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MOCKING THE RULE OF LAW: A KANGAROO COURT FOR AUSTRALIAN DAVID HICKS

by CHARLES I. LUGOSI*

The question is whether the quality of justice envisaged for the prisoners at Guantanamo Bay complies with minimal international standards for the conduct of fair trials. The answer can be given quite shortly: It is a resounding No [sic]. . . . The military commissions are not independent courts or tribunals. The term kangaroo court springs to mind. It derives from the jumps of the kangaroo, and conveys the idea of a pre-ordained arbitrary rush to judgment by an irregular tribunal that makes a mockery of justice. Internationally [sic] military commissions at Guantanamo Bay will be so regarded.¹

Is this foregoing observation by Justice Steyn correct? Are the ongoing trials of detainees at Guantanamo Bay kangaroo courts that mock the rule of law? This article focuses on the court applications, the trial, and the treatment of one of those detainees, Australian David Hicks, to answer those questions.

I. WHAT IS A KANGAROO COURT?

The first recorded use of the term “kangaroo court” was circa 1850, in the state of Texas,² the home of President George W. Bush. A “kangaroo court” is understood to mean a criminal proceeding conducted for show in which the outcome of the case is already decided, and the defendant is destined for execution.³ In this article, I rely on the traditional meaning of “kangaroo court” and

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1. Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, Lecture at the British Institute of International and Comparative Law and Herbert Smith: Twenty-seventh FA Mann Lecture (Nov. 23, 2003), available at <http://www.biicl.org/admin/files/F%20A%20MANN.doc>, at 21-22.

2. David Wilton, *Etymologies and Word Origins: The Letter K*, available at <http://www.wordorigins.org/wordork.htm> (last visited Jan. 21, 2006).

3. *Id.*

the unconstitutional legal procedures characteristic of an unfair trial in which fundamental due process rights of the defendant are denied or abridged. A kangaroo court can be a criminal proceeding designed as propaganda to give the illusion of fair play. However, the proceeding actually serves as a legal mechanism to justify an inevitable finding of guilt and subsequent punishment for political or military objectives. The use of the term "kangaroo court" has no connection to Australia,⁴ other than the fact that the kangaroo is an animal native to that country. Perhaps the term "Texas justice" might be more appropriate. I contend throughout this article that a kangaroo court is a consequence of the substitution of "rule by law" for the "rule of law," and, as an instrument of tyranny, has the effect of institutionalizing injustice.

A. *Distinguishing the Rule of Law from Rule by Law*

I define the "rule of law" as government by laws that all people of moral conscience are willing to obey because the laws are inherently just. The ideal of the "rule of law" is a democratic society that places constitutional limits on the power of government in order to permanently protect inalienable human rights and fundamental freedoms and to provide equality under the laws which are administered by an independent judiciary. The antithesis of the "rule of law" is "rule by law." The main difference between these opposite concepts is that *justice* is the defining characteristic in a society governed by "rule of law," and *deferential coerced obedience* is the defining characteristic in a society governed by "rule by law." Without the moral legitimacy that comes with justice, there can be no rule of law, only the tyrannical imposition of rule by law.

Democratic, federalist, and republican governments are vulnerable to succumbing to a replacement of the rule of law for the rule by law. This may occur on a case-by-case basis,⁵ on a national basis,⁶ or to carry out political agendas.⁷ It will often occur during actual or apprehended insurrection or armed conflict.⁸

4. *Id.*

5. *See, e.g., Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856) (denying citizenship to Dred Scott, a free black person, because, according to Justice Taney, the framers of the Constitution could not possibly have meant to include black people under the protections of the Constitution).

6. *See, e.g., Korematsu v. U.S.*, 323 U.S. 214 (1944) (deciding that the removal of people of Japanese origin from to detention camps during World War II was acceptable because though the group of Japanese citizens was a suspect classification entitled to Constitutional protection, furtherance of military objectives outweighed their civil rights).

7. *See, e.g., Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (finding that President Truman's attempt to seize control of the steel industry during the Korean War in order to avoid a strike and thus keep steel production going to supply the war effort was unconstitutional because it was not an acceptable use of executive authority).

8. *See, e.g., Ex parte Merryman*, 17 Fed. Cas. 144 (C.C.D. Md. 1861) (holding that President Lincoln's suspension of habeas corpus during the Civil War was unconstitutional and done in defiance of the Order of Chief Justice Taney of the Supreme Court to obey a writ of habeas corpus); *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121-22 (1866) (holding that suspension of the writ of *habeas corpus* does not change the laws of jurisdiction, and does not give military commissions jurisdiction over cases that would otherwise be tried in the federal courts); *see also* FREDERICK S. CALHOUN, *THE LAWYEN: UNITED STATES MARSHALS AND THEIR DEPUTIES: 1789-1989* 102-03 (1989) (discussing evidence that has emerged that, in response to Chief Justice Taney's admonition of President Lincoln's suspension of

Signs of this transition can be the executive promulgation of unjust laws where the government exercises arbitrary powers, abridges inalienable human rights at will, and selectively removes the civil rights of all human beings that are designated as enemy combatants from constitutional protection. Another sign may be an attempt by the executive to use its war powers as a pretext to assume unconstitutionally delegated powers and use them to remove individuals from the territorial jurisdiction of the civil courts and, by extension, the Constitution. An additional sign may be the creation of military courts who are accountable only to the executive branch of government, as an attempt to circumvent an independent judiciary, which might embarrass or frustrate the government's goal of destroying its enemies.

Today, Americans seem willing to defend their country from the threat of criminal acts carried out by international terrorists who may possess weapons of mass destruction, even at the cost of sacrificing the constitutional civil liberties that have distinguished America from totalitarian regimes. Evidence of this willingness is found in the current legal restructuring that sacrifices the rule of law in favor of rule by law. The attacks of September 11, 2001 resulted in quick action by Congress to pass the Patriot Act⁹ and an authorization for the use of military force to invade foreign sovereign nations who were believed to be harboring stateless terrorists intent on launching attacks on Americans or American property or interests, at home or abroad.¹⁰ Domestically, the Patriot Act has transformed America into a police state.¹¹ Internationally, the result has been the contentious invasions of Afghanistan and Iraq and the toppling of the respective Taliban and Sunni Bathist governments. The trade of personal liberty and freedom for national security has now become institutionalized.

One consequence has been indefinite, executively ordered detention without counsel, former charge, or public trial. This development is indicative of rule by law, reminiscent of the detention of loyal American citizens during World War II who were of Japanese ancestry.¹² The Supreme Court's deference to the executive branch, its concern for national security, and its approval in *Korematsu v. United States* of detaining and imprisoning American citizens of Japanese decent and alien

the writ of habeas corpus, President Lincoln ordered Chief Justice Taney's arrest).

9. USA PATRIOT ACT of 2001, Pub. L. No. 107-56, § 1(a), 115 Stat. 272 (2001).

10. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). This Act states:

That the President is authorized 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.

Id.

11. See also John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" For "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1133 (2002) (concluding that "[i]f American people accept a form of police statism in the name of a promise of personal security, that would be the greatest defeat imaginable").

12. See *Korematsu*, 323 U.S. at 215 (describing that, "an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California . . .").

Japanese families alike for the duration of the hostilities,¹³ has years later been criticized as one of the worst decisions ever made by that court.¹⁴ The current revival of executive detention comes at a time when the United States promotes itself as a beacon of human rights and a model of democracy for the world to follow.

There is considerable temptation during a time of hostilities to suspend the rule of law in favor of rule by law. An obvious example is the imposition of martial law when all civilian authority collapses and the courts are unable to function during an invasion by enemy forces.¹⁵ I contend that a nation must strive to adhere to the rule of law in all circumstances, short of extreme necessity, in order to demonstrate a nation's true character of moral integrity and constitutional faithfulness, even when under fire. To abandon the substance of the rule of law in the present military campaign against terrorists is a signal to the rest of the world that America is not the human rights champion it claims to be, and that America under attack is a totalitarian state no better than its enemies.

The United States Constitution is not a lame duck document to be dodged during times of national crisis. Instead, conceived in the aftermath of a revolutionary war, it is meant to govern as the supreme law in war and in peace. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."¹⁶ Only Congress is permitted, in the Suspension Clause of the Constitution, to suspend the writ of habeas corpus and this may only be done when the public safety requires the measure during invasion or rebellion.¹⁷ The universal availability of constitutional habeas corpus by a strong, independent, and fearless judiciary indicates the presence of the rule of law.

Nothing in the Constitution authorizes the President or Congress to suspend the operation of the Fifth and Fourteenth Amendments, which include the right of every person not to be deprived of liberty without due process of law and the guarantee to every person the right of equal protection before the law.¹⁸ That means that all detainees at Guantanamo Bay, including David Hicks, are entitled to constitutional protection, for it is settled jurisprudence that every "person" includes aliens under the jurisdiction of the United States.¹⁹ The first person to affirm this position ought to be the President of the United States, for it is his sworn duty to take care to faithfully execute the law,²⁰ and not to undermine the rule of law by

13. *Id.* at 223-24 (upholding the constitutionality of the order excluding those of Japanese descent from remaining within certain areas of California).

14. *See Adarand Constructors v. Peña*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting) (stating that despite strict scrutiny in *Korematsu*, the court's analysis "nonetheless yielded a pass for an odious, gravely injurious racial classification").

15. *See Duncan v. Kahanamoku*, 327 U.S. 304, 307-09 (1946) (involving the rights of civilians to be tried in civil courts rather than military courts, even during a period of martial law in Hawaii).

16. *Ex parte Milligan*, 71 U.S. (4 Wall.) at 120-21.

17. *See* U.S. CONST. art. I, § 9, cl. 2 ("[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it").

18. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

19. *See, e.g., U.S. v. Balsys*, 524 U.S. 666 (1998) (finding that resident aliens are persons for the purposes of applying the Fifth Amendment).

20. *See* U.S. CONST. art. I, § 2, cl. 2. This clause requires that:

instituting a new era of executive ordered indefinite detentions of American citizens, legal residents, or foreign nationals.

What is at stake is not just the rule of law, but also the larger political question of whether the government exists to serve the people or whether the people exist to serve the government. The political theory that gave birth to United States was based on the idea of the delegation of powers, where the ultimate power resides in the people of the nation who consent to be governed. The voice of the people is heard through the Constitution. When executive detention becomes the norm, and when the government uses every means at its disposal to oppose habeas corpus and constitutional rights for all persons, that is, all natural human beings, there is strong evidence to suggest a permanent shift in power from "we the people"²¹ to the government. For the Executive to impose laws which serve as an expedient means to an end that disregard the Constitution in their intent and implementation, is more than a violation of law; it is a breach of trust with the American people, whose living will is expressed in the text of that same Constitution. If the Constitution no longer limits executive power, the ship of government is anchorless and adrift in a sea of treacherous uncertainty that could lead to a beachhead on the land of tyranny.

The story of David Hicks is thus more than a simple narrative about how an Australian citizen became captured during the American invasion of Afghanistan and eventually imprisoned at Guantanamo Bay. It is an integral part of the story about the end of the rule of law in the war against terrorism.

B. Background

David Matthew Hicks, now nicknamed the Australian Taliban, was born August 7, 1975 in Adelaide, Australia.²² Described as the typical boy who couldn't settle down, he was expelled from school at fourteen, experimented with drugs and alcohol, worked at a meat packing plant skinning kangaroos, and fished for sharks.²³ In the outback, he worked on cattle ranches and met an aboriginal woman, Jodie Sparrow, with whom he had two children.²⁴ When his relationship with Sparrow failed, he moved to Japan where he became a horse trainer.²⁵ In

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.

See also U.S. Const. art. II, § 3 (stating that "he shall take Care that the Laws be faithfully executed ...").

21. See U.S. Const. pmb. The preamble declares that:

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

22. Richard Leiby, *Taliban From Down Under; David Hicks Always Liked to Roam, But This Time He Went Too Far*, WASH. POST, Mar. 10, 2002, at F1.

23. *Id.*

24. *Id.*

25. *Id.*

1998, Hicks joined the Kosovo Liberation Army.²⁶ He converted to Islam, took the name of Mohammed Dawood and went to Pakistan, where he allegedly joined the Kashmiri Islamic group Lashkar-i-Taiba.²⁷ In 2001, Hicks apparently attended an Al Qaeda training camp in Afghanistan and allegedly went to Kabul to defend it against the Northern Alliance.²⁸

Like U.S. citizen John Walker Lindh and former U.S. citizen Yaser Esam Hamdi, foreign national David Hicks was captured during foreign hostilities in Afghanistan.²⁹ Unlike Hamdi, who was alleged to be carrying a weapon on a battlefield, Hicks was unarmed and outside the combat zone when he was detained by Northern Alliance soldiers, a rebel coalition of Afghan fighters loyal to the American invaders, at a roadblock on December 9, 2001 and turned over to the U.S. military.³⁰ On January 12, 2002 Hicks was transferred to Camp X-ray at Guantanamo Bay where he was held in a six-foot by eight-foot wire cage until May 2002 when he was moved to a cell in solitary confinement at Camp Delta constructed within a shipping container.³¹ His regular exercise consists of two fifteen-minute exercise periods per week.³² Later he was transferred to Camp Echo, where he was kept in solitary confinement and deprived of sunlight. Throughout his ordeal he has been subject to interrogation, isolation, torture,³³ and indefinite detention.

Initially Hicks, Lindh, and Hamdi were strategically removed from the jurisdiction of the federal courts on the assumed authority of *Johnson v. Eisentrager*,³⁴ a 1950 Supreme Court case. Their detention at the American naval base at Guantanamo Bay, on land leased from the sovereign nation of Cuba, put them beyond the reach of the rule of law. It was no doubt presumed that aliens in military custody detained outside the sovereign territory of the United States would be legally barred from petitioning a court on a writ of habeas corpus so long as they were incarcerated in Cuba, because in theory Cuba, a foreign government, retained ultimate territorial jurisdiction and sovereignty.

When it was discovered that Lindh and Hamdi were American citizens, they were removed from Guantanamo Bay to military prisons on the United States mainland.³⁵ Although Lindh and Hamdi were both fighting for the Taliban and

26. *Id.*

27. *Id.*

28. Leiby, *supra* note 22, at F1.

29. Bradley Graham, *3 Charges Placed Against Detainee*, WASH. POST, Jun. 11, 2004, at A3.

30. David Kenny, *The Hicks Trial*, National Forum on the War on Terrorism and the Rule of Law November 10, 2003, available at http://www.gtcentre.unsw.edu.au/publications/papers/docs/2003/88_StephenKenny.pdf.

31. *Id.*

32. *Id.*

33. See Allison Caldwell, *Witness Claims David Hicks Abused by U.S. Military in Afghanistan Prison*, THE WORLD TODAY, May 20, 2004 at 33., available at <http://www.abc.net.au/worldtoday/content/2004/s1112199.htm> (describing how an eyewitness, Shah Mohammad, has come forward describing how in December 2001 Hicks was tied up and repeated beaten in two hour sessions by American soldiers using their bare fists, calling him "white boy").

34. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

35. *Second American Taliban on U.S. Soil*, CNN, April 5, 2002, <http://archives.cnn.com/2002/US/04/05/ret.second.american.taliban/index.html>.

American citizens, they were treated unequally before the law.

Lindh, noticeably of Caucasian ancestry, and raised in California,³⁶ was soon charged with various offenses and permitted his full constitutional rights at his trial in the federal court system.³⁷ Eventually, Lindh entered into a plea bargain that resulted in a lengthy term of imprisonment in the United States.³⁸

Hamdi, noticeably dark-skinned, was born in Louisiana and raised in Saudi Arabia.³⁹ Unlike Lindh, dubbed the “American Taliban,”⁴⁰ Hamdi was denied his constitutional rights, designated an enemy combatant, and indefinitely remained detained. Also unlike Lindh, despite his American citizenship, Hamdi was never referred to as an “American Taliban.”

