Indefinite Detention After *Boumediene*: Judicial Trailblazing in Uncharted and Unfamiliar Territory

"[A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat."[1]

I. INTRODUCTION

The United States holds due process of law as one of its most cherished and revered constitutional protections.[2] The national reverence for due process, however, has not been evident over the past seven years during which hundreds of people have been detained without charges at Guantanamo Bay Naval Base (Guantanamo Bay) as threats to national security.[3] Abdulrahim Abdul Razak Al Ginco was a college student in the United Arab Emirates when he fled his strict Muslim father for Afghanistan in 2001.[4] After a brief association with the

1. Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004).

2. *See generally* U.S. CONST. amend. V, XIV, § 1 (ensuring no person shall be deprived life, liberty, or property without due process of law).

3. *See* Erwin Chemerinsky, *Foreword* to PETER JAN HONIGSBERG, OUR NATION UNHINGED: THE HUMAN CONSEQUENCES OF THE WAR ON TERROR xv, xv-xviii (2009) [hereinafter Chemerinsky, *Foreword*] (noting indefinite detention's shameful, insidious, and troubling implications for civil liberties); Erwin Chemerinsky, *Wartime Security and Constitutional Liberty*, 68 ALB. L. REV. 1119, 1120 (2005) [hereinafter Chemerinsky, *Wartime Security*] (stating Bush Administration continually sought detention without due process); John W. Whitehead, *We Are All Potentially Enemy Combatants*, AM. CHRON., June 21, 2007, http://www.americanchronicle.com/articles/view/30609 (opining Bush Administration created groundwork for system of incarceration regardless of innocence or guilt). Because nearly all of the detainees being held at Guantanamo Bay are Arab-Muslims, the lack of due process is resulting in growing anti-American sentiment amongst many Arab-Muslims, both in the United States and abroad. *See* John Ip, *Comparative Perspectives on the Detention of Terrorist Suspects*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 773, 870 (2007) (describing Guantanamo Bay as "a propaganda gift to America's enemies" (quoting Editorial, *Un-American by Any Name*, N.Y. TIMES, June 5, 2005, at D13)).

4. *See* Al Ginco v. Obama, 626 F. Supp. 2d 123, 127-28 (D.D.C. 2009) (describing Al Ginco's travel to Afghanistan); Editorial, *Another Detainee Debacle: How a Syrian Man Tortured and Imprisoned by al-Qaeda Wound Up at Guantanamo for Seven Years*, WASH. POST, June 28, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/06/27/AR2009062701983.html [hereinafter *Detainee Debacle*] (chronicling Al Ginco's travel to Afghanistan, subsequent torture and imprisonment); Michael Doyle & Marisa Taylor, *Detainees to Demand Hard Evidence*, CENTRE DAILY TIMES, June 22, 2008, at A3 *available at* 2008 WLNR 11761228 (describing legal significance of Al Ginco's case); Tim Golden, *Expecting U.S. Help, Sent to Guantanamo*, N.Y. TIMES, Oct. 15, 2006, http://www.nytimes.com/2006/10/15/us/15gitmo.html (describing bizarre circumstances of Al Ginco's capture by American forces); Editorial, *Nine Years in Hell: Tortured by*

Taliban and/or Al Qaeda, Taliban soldiers brutally tortured Al Ginco until he falsely confessed to being a spy, and imprisoned him in the infamous Sarpusa prison in Kandahar.[5] When a reporter acquiesced to Al Ginco's pleadings and alerted the newly arrived U.S. forces to his presence, Al Ginco was not liberated, but rather sent to Guantanamo Bay as an enemy combatant.[6] Al Ginco spent the next seven years enduring sleep deprivation, stress positions, snarling dogs, and separation from his family, all while never formally charged with any crime.[7]

Hundreds of "unlawful enemy combatants"—those who the United States deems a threat to national security—have been, and continue to be, imprisoned at Guantanamo Bay.[8] American forces captured some detainees on the battlefields of Afghanistan or Iraq, but many were simply plucked from their lives, often based on tenuous evidence of wrongdoing.[9] There has been enormous debate both at home and abroad about the legality of the United States's detention of these individuals, with critics claiming this practice runs afoul of due process, one of our nation's most fundamental protections.[10]

There are several key pieces of legislation the Bush Administration, and later the Obama Administration, have relied upon for legal justification of the indefinite detention of those they deem to be a threat to national security.[11] The

al-Qaeda, Entombed by America at Guantanamo Cuba, TIMES (LONDON), Jan. 16, 2009, [hereinafter *Nine Years in Hell*] (illustrating terrible circumstances of Al Ginco's detention).

5. *See Al Ginco*, 626 F. Supp. 2d at 127-28 (detailing Al Ginco's travel, torture, and detention at Guantanamo Bay); *Detainee Debacle*, *supra* note 4; Golden, *supra* note 4; *Nine Years in Hell*, *supra* note 4.

6. *See Al Ginco*, 626 F. Supp. 2d at 127-28; *Detainee Debacle*, *supra* note 4; Golden, *supra* note 4; *Nine Years in Hell*, *supra* note 4; *see also* Baher Azmy, *Executive Detention,* Boumediene*, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 512 (2010) (detailing facts of *Al Ginco*).

7. *See Al Ginco*, 626 F. Supp. 2d at 127-28; *Detainee Debacle*, *supra* note 4; Doyle & Taylor, *supra* note 4; Golden, *supra* note 4; *Nine Years in Hell*, *supra* note 4.

8. *See* Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CALIF. L. REV. 1193, 1195-96 (2007) (defining term "enemy combatant"). Professor Alexander writes:

> Whereas *Hamdi* defined enemy combatant as one who was 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 there, the [Military Commissions Act] expands the definition to include those who have purposefully and materially supported hostilities against the United States or its allies.

Id. (internal quotation marks omitted); *see also Names of the Detained in Guantanamo Bay, Cuba*, http://www.washingtonpost.com/wp-srv/nation/guantanamo_names.html (last visited Oct. 11, 2010) (listing names of roughly 367 people previously or currently held at Guantanamo detention facility); Stuart Taylor, *Detainees: Obama's Missed Opportunity*, NAT'L. J., Oct. 17, 2009, *available at* 2009 WLNR 20706955 (stating 221 detainees still at Guantanamo Bay).

9. *See Al Ginco*, 626 F. Supp. 2d at 128 (opining government's position in support of detention "defies common sense").

10. *See* Chemerinsky, *Foreword*, *supra* note 3; *Detainee Debacle*, *supra* note 4; *Nine Years in Hell*, *supra* note 4. *See generally* U.S. CONST. amend. V, XIV, § 1 (ensuring no person deprived of life, liberty, or property without due process of law).

11. *See generally* U.S. CONST. art. II, § 2, cl. 1 (defining President as Commander-in-Chief of U.S. military forces); Military Commissions Act of 2006, 10 U.S.C. §§ 948a-948d (2006); Authorization for Use of

Bush Administration relied, in large part, on the President's Article II powers as Commander-in-Chief, pursuant to the Authorization for Use of Military Force (AUMF), as well as the Detainee Treatment Act of 2005 (DTA) and the Military Commissions Act of 2006 (MCA), in authorizing detention.[12] The Obama Administration has moved away from this legal justification for detention, and instead states detention is justified solely on the power the AUMF grants the President.[13] The AUMF is a broad grant of power given to the President in the wake of the terrorist attacks of September 11, 2001, authorizing the use of military force against "those responsible for the . . . attacks launched against the United States."[14] Perhaps responding to intense debate regarding the proper definition of "unlawful enemy combatant," the Obama Administration abandoned the term as a basis for detention.[15] After the Obama Administration dropped the term "unlawful enemy combatant" as a justification for detention, there were significant debates about whether the term was a useful framework outside the realm of detention justification.[16]

Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001) (authorizing President to use force against those responsible for 9/11 attacks or those harboring them); H.R. REP. NO. 109-359 (2005) (Conf. Rep.) (outlining Detainee Treatment Act of 2005).

