Resolving Legal Issues in the War on Terror:
Habeas Corpus, the Supreme Court, and Combatant Status Review Tribunals

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May 9th, 2008
Introduction

Since Abu Ghraib, U.S. detainee policy continues to stay in the news. It has pervaded and, more importantly, affected American political processes in Attorney General Michael B. Muskasey’s confirmation battle, the investigation of destroyed CIA interrogation tapes, the presidential nominating contests, and ongoing struggles between and within the federal government’s branches. The most immediate remedy for many of the contentious issues still surrounding the United States’ policies in the war on terror is to align our treatment of detainees with international humanitarian law, specifically Article Three of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, and this must be done officially. It cannot be overshadowed by the clandestine legal imprimatur of questionable interrogation tactics or treatment by the executive branch—as has happened before. Aligning our treatment as such makes our policies unambiguous, humane, and consistent with historical precedent, putting to rest many of the more acrimonious political and moral questions regarding detainee treatment.

The recent death of Abdul Razzaq Hekmati, the first detainee at Guantanamo Bay to die of natural causes, highlights a greater, more nuanced problem facing the United States and its detainee policy—how to best handle detainees still held at Guantanamo Bay. The processes developed to determine detainees’ statuses and try those charged with violating international law or the laws of war have been surrounded by waves of legal questions. Currently, the Supreme Court is considering Boumediene v. Bush, 476 F. 3d 981 (D.C. Cir. 2007), and the Bush Administration has requested that it hold an emergency hearing for the recently decided appeals case Bismullah v. Gates, ___ F. 3d ___, 2007 WL 2067938 (D.C. Cir. 2007), both of which regard detainees’ rights at Guantanamo Bay. Therefore, to resolve current legal controversies,
the U.S. must not just change how it treats detainees, it must also change the policies and procedures it uses to legally classify, handle, and process detainees.

As the catalytic site for the Bush Administration’s “enhanced” interrogation techniques, Guantanamo Bay, Cuba, serves as the representative bastion of the way in which U.S. policy has departed from historical precedent; changing policy at Guantanamo Bay signifies a change in the entire system. Moreover, as the war on terrorism continues, potentially becoming an ideological war, much like the Cold War, it is imperative that the United States solidifies the moral authority it once claimed to possess (Gordon 2008). It must return to its precommitment to individual rights if it is to effectively combat terrorism. Working to align Gitmo policies with fundamental notions of fairness is a symbolic, yet very real gesture to prepare the war on terror to be a justifiably sustainable endeavor, or, to paraphrase Roger Cohen, an effort focused on counterterrorism rather than global wars.

This piece suggests that modifying the Combatant Status Review Tribunals and their procedures fundamentally alters U.S. detainee policy. The CSRT process is the first step in U.S. detentions, and enhancing the substantive and procedural rights afforded detainees in the status review process—a threshold determination to hold or not hold someone as an enemy combatant—resolves or leaves moot many legal questions, guarantees conformity with basic notions of fairness, and helps ensure the United States is imprisoning those it ought to, providing legitimacy to the rest of its detainee policies. Although there is also a need to evaluate the United States’ system of military commissions, the government has stated it will bring charges

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1 The line between “unlawful enemy combatant” and “enemy combatant” has been largely blurred by similarly interpreted definitions and oftentimes-interchangeable use within policy discussions. For the purpose of this piece, the definitions’ appropriateness will not be questioned because it is agreed upon by the executive and legislative branches, (Youngstown Sheet & Tube Co. v. Sawyer 1952, 635-637).
against only a small percentage of those detained, whereas the CSRT process reaches every individual detained at Guantanamo Bay. Therefore, changing the CSRTs changes the entire process.

**Detainee Cases in U.S. Courts**

The Supreme Court established the justiciability of legal questions regarding detainees from the war on terrorism in *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and to a lesser degree *Rumsfeld v. Padilla*\(^2\), 542 U.S. 426 (2004). *Rasul* and *Hamdi* are two of the first cases that the Supreme Court agreed to hear regarding legal claims made by detainees of the United States regarding their detention as a consequence of the war on terror. They are important not just for the decisions they set forth, but because they spurred a political reaction from the executive and legislative branches of government, which were determined to counter both decisions by promulgating the Detainee Treatment Act and leading the way for a status determination system for Guantanamo detainees.

*Rasul* involved two Australian and twelve Kuwaiti citizens who were captured during the U.S. war in Afghanistan and had been detained at Guantanamo Bay since nearly the beginning of those hostilities in 2002. Through their petitions for writs of habeas corpus, the claimants sought a variety of rights including their release from custody, notice of the charges against them, access to counsel and family members, and access to a neutral decision-maker, (*Rasul v. Bush* 2004, 472). Specifically, at issue in *Rasul*, was whether U.S. courts have jurisdiction to “consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated…in a territory over which the United States exercise[s] plenary and exclusive jurisdiction, but not ‘ultimate jurisdiction?’” (*Rasul v. Bush* 2004, 470-75).

\(^2\) Dismissed because of jurisdictional technicality, *Rumsfeld v. Padilla* will not be discussed here.
The Court held 6-3 that U.S. courts have jurisdiction to grant the petitions and hear the cases. Justice Stevens’ majority opinion opined that habeas corpus is “‘a writ antecedent to statute’” and that, throughout its history, it is at its strongest when offering review of indefinite executive detention, (Rasul v. Bush 2004, 473-74). Furthermore, Stevens explained, Congress explicitly gave U.S. courts the ability to grant habeas corpus review under 28 U.S.C. §§2241(a), (c)(3), and that this power, which need not rely on the constitutional right to habeas corpus, extends to the alien detainees at Guantanamo, (Rasul v. Bush 2004, 473-74). Thus, the Court established its, and more generally federal district courts’, ability to review habeas corpus petitions originating from alien detainee claims at Guantanamo Bay.

