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## WRIT OF HABEAS CORPUS: NO TRUE PRIVILEGE FOR GUANTANAMO DETAINEES

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“To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.”<sup>1</sup>

The writ of habeas corpus<sup>2</sup> affords people, seized by the government, the opportunity to seek review of the validity of their

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<sup>1</sup> *Boumediene v. Bush*, 553 U.S. 723, 744 (2008) (quoting THE FEDERALIST NO. 84 (Alexander Hamilton)).

<sup>2</sup> Translated from Latin as “you have the body.”

detention before the court.<sup>3</sup> The writ protects individual liberties by ensuring against the arbitrary use of government power to detain individuals, by allowing prisoners to question their detention before a judge and by creating a check and balance on the branches of government.<sup>4</sup> The writ, incorporated as a fundamental principle under the United States Constitution, provides that the privilege may only be suspended “in Cases of Rebellion or Invasion [as] the public Safety may require it.”<sup>5</sup> In fact, in 1868, Chief Justice Salton Chase identified the right to habeas corpus as the “the most important human right in the Constitution,” and the “best and only sufficient defense of personal freedom.”<sup>6</sup> The scope of this article will be limited to the use of the writ and its suspension in cases of national security.

Part I of this article will address the historical underpinnings of the writ of habeas corpus, including the writ’s incorporation into the United States Constitution from its British origin. Part II of this article will discuss America’s development of the writ during the Civil War and post-Civil War eras, which resulted in the Ku Klux Klan Act. Part III reviews the modern usage of the writ of habeas corpus, including the suspension of the writ following the attack on Pearl Harbor. Part IV of this article focuses on how the protections of habeas corpus have further been diluted by the “War on Terror”<sup>7</sup> and by the recent rulings affecting prisoners at Guantanamo Bay. Finally, Part V analyzes the District of Columbia courts’ decisions under the standard established by the United States Supreme Court ruling in *Boumediene v. Bush*.<sup>8</sup>

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<sup>3</sup> Jonathan Hafetz, *A Different View of the Law: Habeas Corpus During the Lincoln and Bush Presidencies*, 12 CHAP. L. REV. 439, 439-40 (2009).

<sup>4</sup> *Id.* at 440.

<sup>5</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>6</sup> Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 147 (2000) (quoting *Ex parte Yergler*, 75 U.S. (8 Wall.) 85, 95 (1868)).

<sup>7</sup> President George W. Bush, Remarks by the President upon Arrival to the South Lawn of the Whitehouse (Sept. 16, 2011), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010916-2.html>. President George W. Bush coined this phrase following the attack on Sept. 11, 2001 when he was urging patience: “This crusade - this war on terrorism - is going to take a while.”

<sup>8</sup> *Boumediene*, 553 U.S. at 744.

## PART I. HABEAS CORPUS: A HISTORICAL PERSPECTIVE

Originating in medieval England, the writ of habeas corpus did not independently provide a court with jurisdiction over an individual.<sup>9</sup> Instead, the writ provided a procedural mechanism, by which the courts employed, to produce a person in front of the court who was needed to sufficiently adjudicate a dispute where the court already had jurisdiction over the matter.<sup>10</sup> Thus, a court, acting *sua sponte*, could utilize the writ to exercise its judicial functions.<sup>11</sup> One form of the writ evolved into a mechanism which allowed a prisoner to obtain a court order requiring officers to bring him in court for the purpose of ascertaining the cause for his detention.<sup>12</sup>

This form of habeas eventually developed into the habeas corpus ad subjiciendum,<sup>13</sup> commonly referred to as the “Great Writ,”<sup>14</sup> and its primary use enabled the courts to limit the power of the Crown.<sup>15</sup> During the reign of Charles I, King Charles imprisoned individuals without explaining the reason for their detention.<sup>16</sup> The writ established a procedural mechanism for a prisoner to petition a court to claim unlawful detention.<sup>17</sup> Upon a *prima facie* case of unlawful detention, the court would issue the writ which required prison officials to produce the prisoner to determine if legal cause for detention existed.<sup>18</sup> Sir Edward Coke, among others, argued that the Magna Carta insisted that the writ of habeas corpus allowed the court to enforce the legal limitations on royal commands, claiming that a

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<sup>9</sup> LARRY W. YACKLE, *FEDERAL COURTS: HABEAS CORPUS 2* (2d ed. 2010).

<sup>10</sup> *Id.* at 2-3 (noting that the writ was historically used “to produce a person to be prosecuted, to give evidence, or to be tried in a court of proper jurisdiction[;] . . . to produce a person charged with the process of execution[;] . . . to move a cause involving a person to Westminster[; and] . . . to produce the body of a person in court”).

<sup>11</sup> Brian Farrell, *From Westminster to the World: The Right to Habeas Corpus in International Constitutional Law*, 17 MICH. ST. J. INT’L L. 551, 553 (2009).

<sup>12</sup> *Id.*

<sup>13</sup> YACKLE, *supra* note 9, at 3.

<sup>14</sup> 39 AM. JUR. 2d *Habeas Corpus* § 2.

<sup>15</sup> YACKLE, *supra* note 9, at 4.

<sup>16</sup> *Id.* at 4-7.

<sup>17</sup> *Id.* at 5.

<sup>18</sup> *Id.*

free man should not be imprisoned without good cause.<sup>19</sup> Thereafter, in 1641, Parliament enacted the Star Chamber Act which explicitly authorized courts to demand adequate reasons for a prisoner's detention even when the King had ordered imprisonment.<sup>20</sup> This Act allowed a prisoner to petition the court, and if the court did not issue the writ, the prisoner was not precluded from filing another petition in an alternate court.<sup>21</sup>

