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## Litigation and Delay at Guantanamo Bay

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## LITIGATION AND DELAY AT GUANTÁNAMO BAY

*Marc D. Falkoff\**

For academics, Guantánamo is an intellectual feast. Thanks to the administration's decision to detain suspected terrorists in the supposedly lawless void of an offshore prison camp, we have been busy for years debating fundamental issues concerning the extra-territorial reach of the Constitution,<sup>1</sup> the office of "the Great Writ,"<sup>2</sup> the powers of the executive during wartime,<sup>3</sup> and even the definition of "war" itself.<sup>4</sup> For those of us who still believe our nation can serve as a beacon of human rights for the world, these scholarly questions are a live and pressing concern, not least because they are susceptible to no easy answers. In forums like this one, we accordingly exercise our solemn duty to wrestle with big ideas, so that we may police our judges and elected officials to assure they maintain their intellectual honesty.

But Guantánamo Bay is more than just a marker for a tangle of competing legal theories. Today, Guantánamo remains home to nearly 400 prisoners, none of whom have been convicted of anything and only ten of whom have even been charged with a crime.<sup>5</sup>

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<sup>1</sup> See, e.g., Robert Knowles & Marc D. Falkoff, *Toward a Limited-Government Theory of Extraterritorial Detention*, 62 N.Y.U. ANN. SURV. AM. L. 637 (2007); Elizabeth A. Wilson, *The War on Terrorism and "The Water's Edge": Sovereignty, "Territorial Jurisdiction," and the Reach of the U.S. Constitution in the Guantánamo Detainee Litigation*, 8 U. PA. J. CONST. L. 165 (2006); Kermit Roosevelt III, *Guantánamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017 (2005).

<sup>2</sup> See, e.g., Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 127 (2006); James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497 (2006).

<sup>3</sup> See, e.g., JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* (Simon & Schuster 2006); DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (New Press 2002); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004).

<sup>4</sup> See, e.g., John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002).

<sup>5</sup> Not long after the instant symposium took place, Australian David Hicks pleaded guilty before a military commission to a single count of providing material

Most of these men, including more than a dozen of my Yemeni clients, have been held at Guantánamo for more than five years—sleeping on steel beds, cut off entirely from their families, deprived of intellectual stimulation, slowing growing insane. They have been abused, religiously humiliated, and denied absolutely their day in court. Their condition is, in a word, pitiful.

As a practitioner and an academic, I live uneasily with a dual consciousness about Guantánamo. At times I will be absorbed in debates about the scope of the common-law writ of habeas corpus or about what Justice Kennedy's concurrence in *United States v. Verdugo-Urquidez*<sup>6</sup> might mean for the development of Supreme Court doctrine for overseas detention cases. But then I receive a letter from one of my clients or pay a visit to Guantánamo, and I find myself confronted again, in an unmediated way, with the despair and hopelessness to which many of my clients have succumbed.

I spent this morning exchanging e-mails with lawyers from the Department of Justice, seeking permission to bring a psychiatrist on my next trip down to Guantánamo. A colleague was recently at the prison camp and met with one of our clients, Adnan, who has been on a hunger strike for nearly two months.<sup>7</sup> According to our heartbreaking interview notes, Adnan is now “[i]ncredibly thin. Looks incredibly weak & broken. Says too weak to speak with us. Horrible.”<sup>8</sup> Apparently he also bore new scars on his wrist, indicating that he had recently attempted suicide. I explained to the Jus-

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support to a terrorist organization. According to news accounts, the terms of Hicks' extraordinary plea include that he will serve his sentence in Australia; he will serve no more than nine months; he will not sue the United States government for torture or other abusive treatment; and he will not speak to the media for a full year after his release. See William Glaberson, *Australian to Serve Nine Months in Terrorism Case*, N.Y. TIMES, Mar. 31, 2007, at A10.

<sup>6</sup> *U. S. v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (Kennedy, J., concurring) (discussing the “fundamental rights” of non-citizens abroad).

<sup>7</sup> The protective order under which the Guantánamo habeas lawyers work requires us to treat as “classified” all information learned from our clients, since anything they tell us supposedly represents a national security threat. All information discussed herein has been cleared for public consumption by a Department of Defense “privilege review team.”

