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Tung Yin

University of Iowa

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BOUMEDIENE AND LAWFARE

Tung Yin *

I. INTRODUCTION

Boumediene v. Bush, the Supreme Court of the United States's third decision in four years relating to the Guantánamo Bay detainees,¹ definitively rejected Congress's efforts to close the federal courts to habeas petitions from those detainees.² In doing so, it effectively discarded the procedures and framework that the President and Congress created in the Detainee Treatment Act of 2005 ("DTA")³ and the Military Commissions Act of 2006 ("MCA").⁴ The Court, however, explicitly left undetermined the content of the federal habeas proceedings that are now to take place,⁵ an omission that did not escape Chief Justice Roberts's criticism.⁶

Under close reading, however, *Boumediene* strongly suggests that the detainees are entitled not only to judicial review of their detention via habeas petitions, but also to representation by counsel—though not necessarily appointed counsel—in those proceedings, absent legitimate suspension of habeas corpus by Congress.⁷ Devoid of context, this no doubt would be an entirely un-

* Professor of Law and Claire Ferguson Carlson Fellow, University of Iowa. J.D., 1995, University of California, Berkeley (Boalt Hall). Thanks to Paul Stempel for research assistance.

1. The other cases relating to detainees were *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) and *Rasul v. Bush*, 542 U.S. 466 (2004).

2. See 128 S. Ct. 2229, 2240, 2274–75 (2008).

3. 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. § 2241, and 42 U.S.C. § 2000dd and note (2006)).

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

5. *Boumediene*, 128 S. Ct. at 2277 ("[O]ur opinion does not address the content of the law that governs petitioners' detention."); see also *id.* at 2266 ("We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus.").

6. *Id.* at 2279 (Roberts, C.J., dissenting).

7. See *id.* at 2260.

surprising result. The striking thing about the Court's near insistence on counsel is that it comes in the face of the executive branch's repeated warnings that Al-Qaeda members are engaging in "lawfare"—the use of the legal system as another tool in their asymmetric terrorism against the United States.⁸

In this essay, I examine *Boumediene's* implicit rejection of the argument that lawfare is serious enough to warrant denial of counsel. Part II traces the Court's decisions on extraterritorial application of the Constitution (in particular, habeas) to non-citizens outside the country, beginning with the post-World War II case of *Johnson v. Eisentrager*,⁹ continuing through the recent terrorism cases, and concluding with a detailed examination of *Boumediene*. Part III turns to lawfare, defining the term and considering the government's claim that Al-Qaeda has trained its members to use the American legal system. This part concludes with a discussion of the Lynne Stewart case, in which the government successfully prosecuted a criminal defense attorney for aiding her client's efforts to perpetuate his terrorist group's activities. Finally, Part IV considers why the *Boumediene* Court may not have viewed lawyers and lawfare as a serious threat to national security, given the tools that the government could use to protect itself: security clearance requirements and the ability to monitor attorney-client communications. Part V concludes.

II. ENEMY COMBATANTS AND RIGHTS

At the time the Supreme Court decided *Boumediene*, the United States was detaining between 265 and 270 suspected Al-Qaeda and Taliban fighters at its naval base on Guantánamo Bay, Cuba.¹⁰ Hundreds of other detainees had been released outright or

8. See, e.g., David B. Rivkin, Jr. & Lee A. Casey, *Lawfare*, WALL ST. J., Feb. 23, 2007, at A11.

9. 339 U.S. 763 (1950).

10. See Press Release, U.S. Dep't of Def., Office of the Assistant Sec'y of Def. (Public Affairs), Detainee Transfer Announced (July 2, 2008), [hereinafter July 2008 Press Release], available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=12037> (reporting 265 detainees just after *Boumediene*); Press Release, U.S. Dep't of Def., Office of the Assistant Sec'y of Def. (Public Affairs), Detainee Transfer Announced (May 2, 2008), available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=11893> (reporting 270 detainees just prior to *Boumediene*). President Obama has since issued an executive order to close the detention facility within a year. See Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

repatriated to their home nations for detention since 2002.¹¹ During that time, the detention facility came to symbolize the perceived excesses of the United States' global war on terrorism: a law-free zone in which the government was able to subject detainees to coercive interrogation, if not outright torture.¹² For some critics, *any* form of military detention was unlawful, as they argued that captured fighters should be processed through the criminal justice system.¹³ For others, the problem lay not so much in the use of military detention as in the absence of adequate process to ensure reasonably accurate determinations of both the status and the dangerousness of those detained.¹⁴ In this part of the essay, I examine the doctrinal developments with respect to enemy combatants and due process/habeas rights, beginning with the pre-9/11 precedents, continuing through the statutory interpretation cases, *Rasul* and *Hamdan*, and finishing with *Boumediene*, emphasizing that my focus is on the case law addressing court access by aliens outside sovereign U.S. territory.

A. Pre-2004 Law

In 1950, the Supreme Court decided *Johnson v. Eisentrager*, which was seemingly the most relevant case on point at the time the Court accepted its initial set of post-9/11 terrorism cases in 2004.¹⁵ The respondents in *Eisentrager* were German nationals

11. July 2008 Press Release, *supra* note 10 ("Since 2002, more than 500 detainees have departed Guantanamo for other countries . . .").

12. See, e.g., AMNESTY INT'L, GUANTÁNAMO—AN ICON OF LAWLESSNESS, available at <http://www.amnesty.org/en/library/asset/AMR51/002/2005/en/dom-AMR510022005en.pdf> (alleging four categories of "lawlessness" related to Guantánamo Bay); David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131 (2008). Jennifer Daskal, *Lawless in Guantánamo*, SALON.COM, May 2, 2008, <http://www.salon.com/news/feature/2008/05/02/hamdan/> (describing Guantánamo procedures as "unmoored from American criminal law, the Constitution and international law").

13. See Gabor Rona, "War" Doesn't Justify Guantanamo, FIN. TIMES, Mar 1, 2004, at 17 (contending that prisoners of war "can and should face trial, but not by military courts"); Kenneth Roth, *After Guantánamo: The Case Against Preventive Detention*, FOREIGN AFF., May–June 2008, at 12. See generally RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2008), <http://www.humanrightsfirst.org/pdf/080521-USLS-pursuit-justice.pdf> (advocating increased use of federal criminal prosecution as an effective alternative to military tribunals for terrorism cases).

14. See, e.g., Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Non-Criminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 209–10 (2005).

15. See 339 U.S. 763 (1950).

who had been convicted in American military courts located in China for essentially continuing to wage war against the United States after Germany's surrender.¹⁶ Following their convictions, the German nationals were repatriated to, and imprisoned in, Germany and controlled by the United States Army.¹⁷ They filed habeas petitions, arguing that the military trials violated Articles I and III of the Constitution and their Fifth Amendment rights, as well as the 1929 Geneva Convention, provisions of which govern the treatment of prisoners of war.¹⁸ The United States Court of Appeals for the D.C. Circuit granted the petition, but the Supreme Court reversed, noting that no court had ever extended habeas corpus to "an alien enemy who, at no relevant time and in no stage of his captivity, has been within [the] territorial jurisdiction" of the country.¹⁹

Justice Jackson's opinion was hardly a model of clarity: one cannot ascertain whether the decision was based on a lack of jurisdiction or a substantive determination that the prisoners had no constitutional rights. Subsequent federal cases, however, have denied aliens outside the United States access to our courts, even if challenging their detention; notably, many of these cases specifically involved Guantánamo Bay.²⁰

No doubt motivated in part, if not in whole, by its reading of precedent such as *Eisentrager*, the Bush Administration transferred hundreds of suspected Al-Qaeda and Taliban fighters to a detention camp set up at the Guantánamo Bay naval base.²¹ Not

16. *Id.* at 765–66. At the time, the United States was still engaged in active armed conflict against Japan, and the respondents were passing information about U.S. troop movements to the Japanese military. *Id.* at 766.

17. *Id.* at 766.

