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## The Future of Detainees in the Global War on Terror: A U.S. Policy Perspective

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# COMMENTARY

## THE FUTURE OF DETAINEES IN THE GLOBAL WAR ON TERROR: A U.S. POLICY PERSPECTIVE

*Saxby Chambliss* \*

### I. INTRODUCTION

On September 11, 2001, the terrorist network Al-Qaeda launched a coordinated attack against the economic and political capitals of the United States. Three domestic airplanes were hijacked by Al-Qaeda members and systematically flown into the World Trade Center towers in New York City and the Pentagon in Washington, D.C. A fourth plane, due to the courageousness of the passengers who took control of the cockpit from the terrorists, crashed in a field in Pennsylvania, sparing the U.S. Capitol, or possibly the White House, from similar destruction. The result of these terrorist attacks was the largest single day death toll from foreign attack on American soil, killing over 3,000 innocent civilians.<sup>1</sup>

While Americans and the international community mourned the losses caused by the terrorist attacks, the U.S. government was on the defensive. Within days of the attack, on September 14, 2001, President Bush declared a national emergency.<sup>2</sup> The same day, Congress passed the Authorization for Use of Military Force (“AUMF”), granting the President authority to defend the nation

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\* United States Senator. Senator Chambliss is the Ranking Republican Member of the Senate Agriculture Committee and a member of the Senate Select Committee on Intelligence and the Senate Armed Services Committee.

1. See Bob Herbert, *Vital Statistics*, N.Y. TIMES, Oct. 31, 2002, at A27; see also Richard Rhodes, *What Terror Keeps Teaching Us*, N.Y. TIMES, Sept. 23, 2001, § 6 (Magazine), at 91 (comparing the attack on Pearl Harbor to the attack on September 11, 2001).

2. Proclamation No. 7463, 3 C.F.R. 263 (2001), *reprinted in* 50 U.S.C. § 1621 (2006).

against attack and to combat Al-Qaeda.<sup>3</sup> Shortly thereafter, on October 7, 2001, the United States responded to these attacks by initiating an armed conflict in Afghanistan, targeting Al-Qaeda and the sanctuary it received from the Taliban.<sup>4</sup>

Since the early days following 9/11, Congress has crafted, and the President has signed, a variety of legislation to address legal issues which arose from the ongoing Global War on Terrorism ("GWOT").<sup>5</sup> In particular, in the Detainee Treatment Act ("DTA")<sup>6</sup> and the Military Commissions Act ("MCA"),<sup>7</sup> Congress created the "most generous set of procedural protections" ever granted to enemy combatants detained by the United States.<sup>8</sup> On June 12, 2008, the Supreme Court issued a 5-4 opinion in *Boumediene v. Bush*, striking down portions of those generous procedural protections, and holding, for the first time in our nation's history, that detainees in an ongoing conflict and held outside of the United States at the U.S. Naval Base in Guantánamo Bay, Cuba, ("GTMO") have the right to appeal their detentions under the U.S. Constitution.<sup>9</sup>

As a result of *Boumediene*, terrorists, detained by the United States for aiding Al-Qaeda and committing atrocities against our soldiers on the battlefield, may now enjoy many of the same constitutional privileges as our own citizens. In some cases, they may now receive even more protections than our own citizens enjoy in a criminal context.<sup>10</sup> In reaching this stunning conclusion, the

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3. See 147 CONG. REC. S17045 (daily ed. Sept. 14, 2001); 147 CONG. REC. H17110, 17,156 (daily ed. Sept. 14, 2001).

4. See *Afghanistan Wakes After Night of Intense Bombings*, CNN, Oct. 7, 2001, <http://archives.cnn.com/2001/US/10/07/gen.america.under.attack/>.

5. See, e.g., Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of the U.S.C.); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S.C.); Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (to be codified at scattered sections of 50 U.S.C.); Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (to be codified at scattered sections of 50 U.S.C.).

6. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified as amended at 10 U.S.C. § 801 note, 28 U.S.C. § 2441, and 42 U.S.C. § 2000dd and note (2006)).

7. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

8. *Boumediene v. Bush*, 128 S. Ct. 2229, 2279 (2008) (Roberts, C.J., dissenting).

9. *Id.* at 2262 (majority opinion).

10. Unlike U.S. citizens, terrorists can file a writ of habeas corpus without exhausting

Court ignored numerous clear actions by Congress and the President and instead decided to move our detainee and national security policies into the federal courts. The Court also ignored the fact that, despite having every opportunity to challenge their detention through Combatant Status Review Tribunals (“CSRTs”), many of the detainees at GTMO—including Boumediene—actively refused to participate in a CSRT, and not one had completed successfully the appeals process Congress provided for in the DTA.<sup>11</sup>

In the aftermath of the Supreme Court’s decision in *Boumediene*, Congress and the new administration must re-evaluate our detainee processes and move U.S. detainee policy back under the purview of the political branches. Ironically, and despite its holding, the Court stated that

[i]n considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.<sup>12</sup>

As the Court recognized, the political branches are better suited to understand issues of national security. For example, the members of the Senate Select Committee on Intelligence are well aware of the national security threats that face our nation and have been entrusted by their colleagues to consider fully those threats as new policies in the GWOT are debated.

Over the past few years, Congress has responded quickly to address those court rulings that apply to detainees. With the de-

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alternative remedies. *See id.* at 2274 (requiring “exhaustion of alternative remedies before a prisoner can seek federal habeas relief”); *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975); *Ex parte Royall*, 117 U.S. 241, 253 (1886).