<sup>8</sup> Adnan has been on hunger strikes in the past, but only for relatively short periods. Like many of the prisoners at Guantánamo, he spends a good deal of time composing poetry and has drafted several poems discussing the many hunger strikes that have taken place inside the wire. One of his poems is included in a volume of poetry published in August 2007. See POEMS FROM GUANTÁNAMO: THE DETAINEES SPEAK (Marc Falkoff ed., U. Iowa Press 2007); see also Marc Falkoff, *Verses of Suffering*, AMNESTY INTERNATIONAL MAGAZINE (Fall 2007) (cover story discussing Adnan's psychological deterioration).

tice Department lawyers that Adnan had longstanding psychological problems, probably stemming from the same head injury (suffered in a motor vehicle accident) that had led him from Yemen to Afghanistan to seek cheap medical care in 2001. I also explained that Adnan might be delusional and that he was refusing to take anti-psychotic medication because he believed the prison psychiatrist “had been complicit in torture” and therefore could not be trusted.<sup>9</sup> Under these circumstances, I urged, a visit from a psychiatrist of our choosing—someone who might convince Adnan to take his medication and, perhaps, abandon his hunger strike—was vital to keeping him alive. The Justice Department denied our plea, along with our request for Adnan’s medical records. So we have started drafting a motion to compel a psychiatrist’s visit—a motion that we expect will be denied.

*That* is a typical day in the Guantánamo litigation. Notwithstanding our repeated victories in the Supreme Court, the government will concede nothing to us. More than two years ago, we learned from a *New York Times* article that the military was considering the transfer of more than half of the Guantánamo population to prisons in Saudi Arabia, Afghanistan and Yemen.<sup>10</sup> When we inquired how much notice the Justice Department would provide us before our clients were transferred off the island, we were told we would receive *no* advance warning. The prospect of an unnoticed, dead-of-night transfer for indefinite detention in another country, coupled with the very real prospect that our clients might

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<sup>9</sup> Perhaps Adnan’s distrust of Guantánamo medical personnel is not unreasonable. The military’s position is that the prisoners have no confidential relationship with the doctors at Guantánamo. Therefore, patient records may be used to facilitate interrogations. See Jane Mayer, *The Experiment*, NEW YORKER, July 11, 2005, at 63, available at [http://www.newyorker.com/archive/2005/07/11/050711fa\\_fact4](http://www.newyorker.com/archive/2005/07/11/050711fa_fact4). In June 2005, the American Psychiatric Association issued a statement indicating that the organization was “troubled” by “alleged violations of professional medical ethics by psychiatrists at Guantánamo Bay.” News Release, Am. Psychiatric Assoc., APA Statement on Psychiatric Practices at Guantánamo Bay I (June 27, 2005), available at [http://www.psych.org/news\\_room/press\\_releases/05-40psychpracticeguantanamo.pdf](http://www.psych.org/news_room/press_releases/05-40psychpracticeguantanamo.pdf). At about the same time, the American Psychological Association similarly found it necessary to advise its members that psychologists have an ethical obligation to be alert to and report any acts of torture or cruel or inhuman treatment to appropriate authorities. AM. PSYCHOLOGICAL ASSOC., REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON PSYCHOLOGICAL ETHICS AND NATIONAL SECURITY 4 (June 2005), available at <http://www.apa.org/releases/PENSTaskForceReportFinal.pdf>.

<sup>10</sup> See Douglas Jehl, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. TIMES, Mar. 11, 2005 at A1, available at <http://www.nytimes.com/2005/03/11/politics/11detain.html?8bl>.

just as easily be rendered to another country to be tortured,<sup>11</sup> led us to file an *ex parte* motion for a temporary restraining order (TRO). The TRO was granted, along with a preliminary injunction shortly thereafter, requiring the government to provide us with thirty days' notice before it transfers our clients anywhere.<sup>12</sup> That represented an awful lot of work just to force the government to tell us when it planned to move our clients out of the jurisdiction of a federal court in which a live case was pending.

