YOU SHAN'T HAVE THE BODY: IS ILLEGAL DETENTION REALLY OVER AFTER THE PLANNED SHUTDOWN OF GUANTANAMO BAY?

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"The Habeas Corpus secures every man here, alien or citizen, against everything which is not law, whatever shape it may assume."[1]

"Freedom of the person under the protection of habeas corpus I deem [one of the] essential principles of our government."[2]

I. INTRODUCTION

Picture the scene: a screen flashes across the television exclaiming, "we interrupt your normally scheduled program to bring you breaking news: Washington, D.C. and New York City have been devastated by another terrorist attack." The American response is swift and aggressive. The terrorist cell responsible is quickly identified as a new stateless terrorist cell called Erhaabi. The country is placed into a state of emergency. The President declares that the country has entered the second War on Terror and will take each and every step necessary to protect the freedom of the United States.

As the War on Terror rages, the United States enters the territories occupied by Ehraabi and begins the offensive. As the military pushes from the borders towards the capital, the security forces begin rounding up individuals suspected of being engaged in terrorist activities in connection with Erhaabi. The Government's evidence on these individuals is minimal at best, but they believe they have enough evidence to suspect that these individuals are engaged in terrorist activities. Based upon that determination, the Government decides they have sufficient reason to hold these prisoners indefinitely—with or without a determination of guilt or a statement of charges. The United States has been down this road before,

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[1] Letter from Thomas Jefferson to A.H. Rowan, (Sept. 26, 1798), http://famguardian.org/subjects/politics/thomasjefferson/jeff1520.htm.

[2] President Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), http://famguardian.org/subjects/politics/thomasjefferson/jeff1520.htm.

after the attacks of September 11, 2001. Now, the nation is faced with a similar issue, and the question becomes how will it respond? Will the court decisions that resulted from the unlawful detentions at Guantanamo Bay be respected and supported, or will the President decide that national security necessitates implementation of a renewed policy to hold these individuals indefinitely without sentencing or a trial?

This Note will explore the status of enemy combatants after the habeas corpus litigation that surrounded the detention of suspected terrorists at Guantanamo Bay. It will focus on how far the rights of enemy combatants advanced and, more specifically, what result would follow if another terrorist attack struck the United States on the level of 9/11. Part II will discuss the history of habeas corpus and why our Founding Fathers believed it was such an integral part of our Constitution. Part III will look at the court decisions that came out as a result of the detention of suspected terrorists at Guantanamo Bay following September 11, 2001 and the War on Terror. Part IV will discuss where that leaves detainees classified as enemy combatants presently, and what would happen if the United States were the subject of another terrorist attack causing the War on Terror and its underlying policy to be continued for the foreseeable future.

II. THE HISTORY OF HABEAS CORPUS

The writ of habeas corpus is a well-established principle that developed nearly a millennium ago.[3] In fact, some historians believe the writ of habeas corpus has its roots in the Magna Carta.[4] While its original purpose was "to bring people into court rather than out of imprisonment," it quickly developed into a powerful writ capable of challenging an unlawful or unjustified detention.[5] Before this evolution, the writ served the purpose of "authoriz[ing] the judiciary to bring people (such as witnesses and jurors) before the court."[6] After this evolution, the writ became the "guardian of liberty" and was eventually codified in the historic Habeas Corpus Act of 1679.[7]

The Habeas Corpus Act laid the groundwork upon which the Great Writ was to be incorporated into the American Constitution by the Founding

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[3] Clay V. Bland, Jr., *A Constitutional Limitation: The Controversy Surrounding the Military Commissions Act of 2006 and the Writ of Habeas Corpus*, 53 LOY. L. REV. 497, 501 (2007).

[4] *Id.* at 501 n.19.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 502–03.

Fathers. It governed all persons "committed or detained . . . for any crime"[8] and explicitly barred unlawful or illegal imprisonment.[9] It did, however, provide for "temporary suspension of the writ in times of crisis and need" as determined by the Parliament.[10] From there, the habeas corpus doctrine was transported across the Atlantic Ocean to the settlers in the American Colonies, where it was eventually incorporated as a bedrock of the United States Constitution.[11]

As the only common law writ referenced within the Constitution, its unique position as a tool for liberty is indisputable.[12] While similar to its predecessor in the United Kingdom, the unique and exceptional position of the habeas corpus doctrine within the United States warrants a specific discussion of its development in this nation.

Habeas corpus translates roughly to "you shall have the body."[13] The writ of habeas corpus is meant for "the protection of individuals against the erosion of their right to be free from wrongful restraints on their liberty."[14] It shall only be restrained "when in cases of rebellion or invasion, the public safety may require it."[15] Jurisdiction over habeas corpus proceedings is given to the federal courts.[16] A writ can be granted by "[t]he Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."[17] However, a prisoner shall not be able to file for a writ of habeas corpus unless:

> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof,

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[8] Habeas Corpus Act 1679, 31 Car. 2, c. 2, § III (Eng.).

[9] *See id.* § II.

[10] Bland, *supra* note 3, at 503.

[11] U.S. CONST. art. 1, § 9, cl. 2.

[12] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 558 (2004).

[13] *Habeus Corpus Definition*, WEBSTER'S DICTIONARY, http://www.merriam-webster.com/dictionary/habeas%20corpus (last visited May 20, 2016).

[14] Jill M. Marks, Annotation, *Jurisdiction of Federal Court to Grant Writ of Habeas Corpus in Proceeding Concerning Alien Detainees Held Outside the United States*, 192 A.L.R. FED. 595 (2014).

[15] U.S. CONST. art. 1, § 9, cl. 2.

[16] 28 U.S.C. § 2241 (2016).

