bush administration's request for
relabeling al-Marri an "enemy combat
thwarted not only the Constitution bu

Judge Motz underscored the broade
tion posed to the Constitution. The n
designate allegedly dangerous people
deny them the right to a criminal tria
Today it was an alleged al Qaeda agen
who merely associated with a terroris
it might be someone accused of othe
eventually, it might be a politically dis
batant" category was stretched beyond
severed from membership in the arm

-Marri was entitled to greater protec-
rded him in challenging those allega-
strict court for further proceedings.[2]
oth the original panel decision and the
to invalidate al-Marri's military deten-
f war to help determine what domestic
granted and the Constitution allowed.
cisions, she explained, the legal defini-
d on a person's affiliation with the mili-
adi, moreover, the Court had expressly
IF's grant of military detention power
nciples, such as soldiers who take up
government forces. No precedent sup-
nt in a global military conflict against
ning him without the guarantees of the
arri was a civilian, and under the Con-
d tried for their alleged crimes in the
ts are open and functioning—a prin-
cisions such as *Ex parte Milligan*.
ongress had specifically addressed the
cts at virtually the same time it enacted
ess increased law enforcement's power
d terrorists, and it enhanced the attor-
terrorist suspects seized in the United
detention power, stating that suspected
hin seven days of arrest and rejected
the power to detain indefinitely.[5] By
tant," the administration had therefore
t Congress as well.
er threat that al-Marri's military deten-
notion that the president could simply
as enemies of the state and thereby
al defied the country's core principles.
nt, but tomorrow it might be someone
st group or knew a terrorist; one day,
r crimes such as drug trafficking; and
favored group. Once the "enemy com-
l established law-of-war principles and
ed forces of an enemy nation or par-

ticipation in hostilities on a battlefiel
unprecedented expansion of military
discretion to executive branch officials
trial guarantees of the Constitution w
activity or wanted to engage in coerciv

"To sanction such presidential auth
indefinitely detain civilians," Judge M
consequences for the Constitution—a
dent to designate suspected criminal
combatants" was a more radical step
corpus during an emergency, Motz sa
nent evisceration of not one constitut
tees embodied in the Bill of Rights.[7] A
and, if convicted, should be punished
military detention must cease.

The majority ruled, however, that th
pected terrorist activity on behalf of a
the United States was at war, was suf
United States of their constitutional rig
could not agree on the meaning of "en
opinions in an effort to define the terr
itself highlighted the problems with try
as a global armed conflict and to equat
settings in the United States with soldi

Judge J. Harvie Wilkinson III offere
dential power. He recognized that th
fully in the United States "is a mome
tutional concerns. He also acknowled
apply equally to citizens and noncitize
showed, citizens no less than aliens co
son maintained, however, that it was n
this step into uncharted waters. Terro
as "thousands of human beings can be
large swaths of urban landscape . . .
responded to this threat in the AUMF
necessary and appropriate force" again
It was therefore incumbent on the co
appropriate legal framework for imple
sional command to protect the nation

d, there was no principled limit. This
detention authority gave tremendous
, allowing them to circumvent the fair-
hen they lacked evidence of criminal
e interrogations, or both.
ority to order the military to seize and
Motz warned, "would have disastrous
and the country."[6] Allowing the presi-
s—even suspected terrorists—"enemy
than temporarily suspending habeas
id, because it represented the perma-
ional guarantee but the many guaran-
l-Marri was accused of serious crimes
severely. But, Motz added, al-Marri's

e executive branch's allegations of sus-
al Qaeda, an organization with which
fficient to strip lawful residents of the
ght to a criminal trial. Yet the majority
emy combatant," issuing three separate
m. If nothing else, the fractured ruling
ying to treat the fight against terrorism
e suspected terrorists seized in civilian
ers captured on a battlefield.
ed the most elaborate defense of presi-
e military detention of a person law-
ntous step" that raises serious consti-
dged that this detention power would
ens for, as the Hamdi and Padilla cases
ould be "enemy combatants."[8] Wilkin-
necessary for the United States to take
orism posed an unprecedented threat,
e slaughtered by a single action and . . .
leveled in an instant."[9] Congress had
by authorizing the president to use "all
st those responsible for the 9/11 attacks.
urts, Wilkinson argued, to develop an
menting this broadly worded congres-
against future attacks.

In Wilkinson's view, the criminal ju
address terrorism. The president, he
ibility to deviate from the normal lega
including those arrested inside the U
military detention. Limiting military
with an enemy nation or take up arm
reflected an outmoded view of war il
Qaeda and other terrorist groups. In th
waged against armies or on battlefields
at all times. Constitutional protections
cannot fight this new and unconventi
Marquess of Queensberry rules."[10]

One problem with the criminal just
inability to prevent disclosure of classif
scrupulously protecting defendants' ri
jeopardize national security. They also
of violence and possible attack.[12] Given
to charge terrorism suspects in federal
dangerous. Some cases, Wilkinson said
nal justice system. Indefinite military
vided an alternative.

But Wilkinson's opinion was flawed
counted the criminal system's success
one hand, and the problems with det
other. He also underestimated the dan
circumvent the criminal justice system
supported or engaged in terrorist activ
since designation as an "enemy com
mean a life sentence. Although Wilkin
corpus to prevent mistakes, he viewed
scribed, excluding such important pro
the government's evidence and to conf

Al-Marri appealed the Fourth Circu
ing that the indefinite military deten
United States exceeded the president's
departure from more than two centuri
ri's appeal was supported by former top
officials as well as a range of nongovern
The Bush administration opposed it, t

ustice system was not the only way to
maintained, must also have the flex-
l rules by treating terrorism suspects,
nited States, as combatants subject to
detention to persons who affiliate
s on a battlefield, Wilkinson asserted,
ll suited to today's struggle against al
his new war, the struggle was not being
s but was being fought everywhere and
s had to give way. America, he insisted,
ional enemy with its "hands tied with

ice system, in Wilkinson's view, was its
fied or other sensitive information.[11] By
ghts, he argued, terrorism trials could
o exposed jurors and judges to threats
n the stakes, requiring the government
court was impractical and potentially
d, had to be handled outside the crimi-
detention under a war paradigm pro-

d, both legally and empirically. He dis-
s in handling terrorism cases, on the
aining prisoners without trial, on the
gers of giving the executive license to
n simply by alleging that a person had
ity. This danger was particularly grave,
batant" in the "war on terror" could
son acknowledged the need for habeas
l the habeas process as highly circum-
otections as the prisoner's right to see
front its witnesses.
uit's ruling to the Supreme Court, argu-
tion of legal residents arrested in the
authority and represented a profound
es of precedent and tradition. Al-Mar-
-level Justice Department and military
mental organizations and legal experts.
rying, as it had in Jose Padilla's case, to

on Policy

avoid review by the nation's highest c
executive detention power—a power th
citizens alike. In December 2008, near
initial arrest, the Court announced that
ever, the decision whether to defend th
son arrested in the United States would

The intense controversy over al-Mar
in the next chapter, shows that the righ
start, not the end, of the conversation a
court has the power to consider a habe
it must then determine whether the de
encompasses a series of important ques
military custody? And by what process
as criminals or combatants? Can they b
shares attributes of each but necessitat
questions remain central to the continu

On July 27, 2005, John C. Coughenour,
tenced Ahmed Ressam to twenty-two
detonate explosives at Los Angeles In
millennium. In handing down the se
why the criminal justice system sho
trying suspected terrorists: "Our cou
ment to the ideals that set our nation
national security without denying the
protections." Even though Ressam wa
ning to kill Americans, he "received a
opportunity to have his guilt or innoc
nary citizens." The accusations against
public trial. There were no secret pro
denial of counsel."[13] U.S. Attorney John
sam, disagreed with the sentence and
of appeals agreed and subsequently rem
McKay nonetheless shared Judge Cou
nal justice system could handle such c
Ressam's sentence "sent an important m
the world" that "in the United States a
it is found that terrorism was commit
imposed."[14]

court of its most far-reaching claim of
hat extended both to citizens and non-
rly seven years to the date of al-Marri's
t it would hear his case. This time, how-
e indefinite military detention of a per-
l fall to a new administration.
rri's case, whose resolution is discussed
nt to habeas corpus is in some ways the
about law and national security. Once a
eas petition, as it did in al-Marri's case,
tention is lawful. That inquiry, in turn,
stions. Who, for example, can be held in
s? Are suspected terrorists to be treated
be placed in another category, one that
tes a new set of rules? These and other
uing debate over U.S. detention policy.

, a federal district judge in Seattle, sen-
years in prison for his role in a plot to
nternational Airport on the eve of the
entence, Judge Coughenour explained
uld remain the legal mechanism for
rts have not abandoned our commit-
apart. We can deal with threats to our
e accused fundamental constitutional
as a foreign national accused of plan-
an effective, vigorous defense, and the
cence determined by a jury of 12 ordi-
t him were tested "in the sunlight of a
oceedings, no indefinite detention, no
n McKay, whose office prosecuted Res-
demanded more jail time. (The court
manded the case for resentencing.) But
ughenour's assessment that the crimi-
cases. In addition, McKay pointed out,
message to would-be terrorists around
a fair trial will be given . . . and where
tted, a lengthy prison sentence will be

Terrorism, as Judge Coughenour's
terrorists are criminals who should b
established laws and procedures. The
scope and has the potential to inflict
fundamental nature. Moreover, the fa
may have "declared war" on the Unite
bers and supporters remain outlaws,
such.

Trying terrorists in federal courts i
to those who do not deserve them.[15] Bu
utility and importance of treating terr
system has proved time and again th
who plot or plan to commit terrorist a
have committed such acts in the past.
be a far more capable and sustainable
ists than detaining them indefinitely a
them for "war crimes" in military com

Treating terrorists as combatants al
the worst kind of criminality by acco
Throughout history, terrorists of all st
by claiming that they are fighting aga
ernments have sought to de-legitimiz
laws.[16] Equating terrorists with soldie
combatant"—lends credence to their c
armed struggle with the United States,
claiming legitimacy. It plays directly i
them to cast themselves in the heroic
struggle against a larger and more po
murder of innocent civilians as the in
one example: treating the fight agains
legal framework of armed conflict gav
proclaimed mastermind of the 9/11 at
with George Washington, who, he sai
combatant" if he had been captured du

Conversely, treating terrorists as c
federal court deprives them of the opp
to justify their actions. Thus when F
ing to blow up a commercial airliner
by announcing he was "at war" with A

comments underscore, is a crime, and
e prosecuted in civilian courts under
fact that terrorism is international in
tremendous damage does not alter its
ct that an organization like al Qaeda
d States makes no difference: its mem-
not soldiers, and should be treated as

s sometimes criticized as giving rights
ut those criticisms fail to recognize the
orists as criminals. The criminal justice
at it can effectively incapacitate those
acts in the future, as well as those who
If anything, that system has proved to
e mechanism of incapacitating terror-
as "enemy combatants" or prosecuting
missions.
so has the perverse effect of dignifying
ording terrorists the status of soldiers.
ripes have tried to justify their actions
inst the forces of injustice, while gov-
e them as criminals, bandits, and out-
rs—even under the label of "unlawful
contention that they are engaged in an
, a fight between opposing forces, each
nto the hands of terrorists by allowing
mold of warriors engaged in a historic
werful opponent and to minimize the
levitable casualties of war. To take but
st al Qaeda through the language and
e Khalid Sheikh Mohammed, the self-
ttacks, a platform to compare himself
d, would have been labeled an "enemy
uring the American Revolution.[17]
criminals who must be prosecuted in
portunity to invoke the rhetoric of war
Richard Reid tried to justify attempt-
r with explosives hidden in his shoes
America, Massachusetts District Judge

William Young could credibly reject R
in prison:

> You are not an enemy combatant. Yo
> in any war. You are a terrorist. To g
> soldier gives you far too much stature
> ment who do it or your attorney wh
> view, you are a terrorist.[18]

Labels have strategic consequences. "I
globe," explained former NATO Supre
must do everything possible to deny le
gain legitimacy for ourselves."[19]

To be sure, America's criminal justi
systems, it makes errors. It also for
that will hold up in the crucible of th
demanding task. The government thus
short run simply to label a suspect an
without charge, without a lawyer, and
this approach creates tremendous prob
ing to the prolonged detention of inn
macy of counterterrorism efforts, and
justice.

The United States' use of military c
problems of trying to devise new, "alt
rorists. The commissions have fallen f
standards of due process, failed to brin
for the 9/11 attacks, and tarnished A
administration, military commissions
first person convicted was David Hick
tralia who, at worst, had volunteered t
dier. The second was Salim Hamdan,
education who had worked as a driver
knowledge of any terrorist attacks an
rorism. The third, Ali Hamza al-Bahlu
victed and sentenced to life in prison
for America in open court and failing t
three cases, former chief military pros
United States had managed to convict

Reid's diatribe in sentencing him to life

u are a terrorist. You are not a soldier
give you that reference, to call you a
e. Whether it is the officers of govern-
o does it, or that happens to be your

f we are to defeat terrorists across the
me Commander Wesley K. Clark, "we
egitimacy to their aims and means, and

ce system is not perfect. Like all other
ces prosecutors to develop evidence
e adversarial process, which can be a
s might sometimes find it easier in the
"enemy combatant" and imprison him
without a prompt judicial hearing. But
blems in the long run, inevitably lead-
ocent people, undermining the legiti-
making it harder to bring the guilty to

commissions after 9/11 exemplifies the
ernative" systems for dealing with ter-
far short of internationally recognized
g to justice those allegedly responsible
merica's reputation. During the Bush
obtained only three convictions. The
s, a naïve kangaroo skinner from Aus-
o serve as a low-level Taliban foot sol-
a Yemeni citizen with a fourth-grade
for Osama bin Laden but who had no
d had not engaged in any acts of ter-
l, an al Qaeda propagandist, was con-
after proclaiming his guilt and hatred
o offer any defense. Summarizing these
ecutor Morris Davis lamented that the
only "a dupe, a driver, and a default."[20]

Even after several attempts at reform by flaws and engulfed in controversy. of 2006 (MCA) nominally banned th the commissions' top legal adviser, Ai Hartmann, continued to insist that ev and other "enhanced interrogation tec tion program was admissible at comm also continued to take advantage of l interrogation methods while allowing as evidence. For example, most of the Hamdan was based on statements tha Guantánamo after almost two years of gross abuses. In pretrial proceedings ag zen Omar Khadr, who was fifteen year stan in 2002, the prosecution tried to h fessions coerced from Khadr while he by the United States at Bagram, before

Secrecy continued to pervade the co als and other legal proceedings were cl tive information, but to hide the mistr tory information was withheld from d information as basic as an agent's inte the harsh conditions under which a de

Political influence still plagued th mandated that prosecutors be free fr exercise their professional judgment in ward.[21] But in practice, prosecutors had decisions remained highly politicized officials forced commission prosecutor even though he was, at most, a margi ated an eleventh-hour plea agreement tralia. The deal not only was negotiate but was the result of a request to Vi prime minister John Howard, who wa to oppose Hicks's prosecution by a m lighted what many had long believed tánamo had less to do with his allege with the amount of pressure his gove exert on the United States.

m, the commissions remained plagued
While the Military Commissions Act
ne use of evidence gained by torture,
r Force Brigadier General Thomas W.
idence gained through waterboarding
chniques" from the CIA's secret deten-
ission trials. The Defense Department
lax rules designed to conceal abusive
the fruits of those methods to be used
e government's evidence against Salim
t he had given to FBI interrogators at
f incommunicado detention and other
gainst another detainee, Canadian citi-
rs old when he was seized in Afghani-
ide that its evidence was based on con-
e was severely wounded and detained
his transfer to Guantánamo.
ommissions. Important portions of tri-
osed to the public, not to protect sensi-
eatment of prisoners. Critical exculpa-
etainees and their attorneys, including
rrogation notes that could help reveal
etainee's statements were obtained.
e commissions. On paper, the MCA
rom command influence and able to
n selecting cases and moving them for-
d no such independence, and charging
l. For example, high-ranking military
rs to bring charges against David Hicks
nal figure. Those officials then negoti-
that resulted in Hicks's return to Aus-
d without the prosecutors' knowledge,
ce President Cheney from Australia's
as facing increasing demands at home
ilitary commission. Hicks's plea high-
: that a prisoner's release from Guan-
ed terrorist or military activities than
rnment was capable of and willing to

The Convening Authority, the nomi
the MCA to oversee the commission p
to bring charges for political purpose
that prosecutors bring "sexy" cases to
increase support for the tribunals. Acc
officials, including Deputy Defense Se
him to bring charges against the more r
ber 2006 midterm elections for their '
Department's general counsel, Willia
guilty verdicts were acceptable. "We ca
said. "We've been holding these guys
tals? We have to have convictions."[22]

The military commissions also viol
that any trial be conducted by "a reg
the judicial guarantees which are rec
peoples." The commissions were not '
they were not "established and organ
procedures already in force in [the] c
punish "war crimes" invented after the
the fly.[23] The commissions deviated fro
constituted courts: federal trials and n
by attempting to punish conduct that
the commissions raised serious ex pos

The commissions generated vigorou
and prosecutors as well as military def
trial proceedings in Hamdan's commiss
tain Keith J. Allred, granted a defense
participation in the case based on his
tion.[25] In another case, the judge, Army
evidence against Mohammed Jawad, a
throwing a hand grenade at a military
service members and their Afghan inte
sion" the government was relying on t
torture, obtained from him after he ha
with death.[26] Henley also rejected the
could be convicted of a war crime bas
combatant (i.e., based solely on Jawad's
ated" with al Qaeda), without proving
law of war, as throwing a hand grenade

inally independent body established by
rocess, continually forced prosecutors
s. Hartmann, for example, demanded
capture the public's imagination and
cording to Morris Davis, top Pentagon
ecretary Gordon England, encouraged
notorious detainees before the Novem-
"strategic political value." The Defense
m J. Haynes II, told Davis that only
n't have acquittals," Haynes reportedly
for years. How can we explain acquit-

ated Common Article 3's requirement
gularly constituted court affording all
cognized as indispensable by civilized
"regularly constituted courts" because
ized in accordance with the laws and
country." Instead, they were created to
e fact, and their rules were made up on
m, rather than mirrored, the regularly
military courts-martial.[24] Furthermore,
was not necessarily illegal at the time,
t facto problems.
s resistance from some military judges
ense counsel. In May 2007, during pre-
sion case, the military judge, Navy Cap-
motion to bar Hartmann from further
illegal efforts to influence the prosecu-
Colonel Stephen R. Henley, suppressed
n illiterate young teenager accused of
vehicle in Kabul that injured two U.S.
rpreter. Henley found that the "confes-
to prosecute Jawad was the product of
d been hooded, beaten, and threatened
government's legal theory that Jawad
sed solely on his status as an unlawful
alleged affiliation with a group "associ-
that Jawad's conduct itself violated the
at a military target plainly did not.

In 2007, Morris Davis resigned as cl
ful command influence had corrupted
declaring that "full, fair and open trial
system."[27] The following year, Army
became the fourth prosecutor to resig
of the Jawad case, in which he had se
ing the evidence, Vandeveld believed
prosecuted in the first place and tried
have allowed Jawad's repatriation to
the quickest way for Jawad to escape
tem and go home. Vandeveld also poi
including severe sleep deprivation u
which interrogators moved Jawad fro
teen-day period to cause disorientat
superiors saw that Vandeveld had adm
U.S. officials and argued for more leni
and forced him to withdraw the admi
gon's repeated refusal to disclose exculp
including information that the governm
U.S. custody who had confessed to the
committing. "One would have thought
sions had their fitful start, that a funct
up and procedures and policies not onl
explained in a sworn statement after h

The military commissions' failure, h
single flaw but to a larger effort to cre
justice. In America, as one journalist
commission proceeding, there are no
to see the witnesses and the evidenc
spokesperson responded, oblivious to

Even among those who criticize the
cies, there remains significant disagree
commentators and lawyers, for examp
detaining and trying terrorist suspect
They sympathize with the Bush admi
tive detention system for suspected ter
tem but disagree with the direction th
preserve important elements of the Bu
indefinite detention without charge, w

hief prosecutor, explaining that unlaw-
l the integrity of the commissions and
ls were not possible under the current
Lieutenant Colonel Darrel Vandeveld
gn, citing the Pentagon's mishandling
rved as lead prosecutor. After review-
l that Jawad should never have been
d to negotiate a plea deal that would
Afghanistan, calculating that this was
the corrupt military commission sys-
nted to Jawad's abuse by U.S. officials,
nder the "frequent-flyer program," in
m cell to cell 112 times during a four-
tion and despair. When Vandeveld's
mitted to Jawad's abuse by Afghan and
ient treatment, they reprimanded him
ssion. Vandeveld also cited the Penta-
patory information to defense counsel,
ment had regarding another suspect in
same crime that Jawad was accused of
t that after six years since the commis-
tioning law office would have been set
ly put in effect, but refined," Vandeveld
is resignation.[28]

however, was not due ultimately to any
ate an inferior, second-class system of
t protested after observing a military
secret trials and reporters are allowed
e. "This is not America," a Pentagon
the irony.[29]

e Bush administration's detention poli-
ement over the solution. A number of
ple, have advocated other methods of
ts outside the criminal justice system.
nistration's effort to create an alterna-
rorists outside the criminal justice sys-
hat this effort took. They thus seek to
ush administration's approach, such as
while strengthening procedural protec-

tions and other limits on executive po
Guantánamo, rather than to end it.