My point is simply that Guantánamo exists today as more than a legal abstraction. Some day the prison will be closed and the term "Guantánamo" will be reduced to little more than a cultural signifier, evoking the same kind of national shame that we feel upon hearing about Fred Korematsu and our Japanese American internment camps in World War II.<sup>13</sup> And, doubtless, the congeries of "terror" cases will, in the aggregate, spell out some enduring conception of executive power in wartime.<sup>14</sup> But for the present, it is important to remember that these cases are still being played out on the ground, with hundreds of young men well into their sixth year of detention without charge or trial, their only opportunity to

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<sup>11</sup> See Ken Silverstein, *Pentagon Memo on Torture-Motivated Transfer Cited*, L.A. TIMES, Dec. 8, 2005 at A10.

<sup>12</sup> In granting the preliminary injunction, District Judge Henry H. Kennedy was dismissive of the government's claim that the Guantánamo prisoners were seeking to "veto the same repatriation that they previously told the Court Respondents were required to conduct." *Abdah v. Bush*, No. 04-1254 (HHK), 2005 WL 711814, at \*4 n.3 (D.D.C. Mar. 29, 2005). Judge Kennedy called the government's contention "perplexing," because "it seems beyond question that advocating for release into freedom is not equivalent to advocating for transfer from one ongoing detention in one locale to ongoing detention in another." *Id.*

<sup>13</sup> See *Korematsu v. U.S.*, 323 U.S. 214 (1944). In 1993, President Clinton apologized to Fred Korematsu for the Japanese American internments, evacuations, and relocations, stating that, "[i]n retrospect, we understand that the nation's actions were rooted deeply in racial prejudice, wartime hysteria, and a lack of political leadership." Letter from Bill Clinton to Fred Korematsu (Oct. 1, 1993), available at [www.landmarkcases.org/korematsu/letterofapology.html](http://www.landmarkcases.org/korematsu/letterofapology.html). In January 2004, Korematsu filed an amicus brief with the Supreme Court in support of the Guantánamo petitioners' habeas claims. See Brief of Amicus Curiae Fred Korematsu in Support of Petitioners, *Rasul v. Bush*, et al., 542 U.S. 466 (2004) (Nos. 03-334 & 03-343), 2004 WL 103832.

<sup>14</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (stating that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Of course, more cases are in the pipeline, including those of my clients, who are part of the *Al Odah v. United States* and *Boumediene v. Bush* matters. See, e.g., *Boumediene v. Bush*, 127 S. Ct. 1478 (2007) (Stevens, J.) (concurring in denial of certiorari to review appellate court's holding that Military Commissions Act stripped federal courts of habeas jurisdiction, but suggesting that review of constitutional questions would be appropriate after petitioners exhausted the remedies provided by Congress in the Detainee Treatment Act).

protest their innocence coming at cobbled-together tribunals convened years after their detention began.

I will briefly describe these tribunals (the Combatant Status Review Tribunals or (CSRTs)) because the government's contention is that a Guantánamo prisoner may be held in prison *for life* based solely on a CSRT panel's determination that the prisoner is an "enemy combatant."<sup>15</sup> Under the CSRT's rules, the prisoner is

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<sup>15</sup> What exactly is an "enemy combatant?" The term has a sparse legal pedigree and is unknown to international law. See generally *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (referring to "enemy aliens" without any discussion or analysis of the term); *Ex parte Quirin*, 317 U.S. 1, 12 (1942) (distinguishing unlawful from lawful combatants, and noting that the definition of "unlawful combatant" could include "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property."). Moreover, the Bush administration itself has not settled on a definition. As Justice O'Connor explained in *Hamdi*, the government "has never provided any court with the full criteria that it uses in classifying individuals as such," and therefore the "permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them." 542 U.S. at 516, 522 n.1. In *Hamdi*, the definition of an enemy combatant accepted by the Court was a person "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States." *Id.* at 516 (internal quotation marks omitted). This definition is much narrower than that suggested by President Bush in November 2001, when he issued an executive order making any person subject to trial by a military tribunal if the President determines that the person "is or was a member of the organization known as al Qaeda" or "knowingly harbored" an al Qaeda member. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 2(a)(1), 66 Fed. Reg. 57833 (Nov. 13, 2001). The *Hamdi* definition of an "enemy combatant" is also far narrower than that set forth by Deputy Secretary of Defense Paul Wolfowitz in July 2004 when, less than two weeks after the Supreme Court's decision in *Hamdi v. Rumsfeld*, he issued the order creating CSRTs. The Wolfowitz order defines an "enemy combatant" as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." Paul Wolfowitz, Order Establishing Combatant Status Review Tribunal at 1 (July 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; see also Gordon England, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantánamo Bay Naval Base, Cuba, Encl. (1) at 3 (July 29, 2004) (Memorandum to Sec'ys of the Military Dep't, *et al.*, adopting same definition with respect to revised CSRT procedures). Under the Wolfowitz definition, the government, responding to hypotheticals posed by the district court during hearings for Guantánamo detainees, asserted that "a person who teaches English to the son of an al Qaeda member" and a "little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan" would both be subject to detention as "enemy combatants." *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005). Congress has subsequently defined an "unlawful enemy combatant" as:

