

**GUANTÁNAMO AND THE STRUGGLE FOR DUE PROCESS OF
LAW**

*By Gary Thompson**

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I. INTRODUCTION

Zain wears an orange jump suit, his ankles shackled to the floor, his black hair and beard tangled. Three of us—my partner, Doug, our translator, Tariq, and I—sit with Zain in a small internal room measuring only about seven feet square. We are deep inside one of the prisons at Guantánamo Bay Naval Base, Cuba (“GTMO”).

The room is empty except for us, a table, our chairs, and a camera mounted on the wall in the corner. We have spent a long day talking about Zain’s history and legal case. Zain smiles and tells us some funny stories before bursting into song. In clear notes, he sings a poem he has written heralding the Islamic holiday of *Eid*. His smile is broad, and joy rings through the verses.

We sit in wonder at the unbreakable spirit of this young man who, at age thirteen, fled Tajikistan with his family during a time of violent civil war brought on by the power vacuum left behind by the collapse of the Soviet Union. The family was relocated to a United Nations refugee camp in Afghanistan. At age seventeen, Zain moved to Pakistan to study there and later returned to the camp to find his

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family had left. He found work in Afghanistan and survived during the dangerous times that existed as the Taliban rose to absolute power. In 2003, as Zain picked up farm supplies in town, he was arrested by American forces, black-hooded, mistreated under their custody, and shipped off like animal cargo—his eyes blinded and ears muffled—to the harsh conditions of GTMO.

By the time of my first visit to GTMO in 2007, Zain had been held there for almost five years, getting by on his wits and optimism. He was released back to his family in Tajikistan in 2009, long after it had become painfully evident that his was a case of mistaken identity—he was not the person that the government thought it had apprehended. After seven years of detention—the government realized it had the wrong guy. No formal admissions or apologies were made; instead, Zain was just quietly released and became one of GTMO's *hundreds* of long-forgotten mistakes.¹

I am struck by how many of those who represent detainees describe their clients' legal situation in the same jargon: Kafkaesque, Orwellian, Monty Python, Zoolander, Alice-in-Wonderland, Kangaroo Court. Not much makes sense at GTMO or about GTMO habeas corpus litigation.

I am humbled to be part of this highly experienced and reputable group of "habeas counsel"—lawyers and paralegals who have stepped forward to defend the detainees pro bono and at great expense, including the cost of travel and interpreters. Many counsel began representing GTMO detainees in 2006 (some became involved even earlier) after a federal court first ruled that the detainees were entitled to have access to counsel, the first hurdle that had to be cleared.² Among these lawyers were my colleagues Doug Spaulding (a retired U.S. Marine), Bernie Casey (a former U.S. Army JAG officer), and Allison Lefrak. They, like many others, responded to a call for help put out by the leadership of the Center for Constitutional Rights in New York City.³

1. See Scott Shane & Benjamin Weiser, *Judging Detainees' Risk, Often with Flawed Evidence*, N.Y. TIMES, Apr. 25, 2011, at A1 (discussing Afghan farmer detained at GTMO based on mistaken identity and noting that "[f]or every case of . . . someone wrongly judged a minimal threat—there are several instances in which prisoners rated 'high risk' were released and have not engaged in wrongdoing"); *Guantánamo by the Numbers*, CTR. FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/files/5.23.11_Guantanamo%20by%20the%20Numbers.pdf (last visited Aug. 26, 2011) (providing statistics regarding number of detainees held under questionable circumstances).

2. See *Adem v. Bush*, No. 05-723, 2006 WL 1193853, at *8 (D.D.C. Apr. 28, 1996) (rejecting Bush administration's attempt to deprive detainee of access to counsel).

3. See *Illegal Detentions and Guantanamo: What You Should Know & Do About Guantánamo*, CTR. FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/illegal-detentions-and-guantanamo> (last visited Aug. 26, 2011) ("CCR has been responsible for organizing and coordinating more than 500 pro bono lawyers across the country in order to represent the men at Guantanamo, ensuring that nearly all have the option of

These counsel were dismayed by the government's disregard of the fundamental principles of the American rule of law by refusing to allow for the writ of habeas corpus and by abandoning basic Geneva Convention human rights principles. We negotiated the labyrinth of legal issues involving the GTMO detainees: efforts to keep the writ available so that detainees could proceed in federal court in Washington D.C.; decisions regarding how to press forward in federal court prior to the U.S. Supreme Court case that firmly addressed the habeas jurisdiction issue;⁴ attempts to navigate the hollow administrative procedures then available (and since abandoned) in lieu of habeas corpus; and endeavors to manage the constant swirl of legal briefing and news in one hundred detainee cases with interrelated or overlapping issues.

II. PROTECTING THE GREAT WRIT

At its core, the "Great Writ" of habeas corpus is the simple rule that an independent judge has the power to decide whether the government can detain an individual.⁵ In 1215, the ancient concept was given greater vitality on the field at Runnymede in England, when King John signed the Magna Carta and begrudgingly accepted that a king's decision to detain an individual would be subject to "lawful judgment of his peers [and] the law of the land."⁶ This was the very birth of the "separation of powers" that almost six centuries later would become fundamental to the U.S. Constitution, with all of its checks and balances between three co-equal branches.⁷ The writ of habeas corpus itself was enshrined into the Constitution and subject to suspension only in times of war, rebellion, or insurrection.⁸ President Abraham Lincoln briefly suspended the writ during a time of obvious rebellion, the American Civil War.⁹ More than 140 years later, President George W. Bush effectively suspended the writ indefinitely for the hundreds of men who had been shipped to GTMO,¹⁰ purporting to take back what King John gave up at Runnymede—the total, unquestionable power to detain a human being without oversight or evaluation by anyone.

The President's literal proposition was that he would have sole power, with no oversight by an independent court or political body, to

legal representation.”).

4. *Boumediene v. Bush*, 553 U.S. 723, 732 (2008) (holding that GTMO detainees are entitled to challenge detention pursuant to writ of habeas corpus).

