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**THE TUG OF WAR: COMBATANT STATUS
REVIEW TRIBUNALS AND THE STRUGGLE
TO BALANCE NATIONAL SECURITY AND
CONSTITUTIONAL VALUES DURING THE
WAR ON TERROR**

*Doran G. Arik**

There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they will so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration.¹

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¹ Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, in *THE RIGHTS RETAINED BY THE PEOPLE* 67, 70 (Randy E. Barnett ed., 1989) (internal italics omitted).

INTRODUCTION

The three branches of the American government have been wrangling over the rights of non-citizen detainees held at the U.S. naval base at Guantanamo Bay, Cuba² ever since the government began sending suspected terrorists there in 2002.³ Times of war often give rise to internal struggles within government as the nation's leadership attempts to maintain a delicate balance between the equally important yet competing interests of defending national security and individual liberty. The terrorist attacks of September 11, 2001 unquestionably placed new and different pressures on the American government; an attack on American soil heightened the government's responsibility to preserve and protect the nation. National defense and individual liberty are not mutually exclusive interests, however, and unfortunately the American government has thus far been unable to strike the appropriate balance between the two initiatives. The result is perhaps best described as a six-year tug-of-war between Congress and the Executive on the one hand and the Supreme Court on the other.

Almost immediately after the United States brought the first suspected terrorists to Guantanamo in January of 2002,⁴ detainees

² See Steve Vogel, *U.S. Takes Hooded, Shackled Detainees to Cuba*, WASH. POST, Jan. 11, 2002, at A10.

³ On several occasions, the Supreme Court ruled that the right to seek a writ of habeas corpus in federal court challenging the legality of one's detention extends to Guantanamo detainees, while Congress, under political pressure from both its own members and the Administration, effectively legislated to overturn those decisions. After the Supreme Court held in *Rasul v. Bush*, 542 U.S. 466 (2004), that non-citizen detainees held at Guantanamo have the right to petition federal courts for writs of habeas corpus pursuant to 28 U.S.C. § 2241, Congress passed the Detainee Treatment Act ("DTA") which stripped federal courts of their jurisdiction over detainees' habeas petitions. See *infra* note 47 and accompanying text. Then, after the Supreme Court held in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), that the DTA did not apply to habeas petitions already pending when the DTA was enacted, Congress passed the Military Commissions Act ("MCA") which explicitly and effectively stripped federal courts of any and all jurisdiction over detainees' habeas petitions. See *infra* text accompanying notes 53–54.

⁴ Vogel, *supra* note 2.

began petitioning federal courts for writs of habeas corpus to challenge the legality of their detentions on both constitutional and statutory grounds.⁵ However, each time the Supreme Court held that 28 U.S.C. § 2241, commonly referred to as the habeas statute, extended to alien detainees held at Guantanamo,⁶ Congress responded with legislation to strip federal courts of their jurisdiction over detainees' habeas petitions.⁷ Without access to federal courts through habeas petitions, each detainee must instead rely on the limited review process that accompanies his individual Combatant Status Review Tribunal ("CSRT")—a process hastily created by the Department of Defense ("DOD") in 2004 to review detainees' enemy combatant status designations. Under the Detainee Treatment Act ("DTA") and Military Commissions Act ("MCA"), a detainee at Guantanamo may only seek review in the D.C. Circuit Court as to whether the CSRT in his case properly

⁵ See generally *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002) (holding that the Court did not have jurisdiction over habeas petitions filed by aliens held outside the sovereign territory of the United States), *aff'd by Al-Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd, Rasul*, 542 U.S. 466 (2004) (holding, inter alia, that Guantanamo detainees have the right to file habeas petitions in federal court to challenge the legality of their detentions pursuant to 28 U.S.C. § 2241).

⁶ See *Rasul*, 542 U.S. at 483 (holding that detainees at Guantanamo have the right to petition federal courts for writs of habeas corpus under the habeas statute for a review of the legality of their detentions); see also *Hamdan*, 126 S. Ct. at 2769 (concluding that restrictions imposed on detainees' right to file petitions for writs of habeas corpus in federal court by Congress in the DTA did not apply to cases already pending when the DTA was passed).

⁷ Congress first attempted to limit federal courts' jurisdiction over detainees' habeas petitions in the wake of *Rasul* when it passed the DTA in 2005. See Department of Defense Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Title X, *Matters Relating to Detainees*, Pub. L. 109-148, 119 Stat. 2680 (2005) [hereinafter Detainee Treatment Act]. Then in 2006 the Supreme Court ruled in *Hamdan* that the DTA did not apply to cases already pending when the law was enacted. See *Hamdan*, 126 S. Ct. 2749. In response, Congress passed the MCA, effectively and completely withdrawing detainees' right to file habeas petitions in federal court. See Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600 (2006).

followed DOD standards and procedures.⁸ This limited review prevents any examination of the underlying legitimacy of CSRT procedures, despite the fact that the process denies detainees bedrock procedural guarantees at the core of the American legal system.⁹

In stripping federal courts of their jurisdiction over detainees' habeas petitions, the Administration strenuously maintains, and Congress has thus far seemingly agreed, that because Guantanamo detainees are non-citizens captured and detained abroad, U.S. constitutional rights do not extend to them.¹⁰ Such an argument presupposes that constitutional rights exist in a vacuum, and fails to take into account both the core principles underlying constitutional guarantees and the historical purpose for their inclusion in the Constitution.

The Framers recognized certain rights as deriving from natural law, and intended the Constitution to serve as the protector, not the

⁸ "The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit . . . shall be limited to the consideration of—whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals" Detainee Treatment Act § 1005(e)(2)(C). The MCA left this portion of the DTA unchanged when it was subsequently enacted in 2006. *See* Military Commissions Act.

⁹ Judge Joyce Green of the D.C. District Court, before whom many detainees have appeared after filing petitions, lamented in her disposition of one group of consolidated cases that, "CSRTs are unconstitutional for failing to comport with the requirements of due process." *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 481 (D.D.C. 2005), *vacated*, *Boumediene v. Bush*, 476 F.3d 981, (D.C. Cir. 2007), *cert. and reh'g granted*, 127 S. Ct. 3078 (2007).

¹⁰ *See Boumediene*, 476 F.3d at 990–91; *see generally* *Johnson v. Eisentrager*, 339 U.S. 763 (1950). This Note does not examine whether specific constitutional rights as such should extend to detainees held at Guantanamo. Rather, the discussion here is limited to an examination of the degree to which natural law and founding principles require that a minimum procedural standard be met in order to preserve fundamental constitutional values. The analysis undertaken here does not imply an assumption of the constitutionality, or unconstitutionality, of the jurisdiction-stripping provisions of the DTA and MCA.

creator, of those rights.¹¹ Indeed, the liberty rights as recognized by the Framers did not originate in the Constitution, but rather were deemed natural rights that predated its ratification.¹² More than simply conferring certain rights on American citizens, the constitutional guarantees of due process and habeas corpus serve to “preserve unimpaired the . . . safeguards of civil liberty.”¹³ Because protecting against “interferences with the individual’s right to liberty is . . . one of the fundamental principles of a democratic society,”¹⁴ such a goal cannot be limited to citizens. Unchecked attempts to curtail individual liberty—regardless of citizenry—will irreparably undermine our democratic foundations. Preserving safeguards of civil liberties thus must be a universal imperative.

This Note argues that the CSRT process cobbled together by the DOD undermines the fundamental tenet of individual liberty, which sits at the core of the American legal system. Part I of this Note provides the history of detention at Guantanamo and examines detainees’ challenges to their detentions coupled with the varying responses by Congress and the courts. Part II examines the natural law principles that underlie specific guarantees provided in the Constitution and the degree to which such principles lend legitimacy to the American legal system. Part III presents a more detailed examination of the CSRT system and analyzes how the inherent problems therein undermine the role of natural law

¹¹ See generally Randy E. Barnett, *The Ninth Amendment: It Means What it Says*, 85 TEX. L. REV. 1 (2006) [hereinafter *The Ninth Amendment*] (arguing that “individual natural rights existed prior to the Bill of Rights”); see also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004).

¹² See Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1074–80 (1991) (arguing that the Framers of the American Constitution shared a strong belief in natural rights, including but not limited to the right to liberty, and understood natural rights to “come from God rather than the government”).

¹³ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2772 (2006) (quoting *Ex Parte Quirin*, 317 U.S. 1, 19 (1942)).

¹⁴ Brief of Amici Curiae Specialists in Israeli Military Law and Constitutional Law in Support of Petitioners at 10, *Boumediene v. Bush*, No. 06-1195; *Al-Odah v. United States*, No. 06-1196 (Aug. 24, 2007) [hereinafter Brief of Specialists in Israeli Military Law].

principles in the American constitutional system. Finally, Part IV provides a survey of recent and pending developments, arguing that the most effective method for remedying the problems with the current process for examining detainees' detention, and by extension for striking an appropriate balance between preserving core American principles and protecting our national security interests, lies in congressional action that respects Supreme Court mandates.

I. THE HISTORY OF DETENTION AT GUANTANAMO—A TIMELINE

A. *Arrival and Detention*

Within one week of September 11, 2001,¹⁵ Congress passed a joint resolution authorizing the President to use “all necessary and appropriate force . . . to prevent any future acts of international terrorism against the United States.”¹⁶ Shortly after U.S. troops

¹⁵ On Sept. 11, 2001, terrorists hijacked four planes, crashing two aircraft into the Twin Towers in New York City, and another into the Pentagon in Washington, D.C. See Mitchell Zuckoff & Matthew Brelis, *Thousands Feared Dead After Planes Hit Towers, Pentagon*, BOSTON GLOBE, Sept. 12, 2001, at A1.

¹⁶ Authorization for the Use of Military Force, P.L. No. 107-40, 115 Stat. 224 (2001). The Authorization for the Use of Military Force, a joint resolution of Congress, granted the specific statutory authorization that the President needed, pursuant to the War Powers Resolution, in order to initiate military action first in Afghanistan and later in Iraq. The 93rd Congress passed the War Powers Resolution in 1973 to “insure that the collective judgment of both Congress and the President will apply to the introduction of United States [military] into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.” War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973). Section 8(a) of the resolution vests authority to introduce American troops into hostilities only pursuant to specific statutory authorization. *Id.* See also George W. Bush, President of the U.S., The White House, Presidential Address to the Nation (Oct. 7, 2001), available at <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html> [hereinafter Presidential Address to the Nation].

initiated the first strike in Afghanistan,¹⁷ President Bush issued a military order giving the Secretary of Defense detention and trial authority over individuals captured by the United States and outlining minimum provisional and procedural guarantees for detainees.¹⁸

In January of 2002, Secretary of Defense Donald Rumsfeld announced that the military was “making preparations” to send detainees to the U.S. naval base in Guantanamo Bay, Cuba.¹⁹ One week later, the first of several hundred detainees arrived there.²⁰ Though the President’s Military Order authorized Secretary Rumsfeld to regulate detainees’ trials,²¹ Secretary Rumsfeld made clear at that time that there were “no plans to hold any kind of tribunal [in Guantanamo].”²²

¹⁷ On October 7, 2001 the United States military began strikes, pursuant to President Bush’s order, “against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.” Presidential Address to the Nation, *supra* note 16.

¹⁸ For example, the order mandated that detainees be treated humanely, be afforded adequate food and water, and be allowed to practice their religion freely. In addition, the order provided that detainees were to be given a “full and fair trial” subject to the “rules for the conduct of the proceedings of military commissions.” Press Release, George W. Bush, President of the U.S., The White House, President Issues Military Order: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> [hereinafter President’s Military Order].

¹⁹ Donald Rumsfeld, Sec’y of Def., U.S. Dep’t of Def., DOD News Briefing (Dec. 27, 2001), *available at* <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2696> [hereinafter DOD Briefing].

²⁰ *See* Vogel, *supra* note 2.

²¹ The President’s Military Order authorized the Secretary of Defense to appoint military commissions and issue any other orders and regulations deemed necessary to carry out the provisions of the Order. *See* President’s Military Order, *supra* note 18.

²² DOD Briefing, *supra* note 19.

B. Initial Challenges

Almost immediately after terrorism suspects arrived at Guantanamo, detainees began to seek judicial review of their detentions by filing habeas petitions in federal court.²³ Detainees argued that they did not fight against the United States, that they were never “supporter[s] of the Taliban or any terrorist organization,” and that their detentions were therefore unlawful.²⁴ In response, the government argued that U.S. courts lacked jurisdiction to consider habeas petitions brought by non-citizens captured and detained abroad.²⁵ The D.C. District Court agreed, and granted the government’s motion to dismiss the detainees’ petitions.²⁶

On appeal, the D.C. Circuit Court upheld the District Court’s decision to grant the government’s motion to dismiss.²⁷ However, in 2004 the Supreme Court reversed the decisions of the lower courts, holding in *Rasul v. Bush* that U.S. courts do have

²³ For example, petitioners in *Rasul v. Bush* first filed their habeas petition in D.C. District Court on February 19, 2002. *Rasul v. Bush*, 215 F. Supp. 2d 55, 57 (D.D.C. 2002). The action before the District Court was a consolidation of two cases, *Rasul v. Bush* and *Al-Odah v. United States*. Later appeals in that action to the D.C. Circuit Court and the United States Supreme Court are referenced by varying captions, including both *Rasul v. Bush* and *Al-Odah v. United States*.

²⁴ *Rasul*, 215 F. Supp. 2d at 61.

²⁵ *Id.* at 56.

²⁶ *Id.* at 57. The District Court looked to earlier precedent, and held that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), was controlling. In *Johnson*, the Supreme Court dismissed habeas petitions filed by German nationals captured and tried in China during World War II and subsequently detained at a military prison in Germany. *See id.* In dismissing their habeas petitions for lack of jurisdiction, the Supreme Court held that the writ of habeas corpus did not extend to aliens held outside the sovereign territory of the United States. *Id.* at 778. The District Court in *Rasul* held that, like in *Johnson*, the writ of habeas corpus did not extend to detainees held at Guantanamo because Guantanamo Bay, Cuba is “outside the sovereign territory of the United States,” and thus the Court lacked jurisdiction. *Rasul*, 215 F. Supp. 2d at 72–73.

²⁷ *Al-Odah v. United States*, 321 F.3d 1134, 1144–45 (D.C. Cir. 2003) (on appeal from *Rasul*, 215 F. Supp. 2d 55).

jurisdiction under the habeas statute to consider challenges to the legality of the detention of foreign nationals captured abroad and detained at Guantanamo.²⁸ That same day, in another similar case, a plurality of the Supreme Court held that Congress' Authorization for the Use of Military Force ("AUMF") provided the necessary authorization to detain, but that detainees must be afforded the opportunity to appeal an enemy combatant status determination.²⁹

In response to the Supreme Court's ruling in *Rasul* affirming detainees' right to challenge the legality of their detention by filing habeas petitions, Deputy Secretary of Defense Paul Wolfowitz issued a memorandum establishing CSRTs and outlining the procedures required therein.³⁰ Specifically, CSRT proceedings were to operate under the presumption that each detainee was an enemy combatant.³¹ CSRTs were billed as an opportunity for a detainee to

²⁸ *Rasul v. Bush*, 542 U.S. 466, 484 (2004). In practice, the Supreme Court's disposition in *Rasul* meant that detainees' petitions for habeas corpus in the United States District Court for the District of Columbia could no longer be dismissed for lack of jurisdiction.

²⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004). *Hamdi* involved a habeas petition brought by a United States citizen who was captured in Afghanistan, classified as an enemy combatant and detained at a navy brig in South Carolina. *See id.* In *Hamdi* the Court was confronted with whether a United States citizen could be detained as an enemy combatant without being formally charged. *Id.* at 509. A plurality of Justices held that while a citizen could be detained, due process requires that he be given a "meaningful opportunity" to contest the factual basis of his detention. *See id.* Though the case dealt with the rights of a detained U.S. citizen, the applicability of this case lies in the plurality's conclusion that the AUMF passed by Congress in 2001 did in fact authorize the United States government to hold detainees without charging them. *Id.*

³⁰ Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., U.S. Dep't of Def. on Order Establishing Combatant Status Review Tribunal to the Sec'y of the Navy (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> [hereinafter Wolfowitz Memorandum].

³¹ The Wolfowitz Memorandum defines the term "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." *See id.*

challenge that determination.³² Pursuant to the Wolfowitz Memorandum, panels of commissioned military officers were directed to review each detainee's enemy combatant status designation based upon a record prepared by a designated "Recorder," which consisted of "reasonably available information generated in connection with the initial determination to hold the detainee as an enemy combatant . . . as well as any reasonably available records, determinations, or reports generated in connection therewith."³³ The memorandum provided that detainees were permitted to attend proceedings accompanied by an interpreter and a "Personal Representative,"³⁴ and to call "reasonably available" witnesses.³⁵

CSRT panels are not bound by traditional rules of evidence, but rather may consider "any information it deems relevant and helpful . . . [and] may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances."³⁶ In determining whether detainees were properly designated as enemy combatants, CSRT panels were directed to base their decisions on the "preponderance of the evidence," with the caveat that the panel

³² The Wolfowitz Memorandum outlined various procedures that would govern CSRT review of a detainee's enemy combatant status determination, and provided, amongst other things, that detainees would be given an "opportunity to contest designation as an enemy combatant . . . [and to] consult with and be assisted by a personal representative." *Id.*

³³ *Id.*

³⁴ *See Id.* The "Personal Representative" was authorized to assist the detainee in his CSRT. Implementing guidelines issued by the Secretary of the Navy clarified that the Personal Representative was not to serve as an advocate for the detainee but rather his role was merely to explain the nature of the proceedings. Memorandum from Gordon England, Sec'y of the Navy, U.S. Dep't of Def. on Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Naval Base, Cuba (July 29, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> [hereinafter England Memorandum].

³⁵ The CSRT panel has the authority, pursuant to the Wolfowitz Memorandum, to determine the "reasonable availability" of witnesses, and provides that written statements may be substituted if a witness is deemed not reasonably available. *See* Wolfowitz Memorandum, *supra* note 30.

³⁶ *Id.*

would accord the government's evidence presented against a detainee a presumption of validity.³⁷ Although the Wolfowitz Memorandum explicitly preserved detainees' right to petition U.S. federal courts for writs of habeas corpus,³⁸ the government would later contest that right in subsequent litigation.³⁹

In the months following the *Rasul* decision, detainees filed numerous habeas petitions in federal court,⁴⁰ many but not all of which were consolidated in D.C. District Court to facilitate proceedings.⁴¹ While these consolidations were meant to create a smoother, more uniform process, in reality there were huge inconsistencies in the way district court judges interpreted detainees' rights in the different groups of cases.⁴² For example, in

³⁷ *Id.*

³⁸ *Id.* In fact, detainees were reportedly advised on three separate occasions of their right to seek writs of habeas corpus in federal court. Mark Denbeaux & Joshua W. Denbeaux, *No-Hearing Hearings—CSRT: The Modern Habeas Corpus?* 12 Seton Hall Public Law Research Paper No. 951245 (2006), available at <http://ssrn.com/abstract=951245>.

³⁹ See generally *Rasul v. Bush*, 542 U.S. 466 (2004); see also *Boumediene v. Bush*, No. 06-1195; *Al-Odah v. United States*, No. 06-1196 (U.S. argued Dec. 5, 2007).

⁴⁰ Many of these petitions have since become well known, including those filed on behalf of Jose Padilla and Salim Hamdan. Individual petitions were often filed by "next friends" on behalf of many detainees. Though "next friend" status at times posed problems of standing, *Gherebi v. Bush*, 338 F. Supp. 2d 91 (D.D.C. 2004), such a standing discussion is outside the scope of this Note.

⁴¹ After the Supreme Court held in *Rasul* that proper jurisdiction for detainees' habeas petitions lay in the District Court in Washington, D.C., the government filed a motion to coordinate detainees' numerous pending petitions. In August of 2004, the Calendar and Case Management Committee for the D.C. District Court designated Judge Joyce Green to "coordinate and manage all proceedings in these matters [of Guantanamo detainees] and to the extent necessary rule on common procedural and substantive issues." *Gherebi*, 338 F. Supp. 2d at 94. The Committee's order was affirmed by an Executive Session of the D.C. District Court on September 14, 2004. *Id.* Judge Leon of the D.C. District Court, however, chose not to transfer the pending cases on his docket. As such, he retained the cases collectively known as *Boumediene v. Bush*, currently pending before the Supreme Court. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 452 n.14 (D.D.C. 2005).

⁴² Compare *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005) (granting the government's motion to dismiss detainees' habeas petitions because

one group of cases Judge Richard Leon of the D.C. District Court granted the government's motion to dismiss the petitions on the ground that there "was no viable legal theory under which a federal court could issue a writ of habeas corpus"⁴³ even though detainees technically had the right to petition the court for such writs. Judge Leon reasoned that irrespective of detainees' rights to petition a court for a writ of habeas corpus, they had no legally enforceable constitutional rights on which a federal court could actually issue a writ. In contrast, only one week later in another group of consolidated cases,⁴⁴ Judge Joyce Green of the D.C. District Court denied similar motions to dismiss filed by the government, finding that "Guantanamo detainees are entitled to due process under the Fifth Amendment to the United States Constitution."⁴⁵

C. Congressional Response

Congress swiftly responded to the wave of petitions filed by detainees. Following the Supreme Court's decision to uphold the right of Guantanamo detainees to petition federal courts for writs of habeas corpus, Congress amended the habeas statute.⁴⁶ The

detainees had no substantive constitutional rights on which the court could issue a writ), *with In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) (denying the government's motion to dismiss detainees' habeas petitions because the D.C. District Court was the appropriate forum for their resolution).

⁴³ *Khalid*, 355 F. Supp. 2d at 314.

⁴⁴ *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 443.

⁴⁵ *Id.* at 465. After Judge Green denied the government's motion to dismiss, the government filed a motion for a protective order to prevent disclosure of certain information to detainees and their counsel, and further limit contact between detainees and their counsel. The D.C. District Court ultimately issued a protective order that laid out the scope of attorney-client contact and the extent to which the government was entitled to restrict access to classified documents. The Green Protective Order, named for Judge Green who authored the opinion, was largely followed until its scope was challenged two years later in *Bismullah v. Gates*. See *Bismullah v. Gates (Bismullah I)*, 501 F.3d 178 (D.C. Cir. 2007).

⁴⁶ Section 1005(e)(1) of the DTA expressly amends the habeas statute to strip federal courts of their jurisdiction over habeas petitions filed by detainees at Guantanamo. Detainee Treatment Act § 1005, Pub. L. 109-148, 119 Stat. 2680

DTA, which was signed into law by President Bush on December 30, 2005, prevented any United States court from exercising jurisdiction over petitions for writs of habeas corpus filed by detainees held at Guantanamo.⁴⁷ As an alternative, the DTA

(2005).

⁴⁷ Detainee Treatment Act § 1005. Congress enacted the DTA as part of an emergency supplemental appropriations package to the fiscal year 2006 Department of Defense appropriations bill. Relevant portions of the DTA are found in Section 1005:

(e) Judicial Review of Detention of Enemy Combatants-

(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

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

“(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

“(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

“(A) is currently in military custody; or

“(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.”

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

allowed for judicial review of CSRT determinations exclusively in the D.C. Circuit Court.⁴⁸ The legislative history of the DTA makes clear that Congress' goal was to deny detainees at Guantanamo any rights to petition federal courts for writs of habeas corpus, thereby negating the Supreme Court's ruling in *Rasul*.⁴⁹

The Supreme Court, however, balked at Congress' move to eliminate its jurisdiction. Six months after the DTA was signed into law, the Court held in *Hamdan v. Rumsfeld*⁵⁰ that the DTA "did not strip federal courts' jurisdiction over cases pending *on the date of the DTA's enactment*."⁵¹ The Court gave import to the fact that no provision of the DTA explicitly applied to pending cases, noting that Congress "chose not to so provide—after being

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

Detainee Treatment Act § 1005.

⁴⁸ Detainee Treatment Act § 1005.

⁴⁹ Senator Lindsey Graham's statement during the Senate's consideration of the National Defense Authorization Conference Report, of which the DTA was a part, is just one example of similar statements indicating Congress' intent to expressly respond to the *Rasul* decision. 151 CONG. R. S14256 (daily ed. Dec. 21, 2005) (statement of Sen. Graham) ("Since the *Rasul* decision was based on the habeas statute in the U.S. Code, I am very comfortable amending that statute as a proper congressional response to the Court's decision.").

⁵⁰ 126 S. Ct. 2749 (2006).

⁵¹ *Id.* at 2769 n.15 (emphasis added).

presented with the option—for [a provision to deal with pending cases] . . . [and that] omission is an integral part of the statutory scheme.”⁵² In effect, the Court’s decision invalidated any habeas corpus petition that was pending when the DTA was enacted.

The struggle between Congress and the Court continued. Congress responded to the Court’s ruling in *Hamdan* that the DTA did not apply to pending cases by passing the Military Commissions Act of 2006.⁵³ The legislation again amended the habeas statute, this time explicitly stripping federal courts of jurisdiction over any and all habeas petitions filed by Guantanamo detainees, and again limiting the scope of review to CSRT procedures.⁵⁴ Congress spoke directly to the Court’s decision in

⁵² *Id.* at 2769.

⁵³ Military Commissions Act of 2006 § 7, Pub. L. No. 109-366, 120 Stat. 2600 (2006). As Judge Randolph of the D.C. Circuit Court notably pointed out, “one of the primary purposes of the MCA was to overrule *Hamdan*.” *Boumediene v. Bush*, 476 F.3d 981, 986 (D.C. Cir. 2007).

⁵⁴ Military Commissions Act §7(a). The stated purpose of the comprehensive law was “to authorize trial by military commission for violations of the law of war, and for other purposes.” §7(a). When President Bush signed the MCA into law, he called it “one of the most important pieces of legislation in the war on terror.” Press Release, George W. Bush, President of the United States, The White House, President Bush Signs Military Commissions Act of 2006 (Oct. 17, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html>.

President Bush also described the law as providing “a way to deliver justice to the terrorists we have captured . . . [with] a fair trial, in which the accused are presumed innocent, have access to an attorney, and can hear all the evidence against them. These military commissions are lawful, they are fair, and they are necessary.” *Id.* President Bush’s description is accurate only insofar as it describes the military commissions authorized by the law, but his statement should not be read to encompass the provisions of the MCA that strip federal courts of their jurisdiction to hear Guantanamo detainees’ habeas petitions or those that codify CSRTs and the D.C. Circuit’s appellate review authority.

The relevant portion of the MCA is found in Section 7, entitled Habeas Corpus Matters:

(a) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109–148 (119 Stat. 2742) and the subsection (e) added by added by section 1405(e)(1) of Public Law 109–163 (119 Stat. 3477) and inserting the following new subsection

Hamdan with Section 7(b), which explicitly dealt with pending cases and stated that the amendment to the habeas statute “shall apply to all cases, without exception, pending on or after the date of the enactment of this Act.”⁵⁵ The plain language of the statute foreclosed any further arguments that pending cases fell outside the scope of the legislation.⁵⁶ Subsequently, the D.C. Circuit Court was left with the limited power to review only whether a CSRT complied with its own procedures.⁵⁷

(e):

“(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

“(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

Military Commissions Act § 7.

⁵⁵ Military Commissions Act § 7 (emphasis added).

⁵⁶ The Congressional Record reveals numerous statements making clear that, “[w]ithout exception, both the proponents and opponents of section 7 [of the MCA] understood the provision to eliminate habeas jurisdiction over pending cases.” *Boumediene v. Bush*, 476 F.3d 981, 987 n.2 (D.C. Cir. 2007) (internal citations omitted), *cert and reh’g granted*, 127 S. Ct. 3078 (June 29, 2007).

⁵⁷ The Court was thus limited under the DTA and MCA to a narrow review of the procedures afforded to detainees during the D.C. Circuit’s examination on appeal of an individual CSRT proceeding, rather than a broader analysis of the processes detainees should be afforded during the underlying

While Congress attempted to act with sufficient intent to quell future challenges, the struggle continued. In 2006, a group of detainees⁵⁸ invoked the limited statutory review permitted by the

CSRT process itself.

⁵⁸ One group of detainees, petitioners in *Parhat v. Gates*, are seven Uighurs—a Muslim ethnic minority from western China subject to religious and political persecution by the Communist regime. See U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2004—CHINA (Feb. 28, 2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm>.

According to the State Department, the “[Chinese] Government used the international war on terror as a pretext for cracking down harshly on suspected Uighur separatists expressing peaceful political dissent.” *Id.* Petitioners fled persecution to an Uighur expatriate village in the mountains of Afghanistan near the Pakistan border. Petition for Immediate Release and Other Relief Under Detainee Treatment Act of 2005, and, in the Alternative, for Writ of Habeas Corpus at 13–14, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Dec. 4, 2006) [hereinafter *Petition for Release*]. After the village was bombed in October, 2001, the Uighurs crossed into Pakistan and were taken in by local villagers who later turned them over to the U.S. military, along with the other Uighurs in the village, in exchange for a \$5,000 bounty per Uighur. *Id.* at 15.

Despite public exculpatory statements made on behalf of the *Parhat* petitioners, including a United States Ambassador and a colonel in the United States military, CSRT panels found that each was properly designated an enemy combatant. Respondents’ Joint Opposition to the Application for a Stay of the Judgment of the Court of Appeals for the District of Columbia Circuit Until 14 Days After Disposition of this Case and Consent to the Motion for Expedited Consideration of the Petition for a Writ of Certiorari and for Expedited Merits Briefing and Oral Argument in the Event that the Court Grants the Petition at 8–9, *Gates v. Bismullah*, No. 07A-677 (U.S. Feb. 20, 2008) [hereinafter Respondents’ Joint Opposition Brief]. The eighth petitioner, Haji Bismullah, is an Afghan national who fled Afghanistan to Pakistan in 1996 when the Taliban came to power. *Id.* at 5. Bismullah returned to Afghanistan along with his brothers after Hamid Karzai came to power to “help U.S. and coalition forces defeat the Taliban,” and was later appointed as a transportation minister under Karzai’s government. *Id.* at 5–6. American forces mistakenly arrested him in 2003, and “despite assurances of his innocence from the Afghan government, the military transferred Bismullah to Bagram Air Base and then Guantanamo” where a CSRT found he was properly designated as an enemy combatant. *Conference Call: Another Detainee Case Heads to High Court, Courtwatch—Justices Asked to Take Case of Prisoners Seeking Evidence Government Used to Declare Them ‘Enemy Combatants’*, LEGAL TIMES, March 10, 2008, at 1 [hereinafter *Conference Call*].

