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BOUMEDIENE V. BUSH: JUSTICE SCALIA’S FEAR OF AN UNFAMILIAR RACE AND RELIGION

SCOTT S. ALLEN JR.*

In Boumediene v. Bush, the Supreme Court of the United States considered whether the Military Commissions Act of 2006 (MCA) serves as an unconstitutional suspension of the writ of habeas corpus. The Court held, first, that the MCA “strips” jurisdiction over Guantanamo Bay detainees’ habeas actions from all federal courts. Second, the Court concluded that the Suspension Clause in Article I, Section 9 of the United States Constitution is in effect at the United States Naval Station at Guantanamo Bay, Cuba (GTMO). Third, the Court decided that Congress did not provide an adequate and effective substitute for habeas corpus in the Detainee Treatment Act, thereby rendering MCA § 7 an unconstitutional suspension of the writ of habeas corpus. Lastly, the Court determined that the detainees need not wait for the completion of review of their Combatant Status Review Tribunal in the Court of Appeals before bringing a habeas action in federal district court. In his dissent criticizing the majority’s opinion, Justice Antonin Scalia stated, “America is at war with radical Islamists.” Such language implicates the fear of an unfamiliar race with unique religious practices. Though Scalia’s demonstrated fear

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* J.D. Candidate 2010, University of Maryland School of Law. M.B.A. 2007, University at Buffalo, The State University of New York. B.S. 2005, The State University of New York, College at Geneseo. For my brother, Jeffrey, who recently began a career as an officer in the United States Army, and my friend, Evan. Special thanks to Professor Mark A. Graber, Professor Janet Sinder, and my three parents.
3. See BLACK’S LAW DICTIONARY 728 (8th ed. 2004) (“A writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal.”).
5. Id. at 2244.
6. Id. at 2262; see infra note 146.
7. 28 U.S.C. § 2241(c) (2006); see infra Part II.B.
11. Id. at 2294 (Scalia, J., dissenting).
12. See infra Part IV.
may not be unfounded, it is unprecedented in previous habeas corpus jurisprudence—including Scalia’s previous dissents in Guantanamo detention habeas corpus cases. Scalia may have included this fearful language as a last-ditch effort—after a long line of GTMO habeas corpus jurisprudence—to influence courts’ future habeas corpus opinions to subscribe to his conservative viewpoint.

I. THE CASE

The petitioners are foreign nationals who were detained at the United States Naval Base in Guantanamo Bay, Cuba (GTMO). Some of the petitioners were captured on the battlefield in Afghanistan. Each has denied membership in al Qaeda—the terrorist group responsible for the September 11, 2001 attacks—and the Taliban—the political party that harbors members of al Qaeda in Afghanistan. However, each petitioner stood before a Combatant Status Review Tribunal (CSRT) and was classified as an “enemy combatant.”

13. See infra Part IV.A.
14. See infra Part IV.B.
15. See infra Part IV.C.
16. Boumediene v. Bush, 128 S. Ct. 2229, 2240 (2008). GTMO is comprised of 45 square miles along the southeast coast of Cuba, which were acquired in a lease agreement in 1903, after the Spanish-American War. Rasul v. Bush, 542 U.S. 466, 471 (2004). In 1934, Cuba and the United States entered into a treaty that stated that the lease agreement would remain in effect until the United States abandoned the base or another agreement was made. Id. Over 750 detainees have been held at the United States Naval Station in Guantanamo Bay since January 2002. See List of Individuals Detained by the Dep’t of Def. at Guantanamo Bay, Cuba from Jan. 2002 through May 15, 2006 (May 15, 2006) [hereinafter, Detainee List], available at http://media.miamiherald.com/smedia/2008/02/29/16/DARBI.source.prod_affiliate.56.pdf. However, only seven of the detainees were parties to this lawsuit. Boumediene v. Bush, 476 F.3d 981, 984 (D.C. Cir. 2007).
17. Boumediene, 128 S. Ct. at 2241. The other petitioners were captured in Bosnia and Gambia. Id.
18. See infra text accompanying note 193.
21. Boumediene, 128 S. Ct. at 2241. The term “enemy combatant” has no official definition in the law of war. Ahmad, supra note 19, at 7. However, the Military Commissions
Each "enemy combatant" then petitioned for a writ of habeas corpus in the United States District Court for the District of Columbia.\(^{22}\)

Petitioners' actions to dispute their detention at GTMO began in February 2002.\(^{23}\) The United States District Court for the District of Columbia dismissed the cases because GTMO was outside the sovereign jurisdiction of the United States.\(^{24}\) The Court of Appeals for the District of Columbia Circuit affirmed the decision.\(^{25}\) In 2004, the Supreme Court granted certiorari and reversed, holding that 28 U.S.C. §2241\(^{26}\) extended habeas corpus jurisdiction to GTMO.\(^{27}\)