[17] *Id.*

> the validity and effect of which depend upon the law of nations; or (5) It is necessary to bring him into court to testify or for trial.[18]

After a judge issues a writ in favor of the petitioner, "the authorities responsible for the petitioner's custody are required to demonstrate that he or she is being detained lawfully."[19] If the authorities are unable to demonstrate the legality of the detention, the proper resolution is the release of the illegally detained individual.[20]

While this interpretation of the writ of habeas corpus finds its roots in the English heritage of the United States, which culminated in its inclusion in the Constitution, the modern interpretation of the writ took time to develop. At its earliest inception, the writ of habeas corpus was mainly used as a challenge to the jurisdiction of a court in deciding a matter before it.[21] From there, the writ of habeas corpus underwent a period of not insignificant expansion, leading to its most significant development in 1867.[22] These developments led to the greatest expansion of habeas corpus, by the Act of February 5, 1867 (known as the Habeas Act).[23] It was by this act of Congress that the writ of habeas corpus was extended to "any person . . . restrained of his or her liberty in violation of the constitution . . . or law of the United States."[24]

Unsurprisingly, the Habeas Act quickly came under attack in *Ex parte McCardle*.[25] In that decision, the Supreme Court stated in unequivocal terms that the Habeas Act "gives to the several courts of the United States . . . power to grant writs of *habeas corpus* in all cases where any person may be restrained of liberty in violation of the Constitution, or of any treaty or law of the United States."[26] In effect, this piece of legislation "brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of deprivation of liberty contrary to the National

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[18] *Id.*

[19] Marks, *supra* note 14, at 2b.

[20] 28 U.S.C. §2241.

[21] *See* United States v. Wiltberger, 18 U.S. 76, 105 (1820).

[22] *See* Max Rosenn, *State Prisoner Use of Federal Habeas Corpus Procedures: The Great Writ – A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 340–41 (1983) (discussing three key amendments to the Judiciary Act of 1789, which expanded the reach of habeas corpus to "federal officers in state custody for acts committed in furtherance of federal law" and "to subjects or citizens of foreign governments who were detained under state or federal authority for acts done pursuant to the law of a foreign sovereign").

[23] Act of February 5, 1867, ch. 28, 14 Stat. 385.

[24] *Id.*

[25] *Ex parte* McCardle, 73 U.S. 318, 324 (1868).

[26] *Id.* at 325.

Constitution, treaties, or laws."[27] By this act, the jurisdiction under habeas corpus was extended to its widest possible reach; as a guarantee to every person falling under the jurisdiction of the United States Constitution.[28]

It is this high position that the writ of habeas corpus has maintained in the United States since 1867. Not unlike a center in basketball or a safety in football, habeas corpus remains the final defender of freedom in our judicial system. Whether used to ensure proper process in criminal proceedings,[29] or to challenge the legality of a prisoner's incarceration,[30] habeas corpus is the tool to utilize when personal liberty is at stake. Most importantly, this privilege is an absolute constitutional right that cannot be stripped, diminished, or abolished without express authorization by Congress under the conditions set forth in the Suspension Clause.[31]

III. ANALYSIS OF HABEAS CORPUS AT GUANTANAMO

The controversial detention and interrogation of suspected terrorists at the United States Naval Base at Guantanamo Bay was a policy enacted in response to the tragic terrorist attacks of September 11, 2001.[32] From that point forward, the Executive Branch began detaining suspected terrorists and other individuals with links to al Qaeda, as material witnesses.[33] The most troubling of these post-September 11 detentions were those of persons labeled "enemy combatants," whose detentions were originally authorized on a continuing, indefinite basis with nothing more required than a decision to label that individual as an enemy combatant.[34]

However, before diving into the specific cases coming out of Guantanamo, and in order to understand why the Government arrived at such a position regarding the detention of enemy combatants, it is important to first note a significant United States Supreme Court case decided at the end of World War II. The case involved several German nationals, who surrendered to the United States Army and were detained following

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[27] *Id.* at 325–26.

[28] *Id.* at 326.

[29] 39 AM. JUR. 2D *Habeas Corpus and Postconviction Remedies* § 1 (2006).

[30] 28 U.S.C. § 2241 (2011).

[31] U.S. CONST. art. 1, § 9, cl. 2.

[32] *See* Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) (describing President Bush's plan for the detention of suspected terrorists following the attacks of September 11, 2001).

[33] *See* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 24 (2003).

[34] *See infra* notes 47–165 (describing the challenges to the detention of enemy combatants, which illuminates the lack of procedures and safeguards in place for a person to combat an official designation as an enemy combatant as identified by the military).

conviction by a military commission.[35] The prisoners in that case were captured outside the United States, provided a legitimate proceeding to determine guilt, granted review of that conviction by the proper military authorities, and transferred to a prison in Germany for detention.[36] These individuals petitioned the United States for a writ of habeas corpus, which the Court ultimately denied.[37] The rationale for this decision rested on the location of the prisoners (and the procedures of their detention)—outside of the sovereign territory of the United States—and not on their status as aliens.[38] The court acknowledged that "the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection."[39] But where "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States" no privilege of habeas corpus is extended.[40] The key portion of the Court's decision hinged on the notion of the lack of sovereign territorial control by the United States over the prison in Germany.[41] This position is clear to see as the Court expressly distinguished *Eisentrager* from its earlier decision in *In re Yamashita*,[42] where the Court extended the writ of habeas corpus to the Philippines because the United States had sovereignty over the Philippines at that time.[43]

It seems apparent that this case provided the basis for the policy undertaken by the United States regarding the detention of enemy combatants at Guantanamo Bay. Government officials believed, and the Court at first seemed to support, the contention that because Guantanamo Bay was outside the sovereign territorial jurisdiction of the United States, there was no room for judicial review.[44] According to the Executive Branch, this power was only burgeoned by The Authorization for Use of Military Force (AUMF), which specifies that the President has power "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such