Thanks to the perseverance of his court appointed public defender, Frank Dunham, who filed a writ of habeas corpus and argued that the Supreme Court of the United States should order that his client be either charged or released, Hamdi is now free.⁴¹ Without the help of Dunham, who had to launch court applications just to get to see his client, Hamdi may have spent the rest of his life locked up without charges ever being laid or the legality of his detention challenged.⁴²

Hamdi’s counsel was ultimately successful in the U.S. Supreme Court, which ruled in a majority opinion authored by Justice O’Connor, that “due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”⁴³ The Supreme Court did not reach the question whether the Executive possesses plenary power under Article II of the Constitution to indefinitely detain an enemy combatant—an individual who is part of or supporting forces hostile to the United States or coalition partners in Afghanistan.⁴⁴

Rather than continue with legal proceedings to comply with the Court’s decision, Hamdi made a largely one-sided deal with the Government on September 17, 2004 that included the forfeiture of his American citizenship and his safe return home to Saudi Arabia on October 11, 2004.⁴⁵

36. *John Walker Lindh Profile: The Case of the Taliban American*, CNN, <http://www.cnn.com/CNN/Programs/people/shows/walker/profile.html> (last visited Jan. 26, 2006).

37. *Walker Lindh Indicted on 10 Counts*, CNN, Feb. 6, 2002, <http://archives.cnn.com/2002/LAW/02/05/ret.indictment.walker/index.html>.

38. *Walker Lindh Sentenced to 20 Years*, CNN, Oct. 4, 2002, <http://archives.cnn.com/2002/LAW/10/04/lindh.statement/index.html>.

39. *John Walker Lindh Profile: The Case of the Taliban American*, CNN, <http://www.cnn.com/CNN/Programs/people/shows/walker/profile.html> (last visited Jan. 21, 2006).

40. Phil Hirschkom, *Saudi once held by U.S. returns home*, CNN, Oct. 11, 2004, <http://www.cnn.com/2004/WORLD/meast/10/11/hamdi/>.

41. *Id.*

42. See Charles I. Lugini, *Rule of Law or Rule by Law: The Detention of Yaser Hamdi*, 30 AM. J. CRIM. L. 225 (2003) (detailing the story of Yaser Hamdi, and to a lesser extent, of John Walker Lindh).

43. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

44. *Id.* at 516. The government refused to disclose the full criteria of what defines an enemy combatant, which I suspect the Government did intentionally to ensure it had flexibility in declaring individuals enemies of the state.

45. See *Hamdi v. Rumsfeld Settlement Agreement*, Sept. 2004, <http://news.findlaw.com/hdocs/docs/hamdi/91704stlagmnt.html> (showing the terms of the settlement agreement, which are disclosed and publicly available).

C. What Does the Decision in *Hamdi* Mean for Hicks?

The decision in *Hamdi* condones a minimal standard of legal process specifically tailored to the trial of American citizens designated as enemy combatants. These procedural rules enhance chances for conviction by weakening constitutional due process. In other words, the legal process approved by the plurality opinion in *Hamdi* is a marked departure from constitutional norms and invites the springing up of kangaroo courts. For non-citizens like Hicks, and other foreign nationals, the decision in *Hamdi* means discriminatory treatment, and unequal protection of the laws. A two-tiered system of legal process now exists for "enemy combatants," the lower standard for non-citizens.

This two-tiered system arose because the Supreme Court in *Hamdi* was sharply divided. Justice Scalia authored a dissenting opinion, which Justice Stevens joined,⁴⁶ that was faithful to the text of the Constitution and admonished the Government for its illegal conduct. Justice Thomas, also dissenting, held an opposite view.⁴⁷ He deferred to the Executive's power, offering a blank check that meekly surrendered civil liberties to President Bush. Justices Souter and Ginsberg, also in dissent, held that the President acted contrary to the will of Congress.⁴⁸ However, to produce a judgment, they joined with Justices O'Connor, Kennedy, Breyer and Chief Justice Rehnquist⁴⁹ so that *Hamdi* could at least be given a meaningful opportunity to contest the factual basis of his detention.

The Scalia dissent deserves close examination, for it goes to the core of the constitutional elements key to this case. In summary, his reasoning is compelling in its logic, attractive in its simplicity, and faithful to the Constitution. Scalia observed that historically, citizens who take up arms against their country in armed conflict are prosecuted criminally for treason.⁵⁰ If a criminal trial is impossible, the Suspension Clause may be relied upon by Congress to temporarily suspend civil liberties to legally permit detention without charge. There is no middle ground authorized by the Constitution whereby the Government may unilaterally detain citizens indefinitely without Congress expressly invoking the Suspension Clause. Normally, an enemy combatant captured during armed conflict is an alien, but citizenship is irrelevant when it comes to siding with the enemy.⁵¹ The primary difference is that an alien would be immune from a charge of treason; a citizen would not.

The Constitution contemplates the possibility that citizens may engage in treason and specifically requires there be a charge of treason and a trial open to the public. Moreover, it prohibits convicting an individual without the evidence of an overt act by two or more witnesses for the prosecution.⁵² Executive detention

46. *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting).

47. *Id.* at 579.

48. *Id.* at 539 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

49. *Id.*

50. *Id.* at 544 (Scalia, J., dissenting).

51. *Ex parte Quirin*, 317 U.S. 1, 13 (1942).

52. U.S. CONST. art. III, §3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt

without charge, without trial, held in secret closed proceedings, and employing affidavit evidence based on third party hearsay, which are representative of President George W. Bush's method of administering legal process to enemy combatants, citizens and aliens alike, is the opposite of what the Constitution demands.

Liberty means freedom from indefinite detention at the mere will of the Executive. The Founding Fathers knew all too well that once tyrants are allowed to arbitrarily imprison their enemies, the loss of other rights and freedoms was sure to follow. Guarding against indefinite confinement without charge are the twin pillars of due process and habeas corpus. Informed by the teachings of Blackstone, the Founding Fathers incorporated into the Constitution the Due Process⁵³ and Suspension clauses. Rather than trusting men, the people of the United States are supposed to trust the Constitution to protect liberty and to resist the tyranny of unchecked executive power. Imprisonment is intended to punish wrongful acts; it is not to be used to confine those who might pose danger to public safety.

There is no special procedure to deal with an American citizen who may have aided enemies of the United States in wartime. Any citizen who allies himself with others in violent engagement against his own country is to be punished criminally, pursuant to the treason statute.⁵⁴ In the war against terrorism, the precedent to be criminally punished had already been set, by the criminal prosecution of citizen Lindh.⁵⁵

Only in extreme emergencies, will Congress be able to suspend the writ of habeas corpus and bypass judicial oversight of executive ordered detentions. Rarely has this power been used.⁵⁶ When President Lincoln unilaterally acted in place of Congress to suspend the writ of habeas corpus,⁵⁷ Chief Justice Taney sternly rebuked him for his unconstitutional conduct.⁵⁸

Both Scalia and Stevens agreed that the only constitutional choices available to the Executive with respect to American citizens like Lindh and Hamdi were to charge them with a crime or to suspend the writ.⁵⁹ Indefinite detention on reasonable suspicion is not an option sanctioned by the Constitution. To permit this is to trust the Government, a state of affairs repugnant to the thinking of Founding Fathers who devised the doctrine of the separation of powers specifically to prevent the aggregation of power in the executive branch of government. Instead, faith ought to be placed in the Constitution, which represents the will of the people. "Absent suspension of the writ, a citizen held where courts are open is

Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Id.

53. U.S. CONST. amend. V.

54. 18 U.S.C.A. § 2381 (2000).

55. *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).

56. Act of March 3, 1863, 12 Stat. 755 (1863).

57. Proclamation No. 1, 13 Stat. 730 (1862).

58. *Ex parte Merryman*, 17 F. Cas. 144, 149 (C.D. Md. 1861).

59. *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting).

entitled either to criminal trial or to a judicial decree requiring his release.”⁶⁰ Hamdi was thus entitled to his release, for no charges had been brought against him and Congress had not suspended the writ of habeas corpus.⁶¹ The Government conceded that absent suspension, the writ of habeas corpus is available to every person detained within the United States. The Government also agreed there was no suspension of the writ of habeas corpus in accordance with the Constitution. Hamdi’s indefinite detention of almost two years without charge in a naval brig was thus illegal.

The underlying reasoning of Scalia and Stevens is consistent with a basic understanding of the rule of law. To disregard the Constitution in favor of trusting the President and his staff is to cast aside the rule of law, in favor of rule by men. Substituting military force for the force of law in the ordering of executive detentions is tantamount to usurping the rule of law with rule by law.

Thanks to the O’Connor plurality, the rule by law approach triumphed. The Supreme Court held the executive detention of citizens designated as enemy combatants was legally authorized.⁶² In doing so, they did not decide the Government’s claim that the Executive possesses the plenary power under Article II of the Constitution to authorize the detention of enemy combatants independent of Congressional authority.⁶³ The O’Connor plurality, as well as Justice Thomas, found that the Government had lawfully authorized Hamdi’s detention, pursuant to legislation passed by Congress, the Authorization to Use Military Force (“AUMF”),⁶⁴ even though the words of this law did not explicitly deal with the detention of enemy combatants. The O’Connor plurality held that the AUMF in turn satisfied 18 U.S.C. section 4001(a), which provides that “[n]o citizen shall be imprisoned or otherwise detained pursuant to the United States except by an Act of Congress.”⁶⁵ In so deciding, the O’Connor plurality assumed that section 4001(a) applies to both civilian and military detentions.⁶⁶

Scalia and Stevens criticized the O’Connor plurality for finding a way to make Hamdi’s illegal detention legal.⁶⁷ In Scalia’s opinion, it was wrong for the Court to rescue the Government and improvise a way to allow the Government to legally detain Hamdi and act as a superlegislature, instead of an interpreter of the Constitution.⁶⁸ Specifically, Scalia was appalled that his brethren “found a congressional authorization for detention of citizens where none clearly exists”⁶⁹ and then disregarded the Suspension Clause. After musing about Hamdi’s demand

60. *Id.* at 572.

61. *Id.* at 573.

62. *Id.* at 516.

63. *Id.*; Article two, clause one of the Constitution states: “The President shall be Commander in Chief of the Army and Navy of the United States . . .” U.S. CONST. art. II, §2, cl. 1.

64. 115 Stat. 224 (2001).

65. *Hamdi*, 542 U.S. at 517. Congress passed section 4001(a) as part of a series of law reforms in 1971, which included the repeal of the Emergency Detention Act of 1950, 50 U.S.C. § 811 et seq. (repealed in 1971), which permitted the establishment of concentration camps to hold American citizens. 18 U.S.C. § 4001 (2003).

66. *Hamdi*, 542 U.S. at 517.

67. *Id.* at 575 (Scalia, J., dissenting).

68. *Id.*

69. *Id.*

for due process and the Government's strenuous opposition to compromising its military position, Justice Scalia noted that the O'Connor plurality "comes up with an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a 'neutral' military officer rather than judge and jury."⁷⁰ This dilution of due process invites abuse by facilitating conditions ripe for the creation of a kangaroo court and offends the separation of powers, for the President as Commander in Chief retains the ultimate authority in any appeal from conviction.

Justices Souter and Ginsburg agreed with Justices Scalia and Stevens that Justice O'Connor's opinion erred in finding executive detentions were authorized by the AUMF.⁷¹ The intent behind section 4001(a) was to avoid repeating the injustice of the Japanese internments of World War II, and for that reason explicit language is required in any Congressional authorization that sanctions indefinite detentions.⁷² To find an implied power to indefinitely detain citizens in a statute which authorizes the use of military force against terrorists and those who harbor them goes against precedent and basic statutory interpretation.⁷³

Justices Souter and Ginsberg agreed that the AUMF authorizes the capture and internment of prisoners of war pursuant to the customary laws of war.⁷⁴ This power to detain prisoners of war does not apply to Hamdi, for the Government by its own conduct and admission denied Hamdi prisoner of war status, by holding him for nearly two years incommunicado and violating his rights under the Geneva Convention.⁷⁵ Hamdi was in fact not treated as a prisoner of war. He was held incommunicado and his rights under the Geneva Convention to be treated as a prisoner of war were violated, for he did not have a battlefield hearing by a competent tribunal, as mandated by international law.⁷⁶

Even the Patriot Act, observed Justice Souter, forbids the detention of alien terrorists for more than seven days without the laying of charges or the commencement of deportation proceedings.⁷⁷ Justice Souter pondered why Congress, which was so careful about guarding aliens from indefinite detention under the Patriot Act, would allow citizens to be indefinitely detained.⁷⁸

The O'Connor plurality recognized the "war" on terror is an unconventional military engagement against stateless actors who dwell in the shadows and that the current hunt for Osama bin Laden and his associates will probably not end with a

70. *Id.*

71. *Id.* at 541 (Souter, J., concurring).

72. *Id.* at 544.

73. *See Ex parte Endo*, 323 U.S. 283, 300 (1944) (stating that implied powers from a legislative or executive grant of authority should be interpreted narrowly to protect a citizen's liberties).

74. *Hamdi*, 542 U.S. at 549 (Souter, J., concurring).

75. *Id.*

76. *See* Art. 4 and 5 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949 (1955), 6 U.S.T. 3316, 3320, 3324 T.I.A.S. No. 3364 (defining in Article 4a who constitutes a prisoner of war under six categories, listing under Article 4b others that will be classified as prisoners of war and applying Article 4 designation in Article 5 to those who fall under the power of the enemy and applying full protection to those whose status in Article 4 is in question).

77. 8 U.S.C. § 1226(a)(5) (1996).

78. *Hamdi*, 542 U.S. at 551 (Souter, J., concurring).

ceasefire and a treaty, as in the case of a sovereign nation.⁷⁹ Hamdi's case was unique in the sense he faced the prospect of perpetual detention until his death in custody. Congressional power to detain was required to prevent captured combatants from returning to the battlefield so long as armed conflict had not ceased. The detention of enemy combatants, "for the duration of the conflict in which they were captured," is "fundamental" and an accepted "incident of war" to fall within the general scope of Congressional authorization to use "necessary and appropriate force."⁸⁰ Ordinarily, the purpose of detention is to prevent captured individuals from returning to the field of battle and to once again serve the enemy. Captivity is protective custody, to ensure removal from participation in further hostilities.⁸¹ They are prisoners of war, entitled to treatment pursuant to the terms of the Geneva Conventions, international law that has been ratified by Congress.

The O'Connor plurality concluded that Hamdi's detention as an enemy combatant was legally authorized because he was found carrying arms on a foreign battlefield against the United States.⁸² However, his indefinite detention for the purpose of interrogation was not.⁸³ Indefinitely detaining an enemy combatant for the purpose of gathering intelligence through the use of torture betrays the law of war understanding that only protective non-punitive custody is permitted, and that even Congress may not authorize such treatment in violation of the Geneva Conventions.⁸⁴

Hamdi denied he was an enemy combatant and sought to challenge his designation as such.⁸⁵ Through his counsel he argued he deserved a meaningful and timely hearing in accordance with constitutional due process as understood in the Fifth and Fourteenth Amendments.⁸⁶ In response, the Government claimed that due process was "unworkable" and "constitutionally intolerable."⁸⁷ Instead of adopting a textual interpretation of the Constitution, the O'Connor faction relied upon a civil case dealing with the withdrawal of disability benefits⁸⁸ to come up with a judicial balancing test to satisfy the interests of national security and civil liberty. In the process, the O'Connor plurality devised a legal procedure just for the case of Hamdi and other citizens who happen to be designated an enemy of the state and disappear into confinement.

In the end, the O'Connor opinion decided that legal process well short of the

79. *Id.* at 521.

80. *Id.* at 519.

81. See WILLIAM WENTHROP, *MILITARY LAW AND PRECEDENTS* 788 (Beard Books 2d ed., 2000) (1920) (stating that the purpose of captivity is its need as a temporary war measure, rather than for punishment).

82. *Hamdi*, 542 U.S. at 522 .1.

83. See *id.* at 519 (declaring that the reason people are detained is to stop them from fighting in the future).

84. See generally Kathleen Clark & Julie Mertus, *Torturing the Law: the Justice Departments Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B03 (criticizing the Justice Department and particularly a legal memorandum written by Jay S. Bybee advising the White House of the permissible boundaries of torture).

85. *Hamdi*, 542 U.S. at 523.

86. *Id.* at 524.

87. *Id.* at 525.

88. *Id.* at 529 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

protections of Due Process Clause in the Fifth and Fourteenth Amendments sufficed to guard against the erroneous detention of a citizen-detainee.⁸⁹ The filing of a writ of habeas corpus is the first step to challenge classification as an enemy combatant. The Government must give notice of the factual basis for such classification. Then, the detainee must be given a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker. The detainee has a right to be heard at a meaningful time and in a meaningful manner. These foregoing core elements may not be eroded.