11. As of November 24, 2008, 193 petitions had been filed with the D.C. Circuit Court of Appeals under the appeals provision of the DTA, though several had already been dismissed by that time. Letter from Joseph A. Benkert, Assistant Sec’y of Def., Dep’t of Def., to author (Nov. 24, 2008) (on file with the author) [hereinafter Benkert Letter]. The *Boumediene* ruling left the future of DTA cases uncertain because of potential jurisdictional issues in the Court of Appeals. *Id.* On January 9, 2009, the D.C. Circuit ruled that the provision in the DTA granting that court subject matter jurisdiction over CSRT appeals could not be severed from the provision of the MCA that *Boumediene* declared unconstitutional. *See Bismullah v. Gates*, No. 06-1197, slip op. at 2–3 (D.C. Cir. Jan. 9, 2009). Therefore, the D.C. Circuit no longer had jurisdiction to hear appeals from CSRT determinations. *Id.*

12. *Boumediene*, 128 S. Ct. at 2276–77 (internal citation omitted).

cision in *Boumediene*, Congress will have to do so again. There are many policy and national security considerations with regard to the legal rights the United States should afford to detainees in the GWOT that must be examined and addressed swiftly before courts are allowed to develop further U.S. policy to our nation's detriment. This commentary will lay out a brief history of congressional action on detainee policy, as well as discuss potential action for the political branches to consider in the near future.

## II. CONGRESSIONAL HISTORY ON THE DETENTION OF TERRORISTS

### A. *Authorization for the Global War on Terrorism*

The attacks of September 11, 2001 undoubtedly required a massive and novel response from the United States. Faced with a transnational enemy who successfully attacked the United States or its interests on more than one occasion, and who threatened to do so again, the response was meant to incapacitate Al-Qaeda.

When Congress passed the AUMF, it condemned the terrorist attacks as treacherous violence and cited the necessity for the United States to exercise its right to self-defense.<sup>13</sup> The AUMF granted the President authority

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>14</sup>

In passing the AUMF, Congress created specific statutory authority to combat the perpetrators of the September 11th attacks, Al-Qaeda, and those who support them. This authority, as well as authority provided under the laws of war, gave the United States the right to detain enemy combatants.<sup>15</sup>

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13. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

14. *Id.*

15. See Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A), opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

## B. *Combatant Status Review Tribunals*

In 2004, the Supreme Court decided *Hamdi v. Rumsfeld*, holding, in a plurality opinion, that the President was authorized to detain enemy combatants for the duration of hostilities “based on longstanding law-of-war principles.”<sup>16</sup> In *Hamdi*, the Court recognized that the President’s right to detain those enemies who fought against the United States in Afghanistan was “so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress . . . authorized the President to use.”<sup>17</sup> The Court also held that Congress authorized the President to detain persons designated as enemy combatants, including U.S. citizens such as Hamdi, without a criminal trial.<sup>18</sup> Although the Court rejected the detainee’s petition for a writ of habeas corpus, it determined that detention was permitted so long as an enemy combatant had a process to challenge that designation.<sup>19</sup>

Largely as a result of the Court’s due process requirements from *Hamdi*, the Department of Defense (“DOD”) created the CSRT process to determine a detainee’s status as an enemy combatant and to provide a mechanism for a detainee to challenge an enemy combatant designation.<sup>20</sup> The CSRTs are administrative rather than adversarial, but each detainee has the opportunity to present “reasonably available” evidence and witnesses to a panel of three commissioned officers who will determine whether the detainee meets the criteria for designation as an enemy combatant.<sup>21</sup> The DOD defines “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[,] . . . includ[ing] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”<sup>22</sup> Each detainee is provided a military officer who serves as a personal representative, but not

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16. 542 U.S. 507, 521 (2004) (O’Connor, J., plurality opinion).

17. *Id.* at 518.

18. *See id.* at 519.

19. *See id.* at 533.

20. *See* Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

21. *See id.* at (c), (e), (g)(8)–(12).

22. *Id.* at (a).

as an advocate.<sup>23</sup> The personal representative may, however, view classified evidence, summarize it to the detainee, and comment on it to the tribunal to aid in its determination.<sup>24</sup> Each detainee may elect to participate in the hearing or remain silent.<sup>25</sup>

Because of the hostile environments in which detainees have been captured, the CSRTs are not bound by criminal rules of evidence.<sup>26</sup> Rather, the government's evidence is presumed to be genuine and accurate.<sup>27</sup> For example, evidentiary limits on admitting hearsay are tempered by practical considerations.<sup>28</sup> The CSRT process recognizes that it makes no sense in the middle of a war to compel soldiers fighting in Afghanistan or Iraq to leave the frontlines just to testify about statements or evidence collection.

Although the standard used to determine a detainee's status as an enemy combatant is a "preponderance of the evidence" standard, the process as a whole provides reasonable procedural safeguards to ensure a fair proceeding.<sup>29</sup> For example, the government is still required to present mitigating evidence and each detainee may receive unclassified summaries of the relevant evidence against him.<sup>30</sup>

### C. *The Detainee Treatment Act*

Congress also took note of the Court's decision in *Hamdi* and began crafting legislation to address the Supreme Court's concerns. Before any legislation passed, however, the Supreme Court held that the federal statutory habeas corpus provision extended statutory habeas jurisdiction to GTMO because GTMO was not outside the sovereignty of the United States.<sup>31</sup> As a result of this second Supreme Court decision, Congress passed and the President signed the DTA on December 30, 2005.<sup>32</sup> The DTA included

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23. *See id.* at (6).

24. *Id.*

25. *Id.* at (g)(10)–(11).

26. *See id.* at (g)(9).

27. *Id.* at (g)(9) and (g)(12).

28. *Id.* at (g)(9).

29. *See id.* at (g)(12).

30. *See id.* at (c).

31. *See Rasul v. Bush*, 542 U.S. 466, 473 (2004).

32. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified as amended at 10 U.S.C. § 801, 28 U.S.C. § 2241, and 42 U.S.C. § 2000dd and note (2006)).

the Graham-Levin Amendment which eliminated the federal courts' statutory jurisdiction over habeas corpus claims by aliens detained at GTMO, but provided for an appeal of a status determination made by the CSRTs.<sup>33</sup> Specifically, the D.C. Circuit Court of Appeals ("D.C. Circuit") was given exclusive jurisdiction to hear appeals of any status determination to ensure that such determination was consistent with applicable DOD procedures and evidentiary standards.<sup>34</sup>

The DTA also required DOD to conduct a yearly review of the status of each prisoner.<sup>35</sup> Additionally, the DTA required that the CSRTs "shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee."<sup>36</sup> In accordance with the DTA, DOD issued guidance that if new evidence arose after a CSRT determination, the Deputy Secretary of Defense would "direct that a CSRT convene to reconsider the basis of the detainee's E[nemy] C[ombatant] status in light of the new information."<sup>37</sup>

#### D. *The Military Commissions Act*

Following the enactment of the DTA, the Supreme Court again waded into the military detention process. In *Hamdan v. Rumsfeld*, the Court held that the DTA did not apply to habeas petitions filed prior to the DTA's enactment and that there were flaws in the authority of the military commissions.<sup>38</sup> As a result, Congress passed the MCA, which amended the DTA's provisions regarding appellate review and habeas corpus jurisdiction.<sup>39</sup> Congress expanded the DTA to make its review provisions the exclusive remedy for all aliens detained as enemy combatants.<sup>40</sup> Sec-

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33. 151 CONG. REC. S12667 (daily ed. Nov. 10, 2005) (introduced by Sen. Graham, passed by roll call vote, 49-42) (amended by SA2524, 151 CONG. REC. S12771 (daily ed. Nov. 14, 2005)).

34. See Detainee Treatment Act of 2005 § 1005(e)(2), 119 Stat. at 2742.

35. *Id.* at § 1005(d).

36. *Id.* at § 1005(a)(3).

37. Memorandum of Frank Sweigart, Dir. of the Office for the Admin. Review of the Det. of Enemy Combatants, Dep't of Def., Procedure for Review of "New Evidence" Relating to Enemy Combatant (EC) Status, Instruction 5421.1 (May 7, 2007), available at [www.defenselink.mil/news/May2007/New%20Evidence%20Instruction.pdf](http://www.defenselink.mil/news/May2007/New%20Evidence%20Instruction.pdf).

38. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 574-77 (2006).

39. Military Commissions Act of 2006, Pub. L. No. 109-366 § 3(a), 7, 120 Stat. 2600, 2622, 2635-36 (codified as amended at 10 U.S.C. § 950g, 28 U.S.C. § 2241 (2006)).

40. *Id.* § 7, 120 Stat. at 2635-36 (codified as amended at 28 U.S.C. § 2241 (2006)).

tion 7 of the MCA explicitly revoked the jurisdiction of U.S. courts to hear habeas corpus petitions by all aliens in U.S. custody held as enemy combatants, including those pending at the time of enactment.<sup>41</sup> The statutory habeas provision, previously amended by the DTA, was replaced by the MCA's decree that:

(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) [review of CSRT determinations] and (3) [review of final decisions of military commissions] 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.<sup>42</sup>

Under the MCA, therefore, appeals from a final decision by a military commission would continue to go to the D.C. Circuit but would be routed through a new appellate body, the Court of Military Commission Review ("CMCR").<sup>43</sup> Review of a decision by a military commission could only concern matters of law, not fact.<sup>44</sup> Appeals could be based on inconsistencies with the procedures set forth in the MCA, or, "to the extent applicable, the Constitution or laws of the United States."<sup>45</sup> CSRT determinations would continue to be appealable directly to the D.C. Circuit.<sup>46</sup>

The sequence of events described above shows plainly that Congress intentionally and unequivocally stripped jurisdiction to hear habeas petitions by detainees at GTMO from the courts. There is no ambiguity in the language of the DTA and MCA—it was the desire and intent of the political branches to keep the terrorists held at GTMO out of the U.S. court system, except

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41. *Id.* The Court ruled section 7 unconstitutional in *Boumediene*. *Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008).

42. 28 U.S.C. § 2241(e) (2006).

43. 10 U.S.C. § 950f (2006).

44. *Id.* § 950g(b).

45. *Id.* § 950g(c).

46. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005(e)(2), 119 Stat. 2739, 2742 (codified at 10 U.S.C. § 801 note (2006)).

through the appellate processes that the two Acts lay out, and to deny them the constitutional rights that our own citizens enjoy.

### III. *BOUMEDIENE* AND ITS IMPACT ON CURRENT POLICY

#### A. Boumediene *History*

On February 20, 2007, the D.C. Circuit in *Boumediene v. Bush*, upheld the MCA's habeas-stripping provision.<sup>47</sup> The court's decision applied to a number of pending habeas cases, all of which involved non-U.S. nationals detained at GTMO.<sup>48</sup> There were two main questions on appeal. First, the court considered whether Congress intended the MCA to eliminate habeas review for all alien enemy combatants—including those who had filed habeas petitions before the MCA was enacted.<sup>49</sup> Both the majority and the dissent agreed that the plain language of the MCA prevented courts from hearing any habeas petition filed by an alien detained at GTMO, regardless of when the habeas petition was filed.<sup>50</sup>

The second, and primary question, was whether the MCA's elimination of habeas review for detainees was consistent with the Suspension Clause of the U.S. Constitution.<sup>51</sup> The D.C. Circuit looked at the historical scope of habeas and concluded that non-U.S. citizens held outside the United States historically did not have a right to habeas review.<sup>52</sup> The court then found that, because Congress and the executive branch had determined explicitly that GTMO was not within the territorial jurisdiction of the United States, the detainees held at GTMO were not detained within the territorial United States.<sup>53</sup> Thus, the MCA did not suspend habeas because there was nothing to suspend—"the Constitution does not confer rights on aliens without property or presence within the United States."<sup>54</sup>

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47. *Boumediene v. Bush*, 476 F.3d 981, 988–92 (D.C. Cir. 2007), *rev'd*, 128 S. Ct. 2229 (2008).

48. *See id.* at 904.

49. *Id.* at 986.

50. *Id.* at 986–88; *id.* at 994 (Rogers, J., dissenting).

51. *Id.* at 988.

52. *Id.* at 988–92.

53. *Id.* at 992.

54. *Id.* at 991.