5. BLACK'S LAW DICTIONARY 778 (9th ed. 2009).

6. See MAGNA CARTA, ch. 39; see *Boumediene*, 553 U.S. at 740.

7. See U.S. CONST. arts. I-III; see *Boumediene*, 553 U.S. at 742.

8. U.S. CONST. art. I, § 9, cl. 2.

9. Proclamation No. 7, 13 Stat. 734 (1863).

10. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. §§ 948-49 (2006)).

detain at GTMO any person from any place in the world, treat that person any way whatsoever, and hold that person indefinitely without any due process of law.¹¹ GTMO would be a legal black hole—the President, by classifying a person as an “enemy combatant” under some self-defined standard, could render the justification for any particular detention irrelevant since the detention itself could not be independently questioned.¹² This decision would occur within one branch of government, subject to a chain of command from the king down to the prison guard. In the GTMO world, no recourse, no appeal, and no questions would be allowed.¹³

The initial goal of the habeas lawyers was to obtain recourse for their clients by securing independent court review of detention.¹⁴ While GTMO lawyers have their critics,¹⁵ most people understand the obvious difference between (a) the allegations against a detainee and (b) the principle that a detainee should be treated humanely and receive some due process of law. Defending the accused is not synonymous with supporting the accused; the idea is to obtain a fair trial. If a detainee held under humane conditions, in fact, is convicted pursuant to sufficient due process of law, *then the punishment is just*.¹⁶ But without due process of law, no punishment can be just;¹⁷ indeed, “[t]he Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the ‘cry of horror’ against man’s inhumanity to his fellow man.”¹⁸

For most of the detainees sent into the no man’s land of GTMO, no charges were brought, and no indictments were issued.¹⁹ Before

11. *See id.* (placing unlawful enemy combatants outside the jurisdiction of military commissions and placing determination of “enemy combatant” status under the authority of Department of Defense-created tribunals).

12. *See Boumediene*, 553 U.S. at 736 (explaining that Military Commissions Act of 2006, if found valid by the Court, would bar federal courts from hearing habeas corpus actions on behalf of “enemy combatants”).

13. *See* 10 U.S.C. §§ 948-49.

14. *See Boumediene*, 553 U.S. at 739.

15. Neil A. Lewis, *Official Attacks Top Law Firms over Detainees*, N.Y. TIMES, Jan. 13, 2007, at A1 (discussing public comments by Pentagon official who criticized law firms for representing GTMO detainees).

16. In my own view, the scope of permissible punishment could even include execution for crimes that warrant it.

17. *See* U.S. CONST. amend. V; *see also, e.g.*, *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (the components of procedural due process reflect “principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”); *Robinson v. California*, 370 U.S. 660 (1962) (incorporating the Eighth Amendment against the states).

18. *Robinson*, 370 U.S. at 676 (Douglas, J., concurring).

19. *See End Indefinite Detention at Guantanamo*, AMNESTY INT’L USA, <http://www.amnestyusa.org/our-work/cases/usa-shaker-aamer> (last visited Aug. 26, 2011).

the U.S. Supreme Court restored it (three times),²⁰ there was no habeas corpus or other review by an independent court or authority.²¹ Instead, there were only chain-of-command military tribunals that were charged with finding each detainee to be an “enemy combatant.”²² In fact, some cases were remanded two or three times before the Combatant Status Review Tribunals (“CSRT”) reached the “right” conclusion.²³ Furthermore, these CSRTs were allowed to consider evidence obtained by coerced interrogation and the most absurd forms of multiple-hearsay, such as a person’s summary of another person’s notes of yet another person’s notes of detainee statements allegedly made during an unrecorded interrogation session.²⁴ The detainees were not allowed to see or respond to charges contained in secret classified submissions to the CSRT.²⁵ And they had no access to lawyers who could assist them in the CSRT process.²⁶

Some argue that detention of non-U.S. citizens at GTMO may be justified only if the detainees receive the full panoply of due process rights afforded to U.S. criminal defendants, like the right to a trial in which conviction requires guilt beyond a reasonable doubt.²⁷ However, this is neither the prevailing view nor my personal opinion.²⁸ But at the other extreme is a much greater mistake—*no due process at all*. The proper answer is somewhere in between—if not a traditional military tribunal process, then at least a court procedure that comports with some minimal level of due process.

20. *Boumediene*, 553 U.S. at 771; *Hamdan v. Rumsfeld*, 548 U.S. 557, 585 (2006); *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

21. *See Hamdan*, 548 U.S. at 572-74 (2006) (discussing Detainee Treatment Act of 2005, which generally bars habeas corpus review on behalf of detainees).

22. Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

23. Andrea J. Prasow, *The Bagram Detainee Review Boards: Better, But Still Falling Short*, JURIST (June 1, 2010), <http://jurist.org/forum/2010/06/bagram-detainee-review-boards-show-improvement-but-still-fall-short.php>.

24. *See* Memorandum from Paul Wolfowitz, U.S. Deputy Sec’y of Def., to the U.S. Sec’y of the Navy, Order Establishing Combatant Status Review Tribunal para. (9) (July 7, 2004) [hereinafter Order Establishing CSRT] (“[T]he Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it.”).

25. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 472 (D.D.C. 2005).

26. *See id.*

27. *See, e.g.*, Jess Bravin, *New Rift Opens over Rights of Detainees*, WALL ST. J., June 29, 2009, at A1 (alterations in original) (quoting Navy Captain John F. Murphy, the Obama administration’s chief military prosecutor saying that “[t]here is a school of thought . . . that if they actually convene these things in the [U.S.], the courts will quickly find that all the due process constitutional stuff we deal with in criminal courts will be applicable.”).

28. *See id.* (noting that official majority opinion favors reduced due process rights for GTMO detainees).