However, abusive tactics continued, and prisoners were often transferred from jail to jail to avoid service on the correct jailer or sent overseas to evade the protection of the writ.<sup>22</sup> In response, Parliament enacted the Habeas Corpus Act in 1679, which codified the petition process and prohibited unauthorized movement of prisoners.<sup>23</sup> Under the Act, Parliament retained the power to suspend the writ for certain types of cases, for limited geographical areas, and for defined periods of time.<sup>24</sup> Although the Act only applied to situations where individuals were imprisoned by governmental officials, the common law writ continued to serve as a method to challenge judicially imposed custody.<sup>25</sup> The court's application of the common law writ remains uncertain; some authorities suggest that courts would, at times, investigate the basis for the detention while other accounts indicate that courts restricted its analysis to whether the court ordering the detention had proper jurisdiction over the matter.<sup>26</sup> However, history suggests that a court "declaring that a prisoner was detained under legal process issued by a court of proper jurisdiction was dispositive," and the court refrained from review on the merits.<sup>27</sup>

As England expanded its territory through colonization, the recognition of the writ of habeas corpus spread with the geographic

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<sup>19</sup> *Id.* at 6; but see Ryan Firestone, *The Boumediene Illusion: The Unsettled Role of Habeas Corpus Abroad in the War on Terror*, 84 TEMP. L. REV. 555, 563 (2012) (stating that some academics suggest that the Magna Carta did not provide a basis for the writ).

<sup>20</sup> Firestone, *supra* note 19, at 563.

<sup>21</sup> YACKLE, *supra* note 9, at 9.

<sup>22</sup> Farrell, *supra* note 11, at 555-56.

<sup>23</sup> *Id.* at 556.

<sup>24</sup> YACKLE, *supra* note 9, at 11.

<sup>25</sup> *Id.* at 9-10.

<sup>26</sup> *Id.* at 10.

<sup>27</sup> *Id.*

borders of the country.<sup>28</sup> In all thirteen American colonies, the courts recognized the common law writ of habeas corpus prior to the American Revolution.<sup>29</sup> Furthermore, five states felt that protection under habeas corpus was so important that they incorporated its protections in their constitutions.<sup>30</sup> The Massachusetts' constitutional provision served as a model for the first draft of the United States Constitution, guaranteeing:

The privilege and benefit of the writ of habeas corpus shall be enjoyed in this commonwealth in the most free, easy, cheap, expeditious and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months.<sup>31</sup>

Although a provision recognizing habeas corpus became part of the final draft of the United States Constitution, its language, as ratified, and its placement within Article I have caused academic and judicial debate because the Framers did not place the provision under the powers of the Judiciary.<sup>32</sup> Within Article I of the United States Constitution, which grants powers to Congress, the Suspension Clause dictates that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion [as] the public Safety may require it.”<sup>33</sup> Thus, the clause grants a negative power to Congress, allowing it to suspend the use of the writ in certain situations rather than expressly providing for habeas corpus as a constitutional right.<sup>34</sup>

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<sup>28</sup> Farrell, *supra* note 11, at 557.

<sup>29</sup> Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1369 (2010).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1370 (quoting MASS. CONST. pt. 2, ch. VI, art. VII).

<sup>32</sup> See Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 607-08 (2009).

<sup>33</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>34</sup> *Id.*; *INS v. St. Cyr*, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting) (“A straightforward reading of this text discloses that it does not guarantee any

By enacting the Judiciary Act of 1789, Congress expressly granted inferior federal courts the power to issue writs of habeas corpus.<sup>35</sup> Since this time, Congress has only exercised its Article I, Section 9 power to suspend the writ of habeas corpus on four occasions.<sup>36</sup>

Although Congress has the power to suspend the writ of habeas corpus, the writ provides a detainee the ability to collaterally attack the lawfulness of his attainment, and it establishes an important balance between the branches of government.<sup>37</sup> “It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.”<sup>38</sup> Although the writ clearly provides a check on the power of the president and the executive branch, more recent Supreme Court decisions have also invalidated congressional legislation, amounting to unconstitutional suspension of the writ because the legislation fails to act as a formal suspension.<sup>39</sup>

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content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended.”).

<sup>35</sup> *Id.* at 592 (referencing the Judiciary Act of 1789, ch. 20, 1 Stat. 73); see *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) (quoting Chief Justice Marshall, who declared that the Court did not have the jurisdiction to consider a petition for habeas corpus absent a directive from Congress, as provided in the Judiciary Act of 1789).

<sup>36</sup> Aaron L. Jackson, *Habeas Corpus in the Global War on Terror: An American Drama*, 65 A.F. L. REV. 263, 265-66 (2010) (explaining Congress has authorized the suspension of the writ of habeas on four occurrences: (1) as a response to President Lincoln’s unilateral suspension of the writ during the Civil war; (2) through passing the Klu Klux Klan Act at the request of President Grant; (3) during the 1902 rebellion in the Philippines; and (4) in 1941 after the Japanese attack of Pearl Harbor).

<sup>37</sup> See *Boumediene*, 553 U.S. at 742-43.

<sup>38</sup> *Id.* at 745 (quoting Hamdi, *infra* note 93, at 536).

<sup>39</sup> See *Boumediene*, 553 U.S. at 771.

## PART II. LINCOLN &amp; THE WRIT OF HABEAS CORPUS

Although the Constitution delegates Congress the right to suspend the writ, President Abraham Lincoln unilaterally authorized his army general to suspend the writ, if necessary, in April of 1861; his decision was prompted by the imminent fear that Confederate soldiers would capture Washington, D.C.<sup>40</sup> Under presidential orders, military officials arrested and detained individuals on mere suspicion without providing reason for their detention.<sup>41</sup> Since Congress was not in session at the time, Lincoln asserted that the arrest and detention of Confederate soldiers were necessary to protect and preserve the Nation.<sup>42</sup> Criticism erupted and Lincoln responded at a special session of Congress convened by Lincoln, stating:

It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.<sup>43</sup>

Although Congress did not specifically concede that the Executive Branch had the power to suspend the writ under the United States Constitution, Congress ratified the President's actions after two years of debate by enacting the Habeas Corpus Act in 1863, which allowed

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<sup>40</sup> E.g., Hafetz, *supra* note 3, at 444.

<sup>41</sup> Tyler, *supra* note 32, at 638.

<sup>42</sup> See Hafetz, *supra* note 3, at 444-45.

