

ARTICLES

PANDORA, WE HAVE FOUND YOU—AND YOU CAME FROM GUANTANAMO BAY¹

HOW THE LEGAL LEGACY OF GLOBAL WAR ON TERROR DETENTION OPERATIONS AT GUANTANAMO BAY MAY IMPACT THE FUTURE DETENTION OF PRISONERS OF WAR AND A PROPOSED MEANS TO RESPOND

COLONEL (RETIRED) KEVAN F. JACOBSON*

INTRODUCTION.....	2
I. DETENTIONS AND THE GLOBAL WAR ON TERROR.....	3
II. RASUL V. BUSH.....	6
III. HAMDI V. RUMSFELD.....	8

* The author is currently the Chair of the Political Science and Criminal Justice Department at Southern Utah University. He teaches classes in substantive and procedural criminal law as well as courses related to national security and American government. Professor Jacobson is a retired U.S. Army officer who spent over 30 years as a lawyer in the Judge Advocate General’s Corps. He served around the world as a tactical, operational, and strategic levels in both peace and war, practicing across a broad and diverse spectrum of federal, military, and international law. He holds degrees from Utah State University, B.A. (Political Science), 1981; the J. Reuben Clark Law School, Brigham Young University, J.D., 1984; The Judge Advocate General’s School, LL.M. 1992; and the U.S. Army War College, Masters of Strategic Studies, 2006. He has been a member of the Utah State Bar since 1984.

1. The roots of the myth of Pandora are found in an epic poem by the ancient Greek poet Hesiod. Pandora famously opened a jar and loosed “countless baneful things . . . evils . . . [and] diseases” upon mortals within the earth. HESIOD, WORKS AND DAYS ls. 100–04, <https://chs.harvard.edu/primary-source/hesiod-works-and-days-sb/> [<https://perma.cc/9R6C-UUXR>] (last visited July 31, 2021).

IV.	THE EXECUTIVE BRANCH RESPONDS: COMBATANT STATUS REVIEW TRIBUNALS.....	10
V.	CONGRESS RESPONDS: THE DETAINEE TREATMENT ACT OF 2005	11
VI.	THE SUPREME COURT RE-ENTERS THE FRAY: HAMDAN V. RUMSFELD.....	12
VII.	CONGRESS REACTS AGAIN: A REJECTION OF <i>HAMDAN</i>	15
VIII.	THE COURT WIELDS A CONSTITUTIONAL MACE: BOUMEDIENE V. BUSH	16
IX.	THE COURT'S DETENTION JURISPRUDENCE IN APPLICATION: AL HELA V. TRUMP	22
X.	THE FUTURE: THE SPECTER AND PROSPECT OF FULL DUE PROCESS	26
	A. Due Process and <i>Al Helá</i>	26
	B. The Potential Challenge of Due Process Related Litigation ...	29
	C. A Means to Meet the Challenge	31
XI.	A POTENTIAL MODEL: THE EMERGENCY DETENTION ACT OF 1950	32
XII.	A PROPOSED DETENTION REVIEW STRUCTURE	34
	CONCLUSION	35

INTRODUCTION

On August 28, 2020, a panel of the United States Court of Appeals for the District of Columbia Circuit announced its decision in *Al Helá v. Trump*.² As a detainee held at Guantanamo Bay, Al Helá sought a writ of habeas corpus from the United States District Court for the District of Columbia.³ After that court denied the writ, Al Helá asserted before the Court of Appeals that he was “entitled to release for violation of both ‘substantive’ and ‘procedural’ due process[.]”⁴ Judge Rao authored the majority opinion which concluded that “the Due Process Clause may not be invoked by aliens without property or presence in the sovereign territory of the United States.”⁵ The Court of Appeals thus answered, for now, a critical question that the Supreme Court had left open: Whether Guantanamo detainees have cognizable due process rights.⁶

2. 972 F.3d 120 (D.C. Cir. 2020).

3. *Id.* at 128.

4. *Id.* at 127.

5. *Id.*

6. *See id.* at 143 (quoting *Qassim v. Trump*, 927 F.3d 522, 530 (D.C. Cir. 2019)) (“In *Qassim*, we noted for the first time that whether the constitutional procedural protections applicable to habeas review derive from ‘the Fifth Amendment’s Due Process Clause, the Suspension Clause, both, or elsewhere’ is an ‘open and unresolved’ question.”). In *Boumediene v. Bush*, Justice Kennedy stated

The foundation of the Court of Appeals' holding was the recognition that neither it nor the Supreme Court had ever effectively held that the Fifth Amendment applies to aliens outside the territorial limits of the United States.⁷ What neither court has resolved, however, is the extent of process that would be due to such persons detained under the law of war *within* the United States. The Supreme Court's Guantanamo jurisprudence leaves little, if any, doubt that such detentions would be subject to judicial review. It thus stands as a broad, open invitation to future detainees to litigate their detention. Similarly, while the Court of Appeals may have, for the time being, resolved the issue of whether due process protections extend to detainees held outside the country, its decision loudly begs the question of what limits the Fifth Amendment might impose on the nation's ability to conduct large scale prisoner of war operations *within* the country should a future major war confront the United States with the necessity of conducting such operations. The scope and scale of litigation of those detentions could make detentions in Guantanamo pale by comparison. It could drag the Departments of Defense and Justice into a legal morass, a potentially years-long exercise which could consume massive resources.

In anticipation of such a contingency, this paper proposes a structure and process that could avoid not only some of the travails associated with the kinds of detentions which have been underway at Guantanamo Bay for nearly twenty years, but also those which could be encountered in a future war with a major power. This Article examines the history of Global War on Terror detentions, reviews salient U.S. Supreme Court and lower court cases which have addressed terror detentions, and proposes a means of adequately preparing for what those cases portend for the future.

I. DETENTIONS AND THE GLOBAL WAR ON TERROR

On September 11, 2001, nineteen Al-Qaeda terrorists bent on mass murder boarded four commercial airliners at three different airports within the United States.⁸ Once aloft, the terrorists attacked the aircraft crews,

that “[i]t bears repeating that our opinion does not address the content of the law that governs petitioners’ detention.” 553 U.S. 723, 798 (2008).

7. See *Al Helu*, 972 F.3d at 138–40.

8. The 9/11 Commission Report, Chapter 1, §1.1, <https://www.9-11.commission.gov/report/911Report.pdf> [<https://perma.cc/82X7-ZX6W>] (last visited July 31, 2021). The Commission was created when President George Bush signed the act “[t]o authorize appropriations for fiscal year 2003 for intelligence and intelligence-related activities of the United States Government, the Community Management Account, and the Central Intelligence Agency Retirement and Disability System, and for other purposes.” Pub. L. 107-306, 116 Stat. 2383 (2002). In pertinent part, Title VI of the Act created a bi-partisan commission to “investigate . . . relevant facts and circumstances relating to the terrorist attacks of

killed the pilots, and assumed control of the airplanes.⁹ Some of the hijackers flew two of the planes into the twin towers of the World Trade Center in New York City.¹⁰ Other terrorist pilots flew a third plane into the Pentagon, headquarters of the U.S. Department of Defense, located across the Potomac River from Washington D.C.¹¹ Passengers aboard the fourth aircraft attempted to regain control by attacking the terrorists then in the cockpit.¹² Apparently realizing that they were about to be overwhelmed, the terrorists crashed the plane into a field outside Shanksville, Pennsylvania.¹³ The attacks killed 2,977 people, the vast majority of whom were civilians.¹⁴ This grim figure exceeded the death toll of those killed at Pearl Harbor in December 1941: 2,403 people, only sixty-eight of whom were civilians.¹⁵

In response to the attacks, Congress passed Public Law 107-40,¹⁶ a Joint Resolution entitled “Authorization for Use Military of Military Force” (AUMF). It sanctioned operations “against . . . nations, organizations, or persons” determined to have been responsible for or associated with the attacks.¹⁷ Within a month, President George W. Bush initiated military operations in Afghanistan. Anticipating the capture of alien terrorists there and elsewhere, and the need thereafter to hold them legally accountable for their crimes, President Bush issued a directive he entitled Military Order of November 13, 2001.¹⁸ His order authorized the detention of terrorist suspects and their trial by military tribunals.¹⁹

September 11, 2001[.]” *Id.* § 604(a)(1)(A). The Commission’s archived website can be found at <https://www.9-11commission.gov/> [<https://perma.cc/CR8U-TYRQ>] (last visited July 31, 2021).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. A Pearl Harbor Fact Sheet, <https://www.census.gov/history/pdf/pearl-harbor-fact-sheet-1.pdf> [<https://perma.cc/473D-6FFG>] (last visited July 31, 2021).

16. Joint Resolution To [sic] authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States, Pub. L. 107-40, 115 Stat. 224 (2001). President George W. Bush signed the legislation on September 18, 2001.

