Keeping Liberty At Bay

How the United States' Guantánamo Bay Detention Facility Violates Detainees' Rights by Limiting Habeas Corpus Protections and How a 1979 Supreme Court Case Can Provide a Solution

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"Enhanced interrogation" techniques included shackling a detainee in stress positions and confined spaces, prolonged sleep deprivation, and 83 episodes of waterboarding. During one waterboarding session, a detainee—Zubaydah—"became completely unresponsive, with bubbles rising through his open, full mouth." He described the experience as follows: "It felt like an eternity, to the point that I found myself falling asleep despite the water being thrown at me by the guard[.]"[1]

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[1] Eliza Relman, *A Guantánamo Bay Detainee's Drawings Show the Brutal CIA Torture He Endured at a Secret US-run Prison in Thailand*, INSIDER (Dec. 15, 2019, 2:09 PM), https://www.businessinsider.com/guantanamo-detainee-drawings-cia-torture-2019-12.

INTRODUCTION

Controversy and constitutional concerns have enshrouded the United States detention facility at Guantánamo Bay, Cuba since its inception in 2002. Guantánamo Bay Detention Camp was established after President George Bush declared war on terrorism in the aftermath of the 9/11 terror attacks.[2] The American Civil Liberties Union ("ACLU") opined that the detention camp was "[o]riginally intended to be an 'island outside the law' where terrorism suspects could be detained without process and be interrogated without restraint."[3] Secrecy, suspension of habeas protections, and isolation of prisoners have culminated in creating the perfect storm of human and constitutional rights violations. This article illuminates how American thirst for retribution through warfare tactics has historically overshadowed the very liberty principles on which the nation was founded.

Further, this comment explores the facility's constitutional violations in the context of American habeas corpus history and jurisprudence. It analyzes how habeas corpus rights in America merge

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[2] Mia Bristol, *The History of Guantánamo Bay*, PANORAMAS SCHOLARLY PLATFORM (Feb. 6, 2020), https://www.panoramas.pitt.edu/news-and-politics/history-guant%C3%A1namo-bay.

[3] *Guantánamo Bay Detention Camp*, ACLU, https://www.aclu.org/issues/national-security/detention/guantanamo-bay-detention-camp.

with the Suspension Clause,[4] and how precedent from *Bell v. Wolfish* can be used to solidify constitutional protections.[5] Constitutional extensions and limitations of habeas corpus in federal and state courts present the historical legislative context for subsequent clashes in the Judiciary. Legislative enactments, such as the Antiterrorism and Effective Death Penalty Act ("AEDPA"), are relevant to the analysis of American habeas corpus history as discussed below. Additionally, the case law on habeas corpus petitions lays the framework for the jurisdictional setup of the Guantánamo Bay Detention Camp.

Part I of this article lays out the factual matrix behind the suspension of habeas corpus relief and other international human rights violations in the Guantánamo Bay. Part II discusses the historical context for how the Guantánamo Bay violations fit into American constitutional and habeas history and jurisprudence. It then provides a summary for the Suspension Clause and its operation. Part III assesses how the Bush Administration's aggressive position in federal courts significantly diminished many constitutional protections, including habeas corpus. Part IV examines the use of *Bell v. Wolfish* as a vehicle to regain constitutional protections of, and provide more humane conditions for, the detainees, as well as the American conscience.

I. THE FACTUAL BACKGROUND BEHIND THE SUSPENSION OF HABEAS CORPUS RELIEF

The Guantánamo Bay Detention Camp is a U.S. military prison facility within the larger U.S. naval base located in southeast Cuba, an area that is subject to United States and Cuban control.[6] The United States assumed control over some Cuban lands in 1903 as a prize for assisting Cuba gain independence from Spain.[7] Established by the Bush Administration in 2002, the detention camp is a symbol of the United States' approach to the war against terrorism as a direct result to the 9/11 terrorist attack.[8]

At its establishment, the facility's officially-stated purpose was to detain high-risk persons, interrogate detainees, and try the detainees for

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

[5] 441 U.S. 520 (1979).

[6] Bristol, *supra* note 2.

[7] *Id.*

[8] *Id.*

war crimes.[9] Initially, the detainees from countries associated with the War on Terror were classified as enemy combatants.[10] This designation by the Bush Administration allowed for the detention of prisoners within the camp without the Geneva Convention's protection.[11] The Geneva Convention and its Protocols generally protect war prisoners from inhumane treatment, torture, assaults upon personal dignity, and execution without judgment.[12] They also grant the right to proper medical treatment and care.[13] I argue, alongside the ACLU, that the Guantánamo Bay facility's actual purpose was indeed to avoid the protections of the Geneva Convention and circumvent the most basic protections of the United States Constitution. In fact, the Guantánamo Bay facility has always been, and continues to be, a Constitution-free zone.[14]

Although the Obama Administration issued a directive to shut down the facility in 2009, it remains infamous for multiple human rights violations of domestic and international law, including torture, indefinite and illegal detention, unfair trials, denial of counsel, sexual degradation, and religious persecution.[15] The detention facility held most of the detainees without any trials since its establishment in 2002.[16]

A combination of the legislative and judicial determinations created the question of whether the facility is within the jurisdiction of American courts, which has been one of the determining factors governing habeas corpus procedures afforded to the camp's detainees. *Ex parte Quirin* and *Johnson v. Eisentrager* gave legal precedence for the denial of habeas corpus rights by claiming they were in the jurisdiction of military courts and not civilian courts.[17] The Bush Administration's conservative-majority Supreme Court campaign against habeas protections, in cases such as *Boumediene v. Bush*, created the appearance

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[9] *See Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*, HUM. RTS. WATCH (July 12, 2011), https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees#.

[10] *Id.*

[11] Remarks by Walter Ruiz, 108 ASIL PROC. 200 (2015).

[12] *Geneva Conventions and their Additional Protocols*, CORNELL L. SCH. LEGAL INFO. INST. https://www.law.cornell.edu/wex/geneva_conventions_and_their_additional_protocols.

[13] *Id.*

[14] Remarks by Walter Ruiz, *supra* note 11.

[15] *See The Guantánamo Docket: A History of the Detainee Population*, N.Y. TIMES, https://www.nytimes.com/interactive/projects/guantanamo (last visited Nov. 14, 2020).

[16] *Id.*

[17] *Ex parte* Quirin, 317 U.S. 1 (1942); Johnson v. Eisentrager, 339 U.S. 763 (1950).

that habeas protections for detainees were all but erased.[18] Other Supreme Court decisions, however, may have strengthened the right to a writ of Habeas Corpus.[19]

II. A BRIEF HISTORY OF HABEAS CORPUS

The writ of habeas corpus requires a detainee's holder to provide a court with sufficient reason for the detainee's incarceration. A habeas corpus petition is a dispute of the legality of a prisoner's detention but without consideration for their innocence or guilt.[20] Habeas corpus protection was originally found in English common law and translated into Anglo-American jurisprudence.[21] In the United States, habeas corpus protections are found in the Constitution, statutes, and case law.[22] The Founding Fathers provided a limit on the application of habeas corpus protections in the Suspension Clause, allowing the right to be suspended solely by Congress in time of national emergency.[23]

The Constitution itself does not expressly define the parameters of the habeas corpus right in the Suspension Clause, which provides: "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion of Invasion the public Safety may require it."[24] However, the Supreme Court later recognized the Writ of Habeas Corpus as a fundamental instrument of justice and defined the scope of its application.[25]

In 1789, Congress accorded the federal courts leverage to grant habeas corpus relief to convicts in federal custody or under federal jurisdiction.[26] However, in 1807, the Supreme Court found that federal courts had no authority to grant habeas corpus relief to state or local

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[18] Boumediene v. Bush, 553 U.S. 723 (2008).