Moreover, the majority explicitly distinguished Rasul from Johnson v. Eisentrager, 339 U.S. 763 (1950), in which 21 German citizens—explicitly citizen agents of a hostile state who were captured, detained, and tried for crimes committed outside U.S. control—were denied access to U.S. district court level review of an habeas claim. Justice Stevens asserted that the petitioners in Rasul:

differ from Eisentrager detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control, (Rasul v. Bush 2004, 475-76).

Stevens thus outlines some of the major concerns regarding detainees’ rights and their potential deprivation, and he asserts the distinguishing characteristics of Guantanamo detainees.

Stevens’ note that the military base at Guantanamo Bay, Cuba, is “territory over which the United States exercises exclusive jurisdiction and control” is echoed by Justice
Kennedy’s concurrence. He posits that Guantanamo Bay “is in every practical respect a United States territory” and its “indefinite lease…has produced a place that belongs to the United States, [thus] extending the ‘implied protection’ of the United States to it,” (Rasul v. Bush 2004, 487). The Court’s proclivity toward defining Gitmo as fully analogous to U.S. territory poses important implications for the protections extended to it and for the merits of denying those detained there their basic rights.

Unlike Rasul, Hamdi v. Rumsfeld involved an American citizen, Yaser Esam Hamdi. Hamdi was captured in Afghanistan during the U.S. conflict there, classified as an enemy combatant for fighting with the Taliban, and detained at a naval brig in Charleston, South Carolina, (Hamdi v. Rumsfeld 2004, 507). He claimed that, as a U.S. citizen, he maintained rights to habeas corpus and to challenge his detention as an enemy combatant in front of a neutral decision maker. The Court ruled in his favor.

The plurality opinion balanced the government’s ability to effectively prosecute the war on terror and Hamdi’s individual rights. It purported that Congress authorized the detention of Hamdi and those similarly characterized as enemy combatants through the 2001 Authorization for Use of Military Force, and that such imprimatur enabled the government to indefinitely detain those that were “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in armed conflict against the United States there,” (Hamdi v. Rumsfeld 2004, 516; internal quotation marks omitted). Therefore, since hostilities were clearly taking place in Afghanistan, Hamdi’s detention as an enemy combatant was not unlawful on its face.

The Court, however, citing Mathews v. Eldridge, 424 U.S. 319 (1976), balanced the government’s “fundamental” right to detain enemy combatants during active conflicts
with Hamdi’s individual rights, *(Hamdi v. Rumsfeld* 2004, 518); ultimately deciding 
Hamdi’s fundamental rights to receive notice of a factual rationale for his detainment and 
an opportunity to challenge this detainment in front of a neutral decision maker 
cumulatively outweigh the government’s fear of an escalating number of such 
international and troublesome challenges. Therefore, although the plurality legitimated 
the authorization for detention like that of Hamdi, it, more importantly, held that such 
detainees have a right to challenge the factual basis of their detention in front of an 
unbiased decision maker.

In response to *Rasul* and *Hamdi*, the Bush Administration and Congress 
established the combatant status review tribunal (CSRT) process and passed the Detainee 
Treatment Act of 2005. First, the Administration created the combatant status review 
tribunal process to determine whether Guantanamo detainees “were properly classified as 
enemy combatants and to permit each detainee the opportunity to contest such 
designation” (CSRT Implementation Procedures 2007, England Memo). The 
government moved with “extraordinary speed” to establish these tribunals so that, as it 
argued, federal judges would not have to grant petitions for habeas corpus following 
*Hamdi* (Lewis 2004a; Lewis 2004b). As early as July 7, 2004, just weeks after *Rasul* and 
*Hamdi* were decided, Deputy Secretary of Defense Paul Wolfowitz sent an order to 
Gordon England, the Secretary of the Navy, outlining the basic characteristics of the 
proposed tribunals. Secretary England responded on July 29, 2004, with a detailed 
implementation procedure for the combatant status review tribunals. The goal was to 
satisfy *Hamdi*’s requirements and create a system in which Gitmo detainees could 
factually challenge their detentions in front of a neutral decision maker.
Additionally, Congress passed the Detainee Treatment Act of 2005 in response to the Supreme Court’s decisions. Signed into law on December 30, 2005, as part of a larger military spending bill, § 1005 (e) of the Detainee Treatment Act (DTA) amended the federal habeas corpus statute so that no court could consider “an application for a writ of habeas corpus filed by or on behalf of an alien detained” at Gitmo or “any other action against the United States or its agents relating to any aspect of the detention” of an “enemy combatant” at Gitmo (Detainee Treatment Act 2005, §1005 (e)(1)). President Bush reinforced this jurisdictional limitation in a signing statement construing the act “‘to preclude’” any federal court “‘from exercising subject matter jurisdiction over any existing or future action’” like that described in Section 1005 (qtd. in Greenhouse, 1/10/06). Thus, the president and Congress politically, and with some expediency, countered the Supreme Court’s decisions in Hamdi and Rasul.

The Supreme Court, however, rebuffed these executive and legislative attempts to limit its jurisdiction in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006). Decided June 29, 2006, Hamdan v. Rumsfeld most basically addressed Congress and the president’s ability to limit access to the writ of habeas corpus. By simply hearing Hamdan’s case, the Court reinforced its ability to consider petitions for writs of habeas corpus by Gitmo detainees in pending cases. It settled any ambiguity to the prospective or retroactive nature of the Detainee Treatment Act.