<sup>43</sup> Frank J. Williams, *Abraham Lincoln and Civil Liberties-Then and Now: Old Wine in New Bottles*, 3 ALB. GOV'T L. REV. 533, 540 (2010).

the President to suspend habeas corpus for a limited amount of time when public safety required.<sup>44</sup>

Shortly after the enactment of the Habeas Corpus Act, the Supreme Court, in *Ex Parte Milligan*,<sup>45</sup> described the functioning of the Suspension Clause. The Court explained that the privilege of the writ existed separately from the writ itself, noting that “[t]he suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. Instead, the writ issues as a matter of course, and on the return made to it, the court decides whether the party applying is denied the right of proceeding any further with it.”<sup>46</sup> Thus, a court was still able to issue the writ, and, upon review, the court had the ability to ascertain whether individual petitioning the writ was part of the class of the individuals for which the writ was suspended.<sup>47</sup>

#### KU KLUX KLAN

For the second time in the nation’s history, Congress authorized the President to suspend the writ of habeas corpus shortly after the conclusion of the Civil War as the Ku Klux Klan engaged in domestic terrorist activities.<sup>48</sup> The Ku Klux Klan committed violent murders, attacks, and rapes, reaching epic proportions, yet resulting in few prosecutions from local authorities.<sup>49</sup> In fact, the Klan’s prevalence within communities threatened the very existence of local government, controlling law enforcement and terrorizing any individual willing to testify in court against its members.<sup>50</sup> In the wake of this emergency, Congress supported President Grant’s insistence to institute military law, allowing the detention of suspected Ku Klux Klan members in an effort to destroy the secrecy among its members and prevent witness intimidation by enacting the Ku Klux Klan Act of 1871.<sup>51</sup> Furthermore, the Act allowed the President to suspend the writ for the purposes of defeating the

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<sup>44</sup> Hafetz, *supra* note 3, at 445.

<sup>45</sup> *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

<sup>46</sup> *Id.* at 130-32.

<sup>47</sup> *See id.*

<sup>48</sup> Tyler, *supra* note 32, at 656.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 656-57.

rebellion and to preserve public safety through preventative detention.<sup>52</sup>

The Act, however, expressly limited the power of the Executive Branch.<sup>53</sup> Prior to suspending the writ in any given area, the President was required to order the insurgents to disperse.<sup>54</sup> In addition, the President only had the authority to suspend the writ until Congress's next legislation session.<sup>55</sup> The Act also required the release of a prisoner if he or she was not indicted by the next seated grand jury.<sup>56</sup> This legislation, however, spurred extensive debate.<sup>57</sup>

Opponents of suspension asserted that Congress vested the President with broad discretion to impact individual liberties.<sup>58</sup> In contrast, supporters suggested that suspension of the writ was essential to restoring order in the affected communities, thereby ensuring its citizens political and civil rights.<sup>59</sup> A consensus emerged, with both sides purporting that the suspension of the writ was an extraordinary measure.<sup>60</sup> Retrospectively, however, Congress, concluded that this preventive suspension of the writ was necessary, finding "[t]he results of suspending the writ of habeas corpus . . . show that where the membership, mysteries, and power of the organization have been kept concealed this is the most and perhaps only effective remedy for its suppression."<sup>61</sup>

A Mississippi newspaper reporter, William McCardle, filed an appeal to the Supreme Court after being arrested for the content of his articles and tried before a military tribunal.<sup>62</sup> Following oral arguments, Congress repealed section 3 of the Habeas Corpus Act of 1867, which effectively stripped the Supreme Court from jurisdiction to review the final judgments of habeas corpus petitions heard in

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 657.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 658.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 658-59.

<sup>60</sup> *Id.* at 659.

<sup>61</sup> *Id.* at 661-62 (quoting S. Rep. No. 42-41, pt. 1, at 99 (1872)).

<sup>62</sup> *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 508 (1868).

lower courts based upon Congress's power under the Constitution's Exceptions Clause.<sup>63</sup> The Supreme Court acknowledged that Congress had acted within the scope of its power and dismissed the case for want of jurisdiction.<sup>64</sup>

In contrast, in *Ex Parte Yerger*,<sup>65</sup> the Supreme Court held that it had jurisdiction to issue the writ of habeas corpus to an individual asserting his unlawful imprisonment.<sup>66</sup> The Court effectively distinguished this case from *Ex Parte Milligan* by ruling that the repeal applied only to writs brought before the Court under the Habeas Corpus Act.<sup>67</sup> Yet, unlike Milligan, Yerger had petitioned the Court for a common law writ of habeas corpus.<sup>68</sup> Thus, it seems that the Supreme Court recognized that Congress could strip its jurisdiction for specific categories of cases; however, Congress's use of the Exceptions Clause did not result in a broad interpretation of Congress's actions, but would be limited in scope.<sup>69</sup>

### PART III. USAGES OF THE WRIT IN THE 20TH CENTURY

#### WORLD WAR II

As global advances were made in modern warfare, the Hawaiian Government recognized a real and imminent threat of war in the Pacific.<sup>70</sup> In response Hawaii's legislature enacted the Hawaii Defense Act<sup>71</sup> on October 3, 1941, which delegated broad powers to

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 510-11.

<sup>65</sup> *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868).

<sup>66</sup> *Id.* at 88.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *See Ex parte McCardle*, 74 U.S. (7 Wall.) at 511-12 ("The act conferring the jurisdiction having been repealed, the jurisdiction ceased; and the court had thereafter no authority to pronounce any opinion or render any judgment in this cause. No court can do any act in any case, without jurisdiction of the subject-matter. It can make no difference at what point, in the progress of a cause, the jurisdiction ceases. After it has ceased, no judicial act can be performed.").

<sup>70</sup> J. Garner Anthony, *Hawaiian Martial Law in the Supreme Court*, 57 YALE L.J. 27, 28 (1947).