17. *Id.*

18. Military Order of November 13, 2001, 66 Fed. Reg. 57833 (2001).

19. A succinct and informative history of the use of military commissions to try persons for violations of the international law of armed conflict can be found at <https://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx> [<https://perma.cc/2RCW-34VS>], a website maintained by the Office of Military Commissions (last visited July 31, 2021). In short, the U.S. has utilized military commissions since the Revolutionary era to try persons accused of war crimes. While many considered—and still do consider—the resort to commissions following the 2001 attacks to be controversial, the trial of alleged war criminals by such tribunals is

The Bush administration chose Naval Station Guantanamo Bay in Cuba (NSGB) as the place of detention and trial. The U.S. acquired NSGB following the 1898 war with Spain by executing a lease with Cuba for a coaling and naval station.²⁰ Per the lease, the U.S. was to “exercise complete jurisdiction and control over and within” the leased property. Cuba, however, retained “ultimate sovereignty . . . over the [leased] land and water.”²¹ The two countries rendered the lease virtually permanent by treaty in 1934.²² They agreed the lease would continue “[s]o long as the United States of America shall not abandon the . . . naval station” or until, by mutual agreement, the parties decided to terminate it.²³

President Bush selected NSGB with the specific intent that detainees held and tried there would *not* be able to invoke the intervention of civilian federal courts via writs of habeas corpus. The President relied directly on a precedent established over fifty years before in *Johnson v. Eisentrager*²⁴ that aliens held by the U.S. outside the country had no

supported by abundant precedent. Perhaps most famously, at the end of World War II in Europe, the victorious allies constituted the International Military Tribunal at Nuremberg to try the principal surviving leaders of the Nazi regime for crimes associated with the initiation and conduct of the European war. During the same era, the U.S. Supreme Court held that post-war use of commissions by the U.S. was consistent with the Constitution. *See In re Yamashita*, 327 U.S. 1 (1946).

20. Cuban-American Treaty of Relations, Cuba-U.S., art. I, Feb. 16-23, 1903, T.S. No. 418 (treaty for the “Lease of Lands for Coaling and Naval stations” leasing, among other lands, Guantanamo Bay to the U.S.).

21. *Id.* at art. III.

22. Treaty of Relations, U.S.-Cuba, May 29, 1934, T.S. No. 866.

23. Cuban-American Treaty of Relations, Cuba-U.S., art. I, Feb. 16-23, 1903, T.S. No. 418, art. III.

24. 339 U.S. 763 (1950). *Eisentrager* involved twenty-one German nationals who engaged in military actions against U.S. forces in China after the unconditional surrender of Germany in May, 1945. The terms of surrender forbade German forces from conducting further hostile actions. The *Eisentrager* holding showed that, in the eyes of the Court, the Germans had acted as unprivileged belligerents when they aided the Japanese forces then pursuing the continuing war between Imperial Japan and the U.S. The Germans were captured by the American Army following the surrender of Imperial Japan in September 1945. Thereafter, they were tried for their unprivileged use of force in war—a war crime—by an American military commission in China. Convicted and sentenced to be imprisoned, they were transported to Germany and confined at Landsberg prison in the southern reaches of that country, then under American control pursuant to ongoing post-war occupation. From Landsberg, the prisoners petitioned the U.S. District Court for the District of Columbia for writs of habeas corpus asserting that their confinement was in violation of various provisions of the U.S. Constitution, federal law, and the Geneva Convention provisions regarding prisoners of war. *Id.* at 765–67. On appeal, the Supreme Court held that, as enemy aliens held outside the U.S., the German nationals enjoyed neither access to U.S. courts nor the right to habeas corpus. *Id.* at 777, 781. In so holding, the Court noted that the petitioners

privilege of habeas corpus.²⁵ Contrary to the President's expectations, the Supreme Court would decide that enemy aliens held at NSGB not only had the right to access federal courts and exercise the privilege of habeas corpus, but also that they had *constitutional rights* to do so, rights which, absent suspension of the writ, neither the President nor Congress could restrain.

II. RASUL V. BUSH²⁶

Rasul involved a group of fourteen foreign nationals who had been captured during U.S. military operations against the Taliban and subsequently detained at NSGB.²⁷ In an action filed in the U.S. District Court for the District of Columbia, they asserted that they were neither combatants nor had they ever committed terrorist acts and hence their detention was unlawful.²⁸ The District Court treated the actions as petitions for writs of habeas corpus. Relying on *Eisentrager*, the court dismissed the petitions on the grounds that "aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus."²⁹ The U.S. Court of Appeals for the District of Columbia Circuit affirmed the dismissal, agreeing that *Eisentrager* denied federal courts jurisdiction to consider the petitions.³⁰ The Supreme Court then granted certiorari.³¹

The Court articulated the issue as "whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"³² The statutory

"(a) [were] enemy alien[s]; (b) ha[d] never been or resided in the United States; (c) [were] captured outside of our territory and there held in military custody as . . . prisoner[s] of war; (d) [were] 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 [were] at all times imprisoned outside the United States." *Id.* at 777.

25. See *Boumediene v. Bush*, 553 U.S. 723, 828 (2008) Scalia, J., dissenting: "The President relied on our settled precedent in . . . *Eisentrager* . . . when he established the prison at Guantanamo Citing that case, the President's Office of Legal Counsel advised him 'that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay].'" (citations omitted).

26. *Rasul v. Bush*, 542 U.S. 466 (2004). The case also decided *Al Odah v. United States*, which raised the same issues. The cases are reported as one.

27. *Id.* at 470–71.

28. *Id.* at 471–72.

29. *Id.* at 473 (quotation marks and citations omitted).

30. *Id.*

31. *Id.*

32. *Id.* at 475.

provisions in question were 28 U.S.C. §§ 2241(a) and (c)(3).³³ Together, these sections grant federal district courts authority to consider petitions for habeas corpus “within their respective jurisdictions” by petitioners asserting that they are being held “in custody in violation of the Constitution or laws or treaties of the United States.”³⁴ Unlike both lower courts, the Court was not convinced that *Eisentrager* was dispositive and proceeded to reexamine it.

As to the matter of whether the petitioners were within the geographical jurisdiction of the district court, Justice Stevens, writing for the Court, relied on *Braden v. 30th Judicial Circuit Court of Kentucky*³⁵ for the proposition “that the prisoner’s presence within the territorial jurisdiction of the district court is not ‘an invariable prerequisite’ to the exercise of district court jurisdiction.”³⁶ Instead, since “‘the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody,’ a district court acts ‘within [its] respective jurisdiction’ . . . as long as ‘the custodian can be reached by service of process.’”³⁷

Having disposed of the question of whether the physical location of a petitioner, standing alone, was of jurisdictional significance, the Court went on to determine whether the territorial reach of the habeas statute extended to NSGB. The Court acknowledged that Cuba “exercised ultimate sovereignty” at NSGB³⁸ but considered that fact of no moment so long as the U.S. otherwise exercised “complete jurisdiction and control” there in accordance with the lease and treaty.³⁹ In the Court’s estimation, enemy aliens held at NSGB were thus within the “‘territorial jurisdiction’ of the United States.”⁴⁰

Finding that “[n]o party questions the District Court’s jurisdiction over petitioners’ custodians,”⁴¹ the Court held “that Section 2241 confers on the District Court jurisdiction to hear petitioners’ habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.”⁴²

33. The federal habeas corpus statute is 28 U.S.C. §§ 2241–55 (2018).

34. 28 U.S.C. §§ 2241(a), (c)(3).

35. 410 U.S. 484 (1973).

36. *Rasul*, 542 U.S. at 478–79.

37. *Id.*

38. *Id.* at 471.

39. *Id.* at 480.

40. *Id.* at 480 (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

41. *Id.* at 483.

42. *Id.* at 484.

III. HAMDI V. RUMSFELD⁴³

Yaser Esam Hamdi, a U.S. citizen, reportedly surrendered in Afghanistan and was thereafter transported to NSGB where he was detained beginning in January 2002.⁴⁴ When personnel at NSGB discovered that he was a citizen, Hamdi was ultimately transferred to South Carolina where he was held in a U.S. Navy brig.⁴⁵ His efforts for habeas corpus relief having failed before the Fourth Circuit Court of Appeals, Hamdi sought and was granted certiorari before the Supreme Court.⁴⁶

To the plurality, the threshold issue was “[w]hether the Executive has the authority to detain citizens who qualify as ‘enemy combatants.’”⁴⁷ Justice O’Connor resolved this affirmatively through the AUMF which empowered the President to employ “all necessary and appropriate force against nations, organizations, or persons associated with the September 11, 2001, terrorist attacks.”⁴⁸ Justice O’Connor acknowledged that Congress did not include specific verbiage about detention in the AUMF,⁴⁹ but also recognized that “detention of [enemy combatants] . . . is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress ha[d] authorized the President to use.”⁵⁰ The plurality intimated that such detention could even extend to Americans for there was no prohibition to the United States “holding one of its own citizens as an enemy combatant.”⁵¹

43. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *Hamdi* was decided the same day as *Rasul*: June 28, 2004.

44. *Id.* at 510.

45. *Id.*

46. *Id.* at 516.

47. *Id.* The plurality limited the reach of its opinion to enemy combatants as that term was defined by the Government for the purposes of the case, that is, persons who were “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States.” *Id.* at 516 (citing Brief for Respondents at 3 (quotation marks omitted)). Chief Justice Rehnquist, and Justices Kennedy and Breyer joined Justice O’Connor. *See id.* at 509. Justice Souter authored a separate opinion, joined by Justice Ginsburg, in which he concurred in part, dissented in part, but concurred with the Court’s judgement. *Id.* at 539.

48. *Id.* at 518.

49. *Id.* at 519.

50. *Id.* at 518.

51. *Id.* at 519. *Ex parte Quirin*, 317 U.S. 1 (1942), was significant for the Justices forming the plurality. *Quirin* concerned the trial by military commission of eight agents of Nazi Germany captured in the U.S. during World War II. One of the agents, Herbert Hans Haupt, was a naturalized citizen of the U.S. The Court upheld both the findings and sentences the commission reached, including the capital sentence against Haupt. Justice O’Connor wrote that “[w]hile Haupt was tried for violations of the law of war, nothing in *Quirin* suggests that his citizenship would

Legal authority to detain Hamdi was not the end of the inquiry, however. Both parties agreed that “absent suspension, the writ of habeas corpus remains available to every individual detained within the United States”⁵² and that there had been no suspension of the writ.⁵³ Neither party thus disputed “that Hamdi was properly before an Article III court to challenge his detention.”⁵⁴ There “remain[ed] the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status”⁵⁵ in federal court via habeas corpus.