- (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
- (ii) a person

presumed guilty, having already “been determined to be an enemy combatant through multiple layers of review by officers of the Department of Defense.”<sup>16</sup> The prisoner is not entitled to the assistance of a lawyer and may instead rely only on a “personal representative” from the military—a person who by regulation *may not* be a lawyer, with whom the prisoner *may not* share a confidential relationship, and who *must* report any inculpatory statements from the prisoner to the tribunal.<sup>17</sup> The prisoner is not allowed to see any of the classified evidence against him. Having never seen the witness statements, of course, the prisoner cannot seek to controvert them on the grounds that they are untrustworthy hearsay—or even that they were derived from abuse or torture.

Hearings conducted under such rules turned out to be, as predicted, a mockery of justice. Take, for example, the CSRT of one of my clients, Farouk Ali Ahmed. Farouk is a young Yemeni man who, upon graduating from high school in 1999, made a vow to God that if he successfully memorized the *Qur'an*, he would spend a year in Afghanistan teaching the holy text to poor children. Farouk memorized the *Qur'an* and fulfilled his pledge: He traveled to Afghanistan to teach and found himself in the country when the United States bombing campaign against the Taliban began. Farouk sought to escape Afghanistan by crossing the border to Pakistan, but after passing through the border town of Khost, he—along with at least thirty other Arabs seeking to do the same—was taken into custody by Pakistani armed forces and turned over to

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who, before, on, or after the date of the enactment of the Military Commissions Act of 2006 [enacted Oct. 17, 2006], has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

Military Commissions Act of 2006, § 948a(1)(A), Pub. L. No. 109–366, 120 Stat. 2600 (2006).

<sup>16</sup> Paul Wolfowitz, Order Establishing Combatant Status Review Tribunal at 1 (July 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; *see also* Defense Department Background Briefing on Combatant Status Review Tribunal (July 7, 2004), *available at* <http://www.dod.mil/transcripts/2004/tr20040707-0981.html>. New rules, differing in no material respect in relation to the issues discussed in the accompanying text, were promulgated following Congress's passage of the Detainee Treatment Act of 2005, Pub. L. No. 109–48, 119 Stat. 2680 (2005). *See* Gordon England, *supra* note 15.

<sup>17</sup> *See* Gordon England, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantánamo Bay Naval Base, Cuba (July 29, 2004), Encl. 1 ¶ C3 (personal representative “shall not be a judge advocate”); *id.* at Encl. 3 ¶ C1 (personal representative “shall explain to the detainee that no confidential relationship exists or may be formed” between them); *id.* at Encl. 3 ¶ D (personal representative directed to tell prisoner, “None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing.”).

the Americans for a bounty.<sup>18</sup>

He was brought to Guantánamo in January 2002 and had his CSRT in October 2004. Although I was his lawyer, I was not allowed to attend the hearing. Farouk did his best to answer the Tribunal's questions, but ultimately he was helpless in responding to the only evidence against him—an assertion from an anonymous Guantánamo prisoner that he had seen Farouk “carrying an AK-47 and wearing fatigues at UBL's private airport.” The paucity of the evidence and its suspect quality led Farouk's personal representative to offer an unusual written statement to the CSRT panel, after it determined that he was properly labeled an “enemy combatant:”

I do not believe that that panel gave full weight to the exhibits regarding [the witness's] truthfulness regarding the time frames in which he saw various other [Guantánamo prisoners] in Afghanistan. It is unfortunate that the [report] in question was so heavily redacted that the Tribunal could not see that while [the witness] may have been a couple of months off in his recollection of [Farouk's] appearance with an AK 47, that he was six months to a year off in his recollections of other Yemeni detainees he identified. I do feel with some certainty that [the witness] has lied about other detainees to receive preferable treatment and to cause them problems while in custody.