Professors Robert Chesney and Jac
neither the criminal nor the military
easily meet the central legal challeng
preventive incapacitation of uniformle
inflict mass casualties and enormous
be stopped before they act."[30] The cri
on preventing error, a commitment e
for some guilty persons to go free tha
victed. "The problem of modern terro
tive forms of liability, and may deman
than the traditional criminal system w
contend.[31] In other words, governmen
people before they do something wron
suspicions and evidence to the same ty
inal process requires. The military sy
detention power. Its focus reflects th
plates the short-term detention of con
It allows for detention based solely on
the enemy's armed force), on the one
cedural protections, on the other (su
under Article 5 of the Geneva Conven
concerned with preventing error, Che
tional military model goes too far in
a hybrid that combines elements of b
based on some form of membership i
nization while offering procedural safe
military status tribunals but consider
trial.

One hybrid proposal that has gained
ing circles is that of a separate nationa
not unknown to the federal system. So
or patent cases, and specialized admi
ing federal benefits, the environment
But national security courts differ fro
that they are not driven by a judge's
but by a desire to evade more rigoro
National security courts, at bottom, se

ower. In short, they propose to reform

ck Goldsmith, for example, argue that
y model "in its traditional guise can
e of modern terrorism: the legitimate
ess terrorists who have the capacity to
economic harms and who thus must
minal model, they say, is too focused
embodied in the idea that it is better
n for one innocent person to be con-
rism demands anticipatory or predic-
nd a lower rate of erroneous acquittals
ould tolerate," Chesney and Goldsmith
nt officials must be able to incarcerate
ng and without having to subject their
ype of adversarial testing that the crim-
stem, by contrast, provides too much
he exigencies of combat and contem-
mbatants and civilians on a mass scale.
association (typically, membership in
hand, and provides relatively few pro-
ch as the streamlined status hearings
ations). If the criminal model is overly
esney and Goldsmith argue, the tradi-
the other direction. Their solution is
oth: allowing for prolonged detention
n or association with a terrorist orga-
eguards more rigorous than traditional
rably less demanding than a criminal

d traction in academic and policymak-
l security court. Specialized courts are
ome courts, for example, hear only tax
nistrative agencies decide cases affect-
, and various government programs.
m most other specialized tribunals in
expertise in a particular subject area
us rules and due process protections.
ek to institutionalize a new system for

the long-term, preventive detention of
tutional safeguards of a criminal trial.

Proposals for national security cou
smith and former Georgetown Law Sc
tor general Neal Katyal would have fe
tion in specialized proceedings. Detai
drawn from a permanent staff of top
security clearances to handle classifie
review of the initial decision to detain,
for further appellate review of wheth
hold people "years after" that decision
plates long-term incarceration withou
of indefinite detention that developed
the "war on terror" and incorporating

Others recommend using nationa
to try terrorist suspects. Former fede
example, has called for prosecutions
McCarthy contends that federal crimi
ardize national security by giving ter
fied or other sensitive information to
Michael B. Mukasey has voiced simil
security court. "Current institutions a
suited to even the limited task of suppl
ber 11, 2001, principally a military effo
new courts would dispense with key sa
have the right to see and confront the
Instead, judges would make determin
evidence in secret, with the input of t
dant or his lawyer present.[36] The court
ating a new "forum for fairly detainin
long the war on terror ensues."[37]

Benjamin Wittes of the Brookings
position.[38] The political branches, he s
sustainable legal architecture for the
pects. Wittes asserts that some form o
suspects—outside the criminal justice
table. The challenge is for Congress t
ficient safeguards and guidelines to h
make the system legitimate. Although

f terrorist suspects without the consti-

urts vary. One championed by Gold-
hool professor and later deputy solici-
ederal judges review preventive deten-
nees would be represented by counsel,
-quality defense lawyers with special
d information. In addition to judicial
Goldsmith and Katyal's proposal calls
er there is "a continuing rationale" to
was made.[32] It thus explicitly contem-
t trial, essentially reforming the model
at Guantánamo under the paradigm of
it into the U.S. legal system.[33]
l security courts both to detain and
ral prosecutor Andrew McCarthy, for
in separate domestic terror courts.[34]
nal trials are ineffective and also jeop-
rrorists the chance to transmit classi-
the public. Former Attorney General
ar concerns about creating a national
and statutes," he argues, "are not well
lementing what became, after Septem-
rt to combat Islamic terrorism."[35] These
afeguards. Defendants would no longer
evidence and witnesses against them.
ations about the admission and use of
the prosecutor but without the defen-
s, moreover, would be permanent, cre-
g and trying terrorists no matter how

s Institution has staked out a similar
ays, have failed to create a mature and
detention and trial of terrorism sus-
of long-term incarceration of terrorist
e system—is both desirable and inevi-
o articulate clear legal rules with suf-
old the executive accountable and to
the courts would have a meaningful

role in this new system, Wittes argues,
cases under legislatively established st
ad hoc judicial decision making.[39] Wi
law of terrorism—that would provide
the Bush administration afforded det
of long-term detention based on less
criminal trials. Wittes recognizes that
ate lens through which to view terro
justice system is not up to the task.[40] T
tion, he believes, would create a more
detainees through the establishment o
procedures.[41]

Despite their technocratic tone, mos
embrace the value judgment that nonc
izens do.[42] "Experience shows," McCart
are permitted access to our courts, . . . j
will effectively treat them as if they ar
and procedural protections."[43] Even th
criminatory proposals reinforce policy
that America simply "owes" less to for
ship-based arguments, however, are lo
as morally suspect. A person's citizensh
danger or is responsible for committin
just as capable of committing grave cri
lent acts of homegrown terrorists like
over, creating a permanent, second-cla
als violates the principle of equal pro
the overwhelming majority of people
Arab descent or Muslim background.
intentional, will further undermine th
and Muslim world and encourage the

Proposals for national security cou
oped. While they call for more relaxe
cally fail to spell out what those rules
of important procedural questions su
to call and confront witnesses, and th
of evidence. In addition, national secu
little guidance on perhaps the most i
of people they would cover. Most pro

that role should be limited to deciding
tandards, not devising policy through
ttes envisions a hybrid model—a new
e greater procedural protections than
tainees while continuing the practice
rigorous standards and rules than in
crime, not war, is the more appropri-
rism, but he argues that the criminal
his hybrid system of preventive deten-
secure legal architecture while helping
f clear, legislatively approved rules and

st proposals for national security courts
itizens deserve less protection than cit-
thy argues, "that once alien combatants
udges, under the rubric of due process,
e as vested as citizens with substantive
he more nuanced and less openly dis-
-based arguments with the suggestion
eign terrorist suspects.[44] These citizen-
gically and legally problematic, as well
hip does not tell you whether he poses a
g a particular terrorist act. Citizens are
mes as foreign nationals are, as the vio-
Timothy McVeigh demonstrate. More-
ss detention system for foreign nation-
tection under law. If past is prologue,
subjected to this new system will be of
This discriminatory impact, even if not
e United States' reputation in the Arab
recruitment of terrorists.[45]
rts are also astonishingly underdevel-
d rules than criminal trials, they typi-
would be, leaving unanswered an array
ch as the burden of proof, the ability
he standards governing the admission
urity court proposals provide relatively
mportant question of all: the category
posals recommend some combination

of membership in or association with
coupled with some proof of future da
mine membership in an amorphous,
What level of association with al Qaed
And how does one determine "danger
a crime? The proposals often fail to gra

National security court proposals,
create for the government to detain in
prosecution altogether. The experienc
tánamo is instructive. In eight years, th
handful of Guantánamo prisoners wit
easier to detain them without trial. It w
istrations to act differently. When g
inevitably gravitate toward a detentio
more flexible and the evidentiary sta
sure on government officials to utiliz
watered-down procedures, rather tha
be strongest in those cases in which t
tenuous and its evidence weaker. Yet it
criminal justice system is most vital to
ful imprisonment.

In addition, national security cour
the problem of coercive interrogation.
tem's ability to incapacitate terrorist su
which the desire to interrogate, rathe
tion policy after 9/11. "Enemy combat
ism" had less to do with any perceive
traditional law enforcement methods
class of prisoners outside the law in or
sive interrogation methods to gain inf
rity courts thus tend to see a problem
problem exists. They also largely igno
criminal justice system will inevitably
methods, whether by denying suspect
use of evidence gained through torture

Some, such as Georgetown Law Scl
cated continuing the military detentio
terrorists under a law-of-war framew
security courts.[46] Cole argues that the

n al Qaeda and other terrorist groups, ngerousness. But how does one deter- hydra-headed terrorist organization? a or other organizations would suffice? ousness" separate from conviction for apple with these basic questions.

moreover, ignore the incentive they dividuals without charge and to forgo e with military commissions at Guan- he Bush administration charged only a h any crime. One reason is that it was would be naïve to expect other admin- iven discretion, government officials n option in which the procedures are ndards lower. Paradoxically, the pres- e a preventive detention regime with n developing their cases for trial, will the government's allegations are more is precisely in those situations that the protecting individuals against wrong-

rt proposals often turn a blind eye to They criticize the criminal justice sys- spects while overlooking the extent to r than incapacitate, drove U.S. deten- ant" detentions in the "war on terror- ed inability to hold prisoners through than it did with the desire to create a der to engage in torture and other abu- ormation. Proposals for national secu- —lack of detention power—where no re that diluting the protections of the facilitate the use of harsh interrogation s access to counsel or allowing for the e and other coercion.

hool professor David Cole, have advo- n of a more limited group of suspected ork rather than creating new national United States should be able to detain

al Qaeda and Taliban "fighters" indefi
tional safeguards of a criminal trial,
participate in hostilities and have no
it is established that they belong to gro
war with the United States. Cole recog
raises serous concerns, including the p
disfavored groups. But he believes tha
shortcomings of the criminal process
with al Qaeda, which he compares wi
ers during World War II. Cole also ar
gated by improving procedures and by
Qaeda or involvement in actual hostil
new detention power.[47]

But Cole cannot avoid the problem
against al Qaeda and other terrorist or
nate but generational and, indeed, pot
rowing also is problematic on its own
level of participation or association is s
Moreover, that determination will init
which can unilaterally strip individuals
cess based on the allegations it choose
neling them into a shadow criminal ju
and protections, is less accountable, a
corpus may ultimately help check the
power. But that checking function can
Padilla, al-Marri, Hamdi, and Guantá
it remains unclear as a practical matte
placed in military detention would fi
government is freed from the criminal
a prisoner before a judge for a hearin
in military custody—potentially in sec
realizes he is being held, files a habeas
judge to order access to counsel and a

Furthermore, Cole invokes the r
detention to justify imprisoning terror
the criminal law model is inappropria
state from prosecuting enemy soldier
because those soldiers may be obligate
conscription laws).[48] But neither is true

nitely and dispense with the constitu-
even if the detainees did not directly
connection to a battlefield, as long as
oups that have asserted that they are at
gnizes that imprisonment without trial
potential for error and the targeting of
t military detention is justified by the
and the nature of the armed conflict
ith the struggle against the Axis pow-
gues that these concerns can be miti-
requiring a stronger connection to al
lities on al Qaeda's behalf to limit this

n that detentions in an armed conflict
rganizations are not simply indetermi-
entially permanent. His proposed nar-
terms. It is difficult to determine what
sufficient to trigger military detention.
ially be made by the executive branch,
s of the safeguards of the criminal pro-
es to make against them, thereby fun-
ustice system that affords fewer rights
nd allows for greater secrecy. Habeas
e exercise of this preventive detention
n take years to produce results, as the
namo detainee cases show. Moreover,
r when or how individuals seized and
rst obtain access to a court. Once the
law requirement of promptly bringing
g, the prisoner could simply languish
cret—until a family member or friend
petition on his behalf, and persuades a
hearing.
rationale of prisoner-of-war military
rism suspects without trial, noting that
ate because the laws of war forbid the
rs (prisoners of war) for fighting and
ed to fight (e.g., by the enemy nation's
e in the case of alleged "al Qaeda fight-

ers": they may be prosecuted criminal
indeed, the United States has done an
cases); and those who join al Qaeda a
and thus can be held accountable for t
ciples of criminal law.

Terrorist organizations, moreover, a
ally evolving. Thus, once terrorism be
tion without criminal process, the ra
detention power to a single group, suc
Qaeda itself has mutated into other gr
government's expansive view of the pr
"associated" groups under the AUMF.)
extend its detention power to individu
ous, whether or not they are affiliated
Guantánamo.

In the end, proponents of a "third
national security courts or the laws o
sanding down the rougher edges of G
rather than scrapping it altogether. T
that the Bush administration went too
engaging in torture and other gross
straints on presidential power. But they
not be handled effectively through th
not in many cases) and that the Unit
legal framework for incapacitating and
premise is fundamentally flawed, how
and value of treating terrorism as prin
prosecuting suspected terrorists throu

A common criticism of the criminal
wrongdoing rather than preventing
focus, critics argue, makes criminal law
terrorism's potential to inflict massive
But this underestimates the criminal j
rorism as well as to punish it.

Over time, Congress has cast an in
perpetrate terrorism as well as over th
rorist acts.[50] In enforcing those laws,
ingly on prevention. After 9/11, federal

ly consistent with the laws of war (as,
d continues to do in federal terrorim
are under no legal obligation to do so
their actions, consistent with the prin-

are often loosely defined and continu-
ecomes an acceptable basis for deten-
tionale for limiting the scope of that
h as al Qaeda, diminishes. After all, al
roups and formations. (Hence the U.S.
resident's power to detain members of
) The government will inevitably try to
uals whom it thinks might be danger-
with al Qaeda, as it has already done at

l way"—whether detentions based on
f war—believe that the answer lies in
Guantánamo and the post-9/11 model
hey acknowledge, to varying degrees,
o far by circumventing judicial review,
mistreatment, and rejecting any con-
y nonetheless agree that terrorism can-
he criminal justice system (or at least
ted States must develop an alternative
l interrogating terrorism suspects. This
vever, and fails to recognize the utility
cipally a law enforcement problem and
gh the regular courts.

justice system is that it punishes past
future harm. That backward-looking
w ill equipped to fight terrorism, given
e human and economic destruction.[49]
ustice system's capacity to prevent ter-

ncreasingly broad net over those who
ose who support it or plan future ter-
the government has focused increas-
prosecutors sought to use every avail-

able criminal statute to pursue suspe
could be committed. The primary go
deterring terrorist plots before they co

In implementing this preventive ap
powerful tools at their disposal. Amon
that prohibit providing material suppo
organizations.[52] The first material supp
of the World Trade Center in 1993.[53] It
encompass providing property, service
expert advice, or personnel, including
activity.[54] Another law passed after th
individuals from giving material supp
ignated a foreign terrorist organizatio
person did not actually intend to incite
is necessary is for the person to know
ignated or has engaged in terrorist act
additional provisions targeting more
and attendance at terrorist training ca
the material support provisions so that

Material support laws have beco
enforcement tool to stop terrorism b
support case, a prosecutor does not h
rorist act took place or even that ther
an act. Instead, prosecutors can convic
for terrorist organizations, attempti
would-be terrorists to obtain travel do
ing camps.[60] Not surprisingly, these la
players—a terrorist organization's "fo
prosecutors do not have to prove tha
any specific act of terrorism.[61] In one h
ernment indicted six men from Lack
that they had traveled to Afghanistan
used material support laws to obtain g
tences.[62] While material support laws
their overbreadth—in particular, how
without showing any connection betw
ism or any intent to further terrorist a
ment's capacity to employ criminal sta
terrorism without committing any spe

cted terrorists before any terrorist act
al became detecting, disrupting, and
uld be carried out.[51]

pproach, prosecutors have an array of
ng the most important are federal laws
rt or resources to terrorists or terrorist
port law was enacted after the bombing
defines "material support" broadly to
es, money, lodging, training, weapons,
one's own person, to facilitate terrorist
e 1995 Oklahoma City bombing bans
port to any organization formally des-
n by the secretary of state, even if that
e or facilitate terrorist activity.[55] All that
that the organization has been so des-
ivity.[56] Congress subsequently enacted
specific aspects of terrorist financing
mps.[57] It has also extended the reach of
t they apply extraterritorially.[58]

ome an increasingly important law
before it occurs.[59] To make a material
have to prove that any underlying ter-
e was an agreement to carry out such
t individuals merely for raising money
ng to facilitate arms deals, assisting
cuments, and attending terrorist train-
ws have been used to target low-level
ot soldiers and sympathizers"—since
t the defendant intended to facilitate
highly publicized case, the federal gov-
kawanna, New York, after discovering
n to train with al Qaeda. Prosecutors
guilty pleas and significant prison sen-
have been appropriately criticized for
they can be used against individuals
ween the support provided and terror-
activity—they underscore the govern-
atutes to prosecute those who support
cific terrorist acts.

Conspiracy laws provide another m
they materialize. The seditious conspi
agreement to conspire to overthrow o
war against it, or interfere with the e
was enacted in 1861—long before the
"a vehicle for the government to make
a violent situation."[64] More recently, it
Abdel Rahman and his codefendants
tunnels and landmarks and for plann
Hosni Mubarak.[65] Under principles of
bility"), as long as one member of the c
out the agreement, other members of t
for crimes committed in furtherance
the highest member.

Prosecutors have also used generall
ter terrorism, much as prosecutors pr
gangsters like Al Capone. Prosecutors
under laws prohibiting fraud, money l
and the destruction of property.[66] In
statutes involving more "minor" offe
fraud, making false statements to fed
ments. These statues allow for immed
of bail, cast a wide net over possible p
prosecutors to reveal their suspicions
Most important, they allow for the d
activity is suspected but there is not
ism charges.[67] As the Department of Ju
terrorism targets on alternative groun
sometimes the only available method
tial terrorist planning and support act
security information."[68] And even tho
is ordinarily less severe than for terro
tial jail terms still can be imposed.

The government, moreover, need n
detain someone it believes presents a th
ample authority to detain criminal s
with a crime. While the Bail Reform A
of defendants under the "least restric
their continued detention pending tria

eans of disrupting terrorist plots before
racy statute, for example, outlaws any
r put down the U.S. government, levy
xecution of any U.S. law.[63] The statute
rise of modern terrorism—to provide
arrests before a conspiracy ripens into
t was used to prosecute Sheikh Omar
for plotting to bomb New York City
ning to assassinate Egyptian president
conspiracy liability (or "Pinkerton lia-
onspiracy takes a step toward carrying
he conspiracy can be held accountable
of that conspiracy, from the lowest to

y applicable criminal statutes to coun-
reviously used the tax laws to convict
have, for example, convicted terrorists
aundering, racketeering, arms dealing,
addition, they have increasingly used
nses, such as financial or credit-card
eral officials, or obtaining false docu-
iate incapacitation through the denial
rohibited conduct, and do not require
s that wider terrorist activity is afoot.
etention of individuals when terrorist
sufficient evidence to support terror-
stice has explained, the prosecution of
ds "is often an effective method—and
—of deterring and disrupting poten-
ivities without compromising national
ugh the punishment for such offenses
rism or other violent crimes, substan-

ot wait until it obtains a conviction to
reat to the public. Federal law provides
uspects once they have been charged
ct of 1984 generally requires the release
tive" conditions possible, it allows for
l if a judge determines that the defen-

dant poses a flight risk or that his pretr
the safety of the community. In terror
presumption in favor of detention.[69] T
citizens pending immigration removal
and such detention can be mandatory

Critics of the criminal justice m
prosecutions risk disclosure of classif
ous requirements that prevent the ad
and employ rules that hamstring pro
officers. While national security inves
criticisms are misguided.