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[35] Johnson v. Eisentrager, 339 U.S. 763, 765 (1950).
[36] *Id.* at 766.
[37] *Id.* at 780–81.
[38] *Id.* at 778.
[39] *Id.* at 777–78.
[40] *Id.* at 778.
[41] *Id.* at 780.
[42] *In re* Yamashita, 327 U.S. 1 (1946).
[43] *Id.* at 66.
[44] *Id.*

organizations or persons . . . ."[45] It would take an almost constant assault upon the Supreme Court to finally tear down the Government's position, and attempt to restore the guaranteed right to the writ of habeas corpus to those prisoners detained at Guantanamo Bay. For the purposes of this Note, the focus will be on four key cases that accurately highlight the fight between the detainees at Guantanamo and the United States Government.[46]

A. Hamdi v. Rumsfeld *&* Rasul v. Bush, *The First Steps*

Two cases, decided concurrently by the Supreme Court, dealt the first major blow to the Government's position regarding the detention of enemy combatants at Guantanamo Bay. These two cases were *Rasul v. Bush*[47] and *Hamdi v. Rumsfeld*.[48] Together, they combined to stand for the principle that neither the AUMF nor any other authority stripped the United States district courts of jurisdiction to hear habeas corpus petitions from prisoners being detained at Guantanamo Bay.[49]

In *Rasul*, the petitioners were two Australian citizens and twelve Kuwaiti citizens captured during hostilities between the United States and the Taliban in Afghanistan.[50] Petitioners had subsequently been held at Guantanamo Bay Naval Base in Cuba under the control of the United States military.[51] In their petition to the court, these detainees alleged that "none of the petitioners ha[d] ever been a combatant against the United States or ha[d] ever engaged in any terrorist acts," and further, "none ha[d] been charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal."[52] Under habeas corpus (and other federal statutes), these petitioners challenged the legality of their detention and sought to "be informed of the charges against them, to be allowed to meet with their families and with counsel, and to have access to the courts or some other impartial tribunal."[53] The Government's position against these petitioners was clear, based on the AUMF and the precedent in *Eisentrager*, that "aliens detained outside the sovereign territory of the

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[45] Authorization for Use of Military Force, Pub. L. No. 107–40, § 2(a), 115 Stat. 224 (2001).

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

[47] *Rasul*, 542 U.S. at 466.

[48] *Hamdi*, 542 U.S. at 507.

[49] *See id; see also Rasul*, 542 U.S. at 466.

[50] *Rasul*, 542 U.S. at 470–71.

[51] *Id.* at 471.

[52] *Id.* at 471–72.

[53] *Id.* at 472.

United States [may not] invok[e] a petition for a writ of habeas corpus."[54] After briefly discussing the history of the writ of habeas corpus, including its historic purpose and application, the Supreme Court determined that the key issue presented was "whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ultimate sovereignty."[55]

The Court's answer to this question was a resounding yes.[56] The rationale for that decision was two-fold. First, unlike in *Eisentrager*, the petitioners in this case "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 second, "for more than two years they have been *imprisoned in territory over which the United States exercises exclusive jurisdiction and control.*"[57] The importance of deciding that habeas did not extend in *Eisentrager* was thus linked to (1) the fact that the German prisoners did receive some process analogous to habeas corpus and (2) the fact that the United States exercised neither territorial sovereignty nor de facto sovereignty over the prison in Germany.[58] Therefore, the fact that "the United States shall exercise complete jurisdiction and control over and within [the areas of the lease]," and the lease shall remain in effect "[s]o long as the United States of America shall not abandon the . . . naval station of Guantanamo," is more than sufficient to establish that the United States has de facto sovereignty over the operations and activities of the base, even though they recognize "the ultimate sovereignty of the Republic of Cuba over the [leased areas]."[59]

In *Hamdi*, the petitioner was an American citizen who moved to Afghanistan before the start of the war, was arrested by the Northern Alliance and interrogated by the United States in Afghanistan where he was labeled an enemy combatant, and was later transferred to Guantanamo Bay.[60] Once the military realized Hamdi was an American citizen, he was transferred to a naval brig in the United States for holding.[61]

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[54] *Id.* at 472–73.

[55] *Id.* at 475 (quotation omitted).

[56] *Id.* at 484.

[57] *Id.* at 476 (emphasis added).

[58] *Id.* at 481–82 (explaining that "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of the exact extent and nature of the jurisdiction or dominion exercised in fact by the [government]") (quotation omitted).

[59] *Id.* at 471.

[60] Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

[61] *Id.*

Regarding his detention, "[t]he Government contend[ed] that Hamdi is an 'enemy combatant,' and that this status justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted."[62] On the other hand, Hamdi's father, who filed the petition on Hamdi's behalf, believed that "Hamdi's detention was not legally authorized" because "as an American citizen . . . Hamdi enjoys the full protections of the Constitution," which guarantees certain safeguards, namely, access to counsel and notice of charges under the Fifth and Fourteenth Amendments.[63] Yet, the only evidence the Government provided in support of Hamdi's detention and treatment as an enemy combatant was Hamdi's involvement with a Taliban military unit.[64] The Government reasoned that since "al Qaeda and the Taliban were and are hostile forces engaged in armed conflict with the armed forces of the United States," any "individuals associated with those groups were and continue to be enemy combatants."[65]

The district court found the Government's evidence unconvincing and requested production of "numerous materials for *in camera* review" in order to determine the legality of Hamdi's detention.[66] They reasoned that anything less than full production of documents allowed for the classification and detention of enemy combatants with "little more than the government's say-so."[67] The Fourth Circuit reversed the holding of the district court based on the fact that, "because it was undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, no factual inquiry or evidentiary hearing allowing Hamdi to be heard or to rebut the Government's assertions was necessary or proper."[68] Further, the Fourth Circuit found it irrelevant that Hamdi was a citizen because "one who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such."[69] They reasoned his citizenship "entitle[d] Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches."[70]

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[62] *Id.* at 510–11.
[63] *Id.* at 511 (quotation omitted).
[64] *Id.* at 513.
[65] *Id.* (quotation omitted).
[66] *Id.*
[67] *Id.*
[68] *Id.* at 514 (quotation omitted).
[69] *Id.* at 516 (quotation omitted) (citations omitted).
[70] *Id.* (quotation omitted).