However, in deference to executive prerogatives in a time of military conflict, the Government may be relieved from the burdens of due process to meet "the exigencies of the circumstances."⁹⁰ The Government need only offer hearsay evidence, which may "need to be accepted as the most reliable available evidence."⁹¹ The Government would also enjoy the equivalent of a presumption of proving its case on hearsay evidence.⁹² The detainee has the right to rebut this rebuttable presumption and must be allowed a fair opportunity to do so.⁹³

The O'Connor opinion cautioned, "[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short."⁹⁴ The Government fell short in Hamdi's case, for he received no process. His repeated interrogations did not serve as constitutionally fact-finding "before a neutral decision-maker."⁹⁵ Left unanswered was whether hearsay evidence extracted by methods of torture from a detainee would be accepted as the most reliable available evidence in a future case.

In anticipation of future applications for habeas corpus from alien detainees held at Guantanamo Bay, the O'Connor opinion ventured to say that "an appropriately authorized and properly constituted military tribunal" could meet the minimal required standards for review of enemy combatant status.⁹⁶ The O'Connor opinion is significant in omitting to say that the existing due process already in place in the military courts had to be followed. What the O'Connor opinion did say was that there are military regulations that establish a comparable process to determine the status of enemy detainees who assert prisoner of war status under the Geneva Convention.⁹⁷ When this determination is not made, and a prisoner files a petition for a writ of habeas corpus, the presiding court must ensure that "the minimum requirements of due process are achieved."⁹⁸ Presumably, this directive means no more, as well as no less, than the minimal due process described above.

Justices Souter and Ginsburg took care to distance themselves from the

89. *Id.* at 533.

90. *Id.* at 533.

91. *Id.* at 533-34.

92. *Id.* at 534.

93. *Id.*

94. *Id.* at 537.

95. *Id.*

96. *Id.* at 538.

97. *Id.* (citing *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Army Regulation 190-8, § 1-6 (1997)).

98. *Id.*

O'Connor plurality's grant of an evidentiary presumption in favor of the Government and the substitution of a military tribunal in place of a federal court.⁹⁹

In marked contrast, Justice Thomas went beyond the deference given the President by the O'Connor plurality and argued that due process in the context of detaining enemy combatants amounts to nothing more than executive determination, with or without good faith.¹⁰⁰ Justice Thomas supported the propositions that the Government may detain anyone believed to be dangerous, and in appropriate circumstances, executive process replaces judicial process, to meet the interests of public safety.¹⁰¹ This extreme deference to executive power illustrates the surrender of rule of law to rule by law. Under this approach, the meaning of due process is not fixed and may be changed to suit the desired goal in the particular circumstances of each class of cases. The Government may in this manner trample over anyone's civil liberties at will.

The *Hamdi* case was a victory for the Government. The constitutional question of the President's power to detain under Article II was left open for decision on another occasion. The indefinite detention of enemy combatants was held to be lawful. Giving a meaningful opportunity to enemy combatants to gain their freedom from detention by contesting their status before a court of law showed the world America still believed in fairness for the vanquished. The military emerged unscathed from the litigation, unimpeded in their task to win the war against terrorists. National secrets would remain so. Most important of all, the Government was handed a constitutionally endorsed script to try enemy combatants on terms to its liking, so that the Government could design a form of legal process that would ensure the conviction and/or continued detention of persons believed dangerous to public safety.

II. A COMPARATIVE PERSPECTIVE

In response to the attacks on America of September 11, the British Parliament passed the Anti-Terrorism, Crime and Security Act of 2001,¹⁰² which was designed to permit the certification of suspected international terrorists and authorize their indefinite detention, without notice of the charges against them, or the prospect of a trial.¹⁰³ Nine of the detainees held pursuant to the Anti-Terrorism, Crime and Security Act commenced legal proceedings challenging the lawfulness of their detention.¹⁰⁴ The petitioners claimed violations of the European Convention on Human Rights (implemented in the United Kingdom by the Human Rights Act of 1998) and argued for their release, contending that Parliament was unlawfully

99. *Id.* at 553 (Souter, J., concurring).

100. *Id.* at 590 (Thomas, J., dissenting).

101. *See* United States v. Salerno, 481 U.S. 739, 748 (1987) (explaining that "compelling government interests can justify detention of dangerous persons."); *Moyer v. Peabody*, 212 U.S. 78, 85 (1909) (noting that "public danger warrants the substitution of executive process for judicial process").

102. Anti-terrorism, Crime and Security Act 2001, ch. 24, available at <http://www.hmso.gov.uk/acts/acts2001/20010024.htm> (last visited Jan. 26, 2006).

103. Explanatory note for Anti-terrorism, Crime and Security Act 2001, ch. 24, available at <http://www.hmso.gov.uk/acts/en2001/2001en24.htm> (last visited Jan. 26, 2006).

104. *A and Others v. Sec'y of State for the Home Dep't*, [2004] UKHL 56.

derogating from its international legal obligations and British constitutional law.¹⁰⁵

On December 16, 2004 the British House of Lords, the highest court in the United Kingdom, decided eight to one that the indefinite detention of foreign nationals who were suspected to be terrorists or who were affiliated with international terrorism, was incompatible with the European Convention.¹⁰⁶ The British House of Lords left to Parliament the responsibility to exercise its sovereignty and remedy the law.¹⁰⁷

Neither international human rights law nor the European Convention permits indefinite detention without trial as an exercise of executive branch power. According to Baroness Hale of Richmond, “[o]nly the courts can [decide who should be locked up] and, except as a preliminary step before trial, only after the grounds for detaining someone have been proved. Executive detention is the antithesis of the right to liberty and security of person.”¹⁰⁸

In dissent, Lord Walker of Gestingthorpe supported the judgment of the Secretary of State that indefinite detention was necessary.¹⁰⁹ Lord Walker seemed to think it was important, that under the Act only a very few individuals were detained¹¹⁰ and that there were legislative safeguards in place to protect against oppression.¹¹¹ He noted that, the powers of the Secretary of State were subject to judicial review by an independent and impartial court, the Special Immigration Appeals Commission (“SIAC”), which is required by law to periodically review every certificate of detention.¹¹² Additionally, Lord Walker noted that the anti-terrorism legislation was temporary and provided for administrative review by a body of distinguished appointees known as the Committee of Privy Councillors.¹¹³ Lord Walker believed that the impugned legislation was a proportionate response that achieved the proper balance between national security and individual rights.¹¹⁴

Supporting the judgment, Lord Hope of Craighead also examined the balance between security and liberty.¹¹⁵ On the side of security, he observed that the first responsibility of government is to protect the lives of its citizens and to preserve democracy.¹¹⁶ On the other side, the duty of the court is to protect the rights of the individual, including the right to liberty.¹¹⁷ Lord Hope reminded the court of the ageless wisdom of Scottish Baron Hume, who observed over 150 years earlier the need for courts to guard against indefinite detention and unfair trials:

As indeed it is obvious, that, by its very constitution, every court of criminal justice must have the power of correcting the greatest and most

105. *Id.* at [3], (Bingham, L.J., concurring).

106. *Id.* at [43], [73] (Bingham, L.J., concurring).

107. *Id.*

108. *Id.* at [222] (Hale, L.J., concurring).

109. *Id.* at [217] (Walker, L.J., dissenting).

110. *A and Others*, [2004] UKHL 56 at [218] (Walker, L.J., dissenting).

111. *Id.* at [217].

112. *Id.*

113. *Id.*

114. *Id.* at [209].

115. *Id.* at [99] (Hope, L.J., concurring).

116. *A and Others*, [2004] UKHL 56 at [99] (Hope, L.J., concurring).

117. *Id.*

dangerous of all abuses of the forms of law,—that of the protracted imprisonment of the accused, untried, perhaps not intended ever to be tried, nay, it may be, not informed of the nature of the charge against him, or the name of the accuser.¹¹⁸

Lord Hope commented that the risks that Baron Hume recognized are as great now, as they were in the past.¹¹⁹ Lord Hope also noted that everyone in Britain has the right to liberty,¹²⁰ and that the right to liberty is enshrined in Article Five of the European Convention on Human Rights.¹²¹ Lord Hope pointed out that Article Fourteen of that same Convention guarantees that the right to liberty is to be enjoyed without discrimination.¹²² Therefore, the right to liberty is to be enjoyed by everyone in Britain, not just those who are citizens or have been granted legal residency.¹²³

Additionally, according to Lord Hope, when it comes to liberty, the executive branch is to be given less latitude than the generally wide discretion it has with regard to national security.¹²⁴ He noted that it is the responsibility of the court to protect the rights and freedoms of the individual, and to ensure that executive action is appropriate.¹²⁵ Even unpopular minorities must be treated equally with the majority in order to strike a proper balance between security and the right to liberty.¹²⁶ Lord Hope concluded that if indefinite detention of citizens linked to international terrorism is not strictly required, then indefinite detention of foreign nationals who represent the same threat should also not be required.¹²⁷

Lord Hope acknowledged that when the appellants were detained, there was an emergency threatening the “life of the nation.”¹²⁸ However, when no war has been declared, but the life of the nation is threatened by terrorism, could a state of emergency be used to justify the discriminatory and indefinite detention of foreign nationals? Despite the fact that the nation was threatened, Lord Hope suggested that the answer depends on the government asking the right question: whether “the exigencies of the situation we face now require that the appellants be deprived of their right to liberty?”¹²⁹

Stated differently, there comes a point in time when a true emergency, which is sudden and unexpected, resulting in a situation of pressing need, is replaced by a state of fear, the “worst enemy of democracy.”¹³⁰ Without the danger of an

118. *Id.* at [100] (quoting BARON HUME FROM COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING CRIMES 98 (4th ed. 1844)).

119. *Id.*

120. *Id.* at [101].

121. *Id.* (Hope, L.J.).

122. *A and Others*, [2004] UKHL 56 at [101] (Hope, L.J., concurring).

123. *Id.*

124. *Id.* at [107].

125. *Id.* at [108].

126. *Id.* at [101].

127. *See id.* at [132] (stating that the distinction between British nationals and foreign nationals is irrational and raises an issue of discrimination).

128. *A and Others*, [2004] UKHL 56 at [118].

129. *Id.* at [120].

130. *Id.* at [115].

imminent disaster, the choice becomes one of living in fear in a totalitarian society or to live by courage in a democracy governed by the rule of law. Under the first option, under the cloak of legality there can be the indefinite detention of unprotected classes of people who might do harm in order to preserve national security. Under the second option, justice exists in all the courts to ensure that no one is deprived of liberty without due process of law, and punishment is reserved for those who in fact have done harm to others. The first option represents rule by law, and the second option represents the rule of law.

Lord Bingham of Cornwall, delivered the first judgment and sent a strong message about the doctrine of executive deference in a time of war.¹³¹ The rule of law demands nothing less than that the courts fulfill their role as the “guardian of human rights”¹³² and use appropriate judicial activism to defend the Constitution from an executive branch attack.¹³³ Lord Bingham stated that “the function of independent judges charged to interpret and apply the law is universally recognized as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.”¹³⁴ Government accountability cannot be divorced from close judicial scrutiny.¹³⁵

Turning to the wisdom of Justice Jackson of the United States Supreme Court, Lord Bingham adopted the following passage from *Railway Express Agency, Inc. v. New York*,¹³⁶ on the topic of equality before the law:

This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, *nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.* Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.¹³⁷

Lord Bingham was aware that since the attacks of 9/11, seventeen individuals had been certified and detained under British law.¹³⁸ While it was tempting to excuse these detentions on the grounds that some of the seventeen were no longer

131. *Id.* at [41] (Bingham, L.J.) (citing *Korematsu*, 584 F.Supp. at 1420, Lord Bingham explained that national security and military necessity could not shield the executive branch from judicial scrutiny).

132. *Id.* (citing *Int'l Transp. Roth GmbH v. Sec'y of State for the Home Dep't*, [2003] Q.B. 728, [27] (Brown, L.J.)).

133. *Id.* at [41].

134. *A and Others*, [2004] UKHL 56 at [42].

135. *Id.* at [41].

136. 336 U.S. 106 (1949).

137. *A and Others*, [2004] UKHL 56 at [46] (quoting *Railway Express*, 336 U.S. at 112-13) (emphasis added).

138. *Id.* at [218].

in custody, that fact that only a handful of people were removed from society and probably not be missed by those who did not know them did not make a difference in principle to his position that equality before the law was a fundamental human right.

Moreover, Lord Bingham accepted the proposition that treating “like cases alike and unlike cases differently is a general axiom of rational behavior.”¹³⁹ Therefore, Americans should ask whether the unequal treatment of Hamdi, and Hicks, when compared with Lindh, is rational. The foreign nationality of the detainees did not bar them from qualifying for the full protection of their right to liberty in *A and Others*¹⁴⁰ and British and European jurisprudence have recognized the constitutional liberty rights of aliens to be equal with citizens.¹⁴¹ Lord Bingham illustrated this point by referring to the authority of *Khawaja v. Secretary of State for the Home Department*:¹⁴²

Habeas corpus protection is often expressed as limited to ‘British subjects.’ Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic ‘no’ to the question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. *He who is subject to English law is entitled to its protection.* This principle has been in the law at least since Lord Mansfield freed ‘the black’ in *Sommersett’s Case* (1772) 20 St. Tr. 1. There is nothing here to encourage in the case of aliens or non-patrials the implication of words excluding the judicial review our law normally accords to those whose liberties is infringed.¹⁴³

This is in marked contrast to the United States, where individuals designated as enemy combatants are not entitled to the full protection of constitutional due process unless prosecuted in the federal court system. For example, compare the treatments of Lindh with those of Hamdi and Hicks. Lindh, a United States citizen who was captured with members of the Taliban,¹⁴⁴ was given notice of a hearing just two months after his capture.¹⁴⁵ Hamdi, also a United States citizen but one with dark skin, was captured alone, overseas, and held for two and a half years¹⁴⁶ before being granted the right to meaningful access to the courts.¹⁴⁷ Hicks, a Caucasian and national of Australia,¹⁴⁸ was held for two years before being given the right to trial by a district court, as opposed to a military tribunal.¹⁴⁹ Lindh received preferential treatment to Hamdi, a dark-skinned Arab American, who

139. *Id.* at [46] (quoting *Matadeen v. Pointu*, [1999] 1 A.C. 98, 109 (Hoffman, L.J.)).

140. *Id.* at [48].

141. *Id.*

142. [1984] 1 A.C. 74.

143. *A and others*, [2004] UKHL 56 at [48] (quoting *Khawaja*, 1 A.C. 74) (emphasis added).

144. *United States v. Lindh*, 227 F. Supp. 2d 565, 568 (E.D. Va. 2002).

145. *See U.S. v. Lindh*, 1:02CR0037 (docket) (E.D. Va. Feb. 5, 2002) (having his arraignment set for Feb. 11, 2002).

146. *Hamdi*, 542 U.S. at 511.

147. *Id.* at 533.

148. *Rasul v. Bush*, 542 U.S. 466, 472 n.4 (2004).

149. *Id.* at 484.

received no process, and to Hicks, a Caucasian who is denied the protection of the United States Constitution because he is a foreign national and is being tried by a military commission where the rules are stacked against him. Still, the older cases of American citizen Jose Padilla¹⁵⁰ and French citizen Zacarias Moussaoui¹⁵¹ remain in custodial limbo, for their cases linger in the U.S. federal courts. In the United States, whether due process applies depends on who you are, what court you are tried by, or where you are detained—situations that would never be tolerated by the British or European courts.

Lord Bingham concluded that the discriminatory treatment of the foreign nationals was unlawful and could not be justified.¹⁵² He stated that discriminatory treatment of foreign nationals was a disproportionate response that would not be tolerated.¹⁵³ Similarly, Lord Nicholls of Birkenhead began his concurring opinion, noting, “[i]ndefinite imprisonment without charge or trial is anathema in any country which observes the rule of law.”¹⁵⁴

Perhaps the most useful perspective for Americans comes from the concurrence of Lord Hoffman, who understood that terrorist violence, however destructive, would not threaten the life of the British nation.¹⁵⁵ He stated:

This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of human life. I do not underestimate the ability of fanatical groups to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.¹⁵⁶

The real threat to the life of a nation comes from draconian detention laws that substitute rule by law for the rule of law. Lord Hoffman observed:

In my opinion, such a power [of detention] in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.¹⁵⁷

150. See *Rumsfeld v. Padilla*, 542 U.S. 426, 442 (2004) (holding that where the prisoner was detained the commander is the only proper respondent).