## B. *Supreme Court Decision in Boumediene*

On June 12, 2008, the Supreme Court issued its opinion in *Boumediene v. Bush*, holding that detainees held at GTMO have the constitutional privilege of habeas corpus and that section 7 of the MCA—which stripped the courts’ jurisdiction to hear habeas claims from detainees—was unconstitutional because the procedural mechanisms in the DTA were not an adequate substitute for the writ of habeas corpus.<sup>55</sup> The Court asserted that if Congress’s intent was to deny habeas privileges to these detainees, it must formally suspend the writ as mandated by the Suspension Clause of the Constitution.<sup>56</sup>

The Suspension Clause states that “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>57</sup> Although the Court held that the clear language of section 7 of the MCA strips jurisdiction from the courts and that, if the statute is valid under the Constitution, the cases must be dismissed,<sup>58</sup> the Court found the “MCA does not purport to be a formal suspension of the writ.”<sup>59</sup> In rejecting the idea that the CSRT process was an adequate substitute for habeas corpus relief, the Court noted that it did not allow the detainees to “challenge the President’s legal authority to detain them, contest the CSRT’s findings of fact, supplement the record on review with exculpatory evidence, and request an order of release.”<sup>60</sup>

In determining whether the Suspension Clause applied to the detainees at GTMO, the Court considered three factors:

- (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made;
- (2) the nature of the sites where apprehension and then detention took place; and
- (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.<sup>61</sup>

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55. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008).

56. See *id.* at 2262 (“If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.”).

57. U.S. CONST. art. I, § 9, cl. 2.

58. *Boumediene*, 128 S. Ct. at 2242.

59. *Id.* at 2262.

60. See *id.* at 2274.

61. *Id.* at 2259.

First, the Court found that the status of the detainees was in question because the detainees denied they were enemy combatants and because the CSRTs were inadequate, due to both the lack of counsel afforded to the detainees and the presumption of validity accorded to the government's evidence.<sup>62</sup> Second, the Court found that the detainees' location at GTMO, where they were under U.S. control, should be given weight.<sup>63</sup> Finally, the Court found few, if any, practical barriers to extending habeas to those at GTMO.<sup>64</sup> The Court noted that to the extent practical barriers did arise, habeas "procedures likely [could] be modified to address them."<sup>65</sup>

The Supreme Court's decision in *Boumediene* was a marked departure from previous jurisprudence. In the leading case on point, *Johnson v. Eisentrager*, the Court refused to grant habeas rights to enemy combatants detained during World War II and later held in a prison in Allied-occupied Germany.<sup>66</sup> The *Eisentrager* Court considered

(a) [that each petitioner was] an enemy alien; (b) ha[d] never been or resided in the United States, (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.<sup>67</sup>

None of these factors relied on the procedural protections afforded to the petitioners. Instead, the Court in *Eisentrager* examined the status and nature of the detainees and their detention.

*Boumediene* attempted to distinguish *Eisentrager* because the *Eisentrager* detainees had been tried and convicted already.<sup>68</sup> Conveniently, the Court failed to recognize a key distinction between the *Boumediene* detainees and those in *Eisentrager*. Unlike in *Eisentrager*, where the war had ended, the United States still is engaged in military action against the very enemies associated with the GTMO detainees. If the Court had considered this dis-

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62. *Id.* at 2259–60.

63. *Id.* at 2260–61.

64. *Id.* at 2261–62.

65. *Id.* at 2262.

66. 339 U.S. 763, 766, 781 (1950).

67. *Id.* at 777.

68. *Boumediene*, 128 S. Ct. at 2259–60.

inction, along with the other factors in *Eisentrager*, it might have concluded that the detainees at GTMO more closely resemble prisoners of an ongoing war whose detention would be undeniably justified.<sup>69</sup> It is ironic that the Court found GTMO to be within the de facto control of the United States,<sup>70</sup> yet complained that the Court of Appeals could not instruct the release of a detainee upon finding unlawful detention.<sup>71</sup> If GTMO is under the jurisdiction of the courts, then surely a court could make and enforce such an order, if only in a legal sense.

In his dissent in *Boumediene*, Chief Justice Roberts pointed out that the Court in *Hamdi* “explained that the Constitution guaranteed an American *citizen* challenging his detention as an enemy combatant the right to ‘notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.’”<sup>72</sup> Further, Roberts argued the Court in *Hamdi* thought this could be accomplished “by an appropriately authorized and properly constituted military tribunal.”<sup>73</sup> As Chief Justice Roberts noted, “surely the Due Process Clause does not afford *non-citizens* in such circumstances greater protection than citizens are due.”<sup>74</sup>

Despite the fact that the D.C. Circuit found it unnecessary to address whether the DTA provided adequate substitute procedures for habeas, the Supreme Court decided to rule on this issue on first impression. The Court justified this departure by concluding that habeas “entitle[d] the prisoner to a meaningful opportunity to demonstrate that he [was] being held pursuant to ‘the erroneous application or interpretation’ of relevant law”<sup>75</sup> and that a “court must have the power to order the conditional release of

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69. The Court in *Boumediene* discussed the threat faced in post-World War II Germany and recognized that American forces “faced potential security threats from a defeated enemy. . . . [and] the Court was right to be concerned about judicial interference with the military’s efforts to contain ‘enemy elements, guerilla fighters, and were-wolves.’” *Id.* at 2261 (quoting *Eisentrager*, 339 U.S. at 784). This discussion ignores the reality of the threat the U.S., and in particular U.S. armed forces, face around the world from Al-Qaeda, and instead focuses solely on the general security of the U.S. military base GTMO.

70. *Id.* at 2253.

71. *Id.* at 2271.

72. *Id.* at 2281 (Roberts, C.J., dissenting) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004)).

73. *Id.* (quoting *Hamdi*, 542 U.S. at 538).

