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An Evolution of Legal Rights for Guantanamo Bay Detainees: Habeas Corpus in the 21st Century

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ABSTRACT

Guantanamo Bay, resting under United States' jurisdiction since the early 20th century, has infamously stood as the symbol for where alleged terrorists and constitutional protections disappear. However, between the years of 2004 – 2008, the United States Supreme Court ruled on four landmark cases, gradually providing Guantanamo Bay detainees constitutional protections and access to the writ of habeas corpus – allowing detainees for the first time to challenge the legalities behind their detentions. Subsequently, judicial and executive powers have continuously contested one another, as Supreme Court rulings and documents released by the Bush Administration have intentionally aimed to minimize the regulations set forth in ones prior. The purpose of this research is to identify and explain the main factors that ultimately brought petitioners before the Supreme Court. Specifically, the Court of Appeals relying on various statutory predicate and aggressive litigation released by the Bush Administration over the years in efforts to continuously limit legal resources provided to detainees through continuous court rulings.

Key Words: Guantanamo Bay, Habeas Corpus, Guantanamo Bay and Political Discourse

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'*The purpose of holding the prisoners at Guantanamo Bay was and is to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors*.'
- Lord Goldsmith, Former U.K. Attorney General

INTRODUCTION

In 2003 an individual known as Ammar al Baluchi disappeared in Pakistan and was not seen again until 2006, when he was transferred to the Guantanamo Bay detention facility in Cuba (CAGE, 2020). Al Baluchi claimed that, during this three-year clandestine period, he was captured and held by operatives of the Central Intelligence Agency (CIA) at a black site where he was continuously tortured in efforts to extract information regarding his plot with the September 11, 2001 terrorist attacks.

In 2007, the Federal Bureau of Investigation (FBI) joined CIA operatives at Guantanamo Bay, assisting in the interrogation methods used on al Baluchi (CAGE, 2020). In 2012, the U.S. government filed charges for a capital case against al Baluchi, to be analyzed in a military commission, rather than a traditional civilian criminal court. Mr. al Baluchi has attempted to file a motion to dismiss all testimonies he previously provided due to them being a product of the torture he experienced, but government lawyers have argued that torture did not occur, only methods of 'harsh treatment' that left no physical ramifications. Ammar al Baluchi waited eight years in the pre-trial phase while being detained at Guantanamo Bay, and the case is still pending today. Unfortunately, Ammar al Baluchi is only one of the hundreds of detainees who have been deprived of their legal and constitutional rights to habeas corpus and due process during their time at Guantanamo Bay.

Establishment of Guantanamo Bay

In 1903, following the conclusion of the Spanish American War, the United States negotiated with Cuba to lease 45 square miles of land located on the southeastern tip, in efforts to

house a U.S. Naval base (Strauss, 2013). The legal framework stemming from this agreement was twofold: an official agreement between the two states, and a treaty outlining the terms later ratified by congress.

In 1934, Congress ratified a follow up treaty making it explicitly clear that while the 45 square miles were to remain under complete Cuban Sovereignty and only intended for naval base purposes, the land was also under complete and total jurisdiction of the United States, giving the U.S. the abilities to decide what actions taking place on this land would be necessary over time (Strauss, 2013). Further, the agreement could only be terminated under the mutual agreement of both parties, in which the U.S. would ultimately vacate the area.

At the end of the Cuban Revolution in 1959, Cuba attempted to strip the United States of their jurisdiction of the 45 square miles, but the U.S. refused termination of the lease and continued occupancy (Elsea, J.K., & Else, D.H., 2016). The United States ended diplomatic relations with Cuba, and as a result, Cuba stopped sourcing water and electrical supplies – resulting in the U.S. sustaining the naval base entirely on its own.

The facility's primary functions began transitioning in the 1990s as it started housing Haitian asylum seekers arriving by boat (Elsea, J.K., & Else, D.H., 2016). The Naval Base housed around 6,000 individuals throughout the late 1990s, until it cleared out and began undergoing renovations to detain an upwards estimate of around 2,000 alleged terrorists – one of the first preparations for the onset of the global War on Terror following the September 11 attacks. In 2002, around 300 detainees were transferred in from Afghanistan, and by 2003 the facility had reached 683 detainees with over 700 other detainees being transferred out to other countries (Elsea, J.K., & Else, D.H., 2016). Since 2002, Guantanamo Bay has established

multiple camps that have detained 779 alleged terrorists, with 40 remaining today (American Civil Liberties Union, 2018).

Guantanamo Bay and its 45 acres rests on land under U.S. jurisdiction but total Cuban sovereignty. These terms, negotiated strategically, have mitigated the legal responsibility that U.S officials have held towards abiding by international law and the United States Constitution and legislative law when regulating the treatment of all non-US citizen detainees held at the facility (Strauss, 2013). Government officials operating this notorious 'legal black hole' began setting precedent for its tendency to neglect judicial law in 1992 when the Haitian asylum seekers (mentioned above) were actually en route to Florida when interdicted by the U.S. Coast Guard, brought over and detained at Guantanamo Bay, and held indefinitely with no access to protections under due process (Sanders, 2018).

American lawyers attempted to intervene and help the thousands of individuals detained, but the courts ruled Haitians were not entitled to any constitutional rights, nor did the Bill of Rights extend to aliens at Guantanamo Bay (Sanders, 2018). Setting precedent for allowing Haitians to suffer arbitrary detentions, the courts cited *Johnson v. Eisentrager* (1950) which ruled that U.S. lawyers could not file petitions for a writ of habeas corpus[1] on behalf of detainees that were located outside of U.S. sovereignty. Circumstances such as these are what led Gerald Neuman to refer to Guantanamo Bay as an 'anomalous zone', defined as 'a geographical area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended' (Neuman, 1996).

[1] *Habeas Corpus*: a court order that commands an individual or a government official who has restrained another to produce the prisoner at a designated time and place so that the court can determine the legality of custody and decide whether to order the prisoner's release.

The ‘anomalous zone’ notion strengthened in 2001 when President Bush announced the initiation of the War on Terror. The 2001 Authorization for Use of Military Force was adopted shortly afterwards, and Guantanamo Bay was then immediately utilized as the detention facility for what seemingly appeared as the means for keeping captured alleged terrorists far from access to habeas corpus or any protections under due process (Sanders, 2018). While this declaration of international war would have required officials to abide by international humanitarian law pertaining to the overall treatment of detainees, government officials have abused the physical site location in efforts to interpret and construct legal instruments in order to extract as much information from detainees as possible.

In October 2001, the PATRIOT Act was passed in order to strengthen counter terrorism measures in the United States. §236A. (5) strategically noted a detention period of seven (7) days before an alien needed to be charged with an offense:

> The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention.

While the language in the PATRIOT Act appeared to grant detainees a limited time frame on waiting, it did in fact infringe on basic human rights of life and liberty - individuals in the past have been entitled to know their charges upon holding.