While debate continues as to what and how much due process should be provided, the remaining GTMO detainees sit in their tenth year of detention under maximum-security prison conditions.²⁹ Indeed, this has now become the problem—the courts keep changing the legal standard for detention, the government keeps changing the due process that will be observed, and Congress keeps changing the political pressures surrounding the issue. Meanwhile, years have passed, and the detainees, in effect, have become convicted criminals serving ten-year (and counting) sentences under harsh conditions.

III. VISITING GTMO

Before I actually travelled to GTMO to visit clients, I had plenty of opinions about the situation. However, GTMO changed me in a way I was not prepared for. The experience of seeing and speaking with our clients face to face made me view them as individuals, each with a story and personality. This aspect seems obvious to note, but it is one thing to ask whether “those detainees” should be there, and quite another to ask whether Zain, the guy with the funny stories, should be there.

The GTMO experience is accurately described in books like *Eight O’Clock Ferry to the Windward Side* by Clive Stafford Smith.³⁰ First, one flies to Fort Lauderdale, Florida, and finds the small aircraft terminal, where there is a desk for “Air Sunshine.” On my first journey, our small propeller plane held about twelve passengers. Every aspect of the plane was rickety, and the flight was long and rough, with engines ear-piercingly loud. During another small-aircraft flight, the pilot announced that we needed fuel and searched in the pitch dark for the runway on the island of Little Exuma, Bahamas. Due to restrictions over Cuban airspace, the four-hour flight took a long, circuitous route over the Bahamas, between Cuba and Haiti, and then arced around the south side of Cuba toward the base.

Approaching by plane in daytime, a passenger is struck by the jagged coastline, with few beaches sloping down from hills. One can see the GTMO perimeter fence of barbed wire, fronted by a strip of land and lined with guard towers. The leeward side of the base contains the airport and little else. There are random abandoned structures, like an empty swimming pool and some crumbling houses, along with other surreal touches. It is a step back in time.

The lawyers and interpreters stay at the Combined Bachelor’s Quarters (“CBQ”), located at the farthest end of the leeward side. The

29. See *id.* (noting that almost half of the remaining detainees “could be held indefinitely without trial”).

30. See generally CLIVE STAFFORD SMITH, *EIGHT O’CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE IN GUANTÁNAMO BAY* (2007).

CBQ is modest and sleepy and, given the small beach nearby, almost provides the feel of a vacation. But the difficult work begins the morning after arrival when an old school bus travels down to the morning ferry across the wide bay to the windward side, which houses the prisons and most of GTMO.

On the windward side, guards accompany counsel through a series of procedural steps, including stops to eat breakfast at the GTMO McDonalds, to confirm papers, and to obtain identification badges before heading off to the prisons. The client interviews are held in small rooms, some inside the prisons and some inside small wood cabins, where window air conditioning units battle the stifling outdoor heat. Iguanas lounge around outside. The prisoners' feet are chained to the floor. As any habeas counsel will confirm, the interpreters play an important role and are admired by the lawyers. Interviews last most of the day, with a lunch break included. All notes must be turned over to an independent privilege review team.

The ferry back to the leeward side usually leaves time for an evening run or swim before the habeas crowd gathers for a cookout and discussion. During one visit, we ended up trapped for nearly a week by hurricane weather. But whatever the conditions, everyone's goal is simple—gather information and prepare for a habeas trial.

IV. FROM HABEAS JURISDICTION TO ACTUAL HEARINGS

It took about six years just to proceed from the first detentions to the first actual habeas corpus trials.³¹ From about 2002 to 2004, the government would neither confirm the identities of detainees, known only by their "internment serial number" ("ISN"), nor permit them to have counsel.³² Thus, habeas petitions could be filed in only the few cases where identities were known. However, a leak of all the detainees' names in early 2005 led to petitions being filed by or on behalf of most of those held at GTMO.³³ This resulted in extensive preliminary litigation regarding whether the federal court had jurisdiction to hear detainee petitions, the applicability of various statutes, and the appropriate procedures to be used in habeas cases.³⁴ These cases took years to process, all while detainees sat in GTMO without charges.³⁵

In June 2004, the Supreme Court answered the threshold

31. See William Glaberson, *Judge Opens First Habeas Corpus Hearing on Guantanamo Detainees*, N.Y. TIMES, Nov. 7, 2008, at A21; see also *Boumediene v. Bush*, 553 U.S. 723, 797-98 (2008).

32. David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 1988-89 (2008).

33. *Id.* at 1989.

34. See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005).

35. See *Rasul v. Bush*, 542 U.S. 466, 471-73 (2004).

question in *Rasul v. Bush*, holding that district courts have jurisdiction under the federal habeas corpus provision, 28 U.S.C. § 2241.³⁶ The Court rejected the contention that the writ did not reach to the foreign territory of Cuba, finding that the United States “exercises ‘complete jurisdiction and control’ over the Guantanamo Bay Naval Base.”³⁷

Shortly after *Rasul*, the CSRT military panels were established and charged with determining whether any given detainee was an “enemy combatant,” defined as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.”³⁸ The CSRT process was no substitute for habeas corpus, in part because CSRT members were military officers subject to command influence; detainees had no right to counsel and only a limited right to call witnesses; and the rules of evidence did not apply, allowing panels to rely on classified hearsay and, most alarmingly, on evidence obtained by alleged torture or coercion.³⁹ Courts agreed that the CSRTs did not pass muster.⁴⁰

Lacking further direction, the Washington, D.C. federal district courts, which heard all GTMO habeas petitions, were in disarray as to how to press forward in the habeas cases.⁴¹ But on December 30, 2005, President Bush signed into law the Detainee Treatment Act of 2005 (“DTA”), which purported to strip the district courts of all habeas corpus jurisdiction.⁴² In response, district courts uniformly stayed all consideration of habeas petitions pending the Supreme Court’s revisiting the jurisdiction question.⁴³

In June 2006, the Court ruled in *Hamdan v. Rumsfeld* that the DTA cannot be applied retroactively to divest district courts of

36. *Id.* at 485; see 28 U.S.C. § 2241 (2006) (“Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.”).