The Supreme Court ultimately granted certiorari to determine "whether the Executive has the authority to detain citizens who qualify as 'enemy combatants.'"[71] The Court's analysis began by concluding that the AUMF did in fact operate as a Congressional authorization for Hamdi's detention.[72] Further, the "detention of individuals . . . for the duration of the particular conflict in which they were captured" when those individuals aided forces actively fighting the armed forces of the United States "is so fundamental and accepted an incident of war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[73] This is particularly true when "[t]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again."[74] The citizenship of that person is irrelevant to this analysis as "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant."[75] When a citizen of the United States "'associate[s] themselves with the military arm of the enemy government'" they are "'enemy belligerents within the meaning of . . . the law of war.'"[76]

Hamdi argued that this situation was distinguishable because of the possibility for an indeterminate length of detention due to the unique situation presented by the War on Terror.[77] Under the laws of war, "detention [of prisoners of war] may last no longer than active hostilities."[78] However, since "[a]ctive combat operations against Taliban fighters . . . [were] ongoing in Afghanistan," the "United States . . . [could] detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who engaged in armed conflict against the United States."[79] As such, so long as "the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of necessary and appropriate force, and therefore are authorized by the AUMF."[80]

The Court's decision found "legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, in fact, an enemy combatant" so long as that status "is established by concession or by some

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[71] *Id.*

[72] *Id.* at 517.

[73] *Id.* at 518.

[74] *Id.*

[75] *Id.* at 519.

[76] *Id.* (quoting *Ex parte* Quirin, 317 U.S. 1, 37–38, *modified sub nom.* United States *ex rel.* Quirin v. Cox, 63 S. Ct. 2 (1942)).

[77] *Hamdi*, 542 U.S. at 519–20.

[78] *Id.* at 520.

[79] *Id.* at 521 (quotation omitted).

[80] *Id.* (quotation omitted).

other process that verifies this fact with sufficient certainty."[81] It was on this part of the analysis that the Court disagreed with the Government's contentions.

Both Hamdi and the Government "agree[d] that, absent suspension, the writ of habeas corpus remain[ed] available to every individual detained within the United States."[82] Further, they agreed that the writ was not suspended.[83] However, the Government's contention was that even though "habeas petitioners would have some opportunity to present and rebut facts . . . courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process."[84] As such, due to the "flexibility of the habeas mechanism and the circumstances presented in this case" the evidence presented should be sufficient.[85] Any "further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake."[86] This reasoning was premised on a separation of powers argument, where the courts should only have limited review of Executive decisions and should "review [the government's] determination that a citizen is an enemy combatant under a very deferential 'some evidence' standard."[87] This analysis would involve the court "assum[ing] the accuracy of the Government's articulated basis for Hamdi's detention . . . and assess[ing] only whether that articulated basis was a legitimate one."[88]

To allow such an argument to pass, the Court would have been giving the Executive the power to detain "without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law."[89] This creates a serious "risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process."[90] Therefore, even where the Government does have a substantial interest in detaining individuals who pose a serious threat to national security, "history and common sense teach us that an unchecked system of detention carries the potential to become a means for

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[81] *Id.* at 523.
[82] *Id.* at 525.
[83] *Id.*
[84] *Id.* at 526.
[85] *Id.*
[86] *Id.* at 527.
[87] *Id.* (quoting Brief for Respondents at 26, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696)).
[88] *Id.* at 527–28.
[89] *Id.* at 528.
[90] *Id.* at 530.

oppression and abuse of others who do not present that sort of threat."[91] The Founders specifically included the writ of habeas corpus, as well as other checks within all three branches, to avoid the type of oppression that could result from an unchecked Executive Branch.[92]

The resolution was to balance these competing interests. The Court expanded on its holding in the companion case of *Rasul v. Bush*, by ruling that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[93] These basic rights are "constitutional promises [which] may not be eroded."[94]

The decisions in *Hamdi* and *Rasul* were a major first step in litigating the rights of individuals detained as enemy combatants. They reaffirmed access to the fundamental writ of habeas corpus, even during times of war, and reaffirmed that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[95] Further, both cases confirmed that "unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."[96]

It was clear from these decisions that status as an enemy combatant was not enough to deprive an individual of due process of law. Both cases stand for that principle. However, the Court left one main question unanswered: what process was due to enemy combatants? This left the door open for future restraints by the Executive and Legislative Branches in an attempt to find the outermost limits of what was allowable. It also set the stage for the next major challenge in the courts.

B. The Detainee Treatment Act of 2005 and Hamdan v. Rumsfeld

In response to the Court's decisions in *Hamdi* and *Rasul*, the Government passed The Detainee Treatment Act of 2005 (hereinafter "the DTA").[97] The DTA "place[d] restrictions on the treatment and interrogation

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[91] *Id.*

[92] *Id.*

[93] *Id.* at 533.

[94] *Id.*

[95] *Id.* at 536 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (explaining that the President's position as Commander-in-Chief is not without limits)).

[96] *Id.*

[97] Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2743 (2005) [hereinafter "DTA"].

of detainees in U.S. custody, and it furnishe[d] procedural protections for U.S. personnel accused of engaging in improper interrogation."[98] Further, the DTA "set[] forth certain 'procedures for status review of detainees outside the United States.'"[99] These procedures include using Combatant Status Review Tribunals, or "CSRTs[,] to determine the proper classification of detainees held in Guantanamo Bay, Iraq, and Afghanistan" and the adoption of "certain safeguards as part of those procedures."[100] Most troubling, the DTA removed federal jurisdiction over habeas corpus petitions filed by detainees at Guantanamo Bay.[101] Instead, the United States Court of Appeals for the District of Columbia Circuit was given "exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant."[102] With the passing of the DTA, it was apparent that both Congress and the President believed the CSRT proceedings, and the limited judicial review of the findings of those procedures, was sufficient to satisfy the Supreme Court's requirement of "some process" after *Rasul* and *Hamdi*. That belief was swiftly challenged.