18. *Id.* at 767.

19. *Id.* at 768, 791.

20. See *Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995); *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1513–15 (11th Cir. 1992); *Bird v. United States*, 923 F. Supp. 338, 341–43 (D. Conn. 1996); *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 897 F. Supp. 595, 598, 605 (D.D.C. 1995). Eric Posner argues that *Eisentrager* should be understood as basing its decision on two independent reasons: (1) the intolerable burden on the military of allowing enemy aliens to call soldiers to account for their detention; and (2) the "limited constitutional status of the noncitizen." See Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism* 1, 4–5 (Univ. of Chicago Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 228, 2008), available at <http://ssrn.com/abstract=1211426>.

21. See, e.g., *Rasul v. Bush*, 542 U.S. 466, 497–98 (2004) (Scalia, J., dissenting) ("Today, the Court springs a trap on the Executive, subjecting Guantánamo Bay to the oversight of the federal courts even though it has never before been thought to be within their

long after, detainees started filing habeas petitions in federal district courts across the country to challenge their detention at the base.²²

B. *Rasul* and Hamdan

These habeas cases reached the Supreme Court in 2004 when, in *Rasul v. Bush*, the Court held that, notwithstanding *Eisentrager*, the Guantánamo detainees were entitled to file habeas petitions in federal court.²³ *Rasul* appeared, however, merely to interpret the federal habeas corpus statute to extend to petitions brought by persons detained at Guantánamo Bay.²⁴ Though the Court discussed a number of different theories, including the United States' effective control over Guantánamo Bay, it ultimately held "that [28 U.S.C.] § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention."²⁵

As the detainee habeas petitions proceeded through the lower courts after *Rasul*, one district court judge dismissed a series of Guantánamo habeas petitions on the ground that *Rasul* was satisfied once the petitions were filed because *Rasul* gave detainees no substantive rights; it merely answered the question of jurisdiction.²⁶

Congress enacted the DTA²⁷ in response to *Rasul*. Among other things, the DTA purported to eliminate nearly all federal court jurisdiction over habeas petitions by Guantánamo detainees—the sole exception was that the D.C. Circuit was granted jurisdiction to review final decisions of Combatant Status Review Tribunals ("CSRTs") or military commissions.²⁸ The DTA contained one pro-

jurisdiction—and thus making it a foolish place to have housed alien wartime detainees.".)

22. *See id.* at 471–72.

23. *Id.* at 484. *Rasul* was part of a trio of terrorism cases issued on the same day. The other two cases, however, involved American citizens detained on U.S. soil. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426, 430, 432 (2004).

24. *See Tung Yin, The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1061, 1064–65 (2005).

25. *Rasul*, 542 U.S. at 480–84.

26. *Khalid v. Bush*, 355 F. Supp. 2d 311, 322–23 (D.D.C. 2005).

27. 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. § 2241, and 42 U.S.C. § 2000dd and note (2006)).

28. *See* 28 U.S.C. § 2241(e) (2006) ("Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consid-

vision stating that its effective date was the date of enactment,²⁹ but it had another provision stating that “pending” claims challenging either status determinations by CSRTs or convictions by military courts were subject to the newly devised D.C. Circuit jurisdiction.³⁰

One such case pending before the Supreme Court at the time of the DTA’s enactment was a habeas petition filed by Salim Ahmed Hamdan, a Guantánamo detainee who had been designated for prosecution by a military commission.³¹ According to the government, Hamdan had served as Al-Qaeda founder and leader Osama bin Laden’s driver and bodyguard and had violated various laws of war by conspiring to attack civilians and civilian objects, to commit murder, and to engage in terrorism.³² The district court had granted Hamdan’s petition, only to be reversed by the D.C. Circuit.³³

In a 5-3 decision,³⁴ the Supreme Court held that the DTA’s jurisdiction-stripping provision applied only to those pending cases that were subject to exclusive D.C. Circuit review.³⁵ Because Hamdan’s case was pending on the effective date of the DTA but failed to fall into either category of cases subject to exclusive D.C. Circuit review, the Court concluded that its jurisdiction remained intact.³⁶

Significantly, the Court arrived at this conclusion as a matter of statutory interpretation. Though it hinted that withdrawal of its appellate jurisdiction over pending cases such as Hamdan’s would raise a serious Suspension Clause problem,³⁷ the Court

er” any habeas petition or other action brought by an alien detained at Guantánamo Bay).

29. Detainee Treatment Act of 2005 § 1005(h)(1), 199 Stat. at 2743; *see also* 10 U.S.C. § 801 note (2006).

30. *Id.* § 1005(h)(2), 119 Stat. at 2743–44; *see also* 10 U.S.C. § 801 note (2006).

31. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 566–67 (2006).

32. *Id.* at 569–70 (citing Petition for Writ of Certiorari app. 65a–67a, *Hamdan*, 548 U.S. 557 (No. 04-5393)).

33. *Id.* at 567.

34. Chief Justice Roberts recused himself from the case because he sat on the D.C. Circuit panel whose decision the Court reviewed. *See id.* at 635.

35. *Id.* at 578–84.

36. *See id.* at 583.

37. *See* U.S. CONST. art. I, § 9, cl. 2.

made clear that it was interpreting the DTA to avoid a constitutional issue.³⁸

The concurring justices suggested answers for the constitutional issue. In a key concurrence, Justice Breyer wrote that “[n]othing prevents the President from returning to Congress to seek the authority he believes necessary.”³⁹ Similarly, Justice Kennedy invoked in his concurrence the classic three-zone separation-of-powers framework from the *Steel Seizure* case and argued that the President’s power was at its lowest ebb because he acted in conflict with the detailed Uniform Code of Military Justice enacted by Congress.⁴⁰

C. Boumediene

Responding to the Court’s suggestion in *Hamdan* that the President needed congressional authority for his military commissions, Congress passed the MCA.⁴¹ Among other things, the MCA (1) authorized military commissions for Guantánamo detainees;⁴² (2) codified law-of-war violations triable by military commission;⁴³ (3) codified the procedures to be used in military commissions;⁴⁴ and (4) clarified that the jurisdiction-stripping amendments to the federal habeas corpus statute applied to all pending cases brought by Guantánamo detainees.⁴⁵

The MCA thus essentially negated *Hamdan*’s interpretation of the DTA. Not surprisingly, many commentators viewed the enactment of the statute as a victory for the President.⁴⁶ Even af-

38. See *Hamdan*, 548 U.S. at 584 n.15.

39. *Id.* at 636 (Breyer, J., concurring).

40. *Id.* at 638–39 (Kennedy, J., concurring) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, (*Steel Seizure*) 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring)).

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

42. *Id.* § 3(a), 120 Stat. 2600, 2602 (codified at 10 U.S.C. § 9486 (2006)).

43. *Id.* § 3(a), 120 Stat. 2600, 2626–30 (codified at 10 U.S.C. § 950v(b) (2006)).

44. *Id.* § 3(a), 120 Stat. 2600, 2603–25 (codified at 10 U.S.C. § 948h–950j (2006)).

45. *Id.* § 7(b), 120 Stat. 2600, 2636 (to be codified at 28 U.S.C. § 2441) (stating that the DTA’s withdrawal of jurisdiction “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”).