The majority in Hamdan also broadly rejected the military commissions created to try Hamdan and others. Justice John Paul Stevens’ majority opinion conceded that the Uniform Code of Military Justice (UCMJ), 2001 Authorization for Use of Military Force (AUMF), and the DTA cumulatively provide “a general Presidential authority to convene
military commissions,” but they never explicitly authorized their creation in this case, 
(*Hamdan v. Rumsfeld* 2006, 2775). Therefore, the Court specifically rejected the Gitmo 
military commissions for violating the UCMJ and Geneva Conventions because their 
processes broke with rules for general courts-martial and those “‘judicial guarantees 
which are recognized as indispensable by civilized people,’” (*Hamdan v. Rumsfeld* 2006, 
2803).

Like before, Congress promptly countered the Supreme Court’s ruling, creating 
the Military Commissions Act of 2006 (MCA) to remedy any problems raised by 
*Hamdan*. The MCA sought “to authorize trial by military commission for violations of 
the law of war” (Military Commissions Act 2006). It was Congress’s attempt to take “up 
the Court’s invitation in *Hamdan*,” and was a concrete, direct action by Congress to fix 
the problems with Gitmo’s military commissions highlighted in *Hamdan* (Estreicher & 
O’Sca nnlain 2006).

The MCA’s passage did not resolve everything, however. Although it appears to 
be a tightly formulated piece of legislation to solve the problems expressed in *Hamdan* 
and expand “substantial safeguards” for those accused of “punishable offenses or 
violations of the law of war,” many legal questions remain (Eistreicher & O’Sca nnlain 
2006). The MCA leaves coerced evidence and hearsay admissible (Military 
Commissions Act 2006, §948r; §949a), limits those that can serve as defense counsel 
(Military Commissions Act 2006, §949c), provides for the exclusion of those accused 
from certain proceedings (Military Commissions Act 2006, §949d), and restates that “‘no 
court, justice, or judge shall have jurisdiction to hear or consider an application for a writ 
of habeas corpus filed by or on behalf of an alien detained by the United States’”


(Military Commissions Act 2006, Sec. 7 Habeas Corpus Matters). These matters, particularly the suspension of habeas corpus for all alien detainees, led to *Boumediene v. Bush*, which is currently pending decision by the Supreme Court.

**Boumediene v. Bush: a probable interpretation**

In June of 2007, the Supreme Court granted certiorari to hear the challenges presented in *Boumediene v. Bush*, thereby reversing their initial denial of the petitioners’ request (Elsea & Thomas 2007, 26). The case is largely a review of whether the MCA “validly stripped federal court jurisdiction over habeas corpus petitions” filed by all aliens (Elsea & Thomas 2007, 26). Concomitantly, it addresses the more nuanced question arising from “modern Supreme Court decisions…holding that habeas corpus need not be available in a formal sense as long as prisoners have an ‘adequate and effective’ substitute for challenging the validity of their detention” (Greenhouse 2007). Thus, a major issue is whether U.S. policies and procedures, specifically CSRTs provide a safeguard equivalent to habeas corpus. Evaluating these issues requires a look at habeas corpus—its place in history and in Court precedent—and the CSRT process—its procedures, rights, and limitations.

An investigation of the MCA’s habeas provision must start with a look at the act’s congressional history. The debate over the MCA was extensive and contentious in both houses of Congress, but its record with respect to limiting habeas corpus is best represented by the debate regarding the Specter-Leahy Amendment, S. 5087, which was closely defeated by a vote of 51-48. Proposed by Senators Arlen Specter and Patrick Leahy and co-sponsored by Senators Dodd, Feingold, Dorgan, and Clinton, The Specter-Leahy Amendment was designed to “strip” the habeas provision from the MCA and “retain the constitutional right of habeas corpus for people detained at Guantanamo” (Leahy, Congressional Record, S10245; Specter, Congressional
Acrimony arose regarding the nature of the MCA’s habeas provision, if it was needed, and what rights it specifically limited.

The dialogue on the floor of the Senate regarding this amendment elucidated an important question regarding habeas corpus and Guantanamo Bay—that is, where the privilege of the writ of habeas corpus originates and how or why it may be limited. Some scholars believe that although the Constitution does not “expressly [grant] a right of access to the writ,” such an establishment of the writ exists as an “attribute of the suspension clause or the due process clause or both,” making it a constitutional right inaccessible to ordinary congressional legislation’s scope (Doyle 2006, 26). Others posit that Congress’s power to modify access to habeas corpus is well established in “the power of Congress to ‘ordain and establish’ the lower federal courts,…to regulate and make exceptions to the appellate jurisdiction of the Supreme Court,” and to “make all laws which shall be necessary and proper for carrying into Execution” Congress’s and the courts’ other powers (Doyle 2006, 26; U.S. Constitution, Art I, Sec. 8, Cl. 18).

The senators who supported the amendment viewed the elimination of habeas corpus for alien detainees in U.S. custody as a constitutional issue and therefore an unconstitutional violation of the suspension clause, which states, “[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it” (U.S. Constitution, Art I, Sec. 9, Cl. 2). Those that opposed the amendment opined the MCA only amended an ordinary piece of legislation—the federal habeas corpus statute, as amended by the DTA—by means of ordinary legislation. They saw no constitutional issue, but rather a statutory one akin to modifying federal court jurisdiction that need not be limited by the suspension clause.
More specifically, the debate largely surrounded different interpretations of *Rasul v. Bush* and *Hamdi v. Rumsfeld*. On either side of the debate were two experienced legal minds, Senator Specter, a former prosecutor, and Senator Lindsey Graham, a former military judge advocate. Senator Specter purported, paraphrasing *Rasul*, “that the Constitution draws no distinction between Americans and aliens held in custody” (Congressional Record, S10264). He went on to paraphrase Justice O’Connor’s opinion in *Hamdi*, that “[a]ll agree that absent suspension, the writ of habeas corpus remains available to every individual detained within the United States,” and since Guantanamo Bay is effectively “the United States,” habeas corpus remains open to those detained there, alien or citizen (Specter, Congressional Record, S10264).