One of the main arguments for in
ists as "enemy combatants" instead of
the need to protect classified inform
Procedures Act (CIPA) already addre
CIPA in 1980 to facilitate the prosecu
ing intelligence assets and informatio
in federal prosecutions of suspected te
has been able to use information gain
intelligence sources without compron
also enabled the government to prose
the details of sensitive military and int

CIPA does not change the goverr
the rules of evidence but instead regu
of classified material. It authorizes a j
in a closed hearing to determine whe
defendant can obtain that informatio
information at trial. If a judge finds t
the government a chance to create an
a redacted version of the classified d
blacked out), an unclassified summar
sensitive material would prove.[73] Rega
tute must "provide the defendant with
his defense" as would disclosure of th
government does not or cannot provi
to withhold the information. But ther
that the court impose an appropriate s
punish the government, but to ensure
process. Sanctions can include barrin

rial confinement is necessary to ensure
ism cases, the act specifically creates a
The government also may detain non-
proceedings in certain circumstances,
in cases involving terrorism.[70]
odel further contend that terrorism
fied information, impose overly oner-
mission of relevant hearsay evidence,
osecutors and other law enforcement
tigations can present challenges, these

definitely detaining suspected terror-
trying them in federal court has been
ation. But the Classified Information
esses this concern.[71] Congress enacted
tion of cold war spies without expos-
on. It has since become a crucial tool
errorists. Under CIPA, the government
ed from foreign law enforcement and
nising the sources' integrity. CIPA has
cute terrorism cases without revealing
elligence operations.[72]
nment's discovery obligations or alter
ulates a defendant's access to and use
udge to review classified information
ther it is relevant to the case before a
n during pretrial discovery or use the
he information relevant, CIPA affords
unclassified substitute, which may be
ocument (with the sensitive portions
y, or a statement of the facts that the
rdless of the form it takes, the substi-
substantially the same ability to make
e classified information itself.[74] If the
de a fair substitute, it can still choose
e is a cost in doing so. CIPA requires
sanction in such circumstances, not to
e the integrity of the trial and judicial
g the government from calling a wit-

ness if the defendant is deprived of ev
examine the witness or dismissing the
ment refuses to disclose information in

CIPA, to be sure, is not perfect, an
ability to obtain relevant information
dence at trial. Under the act, judges r
potentially thousands of pages of law
ments is relevant and helpful to the de
during the pretrial discovery process
have ordered disclosure only to mem
rity clearance and barred the defendan
This "cleared counsel" solution, howev
perspective. It prevents a defendant fr
evance of materials, thus impairing a
effective assistance of counsel. It also
tional right to self-representation, sinc
clearance necessary to review classifie
more, judges can evaluate the relevan
ex parte, considering arguments by the
dant and his counsel from participati
has helped enable terrorism cases to b
jeopardizing the disclosure of sensitive
rick Fitzgerald, the U.S. attorney who h
bombings case, noted, "When you see
involved in that case, and when you se
pretty darn confident that the federal
prosecutions."[78]

Two examples are commonly cited
cause the disclosure of sensitive info
involved an alleged breach during th
man, when the government handed o
individuals alleged to be unindicted c
Laden. The list supposedly reached b
that his connection to the case had be
the government had neglected to invo
ment tool, such as a protective order,
tion. Had the government done so, as
tive information would not have been
involved the introduction of bin Lad

vidence necessary to effectively cross-
e prosecution altogether if the govern-
mportant to the defense.[75]
d it can adversely affect a defendant's
and challenge the government's evi-
must determine what evidence among
enforcement and intelligence docu-
efense and must therefore be disclosed
. To help facilitate this review, courts
bers of the defense team with a secu-
t himself from seeing the information.
ver, presents a problem from a defense
rom helping his lawyer assess the rel-
defendant's constitutional right to the
can jeopardize a defendant's constitu-
e defendants typically lack the security
ed information themselves.[76] Further-
ce of materials requested in discovery
e government but excluding the defen-
ng.[77] But its shortcomings aside, CIPA
e prosecuted in federal court without
national security information. As Pat-
helped prosecute the 1998 U.S. embassy
how much classified information was
ee that there weren't any leaks, you get
courts are capable of handling these

d to show that criminal prosecutions
rmation. Neither has merit. The first
he trial of Sheikh Omar Abdel Rah-
over to the defense a list of names of
co-conspirators, including Osama bin
in Laden in Khartoum, alerting him
en uncovered.[79] The problem was that
oke CIPA or any other court-manage-
to prevent disclosure of the informa-
s it has done in other cases, the sensi-
disseminated.[80] The second example
en's satellite phone records and other

evidence regarding a satellite phone
embassy bombings trial that suppose
him to stop using the phone.[81] Bin L
phone long before the material was
defense in discovery. The federal pros
problem.[82]

Another criticism of terrorism pr
restrictive and hinder prosecutors fro
eral rules of evidence often prevent the
for public policy reasons that have no a
ist," former defense secretary Donald
secretary Paul Wolfowitz told Congr
skeptics of the criminal justice system
suggest that soldiers in Desert Storm
warrants before capturing Iraqi soldier
brushed attacks ignore the way that th
practice. They also create a straw man
connection to terrorism prosecutions.

One example is the authenticatio
need to ensure that a document or re
to be. The Federal Rules of Evidence i
ment. The rules establish categories of
as certified public records) that requ
what they appear to be.[85] They also g
admission of other material, requiring
sufficient to support a finding that th
ponent claims."[86] The government gen
cating evidence in terrorism prosecut
came from a theater of military oper
for example, the government successf
camp application with Padilla's fingerp
Afghanistan. The government establis
despite vigorous objection by the de
who described how he came into pos
before it was sent to a federal agent in
chain of custody and the document's r

Courts have also applied evidentiar
with relevant testimony can present it
when the witness cannot testify in per

e battery pack during the 1998 U.S.
edly tipped off bin Laden and caused
aden, however, had ceased using the
presented at trial or disclosed to the
ecution thus was not the source of the

rosecutions is that the rules are too
m presenting evidence to a jury. "Fed-
e introduction of valid factual evidence
application in a trial of a foreign terror-
Rumsfeld and former deputy defense
ess in December 2001.[83] Or as other
put it, "It would provoke laughter to
should have obtained search or arrest
rs and their equipment."[84] These broad-
ne rules of criminal procedure work in
of "battlefield captures" that has little

n of evidence. Judges understandably
ecording is what one side represents it
mplement this commonsense require-
"self-authenticating" documents (such
ire no additional proof that they are
ive a judge wide latitude to allow the
only that the party provide "evidence
ne matter in question is what its pro-
erally has not had problems authenti-
ions, even when some of the evidence
ations. At Jose Padilla's criminal trial,
fully introduced an al Qaeda training
prints on it that had been uncovered in
hed the authenticity of the document,
fense, through a confidential witness
session of the document in Kandahar
n Pakistan to allay concerns about the
eliability.[87]
y rules flexibly to ensure that a witness
t to the jury even in the unusual case
son. Judges, for example, have allowed

testimony of witnesses through video
conferencing as long as a defendant h
examine the witness and a jury can o
same is true for the rule against hearsa
tions allowing out-of-court statement
over terrorism cases have typically ap
so that relevant evidence may be cons
ness and integrity of the process.

At the same time, this flexibility is
lishes certain baseline guarantees that
for example, has the right to a promp
and to the assistance of counsel, inclu
government's expense if necessary. A d
see and confront the evidence and wit
to compel the production of witnesses
disclose to the defendant any materia
ing the defendant's innocence, includi
impeach a government witness. In ad
a defendant's guilt by proof beyond a
and defense lawyers, however, all have
parameters in terrorism prosecutions,
the case.

The Zacarias Moussaoui trial is son
prosecuting terrorism cases in federal
site, highlighting the ability of federal
trying circumstances. The district judg
mentally unstable defendant who foug
his attorneys, refused to enter a plea,
ideological rants against the United Sta
his constitutional right to represent hi
lenging legal questions because the ca
Moussaoui could not see. The judge n
issues arose. For example, she provide
classified information that Moussaoui
tion was not ideal, and burdened Mo
But the same issue has come up in mil
shows that creating an alternative syst
away but only channels them into a sys
ity, and less institutional capacity to ad

otaped depositions or two-way video-
nas an adequate opportunity to cross-
bserve the witnesses' demeanor.[88] The
ay, which contains a number of excep-
s to be considered.[89] Judges presiding
plied the rules in a pragmatic fashion
sidered without undermining the fair-

not boundless: the Constitution estab-
cannot be transgressed. A defendant,
ot judicial hearing following his arrest
ding for counsel to be appointed at the
efendant must have the opportunity to
nesses against him as well as the ability
in his favor. The government must also
al evidence in its possession support-
ng any evidence that could be used to
dition, the government must establish
reasonable doubt. Courts, prosecutors,
managed to operate within these fixed
no matter the size or the complexity of

metimes cited to show the problems of
court.[90] But this trial shows the oppo-
courts to function under even the most
ge in the case confronted a difficult and
ht continually with the court and with
and sought to use the courtroom for
ates. Moussaoui also wanted to exercise
imself. Self-representation posed chal-
se involved classified information that
evertheless fashioned solutions as new
ed standby counsel with access to the
was not permitted to see.[91] This solu-
oussaoui's right to self-represenation.[92]
itary commission prosecutions, which
em does not make tough questions go
stem with less experience, less credibil-
ldress them.[93]

Perhaps the most controversial iss
effort to question several individuals
testimony, Moussaoui's attorneys beli
ment's case for a death sentence by sh
9/11 attacks. The court of appeals even
tion of witness depositions in favor
receive summaries of the witnesses'
tion, which was modeled on CIPA, ha
defendant's Sixth Amendment right to
favor, an important reminder of how
promised even when the criminal justi
should not obscure these two points:
that sought to balance the respective in
there would never have been any prob
witnesses in the first place had those in
tody rather than illegally imprisoned a

Another frequent criticism of crim
constitutional requirements like *Mira*
rogation of terrorism suspects. Under
Miranda v. Arizona, law enforcement a
before questioning him, that he has th
he says can be used against him, and t
an attorney even if he cannot afford o
preserve an individual's constitutional
the inherently coercive pressures of cu
ings also seek to prevent false confessi
convictions and lead law enforcement
in violation of *Miranda* may be supp
defendant at trial. Once highly contro
embedded in routine police practice
become part of our national culture."[96]

Criticisms of applying *Miranda* to
conceptions. First, *Miranda* applies o
who are in custody; it does not limit
those who are not. Officials, moreover
tody without providing *Miranda* war
That is, what *Miranda* restricts is the
it obtains from custodial interrogation
as long as the government has other e

ue in Moussaoui's trial concerned his held at secret CIA "black sites" whose ieved, would undermine the govern- nowing his lack of involvement in the tually rejected the district court's solu- of a process in which the jury would testimony.[94] The appeals court's solu- as rightly been criticized as limiting a o compel and examine witnesses in his constitutional protections can be com- ice system is used. But those criticisms first, that the court devised a solution nterests of the parties, and second, that blem in gaining access to the detainee- ndividuals been in lawful criminal cus- nd tortured in a secret CIA jail.

inal prosecutions is that they impose *nda* warnings that impede the inter- the Supreme Court's 1966 decision in gents must inform a suspect in custody, he right to remain silent, that anything hat he has the right to the presence of ne.[95] The purpose of the warnings is to right against self-incrimination amid stodial interrogations. *Miranda* warn- ons, which can both result in wrongful authorities astray. Statements obtained pressed and cannot be used against a oversial, *Miranda* rights have "become to the point where the warnings have

o terrorism cases rest on several mis- nly to the questioning of individuals the government's ability to question r, can still question individuals in cus- nings in order to gather information. government's ability to use evidence ns against the defendant at trial. Thus, evidence untainted by those interroga-

tions, *Miranda* poses no impediment t
to popular belief, many terrorism susp
after *Miranda* warnings are provided.

Another criticism of *Miranda* in th
warnings would be extended to milit
argument goes, should not have to a
diers captured on the battlefield. The
with *Miranda* but with the failure to li
and with a conception of the battlefiel
limitless. In practice, *Miranda* has not
investigations, including those conduc
Miranda pragmatically in this conte
impede criminal prosecution in the u
pect was captured and interrogated in
ation, a court might find that *Miranda*
exigencies of the situation, thereby m
as it was made voluntarily.[98] A court m
safety" exception applied to questioni
time-sensitive intelligence.[99] But that i
ment made by John Yoo and others: th
to interrogations conducted in the glob

An example of the criminal justice
rorism cases is the prosecution of the
Africa that killed more than two hun
The defendants were convicted and se
in the plot. Three of the four defendan
an American citizen, claimed that the
Amendment right to be free of unlaw
agents raided his home in Kenya and c
conversations without a warrant. Tw
statements to U.S. and non-U.S. offici
be suppressed because they were not p
because their statements were not vol
under which they were held. The appe
affirmed the convictions.[100] The court m
same constitutional protections as oth
they were foreign nationals arrested ou
to apply those protections to accomm
ism investigations without sacrificing

to prosecution. Furthermore, contrary
pects do not stop but continue talking

ne national security context is that the
tary operations. Military officials, the
administer *Miranda* warnings to sol-
problem with this argument lies not
mit armed conflict to its proper sphere
ld that is so elastic that it is effectively
been an obstacle in counterterrorism
cted overseas, and courts have applied
xt.[97] Nor would *Miranda* necessarily
nusual case in which a terrorism sus-
a real battlefield setting. In that situ-
da did not apply, given the nature and
aking a statement admissible as long
might also find that *Miranda*'s "public
ng that was urgently needed to secure
s very different from the radical argu-
at *Miranda* requirements do not apply
bal "war on terror."
system's ability to handle complex ter-
e 1998 U.S. embassy bombings in East
dred people and wounded thousands.
ntenced to life in prison for their role
nts appealed. One defendant, who was
e government had violated his Fourth
wful searches and seizures when FBI
onducted surveillance of his telephone
o other defendants argued that their
ials after their arrest in Kenya should
provided valid *Miranda* warnings and
luntary, given the coercive conditions
als court rejected these challenges and
recognized that the defendants had the
her criminal defendants, even though
utside the United States. It then sought
odate the demands of overseas terror-
fundamental trial rights. The appeals

court concluded, for example, that w
administered when the United States
tion of a suspect in foreign custody, th
way that takes into account local conc
the United States, a suspect in custod
right away or at the detaining govern
that while the Fourth Amendment app
application could vary based on the ci
would still need to demonstrate that t
able to introduce evidence at trial, it w
rant to search a person's home or list
country, as it would inside the United

Questions can—and should—be as
the right result on all the issues and w
of security. But from the perspective o
the Bush administration in the "war c
margins. The prisoners were not deta
ants," nor were they put before substa
military commissions, as were other
in the same terrorist attack. Instead,
time-tested system and given the same
if those rights were interpreted in lig
overseas counterterrorism operations.

Critics of using the criminal justice
timate its strengths in gaining valuable
important information-gathering tools
lenient treatment in exchange for the
with crimes often provide useful and i
suspects in order to avoid going to jail o
the prospect of a reduced jail term. Inc
are structured to obtain this cooperatio
who accept responsibility in pleading
assistance in the investigation of anothe
the government can threaten to seek ev
do not cooperate.[104] Defense lawyers ty
underscoring the advantages of cooper
and by facilitating negotiations with th

Prosecutors have long used the pro
ing down large and complex criminal

while *Miranda* warnings must still be
actively participates in the interroga-
e warnings could be administered in a
ditions, including the fact that outside
y might not be entitled to an attorney
ment's expense. The court also found
plies to American citizens overseas, its
ircumstances. While the United States
the search or surveillance was reason-
would not be required to obtain a war-
ten to his telephone calls in a foreign
States.

sked about whether the court reached
whether it erred too much on the side
f the extraordinary measures taken by
on terrorism," these debates are at the
ained indefinitely as "enemy combat-
ndard tribunals like the Guantánamo
individuals accused of involvement
they were prosecuted in a legitimate,
e trial rights as other defendants, even
ght of the particular circumstances of

system to fight terrorism also underes-
intelligence. One of prosecutors' most
s is their ability to offer suspects more
eir cooperation.[101] Individuals charged
ncriminating information about other
or to lessen their own exposure through
deed, the federal sentencing guidelines
n by reducing sentences for defendants
guilty[102] and who provide substantial
er criminal suspect.[103] At the same time,
ven longer jail terms against those who
pically help, not hinder, this process by
rating and the risks of not cooperating,
e government when appropriate.

mise of more lenient treatment in tak-
enterprises like organized crime and

drug cartels. More recently, they have
cases against terrorist suspects.[105] By
prison sentences to induce cooperatio
ment has obtained "critical intelligen
groups, safe houses, training camps, r
States, as well as the operation of those
harm."[106] In the "Lackawanna Six" cas
a reduced sentence for one of the def
Goba's assistance. Goba, in turn, not c
lead to the conviction of his codefenda
mony for the government in other terr

By their nature, criminal investigat
tion and greater understanding of th
lated.[108] Each investigation offers the c
mants will cooperate and provide valu
yield search warrants, post-arrest sta
governments, all of which contribute
edge. What may at first seem small a
ultimately enable law enforcement to
prosecutions in court.[109] Those cases p
have called a "treasure trove" of new in

The criminal justice system also h
ering. Prosecutors must anticipate th
receives from an informant or a coope
tion will later be challenged by defen
and jury if introduced in court. Prose
ensure that the information is accurat
it. This examination and corroboratio
judicial proceedings and yields more d
prosecutor explained, "When you hav
judge to get a wiretap, or proof beyond
tion must be reliable and corroborate
ings like the Combatant Status Review
Guantánamo, the government had no
information, since it believed that the
by a judge or presented in court. In
encourage shoddy intelligence gatheri

Criminal prosecutions, moreover,
military commissions, national securit

used this tactic to infiltrate and build
leveraging criminal charges and long
n from defendants, the Justice Depart-
ce about al-Qaida and other terrorist
recruitment, and tactics in the United
e terrorists who mean to do Americans
se, for example, prosecutors agreed to
endants, Yahya Goba, in exchange for
only provided information that helped
nts, but also provided important testi-
rorism cases.[107]

tions also lead to both more informa-
e information that has been accumu-
chance that new defendants and infor-
able information. Those investigations
tements, and assistance from foreign
e to a growing storehouse of knowl-
nd isolated pieces of information can
infiltrate terrorist activities and bring
roduce what national security experts
nformation about terrorism.[110]

helps foster reliable intelligence gath-
hat any information the government
erating witness in a criminal investiga-
se counsel and scrutinized by a judge
ecutors therefore have an incentive to
e by probing, analyzing, and verifying
n process helps ensure the integrity of
ependable information. As one former
ve to demonstrate probable cause to a
l a reasonable doubt to a jury, informa-
d."[111] By contrast, with sham proceed-
Tribunals used to justify detentions at
incentive to ensure the accuracy of the
information would never be reviewed
short, inferior adjudicatory systems
ng.

will always have the legitimacy that
y courts, and other second-class mod-

els lack. Often, the most important lea
from voluntary statements by membe
public. Sometimes those tips come fr
selves, as in the case of the attempte
portation system on July 21, 2005.[112] E
information—the members of the sam
munity as the would-be terrorists—ar
they perceive their group has been sin

Of course, not every terrorist susp
cooperate. But there is no evidence
frequently than do defendants accuse
possible in some cases that the gover
charge a suspect or that the governme
mation that it cannot use at trial, for e
a source or risk disclosure of sensitiv
and the problem is not novel; it com
and organized-crime cases. In genera
effective not only at incapacitating su
in attacks but also at gaining informa
acts. By contrast, creating alternatives
government to interrogate suspects w
the fruits of those interrogations as a
mendous costs that far outweigh any b

Most intelligence and counterterr
other abusive interrogation practices
and are counterproductive in the long
"overwhelms investigators with misle
ler III, director of the FBI since 2001
disrupted because of intelligence gain
ment.[115] The "only thing torture guara
rogator, "is pain."[116] An extensive repor
intelligence agencies describes the us
outmoded, amateurish, and unreliabl
mander of the U.S. Central Command
has stated that torture and other "expe
tion are not only wrong but useless an

Bush administration officials never
interrogation methods saved lives an
ing valuable information. They often

ads in uncovering terrorist plots come
ers of the community and the general
om relatives of the perpetrators them-
d bombing attacks of London's trans-
But the people with the most valuable
e religious, ethnic, or geographic com-
re less likely to offer their assistance if
gled out for inferior treatment.

