2013

Victory Without Success? – The Guantanamo Litigation, Permanent Preventive Detention, and Resisting Injustice

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In February 2002, when the Center for Constitutional Rights (CCR) brought the first habeas cases challenging the Executive's right to detain prisoners in a law free zone at Guantanamo, almost no legal commentator gave the CCR much chance of succeeding. Yet, two years later in 2004, after losing in both the District Court and Court of Appeals, the Supreme Court in *Rasul v. Bush*[2] handed us a resounding victory. Four years later, the Supreme Court again ruled in our favor in 2008 in *Boumediene v. Bush*,[3] holding that the detainees had a constitutional right to habeas and declaring the Congressional statute, which stripped them of that right, unconstitutional. For the first time in American history, the Court had struck down a wartime national security

1. Bessie McKee Walthour Professor of Law, University of Pittsburgh Law School, President Center for Constitutional Rights. I would like to thank my research assistants Janet Checkley and Bret Grote for their valuable assistance on this article, and my colleagues at the Center for Constitutional Rights, Wells Dixon, Baher Azmy and Michael Ratner for their insights into the Guantanamo issues. I would also like to thank Wayne State for both the invitation to present this article as a lecture at Wayne State and for their assistance. I would also like to thank the Document Technology Center at the University of Pittsburgh for their assistance.

2. Rasul v. Bush, 542 U.S. 466 (2004).

3. Boumediene v. Bush, 553 U.S. 723 (2008).

measure enacted by Congress. Numerous commentators termed these Supreme Court cases "landmarks."[4] We had won, or so we all thought.

Now, another four years have passed, and our great victories have not achieved the result we desired. The litigation, of course, had an enormous impact, resulting in hundreds of Guantanamo prisoners being released.[5] Yet despite Obama's promise to do so, Guantanamo is still not closed and more than a decade after the first detainees were brought to Guantanamo, almost 170 prisoners still languish there.[6] Many of the lawyers, scholars, and advocates involved in the litigation are deeply disappointed and feel – as Joe Margulies, the lead counsel in *Rasul v. Bush* puts it – that "[he] now looks back on *Rasul* as a failure."[7]

In a recent New Republic article titled, "The Great Legal Paradox of Our Time: How Civil Libertarians Strengthened the National Security State," Harvard Professor Jack Goldsmith, a former Bush administration official, goes a step further. He argues that while the CCR's Hail Mary *Rasul* lawsuit produced a famous Supreme Court victory, it not only failed to achieve the results CCR hoped for, but ultimately helped cement and legitimate the counterterrorism policies that Bush introduced and Obama ultimately continued.[8] According to Goldsmith, by challenging the government's authority, CCR ironically ended up strengthening it.[9] While the Supreme Court has imposed restraints on executive power, Goldsmith argues that the courts have approved of "extraordinary presidential powers in the long war against terrorists," particularly the "remarkable fact" that, as we pass the 11th anniversary of the

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4. Baher Amzy, Executive *Detention, Boumediene and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 450 (2010); Stephen I. Vladeck, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. 505, 506 (2009); Noah Feldman, *Who Can Check the President?*, N.Y. TIMES, Jan. 8, 2006, at 55.

5. Muneer I. Ahmad, Resisting *Guantanamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1754 (2009).

6. Jack Goldsmith, *The Great Legal Paradox of Our Time: How Civil Libertarians Strengthened the National Security State*, NEW REPUBLIC (Mar. 16, 2012), *available at* http://www.newrepublic.com/article/politics/101561/guantanamo-bay-prison-obama. (hereinafter Goldsmith, *The Great Legal Paradox of Our Time*).

7. Joseph Marguilies & Hope Metcalf, *Terrorizing Academia*, 60 J. LEGAL EDUC. 433, 471 (2011) (commenting further, Margulies and others do not regret their decision to bring a lawsuit on behalf of the Guantanamo detainees, for "[a]t that moment there was no choice but to litigate. He would do it again tomorrow, were the circumstances the same."). *See* Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. L. REV. 89, 94 (2012) (arguing that, "despite winning their legal arguments, suspected terrorists lose the practical battle to change their daily lives."). *See also* Aziz Z. Hug, *What Good is Habeas?*, 26 CONST. COMMENT. 385 (2010) (recognizing that *Boumediene*'s actual impact on detainee cases is relatively limited).

8. Goldsmith, *supra* note 6.

9. *Id.*

September 11th attacks, the Obama administration is preventively detaining almost 170 prisoners at Guantanamo without charge or trial, and almost 2,000 more in Afghanistan.[10] That this practice of long-term preventive detention is now generally accepted as lawful and legitimate is, in Goldsmith's account, at least partly a result of the CCR lawsuits.[11]

Goldsmith recognizes that *Rasul* and *Boumediene* had an important restraining impact on the government and aided the detainees.[12] Clearly, the release of six or seven hundred of the nine hundred imprisoned at Guantanamo was a huge accomplishment,[13] as was aiding a global movement to make Guantanamo a matter of important public debate.[14] Nevertheless, Goldsmith also quotes Michael Ratner, the president of the CCR, during the last decade and the inspiration behind the Guantanamo litigation, as believing that while they won courtroom battles, the CCR thus far has lost on their broader arguments: "We lost on the enemy combatant issue ... on the preventive detention issue, more or less, ... [and] on the military commission issue, more or less."[15] For Goldsmith, "[p]aradoxically, and to Ratner's regret, his victories in court and elsewhere helped Barack Obama to legitimate counterterrorism policies that Ratner sought to end."[16] And most ironically, according to Goldsmith, "[a] decade after the GTMO detention facility began its life as a creature of presidential unilateralism, it and the...legal decisions it spawned stand as a testament to the power of modern wartime checks and balances."[17]

In certain respects, Goldsmith's account is relatively easy to critique. He ignores the reality of the injustice that still exists at Guantanamo. Guantanamo is not a testament to the power of wartime checks and

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10. *Id. See also Bagram: The Other Guantanamo?* (CBS News broadcast Nov. 13, 2011) ("There are now 3000 alleged insurgents detained in Bagram, five times as many [around 600] as when President Obama took office [in January 2009]."). The article discusses an agreement that the United States and Afghanistan negotiated on prisoner transfer, where many of the Afghan prisoners held in Bagram would be eventually transferred to Afghan control, however, the scope of the agreement is still unclear, and at minimum, the non-Afghan prisoners, many of whom were undoubtedly captured outside of Afghanistan, would remain in United States control. *See also* Rod Nordland, *U.S. and Afghanistan Agree on Prisoner Transfer as Part of Long-Term Agreement*, N.Y. TIMES, Mar. 10, 2012 at A9.

11. Goldsmith, *supra* note 6.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Jack Goldsmith, *POWER AND CONSTRAINT*: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, 163 (2012).

17. *Id.*

balances, but it has been and remains a symbol of unlawful oppression and injustice. For example, Goldsmith claims, in part, that because of the court's rulings, "a decade after 9/11 nearly two hundred dangerous terrorists remain at GTMO, legitimately and with relatively little controversy, in military detention without trial."[18] Goldsmith simply ignores the reality of the 86 Guantanamo prisoners, more than half the remaining total, the U.S. Defense Department and State Department has approved for transfer or release because it would be "consistent with the national security and foreign policy interests of the United States."[19] These prisoners nonetheless remain indefinitely, perhaps forever, detained at GTMO because of the failure of checks and balances to protect human rights.[20]

Thus, while Goldsmith touts the Guantanamo litigation as evidence that the system works, that errors are corrected, and that the Imperial Presidency is no longer very imperial at all but instead accountable, he ignores the tremendous suffering that still exists at Guantanamo. One all too tragic example of this continued suffering is represented by Adnan Latif, the Yemeni man who on September 8, 2012, became the ninth prisoner to die at Guantanamo.[21] As the detainee's lawyer has stated, pending an investigation by the U.S. military, although we do not know exactly how Mr. Latif died, "he died because he was there."[22]

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18. *Id.* at 231.

19. The White House, *Executive Order--Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities* (Jan. 22, 2009), *available at* http://www.whitehouse.gov/the_press_office/Closure_Of_Guantanamo_Detention_Facilities/; Editorial, *America's detainee problem*, L.A. TIMES (Sept. 23, 2012), *available at* http://articles.latimes.com/2012/sep/23/opinion/la-ed-detention-20120923; Andy Worthington, *Guantanamo Scandal: The 40 Prisoners Still Held, but Cleared for Release at Least Five Years Ago*, TRUTHOUT, (June 8, 2012), *available at* http://truth-out.org/news/item/9668-guantanamo-scandal-the-forty-prisoners-still-held-but-cleared-for-release-at-least-five-years-ago (commenting that "[o]ne of the greatest injustices at Guantanamo is that of the 169 prisoners still held, over half – 87 in total – were cleared for release by President Obama's interagency Guantanamo Review Task Force"; that figure is now down to 86 with the death, presumed to be by suicide, of one of the detainees cleared for release or transfer).

20. *See* David Frakt, *Guantanamo Detainees: The 'Other' Victims of 9/11*, JURIST – FORUM (Sept. 20, 2012), *available at* http://jurist.org/forum/2012/09/david-frakt-guantanamo-detainees.php. *See also* David Frakt, *Prisoners of Congress: The Constitutional and Political Clash Over Detainees and the Closure of Guantanamo*, 74 U. PITT. L. REV. 1 (2012).

21. Carol Rosenburg, *Dead Guantanamo detainee won, then lost court-ordered release*, MIAMI HERALD, (Sept. 11, 2012), *available at* http://www.miamiherald..com/2012/09/11/2996888/dead-guantanamo-detainee-won-then.html.

22. Ben Fox, *The Big Story: Dead prisoner had troubled history at Guantanamo*, ASSOCIATED PRESS (Sept. 11, 2012), *available at* http://bigstory.ap.org/article/guantanamo-prisoner-who-died-battled-confinement.

However, Goldsmith's analysis does raise important and deeper questions about the role of law reform litigation generally and the CCR's Guantanamo litigation more specifically. Goldsmith is certainly correct that many in the human rights community are deeply disappointed by what has transpired since the Supreme Court decided *Rasul* and *Boumediene*. Under the Obama administration, the practice of wartime preventive detention of captured suspected terrorists has been continued and legitimated. When the CCR first initiated the *Rasul* litigation, we believed that captured suspected terrorists were entitled to be charged and given a fair, criminal trial under the constitution's legal processes. We were opposed to a wartime emergency preventive detention model for dealing with suspected terrorists. We still hold that view. However, that is not what has happened, despite our victories in the Supreme Court.

Moreover, even the habeas review that the CCR won has turned out to be quite limited. In *Rasul* and *Boumediene,* the Supreme Court issued what were procedural, jurisdictional opinions, holding that the federal courts had jurisdiction to hear the detainees' habeas claims, but addressing almost none of the detainees' substantive issues, such as what legal standards applied to the detentions.[23] The Court left it to the lower courts, in this case the D.C. Circuit and district courts, to fill in the substantive and evidentiary standards by which habeas review would be decided.[24] The D.C. Circuit, which was reversed twice by the Supreme Court in the Guantanamo litigation, has proven to be an implacable foe of meaningful review.[25]

This Article will explore and explain how and why the CCR's landmark victories in the Supreme Court have resulted in disappointment and will address the question that Goldsmith's analysis raises: has the Guantanamo litigation simply legitimated permanent military preventive detention? In doing so, it will place the Guantanamo cases and post-9/11 litigation in a broader context of rights-based courtroom challenges to injustice, exploring the dilemmas and advantages of such litigation, ultimately concluding that Goldsmith's analysis misses a key aspect of the Guantanamo litigation.

Part I of the Article explores how the lower courts have limited *Boumediene*'s ruling. Part II analyzes the deeper question of the lower court's acceptance of the military preventive detention paradigm in the conflict with al Qaeda, and why that paradigm is problematic. Part III

23. *E.g.*, Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008).

24. *See generally, id.*

25. *See generally, id.*

addresses the underlying reasons why the Supreme Court victories have led to the dashed hopes, continued injustice, and disappointment that characterizes the current situation in Guantanamo. This section locates the Guantanamo litigation in a broader context, illustrating how both domestic U.S. courts and other national legal systems have often, in similar contexts, followed the same trajectory. It argues that the real problem with the Guantanamo litigation lies in the failure of rights to fulfill their promise without a strong political movement pushing those rights forward. Both victory and defeat have to be judged in a broader frame than just what happens in the courtroom battle. The concluding part challenges Goldsmith's account that the Guantanamo litigation's main role was to legitimate the Bush/Obama system of preventive detention, arguing that rather than simply playing a supporting role in Goldsmith's well-oiled system of checks and balances and Presidential accountability, litigation of this sort can and often does also serve as a mechanism of long-term resistance to an oppressive system.

I. *BOUMEDIENE*'S NARROWING BY THE LOWER COURTS

The Supreme Court's rhetoric and language in *Boumediene* soared, with Justice Kennedy writing for the Court that "[s]ecurity subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."[26] But the Court's opinion was also quite narrow and procedural. As the Court repeatedly emphasized, "our opinion does not address the content of the law that governs petitioners' detention."[27] Moreover, in many respects, the functional test that Justice Kennedy articulated in *Boumediene* was in tension with its lofty rhetoric and justification of his opinion.[28]

The Supreme Court left it to the lower courts to fill in the myriad of substantive and evidentiary issues that it had not addressed and to apply the vague functional test to other situations. The D.C. Circuit, to which the Guantanamo litigation has been directed, has been hostile to the detainees, with several of the judges on the Circuit publicly criticizing

26. *Boumediene*, 553 U.S. at 797.