<sup>71</sup> 1941 Haw. Sess. Laws 1-25.

the executive branch in case of emergency, granting the governor power over citizens and property, while only providing minimal safeguards to individual rights.<sup>72</sup> After the devastating attack on Pearl Harbor on occurring December 7, 1941, Governor Joseph Poindexter responded by invoking the power granted under the Hawaii Defense Act, proclaiming martial law, establishing himself as the military governor of Hawaii, publishing ordinances aimed at governing the conduct of the Territory's citizens, and creating military tribunals to punish ordinance offenders.<sup>73</sup> Moreover, the governor suspended the privilege writ of habeas corpus by relying on the Hawaiian Organic Act<sup>74</sup> which dictated:

The governor shall be responsible for the faithful execution of the laws of the United States and the Territory of Hawaii . . . and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the writ of habeas corpus or place the Territory, or any part thereof, under martial law until communication can be had with the president and his decision thereon made known.<sup>75</sup>

The governor complied with the Hawaiian Organic Act by notifying President Roosevelt that he had suspended the privilege of the writ, but failed to communicate the extent of the power he had assumed.<sup>76</sup> Without the benefit of this critical detail, the President supported the Hawaiian governor's actions.<sup>77</sup> Therefore, based upon the President's uninformed approval, the Hawaiian military overtook courtrooms and issued orders without regard to territorial, federal, or constitutional protections, including censorship of the press.<sup>78</sup> The military rule created extreme oppression over the rights of the Hawaiian citizens as later noted by the Supreme Court:

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<sup>72</sup> Antony, *supra* note 70, at 28-29.

<sup>73</sup> *Id.* at 29.

<sup>74</sup> 48 U.S.C. § 532 (1940).

<sup>75</sup> Antony, *supra* note 70, at 29.

<sup>76</sup> *Id.* at 30.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 31.

[T]he military authorities took over the government of Hawaii. They could and did, by simply promulgating orders, govern the day to day activities of civilians who lived, worked, or were merely passing through there. The military tribunals interpreted the very orders promulgated by the military authorities and proceeded to punish violators.<sup>79</sup>

#### PART IV: USAGES OF THE WRIT IN THE 21ST CENTURY

##### “THE WAR ON TERROR”

The devastating events of September 11, 2001, ignited fear and insecurity in the hearts of Americans. During President George W. Bush’s address to the nation following the attacks he stated, “All of this was brought upon us in a single day, and night fell on a different world, a world where freedom itself is under attack.”<sup>80</sup> A new sense of nationalism immediately emerged as citizens united to honor the victims.<sup>81</sup> In addition, this event provoked the United States to develop new security initiatives for the protection of its citizens and to enact legislation aimed at prosecuting individuals involved in terrorist activity and preventing further attacks on American soil, including the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“USA PATRIOT Act”)<sup>82</sup> and the Authorization for Use of Military Force (“AUMF”), which allowed the President to “use all necessary and appropriate force” against those aiding terrorists.<sup>83</sup> The United States military led invasions, killing and detaining individuals allegedly involved with the al Qaeda organization.<sup>84</sup> As a result,

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<sup>79</sup> *Id.* (quoting *Duncan v. Kahanamoku*, 327 U.S. 304, 309 (1946)).

<sup>80</sup> President George W. Bush, Address to Joint Session of Congress (Sept. 20, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>.

<sup>81</sup> COLLEEN E. HARDY, *THE DETENTION OF UNLAWFUL ENEMY COMBATANTS DURING THE WAR ON TERROR*, 5 (2009).

<sup>82</sup> *Id.* at 2-3.

<sup>83</sup> Tor Ekeland, *Suspending Habeas Corpus: Article i, Section 9, Clause 2, of the United States Constitution and the War on Terror*, 74 *FORDHAM L. REV.* 1475, 1503 (2005) (quoting Pub. L. No. 107-40, 115 Stat. 224 (2001)).

<sup>84</sup> *Id.*

numerous detainees around the globe petitioned federal courts, claiming illegal detention and illegal suspension of the writ.<sup>85</sup>

As United States military forces captured enemy combatants abroad, the Bush Administration deliberately selected Guantanamo as the location to imprison its detainees.<sup>86</sup> Guantanamo is a territory currently leased and entirely controlled by the United States; however, it falls under the Republic of Cuba's ultimate sovereignty.<sup>87</sup> Therefore, the Bush Administration determined that the prisoners held there would not be entitled to the Constitution's protections, including the writ of habeas corpus.<sup>88</sup> Thus, the United States could theoretically hold the detainees indefinitely without violating the Constitutional mandate of formal suspension of the writ<sup>89</sup> due to the United States Supreme Court holding in *Johnson v. Eisentrager*, which denied habeas rights to a prisoner who:

(a) [wa]s an enemy alien; (b) ha[d] never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.<sup>90</sup>

Thus, the ruling allowed government officials to manipulate a prisoner's location to purposefully evade the protection of the writ---the very evil that the writ was intended to guard against.<sup>91</sup>

As the "War on Terror" escalated, petitions for the writ of habeas corpus flooded the courts, and the Supreme Court granted certiorari to several "War on Terror" detainees. In these opinions, the Court clarified the constitutional protection of the writ and

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<sup>85</sup> *Id.*

<sup>86</sup> Hafetz, *supra* note 3, at 441.

<sup>87</sup> HARDY, *supra* note 81, at 152.

<sup>88</sup> Hafetz, *supra* note 3, at 441.

<sup>89</sup> *Id.* at 442.

<sup>90</sup> *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950).

<sup>91</sup> Hafetz, *supra* note 3, at 444.

established jurisdictional requirements when “enemy combatants” asserted that they possessed a right to petition the court for habeas corpus. On June 28, 2004, the United States Supreme Court decided three such opinions: *Rumsfeld v. Padilla*,<sup>92</sup> *Hamdi v. Rumsfeld*,<sup>93</sup> and *Rasul v. Bush*.<sup>94</sup>

In *Rumsfeld v. Padilla*, federal agents apprehended Padilla, a United States citizen, while disembarking a plane at Chicago O’Hare International Airport.<sup>95</sup> Ultimately, the Department of Defense detained Padilla at the Consolidated Navy Brig in Charleston, South Carolina and designated Padilla as an “enemy combatant.”<sup>96</sup> Padilla filed a petition for habeas corpus under 28 U.S.C. § 2241 in the Southern District of New York<sup>97</sup> where he had been in criminal custody prior to his detention in South Carolina.<sup>98</sup> Although not reviewing the merits of Padilla’s petition, the United States Supreme Court granted certiorari to determine the proper respondent for the petition and whether the Southern District of New York had jurisdiction over this respondent.<sup>99</sup> The Court held that “the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official.”<sup>100</sup> Since Commander Marr was the equivalent of a warden at the naval brig, the Court determined that Marr, instead of Secretary Rumsfeld was the proper respondent.<sup>101</sup> Furthermore, the Court found that “the general rule for core habeas petitions challenging present physical confinement, jurisdiction lies in only one district—the district of confinement.”<sup>102</sup> Thus, the South Carolina District Court was the only court with jurisdiction over the petition.<sup>103</sup> The

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<sup>92</sup> Padilla, 542 U.S. 426 (2004).