12. *See* Hamlily v. Obama, 616 F. Supp. 2d 63, 67 (D.D.C. 2009) (outlining sources of authority asserted by Bush Administration). *See generally* U.S. CONST. art. II, § 2, cl. 1; Military Commissions Act §§ 948a-948d; Authorization for Use of Military Force § 2; H.R. REP. NO. 109-359. Article II of the United States Constitution authorizes the President, as Commander-in-Chief, to detain members of enemy forces during times of war. *See infra* Part II.A (examining precedent for President's Article II power to detain enemy forces during times of war). The MCA established military commissions to try "unlawful enemy combatants" for violations of the law of war. *See infra* Part II.B (describing purpose of MCA). The AUMF granted the President the authority to use all force necessary against those responsible for the 9/11 terrorist attacks, as well as nations who harbored those responsible. *See infra* Part II.B (describing grant of authority in AUMF). Some scholars describe the AUMF as granting the Executive "great leeway" to effectuate its war policy and, by implication, its policy of preventative detention. *See* Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 604 (2010) (noting leeway initially given to Executive under AUMF). Congress enacted the DTA to strip the federal courts of jurisdiction over detainee habeas corpus actions. *See infra* Part II.B (stating purpose of DTA).

13. *See* Al Odah v. United States, 648 F. Supp. 2d 1, 1 (D.D.C. 2009) (stating government's justification for detention based on AUMF); Al Ginco v. Obama, 626 F. Supp. 2d 123, 126 (D.D.C. 2009) (stating government's argument for detention based on authority from AUMF); *Hamlily*, 616 F. Supp. 2d at 67 (stating government's detention framework based principally upon AUMF); Gherebi v. Obama, 609 F. Supp. 2d 43, 54 (D.D.C. 2009) (clarifying detention authority arises solely from AUMF).

14. Authorization for Use of Military Force § 2.

15. *See* Press Release, U.S. Dep't of Justice, Department of Justice Withdraws "Enemy Combatant" Definition for Guantanamo Detainees (Mar. 13, 2009), *available at* http://www.justice.gov/opa/pr/2009/March/09-ag-232.html. Judge John D. Bates states that "[i]n attempting to define the scope of its authority to detain a class of individuals held at Guantanamo, the new Administration has ceased using the term 'enemy combatant.'" *Hamlily*, 616 F. Supp. 2d at 67 n.2; *see also* Evan Perez & Jess Bravin, "*Enemy Combatant" Label Is Dropped for Detainees*, WALL ST. J., Mar. 14, 2009, at A3, *available at* http://online.wsj.com/article/SB123697422076922961.html (opining Obama Administration abandoning enemy combatant to distance itself from Bush Administration policies). *See generally* Peter Jan Honigsberg, *Chasing "Enemy Combatants" and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT'L L. & FOREIGN AFF. 1 (2007) (examining evolution of term "enemy combatant").

16. *See* Honigsberg, *supra* note 15, at 72 (noting no standard for enemy combatant and potential for arbitrary application). *See generally Testimony Before the H. Comm. on Judiciary Subcomm. on the*

Nevertheless, the power of the U.S. government to indefinitely detain was dealt its most severe blow when the Supreme Court ruled in *Boumediene v. Bush*[17] that detainees being held at Guantanamo Bay were entitled to challenge their detention by filing for the writ of habeas corpus in the federal courts.[18]

In the wake of *Boumediene*, there has been a flood of litigation in which detainees seek the writ of habeas corpus challenging their detention as unlawful.[19] As of this writing, there have been roughly thirteen detainees released, while at least sixteen others who were granted the writ of habeas corpus remain confined in a state of limbo at Guantanamo Bay.[20] With no clear guidance on how to proceed with these novel issues, the judges of the United States District Court for the District of Columbia have had the difficult task of determining which of the petitioning detainees are lawfully detained, and which have been put through an excruciating ordeal without legal justification.[21]

Constitution, Civil Rights, & Civil Liberties, 111th Cong. (2009) (statement of Jeh Charles Johnson, Gen. Counsel to the Dep't of Defense) (stating reason for change of definition of enemy combatant to one tied to AUMF); *Rep. Ike Skelton Holds a Hearing on Reforming the Military Comm'ns Act of 2006 & Detainee Policy Before the H. Comm. on Armed Servs.*, 111th Cong. (2009) (arguing over proper definition of enemy combatant); *Testimony on Legal Issues Regarding Military Comm'ns & the Trial of Detainees for Violations of the Law of War: Before the S. Armed Servs. Comm.*, 111th Cong. (2009) (testimony of Daniel Marcus, Fellow in Law and Gov't, Washington Coll. of Law at Am. Univ.) (stating need for narrower definition of "enemy combatant"); *Opening Statement by Sen. John McCain in the S. Armed Servs. Comm. Hearing on Military Comm'ns*, 111th Cong. (2009) (questioning whether "enemy combatant" definition in need of revision).

17. 553 U.S. 723 (2008).

18. *See id.* at 2234; *see also* Jill Gustafson et al., *Habeas Rights of Aliens in General; Enemy Combatants*, *in* 18B FEDERAL PROCEDURE, LAWYERS EDITION § 45:2466 (2009) (noting *Boumediene* Court ruled DTA process not adequate substitute for habeas corpus); Eric C. Surette & Mary Ellen West, *District Courts–Alien Detainees*, *in* 39 AM. JUR. 2D, *Habeas Corpus* § 94 (2009) (observing Supreme Court granted habeas rights to enemy detainees in Guantanamo Bay). *See generally* 28 U.S.C. § 2241 (2006) (describing writ of habeas corpus).

19. *See generally* Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010); Al-Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010); Kiyemba v. Obama, 605 F.3d 1046 (D.C. Cir. 2010); Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010); Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008); Al Odah v. United States, 648 F. Supp. 2d 1 (D.D.C. 2009); Al-Ansi v. Obama, 647 F. Supp. 2d 1 (D.D.C. 2009); Rabbani v. Obama, 656 F. Supp. 2d 45 (D.D.C. 2009); Khan v. Obama, Civil Action No. 08-1101 (JDB), 2009 WL 2524587 (D.D.C. Aug. 18, 2009); Al Ginco v. Obama, 626 F. Supp. 2d 123 (D.D.C. 2009); Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. 2009); Gherebi v. Obama, 609 F. Supp. 2d 43 (D.D.C. 2009); *In re* Guantanamo Bay Detainee Litig., Misc. No. 08-0442 (TFH) (D.D.C. Dec. 16, 2008) (order amending case management order), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/12/hogan-cmo-order-12-16-08.pdf (describing procedure for hearing detainee habeas corpus actions).

20. *See* Christopher Flavelle, *Why Many Guantanamo Detainees Ordered Released Are Still Stuck There*, PROPUBLICA, Oct. 12, 2009, http://www.propublica.org/feature/gitmo-guantanamo-detainees-ordered-released-are-still-stuck-there-1012. In total, there are roughly 221 detainees still being held at Guantanamo Bay. *See* Taylor, *supra* note 8.