In 2005, the detainee cases were consolidated into two separate actions within the United States District Court for the District of Columbia.\(^{28}\) In *Khalid v. Bush*,\(^{29}\) Judge Leon held that the detainees had no habeas corpus rights.\(^{30}\) However, in *In re Guantanamo Act of 2006*, Pub. L. No. 109-366, 120 Stat. 2600, defines both "unlawful enemy combatant" and "lawful enemy combatant." An "unlawful enemy combatant" is defined as "(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces) . . . ." \(^{Id.}\) A "lawful enemy combatant" is defined as "(A) a member of the regular forces of a State party engaged in hostilities against the United States . . . ." \(^{Id.}\) In Deputy Secretary Paul Wolfowitz's memorandum to the Secretary of the Navy establishing CSRTs, he defines "enemy combatant" as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." Memorandum from Paul Wolfowitz, Deputy Secretary of Def., to Secretary of the Navy (July 7, 2004) (on file with author) (ordering the establishment of CSRTs).


23. *Boumediene*, 128 S. Ct. at 2241; see *Rasul v. Bush*, 215 F. Supp. 2d 55, 56 (D.D.C. 2002) ("The question presented to the Court . . . is whether aliens held outside the sovereign territory of the United States can use the courts of the United States to pursue claims brought under the United States Constitution.").


25. \(^{Id.}\); see *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003). [The detainees] cannot seek release based on violations of the Constitution or treaties or federal law; the courts are not open to them. Whatever other relief the detainees seek, their claims necessarily rest on alleged violations of the same category of laws listed in the habeas corpus statute, and are therefore beyond the jurisdiction of the federal courts. \(^{Id.}\)


28. \(^{Id.}\)


30. \(^{Id.}\) at 317.
Detainee Cases, Judge Hens Green held that the detainees had due process rights under the Fifth Amendment. The government appealed Judge Hens Greens’ ruling and petitioners cross-appealed.

While the District Court’s decisions were pending appeal, Congress passed the Detainee Treatment Act of 2005 (DTA). The DTA stated, “no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.” Additionally, the DTA stated that the Court of Appeals for the District of Columbia Circuit would hold “exclusive” jurisdiction to review CSRTs.

However, in 2006, the Supreme Court held in Hamdan v. Rumsfeld that the DTA was not applicable to cases pending—similar to petitioners’ cases—when the DTA was enacted. In response, Congress amended the DTA with the Military Commissions Act of 2006 (MCA). The MCA denied federal courts jurisdiction over “enemy combatants” habeas actions.

The United States Court of Appeals for the District of Columbia Circuit consolidated the petitioners’ cases on appeal. Despite Congress’ MCA amendment to the DTA, petitioners filed a supplemental brief in hope of being released from GTMO based on the

32. See BLACK’S LAW DICTIONARY 538–39 (8th ed. 2004) (“The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case.”).
33. In re Guantanamo Detainee Cases, 355 F. Supp. 2d at 464. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . nor be deprived of life, liberty, or property, without due process of law . . . .
37. Id.
38. 548 U.S. 557 (2006); see infra Part II.B.
42. Boumediene, 128 S. Ct. at 2242.
holding in *Hamdan*. The Court of Appeals held that the MCA "strips" jurisdiction over petitioners' habeas actions from all federal courts; that the petitioners are not "entitled to the privilege of the writ [of habeas corpus] or the protections of the Suspension Clause [in Article 1, Section 9 of the Constitution, which prohibits the suspension of the writ of habeas corpus unless during times of rebellion or invasion]," and, as a result, it was "unnecessary to consider whether Congress provided an adequate and effective substitute for habeas corpus in the DTA." In holding that detainees at GTMO have no privileges of habeas corpus or the protections of the Suspension Clause, the Court of Appeals primarily relied on precedent set forth in *Johnson v. Eisentrager*, which limited the habeas corpus rights of enemy aliens detained in China during World War II.

On June 29, 2007, the United States Supreme Court granted certiorari to decide three issues: (1) whether the MCA denies federal courts jurisdiction over detainee habeas corpus actions that were pending during its enactment; (2) whether "enemy combatants" detained at GTMO have the privilege of habeas corpus or can invoke the Suspension Clause; and (3) if the first two questions are answered in the affirmative, whether the MCA provided "adequate substitute procedures" for habeas corpus.

II. LEGAL BACKGROUND

Actions disputing the jurisdictional bounds of military tribunals date back to 1866 when the Supreme Court decided *Ex parte*
During and immediately following World War II, prisoners continued to question their habeas corpus rights and the legality of military tribunals in cases such as *Ex parte Quirin* and *Johnson v. Eisentrager*. After the September 11, 2001 terrorist attacks, Congress granted the President authorization to use “all necessary and appropriate force” against al Qaeda. President George W. Bush exercised this grant of power by imprisoning detainees at the United States Naval Base in Guantanamo Bay, Cuba (GTMO). Detainees disputed their imprisonment in cases such as *Rasul v. Bush* and *Hamdi v. Rumsfeld*. In response, Congress passed the Detainee Treatment Act of 2005 (DTA) in an effort to limit the jurisdiction of federal courts over detainee habeas corpus cases. In June 2006, the Supreme Court decided *Hamdan v. Rumsfeld*. In return, Congress amended the DTA with the Military Commissions Act (MCA) in another attempt to limit the federal courts’ jurisdiction to preside over GTMO detention actions.