Justice O’Connor identified the balancing test of *Mathews v. Eldridge*⁵⁶ as the appropriate means “for determining the procedures that are necessary to ensure that a citizen is not deprived of life, liberty, or property, without due process of law[.]”⁵⁷ She articulated the test as follows:

Mathews dictates that the process due in any given instance is determined by weighing the private interest that will be affected by the official action against the Government’s asserted interest, including the function involved and the burdens the Government would face in providing greater process. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of the risk of an erroneous deprivation of the private interest if the process were reduced and the probable value, if any, of additional or substitute procedural safeguards.⁵⁸

In light of this standard, the Court held “that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker.”⁵⁹

Having defined the basic nature of the process due a citizen-detainee, Justice O’Connor then recognized that “exigencies of the circumstances may demand that, aside from these core elements . . . proceedings may be tailored to alleviate their uncommon potential to

have precluded his mere detention for the duration of the relevant hostilities.” *Hamdi*, 542 U.S. at 519 (citing *Quirin*, 317 U.S. at 30–31).

52. *Hamdi*, 542 U.S. at 525.

53. *Id.*

54. *Id.*

55. *Id.* at 524.

56. 424 U.S. 319 (1976).

57. *Hamdi*, 542 U.S. at 529 (quotation marks omitted).

58. *Id.* (citations and quotation marks omitted).

59. *Id.* at 533.

burden the Executive at a time of ongoing military conflict.”⁶⁰ Such tailoring could include reliance upon hearsay evidence. It could also allow for a rebuttable presumption in favor of credible Government evidence justifying detention with the burden of rebuttal resting upon a detainee.⁶¹

Lastly, it is important to note that the Court’s focus in setting forth these standards was upon an Article III court conducting a collateral review of an Executive decision to detain a person as an enemy combatant. Justice O’Connor suggested that there could be other means to review detentions. As she wrote: “There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted [impartial] military tribunal.”⁶² If, however, a detainee had not received notice of the factual basis of the Government’s justification for detention, and an a fair opportunity to rebut it, “a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved.”⁶³

IV. THE EXECUTIVE BRANCH RESPONDS: COMBATANT STATUS REVIEW TRIBUNALS

Having witnessed *Rasul*—and to a lesser extent, *Hamdi*—stymie the original plan that NSGB remain beyond the reach of habeas corpus, the President was not long in reacting. On July 7, 2004, thirteen days following the announcement of the opinions, Paul Wolfowitz, Deputy Secretary of Defense, issued an order establishing Combatant Status Review Tribunals (CSRTs).⁶⁴ The order created procedures whereby foreign nationals then held at NSGB, based upon earlier determinations that they were enemy combatants, could contest such determinations.⁶⁵

The order seized upon the plurality’s suggestion in *Hamdi* that appropriate impartial military tribunals might be sufficient to satisfy the basic due process requirements the Court had set forth. Tribunals were to be comprised of three commissioned officers of the Armed Forces, one of whom was to be a judge advocate (a military lawyer).⁶⁶ A separate military officer would serve as a personal representative for each detainee in order

60. *Id.* at 533–34.

61. *Id.* at 534.

62. *Id.* at 538.

63. *Id.*

64. Memorandum from Deputy Sec’y of Def. Paul Wolfowitz, Order Establishing Combatant Status Review Tribunal (July 7, 2004). A transcription of the order may be found at https://en.wikisource.org/wiki/Order_Establishing_Combatant_Status_Review_Tribunal [<https://perma.cc/T323-GJAA>] (last visited Oct. 20, 2021).

65. *Id.*

66. *Id.* at para. (e).

to assist the detainee in contesting prior determinations.⁶⁷ Detainees were to be given notice of the unclassified factual basis for determinations.⁶⁸ Personal representatives were to have access to all reasonably available and relevant information supporting a combatant determination and could share that information with detainees.⁶⁹ Detainees and their personal representative could attend all sessions of Tribunals with the exception of those involving deliberation or voting.⁷⁰ Detainees could call reasonably available witnesses, could question Government witnesses, could testify, but could not be compelled to testify.⁷¹ Tribunals were not bound by the Rules of Evidence and could consider any information deemed relevant and helpful, including hearsay.⁷² Tribunals were to reach decisions about combatant status by a majority vote, utilizing a preponderance of the evidence standard, and benefitted from a rebuttable presumption in favor of the credibility of Government evidence.⁷³ Determinations of combatant status were subject to review and approval by a Tribunal appointing authority.⁷⁴ The process also contemplated that detainees could seek review of approved decisions via habeas corpus.⁷⁵

V. CONGRESS RESPONDS: THE DETAINEE TREATMENT ACT OF 2005

Congress reacted more aggressively to the Court's decisions than did the President. Via the Detainee Treatment Act (DTA) of 2005,⁷⁶ Congress sought to materially constrain the role of courts in reviewing Executive decisions to detain enemy combatants.

The DTA provided that “the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant.”⁷⁷ Congress also limited the scope of any such review to whether CSRT determinations were “consistent with the standards and procedures specified by the Secretary of Defense” for CSRTs “including the requirement that . . . conclusion[s] . . . be supported by a preponderance of the evidence and allowing a rebuttable presumption in

67. *Id.* at para. (c).

68. *Id.* at paras. (g)(1), (g)(6).

69. *Id.* at para. (c).

70. *Id.* at para. (g)(4).

71. *Id.* at paras. (g)(8), (10)–(11).

72. *Id.* at para. (g)(9).

73. *Id.* at para. (g)(12).

74. *Id.* at para. (f).

75. *Id.* at para. (b).

76. Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739 (2005) [hereinafter DTA].

77. *Id.* § 1005(e)(2)(A).

favor of the Government's evidence[.]”⁷⁸ As to constitutional considerations, Congress provided that “to the extent the Constitution and laws of the United States are applicable [to CSRTs]” the Court of Appeals would decide only “whether the use of [CSRT] standards and procedures to make the [CSRT] determination is consistent with the Constitution and laws of the United States.”⁷⁹

Having affirmatively limited judicial review to one court, Congress further sought to expressly strip all other courts, including the Supreme Court, of any jurisdiction to review detentions of aliens at NSGB. Section 1005(e)(1) of the DTA amended 28 U.S.C. §2241, the federal habeas corpus statute, by adding limiting language at its end, to wit:

Except as provided in section 1005 of the [DTA] no court, justice, or judge shall have jurisdiction to hear or consider

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

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

(A) is currently in military custody; or

(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.⁸⁰

However tightly Congress perceived that it had closed the doors to judicial review, within six months the Supreme Court would open them again, at least for some detainees.

VI. THE SUPREME COURT RE-ENTERS THE FRAY: HAMDAN V. RUMSFELD⁸¹

On July 13, 2004, Salim Hamdan, a detainee at NSGB subject to trial by military commission, was charged with conspiracy to commit

78. *Id.* § 1005(e)(2)(C)(i).

79. *Id.* § 1005(e)(2)(C)(ii).

80. *Id.* § 1005(e)(1).

81. 548 U.S. 557 (2006).

attacks upon civilians, attacks upon civilian objects, murder by an unprivileged belligerent, and terrorism.⁸² Following an adverse decision of his habeas case before the U.S. Court of Appeals for the District of Columbia Circuit, the Supreme Court granted certiorari to Hamdan “to decide whether the military commission convened to try [him] ha[d] authority to do so”⁸³

The Government promptly moved to dismiss the writ of certiorari.⁸⁴ Citing the DTA, the enactment of which post-dated the grant of certiorari, the Government argued that the Supreme Court no longer had jurisdiction to consider Hamdan’s appeal.⁸⁵ The Court was content that “[o]rdinary principles of statutory construction suffice[d] to rebut the Government’s theory [for this] case, which was pending at the time the DTA was enacted[.]”⁸⁶ The Court then focused closely on the language Congress used in declaring the effective date of the DTA.⁸⁷

Section 1005 of the DTA contained the relevant jurisdiction stripping provisions of subsection (e) as discussed above. Congress provided that “[i]n general, this section [i.e. §1005] shall take effect on the date of the enactment of this act.”⁸⁸ But Congress then added: “Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.”⁸⁹

Paragraph (2) addressed the review of CSRTs.⁹⁰ Paragraph (3) concerned the review of trials by military commissions.⁹¹ While the limitations upon judicial review of these two processes expressly extended to “any claim . . . pending on or after the date of the enactment of this Act,” the Court found great significance in the fact that there was no such explicit limit associated with paragraph (1). That paragraph contained the amendments to the habeas corpus statute which provided that “no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus . . . or . . . any other action against the United States or its agents” brought by any alien detained at NSGB.⁹² The issue, therefore, was whether Congress had effectively stripped the Court of jurisdiction to hear Hamdan’s case which *was before it as a habeas*

82. *Id.* at 570.

83. *Id.* at 572.

84. *Id.*

85. *Id.* at 574–75.

86. *Id.* at 575–76.

87. *Id.* at 576–79.

88. DTA § 1005(h)(1).

89. *Id.* § 1005(h)(2).

90. *Id.* § 1005(e)(2).

91. *Id.* § 1005(e)(3).

92. *Id.* § 1005(e)(1).

corpus appeal and which *was* pending at the time Congress passed, and the President signed, the DTA.