ect who has information is willing to
that terrorist suspects cooperate less
ed of other serious crimes.[113] It also is
nment may lack sufficient evidence to
ent has come into possession of infor-
xample, because it would compromise
e intelligence. But such cases are rare
monly arises in large drug-trafficking
l, criminal prosecutions have proved
uspected terrorists before they engage
tion useful to prevent future terrorist
to criminal prosecutions to enable the
ith fewer restrictions and then to use
basis for imprisonment, imposes tre-
benefits.

orism experts agree that torture and
do not produce accurate information
run. Torture, according to one expert,
ading information."[114] Robert S. Muel-
, has stated that no attacks have been
ed through torture or other mistreat-
ntees you," insists a veteran FBI inter-
t from a group of experts advising U.S.
se of harsh interrogation methods as
e.[117] General David H. Petraeus, com-
d and formerly the top general in Iraq,
edient methods" used to gain informa-
d unnecessary.[118]

rtheless claimed repeatedly that harsh
d prevented future attacks by provid-
cited the CIA's interrogation of Abu

Zubaydah at a secret prison in Thailan
catalyst for the initial Justice Departm
sure of its "enhanced interrogation tec
provided leads about a number of terr
who was arrested soon after Zubaydah
boarding, which the CIA inflicted on
gle month, CIA operatives stripped Z
(previously suffered during a firefight
ing so much that he "seemed to turn
made him stand for hours at a time in
Khaled Sheikh Mohammed to waterbo
The former military psychologist, Jam
team, announcing that Zubaydah had
his power to resist broken.[121] There is n
niques produced useful intelligence. In
suggested that the brutal treatment w
ruled by the CIA officials in headqua
rogation.[122] By contrast, the FBI agen
through standard interview techniques
ress, however, came to a halt when th
of the interrogation process, and turn
resenting the efficacy of its interrogati
overstated Zubaydah's importance: th
officials had sought to justify Zubayd
was a senior member of al Qaeda and
Interrogators later realized that Zuba
nel clerk who helped facilitate travel t
order to justify Zubadyah's brutal trea
less continued to perpetuate the lie fo
high-ranking al Qaeda member until
Zubaydah was even a member of or f
the end, not a single plot was thwarted
Zubaydah through torture. As one form
millions of dollars chasing false alarms

The most successful U.S. interrog
through traditional law enforcement m
Ali Soufan of the FBI and Robert McF
tive Service interrogated Abu Jandal, C
at a Yemeni prison where Jandal had

nd following his capture in 2002—the
ment torture memos. Under the pres-
chniques," the CIA claimed, Zubaydah
orism suspects, including Jose Padilla,
n's interrogation. In addition to water-
Zubaydah eighty-three times in a sin-
Zubaydah naked, exposing his injuries
in Pakistan); raised the air condition-
blue"; blasted rock music at him; and
a frigid cell.[119] (The CIA later subjected
oarding 183 times in a single month.)[120]
es Mitchell, led the CIA's interrogation
to be treated "like a dog in a cage" and
no evidence, however, that those tech-
ndeed, the interrogators on the ground
as "unnecessary," but they were over-
rters who were monitoring the inter-
ts who initially questioned Zubaydah
s had far greater success.[123] Their prog-
e CIA team arrived, froze the FBI out
ed to torture.[124] In addition to misrep-
ion methods, the CIA also profoundly
he CIA and top Bush administration
dah's treatment on the ground that he
a close associate of Osama bin Laden.
ydah was merely a low-level person-
o training camps in Afghanistan.[125] In
tment, government officials neverthe-
r years afterward that Zubaydah was a
eventually abandoning the claim that
ormally identified with al Qaeda.[126] In
d as a result of statements wrung from
mer intelligence official said, "We spent
s."[127]
gations since 9/11 instead have come
methods. In the weeks after the attacks,
adden of the Navy Criminal Investiga-
Osama bin Laden's former bodyguard,
d been held for nearly a year. Jandal

refused to cooperate and insisted that
Israel's Mossad. Rather than resorting
up through a combination of guile and
diabetic Jandal sugar-free cookies as a
later provided reams of valuable infor
boarding, sleep deprivation, or other h
withstanding the fact that he was advi
thew Alexander, a former military int
track down al Qaeda leader Abu Mou
coaxing, cajoling, and tricking terroris
the right way to obtain valuable intelli
gator, Eric Maddox, credits similar tact
to the capture of Saddam Hussein. Ma
ranking Baath Party leader with close
to Hussein's whereabouts by creating
Ibrahim that unless he volunteered t
might move, and he could no longer
Substantial intelligence has been glean
rials found on detainees after they wer
from playing detainees against one and
teering information that they believed

Torture is not only ineffective; it a
devastating consequences, as the cas
In late 2001, the United States capture
was interrogated—without torture—h
Cloonan, who says that he advised F
this like it was being done right here,
interrogations, agents were able to da
ment for al-Libi's wife. Al-Libi cooper
tion about al Qaeda staff and trainin
plot to blow up a U.S. military base, t
attack.[133] Al-Libi also denied any conn
Hussein's regime in Iraq, even though
this point.[134] The CIA, however, resist
a potential prosecution witness and w
So, several days into the FBI's interrog
where the FBI was questioning al-Lib
"You're going to Egypt! And while you'
and fuck her!"[135] Shortly thereafter, al-L

t the attacks had been orchestrated by
to torture, Soufan got Jandal to open
craft, starting the process by giving the
sign of friendship and respect. Jandal
mation about al Qaeda without water-
harsh interrogation methods, and not-
sed of his constitutional rights.[128] Mat-
errogator in Iraq whose efforts helped
usab al-Zarqawi, has pointed out that
st suspects, and not torturing them, is
gence.[129] Another professional interro-
tics in yielding the information that led
ddox got Mohammed Ibrahim, a mid-
ties to Hussein, to provide directions
a false sense of urgency: Maddox told
he information immediately, Hussein
help Ibrahim from going to prison.[130]
ed in various other ways—from mate-
re captured (known as "pocket litter"),
other, and from detainees freely volun-
their questioners already knew.[131]
lso can produce misinformation with
e of Ibn al-Shaykh al-Libi illustrates.
ed al-Libi in Afghanistan. He initially
by FBI counterterrorism expert Jack
FBI agents in Afghanistan to "handle
, in my office in New York."[132] During
ngle the possibility of favorable treat-
rated, and provided detailed informa-
g camps in Afghanistan and about a
hus helping avert a potentially deadly
lection between al Qaeda and Saddam
FBI agents repeatedly pressed him on
ed the FBI's effort to treat al-Libi like
vanted to use more aggressive tactics.
gation, a CIA agent burst into the cell
i and started shouting at the prisoner,
're there, I'm going to find your mother
Libi was strapped to a stretcher, bound

and gagged with duct tape, and rende
approval.[136]

In Egypt, al-Libi's interrogators pre
between al Qaeda and Saddam Huss
such connection, he was locked in a ti
finally let out of the box, al-Libi was bea
to "tell the truth." So al-Libi made up a
he knew of going to Iraq to learn abo
interrogators beat al-Libi again to find
about Iraq's helping al Qaeda obtain w
mation was relayed to the United State
obtained. Secretary of State Colin Pow
fession in his February 5, 2003, presen
the United States' military interventio
senior terrorist operative telling how I
cal and biological] weapons to al Q
operative is now detained, and he ha
story—which al-Libi later recanted an
false, and the United States' decision t
confession gained by burying a prisone
his interrogators what they had wante
to a secret jail in Afghanistan and ever
he reportedly committed suicide.[140]

Torture also can help fuel terroris
geance.[141] Al Qaeda leaders such as Aym
and abuse in Egyptian prisons as spark
violence.[142] In addition, torture can ali
lim communities, undermining the Un
those whom it needs in fighting terrori
the world have been seriously underm
actions committed by U.S. officials at
CIA jails.[144] While some may gravitate
how the United States treats prisoners,
the hearts and minds of those who hav

Torture, like indefinite detention a
ens repressive regimes like Egypt, Sud
United States to justify their own hum
tary Assembly of the Council of Europ
nization of forty-six nations, warned:

red to Egypt—with the White House's

ssed him to admit knowing about ties
ein in Iraq. When al-Libi denied any
ny cage for eighty hours. After he was
aten before being given another chance
a story, accusing three al Qaeda figures
ut nuclear weapons.[137] When Egyptian
out more, al-Libi embellished his tale
eapons of mass destruction. The infor-
es, without a description of how it was
ell later relied on al-Libi's coerced con-
tation to the United Nations justifying
n in Iraq.[138] "I can trace the story of a
raq provided training in these [chemi-
aeda," Powell said. "Fortunately, this
s told his story."[139] Unfortunately, that
d the CIA eventually repudiated—was
o invade Iraq rested in part on a false
er alive. Under torture, al-Libi had told
d to hear. Al-Libi was later transferred
ntually sent to a prison in Libya where

sm by inculcating the desire for ven-
han al-Zawahiri have cited their torture
king the desire to take revenge through
enate moderates from Arab and Mus-
ited States' ability to gain support from
sm.[143] America's image and standing in
hined by the brutal and dehumanizing
Abu Ghraib, Guantánamo, and secret
e toward terrorist groups regardless of
torture harms America's ability to win
e not yet committed to that path.
nd sham military trials, also embold-
an, and Syria, which now point to the
an rights violations. As the Parliamen-
pe, an international government orga-

> The commission of unlawful acts—ab
> other countries even though they are
> up of detention centers beyond judici
> the moral authority of the United St
> power is becoming a negative role m
> that they may legitimately follow the

At the same time, torture makes t
information with other countries, a p
a source of frustration among counte
German court, for example, had to di
accomplice of the 9/11 hijackers when
witness to testify at trial because that
gated in secret CIA custody.[147] "The tr
center of our answer to terrorism," exp
counterterrorism prosecutor who saw
conducting disrupted by the rendition
situation, the trial is not important."[148]

The 9/11 Commission warned early
live up to its legal and moral obligatio
abused prisoners in its custody make it
cal, and military alliances the governm
Members of the commission later re
United States' mistreatment of "suspe
secret detention centers abroad."[150] Th
similarly highlighted "the complicatio
rendition pose to terrorism prosecutio

Defenders of torture still cling to th
that torture may be necessary in an e
prisoner has information that could
impossible to know in advance whetl
that would prevent some future attack
however remote or tenuous the threat
ture because it is always possible in t
information. So while torture might b
situations, it will inevitably be used m
Another problem is that torture does
country's entire legal and political syst
to hide or excuse it.

oductions, the exporting of torture to
regarded as "rogue states," the setting
ial supervision—has severely affected
tates. Worse still, the world's greatest
model for other countries, which feel
same path and flout human rights.[145]

he United States less willing to share
oint of contention with key allies and
erterrorism officials in Europe.[146] One
smiss the charges against a suspected
U.S. officials refused to produce a key
t witness was being held and interro-
ial and the legal investigation is at the
plains Armado Spataro, a senior Italian
a broad terrorism investigation he was
and torture of Abu Omar. "In the U.S.

on about the United States' failure to
ons. "Allegations that the United States
t harder to build the diplomatic, politi-
ment will need [to fight terrorism]."[149]
eiterated those downsides, citing the
cted terrorists in military prisons and
he U.S. Senate Intelligence Committee
ns" secret detention and extraordinary
ons and to America's image.[151]
he myth of the "ticking time bomb"—
emergency when authorities believe a
prevent an imminent attack. But it is
her a person actually has information
. As a result, the goal of saving lives—
—can always be invoked to justify tor-
theory that torture will yield valuable
e intended for only the most extreme
more widely once the door is opened.
not occur in a vacuum but infects a
tem, which must continually find ways

Those who defend torture will alwa
torture yielded useful information. But
mation could have been obtained with
ple, that the United States gained any
that could not have been obtained thr
of the evidence gained through tortur
ations aside, torture remains a much les
tion than the more sophisticated and c
ment. Torture also carries tremendous
harms inflicted on its victims. When a
or legalize torture, it undermines its ow
affected communities, and weakens the

The criminal justice system contai
torture, such as the privilege against
to counsel and a prompt judicial hea
confront one's accusers at trial. But as
to detain terrorist suspects militarily a
and other forms of preventive detentio
to criminal prosecution, habeas corpu
torture and other abuse because it pro
prevent the type of secret, extrajudici
ground. It is not simply enough to "t
occupying the White House): the chec
tial—and its availability is more, and n
tional terrorism given the inevitable te
against legal boundaries and to engage

By the end of the Bush administratio
still largely intact, even if some of its
United States continued to detain hun
out charge. It also maintained the pre
engage in torture and other abuse in t
ees at Guantánamo had finally won t
than two hundred men were still imp
United States continued to resist acces
Bagram in Afghanistan.

The Bush administration had not
laws and institutions; it had also chan
tion. Despite the widespread criticism

ays claim there are situations in which one can never know if that same information about it. There is no evidence, for example, information after 9/11 through torture ough lawful means. Conversely, much e was false. Legal and moral considerss effective method of gaining informaalibrated tools of criminal law enforces costs beyond the physical and mental democratic country seeks to sanction n legitimacy, creates a backlash among e rule of law at home and abroad.

ns other safeguards that help to deter self-incrimination, the right of access ring following arrest, and the right to long as the U.S. government continues and as long as national security courts on are considered possible alternatives s will remain important to preventing ovides access to a court and thus helps al detention that is torture's breeding rust" the executive (no matter who is k of an independent judiciary is essenot less, important in an age of internandency of government officials to push e in coercive interrogation practices.

n, the post-9/11 detention regime was worst excesses had been curbed. The dreds of individuals indefinitely withrogative to operate secret prisons and the name of national security. Detainthe right to habeas corpus. But more prisoned there in legal limbo, and the s to habeas corpus for prisoners held at

only altered and corroded America's ged public consciousness and percepn of Guantánamo, many of its key fea-

tures had gained traction, particularly
military commissions, and the broade
The Bush administration had also do
able: it had made torture a matter of p
been won in the courts, abuses unc
against executive and legislative assaul
administration would have to govern i
that was different from any before it.

y indefinite detention without charge, er concept of a global "war on terror." ne what before was virtually unthink- public debate. Important victories had overed, and habeas corpus defended t. But much had changed, and the next n a legal, political, and cultural climate

Continuity and Cha

The Detention Policy of a Ne

On his inauguration as the
States on January 20, 2009, Barack O
America's national security policy: "A
as false the choice between our safet
one of his first official acts as presid
dating the closure of the detention
one year. He also issued three exec
harsh interrogation methods by confi
in the *U.S. Army Field Manual* and
mon Article 3 of the Geneva Conven
of any remaining secret CIA prisons
task force to review existing individu
third called for a comprehensive rev
tion policy.[4]

However, important questions rem
some Guantánamo detainees would p
triated to third countries. But others w
how they would be treated. Would they
and continue to be held indefinitely
detainees still be tried by military co
at other U.S.-run facilities like Bagra
prison—the Parwan Detention Facil
of the Bagram Air Base. But even th
underlying question remained: would
prisoners there without charge and w
even if the Obama administration clos
administration—maintain key feature
Guantánamo embodied?

13

nge

w Administration

forty-fourth president of the United Obama suggested a new direction for s for our common defense, we reject y and our ideals."[1] Two days later, in dent, Obama issued a directive man- facility at Guantánamo Bay within cutive orders that day. One banned ning the CIA to techniques contained d mandating compliance with Com- tions while also directing the closure .[2] The second created a cabinet-level ual Guantánamo detainee cases.[3] The iew of U.S. detention and interroga-

ained. Under the president's directive, resumably be returned home or repa- would not, and Obama did not address y simply be moved to the United States as "enemy combatants"? Would some mmissions? And what about prisoners m in Afghanistan? A new and larger ity—had been built on the outskirts ough conditions were improving, the d the United States continue to hold without access to any court? In short, ed Guantánamo, would it—or a future es of the larger detention system that

The first major test of the new admi
of Ali al-Marri, which the Supreme C
before President Obama took office. Th
was forced to decide almost immedia
nary exercise of presidential detention
onment without trial of a person lawfu
on allegations of terrorism. In Februa
had been filed, and just weeks before t
the Justice Department unsealed a two
providing material support to terrorism
to civilian custody.[5] The solicitor gene
Court to dismiss al-Marri's case as m
obtained the relief he sought in his hab
oned without trial. Faced with a choice
sweeping—and dubious—assertion of
sor. The Court granted the governmen
Although the Court also vacated the Fo
al-Marri's possible military detention, t
venting its use against others in the fut
important question about the presiden
presented by al-Marri's case. Al-Mar
guilty to one count of conspiring to pro
was sentenced to eight years and four m
the criminal justice system to handle ev

In ongoing litigation elsewhere,
tacked closely to the prior administ
tánamo habeas cases, which had fina
ings in district court following the Su
Boumediene v. Bush, the administrati
detain terrorism suspects without cha
support for terrorism must be "substa
combatant" for that of "unprivileged b
cosmetic. The Obama administration
detain individuals indefinitely withou
global armed conflict against al Qaed
even if those individuals were not sei
took up arms against the United State
signal a new direction, such as the Oba
al-Marri rather than defend his milita

nistration's intentions came in the case
Court had decided to hear the month
he Obama administration consequently
tely whether to defend this extraordi-
power: the military seizure and impris-
ully residing in the United States based
ry 2009, after al-Marri's opening brief
the administration's response was due,
-count indictment against al-Marri for
m and sought his transfer from military
ral simultaneously asked the Supreme
noot on the ground that al-Marri had
eas petition: the right not to be impris-
, Obama thus elected not to defend the
executive power made by his predeces-
t's motion and dismissed the petition.[6]
urth Circuit's divided ruling upholding
thereby erasing that precedent and pre-
ure, it left unanswered the exceedingly
nt's domestic military detention power
rri, meanwhile, subsequently pleaded
ovide material support to al Qaeda and
months in prison, showing the ability of
ven the most challenging cases.[7]
however, the Obama administration
ration's legal positions. In the Guan-
ally started to go forward with hear-
upreme Court's June 2008 decision in
on claimed broad power to seize and
arge or trial. While it said a detainee's
antial" and swapped the label "enemy
belligerent," these changes were largely
maintained that the government could
t charge as part of the United States'
a, the Taliban, and associated groups,
zed on or near a battlefield and never
s.[8] Moves that had at first appeared to
ama administration's decision to indict
ry imprisonment, increasingly seemed

like efforts to sidestep difficult cases
limit its options in the future.

On May 21, 2009, Obama delivered
Archives in Washington.[9] Flanked by
Independence, Obama reiterated his
rity policy. "My single most importan
"is to keep the American people safe
we also cannot keep this country safe
fundamental values."[10]

Obama had sharp words for his pre
ber 11, the United States entered a new
presented grave dangers and did not
uncertain threat, he said, the U.S. gov
sions. . . . Instead of strategically apply
often we set those principles aside as lu
To restore those principles, Obama rei
ture. Referring to his earlier decision
niques," Obama did not mince his w
rejecting the notion that torture was n
also defended his decision to close G
had tarnished America's reputation ar
as a recruiting tool for terrorists. In ad
executive power, asserting instead tha
depended on action by all three branc
sensibility, the speech marked a sharp
ber 2006 speech defending secret dete

But Obama's speech also showed
States' post-9/11 detention policy were
Obama stressed the importance of the
ity of the federal courts to handle ter
eral prosecutions were just one of se
closing Guantánamo and fighting terr
tary commissions. While Obama said
never provided a coherent explanatio
used and ignored the harmful consec
second-class justice system. In addit
continue to hold some Guantánamo de
the existence of a category of individu
life, without ever being charged with a

and avoid adverse rulings that might

an important speech from the National
he Constitution and the Declaration of
vision for the country's national secu-
t responsibility as President," he said,
." But, he cautioned, "in the long run
unless we enlist the power of our most

edecessor. After the attacks of Septem-
era, forced to confront an enemy that
abide by legal rules. Faced with this
ernment "made a series of hasty deci-
ing our power and our principles, too
uxuries that we could no longer afford."
terated his commitment to ending tor-
to ban "enhanced interrogation tech-
ords, denouncing those methods and
ecessary to keep America safe. Obama
Guantánamo, charging that the prison
nd undermined its security by serving
ddition, he rejected claims of unilateral
t an effective national security policy
hes of government. In its rhetoric and
contrast with President Bush's Septem-
ntion and torture.
that key components of the United
becoming institutionalized. Although
e criminal justice system and the abil-
rrorism cases, he also stated that fed-
veral tools the U.S. should employ in
orism. Another tool, he said, was mili-
he would reform the commissions, he
n of why commissions should still be
quences of maintaining this tarnished
ion, Obama indicated that he would
etainees indefinitely, thus perpetuating
uals who could be held, potentially for
crime.[11]

ministration

Obama followed a similar approa
embracing the language of change wi
policies of his predecessor. For exam
transparency in government when h
memos from the Bush administration
to legalize torture and other detainee
previously classified August 1, 2002, to
to release photographs depicting the
arguing that the photographs would e
Instead, Obama sought (and subsequ
court decision mandating the release
Information Act.[12]

Obama also said that he intended
that the United States had previously u
seeking damages for torture and illeg
did announce changes designed to cu
including imposing a higher standard
ening internal Justice Department revi
ify the government's position in seeki
CIA's extraordinary rendition program

In November 2009, Attorney Ge
that the United States would bring cr
Mohammed (KSM) and four other G
the 9/11 attacks.[14] The decision to prose
eral court rather than in military com
previous policy. After years of tortur
would finally be tried in accordance wi
said the trial would take place at the
close to where the 9/11 attacks on the W
ing the trial's symbolic importance. Th
that even the most dangerous crimin
regular courts.