### A. Actions Questioning the Jurisdiction of Military Tribunals and Habeas Corpus Rights of Detainees Before September 11, 2001

In 1866, the U.S. Supreme Court decided *Ex parte Milligan*. During the peak of the Civil War, the commanding general of the military district of Indiana arrested petitioner, Lambdin P. Milligan and charged him with aiding the Confederacy and conspiring against

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53. 71 U.S. 2 (1866); see infra Part II.A.
54. 317 U.S. 1 (1942); see infra Part II.A. Another interesting case questioning the imprisonment of detainees during WWII is *Korematsu v. United States*. See 323 U.S. 214 (1944) (questioning the detainment and anti-espionage regulations imposed on United States citizens of Japanese descent who resided on the West Coast). However, the Court in *Korematsu* applied the Equal Protection Clause of the Fourteenth Amendment and did not raise habeas corpus issues. *Id.* at 234–35.
55. 339 U.S. 763 (1950); see infra Part II.A.
57. *See supra* note 16 and accompanying text.
58. 542 U.S. 466 (2004); see infra Part II.B.
59. 542 U.S. 507 (2004); see infra Part II.B.
61. 548 U.S. 557 (2006); see infra Part II.B.
63. 71 U.S. 2 (1866).
64. *Id.* at 107.
Milligan was detained and eventually brought before a military commission. Milligan argued that the military commission did not have jurisdiction because he was a citizen of the State of Indiana and the United States, had never resided in any of the rebellious Confederate states since the beginning of the Civil War, and had a right to trial by jury—a guarantee under the United States Constitution. The Court held that military tribunals cannot preside over civilian cases where civilian courts are open. The Court noted that Milligan’s constitutional right to a trial by jury had been violated. As a result, the writ of habeas corpus should

65. Id. at 122. Milligan and four associates allegedly planned to steal Union weapons and attack Union prisoner-of-war camps. Milligan intended to recruit the POWs to aid in the takeover of other POW camps, the state government of Indiana, as well as Ohio and Illinois. Samuel Klaus, The Milligan Case 32–33 (1970). Milligan was also charged with “inciting insurrection.” Milligan, 71 U.S. at 122.

66. Milligan, 71 U.S. at 107. On September 15, 1863—during the Civil War—President Abraham Lincoln, for the first time in American history, suspended the writ of habeas corpus. Id. at 115. Milligan was detained from October 5, 1864 to January 2, 1865. Id. at 131. On October 21, 1864, the military commission sentenced Milligan to death by hanging. Id. at 107. “Abraham Lincoln cited [Andrew] Jackson’s wartime actions when justifying his administration’s restrictions on civil liberties during the Civil War.” Mark A. Graber, Book Review of Matthew Warshauer’s Andrew Jackson and the Politics of Martial Law. 105 Register of the KY Hist. Soc. 1, 17–19. During the War of 1812, Major General Andrew Jackson declared martial law. Robert V. Remini, Andrew Jackson and the Course of American Empire, 1767-1821, 308 (1977). When martial law is declared during wartime, “the army, instead of civil authority, governs the country because of a perceived need for military security or public safety.” Black’s Law Dictionary 996 (8th ed. 2004). After declaring martial law, Jackson expelled those who claimed to be French citizens from New Orleans. Remini, supra note 66, at 309. After a newspaper writer criticized Jackson’s expulsion order, Jackson had the writer arrested. A lawyer who witnessed the arrest, rushed to Federal District Judge Dominick Augustin Hall, who granted a petition for a writ of habeas corpus. Jackson responded by having Judge Hall arrested. Id.

67. Milligan, 71 U.S. at 108.

68. Id. at 131.

69. Id. at 108.

70. Milligan, 71 U.S. at 121–22. The majority asserted that Congress did not have the power to authorize a military trial for a civilian defendant when civilian courts are open, even during wartime. Id. The dissent disagreed, saying Congress had the power to authorize a military tribunal in this case, but did not exercise such power. Id. at 137 (Chief Justice, dissenting). The dissent noted that Congress’ power to authorize military tribunals is attached to Congress’ power to declare war and is not outweighed by an individual’s Fifth Amendment rights. Id. at 138–39.

71. Id. at 122–23. The Court relied heavily on interpretation of the Fifth and Sixth Amendments:

The sixth amendment affirms that “in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, “excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger . . .”
have been issued and thus, Milligan was to be "discharged from custody." In so holding, the Court stated that "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

The Court reached a different result in *Ex parte Quirin*, a case heard during World War II. In *Quirin*, petitioners were Germans (except for one American citizen) who infiltrated American soil, armed with explosives, with intent to destroy strategic military bases. The petitioners were captured and placed before a military commission, pursuant to President Franklin D. Roosevelt's order.