[19] Bell v. Wolfish, 441 U.S. 520 (1979); *See* Emily Hartz, *From Milligan to Boumediene: Three Models of Emergency Jurisprudence in the American Supreme Court*, 3 BALTIC J. L. & POL. 69 (2010).

[20] *Habeas Corpus*, CORNELL L. SCH. LEGAL INFO. INST. https://www.law.cornell.edu/wex/habeas_corpus.

[21] *Id.*

[22] *Id.*

[23] AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTÁNAMO BAY 6 (2019).

[24] U.S. CONST. art. I, § 4, cl. 2; *Jurisdiction: Habeas Corpus*, FED. JUD. CTR., https://www.fjc.gov/history/courts/jurisdiction-habeas-corpus (last visited Dec. 9, 2020).

[25] *Id.*

[26] *Id.*

prisoners as Congress lacked such legislative authority.[27]

In the Force Bill Act of 1833, Congress extended federal habeas corpus authority, giving federal courts the authority to grant habeas corpus relief to convicts in state custody when their claims were based on federal law.[28] This Act envisioned the possibility that South Carolina would jail federal revenue officers attempting to reinforce tariff laws.[29] Instead, it was used to free federal marshals held by state authorities as they enforced the Fugitive Slave Act.[30]

Congress again extended federal habeas corpus authority in 1842, allowing the federal courts to grant habeas corpus petitions to foreigners held by state governments if their actions were informed by the authority of their home governments.[31] This Act was in response to a Briton being held by New York state authorities for his attack on an America ship.[32]

In 1859, the Supreme Court held that state courts had no authority to grant habeas relief to a federal detainee being held in violation of the Fugitive Slave Act.[33] Furthermore, the Court determined that state courts had no authority to grant habeas corpus relief under *any* situation against a federal court.[34] The Civil War saw a period of extended abuses of habeas corpus rights by the Lincoln Administration.[35] President Lincoln unilaterally suspended habeas corpus rights first for arrests made along military transport lines in different states and later to arrests relating to military crimes in all states.[36] In *Ex parte Merryman*, Chief Justice Taney found that the power to entirely suspend habeas corpus rights was held only by Congress, subject to the Suspension Clause, but could not compel the President to obey the decision.[37] During the Civil War, the Lincoln

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[27] *Id.*

[28] *Force Act (1833)*, OHIO CIV. WAR CENT. https://www.ohiocivilwarcentral.com/entry.php?rec=1512 (last visited Dec. 11, 2020).

[29] Marc Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State* Prisoners, 70 TULANE L. REV. 1, 15–18 (1995).

[30] *Id.*

[31] *Id.* at 9.

[32] PATRICIA BAUER, FORCE BILL, UNITED STATES [1833], BRITANNICA, https://www.britannica.com/topic/Force-Bill.

[33] Ableman v. Booth, 62 U.S. 506, 514–15; Jeffrey Schmitt, *Rethinking Ableman v. Booth and States' Rights in Wisconsin*, 93 VA. L. REV. 1315 (2007).

[34] Arkin, *supra* note 29, at 27-28.

[35] *See id.* at 27.

[36] *Id.* at 58-60.

[37] Ex parte Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487); Arthur T. Downey, *The Conflict Between the Chief Justice and the Chief Executive: Ex parte Merryman*, 3 J. SUP. CT. HIST. 262 (2006).

administration and military authorities ignored similar decisions from other courts and continued their unlawful arrests and detentions.[38] Congress eventually passed the Habeas Corpus Act in 1863, which granted the President authority to suspend habeas corpus rights in wartime.[39]

It was not until a century later, in 1996, that Congress limited habeas corpus protections through the Antiterrorism and Effective Death Penalty Act ("AEDPA").[40] The Act was signed into law by President Bill Clinton in the aftermath of the 1993 and 1995 terror attacks in New York and Oklahoma City, respectively.[41] The Act stipulated three key provisions: a one-year habeas statute of limitations, a requirement that a petitioner could only file successive habeas petitions with approval from the Court of Appeals, and a limitation on granting habeas corpus protection to cases where the state court's findings were contrary to Supreme Court precedent on federal law.[42] AEDPA's supporters argued that it prevented perpetrators of crimes from obstructing justice by filing baseless appeals for years without end.[43] In retrospect, its restrictions on habeas corpus set a precedent for later attempts to suspend the right altogether in the Global War on Terror.[44] The United States' effort to combat terrorism following the September 11 attacks led to major disputes on habeas corpus protections in and between the Legislative, Executive, and Judicial Branches.

A. Habeas Corpus Protection in the War Against Terror From 2001 to 2005:

After the terrorist attacks of September 11, 2001, the outcry for revenge was palpable. To the government and the public at large, the attacks were interpreted as an act of war. One week later, on September

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[38] *See* Arkin, *supra* note 29, at 66.

[39] Habeas Corpus Suspension Act, JUSTIA US Law, https://law.justia.com/constitution/us/article-1/62-habeas-corpus-suspension.html.

[40] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA").

[41] *See* Eli Hager, *America Hates Terrorists But we don't execute them. A short history.*, MARSHALL PROJECT, Jan. 27, 2015, https://www.themarshallproject.org/2015/01/27/america-hates-terrorists.

[42] Cary Federman, *Who Has the Body? The Paths to Habeas Corpus Reform*, 84 PRISON J. 314, 322 (2004).

[43] *See generally* Ankush Agarwal, Comment, *Obstructing Justice: The Rise and Fall of the AEDPA*, 41 SAN DIEGO L. REV. 839 (2004).

[44] *Id.*

18th, 2001, Congress authorized the President to:

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[45]

Soon thereafter, the President issued an executive order allowing the indefinite detention of individuals suspected of being members of, or having some connection to, al-Qaeda.[46] It also authorized the Secretary of Defense to create the Office of Military Commissions—an office that encompasses five organizations that aim to achieve the "overarching goal of a just resolution to all cases referred to a military commission."[47] In addition to Congress's Authorization of Force Joint Resolution, the President cited two Articles of the Uniform Code of Military Justice: 10 U.S.C §§ 821 and 836.[48] Section 821 confers upon military commissions, provost courts, or other military tribunals a concurrent jurisdiction with courts-martial over offenders or offenses that are triable by the latter.[49] Section 836 authorizes the President to prescribe any rules regarding pre-trial, trial, and post-trial procedures.[50]

Almost immediately after the prison was opened, detainees began filing habeas corpus petitions challenging their detentions, mainly on the ground that the government lacked jurisdiction over the facility and the detainees.[51] Courts dismissed every petition, typically citing detainees' status as foreign nationals and designation as enemy combatants, putting

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

[46] *See* Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. § 918 (2002) [hereinafter "PMO, 13 Nov 01"].

[47] *About Us*, OFF. MIL. COMM'N, https://www.mc.mil/ABOUTUS/OrganizationOverview.aspx. The five organizations are: The Office of the Convening Authority, The Office of the Chief Prosecutor, The Military Commissions Defense Organization, The Military Commissions Trial Judiciary, The United States Court of Military Commission Review.

[48] PMO, 13 Nov. 01, *supra* note 46.

[49] Uniform Code of Military Justice, 10 U.S.C. § 821 (2019).

[50] *Id.* § 836.

[51] Daniella Schneider, *Human Rights Issues in Guantanamo Bay*, 68 J. CRIM. L. 423, 434 (2004).

them beyond the purview of the Suspension Clause.[52] This distinction finds its origin in two early Supreme Court Cases. First, in *Ex parte Quirin*, the Supreme Court opined that there was a difference between lawful and unlawful combatants.[53] The Court found that some combatants, such as foreign spies, should not be privileged to the same rights as prisoners of war—and should additionally be subject to the jurisdiction of U.S. military tribunals.[54] Then, in 1950, the Supreme Court further determined in *Johnson* that U.S. civilian courts had no jurisdiction over enemy combatants because the Constitution does not immunize alien combatants in hostile actions against the United States from military trials.[55]

Following the 9/11 attacks, the public and Congress provided the Bush Administration with significant latitude.[56] Congress passed the Authorization for Use of Military Force against Terrorists ("AUMF").[57] The Authorization essentially served as a blank check for the Bush Administration to wage unlimited war.[58] With this authority, President Bush issued Presidential Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.[59] Prisoners detained under the Order were classified as "enemy combatants,"[60] a term validated by *Quirin*.