37. *Rasul*, 542 U.S. at 480 (quoting Lease of Lands for Coaling and Naval Stations, art. III, Feb. 23, 1903, T.S. No. 418).

38. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 475 (quoting Order Establishing CSRT, *supra* note 22, para. a).

39. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 468-78 (discussing how CSRT procedures are constitutionally defective).

40. *E.g., id.* at 481 (“[T]he CSRT procedures are unconstitutional for failing to comport with the requirements of due process.”).

41. See JENNIFER K. ELSEA & KENNETH THOMAS, CONG. RESEARCH SERV., RL 33180, GUANTANAMO DETAINEES: *HABEAS CORPUS* CHALLENGES IN FEDERAL COURT 6 (2005), available at www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL33180_12072005.pdf.

42. See Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739 (codified as amended at 42 U.S.C. § 2000dd (2006), 28 U.S.C. § 2241 (2008) and 10 U.S.C. § 801 (2006)).

43. *E.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 575-85 (2006).

habeas corpus jurisdiction.⁴⁴ The green light was back on. But on October 17, 2006, President Bush signed into law the Military Commissions Act of 2006 (“MCA”), which purported to abolish all statutory habeas jurisdiction relating to GTMO, both prospectively and retroactively.⁴⁵ In several cases, the district courts kept their stays in place, giving the government a pass on having to provide factual returns (the government’s factual allegations justifying detention) despite valiant opposition by habeas counsel up to the appellate court level.⁴⁶

Two years later, in June 2008, the Supreme Court conclusively resolved the jurisdictional issue in *Boumediene v. Bush*, holding “that petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court.”⁴⁷ It took more than five years for the courts to finally resolve the threshold issue of whether detainees could even get a foot in the door of a courtroom with a habeas petition, which meant years of incarceration for hundreds of detainees.⁴⁸

In *Boumediene*, the Supreme Court left it up to the district courts to decide what the government must show to legally detain individuals.⁴⁹ However, the Court was clear that detainees should receive a prompt hearing⁵⁰ and that the district courts have the role of shaping the hearings.⁵¹ To fulfill the Supreme Court’s mandate for prompt hearings, many D.C. District Court judges “agreed to consolidate their cases before former Chief Judge Thomas Hogan, for purposes of streamlining procedures for, and management of, the several hundred petitions filed by detainees.”⁵² On July 29, 2008, Judge Hogan lifted all stays on habeas litigation and vacated all prior dismissals.⁵³ Habeas counsel and the government began to

44. *Id.* at 576-84.

45. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2635-36 (codified as amended at 10 U.S.C. §§ 948-49 (2006)).

46. See, e.g., Feghoul v. Bush, No. 06-618, 2006 WL 3096856, at *1 (D.D.C. Oct. 31, 2006); Al-Shareef v. Bush, No. 05-2458, 2006 WL 3544736, at *1 (D.D.C. Dec. 8, 2006).

47. 553 U.S. 723, 795 (2008).

48. See Robert Barnes, *Justices Say Detainees Can Seek Release*, WASH. POST, June 13, 2008, at A01.

49. *Boumediene*, 553 U.S. at 794-96.

50. *Id.* at 795.

51. *Id.* at 796 (finding that questions involving protection of classified information, avoiding administrative burdens, and other issues “are within the expertise and competence of the District Court”).

52. Mohammed v. Obama, 704 F. Supp. 2d 1, 3 (D.D.C. 2009).

53. Order at 2, *In re Guantanamo Bay Detainee Litig.*, No. 08-0442 (D.D.C. July

debate the proper standard of review in a habeas trial. On November 6, 2008, Judge Hogan issued a Case Management Order addressing various procedural matters, such as the timing of the government's filing of factual returns and duty to disclose exculpatory evidence and the basic point that the government has the burden of proving by a preponderance of the evidence that the detention is lawful.⁵⁴

District court judges adopted various standards of review based on the Authorization for Use of Military Force ("AUMF"), a September 18, 2001 joint resolution of Congress that authorized the President

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁵⁵

The AUMF is the sole congressional authorization underlying the government's authority to detain individuals at GTMO.⁵⁶ Read literally, the words of the AUMF reveal a rather narrow scope.⁵⁷

The government's current position is that the AUMF authorizes detention of three groups of individuals:

[1.] persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001[; 2.] persons who harbored those responsible for those attacks[; and 3.] persons who were part of, or substantially supported, Taliban or al Qaeda forces 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 hostilities, in aid of such enemy armed forces.⁵⁸

The ensuing debate concerned the meaning of two key phrases pertinent to the third group: (1) "substantially support" Taliban or al-Qaeda forces, as opposed to being "part of" such forces; and (2)

29, 2008), available at <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2008mc00442/131990/210/0.pdf?1217397993>.

54. Case Management Order at 2-4, *In re Guantanamo Bay Detainee Litig.*, No. 08-0442 (D.D.C. Nov. 6, 2008), available at <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2008mc00442/131990/940>.

55. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

56. See *Hamlily v. Obama*, 616 F. Supp. 2d 63, 67 (D.D.C. 2009) (discussing government's argument "that its proposed framework [for Guantánamo detention] is based principally upon the AUMF").

57. See AUMF § 2(a).

58. *Hamlily*, 616 F. Supp. 2d at 67 (quoting government's stated position, submitted in response to court order, as of March 13, 2009); see also AUMF § 2(a).

being part of or substantially supporting “associated forces” of the Taliban or al-Qaeda forces.⁵⁹

On April 22, 2009, in *Gherebi v. Obama*, Judge Reggie Walton adopted a modified version of the Obama Administration’s standard for detention, focusing on the phrase “substantially supported.”⁶⁰ Judge Walton ruled that

the President has the authority to detain persons who were part of, or substantially supported, the Taliban or al-Qaeda forces that are engaged in hostilities against the United States or its coalition partners, provided that the terms “substantially supported” and “part of” are interpreted to encompass only individuals who were members of the enemy organization’s armed forces, as that term is intended under the laws of war, at the time of their capture.⁶¹