DTA and MCA to challenge their CSRTs and enemy combatant status designations in the D.C. Circuit Court.⁵⁹ After months of briefing, largely regarding the scope and type of evidence the court may consider in conducting its review, a unanimous panel of the D.C. Circuit dealt a blow to the government by ruling that it must provide to the reviewing court all the information “reasonably available” to the government relevant to a detainee, as opposed to the smaller subset of evidence presented at his CSRT as the government had urged.⁶⁰ Although the government subsequently sought a rehearing *en banc*, arguing that the court’s ruling imposed too substantial a burden and would endanger national security, the D.C. Circuit Court declined to rehear the case in February 2008.⁶¹

In the meantime, another group of detainees mounted a challenge to the court-stripping provision of the DTA and MCA itself. In December 2007, the Supreme Court heard oral arguments in the companion cases *Boumediene v. Bush* and *Al-Odah v. United States*,⁶² wherein petitioner detainees argued that they are entitled to habeas rights under the United States Constitution, and that the CSRT process along with judicial review in the D.C. Circuit is not an adequate and effective alternative.⁶³ The government, in contrast, maintained that the right to petition a federal court for a writ of habeas corpus does not extend to non-citizen detainees at Guantanamo and that the procedures afforded by the DTA and MCA are more than adequate.⁶⁴

Boumediene’s pendency in the Supreme Court afforded the

⁵⁹ Petitioner in *Bismullah v. Gates* filed an appeal from his Combatant Status Review Tribunal on June 9, 2006. Petitioners in *Parhat v. Gates* filed their own appeals on December 4, 2006. After considerable motion practice, the D.C. Circuit ordered that the two groups of cases be set for oral argument on the same day before the same panel. See *Bismullah I*, 501 F.3d 178 (D.C. Cir. 2007).

⁶⁰ See *id.*

⁶¹ *Bismullah v. Gates (Bismullah III)*, 514 F.3d 1291 (D.C. Cir. 2008).

⁶² *Boumediene v. Bush*, No. 06-1195; *Al-Odah v. United States*, No. 06-1196 (U.S. argued Dec. 5, 2007).

⁶³ *Conference Call*, *supra* note 58.

⁶⁴ Transcript of Oral Arguments, *Boumediene*, No. 06-1195; *Al-Odah*, No. 06-1196 (U.S. Dec. 5, 2007).

government another angle in *Bismullah* after its petition for a rehearing *en banc* was denied. In February 2008, the government petitioned the Supreme Court for a writ of certiorari, arguing that until the Court decides the merits of the *Boumediene* case the government should not have to undertake the burdensome task of either compiling voluminous records as required by the D.C. Circuit's July 2007 ruling or, instead, act on the court's alternative suggestion of reconvening new CSRTs.⁶⁵ As such, the government requested that the Supreme Court stay the D.C. Circuit's judgment and hold the petition for certiorari in *Bismullah* until it renders a decision in *Boumediene*, or, alternatively, that the Court grant the petition for certiorari and set *Bismullah* on an expedited schedule so that the two cases may be decided together this term.⁶⁶ For their part, detainees argued in a reply brief that the government's petition to the Supreme Court is merely a veiled attempt to delay detainees' cases brought under the DTA, and that a stay would "harm the interests of justice and serve no legitimate purpose."⁶⁷ Although the Court was expected to consider the appeal at its private conference on March 14, 2008,⁶⁸ no action has yet been taken.

II. FUNDAMENTAL PRINCIPLES, NATURAL LAW AND THE AMERICAN CONSTITUTION

Constitutional ratification debates and Supreme Court jurisprudence provide the background by which to understand the need to provide Guantanamo detainees with procedures that adequately respect constitutional principles. It is clear from the debates prior to ratification of the Constitution and the addition of the Bill of Rights that the Framers recognized that certain rights,

⁶⁵ See *Bismullah I*, 501 F.3d 178 (D.C. Cir. 2007).

⁶⁶ Petition for a Writ of Certiorari at 32–33, *Gates v. Bismullah*, No. 07-1054 (U.S. Feb. 14, 2008). See also *Conference Call*, *supra* note 58.

⁶⁷ Respondents' Joint Opposition Brief, *supra* note 58, at 18.

⁶⁸ Lyle Denniston, *U.S.: Time to Act Is Now On Detainee Case*, SCOTUSblog.com, March 11, 2008, <http://www.scotusblog.com/wp/us-time-to-act-now-on-detainee-case/>.

namely liberty rights, were natural rights.⁶⁹

The Supreme Court has confirmed the importance of natural rights by making clear that even in the context of a national emergency, government encroachment upon natural and fundamental rights is only legitimate if it is sufficiently justified.⁷⁰ The Court's historical view of the right to liberty was clearly embraced by Justice Harlan, who in 1883 recognized it as a "natural right of man" and encouraged a government policy that would acknowledge the Constitution as one "of government, founded by the people . . . for the establishment of justice, for the general welfare, and for a perpetuation of the blessings of liberty."⁷¹ The government's use of CSRTs in the context of the War on Terror fails to acknowledge that even Guantanamo detainees have a natural right to liberty. Though the government's national security rationale for its CSRT policy may be legitimate, the government nevertheless insufficiently justifies the extent of its encroachment. The government's failure to adhere to its great responsibility of protecting liberty has thus undermined our own constitutional system.

A. *The Framers and Natural Rights*

The Constitution, along with the Bill of Rights, is an expression of principles as well as an enumeration of specific guarantees.⁷² These principles reflect the Framers' objective to secure individual

⁶⁹ See *The Ninth Amendment*, *supra* note 11, at 55–60. While the Framers explicitly enumerated certain rights in the Constitution and Bill of Rights, they understood that those documents "did not create or generate many of the rights they secured. Rather, they merely re-stated, or declared, the rights that the people already possessed." Thomas B. McAfee, *Restoring the Lost World of Classical Legal Thought: The Presumption in Favor of Liberty Over Law and the Court Over the Constitution*, 75 *CIN. L. REV.* 1499, 1503 (2007) (internal citations omitted).

⁷⁰ See *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1934); see also *United States v. Robel*, 389 U.S. 258 (1967).

⁷¹ *The Civil Rights Cases*, 109 U.S. 3, 48–49, 52 (1883) (Harlan, J., dissenting).

⁷² Edwin Meese III, *Interpreting the Constitution*, in *INTERPRETING THE CONSTITUTION* 13, 16 (Jack N. Rakove ed., 1990).

liberty,⁷³ and can perhaps best be understood according to an “individual natural rights model” of constitutional interpretation.⁷⁴ Accordingly, certain rights predate the Constitution rather than the Constitution establishing rights to be derived from the document itself.⁷⁵ Although Federalists and their opponents may have disagreed about whether to include a Bill of Rights,⁷⁶ they nonetheless agreed that inherent individual rights, namely individual liberty, were natural rights that did not derive from the Constitution.⁷⁷ Thus the individual liberty right as understood by

⁷³ *Id.*

⁷⁴ See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

⁷⁵ Similarly, the explicit enumeration of certain rights should not be construed to diminish those that are not expressly enumerated. Corwin, *supra* note 1, at 70–71 (“Principles of transcendental justice . . . [as understood in] terms of personal and private rights . . . is the same as that of the principles from which they spring and which they reflect. They owe nothing to their recognition in the Constitution—such recognition was necessary if the Constitution was to be regarded as complete.”).

⁷⁶ Though much debate surrounding the ratification of the Constitution hinged on the issue of whether or not to include the Bill of Rights in the final document—opponents of which argued that including it was both unnecessary and dangerous—it is widely accepted that both supporters and opponents shared a belief in natural rights. See James Madison, *Speech in Congress Proposing Constitutional Amendments* (June 8, 1789), reprinted in JAMES MADISON, *WRITINGS* 437, 444 (Jack N. Rakove ed., 1999) (“[A] great number of the . . . champions for republican liberty, have thought such a provision, not only unnecessary, but . . . some have gone so far as to think it even dangerous.”); see also *The Ninth Amendment*, *supra* note 11, at 7–8, 27 (“Because the Constitution was one of limited and enumerated powers, these enumerated limits constituted a bill of rights [, and] [b]y attempting to enumerate any rights to be protected, it would imply that all that were not listed were surrendered.”) (internal citations omitted). James Madison attempted to allay those fears when he explained the necessity of the Bill of Rights before the House of Representatives, stating that it would, “expressly declare the great rights of mankind secured under this constitution.” Madison, *supra* note 76, at 444.

⁷⁷ It is clear that the Framers understood natural rights—and specifically liberty rights—as rights possessed by all persons, not just citizens. For example, Theodore Sedgwick, a delegate to the Massachusetts ratifying convention, objected to including in the Bill of Rights those that are “self-evident, unalienable [and which] the people possess.” 1 ANNALS OF CONG. 759

the Framers may be invoked by all persons because of its status as a natural right rather than merely because it is explicitly protected under the Constitution.⁷⁸

*B. The Supreme Court, Natural Rights and National Emergencies*⁷⁹

The Supreme Court has long recognized the right to seek a writ of habeas corpus as a safeguard of personal liberty against arbitrary government encroachment.⁸⁰ Federal law provides the Executive the ability to respond to national emergencies using inherent or implied constitutional power or authority delegated from Congress;⁸¹ however, the Supreme Court has instructed that even in times of

(Joseph Gales ed., 1834) (statement of Rep. Sedgwick, Aug. 15, 1789).

The Framers' understanding of individual liberty rights as broadly applicable is also evident in their explicit use of the words "men" and "mankind" during ratification debates. *See, e.g.*, The Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (Dec. 4, 1781), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 415, 454 (Jonathan Elliot ed., 2d ed. 1907) (remarks of James Wilson) at 27 ("Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing."). *See also* Rosen, *supra* note 12, at 1075.

⁷⁸ The inclusion of the Ninth Amendment in the Constitution is evidence of the Framers' recognition of individual, natural and preexisting rights that, even if not enumerated in the Constitution itself, were nonetheless retained. *The Ninth Amendment*, *supra* note 11, at 13–14, 29.

⁷⁹ The term "national emergency" in the context of Executive power does not have a hard and fast definition, but has been interpreted by the Congress and the Supreme Court as the existence of unexpected and dangerous conditions that do not lend themselves to resolution according to precedent. HAROLD C. RELYEA, NATIONAL EMERGENCY POWERS 4 (Cong. Research Serv., Aug. 30, 2007), available at <http://www.fas.org/sgp/crs/natsec/98-505.pdf>.

⁸⁰ *See, e.g.*, *Harris v. Nelson*, 394 U.S. 286, 290–91 (1969) ("The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.").

⁸¹ *See* Relyea, *supra* note 79, at 1. The Executive has used these powers to respond to emergency conditions as far back as 1792. *Id.* at 5. Until the 20th century, however, the power was largely unchallenged by Congress or the Supreme Court. *Id.* at 6–7.

national emergency, the government must shoulder the burden of justification when it seeks to curtail individual liberty or other constitutional rights.⁸²

*i. Home Building and Loan Association v. Blaisdell and the Great Depression*⁸³

The Supreme Court required the government to carry the burden of justification in the 1934 case *Home Building and Loan Association v. Blaisdell*.⁸⁴ In response to widespread unemployment and mortgage foreclosures, as well as low wages and poor credit, the Minnesota state legislature passed a statute that allowed individuals facing foreclosure to petition a state court to postpone the sale of their homes and to extend the statutory redemption period.⁸⁵ Pursuant to this statute, individuals who had defaulted on their mortgage and whose property had been foreclosed petitioned a Minnesota state court for an extension of

⁸² See *Schneider v. State*, 308 U.S. 147, 151 (1939) (“[W]here legislative abridgment of [fundamental] rights is asserted . . . the delicate and difficult task falls upon the courts to . . . appraise the substantiality of the reasons advanced [by the government] in support of the regulation of the free enjoyment of the rights.”).

⁸³ *Home Building and Loan Association v. Blaisdell* came before the Court during the severe economic depression of the early 1930s. 290 U.S. 398 (1934). Against this backdrop, the Court characterized a national emergency as one that requires “limited and temporary interpositions [on constitutional rights] if made necessary by a great public calamity . . . [or] vital public interests would . . . suffer.” *Id.* at 439–40.

⁸⁴ See *id.* at 442 (“The Court also decided that while the declaration by the legislature as to the existence of the emergency was entitled to great respect, it was not conclusive . . . It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends.”).

⁸⁵ *Id.* at 422 n.3, 424–25. “Redemption” refers to the legal right of a party who borrows money to purchase a property to regain ownership of that property after it has been sold at a foreclosure sale due to nonpayment. State statutes often give parties with mortgages a certain period of time to pay the amount for which the property was sold at the foreclosure sale—the “redemption period”—and typically parties are entitled to remain on the premises during that period of time. See 1 HON. WILLIAM HOUSTON BROWN, *THE LAW OF DEBTORS AND CREDITORS* § 8:21 (2007).

the redemption period.⁸⁶ The court granted the extension, and the owner of the mortgage appealed on grounds that it violated the Constitution's Contract Clause.⁸⁷ The Minnesota Supreme Court upheld the state statute as a valid exercise of the government's power to respond to an emergency, though it acknowledged that the statute impaired the obligations of the underlying mortgage contract.⁸⁸

On appeal, the Supreme Court looked to the historical understanding and interpretations of the Contract Clause for guidance.⁸⁹ The Court recognized that in times of national emergency, the government may utilize its power to respond to exigent conditions, but that doing so "must be consistent with the fair intent of the constitutional limitation of that power."⁹⁰ By way of explanation, the Court analogized that, "the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency . . . [however] even the war power does not remove constitutional limitations safeguarding

⁸⁶ *Blaisdell*, 290 U.S. at 418–19. Petitioners argued that because of the economic depression, they were unable to redeem their property, and without relief from the court in the form of an extension, they would lose it. *Id.* at 419.

⁸⁷ *Id.* at 420.

⁸⁸ *Id.* at 420–21.

⁸⁹ The Court stated that because the constitutional grant and limitation of power in the Contract Clause was general, affording "a broad outline," it was necessary to "fill in the details." *Id.* at 426. The Court noted that although the debates in the Constitutional Convention did not provide guidance for interpreting the Contract Clause, the "reasons which led to the adoption of that clause . . . are not left in doubt . . ." *Id.* at 427. The Court explained that debt and legislative interferences with private contracts were so widespread during the Revolutionary period as to undermine "the confidence essential to prosperous trade . . . and the utter destruction of credit was threatened." *Id.* The inclusion of the Contract Clause was necessary both to preserve individual rights to contract and to limit the government's power to encroach on that right. *Id.* at 427–28. The Court went on to examine prior courts' interpretation and application of the Contract Clause in determining its scope, concluding that the Contract Clause "should not be so construed as to prevent *limited and temporary* interpositions" on individuals' rights to enter into and enforce private contracts if the government is faced with a national emergency. *Id.* at 439 (emphasis added).