46. See, e.g., Editorial, *Rushing Off a Cliff*, N.Y. TIMES, Sept. 28, 2006, at A22; Posting of Jack M. Balkin, to Balkinization, <http://balkin.blogspot.com/2006/09/what-hamdan-hath-wrought.html> (Sept. 29, 2006, 06:00 EST) (“Viewed from another perspective, the Military Commissions Bill was nothing less than a smackdown of the Supreme Court . . .”).

ter passage of the MCA, however, few detainees were slated for prosecution. David Hicks pleaded guilty to material-support charges and was repatriated to his native country of Australia.⁴⁷ Subsequently, Hamdan was convicted of providing material support for terrorism (but acquitted of more serious charges) in a military commission, as constituted under the MCA.⁴⁸ He received a sentence of sixty-six months, which, with credit for the time spent in detention, amounted to about five more months of detention.⁴⁹

Meanwhile, the remaining detainees not slated for prosecution now faced dismissal of their habeas petitions.⁵⁰ A large number of the cases were consolidated for appeal before the D.C. Circuit as *Boumediene v. Bush*.⁵¹ In light of the MCA, the D.C. Circuit held that its jurisdiction to entertain the habeas petitions—which were not challenges to CSRT findings or to military commission convictions—had been repealed.⁵² The court also concluded that the detainees had no constitutional right to claim the protection of the Suspension Clause because they were aliens outside U.S. territory.⁵³ The dissenting judge argued that the Suspension Clause served as a positive limit on Congress's power, and therefore the detainees' status and location were irrelevant.⁵⁴

In a 5-4 decision, the Supreme Court struck down the MCA's jurisdiction-stripping provision.⁵⁵ Not surprisingly, the Court agreed that section 7 of the MCA indeed sought to strip federal courts of jurisdiction over habeas petitions brought by Guantá-

My own view at the time was that by deciding *Hamdan* on statutory interpretation grounds, the Court was perhaps attempting to maneuver Congress into checking the President. With both political branches in the hands of the same political party, however, there was no real check. See Tung Yin, *Tom and Jerry (and Spike): A Metaphor for Hamdan v. Rumsfeld, the President, the Court, and Congress in the War on Terrorism*, 42 TULSA L. REV. 505, 506, 535 (2007).

47. *Terror Detainee Back in Australia*, N.Y. TIMES, May 20, 2007, § 1, at 8.

48. William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. TIMES, Aug. 6, 2008, at A1.

49. Press Release, U.S. Dep't of Def., Office of the Assistant Sec'y of Def. (Public Affairs), *Hamdan Sentenced to 66 Months* (Aug. 7, 2008), available at <http://www.defense.gov/link.mil/releases/release.aspx?releaseid=12128> (announcing Hamdan conviction and sentence).

50. *Civil Liberties: Detention Without Trial: The Stuff of Nightmares*, THE ECONOMIST, Oct. 6, 2007, at 70, 71.

51. 476 F.3d 981, 984 (D.C. Cir. 2007).

52. See *id.* at 987-88.

53. *Id.* at 991.

54. *Id.* at 995 (Rogers, J., dissenting).

55. *Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008).

namo detainees.⁵⁶ In the heart of its opinion, the Court considered whether the detainees were protected by the Suspension Clause and, if so, whether the MCA violated that constitutional provision. The Court first noted the role that the writ of habeas corpus has traditionally played in protecting against executive abuse, both in the United States and, before the Revolutionary War, in England.⁵⁷ The Court then reviewed the available historical precedent concerning whether aliens located outside the formal territory of the sovereign had access to the habeas writ—both the government and the detainees had argued that their position was supported by history.⁵⁸ But after a long review of British practice with regard to persons in India, Ireland, Scotland, and Canada, the court found that history provided “no certain conclusions.”⁵⁹

The Court then considered whether the naval base on Guantánamo Bay was “outside” the United States and, if so, whether that mattered.⁶⁰ According to the Court, a series of decisions from the early twentieth century known as the *Insular Cases* laid the groundwork for functional consideration of the extraterritorial reach of the Constitution.⁶¹ In those cases, which involved the applicability of the Constitution in newly acquired territories such as Guam, Puerto Rico, and the Philippines, the Court understood the impracticability of total incorporation and instead adopted a more flexible approach, guaranteeing only “certain fundamental personal rights.”⁶²

56. *Id.* at 2242–44. Boumediene’s argument to the contrary relied upon an unwieldy textual argument that differentiated between “a writ of habeas corpus” and “any other action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien.” *Id.* at 2243. Boumediene contended that section 7 of the MCA which stripped federal courts of jurisdiction over all “cases . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien,” therefore applied only to the second category of cases, not the first. *Id.* The Court rejected this reading because (1) “other action” implied that habeas petitions were a type of action relating to detention of aliens; and (2) the legislative and litigation history demonstrated that the MCA was a clear congressional response to *Hamdan v. Rumsfeld*. *Id.*

57. *Id.* at 2244–47.

58. *Id.* at 2248–51.

59. *Id.*

60. *Id.* at 2251–53.

61. *Id.* at 2254 (citing *Dorr v. United States*, 195 U.S. 138 (1904), *limited by Reid v. Covert*, 354 U.S. 1 (1957); *Hawaii v. Mankichi*, 190 U.S. 197 (1903), *limited by Reid v. Covert*, 354 U.S. 1 (1957); *Downes v. Bidwell*, 182 U.S. 244 (1901), *limited by Reid v. Covert*, 354 U.S. 1 (1957); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901)).

62. *See id.* at 2254–55 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922), *limited*

Building on the notion of “[p]ractical considerations,” the Court discussed the two key post-World War II extraterritoriality cases, *Reid v. Covert* and *Eisentrager*.⁶³ *Covert* involved two civilian women who were convicted in courts martial of murdering their soldier-husbands on American bases in foreign countries.⁶⁴ In a plurality opinion, the Court concluded that, despite the extraterritorial location of their trials, the defendants were entitled to the protection of the Fifth and Sixth Amendments.⁶⁵ The *Boumediene* Court understood *Covert* to have turned on the fact that a jury trial would not have been impractical.⁶⁶

Similarly, the *Boumediene* Court read *Eisentrager* as focusing on the crushing burden that habeas jurisdiction would have imposed on the military were federal courts to review the military convictions of the German prisoners.⁶⁷ The Court added a normative basis for its reasoning: allowing the political branches “to switch the Constitution on or off at will” would upset “our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’”⁶⁸ In short, the Court was skeptical of the President’s motives for transporting the detainees to Guantánamo Bay and of Congress’s motives for enacting the DTA and the MCA.⁶⁹

With all of that in mind, the *Boumediene* Court constructed a test for “determining the reach of the Suspension Clause”: (1) status and citizenship of the detainee and the process by which those determinations were made, (2) the places of capture and detention, and (3) “the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.”⁷⁰ The Court examined the procedures of the CSRTs, concluding that they were insufficient to

by *Reid v. Covert*, 354 U.S. 1 (1957)).

63. *Id.* at 2255–58.

64. *Covert*, 354 U.S. at 3–4.

65. *Id.* at 18–19.

66. *Boumediene*, 128 S. Ct. at 2256–57.

67. *Id.* at 2257.

68. *Id.* at 2259 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

69. *See id.* (“The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain.”).

70. *Id.* This framework was derived from the Court’s reading of *Eisentrager*’s description of the relevant facts for those prisoners, which included their status as enemy aliens, their capture and detention outside the United States, and their convictions in military trials. *See id.* (discussing *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950)).

“eliminate the need for habeas corpus review.”⁷¹ As to the second factor, the Court conceded that the naval base was outside the sovereign territory of the United States but concluded that “[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.”⁷² And, as to the third factor, the Court reasoned that the practical concerns present in *Eisentrager* were absent here, given the absolute control that the United States exerts over Guantánamo.⁷³ Therefore, the Court held that “[i]f 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.”⁷⁴

Finally, the Court concluded that the DTA’s creation of an exclusive avenue of review to the D.C. Circuit of CSRT determinations and military commission convictions was an “inadequate substitute for habeas corpus.”⁷⁵ The DTA conferred on the D.C. Circuit a “quite limited” jurisdictional grant; the Court was also devoid of factfinding ability.⁷⁶

Chief Justice Roberts and Justice Scalia each authored a dissenting opinion; both authors joined each other’s opinion, as did Justices Alito and Thomas.⁷⁷ The main thrust of the Chief Justice’s dissent was criticism of the Court’s cavalier decision to discard the D.C. Circuit review process created by Congress in favor of “shapeless procedures to be defined by federal courts at some future date.”⁷⁸ Because no detainee had yet availed himself of the D.C. Circuit’s review, it was impossible to know whether that review process would be constitutionally inadequate assuming the Constitution even applied.⁷⁹ Chief Justice Roberts also argued that the CSRTs, whose decisions were subject to review in the D.C. Circuit, more than satisfied the standards laid out in *Hamdi v. Rumsfeld*, which suggested the procedures to be used when an American citizen challenges his detention as an enemy comba-

71. *Id.* at 2260. Specifically, the Court faulted the lack of an advocate to represent the detainee, the presumption of validity accorded the government’s evidence, and the general inability of the detainee to rebut his classification as an enemy combatant. *Id.*

72. *Id.* at 2260–61.