27. *Id.* at 798.

28. *See* Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT'L L. 307, 316-18 (2011) (discussing Justice Kennedy's functional test at odds with the separation of powers rationale and rhetoric in the opinion).

the Supreme Court's *Boumediene* opinion as having created a "mess" and as a "charade."[29]

First, the Circuit has held that the federal courts are without power to order the release of Guantanamo prisoners into the United States, even where those prisoners were indisputably not enemy combatants, and where they could not be repatriated to another country, leaving no other remedy.[30] For example, *Kiemba v. Obama* involved Uighur prisoners, members of a Muslim minority group in northwestern China, whose fight had been with the Chinese government, not the Americans.[31] Although they had no connection whatsoever to al-Qaeda or the Taliban, the Uighurs were, nonetheless, detained in Pakistan by the U.S. military due to information provided by Pakistanis, who were eager for reward money.[32] After being shipped to Guantanamo, the government recognized early on that they were not enemy combatants of the United States and could not be detained as such.[33]

Most of the Uighurs were not, however, released from Guantanamo, because they could not be returned to China where they would undoubtedly be jailed or persecuted by the Chinese government, and no third country would take them.[34] Finally, a short time after *Boumediene*, the D.C. Circuit held in *Parhat v. Gates* that the Uighurs could not be legally detained as enemy combatants.[35]

When the government did not seek certiorari in the Supreme Court, the Uighur prisoners filed habeas petitions in the District Court, seeking release into the United States because there was no basis for their continued detention at Guantanamo and no third country to send them to where they would not be subject to persecution.[36] Moreover, religious

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29. Editorial, *A Right Without a Remedy*, N.Y. TIMES, Mar. 1, 2011, at A26, *available at* http://www.nytimes.com/2011/03/01/opinion/01tue1.html (quoting Honor able A. Raymond Randolph, Justice Story Distinguished Lecture Address at the Heritage Foundation: The Guantanamo Mess (Oct. 20, 2010)); Esmail v. Obama, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring); Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451,1453-54 (2011).

30. Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S.CT. 1235 (2010), *rehearing en banc denied, reinstating judgment as amended*; Kiyemba v. Obama, 605 F.3d at 1046 (D.C. Cir. 2010) (*per curiam*).

31. *Id.* at 1023-24.

32. *Id.*

33. Qasim v. Bush, 382 F.Supp.2d 126, 127-28 (D.D.C. 2005) (noting military tribunal's holding that Uighur detainees could not be detained as enemy combatants).

34. *Id.* at 128.

35. Parhat v. Gates, 532 F.2d 834, 854 (D.C. Cir. 2008). That case was decided under the mechanism that Congress had established for review that was struck down in *Boumediene*.

36. *Id.* at 852.

and other humanitarian groups in the United States agreed to sponsor and take care of the Uighurs if released into the United States.[37]

District Judge Urbina granted the Uighurs' habeas corpus petitions and ordered their release into the United States subject to conditions set by the Court.[38] The D.C. Circuit reversed, holding that federal judges had no power to grant the relief requested absent explicit legislative authority.[39] The Circuit furthermore held that to the extent the Due Process Clause of the Fifth Amendment might bar the indefinite detention of someone whom the government had no legal basis to detain, it did not apply to non-citizens detained at Guantanamo.[40] The Circuit simply ignored *Boumediene*, treating it as only applying to habeas jurisdiction and not substantive rights.[41]

The Supreme Court granted certiorari in *Kiyemba*,[42] but vacated that grant and remanded to the Circuit in light of the Obama administration's filing that the detainees had received a resettlement offer, which might moot the controversy.[43] On remand, the D.C. Circuit reaffirmed its prior ruling, and this time the Supreme Court denied certiorari.[44]

Thus, as a practical matter, the detainees are left without any meaningful remedy and judges who find no basis for detention typically instruct "the [g]overnment to take all necessary and appropriate diplomatic steps to facilitate the [prisoners'] release forthwith."[45] As one Circuit Judge candidly recognized, the Circuit has reduced habeas review to essentially rendering "virtual advisory opinions"[46] or as *The New York Times* put it, "the appellate court has all but nullified that view of judicial

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37. *See* Bill Delahunt & Sabin Willett, *Innocent detainees need a home*, BOSTON GLOBE, April 2, 2009, available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/04/02/innocent_detainees_need_a_home/ ("The small Uighur-American community has pledged to aid the detainees with jobs and housing"); *see also* Matthew Barakat, *D.C. Uighurs wait to take in Gitmo detainees*, USA TODAY, October 10, 2008, available at http://usatoday30.usatoday.com/news/nation/2008-10-10-187008770_x.htm?csp=34.

38. *In re* Guantanamo Bay Detainee Litigation, 581 F.Supp.2d 33 (D.D.C. 2008).

39. Kiyemba 555 F.3d at 1027-29.

40. *Id.* at 1026-27.

41. *Id.* at 1028.

42. Kiyemba v. Obama, 130 S. Ct. 458 (2009).

43. Kiyemba v. Obama, 130 S. Ct. 1235 (2010) (*per curiam*).

44. Kiyemba v. Obama, 605 F.2d 1046 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1631 (2011).

45. *See, e.g.*, Ahmed v. Obama, 613 F.Supp.2d 51, 66 (2009); Basardh v. Obama, 612 F.Supp.2d 30, 35-36 (D.D.C. 2009). *See* Jonathon Hafetz, *Calling the Government to Account: Habeas Corpus After* Boumediene, 57 WAYNE L. REV. 99, 131-35 (2011) (for an excellent discussion of the Kiyemba ruling). *See also* Vladeck *supra* note 29, at 1476-85 (discussing remedies in Habeas cases after *Boumediene*).

46. Esmail v. Obama, 639 F.3d. 1075, 1078 (D.C. 2011) (Silberman, J., concurring).

power and responsibility backed by Justice Kennedy and the court majority" in *Boumediene*.[47]

As of January 1, 2013, there are still 166 prisoners detained at Guantanamo.[48] Of these, 86 have been approved for transfer or release, which means that the Department of Defense has determined that they need not be detained at Guantanamo.[49] Of these 57 are Yemenis whose government has agreed to repatriate them.[50]

Yet, as of January 2013, these detainees have not been transferred to Yemen or the other countries where they are from for several reasons. First, in December 2009, under mounting political pressure, the Obama administration imposed a blanket moratorium on transferring Guantanamo detainees to Yemen.[51] Moreover, Congress has enacted legislation in the past two years that rendered it difficult, albeit not impossible for the Obama Administration to transfer a Guantanamo detainee.[52] The National Defense Authorization Act for FY 2012 prohibits the use of Defense Department funds to transfer to or release in the United States any non-citizen held at Guantanamo.[53] Congress also has imposed onerous certification requirements for a transfer from Guantanamo to a foreign country, such as the Executive certifying that the receiving state indeed meets certain national security standards.[54] Additionally, the Courts have thus far refused to allow any remedial action, with the district courts and the Circuit effectively holding that they do not have the power under habeas to order the government to transfer the detainee either to the United States or to any other country.[55] The upshot is that there are many detainees who should not be at Guantanamo, but are nonetheless imprisoned there indefinitely.

Second, the Circuit has established evidentiary standards and presumptions that have made it exceedingly difficult, if not impossible,

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47. Editorial, *A Right Without a Remedy*, N.Y. TIMES, Mar. 1, 2011, at A26.

48. Charlie Savage, *Guantanamo Prison Revolt Driven by Inmates' Despair*, N.Y. TIMES, April 24, 2013, at A1, *available at* http://www.nytimes.com/2013/04/25/us/guantanamo-prison-revolt-driven-by-inmates-despair.html?pagewanted=all.

49. *Id.*

50. Andrei Scheinkman et al., *The Guantanamo Docket - Citizens of Yemen*, N.Y. TIMES, (2012), http://projects.nytimes.com/guantanamo/country/yemen.

51. Baher Azmy, *The Face of Indefinite Detention*, N.Y. TIMES, Sept. 14, 2012, *available at* http://www.nytimes.com/2012/09/14/opinion/life-and-death-at-guantanamo-bay.html; Andy Worthington, Does *Obama Really Know or Care Who is at Guantanamo?*, TRUTHOUT, June 10, 2010, *available at* http://archive.truthout.org/does-obama-really-know-or-care-about-who-is-guantánamo60321.

52. *See infra* notes 52 and 53 and accompanying text.

53. National Defense Authorization Act § 1027 (1st Sess. 2012).

54. National Defense Authorization Act § 1028 (1st Sess. 2012).

55. *Supra* note 30.

for detainees to win habeas claims. For example, the Circuit reversed a district court's factual finding that the government had not demonstrated that a Yemeni citizen imprisoned at Guantanamo since 2002 was an enemy fighter.[56] The Circuit Court held that the district court had failed to accord the government's intelligence report a presumption of regularity.[57] The Circuit majority reached this conclusion despite the fact that the report contained inaccuracies, was produced in a stressful and chaotic situation and by a clandestine method that was never explained, was filtered through interpreters, subject to transcription errors, and heavily redacted for national security purposes.[58] As Judge Tatel argued in a strong dissent in the *Latif v. Obama* case, "it is hard to see what is left of the Supreme Court's command in *Boumediene* that habeas review be 'meaningful.'"[59]

The Court of Appeals has also made clear its view that the government's evidence need not meet a particularly stringent standard. The Circuit has assumed arguendo that the government must meet a preponderance of the evidence standard because the Obama administration has maintained that preponderance was "appropriate."[60] A unanimous panel in *Al-Adahi v. Obama,* however, expressed doubt that habeas review "requires the use of the preponderance standard."[61] In a subsequent case, *Esmail v. Obama,* Judge Silberman wrote that he thought the preponderance standard is "unrealistic," and candidly doubted that "any of [his]colleagues will vote to grant a petition if he or she believes that it is *somewhat likely* that the petitioner is an al-Qaeda adherent or active supporter."[62] The standard Silberman thought he and his colleagues were prepared to accept was the very low "some evidence" standard.[63] As Professor Stephen Vladeck noted, Silberman's opinion could fairly be read as suggesting that he – and at least some of his colleagues – are in fact reviewing the government's case only for "some evidence" rather than the "more evidence than not" requirement of the preponderance standard.[64]

The D.C Circuit's evisceration of the *Boumediene* hope has had a profound impact on the district courts. Since July 2010 when the Circuit

56. Latif v. Obama, 666 F.3d 746, 748 (D.C. Cir. 2011).
57. *Id.* at 748-49.
58. *Id.* at 779.
59. *Id.*
60. Al-Adahi v. Obama, 613 F.3d 1102, 1104-05 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011)
61. *Id.*
62. Esmail v. Obama, 639 F.2d at 1078 (Silberman, J., concurring)(emphasis added).
63. *Id.*
64. Vladeck, *supra* note 29, at 1473.

began issuing its important decisions, district judges have denied 10 habeas petitions in Guantanamo cases and granted none, compared with 22 habeas petitions granted and 15 denied in the two years before that.[65] In the 19 habeas appeals the Circuit has decided, the court has never allowed a prisoner to prevail.[66] As *The New York Times* put it, the "court has developed substantive, procedural and evidentiary rules that are unjustly one-sided in favor of the government."[67]

Nonetheless, the Supreme Court has not decided any appeal of any Guantanamo detainee in the four years since *Boumediene* was decided in 2008.[68] Most recently, it denied certiorari without any dissent in seven Guantanamo detainee cases, including that of Mr. Latif, prompting *The New York Times* to opine that "it is devastatingly clear that the Roberts court has no interest in ensuring meaningful habeas review for foreign prisoners."[69]

The human consequences of the D.C. Circuit's *Latif* decision and the Supreme Court's denial of review were not long in coming. *Latif* was cleared for release from Guantanamo on three separate occasions, including 2009.[70] Yet his release was blocked, first by Obama's moratorium on transfers and then by congressional restrictions.[71] It is doubtful that Administration officials believed that Latif was a threat to the United States, although undoubtedly for political reasons the

65. Editorial, *Reneging on Justice at Guantanamo*, N.Y. TIMES, Nov. 19, 2011, at SR10, *available at* http://www.nytimes.com/2011/11/20/opinion/sunday/reneging-on-justice-at-guantanamo.html.

66. Editorial, *The Court Retreats on Habeas*, N.Y. TIMES, June 13, 2012, at A34, available at http://www.nytimes.com/2012/06/14/opinion/the-supreme-court-retreats-on-habeas.html.

67. *Id.*

68. Kiyemba v. Obama, 130 S. Ct. 458 (2009). As previously noted, the Court did initially grant certiorari in *Kiyemba v. Obama*, to address the question of whether a habeas court had the power to order a prisoner's release from Guantanamo into the United States. Prior to oral argument, the government advised the Court that all of the Uighur petitioners had received offers of resettlement and that some had been resettled since the grant of certiorari and moved to dismiss the petition. The Court then vacated the D.C. Circuit's opinion and remanded to the Circuit to reconsider its ruling in light of the new facts. Kiyemba v. Obama, 103 S. Ct. 1235 (2010). The Circuit reaffirmed its prior ruling and the Supreme Court denied certiorari in *Kiyemba. Kiyemba*, 604 F.3d at 1048 (*per curiam*), *cert. denied*, 131 S. Ct 1631 (2011).