⁹⁰ *Id.*

essential liberties.”⁹¹ The Court ultimately upheld the statute, reasoning that government’s limited encroachment on the rights guaranteed by the Constitution’s Contract Clause was permissible in light of the exigent circumstances presented by the severe economic recession.⁹²

While the Court made clear that “[e]mergency does not create power” and that the government may only act consistent with constitutional limitations,⁹³ practical realities might require a compromise between individual rights—in this case, the right of the mortgage-holders to expect that their private contracts be enforced—and protecting the national interest.⁹⁴ Such a compromise is legitimate so long as it is appropriately targeted to a particular emergency and conducted pursuant to reasonable conditions.⁹⁵ Here, the Court found that the statute met those conditions, and thus that the government did not impermissibly encroach on the mortgage holders’ rights guaranteed in the Constitution’s Contract Clause.

Like the state of emergency that existed in *Blaisdell*, the War on Terror presents conditions that call for a degree of deference to the government in its efforts to protect the national interest. Unlike in *Blaisdell*, however, the government’s CSRT policy is not a legitimate compromise between individual rights and protecting the national interest. While it appears clear that the government’s policy is sufficiently targeted to a particular exigency—the War on Terror—it is not conducted pursuant to reasonable conditions.

⁹¹ *Id.* at 426 (emphasis added).

⁹² *Id.* at 444–47.

⁹³ *Id.* at 424.

⁹⁴ *Id.* at 440.

⁹⁵ The Court explained that the state statute was reasonable because the conditions on the extension of the redemption period did not undermine the integrity of the mortgage contract itself. *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 433 (1934). For example, the Court noted that interest continued to run on the contract, the validity of the foreclosure sale was maintained if the property-owner failed to redeem the property during the extension, and any other statutory conditions on redemption were left intact. *Id.* at 445–46. Moreover, the Court emphasized the fact that the state statute only postponed the redemption period to a specified date, and as a result the statute could not outlive the emergency for which it was created. *Id.* at 447.

While the statute in *Blaisdell* extended deadlines and left the underlying mortgage contract intact,⁹⁶ the government's CSRT policies do not merely limit detainees' rights; rather, the policies arguably eliminate detainees' rights altogether.⁹⁷ Moreover, in *Blaisdell*, the government's power to interfere with individuals' contracts and grant extensions was subject to an articulated deadline whereas the government's CSRT policy is not limited in duration.⁹⁸ Because the government may detain individuals for the duration of the War on Terror⁹⁹—which is essentially of indefinite duration¹⁰⁰—and because every foreign national held at Guantanamo is subject to the CSRT process,¹⁰¹ there is no real limitation on the government's power. Thus, while the War on Terror provides the government an important justification for its actions, any compromise between individual rights and national security must be subject to reasonable conditions in order to be legitimate. Mandating minimal procedural guarantees for detainees during the CSRT process would provide those conditions, and would thus form the basis for an acceptable compromise between

⁹⁶ During the extension of the redemption period, the integrity of the mortgage contract remained intact, interest on it continued to run, the validity of the foreclosure sale as well as the right of the purchaser to obtain a deficiency judgment were maintained, and any other conditions on the redemption period pursuant to existing statutory law remained as they were prior to the extension. *Id.* at 433.

⁹⁷ CSRTs in practice do not provide detainees any real opportunity to challenge an enemy combatant designation. *See infra* Part III.C.

⁹⁸ The Court emphasized in *Blaisdell* that the statute in question was explicitly temporary. 290 U.S. at 439–40. In contrast, neither the Wolfowitz Memorandum outlining CSRTs nor the England Memorandum implementing them articulate any limit on their duration. *See* Wolfowitz Memorandum, *supra* note 30; *see also* England Memorandum, *supra* note 34.

⁹⁹ In 2004, the Supreme Court said in *Hamdi v. Rumsfeld* that the Authorization for the Use of Military Force authorizes the President to detain enemy combatants for the “duration of the conflict.” 542 U.S. 507, 522 (2004).

¹⁰⁰ President Bush has acknowledged that the duration of the “War on Terror” is unknown, stating, “[w]e cannot know the duration of this war.” Press Release, George W. Bush, President of the U.S., The White House, President Submits Wartime Budget (March 25, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/03/20030325-2.html>.

¹⁰¹ *See* Wolfowitz Memorandum, *supra* note 30.

individual rights and national security while legitimizing the government's actions and conforming with fundamental constitutional principles.

*ii. United States v. Robel and the Communist Threat*¹⁰²

Several decades after the Court's landmark decision in *Blaisdell*, the Court again had the opportunity to examine the degree to which the government may curtail constitutional rights in the context of a national emergency. This time, the Cold War and the threat of Communism provided the impetus for government action. In 1967, in *United States v. Robel*, the Supreme Court examined the constitutionality of the Subversive Activities Control Act, which prohibited any member of a "Communist-action organization" from maintaining employment at a "defense facility."¹⁰³ The defendant was a member of the Communist party, and was subsequently prohibited from working at his job in a shipyard.¹⁰⁴ The

¹⁰² In 1950, President Truman proclaimed a state of national emergency in response to the hostilities in Korea. Proclamation No. 2914, 15 Fed. Reg. 9029 (Dec. 16, 1950). See also RELYEA, *supra* note 79, at 8. The state of emergency was not terminated at the end of the Korean conflict, however, due "to the continuance of the Cold War atmosphere which . . . made the imminent threat of hostilities an accepted fact of everyday life, with 'emergency' the normal state of affairs." EMERGENCY POWERS STATUTES: PROVISIONS OF FEDERAL LAW NOW IN EFFECT DELEGATING TO THE EXECUTIVE EXTRAORDINARY AUTHORITY IN TIME OF NATIONAL EMERGENCY at 5, S. REP. NO. 93-549 (1973) (Conf. Rep.) [hereinafter EMERGENCY POWERS STATUTES]. In 1973, a Special Senate Committee charged with examining the use of emergency power during national emergencies recommended that Congress terminate the state of national emergency then in effect. See generally *id.*

¹⁰³ 389 U.S. 258, 259 (1967).

¹⁰⁴ *Id.* at 260. The Subversive Activities Control Act of 1950 required the registration of Communist organizations with the Attorney General, and created the Subversive Activities Control Board which was charged with investigating people suspected of "un-American activities." Laura K. Donohue, *Article: Terrorist Speech and the Future of Free Expression*, 27 CARDOZO L. REV. 233, 246 (2005). In addition to general registration requirements, the Act provided that any member of a Communist organization under a final order to register was prohibited from working anywhere designated as a "defense facility" by the Secretary of Defense. *Robel*, 389 U.S. at 260. The defendant, Mr. Robel,

government justified the statute under “Congress’ war power . . . [as the] Court ha[d] given broad deference to the exercise of that constitutional power by the national legislature.”¹⁰⁵

Justice Warren, writing for the majority, acknowledged the government’s legitimate national security concerns¹⁰⁶ but stated that the government had encroached too deeply on the constitutional right of association protected by the First Amendment.¹⁰⁷ In striking down the statute as unconstitutional, the Court stated that, “the phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit.”¹⁰⁸ The Court focused on the lack of a clear, rational connection between the defendant and the harm the government sought to prevent, as the statute established guilt on the basis of association with the Communist Party without requiring a showing that the individual actually posed a danger to the national interest.¹⁰⁹ Congress’ concern over national defense was certainly not without merit—the 1950s and early 1960s were the height of McCarthyism, and Cold War escalation as well as the Cuban Missile Crisis in 1962 caused widespread security concerns throughout the country. Notwithstanding the fear and paranoia that marked the Cold War era,¹¹⁰ however, the Court stated that the statute itself imposed too

was a member of the Communist party employed at a shipyard in Seattle, Washington. *Id.* In 1962, the Secretary of Defense designated the shipyard in which the defendant worked as a defense facility, and his continued employment there subjected him to prosecution under the Act. *Id.*

¹⁰⁵ *Id.* at 263.

¹⁰⁶ *Id.* at 266–67.

¹⁰⁷ *Id.* at 264. Like the right to liberty, the right of assembly preserved by the First Amendment was also an individual natural right possessed by the people and which existed prior to the ratification of the Constitution. *The Ninth Amendment, supra* note 11, at 13–14.

¹⁰⁸ *Id.*

¹⁰⁹ *United States v. Robel*, 389 U.S. 258, 265 (1967).

¹¹⁰ President Truman’s 1950 proclamation exemplified the widespread anxiety felt throughout the United States at the time:

Whereas recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict;

substantial a burden on the defendant's legitimate constitutional rights.¹¹¹

Here, like in *Robel*, the government cannot justify its CSRT policy simply by pointing to the War on Terror. Certainly the government's interest in protecting national security is as legitimate now as it was during the Cold War.¹¹² Nevertheless, like the policy at issue in *Robel*, CSRTs often establish guilt by association without requiring the government to establish that a detainee actually poses the danger of which he is accused¹¹³—the Supreme Court explicitly held such a policy unjustifiable in *Robel*.¹¹⁴ Moreover, just as in *Robel*, here there are feasible alternatives to

and Whereas world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and Whereas, if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have . . . ; and Whereas, the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible.

EMERGENCY POWERS STATUTES, *supra* note 102 (quoting Proclamation No. 2914, 15 Fed. Reg. 9029 (Dec. 16, 1950)).

¹¹¹ *Robel*, 389 U.S. at 267–68 (“Our decision today . . . recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a less drastic impact on the continued vitality of First Amendment freedoms . . . In this case, the means chosen by Congress are contrary to the letter and spirit of the First Amendment.”) (internal quotations and italics omitted). The existence of alternative methods to protect national security interests, such as prescribing criminal penalties, further restricting access to state secrets or positions in national defense industries, or a more thorough security screening program, presented Congress with just such “less drastic” means. *Id.* at 267.

¹¹² The 1950s and early 1960s experienced the escalation of the Cold War and the threat of mutually assured destruction, and the United States government perceived a real and imminent threat to its security. Today, the threat of terrorism is perceived as just as real and imminent, if not more so, because that threat materialized into an attack on U.S. soil on September 11, 2001.

¹¹³ See *infra* Part III.C. CSRTs permit the use of hearsay evidence as well as evidence obtained by torture or coercion. In addition, CSRTs have upheld enemy combatant status designations based upon unsubstantiated anonymous allegations. See Denbeaux & Denbeaux, *supra* note 38.

¹¹⁴ *Robel*, 389 U.S. at 265.

the government's present CSRT system, many of which have been suggested by members of Congress and even the Administration.¹¹⁵

So while the Executive may indeed respond to national emergencies using inherent or implied constitutional power or authority delegated from Congress, as it did after September 11, 2001, the Supreme Court has made clear that even national emergencies do not provide the government a free pass.

III. COMBATANT STATUS REVIEW TRIBUNALS

Despite their stated purpose, CSRT standards and procedures fail to provide a detainee with the opportunity to challenge his enemy combatant status designation. Detainees' slightly expanded procedural rights in the form of access to counsel and an expanded scope of the record during the D.C. Circuit's limited review of CSRTs—currently “the sole mechanism by which detention may be challenged”¹¹⁶—do not remedy the underlying infirmity of the CSRT process itself. According to the England Memorandum, discussed below, the CSRT process was meant “to determine, in a fact-based proceeding, whether the individuals detained . . . [at] Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation.”¹¹⁷ However, the “opportunity” provided “was far less than the written procedures appear to require.”¹¹⁸ Because CSRTs neither comport with the fundamental elements of due process nor sufficiently respect traditional constitutional principles, CSRTs fail to protect against arbitrary government encroachment on the right to liberty.¹¹⁹

¹¹⁵ See *infra* Part IV.

¹¹⁶ Brief Amicus Curiae of United States Senator Arlen Specter in Support of Petitioners at 12, *Boumediene v. Bush*, No. 06-1195; *Al-Odah v. United States*, No. 06-1196 (U.S. Aug. 24, 2007) [hereinafter Brief of Senator Specter].

¹¹⁷ England Memorandum, *supra* note 34.

¹¹⁸ Denbeaux & Denbeaux, *supra* note 38, at 4.

¹¹⁹ Brief of Senator Specter, *supra* note 116, at 13.

A. The Hasty Introduction of CSRTs

Only one week after the Supreme Court decided in *Rasul* that Guantanamo detainees had the right to challenge the legality of their detentions in federal court,¹²⁰ the DOD issued a memorandum creating CSRTs and directed the Secretary of the Navy to promulgate guidelines for implementation.¹²¹ The Secretary of the Navy, Gordon England, issued a memorandum on July 29, 2004 outlining the formation and procedures of CSRTs,¹²² specifying: 1) the basic structure and process of a CSRT; 2) the specific duties and qualifications of CSRT participants; and 3) the detainees' role in the CSRT process.¹²³ Though the England Memorandum elaborated upon the basic framework provided by the DOD in the Wolfowitz Memorandum,¹²⁴ it failed to provide the procedural guarantees that would ensure the legitimacy of the CSRT process and preserve traditional American constitutional principles.

The government has repeatedly justified its CSRT policy as a wartime exigency¹²⁵ despite the policy's discordance with the

¹²⁰ See *Rasul v. Bush*, 542 U.S. 466 (2004).

¹²¹ See Wolfowitz Memorandum, *supra* note 30.

¹²² England Memorandum, *supra* note 34. The Wolfowitz Memorandum that initially established CSRTs designated the Secretary of the Navy as the Convening Authority, and directed him to issue implementing guidelines. Wolfowitz Memorandum, *supra* note 30.

¹²³ See England Memorandum, *supra* note 34.

¹²⁴ *Id.*

¹²⁵ In defending the CSRT system on the Senate floor, Senator Lindsay Graham stated that, "to substitute a judge for the military in a time of war to determine something as basic as who our enemy is is not only not necessary under our Constitution, it impedes the war effort, [and] it is irresponsible." 152 CONG. R. S10354 (daily ed. Sept. 28, 2006) (Statement of Sen. Graham). Similarly, the government has defended the propriety of CSRT procedures on the basis that wartime exigencies mandate a system that provides for "the detention of the enemy in wartime; the operation of a secure naval facility overseas; civilian access to enemy detainees, and the handling of classified national security information," none of which can be satisfied in a traditional judicial setting. Corrected Brief for Respondent Addressing Pending Preliminary Motions at 26, *Bismullah I*, 501 F.3d 178 (D.C. Cir. Apr. 10, 2007) (Nos. 06-1197, 06-1397).

traditional guarantees of due process.¹²⁶ As the Supreme Court has noted, national security is not a catchall justification for any government action:

[T]he concept of “national defense” cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term “national defense” is the notion of defending those values and ideals which sets this Nation apart It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.¹²⁷

Certainly the government’s objective in defending the nation is a legitimate end and should be accorded due weight, but not without considering whether the means adopted are both appropriate and within the “letter and spirit of the constitution.”¹²⁸ Thus, the primary inquiry is whether the CSRT procedures respect our own constitutional imperatives. As will be discussed below,

¹²⁶ Though the government has argued that CSRT procedures are sufficient to satisfy constitutional requirements, it has ardently maintained that Guantanamo detainees’ non-citizen status precludes them from invoking constitutional protections. *See* Opening Brief for the United States, et al., *Al Odah v. United States*, 476 F.3d 981 (D.C. Cir. Apr. 27, 2005) (Nos. 05-5064, 05-5095 through 05-5116). Joseph Margulies, a Minneapolis civil liberties attorney who represented detainees in challenging the government’s detention policy in *Rasul v. Bush*, described the CSRT process as a system that “forces an alien prisoner unfamiliar with our justice system and held incommunicado to disprove allegations he cannot see, and whose reliability he cannot test, before a military panel whose superiors have repeatedly pre-judged the result, all without counsel.” JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* 170 (2006). The government has defended CSRTs as a legitimate means by which a prisoner might contest his enemy combatant status, but some have accused the government of creating CSRTs solely to give the appearance that detainees are not being held at Guantanamo “beyond the law.” *Id.* at 169–70.