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73. *Id.* at 131. The Court agreed with Milligan's interpretation of the act of Congress of March 3, 1863. Milligan argued that the act mandated his release since he was a citizen of the State of Indiana; he was not a member of the military; and he was imprisoned during a time when the Circuit Court for the District of Indiana convened and adjourned. *Id.*
74. *Id.* at 120–21. However, the Court also recognized that military tribunals, during times of war, are sometimes necessary:
   
   It is essential to the safety of every government that, in a great crisis, like the [Civil War], there should be a power somewhere of suspending the writ of habeas corpus. In every war, there are men ... wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate [jury trial] may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of habeas corpus. *Id.* at 125–26.
75. 317 U.S. 1 (1942).
76. See *id.* The Court viewed the issues raised by petitioners to be of such "public importance" that it granted certiorari and convened during an unscheduled "special" term. *Id.* at 19.
77. *Id.* at 21. Petitioners were born in Germany. *Id.* at 20. During WWII, petitioners boarded a submarine—stocked with explosives—landed on Long Island, NY, changed into civilian attire, and traveled to New York City. Petitioners then boarded another submarine that they navigated to Florida. Petitioners had instructions from high-ranking German military officials to destroy strategic military facilities in the United States. In exchange, their families in Germany were to receive compensation. *Id.* at 21.
78. *Id.* at 21.
79. *Id.* at 22. On July 2, 1942, President Roosevelt declared that: [A]ll persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation and who during time of war enter or attempt to enter the United States ... through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage,
President Roosevelt declared that petitioners were denied access to federal courts. Petitioners argued that the President lacked constitutional authority to establish the military tribunals, they had a right to a jury trial under the Fifth and Sixth Amendments, and that the President’s order, which “prescri[ed]” the procedure, method of review, and sentencing requirements of the commission, conflicted with Congress’ adoption of the Articles of War. The Court distinguished Quirin from Milligan, holding that this military commission had jurisdiction, petitioners were unlawful enemy “belligerents” and therefore had no right to a civilian trial by jury under the Fifth and Sixth Amendments, and, lastly, the President had authority to order trial by military commission. The Court concluded that the petitioners’ detainment was lawful and thus denied their petition for habeas corpus.

In 1950, five years after the end of WWII, the Court again denied a petition for a writ of habeas corpus in Johnson v. Eisentrager. Petitioners were twenty-one German nationals stationed in China who continued to aid Japan after Germany surrendered from WWII. Petitioners were arrested, but unlike petitioners in Milligan and Quirin, were tried before an extraterritorial military tribunal in espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.

\[id\] at 22–23.

80. \[id\] at 23.


82. Quirin, 317 U.S. at 25.

83. \[id\] at 44–45; \textit{contra} Ex parte Milligan, 71 U.S. 2, 121–22 (1942) (holding that military tribunals cannot preside over civilian cases where civilian courts are open).

84. \[id\] at 48.

[T]he detention and trial of petitioners–ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger–are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.

\[id\] at 25.

85. \[id\] at 48. The Court reached a similar conclusion in \textit{In re Yamashita}, 327 U.S. 1, 25 (1946) (holding that the Executive had legal authority to try petitioner–the commanding general of the Japanese armed forces–by military commission).


87. \[id\] at 765–66. Germany surrendered on May 8, 1945. \[id\] Japan had yet to surrender. Petitioners relayed intelligence information with regard to American troop movements to Japan. \[id\] at 766.
Nanking, China. The District Court of the District of Columbia dismissed the petition. The Court of Appeals reversed and held that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ [of habeas corpus]." The Court of Appeals continued that although jurisdiction is not authorized through any statute, the courts should hold it as part of a "judicial power."

After granting certiorari, the Supreme Court questioned how petitioners were privileged to the constitutional right of the writ of habeas corpus when petitioners were enemy aliens, never in the United States, being held as prisoners of war outside the United States, and convicted by a military commission presiding overseas and for violating laws of war. The Supreme Court stated that the Court of Appeals "gave our Constitution an extraterritorial application to embrace our enemies in arms." The Court then held that the Constitution does not immunize enemy aliens from trial by military commissions or punishment when their countries are at war with the United States. Further, the Court held that petitioners failed to show that the military commissions lacked jurisdiction.

88. Id. at 766; see Ex parte Milligan, 71 U.S. 2, 107 (1866) (noting that petitioner's military tribunal presided in the State of Indiana); see also Ex parte Quirin, 317 U.S. 1, 23 (1942) (noting that petitioners' military tribunal presided in Washington, DC). The tribunal was authorized by the Joint Chiefs of Staff of the United States. Eisentrager, 339 U.S. at 766.

89. Eisentrager, 339 U.S. at 767. Petitioners argued that their trial, conviction, and detention were unconstitutional under Article 1, Article III, and the Fifth Amendment of the Constitution, and in violation of the Geneva Convention. Id.