74. *Id.*

75. *Id.* at 2266 (majority opinion) (quoting *Immigration and Naturalization Serv. v. Cyr*, 533 U.S. 289, 302 (2001)).

an individual unlawfully detained.”<sup>76</sup> According to the opinion, these were not the only requirements of the privilege of habeas and more might be required depending on the circumstances.<sup>77</sup> However, as Chief Justice Roberts pointed out in his dissent, the majority failed to define what due process rights the detainees did possess and whether the DTA satisfied them because the Court did not allow the D.C. Circuit an opportunity to rule on them.<sup>78</sup>

The DTA allows the D.C. Circuit to review whether the standards and procedures used by the DOD to determine a detainee’s enemy combatant status are lawful under a preponderance of the evidence, with a rebuttable presumption in favor of the government.<sup>79</sup> Yet, the *Boumediene* Court held this process deficient because a detainee is not able to challenge findings of fact or supplement the record.<sup>80</sup> If the CSRT’s determinations were final judgments, statute and judicial precedents suggests the review should be limited to the record, with judicial discretion to hold additional evidentiary hearings.<sup>81</sup> Additionally, even in pre-trial detention hearings for individuals charged with the most serious criminal offenses, “[t]he rules concerning admissibility of evidence . . . do not apply to the presentation and consideration of information at the hearing.”<sup>82</sup>

#### IV. POTENTIAL CONGRESSIONAL ACTION

##### A. *The Aftermath of Boumediene*

Immediately following the Court’s decision in *Boumediene*, additional detainees filed habeas petitions in the district courts.<sup>83</sup> Courts have moved quickly to schedule hearings for them, as instructed by the *Boumediene* decision.<sup>84</sup> The decision in *Boume-*

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76. *Id.*

77. *Id.*

78. *See id.* at 2279–80 (Roberts, C.J., dissenting).

79. *Id.* at 2272 (majority opinion).

80. *See id.* at 2270.

81. *See* 28 U.S.C. §§ 2254(e)–(f), 2255 (2006).

82. 18 U.S.C. § 3142(f) (2006).

83. *See* Michael John Garcia, Congressional Research Service, *BOUMEDIENE V. BUSH: GUANTANAMO DETAINEES’ RIGHT TO HABEAS CORPUS* 9 (2008), available at <http://fpc.state.gov/documents/organization/110754.pdf>.

84. There are 220 habeas petitions pending before the D.C. District Circuit Courts.

*diene* left open the possibility that the government would be required to defend challenges on two fronts: (1) in habeas proceedings in the district courts and (2) against those detainees who follow the D.C. Circuit appeals process provided in the DTA for any CSRT status determination.<sup>85</sup> Recognizing this burden, the Government argued to the D.C. Circuit that the DTA provision granting the D.C. Circuit jurisdiction over CSRT determinations could not be severed from the now-unconstitutional provision eliminating habeas corpus.<sup>86</sup> Still, the Justice Department may not have the resources to defend against the habeas challenges alone.

Congress should address the many questions left unresolved by the Court, as well as provide a narrower legal framework for courts to proceed in current litigation. As Chief Justice Roberts astutely observed, “[T]he political branches crafted CSRT and D.C. Circuit review to operate together, with the goal of providing noncitizen detainees the level of collateral process *Hamdi* said would satisfy the due process rights of American citizens.”<sup>87</sup> Indeed, “Congress followed the Court’s lead, only to find itself the victim of a constitutional bait and switch.”<sup>88</sup> Given the Court’s interference in a string of detainee cases, it is not clear that any action by the political branches will be followed.

### B. A Possible Solution

Remedial action by Congress does not guarantee a solution, but there are four main legislative fixes which could alleviate the burdens resulting from the Court’s opinion. First, Congress must clarify and reaffirm the President’s authority to detain individuals in the GWOT. Second, Congress must provide a stay for any habeas petition filed by those detainees who have been charged already by military commission. Third, Congress must revise the CSRT process to make it an adequate substitute for habeas. Finally, Congress must prohibit the entry or release of any detainee into the United States.

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Benkert Letter, *supra* note 11.

85. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008) (“[T]he petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court.”).

86. See *Bismullah v. Gates*, No. 06-1197, slip op. at 2–3 (D.C. Cir. Jan. 9, 2009).

87. *Boumediene*, 128 S. Ct. at 2286 (Roberts, C.J., dissenting).

88. *Id.* at 2285.

On the first point, Congress must reaffirm the President's authority to detain enemy combatants that the courts may otherwise weaken due to the length of time which has passed since the AUMF was enacted. The President has implied authority from the AUMF to detain individuals in the GWOT, as well as inherent constitutional authority as Commander in Chief.<sup>89</sup> In its analysis of whether or not the DTA was an adequate substitute, the Court specifically cited as inadequate the fact that it did not allow AUMF challenges to the President's authority to detain individuals.<sup>90</sup> The Court's analysis raises the possibility that individuals who may have been captured in places around the world other than on the battlefield in Afghanistan could challenge the President's authority to detain them based on the AUMF. The Court's insistence on a detainee's ability to challenge this authority is another example of judicial interference with the will and constitutional duty of the political branches to engage in foreign affairs and protect national security. Congress must act to clarify the political will as well as the nature of the current hostilities in which the United States is engaged.

Apparently, congressional action is needed to remind the Court of its own precedents and to make certain that the President's constitutional power is preserved.<sup>91</sup> Congress needs to remind the Court that its role is not to "vindicate" the President's power; rather, it is to interpret statutes that Congress has passed.<sup>92</sup> The Court in *Boumediene* reaffirmed its plurality conclusion in *Hamdi* that the detention of individuals captured in the GWOT "for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has autho-

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89. See U.S. CONST. art. II, § 2, cl. 1.

90. *Boumediene*, 128 S. Ct. at 2271–72 ("Whether the President has such authority turns on whether the AUMF authorizes—and the Constitution permits—the indefinite detention of 'enemy combatants' as the Department of Defense defines that term.")

91. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (the power of the president, with congressional acquiescence, is at its "maximum" because "it includes all that he possesses in his own right plus all that Congress can delegate"); *id.* at 637 (an act "executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.")

92. See *Boumediene*, 126 S. Ct. at 2277 ("On the contrary, the exercise of [the] powers [of the Commander in Chief] is vindicated, not eroded, when confirmed by the Judicial Branch.")

rized the President to use.”<sup>93</sup> In a strange twist of logic, the Court then tossed out *Hamdi* and years of other precedents by suggesting due process requires the ability to challenge the president’s authority. In the past, the Court has given great deference to the President’s authority under the Constitution to detain individuals during conflict.<sup>94</sup> Congress needs to reaffirm that the United States is in armed conflict with Al-Qaeda, the Taliban, and all those who support them,<sup>95</sup> because they no doubt continue to pose a threat to the United States.