21. *See Boumediene*, 553 U.S. at 797 (declining to state scope of government's detention authority in ruling detainees entitled to habeas corpus); Hamdi v. Rumsfeld, 542 U.S. 507, 553 (2004) (stopping short of defining what process due to detainee because detention deemed unlawful); Rasul v. Bush, 542 U.S. 466, 469 (2004) (stating procedure for hearing merits of detainees claims not addressed in opinion); Farah Stockman, *Lawyers Debate "Enemy Combatant*," BOS. GLOBE, Oct. 24, 2008, http://www.boston.com/news/nation/washington/articles/2008/10/24/lawyers_debate_enemy_combatant (noting frustration of federal judge over lack of guidance on "enemy combatant" definition). Judge Richard J. Leon expressed his frustration by saying:

Part II.A of this Note will discuss the historical precedent for the detention of enemy combatants, the writ of habeas corpus, and issues implicating separation of powers during times of national and international crisis.[22] Part II.B will explore the evolution of legislation dealing with detention of enemy combatants from World War II to the present, focusing on how such legislation has come to pass, and its utilization by the executive branch.[23] Part II.C will then examine how the Supreme Court granted detainees the ability to challenge their detention, and how that ability affects habeas corpus litigation in the federal courts.[24] Part II.D will examine the importance of the *Al Ginco* decision and its implications on detainee habeas corpus litigation.[25] Finally, Part III of this Note will call for legislation that may serve to unify the courts in their consideration of detainee habeas corpus actions, maintain the correct separation of powers throughout the three branches of the U.S. government, and ensure that no one is indefinitely detained without clear legal justification.[26]

II. HISTORY

In early 2002, the first detainees from the War on Terror arrived in Guantanamo Bay.[27] The United States did not inform the men of their alleged crimes, permit them access to counsel, or allow them to inform their families of their whereabouts.[28] Within a month of the detainees' arrival at Guantanamo Bay, and without their knowledge, a group of lawyers filed the first Guantanamo detainee habeas corpus action on their behalf.[29] This section will

> We are here today, much to my dismay, I might add, to deal with a legal question that in my judgment should have been resolved a long time ago . . . . I don't understand, I really don't, how the Supreme Court made the decision it made and left that question open . . . . I don't understand how Congress could let it go this long without resolving it.

Stockman, *supra* (second alteration in original). *See generally In re* Guantanamo Bay Detainee Litig., Misc. No. 08-0442 (TFH) (D.D.C. Dec. 16, 2008) (attempting to unify procedural approach of judges hearing detainee habeas corpus actions).

22. *See infra* Part II.A (discussing U.S. cases dealing with detention absent charges, habeas corpus, and separation of powers).

23. *See infra* Part II.B (discussing federal legislation dealing with enemy detention).

24. *See infra* Part II.C (discussing modern habeas corpus precedent in enemy combatant detention cases).

25. *See infra* Part II.D (examining *Al Ginco* and difficulty for federal district courts trying detainee cases without guidance).

26. *See infra* Part III.A (analyzing current guidance for federal courts on handling detainee habeas corpus actions); *infra* Part III.B (stating need for Supreme Court precedent on detainee habeas corpus actions); *infra* Part III.C (recommending new legislation to remedy shortcomings).

27. *See* PETER JAN HONIGSBERG, OUR NATION UNHINGED: THE HUMAN CONSEQUENCES OF THE WAR ON TERROR 10 (2009) (noting first detainees from War on Terror arrived at Guantanamo on January 11, 2002).

28. *See* David Cole, *Out of the Shadows: Preventative Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 726 (2009) (describing early policy of indefinitely holding "enemy combatants" without charge, hearing, or Geneva Convention protections).

29. *See* Chemerinsky, *Wartime Security*, *supra* note 3, at 1119 (noting Ninth Circuit decided first

explore the evolution of the case law dealing with preventative detention, as well as the legislation that purports to justify detention.[30]

A. Early Preventative Detention Case Law

American history is replete with instances of people challenging their detention as illegal.[31] The most notable challenges to detention have come in the wake of major wars, when the U.S. government detained many people, including American citizens, without formal civilian criminal charges.[32] This body of case law sets the broad framework for habeas corpus actions brought by Guantanamo detainees today.[33] This Note will illustrate, however, that these cases did not fully prepare the federal judiciary for the difficult legal questions presented by this new breed of habeas actions.[34]

The first major case to consider military detention in the absence of civilian criminal charges was the 1866 case of *Ex parte Milligan*.[35] In 1864, authorities arrested Lamdin Milligan at his Indiana home and tried him before a military commission, which charged him with and convicted him of conspiracy against the U.S. government, affording aid and comfort to rebels against the authority of the United States, inciting insurrection, disloyal practices, and violations of the laws of war.[36] On appeal, the Supreme Court held Milligan's trial and conviction by a military commission illegal because the federal courts of Indiana were still in operation.[37] The Court explained that while the

Guantanamo habeas action brought by next friends in February 2002). *See generally* Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002) (bringing first Guantanamo detainee habeas corpus action), *aff'd in part, rev'd in part*, 310 F.3d 1153 (9th Cir. 2002).

30. *See infra* Part II.A (examining early U.S. cases dealing with preventative detention and habeas corpus); *infra* Part II.B (examining federal legislation of importance to Guantanamo detainee policy); *infra* Part II.C (examining modern Supreme Court cases pertaining to Guantanamo detainees); *infra* Part II.D (examining recent developments in detainee habeas actions in wake of *Boumediene*).

31. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763 (1950) (holding U.S. courts did not have jurisdiction over war criminals in U.S.-run German prison); *Ex parte* Quirin, 317 U.S. 1 (1942) (holding military commission trial of enemy alien authorized by Congress did not violate Constitution); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (arguing military commissions unconstitutional for civilian when federal court still in operation).

32. *See supra* note 31 (listing multiple instances of postwar detention).

33. *See* Boumediene v. Bush, 553 U.S. 723, 768, 786 (2008) (citing *Eisentrager*, *Milligan*, and *Quirin*).

34. *See* Cole, *supra* note 28 (noting longstanding and unresolved debate over scope of enemy combatant detention authority); *see also supra* note 21 and accompanying text (describing overall lack of guidance for courts on detainee issues).

35. 71 U.S. (4 Wall.) 2 (1866).

36. *See id.* at 7. The commission sentenced Milligan to be hanged on May 19, 1865, but he filed a petition for the writ of habeas corpus in the Circuit Court of the United States for the District of Indiana just nine days before his execution. *See id.*

37. *See id.* at 4 (stating holding of case). The Court stated:

> A citizen not connected with the military service and resident in a State where the courts are open and in the proper exercise of their jurisdiction cannot, even when the privilege of the writ of *habeas corpus* is suspended, be tried, convicted, or sentenced otherwise than by the ordinary courts of law.

Constitution authorizes Congress to suspend the writ of habeas corpus, the suspension power is a limited one.[38] Congress is not authorized to suspend the writ of habeas corpus "unless when in Cases of Rebellion or Invasion the public Safety may require it."[39] Nevertheless, the Court held President Lincoln's suspension of the writ during the Civil War unconstitutional, despite what many would classify as a Southern "rebellion."[40]

Although *Milligan* is different from the modern detainee habeas corpus actions in a number of ways, it is historically significant for considering the extent of military jurisdiction during a suspension of habeas corpus.[41] More importantly, *Milligan* limits the ability of the executive branch to charge civilians outside the control of the judiciary even when habeas corpus has been suspended pursuant to the Suspension Clause.[42]

In 1942, the United States captured eight German conspirators attempting to invade the United States and destroy military targets.[43] *Ex parte Quirin* presented the Supreme Court with a new and difficult question regarding

---

Id.

38. *See id.* at 135 (noting suspension powers limited within states where federal courts still in operation). *See generally* U.S. CONST. art. I, § 9, cl. 2 (setting forth Suspension Clause).

39. U.S. CONST. art. I, § 9, cl. 2 (outlining conditions allowing for suspension of habeas corpus); *see also The Suspension Clause*, 83 HARV. L. REV. 1263, 1263-65 (1970) (stating power to suspend writ of habeas corpus "evidently" belongs exclusively to Congress). Arthur H. Garrison opines that the Second Circuit seemed more sure that the power belonged to Congress when they accepted that

> the Constitution contemplates abridgements of individual liberties in times of national emergency, but the power to effect these abridgements belongs to Congress and not the President. The suspension [sic] the writ, the prescription of its scope, and the application of the realization that in times of war or national emergency civil liberties may have to suffer intrusions can only occur 'in a manner to be prescribed by law.'

Arthur H. Garrison, *The War on Terrorism on the Judicial Front, Part II: The Courts Strike Back*, 27 AM. J. TRIAL ADVOC. 473, 486 (2004) (internal quotation marks omitted) (discussing Second Circuit's analysis of suspension power).