Had the Tribunal taken this evidence out as unreliable, then the position we have taken is that a teacher of the Koran (to the Taliban's children) is an enemy combatant (partly because he slept under a Taliban roof).<sup>19</sup>

Farouk remains in Guantánamo today.<sup>20</sup>

Another of my clients, Abd al Malik Abd al Wahab, was questioned at his CSRT hearing about accusations that he had been observed at an Al Qaeda “guesthouse” and that he was “frequently

<sup>18</sup> British historian Andy Worthington has published an analysis of government records, released pursuant to the Freedom of Information Act, that relate to the capture and detention of Guantánamo prisoners. Among his many interesting findings is that, after the American bombing campaign at Tora Bora, all persons in the area tried to escape from danger by following one of two routes—north through the White Mountains or south through Khost. The Americans, believing that al Qaeda soldiers were fleeing south, concentrated their attacks on the Khost route. In fact, the al Qaeda leadership had chosen to flee via the White Mountains and escaped capture altogether. See ANDY WORTHINGTON, *THE GUANTÁNAMO FILES: THE STORIES OF THE 774 DETAINEES IN AMERICA'S ILLEGAL PRISON* 20, 40–48 (Pluto Press, 2007).

<sup>19</sup> Personal Representative Comments Regarding the Record of Proceedings, ISN [redacted] (n.d.) (on file with the author).

<sup>20</sup> A full account of Farouk Ali Ahmed's case can be found in a series of articles in the *National Journal*. See Corine Hegland, *Empty Evidence*, NAT'L J., Feb. 4, 2006, at 28; Corine Hegland, *Who Is at Guantánamo Bay*, NAT'L J., Feb. 4, 2006, at 33; Corine Hegland, *Guantánamo's Grip*, NAT'L J., Feb. 4, 2006, at 20.

seen” with Osama bin Laden. Here is part of his exchange with the Tribunal President:

Detainee: Regarding [the charge that] I worked at various guesthouses and offices. What was the work?

Tribunal President: I cannot answer that. This is the first time we have seen this evidence. I know nothing more than what is written here.

Detainee: The same with me. I don’t know anything about this. I had a house that the Taliban gave me to live in with my wife, that’s it. . . . Regarding [the charge that I was] frequently seen at [O]sama Bin Ladin’s side. Who saw me?

Tribunal President: I do not know.

Detainee: If it says, was frequently seen, you have to prove that. I am aware of the laws and the courts. This is the first time I have been in prison and the first time in a court like this. And I know that the accused is innocent until proven guilty. You have to come up with the proof. Regarding, also, the detainee attended various other training camps and resided at a Kandahar, Afghanistan guesthouse. What training camps?

Tribunal President: Did you attend any training camps while you were in Afghanistan?

Detainee: Never.

Tribunal President: Then that answers the question.

Detainee: That I resided at a Kandahar guesthouse. This guesthouse, do you mean my house, was my house a guesthouse?

Tribunal President: I would assume so.

Detainee: If it was my house then of course I was there. But, if it is another person’s guesthouse, then no.<sup>21</sup>

Some of the incriminating statements discussed in this passage were made, unbeknownst to Abd al Malik, by Detainee #063 — later identified in public as Mohammed al-Qahtani. Here is what T.J. Harrington, Deputy Assistant Director of the Counterterrorism Division of the FBI, wrote to Major General Donald J. Ryder about al-Qahtani in July 2004:

In September or October of 2002 FBI agents observed that a canine was used in an aggressive manner to intimidate detainee [#063] and, in November 2002, FBI agents observed Detainee [#063] after he had been subjected to intense isolation for over three months. During that time period, [#063] was totally isolated (with the exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting

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<sup>21</sup> Summarized Detainee Statement at 2–3 (on file with the author).

hearing voices, crouching in a corner of the cell covered with a sheet for hours on end). It is unknown to the FBI whether such extended isolation was approved by DoD authorities.<sup>22</sup>