151. *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1670 (2005).

152. *A and Others*, [2004] UKHL 56 at [73].

153. *Id.*

154. *Id.* at [74].

155. *Id.* at [95].

156. *Id.* at [96].

157. *Id.* at [97].

Justices Scalia's and Stevens' dissenting opinion in *Hamdi*¹⁵⁸ appears vindicated.

A. Rasul: A Pyrrhic Victory?

Handed down the same day as *Hamdi*, the Supreme Court decided *Rasul v. Bush*.¹⁵⁹ David Hicks was one of fourteen successful petitioners in that case. In *Rasul*, the Supreme Court held that foreign nationals indefinitely detained at Guantanamo Bay had the right to file challenges in United States courts to contest the legality of their detention.¹⁶⁰ The Court decided nothing more than the narrow question of jurisdiction.¹⁶¹

This action began on February 19, 2002 when Hicks and the others filed petitions of habeas corpus in the U.S. District Court for the District of Columbia through relatives acting as their next friends.¹⁶² All the petitioners claimed they had never been combatants against the United States and that none of them had ever committed a terrorist act.¹⁶³ Not a single petitioner had been charged, permitted to consult with counsel, or provided access to any court or tribunal.¹⁶⁴

Hicks' petition for a writ of habeas corpus sought release from custody, access to counsel, freedom from interrogations, and other relief.¹⁶⁵ In particular, Hicks complained that his treatment violated the American Constitution, international law and treaties to which the United States was a party.¹⁶⁶ Hicks asserted statutory jurisdiction pursuant to 28 U.S.C. sections 1331 and 1350.¹⁶⁷ In addition to seeking his release under the general federal habeas corpus statute,¹⁶⁸ Hicks sued the Government¹⁶⁹ under the Administrative Procedure Act¹⁷⁰ and the Alien Tort Statute.¹⁷¹ Both the District Court and the Court of Appeals dismissed his action.¹⁷² The United States Supreme Court subsequently granted certiorari.¹⁷³

Justice Stevens authored the majority opinion in *Rasul*.¹⁷⁴ Justices O'Connor, Souter, Ginsburg and Breyer signed on to his opinion.¹⁷⁵ Justice Kennedy

158. See *Hamdi*, 542 U.S. at 578 (stating that the power to suspend the writ is within Congress' power, not the Court's).

159. 542 U.S. 466 (2004).

160. *Id.* at 484.

161. See *id.* at 470 (stating that "[t]hese two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba").

162. *Id.* at 471.

163. *Id.* at 471-72.

164. *Id.* at 476.

165. *Rasul*, 542 U.S. at 472.

166. *Id.*

167. *Id.*

168. 28 U.S.C. §§ 2241-2243.

169. *Rasul*, 542 U.S. 466 at 472-73.

170. 5 U.S.C. §§ 555, 702, 706.

171. 28 U.S.C. § 1350.

172. *Rasul*, 542 U.S. at 472-73.

173. *Id.* at 473.

174. *Id.* at 470.

175. *Id.* at 468.

concluded in the result.¹⁷⁶ The Stevens opinion confirmed that the federal courts even in times of war have the general power to review applications for habeas relief from those individuals detained by Executive order.¹⁷⁷

The initial question, whether United States courts had “jurisdiction to consider *challenges* to the legality of the detention of foreign nations,”¹⁷⁸ gave way to the general question of “whether the habeas statute confers a *right to judicial review* of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and executive jurisdiction, but not ‘ultimate sovereignty.’”¹⁷⁹ For the majority,¹⁸⁰ the answer was an unqualified yes:

In the end, the answer to the question presented is clear. Petitioners contend they are being held in federal custody in violation of the laws of the United States. No party questions the District Court’s jurisdiction over petitioners’ custodians Section 2241, by its terms, requires nothing more. We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners’ habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.¹⁸¹

The court provided guidance to the District Courts in footnote fifteen on how the right of judicial review in a petition for habeas corpus could result in freedom of a foreign national detained as enemy combatants. That footnote states:

Petitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—*unquestionably describe “custody in violation of the Constitution or laws or treaties of the United States.”*¹⁸²

This elaboration in footnote fifteen is consistent with the Supreme Court’s definition of an “enemy combatant”—formulated in *Hamdi* - to fill the vacuum left by the refusal of the executive branch to provide the Court in that case with any criteria used to designate someone as an “enemy combatant.” Since in *Hamdi* an enemy combatant, for the purposes of that case, was a person 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,”¹⁸³ it makes sense that in the companion case *Rasul*, the Court would, in footnote fifteen,

176. *Id.*

177. *See id.* at 481-82 (observing the historical applications of the habeas statute).

178. *Rasul*, 542 U.S. at 470 (emphasis added).

179. *Id.* at 475 (emphasis added).

180. Justice Kennedy filed an opinion concurring in the judgment and Justices Scalia filed a dissenting opinion, which Chief Justice Rehnquist and Justice Thomas joined. *Id.* at 468.

181. *Id.* at 483-84 (internal citations omitted).

182. *Rasul*, 542 U.S. at 484 .15 (citing 28 U.S.C. § 2241 (c) (3)) (citations omitted) (emphasis added).

183. *Hamdi*, 542 U.S. at 516 (emphasis added).

strongly hint that someone who had never engaged in combat or acts of terrorism merited release from indefinite detention.

Until the decision in *Rasul*, the controlling case was *Johnson v. Eisentrager*,¹⁸⁴ which held that captured enemy alien combatants that had been tried and convicted of war crimes by a military tribunal on foreign soil and imprisoned outside the territorial jurisdiction of the United States were precluded from filing a petition for a writ of habeas corpus.¹⁸⁵ The *Eisentrager* Court made it clear that on these facts, those petitioners had no constitutional right to habeas corpus.¹⁸⁶

The Stevens opinion distinguished *Eisentrager* not only on its facts, but more importantly on the basis that the *Eisentrager* Court had virtually nothing to say about statutory entitlement to habeas corpus, except in a passing remark that noted the absence of statutory authorization to the petitioners in that case.¹⁸⁷ It was this statutory gap that prompted the petitioners in *Eisentrager* to rest their case on the Constitutional right to habeas corpus.¹⁸⁸

Since 1950, that statutory gap has been filled and persons physically detained outside the territorial jurisdiction of the United States need no longer cite the Constitution as the sole authority to seek habeas relief. Jurisdiction may be found even when the prisoner petitioner is not present in the territorial jurisdiction of the district court. This result is possible because "[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody."¹⁸⁹ The jurisdiction found in section 2241 provides that the custodian is within reach by the service of process.¹⁹⁰

The fact that Cuba retains ultimate sovereignty over Guantanamo Bay did not matter to the *Rasul* plurality.¹⁹¹ According to the lease agreement with the nation of Cuba, the United States has complete jurisdiction and control over the Guantanamo Bay naval base, and will continue to indefinitely.¹⁹² In view of the concession by the Government that an American citizen incarcerated at Guantanamo Bay is entitled to seek relief pursuant to the habeas statute, there is no reason why Hicks should be precluded from also seeking the same relief, for the habeas statute makes no distinction between citizens and foreign nationals.¹⁹³

The application of the habeas statute to persons detained at Guantanamo Bay is consistent with the best traditions of the common law, for justice and the rule of law could thus otherwise be circumvented by removing prisoners and enemies of the state condemned to indefinite executive detention from the reach of the

184. 339 U.S. 763 (1950).

185. *Id.* at 781.

186. *Id.* at 780-81.

187. *Rasul*, 542 U.S. at 476.

188. *Johnson*, 339 U.S. at 767.

189. *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 494-95 (1973).

190. 28 U.S.C. § 2241.

191. *Rasul*, 542 U.S. at 480.

192. *See Lease of Certain Areas for Naval or Coaling Stations art. 3, U.S.—Cuba, July 2, 1903, 6 Bevans 1120* (stipulating that no person, partnership, or corporation shall be permitted to maintain a commercial, industrial or other enterprise within said area); *Relations with Cuba art. 3, U.S.—Cuba, May 29, 1934, 6 Bevans 1161* (stipulating that the 1903 agreement shall continue in effect with regard to the naval station of Guantanamo).

193. *Rasul*, 542 U.S. at 481.

judiciary. Lord Mansfield declared that the courts have jurisdiction to issue writs of habeas corpus in foreign territory so long as that territory was "under the subjection of the Crown."¹⁹⁴ The reach of habeas corpus depended upon the practical facts of dominion and control, and not upon territorial boundaries.¹⁹⁵ Early on, American courts followed the British model.¹⁹⁶

Since Hicks and his fellow petitioners were held in federal custody at a military prison under the control of the U.S. Government, and in its role as custodian is subject to the jurisdiction of the district court, the general habeas corpus statute's conditions are met for judicial review as to the legality of the petitioners' executive ordered detentions. Accordingly, the judgment of the court of appeals was reversed and the case remanded to district court to consider in the first instance the merits of the petitioners' claims.¹⁹⁷

Specifically not mentioned was the legal process under which these petitions would be heard. No reference was made to the companion case of *Hamdi*, which outlined a minimal standard of legal process well short of Due Process under the Constitution.¹⁹⁸ Was it simply assumed the O'Connor plurality's standard of legal process would substitute for the normal high threshold required for constitutional Due Process? Failure to address this key point might be interpreted as tacit approval by the Executive to try to lower the standard of legal process set in *Hamdi* for citizens in new petitions filed by non-citizens.

The dissenting opinion, authored by Justice Scalia, disagreed that the district court had jurisdiction to hear the petitions because the text of the habeas statute did not permit the interpretation favored by Justice Stevens.¹⁹⁹ Scalia reasoned that unless some federal court had territorial jurisdiction over the detainee, the district court could not hear the case, for it was not a court of inherent jurisdiction, but one of limited statutory powers. Since the petitioners had conceded at the hearing of the appeal they had abandoned an alternative jurisdictional argument based on constitutional habeas corpus,²⁰⁰ the petitioners' case was doomed for lack of jurisdiction. Justice Scalia warned that the expansion of the scope of the habeas statute would result in legions of petitions for habeas relief by foreign nationals captured in a foreign theater of active combat.²⁰¹

194. *King v. Cowle*, 97 E.R. 587, 598-99 (U.K.).

195. *Ex parte Menya*, (1960) 1 Q.B. 241, 303 (U.K.) (Lord Evershed, M.R.).

196. *See United States v. Villato*, 28 F. Cas. 377, 378 (C.C.D. Pa. 1797) (No. 16,622) (discussing the attempted naturalization of a foreigner under Pennsylvania law to challenge charges of high-treason); *Ex Parte D'Oliviera*, 7 F. Cas. 853, 854 (C.C. Mass. 1813) (No. 3,967) (granting the release of a Portuguese seamen in the merchants' service outside of the United States); *Wilson v. Izard*, 30 F. Cas. 131, 132 (C.C. N.Y. 1815) (No. 17,810) (holding that the place of service of volunteers in the armed services may be changed notwithstanding the insertion in their enrollment of the officer's name under whom they were to serve).

197. *Rasul*, 542 U.S. at 485.

198. *Hamdi*, 542 U.S. at 533.

199. *Rasul*, 542 U.S. at 489 (Scalia, J., dissenting) (reiterating "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*") (emphasis in original).

200. *Id.* at 489 .1.

201. *Id.* at 2706-2707.

B. Post-Rasul Developments

Since *Rasul*, numerous petitions for writs of habeas corpus have been filed in the United States District Court for the District of Columbia on behalf of foreign nationals detained at Guantanamo Bay. None of these petitioners are U.S. citizens. They share the common history that they were taken into custody outside of any battlefield or zone of military combat, outside of Afghanistan. One petitioner, French citizen Ridouane Khalid, was seized in Pakistan. Another petitioner, Lakhdar Boumediene, is an Algerian-Bosnian citizen who was captured in Bosnia.²⁰² Still other petitioners include men from Gambia, Zambia, and Thailand.²⁰³ These petitioners represent a subset of enemy combatants who have not been designated for trial before a military commission. Until the decision in *Rasul*, their fate was indefinite detention pending the President's declaration that the war against terrorism was over, or until such time these individuals were determined by the President or his designee to no longer pose any danger to national security. Nine days after *Rasul*, Deputy Secretary of Defense Paul Wolfowitz issued an Order establishing the Combat Status Review Tribunal (CSRT) to review the legality of the detention of each enemy combatant.²⁰⁴

The most important part of this Order was a new definition of enemy combatant designed to circumvent the effect of footnote fifteen, by severing the link between violence and association with enemies of the United States. The new definition states:

- a. Enemy Combatant. For purposes of this Order, the term "enemy combatant" shall mean 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. This *includes* any person who committed a belligerent act or has directly supported hostilities in aid of enemy forces.²⁰⁵

The intended result was presumably the continued detention of anyone who meets this new definition, even if that person had never engaged in combat or in acts of terrorism against the United States. The effect of this new definition was the neutralization of footnote fifteen, so that enemy belligerency in the form of engaging in combat or in acts of terrorism against the United States was no longer required to justify indefinite detention as an enemy combatant.

On July 29, 2004, Secretary of the Navy, Gordon England, issued a Memorandum implementing the July 7 Order.²⁰⁶ The legal procedures are markedly different than those suggested by the Supreme Court in *Hamdi*. For

202. Khalid v. Bush, 355 F. Supp. 2d 311, 316 (D.C. Cir. 2005).

203. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 446 (D.C. Cir. 2005).

204. Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy for Establishing Combatant Status Review Tribunal, (July 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

205. *Id.* (emphasis added).

206. Memorandum from Gordon England, Secretary of the Navy regarding Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay, Cuba (Jul. 29, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

example, there is no right to counsel, formal rules of evidence do not apply, and there is a presumption in favor of the Government that the detainee is an “enemy combatant.” Detainees are forbidden access to and details of classified information, which includes the factual basis of their detention. Even though detainees have the right to testify why they should not be held as an enemy combatant and present exculpatory evidence (to the extent this evidence is relevant and reasonably available), this is a meaningless right for an innocent person who will not discover why he was detained in the first place. The inevitable result is the continued indefinite detention of the foreign national.

An illustration of how the procedure works in favor of the government is the detention of Mustafa Ait Idir, a petitioner for writ of habeas corpus in *Boumediene v. Bush*.²⁰⁷ In reading a list of allegations forming the basis for his detention, the Recorder of the Combatant Status Review Tribunal (“CSRT”) asserted, “[w]hile in Bosnia, the Detainee associated with a known Al Qaida operative.” In response, the following exchange occurred:

Detainee: Give me his name.

Tribunal President: I do not know.

Detainee: How can I respond to this?

Tribunal President: Did you know of anybody that was a member of Al Qaida?

Detainee: No, no.

Tribunal President: I’m sorry, what was your response?

Detainee: No.

Tribunal President: No?

Detainee: No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person who worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.

Tribunal President: We are asking you the questions and we need you to respond to what is on the unclassified summary.²⁰⁸

In practice, this procedure is worthy of the dark vision of the kangaroo court depicted in Franz Kafka’s book and movie, *The Trial*.²⁰⁹

207. Petition for Writ of Habeas Corpus, *Kahlid*, 355 F. Supp. 2d 311 (D.C. Cir. 2004) (No. 04-CV-1166 (RJL)).

208. Respondents’ Factual Return to Petition for Writ of Habeas Corpus by Petitioner Mustafa Ait Idir, filed Oct. 27, 2004, *reprinted in* In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 469 (D.C. Cir. 2005).

209.