The classification of detainees as enemy combatants allowed the United States to sidestep the Third Geneva Convention, which protected "prisoners of war," and the Fourth Geneva Convention, which protected "enemy aliens."[61] Enemy combatants could thus be held indefinitely

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[52] *See* U.S. CONST. art. I, § 9, cl. 2.

[53] 317 U.S. 1, 30–31 (1942).

[54] *See* Andrew Kent, *Judicial Review for Enemy Fighters: The Court's Fateful Turn in Ex Parte Quirin*, *the Nazi Saboteur Case*, 66 VAND. L. R. 153, 154–55 (2013).

[55] Johnson v. Eisentrager, 339 U.S. 763, 765–68 (1950).

[56] *See generally* JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006).

[57] This authorization included those "nations, organizations, or persons" who harbored the perpetrators of the attacks. Authorization for Use of Military Force, *supra* note 45, at § 2(a).

[58] *See* Johnathan Hafetz, *Detention Without End?: Reexamining the Indefinite Confinement of Terrorism Suspects Through the Lens of Criminal Sentencing*, 61 UCLA L. Rev. 331, 337–38 (2013).

[59] PMO, 13 Nov 01, *supra* note 46.

[60] Aaron J. Jackson, *Habeas Corpus in the Global War on Terror*, 65 A.F. L. REV. 263, 276–77 (2010).

[61] Mark David Maxwell & Sean M. Watts, *Unlawful Enemy Combatant: Status, Theory of Culpability, or Neither?* 5 J. INT'L CRIM. JUST. 19, 21 (2005).

without a right to counsel. Notably, whereas international humanitarian law does not allow for the suspension of habeas corpus law during wartime, multiple U.S. administrations have done just that.[62] Moreover, the enemy combatant designation allowed the Bush Administration to argue that the prisoners were not under U.S. civilian court jurisdiction—federal or state.[63] Thus, without the petitions, they could have been held indefinitely.[64]

The creation of the Guantánamo Bay Detention Camp has served as a black stain on the United States' history and jurisprudence. The fact that the Bush Administration claimed that the facility's location in Cuba put it beyond the purview of the Constitution underscores the nefarious use of this site. In fact, the Administration chose the off-soil location precisely for this reason; if not for the Supreme Court's interference, it would have continued to perpetuate the notion that the constitutional rights of individuals located at the Guantánamo Bay facility are non-existent.[65] The use of the camp to erode Constitutional protections acts is a direct assault on American jurisprudence and underscores the legitimate concerns and foresight of the Constitution Founding Fathers.

Moreover, Supreme Court precedent has laid the cornerstone of the limits on habeas protection. For instance, in *Ex parte Bollman*, Chief Justice Marshall held that the Suspension Clause did not guarantee a right to habeas corpus.[66] Unlike when President Lincoln suspended habeas corpus during the Civil War, the Bush Administration had the benefit of a Congress willing to provide the military with unlimited latitude in the War on Terror.[67]

In 2003, three British nationals held at Guantanamo Bay challenged their detentions at the Supreme Court.[68] In *Rasul*, the Court

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[62] Robert Longley, *Why Bush and Lincoln Both Suspended Habeas Corpus*, THOUGHTCO, https://www.thoughtco.com/bush-lincoln-both-suspended-habeas-corpus-3321847.

[63] *Id.*

[64] *See* Stevie Haire, *No Way Out: The Current Military Commissions Mess at Guantanamo*, 50 SETON HALL L. REV. 855, 857–58 (2020).

[65] *Supreme Court Deals Blow to Bush Administration's Guantánamo Policy and Affirms Individual Right to Bear Arms*, ACLU, https://www.aclu.org/press-releases/supreme-court-deals-blow-bush-administrations-guantanamo-policy-and-affirms (last visited Dec. 9, 2020).

[66] 8 U.S. 75, 100–01 (1807).

[67] Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. § 918 (2002).

[68] Shafiq Rasul, Ruhal Amhedand, and Afis Iqbal—known as the "Tipton Three"—had

recognized the right of foreign nationals held at the Guantánamo Bay facility to file writs of habeas corpus in U.S. courts.[69] Their cases had passed through federal District Court where the presiding judge had determined that the petitioners had no right to access U.S. courts.[70] The judge cited the aforementioned *Johnson v. Eisentrager*, in which the Supreme Court found that German war criminals held in a U.S.-run German prison had no access to U.S. courts' habeas corpus rights.[71] The government argued that it retained all effective power over the territory surrounding the prison.[72] But because the Guantánamo Naval Base stood atop land leased from the Cuban Government, the court ruled that Cuba still retained "ultimate sovereignty."[73]

The Supreme Court granted certiorari in *Rasul v. Bush* in November 2003.[74] The Court overruled the lower courts' decisions, declaring that the government had complete control over the prison and that detainees at the Guantánamo Bay facility had the right to petition for writs of habeas corpus in U.S. courts.[75] This decision forced the Bush Administration to find another way to prosecute detainees while satisfying the Court's requirement for due process.

A year later, the Supreme Court held in *Hamdi v. Rumsfeld* that relief via a habeas corpus proceeding extends to petitioners who are U.S. citizens being held as enemy combatants.[76] As a result, detainees at the Guantánamo Bay facility were able to bring habeas corpus petitions in federal court, allowing them to challenge their designation as enemy combatants. In that case, the Court of appeals vacated the fourth circuit's decision based on the entitlement of Hamdi to a limited judicial inquiry into his detention's legality.[77] Consequently, Yaser Esam Hamdi was released from the facility without formal charges ever being brought against him.[78]

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been some of the first men to arrive at Guantánamo in 2002.

[69] 542 U.S. 466, 481 (2004).

[70] *Id.*

[71] 339 U.S. 763, 776 (1950).

[72] *Rasul*, 542 U.S. at 471.

[73] *Id.*

[74] *Id.* at 473.

[75] *Id.* at 485.

[76] 542 U.S. 507, 531–33 (2004).

[77] *Id.*

[78] *Hamdi to Be Freed This Week, Lawyer Says*, NBC NEWS (Sept. 27, 2004, 2:23 PM), https://www.nbcnews.com/id/wbna6116717.

B. The Evolution of the Habeas Corpus Protection from 2005 to 2020:

In response to these rulings by the Supreme Court, Congress passed several laws narrowing the scope of relief that detainees could seek. The 2005 Detainee Treatment Act ("DTA") attempted to restrict detainees' habeas corpus rights.[79] The DTA established military hearings held at the Guantánamo Bay facility, known as Combatant Status Review Tribunals ("CSRTs"), which assessed whether an "enemy combatant" designation had been assigned correctly.[80] The DTA also gave the D.C. Circuit Court of Appeals the power to review the CSRTs' findings.[81] Further stipulation addressed the interrogation methods, treatment of detainees, and the immunity of interrogators.[82] The Act also provided that only those treatments and techniques of interrogation authorized by, and listed in, the United States Army Field Manual on Intelligence Interrogation could be used.[83]

It did not take long for a challenge to these new laws to wind its way through the courts. The DTA was challenged soon after its passing, in *Hamdan v. Rumsfeld*.[84] Salim Hamdan, a Yemeni who had been captured in Afghanistan and detained at the Guantánamo Bay facility filed a habeas petition contesting the constitutionality of CSRTs. While declining to address Hamdan's and his fellow detainees' habeas rights, the Court held that the CSRT military tribunals were unconstitutional, as their operational rules had not been set by Congress and did not match those set by the Geneva Conventions or the Uniform Military Code of

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[79] *See* Detainee Treatment Act of 2005, Pub. L. No. 111-84, §1005(e)(2)(A), 119 Stat. 2742 (2009) (amending Pub. L. No. 109-148 (2005)).