Around the same time, international humanitarian law continued to be breached as the Bush administration announced members of Al Qaeda and the Taliban were not entitled to any protections set forth in Articles 3 and 4 of the 1949 Geneva Conventions. Common article 3

regulated the treatment of detainees as it prohibited torture and other cruel treatment, while article 4 outlined the criteria for captured hostiles to earn Prisoner of War (POW) status:

> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.[2]

Government officials immediately made arguments as to why captured members of the Taliban and Al Qaeda were not subject to these protections - (a) common article three pertained specifically to conflicts not of international nature (the War on Terror was indeed international in nature), and (b) individuals affiliated with these two organizations had failed to satisfy all of the laws of war mentioned above (Sanders, 2018). In concurrence, the Bush Administration announced the immunity that these detainees would have under the two articles of the Geneva Convention, and established a new classification of 'unlawful enemy combatants' - to whom protections under due process and international humanitarian law would not extend to.

[2] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/375-590007?OpenDocument

Additionally, in November of 2001, military commissions were established by the Bush Administration in further efforts to keep unlawful enemy combatants at arm's length from the protections and regulations typically over sought in military or civilian court.

2001 made history for the Bush Administration, as the declaration on the War on Terror, as well as subsequent legal arguments, set precedent for a new beginning on counter terrorism measures – with a strong component on how captured alleged terrorists and detainees would be treated henceforth. In 2002 the first detainees were captured and held at Guantanamo Bay.

While hundreds of detainees, such as Amar Al Baluchi, have since then suffered from objectively horrific experiences, only four have been able to bring their cases before the United States Supreme Court to challenge their access to habeas corpus, the legalities behind their detentions, and bringing to light the intentional legal limitations the government has tried placing on detainees during their time in captivity.

In 2005, reports were released on behalf of the U.S. Department of Defense on the living conditions of those imprisoned within the four camps at Guantanamo Bay. While all four camps had slightly different standards, all were noted to provide 'humane' and 'consistent' treatment and environments for detainees (Rhem, 2005). While the structure and organization of the camps were discussed, one key factor was missing: the treatment of detainees throughout interrogations.

Over the years, detainees have experienced arbitrary and lengthy detentions – many lasting 10 - 15 years without any charge or trial (Amnesty International, 2020). During interrogations, officials have used what is often referred to as 'enhanced interrogation methods' where many detainees have suffered from torture and other cruel, degrading treatment. In the 2019 New York Times article *What the C.I.A.'s Torture Program Looked Like to the Tortured*, sketches were featured, created by Abu Zubaydah, a prisoner who was able to depict the torture

he faced while in captivity at Guantanamo Bay (Rosenberg, 2019). His drawings included self-portraits of undergoing: waterboarding, small and large box confinements, sleep deprivation, stress positions, short shackling, and walling. Unfortunately, Abu Zubaydah's maltreatment was not an isolated occurrence, as the methods listed above were approved to be used during interrogations over the years.

When the Bush Administration announced the War on Terror in late 2001, partisanship throughout the country was clear, as Americans were in full support of most means necessary in order to protect the country (Kam, C. & Kinder, D., 2007). However, support quickly declined and over the years U.S. president administrations have taken vastly different approaches on their ways of addressing the War on Terror and treatment of detainees. While the Obama Administration made efforts to acknowledge the critics' perspective of Guantanamo Bay, the Bush administration made efforts to rebut it.

Critics have argued since the Bush Administration that lengthy detentions constitute cruel treatment, and Guantanamo Bay detainees should be entitled to trials under the traditional criminal justice system (Yoo, 2006). However, when concerns arose, officials within the Office of Legal Council (OLC) of the Bush Administration declared it was precedent per the laws of war, to detain prisoners of war for the duration of such hostilities, and Guantanamo Bay detainees were not being treated any differently.

Additionally, the OLC recognized that the purpose of traditional criminal justice systems, for those guilty of crimes, is to not only detain the individual, but to punish him/her for the crimes committed. Prisoners of war were indeed captured and detained, but this was in efforts to prohibit them only from being able to continue fighting against the nation, not to incorporate any type of punishment for doing so. Regulated under the 1949 Geneva Conventions, unless the captured

individual has allegedly violated the laws of war, a prisoner of war typically does not have access to an attorney or is given his/her Miranda rights – as a judicial review does not occur.

Officials also argued access to traditional systems could in fact result in the loss of intelligence (Yoo, 2006). Jose Padilla[3] was a unique example, as the American citizen was living in Afghanistan when he began training under al Qaeda. In 2002 the individual was en route to Chicago with plans to detonate a large bomb, when security captured him. Padilla was an invaluable asset to the U.S. intelligence community, as he could provide details on a future terrorist attack and other members of al Qaeda who were involved. Worried that a traditional criminal trial could result in the government losing custody of Padilla, the OLC was able to adhere to the CIA's legal recommendation of holding Padilla as a combatant. As his American citizenship exempted him from being detained at Guantanamo Bay, Padilla was transferred to Charleston South Carolina, where he was detained until later tried in criminal court for additional allegations.

In addition to detention and trials raising many concerns over the years, methods of interrogation employed on detainees have been of great debate. While torture and cruel treatment have been arguably defined and refined over the years - both have, nevertheless, been considered illegal. However, coercive interrogation methods are not (Yoo, 2006). These methods are those that have been approved by government and CIA officials to involve some physical touch of detainees, not amounting to torture or cruel treatment.

Approved techniques tend to change, as different administration officials fluctuate on their interpretations of torture. While many critics have argued that even coercive methods are a violation of human rights, Bush Administration officials have argued in return that the real human rights violation would be to allow thousands of innocent civilians to die as a result of one

[3] See *Hamdi v. Rumsfeld* (2004) for a ruling pertaining to enemy combatant status.

individual's intentions (Yoo, 2006). When it becomes a moral debate of the costs versus the benefits, officials believe critics tend to overestimate the cost and disregard the benefits, failing to understand just how useful coercive interrogation methods have been. An example of this is when American operatives used coercive interrogation on the individuals Ramzi bin al Shibh and KSM, who were able to provide information on the structure of, processes within, and the individuals involved in the al Qaeda organization (Yoo, 2006).

Unfortunately, one individual mentioned to be included on this mission was Abu Zubaydah, an individual who was mentioned earlier in this paper for his release of sketches in the *New York Times*, depicting interrogation techniques that were nothing short of torture or cruel treatment. Methods such as these have contributed to the concerns throughout the duration of the War on Terror.

In 2008, Barack Obama took office and promised to close Guantanamo Bay, as the bipartisan consensus over the facility continued to weaken (McCabe, 2019). Democrats more than ever questioned the morality and ethics of the country, and republicans continued to support the enhanced interrogation methods applied on enemy combatants. Obama later signed two executive orders: 13491 and 13492, a task force to execute 'Ensuring Lawful Interrogations' and the closure of Guantanamo Bay, respectfully.

Guantanamo Bay was indeed not closed, and in 2009 the government initiated two reforms pertaining to the interrogation methods used at the facility: an interagency program to incorporate CIA and FBI officials during interrogations, and the second to focus on banning the enhanced interrogation methods used all together (McCabe, 2019). While the Obama Administration went through great lengths to address the critic's concerns and provide viable solutions, officials are still promising more action and results today.

Habeas Corpus for Guantanamo Bay Detainees

Habeas corpus, an important component of jurisprudence, is a written order ('writ'), requesting the holding party to produce the person being detained before the court for some purpose, most often, to review the legalities of the individual's detention (Duignan, 2009). Exact origins of the writ are unknown but can easily trace back to the time of King Henry VII 1485 – 1509, to assist individuals being imprisoned during that time.