The Court noted that “[a] familiar rule of statutory construction, relevant here . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.”⁹³ In examining how Congress developed § 1005(e), the Court found that:

Congress not only considered the respective temporal reaches of paragraphs (1), (2), and (3) of subsection (e) together at every stage, but omitted paragraph (1) from its directive that paragraphs (2) and (3) apply to pending cases only after having rejected earlier proposed versions of the statute that would have included what is now paragraph (1) within the scope of that directive.⁹⁴

Having in mind precedent which “held that Congress would not be presumed to have effected [a] denial” of jurisdiction to hear habeas cases “absent an unmistakably clear statement to the contrary,”⁹⁵ the Court concluded that “Congress’ rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government[.]”⁹⁶ The Court therefore denied the Government’s motion to dismiss the writ of certiorari.⁹⁷

The *Hamdan* Court in effect branded the DTA as a failed Congressional exercise in drafting legislation. Significantly, the Court emphasized that it had decided the case on statutory grounds, that is, a conclusion “that Section 1005(e)(1) [did] not strip federal courts’ jurisdiction over . . . pending [cases.]”⁹⁸ The Court did “not decide whether, if it were otherwise, this Court would nonetheless retain jurisdiction to hear Hamdan’s appeal.”⁹⁹

93. *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006).

94. *Id.* at 579. The Court cited a comparison of DTA §1005(h)(2), 119 Stat. 2743-2744, with 151 Cong. Rec. S12655 (Nov. 10, 2005) (S.Amdt. 2515); *see id.* at S14257-S14258 (Dec. 21, 2005).

95. *Hamdan*, 548 U.S. at 575 (citing *Ex parte Yerger*, 8 Wall. 85, 102–103 (1869)).

96. *Id.* at 579–80.

97. *Id.* at 584. Having found jurisdiction to hear Hamdan’s case, the Court proceeded to decide it on the merits. It ultimately held “that the military commission convened to try Hamdan lack[ed] power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions.” *Id.* at 567.

98. *Id.* at 584 n.15.

99. *Id.*

This observation would prove prescient, for Congress did not take kindly to the Court's interpretation of the DTA. Subsequent legislation would present the Court with an opportunity to decide the jurisdictional issue it declined to address in *Hamdan*.

VII. CONGRESS REACTS AGAIN: A REJECTION OF *HAMDAN*

The Court announced its decision in *Hamdan* on June 29, 2006. Less than four months later, Congress delivered a bold, direct response by passing the Military Commissions Act (MCA) of 2006.¹⁰⁰

Section 7 was entitled "Habeas Corpus Matters." It again amended 28 U.S.C. § 2241, striking subsection (e) (added by the DTA) and replacing it as follows:

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

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 . . . 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.¹⁰¹

Congress thus affirmatively deleted any internal reference to—and thus any distinction regarding—"any claim . . . that is pending on or after the date of the enactment of this Act," the language upon which the Court seized in *Hamdan* to conclude that Congress had prescribed disparate jurisdictional standards for habeas corpus claims. Then, to remove any possible doubt about Congressional intent—to include, presumably, the actual intent of the DTA—Congress specified that the MCA amendments:

[S]hall take effect on the date of the enactment of this Act,
and shall apply to all cases, without exception, pending on

100. Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600 (2006) [hereinafter MCA].

101. *Id.* § 7(a).

or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.¹⁰²

As for judicial review of the detention of alien enemy combatants, Congress could not have expressed its intentions more clearly: First, no federal court, judge, or justice was thenceforth to have jurisdiction to hear or consider habeas cases; and, second, the only contemplated judicial reviews associated with detention were those reserved in the DTA to the U.S. Court of Appeals for the District of Columbia Circuit.

Congress thus unflinchingly laid down the legislative gauntlet through MCA §7. The Court was not long in taking it up on behalf of the judiciary.

VIII. THE COURT WIELDS A CONSTITUTIONAL MACE: BOUMEDIENE V. BUSH¹⁰³

Lakhdar Boumediene was among the many detainees at NSGB who began seeking relief via habeas corpus in 2002. The long course of litigation was influenced in turn by *Rasul*, *Hamdi*, and *Hamdan*. Boumediene's case was ultimately consolidated with cases brought by other detainees.¹⁰⁴ When it last reached the U.S. Court of Appeals for the District of Columbia Circuit, which occurred following passage of the MCA, that court "concluded that MCA section 7 [stripped] it, and all federal courts, [of] jurisdiction to consider petitioners' habeas corpus applications [and] that petitioners [were] not entitled to the privilege of the writ or the protections of the Suspension Clause" of Article I, Section 9, Clause 2 of the United States Constitution.¹⁰⁵ The Supreme Court granted certiorari to consider a "question not resolved by [its] earlier cases, [i.e.] whether [petitioners had] the *constitutional* privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause[.]"¹⁰⁶

The Court first addressed whether the MCA deprived "federal courts [of] jurisdiction to hear habeas corpus actions pending at the time of its enactment."¹⁰⁷ The petitioners argued that the MCA still drew a distinction between habeas cases and other forms of review and that the

102. *Id.* § 7(b) (emphasis added).

103. 553 U.S. 723 (2008).

104. *Id.* at 734–35.

105. *Id.* at 735–36 (citations omitted). "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." U.S. CONST. art. I, § 9, cl. 2.

106. *Boumediene*, 553 U.S. at 732 (emphasis added).

107. *Id.* at 736.

MCA did not impact jurisdiction over the former for any cases pending when it was enacted.¹⁰⁸ But the Court made fairly short work of this assertion. It recognized that the MCA was a direct response to the Court's interpretation of the DTA in *Hamdan*.¹⁰⁹ Given the Court's decision that the DTA did not clearly revoke habeas jurisdiction, "Congress [could] make an informed legislative choice either to amend the statute or to retain its existing text."¹¹⁰ Since Congress had acted to address the deficiency "its intent must be respected even if a difficult constitutional question is presented."¹¹¹ The Court found that there was "little doubt that the effective date provision applies to habeas corpus actions"¹¹² and held "that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions" brought by Boumediene and the other petitioners.¹¹³ The Court then proceeded to address the more consequential issue: "[W]hether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status [as designated enemy combatants] or their physical location" at NSGB.¹¹⁴

The Court began with what it called a "brief" exposition of the "history and origins" of habeas corpus in England and the U.S.¹¹⁵ What the Court described as "brief" ultimately consisted of a twenty-six page treatment which constituted more than a third of the total volume of the majority opinion. Much of this focused on the extent to which the writ of habeas corpus had been applied in an extraterritorial manner. This was particularly relevant given the unique status of NSGB—a matter the Court had extensively explored in *Rasul*.

Despite its immersion in centuries worth of habeas jurisprudence, the Court repeatedly observed—if not conceded—that neither history nor the parties themselves provided any dispositive precedent.¹¹⁶ Inevitably

108. *Id.* at 737.

109. *Id.* at 738.

110. *Id.*

111. *Id.*

112. *Id.* at 737.

113. *Id.* at 739.

114. *Id.*

115. *Id.*

116. *See, e.g., id.* at 746 ("The Government argues the common-law writ ran only to those territories over which the Crown was sovereign. Petitioners argue that jurisdiction followed the King's officers. Diligent search by all parties reveals no certain conclusions."); *id.* at 748 ("We find the evidence as to the geographic scope of the writ at common law informative, but, again, not dispositive."); *id.* at 749 ("[W]e cannot disregard the possibility that the common law courts' refusal to issue the writ to these places was motivated not by formal legal constructs but by what we would think of as prudential concerns."); *id.* at 752 ("Each side in the present matter argues that the very lack of a precedent on point supports its position[;]" "[b]oth arguments are premised, however, upon the assumption that the historical record is complete and that the common law, if properly understood, yields a

returning to *Eisentrager*—which, lest it be forgotten, had held that aliens in U.S. custody outside the country could *not* resort to habeas corpus—the Court created a test comprised of three factors for determining when such persons *could* claim protection of the writ: “(1) [T]he 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.”¹¹⁷ When applied to the facts, the Court determined that each factor weighed heavily in favor of a conclusion that the petitioners should qualify to seek the writ.

Regarding the first, it was true that like the detainees in *Eisentrager*, none of the petitioners were U.S. citizens. Their status as combatants, however, was at issue, indeed a primary issue. The *Eisentrager* detainees had been tried and convicted for war crimes by military commissions through “a rigorous adversarial process to test [their status and] the legality of their detention.”¹¹⁸ The petitioners, on the other hand, had at best been subject to the “far more limited” CSRT process and continued to dispute the CSRT determinations that they were combatants.¹¹⁹

Under the second factor, the petitioners were akin to the *Eisentrager* defendants in that each had been captured in foreign countries. The *Eisentrager* defendants, however, were thereafter held in a U.S.-administered prison in occupied Germany whereas the petitioners were detained at NSGB. As it had done in *Rasul*, the Court determined that NSGB “[i]n every practical sense . . . is not abroad; it is within the constant jurisdiction of the United States.”¹²⁰

The singular status of NSGB also stood in favor of the petitioners for purposes of the third factor. The Court acknowledged that there might well be “incremental” monetary and other burdens imposed upon the Government through responding to habeas litigation, yet the “Government [had presented] no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims.”¹²¹ The Court then added: “[I]n light of the plenary control the United States asserts over the base, none are apparent to us.”¹²²

Having thus created and applied a new test, the Court proceeded to reach the unprecedented conclusion “that noncitizens detained by our Government in territory over which another country maintains *de jure*

definite answer to the questions before us. There are reasons to doubt both assumptions.”).

117. *Id.* at 766.

118. *Id.* at 767.

119. *Id.*

120. *Id.* at 769.