Holder, however, also stated that so
be tried in military commissions. Con
improving the commissions, strengthe
more resources to defense counsel, and
through mistreatment.[15] Notwithstand
sions still failed to meet the standards
courts-martial. The commissions, for

ch on other national security issues, thout deviating significantly from the ple, he proclaimed the importance of ne released redacted versions of four 's Office of Legal Counsel that sought e mistreatment, including the second, orture memo. But Obama also refused abuse of prisoners by U.S. personnel, endanger American service members. ently obtained) reversal of an appeals of the photos under the Freedom of

to reform the "state secrets" privilege used to shut down litigation by victims gal detention. And the administration rb abuse of the state secrets privilege, to invoke the privilege and strength- iew.[13] But Obama also refused to mod- ng to dismiss lawsuits challenging the and gross mistreatment of detainees. neral Eric H. Holder Jr. announced iminal charges against Khaled Sheikh uantánamo detainees for their role in ecute the suspected 9/11 plotters in fed- nmissions marked a sharp break with e and illegal detention, the prisoners th the Constitution. Moreover, Holder federal courthouse in New York City, World Trade Center occurred, increas- e prosecution would send the message als could be brought to justice in the

ome Guantánamo detainees would still ngress had recently enacted legislation ening evidentiary standards, promising d restricting the use of evidence gained ling these latest reforms, the commis- of either the federal courts or military example, contained fewer protections

against the use of hearsay, which coul
through coercion, and were more pr
had larger problems. They continued t
criminal offenses as material support f
lacked the legitimacy of the federal cou
record of trying complex terrorism
still applied only to foreign nationals,
under law and reinforcing the percep
nated against noncitizens.

In addition, the Obama administra
to hold some detainees without trial b
ing military detention power that trea
against al Qaeda and those associated
not explain why one detainee might re
no trial at all. Instead, the administrat
ated by Obama's executive order listed
calculation, including "protection of i
possible "legal or evidentiary problem
sions were based on expediency rather
meant that when the government beli
charges in federal court; when the go
evidence, it resorted to the more re
and when the government's case was
gether and simply held the prisoners
unknown to American law: that the
too dangerous to release. In short, whi
a preference for trying suspected terro
that—a preference, not a requirement.
sions and indefinite detention withou
tánamo remained available whenever t
a person in its custody the full protecti

One thing, however, had changed:
least no longer deprived of habeas cor
taking away the right to habeas corp
because the Supreme Court ruled in *Bo*
by the Constitution. Following the Co
judges in Washington, D.C., were nov
corpus hearings in individual Guantá
whether the detentions were lawful. B

d be used to launder evidence gained
one to secrecy. The commissions also
he error of treating as war crimes such
or terrorism and conspiracy. They also
rts, as well as their expertise and track
cases. Furthermore, the commissions
violating principles of equal protection
tion that the United States discrimi-

ation indicated that it would continue
y endorsing the same claim of sweep-
ted the world as a battlefield in a war
d with it. The administration also did
eceive a full criminal trial and another
tion's Detention Policy Task Force cre-
a number of factors that went into the
ntelligence sources and methods" and
s."[16] This raised the concern that deci-
than principle. As a practical matter, it
eved it could easily convict, it brought
overnment had some doubts about its
laxed rules of military commissions;
weakest, it dispensed with a trial alto-
indefinitely under a theory previously
prisoners were too difficult to try but
ile the Obama administration adopted
rists in federal court, it remained only
. The twin system of military commis-
t charge that had developed at Guan-
the United States did not want to afford
ion of its laws.
those detained at Guantánamo were at
pus. Nor could Congress pass a statute
us, as it had tried to do twice before,
oumediene that this right was protected
ourt's decision in *Boumediene*, district
v obligated to conduct prompt habeas
ánamo detainee cases and to examine
By the fall of 2008, these hearings had

started to move forward, and dozens
took office. The results underscored wh
corpus for so long: in most cases, it si
in court.

District judges generally accepted th
some individuals at Guantánamo cou
combatants" under the 2001 Authoriza
even if they did not take up arms on a
dard than the Supreme Court had upl
did, however, insist on a stronger con
with the Taliban, al Qaeda, or "associa
was required. Judge Reggie B. Walton,
position that "substantial support" fo
basis for detention under the AUMF,
to actions taken within that organizat
judge, John D. Bates, rejected the gov
port" of al Qaeda or an associated terr
tary detention, finding that an individ
tion or to have committed a belligeren
That determination was rejected by th
support alone could be a basis for det
appeals also suggested that courts co
interpreting the AUMF, which contrad
sion in *Hamdi* and well-settled rules o

But the district judges also found in a
government had failed to provide credib
onment; that is, that the government h
show that the prisoner fell within the
however defined. By the one-year anniv
eral judges had ruled in twenty-six of th
they decided that there was no basis t
that number was thirty-two out of the
the government had failed to justify the
of the time. The judges, moreover, were
hostile to, the government's claim that t

The first habeas hearings were held
the same judge who four years earlier
tions on the ground that the Guantána
through habeas corpus. The first case

s were underway by the time Obama
hy the government had resisted habeas
mply could not defend the detentions

he government's argument that at least
ld be held without charge as "enemy
tion for Use of Military Force (AUMF)
a battlefield, a broader detention stan-
held in *Hamdi v. Rumsfeld*. The judges
nection to and degree of involvement
ated forces" than the government said
for example, adopted the government's
r the Taliban or al Qaeda provided a
but he tethered "substantial support"
tion's "command structure."[17] Another
ernment's claim that "substantial sup-
orist organization alone justified mili-
dual had to be "part of" that organiza-
t act to be detained under the AUMF.[18]
e court of appeals in a ruling that said
ention under the AUMF. The court of
uld not consider international law in
dicted both the Supreme Court's deci-
f statutory interpretation.[19]
a staggering percentage of cases that the
ble or reliable evidence to justify impris-
ad not established the facts required to
legal category of "enemy combatant,"
ersary of *Boumediene* in June 2009, fed-
he thirty-one Guantánamo habeas cases
o hold the prisoners; by January 2010,
forty-one cases decided, meaning that
e prisoner's detention almost 80 percent
e often sharply critical of, if not openly
he evidence supported detention.
l before district judge Richard J. Leon,
had summarily dismissed several peti-
amo detainees had no rights to enforce
that Leon considered involved the six

Algerian prisoners who had been befo
Leon conducted a weeklong hearing b
permitted to participate by telephone
that did not involve classified inform
den even from the detainees' lawyers
withstanding, for the first time in mo
was forced to present evidence befor
an actual hearing, the government's ca
the hearing had even started, the gove
gation: that the men had been plann
embassy in Sarajevo.[20] By the hearing's
government had failed to present any
tion against five of the six prisoners: t
Afghanistan to fight against U.S. and a
relied exclusively on information con
an unnamed source without providin
evaluate the credibility and reliability o

"To allow enemy combatancy to re
in his public ruling, "would be inconsi
protect [the prisoners'] from the risk o
upheld the continued detention of the
to al Qaeda in Afghanistan (a ruling la
that the other five detainees be released
took the unusual step of imploring th
sion, warning that "seven years of wai
an answer to a question so importan
ernment did not appeal, and all five r
granted by Judge Leon were eventually

Another habeas decision by a diffe
citizen accused of traveling to Afghan
ban camp, and engaging in hostilities
broad-brush allegations routinely leve
The detainee, Ali Ahmed, admitted th
9/11 attacks to attend a religious schoo
he had attended a terrorist training c
ist group, or taken up arms against th
acknowledged that he was staying at a
the government said was frequented
denied any connection to terrorism.

ore the Supreme Court in *Boumediene*.
ehind closed doors, with the detainees
only in those portions of the hearing
ation. Some of the evidence was hid-
s. But this extraordinary secrecy not-
ore than seven years, the government
e a judge. Faced with the prospect of
se no longer seemed so strong. Before
ernment dropped its most serious alle-
ning a bomb attack on the American
conclusion, Judge Leon found that the
credible proof of its remaining allega-
that the men had planned to travel to
llied forces there. The government had
tained in a classified document from
g sufficient information to adequately
of the information.
st on so thin a reed," Leon announced
stent with the Court's obligation . . . to
of erroneous detention."[21] Although he
e sixth prisoner for providing support
ater reversed on appeal), Leon ordered
d as soon as possible. In addition, Leon
he government not to appeal his deci-
ting for our legal system to give them
t . . . is more than plenty."[22] The gov-
men whose habeas petitions had been
repatriated.
erent district judge involved a Yemeni
istan, training at an al Qaeda or Tali-
against the United States—the type of
eled at many Guantánamo prisoners.[23]
at he had gone to Pakistan before the
ol to study the Qur'an and denied that
camp, become a member of a terror-
he U.S. or its allies. While Ali Ahmed
guesthouse when he was arrested (one
by al Qaeda and Taliban fighters), he

The government relied on its "mos
the government said, its allegations mu
tion, to determine whether the evidenc
that the detainee should continue to l
approach required the fact-finder to d
myriad allegations, connecting the do
used for analysis in the intelligence c
imported wholesale into the detention
indefinite imprisonment. The district j
the government's requested inferences
allegations be supported by reliable an

> Even using the Government's theore
> acknowledged that the mosaic theo
> which compose it and the glue which
> wall is only as strong as the individ
> cement that keeps the bricks in place.

"Therefore," Judge Kessler emphasized
are inherently flawed or do not fit tog
just as the brick wall will collapse."[25] A

As Judge Kessler explained, the go
Ahmed had fought against the United S
ernment's evidence, derived principally
former or current Guantánamo detain
equivocation and speculation."[26] The ju
dence was unreliable because it was ob
at the Dark Prison in Afghanistan who
food and water, kept in total darkness w
for weeks at a time, and subjected to oth
edged that Ali Ahmed had stayed briefly
and Taliban members stayed during t
the government's theory of guilt-by-a
was "no solid evidence" that Ali Ahme
against the United States or its allies. Ju
Arab man seeking to flee the violence a
plausibly seek the company of or stay w
religion, and culture, and she refused t
conduct alone constituted evidence of t

saic" theory. According to this theory, ust be examined together, not in isola- ce as a whole supported the conclusion be held under the AUMF. The mosaic raw inferences from the government's ots without hard evidence. Previously community, the mosaic approach was n context after 9/11 and used to justify judge, Gladys Kessler, refused to draw and instead demanded that each of its d credible evidence.

etical model of a mosaic, it must be ry is only as persuasive as the tiles binds them together—just as a brick lual bricks which support it and the [24]

d, "if the individual pieces of a mosaic ether, then the mosaic will split apart, nd collapse it did.

vernment had failed to prove that Ali States or supported terrorism. The gov- y from the hearsay statements of other ees, was generic and "riddled . . . with dge further noted that some of the evi- btained from detainees at Bagram and had been chained to walls, deprived of with loud music or other sounds blaring er torture and abuse.[27] Kessler acknowl- at a guesthouse where alleged al Qaeda he same time period. But she rejected ssociation and determined that there d engaged in or planned any hostilities dge Kessler also observed that a young and chaos of a war-torn country might with individuals who shared a language, o make the extraordinary leap that this errorism or other violent activities.[28]

In another case, Judge Leon ridic
continued detention.[29] Abdulrahim Al
who had been taken into custody by
in January 2002 and brought to Guan
Janko traveled to Afghanistan to partic
stayed for several days at a guesthouse
and operatives in early 2000, where h
then briefly attended an al Qaeda trai
that Janko had been tortured by al Qa
a U.S. spy and afterward had been imp
eighteen months at the notorious Sarp
ees were routinely abused and often die
tained that Janko still remained part
was taken into custody after U.S. force
ence at the prison, where Janko had be
Northern Alliance prisoners.[30] The go
"defies common sense." "Five days at
eighteen days at a training camp does
brotherhood."[31] Furthermore, any mod
Taliban that Janko may once have had,
quent torture and abuse by those grou

The case of Afghan prisoner Moha
ing judicial frustration over the gover
detentions. Jawad had been a young
Afghanistan by the United States for a
military vehicle, injuring two U.S. Spe
interpreter. The government had tried
mission under the flawed theory that
failed miserably. Although its case was
missions, where the deck was stacked
refused to release Jawad and argued th
an "enemy combatant" even if it chose
mission proceedings stalled, Jawad so
federal court. In seeking dismissal of t
to rely on coerced evidence, including
judge had already thrown out as the p
to suppress his prior statements to i
were obtained through torture. Jawad'
the United States: following his arrest

uled the government's arguments for bdul Razak Janko was a Syrian citizen U.S. forces in Kandahar, Afghanistan, tánamo. The government argued that cipate in jihad on behalf of the Taliban; used by Taliban and al Qaeda fighters he helped to clean some weapons; and ning camp. The government conceded eda into falsely confessing that he was prisoned by the Taliban for more than usa Prison in Kandahar where detained. Nonetheless, the government main- of the Taliban and al Qaeda when he es learned from a reporter of his pres- en left behind with thousands of other vernment's position, Judge Leon said, a guesthouse in Kabul combined with not add up to a long-standing bond of licum of sympathy for al Qaeda or the Leon noted, was vitiated by his subse- ps.[32]

mmed Jawad highlighted the mount- rnment's handling of the Guantánamo g teenager when he was taken from llegedly throwing a hand grenade at a ecial Forces soldiers and their Afghan to prosecute Jawad in a military com- t he had committed a war crime and in shambles even in the military com- d heavily in its favor, the government hat he could be detained indefinitely as e to forgo prosecution. With the com- ought relief through habeas corpus in he petition, the government continued g a false "confession" that the military roduct of torture. Jawad again moved nterrogators on the ground that they 's motion detailed his mistreatment by t in Kabul, during his forty-nine days

at Bagram where he was beaten and
tánamo where he was subjected to ext
other cruel treatment that drove him
its response to the motion was due, th
on Jawad's statements, effectively con
mistreated. The Court in turn suppre
torture. Yet the government still cont
prompting a scathing rebuke from the
case has been gutted," Huvelle told the
to put too fine a point on it."[33] When
delay, Huvelle refused and scheduled
emphasizing how long Jawad had been
this case is riddled with holes," she sai
before the hearing, the government fi
was illegal. Judge Huvelle granted the
quently returned home to Afghanistan

Another judge, Colleen Kollar-Kote
ment of the government's evidence. In
almost exclusively on "confessions" t
Rabiah, had provided to U.S. interrog
Rabiah had traveled to Afghanistan f
had met with Osama bin Laden four
tains (the site of a bin Laden complex
members in Afghanistan.[36] But Kollar
tions unsubstantiated; she also noted t
to defend al-Rabiah's detention based
the government's own interrogators di
to credit confessions," Kollar-Kotelly
not even defend as believable."[37] Thos
through highly coercive methods, inc
never return to Kuwait if he did not a
that "no one leaves Guantánamo innoc

These and other cases demonstrat
Prisoners had been imprisoned at Gu
ernment's allegations that they were c
worst." Until *Boumediene*, however, no
a fair hearing, let alone been charged
government had instead waged a relen
access to a lawyer and a judge, all the

threatened with death, and at Guan-
treme isolation, sleep deprivation, and
to attempt suicide. The day on which
he government abandoned its reliance
ncceding that Jawad had been grossly
ssed the statements as the product of
tinued to argue for Jawad's detention,
district judge, Ellen S. Huvelle. "Your
government's attorneys. "I don't need
the government sought an additional
a prompt hearing to decide the case,
imprisoned already. "Seven years and
d. "This case is an outrage."[34] Just days
nally conceded that Jawad's detention
habeas petition, and Jawad was subse-
n.[35]

elly, issued a similarly blistering indict-
n that case, the government had relied
hat the prisoner, Fouad Mamoud al-
ators. The government alleged that al-
rom his home in Kuwait in 2001 and
times, fought in the Tora Bora moun-
), and had personal links to al Qaeda
r-Kotelly not only found those allega-
hat the Justice Department had sought
d on unreliable confessions that even
id not accept. "The Court is unwilling
explained, "that the Government can-
e confessions, she noted, were wrung
luding warnings that al-Rabiah could
dmit to involvement in terrorism and
cent."[38]

ed the importance of habeas corpus.
antánamo for years based on the gov-
dangerous terrorists: "the worst of the
one had received anything approaching
and tried in a court of law. The U.S.
ntless campaign to deny the detainees
while subjecting them to harsh inter-

rogations, prolonged isolation, and otl
given hearings, and judges had a chan
clear that in many cases the governme
out any credible or reliable evidence.

The district court habeas decisior
misrepresentations on which Guantá
suffered from a shortcoming that thr
effect. Release from imprisonment has
pus cases.[39] However, at Guantánamo,
typically did not end with an order ma
they concluded with language directing
and appropriate diplomatic steps to fa
language represented a perceived limit
order the release of a prisoner who wa
but who could not be returned to his
the risk of torture or other persecution
try had yet been found where he could

In 2007, the United States was still
tánamo who, it conceded, were "no lo
"cleared for release."[41] The continued
have been released persisted even af
decision the following year, as some
tion had been invalidated by courts in
behind bars because the government h
home country or repatriate them to a t
the detainees now had a right to a
whether the court could provide an eff
detention was illegal. Lakhdar Boumed
landmark decision bearing his name
than six months after Judge Leon ruled
he was finally resettled in France.[42] Ot
Pressure to end such illegal imprison
cases of seventeen Uighurs, members
western China who had fled their hom

In 2002, the Uighurs were seized
hunters, sold to U.S. forces, and bro
United States eventually admitted tha
prisoners, it was unable to resettle the
to anger China by accepting them and

her abuse. Once detainees finally were
ce to take a look at the facts, it became
nt had been imprisoning people with-

ns helped expose the falsehoods and
namo had been built. But they also
reatened to deprive them of practical
s long been the remedy in habeas cor-
decisions finding the detentions illegal
ndating the prisoner's release. Instead,
g the government "to take all necessary
cilitate the [detainee's] release."[40] This
ation on the power of federal judges to
s unlawfully detained at Guantánamo
home country (often because he faced
there), and for whom no other coun-
be safely resettled.
detaining eight-two people at Guan-
onger enemy combatants" or had been
detention of individuals who should
ter the Supreme Court's *Boumediene*
Guantánamo prisoners whose deten-
habeas corpus proceedings remained
ad been unable to return them to their
hird country. In other words, although
court hearing, it remained uncertain
fective remedy when it found that their
diene, the lead petitioner in the Court's
, remained at Guantánamo for more
that his detention was unlawful, until
thers remained in limbo much longer.
ments reached a boiling point in the
of a persecuted Muslim minority from
es for Afghanistan.
by the Northern Alliance and bounty
ought to Guantánamo. Although the
t it had no basis to detain the Uighur
em, partly because no country wanted
d partly because the United States had

branded them dangerous terrorists. W
challenged in court, the Bush admini
were "enemy combatants." It claimed
the East Turkestan Islamic Movemen
ated" with al Qaeda, thus bringing t
interpretation of the AUMF. An appe
lack of proof and suggested that the U
the ETIM a terrorist association base
the Internet.[43] The court held that the
ers' detention. Following the Supreme
Uighurs sought their release through h

In October 2008, district judge Ric
directing that the men be brought to th
to be ordered by the court. By then,
more than six years, and the governme
ible or reliable evidence that they pos
allies. Indefinite detention of the inn
keeping with our system of governme
onment after a court had found there
only gut habeas corpus and undermine
mediene, Urbina said, but would also
ciary in violation of the Constitution's

The Bush administration blocked th
arguing that no court could order the p
no matter how long the resettlement pr
Court of Appeals reversed the district
decision, finding in *Kiyemba v. Bush*
order the release of Guantánamo priso
those prisoners had been found not to
danger, and had been deemed eligible
U.S. government.[45] The appeals court
ernment's power to control immigrati
seeking admission to the United State
tion law, but were asking only for temp
another country could be found for th
the only effective remedy for their ind
edy off the table, *Kiyemba* threatened
for prisoners at Guantánamo who coul
and whom the United States was unab

When the Uighur detentions were first
stration clung to the theory that they
that the Uighurs were connected with
t (ETIM), which it said was "associ-
them within the government's elastic
llate court ridiculed the government's
United States had originally designated
ed on Chinese propaganda posted on
ere was no lawful basis for the prison-
e Court's decision in *Boumediene*, the
habeas corpus.
ardo M. Urbina granted their request,
he United States and freed under terms
the Uighurs had been imprisoned for
ent still had failed to present any cred-
sed a threat to the United States or its
ocent, Judge Urbina ruled, "is not in
ent."[44] The Uighurs' continued impris-
was no basis to hold them would not
e the Supreme Court's decision in *Bou-*
allow the executive to nullify the judi-
separation of powers.
he order by filing an emergency appeal,
risoners' release into the United States,
rocess took. A panel of the D.C. Circuit
court's order in a divided, two-to-one
that federal courts were powerless to
ners into the United States, even when
be "enemy combatants," presented no
e for release to another country by the
relied principally on the federal gov-
on, even though the Uighurs were not
es or legal status under U.S. immigra-
orary release from imprisonment until
em. Given the circumstances, this was
definite detention. By taking that rem-
to render habeas corpus a dead letter
d not be returned to their home nation
ble or unwilling to repatriate to a third

country. Taken to its logical conclusion
end the unlawful imprisonment of a G
tive's objection or as long as the execut
diplomatic efforts to secure the detai
that process took. Prisoners at Guantá
battle by proving that their detention
the judge said that he or she was power

In April 2009, the Uighurs appe
Kiyemba to the Supreme Court. In its
the Obama administration adhered t
that the federal courts lacked the powe
tion by ordering their release and defe
same time, the new administration ste
ate the prisoners and to avoid anothe
by rendering the Uighurs' challenge m
to Bermuda; six went to Palau.[46] But t
to repatriate all the petitioners in *Kiy*
temporary release in the United Stat
right-wing propaganda about the dan
Uighurs could pose to America's secur
ity to transfer Guantánamo detainees
sures to appropriations legislation tha
of Guantánamo detainees to other cou
from bringing Guantánamo detainees
other than trial.[47] Amid the cloud of l
judges to provide actual habeas relief,
Kiyemba in October 2009. But in Mar
ment, the Court dismissed the Uighu
vided new evidence that all of the rem
offers of repatriation and that some ha
D.C. Circuit's decision and remanded
sider the implications of these new fa
year before, the Supreme Court did no
Kiyemba, that meant the Court left un
federal courts to provide meaningful re
they had jurisdiction.