The first Habeas Corpus Act of 1679 was enacted by the British Parliament, in efforts to prevent arbitrary detentions. §III (3) regulated the ability for detainees or parties on behalf of detainees to appeal the legalities of said detentions:

> (3) and if any person or persons shall be or stand committed or detained as aforesaid, for any crime, unless for felony or treason plainly expressed in the warrant of commitment, in the vacation-time, and out of term, it shall and may be lawful to and for the person or persons so committed or detained (other than persons convict or in execution of legal process) or any one on his or their behalf, to appeal or complain to the lord chancellor or lord keeper, or any one of his Majesty's justices, either of the one bench or of the other, or the barons of the exchequer of the degree of the coif.

While it was not until the 19th century that the United Kingdom adopted newer forms of habeas corpus acts, the United States adopted its own form of habeas corpus protection into the 1787 United States Constitution. Article I §9 is what is referred to as the 'Suspension Clause' stating:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

In 1861 President Lincoln attempted the first suspension of the writ, as the country was undergoing a civil war and he believed traditional criminal proceedings would not have been efficient in preventing ongoing threats of treason. In *Ex Parte Merryman* (1861) the Supreme Court ruled the President of the United States did not have the power to suspend the writ of habeas corpus, as such power only belonged to Congress. Officials of the Executive and Judicial branches have since then gone back and forth continuously, attempting to limit the regulations passed by one another.

While *Ex Parte Merryman* (1861) was only one, early example of the struggle to balance the separation of powers with the suspension of the writ of habeas corpus, it was between 2004 – 2008 where the two branches explicitly presented a 'push and pull' dynamic. In 2001 the president released the AUMF, staging the official War on Terror. While the Supreme Court ruling of *Rasul v. Bush* (2004) stood primarily on 28 U.S.C §2241, to be discussed later on in this paper, *Hamdi v. Rumsfeld* (2004) aimed to challenge the legalities behind the detentions and classifications of detainees outlined in the 2001 AUMF.

Upon these rulings, the president signed off on Congress's 2005 Detainee Treatment Act, in efforts to minimize habeas corpus for detainees, which was partially dismissed by the 2006 Supreme Court ruling in *Hamdan v. Rumsfeld* - which also declared additional guidelines for military commissions, per the 1949 Geneva Conventions. In response, the government issued the Military Commissions Act of 2006, which aimed to address the concerns mentioned in *Hamdi*, however, stripped the Geneva Conventions as a source of protection for detainees at Guantanamo Bay. Two years later, *Boumediene v. Bush* (2008) was argued before the Supreme Court, ruling

that not only were the regulations set forth in the MCA 2006 unconstitutional, but detainees were entitled to constitutional protections under the suspension clause henceforth.

Rasul v. Bush (2004) was the first Supreme Court case to argue the legal rights provided to Guantanamo Bay detainees post the initiation of the global War on Terror. Shortly after the onset, 14 foreign nationals were captured in Afghanistan and transferred into custody at the Guantanamo Bay detention facility. Defendants had requested, and been denied: information regarding charges and allegations, access to legal counsel, and communication with family members.

British national Shafiq Rasul was amongst the many captured and challenged the legalities of his detention before the District Court and Court of Appeals (*Rasul v. Bush*, 2004). Both courts sighted *Johnson v. Eisentrager* (1950), stating that non-U.S. Citizens did not have the rights to American litigation and constitutional protection when not detained under complete U.S. sovereignty, and ruled in concurrence (*Rasul v. Bush*, 2004). Ultimately deciding against the government, the United States Supreme Court ruled, in accordance with 28 U.S.C §§2241 (a), (c)(3), that any individual detained under U.S. custody, who believes their detention is in violation of the U.S. constitution, has the right to petition for a writ of habeas corpus in efforts for a judicial review of said detention.

Decided on the same day of *Rasul v. Bush* (2004), *Hamdi v. Rumsfeld* (2004) was a separate Supreme Court Case challenging the question of whether U.S. citizens could be labeled as ‘enemy combatants.’ While the court recognized the release of the 2001 AUMF providing the president with the power for means of detention during war, it was ruled that American citizens could receive enemy combatant status but were indeed entitled to all of the protections under due process to challenge their title, regardless of their location of capture.

Following the 2004 rulings, the Bush administration established Combatant Status Review Tribunals in efforts to provide enemy combatants with trials providing very limited due process protections (Sanders, 2018). The 2005 Detainee Treatment Act was also enacted, which aimed to strip federal court judges from jurisdiction of adjudicating a writ of habeas corpus for pending and future cases regarding the detainment, trial, or treatment of alien enemy combatants detained at Guantanamo Bay.

In 2006 the Supreme Court announced in *Hamdan v. Rumsfeld* that the 2005 DTA did not apply to pending cases, and federal courts did in fact have the jurisdiction to review the petitions for a writ of habeas corpus on behalf of detainees. Additionally, legal trials and processes resulting from conflicts of both international and not of international nature were obligated to abide by the regulations set forth in the Geneva Conventions (*Hamdan v. Rumsfeld,* 2006). Humane treatment was to be maintained throughout the War on Terror, and trial processes were required to maintain common article 3 standards of providing protection under due process.

A few months after the ruling of *Hamdan v. Rumsfeld* (2006), Congress passed the Military Commissions Act of 2006. In efforts to further regulate and limit the degree of legal protections provided to alleged terrorists, the MCA 2006 provided that all non-U.S. citizen enemy combatants were entitled to a status review under Combatant Status Review Tribunals. Additionally, the act aimed to amend the shortcomings found in the 2005 DTA regarding 28 U.S.C. §2241(e)(1) to clarify the intentional placement of jurisdiction for habeas corpus matters relating to alien enemy combatants in the United States – again, removing any civilian court from having the jurisdiction to intervene in a military commissions trial.

Boumediene v. Bush (2008) was a Supreme Court case which addressed a new question not answered in the previous cases: whether alien detainees at Guantanamo Bay had a

constitutional right to the writ of habeas corpus, and whether the commissions established under the 2006 MCA were a constitutional replacement of that right. In review of the 2005 DTA and the MCA §7, the Supreme Court acknowledged that both were intended to limit access to habeas corpus review.

In turn, the court ruled that while aspects of both processes may in fact not be unconstitutional, as a whole they had too great of a room for error in the trial phase, and do not meet regulations set forth under common article 3 for constitutional substitutions for habeas corpus reviews. The court ruled Guantanamo Bay detainees did have a constitutional right to a writ of habeas corpus, and MCA 2006, specifically §7 was an unconstitutional suspension of the writ.

It is clear from the above rulings that Guantanamo Bay detainees have gradually been awarded the protections under the writ of habeas corpus. The purpose of this paper is to identify what has contributed to the progressive realization of rights to habeas corpus for Guantanamo Bay Detainees since 2002. Specifically, the role of United States' statutory predicate, as well as aggressive litigation released by the United States government, beginning with the Bush Administration. Data for this research is primarily comprised of (1) Supreme Court cases, including those discussed above, and (2) litigation released and/or ratified by the Bush Administration, including: Military Commissions order of November 13, 2005 Detainee Treatment Act, Mobbs Declaration, 2006 Military Commissions Act, and the 1949 Geneva Conventions.