Senator Graham, joined by Senator John Warner, disagreed, offering a different interpretation of those two cases. They asserted *Rasul* “did not reach the question of the constitutional right of habeas corpus that applies to U.S. citizens,” and instead limited its decision to extending a statutory right of habeas corpus to alien detainees (Warner, Congressional Record, S10265). Therefore, “it is a statutory right of habeas that has been granted to enemy combatants,” and things “would change in many ways” had the Court ever established a similarly applicable constitutional right (Graham, Congressional Record, S10267). They deem *Hamdi* inapposite because it only considered a U.S. citizen’s rights. Ultimately, this exchange leaves the legislative intent ambiguous as to whether the MCA is a suspension of the writ of habeas corpus or just a limitation on its statutory scope.

The uncertainty of Congress’s intent requires that the issue be looked at from multiple angles. First, if the MCA’s habeas provisions constitute a suspension of habeas corpus, is that suspension constitutional? The suspension clause’s most obvious requirement is that “unless…in Cases of Rebellion or Invasion,” the writ of habeas corpus “shall not be suspended.”
It would be hard to argue that in late September 2006, the United States was plagued by either an invasion or a rebellion, and thus, “it would [be] problematic” to suspend the writ of habeas corpus (Kenneth Starr qtd. in Congressional Record, S10256). Moreover, the suspension clause continues, habeas corpus “shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it” (emphasis added). As stated, the privilege of habeas corpus cannot just be lawfully suspended if there is invasion or rebellion; it can only be suspended when, in such cases, “the public safety may require” suspension. It would be different if written, “…unless in Cases of Rebellion or Invasion when the public safety may require it.” In that case the “when” would be explanatory. It would describe why habeas corpus could be justifiably suspended. As it exists, the “when” describes a condition for that suspension. Following the immediate aftermath of September 11, 2001, it is clear the public safety did not require the suspension of habeas corpus. Instead, federal courts’ acceptance of habeas corpus petitions was required to resolve legal issues in *Rasul v. Bush, Hamdi v. Rumsfeld,* and *Hamdan v. Rumsfeld,* and it is obvious the conditions set forth in the suspension clause were not met in September 2006. Therefore, if the MCA suspended habeas corpus in a constitutional sense, that suspension would be invalid.

Second, the notion that the MCA is only a legislative change to an ordinary piece of legislation must be evaluated. By this argument, the MCA amends 28 U.S.C. § 2241 but does nothing to a distinct, constitutional right to habeas corpus. Congress has lawfully legislated with regard to habeas corpus before. It created § 2241 through normal legislative processes and expanded its authority in 1833 and 1842 by similar means (Doyle 2006, 4). It promulgated the Habeas Corpus Act of 1867, which “enabled all persons in custody ‘in violation of the Constitution, or any treaty or law of the Unites States’ to seek redress in federal court,” and
greatly expanded the statute’s scope (Tarr 2006, 33). Thus, there is a clear history of expanding the right of habeas corpus through ordinary legislation, and Congress’s ability to do so is akin to and stems from its ability to shape federal court jurisdiction. Under these circumstances, Congress could expand and contract the breadth of the writ of habeas corpus through standard congressional action, so long as it did not suspend the baseline writ outright, (Felker v. Turpin 1996). Consequently, the MCA is a lawful modification to and not a suspension of habeas corpus.

Lastly, what if this distinction between a constitutional and statutory right to habeas corpus is mistaken, and the uncertainty of Congress’s intent does not matter? In this case, although there is traditionally a constitutional right to habeas corpus established in the suspension clause and a statutory right promulgated by Congress, the two rights are inextricably married. The Constitution does not grant a right to habeas corpus; rather, it guarantees its “privilege…not be suspended” (U.S. Constitution, Art. I, Sec. 9, Cl. 2). This may be because the Founders largely viewed habeas corpus as a certainty, an assumed part of any constitutional system’s protections. Unlike many other rights, like the right of confrontation and trial by jury, which were explicit in state and federal constitutions, “the writ of habeas corpus was transmitted into American law principally through tradition and common law” (Oaks 1995, 247). The federal statutory right to habeas corpus, therefore, becomes the realization of the “privilege” mentioned, but only implicitly extended, in the Constitution. Thus, the two rights are inseparable. Once established, one cannot modify the habeas corpus statute without adhering to the fundamental conditions enumerated in the suspension clause, and the MCA would present an unconstitutional suspension of this singular writ.
Overall, these three circumstances yield little clarity to the question of what exactly the MCA accomplished, and no matter which way one looks at the issue, it is unlikely the Supreme Court will answer *Boumediene v. Bush* with such a straightforward answer. Specifically, the writ’s place in the United States’ legal foundations and the U.S. courts’ common law, dynamic approach to issues of habeas corpus make such a concrete decision unlikely (Fallon & Meltzer 2007, 2033). The writ of habeas corpus is one of the most fundamental protections of the Anglo common law legal system. It predates rights, generally, for in its original capacity, it only examined if a custodian had the power to hold a detainee. It did not concern itself with rights violations (Goldstein 2008). It is truly “‘a writ antecedent to statute,’” (*Rasul v. Bush* 2004, 473).