40. *See Milligan*, 71 U.S. (4 Wall.) at 124-25 (decrying suspension of habeas corpus as irreconcilable with constitutional protections); Seth P. Waxman, *The Combatant Detention Trilogy Through the Lenses of History*, *in* TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES 1, 6-7 (Peter Berkowitz ed., 2005) (describing Court's condemnation of Lincoln's suspension of habeas corpus). It is important to note that the Supreme Court has never found a violation of the Suspension Clause. *See* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 COLUM. L. REV. 537, 538 (2010) (describing history of Supreme Court Suspension Clause decisions).

41. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 135 (1866) (restricting military jurisdiction during suspension of habeas corpus). *Compare id.* (considering detention of U.S. citizen captured and imprisoned in America), *with* Boumediene v. Bush, 553 U.S. 723 (2008), *and* Al Ginco v. Obama, 626 F. Supp. 2d 123 (D.D.C. 2009) (considering detention of aliens captured and imprisoned abroad).

42. *See Milligan*, 71 U.S. (4 Wall.) at 133 (stating limitations on military detention of citizen when courts still operating). *See generally* U.S. CONST. art. I, § 9, cl. 1 (listing requirements for suspension of habeas corpus).

43. *See Ex parte* Quirin, 317 U.S. 1, 21 (1942) (stating facts of case).

habeas corpus.[44] The Supreme Court considered whether President Roosevelt exceeded his authority as commander-in-chief when ordering a military commission to try the petitioners.[45] The Court held that Congress, under the Articles of War, authorized the president to order the trial of unlawful enemy combatants by military commission.[46] *Quirin* successfully illustrates separation of powers during wartime: Congress passed legislation granting the Executive power to detain, and the Judiciary subsequently validated it as constitutional.[47]

Perhaps the most important case affecting modern detainee habeas corpus actions is *Johnson v. Eisentrager*.[48] Eisentrager and twenty other German nationals were captured in China and tried there by a U.S. military commission for violating the laws of war by continuing military operations against the United States after the unconditional surrender of Germany in WWII.[49] The Court, in a six-to-three opinion, held non-resident enemy aliens did not enjoy access to the courts of the United States during wartime, and thus petitioners had no right to seek the writ of habeas corpus in U.S. courts.[50] The Court reasoned that it is an alien's presence within the territorial jurisdiction of the United States that gives the Judiciary authority to act.[51] *Eisentrager* later became one of the Bush Administration's strongest pieces of support for its program of preventative detention at Guantanamo Bay.[52]

44. *See id.* at 25-26. Quirin was one of eight German conspirators who made a clandestine landing on the east coast of the United States during WWII with the mission of blowing up various U.S. targets. *See id.* at 21. After a quick apprehension, President Roosevelt ordered the men tried by a military commission, which later convicted and condemned all eight. *See id.* at 22-23. Seven of the men filed habeas corpus petitions in federal court that the Supreme Court later considered. *See id.* 18-20.

45. *See id.* at 24-25 (stating issue Court considered).

46. *See id.* at 48 (stating holding of Court). The Court determined that the petitioners were unlawful enemy combatants in violation of the laws of war because they acted as spies, did not wear military uniforms, and attempted to sabotage U.S. targets. *See id.* at 35.

47. *See generally Quirin*, 317 U.S. at 26-29 (implicating functional separation of powers during wartime). Some scholars believe that considerations of the doctrine of separation of powers have been influential on Supreme Court rulings pertaining to executive wartime policies. *See* Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 391 (2010). Professor Fallon believes, with regards to modern habeas corpus litigation, that "the Court's hesitancy to render substantive rulings—or at least substantive rulings in favor of detainees—may grow partly from a worry about the politically constructed bounds of judicial power." *Id.*

48. 339 U.S. 763 (1950).

49. *See id.* at 765-66 (stating facts of case). Although imprisoned in occupied Germany, the men petitioned the United States District Court for the District of Columbia for writs of habeas corpus. *See id.* at 766.

50. *See id.* at 790-91 (stating holding of case).

51. *See id.* at 781 (criticizing circuit court's disregard for question of territorial jurisdiction).

52. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 577 (2004) (citing *Eisentrager* as requiring presence within sovereign to enjoy habeas protection); Rasul v. Bush, 542 U.S. 466, 501 (2004) (stating government's position that *Eisentrager* precedent controls); *see also* Fiona de Londras & Fergal F. Davis, *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms*, 30 OXFORD J. LEGAL STUD. 19, 39 (2010) (noting Bush Administration's Guantanamo detention policy based "to a large extent" on *Eisentrager*).

B. Federal Legislation Regarding Preventative Detention Authority

The United States currently has no statute, nor any pending, which explicitly governs the standards for preventative detention.[53] Consequently, the only statutory authority for the president to detain someone without charge, short of suspending the writ of habeas corpus,[54] is gleaned through executive interpretation of congressional acts.[55] Despite the lack of clear statutory language addressing the standards for preventative detention, there are several pieces of legislation that both the Bush and Obama Administrations have heavily relied upon to legitimize their programs of preventative detention.[56]

One week after the 9/11 terrorist attacks, the 107th Congress passed a joint resolution called the Authorization for Use of Military Force (AUMF).[57] The AUMF 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.[58]

Although the AUMF makes no mention of "detention," the Bush and Obama Administrations have relied on it to authorize preventative detention as incident

53. *See* Cole, *supra* note 28, at 698 (emphasizing need for statute expressly addressing scope of President's detention authority); Peter Baker, *Obama to Use Current Law to Support Detentions*, N.Y. TIMES, Sep. 24, 2009, at A23, *available at* http://www.nytimes.com/2009/09/24/us/politics/24detain.html (reporting Obama Administration will not seek further legislation supporting detention).

54. *See generally* U.S. CONST. art. I, § 9, cl. 2 (stating habeas corpus suspension proper only during rebellion, invasion, or when public safety requires it). Habeas corpus, or "the Great Writ" as it is often called, is a constitutional protection that allows a detained individual to challenge the legality of his or her detention in the federal courts of the United States. *See* 28 U.S.C. § 2241 (codifying writ of habeas corpus). Professor Daniel Farber describes the writ as "the historic method of ensuring that the government detains individuals in accordance with the law." *See* Daniel A. Farber, *Justice Stevens, Habeas Jurisdiction, and the War on Terror*, 43 U.C. DAVIS L. REV. 945, 948 (2010).

55. *See* Al Odah v. Obama, 648 F. Supp. 2d 1, 7 (D.D.C. 2009) (stating government's justification for detention based on AUMF); Al Ginco v. Obama, 626 F. Supp. 2d 123, 126 (D.D.C. 2009) (stating government's argument for detention based on authority from AUMF); Hamlily v. Obama, 616 F. Supp. 2d 63, 67 (D.D.C. 2009) (stating government's detention framework based principally upon AUMF); Gherebi v. Obama, 609 F. Supp. 2d 43, 54 (D.D.C. 2009) (clarifying detention authority arises solely from AUMF); Cole, *supra* note 28, at 734 (noting Bush detention authority based not on legislative directive but executive interpretation of AUMF).

56. *See generally* Military Commissions Act of 2006, 10 U.S.C. §§ 948a-948d (2006); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); H.R. REP. NO. 109-359 (2005) (Conf. Rep.) (outlining Detainee Treatment Act of 2005).

57. *See generally* Authorization for Use of Military Force § 2.