ANALYSIS OF COURT CASES

One week following the September 11 terrorist attacks, Senate passed Joint Resolution 23 on the Authorization for Use of Military Force (2001). The government immediately concurred

that the president was entitled to use any means or force necessary to fight and protect the nation from terrorism. §2 (a) begins by addressing the President's power stating:

> IN GENERAL.—That the President is authorized 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 organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

The following month, the capture of 14 foreign nationals, mentioned earlier in this paper, resulted in their transfer and detention at Guantanamo Bay. During their time in captivity, all individuals had petitioned for their basic rights under due process, but were denied (*Rasul v. Bush*, 2004). On November 13, 2001 while the individuals were in custody awaiting trials, the Bush administration enacted an Executive Military Order regarding the detention, treatment, and trial of certain non-citizens in the War on Terror. Military Commissions were established to deprive non-U. S citizen alleged terrorists of due process rights, as so stated in §1(f):

> Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

Additionally, §4 of the Executive Order provides the Secretary of Defense with the authority to issue orders and regulate operations to include: appointment to the military commission(s), times and locations, pre-trial, trial, and post-trial procedures, determination of the admissibility of specific evidence, and designation of attorneys (Bush, 2001). Essentially, these regulations provide the President of the United States and the Secretary of Defense full power over the details of trials given to non – U.S. citizen alleged terrorists.

In 2004 the case of *Rasul v. Bush* was argued before the United States Supreme Court to answer the question of whether the right to a writ of habeas corpus extended to alien detainees in territories of which the United States does not hold ultimate sovereignty. The District Court and Court of Appeals previously dismissed Rasul's case on the grounds of *Johnson v. Eisentrager* (1950), declaring that individuals detained where the U.S. lacked sovereignty were not entitled to constitutional protections for a writ of habeas corpus, even if they were originally captured by U.S. personnel. Justices of *Rasul* acknowledged the reference to *Johnson v. Eisentrager* made by the lower courts, but recognized that the case had very little merit in establishing legal predicate as the case was later overruled by *Braden v. 30th Judicial Circuit Court of Kentucky* (1973) where the Justices proclaimed:

> The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who hold him in what is alleged to be unlawful custody.

Further, in *Rasul v. Bush*, the Justices argue the habeas statue does not differentiate between Americans and aliens:

> Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's

> citizenship.[10] Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241.

In fact, 28 U.S. Code §2241 originally did not omit foreign nationals or aliens from eligibility for being granted a writ of habeas corpus, until later revised by the 2005 Detainee Treatment Act, which will be discussed later on in this paper. At this point in 2004, foreign nationals were specifically addressed under §§(c)(4) to be allocated rights to a writ of habeas corpus:

> (C) The writ of habeas corpus shall not extend to a prisoner unless— ……. (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, the validity and effect of which depend upon the law of nations;

Taking all of these components into consideration, the Supreme Court ultimately ruled in *Rasul v. Bush* all alien detainees, whom believe their captivity is in violation of the U.S. Constitution, are indeed entitled to the protections under habeas corpus in territories where the United States holds jurisdiction, but not necessarily ultimate sovereignty.

During the time of *Rasul v. Bush*, Yaser Esam Hamdi was captured and detained in Afghanistan by U.S. officials, as he was believed to have been affiliated with Al Qaeda. He was later transferred to Guantanamo Bay in 2002 under ‘enemy combatant’ status. After his transfer, it was revealed that Hamdi was born in Louisiana in 1980 and moved to Afghanistan with his family a few years later (*Hamdi v. Rumsfeld*, 2004).

Although continuing to hold him under 'enemy combatant' status, Hamdi was transferred from Guantanamo Bay to Virginia, until a later transfer to South Carolina. The government declared Hamdi's enemy combatant status to be justification for holding him in the United States indefinitely without charges or a trial. The Supreme Court case of *Hamdi v. Rumsfeld* was argued on April 28th, the same day as *Rasul v. Bush*, to question the legality of detaining United States citizens under the status of 'enemy combatant' as well as the constitutional process they were entitled to while challenging such.

In June of 2002, Hamdi's father named himself as younger Hamdi's legal representation, and challenged Hamdi's detention under 28 U.S.C §2241 before the district court of Virginia (*Hamdi v. Rumsfeld*, 2004). Older Hamdi argued his son's legal proceeding was unconstitutional, because he did not receive any information on his charges, and as a United States citizen, was entitled to legal counsel and an impartial jury – arguing the clear deprivation of these resources were in violations of the fifth and 14 amendments of the United States Constitution, respectfully:

> *Amendment V*: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

> *Amendment XIV§1*[4]*:* All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

While the District Court immediately recognized the legitimacy of older Hamdi's position and granted Yaser Hamdi access to legal counsel, the Court of Appeals reversed the decision, arguing that the District Court needed to take more extensive, cautious procedures before anyone under 'enemy combatant' status could be entitled to a writ of habeas corpus (*Hamdi v. Rumsfeld*, 2004). The Court of Appeals acknowledged Hamdi's litigation process to be sufficient for enemy combatants.

Heavily influencing this decision was a declaration presented to the Court of Appeals, issued by Michael H. Mobbs ('Mobbs Declaration' henceforth), which testified on behalf of the government for the criteria believed to have been satisfied by Hamdi in earning 'enemy combatant' status. Mr. Mobbs was the Special Advisor to the Under Secretary of Defense for Policy during the time, and submitted the 9-section memo in efforts to enforce the legal limitations set before Hamdi. The integrity of the document came mostly from Mobbs' position and expertise in the field, rather than sufficient evidence more commonly used in trials, as he concluded with supporting information in §9 stating:

[4] §2 of Amendment XIV not used for above reference

> ‘A subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces which supports his classification as an enemy combatant.’

While Mobbs does refer to Hamdi’s interviews, there is no clear or direct evidence of the interviews taking place, or further context from such to support his statements. However, the document weighed heavily on the Court of Appeals, as they ruled against the district court, and passed the document back down as sufficient evidence for the justification of Hamdi’s litigation procedure.

Upon receival, the District Court dismissed the Mobbs Declaration, deeming it to be, alone, insufficient in justifying Hamdi’s detention, and requested further supporting evidence in efforts to perform an extensive judicial review of his detention and the constitutional process owed to him (*Hamdi v. Rumsfeld*, 2004). The Court of Appeals denied a rehearing, and the United States Supreme Court granted certiorari of the case.

The decision of *Hamdi v. Rumsfeld* was a multi-ruling case, the first being that American citizens could indeed be classified under ‘enemy combatant’ status. Justice O’Connor referred back to the Nuremburg Military Tribunal of 1947 to reiterate the purpose of capturing combatants during war:

> ‘Captivity in war is neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoner of war from further participation in the war’

Additionally, the court referenced the precedent set forth in *Ex parte Quirin* (1942), which stated that American citizens were fully capable of being labeled as enemy combatants, presuming they engage in hostilities qualifying them of such status:

> Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.

Previous statutory predicate has affirmed the fact that American citizens can indeed be captured and classified under 'enemy combatant' status, and the Supreme Court in *Hamdi v. Rumsfeld* continued to uphold these rulings. However, the Court of Appeals producing the Mobbs declaration as the sole piece of evidence supporting his enemy combatant status was not sufficient enough to prove such, nor did it provide Hamdi a fair trial with the ability to introduce or dispute evidence presented against him.