[80] A Combatant Status Review Tribunal (CSRT, phonetically "Seecert"), is a onetime administrative process designed to determine whether each detainee under the control of the Department of Defense at Guantanamo meets the criteria to be designated as an enemy combatant. Each detainee has the opportunity to contest such designation. The CSRT process is not a criminal trial and is not intended to determine guilt or innocence; rather, it is an administrative process structured under the law of war to confirm the status of enemy combatants detained at Guantanamo as part of the Global War on Terrorism. Arsalan M. Suleman, *Detainee Treatment Act of 2005*, 19 HARV. HUM. RTS. L.J. 257, 264 (2006).

[81] *See* William R. Payne, Note, *Cleaning Up "The Mess": The D.C. Circuit Court of Appeals and the Burden of Proof in the Guantanamo Habeas Cases*, 36 HARV. J.L. & PUB. POL'Y 873, 889.

[82] Detainee Treatment Act of 2005, *supra* note 79, at §§ 1001–06.

[83] *Id.*

[84] 548 U.S. 557 (2006).

Justice.[85] This is because the CSRT military tribunal did not show that Hamdan's crimes constitute an offense against the law of war to be tried by a military commission.[86] Further, the operational rules did not grant Hamdan the right to review the commission's evidence against him, which also constitutes a violation to the Uniform Code of Military Justice.[87]

In response to the *Hamdan* decision, the Bush Administration enacted the Military Commissions Act of 2006.[88] The Act's official purpose was to reauthorize military tribunals by stipulating that the Geneva Conventions would no longer apply to enemy combatants.[89] Further, it precluded detainees from filing habeas petitions in U.S. courts once the government declared them to be "unlawful enemy combatants."[90] In practice, this gave the government the power to declare any foreigner an enemy combatant and hold them without habeas corpus protections.

In 2006, a Guantánamo detainee named Lakhdar Boumediene sued the U.S. government in a habeas corpus petition, challenging the constitutionality of the Military Commissions Act and disputing the legality of his detainment at the Guantánamo Bay facility.[91] The case was first heard in the D.C. Circuit, which agreed with the government's argument to deny habeas protections to detainees.[92] The Supreme Court granted certiorari to the defendants in June 2007 on the question of "whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to [the] Nation's security, may assert the privilege of the writ [of habeas corpus] and seek its protection."[93] The

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[85] *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 87, ¶ 2, Aug. 12, 1949, 6 U.S.T. 3316 ("[C]ourts or authorities of the Detaining Power . . . shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed."); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 118, ¶ 1, Aug. 12, 1949, 6 U.S.T. 3516 (same liberty to reduce penalties of non-POWs).

[86] Hamdan v. Rumsfeld, 548 US 557*,* at 599-602.

[87] *Id.* at 614.

[88] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (enacting Chapter 47A of title 10 of the *United States Code* as well as amending § 2241 of title 28).

[89] *Id.* at § 948b(g).

[90] Michael C. Dorf, *The Orwellian Military Commissions Act of 2006*, 5 J. INT'L CRIM. JUST. 10, 10 (2007).

[91] Boumediene v. Bush, 553 U.S. 723, 725 (2008).

[92] *Id.* at 724.

[93] *Id.* at 746.

Court found that the Guantánamo detainees had the constitutional right to habeas corpus review.[94] Moreover, Congress could only revoke that right by providing an effective substitute.[95] The Court declared the Detainee Treatment Act of 2005 an inadequate substitute for habeas corpus,[96] and rejected the Government's case comparing the limitations in the MCA to those in AEDPA.[97] The Court stated that the restrictions in AEDPA were procedural, unlike those in the MCA, which were a complete denial of the right of habeas corpus.[98] The *Boumediene* majority held that the Guantánamo detainees had the right to submit habeas corpus petitions straight to the D.C. Circuit which would decide if the Government had adequate evidence to continue holding the prisoners without charge.[99]

Notably, in the aftermath of the *Boumediene* decision, the D.C. Circuit saw a period of significant success for the habeas corpus petitions of Guantánamo detainees. In 2010, however, the D.C. Circuit decided to require federal judges to give a special presumption of validity in favor of the Government's evidence in habeas petitions by Guantánamo detainees.[100] Consequently, the success rate of habeas petitions dropped significantly.

In international law, the purpose of war prisoners detentions is "to prevent captured individuals from returning to the field of battle and taking up arms once again."[101] This "captivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.'"[102] It is intended to be "devoid of all penal character."[103] This requirement is consistent with obligations under the Geneva Conventions which require that detained prisoners of war and civilians in war zones be treated humanely.[104]

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[94] *Id.* at 732.
[95] *Id.* at 733.
[96] *See* Detainee Treatment Act of 2005, *supra* note 79, at § 1005(e).
[97] *Bush*, 553 U.S. at 774–79.
[98] *Id.*
[99] MICHAEL GARCIA, CONG. RSCH. SERV., RL 34536, BOUMEDIENE V. BUSH: GUANTÁNAMO DETAINEES' RIGHT TO HABEAS CORPUS (2008).
[100] Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010).
[101] *Id.* (quoting Nuremberg Military Tribunal, reprinted in 41 AM. J. INT'L L. 172, 229 (1947); W. WINTHROP, MILITARY LAW AND PRECEDENTS 788 (rev. 2d ed. 1920)).
[102] *Id.*
[103] *Id.*
[104] *See* Geneva Convention Relative to the Treatment of Prisoners of War *supra* note 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War *supra* note 85.

In 2011, President Barack Obama signed an order affirming the habeas corpus rights of Guantánamo detainees.[105] The order included a review of the detainees to determine whether their detentions were vital to ensuring the security of the United States.

Additionally, in light of the close relationship between the right to seek relief through habeas corpus petitions and the Fifth Amendment's guarantee of due process of the law, many believed that the issue of whether Guantánamo Bay detainees were protected by the Fifth Amendment had been settled with the Supreme Court's holding in *Boumediene v. Bush*.[106] That assumption was challenged after a series of D.C. Circuit decisions, including *Kiyemba v. Obama ("Kiyemba III")*,[107] and most recently, Abdulsalam Ali Abdulrahman *Al Hela v. Trump ("Al Hela")*.[108]

In *Al Hela*, the detainee claimed that his detention at the Guantánamo Bay facility violated both substantive due process, in that he was being held under an "indefinite sentence," and procedural due process, relating to his ability to challenge his habeas corpus proceedings.[109] Relying on *Johnson v. Eisentrager*, the D.C. Circuit held that Al Hela, similarly to *Eisentrage*r, was not entitled to such protections as he remained at the Guantánamo Bay facility.[110] Moreover, in so holding, the D.C. Circuit expressly rejected Al Hela's contention that *Boumediene* abrogated *Eisentrager* due to the close relationship between habeas writs and the Fifth Amendment guarantee of due process. Instead, the D.C. Circuit ruled that the Supreme Court "clearly differentiated between the Suspension and Due Process Clauses and [in *Eisentrager*] carefully limited its holding to the Suspension Clause . . . ."[111] Therefore, *Eisentrager* remained binding law, and Al Hela's arguments to the

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[105] Exec. Order No. 13,567, 3 C.F.R. § 100.1 (2012); Dick Jackson, *Executive Order 13567: Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force & Accompanying Presidential Fact Sheet: New Actions on Guantánamo and Detainee Policy*, 50 INT'L LEGAL MATERIALS 928 (2011).