¹²⁷ *United States v. Robel*, 389 U.S. 258, 264 (1967).

¹²⁸ Chief Justice Marshall famously declared in *McCulloch v. Maryland*: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” 4 Wheat. 316, 421 (1819).

CSRTs fail to meet even this standard.¹²⁹

B. The CSRT Participants and Procedures

The government depicts CSRTs as non-adversarial proceedings wherein neutral panels determine whether detainees already classified as enemy combatants actually meet the criteria for such a designation, and in which detainees are afforded more than sufficient procedural guarantees.¹³⁰ CSRT procedures as outlined in

¹²⁹ It is important to make explicit the focus of this inquiry. It is not a question of whether the procedures afforded detainees actually satisfy explicitly delineated constitutional *requirements*. Rather, the question is whether the procedures afforded the detainees are in line with traditional constitutional *principles*. This is unquestionably a much lower standard.

¹³⁰ The government has argued that CSRTs are “virtually identical” to the tribunals conducted pursuant to Army Regulation 190-8, which implements Article 5 of the Geneva Convention. Transcript of Oral Argument at 32–33, *Boumediene v. Bush*, No. 06-1195; *Al-Odah v. United States*, No. 06-1196 (U.S. Dec. 5, 2007); *see also* Brief for the Boumediene Respondents at 50, *Boumediene v. Bush*, No. 06-1195; *Al-Odah v. United States*, No. 06-1196 (U.S. Oct. 9, 2007). In defending CSRTs before the Supreme Court, the government noted that, like Army Regulation 190-8, CSRTs are:

Composed of three commissioned officers plus a non-voting officer who serves as a recorder; [CSRT] members are sworn to faithfully and impartially execute their duties; The detainee has the right to attend the open portions of the proceedings; An interpreter is provided if necessary; The detainee has the right to call relevant witnesses if reasonably available, question witnesses called by the [CSRT], and testify or otherwise address the [CSRT]; The detainee may not be forced to testify; The [CSRTs] make decisions by majority vote; The decision is made based on a preponderance of the evidence; The [CSRTs] create a written report of their decision; and The [CSRT] record is reviewed by the Staff Judge Advocate for legal sufficiency.

Id. at 50–51. In addition, the government argued that in fact CSRTs provide *more* procedural guarantees than Army Regulation 190-8 in that CSRTs provide detainees with a Personal Representative, detainees are provided with an unclassified summary of the government’s evidence and are permitted to present their own documentary evidence, and the Recorder is obligated pursuant to CSRT procedures to provide the panel with any relevant potentially exculpatory information. *Id.* at 51–52.

While the government is correct to point out the similarities between

the England Memorandum guarantee that detainees are supplied interpreters if necessary and that each detainee be appointed a Personal Representative to explain the nature of the CSRT and assist him in the proceedings.¹³¹ Detainees are to be presented with an unclassified summary of the charges against them, are permitted to testify before the CSRT panel but are not required to do so, and are permitted to cross-examine government witnesses or call their own, so long as they are “reasonably available.”¹³²

The reality of CSRT proceedings present a much darker picture. Armed guards bring the detainee, shackled at the hands and feet, to a small room where he is seated against the wall and chained to the floor.¹³³ The detainee sits across from his Personal Representative, an interpreter, a paralegal, and the Recorder,¹³⁴ whose function is most analogous to that of an “investigator and prosecutor, [who] has nearly complete control over the information that reaches a CSRT hearing panel.”¹³⁵ The three members of the panel, all commissioned military officers who make the ultimate determination as to whether the detainee was properly designated as an enemy combatant, sit off to one side of the room.¹³⁶

CSRTs and the procedures authorized in Army Regulation 190-8 as well as those CSRT procedures which, in the government’s view, exceed the guarantees afforded in the army regulation, those similarities do not speak to the infirmities in the CSRT process. For example, permitting a detainee to call reasonably available witnesses is meaningless if the CSRT panel almost always concludes that detainees’ witness requests are not reasonably available. *See* Denbeaux & Denbeaux, *supra* note 38, at 31–33. A guarantee that a detainee may question witnesses presented against him is meaningful only if government witnesses actually appear at his CSRT. It is really no guarantee at all if, as has been reported, the government “did not produce any witnesses in any hearing.” *Id.* at 2. That CSRTs are required to create a written report of their decisions provides only a nominal procedural guarantee if that decision is based upon evidence obtained by coercion or anonymous or otherwise unsupported conclusory statements. *Id.* at 33–36.

¹³¹ England Memorandum, *supra* note 34.

¹³² *See id.*

¹³³ Denbeaux & Denbeaux, *supra* note 38, at 20.

¹³⁴ *Id.*

¹³⁵ Respondents’ Joint Opposition Brief, *supra* note 58, at 4.

¹³⁶ Wolfowitz Memorandum, *supra* note 30.

When gathering evidence to present to the panel, the Recorder is directed to examine all “reasonably available” information in the government’s possession relevant to a detainee’s enemy combatant status designation,¹³⁷ and at his discretion includes “such evidence . . . as may be sufficient to support the detainee’s classification as an enemy combatant.”¹³⁸ He is then charged with compiling an unclassified summary that he presents to the CSRT panel for review.¹³⁹ In essence, the Recorder has access to information in the

¹³⁷ The England Memorandum refers to the entire body of information in the government’s possession about a particular detainee as “Government Information,” and defines such information as:

[S]uch reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings.

England Memorandum, *supra* note 34, at Enclosure 1. The Recorder is charged with reviewing this large body of information, and at his discretion chooses what to present to the CSRT panel. *Id.*

¹³⁸ The England Memorandum refers to this smaller subset of information as “Government Evidence.” England Memorandum, *supra* note 34, at Enclosure 1–2.

¹³⁹ *Id.* at Enclosure 1. The Recorder is also responsible for preparing a “record” of the proceedings, which consists of the documentary evidence presented to the panel, witness transcripts, any evidence presented by the detainee, and “the findings of fact upon which the [panel’s] decision was based.” *Id.* Certainly the Recorder need not include information that is duplicative or irrelevant. Of concern is the fact that the Recorder is not required to present to a CSRT panel *all* information in the government’s possession that is relevant to a detainee—what the England Memorandum terms “Government Information”—but rather only information that he deems sufficient to support a detainee’s enemy combatant status designation, or “Government Evidence.” *See id.* Moreover, the Recorder has unchecked discretion in his presentation of exculpatory evidence, if there is any. Thus, there is a real possibility that the government could possess relevant information, some of which might be exculpatory, that the Recorder is not required to present to the panel.

The scope of the record is also implicated if a detainee petitions the D.C. Circuit for a review of his CSRT, pursuant to his right to do so under the DTA. Until recently the D.C. Circuit Court was only permitted to review the record

government's possession about a particular detainee that is not necessarily presented to the panel. Perhaps more importantly, CSRT regulations direct the Recorder to present to the panel any potentially exculpatory evidence, but the Recorder's decisions are neither reviewed nor checked by any process to confirm that the panel was given all relevant information.¹⁴⁰

As for the Personal Representative, while he is authorized to "assist" the detainee, the England Memorandum makes clear that this officer acts neither as a lawyer nor as an advocate.¹⁴¹ In fact, a Personal Representative does little more than explain the process to the detainee in meetings that are often brief and rarely take place more than once.¹⁴² The other so-called "guarantees" outlined in the

presented to the CSRT panel, but the scope of the record on review in the D.C. Circuit is now being challenged. *See Bismullah I*, 501 F.3d 178 (D.C. Cir. 2007), *reh'g en banc denied*, *Bismullah III*, 514 F.3d 1291 (D.C. Cir. 2008), *petition for cert. filed*, *Gates v. Bismullah*, No. 07A-677 (U.S. 2008). Though the D.C. Circuit Court recently agreed with detainees that it should be privy to the entire body of information in the government's possession relevant to a detainee when reviewing a CSRT, *see Bismullah I*, 501 F.3d 178, in February 2008 the government petitioned the Supreme Court for a stay of the D.C. Circuit Court's order, or in the alternative for the Supreme Court to examine the scope of review on the merits. *Petition for a Writ of Certiorari* at 33, *Gates v. Bismullah*, No. 07-1054 (U.S. Feb. 14, 2008).

¹⁴⁰ Petitioners' Joint Brief in Support of Pending Motions to Set Procedures and for Entry of Protective Order at 7, *Bismullah I*, 501 F.3d 178 (D.C. Cir. March 26, 2007) (Nos. 06-1197, 06-1397).

¹⁴¹ *Id.* The England Memorandum directs the Personal Representative to state the following at each initial meeting with a detainee:

I am neither your lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing. I am available to assist you in preparing an oral or written presentation to the [panel] should you desire to do so.

Id.

¹⁴² Denbeaux & Denbeaux, *supra* note 38, at 14. Mark Denbeaux, a professor at Seton Hall University School of Law and counsel to two detainees held at Guantanamo, undertook an analysis of CSRT proceedings at Guantanamo. His study compared "the hearing process that the detainees were promised with the process actually provided." *Id.* at 4. The results of the study are based on records from 393 of the 558 detainees for whom CSRTs were

England Memorandum similarly fall far short of the minimal procedural safeguards that would be necessary to ensure both the legitimacy of the CSRT system and adherence to our overarching constitutional system.

C. CSRTs Do Not Provide Adequate Procedural Safeguards

Although the fundamental right to liberty exists regardless of one's citizenship, such a right is meaningless without adequate protective measures, which lie in procedural due process guarantees and judicial review. Indeed, the Framers saw the judiciary as the protector of fundamental rights. Thomas Jefferson expressed his understanding that the Bill of Rights would be "the legal check [on the threat to rights] which it puts into the hands of the judiciary."¹⁴³ James Madison expressed his understanding of the courts as "the guardians of those rights."¹⁴⁴ The CSRT process does not begin to provide even minimal procedural guarantees to ensure that the government does not use its congressionally recognized power to detain enemy combatants at Guantanamo arbitrarily. Thus the legitimacy of the detentions as well as our commitment to the natural law principles underlying the Constitution are severely undermined.

Although the government has strenuously argued that the

conducted. Of those 393 detainees, only 102 full CSRT records are available. *Id.* In addition to the 102 full CSRT records, Professor Denbeaux reviewed 356 "transcripts"—summarized detainee statements—that were released by the DOD as part of a Freedom of Information Act lawsuit initiated by the Associated Press. *Id.* at 7. After comparing the transcripts with the full CSRT records, the study concluded that of the 558 detainees for whom CSRTs were conducted, 202 detainees chose not to participate in the process; of the 102 full hearing records available, forty-three of them represent CSRTs where the detainee was not physically present. *Id.* at 8.

¹⁴³ McAfee, *supra* note 69, at 1522 (quoting Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 620 (1971)).

¹⁴⁴ *Id.* at 1523 (quoting Madison's statement of June 8, 1789, in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 83–84 (Helen E. Veit, Kenneth R. Bowling, & Charlene Bangs Bickford eds., 1991)).

procedures afforded detainees need not satisfy constitutional requirements because detainees held at Guantanamo do not have constitutional rights,¹⁴⁵ this argument ignores the values and principles underlying the Constitution—values which are “essential components of the rule of law.”¹⁴⁶ Even if the Constitution does not apply to detainees per se, those principles underlying the Constitution are still applicable and thus mandate that we provide, at a minimum, procedural guarantees that conform with the American notion of due process. In order to “ensure that the rule of law prevails at Guantanamo,”¹⁴⁷ detainees must be afforded a system of adequate substantive and procedural safeguards to ensure that long-held constitutional principles are not compromised.¹⁴⁸

¹⁴⁵ See *Johnson v. Eisentrager*, 339 U.S. 763 (1950). Both the government and the D.C. Circuit Court have relied on the Supreme Court’s reasoning in *Johnson v. Eisentrager* to deny detainees at Guantanamo constitutional rights. *Johnson* examined the rights of a group of German nationals captured by American forces in China during World War II who were tried and convicted by a military commission sitting in China, and subsequently sent to Germany to serve out their sentences. *Id.* at 765–66. In holding that nonresident enemy aliens captured and detained abroad have no right to petition a United States court for a writ of habeas corpus, the Supreme Court explained that non-resident aliens have historically only been permitted access to United States courts if they could demonstrate some arguable presence within the United States. *Id.* at 776–78. In contrast, the German detainees in this case “at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.” *Id.* at 777. In denying Guantanamo detainees the right to seek writs of habeas corpus, both the government and the courts have borrowed the rationale from *Johnson*, explaining that because Guantanamo detainees are non-resident aliens captured abroad and detained in Cuba, *Johnson* precludes any constitutional right to habeas corpus. See Opening Brief for the United States at 15, *Al-Odah v. United States*, 476 F.3d 981 (D.C. Cir. Apr. 27, 2007) (Nos. 05-5064, 05-5095 through 05-5116); see also *Rasul v. Bush*, 215 F. Supp. 2d 55, 68 (D.D.C. 2002). This reasoning has been widely criticized, and even the Supreme Court called such a comparison into question in *Rasul*. See *Rasul v. Bush*, 542 U.S. 466, 476–78 (2004).

¹⁴⁶ Brief of Specialists in Israeli Military Law, *supra* note 14, at 4.

¹⁴⁷ Brief of Senator Specter, *supra* note 116, at 4.

¹⁴⁸ That is not to say that non-citizen prisoners captured and detained

The traditional understanding of due process—fundamental to an adversarial system¹⁴⁹—is inextricably linked with “the right to present a defense (including the right to testify and to call witnesses); . . . representation by counsel . . . and the right to confront and cross-examine.”¹⁵⁰ But because CSRTs are explicitly non-adversarial,¹⁵¹ they cannot provide detainees with that opportunity. Technically, the England Memorandum sets out provisions to allow detainees the opportunity to “participate” in the CSRT process by giving them:

[T]he assistance of a Personal Representative; an interpreter if necessary; an opportunity to review unclassified information; the opportunity to appear personally to present reasonably available information relevant to [his classification] as an enemy combatant; the opportunity to question witnesses . . . ; and, to the extent

abroad must necessarily be able to invoke all potential procedural safeguards existing within the broadest application of constitutional due process. Such an argument has been widely criticized for its incompatibility with the Executive’s constitutional war powers and because of the far-reaching ramifications of extra-territorial application of constitutional rights. See Tung Yin, *Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism*, 73 TENN. L. REV. 351, 366, 373–75 (2006). See also *Johnson*, 339 U.S. at 784 (“If the *Fifth Amendment* confers its rights on all the world . . . [s]uch a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and ‘werewolves’ could require the American Judiciary to assure them [constitutional protections] No decision of this court suggests such a view.”). This Note asserts that one of the “primary purposes” of the Due Process Clause—to protect the natural right to liberty against arbitrary encroachment by the government—is instructive in determining what procedures should be afforded to Guantanamo detainees. An examination of the ramifications of extra-territorial application of all constitutional rights is beyond the scope of this Note.