In addition to opposing the relea
the United States, the Obama admini
not review the transfer of Guantánam

n, the ruling meant that no court could Guantánamo detainee over the execu- ive represented that it was engaging in nee's repatriation, no matter how long ánamo could thus continue to win the was illegal, only to lose the war when rless to order their freedom.

ealed the D.C. Circuit's decision in brief opposing Supreme Court review, to the Bush administration's position r to remedy the Uighurs' illegal deten- nded the lower court's decision. At the epped up diplomatic efforts to repatri- er legal showdown over habeas rights noot. Four Uighur prisoners were sent the Obama administration was unable *emba*, and it refused to support their tes. Congress, meanwhile, goaded by ngers the temporary release of a few ity, sought to limit the president's abil- s to the United States. It added mea- at imposed conditions on the transfer untries and prohibited the government s to the United States for any purpose legal uncertainty over the authority of the Supreme Court granted review in rch, 2010, one month before oral argu- rs' petition after the government pro- maining Uighur detainees had received d refused them. The Court vacated the the case to the appeals court to con- cts.[48] Thus, as in the al-Marri case the t rule on the critical issue before it. In answered the question of the power of elief in habeas corpus cases over which

se of any Guantánamo detainee into stration maintained that courts could no detainees to another country, even

if a detainee presented evidence that
country. The Obama administration
tion's position that the transfer of pris
a matter solely for the executive. In th
could seek to evade habeas corpus sin
ees to another U.S. prison, such as Ba
to another country that would contin
request. At the same time, an Obar
mended continued reliance on "diplo
that prisoners transferred there by the
despite the repeated failure of those as
force advised strengthening the relia
administration has resisted any court
Circuit has upheld the administration
cannot enjoin the transfer of Guantá
would likely be tortured in the receivi
far declined to intervene.[50]

The Obama administration's appro
course: instituting modest reforms wi
abandoning broad claims of executive
Court's decisions recognizing a habea
tánamo, Bagram has become the prin
on terrorism." Indeed, Obama admin
that Bagram's importance as a prison
Obama administration barred the CI
tions and ordered the closure of the d
new administration has improved cor
military procedures for challenging de
greater access to the government's evi
nesses during hearings before newly c
reforms lack important protections. I
for example, the reforms provide only
The reforms also do not ensure the in
tary boards that make the detention d
them independent from the chain of
States continues to rely heavily on cla
ees are not permitted to review.[53] Most
continues to resist habeas corpus right
means no judicial review of the stan

t he was likely to face torture in that
thus adopted the prior administra-
soners in the "war on terror" remains
heory, this means that the government
mply by moving Guantánamo detain-
agram, or outsourcing their detention
nue to hold them at the United States'
ma administration task force recom-
omatic assurances" by other countries
e United States would not be tortured,
ssurances in the past.[49] While the task
ability of diplomatic assurances, the
review of transfer decisions. The D.C.
n's position, ruling that federal courts
anamo detainees who claim that they
ng state. The Supreme Court has thus

ach to Bagram has followed a similar
thout altering the overall paradigm or
e detention power. Since the Supreme
s corpus right for those held at Guan-
cipal U.S. detention center in the "war
nistration officials have acknowledged
for terrorism suspects rose after the
A from conducting long-term deten-
detention center at Guantánamo.[51] The
nditions at Bagram and beefed up the
etention, promising Bagram prisoners
dence and more ability to present wit-
reated detainee review boards. But the
nstead of affording access to counsel,
a nonlawyer personal representative.
mpartiality of the three-member mili-
decisions, including by failing to make
f command.[52] In addition, the United
ssified information, which the detain-
important, the Obama administration
ts for prisoners held at Bagram, which
dards or procedures the U.S. govern-

ment is using and no judicial examina
even though some prisoners at Bagra
at Guantánamo. At the same time, th
the legal authority to bring detainees
adhering to the prior administration's
pected terrorists anywhere in the wor
charge or access to a court by transp
America's borders.[54]

In addition to shaping future detentio
grapple with the past. The evidence is
tortured and mistreated prisoners in
abuses emanated from policies and di
of the U.S. government. One question
will be made public. Another is whet
gated and held accountable.

In August 2009, the Obama admi
sified 2004 report by the CIA's Office
Bush administration's interrogation pr
release of other formerly secret docu
and interrogation practices—was forc
suit by the American Civil Liberties Un
focused on the treatment of detainees
United States during 2002 and 2003.
provided chilling new details about the
It called the CIA's interrogation progr
found that it had led to the use of "una
undocumented" techniques.[56] The re
mock executions to convince detainee
to punish a detainee's family by killing
ee's neck at his carotid artery until he l
example, how interrogators put a hand
Abd al-Rahim al-Nashiri, and, to terr
while he stood naked and hooded.[58]

The OIG report provided additio
techniques were not only legally sus
criminal. This fact was not lost on th
warned that agency officers might or
appear before the World Court for w

ation of the factual basis for detention, m have been held for as long as those he Obama administration still asserts to Bagram from other countries, thus view that the executive may seize sus- ld and hold them indefinitely without orting them to a U.S. enclave outside

n policy, the new administration must s overwhelming that the United States its custody after 9/11 and that these rectives approved at the highest levels is whether all evidence of these abuses ther those responsible will be investi-

nistration released a partially declas- e of Inspector General (OIG) into the actices.[55] The report's release—like the uments describing post-9/11 detention ced by a Freedom of Information Act nion and other groups. The OIG report held in CIA secret prisons outside the Although heavily redacted, the report e Bush administration's torture regime. am ad hoc and poorly supervised and uthorized, improvised, inhumane, and port described interrogators' staging s that they could be killed, threatening g his children, and squeezing a detain- began to pass out.[57] It also detailed, for dgun to the head of one CIA prisoner, rify him further, revved a power drill

onal evidence that CIA interrogation pect but, in some instances, patently ose involved at the time. One official he day wind up on a "wanted list" to ar crimes for methods used in secret

CIA jails.[59] Concern about the legalit
shroud its entire detention operation i
seek approval from Justice Departmer
to help avoid criminal liability—a step
officials had already engaged in tactics
at the time.[60]

The day the OIG report was rele
announced that the Justice Departmer
tion into the treatment of prisoners in
tion represented a first step toward ac
President Obama's stated desire to loo
this dark chapter of American history
limited, focusing on a very small nun
naled that the Justice Department wou
in good faith or within the bounds of l
cerns about the investigation's scope, s
interrogators who exceeded Justice D
architects of the techniques themselves
istration officials who had authorized
lawyers who had facilitated it. Thus, t
States' torture and mistreatment of pri
tiny. At worst, Holder's investigation c
few low-level agents and perpetuating
the result of a handful of bad apples
policy created by high-level officials. S
worse than no investigation at all, crea
had come to grips with its descent into

President Obama, to be sure, had i
ernment acts outside the law for eigh
plications and practical problems that
had to navigate an increasingly trea
bers of the opposing party continually
national security, often by distorting
his own party resisting his efforts to
ism suspects to trial in the United Sta
resistance from some senior military a
maintain the status quo. These pressur
new administration was willing to risk
practices of its predecessor.

y of these methods drove the CIA to
in secrecy. It also caused the agency to
nt lawyers for the interrogation tactics
o taken in some instances *after* agency
s that exceeded the guidelines in effect

eased, Attorney General Eric Holder
nt had opened a preliminary investiga-
n U.S. custody abroad.[61] The investiga-
countability and one that went against
k forward, not backward, and to leave
in the past. But the investigation was
mber of cases.[62] Holder, moreover, sig-
uld not prosecute those who had acted
egal guidance. This raised serious con-
suggesting that it would focus only on
epartment guidelines and not on the
s, including those high-ranking admin-
d torture and the Justice Department
those most responsible for the United
isoners would continue to evade scru-
ould result in a whitewash, targeting a
the lie that the abuse of prisoners was
rather than a widespread government
uch a facade of accountability could be
ting a false sense that the United States
o torture.
nherited a colossal mess. When a gov-
t years, it creates a host of legal com-
are difficult to overcome. Obama also
cherous political terrain, with mem-
y trying to make him appear weak on
the facts, and with some members of
close Guantánamo and bring terror-
tes. In addition, Obama faced internal
nd intelligence officials determined to
es helped limit the extent to which the
k political capital by breaking from the

By the end of Obama's first year in
Guantánamo. In the face of mounting
that he might abandon the plan to try
attacks in federal court and return the
nite detention of terrorism suspects re
Obama had banned torture, the loop
niques, such as those created by 2006
Manual, had not yet been closed.[64] If
back, it still had a long way to go.

It would be a mistake, however,
through the lens of individual presi
United States' continuation of centerp
indefinite detention and military comm
or "bad" choices of its leaders. Ultima
radical changes in law and policy can l
as mainstream. It is about how politica
lic inevitably gravitate toward tough-s
even if the evidence shows that thos
ful, and even harmful to the country's
unleashes impulses to find new ways
without restriction, and avoid accou
President Obama ordered the closure
about the continued use of secret jails
prisons like Bagram: new microspaces

The response to the Christmas Day 2
just how much public perception and
Nigerian Umar Farouk Abdulmutallab
in his underwear while aboard a North
he was arrested and charged with atte
mass destruction. Politicians and punc
tration for prosecuting Abdulmutallab
tary commission, even though federal p
convictions in terrorism-related cases s
obtained only three, all of which were r
that the criminal justice system could n
was behind bars under maximum secu
tain conviction), critics pressed the equa
ecution would undermine the governm
because it prevented the use of harsh in

office, he had not only failed to close public pressure, Obama also indicated KSM and the other plotters of the 9/11 em to a military commission.[63] Indefi- emained U.S. policy. And even though pholes for abusive interrogation tech- 6 amendments to the *U.S. Army Field* f the pendulum was starting to swing

to view these developments simply dents and their administrations. The pieces of the "war on terror," such as missions, is about more than the "good" tely, it is about how far-reaching, even become institutionalized and accepted l leaders, commentators, and the pub- sounding responses to security threats se responses are unnecessary, unlaw- s safety. And it is about how terrorism to detain beyond the law, interrogate ntability. Thus, for example, even as of secret CIA prisons, reports emerged s within existing Defense Department for lawless government action.[65]

009 attempted airplane bombing shows discourse have shifted since 9/11. After failed to detonate an explosive hidden nwest Airlines flight bound for Detroit, mpted murder and use of a weapon of dits then attacked the Obama adminis- in federal court rather than in a mili- prosecutors had obtained four hundred ince 9/11 and military commissions had mired in controversy.[66] Unable to claim ot incapacitate the failed bomber (who urity conditions and facing almost cer- ally spurious claim that a criminal pros- ment's ability to gain useful intelligence terrogation methods and required that

the defendant be afforded a lawyer. Iron
commission for Richard Reid when he
ing to detonate a shoe bomb on an airpl
President Bush for prosecuting Reid i
posed denying Reid access to a lawyer
years later, however, military commissi
interrogations had become mainstream
dance with the Constitution had beco
that carried the political risk of being pa

The failed car bombing in New Yo
May similarly illustrates how the creat
terrorism paves the way for overreactio
stitutional rights and values. The suspe
Shahzad, was arrested at John F. Kenn
to flee the country and was charged w
destruction and other crimes. Althou
ate with law enforcement officials, t
cized for prosecuting him in the civil
the rights guaranteed by the Constitu
not have given him *Miranda* warning
tioning. I would have instead declared
former New York City mayor and f
Two senators, Joe Lieberman (I-CT) a
a bill, widely denounced as both sens
empower the government to revoke th
or joined a foreign terrorist group, wit
of a crime.[67] The administration, bow
announced that it would seek legisla
safety" exception to give the governme
in terrorism cases without informing t

The dark cloud cast by U.S. deten
without a silver lining from the standpo
values. The Bush administration's dec
tion center was based on its belief tha
corpus and other legal protections as
the United States. Guantánamo, as we
an idea, the product of a new system
tánamo, in turn, gave rise to landma
the proposition that the executive co

ically, no one had considered a military
e was arrested in Boston after attempt-
lane only months after 9/11 or criticized
n federal court. Nor had anyone pro-
r to interrogate him aggressively. Eight
ions, indefinite detention, and coercive
n, while criminal prosecutions in accor-
me merely an option—one, moreover,
ainted as weak on terrorism.

ork City's Times Square the following
tion of a "new normal" for addressing
on and for a continuing erosion of con-
ect, an American citizen named Faisal
nedy International Airport as he tried
ith conspiring to use weapons of mass
gh Shahzad quickly began to cooper-
he Obama administration was criti-
ian justice system and providing him
tion to criminal defendants. "I would
s after just a couple of hours of ques-
him an enemy combatant," remarked
federal prosecutor Rudolph Giuliani.
and Scott Brown (R-MA), introduced
eless and unconstitutional, that would
e citizenship of anyone who supported
hout their even having been convicted
ing to political pressure, subsequently
ation expanding the *Miranda* "public
nt more leeway to interrogate suspects
hem of their rights.[68]

tion policy after 9/11 is not, however,
oint of human rights and constitutional
cision to use Guantánamo as a deten-
at individuals could be denied habeas
long as they were imprisoned outside
have seen, was not just a prison; it was
of prisons beyond the law. Yet Guan-
rk Supreme Court decisions rejecting
uld avoid the Constitution simply by

moving prisoners across a geographic
tions and other legal safeguards a null
batants" in a "war on terrorism." Desi
tánamo triggered the Constitution's r
did more than galvanize the human r
create alliances with international acto
with those law enforcement, military,
stand that upholding the rule of law h
Guantánamo also breathed new life i
stitution, capable of reaching arbitrar
government action regardless of wher
noncitizens lack even basic constituti
notion that rights protect individuals,
to exploit international law, Guantána
importance of the Geneva Conventio
restrict the power of governments in ti

Above all, Guantánamo underscore
which proved to be the single most im
reaching. The most significant resistan
commissions, and abusive interrogati
after finally awakening from its post-9/
ingness to ratify, if not expand on, th
asserted by President Bush and to dep
Although the press had played an imp
extraordinary rendition, and other ab
curtail illicit practices. Only the court
pus jurisdiction, had imposed real l
and treatment of terrorism suspects. T
branch in which law and facts matter
in which the incarceration of human b
or partisan gamesmanship, and in wh
at least some immunity from the fear,
thoroughly infected the public debate

Habeas corpus, to be sure, remains
curtailing illegal executive action. Cou
rights extend to the overseas detentio
tánamo. And even if they do, habeas
more secret forms of confinement: wh

line and render the Geneva Conven-
ity by labeling prisoners "enemy com-
gned to limit the Constitution, Guan-
reconceptualization and expansion. It
rights movement in the United States,
ors and institutions, and build bridges
and intelligence officials who under-
elps keep America safe as well as free.
nto the idea of a transnational Con-
y detention, torture, and other illegal
e it occurs. Premised on the idea that
onal rights, Guantánamo affirmed the
not just American citizens. Designed
mo helped demonstrate the continued
ons and other international rules that
ime of war.

d the enduring need for habeas corpus,
nportant check against executive over-
nce to extrajudicial detention, military
ons came from the courts. Congress,
/11 slumber, repeatedly showed its will-
e sweeping claims of executive power
rive the courts of any meaningful role.
portant part in helping expose torture,
buses, these exposés had done little to
s, through the exercise of habeas cor-
imits on the government's detention
The federal judiciary remained the one
d, even if they did not matter enough,
eings was not reduced to sloganeering
nich decisions could be rendered with
hysteria, and irrationality that had so
over national security.

both a limited and imperfect tool for
rts ultimately may not find that habeas
n of foreign nationals except at Guan-
s by its nature has difficulty reaching
en the prisoner's location is unknown,

the U.S. role is hidden behind a foreign
ferred to another country for continue
over, the mere availability of habeas do
correct answer, to the issues presente
the "war on terror," the courts have s
the most basic question it raised: who
that is, who is properly subject to mil
the ordinary requirement of criminal
tion. Finally, as the Guantánamo litig
petition does not itself ensure a prison
ticularly given the reluctance of judge
resettlement.

But if habeas is not the only comp
security policy, it is an indispensable c
clearer since 9/11, both despite and b
executive and Congress to eliminate it
lem, there will be a risk that the United
ple without charge or prosecute them
rather than in the regular federal cou
engage in torture and other illegal met
decisions have helped ensure the poss
detention, regardless of a prisoner's ci
thus serve as a check against further ab
of more law-free zones like Guantána
indefinite military imprisonment outs
are new proposals for national security
detention that threaten to institutiona
and human rights. In the face of inte
dangerous people without charge, wit
court, habeas corpus will continue to b
vidual liberty and safeguard against ill

The government must protect the p
massive damage means that the gover
vigilant in carrying out that duty. But
its Constitution and values in the pro
tions, habeas remains—as it has been
arbitrary and unlawful detention and
to the rule of law.

n proxy, or the prisoner is simply trans-
ed detention and interrogation. More-
oes not ensure an answer, let alone the
d. Indeed, more than nine years into
still not definitively answered perhaps
o is a civilian and who is a combatant,
itary detention and thus exempt from
charge and trial under the Constitu-
ation shows, even "winning" a habeas
ner's prompt release from custody, par-
es to intervene in the area of prisoner

ponent of a rights-respecting national
one. The vitality of habeas has become
ecause of the sustained efforts by the
. As long as terrorism remains a prob-
d States will continue to imprison peo-
before second-class military tribunals
rts, to deny them due process, and to
thods of interrogation. Supreme Court
sibility of habeas review over any U.S.
tizenship or location. Those decisions
uses and deterrent against the creation
amo. At the same time, not only does
ide the laws of war continue, but there
y courts and other forms of preventive
alize violations of basic constitutional
ensifying pressures to detain allegedly
hout a lawyer, and without access to a
e the most important bulwark of indi-
egal executive action.
ublic, and terrorism's capacity to inflict
nment must be unflagging and hyper-
the United States also must not forgo
cess. Despite its limits and imperfec-
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CHAPTER 1

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King (London: Selden Society, D.E.C. Yale *nediene v. Bush*, at 5, n. 4.
Clause," 595–97.
K.B. 1763) (examining affidavits showing for bad purposes"); *R. v. Turlington*, 97 Eng. tion and reviewing evidence from inspection operly committed to a "mad house"); *Barney's* g affidavits showing prisoner held based on

Eng. Rep. 711 (K.B. 1778) (refusing to accept en properly impressed into service in the protected from impressment by virtue of his the king).
arpe, *The Law of Habeas Corpus*, 39; *R. v.* eting a statute in a bankruptcy case); *R. v.* . 1746) (interpreting a statute in an impress-8 (K.B. 1601) (ordering release base upon handgun was justified due to his status as a (K.B. 1760) (finding petitioner was legally bmission of an affidavit showing he was a

1670).
e Institutes of the Laws of England, 5th ed.

he Laws of England, vol. 3, 133; Sharpe, *The*

07 Eng. Rep. 29, 43 (H.L. 1758) (opinion of 1010 (K.B. 1825). Courts did, however, inquire

whether prisoners should be bailed in advanc
93 Eng. Rep. 1086 (K.B. 1739) (reviewing affid
robbery); *Farington's Case*, 84 Eng. Rep. 1227 (
"showing good reason for it").

32. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); N
Habeas Corpus," 83 *Harvard Law Review* 1038

33. Sharpe, *The Law of Habeas Corpus*, 115–

34. *R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 175

35. *Case of Three Spanish Sailors*, 96 Eng. Re

36. Halliday and White, "The Suspension C

37. *Bourn's Case*, 79 Eng. Rep. 465 (K.B. 161
Dover); *Jobson's Case*, 82 Eng. Rep. 325 (K.B. 1
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41. Halliday and White, "The Suspension C

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restricted only to "sovereign territories" but e
exercised de facto control. See *Sir Matthew H*
English Dictionary, 2d ed., 1989; Halliday and

43. *Ex parte Mwenya*, 1 Q.B. 241, 303 (C.A.

44. *R. v. Cowle*, 97 Eng. Rep at 600.

45. A. B. Keith, *A Constitutional History of*

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History of the British Empire, vol. 2, ed. P. J. M
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47. Charter Act, 53 Geo. 3, c. 155, § XCV (18
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48. Nasser Hussain, *The Jurisprudence of Em*
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Pandey, *The Introduction of English Law into I*
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49. Hussain, *The Jurisprudence of Emergenc*
Impey to the Lord Chancellor, "Observations
(September 20, 1776) (British Museum Add.
rians, *Boumediene v. Bush*, at 13–14 (citing *Cu*
Add. MSS 38,400, folio 84 (Sup. Ct. Calcutta

50. Brief of Legal Historians, *Boumediene v*
pension Clause," 663–67.

ce of trial. See, for example, *R. v. Greenwood*,
davits asserting prisoner was not at place of
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Note, "Developments in the Law—Federal
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9).
ep. 775 (C.P. 1779).
Clause," 585–86.
9) (writ issued to Cinque Ports town of
626) (writ issued to Durham, a County

59) (writ issued to Channel Island of Jersey);
rit issued to Jersey).
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38 (Crown instructions to the governors of
West Indies, Nova Scotia, and Quebec).
Clause," 586–87.
1759). The "King's dominions" were not
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Bengal).
y, 81 and 164, n. 36 (citing Chief Justice
on the Administration of Justice in Bengal"
MS. 16,265, fol. 235)); Brief of Legal Histo-
mall a Deen Ally Khan v. Charles Goring, BL
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58. *The Declaration of Independence*, paras.

59. See, for example, 17 Geo. 3, c. 9 (1777). Suspension Clause," 645–51.

60. Paschal, "The Constitution and Habeas "Habeas Corpus and the Suspension Clause a *Rights Law Review* 555, 566 (2002).

61. Max Farrand, *The Records of the Federal* Yale University Press, 1911), 341, 438; Duker, *A* 127–28.

62. The clause provides in full: "The privile suspended, unless when in Cases of Rebellion it." U.S. Const., art. I, § 9, cl. 2.

63. Zechariah Chafee Jr., "The Most Impor *Boston University Law Review* 143, 143 (1952).

64. David L. Shapiro, "Habeas Corpus, Sus *Notre Dame Law Review* 59, 64 (2006).

65. Eric M. Freedman, *Habeas Corpus: Reth* New York University Press, 2001), 20–21; "De Corpus," 1265; Paschal, "The Constitution an

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67. Judiciary Act of 1789, ch. 20, § 14, 1 Stat codified at 28 U.S.C. § 2241.

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s Corpus," 608. See also Gerald L. Neuman,
fter *INS v. St. Cyr*," 33 *Columbia Human*

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ege of the Writ of Habeas Corpus shall not be
n or Invasion the public Safety may require

tant Human Right in the Constitution," 32

pension, and Detention: Another View," 59

hinking the Great Writ of Liberty (New York:
evelopments in the Law—Federal Habeas
d Habeas Corpus," 623–24.
the public safety should require the sus-
e courts of the United States, it is for the
(4 Cranch) 75, 101 (1807). See also Joseph
e United States § 1342 (Boston: Hilliard, Gray

. 73, 82. The present version of the act is

68. *Marbury v. Madison*, 5 U.S. (1 Cranch) 1
another section of the Judiciary Act of 1789 a
mandamus and then struck down that sectio
tion beyond the limits of Article III of the Co
tion in the Supreme Court "in all cases affect
consuls, and those in which a state shall be pa
jurisdiction." U.S. Const., art. III, § 2.

69. *Bollman*, 8 U.S. (4 Cranch) at 100–101.
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Corpus," 626–28; Freedman, *Habeas Corpus:*
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that rely on legislative action for their implen
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72. As Professor Eric Freedman explains, th
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the Suspension Clause." Freedman, *Habeas C*

73. *St. Cyr*, 533 U.S. at 304 n. 24. See also *Jo*
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74. Duker, *A Constitutional History of Habe*
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75. *Ableman v. Booth*, 62 U.S. (21 How.) 506
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76. Gerald L. Neuman, "Habeas Corpus, E
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78. Act of March 2, 1833, ch. 57, §§ 3, 7, 4 St

79. Act of August 29, 1842, ch. 257, 5 Stat. 5

80. Act of February 5, 1867, ch. 28, § 1, 14 S

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s empowering the Court to issue writs of
n for expanding the Court's original jurisdic-
onstitution. Article III vests original jurisdic-
ing ambassadors, other public ministers and
arty, the Supreme Court shall have original

For a discussion of the relationship between
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the only example of constitutional guarantees
nentation. See Neuman, "Habeas Corpus and
ation" clause of article I and "Compensation"

he suggestion that Congress could suspend
ave come as a shock to all of the debaters over
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nes .v Cunningham, 371 U.S. 236, 238 (1963)
tional command that the writ of habeas

as Corpus, 126–56; Rex Collings, "Habeas
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xecutive Detention, and the Removal of
98); Paschal, "The Constitution and Habeas

te is the "direct ancestor" of the 1789 Judi-
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91. *Fisher v. Baker*, 203 U.S. 174, 179–80 (190

92. Hawaiian Organic Act, ch. 339, § 67, 31

93. *Duncan v. Kahanamoku*, 327 U.S. 304, 3
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94. *United States v. Villato,* 28 F. Cas. 377 (N
v. Holloway, 1 Serg. & Rawle 392, 1815 WL 124
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noncitizens during the colonial era as well. Se
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97. *Ex parte D'Olivera,* 7 F. Cas. 853 (No. 3,9
ever, directed that the prisoners be discharge

98. Act of July 6, 1798, ch. 66, 1 Stat. 577.

99. Gerald L. Neuman and Charles F. Hobs
Case Missing from the Canon," 9 *Green Bag 2*
tained habeas petitions on behalf of foreign n
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and procedural requirements, and had some
Corpus, Executive Detention, and the Remov
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104. *Gegiow v. Uhl*, 239 U.S. 3 (1915) ("publi
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evidence suggests the writ was available to
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son, "John Marshall and the Enemy Alien: A
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nationals during wartime. See, for example,
(reviewing claim of British citizen detained
g relief).
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v. Wright, No. 06-7427 (4th Cir. 2006), 13–17.
.
al. 1885), *aff'd sub nom. United States v. Jung*

er those decisions conformed to statutory
evidentiary support. Neuman, "Habeas
val of Aliens," 1007–16; *Heikkila v. Barber*, 345
).
c charge" provision); *Kessler v. Strecker*, 307
ion).

106. The "plenary power" doctrine was firs
give Congress sweeping authority to define th
could enter and remain in the United States.
and the Principle of Plenary Congressional P

107. *St. Cyr*, 533 U.S. at 314.

108. Ibid., 309–14.

109. And, in another important habeas cor
rejected the government's contention that the
indefinitely if it were unable to remove them
533 U.S. 678 (2001).

110. *In re Stacy*, 10 Johns 328, 334 (N.Y. Sup

111. For other early examples, see *Wilson v.*
17,810) (considering the habeas corpus petitic
enlisted in the U.S. army); Brief *Amici Curiae*
eral Jurisdiction, *Al-Marri v. Wright*, at 16.

112. See, for example, *Matter of Peters*, M-12
ing whether prisoner "enlisted . . . when he w
ness or understanding it by reason of intoxica
commitment), cited in Freedman, *Habeas Co*
and 166, n. 56; *United States v. Irvine*, M-1184,
whether enlistment was based on the necessa
Habeas Corpus: Rethinking the Great Writ of L
578, 580–81 (Del. Ch. 1820) (examining whetl
ment and rendering enlistment invalid).

113. For a relatively early, but influential ex
U.S. (20 How.) 65 (1858), and *Ex parte Reed*, 1

114. *Loving v. United States*, 517 U.S. 748 (19
Burns v. Wilson, 346 U.S. 137, 144–45 (1953) (p
relationship" between civil and military law);
tion, and the Removal of Aliens," 1042.

115. *Givens v. Zerbst*, 255 U.S. 11, 19 (1915). S
186 U.S. 49 (1902) (court-martial composed c
under governing statute to try officer of volu
(examining whether solider had been under t

116. A plurality of the Supreme Court, for e
when it said that judges could consider whetl
consideration" by a court-martial. *Burns*, 346

117. Richard H. Fallon Jr. and Daniel J. Mel
tive Rights, and the War on Terror," 120 *Harv*

118. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 6
(Chase, C.J., concurring).

119. Ibid., 6–7, 121, 130 (italics in original).

120. Ibid., 120–22, 130.

121. Ibid. 120–21.

122. Ibid., 135–36 (Chase, C.J., concurring).

123. *Reid v. Covert*, 354 U.S. 1, 30 (1957) (plu

t articulated in the late nineteenth century to
he terms and conditions under which aliens
See Stephen H. Legomsky, "Immigration Law
ower," *Supreme Court Review* 255, 256 (1984).

rpus case decided three days later, the Court
e executive could detain foreign nationals
from the United States. *Zadvydas v. Davis*,

. Ct. 1813).
Izard, 30 F. Cas. 131 (C.C.D.N.Y. 1815) (No.
on of British subjects who had previously
Professors of Constitutional Law and Fed-

215 (D.W. Tenn. December 31, 1827) (examin-
as wholly incapable of transacting busi-
ation," thus invalidating the legal basis for
rpus: Rethinking the Great Writ of Liberty, 28
roll 1 (C.C.D. Ga. May 8, 1815) (examining
ry parental consent), cited in Freedman,
iberty, 165, n. 55; *State v. Clark*, 2 Del. Cas.
her soldier was intoxicated at time of enlist-

pression of this view, see *Dynes v. Hoover*, 61
00 U.S. 13 (1879).
96); *Weiss v. United States*, 510 U.S. 163 (1994);
lurality opinion) (noting the "peculiar
Neuman, "Habeas Corpus, Executive Deten-

ee also, for example, *McClaughry v. Deming*,
of regular army officers lacked jurisdiction
nteer army); *In re Grimley*, 137 U.S. 147 (1890)
the proper age when he enlisted).
example, suggested this more expanded role
her a defendant's claims had received "fair
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126. Executive Order No. 9185, 7 Fed. Reg.
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127. Francis Biddle, *In Brief Authority* (New

128. Danelski, "The Saboteurs' Case," 71.

129. *Ex parte Quirin*, 63 S. Ct. 1 (1942).

130. *Ex parte Quirin*, 317 U.S. 1 (1942); Dan

131. *Yamashita v. Styer*, 327 U.S. 1 (1946).

132. Danelski, "The Saboteurs' Case," 80; L
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133. Danelski, "The Saboteurs' Case," 72–73

134. Steven B. Ives Jr., "Vengeance Did Not
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136. Lael, *The Yamashita Precedent*, 80–81; I

137. *Yamashita*, 327 U.S. at 27–28 (Murphy,

138. Ibid., 61 (Rutledge, J., dissenting).

139. *Quirin*, 317 U.S. at 19.

140. *Yamashita*, 327 U.S. at 9.

141. *Johnson v. Eisentrager*, 339 U.S. 763 (195

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143. *Ahrens v. Clark*, 335 U.S. 188 (1948).

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145. Ibid., 195 (Rutledge, J., dissenting).

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147. Ibid., 965.

148. *Johnson v. Eisentrager*, 339 U.S. at 769.

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151. See Timothy Endicott, "Habeas Corpu
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152. *Johnson v. Eisentrager*, 339 U.S. at 795 (

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154. *Ex parte Burford*, 7 U.S. (3 Cranch) 448

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challenging action by military commissions.
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Ahrens—it noted that the prisoners could refi
parte Betz, 329 U.S. 672 (1946).

159. In May 1948, for example, the Court h
behalf of seventy-four German soldiers convi
ex rel. Bersin v. Truman, 334 U.S. 824 (1948).

160. Vladeck, "Deconstructing *Hirota*," 150

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CHAPTER 6

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15. See, for example, *Bridges v. Wixon*, 326 U
Lopez-Mendoza, 468 U.S. 1032 (1984) (Fourth
United States, 282 U.S. 481 (1931) (just compen

to death by the Tokyo tribunal. See Steven I.
rpus, Citizenship, and Article III," 95 *George-*

e Court's so-called original jurisdiction under
usly considered "original" habeas petitions
See, for example, *Ex parte Yerger*, 75 U.S. (8

as petitions in 1946—before its decision in
le in the appropriate district court. See *Ex*

ad refused to hear petitions brought on
cted at a war crimes trial at Dachau. *Everett*

0–1501.
1948).
5–16.
ns of the Constitution Following the Flag," 1
deck, "Deconstructing *Hirota*," 1524–25.

al Case against a Global Constitution," 95

racy and Foreign Affairs (New York: Colum-

. 1 (1834) (statement of Rep. Madison), 449.

Constitution," 31 *Yale Journal of International*

570-571 (1798).

atement of Rep. Harrison Gray Otis); *Annals*
of Rep. William Gordon); Gerald L. Neu-
s, Borders, and Fundamental Law (Princeton,

3.
tatement of Rep. Edward Livingston).
utions, reprinted in *The Debates in the Several*
al Constitution, ed. Jonathan Elliot, vol. 4

(1896).
U.S. 135 (1945) (First Amendment); *INS v.*
Amendment); *Russian Volunteer Fleet v.*
nsation clause).

16. Gerald L. Neuman, "Closing the Guant
(2004).

17. Neuman, *Strangers to the Constitution*, 73-
vision of this approach, rooted in membership

18. *Loughborough v. Blake*, 18 U.S. (5 Wheat
Court upheld Congress's power to impose a d
required that any duties, imposts, and excises
U.S. Constitution, art. I, § 8.

19. See, for example, *United States v. Dawso*
venue requirements of article 3, section 2); *W*
(applying Seventh Amendment's guarantee o
ing the Guantanamo Loophole," 8.

20. *Loughborough*, 18 U.S. (5 Wheat.) at 319

21. 60 U.S. (19 How.) 393 (1857). Benjamin
Constitution covered territories but rejected t
required the protection of slavery. Ibid., 624–

22. *In re Ross*, 140 U.S. 453, 464 (1891).

23. *Neely v. Henkel*, 180 U.S. 109, 122 (1901).

24. John Heffner, Note: "Between Assimila
as a Model for Minorities World-Wide," 35 *Te*
(2002); Gavan Daws, *Shoal of Time: A History*
sity of Hawaii Press, 1974), 271–80.

25. Julius W. Pratt, *America's Colonial Exper*
Gary Lawson and Guy Seidman, *The Constitu*
sity Press, 2004), 11.

26. *Downes v. Bidwell*, 182 U.S. 244 (1901).

27. Ibid., 251.

28. Ibid., 287.

29. Ibid., 378, 380 (Harlan, J., dissenting).

30. Ibid., 293 (White, J., concurring).

31. Ibid., 291.

32. See *Balzac v. Porto Rico*, 258 U.S. 298 (19
inapplicable in Puerto Rico); *Ocampo v. Unite*
ment grand jury provision inapplicable in Ph
(1904) (jury trial provision inapplicable in Ph
(1903) (grand jury and jury trial provisions in
Bidwell (revenue clauses of Constitution inap

33. Christina Duffy Burnett, "American Ex
University of Chicago Law Review 797 (2005).

34. *Balzac v. Porto Rico*.

35. Gerald L. Neuman, "Whose Constitutio

36. *Reid v. Covert*, 354 U.S. 1 (1957).

37. Ibid., 5–6 (plurality opinion).

38. Ibid., 9.

39. Ibid, 6.

40. Ibid., 12.

anamo Loophole," 50 *Loyola Law Review* 1, 8

–74. Senator Daniel Webster offered a different
in the Union rather than the states (78–79).
.) 317, 319 (1820). In *Lougherborough*, the
direct tax on the District of Columbia but
be uniform, as the Constitution requires.

n, 56 U.S. (15 How.) 467 (1854) (applying
Vebster v. Reed, 52 U.S. (11 How.) 437 (1851)
f a jury trial in civil cases); Neuman, "Clos-

.
Curtis's dissenting opinion agreed that the
the Court's conclusion that due process
27 (Curtis, J., dissenting).

tion and Revolt: A Third Option for Hawaii
exas International Law Journal 591, 595–96
of the Hawaiian Islands (Honolulu: Univer-

riment (New York: Prentice-Hall, 1950), 68;
ation of Empire (New Haven, CT: Yale Univer-

922) (Sixth Amendment right to jury trial
ed States, 234 U.S. 91 (1914) (Fifth Amend-
ilippines); *Dorr v. United States*, 195 U.S. 138
ilippines); *Hawaii v. Mankichi*, 190 U.S. 197
napplicable in Hawaii); see also *Downes v.*
plicable to Puerto Rico).
pansion and Territorial Deannexation," 72

on?" 100 *Yale Law Journal* 909, 965 (1991).

41. Ibid., 74 (Harlan, J., concurring).

42. Neuman, *Strangers to the Constitution*, 9

43. *Kinsella v. United States ex rel. Singleton*, noncapital crimes); *Grisham v. Hagan*, 361 U.S (1960) (civilian employees of the armed force *gliardo*, 361 U.S. 281 (1960) (civilian employee crimes).

44. See, for example, *Ramirez de Arellano v.* citizen could bring claim against the military farm in Honduras to train Salvadorian soldie 1113 (1985); *Berlin Democratic Club v. Rumsfeld* the First, Fourth, and Sixth Amendments app allegedly illegal intelligence gathering).

45. Isthmian Canal Convention, Novembe

46. Ibid., art. 3.

47. Panama Canal Treaty of 1977, Septembe No. 10030.

48. Act of August 24, 1912, ch. 390, §§ 8–9,

49. Neuman, "Closing the Guantanamo Lo

50. Ibid., 18–19.

51. *Canal Zone v. Castillo L. (Lopez)*, 568 F.2 provision of the Canal Zone Code outlawing due process standard); *Raven v. Panama Cana* jecting the exclusion of Panamanian employe the federal Privacy Act to review under the e tion but rejecting the claim on the merits).