This is the same Guantánamo prisoner who was subjected to extraordinary interrogation techniques—patently in contravention of the Geneva Conventions—approved by officials at the CIA.<sup>23</sup> A classified document cataloging seven-weeks’ worth of al-Qahtani interrogation sessions was leaked to *TIME Magazine* in the summer of 2005 and has been posted on the Internet.<sup>24</sup> The document is truly disturbing. Al-Qahtani was subjected to a host of humiliations: his personal space was invaded by a female; water was repeatedly poured over his head; photographs of 9/11 victims were pinned to his clothes; and his access to a toilet was restricted. He was interrogated for twenty hours a day for nearly the entire seven weeks — with a break allowed only for a brief period of hospitalization after his heart rate fell to thirty-five beats per minute.<sup>25</sup> None of this evidence was made available to Abd al Malik’s CSRT panel. When I presented it by letter to the Administrative Review Board—which is kind of a “parole” hearing for unconvicted prisoners where their “dangerousness” is assessed to determine if they may be released from Guantánamo<sup>26</sup>—it was received with utter silence. Abd al Malik remains in Guantánamo today.

How do we cure the procedural injustices that are so manifest in these CSRT proceedings? The obvious answer is through habeas corpus hearings in the civilian courts, where the government must come forth with competent evidence justifying the legality of our clients’ detention. Our demands are time-honored and fundamental: a neutral judge, the assistance of counsel, access to the evi-

<sup>22</sup> Letter from T.J. Harrington to Army Major General Donald J. Ryder 2 (July 14, 2004), [http://www.aclu.org/torturefoia/released/FBI\\_4622\\_4624.pdf](http://www.aclu.org/torturefoia/released/FBI_4622_4624.pdf) (detainee number redacted in original).

<sup>23</sup> The memorandum approving of enhanced interrogation techniques for Guantánamo prisoners—including the infamous practice of waterboarding—was leaked to ABC News in November 2005 by “former and current intelligence officers and supervisors.” See Brian Ross & Richard Esposito, *CIA’s Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866>.

<sup>24</sup> Interrogation Log of Detainee 063, TIME, (Mar. 3, 2006), <http://www.time.com/time/2006/log/log.pdf>.

<sup>25</sup> See Adam Zagorin & Michael Duffy, *Inside the Interrogation of Detainee 063*, TIME, June 12, 2005, <http://www.time.com/time/magazine/article/0,9171,1071284,00.html?iid=sphere-inline-sidebar>.

<sup>26</sup> See U.S. DEP’T OF DEF., ADMINISTRATIVE REVIEW PROCEDURES FOR ENEMY COMBATANTS IN THE CONTROL OF THE DEP’T OF DEF. AT GUANTÁNAMO BAY NAVAL BASE, CUBA (May 11, 2004), <http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf>.

dence being used against our clients, and an opportunity to counter the government's allegations with our own evidence. After *Rasul v. Bush*, such hearings seemed inevitable.<sup>27</sup> But just months after the Supreme Court stated definitively that federal courts have jurisdiction to hear Guantánamo prisoners' habeas cases, the government moved to dismiss all of our habeas cases en masse, claiming that the Guantánamo prisoners have no constitutional rights that might be vindicated via the Great Writ. This is not the place to rehash our arguments in opposition, so I will simply note that, in January 2005, Senior District Judge Joyce Hens Green denied the government's motion to dismiss, holding that the Guantánamo prisoners do possess certain fundamental constitutional rights and that habeas hearings were appropriate.<sup>28</sup> The government appealed that decision on an interlocutory basis, and we were forced to wait for more than *two years* for a decision on the appeal from the D.C. Court of Appeals.

In February 2007, the Court of Appeals finally ruled. Over a dissent from Judge Janice Rogers, the panel dismissed the habeas petitioners' claims after determining that intervening legislation from Congress had stripped the federal courts of jurisdiction to hear the prisoners' habeas claims.<sup>29</sup> In doing so, the panel necessarily ruled that the Guantánamo prisoners do not have a common-law or constitutional right to habeas corpus; it was therefore unnecessary to determine whether the limited review of a prisoner's "enemy combatant" status—provided by Congress in the Detainee Treatment Act of 2005<sup>30</sup> and the Military Commissions Act of 2006<sup>31</sup>—was an adequate and effective substitute for the men's habeas rights.<sup>32</sup> Of course, we immediately filed a petition in the Supreme Court for a writ of certiorari, which we hope will be granted on an expedited basis. If certiorari is denied, we will be forced to begin the litigation almost anew, filing petitions in the Court of Appeals challenging the constitutionality of the CSRT hearings to which our clients were subjected.<sup>33</sup>

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<sup>27</sup> *Rasul v. Bush*, 542 U.S. 466, 481, 484 (2004) (holding that federal courts have jurisdiction to consider habeas petitions by foreign nationals imprisoned at Guantánamo Bay Naval Base in Cuba).