91. Eisentrager, 339 U.S. at 767.

92. Id. at 777.

93. Id. at 781.

94. Id. at 785.

95. Id. at 790.
B. Jurisprudence Regarding the Jurisdiction of Military Tribunals and Habeas Corpus Rights of Detainees After September 11, 2001

After the September 11 attacks, Congress passed the Authorization for Use of Military Force (AUMF).\(^96\) The AUMF stated that:

\[\text{The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.}\(^97\]

After United States intelligence determined that al Qaeda was responsible for the attacks, President George W. Bush commanded the United States Armed Forces to infiltrate Afghanistan pursuant to the authorization.\(^98\) During this armed conflict, the United States captured several foreign nationals and detained them at GTMO.\(^99\) On November 13, 2001, President Bush gave an executive order authorizing the trial of al Qaeda members through military commission at “any place” the Secretary of Defense determined, including GTMO.\(^100\) In this order, the President invoked his power under 10 U.S.C. §836\(^101\) and stated that the general principles of law and evidence rules that apply in

\(^96\). See Pub. L. No. 107-40, 115 Stat. 224 (2001) (granting the President authorization to use force against those responsible for the September 11 attacks). The bill was passed on September 18, 2001. \(\text{id.}\)

\(^97\). \(\text{id}\). Congress justified this authorization in the bill by stating that the United States must “exercise its right to self-defense” and that acts of terrorism “pose an unusual and extraordinary threat to the national security and foreign policy of the United States.” \(\text{id.}\)


\(^99\). See Detainee List, \textit{supra} note 16.

\(^100\). See Military Order No. 3 C.F.R. 918 (Nov. 16, 2001).

\(^101\). 10 U.S.C. § 836 (2006) (stating that the President may prescribe the procedures of military commissions).
typical criminal cases in district courts will not apply to the military commissions.\(^\text{102}\)

One of the first GTMO detention cases heard in the Supreme Court was *Rasul v. Bush*.\(^\text{103}\) Petitioners included two Australians and twelve Kuwaitis, whom the United States captured during armed conflict with the Taliban.\(^\text{104}\) The two Australians invoked their right to a writ of habeas corpus while the Kuwaitis asserted causes of action under three federal statutes, including the general habeas corpus statute, 28 U.S.C. §§ 2241-43.\(^\text{105}\) The District Court dismissed the actions and the Court of Appeals affirmed, relying on *Eisentrager*.\(^\text{106}\) The Supreme Court granted certiorari and distinguished *Rasul* from *Eisentrager* by noting that the detainees in *Rasul* were not nationals of a country at war with the United States, denied participation in an act of aggression against the U.S., had never gone before a tribunal, had never been charged, and "for more than two years, [the detainees] ha[d] been imprisoned in territory over which the United States exercises exclusive jurisdiction and control."\(^\text{107}\) The Court held that 28 U.S.C. § 2241 grants the United States District Court for the District of Columbia with jurisdiction over the "custodians" of the detainees, and therefore, jurisdiction to hear the detainees' habeas corpus actions.\(^\text{108}\)

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102. Military Order No. 3 C.F.R. 918 (Nov. 16, 2001). The military commissions allowed for the admissibility of hearsay. See infra note 169 and accompanying text. Hearsay is, "[t]raditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness." Black's Law Dictionary 739 (8th ed. 2004).


104. Id. at 470. Relatives of the petitioners filed the action with the U.S. District Court for the District of Columbia. Id. at 471.

105. Id. at 472. The Kuwaitis also asserted causes of action under the Administrative Procedure Act, 5 U.S.C. §§ 555, 702, 706, and the Alien Tort Statute, 28 U.S.C. § 1350. Moreover, the "Kuwaiti detainees filed a complaint seeking to be informed of the charges against them, to be allowed to meet with their families and with counsel, and to have access to the courts or some other impartial tribunal." Id.

106. *Rasul*, 542 U.S. at 472–73; see supra Part II.A.

107. Id. at 476.

108. Id. at 483–84.

[\text{P}]ersons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review. In *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973), this Court held... that the prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas statute. Rather, because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of § 2241 as long as "the custodian can be reached by service of process."
On the same day as Rasul, the Court also decided Hamdi v. Rumsfeld. In Hamdi, the Court questioned the constitutionality of the United States Government's detention of a U.S. citizen as an "enemy combatant" on U.S. soil. The petitioner, Yaser Esam Hamdi, is a United States citizen. However, petitioner relocated to Afghanistan where he allegedly became a member of the Taliban. After being captured by troops of the Northern Alliance of Afghanistan, a U.S. ally, petitioner was detained at GTMO. When it was determined that he is a U.S. citizen, Hamdi was eventually transferred to a prison in Charleston, South Carolina. Though the district court granted petitioner access to an attorney, the United States Court of Appeals for the Fourth Circuit held that the district court did not appropriately consider the government's security interests. The Court of Appeals subsequently determined that because petitioner was "captured in a zone of active combat in a foreign [nation]," the habeas petition should be dismissed and that

Id. at 478–79.