Moreover, delegates to the Constitutional Convention displayed an obvious respect for the writ. The main point of contention was whether it should always be available, or if, in some instances, suspension was warranted. Specifically, James Madison’s chronicling of the convention depicts an exchange between William Pinkney and Gouverneur Morris regarding whether the writ should be “inviolable” (Paschal 1970, 609-610). The Suspension Clause’s negative language—“not suspended, unless…”—suggests the “convention’s overriding purpose” was to side with Pinkney and make the writ of habeas corpus stronger and more inviolable (Paschal 1970, 609-611). Thus, the intent of the Founders’ seems to favor a protective reading of the suspension clause and illustrate its importance at the foundational level of U.S. law.

More formally, the codification of the writ “traces its ancestry to the first grant of federal court jurisdiction,” predating even the passage of the Bill of Rights, (*Rasul v. Bush* 2004, 473-74; Goldstein 2008). And, although the modern writ may be associated with “federal court relitigation of constitutional issues” arising in state courts, the Supreme Court has stated and
repeated that, “at its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest,” (Fallon & Meltzer 2007, 2037; INS v. St. Cyr 2001, 301). Therefore, habeas corpus is one of the most ensconced protections in U.S. law, and the Supreme Court undoubtedly treats it with great respect, particularly when indefinite, executive detention is questioned. It is highly unlikely that Boumediene v. Bush will be solved with a validation of habeas corpus’s suspension.

This longstanding and expressed reverence for the writ of habeas corpus directs an interpretation of the Military Commissions Act to Swain v. Pressley, 430 U.S. 372 (1977). Swain viewed access to the protection of the writ of habeas corpus as controlling rather than access to the writ itself. The majority opined that “the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person’s detention does not constitute a suspension of the writ of habeas corpus,” (Swain v. Pressley 1977, 381). Therefore, the baseline question is whether the Combatant Status Review Tribunal process is an “adequate and effective” substitute for the review the writ of habeas corpus provides, (Swain v. Pressley 1977, 381). It is not.

**Combatant Status Review Tribunals: inadequate and ineffective**

Established by an order from Deputy Secretary of Defense Paul Wolfowitz on July 7, 2004, and implemented by Secretary of the Navy Gordon England on July 29, 2004, the Combatant Status Review Tribunal process is designed to determine whether detainees at Guantanamo Bay are “properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation” (CSRT Implementation Procedures 2007, England Memo). By design, the CSRT process closely follows Justice O’Connor’s prescriptions in Hamdi. Specifically, the CSRT’s adhere to the notion “that [28 U.S.C.] §2241 and its
companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review” (*Hamdi v. Rumsfeld* 2004, 525).

The CSRT process provides that detainees may be present at “all Tribunal proceedings” except those involving deliberation, voting, or issues that could affect the national security (CSRT Implementation Procedures 2007, § F(3)), and it allows detainees to “present evidence[,]…including the testimony of witnesses who are reasonably available and…relevant” (CSRT Procedures, § F(6)) It also states “detainee[s] may present oral testimony” (CSRT Implementation Procedures 2007, § F(7)). These rights stem directly from § 2243, which extends the right of the person detained to “deny any of the facts” against them “or allege any other material facts,” and § 2246, which guarantees the right to present evidence orally, by deposition, or by affidavit (Federal Habeas Corpus Statute, §§2243, 2246). The CSRTs’ rights flow from the federal habeas corpus statute’s protections.

The CSRT process also incorporates Justice O’Connor’s *Hamdi* suggestions as to how such a determinative process may depart from U.S. evidentiary standards in a time of war. Because “the full protections that accompany challenges in other settings may prove unworkable and inappropriate in the enemy-combatant setting,” O’Connor notes that hearsay may be acceptable evidence and “a presumption in favor of the Government’s evidence” may be reasonable, (*Hamdi v. Rumsfeld* 2004, 533-35). The CSRT process specifically allows any “relevant and helpful” information, including hearsay, and explicitly establishes a presumptive assumption in favor of the government’s evidence (CSRT Implementation Procedures 2007, § G(7)). Overall, the CSRT process is a solution specifically designed to reconcile the *Rasul* and *Hamdi* opinions, and it clearly attempts to work within the bounds outlined by O’Connor in *Hamdi*. In its execution, however, the process falls well short of meeting its enumerated rights.
Most basically, the government uses its national security interests to circumscribe most rights afforded detainees in the CSRT process. Classified evidence is never presented to detainees. It is summarized and offered in compendium with a presumption in favor of its validity. Called Unclassified Summaries of Evidence, such overviews are deemed “not persuasive” by the government “because they “provide conclusory statements without supporting unclassified evidence,”” (Denbeaux & Denbeaux 2006, 21). They are devised to summarize “the relevant facts the information would tend to prove,” instead of all the information they provide, and consequently make “it difficult for detainees to address [their] thrust” (CSRT Implementation Procedures 2007, § E(3)(a); Denbeaux & Denbeaux 2006, 21).

In 52 percent of CSRT hearings for which public information is available, the government presented only such presumptively accurate summaries of classified evidence (Denbeaux & Denbeaux 2006, 22). It offered no unclassified evidence to which the detainee could offer a meaningful rebuttal, and thus, rendered detainees’ ability to rebut the evidence against them meaningless.

The government also has not called a single witness in any CSRT. Although the CSRTs are given broad powers to “order U.S. military witnesses to appear and to request the appearance of civilian witnesses,” in not one CSRT has the government produced a witness (CSRT Implementation Procedures 2007, § E(2); Denbeaux & Denbeaux 2006, 21). Therefore, the detainees’ right to question witnesses against him, an extension of the right to rebuttal, is purely “academic” (Denbeaux & Denbeaux 2006, 21).