[106] *See, e.g.*, Jonathan Hafetz, *Due Process and Detention at Guantánamo: Closing the Constitutional Loopholes*, JUST SEC. (2014); *see also* Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioners, Kiyemba v. Obama, 559 U.S. 131 (2010) (No. 08-1234).

[107] 605 F.3d 1046 (D.C. Cir. 2010) (per curiam).

[108] No. 05-01048, slip op. at 22 (D.C. Cir. Aug. 28, 2020).

[109] *Id.*

[110] *See* 339 U.S. 763 (1950).

[111] *Al Hela*, slip op. at 27.

contrary necessarily failed.

C. The Bush Administration's Aggressive Strategy Against Habeas Corpus Relief:

After 9/11, the Bush Administration aggressively attempted to eliminate habeas protections through legislative, executive, and judicial actions on this fundamental component of American law. By passing the Detainee Treatment Act, and having a conservative majority on the Supreme Court, the Bush Administration partially succeeded in undermining enemy combatants' constitutional protections.[112]

The government has repeatedly engaged in overreaching conduct because the framing of habeas corpus rights within the Suspension Clause bears a flaw—allowing for the removal of habeas corpus in extraordinary circumstances (i.e., rebellion, invasion, and threat to public safety). Essentially, the clause left room for habeas corpus restrictions in times of war.[113]

The habeas corpus restrictions in AEDPA acted as the precursor to the suspensions that would follow in the coming years of the War on Terror.[114] AEDPA extensively limited the authority of the federal courts to grant habeas corpus relief over decisions made by state courts.[115] It provided a point of reference for the Military Commissions Act and the grounds to put limits on the number of successive petitions a detainee could make. Subsequent findings by the Supreme Court that the law did not infringe on the Suspension Clause opened room for similar procedural restrictions in legislation enacted on account of the Guantánamo detainees.

The precedents from *Quirin* and *Eisentrager* provided the Bush Administration with a basis for stripping habeas protections from Guantánamo detainees. To that end, *Rasul v. Bush* was the case which began the Bush Administration's struggle against the Judiciary and Legislature.[116] The *Rasul* decision overruled the precedent set by

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[112] *See generally* Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901 (2012).

[113] Helen Norton, *Excavating the Forgotten Suspension Clause*, JOTWELL (Oct. 26, 2018), https://conlaw.jotwell.com/excavating-the-forgotten-suspension-clause/ (reviewing AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTÁNAMO BAY (2017)).

[114] CONG. RSCH. SERV., RL33391, FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW 25 (2010).

[115] *Id.* at 9.

[116] 542 U.S. 466 (2004); *see also* Daniel A. Farber, *Justice Stevens, Habeas Jurisdiction,*

Eisentrager.[117] The Supreme Court's determination that the Guantánamo detainees were under the jurisdiction of U.S. courts set in motion a series of Congressional and Executive directives limiting federal courts' authority to grant habeas corpus protections. The *Rasul* decision put an end to the government's argument that the facility was in Cuba's sovereign territory and thus outside U.S. court jurisdiction.[118]

The Detainee Treatment Act maintained the enemy combatant designation that allowed the Bush Administration to keep skirting around the Geneva Conventions and invoke the *Quirin* case. Consequently, the Act was challenged in *Hamdan v. Rumsfeld* (2006).[119] The Supreme Court would strike down the CSRTs on the grounds of the unconstitutional establishment.

The Military Commissions Act of 2006 extended the conflict between the Judiciary and the Bush Administration. The Bush Administration's efforts pushed this Act to limit federal courts' authority to hear cases from Guantánamo detainees. It is also evidence of the alignment between Congress and the Administration to ensure the Guantánamo detainees received the least possible protection under both domestic and international law.

The *Boumediene* decision was a landmark ruling that drastically altered habeas corpus protections within the United States. Previous decisions such as *Rasul v. Bush* and *Hamdan v. Rumsfeld* simply addressed jurisdictional protections of Guantánamo detainees. President Obama's Executive Order 13567 further affirmed the Boumediene court's acknowledgement of habeas corpus rights of Guantanamo detainees.[120] Supporters of the suspension of Guantánamo detainees' habeas corpus rights argue that it was a necessary measure to ensure the safety of the American public.[121] But the Suspension Clause allows only Congress to suspend habeas corpus.

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and the War on Terror, 43 U.C. DAVIS L. REV. 945 (2009).

[117] *Rasul*, 542 U.S. at 466.

[118] *Id.* at 485.

[119] Dennis Phillips, *"Hamdan v. Rumsfeld": The Bush Administration and 'The Rule Of Law'*, 25 AUSTRALASIAN J. AM. STUD. 40, 48 (2006).

[120] Press Release, White House, Executive Order 13567—Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, the White House, (Mar. 7, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/executive-order-13567-periodic-review-individuals-detained-guant-namo-ba.

[121] Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 555 (2010).

In spite of the Bush Administration's partial success in dealing with 9/11 aftermath, the Guantánamo Bay facility's restrictions and suspension of habeas corpus rights violate the Suspension Clause. Although the 9/11 attacks were a clear threat to public safety that justified extreme measures, those measures should not have lasted for more than two decades. The privilege assumed by the Government through exploiting the 9/11 terrorist attacks has resulted in grave deprivations of the very liberties on which our nation was founded.

III. *BELL V. WOLFISH* PROVIDES A PATH TO HABEAS RELIEF

The Bush Administration's drive to strip away habeas protections, with the approval of the Supreme Court, conflicted with the Court's precedent established just a few decades earlier. In 1979, the Supreme Court made clear that punishing detainees before allowing them to have their day in court violates Due Process.[122]

Due process of law "encompass[es] freedom from bodily restraint and punishment."[123] Even before the Supreme Court's ruling in *Bell v. Wolfish*, the rights of detainees have long been acknowledged under the Uniform Code of Military Justice. Article 13, UCMJ provides:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to ensure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.[124]

The military has protected this right of due process in the Uniform Code of Military Justice since 1949.[125] Rule for Court Martial (RCM) 305(k) provides a remedy for violations of Article 13 by awarding administrative confinement credit or another appropriate remedy, up to and including the dismissal of charges, to the illegally-punished pre-trial detainee.

Louis Wolfish, was a detainee at Metropolitan Correctional Center (MCC) who brought a class-action lawsuit on behalf of himself and the rest of the facility's detainees and inmates.[126] Wolfish argued that

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[122] Bell v. Wolfish, 441 U.S. 520, 536–37 (1979); *see also* Graham v. Connor, 490 U.S. 386, 395 n.10 (1989) ("[T]he Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.").
[123] Ingraham v. Wright, 430 U.S. 651, 673–74 (1977).
[124] Uniform Code of Military Justice Art. 13, 10 U.S.C. § 813.
[125] *Id.*
[126] *Bell*, 441 U.S. at 520.

the conditions of their detainment were overly restrictive.[127] The New York facility had taken to double-bunking due to a lack of resources.[128] The detainees were subjected to visual body cavity searches and had their rooms searched without their presence.[129] As an attempt to prevent smuggling contraband through books, the inmates could only receive books straight from the publisher, and were prohibited from receiving packages except on Christmas.[130] The detainees argued their rights to privacy, autonomy, and ownership were violated.[131]

Moreover, the detainees argued that as pretrial detainees, they should not have been subject to the same treatment as sentenced inmates.[132] The case was first heard in the U.S. District Court for the Southern District of New York, which determined that the MCC restrictions were inordinately restrictive and agreed that pretrial detainees should not be treated like sentenced inmates.[133] Specifically, the trial court found numerous constitutional violations at the correctional facility and ultimately "intervened broadly into almost every facet of the institution" including "enjoin[ing] no fewer than 20" correctional facility practices.[134] Namely, the District Court found that pretrial detainees who have yet to be tried and convicted are "presumed to be innocent and [are] held only to ensure their presence at trial," and as such "any deprivation or restriction of [their] rights beyond those necessary for confinement alone[] must be justified by compelling necessity."[135]