52. *Canal Zone v. Scott*, 502 F.2d 566, 568 (5

53. Trusteeship Agreement for the Former 3, T.I.A.S. No. 1665, 8 U.N.T.S. 189.

54. Neuman, "Closing the Guantanamo Lo

55. Ibid., 24–25.

56. *Ralpho v. Bell*, 569 F.2d 607, 618–19 (D.C

57. Ibid. (internal quotation marks omitted

58. *Juda v. United States*, 6 Cl. Ct. 441 (1981)

59. See Harold Hongju Koh, "America's Off *Review* 139–43, 153–55 (1994); Brandt Goldstei *Law Students Sued the President—And Won* (N

60. *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1 *Baker*, 953 F.2d 1498 (11th Cir. 1992).

61. *Cuban-American Bar Ass'n v. Christophe*

62. *Haitian Ctrs. Council, Inc. v. McNary*, 96 omitted), *vacated as moot*, 509 U.S. 918 (1993)

63. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.

64. *Haitian Ctrs. Council, Inc. v. Sale*, 823 F.

65. Compare *United States v. Toscanino*, 500 Constitution's protection against unreasonabl

93.
361 U.S. 234 (1960) (civilian dependents for
S. 278 (1960) *Grisham v. Hagan*, 361 U.S. 278
es accused of capital crimes); *McElroy v. Gua-*
es of the armed forces accused of noncapital

Weinberger, 745 F.2d 1500 (ruling that a U.S.
under the Due Process Clause for using his
rs), *vacated and remanded as moot*, 471 U.S.
d, 410 F. Supp. 144 (D.D.C. 1976) (ruling that
olied to U.S. citizens in Germany based on

r 18, 1903, U.S.-Panama, art. 2, 33 Stat. 2235.

er 7, 1977, U.S.-Panama, 33 U.S.T. 39, T.I.A.S.

37 Stat. 560, 565–66 (1912).
oophole," 18.

d 405, 407–11 (5th Cir. 1978) (evaluating a
vagrancy under the federal Constitution's
al Co., 583 F.2d 169, 171 (5th Cir. 1978) (sub-
ees of the Canal Zone from the protections of
qual protection clause of the U.S. Constitu-

th Cir. 1974).
Japanese Mandated Islands, July 18, 1947, art.

oophole," 23–24.

C. Cir. 1977).
).
).
fshore Refugee Camps," 29 *Richmond Law*
in, *Storming the Court: How a Band of Yale*
New York: Scribner, 2005).
109 (11th Cir. 1991); *Haitian Refugee Ctr. v.*

r, 43 F.3d 1412, 1430 (11th Cir. 1995).
59 F.2d 1326, 1342–43 (2d Cir. 1992) (italics
.
.S. 155 (1993).
Supp. 1028, 1042 (E.D.N.Y. 1993).
o F.2d 267 (2d Cir. 1974) (ruling that the
le searches and seizures and guarantee of

due process applied to the FBI's alleged abdu
smuggler in Uruguay), with Neuman, "Whos
Also, two courts of appeals rejected challenge
outside the United States after assuming, but
applied. See *Sami v. United States*, 617 F.2d 755
arrest by Germany based on information pro
Rubies, 612 F.2d 397 (9th Cir. 1979) (finding th
high seas was reasonable).

66. *United States v. Verdugo-Urquidez*, 494 U

67. Ibid., 262–63.

68. Rehnquist also suggested that the Four
the United States without a sufficient connect
national community because the amendment
a connection that Rehnquist said Verdugo-U
to the United States involuntarily. *Verdugo-U*
nedy, who provided the necessary fifth vote f
suggestion.

69. *Verdugo-Urquidez*, 494 U.S. at 273.

70. Ibid., 275 (citation and internal quotati

71. Ibid.

72. Ibid., 282–84 (Brennan, J., dissenting).

73. Ibid., 284.

74. Ibid., 285–86. Justice Harry Blackmun a
dissenting opinion in *Verdugo-Urquidez* but d
Fourth Amendment's extraterritorial protecti
searches and seizures," not the amendment's
respect to noncitizens (297–98), (Blackmun,

75. Ibid., 275–78 (Kennedy, J., concurring).

76. For a discussion of Kennedy's approach

CHAPTER 7

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

2. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004);

3. Transcript of Oral Argument, April 28, 2
2004 WL 1066082 at *41.

4. The United States released the two Britis
before the Supreme Court decided their case.

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

6. The point was made by Justice David So
v. Bush, 542 U.S. 466 (2004), 2004 WL 943637

7. *Eisentrager*, 339 U.S. at 778.

8. Ibid., 789–90.

9. *Ahrens v. Clark*, 335 U.S. 188 (1948).

10. *Braden v. 30th Judicial Circuit Court of K*

11. Ibid., 494–95.

ction and torture of a suspected Italian drug
e Constitution?" 970–71 (discussing cases).
es to arrests and seizure of foreign nationals
not actually deciding, that the Constitution
(D.C. Cir. 1979) (rejecting claim of wrongful
vided by the United States); *United States v.*
hat the search of alien's vessel interdicted on

U.S. 259 (1990).

th Amendment did not apply to aliens inside
tion to the country to make them part of the
's text referred to "the right of the people,"
rquidez lacked, since he had been brought
rquidez, 494 U.S. at 271. But Justice Ken-
or the Court's ruling, explicitly rejected that

on marks omitted).

adopted a similar approach in his separate
differed from Brennan in arguing that the
ions should be limited to "unreasonable
separate warrant requirement, at least with
J., dissenting).

, see Neuman, *Strangers to the Constitution*, 8.

Rumsfeld v. Padilla, 542 U.S. 426 (2004).
2004, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004),

sh citizens, Shafiq Rasul and Asif Iqbal,
).
uter. See Transcript of Oral Argument, *Rasul*
, at *43.

Kentucky, 410 U.S. 484 (1973).

12. *Burns v. Wilson*, 346 U.S. 137 (1953) (cou
States ex rel. Toth v. Quarles, 350 U.S. 11 (1950)
Pittsburgh after his discharge from the milita
acts committed while previously in military s
13. *Rasul*, 542 U.S. at 478–79.
14. Ibid., 478.
15. Ibid., 497–98 (Scalia, J., dissenting).
16. Ibid., 486–87 (Kennedy, J., concurring)
17. Ibid, 486.
18. Ibid., 487.
19. 542 U.S. 507 (2004).
20. Ibid., 511–12 (plurality opinion)
21. Ibid., 512–13.
22. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527,
23. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Ci
24. Ibid., 465–66.
25. *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4t
denial of rehearing en banc).
26. Ibid., 357 (Traxler, J., concurring in the
27. Ibid., 371–73 (Motz, J., dissenting from
28. *Hamdi v. Rumsfeld*, 542 U.S. at 516 (plur
omitted).
29. Ibid., 519–21.
30. Ibid., 536.
31. Ibid., 533, 539.
32. Ibid., 534.
33. Ibid., 538–39.
34. Ibid., 547–48 (Souter, J., concurring in
the judgment). See also 18 U.S.C. § 4001(a).
35. *Hamdi*, 542 U.S. at 547–48 (Souter, J., co
concurring in the judgment).
36. Ibid., 548–51.
37. Ibid., 554–69 (Scalia, J., dissenting).
38. Ibid., 524 (plurality opinion).
39. Scalia did leave open the possibility tha
arrested and detained in the United States wh
"enemy alien."
40. *Hamdi*, 542 U.S. at 579–99 (Thomas, J.
41. Ibid., 583.
42. *Padilla*, 542 U.S. at 447, n. 16; ibid., 453
43. See *Al-Marri v. Rumsfeld*, 360 F.3d 707 (
44. *Padilla*, 542 U.S. at 465 (Stevens, J., diss
45. Ibid.
46. While it is uncertain how the Court wo
at least five justices disapproved of Padilla's m
Justice Stevens indicated that Padilla's militar

rt-martial of U.S. soldiers in Guam); *United*
(court-martial of U.S. soldier arrested in
ry and then taken to Korea to stand trial for
ervice there).

535 (E.D. Va. 2002).
r. 2003).

h Cir. 2003) (Wilkinson, J., concurring in the

denial of rehearing en banc).
the denial of rehearing en banc).
rality opinion) (internal quotation marks

part, dissenting in part, and concurring in

ncurring in part, dissenting in part, and

t his opinion might apply to noncitizens
no did not fall within the narrow definition of

dissenting).

(Kennedy, J., concurring).
7th Cir.) *cert. denied*, 543 U.S. 809 (2004).
enting).

ould have decided the merits, it appears that
ilitary detention. In a footnote in his dissent,
y detention as an "enemy combatant" was

illegal. *Padilla*, 542 U.S. at 464, n. 8. Four justi
believed that Hamdi's military detention was
alleged, presented a stronger case for military
seized on a foreign battlefield carrying a weap
forces there. Although Breyer had joined O'C
sibility of military detention in a battlefield ca
in *Padilla*, suggesting that he too believed tha
nite military detention an American arrested
suggests that at a minimum five justices (Stev
would have invalidated Padilla's continued de
the facts alleged.

CHAPTER 8

1. Order, *Hamdi v. Rumsfeld*, Civil Action n
(Under Seal Until Friday, October 8, 2004, at
batant to be freed soon," CNN.Com, Septemb

2. *Yaser Esam Hamdi v Donald Rumsfeld*, Se
Joel Brinkley and Eric Lichtblau, "Held 3 Yea
Herald Tribune, October 13, 2004; Jerry Mark
Citizen's Detention as Enemy Combatant Spa
ber 12, 2004.

3. Memorandum for the Secretary of the N
Review Tribunal, July 7, 2004 (CSRT Order).

4. See Memorandum, "Implementation of
cedures for Enemy Combatants Detained at G
29, 2004, encl. 1. para. G (11); "A Government
Captain Pat McCarthy," NPR (*Fresh Air*), Nov

5. Mark Denbeaux and Joshua Denbeaux, *
ernment's Combatant Status Review Tribunals
School, 2006), 14–18.

6. Ibid., 1, 19, 25–33; Michael Melia, "Enem
September 11, 2007.

7. Geri L. Dreiling, "Changing the Ground
Access to Detainees," *ABA Journal & Report*, 1

8. See *Miller v. Fenton*, 474 U.S. 104, 109 (19
165, 173 (1952). Coerced confessions are thus i
their purported reliability. See *Rogers v. Richm

9. See *Jackson v. Denno*, 378 U.S. 368, 385–8
(1959).

10. U.S. Department of the Army, *U.S. Arm
tion*, 1–8 (1992).

11. Eighteen percent of detainees alleged th
beaux and Denbeaux, *No-Hearing Hearings* 24

12. Human Rights Watch, *Guantanamo: Th*

13. Department of Defense, news release, Ju

ices (Stevens, Scalia, Souter, and Ginsburg)
illegal, even though Hamdi, on the facts
detention than Padilla, since Hamdi was
pon during combat against U.S. and allied
Connor's opinion in *Hamdi* accepting the pos-
ase like Hamdi's, he joined Stevens's dissent
t the president could not subject to indefi-
in a civilian setting in the United States. This
ens, Scalia, Souter, Ginsburg, and Breyer)
etention as an "enemy combatant," even on

no. 2:02cv439 (E.D. Va. October 5, 2004)
12:00 pm EST); "Man held as enemy com-
ber 23, 2004.
ettlement Agreement, September 17, 2004;
rs by U.S., Saudi Goes Home," *International*
on, "Hamdi Returned to Saudi Arabia; U.S.
rked Fierce Debate," *Washington Post*, Octo-

Navy, Order Establishing Combatant Status

Combatant Status Review Tribunal Pro-
Guantanamo Bay Naval Base, Cuba," July
Lawyer's Take on Gtmo: Interview with
vember 1, 2007.
No-Hearing Hearings: An Analysis of the Gov-
at Guantánamo (Newark, NJ: Seton Hall Law

ies Reunite at Guantanamo," *Associated Press*,

Rules: DOJ Proposes New Limits on Lawyer
November 3, 2006.
985). See also *Rochin v. California*, 342 U.S.
inadmissible in criminal trials, regardless of
mond, 365 U.S. 534, 540–41 (1961).
36 (1964); *Spano v. New York*, 360 U.S. 315, 320

y Field Manual 34–52: Intelligence Interroga-

ey had made statements under torture. Den-
4, 36.
e Road to Abu Ghraib 17 (2004).
une 12, 2005.

14. James Risen, *State of War: The Secret His*
(New York: Free Press, 2006), 33; Baher Azm
New Common Law of Habeas," 95 *Iowa Law*
15. Brief of Respondents at 20–21, 27, *Hama*
16. CSRT Order, para. a.
17. "Prepared Remarks of Attorney Genera
Academy regarding Civil Liberties and the W
White House, "Press Gaggle with Scott McCl
18. Mark Denbeaux et al., *The Empty Battle*
NJ: Seton Hall Law School, 2007). This repor
detainees" transferred to Guantanamo from
19. Mark Denbeaux et al., *The Meaning of 'I*
Representations of 'Battlefield' Capture and 'Re
ark, NJ: Seton Hall Law School, 2007), 9–10.
20. Ibid. In fact, only a small percentage of
Department says have "returned to the battle
following their release from Guantánamo (1–
21. *Parhat v. Gates*, 532 F.3d 834, 848–49 (D.
Hunting of the Snark 3 [1876]).
22. Denbeaux and Denbeaux, *No-Hearing*
23. News transcript, Defense Department
Tribunals, March 29, 2005.
24. Ibid.; Denbeaux and Denbeaux, *No-He*
25. Order, Administrative Review Procedu
the Department of Defense at Guantánamo N
26. Farah Stockman, "Some Cleared Guant
Globe, November 19, 2007.
27. *Al Odah v. United States*, 346 F. Supp. 2d
28. Ibid., 10.
29. Tim Golden, "Naming Names at Gtmo
30. *Al Odah*, 346 F. Supp. 2d at 6–7. See als
31. "Lawyer to Visit Guantanamo Pair," *BB*
handful of Guantánamo detainees designated
able to meet with a lawyer, and those detaine
counsel.
32. For a collection of these accounts, see M
The Guantánamo Lawyers: Inside a Prison Out
sity Press, 2009).
33. See Murat Kurnaz, *Five Years of My Life*
York: Palgrave Macmillan, 2008); Moazzam
Guantanamo, Bagram, and Kandahar (New Yo
34. See Carol Rosenberg, "U.N. Fact-finde
amo," *Miami Herald*, November 18, 2005. The
were supposed to remain confidential, to be s
ant to ICRC policy.
35. *In re Guantanamo Detainee Cases*, 344 F

story of the CIA and the Bush Administration
y, "Executive Detention, *Boumediene*, and the
Review 445, 478 (2010).
di v. Rumsfeld, 542 U.S. 507 (No. 03-6696).

l Alberto R. Gonzales at the U.S. Air Force
Var on Terrorism," November 20, 2006;
ellan and Faryar Shirzad," July 6, 2005.
field and the Thirteenth Criterion (Newark,
t does not consider the fourteen "high-value
CIA "black sites" in September 2006.
Battlefield': An Analysis of the Government's
cidivism' of the Guantánamo Detainees (New-

f the former prisoners who the Defense
field" actually engaged in hostile activities
2, 5, 18).
.C. Cir. 2008) (quoting Lewis Carroll, *The*

Hearings, 10–11.
Special Briefing on Combatant Status Review

aring Hearings 37–40.
res for Enemy Combatants in the Control of
Naval Base, Cuba, May 11, 2004, at 1–2.
tanamo Inmates Stay in Custody," *Boston*

1, 5, (D.D.C. 2004).

," *New York Times*, October 21, 2007.
o *Harris v. Nelson*, 394 U.S. 286, 298 (1969).
C *News*, August 31, 2004. Previously, only the
l for trial by military commission had been
es had met only with military, not civilian,

Mark Denbeaux and Jonathan Hafetz, eds.,
side the Law (New York: New York Univer-

: *An Innocent Man in Guantanamo* (New
Begg, *Enemy Combatant: My Imprisonment at*
ork: New Press, 2007).
rs Reject Pentagon Offer to Tour Guantan-
ICRC visited the detainees, but its reports
shared only with the detaining power, pursu-

. Supp. 2d 174 (D.D.C. 2004).

36. Ibid., 180. See also Brendan M. Driscoll
30 *Fordham International Law Journal* 873 (20
37. *Khalid v. Bush*, 355 F. Supp. 2d 311, 320–2
38. Ibid., 317–20.
39. Eleven early habeas cases, which had b
been consolidated for decision by Judge Gree
of the CSRT. Those cases originally included
Judge Leon subsequently exercised his prerog
him returned to him so he could decide all is
40. *In re Guantánamo Detainee Cases*, 355 F
41. Ibid., 458 (quoting *Ralpho v. Bell*, 569 F.
42. Ibid., 468–74.
43. Ibid., 469.
44. Ibid., 470–71.
45. Carol D. Leonnig, "Evidence of Innocer
Post, December 5, 2007, A1.
46. *In re Guantánamo Detainee Cases*, 355 F
Guantánamo and the Abuse of Presidential Pow
182–88.
47. See, for example, U.S. Department of St
Practices 2003: Egypt" (Washington, DC: U.S
48. Raymond Bonner, "Australian's Long P
York Times, January 29, 2005.
49. *In re Guantanamo Detainee Cases*, 355 F
50. Judges would, however, continue to cor
maintain the status quo, including requests to
and to afford limited protection to detainees
example, *Al-Joudi v. Bush*, 406 F. Supp. 2d 13 (
notify detainees' counsel within twenty-four
as a result of a hunger strike and provide cou
records).
51. Jonathan Mahler, "The Bush Administr
January 8, 2006.
52. Ibid.
53. Press release, "Department of Defense,
Subject to His Military Order," July 3, 2003.
54. Because Hamdan had been designated
administration gave him access to an attorney
who had not been charged or designated for t
Court's June 2004 decision in *Rasul*.
55. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152
56. U.S. Department of Defense, "Military
Ahmed Hamdan," July 13, 2004.
57. Hamdan's case was transferred to the U
bia from the Western District of Washington,
Supreme Court's decision in *Rasul*.

l, Note: "The Guantánamo Protective Order,"
07).
27 (D.D.C. 2005).

een assigned to various district judges, had
n on common issues, including the validity
the habeas petitions before Judge Leon. But
gative to have the cases originally assigned to
sues, including the common ones.
. Supp. 2d 464 (D.D.C. 2005).
2d 607, 618–19 (1977)); ibid., 463–64.

nce Rejected at Guantanamo," *Washington*

. Supp. 2d at 473–74; Joseph Margulies,
ver (New York: Simon & Schuster, 2006),

tate, "Country Reports on Human Rights
. Government Printing Office, 2004).
ath in the U.S. Anti-Terrorism Maze," *New*

. Supp. 2d 482 (D.D.C. 2005).
nsider certain applications intended to
o maintain a detainee's access to counsel
on life-threatening hunger strikes. See, for
D.D.C. 2005) (ordering that the government
hours if their clients were being forced-fed
nsel with access to those detainees' medical

ation vs. Salim Hamdan," *New York Times,*

President Determines Enemy Combatants

for trial by military commission, the Bush
y—access that other Guantánamo detainees
trial were denied until after the Supreme

2, 155–56 (D.D.C. 2004).
Commission List of Charges for Salim

.S. District Court for the District of Colum-
, where it was originally filed, following the

58. *Hamdan*, 344 F. Supp. 2d at 161–62. The
the requirements of a "competent tribunal" b
detainee's status under the Geneva Conventio
detainee had been properly classified as an "e
detention.

59. Ibid., 172.

60. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C.

61. Ibid., 44 (Williams, J., concurring).

62. *Hamdan v. Rumsfeld*, 546 U.S. 1002 (200

63. Pub. L. No. 109-148, 119 Stat. 2680 (200

64. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506
that it had jurisdiction to hear a habeas challe
mission through that very avenue. See *Ex par*
than a century later, the Supreme Court again
as an absolute bar to the exercise of its appell
v. Turpin, 518 U.S. 651, 661–62 (1996). See gen
Guide to *Ex parte McCardle*," 15 *Arizona Law*

65. DTA § 1005(e)(3).

66. See, for example, *Yamashita v. Styer*, 327
25 (1942).

67. DTA § 1005(e)(3).

68. 151 Cong. Rec. S12777-02, S12800 (Nov

69. *Quirin*, 317 U.S. 1; *Ex parte Milligan*, 71

70. 151 Cong. Rec. S12777-02, S12803 (Nove
Cong. Rec. S12777-02, S12799 (November 15,
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Index

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About the Author

JONATHAN HAFETZ is Ass
University School of Law and has litig
cases. He is the coeditor (with Mark
yers: Inside a Prison Outside the Law (N

sociate Professor of Law at Seton Hall
gated leading habeas corpus detention
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