110. Id. at 509. Another Supreme Court case questioning the constitutionality of the United States Government's detention of a U.S. citizen as an "enemy combatant" on U.S. soil was Rumsfeld v. Padilla, 542 U.S. 426 (2004). In Padilla, the Court ruled in favor of the Bush Administration, finding that Padilla should have brought his case in South Carolina instead of New York. Id. at 451. However, the Bush Administration's victory was merely procedural. JEFFREY TOOBIN, THE NINE 233 (2007).

111. Id. Hamdi was born in Louisiana in 1980. As a child, Hamdi moved to Saudi Arabia.

112. Id. at 510. Hamdi allegedly "affiliated with a Taliban military unit and received weapons training." Id. at 513. Upon capture, Hamdi "surrender[ed] his Kalishnikov assault rifle." Id.

113. Id. at 510.

114. Hamdi, 542 U.S. at 510. Hamdi was transferred to a naval brig in Norfolk, VA before his detention in Charleston, SC. Id. Petitioner’s father filed a habeas corpus petition. Id. at 511. The petition asked the Court to (1) appoint counsel; (2) order the Government to stop interrogating Hamdi; (3) declare that Hamdi’s Fifth and Fourteenth Amendment rights were violated; (4) order an evidentiary hearing; and (5) order the release of Hamdi. Id.

115. Id. at 512.

116. Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002). After reviewing the Government’s response motion, the Court of Appeals ordered the District Court to determine the sufficiency of the Government’s argument. Hamdi v. Rumsfeld, 542 U.S. 507, 513 (2004). The District Court characterized petitioner’s under-oath statement as hearsay and ordered the production of evidence necessary for "meaningful judicial review." Evidence to be produced included Hamdi’s statements, notes taken during Hamdi’s interviews, the interviewers’ contact information, statements by the Northern Alliance troops who captured Hamdi, and names and titles of the Government officials who determined that Hamdi was an "enemy combatant." Id. at 513–14.

117. Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003). The Court of Appeals stated that because “Article III [which enumerates the powers of the Supreme Court] contains nothing analogous to the specific powers of war so carefully enumerated in Articles I and II
the AUMF authorized petitioner's detention. The Supreme Court granted certiorari and held that "although Congress authorized [through the AUMF] the detention of combatants in the narrow circumstances alleged [in Hamdi], due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker." The Court concluded its opinion by suggesting that an authorized tribunal—like a Combatant Status Review Tribunal (CSRT)—may satisfy due process demands.

On July 7, 2004, approximately a week after the Hamdi decision, Defense Secretary Donald Rumsfeld responded by establishing CSRTs. CSRTs determined if detainees held at GTMO were "enemy combatants." Each CSRT was comprised of three neutral United States military officers, including one judge advocate. Each detainee was assigned a military officer as a "personal representative" and was allowed to testify, call witnesses,

[which enumerate the powers of Congress and the President respectfully]," the courts are "prohibited" from questioning Hamdi's detention further. Id. at 463. 118. Id. at 467. The Court of Appeals also rejected Hamdi's reliance on Ex parte Quirin stating that "[i]n the case of a citizen who takes up arms against the United States in a theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such." Id. at 475. 119. Hamdi, 542 U.S. at 509. Petitioner argued that his detention was illegal under 18 U.S.C. § 4001(a), which states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Id. at 517. The Court recognized that though indefinite imprisonment for the purposes of interrogation is not authorized, the United States may detain members of the Taliban who engaged in armed hostilities against the United States for the duration of the conflict in Afghanistan, pursuant to the AUMF. Id. at 521. However, the Supreme Court rejected the Government's argument that "respect for separation of powers" should discourage the Court from questioning the constitutionality of the detention of enemy combatants. Id. at 527, 533. The Court employed the Mathews v. Eldridge, 424 U.S. 319 (1976) balancing test in accepting Hamdi's argument that he is entitled to fact-finding proceeding before a neutral tribunal. Id. at 529. "Mathews dictates that the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest." Id. (quoting Mathews, 424 U.S. at 335). In her plurality opinion, Justice Sandra Day O'Connor stated "[T]he Supreme Court has long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." Id. at 536. 120. See Hamdi, 542 U.S. at 538. The Court stated that "[a]n interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker." Id. at 537. 121. See Wolfowitz, supra note 21. 122. Id. 123. Id. A judge advocate is an attorney in the armed forces. See, e.g., United States Navy Judge Advocate General's Corps, http://www.jag.navy.mil/; United States Marine Corps Staff Judge Advocate to the Commandant, http://www.marines.mil/unit/judgeadvocate/Pages/Home/SJA_to_the_CMC.aspx.
and introduce evidence before the CSRT.\textsuperscript{124} The three officers presiding on the CSRT then determined if the detainee was an “enemy combatant” or should be deported to their country of citizenship.\textsuperscript{125}

Congress also responded to the Supreme Court’s decision in \textit{Hamdi} by passing the Detainee Treatment Act (DTA) in 2005.\textsuperscript{126} The DTA stripped federal courts of jurisdiction over habeas actions by GTMO detainees:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.\textsuperscript{127}

Further, the DTA granted the United States Court of Appeals for the District of Columbia Circuit “exclusive jurisdiction” over CSRT decisions regarding the proper detention of an “enemy combatant.”\textsuperscript{128}

Despite Congress’ enactment of the DTA, the Supreme Court decided \textit{Hamdan v. Rumsfeld} in June 2006.\textsuperscript{129} Petitioner, Salim Ahmed Hamdan, was captured in Afghanistan in November 2001.\textsuperscript{130} Three years later, petitioner was charged while detained at GTMO with conspiracy “to commit . . . offenses triable by military commission.”\textsuperscript{131}

\textsuperscript{124} Wolfowitz, \textit{supra} note 21.