In short, Judge Walton concluded that the “substantial support” standard means that the government can detain only those “individuals who were members of the ‘armed forces’ of an enemy organization at the time of their initial detention.”⁶² The standard “is not meant to encompass individuals outside the military command structure of an enemy organization, as that term is understood in view of the limiting principles set forth [previously in the opinion].”⁶³

On May 19, 2009, in *Hamliily v. Obama*, Judge John Bates adopted a similar standard that defines the power to detain individuals based on their “support” or “substantial support” of a terrorist network, as opposed to being an active member.⁶⁴ Judge Bates concluded that

the Court rejects the concept of “substantial support” as an independent basis for detention. Likewise, the Court finds that ‘directly support[ing] hostilities’ is not a proper basis for detention. In short, the Court can find no authority in domestic law or the law of war, nor can the government point to any, to justify the concept of “support” as a valid ground for detention. . . . [Thus,] [d]etention based on substantial or direct support of the Taliban, al Qaeda or associated forces, without more, is simply not warranted by domestic law or the law of war.⁶⁵

Judge Bates reasoned that “[d]etaining an individual who ‘substantially supports’ [al-Qaeda or Taliban forces], but is not part

59. See *Hamliily*, 616 F. Supp. 2d at 75-77; *Gherebi v. Obama*, 609 F. Supp. 2d 43, 53 (D.D.C. 2009).

60. *Gherebi*, 609 F. Supp. 2d at 70-71.

61. *Id.* at 71.

62. *Id.* at 70.

63. *Id.*

64. *Hamliily*, 616 F. Supp. 2d at 69-70.

65. *Id.* at 69.

of [them], is simply not authorized by the AUMF itself or by the law of war,” and went on to reject “the government’s reliance on ‘substantial support’ as a basis for detention independent of membership in the Taliban, al-Qaeda or an associated force.”⁶⁶ “[S]ubstantial support,” while not “an independent basis for detention,” may be taken into account, he said, in helping “to determine who is a ‘part of’ a covered organization.”⁶⁷ Specifically, Judge Bates held that detention authority includes those who are “functional members” of al-Qaeda, the Taliban, and co-belligerent groups, as well as those others who directly participate in hostilities.⁶⁸ The D.C. Circuit would later change the standard,⁶⁹ but at that time (2009-2010), dozens of habeas trials, including ours, were proceeding under this *Gherebi-Hamlily* standard.

V. THE HABEAS TRIALS

After the Supreme Court restored the right of habeas corpus for the third and final time in *Boumediene*, the government accelerated its release of dozens of detainees.⁷⁰ Realizing that it would have to present evidence before an independent federal judge in Washington, D.C., the government folded its cards in many cases.⁷¹ In some cases, the detainee could return to his home country.⁷² Other detainees, like innocent Chinese Uighurs, needed to relocate due to the fear of torture in their home countries; however, some remain in GTMO to this day.⁷³

Eventually, the habeas cases for detainees who remained in GTMO began moving forward. When these cases finally made it to

66. *Id.* at 76.

67. *Id.*

68. *Id.* at 77-78.

69. *See infra* Part VII.

70. *See* *Boumediene v. Bush*, 553 U.S. 723, 771 (2008); William Glaberson, *Guantanamo’s Detention Camp Remains, but Not its Legal Rationale*, N.Y. TIMES, June 13, 2008, at A23 (noting that Guantánamo held 270 detainees at the time the Supreme Court decided *Boumediene*); Charlie Savage, *Rulings Raise Doubts on Policy on Transfer of Yemenis*, N.Y. TIMES, July 9, 2010, at A11 (noting that 181 detainees remained at Guantánamo).

71. *See, e.g.*, William Glaberson, *U.S. Drops War Crimes Charges for 5 Guantanamo Detainees*, N.Y. TIMES, Oct. 22, 2008, at A1 (suggesting link between *Boumediene* decision and U.S. Justice Department’s decision to dismiss charges against detainees).

72. *See, e.g.*, William Glaberson, *6 Guantanamo Detainees are Released to Other Countries as Questions Linger*, N.Y. TIMES, June 12, 2009, at A6 (reporting release of Iraqi and Chadian detainees to their home countries).

73. *See, e.g.*, Erik Eckholm, *Freed from Guantanamo, Uighur Muslims Bask in Bermuda*, N.Y. TIMES, June 15, 2009, at A4 (reporting release of Uighur Muslims to Bermuda because of fear of persecution in China); Adam Liptak, *Justices Decline to Hear Appeal from Chinese Detainees*, N.Y. TIMES, Apr. 19, 2011, at A18 (discussing Supreme Court’s refusal to hear appeal from Uighurs detained in GTMO).

hearing, the government was called upon to justify the detentions.⁷⁴ The government's hurdle, however, was not high—it merely had to show, under relaxed evidence standards, that the detainee was an “enemy combatant” by a preponderance of the evidence.⁷⁵ Under this lower standard of proof, detainees prevailed in about thirty-five of the first fifty cases that went to full hearings before district courts; the government prevailed in only about fifteen of those cases.⁷⁶ Even after releasing hundreds of detainees and holding on to only the so-called “worst of the worst,” the government failed in about thirty-five of fifty evidentiary hearings that required the minimal level of proof to justify detention.⁷⁷ How could the government not even clear this most minimal level of due process?

VI. RAVIL MINGAZOV

For our client Ravil Mingazov, who remained in GTMO after Zain's release in 2009, we proceeded as far as a full habeas trial. Ravil is a Muslim from the Tatarstan region of Russia.⁷⁸ As a former ballet dancer,⁷⁹ he jokes that he is “the world's only ballet-dancing terrorist!” As a young man in the Russian Army, Ravil continued to dance as a member of a Russian Army ballet troupe.⁸⁰ He was later assigned to a border control unit and posted on the Mongolian border.⁸¹ Following the collapse of the Soviet Union, Ravil left the army and returned home to Tatarstan.⁸² He then became interested in the Muslim religious traditions of his family and many ethnic Tatars.⁸³ Although Ravil's family was culturally and historically Muslim, the influence of religion during the Soviet era was minimal.⁸⁴ But after the Soviet Union's fall, all types of religion

74. Case Management Order at 2, *In re Guantanamo Bay Detainee Litigation*, No. 08-0442 (D.D.C. Nov. 6, 2008) (stating that government must provide “justification for detaining the petitioner”).