69. *The Court Retreats on Habeas*, *supra* note 66.

70. Editorial, *Death at Guantanamo Bay*, N.Y. TIMES, Sept. 15, 2012, at SR10, *available at* http://www.nytimes.com/2012/09/16/opinion/sunday/death-at-guantanamo-bay.html.

71. *Id.*

administration chose to appeal his case.[72] Before he was found unconscious in his cell, Latif had been on a hunger strike, had attempted suicide, and after he lost his appeal he told his lawyer, "I am a prisoner of death."[73]

Third, in addition to the Circuit's very crabbed reading of habeas rights at Guantanamo, the Circuit has also issued a number of other rulings which dramatically restrict the reach of *Boumediene* and render it ineffective. The Circuit has refused to apply *Boumediene* to accord habeas rights to detainees confined first at Bagram Air Force Base and now at the Parwan detention facility in Afghanistan, even where the detainee was captured outside of Afghanistan and brought to Bagram for detention purposes.[74] In a unanimous panel decision joined by two of the more liberal judges on the Circuit – Edwards and Tatel – the Appeals Court reversed a district court's ruling that the Court did have habeas jurisdiction for non-Afghan detainees who were apprehended outside of Afghanistan far from any Afghan battlefield and brought to the theater of war to be detained for many years at Bagram.[75] The Circuit held that since Bagram was considered a war zone, the *Boumediene* functional test did not allow detainees to challenge their detention in federal court, and thus the detainees in Afghanistan were outside the scope of American judicial review.[76] The *Al Maqaleh* decision has been aptly criticized as creating a law-free zone or legal black hole as Bagram.[77] Similarly, the Circuit has held that *Boumediene* only addressed the right to habeas, and determined that prisoners held at Guantanamo (or elsewhere outside of the United States) have no due process rights under the U.S. Constitution.[78]

Finally, the D.C. Circuit and other circuits have uniformly refused to decide civil actions against U.S. officials brought by aliens seeking damages for torture at Guantanamo or elsewhere.[79] Perhaps the most

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72. *See, e.g.*, Benjamin Wittes, *Thoughts on Adnan Latif*, LAWFARE BLOG (Sept. 12, 2012), http://www.lawfareblog.com/2012/09/thoughts-on-adnan-latif/. ("Almost nobody thought that Adnan Latif needed to be in custody at all....[H]ad Congress not eventually made it virtually impossible to transfer people from Guantanamo, Latif would not have remained in custody until his presumably self inflicted death").

73. Azmy, *supra* note 51.

74. Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010).

75. *Id.*

76. *Id.*

77. Editorial, *Bagram, A Legal Black Hole?*, L.A. TIMES, May 26, 2010, at A20, *available at* http://articles.latimes.com/2010/may/26/opinion/la-ed-bagram-20100526.

78. Kiyemba v. Obama, 555 F.3d 1022, 1027-29 (D.C. Cir. 2009).

79. *See e.g.*, Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff'd*, 532 F.3d 157 (2d Cir.), *aff'd, en banc, vacated and superseded on reh'g en banc*, 585 F.3d 559 (2d

troubling example of the courts of appeals' refusal to address claims that U.S. officials sanctioned torture is the *Maher Arar* case. Arar, a Canadian citizen of Syrian descent, was transferring planes at Kennedy Airport in New York when he was detained by INS agents based on a tip from the Canadian police that he was a member of al Qaeda.[80] Questioned repeatedly by the FBI, Arar denied the allegations.[81] After two weeks of solitary confinement in Brooklyn, American officials, with the approval of then U.S. Attorney General John Ashcroft, secretly rendered Arar to Syria, where he was tortured and locked in a damp, cold, underground cell that Arar termed a "grave" cell because it measured only three feet wide, six feet long and seven feet high.[82] After a year in detention, the Syrian government released him, concluding that Arar had no connection to terrorism, and he returned home to Canada.[83] To this day, Arar suffers severely from his ordeal.[84]

In 2004, Canada convened a commission to conduct an official inquiry into the Arar affair.[85] In September 2006, the commission issued a voluminous report fully exonerating Arar of any connection to al Qaeda or any terrorist group.[86] The Canadian government accepted the commission's recommendation and officially apologized to Arar and paid him $11.5 million Canadian dollars as compensation for Canada's role in his ordeal.[87]

In January 2004, Arar filed a complaint against various U.S. officials, including former U.S. Attorney General John Ashcroft.[88] Arar sought damages and alleged that the defendants had sent him to Syria for the purpose of subjecting him to torture and detention there, and had indeed conspired with Syrian officials to do so.[89] Arar and his lawyers questioned why the United States would send a man whom it suspected of being an al Qaeda terrorist to Syria, which the U.S. claimed at the time

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Cir. 2009); Rasul v. Myers, 555 U.S. 1083 (2008), *aff'd on remand*, 563 F.3d 527 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009).

80. *Arar, supra* note 79, at 252-53.

81. Id. at 253.

82. *Id.*

83. *Id.* at 255.

84. *Id.* at 252-57 (the facts Arar alleged in his complaint are restated in the District Court opinion in his lawsuit).

85. COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHAR ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR 59 (2006).

86. *Id.*

87. Ian Austen, *Canada Will Pay $9.75 Million to Man Tortured in Syria*, N.Y. TIMES, Jan. 27, 2007, at A5, *available at* http://www.nytimes.com/2007/01/27/world/americas/27canada.html?_r=0.

88. *Arar, supra* note 79 (the allegations can be found in this complaint).

89. *Id.* at 256-57.

was a state sponsor of terrorism that practices torture, and not to Canada, the United States' friend and ally.[90] The only plausible explanation is that U.S. officials must have believed that the Syrian government would detain and use coercive interrogation methods on Arar to obtain information that the FBI had not been able to acquire, nor would Canada obtain through using normal police methods. As it turned out, Arar simply did not have information to provide. Arar argued that since U.S. officials were constitutionally forbidden from torturing him in New York, they could not intentionally subject him to torture by outsourcing it - namely shipping him to Syria to be tortured there.[91] Despite Arar's strong claims on the merits, the District Court, a divided Second Circuit panel, and a divided en banc Court of Appeals' decision dismissed Arar's claims.[92] Each decision found, under somewhat different reasoning, that Arar had no *Bivens*' claim for damages.

The Second Circuit's dismissal of Arar's claims is not exceptional, but rather the norm. Every other circuit court has also dismissed actions by aliens or even citizens for torture claims arising out of U.S. officials' conduct in the "war on terror."[93] For example, the D.C. Circuit also has dismissed claims of torture brought by aliens.[94] Prior to *Boumediene*, the D.C. Circuit and district courts in that circuit consistently held that the constitutional proscription of cruel and inhumane punishment did not reach U.S. officials who tortured aliens abroad.[95] In *Rasul v. Myers*, first decided by the D.C. Circuit just prior to the Supreme Court's holding in *Boumediene*, the court reiterated that rule in dismissing a *Bivens* damage action brought by former detainees at Guantanamo against high

90. I was one of Arar's lawyers.

91. *Arar, supra* note 79, at 256.

92. *Arar, supra* note 79, *aff'd*, 532 F.3d 157 (2d Cir.), *aff'd, en banc, vacated and superseded on reh'g en banc*, 585 F.3d 559 (2d Cir. 2009).

93. *See In Re* Iraq and Afghanistan Detainee Litig 479 F. Supp 2d 85 (D.D.C 2007); Harbury v. Deutch 233 F 3d. 596,602-3 (D.C. Cir. 2000); Rasul v. Myers, 512 F.3d 644, 663-65 (D.C. Cir. 2008), *vacated and remanded*, 555 U.S. 1083 (2008), *aff'd on remand*, 563 F.3d 527 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009), Lebron v. Rumsfeld 670 F. 3d 540 (4th Cir 2012) , cert. denied 2012 U.S. LEXIS 4422 (2012), Vance v.Rumsfeld, 701 F. 3d 193 (7th Cir 2012) (en banc), cert. denied 2013 U.S. LEXIS 4438 (2013).

94. *Id.*

95. *See* Harbury v. Deutch, 233 F.3d 596, 604 (D.C. Cir. 2000); Boumediene v. Bush, 476 F.3d 981, 984 (D.C. Cir. 2007); People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999) ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.").

government officials for alleged torture they suffered during their detention.[96]

The Supreme Court vacated the *Rasul* dismissal after the *Boumediene* decision, ordering the D.C. Circuit to review its decision in light of *Boeumediene*.[97] However, in *Kiyemba v. Obama*, the D.C. Circuit held that the Court's *Boumediene* decision only involved the applicability of the Suspension Clause to Guantanamo and did not affect prior circuit law that stated that the Due Process Clause did not apply to aliens without property or presence within the United States.[98] When the D.C. Circuit revisited *Rasul*, it noted that "the Court in *Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause."[99] While the court is technically correct that *Boumediene* explicitly addressed only the Suspension Clause, *Bouemediene*'s extended discussion of the Constitution's extraterritorial reach clearly undermined the circuit's prior holdings that the Constitution simply did not apply to aliens tortured abroad. The Court's review of its prior extraterritorial jurisprudence in *Boumediene* made clear that "these decisions undermine the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends."[100]

The D.C. Circuit, however, chose not to rest its decision on the ground that the Constitution does not apply to torture of aliens abroad, holding instead that the defendants were entitled to qualified immunity, because reasonable officials would not have known that the prohibition against torture applies to Guantanamo until at least after *Boumediene* was decided in 2008.[101] Indeed, the court's dicta suggests that, even now, it is not clearly established that the constitutional proscription against torture applies to Guantanamo or any other U.S. military base abroad, and that U.S. officials who engaged in torture abroad today would still be entitled to qualified immunity.[102]

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96. Rasul v. Myers, 512 F.3d 644, 663-65 (D.C. Cir. 2008), *vacated and remanded*, 555 U.S. 1083 (2008), *aff'd on remand*, 563 F.3d 527 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009).

97. Rasul v. Myers, 555 U.S. 1083 (2008), *aff'd on remand*, 563 F.3d 527 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009).

98. *Kiyemba*, 555 F.3d at 1026-27.

99. *Rasul*, 563 F.3d at 529.

100. *Boumediene*, 553 U.S. at 755.

101. *Rasul*, 563 F.3d at 532.

102. *Id.* at 529 (stating that the circuit's prior law that the Constitution does not apply to U.S. actions against aliens abroad remains undisturbed by the Supreme Court's opinion

Thus, despite the landmark victories that detainees won in the Supreme Court between 2004 and 2008, the overall legal situation seems bleak. The D.C. Circuit has negated any meaningful judicial remedy for the Guantanamo detainees, has reviewed detainees' claims under an exceedingly pro-government standard, has refused to extend *Boumediene*'s grant of habeas jurisdiction to military bases in Afghanistan, and has not recognized the application of other closely related constitutional rights such as due process to the Guantanamo detainees. Moreover, the D.C. Circuits and other circuits have refused to allow any claims by aliens seeking accountability for torture to proceed.[103] Through all of this judicial narrowing of *Boumediene*, the Supreme Court has sat silent, refusing to hear any case involving these issues through Obama's first term in office. How does one explain this judicial retreat?

Before answering that question, however, one needs to address the question at the heart of Goldsmith's analysis: have we established a system of potentially permanent preventive military detention?[104]

Of the remaining prisoners identified as enemy belligerents who the government believes should be militarily detained at Guantanamo (as opposed to the numerous detainees who have been cleared for release), 36 have been slated for prosecution before the military commissions.[105] The remaining 48 detainees being preventively detained, in that there are no plans to charge them with having committed any crime, but they are being held as enemy belligerents without trial.[106] Each was given a hearing before a military review panel and the government asserts that they are either al Qaeda or Taliban members or have significantly supported those organizations., The government does not, however, explain why any particular individual cannot be tried either in federal court or even before a military commission; instead, it simply claims that such a trial is "not feasible."[107]

Thus, the government has established a long-term system of preventive military detention, which Goldsmith terms "remarkable."[108] What is the legal basis for this system and is it justified?

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in *Boumediene*, with the exception of the Suspension Clause – which does not apply in some circumstances – remains undisturbed by the *Boumediene* decision).

103. *See generally, supra* note 93.

104. *See* Goldsmith, *supra* note 6.

105. DEPARTMENT OF JUSTICE ET AL., GUANTANAMO REVIEW TASK FORCE, FINAL REPORT (JAN. 22, 2010), *available at* http://www.justice.gov/ag/guantanamo-review-final-report.pdf.

106. *Id.* at 9-10.

107. *Id.* at 22.