\textsuperscript{125} \textit{Id}.


\textsuperscript{128} Boumediene v. Bush, 128 S. Ct. 2229, 2276 (2008). The jurisdiction of the Court of Appeals was limited to the consideration of whether the final determinations made by the CSRTs were in accordance with the procedures set forth by the Secretary of Defense and the Constitution of the United States. 10 U.S.C. §801 (2006).

\textsuperscript{129} 548 U.S. 557 (2006).

\textsuperscript{130} \textit{Id}. at 566. Hamdan is a citizen of Yemen. \textit{Id}.

\textsuperscript{131} \textit{Id}. Hamdan’s charging document contained 13 paragraphs. The first two paragraphs explained the military tribunal’s jurisdiction. The next nine paragraphs detailed al Qaeda’s actions through 2001 and listed Osama bin Laden as al Qaeda’s leader. \textit{Id}. at 569. Paragraph 12 stated that Hamdan “willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism.” \textit{Id}. at 569-70. Paragraph 13 lists four specific allegations:

\begin{enumerate}
\item he acted as Usama bin Laden’s "bodyguard and personal driver," "believ[ing]" all the while that bin Laden "and his associates were involved in" terrorist acts prior to and including the attacks of September 11, 2001; (2) he arranged for transportation of, and actually transported,
Petitioner argued that the CSRT that the executive branch established lacked authority because no statute or case law supported trial by commission for a conspiracy charge, and the CSRT’s procedures, which disallow the defendant to hear incriminating evidence, violated the Uniform Code of Military Justice \(^3\) and the Geneva Conventions \(^3\) \(^3\). Though the District Court granted petitioner a writ for habeas corpus, the Court of Appeals reversed. \(^1\) After the Supreme Court granted certiorari in November 2005, \(^1\) the Government filed a motion to dismiss, arguing that the Supreme Court lacked jurisdiction to review the appeal as a result of the DTA. \(^1\) However, the Court rejected the Government’s DTA argument \(^1\) and agreed with petitioner that his tribunal’s procedures violated military and international law. \(^1\) The Court held that the DTA’s jurisdiction—

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1. See UCMJ, supra note 81.
3. Hamdan, 548 U.S. at 567.
4. Id. The Court of Appeals disagreed with the District Court by holding that Hamdan was not entitled to protection under Article 3 of the Geneva Convention. Id. at 571. The Court of Appeals also held that Hamdan’s trial before a military tribunal was not a violation of the UCMJ. Id. at 572.
5. Id. at 572. In his dissent, Justice Scalia agreed with the Government that the DTA strips the Supreme Court’s jurisdiction in this case. Id. at 575-84 (Scalia, J., dissenting).
6. Id. at 575–84. The Court stated that “the Government has identified no . . . ‘important countervailing interest’ that would permit federal courts to depart from their general ‘duty to exercise the jurisdiction that is conferred upon them by Congress.’” Id. at 589 (quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996). The Court also rejected the Government’s argument that even if the Court has jurisdiction, civilian courts should wait for the completion of the military proceeding before attacking the proceeding. Id. at 584–85.
7. Hamdan, 548 U.S. at 567. In Part V of the Hamdan opinion, the Court also held that a military tribunal may not try a conspiracy charge. Id. The Court stated that neither the AUMF nor the DTA authorized the President to convene military tribunals outside those authorized and enumerated in Article 21 of the UCMJ. Id. at 593–94.
stripping language had no effect on pending cases.\textsuperscript{140} Hamdan’s case was remanded to the lower civilian court for further proceedings.\textsuperscript{141}

In response to the holding in \textit{Hamdan}, Congress amended the DTA with the Military Commissions Act of 2006 (MCA).\textsuperscript{142} President George W. Bush signed the MCA on October 17, 2006.\textsuperscript{143} Once again, through Section 7(b) of the MCA, Congress denied federal courts jurisdiction over “enemy combatant” habeas actions by stating that the MCA took effect \textit{immediately}, and applied to “all cases, without exception, pending on or after the date of the enactment of this [Military Commissions] Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.”\textsuperscript{144}

III. THE COURT’S REASONING

The U.S. Supreme Court held in \textit{Boumediene} that the Military Commissions Act (MCA) “strips” jurisdiction over petitioners’ habeas actions from all federal courts\textsuperscript{145} and that the Suspension Clause in Article 1, Section 9 of the United States Constitution is in effect at the Naval Base in Guantanamo Bay, Cuba (GTMO).\textsuperscript{146} Furthermore, the Court held that Congress did not provide an adequate and effective substitute for habeas corpus in the Detainee Treatment Act (DTA), thereby rendering MCA § 7 an unconstitutional suspension of the writ of habeas corpus,\textsuperscript{147} and that detainees need not wait for the