Second, Congress should provide a stay for habeas petitions filed by those detainees who have been charged already by military commissions. To date, over 550 detainees have gone through the CSRTs,<sup>96</sup> and twenty-three detainees have been charged with crimes by a military commission.<sup>97</sup> Two of those charged have been convicted already.<sup>98</sup> There are also about 250 additional detainees who have gone through the CSRT process and remain at

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93. *Id.* at 2240–41 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004)); *see also id.* at 2277 (“The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.”).

94. *See Hamdi*, 542 U.S. at 518 (“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”) (citing *Ex Parte Quirin*, 317 U.S. 1, 28, 30 (1942)).

95. The term “support” is used as commonly known: “to provide for . . . tolerate . . . [give] assistance.” RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 1295 (2d ed. 1997). Today, Al-Qaeda has support from a number of associated terrorist organizations globally, making it difficult to prove clear and convincing connections to the core of Al-Qaeda. *See* NATIONAL INTELLIGENCE COUNCIL, THE TERRORIST THREAT TO THE U.S. HOMELAND, July 2007, available at [http://www.dni.gov/press\\_releases/20070717\\_release.pdf](http://www.dni.gov/press_releases/20070717_release.pdf) [hereinafter NIC, TERRORIST THREAT] (“We assess that al-Qa’ida will continue to enhance its capabilities to attack the Homeland through greater cooperation with regional terrorist groups.”).

96. DEPARTMENT OF DEFENSE, LIST OF DETAINEES WHO WENT THROUGH COMPLETE CSRT PROCESS, [http://www.dod.mil/pubs/foi/detainees/detainee\\_list.pdf](http://www.dod.mil/pubs/foi/detainees/detainee_list.pdf)

97. E-mail from Anonymous Department of Defense Official to Jennifer Wagner, Professional Staff Member for the Senate Select Committee on Intelligence (Oct. 20, 2008, 16:52 EST) (on file with author).

98. Press Release, U.S. Dep’t of Def., Detainee Convicted of Terrorism Charge at Military Commission Trial (Nov. 3, 2008), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=12329>; Press Release, U.S. Dep’t of Def., Detainee Convicted of Terrorism Charge at Military Commission Trial (Aug. 6, 2008), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=12118>.

GTMO.<sup>99</sup> In contrast, 220 have filed for a writ of habeas corpus in federal court.<sup>100</sup>

The Court in *Boumediene* recognized that it traditionally “require[s] exhaustion of alternative remedies before a prisoner can seek federal habeas relief.”<sup>101</sup> Yet, the Court inexplicably found that the detainees were “entitled to a prompt habeas corpus hearing” because there was “no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions.”<sup>102</sup> Aside from turning years of precedent on its head, the Court’s decision placed the executive branch in the untenable position of expending precious resources to defend duplicative and simultaneous litigation from these detainees.

Although the Court held the CSRT process inadequate as a substitute for habeas, it did not find the process unconstitutional.<sup>103</sup> Thus, according to the Court, nothing barred a detainee from requiring the executive branch to defend against habeas petitions, CSRT appeals, and military commission appeals concurrently.<sup>104</sup> Despite this quagmire, the Court recognized—but decided to ignore—these deficiencies in the judicial system. “[W]ere it probable that the Court of Appeals could complete a prompt review of their applications [for CSRT determinations under the DTA],” the Court would be more inclined to require the exhaustion of alternative remedies.<sup>105</sup> But to do so “would be to require additional months, if not years, of delay.”<sup>106</sup> The Court stated this despite the fact that the detainees had “steadfastly refused to avail themselves of the [DTA’s] review mechanisms.”<sup>107</sup> At a min-

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99. See Gerry J. Gilmore, *Gates Cites Positive Response to Pending Guantanamo Closure*, AM. FORCES PRESS SERVICE, Jan. 22, 2009, <http://www.defenselink.mil/news/newsarticle.aspx?id=52774>.

100. Benkert Letter, *supra* note 11.

101. *Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008); see, e.g., *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975); *Ex parte Royall*, 117 U.S. 241, 253 (1886).

102. *Boumediene*, 128 S. Ct. at 2275.

103. *Id.* (“The only law we identify as unconstitutional is MCA § 7 . . . . [B]oth the DTA and the CSRT process remain intact.”).

104. The D.C. Circuit disagreed with the Court and held that by invalidating section 7 of the MCA, the provisions of the DTA that granted CSRT appeals jurisdiction to the D.C. Circuit also became invalid because the provisions are inseverable. See *Bismullah v. Gates*, No. 06-1197, slip op. at 2–3 (D.C. Cir. Jan. 9, 2009). Thus, the ruling in *Boumediene* effectively granted what Congress had expressly eliminated and eliminated what Congress had explicitly granted. There has not been a challenge to a military commission ruling.

105. *Boumediene*, 128 S. Ct. at 2275.

106. *Id.*

107. *Id.* at 2282 n.1 (Roberts, C.J., dissenting).

imum, therefore, it makes sense that any habeas proceedings for detainees charged by military commission be stayed, pending the outcome of their CSRT appeal or a military commission appeal. This assumes, of course, that the Court will not overlook congressional intent in the future and hold any portion of the military commissions or appeals process deficient as devoid of due process rights.<sup>108</sup>

Third, Congress needs to re-examine thoroughly the CSRT process and attempt to follow the Court's vague instructions as to what would make that process an adequate substitute for a writ of habeas corpus petition. For those detainees who have not yet been, or may never be, charged by military commission, Congress should pass legislation to increase protections for the detainees in the CSRT process, thus meeting the Court's standard for an adequate substitute for habeas. To do this without damaging our national security, however, Congress must limit the disclosure of classified information in any court proceeding.