108. Goldsmith, *supra* note 6.

II. PREVENTIVE MILITARY DETENTION

Prior to September 11th, the United States relied on federal criminal prosecution and conviction to incarcerate alleged terrorists. After September 11th, the United States government adopted a warfare model as the preferred mechanism to preventively detain suspected al Qaeda and Taliban members, fighters, and supporters. This preventive paradigm, as John Ashcroft termed it, proved controversial,[109] as did related proposals for the creation of a "National Security Court," or a "Congressionally sanctioned system of preventive detention," as proposed by Professors Jack Goldsmith and Neal Katyal."[110]

The Bush administration's detention of prisoners at Guantanamo, at black sites around the world and at Bagram in Afghanistan, was very controversial. Yet the Obama administration has continued the policy of indefinite military detentions of al Qaeda terrorism suspects who will never be charged and tried for any crime – either in federal court or before a military commission – and the federal courts have accepted and legitimized this practice. Thus, at present, both the D.C. Circuit and district courts in the Circuit have affirmed the President's power to detain people who were a "part of" Al Qaeda, the Taliban, or associated forces.[111] In *Gherebi v. Obama*, Judge Walton rejected the argument that the laws of war do not recognize the indefinite military detention of insurgents in a non-international armed conflict, such as that against Al Qaeda.[112] He also rejected the argument that the only individuals subject to military detention are people who are not merely members of Al Qaeda, but those who directly participated in hostilities.[113] Judge Walton substantially agreed with the Obama administration's position that the government could "detain persons who were a part of, or substantially

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109. *See, e.g.*, DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR (2007) (criticizes the Bush administration's use of the preventive paradigm).

110. *See* Jack Goldsmith & Neal Katyal, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19, *available at* http://www.nytimes.com/2007/07/11/opinion/11katyal.html. *See also* BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 162-66 (2008) (supporting that Congress create a national security court); Sophia Brill, *The National Security Court We Already Have*, 28 YALE L. & POLY REV. 525 (2010) (discussing proposals and the criticism).

111. *See generally, supra* note 93 (cases cited therein are among these decisions).

112. Gherebi v. Obama, 609 F. Supp. 2d. 43, 55-62 (D.D.C. 2009). For the Center for Constitutional Rights arguments made in that case, see Majid Khan's Supplemental Memorandum Regarding the Government's Detention Authority, Khan v. Obama, Civ. Action No. 06-1690 (RBW) 3/20/2009 (on file with the WAYNE LAW REVIEW).

113. Gherebi, 609 F. Supp. 2d. at 67.

supported, Taliban or al-Qa[e]da forces or associated forces"[114] but limited the term "substantial support" to only those individuals "who were members of the 'armed forces' of an enemy organization at the time of their initial detention."[115] The AUMF detention power was broad enough to reach al-Qaeda members who were not active fighters, but did not cover mere "[s]ympathizers, propagandists, and financiers."[116] Similarly, in *Hamily v. Obama,* Judge Batedid not find that providing "substantial support" sufficed to permit an individual to be detained; he agreed with Judge Watson that the government could detain those who were "a part of" al Qaeda, the Taliban, or an associated force.[117] Other judges also adopted the "part of" standard.[118]

The D.C. Circuit has not only affirmed the "part of" standard adopted by these district courts, but also expanded the government's detention authority. A panel held that the category of persons subject to indefinite military detention "includes those who are part of forces associated with Al Qaeda or the Taliban *or those who purposefully and materially support such forces* in hostilities against U.S. Coalition partners."[119] The Circuit made it clear that evidence supporting the military's reasonable belief that a non-citizen seized abroad *either* attended Al Qaeda training camps in Afghanistan or visited Al Qaeda guesthouses "would seem to overwhelmingly, if not definitively, justify the government's detention of such a non-citizen."[120] In sum, as one scholar put it, "[w]hat has emerged after nearly a decade of habeas corpus litigation over Guantanamo is a de facto system of indefinite detention...."[121]

More recently, Congress has weighed in by enacting legislation to provide explicit statutory authorization for a system of indefinite military detention. The National Defense Department Appropriation Act of 2012, at minimum, explicitly reaffirmed President Obama's interpretation of his authority to detain not only suspected al Qaeda members and fighters but individuals who have "*substantially supported* al Qaeda, the Taliban, or *associated forces* that are engaged in hostilities against the United States..."[122] For aliens who fall within this definition –

114. *Id.* at 53.
115. *Id.* at 70.
116. *Id.* at 68.
117. Hamlily v. Obama, 616 F.Supp.2d 63, 71-76 (D.D.C. 2009).
118. *See* Awad v. Obama, 646 F.Supp.2d 20, 23 (D.D.C. 2009); *see also* Al-Bihani v. Obama, 594 F. Supp. 2d 35, 39 (D.D.C. 2009).
119. Al Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010) (emphasis added).
120. *Id.* at 873, n. 2.
121. *See* Hafetz, *supra* note 45, at 148.
122. NDAA § 1021b.

and the terms "substantially supported" and "associated forces" are not defined – the presumption of the bill is that they will face indefinite military detention, rather than criminal arrest and prosecution.

This legitimation of a system of indefinite military detention for al Qaeda members, supporters or fighters has four basic flaws. First, the detention power is argued to stem from the laws of war, but those laws cannot be said to authorize such detention. Second, unlike a traditional international war where there is high likelihood that prisoners captured in enemy uniforms on the field of battle are indeed enemy forces, the current situation reveals a murkier reality; the relationship of the captured individual to al Qaeda or some "associated force" is at best unclear. This different reality requires stronger procedural protections than typical law of war hearings. Third, unlike traditional international wars, there has been no strong showing that the regular legal process is unavailable or unworkable and that a preventive detention regime is necessary. Finally, and most importantly, it is becoming increasingly clear that the preventive detention regime thus far authorized by the lower courts has a strong likelihood of not only being indefinite, but also permanent. To deprive someone of their liberty for what could very well be their entire lifetime without charging them with any crime or having the evidence necessary to convict them in a regular court, strikes at the heart of our core constitutional values and is not what is contemplated by the laws of war.

First, it is generally agreed that the laws of war do not explicitly authorize military detention in non-international armed conflict, the category which the Supreme Court in *Hamdan* held characterized the current conflict with Al Qaeda.[123] The Obama administration correctly argues that the laws of war "have evolved primarily in the context of international armed conflicts..." and therefore the Administration seeks to apply "[p]rinciples derived from law-of-war rules governing international armed conflicts ... [by analogy to] inform the interpretation of the detention authority Congress has authorized for the current armed conflict" against the Taliban, Al Qaeda and associated forces.[124] A vigorous academic and judicial debate has ensued. One view is that insurgents or fighters in such non-international conflict can be viewed as combatants or belligerents who can be detained in the same manner as enemy prisoners in international conflict.[125] The other is that they must be viewed as civilians who can only be detained in certain

123. Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006).

124. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees at Guantanamo Bay (March 13, 2009), at 1.

125. *See infra* note 126 and accompanying text.

circumstances.[126] The International Red Cross and various international law scholars have taken the position that in non-international wars, such as that between a non-state actor like Al Qaeda and the United States, there is no recognized legal category of enemy combatant.[127] This view was adopted by four judges in the Fourth Circuit who participated in the en banc review in *Al Marri v. Pucciarelli*, involving the military detention of a resident alien in the United States who held that the alien could not be detained as an enemy combatant.[128] While five circuit judges in that case found that detention authority existed, they recognized that the traditional laws of war did not recognize insurgents in non-international conflict as enemy combatants.[129] Each proposed a test for when an individual could be subject to military detention in the

126. *See, e.g.*, Gabor Rona, *An Appraisal of US Practice Relating To 'Enemy Combatants'*, 10 Y.B. INT'L HUMANITARIAN L. 232 (2007) (arguing that under international humanitarian law "a combatant is someone who by virtue of membership in the armed forces or associated militia possesses" a privilege or license to kill enemy soldiers during wartime, and that therefore insurgents or terrorists cannot as a matter of law be combatants, but must be considered civilians who have engaged in unlawful acts and may be detained or punished pursuant to domestic, not international law); John Cerone, *Misplaced Reliance on the "Law of War"*, 14 NEW ENG. J. INT'L & COMP. L. 57, 66 (2007); BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2008); Laurie R. Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 64 RUTGERS L. REV. 1169 (2011) (current detention "system stretches the traditional notion of law of war detention beyond its limits"); David Glazier, *Playing By the Rules; Combatting Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957 (2009) (arguing that "good faith application" of the laws of war ultimately provides better protection for both national security and civil liberties); Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365 (2012); John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 A.J.I.L 201-02 (2011) (Former Legal Advisor and attorney advisor to the State Department argue that new law should be developed to address detention in non-international conflicts.); Ingrid Brunk Weurth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U.L. REV. 1567 (arguing that the "laws of war" as interpreted from history have little significance in the realities of war and detention today).

127. *See* Int'l Comm. of the Red Cross, Official Statement: The Relevance of IHL in the Context of Terrorism, at 1, 3 (Feb. 21, 2005), *available at* www.ICRC.org/eng/resources/document/mis/terrorism-ihl-210705.htm. *See also* Rona, *supra* note 126; Brief For Amici Curiae Experts in the Law of War in Al-Marri v. Spagone No. 08-368 United States Supreme Court (2009), at *22-23 (international laws of war do not "furnish independent authorization for the detention of any defined class of people as combatants").

128. Al-Marri v. Pucciarelli, 534 F.3d 213, 233 (4th Cir 2008) (en banc) (Motz, J., concurring) ("Common Article 3 and other Geneva Convention provisions applying to non-international... conflicts simply do *not* recognize the "legal category" of enemy combatant.").

129. *Al-Marri*, 534 F.3d at 233.

conflict with Al Qaeda.[130] The Supreme Court accepted certiorari in *Al Marri*, but the case was dismissed as moot after the detainee was transferred from military custody to civilian authority for criminal prosecution.[131]

Thus, the argument that detainees at Guantanamo or elsewhere should be subject to preventive military detention is based not on existing law, but rather on analogizing the current conflict with Al Qaeda to that of a traditional war. The Obama administration has claimed that the Authorization for Military Force (AUMF) provides the executive with the power to detain individuals whose relationship to Al Qaeda or the Taliban, "would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable."[132] Similarly, two top legal advisors to the State Department during the Bush administration have recently recognized that the existing international laws governing detention in conflicts with non-state actors are unclear and do not provide adequate guidance for states involved in such conflicts.[133] Thus, adopting the law of war model requires reasoning by analogy to the rules governing traditional international armed conflict.

However, the analogy to detention of prisoners of war in international armed conflict that the administration and courts have been operating on does not work for three fundamental reasons. First, as with any preventive detention scheme, wartime detention of enemy fighters is only justified as a departure from normal rules that only permit long term detention of an individual without trial where there is a strong showing of necessity.[134]

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130. *Id. at* 286 (Williams, C.J., concurring in part and dissenting in part) ("the plurality opinion may very well be correct that, under the traditional 'law of war', persons not affiliated with the military of a nation-state may not be considered enemy combatants."); *Id.* at 299 (Wilkinson, J., concurring in part and dissenting in part) (recognizing that traditionally, enemy combatants referred to soldiers of a nation state).

131. Al-Marri v. Spagone, 129 S. Ct. 1545 (2009).

132. Department of Justice Memorandum of March 13, 2009, at 7 (on file with the author).

133. Bellinger III, *supra* note 126 (Former Legal Advisor and attorney advisor to the State Department argue that new law should be developed to address detention in non-international conflicts). The International Committee for the Red Cross has also conducted a study of the changes in warfare that have occurred in the 60 years since the Geneva Conventions were signed, and identified numerous "gaps or weaknesses in the existing legal framework," including the detention of persons in non-international armed conflict. *See* Jakob Kellenberger, *Official Statement of ICRC: Strengthening Legal Protection for Victims of Armed Conflicts* (Sept. 21, 2010), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/ihl-development-statement-210910.

134. *See* David Cole, Out *of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 698 (2009) (preventive detention should only be available when the government cannot use the criminal justice system to prosecute a

In traditional international armed conflicts, that necessity exists because enemy soldiers have committed no crime or misconduct under national laws of either party to the conflict, nor in most circumstances will they have committed any violation of international law. Therefore there is no basis for detention except for that provided by the laws of war. For example, German soldiers captured during World War II had committed no crime under U.S. law and could not be prosecuted.[135] Soldiers captured during international armed conflict are detained not because they are criminals, nor because they are generally dangerous, but to prevent them from returning to the battle on behalf of the enemy during the course of war.[136]

Here, in contrast to the international wars the United States has fought in the past, anyone who could be detained as an Al Qaeda fighter under a reasonable test will also, almost by definition, have committed a crime under U.S. law. Therefore, unlike preventive detention permitted either domestically or pursuant to the laws of war authorizing the detention of enemy prisoners of war, the criminal justice system is theoretically available to prosecute and detain individuals found fighting for Al Qaeda. The fact that Al Qaeda terrorists can be prosecuted by the criminal justice system thus removes the linchpin characteristic of all the current examples of preventive detention.