58. *Id.*

to the normal waging of war.[59]

In December 2005, Congress passed the Detainee Treatment Act of 2005 (DTA).[60] The DTA stripped the federal courts of jurisdiction to hear habeas corpus actions brought by Guantanamo detainees, as well as any other action brought by a detainee or former detainee in which the United States was a defendant.[61] It further stated that the United States Court of Appeals for the District of Columbia Circuit had exclusive jurisdiction to review the findings of the Combatant Status Review Tribunals (CSRT).[62]

In response to the Supreme Court's ruling in *Hamdan v. Rumsfeld*,[63] which limited the power of the DTA, Congress passed the Military Commissions Act of 2006 (MCA).[64] The MCA established military commissions to try "unlawful enemy combatants" for violations of the laws of war.[65] Most importantly, the MCA amended the habeas corpus language in the U.S. Code to reflect the blocking of habeas corpus actions the DTA prescribes.[66] The Supreme Court,

59. *See* Cole, *supra* note 28, at 727, 732 (noting detaining enemy soldiers incident to war and absence of mention of detention in AUMF); *see also supra* text accompanying notes 12-13 (discussing Bush and Obama Administrations' stated detention authority). Responding to the argument that the AUMF did not explicitly mention detention, the Supreme Court reasoned:

> [I]t is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "'necessary and appropriate force,"' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.

Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).

60. *See generally* H.R. REP. NO. 109-359 (outlining Detainee Treatment Act of 2005).

61. *See id.* The Bush Administration maintained the DTA not only stripped the federal courts of jurisdiction for future habeas actions, but for pending cases as well. *See* Ian Wallach, *No Habeas at Guantanamo? The Executive and the Dubious Tale of the DTA*, JURIST, Mar. 6, 2006, http://jurist.law.pitt.edu/forumy/2006/03/no-habeas-at-guantanamo-executive-and.php.

62. *See* H.R. REP. NO. 109-359 (2005) (Conf. Rep.) (ordering exclusive jurisdiction for D.C. Circuit). CSRTs were established in the wake of *Hamdi* to review detainees' designations as "unlawful enemy combatants." *See* Memorandum from the Deputy Sec'y of Def. to the Sec'y of the Navy (July 7, 2004), *available at* http://www.defense.gov/news/Jul2004/d20040707review.pdf (establishing combatant status review tribunals). The CSRTs were meant to serve as "a more formal substitute for unilateral executive determinations of a detainee's enemy combatant status." *See* Neal Devins, *Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants*, 12 U. PA. J. CONST. L. 491, 514 (2010).

63. 548 U.S. 557 (2006). The Court in *Hamdan* held that Congress had not expressly authorized the military commissions set up to try Guantanamo detainees. *See id.* at 632-35 (outlining holding of case). The Court also held that the military commissions violated the Uniform Code of Military Justice, and did not satisfy the Geneva Conventions. *See id.* The Court further held that the DTA did not strip the Supreme Court of jurisdiction to hear the case. *See id.* at 616.

64. *See generally* Military Commissions Act of 2006, 10 U.S.C. §§ 948a-948d (2006).

65. *See id.* (describing means for trying "unlawful enemy combatants"). *See generally* Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT'L L. 322 (2007).

66. *See* Military Commissions Act §§ 948a-948d (stripping federal courts of habeas jurisdiction). This congressional move, made at the behest of the Executive, served two purposes: it responded to the Supreme Court's ruling in *Hamdan* by explicitly creating military commissions through congressional action, and it refined the language that stripped the federal courts of jurisdiction to hear Guantanamo habeas corpus actions. *See id.*; HONIGSBERG, *supra* note 27, at 147 (2009) (noting MCA unequivocally stripped federal courts of

however, held this section of the MCA unconstitutional in *Boumediene v. Bush*, striking a severe blow to the Bush Administration's desired detention policy.[67]

C. Modern Detainee Case Law: Challenges to Detention as Unlawful

Modern detainee case law has greatly evolved with every successive Supreme Court case to consider the matter.[68] One of the major cases considering detainees from the War on Terror was *Hamdan v. Rumsfeld*, which rebuked attempts by the Bush Administration to replace traditional habeas corpus with ad hoc combatant status review tribunals.[69] Other than *Hamdan*, the Court has decided three important detainee cases, each of which granted stronger protections to detainees at Guantanamo Bay.[70]

In *Hamdi v. Rumsfeld*,[71] U.S. forces detained Yaser Hamdi, a U.S. citizen captured on the battlefield in Afghanistan.[72] In response to Hamdi's father filing a habeas corpus action as his son's next friend, the government stated it had authority to detain Hamdi indefinitely, and without formal charges, based on its determination that he was an "enemy combatant."[73] After noting that the AUMF did authorize the president to detain "enemy combatants," the Court held due process granted Hamdi, as a United States citizen, the right to challenge his detention by informing him of the factual basis for his classification as an "unlawful enemy combatant," and a meaningful opportunity to rebut those facts before a neutral decision maker.[74] The Court further decided that separation of powers did not require the Judiciary to automatically

Guantanamo habeas corpus actions); Bradley, *supra* note 65, at 322-23 (noting MCA purports to strip federal courts of detainee habeas jurisdiction). The Bush Administration and Congress unsuccessfully sought to employ military commissions as a constitutional alternative to the writ of habeas corpus. *See* HONIGSBERG, *supra* note 27, at 148 (noting 'Executive's belief that MCA's congressional authorization rendered it more difficult to hold unconstitutional).

67. 553 U.S. 723 (2008). The decision in *Boumediene* was "a major rejection of the Bush administration's cynical position that by holding the detainees at the naval base in Guantanamo, it could put them beyond the reach of American law." HONIGSBERG, *supra* note 27, at 170; *see also infra* Part II.D (examining recent Supreme Court cases dealing with Guantanamo detainees in wake of *Boumediene*). *But see* Devins, *supra* note 62, at 520-22 (opining importance of *Boumediene* decision overstated).

68. *See Boumediene*, 553 U.S. at 790-91 (holding DTA not adequate substitute for habeas corpus and MCA unconstitutional suspension of writ); Hamdi v. Rumsfeld, 542 U.S. 507, 539 (2004) (holding U.S. citizen has unquestionable right to challenge detention in federal courts); Rasul v. Bush, 542 U.S. 466, 484-85 (2004) (holding federal courts have jurisdiction to hear habeas corpus petitions even if detainee abroad).

69. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 557 (2006); *see also supra* note 63 (describing holding of Court in *Hamdan*).

70. *See generally supra* note 63 (describing evolution of Supreme Court detainee case law used in *Hamdan*).

71. 542 U.S. 507 (2004).

72. *See id.* at 510 (describing background facts of case); Honigsberg, *supra* note 15, at 35-36 (recounting Hamdi's capture and detention).

73. *See Hamdi*, 542 U.S. at 511-12 (noting government's argument for indefinitely detaining Hamdi absent formal charges); *see also* Honigsberg, *supra* note 15, at 4-5 (stating "enemy combatant" not legal term but one made up by administration to justify detention).

74. *See Hamdi*, 542 U.S. at 533 (stating holding of Court).

accept as true the government's classification of an American citizen as an unlawful enemy combatant.[75]

Both the government and civil liberties groups can claim small victories from the Court's decision in *Hamdi*.[76] While the Supreme Court upheld the government's detention authority under the AUMF, the Court refused to endorse an overly broad executive power, abstained from ruling on whether Article II Commander-in-Chief powers authorized the president to detain Hamdi, and rejected the argument that the AUMF authorized indefinite detention for the purpose of interrogation.[77] Although the Court in *Hamdi* took important steps to protect civil liberties, it stopped short of answering some of the more difficult procedural questions posed, preferring to leave them for another day.[78]

On the same day the Court decided *Hamdi*, it delivered an opinion in another important detainee case: *Rasul v. Bush*.[79] In *Rasul*, the Court considered whether U.S. federal courts had jurisdiction to hear actions brought by Guantanamo Bay detainees challenging the constitutionality of their detention.[80] The Court held that 28 U.S.C. § 2241, the federal habeas corpus statute, conferred jurisdiction upon the U.S. district courts to hear the alien-detainees' challenges to their detention.[81] The Court reasoned that even though Guantanamo Bay was located in Cuba, the degree of control maintained by the United States over the naval base was analogous to the territorial jurisdiction of the United States.[82] Although the long-term importance of *Hamdi* and *Rasul* was uncertain due to the adoption of the DTA and later the MCA, the

75. *See id.* at 535-36. The Court goes on to emphatically assert that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Id.* at 536 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)).