The first challenge to the constitutionality of the DTA came in the form of *Hamdan v. Rumsfeld*.[103] Hamdan is a Yemeni national who was captured by militia forces in Afghanistan and turned over to the United States.[104] After his capture, Hamdan was held at the U.S. prison in Guantanamo Bay.[105] Hamdan filed a petition to challenge his detention, specifically alleging that "the procedures that the President has adopted to try him violate the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him."[106] The Government's main argument against Hamdan's petition was that it should be dismissed because all claims of this type were barred under the newly established DTA, even though his case was already pending at the time of passage of the DTA.[107]

Rather than deciding the overall constitutionality of the DTA, the Court merely focused on the argument asserted by the Government.[108] The

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[98] Hamdan v. Rumsfeld, 548 U.S. 557, 572 (2006) (citing DTA §§ 1002–04).
[99] *Id.* (quoting DTA § 1005).
[100] *Id.* (citing DTA § 1005).
[101] DTA § 1005(e)(1).
[102] DTA § 1005(e)(2)(A).
[103] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
[104] *Id.* at 566.
[105] *Id.*
[106] *Id.* at 567.
[107] *Id.* at 572.
[108] *See id.* at 574–76.

Government's argument rested on the belief that the DTA "had the immediate effect, upon enactment, of repealing federal jurisdiction not just over detainee habeas actions yet to be filed but also over any such actions then pending in any federal court."[109] However, the Court, citing "[o]rdinary principles of statutory construction," found this argument unconvincing.[110] The Court reasoned that "[i]f a statutory provision would operate retroactively as applied to cases pending at the time the provision was enacted, then our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."[111] Therefore, the Court was unwilling to read into the DTA a bar on cases pending before its enactment, and thus, there was no need to reach the issue of the constitutionality of the DTA.[112]

C. Boumediene v. Bush, *The First Real Victory*

Instead, the Court waited two years, until the case of *Boumediene v. Bush*,[113] to determine the constitutionality of the DTA.[114] However, *Boumediene* stands for far more than simply the decision that struck down the DTA as unconstitutional. It was also the widest reaching decision by the Supreme Court on the issue of detainees being held as enemy combatants at Guantanamo Bay in Cuba.[115] With *Boumediene*, the Court once and for all affirmed that the writ of habeas extended to all prisoners being held at Guantanamo Bay and the procedures being utilized by the Government were not sufficient to meet the strict constitutional requirements as a substitute for habeas corpus.[116]

The decision in *Boumediene* stands for three key principles. First, "the constitutional privilege of habeas corpus" extends to all people detained at Guantanamo Bay whether they be United States citizens or aliens.[117] Second, the DTA's "provi[sion of] certain procedures for review of the detainees' status . . . [is] not an adequate and effective substitute for habeas corpus."[118] Finally, 28 U.S.C. § 2241(e) (also known as the Military

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[109] *Id.* at 574.
[110] *Id.* at 575.
[111] *Id.* at 576 (internal quotation marks omitted).
[112] *Id.*
[113] Boumediene v. Bush, 553 U.S. 723 (2008).
[114] *Id.*
[115] *Id.*
[116] *Id.* at 732.
[117] *Id.*
[118] *Id.* at 733.

Commissions Act of 2006), "operates as an unconstitutional suspension of the writ."[119]

The Court reached this decision after a lengthy historical analysis of the writ of habeas corpus. The Framers clearly "viewed freedom from unlawful restraint as a fundamental precept of liberty" and thus recognized the "necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system."[120] This "is evident from the care taken to specify the limited grounds for its suspension."[121] It further "ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty."[122] The writ of habeas corpus was a key part of the separation of powers principles that were at the foundation of this country's creation.[123]

As such, it would create a troubling result to accept the Government's position that, because they do not have formal sovereignty over Guantanamo Bay, the Constitution's protections do not attach.[124] To allow this result would be to give the political branches a means "to govern without legal constraint" simply by "surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States."[125] The Constitution does not work that way. It "grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where [the Constitution's] terms apply."[126] To give Congress and the President that power would equate to giving them "the power to switch the Constitution on or off at will."[127] Therefore, based on this factor (and others), the Court determined that the privilege of habeas corpus has full effect at Guantanamo Bay, and "[i]f the privilege . . . is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause."[128]

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[119] *Id.* (discussing 28 U.S.C. § 2241(e)(1) (2008), which states, "[n]o court, justice or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination").

[120] *Id.* at 739–40.

[121] *Id.* at 743.

[122] *Id.* at 745 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004)).

[123] *Id.*

[124] *Id.* at 764.

[125] *Id.* at 765.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 771.

Further, the DTA does not provide an adequate substitute for habeas corpus.[129] For starters, the DTA was "intended to circumscribe habeas review" rather than provide a more efficient means of review while "preserv[ing] habeas corpus review as an avenue of last resort."[130] The DTA further granted exclusive jurisdiction to the court of appeals, rather than the district court, which "indicates Congress intended the Court of Appeals to have a more limited role in enemy combatant status determinations than a district court has in habeas corpus proceedings."[131] Moreover, "[i]n passing the DTA, Congress did not intend to create a process that differs from traditional habeus corpus process in name only," rather "[i]t intended to create a more limited procedure."[132]

At the very minimum, "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."[133] To be effective, "[t]he habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain."[134] As such, "where relief is sought from a sentence that resulted from the judgment of a court of record . . . considerable deference is owed to the court that ordered confinement."[135] However, "[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing."[136]

The key question for a court, then, is whether the CSRT proceedings are an adequate substitute for habeas corpus, as the Government alleges. In order to make that determination, it requires a court to look at "the sum total of procedural protections afforded to the detainee at all stages, direct and collateral."[137] The most troubling deficiency of process within the CSRT proceedings are the "constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant."[138] A detainee has only "limited means to find or present

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[129] *Id.* at 772.