In addition to ruling American citizens eligible for enemy combatant status, the Supreme Court aimed to address to what extent they are entitled due process. Similar to *Rasul v. Bush,* the Supreme Court referred to 28 U.S.C. §2241, acknowledging that detainees whom believe their captivity violate their constitutional rights are entitled to petition for a writ to habeas corpus.

Coupled with the Suspension Clause, stating that right shall not be suspended unless in a case of national security, the Supreme Court referred to the *Mathew's Test*[5], to provide insight as to how best calculate the due process protections for enemy combatants. In *Mathews v. Eldridge* (1976), the test was established to balance three factors when attempting to settle the ambiguity

[5] A balance test established in *Mathew v. Eldridge* (1976) in efforts to establish the proper criteria for providing an individual with due process, while maintaining the interests of the government https://tile.loc.gov/storage-services/service/ll/usrep/usrep424/usrep424319/usrep424319.pdf

of when and what due process rights should be awarded to detainees: (1) the private interest, (2) risk of erroneous deprivation of the private's interest through the procedures used, and (3), the government's interest.

While the Supreme Court did in fact acknowledge the legitimacy of the Mobbs Declaration in the interests of the government, the inability for Hamdi to present or rebut any additional evidence strongly outweighed the information presented in the document, and the Supreme Court ruled his trial to be unconstitutional. Thus, *Hamdi v. Rumsfeld* (2004) set precedent that while American citizens can indeed be classified as enemy combatants, they are entitled to due process protections – and while the exact procedures are subject to change based upon interests, they should never fail to satisfy their constitutional rights. This includes the sole ability to challenge their enemy combatant status.

In 2005, the Bush Administration released the Detainee Treatment Act, which on the surface, appeared to place special emphasis on the standards of interrogation procedures and the prohibition of torture and/or cruel treatment of detainees. Opening sections §1002 (a) – (c), § 1003 (a) – (d) regulate the treatment of detainees, while the following section §1004 (a)(b) regulate the procedures and resources available to government personnel who are found guilty of violating the previous sections.

Buried in the document is §1005(e), regarding the Judicial Review of Detention of Enemy Combatants, which was transcribed to amend 28 U.S.C §2241, adding section (e) to read as:

> (e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider--

> (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
>
> (2) any other action against the United States or its agents relating to any aspect of the
>
> detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who--
>
> (A) is currently in military custody; or
>
> (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.'.

This 2005 amendment to 28 U.S.C §2241 stripped federal judges from jurisdiction to grant a writ of habeas corpus for enemy combatants detained at Guantanamo Bay. As of the enactment date of December 30, 2005, all currently pending and future cases for a writ of habeas corpus were to be dismissed on these grounds. This was not the only effort to limit the rights of due process for detainees. Towards the end of §1005, §(3) *Review of final decisions of military commissions* stripped federal courts from jurisdiction to order certiorari for decisions made in Military Commissions:

> (A) IN GENERAL- Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to

> Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

Following *Rasul v. Bush* and *Hamdi v. Rumsfeld*, the 2005 Detainee Treatment Act indeed attempted to limit the ability for further cases to be argued before the Supreme Court, for fear of rulings in favor of the rights of Guantanamo Bay detainees.

With all attempts to limit Guantanamo Bay detainees with opportunities to argue before the Supreme Court, in 2006 the case of *Hamdan v. Rumsfeld* was successfully brought and argued before the United States Supreme Court to challenge the legality of Hamdan's military commission, as those established in 2001.

In 2001, Yemeni National, Salim Hamdan, was another subsequent result of the 2001 AUMF issued by the Bush Administration, as he was captured in Afghanistan and transferred to Guantanamo Bay in 2002 (*Hamdan v. Rumsfeld*, 2006). He was detained for just over a year when the President announced he and a few other detainees were eligible for trials under military commissions, although charges at this time were not yet announced. Another year of detention had gone by when Hamdan was finally informed of his charges – one count of conspiracy, of which was supposedly triable under military commissions.

Late in 2003 Hamdan was provided with military counsel, where they demanded charges and a speedy trial under 10 U.S.C. §810:

> Notification to Accused and Related Procedures. –
>
> (1) When a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken –

(a) To inform the person of the specific offense of which the person is accused; and

(b) To try the person or to dismiss the charges and release the person.

Hamdan's request had been denied, as he was informed that he was not protected under the Uniform Code of Military Justice (UCMJ). Another year later the government released a 13 paragraph document broken into three categories: two paragraphs outlining military commission jurisdiction, nine paragraphs detailing the allegations and missions of the Al Qaeda terrorist organization from 1989 – 2001, and the two final paragraphs explaining Hamdan's charges – 'conspiracy 'to commit…offenses triable by military commission.''' (*Hamdan v. Rumsfeld*, 2006). The specific acts of conspiracy were unclear at the time.

On July 7, 2004, a Combatant Status Review Tribunal had met to review the conditions of Hamdan's detention and ruled them to be sufficient given his already proclaimed 'enemy combatant' status. Concurrently, Hamdan's trial before the military commissions continued. A few months later on November 8 2004, the District Court granted Hamdan a petition for a writ of habeas corpus.

The District Court ruled that the President only had the authority to establish military commissions when the offender, or offenses, fall under the laws of war regulated under the Third Geneva Conventions (*Hamdan v. Rumsfeld*, 2006). At this point in time, Hamdan was not on trial for his alleged charge, but rather to determine if he indeed was to be considered an 'enemy combatant'. Thus, the established military commission to try Hamdan for whether or not he was deemed a prisoner of war was ruled unconstitutional, because judges would decide this ruling based on evidence that Hamdan would never see, hear, or rebut – violating the Uniform Code of Military Justice and the Third Geneva Conventions.

The Court of Appeals reversed the District Court – stating the Geneva Conventions were not legally enforceable, and ruling Hamdan unentitled to any protections set forth in them would not be in violation of the UCMJ nor the Geneva Conventions (*Hamdan v. Rumsfeld*, 2006). The United States Supreme Court granted the case certiorari on November 7, 2005 to determine the legalities of the military commission assigned to Hamdan.

The Supreme Court's grant of certiorari was initially delayed, as the government attempted to dismiss the writ on grounds of the 2005 Detainee Treatment Act, discussed earlier. Particularly, the government cited §1005(e), where federal jurisdiction had been removed from reviewing the Court of Appeals' rulings, as well as §1005(h), announcing the immediate enactment of the order, and subsequent regulations, for all future and currently pending cases during that time.

The Justices, in §II of *Hamdan v. Rumsfeld* challenged the government's argument, and counter argued that nowhere in §1005(e)(1) alone is there any mention of stripped jurisdiction for pending cases at the time, which Hamdan's case was. According to the judges, the government's argument was nothing more than a poor inference resulting from the lack of inclusion of pending cases written into §(e)(1):

> The omission is an integral part of the statutory scheme that muddies whatever "plain meaning" may be discerned from blinkered study of subsection (e)(1) alone. The dissent's speculation about what Congress might have intended by the omission not only is counterfactual, cf. n. 10, supra (recounting legislative history), but rests on both a mis- construction of the DTA and an erroneous view our precedents, see supra, at 17, and n. 12.

For the arguments based from the 2005 DTA, the Supreme Court ultimately denied the government's dismissal, and resumed the certiorari.

In presenting arguments against Hamdan, the government began by first arguing the scope of jurisdiction held by the Supreme Court for this case, referring back to *Schlesinger v. Councilman* (1975), a Supreme Court ruling stating civilian courts should abstain from interfering with military court trials.