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dangerous individual); *See also* Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice,* 2 HARV. NAT'L SEC. J. 85, 96 (2011) (characteristic of modern preventive detention schemes is that preventive "detention is only permissible to the extent necessary to *prevent* future harms"). Thus, all preventive detention policies hitherto recognized in the United States provide for the detention of individuals who cannot be tried by the normal judicial system because they have *committed no crime.* The Supreme Court has allowed the civil commitment of persons who are mentally ill and dangerous, but have committed no crime and therefore cannot be prosecuted. *See* Addington v. Texas, 441 U.S. 418 (1979). Similarly, U.S. law allows preventive detention in the form of quarantine to isolate a person with a dangerous disease who could not be prosecuted criminally. *See* O'Connor v. Donaldson, 422 U.S. 563, 586 (1975) (Burger, C.J., concurring). The Court has allowed detention without bail of persons who have been charged criminally and are deemed to pose a danger to the community or a risk of flight. *See* United States v. Salerno, 481 U.S. 739 (1987). Again, we permit preventive detention in that circumstance because the criminal justice system cannot instantaneously adjudicate criminal liability, so preventive detention is viewed as a necessary measure imposed until the criminal process can reach a conclusion.

135. PHILIPPE SANDS, FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 31 (2003).

136. Laura M. Olson, *Guantanamo Habeas Review: Are the D.C. District Court's Decisions Consistent with IHL Internment Standards,* 42 CASE W. RES. J. INT'L L. 197, 202 (2009) ("Captured combatants, simply because they are opposing combatants, are interned in order to prevent them from returning to the battlefield.").

The argument for preventive detention of Al Qaeda suspects, therefore, is not that it is theoretically impossible to criminally prosecute Al Qaeda terrorists, but rather that it is impractical, infeasible, or difficult to do so. Yet there is no solid evidence that it is impractical to prosecute terrorists in criminal courts.[137] Indeed, the evidence is to the contrary. For example, a well-documented report for Human Rights First, written by two former federal prosecutors, examines the actual experience of more than 100 international terrorism cases that have been prosecuted in federal courts over the past fifteen years.[138] The authors conclude that, "contrary to the views of some critics, the court system is generally well-equipped to handle most terrorism cases."[139]

However, the interagency task force established by the Obama administration in 2009 to review the status of the prisoners being held at Guantanamo concluded that "for many detainees at Guantanamo, prosecution is not feasible in either federal court or a military commission."[140] The task force gave two main reasons for this conclusion. The first was that "[w]hile the intelligence about them may be accurate and reliable, that intelligence, for various reasons, may not be admissible evidence or sufficient to satisfy a criminal burden of proof in either a military commission or federal court."[141] The Task Force did not identify "the various reasons" that such reliable and accurate evidence would not be admissible in federal court.[142] The fundamental question left unanswered by the Task Force is whether such evidence will stand up to the objective scrutiny that a federal court or traditional military commission would normally accord in a criminal proceeding.[143] Indeed, a review of the habeas cases such as that of Mr. Latif discussed above, yields grave doubts as to the Task Force's conclusion that the "intelligence" against those individuals who can be preventively detained but not prosecuted is in fact "accurate and reliable," and would meet a

137. *See generally* Jules Lobel, Preventive Detention and Preventive Warfare: U.S. National Security Policies Obama Should Abandon, 3 J..of Nat'l Security L. and Pol'y 341, 344-45 (2009) (for a review of the argument that it is practical to try terrorist suspects in Federal Courts).

138. Richard B. Zahel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, HUMAN RIGHTS FIRST (May 2008).

139. *Id.* at 5.

140. DEPARTMENT OF JUSTICE, *supra* note 105, at 22.

141. *Id.*

142. *Id.*

143. *Id.* at 23 (The Task Force did conclude that the "principal obstacles to prosecution in the cases deemed infeasible by the Task Force typically did not stem from concerns over protecting sensitive sources or methods from disclosure, or concerns that the evidence against the detainee was tainted.").

reasonable test requiring more than the "some evidence" test favored by judges in the D.C. Circuit.[144]

The Task Force review also concluded that many of the detainees could not be prosecuted because of "jurisdictional limitations", namely that there was no evidence that the detainee participated in a specific terrorist plot, and that they could not be charged with material aid to terrorism because of the statute of limitations and other jurisdictional concerns.[145] Again, it is unclear why, if the government has reliable, accurate, and credible evidence that a detainee played a "significant organizational role within al-Qaida," had extensive training and were "veteran jihadists with a lengthy involvement in the training camps in Afghanistan,"[146] it could not prosecute the detainee for conspiracy to commit terrorist acts even if there was no evidence tying them to a specific terrorist plot, and even if a material aid to terrorism prosecution was not jurisdictionally possible.

In sum, the arguments made by the Task Force seem vague, inconclusive, and somewhat contradictory. However, even if it is true that the Task Force could demonstrate that it is legally, as opposed to politically, unfeasible to prosecute some of the Guantanamo detainees, there are other detainees that the United States is currently holding without making that showing. The Task Force was not tasked with determining whether it is unfeasible to prosecute the 50 or so non-Afghan detainees being currently held by the United States military at Parwan in Afghanistan who were not captured on any battlefield.

Professor David Cole argues that military detention of Al Qaeda fighters is justified even if it is feasible to prosecute captured Al Qaeda fighters.[147] He has argued that "the fact that Al Qaeda is engaged in warfare that is itself a crime should [not] *restrict* the United States' options in defending itself."[148] For him, the United States' right to try Al Qaeda fighters for either war crimes or ordinary crimes does not mean that we should be "*required* to try them while the conflict continues."[149] But, as he recognizes, "any preventive-detention regime must be predicated on a showing that criminal prosecution *cannot* adequately

144. Worthington, *supra* note 51 (reviewing the Task Force's conclusions in light of the habeas cases then litigated).

145. DEPARTMENT OF JUSTICE, *supra* note 105, at 22.

146. *Id.* at 24.

147. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 711 (2009) (emphasis added).

148. *Id. See also* David Cole, *Closing Guantanamo: The Problem of Preventive Detention*, BOSTON REV. (Jan./Feb. 2009), *available at* http://bostonreview.net/BR34.1/cole.php.

149. Cole, *supra* note 147, at 731.

address a serious problem of dangerousness."[150] Therefore, it should be incumbent on those arguing for a wartime preventive detention system tied to Congress' authorization of force against the September 11 terrorists to demonstrate that the criminal courts cannot, as a practical matter, prosecute a significant number of detainees against whom it has clear and convincing evidence are in fact, Al Qaeda fighters. That it might be more costly or more difficult to do so is insufficient under Cole's initial premise that preventive detention is only justified where criminal prosecution "is not a viable option" to addressing a serious threat.[151] The government has thus far failed to make that showing.

Moreover, the detainees at Guantanamo and Parwan are not treated as typical prisoners of warfare, but instead are detained in conditions similar to those used to incarcerate dangerous criminals as opposed to prisoners of war.[152] While the Bush and Obama administrations imported some of the rules that stem from international warfare, such as the provision allowing each side to detain prisoners until the end of hostilities, they explicitly did not incorporate the international warfare rules providing that detainees were to be treated as prisoners of war under the Third Geneva Convention and detained in conditions of confinement consistent with that Convention.[153] Apparently those provisions of the laws of war were not applicable by analogy. That the government does not recognize the incorporation of the basic rules regarding prisoners of war, preferring to treat these prisoners as if they were dangerous criminals and not traditional prisoners of war, again suggests the inaptness of the international war model of detention designed to incapacitate enemy soldiers who have engaged in no criminal misconduct that merits punitive treatment.

The second distinction between the current conflict with Al Qaeda, the Taliban and associated forces, and a traditional international war which makes importing the rules developed in the latter context into this one difficult, is that in this case, unlike a traditional war, it is not relatively easy to determine who is an enemy soldier in an international conflict. Typically, prisoners captured in a traditional war are captured

150. *Id.* at 698 (emphasis added).

151. *Id.* at 697.

152. Chris Sands, *Prisons' legacy haunts Afghanistan*, THE NATIONAL (October 15, 2009), *available at* http://www.thenational.ae/news/world/prisons-legacy-haunts-afghanistan (quoting U.S. General Stanley McChrystal about prisons in Afghanistan: "Committed Islamists are indiscriminately mixed with petty criminals and sex offenders, and they are using the opportunity to radicalise and indoctrinate them.").

153. George J. Annas, *Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror*, 87 B.U. L. REV. 427, 451 (2007) ("It is the position of the United States that the Geneva Conventions do not apply to the prisoners at Guantanamo.").

on a battlefield, wearing uniforms, and there is no dispute that they are enemy combatants. That many detainees were captured in non-battleground situations wearing civilian clothes where the evidence that they are in fact enemy fighters is quite murky, suggests the need for far stronger procedural protections before they can be detained than for those captured in a traditional international war. While spies and other non-uniformed soldiers have traditionally been captured during international wars and either prosecuted or detained for the duration of hostilities, the general rules were developed with the battlefield and uniformed armies in mind.

As the former Legal Advisor and an attorney advisor to the State Department under the Bush administration have recognized, the procedures that ought to be required when someone is captured in a non-state, non-international conflict are different from those needed in an international conflict from which the basic rules on detention have been analogized. This is "because of the high risk of erroneously identifying individuals as members of non-state groups."[154]

As these former officials note, while the Third Geneva Convention contains a provision requiring a minimal process for detainees to determine whether they should be accorded prisoner of war status, the Geneva Conventions provisions governing non-international conflicts are silent on the process to be accorded detainees who claim they are innocent civilians. They write that:

> As with the question of who is subject to detention, rules from international armed conflict are inadequate to fill the gap. In international armed conflicts most combatants are detained without any prior process confirming that they are subject to detention. No such process is needed because most lawful combatants do not contest that they engaged in belligerent acts. Unlike nonstate fighters, lawful combatants benefit from prisoner of war protections linked to their status – a powerful incentive to admit to that status. Challenges would typically be futile in any event since combatants [in international wars unlike non-international wars involving nonstate actors] are so often captured in uniform, on the battlefield, in the course of belligerent acts.[155]

Thus, importing the rules of international warfare into the current conflict is inappropriate, where who can be detained and the process by

154. Bellinger III & Padmanabhan, *supra* note 126, at 221.
155. *Id.* at 222.

which they are detained are unclear under international law, and the circumstances of capture and detention demand more, not less, clarity.

Finally, and most importantly, the military preventive detention system now in place to detain al Qaeda and Taliban suspects is very likely to be permanent. Yet the basic international war rule that allows nations to hold prisoners until the end of hostilities contemplates detention of a limited duration. The military conflict with Al Qaeda has now been ongoing for at least 11 years and, despite the death of Bin Laden and other top leaders, shows no signs of ending any time soon. In virtually all other modern warfare – even civil conflicts between insurgents and governments – there is some prospect of a negotiated settlement ending the conflict. Here, there is none. Moreover, since Al Qaeda has morphed into a loose network of affiliated groups in far-flung nations, there seems little possibility of a definitive military victory over Al Qaeda, even if the United States were to achieve military success in Afghanistan and Pakistan or to negotiate some political settlement with the Taliban. Preventive detention in this circumstance therefore means the virtually permanent incarceration in harsh conditions of people who contest their status as belligerents and often are not captured in any visible battleground, but in civilian areas.

The specter of permanent preventive detention raises a question left unresolved in *Hamdi* and *Boumediene*. In *Hamdi*, the plurality recognized that, "if the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [that the President has detention authority under the law of war] may unravel."[156] Certainly, an unending, virtually permanent war against Al Qaeda and a far flung and amorphous decentralized network of "associated forces" throughout the world would seem to constitute practical circumstances "entirely unlike" the conflicts which informed the development of the laws of war. Indeed, if as the Obama administration claims, United States ground forces will leave Afghanistan in 2014, the "battlefield" that was important for *Hamdi's* plurality's conclusion that the President had detention power under the AUMF as informed by the laws of war, will have virtually evaporated. Instead, the "war" against Al Qaeda, the Taliban and associated forces may well amount to sporadic drone firings and other special operations launched against an assortment of groups and targets around the world associated with Al Qaeda. At that point, there may not be any "war" for purposes of the laws of war, and the detainees under that model would have to be released.

156. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion).

So too, in *Boumediene*, the Court continually emphasized the lengthy duration of the conflict with Al Qaeda and of the detentions of the Guantánamo prisoners, noting that "the cases before us lack any precise historical parallel."[157] The Court ended its *Boumediene* opinion by again emphasizing the potentially indefinite and permanent nature of the conflict against terrorism: "[b]ecause our Nation's military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury."[158]

There is broad recognition that the potentially permanent detention of suspected Al Qaeda and Taliban fighters raises a serious problem of potentially constitutional dimension. The most prominent solution urged is to terminate detention authority over individual fighters when the government concludes that they no longer pose a threat to the security of the state, as opposed to triggering the end of detention authority on the conclusion of hostilities.[159] The Obama administration has essentially taken this approach, providing for annual administrative reviews to determine when any particular individual becomes less dangerous so that he no longer requires detention.[160] Curtis Bradley and Jack Goldsmith argue that such individualized reviews are akin to re-conceptualizing the end of the conflict in terms of the individual rather than the non-state group.[161] It is also the approach taken in the Fourth Geneva Convention with respect to civilians who are detained during periods of armed conflict as a security threat, with the Convention requiring twice annual reviews of detention decisions of such civilians to determine when the

157. Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008).

158. *Id.* at 2277.

159. *See* Bellinger III & Padmanabhan, *supra* note 126, at 231.