75. *Id.* at 4-5.

76. Charlie Savage, *Reversal Upholds Detention of Yemini at Guantánamo*, N.Y. TIMES, July 14, 2010, at A19 (noting that courts had ordered thirty-six Guantánamo detainees freed and denied the release of 15).

77. *Id.*

78. *Al Harbi v. Obama*, No. 05-02479, 2010 WL 2398883, at *3 (D.D.C. May 13, 2010).

79. *Id.*

80. *Id.*

81. *Id.*

82. Petitioners' Status Report at 2, *Al-Harbi v. Bush*, No. 05-CV-2479 (D.D.C. July 18, 2008) [hereinafter Status Report]; see *Al Harbi*, No. 05-02479, 2010 WL 2398883, at *3.

83. See *Al Harbi*, No. 05-02479, 2010 WL 2398883, at *3.

84. See *Revelations from the Russian Archives: Anti-Religious Campaigns*, LIBRARY OF CONG. (July 22, 2010), <http://www.loc.gov/exhibits/archives/anti.html> (“The Soviet Union was the first state to have as an ideological objective the elimination of

experienced resurgence in Russia.⁸⁵

Ravil was able to secure a job at a nearby military installation,⁸⁶ working for an emergency preparedness unit whose mission was similar to that of the U.S. Federal Emergency Management Agency.⁸⁷ In charge of the unit's food supply operation,⁸⁸ he was recognized with awards and commendations for his resourcefulness and management skills.⁸⁹ With a stable job and awakening new faith, Ravil married a Muslim woman and decided to begin a family.⁹⁰

As Ravil increasingly embraced his religious roots, anti-Muslim sentiment grew within the military and Russia in general.⁹¹ Ravil became a defender and advocate for other Muslims on the military base, requesting time for daily prayer and providing halal meat and food, and was targeted with growing hostility and abuse from his superiors.⁹² After the birth of his new son, Ravil tried to give the baby the Muslim name *Yusuf*, but Russian authorities changed it to *Joseph*.⁹³ Ravil realized that if he wanted to raise his new son in a place more tolerant of Muslims, he would have to find a new home for his family outside of Russia.⁹⁴

Ravil left Russia for neighboring Tajikistan,⁹⁵ where he hoped to gain further passage to Afghanistan, Pakistan, and perhaps a more prosperous Middle Eastern country where he could send for his family and settle down.⁹⁶ In Tajikistan, he joined a group of Uzbek refugees that he believed could help him move along on in his

religion.”).

85. See *International Religious Freedom Report 2010*, U.S. DEPT OF STATE (Nov. 17, 2010), <http://www.state.gov/g/drl/rls/irf/2010/148977.htm> (discussing current legal protections available to safeguard religious freedom of Russian citizens).

86. *Al Harbi*, No. 05-02479, 2010 WL 2398883 at *3.

87. See *About FEMA*, U.S. DEPT OF HOMELAND SEC. (Aug. 1, 2011), <http://fema.gov/about>.

88. Status Report, *supra* note 82, at 2.

89. *The Guantánamo Docket: Ravil Mingazov*, N.Y. TIMES, at 2, <http://projects.nytimes.com/guantanamo/detainees/702-ravil-mingazon/documents/6> (last visited Aug. 26, 2011) [hereinafter *Guantánamo Docket*] (“I was actually honored several times by all kinds of presents by the generals and from the government.”).

90. See *Al Harbi*, No. 05-02479, 2010 WL 2398883, at *3.

91. Status Report, *supra* note 82, at 2; see *Al Harbi*, No. 05-02479, 2010 WL 2398883, at *3.

92. *Ravil Mangazov: Russian Guantánamo Detainee in Need of Protection*, CTR. FOR CONSTITUTIONAL RIGHTS, http://www.ccrjustice.org/files/Profile%20of%20Ravil%20Mingazov%20-%20Public_FINAL%20_7-21-09_.pdf (last visited Aug. 26, 2001) [hereinafter *Russian Detainee*]; see Status Report, *supra* note 82, at 2.

93. See *Russian Detainee*, *supra* note 92.

94. Status Report, *supra* note 82, at 2.

95. *Al Harbi*, No. 05-02479, 2010 WL 2398883, at *3.

96. *Guantánamo Docket*, *supra* note 89, at 5-6 (“My main goal was to go to Tajikistan and then from Tajikistan [to] go to Afghanistan or to [some] other Muslim Country.”).

journey.⁹⁷ Eventually, the group was transported by helicopters furnished by the Tajikistan government across the border into northern Afghanistan as part of a multilateral political agreement between Uzbekistan, Tajikistan, and Afghanistan.⁹⁸ Trucks and buses took Ravil and other refugees to a camp near the Afghan city of Kunduz, where he was assigned menial camp tasks, such as gathering firewood, helping to construct or repair houses, and doing electrical work.⁹⁹

When the United States began bombing Afghanistan in October 2001, Ravil became one of the thousands of displaced Afghan and foreign refugees who ultimately found their way across the Afghan border into Pakistan.¹⁰⁰ His journey led him to an Islamic center in Lahore, Pakistan, and then to a house for refugees in Faisalabad.¹⁰¹ In March 2002, just days after Ravil's arrival at the house, he and others were arrested by Pakistani authorities.¹⁰² Ravil was turned over to U.S. forces and taken to the detention facility at Bagram Air Force Base in Afghanistan.¹⁰³ After being interrogated for several months at Bagram, Ravil was transported to GTMO in June 2002.¹⁰⁴

Ravil spent the next three years at GTMO prison living under difficult conditions, often in near-solitary confinement, and was finally able to file his habeas petition on December 28, 2005.¹⁰⁵ More than four years passed before he reached his evidentiary hearing¹⁰⁶ as the government used every procedural step possible—like filing factual returns, disclosures of inculpatory or exculpatory evidence, and dates of any hearing—to avoid a fair and prompt hearing.¹⁰⁷ For example, the government amended its factual return multiple times, disclosing old evidence that had been allegedly newly discovered right up to the eve of trial.¹⁰⁸

97. Status Report, *supra* note 82, at 2; *Russian Detainee*, *supra* note 92.

98. See *Guantánamo Docket*, *supra* note 89, at 6.

99. See *id.*

100. Status Report, *supra* note 82, at 2.

101. *Guantánamo Docket*, *supra* note 89, at 10-11; see *Russian Detainee*, *supra* note 92.