[T]here can be no doubt that behind all the actions of this court of justice, that is to say in my case, behind my arrest and today’s interrogation, there is a great organization at work. An

On January 19, 2005, District Court Judge Richard J. Leon denied the habeas corpus petitions of Khalid, Boumediene and others on the basis that there was “no viable legal theory” upon which to grant relief.²¹⁰ Judge Leon held his role as “highly circumscribed”²¹¹ and found that the President’s Detention Order²¹² of November 13, 2001 was a valid exercise of the authority granted to him by Congress by the AUMF and “consistent with” his war powers under Article II of the Constitution.²¹³ Taking guidance from *Hamdi*, Judge Leon, like the Supreme Court plurality in *Hamdi*, expressly refrained from making an express finding of presidential authority under Article II.²¹⁴

Judge Leon accepted *Rasul*’s directive that the petitioners have a right to file a writ of habeas corpus. However, he rejected any merit to the petitioners’ claims, for he reasoned that since the majority in *Rasul* had left intact the holding in *Eisentrager*,²¹⁵ “non-resident aliens captured and detained pursuant to the AUMF and the President’s Detention Order have no viable constitutional basis to seek a writ of habeas corpus.”²¹⁶ The petitioners’ arguments based on footnote fifteen of *Rasul* were emphatically rejected, as Judge Leon read footnote fifteen in the context of the “question presented” being one solely of jurisdiction to consider challenges.²¹⁷ This question was severable from any question of merit, a task left to District Court judges by the Supreme Court.²¹⁸

So long as the detention of the petitioners was based upon a lawful military order, such custody was lawful even if the conditions of that custody violated United States law.²¹⁹ Judge Leon noted that new safeguards had been put in place by Congress to govern the treatment of the detainees at Guantanamo Bay.²²⁰ What constitutes torture is an altogether different matter not addressed by Judge Leon, for he did not discuss the leaked infamous torture memo sent to the President’s then counsel, Alberto Gonzales, which excluded from the definition of torture any

organization which not only employs corrupt warders, oafish Inspectors, and Examining Magistrates of whom the best that can be said is that they recognize their own limitations, but also has at its disposal a judicial hierarchy of high, indeed of the highest rank, with an indispensable and numerous retinue of servants, clerks, police, and other assistants, perhaps even hangmen, I do not shrink from that word. And the significance of this great organization, gentlemen? It consists in this, that innocent persons are accused of guilt, and senseless proceedings are put in motion against them.

FRANZ KAFKA, *THE TRIAL* 54-55 (Schocken Books ed., 1999).

210. *Khalid*, 355 F. Supp. 2d at 314.

211. *Id.* at 329.

212. Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

213. *Khalid*, 355 F. Supp. 2d at 320.

214. *Id.* at 320 n.11; *Hamdi*, 542 U.S. 507 at 516-17.

215. *Khalid*, 355 F. Supp. 2d at 323.

216. *Id.* at 321.

217. *Id.* at 323.

218. *Id.*

219. *Id.* at 324.

220. *Id.* at 325 n.18; see Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091 (b)(1) (2004) (providing that foreign nationals detained at Guantanamo Bay may not be subject to “torture, or cruel, inhuman or degrading treatment or punishment”).

infliction of intense pain short of causing “organ failure, impairment of bodily function, or even death.”²²¹ Judge Leon also did not discuss evidence available to him provided by an unidentified member of the Federal Bureau of Investigation to the District Court of the District of Columbia. In a document dated August 2, 2004, and filed with the Court Security Officer on January 6, 2005, an FBI observer of detainees at Guantanamo Bay made the following observations:

On a couple of occasions [sic], I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food or water. Most times they had urinated or defecated [sic] on themselves, and had been left there for 18-24 hours or more. On one occasion [sic], the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MP's what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occasion [sic], the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious [sic] on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occasion [sic], not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.²²²

The government of Cuba has expressed its outrage at the United States for its

221. Memorandum from Jay S. Bybee, former Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President of the United States (Aug. 1, 2002), *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>. On Oct. 17, 2003, Jay Bybee began new duties as a judge on the Ninth Circuit Court of Appeals. *See* OCE Public Information Office, *Investiture held for Circuit Judge Jay S. Bybee* (Oct. 17, 2003), <http://www.ce9.uscourts.gov/Web/OCELibra.nsf/0/addae972bed762f888256dc50062aae7?OpenDocument> (announcing the investiture of Jay S. Bybee as a judge in the United States Ninth Circuit Court of Appeals); *see also* Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Mar. 6, 2003), <http://www.ccrny.org/v2/reports/docs/PentagonReportMarch.pdf> (discussing the definition of torture under 18 U.S.C. § 2340).

222. *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 474. This kind of treatment is known as “torture lite,” and does not meet the U.S. definition of torture. Self-defense in exigent circumstances (like the ticking bomb scenario) is thought to justify this kind of treatment. Judicially sanctioned torture and torture warrants are options under consideration. *See* ALAN DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT: RESPONDING TO THE CHALLENGE* 148 (Yale University Press 2002) (Dershowitz discusses the jurisprudential balance between due process considerations and the need to get valuable security information from terrorism suspects under exigent circumstances, proposing a system of “torture warrant” process); Andrew A. Moher, Comment, *The Lesser of Two Evils? An Argument for Judicially Sanctioned Torture in a Post 9/11 World*, 26 T. JEFFERSON L. REV. 469, 479 (2004) (discussing various viewpoints on the usefulness and consequences of the use of torture on terrorism detainees). *See also* OBEDIENCE (Penn State University 1965) (a film made by noted psychologist Stanley Milgram depicting psychological experiments being conducted that demonstrated how “torture lite” easily progresses to the worst forms of torture).

“criminal conduct” and abuse of the human rights of the Guantanamo detainees and has demanded humane treatment of the prisoners.²²³

Judge Leon dismissed all the petitions, including claims based upon the Geneva Conventions, because these petitioners were not conventional prisoners of war, for they were not detained on a field of combat in a zone of hostilities,²²⁴ and also because international treaties as a general rule are not privately enforceable.²²⁵ Even if the United States had violated international legal norms, by arbitrarily and indefinitely detaining and torturing individuals of suspicion, Judge Leon, relying upon the majority opinion in *In re Yamashita*,²²⁶ held that under the separation of powers doctrine, he did not have the authority to engage in judicial review beyond the limited question of whether Congress had given the military authority to detain an individual as an enemy combatant.²²⁷ The rightness or wrongness of the military’s decisions and finding of guilt or innocence is immune from judicial review.²²⁸ The detainees are thus absorbed into the “black hole”²²⁹ of the American Gulag Archipelago.²³⁰

In stark contrast, Senior Judge Joyce Hens Green, former Chief Judge of the United States Foreign Intelligence Surveillance Court, came to opposite conclusions than Judge Leon, in a consolidated judgment involving eleven other coordinated petitions, in a redacted decision released January 31, 2005.²³¹ Judge Green concluded that the petitioners have valid claims under the Fifth Amendment to the United States Constitution and that the CSRT procedures were unconstitutional, violating the due process of law. As was his prerogative, Judge Leon chose not to transfer the government’s motions to dismiss to Judge Green, as did other judges.²³²

Judge Green specifically rejected the Government’s position that uncharged detainees only had the mere right to allege in a habeas petition to a U.S. district

223. See *Cuba Demands U.S. Stop Alleged Abuses at “Illegally Occupied” Guantanamo Base*, CARIBBEAN NET NEWS, Jan. 20, 2005, <http://www.caribbeanetnews.com/2005/01/20/demands.shtml> (stating that Cuba demanded that the United States cease its “criminal conduct” in abusing prisoners held at Guantanamo Bay).

224. *Khalid*, 355 F. Supp. 2d at 326.

225. *Id.* at 327.

226. 327 U.S. 1 (1946).

227. *Khalid*, 355 F. Supp. 2d at 328. See *In re Yamashita*, 327 U.S. 1, 6-7 (1945) (stating that where a commanding officer of Japanese forces in the Philippines was charged with breach of military duty was an issue for determination by military commission, and not the courts, where peace had not been proclaimed).

228. *Khalid*, 355 F. Supp. 2d at 328-30.

229. I define a “black hole” in the context of indefinite detention at Guantanamo Bay as an impenetrable abyss housing a wretched prison from which there is no escape.

230. See generally ALEKSANDR SOLZHENITZYN, *THE GULAG ARCHIPELAGO*, (Thomas P. Whitney trans., Harper & Row 1974-1978) (detailing life in the prison system of the former Soviet Union over three volumes). Human Rights First has documented the existence of a secret global network of American concentration camps and prisons in addition to the known facilities at Guantanamo Bay naval Base. See Human Rights First, *Ending Secret Detentions* (June 2004), available at http://www.humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf (listing disclosed and suspected information regarding United States operated detention facilities in multiple countries).

231. *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 445.

232. *Id.* at 452 n.14.

court unlawful detention contrary to the Constitution and possessed no substantive underlying rights to have their cases heard on the merits.²³³ She agreed with the Government that, “it would be far easier for the government to prosecute the war on terrorism if it could imprison all suspected ‘enemy combatants’ at Guantanamo Bay without having to acknowledge and respect any constitutional rights of detainees.”²³⁴ To accept that argument would do a great disservice to the men and women who have fought and died for liberty, justice, equality, and the rule of law.²³⁵

Although this nation unquestionably must take strong action under the leadership of the Commander in Chief, to protect itself against enormous and unprecedented threats, that necessity cannot negate the existence of the most basic fundamental rights for which the people of this country have fought and died for well over two hundred years. In deference to *Rasul*'s holding that Guantanamo Bay is the functional equivalent of a U.S. territory in which the Constitution applies, Judge Green recognized the due process rights of the detainees under the Fifth Amendment.²³⁶

What is due process in one case is not necessarily due process in another. Due process is a flexible concept that works like the stretching and contraction of a rubber band. The specific process depends upon the context and all of the circumstances involved.²³⁷ Normally courts will consider:

[T]he private interest of the person asserting the lack of due process; the risk of erroneous deprivation of that interest through use of existing procedures and the probable value of additional or substitute procedural safeguards; and the competing interests of the government, including the financial, administrative, and other burdens that would be incurred were additional safeguards to be provided.²³⁸

Judge Green noted that the *Hamdi* case involved identical issues, with the exception that the Supreme Court in *Hamdi* dealt with an American citizen. Judge Green modeled her due process analysis to conform to *Hamdi*.²³⁹ Due process was essential to prevent erroneous detentions, and there were no short cuts to a meaningful inquiry. Mere “say so” that a detainee was a terrorist or associated with al Qaeda falls well short of due process.

Judge Green concluded that the CSRT procedures failed constitutional standards for due process.²⁴⁰ There was no disclosure of material evidence upon which the government relied to designate the detainee as an enemy combatant. There was also a failure to provide the assistance of counsel, and the definition of

233. *Id.* at 454.

234. *Id.* at 464.

235. *Id.*

236. *Id.*

237. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

238. *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 465 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

239. *Id.* at 465-66.

240. *Id.* at 468.

“enemy combatant” used was vague and potentially overbroad. The “handling” of allegations of torture by the CSRT also troubled Judge Green.²⁴¹

As to the claims under the Geneva Conventions, Judge Green held that they were self-executing.²⁴² By definition, al Qaeda operatives did not meet the definition of a prisoner-of-war.²⁴³ The situation was different for Taliban detainees, since Afghanistan is a “High Contracting Party” to the Conventions.²⁴⁴ A mere declaration by President Bush overriding the protocols established by the Geneva Conventions that denies prisoner of war status to all Taliban fighters ignores Army Regulation 190-8, and substitutes executive fiat for an Article Five determination on an individualized basis.²⁴⁵ This was improper. Accordingly these claims were valid. The remaining claims were dismissed.²⁴⁶

III. THE MILITARY COMMISSIONS

While the *Hamdi* and *Rasul* cases worked their way through the federal courts, the United States Government put into place a legal apparatus to prosecute detainees held at Guantanamo Bay. At the same time, the government delayed charging the detainees so that interrogations could continue as long as possible. The primary focus appeared to be on gathering intelligence to prevent further attacks and finding Osama bin Laden and his key associates. Indefinitely delaying the implementation of military commissions to try detainees was a strategy that worked well with psychological weapons the military employed to coerce the collection of intelligence. After June 25, 2004, the date the *Hamdi* and *Rasul* decisions were released, Secretary Rumsfeld recognized that trials could no longer be delayed because a flood of future habeas corpus petitions was imminent.²⁴⁷ In July of 2004, Hicks and three other detainees were the first cases to be prosecuted by military commission operating under rules designed specifically for Hicks and other non-citizens.²⁴⁸

A brief review of the origin of this new court system is appropriate. On September 11, 2001, al Qaeda terrorists successfully attacked the World Trade Center and the Pentagon, using hijacked civilian passenger jets as weapons. In response, President George W. Bush declared a national emergency on September 14, 2001.²⁴⁹ On September 18, 2001, Congress authorized the President to use

241. *Id.*

242. *Id.* at 479.

243. *Id.* at 479-80.

244. *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 479.

245. *Id.* at 480.

246. *Id.* at 480-81.

247. See Dep't of Defense News Release, *Military Commission Charges Referred*, (June 29, 2004) available at <http://www.defenselink.mil/releases/2004/nr20040629-0951.html> (discussing the charges issued immediately following the *Hamdi* and *Rasul* rulings).

248. *Id.*

249. Declaration of National Emergency by Reason of Certain Terrorist Acts By the President of the United States of America:

A national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States. NOW, THEREFORE, I, GEORGE W.

military force against al Qaeda and any government that supported these terrorists.²⁵⁰ On October 7, 2001, the first air strikes were launched against the Taliban Government in Afghanistan, which had allowed al Qaeda to operate terrorist training camps in its country.²⁵¹ On October 24, 2001, Congress passed the Patriot Act to enhance domestic security against terrorism.²⁵² The Patriot Act granted unprecedented sweeping power to the executive branch to override civil liberties and engage in the intrusive surveillance of people.²⁵³ Specifically, it allowed for the tracking of money, tightening of borders, detention of legal, resident aliens, strengthening of criminal laws to harshly punish and deter terrorist acts, and the coerced co-operation of private and public institutions to secretly violate the privacy of customers and patrons.²⁵⁴ On November 13, 2001, the President issued an order authorizing trial by military commission against any captured enemy combatant charged with violating the laws of war.²⁵⁵ Beginning in January 2002, hundreds of prisoners seized in Afghanistan, most of whom were Taliban “foot soldiers,” transported overseas to Guantanamo Bay for interrogation

BUSH, President of the United States of America, by virtue of the authority vested in me as President by the Constitution and the laws of the United States, I hereby declare that the national emergency has existed since September 11, 2001, and, pursuant to the National Emergencies Act (50 U.S.C. 1601 et seq.), I intend to utilize the following statutes: sections 123, 123a, 527, 2201(c), 12006, and 12302 of title 10, United States Code, and sections 331, 359, and 367 of title 14, United States Code. This proclamation immediately shall be published in the Federal Register or disseminated through the Emergency Federal Register, and transmitted to the Congress. This proclamation is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of September, in the year of our Lord two thousand one, and of the Independence of the United States of America the two hundred and twenty-sixth.

George W. Bush.

66 Fed. Reg. 48, 199 (Sept. 14, 2001).

250. Authorization to Use Military Force (AUMPF), Pub. L. No. 107-40, § 2(a) 115 Stat. 224, 224 (2001).

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

252. H.R. 3162 was introduced on October 23, 2001 by Rep. James Sensenbrenner, who helped draft the Bill. H.R. 3162: Bill Summary and Status for the 107th Congress, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:@@R> (detailing the legislative history of the PATRIOT Act). On October 24, 2001 the Patriot Act passed the House by a vote of 357-66, after a successful motion to suspend the rules. *Id.* On October 25, 2001, the PATRIOT Act was passed by the Senate without amendment on a vote of 98-1. *Id.* The Act was signed by the President the next day and became law on October 26, 2001. *Id.*

253. See Senator Russell Feingold, U.S. Senator, Address given to the Associated Press Managing Editors Conference: On Opposing the U.S.A. Patriot Act (Oct. 12, 2001), available at <http://www.archipelago.org/vol6-2/feingold.htm> (detailing the Senator’s reasons for opposing the USA PATRIOT Act).