In *Councilman*'s ruling, the Supreme Court identified a twofold consideration that ultimately leads to court-martial abstention of interference with military trials: (1) military discipline and efficiency upheld by the military justice system, and (2) court-martial should respect the preparedness that military courts obtain (*Hamdan v. Rumsfeld*, 2006). The government argued, because a military commission was currently ongoing, the Supreme Court did not have jurisdiction to interfere with the trial.

The Supreme Court rebutted the government's argument, stating that (1) Hamdan was not a member of the military, and (2) he was not being given access to trials with the required independent review panels – for these reasons, the Supreme Court ruled that there were no grounds for abstaining in this trial, and *Councilman* would be a poor precedent to set forth on.

Upon the Supreme Court's analysis and ruling of jurisdiction for Hamdan's case, the court turned to the opinion of Justice Stevens, to determine the legality of the military commission assigned to Hamdan (*Hamdan v. Rumsfeld*, 2006).

There are three different ways in which military commissions are established: (1) martial law has been enacted, (2) if military government has temporarily taken over enemy territory, or (3) when the unlawful act itself has taken place during war (*Hamdan*

v. Rumsfeld, 2006). The last one, however, does not include acts that occur before or after war – it must have occurred during. Given Hamdan's commission resides within the third category, Justice Stevens, relying on *Reid v. Covert* (1957)[6], recounts the two different types of offenses this commission type has the jurisdiction to argue: violations of laws of wars, and disobedience of military orders that are not triable under civilian court.

Citing *Quirin,* the government argued the charge of conspiracy to indeed be a violation of the laws of war, as defendants had been charged with multiple offenses, including the fourth one charge of conspiracy:

> "[I.] Violation of the law of war.
>
> "[II.] Violation of Article 81 of the Articles of War, de- fining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.
>
> "[III.] Violation of Article 82, defining the offense of spying.
>
> "[IV.] Conspiracy to commit the offenses alleged in charges [I, II, and III]." 317 U. S., at 23.

However, charge IV did not, and could not, stand-alone (*Hamdan v. Rumsfeld*, 2006). The court argued the first charge in *Quirin* was a violation of the law of war in itself, justification for the other three were not needed – as conspiracy could not have even been charged without the completion of the act in the first charge. Additionally, international sources such as the International Military Tribunal at Nuremburg, have refused to acknowledge conspiracy as a

[6] A Supreme Court landmark case which ruled that U.S. citizens abroad could not be tried under military tribunals, but were indeed entitled to full constitutional rights, including the right to a trial by jury https://tile.loc.gov/storage-services/service/ll/usrep/usrep354/usrep354001/usrep354001.pdf

violation of the laws of war. For these reasons, the Supreme Court ruled that Hamdan's commission did not have the jurisdiction to continue.

Additionally, Justice Stevens acknowledged the commission to be acting in violation of Article 21 of UCMJ, as Hamdan was charged three years after his arrest, for a crime not eligible for trial under a military commission:

> Hamdan was arrested in November 2001 and he was not charged until mid-2004. These simply are not the circumstances in which, by any stretch of the historical evidence or this Court's precedents, a military commission established by Executive Order under the authority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment (*Hamdan v. Rumsfeld*, 2006).

Reverting to the opinion of the Court as a whole, the court ruled the commission to be unauthorized to continue trial, even if it did hold jurisdiction over the alleged charges (*Hamdan v. Rumsfeld,* 2006). Referring to Commission Order No. 1[7], which was enacted during Hamdan's time in detention, the court acknowledged the structure of military commissions to contain one very important loophole: the ability for members of the commission to 'close' any evidence from the defendant to see, hear, or rebut for the purpose of national security. Hamdan claims this procedure would be illegal in criminal court, one that should have had the jurisdiction to try him to begin with. Specifically, the procedures of the commission would ultimately leave Hamdan to be 'excluded from his own trial.'

Overall, the commission established to try Hamdan, as according to the 2001 Military Commissions Act, was ruled unconstitutional. Hamdan's alleged charges did not fall under the

[7] Signed in August 2005 by Secretary of Defense Donald H. Rumsfeld https://www.mc.mil/Portals/0/MCO%20No.%201%20(Aug%2031,%202005).pdf

jurisdiction of military commissions, and the structure of the commission failed to uphold constitutional rights. While the court acknowledged that Hamdan indeed has the potential to be a dangerous human being, the government must comply with the regulations set forth in Common Article 3 and adhere to the Rule of Law for any criminal proceedings.

In late 2006, Congress enacted a new Military Commissions Act, including revisions and upgrades from the MCA 2001. The timing came right after the ruling of *Hamdan v. Rumsfeld*, which ruled the current military commissions to be unconstitutional, as they violated Common Article 3 of the Geneva Conventions and Article 21 of the UCMJ for trying enemy combatants detained at Guantanamo Bay with minimal access to due process rights. Thus, the 2006 MCA had primary objectives of addressing rights under habeas corpus and the Geneva Conventions which enemy combatant detainees were entitled to (or not) henceforth.

The Military Commissions Act of 2006 §948b. *Military commissions generally (f)* recognized the structure of the military commissions to be in accordance with common Article 3 of the Geneva Conventions, however, it was made clear in the following section (g) that detainees were not entitled to 'invoke the Geneva Conventions as a source of rights' (MCA, 2006). Immediately following this statement was §948c. which stated that any alien combatant was subject to trial by military commissions, while there was no mention of jurisdiction for specific alleged charges.

Later in the document, subchapter VI §950j(b) *finality or proceedings, findings, and sentences*, establishes jurisdiction of military commission rulings to only military commissions – attempting to prevent other court-martials from remanding their decisions:

> Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus

> provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter. 7

Sec. 7 *Habeas Corpus Matters* addressed 28 U.S.C §2241 to amend subsection (e) to read as subsection (e)(1):

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

This section reads the same as what was originally amended by the 2005 Detainee Treatment Act with one key difference: subsection (e)(1) was constructed to read as one section, instead of line by line, which was used against the government's argument when the Supreme Court analyzed the section in *Hamdan v. Rumsfeld* to determine jurisdiction. Subsection (e)(2) then addresses the 2005 Detainee Treatment Act directly, to reiterate the jurisdiction of granting habeas corpus for alien enemy combatants. Additionally, the section acknowledges enemy combatants who are detained by the United States, rather than solely those detained at Guantanamo Bay:

> Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have

> jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.''.

It is clear the Military Commissions Act 2006 addressed shortcomings of the 2001 Act which were ruled unconstitutional by the Supreme Court, presumably in efforts to prevent future court-martials from having the ability to argue the regulations or potential disparities currently set forth. Concluding sec.7 was subsection (b), declaring all future and current pending cases relating to the detention or trial of alien enemy combatants detained by the United States to be regulated under the act as of the enactment date, October 17, 2006.

Awaiting trial for nearly six years, petitioners in *Boumediene v. Bush* (2008) were detained enemy combatants at Guantanamo Bay, since the onset of the War on Terror. Claims were brought before the Court of Appeals following the ruling in *Hamdan*, however, the court dismissed the case, ruling §7 of the recent 2006 Military Commissions Act to strip federal jurisdiction for granting a writ of habeas corpus, as the petitioners were not at the time entitled to the writ or to protections under the Suspension Clause of the Constitution. The Supreme Court granted certiorari and aimed to identify if the 2006 MCA indeed stripped federal jurisdiction of a writ for habeas corpus, and to address whether detainees at Guantanamo Bay have a constitutional right to the writ and protections under article 1, §9 of the constitution.