73. *Id.* at 2261.

74. *Id.* at 2262.

75. *Id.* at 2274.

76. *Id.* at 2265–66.

77. *See id.* at 2279, 2293.

78. *Id.* at 2279 (Roberts, C.J., dissenting).

79. *Id.* at 2281–82.

tant.⁸⁰ In the end, he concluded, the majority merely spawned “further litigation to determine the content of [the] new habeas right, followed by further litigation to resolve . . . particular cases, followed by further litigation before the D.C. Circuit.”⁸¹

Though agreeing with Chief Justice Roberts that the majority opinion “accomplishe[d] little” in the long run, Justice Scalia described its immediate consequences as “disastrous” and “devastating” because of the decision’s negative impact on the President’s ability to fight Al-Qaeda.⁸² After delivering this prophecy, Justice Scalia proceeded to criticize the Court’s Suspension Clause analysis on two fronts. First, he argued that whether the Suspension Clause protected aliens detained outside the country, even if such aliens were found in territory effectively controlled by the United States, was sufficiently in dispute such that the Court should have presumed Congress’s action constitutional.⁸³ Second, he disputed the majority’s assertions that historical practice pointed to no clear resolution of the entitlement of aliens outside the country to habeas corpus⁸⁴ and that separation of powers required that the Court be available to challenge the executive branch’s manipulation of the law in its attempt to create a law-free zone.⁸⁵ Justice Scalia accused the majority of “blatantly misdescrib[ing] important precedents, . . . break[ing] a chain of precedent as old as the common law,” and setting an “impossible task” for military commanders.⁸⁶

D. *Detainees and Counsel*

Whether one agrees with *Boumediene*’s ultimate outcome, there is some validity to Chief Justice Roberts’s criticism of the majority’s failure to detail the procedures to be followed in re-

80. *Id.* at 2284–86 (discussing the due process standard set forth in *Hamdi v. Rumsfeld*, 542 U.S. 507, (2004)).

81. *Id.* at 2293.

82. *Id.* at 2294 (Scalia, J., dissenting); see also *id.* at 2296 (“Henceforth . . . how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.”).

83. See *id.* at 2296–98.

84. *Id.* at 2305 (“In sum, *all* available historical evidence points to the conclusion that the writ would not have been available at common law for aliens captured and held outside the sovereign territory of the Crown.”).

85. See *id.* at 2302–03.

86. *Id.* at 2307.

viewing habeas challenges to detention at Guantánamo Bay. The Court itself was explicit about the limits of its opinion,⁸⁷ and made clear just two requirements: (1) “the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law,”⁸⁸ and (2) “the habeas court must have the power to order the conditional release of an individual unlawfully detained.”⁸⁹

Do these requirements shed any light on the role that counsel plays in the procedures that the Court envisions? In one sense, the question is easily answered, as nothing in the DTA and MCA purports to restrict the detainees’ access to counsel in the D.C. Circuit proceedings, to the extent that they are able to procure the services of an attorney at their own expense or pro bono. And since even state prisoners in the United States who seek habeas relief have no constitutional right to be provided counsel at public expense,⁹⁰ there is no reason to believe that Guantánamo detainees would be entitled to appointed counsel. Thus, it seems clear that *Boumediene* permits, but does not require, counsel at the D.C. Circuit review stage.

Yet, there is more to be said on the subject. In traditional federal habeas corpus review of state-court convictions, the prisoner had at least one complete proceeding in which there was a constitutional right to counsel—namely, the state trial.⁹¹ If that lawyer’s performance was constitutionally ineffective, the prisoner may be entitled to a new trial.⁹² In the Guantánamo detainee context, on the other hand, it appears possible that a detainee might go through the entire process of challenging his status as an enemy combatant—from CSRT through federal habeas corpus—without the assistance of an attorney.⁹³

87. *Id.* at 2266 (majority opinion) (“We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus.”).

88. *Id.* (quoting *Immigration and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 302 (2001)).

89. *Id.*

90. See *Ross v. Moffitt*, 417 U.S. 600, 609–11 (1974) (denying a constitutional right to state-funded counsel for post-conviction relief).

91. See *Gideon v. Wainwright*, 372 U.S. 335, 340–45 (1963) (holding that an indigent criminal defendant is entitled to appointed defense counsel).

92. See *Strickland v. Washington*, 466 U.S. 668, 686–87 (1984).

93. See *Boumediene*, 128 S. Ct. at 2260. As a practical matter, public interest litigation groups and national law firms have been lining up to represent Guantánamo detai-

Though *Boumediene* did not explicitly condemn the possible absence of legal representation throughout the combatant-status-challenge process, one can infer the Court's sense of the importance of counsel throughout the opinion. For example, in concluding that CSRT proceedings fell "well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review," the very first deficiency that the Court identified was that "[a]lthough the detainee is assigned a 'Personal Representative' to assist him during CSRT proceedings, the Secretary of the Navy's memorandum makes clear that person is not the detainee's lawyer or even his 'advocate.'"⁹⁴

One might argue that the detainee does not need a *lawyer* to serve as his advocate if the single issue is the detainee's combatant status, for combatant status is what makes one a legitimate military target; thus, all combat soldiers in theory should be trained to make that determination.⁹⁵ Of course, there may well be a difference between training to make a decision in the heat of combat versus during the more deliberative review process after the shooting has stopped. In any event, the Secretary of the Navy's regulations go beyond even this minimal level of assistance by providing no advocate at all.⁹⁶ Therefore, unless the detainee himself has a working knowledge of the modern law of war, it may be unreasonable to expect that he can successfully represent himself unassisted through the combatant-status-challenge process.

Note also the Court's emphasis on the need to provide a *meaningful* opportunity to challenge combatant status.⁹⁷ The Court's ensuing discussion noted that a detainee faces daunting obstacles in doing so under the existing process, among them that "[h]e does not have the assistance of counsel."⁹⁸ The lack of counsel compounds the detainee's limited "ability to rebut the Govern-

nees on a pro bono basis on their habeas petitions. *See, e.g.*, Christian Berthelsen & Stuart Pfeifer, *Why Carona's Defense Is 'Free'*, L.A. TIMES, Jan. 28, 2008, at B1.

94. *Boumediene*, 128 S. Ct. at 2260 (citation omitted).

95. *See* Yin, *supra* note 24, at 1110–11.

96. Memorandum from the Secretary of the Navy on Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantánamo Bay Naval Base, Cuba (July 29, 2004), available at <http://www.defense.link.mil/news/jul2004/d20040730comb.pdf>. Detainees are given the assistance of a Personal Representative who is "neither a lawyer nor [an] advocate" for the detainee. *Id.* at encl. (3).

97. *Boumediene*, 128 S. Ct. at 2266.

98. *Id.* at 2269.

ment's evidence against him."⁹⁹ Counsel, being free from confinement, can help locate witnesses or documents that the detainee might not be able to access.