Unfortunately, the Court was silent on exactly what rights or processes would be adequate. The Court, however, did imply that the outcome of future cases may be different for detainees going through a different CSRT process and suggested some procedural protections which would strengthen the process.<sup>109</sup> According to the Court, a detainee's ability to "contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release would come close" to satisfying statutory habeas corpus requirements.<sup>110</sup> Any legislation should

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108. This also assumes that President Obama will not ignore past congressional action. On January 22, 2009, President Obama issued an executive order requiring that all military commissions be halted. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009). On January 29, 2009, a military judge denied a government motion requesting a continuance in a military commission proceeding, stating that "Congress passes the Military Commission Act which remains in effect. The Commission is bound by the law as it currently exists not as it may change in the future." U.S. v. Al-Nashiri, Case No. P-002, slip op. at para. 4(e) (Jan. 29, 2009), [http://www.defenselink.mil/news/Jan2009/DelayArrestment\\_MJ.pdf](http://www.defenselink.mil/news/Jan2009/DelayArrestment_MJ.pdf). On February 5, 2009, the convening authority for military commissions dropped the charges against al-Nashiri in order to comply with President Obama's Executive Order. Gerry J. Gilmore, *Judge Dismisses Charges Against USS Cole Suspect at Guantanamo*, AM. FORCES PRESS SERVICE, Feb. 6, 2009, [www.defenselink.mil/news/newsarticle.aspx?id=52990](http://www.defenselink.mil/news/newsarticle.aspx?id=52990).

109. See *id.* at 2275 (majority opinion) ("If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time.")

110. *Id.* at 2274.

begin by addressing these issues, even though the Court ignored the DTA's express allowance for "the D.C. Circuit to remand a detainee's case for a new CSRT determination" if new evidence arose.<sup>111</sup>

The elements identified in *Boumediene* could be satisfied by incorporating elements from U.S. criminal law into the process, an unprecedented benefit for foreign nationals located outside the United States during a time of war. For example, the Bail Reform Act of 1966 affords the government a "rebuttable presumption" with respect to their efforts to detain a defendant prior to a trial.<sup>112</sup> In practice, this presumption saves the government from having to prove the competency, authenticity, and weight of the evidence supporting pre-trial detention for individuals charged with some of the most serious criminal offenses.<sup>113</sup> Similarly, an express rebuttable presumption could be provided for the government in pursuing the continued detention of detainees at GTMO. This would usually offer a detainee some opportunity to challenge the government's evidence before a trier of fact determines the outcome. Also, the statutory habeas provisions applicable to state and federal custody, although restricted to post-judgment hearings, presume the factual record to be correct and limit new evidence, including exculpatory, to claims that rely on

a factual predicate that could not have been previously discovered through the exercise of due diligence; and . . . the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.<sup>114</sup>

Applying these processes to the CSRT context would allow the detainee to introduce exculpatory evidence during the review process while giving substantial judicial deference to the due diligence of the government. Such deference would necessarily include an acceptance of the difficult "trial" environment that a CSRT faces. As former Attorney General Michael Mukasey so aptly observed, "this is not CSI Kandahar."<sup>115</sup>

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111. *Id.* at 2289 (Roberts, C.J., dissenting).

112. *See* 18 U.S.C. § 3142(e) (2006).

113. *See id.* §§ 3142(e), 3142(f)(1).

114. 28 U.S.C. § 2254(e)(2) (2006).

115. Michael Mukasey, U.S. Attorney Gen., Address at the American Enterprise Institute for Public Policy Research (July 21, 2008), available at <http://www.usdoj.gov/opa/pr/2008/July/08-opa-633.html>.

Finally, and of most importance, Congress needs to ensure that none of the detainees at GTMO have physical access to the United States or may be released into the United States. Although the Court in *Boumediene* held that one way in which the DTA was an inadequate substitute for habeas was the inability to order the release of the detainee,<sup>116</sup> the Court disregarded the fact that hundreds of detainees have been transferred or released to date, and dozens released specifically upon a determination by the CSRT that each detainee was not an enemy combatant.<sup>117</sup> Not one of these detainees, however, has been released into the United States. If district courts are now able to hear habeas petitions and order the release of detainees,<sup>118</sup> any legislation Congress considers must make it clear that detainees held at GTMO will not be transferred to the United States, released into the United States, or provided with any rights that accompany being located in the United States. Al-Qaeda searches everyday for operatives who can evade our enhanced security mechanisms in its quest to commit another attack against our homeland.<sup>119</sup> It is important to remember that most detainees held at GTMO were captured on the battlefields in Afghanistan or Iraq and were determined to be a threat to our efforts to combat terrorism; others were apprehended in other parts of the world based on the reasonable suspicion that they were connected to Al-Qaeda. Whatever their ties to terrorists groups or activities, these individuals should never be given the privilege of crossing our borders. To do so would be

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116. See *supra* note 71 and accompanying text.

117. Over 500 detainees have been transferred or released from GTMO since 2002. See Press Release, Dep't of Def., Detainee Transfer Announced (Dec. 16, 2008), available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=12394>. Of those, forty-two have been released as a result of being designated no longer enemy combatants. See Benkert Letter, *supra* note 11; E-mail from Anonymous Department of Defense Official to Jennifer Wagner, Professional Staff Member for the Senate Select Committee on Intelligence (Feb 3., 2009, 18:02 EST) (on file with author).

118. On February 18, 2009, the D.C. Circuit reversed a district court ruling ordering the government to bring seventeen GTMO detainees, who had filed habeas petitions, to the United States and release them. *Kiyemba v. Obama*, 08-5424, slip op. at 3-4, 18 (D.C. Cir. Feb. 18, 2009). The court aptly points out that the right to admit an alien into the United States rests solely with the political branches. *Id.* at 7 ("With respect to the exclusive power of the political branches in this area, there is, as the Supreme Court stated in *Galvan*, 'not merely a page of history . . . but a whole volume.'") (citing *Galvan v. Press*, 347 U.S. 522, 531 (1954)). However, the case does not address the ability of the courts to order the release of these detainees into the physical United States if President Obama transfers them to U.S. territory, even under limited or no immigration status.