Additionally, detainees cannot effectively call witnesses on their own behalf. Seventy-four percent of those detainees that requested witnesses were denied. Of the 26 percent that were provided some or all of their witnesses, none was granted witnesses from outside of Gitmo, and
only 50 percent of those requesting other Gitmo detainees as witnesses were successful (Denbeaux & Denbeaux 2006, 27-29). Thus, the detainees’ right to produce testimonial evidence is nullified, except to occasionally present testimony from other Gitmo detainees—individuals determined to be enemies of the United States and, hence, not dispositive.

With slightly more likelihood, the detainees “were allowed to present their documentary evidence, at least in part, 40% of the time” (Denbeaux & Denbeaux 2006, 30). Usually, the unclassified documentary evidence allowed was letters from family and friends appropriately given little consequence by the tribunals because “[c]orrespondence written by family and friends generally lacks inculpatory [or exculpatory] value” (Denbeaux & Denbeaux 2006 23). Summarily, the government allowed unclassified documentary evidence in less than half of the proceedings, and when it did, it only allowed legally inconsequential evidence.

Furthermore, much of the detainees’ unclassified information denied production was accessible and dispositive. *Bismullah v. Gates*, which is being stalled between appeals, concerns an Afghan whose strong opposition to the Taliban was supported by U.S. military and diplomatic officials, including the American ambassador, but the CSRT reviewing his detention never considered these official statements (Greenhouse 2008). Another detainee was denied court documents from a previous hearing in Bosnian courts that acquitted him of being a terrorist. The CSRT “concluded that these official Court documents were not ‘reasonably available’ even though” the government’s evidence “discussed another document from the same Bosnian legal proceedings” (Denbeaux & Denbeaux 2006, 33). Detainees were also denied the production of documents like passports and medical records that could provide dates or details of clarification disproving their status as an enemy combatant (Denbeaux & Denbeaux 2006, 32-33).
In sum, “96% of the detainees were shown no facts by the Government to support their
detention as enemy combatants and 89% of the detainees had no evidence to present,” leaving
only 11 percent to present evidence that was usually accorded little weight (Denbeaux &
Denbeaux 2006, 31). In application, the CSRT process dissolves the detainees’ enumerated
rights to rebut the evidence against them and to provide evidence on their behalf. The rights are
so rarely actualized that they hardly exist.

The admissibility of hearsay and the presumptive but rebuttable assumption in favor of
the government’s evidence given suggestive imprimatur by Justice O’Connor’s plurality opinion
in *Hamdi v. Rumsfeld* are similarly inoperative in the CSRTs’ application. Despite language
suggesting hearsay may be considered by CSRTs if “the reliability of such evidence in the
circumstances” be “tak[en] into account,” no documentation suggests tribunals ever “questioned
the reliability of any hearsay” (CSRT Implementation Procedures 2007, § G(7); Denbeaux &
Debneaux 2006, 34). The absence of hearsay review is particularly troubling for three reasons:
such hearsay usually comes from anonymous sources; these sources sometimes have been
coerced, leaving their reliability suspect; and there is continual confusion regarding the names of
many detainees, which serve as the only link between the accused and the hearsay evidence
against them (Denbeaux & Denbeaux 2006, 34). By design, hearsay seems to serve as a
requisite evidentiary tool during foreign conflict, one that requires appropriate scrutiny to be
utilized fairly, but in practice, it has been an unchecked method of accusation, further distancing
the CSRTs from fairness.

As mentioned above, the government presented little meaningful unclassified evidence
against the detainees. Therefore, the presumptive but rebuttable assumption of validity in favor
of the government’s evidence “becomes, in practice, an irrebuttable one” (Denbeaux &
Denbeaux 2006, 19). The absence of information provided to detainees makes the right to challenge that information largely nugatory.

The CSRT process not only fails in actualizing the rights and protections it establishes by design, it fails on three fronts to ensure that the CSRTs comport with larger, more basic notions of fairness. While potentially enumerated in the U.S. Constitution, these essential rights go beyond the narrower, but fundamental rights non-citizens may claim at Gitmo (Fallon & Meltzer 2007, 2083, 2094). They are, according to Common Article 3 of the Geneva Conventions, the type of “‘judicial guarantees recognized as indispensable by civilized peoples,’” and therefore, internationally recognized as vital to due process in any legal system, (Hamdan v. Rumsfeld 2006, 2803; ICCPR, Articles 9 & 14).

First, detainees are denied the right to counsel. Instead, the process affords them a “personal representative” that explicitly “shall not be a judge advocate” (CSRT Implementation Procedures 2007, § C(3)). Although this representative serves to help the detainee review the evidence against him and present evidence on his own behalf, he serves the CSRT and provides no relationship analogous to that of attorney-client. Most representative-detainee meetings last between 30 and 90 minutes, with 13 percent taking 20 minutes or less, and each representative must inform his respective detainee, “‘none of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing’” (qtd. in Denbeaux & Denbeaux 2006, 15). Thus, the personal representative provides minimal support and does so in a role that is explicitly non-advocate.

The right to effective counsel lies at the core of those “procedural and substantive safeguards designed to assure fair trials before impartial tribunals,” (Gideon v. Wainwright 1963, 344; ICCPR, Art. 14, Sec. 3(b),(d)). Although CSRTs are not standard trials, they are
accusatory, if not adversarial proceedings, and the right to counsel is an essential protection for those “not in the presence of persons acting solely in [their] interest,” (*Miranda v. Arizona* 1966, 469). Therefore, the right to counsel fundamentally protects individuals facing accusatory proceedings—individuals similarly situated to the detainees facing CSRTs—and O’Connor makes this clear in *Hamdi v. Rumsfeld*. Hamdi’s enemy combatant status did not limit this right. He “unquestionably [had] the right to access to counsel in connection with the proceedings” against him, (*Hamdi v. Rumsfeld* 2004, 539). The denial of effective counsel creates a significant deficiency in the CSRT process, and the potential consequence—indefinite detention—of any CSRT proceeding demands that detainees are given such essential protections.