III. LAWFARE

In a 2001 paper, then-U.S. Air Force Colonel Charles Dunlap, Jr., questioned whether international law had begun to obstruct U.S. military operations such as those in Kosovo in the late 1990s; along the way, he described the concept of "lawfare" as "the use of law as a weapon of war."¹⁰⁰ Dunlap argued that the goal of U.S. opponents engaging in lawfare was to sap public support for such armed conflict by "mak[ing] it appear that the U.S. is waging war in violation of the letter or spirit of" international law.¹⁰¹ Building on Dunlap's concept, former Department of Justice ("DOJ") lawyers David Rivkin and Lee Casey have argued that "Al Qaeda and the Iraqi insurgents . . . routinely claim that American forces systematically violate the laws of war" with the goal of "undermining America's political will to win."¹⁰² The 2005 iteration of the Pentagon's National Defense Strategy notes that the United States "will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism."¹⁰³

It is important to note that this is not the only modern use of the term "lawfare." Critics of the Bush Administration have argued that the administration, not Guantánamo detainees or their lawyers, is the one engaging in lawfare. David Luban contends that the government has actively "made it more difficult for lawyers to provide legal representation to Guantánamo prisoners" through tactics such as manipulation of flight

99. *Id.* at 2260.

100. Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* 5, available at <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

101. *Id.* at 11.

102. Rivkin & Casey, *supra* note 8; see also Eric Talbot Jensen, *The ICJ's "Uganda Wall": A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 *DENV. J. INT'L L. & POL'Y* 241, 260–67 (2007) (discussing International Court of Justice opinions that have made it easier for practitioners of lawfare to use the law of war against compliant nations).

103. DEPT OF DEF., *THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA* 5 (2005), available at <http://www.dami.army.pentagon.mil/offices/dami-zxg/National%20Defense%20Strategy%20Mar05-U.pdf>.

schedules to make travel difficult and disparagement of the lawyers to detainees.¹⁰⁴ For the purposes of this paper, however, I will focus on the Rivkin/Casey designation.

A. *Al-Qaeda Training Manuals*

U.S. officials have repeatedly referred to Al-Qaeda training manuals that teach suspected fighters to falsely claim that they have been tortured,¹⁰⁵ to use lawyers to transmit secret messages,¹⁰⁶ or “to use America’s freedom as a weapon against us.”¹⁰⁷ According to a former U.S. interrogator stationed in Iraq, one such Al-Qaeda manual obtained by British authorities informed its readers that “[t]he Americans ‘will not harm you physically, . . . they must be tempted into doing so. And if they do strike a brother, you must complain to the authorities immediately.’ It added that the baiting of Americans should be sufficient to result in an attack that leaves ‘evidence.’”¹⁰⁸

In other words, there is evidence that the Al-Qaeda leadership has studied U.S. law and interrogation practices and synthesized a strategy that seeks to exploit the legal limits on interrogation. If the purpose of informing the reader that he will not be tortured during interrogation is to urge the reader to remain silent if captured, it would hardly appear sinister. Some federal courts, for example, have concluded that a defendant does not obstruct justice when he merely urges a witness not to tell the police anything.¹⁰⁹

104. David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 1983, 1989–90, 1996 (2008).

105. See, e.g., Raymond Bonner, *Australia Uneasy About U.S. Detainee Case*, N.Y. TIMES, Apr. 10, 2005, § 1, at 10 (discussing the detention and alleged torture of David Hicks).

106. See, e.g., Katharine Q. Seelye, *U.S. Argues War Detainee Shouldn't See a Lawyer*, N.Y. TIMES, June 1, 2002, at A10.

107. *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the S. Comm. on the Judiciary*, 107th Cong. 311 (2002) (statement of John Ashcroft, Att’y Gen. of the United States).

108. CHRIS MACKEY & GREG MILLER, *THE INTERROGATORS: TASK FORCE 500 AND AMERICA'S SECRET WAR AGAINST AL QAEDA* 179 (2005); see also Rivkin, & Casey, *supra* note 8 (stating that the Al-Qaeda training manual instructs detained fighters to claim torture and abuse to gain “a moral advantage over their captors”).

109. See, e.g., *United States v. Farrell*, 126 F.3d 484, 489 (3d Cir. 1997). *But see United States v. Shotts*, 145 F.3d 1289, 1300–01 (11th Cir. 1998), *overruled in part by Arthur Anderson LLP v. United States*, 544 U.S. 696 (2005) (rejecting *Farrell*).

But the quoted portion of the manual goes further and exhorts the reader to provoke a violent reaction for the purpose of getting the interrogator in trouble with his or her supervisors.¹¹⁰ Needless to say, the best course of action for an interrogator in such a situation is to resist the provocation. Even so, should it be irrelevant that the physical attack would not have occurred but for the detainee's premeditated goading? The entrapment defense, for example, excuses some types of criminal conduct induced by law enforcement officers where the defendant "would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."¹¹¹ The analogy has limits, to be sure, given that entrapment might not excuse violent conduct,¹¹² which might be especially salient given the control that the interrogator can maintain over the detainee.¹¹³ The point is that the entrapment defense recognizes that when police officers induce defendants into committing crimes that otherwise would not have been committed, the officers have, in a sense, attempted to manipulate and exploit the law improperly. In the same way, an Al-Qaeda member who provokes an interrogator may suffer an injury, but that member is also attempting to manipulate and exploit the controls that we place on our interrogators.

Finally, the alleged instructions to make false claims of torture and to use attorneys to pass secret messages clearly seek to take unfair advantage of our legal system. A false claim of torture is not merely frivolous, but akin to malicious prosecution: an intentional misuse of the judicial system for the purpose of inflicting unlawful harm on the victim.¹¹⁴ By falsely claiming to have been tortured, an Al-Qaeda member can force the opening of an invest-

110. See *supra* text accompanying note 108.

111. *Sorrells v. United States*, 287 U.S. 435, 454 (1932) (Roberts, J., concurring).

112. See, e.g., MODEL PENAL CODE § 2.13(3) (Proposed Official Draft 1962). Most states, however, have not so limited the entrapment defense. See 2 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 5.1(c) n.17 (3d ed. 2007) (noting that only Delaware, Hawaii, Kentucky, Missouri, New Jersey, Pennsylvania, and Utah have so limited the entrapment defense).

113. For some examples of the methods an interrogator may use to control a detainee, see TONY LAGOURANIS & ALLEN MIKAELIAN, FEAR UP HARSH: AN ARMY INTERROGATOR'S DARK JOURNEY THROUGH IRAQ 30 (2007).

114. See BLACK'S LAW DICTIONARY 977-78 (8th ed. 2004) (defining "malicious prosecution").

igation, tying up resources and possibly leading the government to throw away a trained asset.¹¹⁵

Using an attorney to pass secret messages to other Al-Qaeda members distorts the attorney-client relationship beyond its intended purpose. All communications between the client and the lawyer for the purpose of seeking legal advice are protected from disclosure by the attorney-client privilege; the privilege recognizes the need to facilitate the free-flow of information between client and lawyer to ensure the effective adversarial presentation of the client's case.¹¹⁶ Although the privilege may well conceal relevant evidence from the court, the legal system has concluded that this detriment is outweighed by the need to preserve client confidences; in this way, the client will feel free to confide fully in his or her lawyer, thereby ensuring that the lawyer can give the most accurate legal advice.¹¹⁷

Yet, there is an important exception to information protected by the attorney-client privilege: communications between client and lawyer about prospective criminal conduct (as opposed to past, completed crimes) are not privileged.¹¹⁸ In *United States v. Zolin*, the Supreme Court explained that the attorney-client privilege imposes costs on society by "withholding relevant information from the factfinder" and therefore "applies only where necessary to achieve its purpose."¹¹⁹ Using lawyers to pass secret messages to others goes beyond the purpose of the privilege, particularly if intended to "be helpful to [other members] in their

115. Given the chronic shortage of trained Arabic speakers available to the U.S. government, this is not a trivial matter. See, e.g., Darlene Superville, *U.S. Still Tongue-Tied When It Comes to Speaking Arabic*, CHI. TRIB., Nov. 21, 2003, at 38.

116. See, e.g., *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950) (summarizing common law elements and purposes of attorney-client privilege).