119. See NIC, TERRORIST THREAT, *supra* note 95 ("Although we have discovered only a handful of individuals in the United States with ties to al-Qa'ida senior leadership since 9/11, we judge that al-Qa'ida will intensify its efforts to put operatives here.").

nothing short of an invitation for Al-Qaeda to operate inside our homeland.

### C. *Classified Information*

Any habeas challenge will certainly require an examination of the classified intelligence and other information supporting the detainee's connection to a terrorist organization. Congressional action clarifying the President's authority to detain individuals, regardless of where they were captured, may assist the courts in finding that a detainee's connections to Al-Qaeda are sufficient for his detention and may lessen the need to expose classified information in the process.<sup>120</sup> As it stands today, however, any examination of the records used in the CSRT process may expose sensitive intelligence, particularly intelligence the United States has received from interrogations. In order to avoid the disclosure of sensitive sources and methods, courts must respect the government's assertions and examine them, at a minimum, under a rebuttable presumption standard similar to that used in criminal bail hearings.<sup>121</sup>

How should this be accomplished? One possible legislative solution is to create a tiered process for sharing information with the detainee, such as releasing any unclassified information to the detainee and only releasing SECRET information to a cleared counsel for the detainee. If a judge requires additional information, then the government should release TOP SECRET information, and anything above that, only to the judge in camera and ex parte.

Some have complained about any effort to restrict information a detainee may see during the course of a CSRT. For years, our criminal justice system has used the Classified Information Procedures Act to protect classified information from unwarranted disclosure while ensuring that the criminal process is fair.<sup>122</sup> No

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120. See *Boumediene v. Bush*, 126 S. Ct. 2229, 2276 (2008) ("Another of Congress' reasons for vesting exclusive jurisdiction in the Court of Appeals, perhaps, was to avoid the widespread dissemination of classified information. . . . We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings. We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering . . .").

121. See *supra* note 109 and accompanying text.

122. See Classified Information Procedures Act, 18 U.S.C. app. 3 (2006).

less deference to the protection of classified information should be afforded the CSRT process. These detainees are not ordinary criminals. They are terrorists—terrorists who in many cases have taken an oath to kill our citizens and destroy our country. There is no reason to ever give them access to classified information.

#### D. *Other Concerns*

Since the Court in *Boumediene* opened the U.S. judicial system to petitions filed by detainees, Congress should make sure that enemy combatants are not afforded due process protections that even U.S. citizens are denied. No one can reasonably argue that a non-U.S. national captured on the battlefield in Afghanistan or Iraq deserves all, or even substantial, due process protections which a U.S. citizen facing criminal prosecution would not be granted. As such, Congress should look to U.S. criminal law and allow a court to deny a writ “on the merits, notwithstanding the failure of the applicant to exhaust the remedies available” in other venues.<sup>123</sup> Congress should also limit the number of habeas petitions detainees are allowed to file by applying current federal habeas law specifically to detainee habeas actions.<sup>124</sup>

### V. CONCLUSION

It is crucial to our national security that the political branches of the federal government act swiftly to answer the questions *Boumediene* left open and define the legal boundaries for future habeas petitions in U.S. courts.<sup>125</sup> In this ongoing GWOT, it is clear that terrorists are not reasonable actors capable of negotiating cease-fires or willing to end their attacks against innocent Americans. Osama bin Laden has made clear that Al-Qaeda believes it is the duty of all Muslims to wage jihad against the United States and its allies.<sup>126</sup> This threat is compounded each time

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123. See 28 U.S.C. § 2254(b)(2) (2006).

124. See *id.* § 2244 (requiring dismissal of “second or successive” habeas petitions).

125. Legislation was introduced in the 110th Congress, but was not considered by the Senate Judiciary Committee. See Enemy Combatant Detention Review Act of 2008, S. 3401, 110th Cong. (2008).

126. See Osama bin Laden, Declaration of War Against the Americans Occupying the Land of the Two Holy Places, Aug. 1996, available at [http://www.pbs.org/newshour/terrorism/international/fatwa\\_1996.html](http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html) (originally published in Al Quds Al Arabi (London)); see also James Risen & David Johnston, *Two Years Later: Qaeda Leaders; Bin Laden is*

the United States releases a detainee from GTMO. As of the end of December 2008, of the GTMO detainees transferred from U.S. custody, there are “18 confirmed and 43 suspected of returning to the fight. So 61 in all former Guantanamo detainees are confirmed or suspected of returning to the fight.”<sup>127</sup>

Clearly cognizant of this global threat, Congress and the President over the past several years have enacted significant pieces of legislation to address terrorism. Unfortunately, and in sharp contrast to the balance of power ordained by our founders, the intentions of the political branches have been disregarded by the Judiciary. No American who values his constitutional rights should want terrorists who have been detained holding weapons, fighting for Al-Qaeda’s cause in war zones, and aiming to kill U.S. soldiers to receive the full benefit of the Constitution of the most democratic and free society in the world.

For reasons that are beyond the comprehension of many, the Supreme Court failed to recognize or appreciate the nature of the enemy who confronts us today. In one breath, the Court in *Boumediene* noted that “[s]ecurity depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict.”<sup>128</sup> One would imagine the Court meant the ability to interdict *any* enemy who would do the United States harm. Yet, the Court continued, “[s]ecurity subsists, too, in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.”<sup>129</sup> For over 200 years, these principles have guided Americans in their daily conduct and in their respect for their homeland, their values, and their government. Al-Qaeda is waging a violent war against these very same principles—principles that the Court in *Boumediene* took great pains to bestow upon them. With each court decision since the 9/11 terrorist attacks on our homeland, Al-Qaeda must gain more and more gratitude for our fidelity to freedom’s first principles. It is time for Congress to reclaim these first principles for the American people, not for terrorists.

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*Seen with Aide on Tape*, N.Y. TIMES, Sept. 11, 2003, at A1.

127. DoD News Briefing with Geoff Morrell from the Pentagon, Department of Defense (Jan. 13, 2009), <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4340>.

128. *Boumediene v. Bush*, 126 S. Ct. 2229, 2277 (2008).

129. *Id.*

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