121. *Id.*

122. *Id.*

sovereignty have . . . rights under our Constitution.”¹²³ In doing so, the Court recognized that “the cases before [it lacked] any precise historical parallel.”¹²⁴ They instead involved persons subjected to executive detention for the duration of a conflict the end of which could not be reliably projected and who were “held in a territory that, while technically not part of the United States, [was] under the complete and total control of” the U.S. Government.¹²⁵ These conditions rendered “the lack of a precedent on point [to be] no barrier” to a holding which the Court put in these terms:

We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. 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. This Court may not impose a de facto suspension by abstaining from these controversies. The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.¹²⁶

The Court then proceeded to consider whether the denial of habeas corpus jurisdiction wrought by the MCA was still consistent with the Suspension Clause given the judicial review procedures of the DTA. In other words, the Court examined whether the process provided in § 1005(e)(2) of the DTA, permitting the U.S. Court of Appeals for the District of Columbia Circuit to review decisions of CSRTs, was an “adequate substitute” for habeas corpus procedures.¹²⁷

The Court once again allowed that it was addressing an issue for which there was limited precedent, with little known about the content and character of procedures which could serve in lieu of the collateral review which traditional habeas corpus contemplates.¹²⁸ The Court did address two cases, *United States v. Hayman*¹²⁹ and *Swain v. Pressley*,¹³⁰ wherein it had held that certain alternatives to traditional habeas corpus review were constitutional. *Hayman* involved a statute¹³¹ which permitted a federal prisoner to move the sentencing court to examine the constitutionality of

123. *Id.* at 770.

124. *Id.* at 770–71.

125. *Id.* at 771.

126. *Id.* (citations omitted).

127. *Id.* at 771–72.

128. *Id.* at 772.

129. 342 U.S. 205 (1952).

130. 430 U.S. 372 (1977).

131. 28 U.S.C. § 2255 (2018).

the prisoner's sentence in lieu of raising the issue collaterally before a separate district court via habeas corpus.¹³² *Swain* dealt with a statute¹³³ which provided for collateral review by the Superior Court of the District of Columbia of sentences imposed by judges of that court rather than relying on habeas corpus before the U.S. District Court for the District of Columbia.¹³⁴ Both statutes empowered the reviewing courts to find facts, decide jurisdictional issues, determine the lawfulness of sentences, and to make other appropriate conclusions of law.¹³⁵ Both benefited from saving clauses under which "a writ of habeas corpus would be available if the alternative process proved inadequate or ineffective."¹³⁶ The goal of both was to render collateral review more timely and efficient rather than constraining or limiting such review.¹³⁷

Hayman and *Swain* illustrated that Congress could provide for alternatives to habeas corpus that would pass constitutional muster, but they still failed to flesh out the details of a permissible substitute. Disavowing the intent to "offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus[.]" the Court returned to the history of habeas corpus jurisprudence and from it derived at least five required elements of an adequate substitute.

Stripped of redundancies, those elements included five important points. First, and as a base for all others, a petitioner must have "a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."¹³⁸ Second, petitioners must be allowed "to introduce exculpatory evidence that was either unknown or previously unavailable to the" petitioner.¹³⁹ Third, the reviewing court "must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain."¹⁴⁰ Fourth, the reviewing court "must have the means to correct errors that occurred" in underlying proceedings, i.e. those at CSRTs, including the "authority to assess the sufficiency of the Government's evidence against the detainee."¹⁴¹ Fifth, the reviewing court "must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release."¹⁴²

132. *Boumediene*, 553 U.S. at 774–75.

133. Then D.C. CODE ANN. § 23-110(g) (West 1973).

134. *Boumediene*, 553 U.S. at 775.

135. *Id.* at 776–77.

136. *Id.* at 776.

137. *Id.* at 775–76 (citations omitted).

138. *Id.* at 779 (citations omitted).

139. *Id.* at 780, 786 (citations omitted).

140. *Id.* at 783.

141. *Id.* at 786.

142. *Id.* at 787.

The Court then measured the authority of the Court of Appeals for the District of Columbia Circuit under the DTA against its newly created test for adequacy and found that authority was wanting. In lieu of explicit authority to order release of a detainee, the Court found that, at best, such authority could be implied.¹⁴³ The capacity of a petitioner to challenge the authority of the President to detain persons under the AUMF was likewise subject to implied authority.¹⁴⁴ The Court was willing to assume that the Court of Appeals could “review or correct the CSRT’s factual determinations” but could not “construe the DTA to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings.”¹⁴⁵

Troubled by the numerous instances where it would need “to read into the statute each of the necessary procedures we have identified” in order to conclude that the DTA review process equated to habeas corpus review, the Court “could not overlook the cumulative effect of [it] doing so.”¹⁴⁶ The Court concluded that if it were to “hold that the detainees at Guantanamo may, under the DTA, 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[,]” the Court would “come close to reinstating the § 2241 habeas corpus process Congress sought to deny them” via the DTA and the MCA.¹⁴⁷

Rather than do so, the Court held that “the DTA review process [was], on its face, an inadequate substitute for habeas corpus” and that “MCA § 7 thus effect[ed] an unconstitutional suspension of the writ.”¹⁴⁸ The doors of federal courts were thus again thrown open—*now as a matter of constitutional right*—to alien detainees held at NSGB to challenge their ongoing detention via petitions for habeas corpus.

Boumediene set forth a bottom line: Absent lawful suspension of the writ of habeas corpus, when the United States detains persons under the law of war, and holds them in a place akin to NSGB, they will have assured access to a federal courtroom via habeas corpus to contest the lawfulness of their detention. If there could be any doubt that U.S. citizens enjoy the same access, *Hamdi* removed it.

143. *Id.* at 788.

144. *Id.*

145. *Id.* at 788–89.

146. *Id.* at 792.

147. *Id.*

148. *Id.*

**IX. THE COURT'S DETENTION JURISPRUDENCE IN APPLICATION:
AL HELA V. TRUMP**

While the four Supreme Court decisions opened—and held open—the doors of the federal courts to detainees in order that they might receive “a meaningful opportunity to demonstrate that [they are] being held pursuant to ‘the erroneous application or interpretation’ of relevant law,”¹⁴⁹ the Court has since remained virtually silent on the matter. As the Court of Appeals for the District of Columbia observed in *Al Hela*: “After *Boumediene*, the lower courts took up the Supreme Court’s command to balance the right of detainees to ‘meaningful review’ of their habeas claims with the government’s ‘legitimate interest in protecting sources and methods of intelligence gathering,’ all while according ‘proper deference . . . to the political branches.’”¹⁵⁰ The Court “provided scant guidance on these questions, consciously leaving the contours of the substantive and procedural law of detention open for lower courts to shape in a common law fashion.”¹⁵¹ The Court of Appeals and the U.S. District Court for the District of Columbia did just that and “developed a substantial body of law under the Suspension Clause to govern habeas review for Guantanamo detainees [about which the] Supreme Court has declined further review.”¹⁵²

Much of the contours of that substance and procedure came to be reflected in case management orders issued by the judges of the U.S. District Court for the District of Columbia and “used in many Guantanamo habeas cases to manage discovery and to protect classified information from unwarranted disclosure.”¹⁵³ The orders which governed the litigation in *Al Hela* are representative.¹⁵⁴

The orders set out a detailed process by which *Al Hela*’s habeas petition would be reviewed, one which was designed to meet the requirements developed in both *Hamdi* and *Boumediene*.¹⁵⁵ The government was to file a return to the petition “containing the factual basis

149. *Id.* at 799.

150. *Al Hela v. Trump*, 972 F.3d 120, 146 (D.C. Cir. 2020) (citing *Boumediene*, 553 U.S. at 796).

151. *Id.* (citing *Al Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010)).

152. *Id.*

153. *Id.* at 128.

154. *See In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, 2008 WL 4858241 (D.D.C. Nov. 6, 2008), as amended, 2008 WL 5245890 (D.D.C. Dec. 16, 2008). *Al Hela*’s case, Civil Action Number 05-cv-1048, was one of many the orders addressed.

155. *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442, 2008 WL 4858241, at *1 (D.D.C. Nov. 6, 2008).

upon which it [was] detaining” Al Hela.¹⁵⁶ As to its legal basis, the government was to “file a succinct statement explaining its legal justification for detaining” Al Hela and, if it did so based on an allegation that Al Hela was “an enemy combatant, the government [was to] provide the definition of enemy combatant on which it relied.”¹⁵⁷ The government was also required to “file an unclassified version of [its] factual return[.]”¹⁵⁸ The government had to “disclose to [Al Hela] all reasonably available evidence in its possession that tend[ed] materially to undermine the information presented to support the government’s justification for [detention]” and had a continuing duty to disclose subsequently discovered exculpatory evidence.¹⁵⁹ The government was also required to certify “either that it ha[d] disclosed [all] exculpatory evidence or that it [did] not possess” such.¹⁶⁰ At Al Hela’s request, the government was obliged to “disclose to [him]: (1) any documents or objects in its possession that [were] referenced in the factual return; (2) all statements, in whatever form, made or adopted by [Al Hela] that relate[d] to the information contained in the factual return; and (3) information about the circumstances in which such statements . . . were made or adopted.”¹⁶¹ The district court judge could “for good cause, permit [Al Hela] to obtain [additional] limited discovery . . . by written motion [which was to] (1) be narrowly tailored, not open-ended; (2) specify the discovery sought; [and] (3) explain why the request, if granted, [was] likely to produce evidence that demonstrates that [Al Hela’s] detention [was] unlawful[.]”¹⁶²

Classified material was subject to special handling. “If any information to be disclosed to” Al Hela under the order was “classified, the government [was to] provide [Al Hela] with an adequate substitute and, unless granted an exception, provide [his] counsel with the classified information, provided the . . . counsel [was] cleared to access” it.¹⁶³ The government was to “move for an exception to disclosure” if it objected “to providing the petitioner’s counsel with the classified information.”¹⁶⁴

In response—and rebuttal—to the government’s return, Al Hela was to “file a traverse containing the relevant facts and evidence supporting [his] petition”¹⁶⁵ While the government would bear “the burden of proving by a preponderance of the evidence that [Al Hela’s] detention [was]

156. *Id.* at *2.