254. *Id.* Senator Russell Feingold cast the lone dissenting vote as a protest against the loss of civil liberties and the transformation of America into a police state. *Id.* Feingold lamented the deal that had been struck by the Democrats and the Republicans to pass this draconian legislation without oversight by the Judiciary Committee, and without debate. *Id.*

255. Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, § 4(a) (Nov. 13, 2001) (“President’s Military Order”).

and indefinite detention.²⁵⁶ On March 21, 2002, the Department of Defense issued Military Commission Order No. 1, setting out the legal procedure for trials by military commissions against individuals subject to the President's military order.²⁵⁷ On April 30, 2003, the Department of Defense added an Instruction with regard to policies for future issuance and interpretation of Military Commission Instructions.²⁵⁸ Additionally, effective April 30, 2003, a set of rules was released governing the conduct of military and civilian counsel involved in defending any defendant tried by a military commission.²⁵⁹

One of the advisors to the Department of Defense regarding the military commissions is Professor Ruth Wedgewood, who teaches international law at Johns Hopkins University.²⁶⁰ In response to widespread criticism of the legal procedures adopted by the Military Commissions, Wedgewood dismisses some of the complaints as being "manifestly ill-founded."²⁶¹ Wedgewood claims that the rules "take[] full account of modern standards of international humanitarianism and human rights law," and "ha[ve] one guiding principle: to provide a full and fair trial for any accused, while upholding the laws of war."²⁶² To support her position, Wedgewood cited numerous provisions that are consistent with procedures associated with constitutional due process.

The rules respect the common law's presumption of innocence in favor of the defendant, burden of proof on the government, right to cross-examination of witnesses, right to call defense witnesses, mandated disclosure of any exculpatory evidence and requirement of proof beyond reasonable doubt. A defendant is given his choice of military counsel and can engage any civilian counsel who qualifies for security clearance. Any finding of guilt must be rendered by a two-thirds vote. All convictions will be reviewed by an independent appellate panel—with one or more civilian members endowed with authority to reverse judgments for serious errors of law. Members of the press are entitled to

256. David Rose, *Guantanamo Bay on Trial* (Jan. 2004), available at <http://www.pbs.org/wgbh/pages/frontline/shows/khadr/readings/gitmo.html> (last visited Nov. 5, 2005). At first they were housed in primitive makeshift conditions at what was called Camp X-Ray, and then were later transferred to a newly built Camp Delta. *Id.*

257. Dep't of Defense, Military Commission Order No. 1 (Mar. 21, 2002), available at <http://www.dod.mil/news/Mar2002/d20020321ord.pdf> (discussing the "Procedures for Trials by Military Commissions of Certain Non-Citizens in the War Against Terrorism").

258. Military Commission Instructions, Dep't of Defense, Military Commission Instruction No. 1, (Apr. 30, 2003), available at <http://www.dtic.mil/whs/directives/corres/mco/mci1.pdf>.

259. Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel and Civilian Defense Counsel, 32 C.F.R. § 13.1 (2005).

260. Ruth Wedgewood, *Justice Will Be Done At Guantanamo*, FIN. TIMES OF LONDON, July 10, 2003, at Comment 19, available at <http://usinfo.state.gov/regional/nea/sasia/afghan/text2003/0715gtmo.htm>. Other advisors identified by Wedgewood include: "Lloyd Cutler (White House counsel to President Bill Clinton), Bernard Meltzer (Nuremberg prosecutor and University of Chicago law professor), and William Webster (a judge and chief of the Federal Bureau of Investigation under President Jimmy Carter and of the Central Intelligence Agency under President Ronald Reagan)." *Id.*

261. *Id.*

262. *Id.*

witness the full trial proceedings, except when classified or sensitive information is presented.²⁶³

United States military lawyer, Major Michael Mori, who was appointed to defend David Hicks, issued a public statement at a Washington press conference on January 21, 2004 condemning the Military Commission process as unfair. Mori stated, “[t]he reality is, we wouldn’t tolerate these rules if they were applied to U.S. citizens.”²⁶⁴ “The Commission process has been created and controlled by those with a vested interest only in convictions,” added Mori.²⁶⁵ “Th[ere] is no valid reason to create a new justice system only for non-U.S. citizens.”²⁶⁶ Since the general court martial system has jurisdiction to try war crimes and complies with international law, and since military commissions will have a lower standard of proof than a court martial, Mori’s remarks imply that the Government had established kangaroo courts to ensure all suspected terrorists would be convicted. Even if Hicks is acquitted, he could still be returned indefinitely to captivity as an enemy combatant.²⁶⁷ Steve Watt of the Centre for Constitutional Rights in New York agreed with Mori, stating, “The military commissions serve only one unique purpose . . . to secure convictions that could not be got in a court of law.”²⁶⁸

A. *Are the Military Commissions Kangaroo Courts?*

Before evaluating whether the military commissions are kangaroo courts, it is important to survey what reputable international and domestic organizations who have studied the rules have said about the legal process established for the trial of David Hicks.

The Australian section of the International Commission of Jurists issued this statement on January 22, 2004, condemning the legal process as contrary to the rule of law and an unnecessary circumvention of established international law:

The tribunals are not courts, they’re not subject to the rule of law, they are not courts martial and subject to American law, Australian law or international law. The procedures do not allow for a fair trial and are not in compliance with the separation of powers doctrine which prevent executive control over what clearly ought to be judicial proceedings. . . . David Hicks is clearly a prisoner of war and thus subject to the Geneva Convention on Prisoners of War to which the United States is a party. It is not for the United States to decide whether it will carry out its treaty obligations under the Geneva [C]onvention, it is a matter of law that it

263. *Id.*

264. Richard Phillips, *US Military Lawyer Denounces Guantanamo Bay Trials*, WORLD SOCIALIST WEB SITE, Jan. 30, 2004, http://www.wsws.org/articles/2004/jan2004/mori-j30_prn.shtml.

265. Terry Frieden, *Hick’s Defense Slams Trial Process*, CNN, Jan. 21, 2004, <http://www.cnn.com/2004/LAW/01/21/australian.guantanamo/index.html>.

266. *Id.*

267. Marian Wilkinson, *Trial and Terror*, SYDNEY MORNING HERALD, July 12, 2003, <http://www.smh.com.au/articles/2003/07/11/1057783354659.html?oneclick=true>.

268. *Id.*

should do so.²⁶⁹

Amnesty International Australia (“AI Australia”) also made a public statement deploring the unfair legal process created for the trial of David Hicks, expressing concern that Military Order No. 1 encourages human rights violations by admitting evidence extracted by torture.²⁷⁰ AI Australia criticized other features of the legal procedure, citing the following problems: the absence of equality before the law, as discrimination on the basis of nationality results in better treatment of American citizens charged with the same offense; the absence of judicial independence from the executive branch of the American government, which has the power to name the judges, remove the judges, control the number of judges, and overrule the judges, for the President through his office and the Secretary of Defense holds the power of deciding any ultimate appeal; the absence of a right of appeal to any impartial and independent court; the restriction of the right to counsel of choice; the undermining of the presumption of innocence caused by public pronouncements by the President labeling the defendants as “terrorists,” “vicious killers,” and “very dangerous people”; and the absence of an open, public and transparent hearing.²⁷¹ These defects convinced AI Australia that the procedures offend the rule of law.²⁷²

In London, Amnesty International’s headquarters followed by issuing its own condemnation of the military commissions, repeating the same complaints as AI Australia.²⁷³ In a comprehensive and thoroughly researched document, AI singled out for special mention the double standards, the use of torture, and the kangaroo court nature of the proceedings:

Amnesty International has called for the Military Order to be rescinded ever since it was signed, on the grounds that it is fundamentally flawed and because trials under its provisions will violate international fair trial standards.

- The commissions will entirely lack independence from the executive.
- The right to counsel of choice and to an effective defense is severely restricted.
- There will be no right of appeal to an independent and impartial court established by law.
- Only foreign nationals are eligible for such trials, violating the prohibition on the discriminatory application of fair trial rights. A US citizen charged with a similar crime would not face trial by military commission, and would have the right to appeal to higher courts of law.

269. International Commission of Jurists, *Australian Section of the ICJ Criticises US Tribunal*, INT’L COMMISSION OF JURISTS, Jan. 23, 2004, http://www.icj.org/news.php3?id_article=3222&lang=en.

270. Amnesty International, *Amnesty International Announcement re David Hicks*, June 11, 2004, <http://www.fairgofordavid.org/htmlfiles/documents/amnesty11June04.htm> [hereinafter AI on David Hicks].

271. Amnesty International, *United States of America: A Deepening Stain on US Justice*, AMNESTY INT’L, Aug. 19, 2004, <http://web.amnesty.org/library/Index/ENGAMR511302004>.

272. *Id.*

273. *Id.*

....

Even if a defendant is acquitted, his release is not guaranteed. If he is considered still to be a security risk or to have intelligence value, he would return to indefinite detention unless and until a Combatant Status Review Tribunal ["CSRT"] determined that he was no longer an "enemy combatant."

....

Double standards are apparent. On the one hand, the executive plans to try a selection of foreign nationals under a military commission system designed to secure convictions on lower standards of evidence than pertain in the US courts. On the other, the very same administration has discussed how any US agents accused of torture during the "war on terror" might avoid conviction. Previously secret memoranda have suggested legal defenses for accused US agents of "necessity" and "self-defense," as well as the notion that authorization under the President's Commander in Chief powers could override the prohibition on torture.

....

The military commissions will be able to use the fruits of any torture or ill-treatment that may have occurred. Indeed, the procedures for the commissions provide that evidence "shall" be admitted if the presiding officer or a majority of the commission members consider that it "would have probative value to a reasonable person". . . . We now know that the administration has approved interrogation techniques that have gone beyond normal US army doctrine. The purpose of the techniques has been to extract information. Methods approved in December 2002 by Secretary Rumsfeld for use at Guantanamo, for example, included stress positions, sensory deprivation, hooding, stripping, the use of dogs to inspire fear, and isolation.²⁷⁴

The international message has been strong, clear and consistent. The United States is viewed more as a tyrant than a beacon of rule of law. A systematic campaign of human rights abuses, military aggression, and the establishment of kangaroo courts have eroded much of the goodwill and sympathy following the attacks of September 11 and arguably exposed the true nature of the military commissions to be rule by law. Rather than eliminating the roots of hatred against the United States, the policies chosen by the Bush administration to bypass international standards of fairness and human rights have laid the seeds for future terrorist attacks upon Americans.

Within the United States, distinguished legal organizations and scholars have rebuked the government for in effect abandoning the rule of law and imposing kangaroo courts upon the vanquished.

On August 2, 2003 the National Association of Criminal Defense Lawyers Board of Directors unanimously passed a motion declaring that it is unethical for a criminal defense lawyer to represent a person accused before the Military

274. *Id.*

Commissions.²⁷⁵ The NACDL determined that the legal procedures “make it impossible for counsel to provide adequate or ethical representation” and observed that counsel “cannot contract away his or her client’s rights.”²⁷⁶ Those defense counsel who choose to represent a detainee ought to raise every conceivable good faith argument challenging the jurisdiction of the Military Commission, the legality of the denial of the application of the Uniform Code of Military Justice (“UCMJ”), international treaties and the due process of law, and utilize the civilian courts of the United States to rule whether the proceedings are constitutional, without regard to personal consequences.²⁷⁷ The National Board of Directors adopted the NACDL Ethics Advisory Committee’s report in its entirety, including the denunciation of the military commissions and the serious erosion of the rule of law: “These military commissions do not ‘preserve, protect and defend the Constitution of the United States’—they make a mockery of it.”²⁷⁸ Without using the term “kangaroo court,” the NACDL strongly implied that is exactly the kind of court the military commissions are, for they lead to inevitable convictions and likely executions:

One cannot help but feel that [in] secret trials with secret evidence, evidence sometimes even presented in secret from the accused and defense counsel, with little restrictions on the admissibility of evidence and ignoring the requirement that the protections and procedures of the UCMJ are applicable to military commissions and the Geneva Convention will lead to unjust and unreliable results that will lead to these proceedings being viewed as a mere way station on the road to an inevitable conviction and probable execution.²⁷⁹

The House of Delegates to the American Bar Association (“ABA”) adopted a resolution in August 2003 calling upon Congress and the Executive Branch to ensure that all defendants in military commission trials have the opportunity to receive the effective and zealous assistance of civilian defense counsel.²⁸⁰ The resolution opposed any rules that would restrict the participation of any counsel who passed security clearances.²⁸¹ In particular, the ABA called upon the Government to: stop monitoring privileged solicitor-client communications; provide full disclosure of all information necessary to prepare a defense; lift gag orders prohibiting public statements by defense counsel; permit defense counsel outside support from other counsel and research providers; accommodate the professional obligations of defense counsel; cover the costs of travel, lodging, and security clearances for trials at Guantanamo Bay; permit appropriately qualified

275. NACDL Ethics Advisory Committee, Opinion 03-04, 25 (Aug. 2003), available at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/\\$FILE/Ethics_Op_03-04.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/$FILE/Ethics_Op_03-04.pdf) (discussing a criminal defense attorney’s duties to the client before a Military Commission at Guantanamo Bay under Military Order of November 13, 2001).

276. *Id.* at 1.

277. *Id.*

278. *Id.* at 6 n.8.

279. *Id.* at 7.

280. 301 American Bar Association, *Adopted by the House of Delegates* (Aug. 11-12, 2003), available at <http://www.abanet.org/leadership/2003/journal/301.pdf>.

281. *Id.*

foreign attorneys to join the defense teams; and in cases where the death penalty is sought, ensure the trials conform to previously established ABA guidelines.²⁸²

Neil Sonnett, Chair of the ABA Task Force on the Treatment of Enemy Combatants, noted in his report to the ABA on January 4, 2002, that over 680 detainees from at least forty countries could all go on trial, and cited a media report that the Government was busy building an execution chamber at Guantanamo Bay.²⁸³ Sonnett identified one of the major criticisms of the military commissions as its responsibility to fulfill all major roles in the trial process. Sonnett observed:

[T]he fate of each detainee is wholly in the hands of their captors. The military serves as accuser, jailer, prosecutor, defense lawyer, judge, jury, and appellate authority, and are not subject even to the *procedural* rules governing courts martial, which include the right of appeal to a higher court and, ultimately, to the Supreme Court of the United States.²⁸⁴

On behalf of the Lawyers Committee for Human Rights, Deborah Pearlstein, Director of the U.S. Law and Security Program, wrote on December 16, 2003 to

282. *Id.*

283. See Appended Report of Jan. 4, 2002 to 301 American Bar Association, Adopted by the House of Delegates, Aug. 11-12, 2003, at 285 available at <http://www.abanet.org/leadership/2003/journal/301.pdf> (calling on Congress and the executive branch to ensure defendants in military commission trials have the opportunity to obtain effective assistance of counsel and opposing restrictions for those attorney's who have received security clearance).

284. *Id.* at 2. One cannot help but reflect on the striking similarity to the Lord High Executioner and Pooh Bah, Lord High Everything Else, in the opera, *The Mikado*, who also selects subjects for trial, renders judgment, and executes the convicted. Gilbert & Sullivan, *The Mikado, Act I* (1885), available at <http://condor.stcloudstate.edu/~scogdill/mikado/libretto1.html>. The theme song for Ko-Ko, the Lord High Executioner, describes a list of enemies of the state that he personally has selected for detention, certain conviction and execution. W.S. Gilbert, *I've Got a Little List*, available at <http://www.cs.rice.edu/~ssiyer/minstrels/poems/135.html>. In his speech immediately before his song, he states, "I am happy to think there will be no difficulty in finding plenty of people whose loss will be a distinct gain to society at large." *Id.* [hereinafter *List*]. He then sings, "[a]s some day it may happen, that a victim must be found, I've got a little list, I've got a little list of society offenders who might be underground, and who never would be missed, never would be missed!" John Cairns, Jr., *Roundtable: Speaking at Length*, (1989), available at http://iweb.tntech.edu/elmorgan/392/392_Roundtable_Cairns_S2k.html. In another scene, Ko-Ko, Nanki-Poo and Yum Yum are discussing the legal advice given by his solicitor:

Ko: I've just ascertained that by the Mikado's law, when a married man is beheaded his wife is buried alive.

Nanki-Poo and Yum-Yum: Buried alive!

Ko: Buried Alive. It's a most unpleasant death.

Nanki-Poo: But whom did you get that from?

Ko: Oh, from Poo-Bah, He's my Solicitor.

Yum-Yum: But he may be mistaken!

Ko: So I thought; so I consulted the Attorney-General, the Lord Chief Justice, the Master of the Rolls, the Judge Ordinary and the Lord Chancellor. They're all of the same opinion. Never knew such unanimity on a point of law in my life!