¹⁴⁹ The term “adversarial system” is a legal term of art that refers to “a procedural system, such as the Anglo-American legal system, involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker.” BLACK’S LAW DICTIONARY 58 (8th ed. 2004).

¹⁵⁰ Yin, *supra* note 148, at 401 (internal citations omitted).

¹⁵¹ England Memorandum, *supra* note 34. “Non-adversarial” as used here is a legal term of art that contrasts the traditional American adversary system. See *supra* note 149.

they are reasonably available, the opportunity to call witnesses on his behalf.¹⁵²

Despite the supposed procedures afforded detainees in the England Memorandum's implementing guidelines, detainees' requests to see government evidence, witnesses, or even testimony from other detainees at Guantanamo have almost always been denied.¹⁵³ These guarantees, therefore, are illusory at best. Written accounts and studies of CSRTs demonstrate the extent to which their procedures undermine traditional constitutional protections of liberty and demonstrate a prisoner's total inability to mount any kind of meaningful defense.¹⁵⁴

i. The Government's Evidence

CSRT guidelines do not require the government to conform to traditional rules of evidence, but rather permit the panel to consider hearsay and evidence possibly obtained through torture or coercion.¹⁵⁵ Such a departure from traditional evidentiary

¹⁵² England Memorandum, *supra* note 34.

¹⁵³ Denbeaux & Denbeaux, *supra* note 38, at 30. CSRT panels are only required to honor detainees' requests for witnesses and evidence if they are "reasonably available," though CSRT procedures fail to define this term. Thus, to deny a detainee's request, the government need only maintain that the evidence or witness requested by the detainee was not reasonably available. *Id.* It should be noted that although requests for testimony from other detainees were sometimes granted, the extent to which such testimony might help exonerate a detainee is questionable, given that such testimony is delivered by a presumed enemy combatant in favor of another presumed enemy combatant. *Id.* at 5.

¹⁵⁴ See generally *id.* (concluding that CSRTs are an attempt by the government to "replace habeas corpus with this no hearing process"); see also MARGUILIES, *supra* note 126. Indeed, several detainees have been subject to second hearings after initially being found not to be enemy combatants, and "at least one detainee, after his first and second [CSRTs] unanimously determined him to not be an enemy combatant, had yet a third [CSRT] . . . which finally found him to be properly classified as an enemy combatant." Denbeaux & Denbeaux, *supra* note 38, at 37. Such re-hearings are conducted *in absentia*, and a detainee is not informed that his first CSRT determined he was not an enemy combatant. *Id.* at 37-39.

¹⁵⁵ Denbeaux & Denbeaux, *supra* note 38, at 35-36; see also MARGUILIES, *supra* note 126, at 164. The government has maintained that although CSRT

standards, in conjunction with inconsistent adherence to other evidentiary rules governing the CSRTs, makes reliability uncertain.¹⁵⁶ For example, CSRT panels have been known to rely

procedures permit the panels to consider hearsay evidence or that obtained through torture or coercion, those procedures also “require [panels] to reject unreliable evidence based on any concerns regarding coercion that may have arisen in the proceedings before them.” Brief for the Respondents at 58, *Boumediene v. Bush*, 06-1195; *Al-Odah v. United States*, 06-1196 (U.S. Oct. 9, 2007). However, whether or not CSRT panel members are aware that the evidence before them may have been obtained through torture or coercion such that they might have concerns about its reliability is unclear. The government punted as to whether the rules permitting questionable evidence might lead to a determination based on coerced testimony in the case of a specific detainee, stating, “[t]o the extent the rules are deemed insufficient in any concrete situation to ensure that determinations are not based on coerced testimony, the District of Columbia Circuit can say so on DTA review in a case that actually presents such an issue.” *Id.* at 58. CSRT panels have affirmed a detainee’s enemy combatant status only on the basis of anonymous allegations, without any actual evidence. In the case of Murat Kernaz, a German Muslim of Turkish descent, a CSRT credited a “single, unsigned document authored by an unnamed military official who wrote, without supporting evidence, that Kurnaz was a member of al-Qaeda” despite overwhelming and credible evidence to the contrary. *Id.* at 165–66.

¹⁵⁶ In 2006, *The National Journal* reviewed the government’s files on 132 Guantanamo detainees, as well as largely redacted transcripts of the CSRTs for 314 detainees, and concluded that “much of the evidence—even the classified evidence—gathered by the Defense Department against [the detainees] is flimsy, second-, third-, fourth- or 12th-hand. It’s based largely on admissions by the detainees themselves or on coerced, or worse, interrogations of their fellow inmates, some of whom have been proved to be liars.” Corine Hegland, *Empty Evidence*, NAT’L J., Feb. 4, 2006. Indeed, the review found that one particular Guantanamo detainee made accusations against more than 60 other detainees—“more than 10 percent of Guantanamo’s entire prison population”—placing many of them at a jihadist training camp. *Id.* After Syrian detainee Mohammed al-Tumani’s protestations that he was not at the training camp were bolstered, perhaps uncharacteristically, by his Personal Representative who took the time to examine the classified evidence, it was discovered that the aforementioned accuser “had placed Tumani [at the training camp] three months before the teenager had even entered Afghanistan.” *Id.* His curiosity piqued, the Personal Representative looked into the other detainees the accuser had fingered, and discovered that “[n]one of the men had been in Afghanistan at the time the accuser said he saw them at the camp.” *Id.* Despite the seemingly blatant unreliability of this evidence, Tumani’s CSRT nonetheless declared him an

on evidence that a prisoner owns a particular kind of cheap, common Casio watch as proof that the detainee has or knows how to make explosives.¹⁵⁷ Similarly, one CSRT panel relied on a detainee's sarcastic remarks as true admissions of his involvement with terrorism.¹⁵⁸

Of all the information the Recorder may collect about a detainee and which may ultimately be presented to a CSRT panel, CSRT guidelines permit a detainee access only to *unclassified* evidence.¹⁵⁹ Though this may certainly seem legitimate given the government's national security concerns, because most evidence and other relevant information presented against a detainee at a CSRT is classified, practical application means detainees often have no opportunity to see or rebut any of the evidence presented against them.¹⁶⁰ In fact, in 52% of CSRT proceedings, the government did

enemy combatant. *Id.*

¹⁵⁷ The government has used ownership of a Casio watch, one model of which has a circuit board that al Qaeda has used for making bombs, as evidence against at least ten detainees held at Guantanamo. Hegland, *supra* note 156, at 165; *see also* MARGUILIES, *supra* note 126.

¹⁵⁸ During one detainee's CSRT, he was reported to have said, "I saw bin Laden five times: Three times on Al Jazeera and twice on Yemeni news." MARGUILIES, *supra* note 126, at 165. This statement was characterized in the detainee's file as an admission to knowing Osama bin Laden. Similarly, after another detainee sarcastically yelled "Fine, you got me; I'm a terrorist," the CSRT panel recorded this statement as an admission despite the fact that the interrogators recognized it as sarcasm. *Id.* These statements should have been accurately conveyed in the detainees' files, allowing the CSRT panels to make a more informed assessment. Because this "evidence" was misrepresented, the panel's ultimate determination must be called into question.

¹⁵⁹ *See* England Memorandum, *supra* note 34, at 7. Unclassified evidence includes documents from family and friends and publicly available documents released by the government or published by the press. *See* Denbeaux & Denbeaux, *supra* note 38, at 24–29. Technically, unclassified evidence also includes internal government documents labeled "For Official Use Only." *Id.* The extent to which these documents are relied upon is unclear, and independent studies have charged that the government treats these official documents as classified despite their unclassified status. *Id.*

¹⁶⁰ *See* Denbeaux & Denbeaux, *supra* note 38, at 25 ("In essence detainees were not shown any evidence against them, classified or unclassified. Not only was [certain unclassified but "For Official Use Only"] evidence withheld from

not present any unclassified evidence in its cases against detainees but rather relied “solely on the presumptively valid classified information to meet its burden of proof.”¹⁶¹ Moreover, an astounding 89% of detainees were not provided any facts or evidence, unclassified or otherwise.¹⁶² These statistics illustrate that detainees have virtually no access to the vast majority of documents and information in the government’s possession.

Finally, CSRT determinations often rest upon classified evidence, which is presumed to be reliable and to which detainees have no access.¹⁶³ CSRTs operate under a rebuttable presumption in favor of the government’s evidence.¹⁶⁴ Rebuttable presumptions are certainly not novel; indeed, courts often use them when direct proof is impractical or difficult to obtain.¹⁶⁵ However, because

the detainee in violation of the CSRT procedures, but other declassified evidence was also withheld.”).

¹⁶¹ *Id.* at 22 (“A review of the 361 [available CSRT] transcripts reveals that the Government may have shown the detainee some evidence before he began his statement in 4% of the cases. When the hearing began, 89% of the detainees had no facts to rebut whether from witnesses or from documentary evidence. The same documents reveal that the [CSRT panel] showed the detainee unclassified information in only 7% of the hearings. It is unclear why the [CSRT panel] showed unclassified evidence in some cases but not others.”).

¹⁶² *Id.* at 22, 31.

¹⁶³ For example, the records for detainee ISN #1463 include the detainee’s statement that, “[T]here is no attorney here today and I don’t know anything about the law . . . I cannot say anything that [might] be used against me. I am even afraid to say what my name is.” MARGUILIES, *supra* note 126, at 163. During the CSRT proceeding for Mustafa Ait Idir, a Bosnian-Algerian, the CSRT panel questioned him about charges that he associated with an Al Qaeda operative and planned to attack the U.S. embassy in Sarajevo. When Idir asked for the name of the al Qaeda operative with whom he had allegedly associated, the CSRT panel refused, saying it did not know the name of the operative. Idir responded, “How can I respond to this? . . . If you tell me the name then I can respond and defend myself against this accusation.” The CSRT panel either refused or was unable to give him any information, rendering it impossible for Idir to rebut or contest the accusation. *See* Denbeaux & Denbeaux, *supra* note 38, at 16–17.

¹⁶⁴ Denbeaux & Denbeaux, *supra* note 38, at 19; *see also*, England Memorandum, *supra* note 34.

¹⁶⁵ *See, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. 224, 247–50 (1988), *accord*, *D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE* 541–42 (1977).

CSRT panels may consider evidence that is never shared with detainees, it is virtually impossible for a detainee to disprove any evidence supporting the determination that he is an enemy combatant.¹⁶⁶

ii. The Detainees' Evidence

While CSRT guidelines technically permit a detainee to request his own exculpatory evidence, those same guidelines also allow the government to deny a detainee's request for evidence if it is irrelevant or if it is not "reasonably available."¹⁶⁷ Such standards are easily manipulated by the government—CSRTs often fail to provide any reason at all for denying evidence requests¹⁶⁸ even when the outside evidence could in fact contribute greatly to the CSRT process. For example, prior to the CSRT for Mustafa Ait Idir, a Bosnian-Algerian apprehended in Bosnia and accused of associating with an al Qaeda operative and planning an attack on the U.S. embassy in Sarajevo, the detainee requested official court documents from Bosnia which he asserted would have proved that he had already been cleared of terrorism charges; the government

¹⁶⁶ Because the evidence before a CSRT is almost always classified and the detainee is not permitted access to it, he is "unable to challenge, explain, or simply rebut it. The rebuttable presumption of validity becomes, in practice, an irrebuttable one." Denbeaux & Denbeaux, *supra* note 38, at 19. For example, during the CSRT for detainee ISN # 1463, who was only provided an unclassified summary of evidence, the detainee said in response to the allegations against him, "That is not true. I did not help anybody and whoever is saying that I did, let them present their evidence It's not fair for me if you mask some of the secret information How can I defend myself?" *Id.* at 21.

¹⁶⁷ England Memorandum, *supra* note 34, at 4.

¹⁶⁸ Detainees ISN #333, ISN #680, and ISN #928 all identified specific documents or evidence during their CSRTs that they said would exonerate them, including passports and visas. Denbeaux & Denbeaux, *supra* note 38, at 32–33. In each of their cases, the government failed to procure the identified evidence after designating the information as not "reasonably available." *Id.* Consequently, each detainee's enemy combatant status designation was affirmed. *Id.*

refused to grant Idir's request.¹⁶⁹ Although the Bosnian government had already investigated Idir and cleared him of terrorism charges,¹⁷⁰ and though Idir's CSRT panel consulted other legal documents from Bosnia, the panel determined that the specific records sought by Idir were not "reasonably available."¹⁷¹

iii. Witnesses

CSRT guidelines technically give detainees the right to cross-examine the government's witnesses and to call their own witnesses.¹⁷² These rights are only meaningful, however, if the government's witnesses are actually present at a CSRT and if detainees' requests for witnesses are honored. For 393 out of the 558 detainees for whom CSRTs were reportedly conducted at Guantanamo—and the only CSRTs for which records have actually been released—the government did not produce a single witness.¹⁷³

Furthermore, a detainee's right to call his own witnesses is severely limited in practice. Because detainees are completely isolated from the outside world, unable to communicate with family, and have only limited communication with counsel,¹⁷⁴ it is unclear how a prisoner detained at Guantanamo could practically

¹⁶⁹ Denbeaux & Denbeaux, *supra* note 38, at 33. See also MARGUILIES, *supra* note 126, at 164.

¹⁷⁰ MARGUILIES, *supra* note 126, at 164.

¹⁷¹ Denbeaux & Denbeaux, *supra* note 38, at 33. Other records that CSRTs have determined to be not "reasonably available" include such things as medical records from a hospital in Jordan and testimony from explicitly identified family members even though their names, phone numbers and addresses had been provided by the detainee. *Id.* at 32. The government is not required to explain why certain evidence is not reasonably available; a conclusory statement that the evidence is not reasonably available is a sufficient justification. See generally Denbeaux & Denbeaux, *supra* note 38.

¹⁷² England Memorandum, *supra* note 34.

¹⁷³ Denbeaux & Denbeaux, *supra* note 38, at 21. In these cases, CSRTs relied on classified information.

¹⁷⁴ Detainees are not represented by counsel for purposes of their CSRTs, though detainees may be represented by counsel, often on a pro bono basis, for purposes of D.C. Circuit review of their CSRTs.

locate any witnesses to testify on his behalf.¹⁷⁵ In reality, a detainee's potential pool of witnesses is limited to other alleged terrorists similarly detained at Guantanamo. This subset of witnesses, as well as any proposed witness for the detainee, is further limited by the CSRT panel's discretion to decide whether the witness is "reasonably available." Unsurprisingly, the panels do not often honor witness requests.¹⁷⁶ Therefore, while detainees' requests for testimony from other detainees at Guantanamo were granted approximately 50% of the time, requests for testimony of witnesses located outside Guantanamo were uniformly denied.¹⁷⁷

IV. MOVING FORWARD: RECENT DEVELOPMENTS IN THE ADMINISTRATION, CONGRESS AND THE COURTS

The continuing disagreement among the Supreme Court, Congress and the Administration over detainees' rights has resulted in a six-year struggle between the three branches and has seriously undermined the credibility of the American constitutional system.¹⁷⁸ The good news, albeit minor, is that recent

¹⁷⁵ MARGUILIES, *supra* note 126, at 167.