117. *Id.* at 358 ("The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases.") (quoting MODEL CODE OF EVIDENCE R. 210 cmt. a (1942)); see *The Supreme Court, 1980 Term—Federal Jurisdiction and Procedure: The Attorney-Client Privilege: Upjohn Co. v. United States*, 95 HARV. L. REV. 270, 274-76 (1981) (summarizing costs and benefits of the attorney-client privilege).

118. See *United States v. Zolin*, 491 U.S. 554, 563 (1989), *vacated and remanded by Church of Scientology v. United States*, 503 U.S. 934 (1992).

119. *Id.* at 562 (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)).

work outside prison”¹²⁰—that is, to assist other terrorists in avoiding the authorities.¹²¹

In short, the training manuals appear to instruct Al-Qaeda members to exploit the U.S. legal system, not for the legitimate purpose of vindicating one’s legal rights, but for the purpose of continuing asymmetric warfare against the United States.

B. Lynne Stewart as a Case Study

It is one thing to denounce detainees who purposefully manipulate and exploit the faultlines in American law by falsely claiming torture or deliberately provoking attacks by interrogators. It is an altogether different matter to spread that criticism to lawyers representing detainees. Is lawfare practiced by individual lawyers a figment of paranoid imagination, or the new insidious reality? There have been extreme suggestions that the mere representation of suspected Al-Qaeda fighters amounts to fighting against the United States. For example, in early 2007, Deputy Assistant Secretary of Defense for Detainee Affairs Charles Stimson named a number of national law firms that were representing Guantánamo detainees and then said, “I think, quite honestly, when corporate C.E.O.’s see that those firms are representing the very terrorists who hit their bottom line back in 2001, those C.E.O.’s are going to make those law firms choose between representing terrorists or representing reputable firms.”¹²² However, even key members of the Bush Administration rejected that view,¹²³ as has Dunlap.¹²⁴

120. See THE AL QAEDA MANUAL, UK/BM-176 to UK/BM-180, Lesson Eighteen, http://www.usdoj.gov/ag/manualpart1_4.pdf. According to the Department of Justice, this manual was found in Manchester, England, in the possession of a suspected Al-Qaeda member. See THE AL QAEDA MANUAL, http://www.usdoj.gov/ag/manualpart1_1.pdf.

121. Of course, there could be a more innocuous purpose, such as simply conveying information, say, about the captured prisoner’s whereabouts to family members. But if that were the motivation, there would be no need for the secrecy urged in the training manual.

122. Neil A. Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES, Jan. 13, 2007, at A1. While Stimson did not go so far as to accuse such law firms as engaging in treason, the implication of his charge was that they were assisting the enemy.

123. *Id.* (quoting then-Attorney General Alberto Gonzales, who defended the law firms in their choice of representation).

124. Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, YALE J. INT’L AFF., Winter 2008, at 146, 148 (2008) (“To be clear, I condemn any interpretation of lawfare which would cast terrorists as those legitimately using the courts to challenge any governmental action.”).

Perhaps the closest example one can find of a defense lawyer actively assisting terrorists under the guise of practicing law is the controversial prosecution and conviction in 2005 of New York attorney Lynne Stewart for providing material support to a designated terrorist organization.¹²⁵ Stewart, who describes herself on her website as a “[r]adical human rights attorney,”¹²⁶ built her legal career largely by representing poor, minority clients accused of criminal conduct, including cases involving “police brutality, the Black liberation movement, secret evidence, bias crime, terrorism, and apartheid.”¹²⁷ It was unsurprising then that she represented Omar Ahmad Ali Abdel Rahman in his 1995 criminal trial for his involvement in the 1993 truck bomb attack on the World Trade Center,¹²⁸ and continued to do so after his conviction.¹²⁹ Also known as the Blind Sheikh,¹³⁰ Abdel Rahman has been the spiritual leader of al-Gama’a al-Islamiyya (“the Islamic Group”), a designated foreign terrorist organization responsible for terrorist attacks in Egypt and Ethiopia.¹³¹

It is here that Stewart arguably crossed the line from zealous advocacy into something criminal. According to the government, in May 2000, Stewart visited Abdel Rahman, ostensibly for attorney-client purposes, but in reality to allow him to exchange messages with his followers through Stewart’s translator.¹³² The indictment against Stewart charged that, during this meeting, she concealed the fact that she was not involved in the conversation between Abdel Rahman and the translator “by having [the translator] look periodically at Stewart and Abdel Rahman in turn” and by “pretend[ing] to be participating in the conversation . . . by making extraneous comments such as ‘chocolate’ and ‘heart at-

125. See, e.g., Julia Preston, *Lawyer Is Due for Sentencing in Terror Case*, N.Y. TIMES, Oct. 16, 2006, at B1 (describing controversy over guilty verdict for Stewart).

126. Justice for Lynne Stewart, <http://www.lynnestewart.org/> (last visited Feb. 20, 2009).

127. Brief and Special Appendix for Defendant-Appellant-Cross-Appellee Lynne Stewart at 9, *United States v. Sattar*, No. 06-5015-CR(L), (2d Cir. June 29, 2007) available at <http://www.lynnestewart.org/>_BriefforDefendant-Appellant-Cross-AppelleeLynneStewart.pdf.

128. See Richard Bernstein, *Biggest U.S. Terrorist Trial Begins as Arguments Clash*, N.Y. TIMES, Jan. 31, 1995, at A1 (covering Stewart’s advocacy as counsel for Rahman).

129. See George Packer, *Left Behind*, N.Y. TIMES, Sept. 22, 2002, § 6 (Magazine), at 42.

130. See *Appraisal of Threat Posed by Bin Laden*, N.Y. TIMES, Apr. 11, 2004, § 1, at 17.

131. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2007, 277–78 (2008), available at <http://www.state.gov/documents/organization/105904.pdf>.

132. See *United States v. Sattar*, 272 F. Supp. 2d 348, 354–55 (S.D.N.Y. 2003).

tack.”¹³³ Stewart was apparently aware that she was acting unlawfully because she and the translator laughed while agreeing that “they would get ‘in trouble’” if the guards knew that the translator was reading Abdel Rahman a letter from one of his followers.¹³⁴ It is perhaps no coincidence that Justice Scalia implied in his dissenting opinion in *Boumediene* that Abdel Rahman’s lawyers had passed critical information to Osama bin Laden.¹³⁵

Analysis of the Stewart conviction is admittedly complicated by the fact that the government had to change its theory of the case. Initially, the government charged that Stewart had provided the Islamic Group with material support such as communications equipment and personnel, the latter including herself.¹³⁶ After the district court dismissed the counts of the indictment on the theory that they were unconstitutionally vague, the government secured a superseding indictment that charged Stewart with providing the Islamic Group material support such as personnel, including Abdel Rahman.¹³⁷ This mid-case change of theory heightened the suspicions of Stewart’s supporters that she was being unfairly targeted because of her reputation for aggressive advocacy on behalf of her clients, and was viewed by some as an effort to “chill” other defense attorneys representing suspected terrorists.¹³⁸

Nevertheless, the Stewart case stands out among the post-9/11 terrorism prosecutions as featuring a defense lawyer as a defendant. Whether this is due to the fact that lawyers do not engage in lawfare or that it is extremely difficult to detect such lawfare is discussed in the next Part.

133. See Indictment para. 30.m, *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2008) (No. 02 Cr. 395), available at <http://news.findlaw.com/hdocs/docs/terrorism/uslstwr111903sind.html>.

134. *Id.* para. 30.n.

135. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2295 (Scalia, J., dissenting) (citing S. REP. NO. 110-90, pt. 7, at 14–15 (2007)).