<sup>93</sup> Hamdi, 542 U.S. 507 (2004).

<sup>94</sup> Rasul, 542 U.S. 466 (2004).

<sup>95</sup> Padilla, 542 U.S. at 430.

<sup>96</sup> *Id.* at 431-32.

<sup>97</sup> *Id.* at 432.

<sup>98</sup> *Id.* at 430-31.

<sup>99</sup> *Id.* at 434.

<sup>100</sup> *Id.* at 435.

<sup>101</sup> *Id.* at 436.

<sup>102</sup> *Id.* at 443.

<sup>103</sup> *Id.* at 451.

Court remanded the case with an order of dismissal without prejudice.<sup>104</sup>

In *Hamdi v. Rumsfeld*, the Northern Alliance seized a United States citizen living in Afghanistan and turned him over to the United States military.<sup>105</sup> Interrogated and detained in Afghanistan, Hamdi was later transferred to Guantanamo and, eventually, to the naval brig located Charleston, South Carolina.<sup>106</sup> The Government labeled Hamdi as an “enemy combatant” and claimed that this status alone justified indefinite detention without formal charges or proceedings.<sup>107</sup> Although the Court noted that formal suspension of the writ had not occurred,<sup>108</sup> it recognized that Congress had enacted the AUMF after 9/11, which “authorize[d] the President to use ‘all necessary and appropriate force’ against ‘nations, organizations, or persons’ associated with the . . . terrorist attacks.”<sup>109</sup> In holding that Hamdi must be notified of the factual basis for his classification as an “enemy combatant”<sup>110</sup> and allowed to dispute his status before a neutral decision-maker in a timely and meaningful manner, the Court stated that the proceeding “may be tailored to alleviate [its] uncommon potential to burden the Executive at a time of ongoing military conflict.”<sup>111</sup> The Court suggested that the hearing could include the introduction of hearsay and a burden-shifting scheme that would allow the Government a rebuttable presumption as to the credibility of its evidence, requiring the petitioner to rebut the presumption with more “persuasive evidence.”<sup>112</sup> Moreover, the Court stated that those deemed to be “enemy combatants” could be detained throughout the duration of the hostilities with the Taliban, which could potentially result in indefinite confinement.<sup>113</sup> Therefore, the Court ruled that the government’s standard of “some evidence”

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<sup>104</sup> *Id.*

<sup>105</sup> *Hamdi*, 542 U.S. at 510.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 525.

<sup>109</sup> *Id.* at 518.

<sup>110</sup> The Court defined “enemy combatant” as individual who was “‘part of or supporting forces hostile to the United States or coalition partners’ . . . and [who] ‘engaged in an armed conflict against the United States.’” *Id.* at 516.

<sup>111</sup> *Id.* at 533.

<sup>112</sup> *Id.* at 533-34.

<sup>113</sup> *Id.* at 520.

was inadequate under the Constitution's due process standard.<sup>114</sup> The Court noted that its holding did not preclude the government from utilizing a military tribunal employing a constitutional process.<sup>115</sup>

In *Rasul v. Bush*, the United States Supreme Court considered whether the protections of habeas corpus should be extended for two Australian citizens and twelve Kuwaiti citizens who were captured abroad during military actions against al Qaeda and the Taliban.<sup>116</sup> Filing in the United States District Court for the District of Columbia, the petitioners challenged their detention, claiming that they were not "enemy combatants" or terrorists and alleging that they were not allowed access to a court or tribunal.<sup>117</sup> The district court dismissed all actions for lack of jurisdiction by relying on *Johnson v. Eisentrager* and found that the privilege of the writ did not extend to a territory in which the United States lacked sovereignty.<sup>118</sup> The Court recognized that the rule in *Eisentrager* only applied to detainees' constitutional right to habeas corpus review.<sup>119</sup> Thereafter, the Court analyzed whether the habeas statute, 28 U.S.C. § 2241, which authorized federal district courts to hear petitions of the writ for any person "in custody in violation of the Constitution or laws or treaties of the United States," and "within their respective jurisdictions,"<sup>120</sup> provided judicial review to the Guantanamo detainees where the United States did not have ultimate sovereignty.<sup>121</sup> After reviewing the lease with Cuba which stated that the United States has "complete jurisdiction and control" over Guantanamo Bay Naval Base, the Court determined that the statute would provide the district court with jurisdiction over claims of a United States citizen and, since the statute did not state that aliens and citizens would be treated differently, ruled that aliens were entitled to protection of the writ under the statute.<sup>122</sup> Thus, the

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<sup>114</sup> *Id.* at 538.

<sup>115</sup> *Id.*

<sup>116</sup> *Rasul*, 542 U.S. at 470-71.

<sup>117</sup> *Id.* at 471-72.

<sup>118</sup> *Id.* at 472.

<sup>119</sup> *Id.* at 476.

<sup>120</sup> *Id.* at 473.

<sup>121</sup> *Id.* at 475.

<sup>122</sup> *Id.* at 480-81.