Second, the CSRTs operate with an unfair burden of proof. In practice, they operate with a presumption of near guilt—in this case the status of enemy combatant. The implementation procedures explicitly state:

> [e]ach detainee whose status will be reviewed by a Tribunal has previously been determined, since capture, to be an enemy combatant through multiple levels of review by military officers and officials of the Department of Defense (CSRT Implementation Procedures 2007, § B).

The notion that each detainee “has previously been determined…to be an enemy combatant through multiple levels of review” is also repeated to each detainee when they are notified of his CSRT, further “suggest[ing] the presumptive correctness of the detentions” (Denbeaux & Denbeaux 2006, 18-19). Thus, determining a detainee is a non-enemy combatant is not a determination but an overturning of extensive, seemingly reasoned military judgment. The tribunals portray themselves as a superfluous formality.

Beyond the seeming presumption of enemy combatant status, the CSRTs must only “determine whether the preponderance of the evidence supports the conclusion that
each detainee meets the criteria to be designated as an enemy combatant” (CSRT Implementation Procedures 2007, § G(11)). Admittedly a “preponderance of the evidence” standard may be appropriate in the combatant status determination setting, but when it is coupled with the presumptive validity of governmental evidence described above, it creates a system that is unconstitutionally one-sided. As stated in Hamdi, any “process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short” (Hamdi v. Rumsfeld 2004, 537). The CSRT process creates such a constitutionally inadequate system, and therefore, to serve as an effective review, it must be increasingly balanced.

Furthermore, such deference to the government’s evidence—and therefore its previous status determination—violates the “modern habeas practice” that “the appropriate scope of [habeas] review often depends on the nature of the prior executive proceeding” (Fallon & Meltzer 2007, 2097-98). Before their CSRT, most detainees have been subjected to little more than a “rudimentary” battlefield determination of their status (Fallon & Meltzer 2007, 2098). Their prior determinative proceeding was incredibly limited in scope. Therefore, to comport with “modern habeas practice,” it is imperative the government provide a more enhanced review of combatant status once detainees are transferred to Guantanamo.

Lastly, legal norms of fairness dictate that one cannot be tried multiple times for the same alleged wrongdoing. The Fifth Amendment and Article 14, Section 7 of the International Covenant for Civil and Political Rights affirm that never “shall any person be subject for the same offence to be twice put in jeopardy of life or limb” (U.S.
Constitution, Fifth Amendment). The CSRT process, however, allows the director of the tribunals to send proceedings, upon final determination, back to a CSRT to be further considered. Therefore, no CSRT is final until it satisfies the director, and this open-ended structure has led to repeat hearings (Denbeaux & Denbeaux 2006, 37; Glaberson 2007). Some detainees have undergone two or three or more proceedings, and these repeat hearings have always taken place after the detainee was determined to be a non-enemy combatant. Many lawyers purport that these repeat CSRTs illustrate that the process is designed for permanent detention rather than the impartial review of Gitmo detentions (Glaberson 2007). Either way, ordering a rehearing upon an unfavorable outcome does not comport with U.S. law or international notions of fairness, and makes the CSRTs more inadequate.3

Ultimately, the CSRT process’s codified protections are, in practice, inoperative, and, more explicitly, it does not afford rights that ensure fairness. To make the CSRT process an “adequate and effective” substitute for the writ of habeas corpus, it must first adhere to its codified rights. If these rights are extended in theory, but wholly circumvented in application, they are not rights at all. The process must be implemented such that the detainees’ rights to rebut the evidence against them and present evidence on their own behalf are not nullified. Secondly, the CSRT process must unambiguously add to its protections a right to effective counsel, a reasonable, more balanced burden of

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3 Anecdotal evidence suggests outside pressure pervades the military commissions system established at Gitmo. Colonel Morris D. Davis is set to testify on behalf of defendants in the system after stepping down as its chief military prosecutor because of what he expressed as “‘significant doubts about whether [the system] will deliver full, fair, and open hearings’” (qtd. in Glaberson 2008). Although the CSRT and military commissions processes are distinct, these multiple CSRTs may be the result of “political pressure” exerted on decision-makers at Gitmo to create similarly favorable outcomes in the CSRTs (Glaberson 2008). If that is the case, the CSRTs’ lack of independence creates immediate and insurmountable constitutional deficiencies.
proof, and the prohibition of repeat hearings to yield favorable outcomes. In sum, it must be both redrafted and reapplied to ensure the review afforded under CSRTs adequately substitutes for the review granted under the writ of habeas corpus.

Benefits

Drafting and applying a new, strengthened CSRT process balances the government’s war powers and the detainees’ interests in a fair, rights-based process. *Hamdi v. Rumsfeld* employs *Mathews v. Eldridge*, 424 U.S. 319 (1976), to balance Hamdi’s interest as a detainee not to be detained indefinitely against the government’s interest in protecting national security. *Mathews* suggests “a judicious balancing” of these interests “through an analysis of ‘the risk of an erroneous deprivation’ of the private interest if the process were reduced and the ‘probable value, if any, of additional or substitute safeguards,’” (*Hamdi v. Rumsfeld* 2004, 529). Strengthening the CSRTs’ protections and better aligning them with habeas corpus’s standards of fairness balances these competing interests and satisfies the contemplated “calculus” of *Mathews*, (*Hamdi v. Rumsfeld* 2004, 529).