¹⁷⁶ *Id.*

¹⁷⁷ Denbeaux & Denbeaux, *supra* note 38, at 28–29. Requests for witnesses located outside Guantanamo were denied if not reasonably available or "irrelevant." Practical and security considerations regarding the transport of civilians to Guantanamo to testify at a CSRT could also deem a requested witness "not reasonably available." In one case, a CSRT panel denied a detainee's request for witnesses because the panel determined that it "would have been burdened with repetitive, cumulative testimony" by witnesses who would have testified similarly that the detainee was not an enemy combatant. Denbeaux & Denbeaux, *supra* note 38, at 28. However, CSRT guidelines do not include a provision for denying witness requests on this basis.

¹⁷⁸ Members of Congress and the Administration have directly contributed to the perpetuation of the struggle over detainees' rights—had they simply afforded detainees basic procedural guarantees during the CSRT process to allow for a meaningful review and the potential for release, it is at least arguable that detainees' need to challenge the legality of their detentions in federal court would have been sharply diminished. Further, it is perhaps even likely that federal courts at the various stages of the review process might have looked upon detainees' petitions with less scrutiny had they been afforded minimal procedural guarantees in the beginning.

developments in the three branches signal the government's recognition of the need to modify the procedures provided to the Guantanamo detainees.¹⁷⁹ Certainly any revised procedures must allow for legitimate defense of national security interests, but the most effective procedures will do so without compromising core constitutional principles. Affording detainees a process that comports with fundamental constitutional values, while recognizing the need to tailor the system to take account of particular exigencies presented by the War on Terror, will strengthen the United States' security interest by maintaining the credibility of the American constitutional system and preserving the core principles upon which the United States was founded.

A. The Administration

Though the Administration has consistently defended CSRTs as an effective process for reviewing detainees' enemy combatant status,¹⁸⁰ roughly one quarter of detainees cleared by the system

¹⁷⁹ For example, in July 2007 the D.C. Circuit Court ruled to expand the record on review in an action brought under the DTA—a ruling that the government is now attempting to challenge in the Supreme Court. *See Bismullah I*, 501 F.3d 178 (D.C. Cir. 2007). Although the government has challenged the D.C. Circuit's order to produce an expanded—and more complete—record during the review of a detainee's CSRT, various officials from within the Administration, including some members of the military involved in the CSRT process, have acknowledged the need to reexamine the procedures afforded detainees. Commander Jeffrey Gordon of the Navy, a Pentagon spokesman, said in October 2007 that while no decisions had yet been made to “redo” any CSRTs, “discussions on a wide variety of detainee procedures continue within interagency circles.” William Glaberson, *U.S. Mulls New Status Hearings for Guantanamo Inmates*, N.Y. TIMES, Oct. 15, 2007, at A16. All the while, members of Congress have attempted to undo the damaging legislation passed in previous Congresses—numerous bills have been introduced that would repeal the court-stripping provisions passed in 2005 and 2006 and restore habeas rights to Guantanamo detainees. *See infra* note 243 and accompanying text.

¹⁸⁰ The government has contended that detainees, “enjoy more procedural protections than any other captured enemy combatants in the history of warfare.” Brief for the Boumediene Respondents, *supra* note 130, at 9.

remain in custody at Guantanamo.¹⁸¹ The military has suggested that the failure to release some cleared detainees lies in the refusal of the detainees' home countries to accept them back or guarantee that they will not be tortured or mistreated upon their return.¹⁸² However, military officials have also acknowledged that the Pentagon retains the ultimate authority to continue holding a detainee regardless of a CSRT determination that a detainee should be released from custody.¹⁸³ In practice, this means that the Pentagon may order new CSRTs for detainees who are initially recommended for release, thereby allowing the government to continue holding detainees at Guantanamo.¹⁸⁴ The Pentagon's authority to continue detainment despite a CSRT determination in favor of release questions the legitimacy of the entire CSRT process.¹⁸⁵

i. Military Officials Condemn the CSRT Process

Sworn statements by two military officials involved in CSRTs further reinforce the conclusion that the process is fatally flawed.¹⁸⁶ Both officers have filed declarations in federal court to

¹⁸¹ "At least eight prisoners at Guantanamo are there even though they are no longer designated as enemy combatants." Hegland, *supra* note 156. See also Farah Stockman, *Some Cleared Guantanamo Inmates Stay in Custody—Lawyers call U.S. System of Hearings a Sham*, BOSTON GLOBE, Nov. 19, 2007, at 1A.

¹⁸² *Id.* In regard to the transfer of detainees to their home countries, a Pentagon spokesman said, "many countries are just not moving very quickly." William Glaberson, *Hurdles Frustrate Effort to Shrink Guantanamo*, N.Y. TIMES, Aug. 9, 2007, at A1.

¹⁸³ Stockman, *supra* note 181. In addition to determinations made at Guantanamo, case-by-case reviews are also conducted in Washington. In determining whether to authorize release of a detainee, officials consider factors such as new evidence, any danger potentially posed by a detainee, and the willingness of a detainee's home country to ensure that he will not pose a threat to the United States in the future. *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Mark Jacobson, an assistant for detainee policy under Secretary of Defense Donald Rumsfeld from November 2002 through August 2003, said in

support detainees' contentions that the CSRT process is unfair and inadequate.¹⁸⁷ One statement, filed in the Supreme Court by Army Reserve Lt. Col. Stephen A. Abraham,¹⁸⁸ was so revealing and critical of CSRTs that some believe it contributed to the Court's decision to grant certiorari in *Boumediene v. Bush*.¹⁸⁹

Similarly, statements by an unnamed Army Reserve Major¹⁹⁰ collected during an investigation by the Oregon Federal Public Defender's Office in the case of a Sudanese national detained at

an interview with The National Journal, "I think the standards for sending someone to Guantanamo in 2002 and early 2003 were not as high as they should have been." Hegland, *supra* note 156; *see also* Lyle Denniston, *A New Critique of Pentagon Detainee Panels*, SCOTUSblog.com, Oct. 5, 2007, <http://www.scotusblog.com/wp/uncategorized/a-new-critique-of-pentagon-detainee-panels/> [hereinafter *A New Critique*].

¹⁸⁷ *See* Lyle Denniston, *Abraham Takes on Top Security Echelon*, SCOTUSblog.com, Nov. 13, 2007, <http://www.scotusblog.com/wp/uncategorized/abraham-takes-on-top-security-echelon/> [hereinafter *Abraham Takes on Top Security Echelon*]; *see also* *A New Critique*, *supra* note 186.

¹⁸⁸ Lt. Col. Abraham, a California attorney at the law firm of Fink & Abraham and a Reservist in the United States Army, was assigned to the Office for the Administrative Review of the Detention of Enemy Combatants ("OARDEC") in September 2004. Declaration of Reserve Lt. Col. Stephen A. Abraham at 2, *available at* <http://www.scotusblog.com/wp/wp-content/uploads/2007/11/sub-new-abraham-declaration.pdf> [hereinafter *Abraham Declaration*]. OARDEC was charged with testing "the validity of prior summary pronouncements that the detainees at Guantanamo had been properly classified as Enemy Combatants. OARDEC rules authorized the collection of relevant information prior to the empanelling of a [CSRT]." *Id.*

¹⁸⁹ *See* *A New Critique*, *supra* note 186. In a second statement filed in the D.C. Circuit Court in another detainee case, *Hamad v. Gates*, No. 07-1098 (D.C. Cir. 2007), Lt. Col. Abraham charged that, "there was no systematic method for requesting the government information relating to specific detainees" and that, "the individuals collecting, reviewing, and processing the information to be used by the [CSRTs] appeared to have little experience with intelligence products." *Abraham Declaration*, *supra* note 188.

¹⁹⁰ The officer's name was redacted from the publicly available declaration and withheld from reports. According to his sworn declaration, he sat on forty-nine CSRT panels in Guantanamo. Declaration of William J. Teesdale, Esq., *Hamad v. Bush*, No. 05-1009 (D.D.C. Sept. 4, 2007) [hereinafter *Teesdale Declaration*].

Guantanamo also provided sharp criticism of the process.¹⁹¹ In his declaration, the anonymous military official stated that he witnessed several major problems involving evidence and procedure.¹⁹² First, no exculpatory evidence was ever formally presented in any CSRT he attended, although he did acknowledge that panels sometimes inadvertently discovered exculpatory evidence as a result of investigating inconsistencies in the record.¹⁹³ Second, the role and responsibilities of the Recorder seemed to differ in each hearing.¹⁹⁴ Third, he witnessed officers involved in the proceedings express legitimate concern that CSRT panel members “did not understand the distinction between conclusory statements and actual evidence.”¹⁹⁵ Moreover, he stated that in six of the forty-nine CSRT hearings in which he participated, the panel came to a unanimous decision that the detainee was *not* an enemy combatant, but he observed that in each case, the Pentagon directed that a new CSRT panel be convened.¹⁹⁶

ii. Political Influences on the CSRT Process

The government’s CSRT policy has not been untouched by politics. Documents released by the Pentagon in response to a Freedom of Information Act request¹⁹⁷ reveal that CSRTs have resulted in “inconsistent decisions to release men declared by the Bush administration to be among America’s most-hardened enemies . . . rais[ing] questions about whether [the decisions] were arbitrary.”¹⁹⁸ The October 2007 resignation of the lead prosecutor for terrorism trials at Guantanamo, Air Force Col. Morris Davis,

¹⁹¹ See *A New Critique*, *supra* note 186.

¹⁹² See generally Teesdale Declaration, *supra* note 190.

¹⁹³ *Id.* at 6.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 7.

¹⁹⁶ *Id.* at 8.

¹⁹⁷ The Freedom of Information Act request was initiated by the Associated Press. Denbeaux & Denbeaux, *supra* note 38.

¹⁹⁸ Andrew O. Selsky, *Files Raise Questions About Gitmo, Decisions to Release Detainees Appear to Be Inconsistent, Documents Show*, ORLANDO SENTINEL, Oct. 3, 2007, at A6.

also illustrates the force of politics. Col. Davis resigned after he charged that, “politically motivated officials at the Pentagon pushed for [the] conviction of high-profile detainees [in formal military commissions] before the 2008 election.”¹⁹⁹ In discussing his abrupt resignation, Col. Davis cited his concerns about the use of classified evidence in CSRTs and the propensity of supposedly neutral legal advisors to interfere with prosecutorial functions.²⁰⁰

iii. The Administration’s Suggested Alternatives

Aware of the criticisms of and challenges to the CSRT system, the Administration recently indicated that it is considering alternatives.²⁰¹ One of the options being contemplated would allow the government to convene new CSRTs for detainees currently remaining at Guantanamo.²⁰² Another alternative proposed by the White House would involve granting detainees “substantially greater rights [than they currently have] as part of an effort to close the detention center” and relocate detainees to prisons in the United States.²⁰³ This may involve providing detainees counsel and giving final status determination authority to federal judges rather than military officers.²⁰⁴ Though certainly an improvement on the current process, these proposed alternatives are not an acknowledgement by the current Administration that the current CSRT procedures are flawed. Rather, the Administration maintains that they are only an attempt to assess the practicality of closing the detention center at Guantanamo.²⁰⁵

¹⁹⁹ Josh White, *Ex-Official: Push on Terror Cases Politically Motivated*, WASH. POST, Oct. 21, 2007.

²⁰⁰ *Id.*

²⁰¹ William Glaberson, *New Detainee Rights Weighed in Plans to Close Guantanamo*, N.Y. TIMES, Nov. 4, 2007, at A1.

²⁰² Lyle Denniston, *Government Considers Re-Doing Detainee Cases*, SCOTUSBLOG.COM, Oct. 12, 2007, <http://www.scotusblog.com/wp/uncategorized/government-considers-re-doing-detainee-cases>.

²⁰³ Glaberson, *supra* note 201.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

*B. The Courts**i. Bismullah v. Gates and the Fight Over the Scope of the Record on Review*

Petitioners in *Bismullah* were detained at Guantanamo, designated by separate CSRTs as enemy combatants, and subsequently filed petitions for review of their enemy combatant status designations in the D.C. Circuit.²⁰⁶ During review before the D.C. Circuit, the parties disagreed over the breadth of the protective order originally issued in 2005 that dictated the scope of the record on review as well as how to handle sensitive information and interaction between detainees and their counsel.²⁰⁷ The government argued that the record before the D.C. Circuit when conducting its review of a CSRT should be limited to that compiled by the Recorder, and that the government should only be required to turn over to petitioners' counsel the information presented to

²⁰⁶ *Bismullah I*, 501 F.3d 178 (D.C. Cir. 2007). *Bismullah v. Gates* was consolidated from two separate cases—*Bismullah v. Gates* and *Parhat v. Gates*. Petitioner Bismullah was captured in Afghanistan in 2003 and determined by a CSRT to be an enemy combatant on November 30, 2004. The seven petitioners in *Parhat* were captured in Pakistan in December 2001 and each was determined by a separate CSRT to be an enemy combatant. Because both cases were filed under the DTA and ostensibly dealt with the same issue, the D.C. Circuit ordered them to be argued on the same day and consolidated both cases.

²⁰⁷ The Green Protective Order governed a detainee's access to counsel and information from 2004 until it was challenged in *Bismullah I*. See *supra* notes 41, 45. The old protective order provided some protections for letters written between counsel and a detainee that were related to counsel's representation of the detainee, as well as protections for privileged documents and publicly-filed legal documents relating to that representation; a presumption that detainees' counsel have a "need to know" information in their own cases and in related cases; and revised procedures for in-person counsel visits at Guantanamo. See *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004). Though the Green Protective Order provided some guarantees for detainees, it was severely limited in scope and significantly impaired the D.C. Circuit Court's ability to conduct any kind of meaningful review. See *Bismullah I*, 501 F.3d 178.

the CSRT.²⁰⁸ By contrast, petitioners argued that the reviewing court should have access to all evidence and information “reasonably available to the government,” including information that may have not been presented to the CSRT panel.²⁰⁹

The D.C. Circuit Court agreed with detainees that the record on review should consist of the entire body of information collected by the government and not merely that which was compiled by the Recorder and presented to the CSRT panel.²¹⁰ The court explained that such a limitation on courts’ access to evidence would severely inhibit meaningful judicial review, and the court subsequently ordered the government to turn over the relevant documents.²¹¹

The government did not readily acquiesce to the court’s order. Rather than turn over the entire body of information relevant to each detainee, the government requested a panel rehearing, arguing that it could not meet the burden of production imposed by the court’s decision.²¹² While the D.C. Circuit Court ultimately denied the government’s petition for a panel rehearing, it expressly presented the government with the option of convening new CSRTs rather than attempting to compile all of the relevant information in the government’s possession at the time of each detainee’s original CSRT.²¹³ While this alternative would still require the government to compile information regarding a detainee, DOD regulations only require the compilation of information that is reasonably available at the time the CSRT is convened.²¹⁴ The government argued that this standard still imposed too heavy a burden and petitioned the court for a rehearing *en banc*. The court, in an even 5-5 split, denied the government’s motion on February 1, 2008.²¹⁵

Not yet willing to concede, the government asked the D.C.