[130] *Id.* at 777.

[131] *Id.* at 778 (explaining that the fact-finding capabilities of the district courts provide greater review in habeas corpus proceedings than would be available when appellate review was exclusively reserved to the Court of Appeals for the District of Columbia Circuit).

[132] *Id.*

[133] *Id.* at 779 (quoting INS v. St. Cyr, 533 U.S. 289, 302 (2001)).

[134] *Id.* at 783.

[135] *Id.* at 782.

[136] *Id.* at 783.

[137] *Id.*

[138] *Id.*

evidence to challenge the Government's case against him."[139] Further, detainees are not granted access to counsel and often are not given notice of the "most critical allegations that the Government relied upon to order his detention."[140] Any attempt at process that exists within the CSRT proceedings is little more than surface level window-dressing; detainees are limited to viewing the unclassified portion of the Government's case, their ability to cross-examine witnesses is limited without the assistance of counsel, and there is no protection from hearsay evidence, allowing the Government's case to rest on testimony inadmissible in any other judicial setting.[141]

While it is clear that major deficiencies exist in the CSRT proceedings, that analysis was only part of the Court's ultimate decision regarding habeas corpus. It is important to remember that

> [h]abeus corpus is a collateral process that exists, in Justice Holmes' words, to 'cut through all forms and go to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.'[142]

Even if the CSRT procedures were deemed sufficient and satisfactory under a due process inquiry, "the Suspension Clause remains applicable and the writ relevant."[143] Due process is not a substitute for habeas corpus, rather, habeas corpus exists outside of the proceeding in order to protect against the "considerable risk of error in the tribunal's findings of fact."[144] Thus, "[f]or the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings."[145] This requires granting the court the "authority to assess the sufficiency of the Government's evidence against the detainee"[146] and "the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding."[147] It is not, and never can be, sufficient to allow the

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[139] *Id.*
[140] *Id.* at 784.
[141] *Id.*
[142] *Id.* at 785 (quoting Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).
[143] *Id.*
[144] *See id.* at 785–86.
[145] *Id.* at 786.
[146] *Id.*
[147] *Id.*

Government to set the entire record of evidence being used in a proceeding, when that proceeding is challenging the very determination the Government made based upon that evidence.[148]

After four years of continued litigation, the Court finally answered the question of what process is required in order to satisfy habeas corpus. While the Court acknowledged that in certain circumstances "habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough [and adversarial] than they were here," that was not the situation presented in this context.[149] The CSRT proceedings, standing on their own, are not sufficient as to effectively cut-off access to a full habeas (or habeas-like) review.

Therefore, unless the DTA allowed for appropriate review in a proceeding that met the standards as outlined above, the statute must act as an unconstitutional suspension of the writ of habeas corpus. The language of the DTA highlights three key deficiencies that raised concerns regarding its constitutionality.[150] First, the DTA was silent as to the court of appeals' power to release a detainee "should the court find that the standards and procedures used at his CSRT hearing were insufficient to justify detention."[151] Second, the DTA does not explicitly include language allowing detainees to assert "their most basic claim: that the President has no authority under the AUMF to detain them indefinitely."[152] These first two potential constitutional infirmities could be cured, however, if the court was willing to read the statute's silence as an affirmative statement in allowing these actions.[153]

Thus, the third and final deficiency in the DTA is controlling: "whether the DTA permits the Court of Appeals to make requisite findings of fact."[154] The issue here is twofold: first, can the court review or correct the factual findings of the CSRT, and second, can additional evidence be considered in this process.[155]

As to the first question, petitioners are able to "request review of their CSRT determination" in the limited scope of "whether the CSRT followed the 'standards and procedures' issued by the Department of Defense and

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[148] *See generally id.*
[149] *Id.*
[150] *Id.* at 787.
[151] *Id.* at 787–88.
[152] *Id.* at 788.
[153] *Id.*
[154] *Id.*
[155] *Id.*

assessing whether those 'standards and procedures' are lawful."[156] This requires "'that the conclusion of the Tribunal be supported by a preponderance of the evidence . . . allowing a rebuttable presumption in favor of the Government's evidence.'"[157] At best, this language creates a possibility that the court of appeals has the opportunity "to review or correct the CSRT's factual determinations" rather than "merely certifying that the tribunal applied the correct standard of proof."[158] But that is not where this fails.

The DTA fails as to the second prong, which requires "an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings" in order to satisfy constitutional requirements.[159] The language of the DTA clearly purports to limit the court of appeals to evidence introduced at the CSRT proceeding.[160] The Court of Appeals for the District of Columbia Circuit read this to mean "that the DTA allows introduction and consideration of relevant exculpatory evidence that was reasonably available to the Government at the time of the CSRT but not made part of the record."[161] However, even this liberal reading is insufficient to make the DTA proceedings a constitutionally sufficient substitute because "the detainee still would have no opportunity to present evidence discovered after the CSRT proceedings concluded."[162]

As such, the DTA cannot be a constitutional substitute for habeas corpus.[163] The DTA expressly limits the admission of newly discovered evidence, which is likely to be the critical evidence in a detainee's argument that he is not an enemy combatant.[164] Instead, under the DTA, all the court of appeals can do is determine whether "the CSRT followed appropriate and lawful standards and procedures."[165] Once that decision has been made, the court of appeals' jurisdictional limit has been reached and no further review is necessary under the DTA.[166] That is clearly not the same as the

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[156] *Id.* (quoting § 1005(e)(2)(C)).
[157] *Id.* (quoting § 1005(e)(2)(C)(i)).
[158] *Id.* at 788–89.
[159] *Id.* at 789.
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.* at 790.
[165] *Id.* at 789–90.
[166] *Id.* at 790.