§7(a), as mentioned earlier, amended 28 U.S.C §2241(e) into subsections (1) and (2), attempting to strip federal courts from jurisdiction of granting writs of habeas corpus henceforth.

Immediately following these regulations was section 7(b) of the MCA, which declared the enactment date for the 28 U.S.C. §2241 amendment (e):

> "The amendment made by [MCA §7(a)] shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." 120 Stat. 2636.

While the concept of habeas corpus was not explicitly mentioned above, it was defined. Indeed, the court acknowledged the 'detention..' to be nothing short of referring to habeas corpus. The government argued they had no intention of stripping federal jurisdiction – specifically, §7(b) supposedly pertained only to §2241(e)(2) which specified 'other actions' and not §2241(e)(1) which explicitly mentioned habeas corpus. However, the Supreme Court argued that 'other actions' in subsection (e)(2) could not have been defined or understood without its counterpart subsection (e)(1) mentioning habeas corpus matters. With this, the Supreme Court announced §7 of MCA did in fact strip federal jurisdiction of granting writs of habeas corpus for Guantanamo Bay detainees.

The Justices of the Supreme Court then turned to answer the question not yet addressed in the previous cases: Do detainees at Guantanamo Bay have a constitutional right to the writ of habeas corpus? The Court of Appeals, agreeing with the government's argument stemming from *Eisentrager*, argued the United States did not hold *de jure*[8] sovereignty of Guantanamo Bay, thus, constitutional protections did not extend to detainees in those territories (*Boumediene v.*

[8] By law; as opposed to *de facto* - by claim, not legally recognized.

Bush, 2008). Further, the court did not see reason to remedy an adequate substitution of habeas process protections for the detainees moving forward.

Using the *Eisentrager* framework, the court challenged the government's argument that constitutional rights should not be extended to outside territories:

> Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.

It is with this understanding that the court establishes three factors that are necessary in determining if the right to a writ of habeas corpus should ever be suspended: (1) citizenship of the detainee, (2) where the detainee was captured and detained, and (3) issues preventing the individual from receiving a writ of habeas corpus (*Boumediene v. Bush*, 2008). The court then sought to form the parallels between the petitioners in *Eisentrager* and *Boumediene,* in efforts to form a coherent comparison for whether or not the argument in *Eisentrager* genuinely set precedent for those in *Boumediene*.

While the petitioners in both cases were indeed captured abroad, those in *Boumediene* deny being enemy combatants and did not believe they received a fair trial to challenge any alleged violations of laws of war, and subsequent enemy combatant status. In accordance with the Suspension clause, as mentioned earlier in this paper, the writ of habeas corpus is not to be suspended unless national security is at risk – in *Eisentrager,* this was indeed the case. However, U.S. national security was not at risk by those detained at Guantanamo Bay, nor was any other nation. No justification for the MCA suspending the writ was clear. The court also recognized

Guantanamo Bay to be under total control of the U.S. government, and for this reason ruled the constitutional protections under the Suspension clause to withstand for detainees:

> We hold that Art. I, §9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.

The court's rulings that Congress must act in accordance with the suspension clause indicates that (1) detainees are entitled to a writ of habeas corpus unless suspended for a specific purpose, and (2) they would receive adequate substitutions. The court ruling §7 MCA to strip jurisdiction for granting a writ inevitably meant that the writ had indeed been suspended.

However, regulations set forth in the MCA did not meet the formal requirements for allowing such suspension to occur. Because of this, the court declared that under these conditions, petitioners in Boumediene were entitled, under the United States Constitution, to a writ of habeas corpus to challenge their detentions (*Boumediene v. Bush*, 2008). Had the DTA or MCA been able to provide formal substitutions, rather than blatant habeas corpus limitations, such processes could have also been pursued. From this point on, detainees at Guantanamo bay were protected under the Suspension Clause of Art. 1 §9 of the U.S. Constitution, and were entitled to a trial by a U.S. federal court.

DISCUSSION

Guantanamo Bay, belonging to the United States as an extraterritorial extension under *de facto* sovereignty, has operated as an anomalous zone since the 20th century. It has, within a four-

year time period, transitioned from a location where constitutional rights did not apply at all, to a location where detainees are now constitutionally protected under the suspension clause.

It was during the 1990's when government officials were first realized to be withholding due process and habeas corpus rights from Haitian Asylum Seekers, as hundreds were captured by the U.S. Coast Guard and detained at the camp indefinitely, with no access to legal protections of any kind. Knowing the constitutional protections did not extend to those detained at Guantanamo Bay, the Bush Administration in 2001 pushed for a fast transition for the overall purpose of the camp– as the War on Terror would ultimately result in the need for significantly more space for detained alleged terrorists.

In September, the Bush Administration released the 2001 Authorization for Use of Military Force, and within months government and military personnel had captured nearly 700 alleged terrorists and transferred them to Guantanamo Bay, where they would continue to be detained for years without any legal protection or representation. Indeed, the OLC continuously attempted to balance law and moral in the treatment of detainees, but ultimately provided few resources for them once captured.

Bringing to light the legal limitations placed on Guantanamo Bay detainees first occurred roughly three years later when two landmark court cases, *Rasul v. Bush* (2004*)* and *Hamdi v. Rumsfeld* (2004), were brought before the Supreme Court to argue for habeas corpus rights in efforts to challenge the legalities behind their detentions.

Relying on the ruling of *Johnson v. Eisentrager* (1950), the Court of Appeals dismissed Rasul's case, upholding that individuals detained outside of U.S. *de jure* sovereignty were not entitled to a writ of habeas corpus or other constitutional protections. The Supreme Court granted certiorari, and indeed relied on *Braden v. 30th Judicial Circuit Court of Kentucky, (*which later

overruled *Johnson v. Eisentrager* in 1973) in addition to 28 U.S.C. §2241, and ruled that any individual detained under U.S. jurisdiction who believes their detention is in violation of the United States constitution, is entitled to a writ of habeas corpus.

The same month, the case of *Hamdi v. Rumsfeld* (2004) was brought before the Supreme Court to challenge whether United States citizens could be detained under enemy combatant status. The case was initially dismissed by the Court of Appeals, as the government released the Mobbs Declaration - an official testimony on behalf of the government serving as the main source of evidence holding Hamdi under enemy combatant status, without any form of judicial review. It was then argued before the Supreme Court, who again relied on 28 U.S.C §2241, as well as the *Mathews Test* (est. *Mathews v. Eldridge* 1976) to rule that United States citizens could receive enemy combatant status, but were entitled to a writ of habeas corpus in efforts to challenged that status.

The case of *Hamdan v. Rumsfeld* was argued before the Supreme Court in 2006, to answer the question of whether the military commissions established by the Bush Administration in the Military Order of November 13, 2001 violated legal protections under the Geneva Conventions. Hamdan's case was originally dismissed by the Court of Appeals, as they argued the Geneva Conventions were not legally enforceable, and therefore, Hamdan's detention could not possibly violate the regulations set forth. The Supreme Court granted certiorari, which was significantly delayed - as the government attempted to dismiss it on grounds of lack of jurisdiction. This was backed by the earlier enacted 2005 Detainee Treatment Act, which amended the previously noted 28 U.S.C. §2241 to strip federal jurisdiction from granting a writ of habeas corpus on behalf of enemy combatant detainees.