160. *See* U.S. DEPARTMENT OF DEFENSE, *Guantanamo Detainee Processes* (Oct. 2, 2007), *available at* http://www.defense.gov/news/Sep2005/d20050908process.pdf (The Department of Defense defines an Annual Administrative Review as an "[a]nnual review to determine the need to continue the detention of an enemy combatant. The review includes an assessment of whether the enemy combatant poses a threat to the United States or its allies in the ongoing armed conflict against terrorist such as al Qaeda and its affiliates and supporters and whether there are other factors bearing on the need for continued detention (e.g., intelligence value). Based on that assessment, a review board will recommend whether an individual should be released, transferred or continue to be detained. This process will help ensure no one is detained any longer than is warranted, and that no one is released who remains a threat to our nation's security.").

161. Curtis A. Bradly & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2091-92 (2005).

threat they pose ends.[162] These reviews consider the detainee's past conduct, their level of leadership in the terrorist group, conduct during confinement, and age, health and psychological profile.[163]

The difficulty with this approach is the tendency for many administrative reviews in similar situations to become essentially meaningless. My experience with supermaximum prisons in the United States, where prisoners are placed in solitary confinement because they are believed to pose a serious threat to prison security and safety, strongly supports recognition of the problematic nature of these reviews. For many of these supermax prisoners, the periodic administrative reviews that they are accorded are meaningless, with prison officials simply saying either that the nature of the original misconduct was sufficiently egregious as to warrant continued placement in solitary confinement, or that they do not qualify for release.[164] Similarly here, detainees would be at the whim of military officials who could simply decide that a particular individual was either high level enough, or considered recalcitrant or an activist in the detention center, and not let him out, which is likely to occur.

The alternative is to question the whole framework of these military indefinite – likely permanent – detentions. Although detaining someone for several years while the conflict that they arguably were involved with rages may seem reasonable, it seems unreasonable to hold someone for the rest of their life based on what is often little evidence and contested facts without the protections of a legitimate trial.

Indeed, it is likely that eventually the Supreme Court will have to intervene to address the question left unanswered in *Hamdi* and *Boumediene*: does the Constitution permit the establishment of a system of essentially permanent military detention which cannot be viewed as authorized under the traditional laws of war?

III. EXPLAINING WHY THE BOUMEDIENE VICTORY HAS LED TO THIS BLEAK SITUATION FOR THE REMAINING GUANTANAMO DETAINEES

The situation painted in Parts I and II of this article illustrate a disconnect between the "landmark" victories the CCR and its co-counsel won in *Rasul* and *Boumediene* and the continued detention under harsh

162. Using the Fourth Geneva Convention suggests adopting the conceptual framework that these detainees are legally civilians – as the law of non-international conflict seems to suggest – and not combatants, as the Obama and Bush Administrations have argued.

163. Bellinger III & Padmanabhan, *supra* note 126, at 231-32.

164. Austin v. Wilkinson, 189 F.Supp.2d 719, 752 (2002).

conditions of prisoners held by the United States military. Guantanamo and Afghanistan. The D.C. Circuit and district courts have permitted the Executive to continue indefinite military detention at Guantanamo based on a weak evidentiary standard, and can provide essentially no meaningful relief even if a detainee wins their habeas claims. The Circuit has also permitted indefinite military detention at Bagram/Parwan with no judicial review whatsoever.[165] Congress has explicitly authorized military detention and hindered relief even for those detainees cleared for release or transfer to other countries.[166] The Supreme Court has refused to intervene for four years.[167] Why has this disconnect occurred?

Various scholars have offered explanations. These theories revolve around dichotomies between theory and practice, or process and substance, or rights versus remedies. For example, Professor Kim Scheppele writes in a recent article entitled "The New Judicial Deference" that *Boumediene* and other recent cases represent a "new sort of [judicial] deference" based on the dichotomy between principled victories and practical losses.[168] While the old judicial deference allowed the government to win national security or wartime cases through the judiciary's refusal to intervene, *Boumediene* represents a new deferential position where "governments win first by losing these cases on principle and then by getting implicit permission to carry on the losing policy in concrete cases for a while longer, giving governments a victory in practice."[169] The detainees got inspiring rhetoric while the government "got the facts on the ground."[170]

For Professor Scheppele, the contradiction between theory and practice isn't based on practical or political resistance to the Court's decision, but is contained within the judicial opinion itself, which integrates inspiring rhetoric paired with a lack of detail and instructions as to how to implement the decision. "The new judicial deference means that both sides win – with one side getting the right in theory while the other side gets the reality on the ground, each authorized by different aspects of the same judicial decision."[171] According to Scheppele, a wide gap exists "between suspected terrorists' legal gains and their unchanged

165. *Al Maqaleh v. Gates*, 605 F.3d 84 (2010).

166. Janet Cooper Alexander, *Jurisdiction-Stripping in the War on Terrorism*, 2 Stan. J. Civ. Rts. & Civ. Liberties 259, 289 (2006) ("Under the DTA, there is no habeas for complaints about conditions of confinement").

167. *Id.*

168. Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. L. Rev. 89, 93 (2012).

169. *Id.* at 93.

170. *Id.* at 91.

171. *Id.* at 158.

fates."[172] Her analysis also invokes the right/remedy dichotomy, claiming that the Court boldly articulated that the detainees have important rights, but "provided few immediate remedies."[173]

Professor Jenny S. Martinez draws attention to the Supreme Court and lower courts focus on process as opposed to substance in the "war on terror" cases in an attempt to answer the question posed by her client José Padilla,"[w]hy is it that litigation concerning the alleged enemy combatants detained at Guantanamo and elsewhere has been going on for more than six years and almost nothing seems to have actually been decided?"[174] According to Martinzez, the Court's procedural focus allowed it to delay resolution of controversial substantive claims, which may have practical advantages, but comes at a significant human cost to the detainees.

Closely related to Martinez's procedural/substance dichotomy, Professor Stephen Vladeck offers another duality to describe the Court's post-9/11 jurisprudence in terrorism cases – passive/aggressive behavior.[175] He claims that "by repeatedly asserting their authority only to routinely sidestep the merits, the Court has been neither passive nor active, but passive-aggressive," and argues that this approach has its distinct dangers.[176] Similarly, Professor Richard Fallon has echoed Martinez's argument, claiming that the "juxtaposition of the Court's assertiveness in upholding judicial jurisdiction with its reticence regarding substantive rights."[177]

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172. *Id.*

173. *Id.* at 91. Linda Greenhouse has noted the same gap between principle and facts on the ground when in a 2009 article she sought to tackle what she termed the 'mystery of Guantanamo Bay', asking "how can it be that nearly seven years after the first detainees arrived at the prison there – after numerous courtroom battles, the most significant of which resulted in defeats for the Bush Administration's position – not a single detainee has ever been released, by order of any court or any other body in a position of authority, against the wishes of the Administration? How is it, in other words, that after all this time, all this spinning of wheels and running place, nothing has happened?" *See* Linda Greenhouse, *The Mystery of Guantanamo Bay*, 27 BERKELEY J. INT'L L. 1, 2 (2009). Greenhouse attributes this disconnect to the interconnection of a hard line Executive position which radicalized the Court combined with an inherent judicial cautiousness which failed to understand that the Executive would not respond to gentle nudges.

174. Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008).

175. Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. Sidebar 122, 127 (2011).

176. *Id.*

177. Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 391 (2010).

Professor Vladeck has also articulated another related theory to help explain the disconnect between the Court's bold assertiveness in *Boumediene* and the paucity of the substantive rules it has developed to address the detainee situation. The Court, according to Vladeck, has acted mainly to preserve the Court's role and judicial power over these detentions, and not primarily in support of the detainees' rights.[178] Separation of powers considerations are paramount, and not rights.[179] From this perspective, *Boumediene* achieved what the Court really wanted: to inform the Executive that the Court had a role to play in this area, and the Executive could not operate totally outside the reach of the judiciary. As long as the judiciary had a role to play in the separation of powers scheme, the courts would interfere only minimally with the substantive policies that the Executive had put in place at Guantanamo.[180]

All of these explanations make sense and accurately describe the Court's detainee jurisprudence. However, something deeper is at work underlying the dichotomous jurisprudence that has boldly asserted a judicial role over the detainees, yet permitted a preventive detention scheme with only minimal substantive and procedural safeguards to be put in place at Guantanamo. The *Boumediene* contradictions reflect broader forces at work than just those involving the Guantanamo detainees, but are symptomatic of the general approach of domestic and foreign courts in this type of litigation.[181]

Consider the Canadian Supreme Court's decisions in the case of Omar Khadr, a Canadian citizen who was captured in Afghanistan by American forces and brought to Guantanamo at the age of 15.[182] Khadr's

178. Vladeck, *supra* note 175.

179. *Id.*

180. Stephen I. Vladeck, *Boumediene's Quite Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2111 (2009) (arguing that the injury the statute [removing habeas review] inflicted upon the role of the courts was at least relevant, if not central, to the constitutional analysis); *see also* Greenhouse, *supra* note 173, at 8-9.Greenhouse quotes an exchange between Supreme Court Justice Breyer and United States Solicitor General Olson at the Rasul argument that supports this view. Breyer expressed concern that the Bush Administration's position excluded the judiciary totally and led to unchecked executive power violative of the constitution's separation of powers restraints. He suggested to Olson that the Court could take jurisdiction and resolve the problem of unchecked power. Yet Justice Breyer held out "the possibility of really helping you with what you are most worried about ... by shaping the substantive right to deal with all those problems ... that you are worried about." Breyer's solution presaged what has in fact happened: allowing the Guantanamo prisoners to "get their foot in the door," but then working out the substantive rights to allow the government to do what it wants with some minimal protections in place. *Id.* at 8-9.

181. *See id.*

182. Canada (Justice) v. Khadr, 2008 SCC 28, para. 19 [2008] 2 S.C.R. 125 (Can.).

Canadian lawyers sought an order requiring the Canadian government to disclose documents relating to interviews conducted by Canadian officials at Guantanamo.[183] The Canadian government argued that the Canadian Charter of Rights and Duties did not apply extraterritorially.[184] A unanimous Canadian Supreme Court rejected that argument, holding that "if Canada was participating in a process that was violative of Canada's binding obligations under international law, the Charter applies to the extent of that participation."[185]

Two years later in 2010, the Canadian Supreme Court reiterated its previous holding in the Khadr case and issued declaratory relief that Canada had violated the Charter in participating in Khadr's detention.[186] Nonetheless, that assertive holding led to no relief for Khadr, who was detained at Guantanamo until the United States finally released him in 2012.[187] At the same time that the Canadian Court held that Canada had violated the Charter, it also reversed a lower court order requiring Canadian officials to seek Khadr's repatriation to Canada because of the incompleteness of the evidentiary record, "the limitations of the Court's institutional competence," and the need to respect the foreign policy powers of the Executive.[188]

Moreover, a subsequent case decided by the Canadian Federal Court of Appeal appeared to significantly limit the *Khadr* rulings.[189] In *Amnesty International Canada v. Canada*, a unanimous court of appeal distinguished Khadr in holding that the Charter did not apply during the armed conflict in Afghanistan to the detention of non-Canadians by the Canadian forces, nor to their transfer to Afghan authorities even if such transfer exposed them to a substantial risk of torture.[190] The Canadian Supreme Court refused to hear Amnesty International's appeal.[191]

The Canadian Court can thus be seen as paralleling the actions of the United States Supreme Court. First, it boldly asserted jurisdiction over a Guantanamo case.[192] Then, it offers no substantive relief, finally refusing

183. *Id.*
184. *Id.*
185. *Id.*
186. Canada (Prime Minister) v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44 (Can.).
187. *Omar Khadr leaves Guantanamo to return to Canada*, ASSOCIATED PRESS (September 29, 2012), http://www.guardian.co.uk/world/2012/sep/29/omar-khadr-guantanamo-canada.
188. Khadr, 2010 SCC 3, para. 46 [2010] 1 S.C.R. 44, para. 46 (Can.).
189. Amnesty Int'l Can. v. Canada (Chief of the Def. Staff), 2008 FCA 401, [2009] 4 F.C.F. 149 (Can.).
190. *Id.*
191. Amnesty Int'l Can. v. Canada, [2009] 1 F.C.R I (Can.).
192. *See id.*

to review lower court decisions declining to extend the Court's rationale beyond its limited holding and ,arguably, in contradiction to the central thrust of the Supreme Court's rationale.[193]

The Israeli Supreme Court has also operated in a similar fashion. In a celebrated, landmark opinion, the Supreme Court held that various forms of interrogation employed by the Israeli military against Palestinian detainees constituted cruel, inhumane, and degrading treatment.[194] Yet the practices of Israeli forces engaging in these inhumane interrogation practices have not ceased, despite numerous Palestinian complaints of continued torture.[195] Indeed, out of over 700 complaints lodged by Palestinian detainees alleging cruel and inhumane treatment subsequent to the Israeli Supreme Court decision, not one has resulted in any prosecution or disciplinary action taken against Israeli military officials.[196] Thus, the Israeli torture case illustrates a similar disconnect between soaring legal rhetoric and relatively unchanged facts on the ground. It provides yet another foreign example of similar passive/aggressive judicial behavior that the U.S. Supreme Court has exhibited in *Boumediene* and its sequel.