²⁰⁸ *Bismullah I*, 501 F.3d at 185.

²⁰⁹ *Id.* at 184.

²¹⁰ *Id.* at 185–86.

²¹¹ *Id.*

²¹² *Bismullah v. Gates (Bismullah II)*, 503 F.3d 137 (D.C. Cir. Oct. 3, 2007), *amending Bismullah I*, 501 F.3d 178 (D.C. Cir. July 20, 2007).

²¹³ *Bismullah II*, 503 F.3d at 141.

²¹⁴ *Id.*

²¹⁵ *Bismullah III*, 514 F.3d 1291 (D.C. Cir. Feb. 1, 2008).

Circuit Court to stay its July 2007 order, applicable not only to the petitioners in *Bismullah I* but to all the 180 detainee petitions now pending before it, thus giving the government time to challenge that decision in the Supreme Court.²¹⁶ The Circuit Court duly granted the stay—though it applied only to the petitioners in *Bismullah I*—and on February 14, 2007 the government petitioned the Supreme Court to hold the case until after its disposition of another detainee case already pending there, or in the alternative, to grant review and set it on an expedited schedule so that it may be decided this term.²¹⁷ In its petition to the Supreme Court, the government argued that the Circuit Court’s July 2007 order expanding the scope of the record on review is “unprecedented in any administrative or judicial context” and would require the government “to divert a significant portion of its intelligence, law enforcement, and military resources to either creating new ‘records’ for DTA litigation or to conducting entirely new CSRT hearings for those detainees.”²¹⁸ Detainees’ reply brief urged the court to deny the government’s appeal, but agreed that, should the Court decide to hear the case, it should do so on an expedited schedule.²¹⁹ Though the Supreme Court was expected to consider the appeal at its private conference on March 14, 2008,²²⁰ no action has yet been taken.

²¹⁶ Lyle Denniston, *Government Gets Delay in Detainee Cases*, SCOTUSblog.com, Feb. 13, 2008, <http://www.scotusblog.com/wp/uncategorized/government-gets-delay-in-detainee-cases/>.

²¹⁷ Lyle Denniston, *Government Appeals New Detainee Case*, SCOTUSblog.com, Feb. 14, 2008, <http://www.scotusblog.com/wp/uncategorized/government-appeals-new-detainee-case/>.

²¹⁸ Petition for a Writ of Certiorari at 14–15, *Gates v. Bismullah*, No. 07-1054 (Feb. 14, 2008).

²¹⁹ Respondents’ Joint Opposition Brief, *supra* note 58, at 43.

²²⁰ Lyle Denniston, *U.S.: Time to Act is Now on Detainee Case*, SCOTUSblog.com, Mar. 11, 2008, <http://www.scotusblog.com/wp/uncategorized/us-time-to-act-now-on-detainee-case/>.

ii. *Boumediene v. Bush, Al-Odah v. United States and the Fight Over the Constitutionality of Court-Stripping*

While the parties in *Bismullah* continue to disagree over the scope of the D.C. Circuit's review of CSRT procedures under the DTA and MCA, petitioners in the companion cases *Boumediene v. Bush* and *Al-Odah v. United States* are awaiting the Supreme Court's ruling in their own action, wherein they challenged the constitutionality of the court-stripping provision itself.²²¹ After the D.C. Circuit Court ordered that petitioner detainees' habeas petitions be dismissed in February 2007,²²² they filed petitions for writs of certiorari in the Supreme Court.²²³ The Supreme Court initially denied petitioners' request,²²⁴ but in a rare and unexpected move, the Court reversed itself on the last day of the term several months later and granted detainees' petition for certiorari and rehearing.²²⁵

After years of navigating the federal appellate court system,²²⁶

²²¹ *Boumediene v. Bush*, No. 06-1195; *Al-Odah v. United States* (U.S. argued Dec. 5, 2007).

²²² *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). The D.C. Circuit agreed that detainees had no independent right to seek writs of habeas corpus in federal court under the MCA; rather, the court held detainees have only the right to a review of their CSRT determinations pursuant to the DTA. *See generally id.* Judge Rogers dissented from the majority opinion and maintained that the court-stripping provision of the MCA is an unconstitutional suspension of the writ of habeas corpus and that, "[Congress'] attempt to revoke federal jurisdiction that the Supreme Court held to exist exceeds the powers of Congress." *Id.* at 1007 (Rogers, J., dissenting).

²²³ Petition for a Writ of Certiorari, *Boumediene v. Bush*, No. 06-1195 (Mar. 5, 2007).

²²⁴ *Boumediene v. Bush*, 127 S. Ct. 1478 (Apr. 2, 2007) (*denying cert.*); *see also* Joan Biskupic, *Court to Decide Detainees' Rights, Justices Try to Balance Protection of Nation, Protection of Individual*, USA TODAY, Nov. 27, 2007, at 7A. Justices Stevens and Kennedy acknowledged the importance of the issue presented and signaled their intent to consider developments in other pending detainee cases, namely *Bismullah*, as to the efficacy of the CSRT review process. *Id.*

²²⁵ *Boumediene v. Bush*, 127 S. Ct. 3078 (June 29, 2007), *vacating* 127 S. Ct. 1478 (April 2, 2007).

²²⁶ Petitioners in *Boumediene* have been litigating their asserted rights to

detainees finally had the opportunity to present their argument to the Supreme Court on December 5, 2007. Petitioner detainees stressed the inadequacies of the CSRT process, arguing that the constitutional writ of habeas corpus extends to non-citizen detainees held at Guantanamo and thus that the court-stripping provision of the MCA is an unconstitutional suspension of the writ.²²⁷ Petitioners went on to contend that while suspending habeas rights is a valid exercise of Congress' authority if it provides an "adequate and effective alternative,"²²⁸ the CSRT process does not meet this standard.²²⁹

In response, the government first argued that the constitutional writ of habeas corpus does not extend to non-citizens captured and detained abroad, and, alternatively, that Guantanamo detainees "enjoy more procedural protections than any other captured enemy combatants in the history of warfare."²³⁰ The government maintained that detainees were provided an "adequate and effective alternative" for habeas in the form of the CSRT and D.C. Circuit Court review processes,²³¹ and the Court should therefore exercise restraint and refrain from overruling long-respected precedent.²³²

In light of the D.C. Circuit's disposition in *Bismullah*, the petitioners in *Boumediene* and *Al-Odah* filed supplemental briefing with the Supreme Court after the oral argument on December 5, 2007. In an attempt to buttress their constitutional challenge, petitioners cited *Bismullah* in support of their contention that the procedures set up by Congress to challenge CSRTs under the DTA

file habeas petitions in federal court since 2005. See *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

²²⁷ See Brief for the Boumediene Petitioners at 9–15, *Boumediene v. Bush*, No. 06-1195 (U.S. Aug. 24, 2007).

²²⁸ See *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (holding that where a collateral remedy is adequate and effective to test the legality of one's detention, such a substitution is not an unconstitutional suspension of the writ of habeas corpus).

²²⁹ Brief for the Boumediene Petitioners, *supra* note 227, at 18–32.

²³⁰ See Brief for Boumediene Respondents, *supra* note 130.

²³¹ *Id.*

²³² *Id.*

are clearly ineffective.²³³ Because the Supreme Court had signaled that its decision in *Boumediene* and *Al-Odah* “might be affected at least in part by what the Circuit Court [does] in *Bismullah*,”²³⁴ detainees seized the opportunity to reinforce the arguments they made before the Court in early December.

In the first of two supplemental briefs, detainees argued that the D.C. Circuit’s decision to deny the government’s motion for a rehearing *en banc* “does nothing to alleviate the fundamental structural inadequacies of the DTA review process as a substitute for habeas, and will only result in more delay.”²³⁵ In its second brief, filed just days later, detainees further argued that

[t]he fractured nature of the D.C. Circuit’s recent action does not bode well for the future of DTA proceedings. There is ample reason to believe that the D.C. Circuit will continue to engage in divided, incremental decisionmaking on threshold procedural issues on which Congress has provided no guidance, thus making DTA review far less speedy than the centuries-old remedy of habeas.²³⁶

Indeed, both briefs attempted to further emphasize the fact that the D.C. Circuit Court’s disposition in *Bismullah* would not resolve the overarching question of detainees’ rights.

²³³ Lyle Denniston, *Detainees: No Need to Review New Case*, SCOTUSblog.com, Feb. 15, 2008, <http://www.scotusblog.com/wp/uncategorized/detainees-no-need-to-review-new-case/>.

²³⁴ Lyle Denniston, *Detainees: Lower Court Fracture a Problem*, SCOTUSblog.com, Feb. 19, 2008, <http://www.scotusblog.com/wp/uncategorized/detainees-lower-court-fracture-a-problem/>. “During oral argument in early December in the pending cases, several of the Justices seemed interested in giving the Circuit Court some new assignments on detainees’ rights.” *Id.*

²³⁵ Supplemental Reply Brief for Petitioners El-Banna et. al. at 1, *Al-Odah v. United States*, No. 06-1196 (U.S. Feb. 14, 2008).

²³⁶ Motion for Leave to File Supplemental Brief and Supplemental Brief for the Boumediene Petitioners at 4, *Boumediene v. Bush*, No. 06-1195 (U.S. Feb. 19, 2008).

C. Congress

Even if the Supreme Court takes the opportunity in *Boumediene* and *Al-Odah* to hold the court-stripping provision of the MCA unconstitutional, there is still the possibility that Congress may attempt to circumvent the ruling as it did in the wake of both *Rasul* and *Hamdan*.²³⁷ While some members of Congress have recognized that, “the elimination of basic legal rights undermines, not strengthens, [the] ability to achieve justice,”²³⁸ a vocal segment of Congress ardently maintains that habeas corpus does not, and indeed should not, extend to alien enemies captured and detained abroad in wartime.²³⁹

Nonetheless, there is still the possibility for change: Senators Patrick Leahy and Arlen Specter, Chairman and Ranking Member of the Senate Judiciary Committee respectively, have repeatedly criticized Congress’ failure to repeal the court-stripping provision of the MCA, calling it “a historic error in judgment”²⁴⁰ and an attempt to “set back basic rights by some 900 years.”²⁴¹ Moreover, several measures have been introduced in the House and the Senate that would have repealed the section of the MCA that stripped federal courts of their jurisdiction over detainees’ habeas petitions and restored detainees’ right to habeas corpus.²⁴² Unfortunately,

²³⁷ See *supra* note 3.

²³⁸ *Hearing on Restoring Habeas Corpus: Protecting American Values and the Great Writ Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Sen. Leahy), available at http://judiciary.senate.gov/member_statement.cfm?id=2785&wit_id=2629.

²³⁹ See 152 CONG. REC. S10354 (daily ed. Sept. 28, 2006).

²⁴⁰ *Id.*

²⁴¹ 152 CONG. REC. S10265 (daily ed. Sept. 27, 2006) (statement of Sen. Specter). Senator Specter has been criticized for his vote in favor of the MCA because of his ardent statements that the court-stripping provision was unconstitutional and for his subsequent efforts to repeal that provision. *The Avoiding Congressional Accountability Act*, National Review Online, Sept. 17, 2007, <http://nationalreview.com> (search “National Review Online” for “The Avoiding Congressional Accountability Act”; then follow hyperlink under “Search Results”).

²⁴² See *generally* Habeas Corpus Restoration Act of 2007, S. 185, 110th

however, no measures have yet garnered enough support to pass through a House committee or overcome a Senate filibuster.²⁴³

CONCLUSION

Detainees at Guantanamo have only one form of procedural due process, and it is minimal at best: the D.C. Circuit Court can only review whether the CSRT in the detainee's case complied with its own procedures.²⁴⁴ In order to preserve the legitimacy of American constitutional values and ensure the legitimacy of the CSRT system, detainees must be afforded basic procedural guarantees and a fair adversarial process during their initial CSRTs.²⁴⁵ The Framers of the Constitution recognized liberty as a preexisting natural right, and sought to protect it in the Constitution and the Bill of Rights.²⁴⁶ Recognition of Guantanamo detainees' right to liberty might seem counterintuitive in the context of protecting the nation

Cong. (as reported by the Senate June 26, 2007); Habeas Corpus Preservation Act, H.R. 1189, 110th Cong. (2007); Military Commissions Habeas Corpus Restoration Act of 2007, H.R. 267, 110th Cong. (2007); Military Commissions Revisions Act of 2007, H.R. 2543, 110th Cong. (2007); Restoring the Constitution Act of 2007, H.R. 1415, 110th Cong. (2007); Restoring the Constitution Act of 2007, S. 576 (2007); Habeas Corpus Restoration Act of 2006, S. 4081, 109th Cong. (2006).

²⁴³ For example, on September 19, 2007, a Senate amendment to the defense appropriations bill that would have reversed the provisions of the MCA that eliminated the jurisdiction of any court to hear or consider applications for a writ of habeas corpus filed by aliens detained at Guantanamo failed to garner the sixty votes needed to invoke cloture. The cloture vote failed by a mere four votes, however, with fifty Democrats and six Republicans voting to end debate and proceed to a final vote on the amendment. 153 CONG. REC. S11688 (daily ed. Sept. 19, 2007) (Roll Call Vote No. 340, Motion to Invoke Cloture on the Specter Amdt. No. 2022 to H.R. 1585).

²⁴⁴ See *Bismullah I*, 501 F.3d 178 (D.C. Cir. 2007).

²⁴⁵ Though the Supreme Court held in 1891 in *In re Ross*, 140 U.S. 453 (1891), that the United States Constitution has no extra-territorial application, some scholars have read this case as standing for the narrower proposition that "although not all constitutional rights [extend] beyond U.S. territory, persons outside U.S. territory are still entitled to fundamental fairness in their trial." Yin, *supra* note 148, at 366.

²⁴⁶ See Rosen, *supra* note 12, at 1078–79.

from the threat of terrorism, but this does not serve as a justification for ignoring the right altogether. Rather, “[t]he concept that . . . constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and . . . would destroy the benefit of a written Constitution and undermine the basis of our Government.”²⁴⁷

The United States Constitution provides explicit procedural guarantees to protect against certain kinds of government action. However, those guarantees are more than just procedural protections. Provisions like the Fifth Amendment, which provides that, “no person shall . . . be deprived of life, liberty or property, without due process of law,”²⁴⁸ stands for the proposition that we, as Americans, will not stand for or be party to abusive and arbitrary government encroachment on the right to liberty. Importantly, recognizing detainees’ liberty rights does not require that detainees be released or even that detainees be afforded the gamut of constitutional protections. The preservation of liberty merely requires that the process afforded to detainees maintain a basic adversarial structure and conform to traditional constitutional values. Rather than weaken the argument for providing detainees a more legitimate process for challenging their detention, the government’s interest in securing the nation against the threat of terrorism without sacrificing the constitutional principles that underlie our system of government highlights the need for adequate constitutional protection for detainees.

²⁴⁷ Reid v. Covert, 354 U.S. 1, 14 (1957).

²⁴⁸ U.S. CONST. amend. V.