The Supreme Court ruled the Detainee Treatment Act to not pertain to currently pending cases, as Hamdan's was, and proceeded with the certiorari. Given Hamdan's lengthy detention period for a crime, according to precedent set forth in *Quirin* that was not identified as a violation of the laws of war, the Supreme Court acknowledged his commission to be in violation of article 21 of the UCMJ. Further, more generally speaking and in direct contrast with the Court of Appeals, the Supreme Court ruled given the international nature of the War on Terror, all military commissions assigned to try enemy combatants were required to abide by regulations set forth in Common Article III of the Geneva Conventions.

Undoubtedly a response to the ruling in *Hamdan*, later the same year the government issued the military commissions act, addressing all structural shortcomings that supposedly violated protections under the Geneva Conventions and UCMJ. However, while the act improved overall military commission processes and regulations, §7 of the MCA had an alternative motive: to strip federal jurisdiction of habeas corpus for enemy combatants in currently pending and future cases. While the 2005 DTA had attempted something similar, and succeeded in delaying the case of *Hamdan*, it was ultimately not accepted by the Supreme Court. The 2006 MCA declared enemy combatants to be ineligible to claim protections under the Geneva Conventions, and amended the 28 U.S.C. §2241 to ensure enemy combatants would not receive a writ of habeas corpus from any federal judge or court henceforth.

Two years later *Boumediene v. Bush* (2008) challenged the constitutionality of the MCA and the subsequent legal rights provided to Guantanamo Bay detainees. Boumediene and others were captured in 2001 and detained at Guantanamo Bay for over six years. The request for a writ of habeas corpus to challenge their status and detentions was denied by the Court of Appeals, as they cited §7 of the MCA, and claimed they did not have jurisdiction to grant the writ. The case

moved to the Supreme Court, where it was ruled §7 of MCA to be an unconstitutional suspension of the writ, as all enemy combatants were constitutionally protected under the suspension clause. Thus, if a writ of habeas corpus was to be suspended for an enemy combatant, it must be for the purpose of national security and a subsequent, equal trial process must be provided.

The four court cases discussed above demonstrate an evolution of legal rights provided to Guantanamo Bay detainees, but what is even more apparent is the government's continuous attempt to further limit these rights. These cases would have never made it to the Supreme Court if it had not been for either one of two factors: (1) statutory predicate, cited by the Court of Appeals, denying rights to individuals detained in *de facto* sovereignty, or (2) the government's reactive approach, by issuing additional aggressive litigation, continuously attempting to limit due process and habeas corpus protections for detainees. Thus, it with these two variables the Supreme Court Justices have been able to judicially review and remand the lower court's decisions and enforce new rights and constitutional protections that every individual at Guantanamo Bay is entitled to henceforth.

LIMITATIONS

While this research was able to determine two consistent variables influencing the Supreme Court's evolution of habeas corpus rights granted to Guantanamo Bay detainees, this study was limited in both a theoretical and practical component.

One limitation was the lack of court cases post 2008. A case involving a writ of habeas corpus for Guantanamo Bay detainees has not been brought before the Supreme Court in nearly 12 years. Therefore, it is difficult to understand whether rights have been continuously upheld,

continuously dismissed by a lower court, or potentially a combination of both. Thus, post 2008 to current day application of legal protections provided to Guantanamo Bay detainees is somewhat unclear.

Further, while the Supreme Court made its rulings and remanded to the lower courts in each case, there has been no mention of remedy for the ill treatment of prisoners – other than the next court ruling providing additional rights. Follow up trial processes for each petitioner were not addressed.

Lastly, this study did not include testimonies or field research conducted by nongovernmental organizations. Information from these sources would likely be able to provide in depth context as to whether the application of habeas corpus and due process protections granted to Guantanamo Bay detainees over the years have actually been upheld.

CONCLUSIONS

The writ of habeas corpus, an official process of challenging the legalities behind one's detention, has not always been granted to Guantanamo Bay detainees. The purpose of this research was to further explain how the roles of statutory predicate and aggressive litigation pursued by those who were critical of the Government's attempt to restrict habeas corpus have influenced the evolution of these rights for Guantanamo bay detainees. In fact, prior to 2004, petitions for such were immediately dismissed. However, 2004 – 2008 was a historical time period as the Supreme Court made four landmark rulings, changing the course of legal protections provided to detainees.

Additionally, this evolution, especially through *Hamdan v. Rumsfeld* (2006), has shown the importance of international legal norms. Lower courts and government officials continuously dismissed, and argued against, Guantanamo Bay detainees' protections under the Geneva

Conventions. The Supreme Court has declared otherwise. *Hamdan v. Rumsfeld* (2006) was a landmark case in itself, as military commissions were required to have stronger regulations henceforth, specifically under Common Article 3 of the Geneva Conventions. This not only provided detainees with legal rights but established that regulation of treatment of these individuals were just as important under international law, as it was under U.S. constitutional law.

As previously mentioned, the governmental response and subsequent Supreme Court cases to determine the constitutional rights provided to Guantanamo Bay since 2008 has been minimal. The Obama Administration released the updated Military Commissions Act of 2009, which addressed all of the Supreme Court's concerns in the 2006 MCA. In addition to structural amendments, the term 'unprivileged enemy belligerent' was used to replace 'unlawful enemy combatant' to be defined as:

> '(7) UNPRIVILEGED ENEMY BELLIGERENT. — The term 'unprivileged enemy belligerent' means an individual (other than a privileged belligerent) who—
>
> ''(A) has engaged in hostilities against the United States or its coalition partners;
>
> ''(B) has purposefully and materially supported hostilities against the United States or its coalition partners; or
>
> ''(C) was a part of al Qaeda at the time of the alleged offense under this chapter.
>
> ''(8) NATIONAL SECURITY. — The term 'national security' means the national defense and foreign relations of the United States.
>
> ''(9) HOSTILITIES. — The term 'hostilities' means any conflict subject to the laws of war.

In March 2010, the U.S. Senate introduced the Enemy Belligerent Interrogation, Detention, and Prosecution Act – which aimed to authorize the President to form 'high-value detainee interrogations' in which alleged unprivileged enemy belligerents would not be read their Miranda rights upon arrest, and were subjected to detention without trial for the remainder of hostilities (S. 3081 – 111th Congress, 2010). However, this bill has not surpassed the introduction phase. This is a clear continuation of the 'push and pull' concept between the judicial and executive powers, as mentioned earlier in this paper.

Today, 40 individuals remain detained at the Guantanamo Bay detention facility. While the rights of habeas corpus have evolved significantly between 2004 and 2008, it was not until *Boumediene v. Bush* (2008) where Guantanamo Bay detainees received actual constitutional rights to habeas corpus. While recent developments of legal rights have remained unclear, some allusion has brought to light the government's continuous attempt to limit constitutional and legal protections for detainees. Future research should incorporate detainees' testimonies, as well as follow up cases, to closely monitor the overall treatment of prisoners in order to gain further practical awareness, as opposed to solely the theoretical framework introduced through case rulings.

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