W.S. Gilbert, *I've Got a Little List*, available at <http://www.cs.rice.edu/~ssiyer/minstrels/poems/135.html> (last visited Oct. 28, 2005); Gilbert & Sullivan, *The Mikado, Act II* (1885), available at <http://condor.stcloudstate.edu/~scogdill/mikado/libretto2.html>.

Brigadier General Thomas Hemingway, Legal Advisor to the Office of Military Commissions, voicing serious concerns that the legal process fails to meet minimal standards of due process and fair trial standards required under U.S. and international law.²⁸⁵ Her list of required changes included: a right of appeal to an independent civilian court or to the civilian panel of the Court of Appeals for the Armed Forces; assurances of confidentiality for all solicitor client communications; the disclosure of all relevant evidence needed to make a full and complete defense; the lifting of an order of “prior restraint” barring any member of the defense team of attorneys from consulting with legal experts on military and international law; and, open trials accessible to the press, the public, and interested organizations.

Human Rights Watch, headquartered in Washington, D.C., also compiled its own list in its Briefing Paper on U.S. Military Commissions, dated August 2004, explaining why the military commissions are of questionable legitimacy and offend against the rule of law. The list is as follows:

- Deprive defendants of independent judicial oversight by a civilian court.
- Improperly subject criminal suspects to military trials.
- Try prisoners of war (POWs) in a manner that violates the 1949 Geneva Conventions.
- Deprive defense counsel of the means to prepare an effective defense.
- Place review of important interlocutory questions with the charging authority.
- Fail to guarantee that evidence obtained via torture or ill-treatment shall not be used.
- Allow wide latitude to close proceedings and impose a “gag order” on defense counsel.
- Deprive military defense counsel of normal protections afforded military lawyers from improper “command influence.”
- Restrict the defendant’s right to choose legal counsel.
- Provide lower due process standards for non-citizens than for U.S. citizens.

... Without significant changes, warned Human Rights Watch, the United States “would be in violation of its obligations under international law to try anyone before them.”²⁸⁶

The Board of Regents of the American College of Trial Lawyers approved in March 2003 its detailed Report on Military Commissions for the Trial of Terrorists.²⁸⁷ The document identifies three areas in which the military commissions exceed Executive authority and are subject to constitutional

285. Letter from Deborah Pearlstein, Director, U.S. Law and Security Program, to Brigadier General Thomas L. Hemingway, Legal Adviser to the Appointing Authority, Office of Military Commissions, Department of Defense, GC (Dec. 16, 2003), available at http://www.humanrightsfirst.org/us_law/hemingway_ltr121603.pdf (last visited Nov.,6, 2005).

286. Briefing Paper on U.S. Military Commissions, HUMAN RIGHTS WATCH, Aug. 2004, <http://hrw.org/backgrounder/usa/2004/1.htm> (citation omitted).

287. American College of Trial Lawyers, *Report on Military Commissions for the Trial of Terrorists* (Mar., 2003), available at <http://www.actl.com/PDFs/MilitaryCommissions.pdf>.

challenge. The first area is the absence of any procedure for independent judicial review of the decisions, verdicts and sentences to any civilian court, through a petition for habeas corpus or otherwise. Second, the jurisdiction of the military commissions appears not to be confined to charges limited to violations of the laws of war. Third, the rules of the military commissions are both contrary to and inconsistent with section 836 of the Uniform Code of Military Justice.²⁸⁸

The American College of Trial Lawyers' close examination of the legal procedures reveals severe limitations on the procedural rights of the defendant. Any evidence is admissible so long as it "would have probative value to a reasonable person,"²⁸⁹ who in all cases will be a military officer serving on active duty.²⁹⁰ The impartiality of the commissions will always be subject to question because they are composed of military or ex-military officers.²⁹¹ The presiding officer at the trials may issue protective orders keeping secret any information that the Government chooses not to release.²⁹² Access to witnesses and evidence will be denied to the defense team if the Government makes a motion to suppress in the interests of national security.²⁹³ During custodial interrogation, the rights to silence and to seek the assistance of counsel are denied to any detainee defendant.²⁹⁴ Coerced confessions are admissible at trial.²⁹⁵ It is impossible for there to be any meaningful review of any verdict due to a thirty-day limitation period, a limited standard of review and the lack of any or adequate post-trial briefing. Any appeal will be hampered by the absence of any requirement for oral or written reasons for findings of fact or conclusions of law, the secret nature of the commission's deliberations, the absence of legal training by members of the commission, the restriction on defense counsel prohibiting the filing of written submissions, and lax evidentiary standards that eliminate any hope of challenging a ruling admitting contested evidence.²⁹⁶ In the opinion of the American College of Trial Lawyers, "the Review Panel decisions will be regarded as rubber stamps."²⁹⁷

Distinguished legal scholars and many journalists too numerous to list, who have examined the detailed features of the military commissions have added their voice to the debate, and have concluded that these courts are unconstitutional, unfair, violate human rights and deny due process.²⁹⁸ At some point, the question

288. *Id.* at 9-11.

289. Department of Defense, Military Commission Order No. 1, *Procedures for Trials by Military Commissions of Certain Non-Citizens in the War Against Terrorism*, § 6 (D)(1) (Mar. 21, 2002), available at <http://www.dod.mil/news/Mar2002/d20020321ord.pdf>.

290. *Id.* at § 4 (A)(1)-(3).

291. *Id.* at § 4 (A)(3).

292. *Id.* at § 6 (D)(5)(b).

293. *Id.*

294. American College of Trial Lawyers, *Report on Military Commissions for the Trial of Terrorists* (Mar., 2003), available at <http://www.actl.com/PDFs/MilitaryCommissions.pdf>.

295. Dep't of Defense, *supra* note 261, at § 6 (D)(1) (providing that prior statements or conduct of the Accused are admissible into evidence).

296. *Report on Military Commissions for the Trial of Terrorists*, *supra* note 295.

297. *Id.* at 32.

298. See, e.g., George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL'Y 635, 652 (2002) ("The worst prospect is the military tribunals as proposed in the Executive Order of November 13. . . . their mere existence would also generate constant

must be asked, "Why is the Government not listening?"

There is some indication of movement in the government's position, but only on an *ad hoc* basis. Negotiations between Australia, an ally in the war against terrorism, and the United States has produced compromises in the trial process that have yielded some benefits for the trial of David Hicks.²⁹⁹ Concessions made by the U.S. Government include: promising that the death penalty would not be sought; allowing Australian counsel to be retained as a consultant, provided security clearances were satisfied; refraining from listening to conversations between Hicks and his attorneys; allowing Hicks to remain in court to hear all the evidence against him; opening Hick's trial to the media and Australian officials, subject to security requirements; and agreeing, in principle, that Hicks may serve any sentence in Australia.³⁰⁰

Why then, ought Hicks or any other detainee put on trial before a military commission have to make a deal to get the best procedure available? Even with his modified procedures, Hicks will still have an unfair trial. For example, torture may coerce a false confession from him—a confession that will be admissible at his trial. All this raises the interesting question whether each defendant will have his own legal process unique to him, since every detainee will have motivation to escape execution or a life in perpetual imprisonment.

The concept of equal justice for all has been supplanted by a code of procedure built on the principle that the ends justifies the means. This is a utilitarian philosophy that has justified both genocide and discrimination between those people chosen to be bestowed constitutional human rights, and those classes of people denied any meaningful rights at all. In the war against terror, American citizens will be treated most favorably, next will be those foreigners from countries like Britain and Australia that enjoy a favored status with the United States, and finally aliens from other nations will mostly likely be treated worst of all, without

legal challenges, and we should not be surprised if the entire procedure is eventually declared unconstitutional."); David Glazier, *Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003) (arguing that the language in Article 36 of the Uniform Code of Military Justice should be construed to mandate that procedures be the same for military commissions established under George W. Bush's Order No. 1 as court martial); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying Military Tribunals*, 111 YALE L.J. 1259 (2002) (arguing that the President George W. Bush's Order No. 1 establishing military commissions is flatly unconstitutional under any and all circumstances); Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677 (2002) (illustrating that military commissions authorized by President George W. Bush's Order No. 1 make violations of International Law unavoidable and raise serious constitutional issues); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (2001) (illustrating that military commissions authorized by President George W. Bush's Order No. 1 make violations of International Law unavoidable and raise serious constitutional issues); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 749-57 (2002) (arguing that President George W. Bush's Order No. 1, establishing military commissions during the War on Terror, cuts across federal statutes, constitutional requirements and international law incorporated into the domestic laws of the United States).

299. See International Transfer of Prisoners Amendment, Bill 2004, Bills Digest No. 102 2003-04 (Feb. 19, 2004), available at <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd102.htm> (detailing the agreement between the Australian and United States governments with regard to the David Hicks trial).

300. *Id.*

any amelioration of the rules.

Kangaroo courts created for the purpose of eliminating enemy soldiers who hurt American interests are nothing new to American history.³⁰¹ Military Commissions at the conclusion of World War II substituted the rule by law—for the due process mandated by the Fifth Amendment applies to every person, including those accused of war crimes or enemy combatants—for the rule of law.³⁰² A plain textual interpretation of “person” extends the protection of the Constitution to aliens and citizens alike. The dictates of the executive branch cannot excuse failure to abide by the Constitution. In a protest against the injustice rendered to General Yamashita, who was tried, convicted and executed without due process of law, dissenting Justice Rutledge, found the defeated General’s military commission to be unconstitutional and a threat to the rule of law:

More is at stake than General Yamashita’s fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. . . . It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.³⁰³

Is it too late in the day to restore the rule of law? If recent developments are a reliable indicator, the future of restoring the rule of law in the near future will be a long and difficult odyssey of epic proportions.

IV. THE TRIALS OF DAVID HICKS AND SALIM AHMED HAMDAN

On June 10, 2004, the Department of Defense charged David Hicks with one count of conspiracy to commit war crimes, one count of attempted murder by an unprivileged belligerent, and one count of aiding the enemy.³⁰⁴ On June 29, 2004 the Department of Defense issued another press release announcing that charges against Hicks were referred to a military commission.³⁰⁵ On August 5, 2004 Hicks signed an affidavit complaining that he was being tortured.³⁰⁶ His preliminary

301. See, e.g., *In re Yamashita*, 327 U.S. at 25 (1945) (allowing the military commission to proceed to trial on charges against General Tomoyuki Yamashita, Commanding General of the Japanese Army in the Philippine Islands, for a violation of the law of war).

302. *Id.* at 41-42 (Rutledge, J., dissenting).

303. *Id.*

304. Press Release, United States Department of Defense, Guantanamo Detainee Charged (June 10, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040610-0893.html>. A copy of these charges is available at <http://www.defenselink.mil/news/Jun2004/d20040610cs.pdf> (last visited Nov. 5, 2005).

305. Press Release, United States Department of Defense, Military Commission Charges Referred (June 29, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040629-0951.html>.

306. Hicks Aff. ¶ 3, available at <http://www.smh.com.au/news/World/David-Hicks-affidavit/2004/12/10/1102625527396.html>. Paragraphs 5-25 contain a partial list of the treatment Hicks

alleges is torture:

5. I have been beaten before, after, and during interrogations.
6. I have been menaced and threatened, directly and indirectly, with firearms and other weapons before and during interrogations.
7. I have heard beatings of other detainees occurring during interrogations, and observed detainees' injuries that were received during interrogations.
8. I have been beaten while blindfolded and handcuffed.
9. I have been in the company of other detainees who were beaten while blindfolded and handcuffed. At one point, a group of detainees, including myself, were subjected to being randomly hit over a eight hour session while handcuffed and blindfolded.
10. I have been struck with hands, fists, and other objects (including rifle butts). I have also been kicked. I have been hit in the face, head, feet, and torso.
11. I have had my head rammed into asphalt several times (while blindfolded).
12. I have had handcuffs placed on me so tightly, and for so long (as much as 14-15 hours) that my hands were numb for a considerable period thereafter.
13. I have had medication—the identity of which was unknown to me, despite my requests for information—forced upon me against my will. I have been struck while under the influence of sedatives that were forced upon me by injection.
14. I have been forced to run in leg shackles that regularly ripped the skin off my ankles. Many other detainees experienced the same.
15. I have been deprived of sleep as a matter of policy.
16. I have witnessed the activities of the Internal Reaction Force (hereinafter "IRF"), which consists of a squad of soldiers that enter a detainee's cell and brutalize him with the aid of an attack dog. The IRF invasions were so common that the term to be "IRF'd" became part of the language of the detainees. I have seen detainees suffer serious injuries as a result of being IRF'ed. I have seen detainees IRF'ed while they were praying, or for refusing medication.
17. I was told repeatedly that if I cooperated during the course of interrogations, I would be sent home to Australia after the interrogations were concluded. I was told there was an "easy way" and a "hard way" to respond to interrogation.
18. Interrogators once offered me the services of a prostitute for fifteen minutes if I would spy on other detainees. I refused.
19. Failure to cooperate meant the loss of the ordinary necessities of living, such as showers, sufficient food, relief from the prospect of IRF'ing and other regular abuse visited upon non-cooperative detainees, access to reading material, and social contact (including receiving mail).
20. During Ramadan, food was withhold from detainees after the break of the daily fast in order to coerce cooperation with interrogators. Detainees who refused to cooperate were punished regularly, and denied the ordinary necessities of living.
21. I have been told that strobe lights and extreme cold were also used to disorient detainees in order to soften them up for interrogation. I have also heard that religious detainees were exposed to pornography, and were dragged around naked in order to break their will.
22. Detainees were not allowed to know the date, day, year, or time. We were deprived of any and all information and news from the world. Detainees were permitted very little exercise.
23. At one point during 2003 alone, my weight dropped by 30 pounds (and I was not overweight to start).
24. Other detainees also informed me that interrogators attempted to turn them against me by spreading rumors about me. In any event, due to the way interrogations were conducted, and the physical layout of the camps, it was obvious to all of the detainees who was being interrogated, for how long, and whether that detainee emerged abused or not (with the latter signifying cooperation). Thus, any detainee would know who was cooperating with the interrogators.
25. The interrogation process ruled the detention camps and the lives of detainees. Cooperation with interrogators offered the only means of relief from the miserable treatment

hearing began August 25, 2004;³⁰⁷ the lead counsel for the defense team was Joshua Dratel, who was assisted by detailed counsel Majors Michael “Dan” Mori and Lippert.³⁰⁸ Hicks was formally arraigned and pleaded not guilty to all charges.³⁰⁹ During voir dire, the defense challenged the impartiality of the commission members, including the presiding officer, Colonel Brownback.³¹⁰ Major Mori filed nineteen defense motions to dismiss the charges, including the following arguments: the military commission was not authorized to conduct the trial and lacked jurisdiction at Guantanamo Bay; the charges were not triable under the laws of war; the charges and procedures violated equal protection under the United States Constitution; the military commission was not independent; the effect of pre-trial punishment; Hicks’ possible status as a prisoner of war; the intention of the Presiding Officer to give inappropriate legal advice to the other members of the commission; and improper control of the Department of Defense over member selection.³¹¹ So far, over sixty-five pre-trial motions, submissions, and responses have been made, most of them on Hicks’ behalf.³¹² These include objections to the structure and composition of the commission and motions to dismiss for denial of fundamental rights and failure to provide a full and fair trial.³¹³

In October 2004, Hicks refused to participate in his Combatant Status Review Tribunal.³¹⁴ Despite his absence, a record was created, which the prosecution moved to admit against him at his trial before the military commission.³¹⁵ This maneuvering predictably brought strenuous objection by the defense, arguing that the admission of this report would adversely affect Hicks’ presumption of innocence.³¹⁶

Heated argument took place on November 2, 2004 on the constitutionality of the military commission system.³¹⁷ Dratel argued that the military commission system violates equal protection requirements by denying non-citizens the same criminal trial due process rights as those which belong to United States citizens.³¹⁸

and abuse the detainees suffered. Those who failed to comply suffered abuse until they gave in.

Id.

307. LEX LASRY, *UNITED STATES V. DAVID MATTHEWS HICKS: FIRST REPORT OF THE INDEPENDENT LEGAL OBSERVER FOR THE LAW COUNCIL OF AUSTRALIA* 3 (2004), available at http://www.humanrightsfirst.org/us_law/detainees/militarytribunals_overview.

308. *Id.* at 28.

309. *Id.* at 28-36.

310. *Id.*

311. *Id.* at 36-37.