76. *See generally Hamdi*, 542 U.S. 507 (upholding detention authority based on AUMF but not on broad grant of executive power).

77. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004); Waxman, *supra* note 40, at 12-14. *Hamdi* introduced a new wrinkle into the lexicon of Guantanamo detainee actions by endorsing a burden shifting scheme in which the government is required to produce credible evidence to justify detention, at which point the burden shifts to the detainee to rebut said evidence. *See Hamdi*, 542 U.S. at 534 (describing burden-shifting scheme). The Court also approved the use of hearsay evidence in the proceedings, reasoning that it was often the most reliable evidence available. *See id.* at 533-34. Not only did the Court approve the use of hearsay evidence, but it also stated that there was no constitutional issue with a presumption in favor of the government's evidence. *See id.* at 534.

78. *See Hamdi*, 542 U.S. at 534-35 (summarizing Court's holding).

79. 542 U.S. 466 (2004). The Supreme Court decided both *Rasul* and *Hamdi* on June 28, 2004. *See Hamdi*, 542 U.S. at 507; *Rasul*, 542 U.S. at 466. *Rasul* was a case brought by two Australians and twelve Kuwaitis captured in either Pakistan or Afghanistan and detained without charges at Guantanamo Bay. *See Rasul*, 542 U.S. at 470-71. The petition challenged the legality of the fourteen men's detention. *Id.* at 471.

80. *See Rasul*, 542 U.S. at 475 (framing legal question Supreme Court decided).

81. *See id.* at 484 (holding district courts have jurisdiction to hear detainee habeas corpus actions).

82. *See id.* at 480-81. The opinion went on to state that "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact.'" *See id.* at 482 (quoting *Ex parte* Mwenya, [1960] 1 Q.B. 241 at 303 (Eng.)).

importance of the next Supreme Court decision to address Guantanamo detainees was immediately apparent.[83]

Boumediene v. Bush was a consolidated case of a group of Guantanamo detainees challenging their detention, as well as the constitutionality of the MCA's language stripping the federal courts of jurisdiction to hear detainee habeas corpus suits.[84] In its most important Guantanamo detainee decision, the Court held detainees at Guantanamo Bay had a constitutional right to seek the writ of habeas corpus, and that section seven of the MCA was an unconstitutional suspension of the writ.[85] The Court reasoned that while the DTA review process did not have to mirror 28 U.S.C. § 2241 in every respect, it failed to provide an adequate substitute for habeas corpus protections.[86] *Boumediene* paved the way for every Guantanamo Bay detainee to challenge his detention in a federal court, resulting in a flood of detainee habeas corpus petitions.[87]

D. New Developments in Guantanamo Detainee Habeas Corpus Case Law

The Supreme Court established substantial protections for Guantanamo detainees in *Boumediene* when it held that detainees have a constitutional right to seek the writ of habeas corpus in the federal courts of the United States.[88] Nevertheless, the Court stopped well short of describing the proper standards to use in determining whether to grant the writ to a petitioning detainee.[89] Federal district court judges for the District of Columbia are thus forced to determine who deserves to be granted the writ in the complete absence of specific

83. *See* HONIGSBERG, *supra* note 27, at 170-73 (noting "momentous" importance of *Boumediene* decision); *supra* Part II.D (examining impact of *Boumediene* on recent habeas corpus litigation).

84. *See* Boumediene v. Bush, 553 U.S. 723, 732 (2008) (framing issues to be considered by Court). The District Court for the District of Columbia dismissed the detainees' application for the writ of habeas corpus, and the Circuit Court of Appeals for the District of Columbia Circuit affirmed. *See id.* at 734-35.

85. *See id.* at 724-25 (stating holding of case). The case also reinforced the holding of *Rasul*, stating that the fundamental rights of the Constitution extend to Guantanamo Bay because of the degree of control the United States exercises over the base. *See id.* at 770-71 (stating habeas corpus extends to Guantanamo Bay).

86. *See id.* at 791-92.

87. *See* HONIGSBERG, *supra* note 27, at 170-73 (noting important impact of *Boumediene* decision). *See, e.g.*, Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010); Kiyemba v. Obama, 605 F.3d 1046 (D.C. Cir. 2010); Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008).

88. *See Boumediene*, 553 U.S. at 724-25; *see also* HONIGSBERG, *supra* note 27, at 170-73 (noting important impact of *Boumediene* decision).

89. *See* Boumediene, 553 U.S. at 795-97 (noting Court must only show deference to Executive in determining detention standards); BENJAMIN WITTES ET AL., BROOKINGS INST., THE EMERGING LAW OF DETENTION: THE GUANTANAMO HABEAS CASES AS LAWMAKING 4 (2010), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf (noting Court declined to address a number of critical questions in *Boumediene*); Cole, *supra* note 28, at 698 (calling for preventative detention statute to resolve disputes over scope of detention authority); Stockman, *supra* note 21 (noting frustration of district court judge with lack of guidance from Supreme Court).

guidance from either the Supreme Court or Congress.[90] Forcing judges to make such determinations has resulted in disparate standards for continued detention in Guantanamo detainee habeas corpus actions.[91]

The *Al Ginco* case presents an interesting example of the type of difficult determinations district court judges must make due to the bizarre facts involved.[92] Judge Richard J. Leon had to decide whether Al Ginco was "part of" the Taliban or Al Qaeda at the time of his capture—a substantial task in the absence of a binding legal definition of "part of."[93] This issue of first impression was further complicated by the uncontested facts that Al Ginco had stayed at an Al Qaeda guesthouse and trained at the Al Farouq training camp, but was subsequently accused of being a spy, brutally tortured and imprisoned by the same group the government contended he continued to be a "part of."[94]

In the absence of guidance on this novel issue, Judge Leon developed a test for determining whether a person's pre-existing relationship had sufficiently eroded to the point that they were no longer "part of" an organization.[95] To determine whether such a relationship has been vitiated, Judge Leon considered the following: "(1) the nature of the relationship in the first instance; (2) the nature of the intervening events or conduct; and (3) the amount of time that has passed between the time of the pre-existing relationship and the point in time at which the detainee is taken into custody."[96]

Judge Leon held that the government had failed to carry its burden, and that Al Ginco was no longer "part of" the Taliban or Al Qaeda.[97] Applying his three-part test, the judge found that although Al Ginco may have initially had a brief relationship with the Taliban and/or Al Qaeda, the intervening imprisonment and torture were both long and barbaric enough to vitiate any

90. *See supra* note 21 and accompanying text (discussing lack of guidance for lower courts on detainee issues); *see also* WITTES ET AL., *supra* note 89, at 1 (noting federal judges must establish rules governing preventative detention). The Obama Administration has since counseled the courts that for a detainee's detention to be legal he needs to have provided "substantial support" to either the Taliban or Al Qaeda. *See* Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees held at Guantanamo Bay at 2, *In re* Guantanamo Bay Detainee Litig., Misc. No. 08-0442 (TFH) (D.D.C. Mar. 13, 2009), *available at* http://www.justice.gov/opa/documents/memo-re-det-auth.pdf (changing "support" prong of detention authority to "substantial support").

91. *Compare* Hamlily v. Obama, 616 F. Supp. 2d 63, 77 (D.D.C. 2009) (rejecting concept of "support" for detention authority), *with* Boumediene v. Bush, 579 F. Supp. 2d 191, 197 (D.D.C. 2008) (employing concept of "support" to justify continued detention), *rev'd,* 610 F.3d 718 (D.C. Cir. 2010).

92. *See supra* notes 4-7 and accompanying text (describing facts of *Al Ginco*).