Court remanded the case to the district court for a decision on its merits.<sup>123</sup>

In 2006, the Supreme Court, granted certiorari to Hamdan, an alien detainee, imprisoned in Guantanamo Bay.<sup>124</sup> Shortly after 9/11, a presidential order was issued, governing “Detention, Treatment, and Trial of Certain Non Citizens in the War Against Terrorism” when the “President determines ‘there is reason to believe’ that he or she (1) ‘is or was’ a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States.”<sup>125</sup> The Government moved to dismiss for lack of jurisdiction based upon the Detainee Treatment Act of 2005, (“DTA”), which removed jurisdiction from any court to consider “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.”<sup>126</sup> Instead, the Act vested the Combatant Status Review Tribunal (“CSRT”) exclusive jurisdiction to establish the classification of the detainees located in Guantanamo and vested the District of Columbia exclusive jurisdiction for final review, albeit with a limited scope, of the CSRT’s determination.<sup>127</sup> The Court denied the Government’s motion, finding that the jurisdiction stripping statute did not affect pending cases.<sup>128</sup>

Turning to the merits of the case, the Court addressed whether Hamdan’s charge of a conspiracy could be tried by a military commission under the Uniform Code of Military Justice (“UCMJ”) and the Geneva Conventions.<sup>129</sup> The Court recognized that, historically, military commissions have been convened as “an ‘incident to the conduct of war’ when there is a need ‘to seize and subject to disciplinary measures those enemies who in their attempt

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<sup>123</sup> *Id.* at 485.

<sup>124</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 566 (2006).

<sup>125</sup> *Id.* at 568.

<sup>126</sup> *Id.* at 572-731.

<sup>127</sup> *Id.* at 570, 573.

<sup>128</sup> *Id.* at 577.

<sup>129</sup> *Id.* at 567.

to thwart or impede our military effort have violated the law of war.”<sup>130</sup> However, the Court determined that the offense of conspiracy did not constitute an offense against the law of war because neither the acts in furtherance of the conspiracy would not be considered a war crime nor did they occur during a time of war.<sup>131</sup> Furthermore, the procedures employed by the military commission did not pass constitutional muster and violated both the UCMJ and the Geneva Conventions.<sup>132</sup> “Another striking feature of the rules governing Hamdan's commission is that they permit the admission of any evidence that, in the opinion of the presiding officer, ‘would have probative value to a reasonable person,’” including hearsay and evidence obtained through coercion.<sup>133</sup> In addition, any appeal panel was required to “disregard any variance” from governing procedures.<sup>134</sup> The Court concluded that the tribunal must provide the protections guaranteed by courts-martial.<sup>135</sup> In direct response to this holding, Congress responded by enacting the Military Commissions Act of 2006 (MCA), 10 U.S.C. § 948 et seq. (Supp. 2007), which denied federal courts jurisdiction of habeas corpus actions pending at the time of enactment.<sup>136</sup>

In *Boumediene*, a petition for habeas corpus was granted certiorari, and the Court recognized that the statute had stripped the Court of jurisdiction over the case. However, the Court addressed whether the constitutional privilege of the writ extended to enemy combatant detainees held at Guantanamo Bay.<sup>137</sup> The Court analyzed the historical basis for the writ of habeas corpus, noting that during

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<sup>130</sup> *Id.* at 596 (quoting *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942)).

<sup>131</sup> *Id.* at 612.

<sup>132</sup> *Id.* at 567.

<sup>133</sup> *Id.* at 614 (quoting Department of Defense, Military Commission Order No. 1, P 6(D)(1) (March 21, 2004)), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (2002 version with the same wording).

<sup>134</sup> *Id.* at 615 (quoting Military Commission Order No. 1, P 6(H)(4)).

<sup>135</sup> *Id.* at 634.

<sup>136</sup> See *Boumediene*, 553 U.S. at 735-36.

<sup>137</sup> *Id.* at 736.

federal Constitution ratifying conventions, the Suspension Clause was “an ‘exception’ to the ‘power given to Congress to regulate courts,’” and the “Clause not only protects against suspensions of the writ but also guarantees an affirmative right to judicial inquiry into the causes of detention.”<sup>138</sup> In addition, the Court rejected the argument that the protection of the writ only applied in territories where the United States maintained de facto sovereignty and held that the Suspension Clause had full effect in Guantanamo Bay.<sup>139</sup> Thus, the Court held that the Constitutional privilege of the writ applied to the Guantanamo detainees, which could not be withdrawn without a formal suspension.<sup>140</sup>

Thus, the Court analyzed whether Congress could avoid formally suspending the writ by statutorily creating a mechanism that provided an *adequate substitute* for the writ’s protection.<sup>141</sup> By enacting the DTA, Congress provided a review of the CSRT’s proceedings limited to assessing whether the CSRT complied with its own procedures.<sup>142</sup> However, the Court found that a substitute habeas proceeding:

must have the means to correct errors that occurred during the CSRT proceedings . . . includ[ing] some authority to assess the sufficiency of the Government’s evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory

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<sup>138</sup> *Id.* at 743-44 (quoting 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 460-464 (J. Elliot 2d ed. 1876)).

<sup>139</sup> *Id.* at 770-71 (distinguishing the facts from *Eisentrager*, 339 U.S. 763 (1950), and recognizing the United States de jure sovereignty over Guantanamo Bay).

<sup>140</sup> *Id.* at 732.

<sup>141</sup> *Id.* at 733 (“After Hamdi, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo were ‘enemy combatants,’ as the Department defines that term.”).

<sup>142</sup> *Id.* at 777.

evidence that was not introduced during the earlier proceeding.<sup>143</sup>

Furthermore, a habeas substitute court must be able to order conditional release.<sup>144</sup> Although the Court recognized that the legitimacy of the military objective in detaining threats to our nation in order to avoid the dispersion of classified information, the Court held that the DTA impermissibly diluted the protection of the writ.<sup>145</sup>

This opinion ensures that the historical protection of the writ of habeas corpus applies to the detainees at Guantanamo Bay. However, the Supreme Court has not granted certiorari to any habeas corpus petitions since the *Boumediene* decision. Moreover, a study from the Seton Hall Law School suggests that the writ has not been given the Constitutional protections as allocated by the Supreme Court's holdings.<sup>146</sup> In fact, the report notes that since *Boudmediene's* decision, forty-six habeas petitions have been filed, but after the District of Columbia Circuit Court decided *Al-Adahi v. Obama*<sup>147</sup> in 2010, detainees have lost 92% of petitions as a result of judicial deference to the Government's allegations.<sup>148</sup>

In *Al-Adahi*, the United States District Court for the District of Columbia granted Al-Adahi's petition for writ of habeas corpus because the court found "'no reliable evidence in the record that [Al-Adahi] was a member of al-Qaida' and ruled that he should be released."<sup>149</sup> The Government appealed, and the District of Columbia Circuit Court first acknowledged that both parties agreed that the

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<sup>143</sup> *Id.* at 786.