312. See United States Department of Defense, *Hicks Court Motions* (Dec. 2, 2004), available at http://www.defenselink.mil/news/Dec2004/commissions_motions_hicks.html.

313. *Id.*

314. Press Release, Amnesty International, Guantanamo: Military Commissions—Amnesty International Observer’s Notes from Proceedings No. 2 (Nov. 5, 2004), available at <http://web.amnesty.org/library/Index/ENGAMR511552004?open&of=ENG-USA>.

315. *Id.*

316. *Id.*

317. Human Rights First—US law and Security, *Notes from Guantanamo, November 2-3: Equal Protection*, Nov. 2-3, 2004 HUMAN RIGHTS FIRST http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary_02.htm.

318. See *id.*

On October 19, 2004, John D. Altenburg, Jr., Appointing Authority for Military Commissions, granted in part an application to disqualify the members of Hicks' military commission, excusing two members and the alternate member from the original panel of five.³¹⁹ Altenburg refused to name replacements or another alternate.³²⁰ If two of the three remaining panel members are to agree on Hicks' guilt, he would be convicted, because all that is needed to sustain a conviction is a two-thirds majority.

Hicks is still detained at Guantanamo Bay awaiting trial. In the meantime, Hicks had filed an amended petition for habeas corpus in the district court for D.C. on August 31, 2004, seeking his release and an order declaring the military commission to be unconstitutional.³²¹ Following Judge Robertson's decision on November 8, 2004 in *Hamdan v. Rumsfeld*,³²² holding that prisoners at Guantanamo Bay are entitled to due process rights. Hicks moved for partial summary judgment. On December 15, 2004 (in response to a motion for summary judgment), an order was issued putting Hicks' motion in abeyance until all appeals in *Hamdan* had been exhausted.³²³

Salim Ahmed Hamdan, like David Hicks, was captured in Afghanistan, detained at Guantanamo Bay, and singled out for an early trial before a military commission on charges of alleged war crimes, rather than before a court martial convened under the Uniform Code of Military Justice.³²⁴ Like Hicks, Hamdan filed a petition for habeas corpus, challenging the lawfulness of the Government's conduct.³²⁵ The Government moved to dismiss the petition.³²⁶ Judge Robertson dismissed the motion on the basis that a presidential fiat could not substitute for binding legal process under the Geneva Conventions because Hamdan's custodial status needed to be determined by a "competent tribunal" as defined under

Civilian Defense Counsel Josh Dratel argued that the President's November 13, 2001 Military Order establishing the military commissions was fundamentally flawed because it only authorized military commission trials for non-citizens. Since several of the government's most important authorities in support of military commissions were cases involving citizen defendants (one of the saboteurs in the 1942 Nazi saboteur case, *Ex Parte Quirin*, for example, was a U.S. citizen), the prosecution could hardly point to historical experience to justify excluding citizen terrorists from the current vintage of military commissions.

Id.

319. Challenges for Cause Decision No. 2004-001 28 Oct. 19, 2004, available at <http://www.defenselink.mil/news/Oct2004/d20041021panel.pdf>.

320. *Id.*

321. See generally Petitioner Second Amended Petition for Writ of Habeas Corpus and Complaint for Injunctive, Declarative and Other Relief, Hicks v. Bush, No. 1:02-cv-299-CKK (Aug. 31, 2004), available at http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/393/Hicks_amendedpetition_complaint.pdf.

322. 344 F. Supp. 2d 152 (D.C. Cir. 2004).

323. Order Holding in Abeyance Respondent's Motion to Dismiss or for Judgment as a Matter of Law with Respect to Challenges to the Military Commission Process, Dec. 15, 2004, available at <http://www.law.georgetown.edu/faculty/nkk/documents/reply.appendix3e.pdf>.

324. *Hamdan*, 344 F. Supp.2d at 155.

325. *Id.*

326. *Id.*

international law and thus decided if Hamdan was eligible to be put on trial for war crimes.³²⁷ Whether or not Hamdan was a prisoner of war or enemy combatant, Judge Robertson held that the legal procedure established for military commissions are “inconsistent with and contrary to” the significantly superior due process applicable to courts martial under 10 U.S. C. section 836.³²⁸

Military commissions are established pursuant to acts of Congress, and are limited in their jurisdiction to try only offenses that violate the laws of war. Comparing the present case to *Ex parte Quirin*,³²⁹ Judge Robertson rejected the Government’s claim that there is “untrammeled” inherent power in the president to establish military tribunals in his capacity of commander in chief, under Article II of the Constitution.³³⁰ Robertson explained that in *Quirin*, the military tribunals in question were legal because they were permitted by an act of Congress.³³¹ In contrast, Robertson held that in situations where the president goes beyond the boundaries set by Congress and expands the jurisdiction of military commissions, such action would be inconsistent with the will of Congress and would be of questionable authority.³³²

Assuming Hamdan was entitled to the protection of the Geneva Conventions, Judge Robertson noted he was compelled under article 102 to grant Hamdan’s petition for habeas corpus.³³³ It was immaterial whether Hamdan was a member of the Taliban or al Qaeda, for the protection of the Geneva Conventions is triggered by the place of conflict, and not by the combatant’s particular side.³³⁴ Just because the President stated that a captured combatant was not entitled to prisoner of war status did not make it so.³³⁵ In effect, Judge Robertson ruled that the rule of international law could not be circumvented by executive order.

Judge Robertson concluded that the Third Geneva Convention was a self-executing treaty, and as such, required no implementing legislation.³³⁶ Since there was “some doubt” whether or not Hamdan qualified as a prisoner of war, until such

327. *Id.* at 165.

328. *Id.* at 155, 167.

329. 317 U.S. 1 (1942).

330. *See Hamdan*, 344 F. Supp.2d at 158 (“[t]he major premise of the government’s argument that the President has untrammeled power to establish military tribunals is that his authority emanates from Article II of the Constitution and is inherent in his role as commander-in-chief. None of the principal cases on which the government relies has so held.”) (internal citations omitted).

331. *See id.* (noting “the Court expressly found it unnecessary in *Quirin* ‘determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions.’” (quoting *Quirin*, 317 U.S. at 28)).

332. *See id.* at 159-60.

Where the President to act outside the limits now set for military commissions... his actions would fall into his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, in which “the President takes measures incompatible with the expressed or implied will of Congress,” and in which the President’s power is “at its lowest ebb.”

Id. (citing 343 U.S. 579 (1952)).

333. *Id.* at 160.

334. *See Hamdan*, 344 F. Supp. 2d at 161 (“the Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there”).

335. *Id.* at 160-61.

336. *Id.* at 165.

time a competent tribunal answered that question, his trial by military commission was not legal and would not proceed.³³⁷ If the Government was determined to proceed with charges against Hamdan, it could only do so by courts martial under the authority of the Uniform Code of Military Justice.³³⁸

The legal process created just for the military commissions deeply troubled Judge Robertson. In contrasting the rules for courts-martial and military commissions, he identified a deliberate weakening of due process that was presumably designed to facilitate convictions.³³⁹ For example, unlike courts-martial, military commissions have: fewer fact-finders to arrive at a verdict; no right to a speedy trial; very long pre-trial detentions; inhuman conditions of confinement; charges that did not need to be signed by someone with personal knowledge of the case; the admission of evidence of all prior statements or conduct; no right to be promptly informed of the charges, the right to silence, and notice that any statements made may be used in evidence against him; no peremptory challenges; no requirement that witnesses take an oath to tell the truth before testifying; a judge (presiding officer) as a voting member of the jury (trial panel); a rule that only a two thirds majority is needed to deliver a verdict on a charge that carries a life sentence.

The most offensive difference between the two procedures was the use of classified information. In a military commission, "testimony may be received from a confidential informant, and Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name."³⁴⁰ Summaries of transcripts obtained outside of court may be received in evidence, so long as they meet the "reasonably probative" test.³⁴¹ Once admitted, this evidence still may not be shown to Hamdan.³⁴² American jurisprudence and legal history disallow this blatant denial of the right to confront a witness in a civilian criminal court of law for an American citizen,³⁴³ who may invoke the protection of the Sixth Amendment,³⁴⁴ as do most

337. *Id.*

338. *Id.*

339. *See id.* at 166.

The Military Commission is remarkably different from a court-martial [which provides for Constitutional guarantees of due process], however, in two important respects. The first has to do with the structure of the reviewing authority after trial; the second, with the power of the appointing authority or the presiding officer to exclude the accused from hearings and deny him access to evidence presented against him.

Id.

340. *Hamdan*, 344 F. Supp. 2d. at 168.

341. *Id.*

342. *Id.*

343. *Hamdan*, 344 F. Supp.2d at 168.

344. U.S. CONST. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

members of the Supreme Court.³⁴⁵ These foregoing observations were sufficient to convince Judge Robertson that the procedures created for the military commissions were fatally flawed.³⁴⁶

Where there is a conflict between national security and civil rights, the rules of the military commission consistently resolve matters in favor of the Government. There is no balance. This makes an adequate defense impossible, for the defendant cannot effectively instruct his counsel to mount an effective defense in the absence of fair play. The effect of all this is to remove the defendant from participating in his trial, even though he or she may be physically present.

Is this a clear sign of a kangaroo court? Unless the legal procedure of military petitions meets the minimal standards of due process required by the U.S. Constitution between now and when the Hicks trial resumes, the international community will believe that Hicks was indeed tried by a kangaroo court and did not receive a "fair go."

V. CONCLUSION: ABANDONING THE RULE OF LAW

The Military Commissions go beyond betraying the rule of law, for they set the future standard by which Americans will be judged by the international community. On one level, American credibility as the model for the rule of law is shattered. On another level, as a practical matter, when the time comes for Americans to be judged for war crimes,³⁴⁷ Americans cannot later complain when they are tried by another nation's kangaroo court, or an international court not of their choosing, for they have only themselves to blame for setting the precedent in modern times. The President is putting his own soldiers in harm's way. By not treating Hicks and others like him as prisoners of war, captured American soldiers cannot expect treatment under the Geneva Convention, and are at risk to be tortured, interrogated, and summarily executed without due process. To put it bluntly, what goes around comes around.

The United States has refused to submit to the jurisdiction of the International Criminal Court ("ICC"), thereby shielding Defense Secretary Rumsfeld and President Bush from being put on trial for their ultimate responsibility for the human rights abuses that have occurred at prisons and concentration camps at Guantanamo Bay and Iraq. The unofficial reason is that the Bush administration believes that the ICC is a kangaroo court and American defendants would not get a

345. See *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (finding the right of confrontation is not a substantive guarantee that evidence be reliable, it is a procedural guarantee that the reliability of a statement be tested by cross-examination).

346. *Hamdan*, 344 F. Supp. 2d at 155-156. On July 15, 2005, the United States Court of Appeals for the District of Columbia Circuit, reversed Judge Robertson. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). In an opinion authored by Judge Randolph, and joined in by Judge Roberts, now Chief Justice of the United States Supreme Court, the appeals court ruled that the Geneva Convention does not apply and that the Military Commission was a legitimate forum to put Hamdan on trial. On November 7, 2005, the United States Supreme Court quantified a petition for certiorari to the United States Court of Appeals for the D.C. Circuit. *Hamdan v. Rumsfeld*, 126 S. Ct. 622 (2005).

347. Recalling that one side's freedom fighter is another side's terrorist, Americans need to be cognizant that there are some people in the world that believe American soldiers are not the heroes we believe them to be.

fair trial. Defense Secretary Rumsfeld elaborated on his objections before the Senate Appropriations Committee Defense Subcommittee on May 21, 2002:

We must also protect our men and women in uniform from the jurisdiction of the new International Criminal Court Americans may soon be exposed to the risk of prosecution by a court that is unaccountable to the American people, and that has *no obligation to respect the Constitutional rights of our citizens*. The United States has a number of serious objections to the ICC—among them, the lack of adequate checks and balances on powers of the ICC prosecutor and judges; the dilution of the UN Security Council's authority over international criminal prosecutions; and the lack of any effective mechanism to prevent politicized prosecutions of American service members and officials. These flaws would be of concern at any time, but they are particularly troubling in the midst of a difficult, dangerous war on terrorism. There is the risk that *the ICC could attempt to assert jurisdiction over U.S. service personnel, as well as civilians*, involved in counter-terrorist and other military operations—something we cannot allow. Unfortunately, the ICC will not respect the U.S. decision to stay out of the treaty. To the contrary, the ICC will claim the authority to detain and try American citizens U.S. soldiers, sailors, airmen and marines, as well as current and future officials—even though the United States has not given its consent to be bound by the treaty.

The United States understandably finds that troubling and unacceptable As we consider U.N. peacekeeping mandates—for example, the mission in East Timor—I intend to work closely with the Secretary of State to ensure that our forces would be *indemnified from prosecution* before committing them.³⁴⁸

This is unfortunate, for what the United States desperately needs is an independent third party venue and impartial authority to try suspected terrorists in a fair way. The Lockerbie trials of the terrorists charged with killing the passengers on Pan Am flight 111 is a possible model to follow,³⁴⁹ since the United States refuses to submit to authority of the ICC. Another model to follow are the Hamburg terror trials that resulted in the acquittal of Mzoudi and the retrial of Motassadeq. In these proceedings, the German national courts impartially upheld the rules of due process and the presumption of innocence, adhering to the rule of law.³⁵⁰ In Israel too, the government has struggled to maintain a proper balance

348. Statement Of Secretary Of Defense Donald H. Rumsfeld Before The Senate Appropriations Committee Defense Subcommittee 2003, *Defense Budget Request* (May 21, 2002), available at http://www.amicc.org/docs/SACDS5_21_02.pdf (emphasis added). *But see* Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom,"* 9 ANN. SURVEY OF INT'L & COMP. L. 19, 52-53 (2003) (arguing that the United States Government's opposition to the creation and effectiveness of the International Criminal Court is inconsistent with American values and will adversely affect U.S. interests in the long term).

349. *See generally* JOHN P. GRANT, *THE LOCKERBIE TRIAL: A DOCUMENTARY HISTORY*, (Oceana Publications 2005).

350. Loammi Blaauw-Wolf, *The Hamburg Terror Trials—American Political Poker and German Legal Procedure: An Unlikely Combination to Fight International Terrorism*, 5 GERMAN L.J. No. 7, 791

between the protection of human rights and national security.³⁵¹

The United States would do well to abide by the moral standard of the Golden Rule if it ever hopes to regain legitimacy in its fight to defend itself and its interests from terrorist attacks. The Golden Rule is the moral teaching found in every major world religion in various formulations that instructs each one of us to love our neighbor as we love ourselves, that is, to treat others exactly as you wish to be treated in the same circumstances.³⁵² The rule of law requires moral authority to motivate compliance in order to achieve justice in concordance with human dignity and respect. If the President claims that the War on Terror is a just war³⁵³ and necessary to achieve peace for our time,³⁵⁴ something more than hollow words and hypocritical conduct are needed to restore international and national public confidence in what was once American justice. That something more is a restoration of the rule of law.

(2004).

351. Emmanuel Gross, *The Struggle of a Democracy Against Terrorism—Protection of Human Rights. The Right to Privacy versus the National Interest—The Proper Balance*, 37 CORNELL INT'L L.J. 27, 46 (2004).

352. "Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law of the prophets." *Matthew 7:12* (King James); "None of you [truly] believes until he wishes for his brother what he wishes for himself." Number 13 of Imam "Al-Nawawi's Forty Hadiths." (Islam). To discover the remarkable similarity between all major religious and cultural beliefs and the shared belief in various versions of the Golden Rule, see *Shared Belief in the "Golden Rule" Ethics of Reciprocity*, available at <http://www.religioustolerance.org/reciproc.htm>.

353. See generally, Ronald J. Rychlak, *Just War Theory, International Law, And The War In Iraq*, 2 AVE MARIA L. R. 1, 45 (2004) (examining the "just war" theory and concluding that the theory places authority to make the final decision to go to war with the national sovereigns).

354. Making a concession to tyranny is always a mistake, for rather than leading to peace, it encourages the growth of tyranny. The phrase, "peace for our time," refers to a statement of British Prime Minister Neville Chamberlain, who appeased Hitler and his quest for executive power and territorial expansion. Neville Chamberlain, *Peace for Our Time*, available at <http://library.byu.edu/~rdh/eurodocs/uk/peace.html> (last visited Jan. 21, 2006).