review required under habeas corpus, and as such, the Supreme Court had no choice but to rule the DTA as invalid.[167]

IV. RESOLUTION

A. Where Are We Now?

After the Supreme Court's decision in *Boumediene* in June 2008, it seemed that the situation for detainees at Guantanamo Bay was finally going to be resolved. Coming out of *Boumediene*, the Supreme Court affirmed that "men imprisoned at Guantanamo Bay have the constitutional right to habeas corpus."[168] As the Executive Director of the Center for Constitutional Rights (CCR) Vincent Warren put it, "[t]he government will now have to put up or shut up: it will have to show an impartial judge enough evidence to justify detention."[169] It finally appeared as though the judiciary had put the issue to rest by holding the Executive Branch accountable for their actions, even when taken in the name of national security.[170] According to CCR President Michael Ratner, this decision "rightfully discourages Congress and the President from establishing deceptive, extralegal proceedings in times of crisis and confirms our qualms about inventing extralegal and inhumane processes to detain human beings—no matter who they are or where they come from."[171] With *Boumediene*, those parties intimately involved in this tripartite of cases finally had the victory they expected and needed from the Supreme Court.[172]

Things only seemed to be getting better for the detainees in Guantanamo Bay when President Barack Obama was elected in November of 2008, running on a platform that included closing Guantanamo as a "centerpiece" of the campaign.[173] During the campaign the message was clear, he would not stand for the continued indefinite detention of enemy combatants at Guantanamo Bay and he was going to do something about

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[167] *Id.* at 792.

[168] Press Release, Ctr. for Constitutional Rights, Landmark Win for Guantanamo Detainees! (Jun. 12, 2008), https://ccrjustice.org/home/press-center/press-releases/landmark-win-guantanamo-detainees.

[169] *Id.*

[170] *See id.*

[171] *Id.*

[172] *See id.*

[173] Glenn Greenwald, *Democrats Continue to Delude Themselves About Obama's Failed Guantanamo Vow*, THE INTERCEPT (Aug. 12, 2015, 9:09 AM), https://theintercept.com/2015/08/12/democrats-continue-lie-obamas-failed-guantanamo-vow/.

it.[174] He echoed that promise on his first day in office, when "[he] promised to close the Prison at Guantanamo [Bay] within a year."[175] As of today, those promises have fallen on deaf ears.[176]

To the contrary, President Obama actually continued the system of indefinite detention during his presidency. In 2011, President Obama signed an Executive order "that create[d] a formal system of indefinite detention for those held at the U.S. military prison at Guantanamo Bay, Cuba, who continue[d] to pose a significant threat to national security."[177] While this does not strip the detainees of their right to habeas corpus, it affirms the Executive's position that "it has the legal authority to continue to hold all of the detainees at Guantanamo Bay under the laws of war."[178] This Executive action put into force Obama's belief in his "right to continue to *imprison Guantanamo detainees without charges or trial*—exactly what made Guantanamo so evil in the first place—based on the hideous new phrase 'cannot be tried but too dangerous to release.'"[179] His focus was to attempt to relocate those prisoners held at Guantanamo, preferably to U.S. prisons, instead of actually closing the prison.[180] If his plan was successful, it would have "institutionalize[d] and strengthen[ed] the Bush/Cheney scheme of indefinite detention."[181]

Further evidence of this position was found in Obama's continued unwillingness to follow through with promises to veto bills that place obstacles in the path of closing Guantanamo.[182] From 2012 through 2016, each Defense Authorization Bill that passed Obama's desk included either (1) a restriction on the transfer of Guantanamo Bay detainees to U.S. prisons or elsewhere; or (2) further codified the process of indefinite detention at Guantanamo.[183] In each of the years between 2012 and 2015, Obama threatened a veto of those bills only to balk and eventually sign the

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[174] *Id.*

[175] *Close Guantanamo*, AM. C.L. UNION, https://www.aclu.org/feature/close-guantanamo (last visited Jan. 19, 2015).

[176] *See id.*

[177] Peter Finn & Anne E. Kornblut, *Obama Creates Indefinite Detention System for Prisoners at Guantanamo Bay*, WASH. POST (Mar. 8, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/03/07/AR2011030704871.html.

[178] *Id.*

[179] Greenwald, *supra* note 173.

[180] *See id.*

[181] *Id.*

[182] Jenna McLaughlin, *Obama Has Threatened Vetoes Over Guantanamo Before, and Caved In Every Time*, THE INTERCEPT (Oct. 19, 2015, 5:05 PM), https://theintercept.com/2015/10/19/obama-has-threatened-vetoes-over-guantanamo-before-and-caved-in-every-time/.

[183] *See id.*

bill in its original form with the Guantanamo-saving provisions.[184] Finally, Obama did veto the first draft of the 2016 Defense Authorization Bill, citing "across-the-board budget cuts" and restrictions on the closing of Guantanamo as his reasons.[185] However, even though the revised bill did not include any changes regarding Guantanamo Bay, Obama's advisor confirmed he would sign the revised bill.[186] The clock continued ticking for Obama to come through on his campaign promise, but what little progress he made during his two terms has done more to add to rather than detract from the current system of indefinite detention.

To make matters worse, the Supreme Court, as recently as 2011, has declined to clarify the rights of the prisoners held at Guantanamo Bay.[187] The more time that passes from the Court's decision in *Boumediene*, the more controversial the Court's glaring omission, namely, leaving "the details of how to provide hearings for the detainees up to the (not entirely grateful) judges of the D.C. Circuit," which has become the central focus of the decision.[188] As of 2011, all detainees released from Guantanamo came as the result of Executive action.[189] Even worse, those court decisions that have affected prisoners at Guantanamo have all gone against the detainees.[190] These decisions include a ruling that "the government may rely on hearsay evidence that would not be allowed in federal court" and a determination that "a preponderance of the evidence, the lowest standard, is enough to make the case for continued detention."[191] The Supreme Court's continued silence thus means one of two things: it either agrees with the standards being applied by lower courts, or it simply does not wish to comment on the appropriate standards to be used.[192] Either way, it is becoming increasingly possible to read the decision in *Boumediene* as

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[184] *Id.* (explaining that the 2012 bill included a provision that "codified a process of indefinite detention and barred the use of federal money for building a detention facility in the U.S. for transfer of detainees," the 2013 bill "placed restrictions on transferring detainees from Guantanamo Bay to foreign countries and the U.S.," the 2014 bill continued "to uphold restrictive policies about detainees in Guantanamo," and the 2015 bill "banned the use of funds for an additional facility for the transfer of detainees").