<sup>144</sup> *Id.* at 779 (suggesting that "release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted").

<sup>145</sup> *Id.* at 796.

<sup>146</sup> Mark Denbeaux, et al., Seton Hall Law Ctr. for Policy and Research, No Hearing Habeas: D.C. Circuit Restricts Meaningful Review 11 (May 1, 2012), available at <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/hearing-habeas.pdf>

<sup>147</sup> 613 F.3d 1102 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011).

<sup>148</sup> Denbeaux, *supra* note 146, at 1.

<sup>149</sup> 613 F.3d at 1103 (quoting *Al-Adahi v. Obama*, No. 05-280(GK), 2009 WL 2584685 (D.D.C. Aug. 21, 2009)).

preponderance of the evidence standard should be applied.<sup>150</sup> However, the court admonished the district court in failing to apply the “conditional probability analysis,” finding:

Those who do not take into account conditional probability are prone to making mistakes in judging evidence. They may think that if a particular fact does not itself prove the ultimate proposition (e.g., whether the detainee was part of al-Qaida), the fact may be tossed aside and the next fact may be evaluated as if the first did not exist. This is precisely how the district court proceeded in this case: Al Adahi’s ties to bin Laden “cannot prove” he was part of Al Qaida and this evidence therefore “must not distract the Court.” The fact that Al Adahi stayed in an al-Qaida guesthouse “is not in itself sufficient to justify detention. Al Adahi’s attendance at an al-Qaida training camp “is not sufficient to carry the Government’s burden of showing that he was part” of al-Qaida. And so on. The government is right: the district court wrongly “required each piece of the government’s evidence to bear weigh without regard to all (or indeed any) other evidence in the case. This was a fundamental mistake that infected the court’s entire analysis.<sup>151</sup>

The court proceeded to discuss evidence in the record, which independently may be insufficient to categorize Al-Adahi as an enemy combatant, but when analyzed as a whole met the

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<sup>150</sup>The court, however, was unconvinced that the Constitution requires a preponderance of the evidence stand, but suggested that the government may only be required to produce “some evidence.” *Id.* at 1104.

<sup>151</sup> *Id.* at 1105-06 (internal citations omitted).

preponderance of the evidence standard.<sup>152</sup> Therefore, the court remanded the case with instructions to deny Al-Adahi's petition.<sup>153</sup>

Since the *Al-Adahi* decision, only one petition has been granted, *Latif v. Obama*,<sup>154</sup> but it was subsequently vacated and remanded. Further, the Seton Hall Law School's study suggests that the individual components of evidence that the District of Columbia Circuit Court utilized to justify its reversal in *Al-Adahi*: hostile acts, detainees staying in guesthouses, detainees attendance at a training camp, and a detainees' travel route, have been employed by the district court to systemically deny later habeas court petitions, suggesting that governmental findings are afforded extreme deference.<sup>155</sup>

In *Latif*, the district court granted Latif's petition for habeas corpus, and, once again, the government appealed.<sup>156</sup> Although Latif did not deny that he had been interviewed and did not claim that his statements were involuntary, he argued that the governmental record was unreliable because "his interrogators [Text Redacted By the Court] so garbled his words that their summary bears no relation to what he actually said."<sup>157</sup> The district court determined that there was a serious question as to the accuracy of the government's reports.<sup>158</sup> However, the circuit court rejected this finding.<sup>159</sup>

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<sup>152</sup> *Id.* at 1111 (finding that the record showed that Al Adahi stayed at an al-Qaida guesthouse, attended an al-Qaida training camp, met with bin Laden, wearing a model of Casio watch commonly worn linked to al-Qaida, had inconsistent explanations for his actions, and was captured on a bus carrying wounded Arabs and Pakistanis).

<sup>153</sup> *Id.*

<sup>154</sup> 677 F.3d 1175 (D.C. Cir. 2012), *cert. denied*, 132 S. Ct. 2741 (2012).

<sup>155</sup> Denbeaux, *supra* note 146, at 6-11.

<sup>156</sup> 677 F.3d at 1176.

<sup>157</sup> *Id.* at 1178.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

The circuit court noted that there is a presumption of authenticity and regularity of governmental reports.<sup>160</sup> The presumption of regularity “presumes the government official accurately identified the source and accurately summarized his statement, but it implies nothing about the truth of the underlying non-government source’s statement.”<sup>161</sup> The court concluded that the district court was required to make specific findings as to Latif’s credibility, but rather it had determined that Latif presented a “plausible alternative story.”<sup>162</sup> Therefore, in absence of such a credibility finding, the court vacated the order and remanded the case.<sup>163</sup>

#### PART V: CONCLUSION

Although the Court determined that the enactment of the DTA constituted an impermissible suspension of the writ because of a lack of formal suspension in *Boumediene*, the Court never stated whether Congress could formally suspend the writ based on the “War on Terror.”<sup>164</sup> Under the Constitution, the writ may only be suspended “in Cases of Rebellion or Invasion [as] the public Safety may require it.”<sup>165</sup> Historically, Congress has only utilized its power to suspend the writ when hostilities occurred on U.S. soil, affecting a limited number of defined individuals or for a limited duration.

Our enemies in the “War on Terror” include individuals affiliated with the underground terrorist organization al Qaeda. Its membership spans across many countries, and its decentralized

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<sup>160</sup> *Id.* at 1180.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1190.

<sup>163</sup> See *id.* at 1192; Charlie Savage, *Military Identifies Guantanamo Detainee Who Died*, N.Y. TIMES, Sept. 11, 2012, available at <http://www.nytimes.com/2012/09/12/us/politics/detainee-who-died-at-guantanamo-had-release-blocked-by-court.html> (stating that on September 8, 2012, after a decade of detention, Adnan Farhan Abdul Latif was found dead in his cell).

<sup>164</sup> *Boumediene*, 553 U.S. at 732.