Perhaps even more directly relevant is the Supreme Court's decision in *Wilkinson v. Austin*, a case involving a challenge to Ohio's policies with respect to the detention of what Ohio termed the "worst of the worst" prisoners at its supermaximum prison, Ohio State Penitentiary (OSP).[197] The legal situation at Guantanamo has eerie parallels to the situation of prisoners housed in supermaximum solitary confinement facilities in the United States. In *Wilkinson* – a case I argued before the Supreme Court just a year after *Rasul* was decided – the Supreme Court held that prisoners in the Ohio Supermax had a liberty interest in avoiding placement in long-term solitary confinement at that facility because of the draconian nature of the confinement.[198] Therefore, they had to be given a due process hearing before being transferred to the

193. *See id.*

194. Public Committee Against Torture v. State of Israel, H.C. 5100/94 (Israel 1999).

195. PCATI Report, Accountability Still Denied: Periodic Update (January 2012)

196. *Id.* (reporting that as of the end of 2010, over 700 domplaints of torture had been lodged by Palestinians and that not one had led to a criminal investigation). More recently in August 2012, the Israeli Court decided a group of petitions brought by PCATI and other human rights organizations, criticizing the Israeli government's mechanism for investigating complaints of torture, but again providing no direct relief to the victims of torture and not requiring that any specific criminal investigation be initiated. *See* HCJ 1265/11, The Public Committee Against Torture in Israel et al. v. The Attorney General Petition for Granting of order nisi (Decision delivered Aug. 6, 2012).

197. Wilkinson v. Austin, 545 U.S. 209, 210 (2005).

198. *Id.* at 220.

supermax and required periodic reviews of their solitary confinement.[199] It also flows from the decision that since these prisoners had a liberty interest, they had a right to at least some judicial review of the State's decision to send them to the supermax.[200]

Yet, the Court went on to hold that the nature of the process to be provided could be minimal, with no witnesses provided and nothing like an actual trial or typical administrative hearing.[201] As in *Boumediene*, the *Wilkinson* Court announced a strong statement of the liberty interest involved and provided for some process and review, but limited its holding to the facts of the Ohio facility involved and required that only minimal process be accorded the prisoners.[202] The *Wilkinson* holding, in many respects, mirrors the Guantanamo litigation, for as Professor Scheppelle noted in that context, it contained within the opinion both important rhetoric on liberty (in this case the articulation of a liberty interest) and language that would limit the practical usefulness of the right involved. As a result, the Supreme Court *Wilkinson* decision was purely procedural – while the District Court had imposed certain substantive limitations of the prison officials' discretion to place prisoners in long-term solitary confinement for minor infractions, the Court of Appeals had already reversed that ruling.[203] Also, while the District Court's holding had in fact resulted in over 400 prisoners being released from solitary at the supermax, the Supreme Court's ruling has proved to have had only minor effect on prison officials' behavior in placing large numbers of prisoners in solitary confinement, irrespective of whether they have committed major misconduct in prison, and effectively warehousing prisoners in solitary without any real way out.[204]

For example, California has now held over 500 prisoners in draconian solitary confinement at Pelican Bay Penitentiary for over a decade with no end in sight.[205] Virtually all of these are gang members – the internal security equivalent of terrorists internationally – and they are being held in solitary confinement often simply because of the people they have associated with, the literature they read, the artwork they

199. *Id.* at 224.
200. *Id.*
201. *Id.*
202. *Id.* at 229.
203. *Id.*
204. James Ridgeway & Jean Casella, *Cruel and usual: US solitary confinement*, AL JAZEERA (Mar. 19, 2011), http://www.aljazeera.com/indepth/features/2011/03/201137125936219469.html.
205. *See* Ashker v. Governor Brown, Second Amended Complaint Case No. 4:09-cv-05796-CW (N.D. Cal. 2012).

possess in their cells, or the ideological views they hold, and not for any acts of violence they committed while in prison.[206]

Perhaps the best example of the broader contradictions contained in the Guantanamo litigation stems from *Brown v. Board of Education*. *Brown* was a great victory for the NAACP and the rights of African Americans to be free from segregated education, and has been hailed as "perhaps the most important judgment ever handed down by an American Supreme Court."[207] However, as the distinguished legal historian Paul Finkleman has noted, it is ironic that 50 years after the decision, "many scholars and some civil rights activists regard the decision as a failure."[208] Harvard civil rights professor Charles Ogletree concludes, " that fifty years after Brown there is little left to celebrate,"[209] while the great civil rights activist and professor Derrick Bell wrote that "[b]y dismissing *Plessy* without dismantling it, the Court seems to predict if not underwrite eventual failure."[210] Or as Bell put it, the passage of years has transformed the *Brown* ruling "into a magnificent mirage, the legal equivalent of that city on a hill to which all aspire without any serious thought that it will ever be attained."[211]

Indeed, twenty years ago, Professor Gerald Rosenberg's book, The Hollow Hope, set off a firestorm by arguing that *Brown* had virtually no effect in ending racial discrimination or racial segregation.[212] For Rosenberg, the failure of *Brown* to have any direct or even indirect effect on segregation was symptomatic of a broader inability of courts to be effective in producing social change.[213] Rosenberg concluded, "U.S. courts can almost never be effective producers of significant social

206. *Id.*

207. MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 15 (1998).

208. Paul Finkelman, *Civil Rights in Historical Context: In Defense of* Brown, 118 HARV. L. REV. 973, 974 (2005) (book review).

209. Charles J. Ogletree, Jr., *All Deliberate Speed: Reflections on the First Half Century of* Brown v. Board of Education, at XV (2004).

210. DERRICK A. BELL JR., IN WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 185, 199 (Jack M. Balkin ed., 2001).

211. *See* DERRICK BELL, SILENT COVENANTS, BROWN V. BD. OF EDUCATION AND THE UNFILLED HOPES FOR RACIAL REFORM 4 (2004); *see also Id. at* 6 ("Brown brought about transformation without real change").

212. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d. ed. 1991).

213. *Id.*

reform."[214] To him, "courts act as 'fly paper' for social reformers who succumb to the 'lure of litigation'."[215]

On the fiftieth anniversary of *Brown*, Professor Michael J. Klarman published a massive study of the Supreme Court's role in ending racial discrimination, also minimizing the effects of the decision.[216] For Klarman, the Supreme Court played a relatively minor role in changing race relations in the country.[217] The Court's constitutional interpretation generally reflects the social and political climate of the times, and racial change was coming in the 1950s irrespective of *Brown*.[218] As a legal decision, Klarman argues that *Brown* failed to accomplish much, and that its main achievement was to radicalize Southern politics, resulting in white backlash and violence against civil rights activists, which ultimately rallied national opinion behind civil rights.[219]

Rosenberg and Klarman's books produced a vigorous debate about the role of *Brown* and of judicial review more generally.[220] For example, various scholars have disputed Rosenberg's view that Brown accomplished nothing and that litigation is counterproductive, correctly pointing out the indirect effects of *Brown*.[221]

Yet it is indisputable that the *Brown* decision itself produced little change in the decade that followed it. The Court boldly proclaimed that segregation of schools by race was unconstitutional but provided no remedy in the decade after *Brown*.[222] The Supreme Court intervened sparingly between 1954 and the passage of the 1964 Civil Rights Act,[223]

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214. *Id.* at 422.

215. *Id.* at 427.

216. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

217. *Id.*

218. *Id.* at 5-6, 468.

219. *Id.* at 385.

220. *See, e.g.*, Finkelman, *supra* note 208, at 1018 ("it is impossible to imagine the civil rights revolution having succeeded so quickly in sweeping away de jure segregation without Brown"); *see also* LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE (David A. Schultz ed., 1998) (evaluating Rosenberg's thesis and in part criticizing it); Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763 (book review 1993) (criticizing Rosenberg's thesis); Stephen L. Carter, 90 MICH. L. REV. 1216, 1221 (1992) (Rosenberg "gives short shrift to the [Brown] decision's vital importance as a confidence building device for those who were fighting for reform); Brendon Swedlow, *Reason for Hope? The Spotted Owl Injunctions and Policy Change*, 34 LAW & SOC. INQUIRY 825, 849 (2009) ("the owl litigation shows that US courts can produce significant policy change").

221. *Id.*

222. ROSENBERG, *supra* note 212.

223. The Court issued only three full opinions in the area of school segregation in those ten years, despite the massive resistance of the South to integration. The most

As of the passage of that Act in 1964, *Brown* had resulted in only 2.3% of Black Children in the south attending schools with whites.[224] It was only after Congress and the President implemented strong measures supporting southern school desegregation, that the Southern resistance to integrated schools was broken.[225]

Perhaps by mandating the end only to State imposed intentional discrimination, Brown can be viewed as legitimating the ongoing structural, de-facto, societal discrimination that continues to plague our country.[226] As Professor Louis Michael Seidman has written, Brown "served [to] legitimate current arrangements."[227] Indeed, Brown is now cited by the Court to reverse at least some of the integration that has occurred over the past several decades, with some justices arguing that any affirmative action or the use of race to integrate society runs afoul of the race neutrality imposed by Brown.[228]

The broader explanation for the disconnect between the Court's great pronouncements in *Boumediene* and the judiciary's failure to provide meaningful review or relief to many Guantanamo detainees and its legitimation of a system of preventive detention must be found not in specific judicial doctrine, or the Court's procedural versus substantive rulings, or even in the Court's inclination to preserve its own role as opposed to the detainees rights. Rather, the contradictory legacy of *Boumediene* and *Rasul* thus far is more fundamentally the result of a deep-rooted limitation of rights-based litigation, for rights cannot be divorced from politics nor can litigation be viewed independent of the social and political context in which it is brought.

The Guantanamo litigation is simply one more illustration of that broader perspective. From this perspective, the cause of the failures in the Guantanamo litigation does not reside in any court announced doctrine, or the recalcitrance of the D.C. Circuit, but in the consensus of

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important of these, *Cooper v. Aaron*, upheld the role of the Court and required southern communities to obey the decisions of the Court as part of the supreme law of the land. ROSENBERG, *supra* note 212, at 43-44.

224. Dunn, *Title VI, the Guidelines, and School Desegregation in the South*, 53 Va. L. Rev. 42, 44 n.9 (1967).

225. *Id.*

226. Richard Thompson Ford, *Brown's Ghost*, 117 HARV. L. REV. 1305, 1306 (arguing that *Brown* didn't accomplish what most American's believe it did: "What happened (or didn't)? The simple answer is that a lot more than de jure discrimination was, and tragically still is, keeping the races segregated. Many private individuals, families, and institutions of civil society desired and still desire segregation; deprived of direct state support, they found other means for perpetuating it.").

227. Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 717 (1992).

228. Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 778 (2007).

the national security elites and the three branches of government that we need a preventive detention scheme to continue to hold captured Al Qaeda and Taliban suspects where prosecution might be difficult. This consensus has been challenged by human rights groups, but not by any grass roots movement of the American people, who generally do not seem particularly concerned by what is happening now at Guantanamo or at the other main detention center at Parwan, Afghanistan. Joseph Margulies and Hope Metcalf, who were counsel in the detainee cases, have reached a similar conclusion. In an important article, they argue that legal scholars and lawyers had a flawed understanding of the role of litigation and the courts in response to the Bush administration's "war on terror" policies.[229] The legal academy erroneously focused "on what Stuart Scheingold called 'the myth of rights' – the belief that if we can identify, elaborate and secure judicial recognition of the legal 'right,' the political structures and policies will adapt their behavior to the requirements of the law and change will follow more or less automatically."[230] For them, the explanation for what the courts have done or failed to do in the post-9/11 context must be grounded in the political realities of our time, not in doctrinal or structural arguments.[231]

Indeed, as various scholars have noted, the confluence of a number of political factors in 2009 through 2010 underlay the failure of Obama to close Guantanamo and the consolidation of a wartime preventive detention regime there.[232] The Republicans in Congress and former Bush administration officials waged a concerted pushback against any attempt to close Guantanamo, and more broadly to move away from the military detention model.[233] Obama and his advisors did not vigorously contest these moves, wanting to appear strong on national security and fighting terrorism.[234] Indeed, on certain issues such as the moratorium on transferring Yemeni detainees, the Obama administration acted even before Congress did. During this critical juncture, polls of the American people showed that support for closing Guantanamo had plummeted from a majority of the population when Obama was elected, to less than 40% a year later.[235] While the Court's procedural, jurisdictional decisions in *Rasul* and *Boumediene* permitted the consolidation of the current system of preventive detention at Guantanamo, the political context of

229. Marguilies & Metcalf, *supra* note 7, at 437.
230. *Id.*
231. *Id.*
232. *See, e.g.*, Frakt, *supra* note 20.
233. *Id.*
234. *Id.*
235. *Id.*; *see* Marguilies & Metcalf, *supra* note 7.

the last four years is what fundamentally underlies its approval by the courts.

IV. *RASUL*, *BOUMEDIENE* AND THE LEGITIMATION OF PREVENTIVE DETENTION

The great legal paradox of our time that Jack Goldsmith has claimed to uncover thus appears not so paradoxical, unique, or great at all. Indeed, this paradox reflects the contradiction of much public interest, law reform litigation, including *Brown v. Board of Education,* and a host of other important decisions. Just as the CCR's Guantanamo litigation may have served to legitimate a system of wartime preventive detention and strengthen the national security state, *Brown* undoubtedly can be argued to have legitimized continued societal and non-intentional "neutral" policies that perpetuate and reinforce a racially unequal and divided society. So too, one can view CCR's and the ACLU's *Austin v. Wilkinson* litigation, which successfully imposed due process restrictions on Ohio's transfer of prisoners to supermax facilities, as possibly helping to legitimate prolonged solitary confinement,[236] which the litigators who brought that case opposed. Moreover, as some of the examples set forth in part III illustrate, litigation often results in a disconnect between the rights recognized by the court and the realities on the ground, leading the judicial decision to serve in effect as cover for the continuation of the challenged practice.