The Second Circuit agreed and determined that there was no clear necessity for the treatment of pretrial detainees in a manner that presumed guilt.[136] The court found the MCC procedures to be unjust and

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[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] The publisher only rule is a rational response by prison officials to the obvious security problem of preventing the smuggling of contraband in books sent from outside. Moreover, such rules operate in a neutral fashion, without regard to the content of the expression, there are alternative means of obtaining reading material, and the rule's impact on pretrial detainees is limited to a maximum period of approximately 60 days. *Id*. at 548–52.
[131] *Bell*, 441 U.S. at 520.
[132] *Id.*; *see also* David C. Gorlin, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417, 425 (2009).
[133] *Bell*, 441 U.S. at 527–28.
[134] *Bell*, 441 U.S. at 523.
[135] *Id.* at 528 (citation omitted).
[136] *Id.* at 524.

restrictive.[137] The Second Circuit remanded the matter for the District Court to consider whether the detainees' housing was "constitutionally 'adequate.'"[138]

Nevertheless, the Supreme Court did not find any constitutional violation within the MCC procedures and restrictions and overruled the lower courts' decisions.[139] The Court agreed with the government's claim that the restrictions were necessary to ensure safety, maintain order, and prevent illegal activities.[140] The Supreme Court acknowledged pretrial detainees must not be punished like convicted inmates under the Due Process Clause.[141] Although convicted persons may constitutionally be punished—so long as that punishment is not cruel and unusual—the pre-trial detainees may not.[142] Moreover, the purpose of their detention was to ensure their attendance of trial; thus, they ought not to be treated like convicts. [143] Regarding a detainee's due process rights, the Supreme Court agreed that "[w]ithout question, the presumption of innocence plays an important role in our criminal justice system."[144] It then concluded that the proper analysis of the constitutional issue is whether the detainees' pretrial conditions amounted to punishment—because "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."[145]

The detention conditions at Guantánamo Bay violate *Wolfish*.[146] The detainees have been subject to punishment that could only be deemed degrading and inhumane. This punishment includes sleep deprivation, beating, sexual assault, sexual degradation, use of stress positions, forced drug injections, and forced feeding of detainees on hunger strikes. The indefinite incarceration of the detainees without trial or counsel results in a violation of the protections that can be drawn from *Bell v. Wolfish*.[147]

The treatment of detainees at the Guantánamo Bay facility has violated both domestic and international law. Unlike defendants facing charges in domestic tribunals, the detainees at Guantánamo are not

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[137] *Id.* at 575.
[138] *Id*. at 530.
[139] *Id.* at 560-63.
[140] *Id.* at 536-40.
[141] *Id.* at 535.
[142] *Id.* at 536–37.
[143] *Id.* at 536–7.
[144] *Id.* at 533.
[145] *Id.*
[146] *See id.* at 535.
[147] *Id.*

availed of innumerable safeguards available to regular accused individuals, such as probable cause determinations or bond hearings.[148]

A. Violations of Detainees' Fourth and Sixth Amendment Rights of the U.S. Constitution:

The eradication of habeas protections does not simply violate the precedent in *Bell v. Wolfish*, it opens the gates to a litany of other constitutional violations that have practical implications for the accused's rights. For instance, the Military Commissions Act of 2009 requires that a defense counsel be detailed to represent the accused facing trial by military commission.[149] This might be considered as an acknowledgement of the Constitution's guarantee of the right to counsel as set out in the Sixth Amendment.

The Sixth Amendment includes the right to a fair and speedy trial before an impartial tribunal as well as the right to an attorney during criminal proceedings. However, the indefinite detention and denial of access to attorneys has resulted in continued violations of that right.[150] In fact, there are contentions that detainees' right to a trial have been perpetually and indefinitely impeded due to the CIA's desire to keep certain torture techniques, and information obtained via torture, a secret.[151]

Recently, the Supreme Court denied certiorari to review the D.C. Circuit's denial of a Guantánamo detainee's second habeas corpus petition.[152] Among other things, Al-Alwi claimed that it had been over a decade since he was first transferred to the Guantánamo Bay facility in 2002. Moreover, Al-Alwi argued that President Obama's announcement in 2014 ending "Operation Enduring Freedom" also ended the conflict which originally brought him to the facility—the 9/11 terrorist attacks—

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[148] HON. WILLIAM H. ERICKSON ET AL., UNITED STATES SUPREME COURT CASES AND COMMENTS, ¶ 5B.02 (Matthew Bender & Co., 65th ed., 2019).

[149] 10 U.S.C. § 948k(a)(1). *See also* Military Commissions Act of 2009, Pub. L. No. 111-84, § 948(a)(7), 123 Stat. 2574, 2575 (2009) (defining an "unprivileged enemy belligerent" as someone who: "(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.").

[150] Al-Alwi v. Trump, 901 F.3d 294 (D.C. Cir. 2018).

[151] Sacha Pfeiffer, *A Legacy Of Torture Is Preventing Trials At Guantánamo*, NPR (Nov. 14, 2019, 5:02 AM), https://www.npr.org/2019/11/14/778944195/a-legacy-of-torture-is-preventing-trials-at-guant-namo.

[152] *See* Al-Alwi v. Trump, 139 S. Ct. 1893 (2019) (Mem).

and therefore the United States lacked authority to detain him.[153] In rejecting Al-Alwi's contention, the D.C. Circuit explained that the AUMF authorized the President to use military force against individuals and entities involved in the September 11 terrorist attacks, and Supreme Court precedent interpreting the AUMF did not set definite time constraints on the duration of such detention.[154] The AUMF authorized the detention of enemy combatants for "the duration of the particular conflict in which they were captured" and—per the Court—the Afghanistan-based conflict endures.[155] This is because the AUMF may remain in force as long as hostilities between the United States and the Taliban and al Qaeda continue.[156]

Further, the Supreme Court has not yet opined on whether Guantánamo Bay detainees have Sixth Amendment protection. The detainees have been subjected to prolonged detention, often without any charges being brought against them, and have even been denied access to an attorney.[157] Although the Supreme Court's 1942 decision in *Ex Parte Quirin* is often cited for the proposition that such military tribunals are not subject to the Sixth Amendment, this is particularly distressing as military tribunals suffer from partiality and are thus constitutionally-deficient for serving as the prosecution, defense, judge, and jury.[158]

A necessary component of effective representation which is not honored in this situation is regular contact between client and counsel.[159] This barrier to communication means the client cannot actively be involved in their own defense, supply their attorney with facts only known to the accused, or assist in crafting a strategy for the potential resolution

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[153] *Al-Alwi v. Trump: D.C. Circuit Holds the Government's Authority Has Not Unraveled*, 132 HARV. L. REV. 1542 (2019); *see also Al-Alwi*, 901 F.3d at 297, 299–300.
[154] *Al-Alwi*, 901 F.3d at 297.
[155] *Id.* UNITED STATES AIR FORCES CENTRAL COMMAND, 2010–2015 AIRPOWER STATISTICS (Oct. 31, 2015), JA 579 (indicating United States released 847 weapons during 2015); Ali v. Obama, 736 F.3d 542, 552 (D.C. Cir. 2013) ("[T]he 2001 AUMF does not have a time limit, and the Constitution allows detention of enemy combatants for the duration of hostilities.").
[156] *Al-Alwi*, 901 F.3d at 300.
[157] Jane Sutton, *U.S. Judge Blocks New Restrictions on Guantanamo Lawyers*, REUTERS (Sept. 6, 2012), https://www.reuters.com/article/us-usa-guantanamo-idUSBRE8851E720120906.
[158] Louis Fisher, *Military Commissions: Problems of Authority and Practice*, 24 B.U. INT'L L. J. 15, 16 (2006).
[159] MODEL RULES OF PRO. CONDUCT r. 1.4 cmt. at 1 (AM. BAR. ASS'N 1983) ("Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.").

of the case. All these aspects of the attorney-client relationship are critical, which means the Military Commissions Act of 2006 is empty. As the Human Rights Watch opined, the purpose of these military commissions is to exclude full due process protections in trials, particularly the right to representation.[160] The federal courts have proved to be capable of trying terrorism cases as they have prosecuted more than 145 suspects in the same seven-year period without sacrificing constitution protections of suspects embodied in the Fourth, Fifth, Sixth, and Eight Amendments.[161]

The Fourth Amendment limits and restrains courts' and federal officials' exercise of power and authority to secure the people in "their persons, houses, papers, and effects," against all unreasonable searches and seizures.[162] This protection reaches all, whether accused of a crime or not, and the duty of enforcing it is obligatory upon all law enforcement officers.[163] There is a defective tendency among law enforcement officers to obtain convictions by means of unlawful seizures and coerced confessions.[164] Yet, people who are subjected to these constitutional breaches have a right to appeal for the restoration of those fundamental rights.[165] The detainees might be coerced to waive their Fourth Amendment rights under the conditions at Guantánamo, thus allowing the government to obtain evidence that would otherwise be protected by the Fourth Amendment.