<sup>165</sup> U.S. CONST. art. I, § 9, cl. 2.

system makes it difficult to ascertain its members. In comparing this organization to the historical enemies where the writ was suspended, this organization most closely resembles the Klu Klux Klan because the Klan's membership did not encompass an entire region or nation. However, during this period, Congress delicately balanced the nation's need to usurp the power of the Klan to preserve the legitimacy of the justice system against the fundamental principle that the executive branch should not be able to yield the power to arbitrarily imprison individuals by expressly limiting the executive branch's power during the writ's suspension. Congress seemingly recognized that, during periods of rebellion, the executive branch may abuse its power and undermine the constitutional protection of the writ.

Even in *Boumediene*, Justice Kennedy acknowledged that in England during the 1600s:

[T]he writ proved to be an imperfect check. Even when the importance of the writ was well understood in England, habeas relief often was denied by the courts or suspended by Parliament. Denial or suspension occurred in times of political unrest, to the anguish of the imprisoned and the outrage of those in sympathy with them.<sup>166</sup>

Furthermore, the Court understood that habeas corpus proceedings are more crucial where detention is ordered by the executive branch rather than a disinterested tribunal.<sup>167</sup>

In addition, under the Ku Klux Klan Act, Congress restricted the executive branch's power by limiting the suspension's duration. The "War on Terror," however, is perpetual, and contains no identifiable means to determine its conclusion. In fact, the *Boumediene* Court acknowledged that the "War on Terror" was clearly distinguishable from prior military conflicts which were for limited duration, and that the Court may need to address the outer limits of

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<sup>166</sup> *Boumediene*, 553 U.S. at 741.

<sup>167</sup> *Id.* at 783.

the president's war powers "to preserve constitutional values while protecting the Nation from terrorism."<sup>168</sup> Thus, it is unclear whether Congress could currently constitutionally suspend the writ after more than ten years after al Qaeda's invasion based on the constitutional requirement that the writ may only be suspended for the public safety.

Moreover, without a formal suspension, the detainees at Guantanamo Bay are entitled, under the *Boumediene* decision, to the constitutional protections of the writ. The Court declared, "[w]ithin the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person."<sup>169</sup> However, the District of Columbia Circuit Court has impermissibly ignored this critical responsibility, and its decisions threaten individuals misclassified as enemy combatants with indefinite confinement and without effective means to challenge their detention.

A CSRT consists of a hearing and a review of classified and unclassified evidence by a panel of three military judges, and evidence against the detainee is withheld from him, making it seemingly impossible to rebut his involvement in al Qaeda or other terrorist organizations. Furthermore, the detainees do not have access to sources of proof due to both their imprisonment and distance from their homeland.<sup>170</sup> Finally, the rules of evidence and criminal procedure have been relaxed to such an extent that the ownership of personal property similar to property employed in al Qaeda

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<sup>168</sup> *Id.* at 797-98.

<sup>169</sup> *Id.* at 797.

<sup>170</sup> At the conclusion of the CRST for Al-Adahi, Al-Adahi requested to see the classified information. The Tribunal President responded: "Classified information cannot be revealed to a Detainee." Thereafter, Al-Adahi asked to look at the Unclassified Evidence. The Tribunal President did not allow this either, and responded by stating that "[b]asically, all of the Unclassified has been shown to you." Summarized Unsworn Detainee Statement at 9, *Al-Adahi v. Obama*, 692 F.Supp.2d 85 (2010) (No. 05-CV-0280 (GK)), available at [http://s3.amazonaws.com/publica/assets/detention/gitmo/Mohammed\\_Al\\_Edah\\_Government\\_Allegations.pdf](http://s3.amazonaws.com/publica/assets/detention/gitmo/Mohammed_Al_Edah_Government_Allegations.pdf).

bombings can be introduced as evidence of the detainee's affiliation to the organization, even without an admission of ownership by the detainee or a chain of custody establishing ownership.

In *Boumediene*, the Court recognized that the "necessary scope of habeas review in part depends upon the rigor of any earlier proceedings," and, when detention is based upon an executive order rather than a judicial proceeding in front of a disinterested judge, the habeas court must have authority to conduct meaningful review, of both cause for detention and the Executive's power to detain.<sup>171</sup> However, the court continually fails to exercise its authority. The District of Columbia Circuit Court has unilaterally instituted a standard of review that is insurmountable for these detainees. Deference is afforded to the Government's findings of fact and documents, whereby the detainee must prove his innocence without adequate means of doing so after only a probable cause hearing which has determined his status as an enemy combatant, even in a time when the needs of war do not mandate such a relaxed standard. This diminishes the underlying purpose of the writ and its collateral function, which provides the habeas court the power to review the sufficiency of the Government's evidence used to detain the individual. The Judiciary must necessarily act as a check on the Executive branch's power, but blanket deference to the Government results in no check at all - when it is the only check that can reverse an arbitrary and indefinite detention.

The problem is further exacerbated because the CSRT and habeas reviews cannot be fully scrutinized by our nation's citizens. American courts have historically existed as open forums, ensuring the integrity of the justice system. In *Globe Newspaper Company v. Superior Court for Norfolk County*,<sup>172</sup> the United States Supreme Court noted:

the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with

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<sup>171</sup> *Boumediene*, 553 U.S. at 781, 783-84.

<sup>172</sup> 457 U.S. 596, 606 (1982).

benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process - - an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.

Although the Court has historically recognized exceptions to open courtroom proceedings where safety and justice demands, these closed proceedings are memorialized in court records and documents available to the public at a later time. In the CSRTs and habeas reviews, concerns for national safety require that they be closed to the public. However, many of the documents available to the public for review are redacted or deemed classified information, preventing any real scrutiny by the public.

Therefore, as the law stands now, the Guantanamo Bay detainees are destined to indefinite detention without any meaningful review. Congress is arguably unable to formally suspend the writ, which could limit the power of the Executive in detaining those classified as enemy combatants. Furthermore, our nation's citizens have no meaningful method to ascertain whether the judicial system is adhering to Constitutional mandates. Meanwhile, the District of Columbia of Circuit Court has given the Executive Branch extreme deference in its findings, eliminating all cognizable rights to the writ under our Constitution.