What Goldsmith uncovered is not a great paradox unique to the Guantanamo litigation, but rather the limitations and contradictions of law and litigation as an instrument of social change. That does not mean that the CCR's litigation failed or that it should not have been brought. It simply requires a recognition that litigation is constrained by political and social reality, and that as successful as the CCR's litigation was, it was always unlikely to produce the result the lawyers were really seeking without a dramatic change in the political climate. As Joe Margulies puts it, even though *Rasul* was a "failure," "there was no choice but to litigate.... His mistake, for which he takes sole responsibility, was to believe that law, in an intensely legalistic society was enough."[237]

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236. Wilkinson v. Austin, 549 U.S. 209, 229 (2005) (For example, Justice Kennedy's opinion in *Wilkinson v. Austin* suggests that for at least some prisoners, prolonged solitary confinement in a supermax facility might be the State's only alternative.).

237. *See* Marguilies & Metcalf, *supra* note 7, at 471.

A few years ago, I wrote a book titled Success Without Victory, and a series of law review articles on similar themes.[238] This scholarship looked at losing cases in American history and argued that even if the court battle resulted in a legal "loss," the litigators and movements they represented often used the litigation to achieve some political success. My work drew on the writing of social scientists such as Michael McCann, Stuart Schiengold and Joel Handler, who argued that while judicial decisions by themselves rarely lead to social change, the indirect effects and uses of litigation may be its most important aspects for social movements seeking change. This social science scholarship argues, in the words of one scholar, "although litigation by itself may not always produce immediate and sweeping results, it can function as part of an effective political strategy for achieving social reform."[239]

Several points emerge from this scholarship that are relevant to the Guantanamo litigation. First, the legal battle cannot be isolated from the political process. Losing litigation can have an important effect on that process, by engendering favorable publicity, by highlighting injustices or by providing leverage to supplement other tactics and strategies. So too, winning litigation must be combined with a political movement, because the litigation alone often does not produce the change the litigants desire.

Second, the line between success and failure, winning and losing is not as clear as American law and culture pretends it is. Losing cases often have successful outcomes, and winning cases can often be viewed as failures through some lens.

Third, the struggle for justice is a long road, and victory, success, losing, and defeat cannot really be understood except in the long trajectory of history. Americans tend to have a very short attention span and view victories and defeats, as well as the weakening or strengthening of national security, through a short-term lens.

Finally, and perhaps most importantly, one crucial aspect of many losing legal battles is that they contributed to and helped inspire what I term a "culture of resistance" or a "culture of struggle."[240] This culture of

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238. *See generally* JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA (2003) [hereinafter SUCCESS WITHOUT VICTORY]; Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477 (2004); Jules Lobel, *Losers Fools and Prophets, Justice as Struggle*, 80 CORNELL L. REV. 1331 (1995) [hereinafter *Losers Fools and Prophets*].

239. SUSAN GLUCK MEZEY, PITIFUL PLAINTIFFS: CHILD WELFARE LITIGATION AND THE FEDERAL COURTS 5-6 (2000).

240. *See* SUCCESS WITHOUT VICTORY, *supra* note 238, at 267 (these litigators' "contribution to a culture of resistance to injustice provides the essential meaning of their actions"); *see also Losers Fools and Prophets, supra* note 238, at 1336 (losing efforts contribute to a "culture of struggle").

resistance uses law and litigation as one method of resisting injustice; what is critical is not the outcome, rather it is the decision to resist by whatever means are available. Often, as in the CCR's Guantanamo litigation, law was perhaps the most viable means of resistance available given the hostility of the political process.

Just as losing cases can have a certain success, the Guantanamo litigation also reminds us that victorious cases have their failures. What both of these dialectical opposites – success without victory, or victory coexisting with failure – illustrate is the complex, contradictory, and nuanced reality in which litigation subsists. Goldsmith's great paradox of our time only constitutes one aspect of this larger reality.

Goldsmith's failure to recognize the general contradictory and complex nature of law and reality leads him to erroneous conclusions. First, he elevates the judicial role by suggesting that the courts played a major role in legitimating the current system of preventive detention. In fact, while the lower courts have indeed upheld wartime preventive detention for Al Qaeda suspects, the Supreme Court has not, but has acquiesced in the current state of affairs by not taking any cases for review. Moreover, President Obama's speech in May 2009 set forth the necessity for preventive detention for some of the Guantanamo detainees, which meant that the basic policy underlying Guantanamo would continue even if the place of detention was changed.[241] That speech was given before the courts upheld preventive detention for Al Qaeda detainees.

Goldsmith is correct that because of CCR's litigation, the Executive detention policies have been subjected to some aspects of the rule of law, which did play a significant role in legitimating them. Yet undoubtedly, the Bush administration and certainly the Obama administration would have been forced by political pressure to set up some system of hearings to review the detainees' status, which would have accorded the detentions more legitimacy than existed in 2002. For example, even though the D.C. Circuit held that detainees held in Afghanistan have no access to habeas corpus, the administration has claimed to have strengthened the procedural protections for the detainees held there in an attempt to legitimize the detentions. Contrary to Goldsmith's analysis, the continued detention of 86 prisoners now at Guantanamo, who the Executive branch agrees should be transferred consistent with U.S. interests but are still imprisoned there, cannot be viewed as legitimate. This detention is the subject of continuing criticism in the media and

241. President Barack Obama, Remarks by the President on National Security at the National Archives (May 21, 2009).

elsewhere.[242] This injustice continues not because of judicial legitimation, but because the political branches have stymied their release and there is not sufficient political opposition among the population to successfully challenge the detentions.

Second, Goldsmith's view takes a short term perspective on the situation at Guantanamo. Enormous contradictions still abound there. While the current situation allows the Executive to detain people he believes are dangerous (and some who even the administration admits are not particularly dangerous, such as Mr. Latif), in the long term, pressure will undoubtedly build both in the courts and in the political arena to address those contradictions. For example, if United States forces do withdraw from Afghanistan in 2014 and large scale fighting involving the United States ends, the continued detentions of prisoners will be increasingly untenable under a traditional law of war model, and will take on a greater look of permanence. In that context, the Supreme Court may have to confront the questions left open in *Hamdi* and *Boumediene* about the outer limits of the Executive detention power. The answer it gives may not be one that Goldsmith and other supporters of Executive detention power consider to be supportive of the national security interest of the United States. CCR's litigation has started a process of engaging the courts on this issue; at this time the endpoint in that process cannot be predicted nor may it turn out in the long run to legitimate Executive power.

Finally, and most fundamentally, Goldsmith ignores the role of the *Rasul/Boumediene* litigation in aiding resistance to unjust detention policies. Goldsmith apparently cabins such resistance into the box of executive accountability, arguing that pressure on the Executive Branch forces it to be more accountable. However, resistance also contains the possibility of challenging the key national security policies that the Executive and Congress support, and undermining those policies. By helping to create a culture of resistance to these unjust policies, the CCR cases in the long term may well undermine and not legitimate a national security framework that is at odds with basic human rights, democratic values, and a peaceful world order. Over the long term, these cases are likely to aid resistance to the national security state and undermine its legitimacy, an effect Goldsmith refuses to recognize.

While Goldsmith is inaccurate in his view that the main role of CCR's litigation has been to strengthen the national security state, the limitations of law, rights, and litigation that underlie Goldsmith's

242. HUMAN RIGHTS WATCH, LETTER TO SECRETARY OF DEFENSE LEON PANETTA (2012), *available at* http://www.hrw.org/news/2012/04/09/letter-secretary-defense-leon-panetta-repatriate-or-resettle-detainees-cleared-trans.

analysis have important implications for how litigators should litigate these cases and how scholars should analyze them. Margulies and Metcalf argue that an understanding of the limitations of rights-based litigation requires that we "re-imagine" our intellectual endeavor and "knock law from its lofty perch;" presumably litigators "should be more attuned to the limitations of the judiciary, and mindful of the complicated tendency of narratives to generate backlash and counter-narrative."[243] While they are unclear exactly what this means for litigators, they argue that the "ability to fashion the superior legal argument is most useful insofar as it increases the value for the political resource for one narrative or another."[244] This suggests that litigators must view their litigation not simply in terms of the courtroom battle, but as a tool for impacting the political debate.

Perhaps the most important insights can be gleaned from Professor Muneer Ahmad's work. Ahmad represented Omar Khadr for a time before the Bush Military Commissions, and comes to a similar conclusion as Margulies and Metcalf. According to Ahmad, "the work of rights is important but limited ... [and] the mere existence of rights is not enough to do justice."[245] Ahmad disputes the view of the Guantanamo litigation held by some commentators and litigators as transformative – transforming the law and bringing about justice. He argues, "that instead of expecting rights-based legal contest at and around Guantanamo to produce transformative results, we might better understand it as a form of resistance to dehumanization."[246]

Ahmad's perspective is similar to the one I expressed in Success Without Victory, that the key point of much social justice litigation is to resist oppression and not simply to get a judicial recognition of rights. In this way, Ahmad's perspective is very different from the "rule of law" viewpoint that was common amongst the lawyers involved in the habeas Guantanamo petitions.[247] Ahmad analogizes the rights-based litigation of lawyers with the hunger strikes of prisoners – claiming that they may be more alike than dissimilar.[248] Both serve not to transform Guantanamo or to establish the rule of law there, but rather "as resistance, a way of not necessarily stopping the violence of the state, but of making it more

243. Margulies & Metcalf, *supra* note 7, at 471.

244. *Id.* at 464.

245. Ahmad, *supra* note 5, at 1686.

246. *Id.* at 1687.

247. *See, e.g.*, Laura Fletcher, *Alexis Kelly and Zulikah Aziz, Defending the Rule of Law, Reconceptualizing Guantanamo Habeas Attorneys*, 44 CONN. L. REV. 617, 668 (2012) (asserting that "the Guantanamo bar sought to establish procedural rights for detainees as part of a needed defense of the rule of law").

248. Ahmad, *supra* note 5, at 1760.

costly. Rights claims can be understood as a domesticated hunger strike, a rhetorical, abstracted, and comparatively unmessy form of engaging state power."[249]

Professor Ahmad and I agree that there are several benefits from perceiving court challenges such as the Guantanamo litigation as resistance centered rather than transformative. First, it allows the lawyer to take a longer term approach to litigation, viewing the litigation not simply to achieve a specific transformative decision, but rather to commit the lawyer and client to a "long-term oppositional stance, and a set of daily practices of objection and contravention."[250] Second, it provides a broader political and social context for particular litigation over specific rights. In general, such a resistance frame looks at the litigation as one aspect of a broader political and social struggle whose victory might be aided by the court but will require the sustained effort of a resistance movement. Such a long-term resistance perspective will provide the psychological sustenance that will aid the lawyers and clients in preserving over legal defeats and political defeats. Finally, by acknowledging the contradictions contained in the litigation process, a resistance perspective also aids in countering the almost inevitable legitimating function of the litigation.

Ultimately, various scholars, litigators, and media outlets drew important lessons from the CCR's Guantanamo litigation. *The New York Times'* take on the CCR's victory in *Rasul* was reflected in its story a few days after that case was decided, headlined "Scrappy Group of Lawyers Shows Way for Big Firms."[251] For the *Times* and many others, the key lesson seemed to be that a small, "scrappy" group of lawyers could take on the Executive, and fighting almost alone could win. As the article points out, at the beginning the CCR felt "very isolated," and the courtroom struggle seemed hopeless.[252] However, they did win, despite daunting odds, and then the big law firms were beating down the doors to become involved in the habeas litigation. By taking the risk of losing, by fighting what appeared to be a hopeless battle, the CCR was able to win an astonishing victory.

Goldsmith's lesson is, of course, far more pessimistic. Yes, the CCR won a great victory, but it lost the war. Its landmark victories in *Rasul*

249. *Id.*

250. Id. at 1762.

251. Adam Liptak & Michael Janofsky, *Scrappy Group of Lawyers Shows Way for Big Firms*, N.Y. TIMES, June 30, 2004, at A14, *available at* http://www.nytimes.com/2004/06/30/world/threats-responses-advocates-scrappy-group-lawyers-shows-way-for-big-firms.html.

252. *Id.*

and *Boumediene* simply legitimized policies with which the human rights community fundamentally disagreed.

This Article draws a different lesson than that of *The New York Times* article and Goldsmith. While the *Times* story does express the important lesson that one can fight for justice despite great odds against success and sometimes win, the more significant point is that it is important to resist injustice despite the ultimate outcome. Whether one wins or loses, and how one defines success or failure is obviously important, but not decisive. It is the act of resistance – whether by filing a lawsuit, demonstrating in the streets, protesting before Congress, or engaging in a hunger strike – that over the long term will contribute to a culture of resisting oppression which has the potential to topple dictators, undermine an undemocratic national security state, or transform an unjust society.