93. *See* Al Ginco v. Obama, 626 F. Supp. 2d 123, 128 (D.D.C. 2009) (noting lack of guidance for definition of "part of"). The judge plainly states: "neither Congress, nor the Executive, have ever defined the minimum evidentiary showing necessary to warrant being adjudged 'part of' either organization." *Id.*

94. *See id.* (stating unique facts of *Al Ginco*); *see also* Azmy, *supra* note 6, at 512 (describing *Al Ginco* case as "remarkable").

95. *See Al Ginco*, 626 F. Supp. 2d at 129 (stating purpose of new "part of" test).

96. *Id.* (outlining elements of "part of" and "vitiation" test).

97. *See id.* at 130 (stating holding of case).

remnants of those relationships.[98] This notion that a person might at one time be "part of" the Taliban or Al Qaeda, but may then sever that relationship through time or circumstance does not, however, seem to be shared amongst all the district court judges for the District of Columbia.[99]

III. ANALYSIS

This section will argue that the current guidance on detainee habeas corpus actions offered by the Supreme Court as well as the Executive and Legislative branches is vague and inadequate.[100] Because of this inadequacy, federal district court judges cannot proceed with any confidence that their judgments will stand, nor can the litigants form any reasonable predictions from the case law.[101] This section will then examine how more definitive Supreme Court precedent would help to unify the case law dealing with detainee habeas corpus actions.[102] Finally, this section will argue that adoption of legislation clearly addressing the substantive scope of the government's detention authority would clarify the law for the public, the federal courts, and most importantly those detained without charge.[103]

98. *See* Al Ginco, 626 F. Supp. 2d at 130 (applying "vitiation" test to determine whether relationship remained between Al Ginco and Taliban or Al Qaeda).

99. *See* WITTES ET AL., *supra* note 89, at 67-68 (describing differing approaches to vitiation of relationship district court judges employ).

100. *See id.* at 16 (noting scope of government's detention authority left almost entirely to lower federal courts); *see also* Azmy, *supra* note 6, at 514 (noting Court "offered little specific guidance"); Cole, *supra* note 28, at 698 (noting longstanding and unresolved debate over scope of detention authority); *supra* note 21 and accompanying text (describing overall lack of guidance for federal courts on detainee issues).

101. *See* WITTES ET AL., *supra* note 89, at 3 (opining lack of sure standards for either side in ongoing litigation); *infra* Part III.A (examining lack of guidance and negative effect on uniformity of detainee habeas corpus actions); *supra* note 21 and accompanying text (illustrating lack of guidance for federal courts). *But see* Azmy, *supra* note 6, at 537 (noting all considerations within expertise and competence of district courts). Professor Azmy notes the lack of specific guidance from the Supreme Court on detainee habeas corpus matters, but believes that the district courts are adequately prepared to handle these questions absent such guidance. *See* Azmy, *supra* note 6, at 537. Nevertheless, it seems the more persuasive argument is that this lack of guidance creates inconsistencies in the common law of detainee habeas corpus actions. *See* WITTES ET AL., *supra* note 89, at 81 (stating "lack of clarity is dangerous").

102. *See infra* Part III.B (analyzing need for, and benefits of, Supreme Court precedent in detainee habeas corpus actions); *see also* WITTES ET AL., *supra* note 89, at 83 (describing dangers associated with continued appellate court abstention from detainee issues).

103. *See infra* Part III.C (recommending adoption of legislation to clarify scope of government's detention authority); *see also* WITTES ET AL., *supra* note 89, at 82-83 (describing troubling lack of legislative initiative); Londras & Davis, *supra* note 52, at 39 (noting "systematic Congressional failure to provide effective oversight"). Despite the apparent lack of desire to legislate on this matter, "[l]egislative guidance remains the most appropriate means of giving shape to a detention system that will otherwise continue to develop spasmodically, unpredictably, and very likely in undesirable directions." *See* WITTES ET AL., *supra* note 89, at 82-83.

A. Current Guidance on Detainee Habeas Corpus Actions Is Inadequate to Ensure Uniformity of the Law

The Supreme Court's holding in *Boumediene* was limited to the constitutional issues regarding Guantanamo detainees' access to the writ of habeas corpus, leaving all questions of procedure and substantive scope-of-detention authority to the lower federal courts.[104] This lack of guidance has drawn criticism from legal scholars and federal judges alike.[105] A group of noted legal scholars observed that, in holding Guantanamo detainees were entitled to seek the writ of habeas corpus, the Supreme Court "gave only the barest sketch of what such proceedings should look like, leaving a raft of questions open for the district and appellate court judges."[106] Furthermore, the Obama Administration has stated that it will not seek further legislation from Congress to justify or clarify its detention authority.[107] This lack of guidance has led to disparate results in detainee habeas corpus actions with similar facts, based not on the merits of the cases, but rather on which particular judge hears the petition.[108]

B. Need for Supreme Court Precedent Addressing Standards and Procedure for Detainee Habeas Corpus Actions

The Supreme Court's refusal to address the substantive scope of the government's detention authority in *Boumediene* has left the task to federal district court judges, who are free to apply whichever standard they see fit, regardless of its disparity from the standard being applied down the hall of the

104. *See* Boumediene v. Bush, 553 U.S. 723, 797 (2008) (reiterating limited scope of holding); WITTES ET AL., *supra* note 89, at 1 (noting limited nature of *Boumediene* decision); Azmy, *supra* note 6, at 450 (noting *Boumediene* Court left critical questions of substantive law open for resolution by district courts); *supra* notes 21, 89 and accompanying text (illustrating lack of guidance on detainee issues).

105. *See* WITTES ET AL., *supra* note 89, at 81 (describing lack of clarity as dangerous); Cole, *supra* note 28, at 698 (calling for legislation clearly addressing preventative detention); Stockman, *supra* note 21 (noting federal judge's frustration with lack of guidance from Supreme Court and Congress); *supra* note 21 and accompanying text (discussing lack of guidance on detainee issues). *But see* Azmy, *supra* note 6, at 514 (stating district courts equipped to handle questions despite lack of guidance).

106. WITTES ET AL., *supra* note 89, at 5 (noting lack of procedural and substantive guidance for federal courts in *Boumediene*); *see Boumediene*, 553 U.S. at 797 (noting limited nature of holding).

107. *See* WITTES ET AL., *supra* note 89, at 5 (noting President's decision not to seek Congress's involvement in writing laws to address detention questions); Baker, *supra* note 53 (stating Obama Administration not seeking new legislation authorizing detention). With no impending legislation from Congress, the current situation "effectively delegates the writing of the rules to the district court." *See* WITTES ET AL., *supra* note 89, at 7 (considering result of congressional inaction on matter).

108. *See infra* Part III.B (arguing need for Supreme Court precedent in detainee habeas actions to unify case law); *see also* WITTES ET AL., *supra* note 89, at 69-70 (noting weak evidence can support detention and strong evidence can result in granting habeas corpus). *Compare* Awad v. Obama, 646 F. Supp. 2d 20, 27 (D.D.C. 2009) (upholding detention based on "gossamer thin" evidence), *with* Al-Adahi v. Obama, Civil Action No. 05-280 (GK), 2009 WL 2584685, at *16 (D.D.C. Aug. 21, 2009) (granting habeas corpus despite strong evidence of connection with Taliban and Al Qaeda), *rev'd*, 613 F.3d 1102 (D.C. Cir. 2010).

very same courthouse.[109] For instance, it is up to the district judges whether to analyze detention authority under the rubric of "substantial support" for the Taliban and/or Al Qaeda, or the rubric pertaining to being a "part of" either of these groups.[110] There are also differing opinions as to when, and how long, a detainee's relationship with the Taliban and/or Al Qaeda must have existed to justify detention, under either the "part of" or "substantial support" rationales.[111]