157. *Id.*

158. *Id.*

159. *Id.* at *2–3.

160. *Id.* at *3.

161. *Id.*

162. *Id.*

163. *Id.* at *4.

164. *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442, 2008 WL 5245890, at *3 (D.D.C. Dec. 16, 2008).

165. *In re Guantanamo Bay Detainee Litig.*, 2008 WL 4858241, at *4.

lawful,”¹⁶⁶ the District Court judge had discretion to “accord a rebuttable presumption of accuracy and authenticity to any evidence the government present[ed] as justification for the petitioner’s detention if the government establishe[d] that the presumption [was] necessary to alleviate an undue burden presented by the . . . habeas corpus proceeding.”¹⁶⁷ If moved by either party, the District Court judge could “admit and consider hearsay evidence that [was] material and relevant to the legality of [Al Hela’s] detention if the movant establishe[d] that the hearsay evidence [was] reliable and that the provision of non-hearsay evidence would unduly burden the movant or interfere with the government’s efforts to protect national security.”¹⁶⁸

After the traverse was filed, both parties were required to file initial “brief[s] in support of judgment on the record” as well as response briefs.¹⁶⁹ The court could allow oral argument.¹⁷⁰ In the event that there remained no “substantial issues of material fact[,]” the court could enter “final judgment based on the record” or, if such issues remained, Al Hela would be “entitled to an evidentiary hearing.”¹⁷¹

Al Hela’s habeas petition before the district court followed this procedure and included “a full hearing on the merits.”¹⁷² As to classified material, Al Hela “was permitted to view an unclassified summary of the factual return along with a limited number of excerpts from other documents.”¹⁷³ His “counsel was allowed to view most of the classified information in the factual return and supporting exhibits under a protective order.”¹⁷⁴ Lastly, “the government was permitted to withhold particularly sensitive classified information altogether by obtaining permission from the court after an ex parte, in camera review of the material.”¹⁷⁵ Al Hela sought, but was not granted, “personal access to the classified factual return given to his counsel” or access by his counsel to the “the government’s ex parte filings, which sought to exempt particularly sensitive classified material from disclosure.”¹⁷⁶ The district court denied Al Hela’s petition after finding he was not “entitled to release under the Due Process Clause,” that pursuant to its “ex parte, in camera review . . . the government’s intelligence reports were sufficiently reliable to support Al Hela’s detention despite containing anonymous, multi-layered hearsay[,]” and that “the

166. *Id.*

167. *Id.* at *5.

168. *Id.*

169. *Id.* at *5–6.

170. *Id.* at *6.

171. *Id.*

172. *Al Hela v. Trump*, 972 F.3d. 120, 128 (D.C. Cir. 2020).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

government put forward sufficient evidence to demonstrate Al Hela ‘substantially supported’ Al Qaeda and associated forces under the [relevant] AUMF detention standard.”¹⁷⁷

On appeal, Al Hela claimed that, as a matter of statutory law, “the President exceeded the scope of his AUMF authority,” that, as a matter of constitutional law, “his detention without trial violate[d] ‘substantive’ due process[.]” and that “the district court’s discovery and evidentiary rulings violated the procedural guarantees of the Suspension and Due Process Clauses.”¹⁷⁸

The Court of Appeals disposed of Al Hela’s statutory claim through a straightforward reliance upon provisions of the National Defense Authorization Act (NDAA) for Fiscal Year 2012.¹⁷⁹ As the court recognized, in passing the NDAA:

Congress reaffirmed that the AUMF permits the President to detain, ‘pending disposition under the law of war,’ any person ‘who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.’¹⁸⁰

The NDAA also permitted “the President [to] detain such persons ‘without trial until the end of the hostilities authorized by the [AUMF].”¹⁸¹ The court held that “the AUMF and the 2012 NDAA authorize[d] the President to detain individuals who ‘substantially supported’ enemy forces irrespective of whether they also directly supported those forces or participated in hostilities.”¹⁸² Using this standard, the court affirmed “the district court’s determination that the AUMF and the 2012 NDAA permit[ed] the President to detain Al Hela because he ‘substantially supported’ Al Qaeda and its associated forces.”¹⁸³

The court was also “satisfied the district court properly ensured Al Hela a ‘meaningful opportunity’ to challenge the basis for his detention on habeas review [as required under the Suspension Clause.]”¹⁸⁴ As to the hearsay nature of adverse intelligence reports, the court “identif[ied] no

177. *Id.* at 128–29.

178. *Id.* at 129.

179. Pub. L. No. 112-81, 125 Stat. 1298, 1562 (2011) [hereinafter 2012 NDAA].

180. *Al Hela*, 972 F.3d at 130 (citing 2012 NDAA §§ 1021(a) and (b)(2)).

181. *Id.* (citing 2012 NDAA § 1021(c)(1)).

182. *Id.* at 132.

183. *Id.* at 134–35.

184. *Id.* at 138.

clear error in the district court's thorough analysis of the intelligence reports" by which it determined that "the final intelligence reports [were] sufficiently reliable" via "[e]x parte, in camera review[.]"¹⁸⁵ The court acknowledged that Al Hela had not been provided direct, personal access to all of the classified information the government used against him, but that he was supplied with an "unclassified summary [which] provided Al Hela a 'broad overview of many (but not all) of the facts and allegations' against him."¹⁸⁶ Accordingly, the court held that "[t]he district court managed classified information in a manner consistent with our precedents on the requirements of habeas review."¹⁸⁷ Lastly, regarding Al Hela's assertion that "the district court violated the Suspension Clause by denying his cleared counsel access to certain sensitive classified information in the government's ex parte filings,"¹⁸⁸ the court observed that it was "well established that 'the government may withhold classified national security material consistent with its legitimate interest in protecting sources and methods of intelligence gathering.'"¹⁸⁹ Given that "Al Hela's cleared counsel had access to the government's factual return and supporting exhibits[.]" the court "affirm[ed] the district court's decision to allow the government's ex parte filings because such filings [were] within . . . precedents and Al Hela point[ed] to nothing in the record suggesting an abuse of discretion."¹⁹⁰

X. THE FUTURE: THE SPECTER AND PROSPECT OF FULL DUE PROCESS

A. Due Process and *Al Hela*

Al Hela is instructive of the "[m]ore than a decade of case law [which the Court of Appeals for the District of Columbia Circuit] has [developed to define] the procedures required to guarantee detainees the meaningful opportunity for habeas review required by the Suspension Clause while respecting national security prerogatives and the separation of powers."¹⁹¹ But the case is far more significant for what it suggests about the future "contours of the substantive and procedural law of detention[.]"¹⁹² For now, the case affirms that law of war detainees held outside the United States have neither substantive nor procedural due

185. *Id.* at 137.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* (citing *Obaydullah v. Obama*, 688 F.3d 784, 796 (D.C. Cir. 2012) (quoting *Boumediene v. Bush*, 553 U.S. 723, 796 (2008))).

190. *Id.*

191. *Id.* at 136.

192. *Id.* at 146.

process rights. But it signals loudly that such would not, and will not, be the case should such detainees be held within the borders.

In addition to contesting the lawfulness of his detention via the Suspension Clause, *Al Hela* raised issues under the Due Process Clause of the Fifth Amendment: he posited a “‘substantive’ [due process] challenge to his indefinite detention; and . . . several ‘procedural’ [due process] challenges to his habeas proceedings.”¹⁹³ The essence of the former was that “the Due Process Clause bar[red] indefinite detention without trial” and that “his continued deprivation of liberty [was] excessive and [was] therefore punitive.”¹⁹⁴ The latter centered on “three of the district court’s discovery and evidentiary rulings—the same three he challenge[d] under the Suspension Clause[.]”¹⁹⁵

With no little irony, the court founded its analysis of *Al Hela*’s substantive challenge largely upon *Eisentrager*, raising it as a shield rather than a sword, as the Supreme Court effectively did in both *Rasul* and *Boumediene*. It reminded us all that in *Eisentrager*, the Court had “held in no uncertain terms that the Fifth Amendment could not be interpreted to apply to aliens outside the territory of the United States”:¹⁹⁶

If the Fifth Amendment [was meant to confer] its rights on all the world . . . [s]uch extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.¹⁹⁷

The court further noted that the Supreme Court had “repeatedly affirmed *Eisentrager*’s holding as to the Fifth Amendment and its Due Process Clause.”¹⁹⁸ The Court of Appeals itself had similarly “consistently refused to extend extraterritorial application of the Due Process Clause.”¹⁹⁹ The court therefore declined to assess whether *Al Hela* “ha[d] articulated a cognizable due process right because longstanding precedent foreclose[d]

193. *Id.* at 138.

194. *Id.* at 140 (citations omitted).

195. *Id.* at 143.

196. *Id.* at 139 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950)).

197. *Id.* (quoting *Eisentrager*, 339 U.S. at 784–85).

198. *Id.* (citations omitted).