The interest in not being physically—and potentially indefinitely—detained “is the most elemental of liberty interests,” (*Hamdi v. Rumsfeld* 2004, 529). The deprivation of one’s personal liberty fundamentally requires maximum protection against error, particularly if that detention stems from an environment as chaotic as war. It is likely that some detained at Guantanamo Bay are not enemy combatants. The very nature of “unlawful enemy combatant” designation requires a thorough review of the case against such individuals. Many Gitmo detainees were captured by third parties in zones of combat and turned over for cash rewards. “The chances that the wrong people
have been captured are significant” (Huskey 2007, 44-45). Therefore, the detention and status of such individuals requires strict and timely scrutiny to ensure mistakes are not made. The interest against detention at stake and the likelihood that that interest is erroneously deprived require a process heavily fortified with rights for the accused.

Strengthening the protections afforded by CSRTs also satisfies the government’s wartime interests. Returning to the Congressional Record, Senator Lindsey Graham did not oppose the Specter-Leahy Amendment because Gitmo detainees deserved no review of their determinations as enemy combatants; he opposed that such a review take place in U.S. courts. He argued the military must be able “to do what they are best at doing: controlling the battlefield,” and the determination of combatant status directly extends from this power (Graham, Congressional Record, S10367). There is no doubt that the U.S. courts recognize the unique powers and processes afforded the military in times of war and are hesitant to intervene, but if constitutional guarantees are not met, U.S. courts have an obligation to become involved, even in times of war, (Cole 2003, 2570, 2567; Dellums v. Bush 1990; Youngstown Sheet & Tube Co. v. Sawyer 1952). Strengthening the protections of the CSRT process, therefore, eliminates the need for U.S. civilian court intervention by adequately providing rights to detainees, and it would allow combatant status determination to stay the province of the military.

Additionally, by ensuring the CSRT process is fully protective of individual rights, U.S. courts have a basis to deny frivolous suits brought by detainees. As CSRTs focus on the threshold review of if or if not a detainee is an enemy combatant, and do so with adequate protections, the flow of cases into U.S. courts will undoubtedly decrease. There will be greater certainty that an individual is properly held as a detainee, and he
will have less of a claim to access to U.S. courts. Truly front-loading the U.S. detainee process with sufficient rights assures those involved that mistakes are not made and grants legitimacy to each step in the process after initial detention. Currently, it would seemingly settle much of the *Boumediene* and *Bismullah* controversy.

Although, as a matter of application, it can be difficult to determine when newly established rules and protections require retroactivity, the fundamentality of the proposed CSRT rights unambiguously require retroactive application to all detainees. “The procedure[s] at issue…implicate the fundamental fairness of” the CSRTS, and, if not applied, create “‘an impermissibly large risk that the innocent will be convicted,’” (*Teague v. Lane* 1989, 312). When new procedures implicate such fundamental rights, “evenhanded justice” forces their universal and retroactive application, (*Teague v. Lane* 1989, 300).

Further, it must be noted that adding essential rights to the CSRT process does not close U.S. courts to all cases involving detainees. Each of the cases involving detainees’ rights recognizes the war on terror poses a number of unique, dynamic considerations, and therefore, it is impossible to proscribe the U.S. courts’ consideration of detainees’ cases. For example, the cessation of hostilities in Afghanistan might raise a question of whether enemy combatants captured during those hostilities required release or if such detainees could be justifiably detained further—either at Guantanamo Bay or in Afghanistan—for their role in the larger, ongoing war on terror? If such issues are presented, they may require judicial consideration—when constitutional rights are violated, the courts are compelled to respond. Because such unforeseen and wholly new legal issues may arise, increasing the rights afforded in the CSRT process is not a
panacea for the legal deficiencies, cases, or controversies that may stem from U.S. detainee policy. It is only a measure to resolve the current legal impasse regarding detainees’ access to the writ of habeas corpus, and to do so with a commitment to fundamental, individual rights.

Conclusion

In sum, legal cases and controversies have plagued U.S. detainee policy. The legal rights afforded through the United States’ detention processes went through a number of permutations, stemming largely from differences in opinion among the federal government’s branches regarding how to best, or how to most legally, prosecute the war on terror. Of particular importance, has been the detainees’ access to the writ of habeas corpus.

The Supreme Court is now facing Boumediene v. Bush, which seeks to resolve the Military Commissions Act’s suspension of habeas corpus. The writ’s exalted, fundamental character in U.S. law makes it unlikely the Supreme Court will validate the MCA’s suspension of habeas corpus, but it may nevertheless allow such a suspension if there is an adequate and effective substitute. The combatant status review process—the closest thing to habeas review granted to detainees at Guantanamo Bay—does not satisfy the writ of habeas corpus’s requirements. The rights that it does guarantee are, in practice, rendered wholly ineffectual, and it denies outright rights fundamental to unbiased decision-making and review. Therefore, modifying the combatant status review tribunal process and increasing the rights it guarantees is an essential and basic step to aligning U.S. detainee policy with U.S. law, habeas corpus review, and internationally recognized standards of fairness.
Moreover, such an increase in individual detainee rights and a strengthening of the CSRT process satisfactorily balance detainees’ interests against the erroneous deprivation of their liberty through detention and the government’s interest in continuing to protect the national security. If strengthened with additional rights, the CSRT process can adequately serve as a substitute for the writ of habeas corpus, and thus sufficiently protect individual rights, stay within the hands of the armed services, and ensure U.S. detentions are justified from the beginning. The most pressing legal issues are resolved, and U.S. policy is outwardly more protective of individuals’ substantive and procedural rights, priming the war on terror to continue, if it must, with a sufficient basis in justice and fairness.
References


*Congressional Record.* 2006. 109th Cong., 2d sess., vol. ________


Detainee Treatment Act. 2005. H.R. 2863, Title X.