136. See 272 F. Supp. 2d. at 356, 359.

137. See *United States v. Sattar*, 314 F. Supp. 2d 279, 296 (S.D.N.Y. 2004).

138. See, e.g., Tamar R. Birckhead, *The Conviction of Lynne Stewart and the Uncertain Future of the Right to Defend*, 43 AM. CRIM. L. REV. 1, 12 (2006); Lynne Stewart, *Defending the Right to Defend*, 2 SEATTLE J. SOC. JUST. 85, 94–95 (2003); see also *United States v. Reid*, 214 F. Supp. 2d 84, 94–95 (D. Mass. 2002) (“Whatever the merits of [the Lynne Stewart] indictment, its chilling effect on those courageous attorneys who represent society’s most despised outcasts cannot be gainsaid.”); Molly McDonough, *Translators Worry: “Am I Next?”*, A.B.A. J. REP., Mar. 11, 2005, at 10, 10 (noting that translators began fearing “jail time simply for doing their jobs, or . . . be[ing] held accountable for illegal acts committed by lawyers”).

IV. *BOUMEDIENE*, NATIONAL SECURITY, AND THE RIGHT TO COUNSEL

Nowhere did the majority opinion in *Boumediene* mention, much less discuss, lawfare, but the clear implication was that the Court does not see lawfare as posing a sufficient threat to the nation to warrant denial of counsel. Is the Court being unduly optimistic or naïve?

The government has tools available to protect itself from the threat of lawfare by lawyers representing Guantánamo detainees, among them (1) requiring security clearance for lawyers who seek access to classified information;¹³⁹ and (2) using separate teams of agents and lawyers to monitor detainee-attorney conversations.¹⁴⁰

A. *Requiring Security Clearance for Lawyers*

Recall that Justice Scalia implied in his dissent in *Boumediene* that Osama bin Laden was in possession of the names of 200 unindicted co-conspirators (some of whom were presumably cooperating with the government) within two weeks of those names having been provided to defense lawyers who were defending the Blind Sheikh from prosecution.¹⁴¹ Litigating the enemy combatant status of Guantánamo detainees may well involve classified information concerning intelligence-gathering techniques, human sources, and military tactical positioning, among other classified things.¹⁴² One could be legitimately concerned if one believed that lawyers might intentionally or inadvertently pass along such information to Al-Qaeda.

Yet, the government currently requires that lawyers representing Guantánamo detainees obtain security clearances before being allowed to meet with their clients.¹⁴³ Private lawyers have

139. See 28 C.F.R. § 17.41(a)–(b) (2008).

140. See *id.* § 501.3(d).

141. See *supra* note 135 and accompanying text. Justice Scalia also noted that trial testimony in a different case “revealed to the enemy that the United States had been monitoring their cellular network, whereupon they promptly stopped using it.” *Boumediene v. Bush*, 128 S. Ct. 2229, 2295 (2008) (Scalia, J., dissenting).

142. See *id.* at 2276 (majority opinion).

143. See, e.g., Josh White & Joby Warrick, *U.S. To Allow Key Detainees To Request Lawyers; 14 Terrorism Suspects Given Legal Forms at Guantánamo*, WASH. POST, Sept. 28, 2007, at A1; see also *supra* note 139 and accompanying text.

described the process of obtaining such security clearance as onerous and burdensome, which may have the (un)intended effect of deterring such representation.¹⁴⁴

The goal of the security clearance background investigation is, of course, to determine “whether the circumstances of a particular case, taking into consideration prior experience with similar cases, reasonably suggest a degree of probability of prejudicial behavior not consistent with the national security.”¹⁴⁵ Perhaps such intense background investigations are unnecessary. One commentator seems to argue that criminal defense lawyers are inherently reliable and trustworthy, particularly because they “are keenly aware that they risk criminal prosecution for unauthorized disclosure of such information.”¹⁴⁶ Lynne Stewart’s prosecution was widely publicized and no doubt generated significant deterrent value.¹⁴⁷ But, in relation to the monitoring proposal described below, Akhil and Vikram Amar have suggested that the government create an “Honors list” of “approved lawyers who meet the highest ethical standards—say, former Justice Department officials” and allow greater latitude for such lawyers.¹⁴⁸ In addition, in high-stakes cases, given the Stewart precedent—however aberrant an example it might be—one might argue that the consequences of an attorney’s breach of security can be so devastating that the government would be remiss in not taking available steps to minimize its likelihood.

144. See Neil A. Lewis, *In Rising Numbers, Lawyers Head for Guantánamo Bay*, N.Y. TIMES, May 30, 2005, at A10; Neil A. Lewis, *Rules Set up for Terror Tribunals May Deter Some Defense Lawyers*, N.Y. TIMES, July 13, 2003, § 1, at 1 (noting that the cost of obtaining a security clearance can be as high as \$2,800); Adam Liptak, *The Right to Counsel, in the Right Situations*, N.Y. TIMES, Feb. 26, 2008, at A11 (noting the “exhaustive investigation” required for security clearance). For an explanation of the process involved in applying for security clearance, see William H. Miller, *A Position of Trust: Security Clearance Decisions After September 11, 2001*, 14 GEO. MASON U. CIV. RTS. L.J. 229, 235–38 (2004).

145. 32 C.F.R. § 154.40(b) (2008).

146. Ellen C. Yaroshsky, *The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 203, 231 (2006).

147. See, e.g., Michael Powell, *Lawyer Sentenced for Aiding Terrorist Client: 28 Months Is Far Less Than Government Sought*, WASH. POST, Oct. 17, 2006, at A03; Julia Preston, *Sheik’s Lawyer, Facing 30 Years, Gets 28 Months, to Dismay of U.S.*, N.Y. TIMES, Oct. 17, 2006, at A1.

148. Akhil Reed Amar & Vikram David Amar, *The New Regulation Allowing Federal Agents To Monitor Attorney-Client Conversations: Why It Threatens Fourth Amendment Values*, 34 CONN. L. REV. 1163, 1166 (2002).

To be sure, such a requirement is not without costs. In the typical instance of criminal defense in an Article III court, security clearance is required to access classified information.¹⁴⁹ A lawyer who is unable or unwilling to obtain the necessary security clearance may find it difficult to represent his or her client effectively when denied access to critical evidence.¹⁵⁰ As Brian Tamanaha notes, this “gives the Department of Justice the ability to control who will work on classified matters for the defense.”¹⁵¹ However, at least one district court has expressed confidence in its ability to review the government’s security clearance decisions: “[I]n the unlikely event that DOJ officials recommend that the Court deny any counsel’s application for clearance, this result would be appealable both within the DOJ as well as directly to the Court.”¹⁵²

Would a security clearance requirement impede lawfare? If we are hypothesizing lawfare by lawyers, then the answer depends on how effective the government’s background investigation is at unearthing such lawyers. The government certainly appears to cast a wide net in terms of persons to interview. I seem to meet with a special investigator from the FBI about once or twice a year concerning former students who have been hired by the DOJ, based on as little as one three-unit class for which I have been their instructor.

It seems likely that the government might err on the side of denying security clearance to “troublesome” lawyers, as opposed to on the side of granting security clearance to secretly disloyal lawyers. The DOJ regulations on the subject call for the government to ascertain whether a person has sufficient indicia of “loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion.”¹⁵³ These indicia, “loyalty to the United States,” “discretion,” and “sound judgment,” are sufficiently ambiguous so as to allow the government to argue that tenacious attorneys, particularly those committed to public interest causes, do not measure up.

149. See Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 288 (1986).

150. See *id.* at 288.

151. *Id.* at 289.

152. *United States v. Bin Laden*, 58 F. Supp. 2d 113, 120 (S.D.N.Y. 1999).

153. 28 C.F.R. § 17.41(b) (2008).

If lawfare by defense lawyers is truly of concern, the security clearance requirement can be an effective, if overbroad, tool for the government to protect itself.

B. *Monitoring Privileged Conversations*

To the extent that the security clearance requirement is viewed as insufficiently protective against the threat of lawfare, the government can further guard itself by actively monitoring conversations between detainees and their counsel.¹⁵⁴ Because such conversations are presumptively protected by the attorney-client privilege, any such monitoring must be undertaken with caution so as not to violate legitimate invocations of that privilege.