199. *Id.* at 139–40 (citations omitted).

any argument that ‘substantive’ due process extends to Guantanamo Bay.”²⁰⁰

Nor was the court persuaded by Al Hela’s arguments that *Boumediene* had “altered the longstanding rule barring extraterritorial application of the Due Process Clause.”²⁰¹ In the court’s view, the holding in *Boumediene* clearly did not extend beyond the Suspension Clause: It recognized only that the “‘Privilege of the Writ of Habeas Corpus’ is a ‘procedural protection’ for challenging unlawful detention but does not include substantive rights.”²⁰²

With regard to his procedural claims, Al Hela seized on *Qassim v. Trump*,²⁰³ in which the Court of Appeals “noted for the first time that whether the constitutional procedural protections applicable to habeas review derive from ‘the Fifth Amendment’s Due Process Clause, the Suspension Clause, both, or elsewhere’ is an ‘open and unresolved’ question.”²⁰⁴ Having declined to resolve the question in that case, the court chose to do so in *Al Hela*.

As it had with Al Hela’s substantive challenge, the court again resorted to *Eisentrager*. The court acknowledged that none of its decisions, nor any of the Supreme Court’s, had “set forth the particular procedural due process standards that would apply to aliens detained abroad.”²⁰⁵ Yet it also recognized that “*Eisentrager* made no distinction between ‘substantive’ and ‘procedural’ due process, nor between the Due Process Clause and other provisions of the Fifth Amendment.”²⁰⁶ It could find nothing in the Supreme Court’s “more recent decisions [which had] relied upon *Eisentrager*” which “distinguish[ed] between substance and procedure.”²⁰⁷ Nor had its own circuit ever varied from citing “*Eisentrager* for the proposition that procedural due process protections are unavailable to aliens and organizations without property or presence in the United States.”²⁰⁸ Outside the context of the question being suggested and left unanswered in *Qassim*, “neither the Supreme Court nor [the Court of Appeals had] recognized or suggested any grounds for a legal distinction between the extraterritorial application of ‘substantive’ and ‘procedural’ due process rights.”²⁰⁹ The Court’s ultimate answer to the question was definitive:

200. *Id.* at 140 (citations omitted).

201. *Id.*

202. *Id.* at 141 (citing *Boumediene v. Bush*, 553 U.S. 723, 798 (2008)).

203. 927 F.3d 522 (D.C. Cir. 2019).

204. *Al Hela*, 972 F.3d at 143 (quoting *Qassim v. Trump*, 927 F.3d 522, 530 (D.C. Cir. 2019)).

205. *Id.* at 144.

206. *Id.* at 148.

207. *Id.* (citations omitted).

208. *Id.* at 148–49 (citations omitted).

209. *Id.* at 149.

Under longstanding precedents of this court and the Supreme Court, the Due Process Clause cannot be invoked by Guantanamo detainees, whether those due process rights are labeled “substantive” or “procedural.” The Suspension Clause provides all the process to which Al Hela is entitled. Thus, we reject Al Hela’s due process claims on the threshold determination that, as an alien detained outside the sovereign territory of the United States, he may not invoke the protection of the Due Process Clause.²¹⁰

But for all its efforts to breathe life back into *Eisentrager*, and to reinforce its clear boundaries, the *Al Hela* court left what may prove to be an irresistible invitation to future detainees. On one hand, the court foreclosed Fifth Amendment due process to alien detainees with neither “property [nor] presence in the sovereign territory of the United States.”²¹¹ On the other hand, it reminded every reader that “[t]he Due Process Clause of the Fifth Amendment provides ‘[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.’ The Amendment’s protections apply to all ‘person[s]’ within the United States, *citizens and noncitizens alike*.”²¹²

The sum of *Rasul*, *Hamdi*, *Hamdan*, *Boumediene*, and the cases which have applied them, is clear: not only will the Supreme Court’s detainee Suspension Clause jurisprudence readily run from Guantanamo and apply to detainees held *within* the U.S., but the judicial review it contemplates will, of necessity, extend to Fifth Amendment due process issues.

B. The Potential Challenge of Due Process Related Litigation

Operations at NSGB have generated a high volume of litigation in relation to its population. A total of approximately 780 detainees have been held there since 2002.²¹³ The Court of Appeals for the District of Columbia Circuit alone has decided “dozens of . . . cases” brought by Guantanamo detainees.²¹⁴ There is little reason to assume that, should future detention operations be conducted within the United States, detainees held here would prove any less litigious. The volume of potential litigation could prove daunting.

210. *Id.* at 150.

211. *Id.* at 127.

212. *Id.* at 138 (citing *Mathews v. Diaz*, 426 U.S. 67, 77–80 (1976)) (emphasis added).

213. *Guantanamo by the Numbers*, HUM. RTS. FIRST (Oct. 10, 2018), <https://www.humanrightsfirst.org/resource/guantanamo-numbers> [<https://perma.cc/3PPX-F43X>].

214. *Al Hela*, 972 F.3d at 149.

Since World War II, the United States has limited its prisoner of war operations to overseas locations. During the Korean War, the United States held over 160,000 Prisoners of War (“POWs”) in camps within South Korea.²¹⁵ The United States did not regularly maintain POWs during the war in Vietnam but instead delivered captured personnel into the custody of the Republic of Vietnam.²¹⁶ In Iraq, however, the United States once again engaged in large scale detention operations, holding a peak population in U.S. facilities within Iraq of approximately 25,000 in October of 2007.²¹⁷ Such locations would not be in reach of the Suspension Clause.²¹⁸

In contrast, during World War II, the United States confined over 400,000 POWs from Germany alone within the United States in 500 camps distributed among all but three states.²¹⁹ It may be tempting to assume that the nation will never again be confronted with the need to house such numbers, or any number, of POWs within the country, but circumstances could dictate otherwise. As a signatory to the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), the United States is obliged to ensure that “[n]o prisoner of war . . . at any time be sent to or detained in areas where he may be exposed to the fire of [a] combat zone[.]”²²⁰ In the ever evolving environment of modern military operations, including advances in ordnance and delivery systems, the United States may not be able to meet the mandate of the Convention without resort to holding POWs within the United States. Additionally, the U.S. may lack access to alternate protected places or lack cooperative, able allies willing to host U.S. POW operations in other countries.

Just as the NSGB detainees before them, future POWs held in the United States could choose to challenge the lawfulness of their detention. The NSGB detainees contested whether they were, and hence could be held as, enemy combatants.²²¹ Having been designated as such was at the heart of their standing to bring the actions they did. More “conventional” detainees would be similarly situated. Under the GPW, “[m]embers of the

215. CHERYL BENARD ET AL., RAND NAT’L DEF. INST., THE BATTLE BEHIND THE WIRE: U.S. PRISONER AND DETAINEE OPERATIONS FROM WORLD WAR II TO IRAQ 31 (2011).

216. *Id.* at 33.

217. *Id.* at 67.

218. *See, e.g.*, *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010) (holding that the Suspension Clause did not apply to alien detainees held by the U.S. in Afghanistan).

219. BENARD, *supra* note 215, at 6.

220. Geneva Convention Relative to the Treatment of Prisoners of War, art. 23, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

221. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 732 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 570 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004); *Rasul v. Bush*, 542 U.S. 466, 472 (2004).

armed forces of a Party to the conflict . . . members of militias or volunteer corps . . . members of . . . organized resistance movements . . . [and] [p]ersons who accompany the armed forces without actually being members thereof “ all are considered POWs once they “have fallen into the power of the enemy.”²²² So long as the United States considers and treats such persons as POWs, by default, they would have standing akin to that of the NSGB detainees. Every one of them would be a potential litigant.

C. A Means to Meet the Challenge

The defense establishment should be prepared to meet the prospect of broadly contested detentions. Despite the unhappy history of CSRTs, Justice O’Connor’s observation from *Hamdi* still stands: the possibility remains that “appropriately authorized and properly constituted” military tribunals could carry the bulk of the work in reviewing challenged detentions.²²³ They should be designed in light of the Supreme Court’s detainee jurisprudence as to the content of meaningful reviews, particularly the five elements identified in *Boumediene*. While it is difficult to forecast whether such reviews would be construed as adequate substitutes for habeas corpus, they could, if their processes were robust enough, appropriately influence the scale of that review, for “the necessary scope of habeas review in part depends upon the rigor of any earlier proceeding[‘s] . . . procedural adequacy[.]”²²⁴ A sufficiently rigorous administrative review process could protect, in material degree, the interests secured by both the Suspension and Due Process clauses and help avoid the legal bog that came to characterize NSGB detention litigation. A little remembered, never utilized, and long repealed relic of the Cold War, may be an effective model for such reviews.

222. GPW, *supra* note 220, art. 4. Article 5 of the GPW addresses instances where the status of a person may be in question: “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” GPW, art. 5.

For the United States, the process for such tribunals is set forth in U.S. Dep’t of Army, Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, paras. 1–6 (Oct. 1, 1997) [hereinafter AR 190-8]. While the process is compliant with the GPW, it is otherwise remarkably similar to the CSRT procedures created in July 2004, *supra* note 64, which the Court examined in *Boumediene*. Article 5 tribunals, however, are primarily designed to determine if a person *lacks* a requisite status whereas CSRTs were designed to determine whether persons *had* the status of enemy combatants. *See* AR 190-8.

223. *Hamdi*, 542 U.S. at 538.

224. *Boumediene*, 553 U.S. at 781.