102. See *Al Harbi*, No. 05-02479, 2010 WL 2398883, at *3; *Russian Detainee*, *supra* note 92.

103. *Al Harbi*, No. 05-02479, 2010 WL 2398883, at *3.

104. See *id.*; Status Report, *supra* note 82, at 3.

105. Petition for Writ of Habeas Corpus, *Al Harbi v. Bush*, No. 05-CV-02479 (D.D.C. Dec. 28, 2005).

106. See *Al Harbi*, No. 05-02479, 2010 WL 2398883, at *1.

107. See, e.g., Motion to Amend/Correct Factual Return to Include Newly Available Inculpatory Evidence (Fourth), *Al Harbi v. Bush*, No. 05-CV-02479 (D.D.C. Dec. 3, 2009).

108. See, e.g., Notice of Filing of Motion for Leave to Amend Factual Return to Include Additional Inculpatory Evidence, No. 05-CV-02479 (D.D.C. Mar. 25, 2010).

Finally, in April 2010, the habeas trial was held before Judge Henry Kennedy, Jr.¹⁰⁹ At trial, the government contended that Ravil's imprisonment was lawful based on four allegations: (1) he was a member of the Independence Movement of Uzbekistan ("IMU"), which was alleged to support the Taliban; (2) he fought with the Taliban; (3) he attended al-Qaeda training camps in Afghanistan; and (4) he associated with al-Qaeda members at the guesthouse in Pakistan where he was arrested.¹¹⁰ Following the D.C. Circuit Court directives, the district court admitted all hearsay evidence presented by the parties and considered "the accuracy, reliability, and credibility of the evidence on which the parties rely to support their arguments."¹¹¹

The best day in the case was when the weeklong habeas trial ended. We did not then know the outcome, but we knew that Ravil had received a full and fair habeas hearing. The result seemed secondary to the importance of having finally secured a modicum of due process of law. As it turned out, Ravil prevailed, and the district court granted the writ, ordering the government to "take all necessary and appropriate diplomatic steps to facilitate [Ravil's] release forthwith," which in Ravil's case would be to a new country because of the likelihood of mistreatment in Russia upon his return.¹¹² The government appealed,¹¹³ and Judge Kennedy stayed his order, meaning that Ravil was required to remain in GTMO pending at least the outcome of the appeal.¹¹⁴ The government filed its appellant's brief,¹¹⁵ and we filed our appellee's brief.

A few days before its reply was due, the government filed a unique motion pursuant to Federal Rule of Civil Procedure 62.1(a)(3),¹¹⁶ requesting an "indicative ruling" as to how the district court, now divested of jurisdiction due to the appeal, might treat a

109. *Al Harbi*, No. 05-02479, 2010 WL 2398883, at *1.

110. *Id.* at *4, *9, *11-12.

111. *Id.* at *2 (citing *Al-Bihani v. Obama*, 590 F.3d 866, 879 (D.C. Cir. 2010) ("[T]he question a habeas court must ask when presented with hearsay is not whether it is admissible-it is always admissible-but what probative weight to ascribe to whatever indicia of reliability it exhibits.")).

112. Order Granting Writ of Habeas Corpus at 1, *Al-Harbi v. Obama*, No. 05-02479 (D.D.C. May 13, 2010); see Human Rights Watch, *The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States*, vol. 19, No. 2(D), 21-31 (Mar. 2007) (documenting torture, imprisonment, and death of other Russian GTMO detainees returned to Russia), available at <http://www.hrw.org/sites/default/files/reports/russia0307webwcover.pdf>.

113. Notice of Appeal, *Al-Harbi v. Obama*, No. 05-02479 (D.D.C. June 23, 2010).

114. See Order Granting Respondent's Motion for Stay Pending Appellate Review, *Al-Harbi v. Obama*, No. 05-02479 (D.D.C. Aug. 4, 2010).

115. Brief for Respondent, *Al-Harbi v. Obama*, No. 10-5217 (D.C. Cir. Nov. 8, 2010).

116. See FED. R. CIV. P. 62.1(a)(3).

Rule 60(b) motion¹¹⁷ to vacate the judgment and retry the case based on newly discovered evidence.¹¹⁸ According to Rule 62.1, if the court indicates that it would grant the motion or that it raises a substantial issue, then the appellate court considers whether to remand the case.¹¹⁹ The government simultaneously filed a related motion to the D.C. Circuit to stay the appeal pending the district court's treatment of the Rule 62.1 motion.¹²⁰

This is an example of the backwards nature of GTMO litigation. Assume that a GTMO detainee, or any habeas corpus petitioner, files five amended traverses (the petitioner's submission), each time adding new evidence to the record with the permission of the court. Assume further that the petitioner loses so that the writ is denied and then files, deep into the appellate briefing process, the same set of motions based on some old evidence long in his possession but overlooked until after the trial. No court would grant that motion given that the standard under such circumstances is nearly as high as any standard in the law—it is no excuse to argue that the significance of evidence long within the party's possession was just recently appreciated. If judgments could be so easily revisited after trial, the entire trial process would be undermined.