<sup>28</sup> *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 454 (D.D.C. 2005).

<sup>29</sup> *See Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

<sup>30</sup> Pub. L. No. 109-48, 119 Stat. 2680 (2005).

<sup>31</sup> Pub. L. No. 109-366, 120 Stat. 2600 (2006).

<sup>32</sup> *See Swain v. Pressley*, 430 U.S. 372, 381 (1977) ("substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention" does not violate Suspension Clause).

<sup>33</sup> On April 2, 2007, days after the instant symposium took place, the Supreme

I understand the circumspection with which the courts have proceeded. Guantánamo raises profound issues of constitutional concern that should not be lightly addressed without adequate deliberation. Where a congressional fix seems to be on the horizon, it is only to be expected that the courts will strive to delay making binding constitutional pronouncements. Moreover, our generation has been well-schooled in the virtues of judicial minimalism<sup>34</sup> and the doctrine of constitutional avoidance.<sup>35</sup> But five years into their detention without charge, trial, or the protections of the Geneva conventions and three years after their habeas petitions were originally filed, our clients are rightly outraged by the failure of the courts to take definitive action. I firmly believe that by failing to rule on these habeas cases with expedition, our courts have abdicated their judicial function. Indeed, it is a definitional element of habeas corpus that the Writ is to provide a *speedy and effective* remedy illegal detention.<sup>36</sup> Every day that the Guantanamo petitioners remain imprisoned without a fair hearing in a court of law brings

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Court denied our petition for *certiorari*, over the dissent of three Justices. Justice Stevens, joined by Justice Kennedy, concurred in the denial of *certiorari* but issued a “statement” indicating that he believed it was premature to address the “obvious importance” of the constitutional questions before the Guantánamo prisoners had exhausted the remedies provided by Congress in the Detainee Treatment Act. *Boumediene v. Bush*, 127 S. Ct. 1478 (2007). However, while this piece was in production, the Supreme Court reconsidered its denial of *certiorari* and agreed to hear the case in 2007 Term. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (granting petition for rehearing, vacating earlier denial of *certiorari*, and granting petition for *certiorari*).

<sup>34</sup> See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (Harvard Univ. Press 1999); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (Princeton Univ. Press 1999); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* (Amy Gutmann ed., Princeton Univ. Press 1997); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (Harvard Univ. Press 1997); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (The Free Press 1990); Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000) (for an excellent analysis of recent scholarship advocating a “minimalist” approach).

<sup>35</sup> See, e.g., *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (where even a “serious doubt of [a statute’s] constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided”); *Ashwander v. TVA*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring) (passing upon constitutional question should be last resort).

<sup>36</sup> *Carafas v. La Vallee*, 391 U.S. 234, 238 (1968) (writ of habeas corpus, “shaped to guarantee the most fundamental of all rights, is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person”); *Fay v. Noia*, 372 U.S. 391, 400 (1963) (habeas corpus “is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement”), *overruled on other grounds*, 504 U.S. 1 (1992).

about an irremediable injury to our clients and represents an affront to the rule of law.

I try to explain our legal system to my clients, to convince them that the President is not above the law and to assure them that our courts, though sometimes slow, truly seek justice. I also try to keep their hope alive and instill confidence that, once we manage to get them hearings before neutral courts, their freedom will likely be imminent. But every time I go back to Guantánamo I am forced to convey news of more and more delay. Now, three years after I first began working on their behalf, many of my clients have lost faith in our courts and have concluded that American justice is really just a sham. Some of my clients have attempted suicide; some are on hunger strike; and some now refuse to participate in a legal system they conclude has abandoned them. Justice may yet come to my clients and the other prisoners at Guantánamo—but standing here today, I must admit that justice still seems a long way off.