Differing judicial approaches can also be seen in the weight of evidence required to justify detention, as well as how to treat hearsay and evidence obtained in the face of coercion.[112] This creates a situation where neither the government nor the detainee "can be sure of the rules of the road in the ongoing litigation, and the prospect that allocation of a case to a particular judge may prove dispositive on the merits can cut in either direction."[113] The Supreme Court has the opportunity to unify these divergent paths by finally ruling on questions such as the substantive scope of the government's detention authority, the standard and weight of evidence required for continued detention, whether a relationship with the Taliban and/or Al Qaeda can be sufficiently vitiated, and the reliability of hearsay evidence and statements made under coercion.[114]

109. *See* WITTES ET AL., *supra* note 89, at 65 (noting difference in approach of federal judges to detainee habeas actions). A group of scholars from the Brookings Institution opine that "the approaches of the district and appellate judges to the Guantanamo habeas cases differ so markedly on matters so fundamental that some are at least in grave tension with one another on the bottom-line question of whether to tolerate or forbid continued detention given similar sets of facts." *Id.* The group further states there are four issues over which there is often a difference of opinion amongst the judges: differing notions of detention authority, differing notions of what constitutes vitiation of a relationship with the Taliban or Al Qaeda, differing approaches as to what weight to afford coerced statements, and differing ideas about how much evidence is needed for the government to meet its burden. *See id.*

110. *Compare* Boumediene v. Bush, 579 F. Supp. 2d 191, 197 (D.D.C. 2008) (denying habeas corpus for petitioner Bensayah based on "support" for Al Qaeda), *rev'd*, 610 F.3d 718 (D.C. Cir. 2010), *with* Al Odah v. United States, 648 F. Supp. 2d 1, 18 (D.D.C. 2009) (denying habeas corpus based on petitioner being "part of" terrorist organization), *and* Al Mutairi v. United States, 644 F. Supp. 2d 78, 96 (D.D.C. 2009) (granting habeas corpus after government failed to establish petitioner as "part of" terrorist organization). This ambiguity stems from language in *Hamdi* authorizing the detention of persons who were "part of or supporting forces hostile to the United States or coalition partners." *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004) (internal quotation marks omitted); Fallon, *supra* note 47, at 357-58 (stating breadth of detention authority most important unresolved question).

111. *See* WITTES ET AL., *supra* note 89, at 65 (noting different approaches of district court judges to questions of relationship timing/vitiation); *see also* Azmy, *supra* note 6, at 512 (citing *Al Ginco* as first case to employ vitiation of relationship in granting habeas relief). *Compare Awad*, 646 F. Supp. 2d at 20 (holding detention justified if someone ever part of Al Qaeda), *with* Al Ginco v. Obama, 626 F. Supp. 2d 123, 130 (D.D.C. 2009) (holding petitioner no longer "part of" terrorist organization because relationship with organization vitiated"").

112. *See* WITTES ET AL., *supra* note 89, at 69-70 (describing totally disparate outcomes in cases with evidence similar in amount and reliability); *see also supra* note 106 (illustrating different requirements of proof amongst district court judges).

113. WITTES ET AL., *supra* note 89, at 3.

114. *See id.* at 73 (noting two detainee habeas actions currently on appeal to D.C. Circuit and third recently

C. Legislation Required to Clarify Scope of Government's Detention Authority

The United States Congress should pass legislation clarifying the nature and scope of the government's detention authority, creating a unified approach to Guantanamo detainee habeas corpus actions.[115] Clear statutory language is especially important because the common law method of forming the law through ongoing habeas litigation is inadequate under these circumstances due to the limited number of cases from which the common law may evolve.[116] Due to the inadequacy of guidance, at least one D.C. Circuit judge has, "plead[ed] for the political branches to intervene."[117] Crafting legislation that deals with these difficult issues is a fitting task for Congress, considering its "policy expertise, democratic legitimacy, and oath to uphold and defend the Constitution."[118] Legislation clearly addressing detainee habeas corpus actions would not only create uniform standards for such cases, it would also add a great deal of legitimacy to the United States's much-maligned program of

ruled upon). The D.C. Circuit, and hopefully the Supreme Court in the near future, will soon have the opportunity to rule on issues such as the required burden of proof, the substantive scope of the government's detention authority, whether a relationship with a terrorist organization can be vitiated, and the reliability of hearsay evidence and statements made under coercion. *See id.* at 73-78 (noting issues to be considered on appeal).

115. *See* WITTES ET AL., *supra* note 89, at 82-83 (opining legislation most appropriate means to unify detainee habeas law); Chemerinsky, *Wartime Security*, *supra* note 3, at 1125 (stating Congress needs to pass legislation addressing Guantanamo detainee habeas corpus actions); Cole, *supra* note 28, at 698 (stating statute expressly addressing detention issues required); *see also* Londras & Davis, *supra* note 52, at 46 (stating legislature must be responsive to judicial review).

116. *See* WITTES ET AL., *supra* note 89, at 6 (noting unsuitability of common law process for developing detainee habeas corpus law). Judge Janice Rogers Brown of the D.C. Circuit warned:

> The common law process depends on incrementalism and eventual correction, and it is most effective where there are a significant number of cases brought before a large set of courts, which in turn enjoy the luxury of time to work the doctrine supple. None of those factors exist in the Guantanamo context. The number of Guantanamo detainees is limited and the circumstances of their confinement are unique.

Al-Bihani v. Obama, 590 F.3d 866, 881 (D.C. Cir. 2010) (Brown, J., concurring); *see also* Resnik, *supra* note 12, at 628 (describing evolution of detainee habeas law as moving at "glacial" pace). Judge Thomas F. Hogan of the D.C. District Court stated from the bench:

> It is unfortunate, in my view, that the Legislative Branch of our government, and the Executive Branch have not moved more strongly to provide uniform, clear rules and laws for handling these cases and called for a national legislative solution with the assistance of the Executive so that these matters are handled promptly and uniformly and fairly for all concerned.

WITTES ET AL., *supra* note 89, at 82 (quoting Transcript of Record at 7, Anam v. Obama, 653 F. Supp. 2d 62 (D.D.C. 2009) (No. 04-1194)) (internal quotation marks omitted).

117. *See* WITTES ET AL., *supra* note 89, at 6 (noting desire of federal judge for legislation addressing detainee habeas corpus actions); *see also supra* note 116 and accompanying text (discussing unsuitability of common law process for shaping detainee habeas corpus law).

118. *See Al-Bihani*, 590 F.3d at 882 (Brown, J., concurring); WITTES ET AL., *supra* note 89, at 82-83 (stating legislative guidance best means to clarify detention law).

preventative detention.[119]

IV. CONCLUSION

As this Note goes to print, the Supreme Court has yet to consider another Guantanamo detainee habeas corpus case since *Boumediene*. The judges of the United States District Court for the District of Columbia continue to rule on habeas petitions in the absence of clear guidance. Detainees and their attorneys have little ability to predict the outcome of their petitions in the face of such uncertainty. Because the outcome of these petitions will ultimately decide the freedom of these men, it is imperative that the Court delineate the standards for detention more clearly.

The Supreme Court will have the ability to rule on a broad range of issues pertaining to Guantanamo detainees should it choose to grant certiorari to any of the detainee habeas corpus cases currently being appealed. By ruling on issues such as the required burden of proof, the weight afforded to hearsay evidence, the scope of detention authority, and the vitiation of a relationship, the Court would take great steps towards clarifying detainee case law, and shoring up disparate results in cases bearing largely similar facts. The United States of America was built around the values of liberty and the rule of law. It is now incumbent upon the Supreme Court to ensure these values are uniformly upheld so no person shall be detained outside the clear rule of law.

Tyler L. Sparrow

119. *See* Ip, *supra* note 3, at 869-70 (noting anti-American sentiment largely stemming from detention viewed as illegal); Londras & Davis, *supra* note 52, at 46 (stating inter-institutional dialogue brings "situation of apparent lawlessness towards legality"); *see also* WITTES ET AL., *supra* note 89, at 82-83 (opining legislative guidance best method for unifying disparate approaches in detainee habeas corpus law).