But in the world of GTMO litigation, the D.C. Circuit Court granted the stay of the appeal on April 19, 2011,¹²¹ and as this Article goes to print, we await the district court's indicative ruling under Rule 62.1. While we wait, another year of indefinite detention passes for Ravil, who is not a single step closer to release than the day he entered GTMO—there are no formal charges, no conviction of anything, and no defined sentence. Moreover, the minimal due process achieved through his habeas corpus hearing has been rendered illusory.

Is it any surprise that he lost all interest in his legal case? If the court remands his case for a new trial and he prevails again, with time for another appeal added, his current ten-year term could easily swell to fifteen years. *And he has never been formally charged with any wrongdoing.* At least in the current political climate, he cannot

117. FED. R. CIV. P. 60(b).

118. See Respondent's Notice of Filing of Motion to Hold Appeal in Abeyance Pending Decision by the District Court on Respondents' Motion for Relief from the Judgment, *Al-Harbi v. Obama*, No. 10-5217 (D.C. Cir. Dec. 15, 2010). Due to the allegedly sensitive nature of the newly discovered evidence, the government's 62.1(a)(3) motion remains classified to this day.

119. See FED. R. CIV. P. 62.1(a)(3).

120. Again, due to the allegedly sensitive nature of the information contained in this simultaneously filed motion with the D.C. Circuit, its content remains classified.

121. Order Granting Motion to Stay at 1, *Al-Harbi v. Obama*, No. 10-5217 (D.C. Cir. Apr. 19, 2011).

be tried in a court of law in the United States. Military trials at GTMO are few and far between, moving at a snail's pace. Ravil may be part of the largest group of detainees at GTMO—those stuck in the rabbit-hole of indefinite detention.

VII. EVER-CHANGING STANDARDS

In the Kafkaesque world of GTMO, the standards continue to change, especially as the D.C. Circuit Court addresses any case where the writ was granted. In *Al-Adahi v. Obama*, the court reluctantly accepted that the government had to prove its case by a preponderance of the evidence.¹²² Even though the government itself agreed with this standard, the court, solely on its own activist initiative, suggested that the standard for detention might be merely “some evidence” instead of a “preponderance of the evidence.”¹²³ The court also pronounced that independently unverifiable facts could be batched together under a “conditional probability analysis” in order to reach the ultimate factual conclusion that detention is justified.¹²⁴ The court then essentially continued to review the facts de novo and reach its own finding of fact—reversing the writ—an unprecedented approach from an appellate court to a set of factual findings.¹²⁵

The D.C. Circuit also changed the *Gherebi-Hamlily* standard and ruled that it is not necessary for the government to show “[t]hat an individual operates within al-Qaeda’s formal command structure” to establish that the person is “part of” al-Qaeda—the standard is more “functional” and allowed for any number of indicia to show such membership.¹²⁶ In short, after dozens of habeas trials, the D.C. Circuit has declared a do-over, effectively stating to district court judges that it fully expects them to deny the writ whenever, and however, possible.

And finally, consider the case of *Esmail v. Obama*, in which the court affirmed the denial of a habeas petition.¹²⁷ Judge Laurence Silberman, who wrote a concurring opinion admonishing the Supreme Court for its *Boumediene* ruling, repeated the suggestion that the review standard should be merely “some evidence” and

122. See *Al-Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010).

123. See *id.* at 1104.

124. *Id.* at 1105.

125. See *id.* at 1106-07.

126. *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010); see also *Uthman v. Obama*, 637 F.3d 400, 402 (D.C. Cir. 2011) (rejecting district court’s application of “command structure test” as unnecessary to proving that detainee was part of al-Qaeda); *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010) (finding no AUMF requirement that detainee must be found part of the al-Qaeda “command structure” to be “part of” the group).

127. *Esmail v. Obama*, 639 F.3d 1075, 1077 (D.C. Cir. 2011) (finding that detainee was more likely than not “part of” al-Qaeda at time of his capture).

doubting that his colleagues would disagree “[u]nless, of course, the Supreme Court were to adopt the preponderance of the evidence standard (which it is unlikely to do—taking a case might obligate it to assume direct responsibility for the consequences of *Boumediene v. Bush*).”¹²⁸ He concluded that the process “becomes a charade prompted by the Supreme Court’s defiant—if only theoretical—assertion of judicial supremacy sustained by posturing on the part of the Justice Department, and providing litigation exercise for the detainee bar.”¹²⁹

Judge Silberman became the second member of the D.C. Circuit to publically lambaste the Supreme Court for *Boumediene*.¹³⁰ Senior Circuit Judge A. Raymond Randolph, another conservative jurist on that court, delivered a public lecture entitled “The Guantanamo Mess” and likened the Supreme Court to the characters in *The Great Gatsby*, creating messes for other people to clean up.¹³¹

VIII. CONCLUSION

Ten years later, nearly everything about GTMO habeas litigation remains unsettled, including whether district courts even have jurisdiction, the scope of the government’s detention authority, what the government has to prove to justify detention, whether it has to prove it by a preponderance of, or merely “some” evidence, whether the court can hear evidence obtained by coercion, just how many levels of hearsay can be accepted, and almost any other legal issue. And this is just habeas corpus¹³²—the bare-bones due process of law that allows an independent court to review the President’s decision to detain an individual. We are even farther away from consensus on whether and how to charge detainees with crimes and where and how to bring them to trial for those crimes. We have made a bungle of due process of law.

And yet, all agree on the critical importance of getting it right, especially as we strive to protect our vital national security, while at the same time holding fast to due process and the American rule of law. Any person who has or would physically harm Americans or their allies must be punished—swiftly and justly. Due process is the best foundation we have.

128. *Id.* at 1078 (Silberman, J., concurring) (citation omitted).

129. *Id.* (citation omitted).

130. See A. Raymond Randolph, Senior Judge, Court of Appeals for the D.C. Circuit, Joseph Story Distinguished Lecture: The Guantanamo Mess (Oct. 20, 2010), available at <http://www.heritage.org/events/2010/10/guantanamo-mess>.

131. *Id.*

132. See U.S. CONST. art. 1, § 9, cl. 2.