[185] Gregory Korte, *Obama Will Sign Defense Bill Despite Guantanamo Bay Closure Ban*, USA TODAY (Nov. 10, 2015), http://www.usatoday.com/story/news/politics/2015/11/10/obama-sign-defense-bill-despite-guantanamo-bay-closure-ban/75522470/.

[186] *Id.*

[187] *See* Robert Barnes, *Supreme Court Declines to Clarify Rights of Guantanamo Detainees*, THE WASH. POST (Apr. 10, 2011), https://www.washingtonpost.com/politics/supreme-court-declines-to-clarify-rights-of-guantanamo-detainees/2011/04/07/AFGN1VGD_story.html.

[188] *Id.*

[189] *Id.* (explaining that "not a single release has come as the direct result of a judicial order").

[190] *Id.*

[191] *Id.*

[192] *See id.*

something far short of the great victory its proponents originally believed it to be.

B. Where do we need to go?

As of today, indefinite detention appears far from over, whether in Guantanamo or elsewhere. So long as the United States Executive continues to find legal justification for indefinite detention under the AUMF, this is not likely to change anytime soon.[193] Under this system, the Executive Branch, rather than the Judiciary, is responsible for making determinations regarding the legality of detention.[194] But if the United States wants to remain the leader of the free world, it is time that it abides by the law and gives detainees the rights guaranteed under both the United States Constitution and international law.[195]

Therefore, the first step in ending the situation of unlawful and indefinite detention is to close Guantanamo—the right way. This will require a change in the policy surrounding these prisoners, not simply a transfer of these prisoners to a United States prison.[196] It is not sufficient to transfer the prisoners, "most of whom . . . have been imprisoned for more than a decade without charge or trial," to a prison in the United States, or elsewhere.[197] This type of action would simply "import[] indefinite detention and unfair military commissions . . . [and] create 'Guantanamo North' on American soil, entrenching the prison's blight on our nation's core values and the rule of law."[198] Instead, the Executive needs to "end[] indefinite detention without charge or trial; transfer[] detainees who have been cleared for transfer; and try[] detainees for whom there is evidence of wrongdoing in our federal criminal courts here in the U.S."[199] Anything short of providing these detainees with "all the rights the Supreme Court and the federal courts have said they are entitled to under the US Constitution" is insufficient.[200] As is the case with homicide, rape, and other serious offenses, if a federal prosecutor is unable to put together a case and win a conviction, there can be no further detention or imprisonment.[201]

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[193] *See* Susan Seligson, *Guantanmo: The Legal Mess Behind the Ethical Mess*, B.U. TODAY (May 28, 2013), http://www.bu.edu/today/2013/gitmo-the-legal-mess-behind-the-ethical-mess/.

[194] *See id.*

[195] *See id.*

[196] *See Close Guantanamo*, *supra* note 175.

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] Seligson, *supra* note 193.

[201] *See Close Guantanamo*, *supra* note 175.

National security can no longer be an acceptable argument supporting illegal or extralegal activities of the Government. In allowing this type of government action to continue, the courts and the American people are giving the government a blank check to constrain liberty and freedom whenever it wants. Our government was created with a system of checks and balances to avoid exactly this type of government overreach by one branch.

In order to succeed in ending indefinite detention, each branch must do their part. This starts with the Executive, who must legitimately "end indefinite detention and close the Guantanamo prison."[202] Further, the Executive Branch "should suspend the failing military commissions, and . . . transfer to federal court any detainee it seeks to prosecute."[203] In connection with this, Congress "must lift the unnecessary restrictions on transfer and release from Guantanamo" for those prisoners "whom the national security agencies and military have unanimously determined should be released."[204] Finally, and perhaps most importantly, "[t]he Supreme Court must define the scope of wartime detention, and ensure that the right to habeas corpus is a meaningful one that tests, and does not endorse, the government's case."[205] This requires first defining what process is necessary for detainees and, second, providing for the release of those detainees deemed to have received insufficient process under a habeas corpus proceeding.

V. CONCLUSION

In the immediate aftermath of September 11, 2001, this country officially entered into the "global War on Terror." Under the guise of this overbroad campaign, the United States Government has frequently declined to provide the most basic rights to prisoners captured and detained at the military prison at Guantanamo Bay. As of today, three (really, four) important court decisions have determined that these prisoners are entitled to habeas corpus, even if they are held at a prison outside of the territorial sovereignty of the United States. But the Supreme Court was, and has continued to be, unwilling to state what process is required for this distinct class of prisoners labeled as "enemy combatants." This has led to the

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[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*

continued, indefinite detention of suspected terrorists at Guantanamo Bay with little end in sight.

If a new terrorist attack happened on United States soil tomorrow, it is hard to imagine that the perpetrators of the new attack would find any solace in the Supreme Court's decision and the subsequent defiance in its proper implementation by the United States Government. Unless further action is taken, indefinite detention will continue to be a Government-mandated policy of the United States. It is time to stop this injustice. It is time for the three branches of the United States Government to come together to correct more than fifteen years of wrongs. Indefinite detention is not now and never has been legal. It is time the United States stop endorsing this illegal policy in the name of national security. Otherwise, this nation is no better than the repressive dictators or extremist terrorists it claims to be fighting.