XI. A POTENTIAL MODEL: THE EMERGENCY DETENTION ACT OF 1950²²⁵

In September 1950, Congress passed the Emergency Detention Act (EDA), wherein it authorized preventive detention by the Executive Branch under defined conditions. In setting forth its findings and purpose, Congress declared the existence of an international communist movement bent on establishing a “Communist totalitarian dictatorship in all the countries of the world[.]”²²⁶ Congress found that, during a “time of internal security emergency[.]” the “detention of persons who there is reasonable ground to believe probably will commit or conspire with others to commit espionage or sabotage is . . . essential to the . . . defense . . . of the United States.”²²⁷ Neither blind nor deaf to due process concerns, Congress also found that it was “essential that such detention[s] . . . be so authorized, executed, restricted and reviewed as to prevent any interference with . . . constitutional rights and privileges[.]”²²⁸ Congress therefore built a number of procedural safeguards into the process.

Under the EDA, the Attorney General would initiate detention by issuing a written warrant for apprehension based on probable cause to believe that a particular person probably would engage in, or would probably conspire to engage in, either espionage or sabotage.²²⁹ In issuing the warrant, the Attorney General was also to apply for an order that the person be detained for “the duration of [the] emergency.”²³⁰

Those apprehended were entitled to appear before an administrative hearing officer, normally within forty-eight hours.²³¹ The hearing officer was to inform the person of the basis for detention, the right to counsel, the right to a preliminary examination, the right to silence, and that any statement the person chose to make could be used against the person. If the person elected a preliminary hearing, the person was to be given a reasonable time and opportunity to consult counsel, and the hearing was to be conducted within a reasonable time.²³² The person could introduce

225. Emergency Detention Act of 1950, Title II, Internal Security Act of 1950, Pub. L. 81-831, 64 Stat. 1019 (1950) [hereinafter the Emergency Detention Act or EDA]. While it was in force, the EDA was encoded as 50 U.S.C. §§ 811–26. The EDA was repealed by an act to amend title 18 of the United States Code, to prohibit the establishment of detention camps, and for other purposes. Pub. L. 92-128, 85 Stat. 347-348 (1971).

226. EDA § 101(1).

227. *Id.* § 101(14).

228. *Id.* § 101(15).

229. *Id.* § 104(a)(1). The Attorney General was authorized to designate other officers of the Department of Justice to perform the same duties. *See id.* § 104(a).

230. *Id.* § 104(a)(2).

231. *Id.* § 104(d).

232. *Id.*

evidence at the hearing and cross examine witnesses with provision that the Attorney General was not obliged to disclose information if disclosure would be “dangerous to national safety and security.”²³³

If, after considering all the evidence, and any “objections made by such person to his detention[.]”²³⁴ the hearing officer found that there was probable cause to support detention, the officer was to order detention, provide the person a copy of the detention order, and inform the person of the right to request review by a Detention Review Board.²³⁵ The hearing officer could also order detention without a hearing if the detainee waived the hearing.²³⁶

The Detention Review Board was to be constituted by the President and it was to include nine members who could sit in three-member panels.²³⁷ The Board’s principal mission was to consider petitions from detainees who sought review of detention orders issued by hearing officers. The Board was to apply the same standard of proof which prevailed at the preliminary hearing level: reasonable grounds to believe that the detainee would probably conspire to, or commit espionage or sabotage.²³⁸ The Board was authorized “to issue orders confirming, modifying, or revoking” detention orders.²³⁹

In essence, Board hearings were *de novo* determinations of grounds for detention. The Attorney General was to disclose to the detainee all evidence believed to justify detention, except that which the Attorney General believed would pose risks to national security if it were released.²⁴⁰ The Board had independent power to subpoena witnesses and require the production of evidence.²⁴¹ Detainees were entitled to be represented by counsel at Board hearings and had the right to testify, to compel witnesses to appear, and to cross-examine witnesses.²⁴² If the Board found grounds for detention, it was obliged to enter formal findings of fact and serve them on the detainee with “an order dismissing the petition and confirming the order of detention.”²⁴³

Within sixty days of the issuance of the Board’s order, the detainee could petition a U.S. Court of Appeals to conduct a judicial review of the

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* §§ 105(a), (b).

238. *Id.* §§ 109(a)(1), (2).

239. *Id.* § 109(a)(3).

240. *Id.* § 109(c).

241. *Id.* § 109(d).

242. *Id.* § 109(f).

243. *Id.* § 110(c).

detention.²⁴⁴ The Board was obliged to provide the court with “a duly certified transcript of the entire [Board] proceedings . . . including all evidence upon which the order . . . was entered [and] the findings and order of the Board.”²⁴⁵ A petitioner could introduce new evidence before the court upon a showing that it was “material and that there were reasonable grounds for the failure to” introduce it at the Board hearing.²⁴⁶ The Board’s factual findings, however, were conclusive if they were “supported by reliable, substantial, and probative evidence[.]”²⁴⁷ The court of appeals’ jurisdiction was exclusive.²⁴⁸ It had power to “affirm, modify, or set aside” a Board order. Its “judgment and decree [were] final [though] subject to review by the Supreme Court of the United States upon writ of certiorari or [appropriate] certification.”²⁴⁹

Finally, Congress recognized that persons detained pursuant to the Act could seek independent judicial review via habeas corpus.²⁵⁰ It also provided that “[n]othing contained in [the Act] shall be construed to suspend or to authorize the suspension of the privilege of the writ of habeas corpus.”²⁵¹

XII. A PROPOSED DETENTION REVIEW STRUCTURE

If the U.S. Defense establishment were to adopt the EDA as a template, a responsive detention review process could include the following features.

Capture on the battlefield, followed by military doctrinal processing of the detainee, would be equivalent to the issuance of a warrant by the Attorney General. If, following arrival in a permanent detention facility in the United States, a detainee sought to contest his or her presumptive GPW status, the detainee would be informed in writing of the right to a hearing before an administrative officer.

A hearing before a judge advocate (a military attorney) would be the equivalent of the EDA administrative hearing. This could incorporate all of the procedures of CSRTs as they were first promulgated, with several

244. *Id.* §§ 111(a), (c). The appropriate court was that for the Circuit “wherein the petitioner [was] detained or reside[d].” *Id.* § 111(c).

245. *Id.* § 111(c).

246. *Id.* § 111(d). In such an event, the Board was to be given the opportunity to consider the new evidence and modify its findings or make new findings.

247. *Id.* § 111(c).

248. *Id.* § 111(d).

249. *Id.*

250. *Id.* § 103(b)(4) recognized that release from detention could occur upon the issuance of “a final order of release by a United States court, after review of the action of the Board of Detention Review, *or* upon a writ of habeas corpus.” (emphasis added).

251. *Id.* § 116.

notable exceptions. The hearing officer would be a single judge advocate. The detainee would have the right to appointed counsel (again a judge advocate). The commander exercising General Courts-Martial Convening over the detention facility would serve as the appointing authority, supported by his or her Staff Judge Advocate. The appointing authority would be empowered to direct the release and repatriation of any detainee whose continued detention was determined not to be consistent with the GPW. Should continued detention be directed, the detainee would have the right to review by an independent board.

The most essential element of an improved process would be the employment of a board akin to the EDA Detention Review Board. It should possess the same authorities and perform the same basic roles that the EDA chartered for that board—all of which notably and closely align with the five *Boumediene* elements—though it should also be expressly authorized “to conduct a meaningful review of both the cause for detention and the Executive’s power to detain.”²⁵² Detainees should enjoy the same rights as they would have had before the EDA board, though evidentiary and discovery practices could closely emulate those developed in the NSGB cases by the District Court for the District of Columbia and repeatedly approved by the Court of Appeals. The precise size and structure of the board would depend on the perceived volume of its work.

Consistent with the EDA model, detainees could petition for direct judicial review, for which exclusive jurisdiction could be vested in the United States Court of Appeals for the District of Columbia Circuit. Its roles and authorities would parallel those specified for Courts of Appeals in the EDA. The same provisions for review by the Supreme Court and collateral review via habeas corpus could be included.

While the structure contemplates a role for judicial review, if the underlying procedures—particularly at the review board level—were robust enough, there could be substantial room for judicial deference, perhaps even for judicial acknowledgement that board review would adequately substitute for habeas corpus. Indeed, had the United States implemented such a model for Guantanamo Bay in the early phases of detention operations there, it might have been considered an adequate substitute for habeas review and a means for the Supreme Court to avoid constitutionalizing the matter as it ultimately did in *Boumediene*.

CONCLUSION

America's ongoing “generational” war against terror has forever altered essential elements of the legal landscape regarding detention under the law of war. The ill-starred history of detentions at Guantanamo Bay now includes Supreme Court jurisprudence which firmly establishes a right

252. *Boumediene v. Bush*, 553 U.S. 723, 783 (2008).

to judicial review for persons who find themselves detained in such a place. That jurisprudence emerged through a remarkable interplay—a clash—of the three branches of our government, a government waging a war: a President sought to moot it, Congress sought to truncate it, and the Supreme Court, by resort to the founding document, gave it some definitive ends.

Those ends, however, may be but a beginning. They portend a future where other detainees, perhaps large numbers of them, should they be brought to the United States, might very well seek to litigate their detention. There is now a wide door open to that prospect. Whether as a consequence of legitimate concerns over the lawfulness of their detention, or in pursuit of a calculated strategy of “lawfare”²⁵³ to vex the nation and tax its resources, we would be well advised to be prepared to meet the challenge with a viable, scalable solution. We cannot cap Pandora’s jar, but we can respond to what she has lost.

The proposals found here may help serve those needs.

253. “Lawfare refers . . . to the use of law as a weapon of conflict[.]” *About Lawfare: A Brief History of the Term and the Site*, LAWFARE, <https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site> [<https://perma.cc/6VRL-F4K6>] (last visited Aug. 1, 2021).