Moreover, the Constitution states that "No Bill of Attainder or Ex Post Facto law shall be passed."[166] In *United States v. Mohammad Al Nashiri*, the Military Commissions Trial Judiciary ruled that evidence that was the result of torture could not be used.[167] Lastly, the Court of Military

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[160] *US: New Legislation on Military Commissions Doesn't Fix Fundamental Flaws Proceedings to Try Detainees at Guantanamo Remain*, HUM. RTS. WATCH (Oct. 8, 2009, 1:37 PM), https://www.hrw.org/news/2009/10/08/us-new-legislation-military-commissions-doesnt-fix-fundamental-flaws.

[161] *Id.*

[162] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[163] *Id.*

[164] Weeks v. United States, 232 U.S. 383, 392 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961), and *overruled in part by* Elkins v. United States, 364 U.S. 206 (1960).

[165] *Id.*

[166] U.S. CONST. art. I, § 9, cl. 3.

[167] AE 353AA (Mil. Comm'n Trial Judiciary, Guantánamo Bay May 18, 2021), https://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(AE353AA(RULING)).pdf.

Commission Review ("CMCR") made clear that the ex post facto rule applies to detainees at Guantánamo Bay.[168]

B. Torture at Guantanamo Bay Violates Detainees' Eighth Amendment Rights and Indirectly Undermines their First Amendment Rights:

Last, and perhaps most obvious, the Eighth Amendment prohibits the federal government from imposing excessive bail and fines, or cruel and unusual punishment.[169] The Supreme Court has held that "[p]risoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[170] The well-documented torture at Guantánamo Bay violates the Eighth Amendment.[171]

In 2002, John Yoo a deputy assistant attorney general in Bush Administration, authored what are now infamously referred to as the "torture memos."[172] In these memos, he rationalized the use of various torture methods.[173] Under federal law, to be considered torture, a victim must experience severe pain that was "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death."[174] Yoo stated that although the methods used at Guantánamo Bay "may amount to cruel, inhumane, or degrading treatment, they do not produce pain or suffering of the necessary intensity to meet the definition of torture."[175]

According to Yoo, those violent acts include various forms of sexual harassment, humiliation, and threats of rape; physical beatings and

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[168] *See* 389 F. Supp. 3d 1233, 1240–41 (C.M.C.R. 2019).
[169] U.S. CONST. amend. VIII.
[170] Brown v. Plata, 563 U.S. 493, 510 (2011) (citations omitted); *see also* Estelle v. Gamble, 429 U.S. 97, 102 (1976) (concluding that the Eighth Amendment "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . against which we must evaluate penal measures") (citations omitted).
[171] Oliver Laughland, *How the CIA Tortured Its Detainees*, THE GUARDIAN (May 20, 2015), https://www.theguardian.com/us-news/2014/dec/09/cia-torture-methods-waterboarding-sleep-deprivation.
[172] Memorandum for Alberto R. Gonzales, Counsel to the President, re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, Op. O.L.C. 1 (2002), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf.
[173] *Id.*
[174] *Id.*
[175] *Id.*

abuse, including waterboarding and use of "stress positions" for extended periods of time; religious abuse, which included mocking of the call to prayer, forced shaving, and degrading the Qur'an; prolonged periods of solitary confinement, manipulation of light and sound, and exposure to extreme temperatures; and other forms of severe physical and mental distress.[176] These practices may also amount to a breach of the right to freedom of religion under the First Amendment and international law by depriving detainees of their ability to meaningfully engage in their religious practices.[177] For example, an essential component of Islam is the ability to engage in *Juma'a* communal prayer.[178] That religious component, however, is prevented when detainees are kept in solitary confinement.[179] Additionally, strip searches and full body scans that display their nude bodies before entering common areas are humiliating procedures which violate Islamic practice.[180]

Following their confinement in Guantánamo Bay, detainees who have been released reported experiencing after-effects of force feeding,

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[176] Bridge Initiative Team, *Factsheet: Torture at Guantánamo Bay Detention Camp*, GEO. U. (Jul. 19, 2020), https://bridge.georgetown.edu/research/factsheet-torture-at-guantanamo-bay-detention-camp/.

[177] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); G.A. Res. 2200A (XXI), art. 18(1) (Dec. 16, 1966) ("Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom . . . either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice or teaching."); G.A. Res. 2200A (XXI), art. 18(2) (Dec. 16, 1966) ("No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."); G.A. Res. 36/55, art. 1(2) (Nov. 25, 1981) ("No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice."); Human Rights Committee General Comment No. 22, U.N. DOC. HRI/GEN/1/REV.1 at 35, ¶ 5 (1994) ("Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18.2.").

[178] MARION HOLMES KATZ, PRAYER IN ISLAMIC THOUGHT AND PRACTICE 26 (2013).

[179] *Id.*

[180] *Current Conditions of Confinement at Guantánamo: Still in Violation of the Law*, CTR. FOR CONST. RTS. , 12-13 (Feb. 23, 2009), https://ccrjustice.org/sites/default/files/assets/CCR_Report_Conditions_At_Guantanamo.pdf.

including both psychological distress—such as PTSD, depression, anxiety, and nightmares—and physical pain, including permanent headaches and even brain injuries.[181]

Detainees who engaged in hunger strikes were subjected to force feeding, which often involved a tube being inserted through the detainee's nose and into his stomach.[182] This practice has been described as painful and traumatic, causing bleeding, vomiting, and fainting.[183] The lasting effects of such gruesome torture are perhaps most vividly illustrated in the case of Mustafa al-Hawaswi, who was accused of financing the September 11 hijackers. Al-Hawaswi was captured and subjected to "rectal rehydration" or "rectal feedings" as a means of "behavior control," wherein pureed food would be administered via the rectum "us[ing] the largest tube" available.[184] Throughout his detention, al-Hawaswi was denied contact with lawyers.[185] When al-Hawaswi was first detained by the CIA he was cleared as having no medical problems.[186] After his torture, al-Hawaswi was diagnosed with an anal prolapse, anal fissure, and chronic hemorrhoids.[187] During his subsequent courtroom appearances, al-Hawaswi has had to sit on a pillow due to these permanent physical ailments which serves as a visual reminder of the torture he endured.[188] Moreover, Walter Ruiz—al-Hawaswi's attorney—stated that forced feeding that Guantánamo camp detainees are subject to is degrading and inhumane treatment which amounts to torture and punishment.[189]

In 2009, the International Committee of the Red Cross (ICRC) published a report from its 2006 visit to Guantánamo. The ICRC

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[181] Matt Apuzzo, Sheri Fink, & James Risen, *How U.S. Torture Left a Legacy of Damaged Minds*, N.Y. TIMES (Oct. 8, 2016), https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html; Pfeiffer, *supra* note 151.