Typically, the government attempts to satisfy that obligation by designating a “privilege team” that is distinct and walled off from the investigating/prosecuting team.¹⁵⁵ Although such walls are generally deemed inadequate when it comes to imputed disqualification of private lawyers,¹⁵⁶ government lawyers are not subject to the same rule.¹⁵⁷ Thus, the “privilege team” can monitor conversations or engage in other similar conduct that would require intrusion into privileged communications (as might happen during the search of a lawyer’s office), segregate arguably unprivileged conversations or material, and seek court approval for the disclosure of such items to the investigating/prosecuting team.¹⁵⁸

154. *See id.* § 501.3(d) (permitting monitoring where “reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism”).

155. *Id.* § 501.3(d)(3) (“To protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material . . . a privilege team shall be designated, consisting of individuals not involved in the underlying investigation.”).

156. *See, e.g.,* *Trone v. Smith*, 621 F.2d 99, 999–1001 (9th Cir. 1980) (holding that an entire law firm would be disqualified if one attorney would be disqualified due to prior representation of a client in a matter substantially related to current adverse representation).

157. *See* *United States v. Mapelli*, 971 F.2d 284, 287–88 (9th Cir. 1992); *United States v. Caggiano*, 660 F.2d 184, 190–91 (6th Cir. 1981); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342, (1975), *reprinted* at 62 A.B.A. J. 517 (1976). The reason for the different treatment of government lawyers is practical: “[T]he client is not significantly prejudiced when the entire law firm is disqualified . . . because the client is free to hire another law firm. . . . In the case of government agencies, however, this assumption fails.” *In re Grand Jury Investigation of Targets*, 918 F. Supp. 1374, 1378 n.11 (S.D. Cal. 1996).

158. *See* 28 C.F.R. § 501.3(d)(3); Majorie Cohn, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 *FORDHAM L. REV.* 1233, 1242–43 (2003).

The efficacy of monitoring attorney-client communications is demonstrated by Lynne Stewart's conviction. The inculpatory evidence against Stewart consisted of tape recordings of the conversations between the translator, Yousry, and Abdel Rahman,¹⁵⁹ along with Stewart's admission that she violated the rules.¹⁶⁰ The government obtained the recordings through its monitoring of Abdel Rahman and Stewart under a warrant obtained from the Foreign Intelligence Surveillance Court.¹⁶¹ Abdel Rahman was also subject to so-called special administrative measures ("SAMs"), per Bureau of Prison regulations, which also called for monitoring of his conversations.¹⁶²

Monitoring of privileged communications is an extremely controversial issue, for both legal and pragmatic reasons.¹⁶³ Numerous commentators have argued that such monitoring legally destroys the attorney-client privilege because the communication is no longer limited to the presence of the attorney and the client.¹⁶⁴ In addition, when the government discloses in advance the fact that attorney-client communications may be monitored, as is done with the Bureau of Prison SAMs,¹⁶⁵ there must be a chilling effect on the lawyer and the client, who are forced to trust that

159. See Julia Preston, *Tapes Fall Short of Revealing a Terror Sheik's Call to Jihad*, N.Y. TIMES, Aug. 27, 2004, at B2.

160. See Julia Preston, *Lawyer Is Due for Sentencing in Terror Case*, N.Y. TIMES, Oct. 16, 2006, at B1.

161. See Rachel Zabarkes Friedman, *Lawyer of Jihad*, NAT'L REV., Aug. 23, 2004, at 29, 31. The Foreign Intelligence Surveillance Act of 1978 created the Foreign Intelligence Surveillance Court ("FISC"), to be staffed by federal district and appellate judges selected by the Chief Justice of the Supreme Court. See 50 U.S.C. § 1803(a) (2006). Where the government seeks to engage in domestic surveillance for the purpose of gathering foreign intelligence, and where such surveillance may intercept communications by United States citizens or residents, the government needs a warrant issued by the FISC. See *id.* § 1801(h).

162. See Molly McDonough, *Lawyer Charged with Aiding Terrorists*, A.B.A. J. EREPORT Apr. 12, 2002, at 14 (noting that SAMs limited Abdel Rahman's "access to the mail, media, telephone and visitors").

163. See generally Charlie Cassidy & Cassandra Porsch, *Government Monitoring of Attorney-Client Communications in Terrorism-Related Cases: Ethical Implications for Defense Attorneys*, 17 GEO. J. LEGAL ETHICS 681 (2004); Cohn, *supra* note 158; Teri Dobbins, *Protecting the Unpopular from the Unreasonable: Warrantless Monitoring of Attorney Client Communications in Federal Prisons*, 53 CATH. U. L. REV. 295 (2004); Sharon Jeffrey, *An Act of Patriotism? Infringing on the Individual's Sixth Amendment Right to Effective Counsel*, 33 SW. U. L. REV. 165 (2004); Ellen S. Podgor & John Wesley Hall, *Government Surveillance of Attorney-Client Communications: Invoked in the Name of Fighting Terrorism*, 17 GEO. J. LEGAL ETHICS 145 (2003).

164. See, e.g., Heidi Boghosian, *Taint Teams and Firewalls: Thin Armor for Attorney-Client Privilege*, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 15, 20 (2003).

165. *Id.* at 19-20 & n.22.

the “privilege team” will not share material with the investigation/prosecution team.¹⁶⁶ As one commentator argues, in the terrorism context, the “privilege team” may feel the need to share overheard information out of the possibility that it might be related to a future attack.¹⁶⁷ Finally, the legal authority for such monitoring impacts the concern for potential government overreaching: whereas monitoring pursuant to a Foreign Intelligence Surveillance Act (“FISA”) warrant requires the approval of Article III judges, monitoring pursuant to SAMs is premised entirely on Executive Branch control.¹⁶⁸

Because Guantánamo Bay is outside the United States, FISA’s warrant requirements do not apply to government surveillance of persons, whether aliens or citizens.¹⁶⁹ Arguably, however, known monitoring of communications involving American lawyers at Guantánamo might still require some form of judicial authorization.¹⁷⁰

As with the security clearance requirement, the monitoring of privileged conversations may well be overkill, given its potentially chilling effects on the detainees. At the same time, where the government has a reasonable basis to suspect that a defense lawyer may be assisting a detainee in engaging in lawfare, careful monitoring of conversations will likely detect the plot. Because such monitoring can have value but also raises concerns of chilling, it should be authorized via FISA rather than SAMs, given the need for judicial authorization of FISA warrants.

V. CONCLUSION

Whether one views *Boumediene* as the Court’s shining moment in standing up to the political branches’ attempt to short-circuit the Constitution, or as the latest interference by the branch least-qualified to opine on the matter, it seems clear that Chief Justice

166. Podgor & Hall, *supra* note 163, at 162.

167. See Boghosian, *supra* note 164, at 21 (quoting Kate Martin of the Center for National Security Studies).

168. Cf. Amar & Amar, *supra* note 148, at 1167 (arguing for videotaping of attorney-client communications and allowing review by a judge prior to review by an executive branch agent).

169. See 50 U.S.C. § 1801(f), (j) (2006).

170. See, e.g., *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 159 (D.D.C. 1976).

Roberts was at least correct that the opinion would generate future litigation.

In so holding, the Court decisively rejected the idea that detainee litigation itself was lawfare, as well as the notion that lawyers were too dangerous to be allowed to represent detainees. Here, the Court was perhaps influenced by the paucity of actual instances of lawyers intentionally conspiring with terrorist clients, coupled with the fact that the government's available counter-terrorism tools enabled it to detect and punish one such high-profile example. This is not to say that requiring security clearances for detainee representation or monitoring privileged communications is necessarily desirable. Serious concerns have been raised about both practices in terms of their impact on the attorney-client relationship and its effectiveness. It is enough to say that if lawfare were ever to be deemed a serious enough threat to national security so as to call for response, these two techniques would be less drastic measures than altogether denial of counsel, and there is every reason to think that requiring security clearances and monitoring privileged conversations would be effective at countering lawfare.