[182] *See, e.g.*, Ali Watkins, *Congress Just Tried to Legislate Against Torture, But Don't Get Too Excited Yet*, HUFFINGTON POST (Dec. 16, 2014, 5:46 PM), https://www.huffpost.com/entry/senate-torture-us_n_6336378; Sacha Pfeiffer, *A Legacy Of Torture Is Preventing Trials At Guantánamo*, NPR (Nov. 14, 2019, 5:02 AM), https://www.npr.org/2019/11/14/778944195/a-legacy-of-torture-is-preventing-trials-at-guant-namo.

[183] Bridge Initiative Team, *supra* note 176; Remarks by Walter Ruiz, *supra* note 11, at 202.

[184] Pfeiffer, *supra* note 151.

[185] Remarks by Walter *Ruiz*, *supra* note 11, at 200.

[186] Pfeiffer, *supra* note 151.

[187] *Id.*

[188] *Id.*

[189] Remarks by Walter Ruiz, *supra* note 11, at 200.

documented the experiences of fourteen "high value detainees" during their time at Guantánamo and other CIA black sites around the globe.[190] The ICRC reported the disturbing treatment of these detainees, including many of the torture methods detailed above.[191] The report also documented the role of medical personnel at the facility. One detainee alleged that he wore a pulse oximeter while being suffocated until a health professional, who was in the room during the torture, intervened.[192] Another detainee alleged that, after a health professional ordered that he be allowed to sit after a prolonged period of standing in a stress position, the healthcare worker made a point to tell the detainee, "I look after your body only because we need you for information."[193] Such accusations have led to an inquiry into the medical ethics of healthcare providers at the camp.[194] The report thus further demonstrated that the psychological and physical abuse that occurred at the facility is "tantamount to torture."[195]

Adding to the controversy surrounding the United States' use of torture tactics, the Senate Intelligence Committee's report on the use of "enhanced interrogation techniques" at Guantánamo Bay revealed that such techniques were actually ineffective as they failed to obtain reliable information from the detainees.[196] Moreover, evidence obtained via torture is often inadmissible, and consequently prosecution efforts have been thwarted.[197] The report also concluded that the torture of the detainees was "brutal and far worse than the CIA represented to policymakers," and listed a plethora of issues with the program, emphasizing that the CIA purposefully impeded Congressional and White House oversight of the program.[198]

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[190] INT'L COMM. OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN "HIGH VALUE DETAINEES" IN C.I.A. CUSTODY (Feb. 14, 2007).
[191] *Id*. at 26.
[192] *Id.* at 22.
[193] *Id.*
[194] *See id.* at 22–23.
[195] *U.S. Uses Evidence Gained by Torture*, NBC NEWS (Dec. 2, 2004. 6:02 PM), https://www.nbcnews.com/id/wbna6641282.
[196] Relman, *supra* note 1; *see generally* S. REP. NO. 113-288 (2014).
[197] S. REP. NO. 113-288, *supra* note 196.
[198] *Id*. at xii-xvi.

IV. THE *BELL V. WOLFISH* DISTINCTION AS A SOLUTION TO CONSTITUTIONAL RIGHTS BREACHES IN GUANTÁNAMO BAY

The best way to vindicate these rights is through a Due Process and Eighth Amendment argument based on *Wolfish*'s premise that pre-trial prisoners should not be treated like those who are convicted.

Detainees are also deprived of meaningful contact with their families.[199] For example, telephonic access to family members was expressly denied in the first years of the Bush Administration, and even after it was permitted, it remained extraordinarily limited.[200] There have also been some occasions of multiple family members being confined at Guantánamo. In these cases, the Department of Defense denied those family members access to one another and housed the individuals at different camps within the facility.[201]

In the American Legal System, the law presumes an individual's innocence until proven guilty, yet these detainees are effectively denied this presumption by the way in which they are confined, tortured, and inhumanely treated. All these examples demonstrate that detainees at Guantánamo Bay are being punished before they have been convicted of any of their alleged crimes. Such treatment amounts to punishment without due process of the law, which *Wolfish* expressly forbids.

CONCLUSION

The historical framework of habeas corpus in the United States presents a history of the executive's willingness to restrict or suspend the protection entirely. Both federal and state courts grant habeas petitions at their own prerogative. Notably, the only guarantee enshrined within the Constitution is Congress's provision to suspend the habeas corpus protection in certain specific circumstances. The stipulated situations are rebellions, invasions, and times where there is an existing threat to public safety. Habeas corpus protections were most famously suspended during the Civil War when President Lincoln unilaterally suspended these rights without initial Congressional support. Beyond the Civil War, habeas corpus rights have been suspended during the Second World War and the Global War on Terrorism.

The end of World War II saw two key cases that informed habeas

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[199] *Fisher*, *supra* note 158.
[200] *Id.*
[201] *Id.*

corpus petitions in U.S. courts. *In re Quirin* formalized the designation of enemy combatants. The Supreme Court determined that enemy combatants were outside the jurisdiction of any civilian U.S. court. This case would provide a precedent for the establishment of military tribunals to try foreigners in wartime. *Johnson v. Eisentrager* established the basis for suspension of habeas corpus rights for alien enemies on jurisdictional and sovereign territory grounds. These cases provided legal basis for the Bush Administration to deny Guantánamo detainees' habeas petitions. That final push toward eradicating the protections of habeas corpus left a wide opening to violate Guantánamo detainees' pre-trial rights.

The terror attacks in 1993 and 1995 would lead to the enactment of AEDPA. The Act would lay the groundwork for the restriction and suspension of habeas corpus after the September 11 attacks. Congress and the Bush Administration attempted to restrict the power of federal courts to habeas petitions through the Detainee Treatment Act and Military Commission Act of 2006. Cases such as *Rasul v. Bush*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*, led to changes in habeas corpus practices that allow for federal courts to hear the petitions and explicitly guarantee habeas corpus protection.

But without an explicit guarantee of habeas corpus in the Constitution to foreign enemy combatant detainees, the chain of constitutional violations throughout American history is unsurprising. The precedent set-in prior cases permitted these violations at the Guantánamo Bay facility. The climate of fear following the September 11 attacks afforded the government latitude to act in any manner it deemed necessary, however brutal. The human rights violations at Guantánamo serve as a symbol of America's extreme response to that terrorist attack.

A credible threat to the safety of the American public may trigger a suspension of habeas corpus rights. The September 11 terror attacks, indeed, were unprecedented in scale and impact: the loss of human life and audacious damage to property signaled a clear and extremely dangerous threat to public safety. The laws of American warfare, however, do not provide the right to entirely and irrevocably withdraw the right to habeas corpus. The War on Terror has resulted in ceaseless efforts by the government to deny captured suspects their habeas corpus rights. This has theoretically allowed the government to hold and interrogate them indefinitely, in pursuit of what it perceives to be vital information.

Gathering vital information to fight in the War on Terror should not take precedence over respecting international and domestic

humanitarian law. The suspension of habeas corpus rights follows in the unfortunate tradition of America's refusal to balance liberty interests in its quest for revenge through the War on Terror.

The *Bell v. Wolfish* decision could provide a new avenue to challenge this disappointing development. The Court's holding that pre-trial prisoners should not be punished in the same manner as convicted prisoners is still valid law. None of the people facing prosecution in Guantánamo have been convicted, but their terrible conditions of confinement would indicate differently. This violation leads to more real and detrimental violations of clear constitutional rights and only serves to increase the infringement of defendant's rights. But, most importantly, it does harm to our collective belief that we are a nation of just and righteous principles.

Perhaps no judicial analysis better captures the complexity of this phenomenon than that of Justice Stevens in his dissenting remark in *Rumsfeld v. Padilla*: "[I]f this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny."[202]

[202] 542 U.S. 426, 465 (2004).