\textsuperscript{140. \textit{Id.} at 575–76 (“Ordinary principles of statutory construction suffice to rebut the Government’s theory—at least insofar as this case, which was pending at the time the DTA was enacted, is concerned.”).}

\textsuperscript{141. \textit{Id.} at 635. However, the Court recognized Hamdan’s dangerous character and the risk that he posed to innocent civilians. Hamdan remained detained at GTMO. \textit{Id.} at 635.}

\textsuperscript{142. \textit{See Pub. L. No. 109-366, 120 Stat. 2600. The MCA “authorize[d] trial by military commission for violations of the laws of war, and for other purposes.” \textit{Id.} Additionally, the MCA (1) defined “lawful enemy combatant” and “unlawful enemy combatant;” (2) established procedures for military tribunals; (3) stated that no unlawful enemy combatant “subject to trial by military commission under [the MCA] may invoke the Geneva Conventions as a source of rights;” (4) stated that a finding by a CSRT that a detainee is an unlawful enemy combatant is “dispositive” for purposes of jurisdiction for a military tribunal; and (5) allowed military tribunals to impose any non-forbidden punishment, including the death penalty. \textit{Id.} at 2601–03.}

\textsuperscript{143. \textit{See id.}}

\textsuperscript{144. \textit{See id.} at 2636 (emphasis added).}

\textsuperscript{145. \textit{Boumediene} v. Bush, 128 S. Ct. 2229, 2244 (2008).}

\textsuperscript{146. \textit{Id.} at 2262. The Suspension Clause prohibits the suspension of the writ of habeas corpus unless during times of rebellion or invasion. U.S. CONST. art. I, § 9, cl. 2.}

\textsuperscript{147. \textit{Boumediene}, 128 S. Ct. at 2274. The Court of Appeals did not address whether the DTA provided an adequate substitute for habeas corpus. \textit{Id.} at 2262; \textit{see supra} text}
completion of review from the Combatant Status Review Tribunal (CSRT) in the Court of Appeals before bringing a habeas action in district court. 148

In holding that the MCA strips federal courts of jurisdiction over petitioners' habeas actions, the Court rejected petitioners' argument that the MCA is not a clear declaration of the legislature's intent to strip jurisdiction from federal courts in pending cases. 149 Instead, the Supreme Court agreed with the Court of Appeals in recognizing that Congress passed the MCA as a direct result of the holding in Hamdan 150 and stated that, "[Congress'] intent must be respected even if a difficult constitutional question is presented." 151

Next, the Court held that the Suspension Clause has full effect at GTMO. 152 The Court determined that neither petitioners' status as "enemy combatants" nor their physical location in Cuba prevents their ability to seek the writ of habeas corpus. 153 In so holding, the Court first rejected the Government's contention that "enemy combatants" are not entitled to the writ of habeas corpus after making a historical analysis dating back to the Framers of the Constitution; the Court concluded that the right to habeas corpus is one of the fundamental principles that ensure liberty in the United States. 154 The Court noted that the Suspension Clause limits abuse of habeas corpus rights by the political branches and promotes "judicial inquiry" into causes of

accompanying note 47. Typically, the Supreme Court sends unaddressed issues back to the lower courts. However, the Supreme Court determined this case to be "exceptional," taking into consideration the length of time the detainees had been imprisoned. Id. at 2262.

148. Id. at 2275.
149. Id. at 2243–44. Petitioners' argument is based on a textual interpretation of the MCA. Id. at 2243.
150. See supra note 142 and accompanying text.
151. Boumediene, 128 S. Ct. at 2243–44.
152. Id. at 2262. "The [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account." Id. at 2247.
153. Id. at 2262.
154. Id. at 2244 ("The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom."). Alexander Hamilton once wrote:

[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone ... are well worthy of recital: "To bereave a man of life ... without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government."

Id. at 2247 (quoting The FEDERALIST NO. 84 (Alexander Hamilton)).
imprisonment. Next, the Court rejected the Government’s argument that the United States does not claim sovereignty over GTMO. In rejecting the Government’s argument, the Court compared the GTMO lease to the acquisition of territories such as Puerto Rico, Guam, and Hawaii and stated that “[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where [the Constitution’s] terms apply.” The Court also distinguished GTMO detainees, detention sites, and practical concerns from those in Eisentrager—the case on which the lower appellate court relied.

Third, in holding that the DTA does not provide an adequate substitute for habeas corpus thereby rendering the MCA unconstitutional, the Court stated that it considers “it uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.” The Court also stated that the habeas court must have the power to release the prisoner if it determines the imprisonment is unlawful. Though the Court acknowledged that deference is typically owed to a court of record that sentences a detainee to prison, it distinguished a court of record from the executive order that commanded the petitioners’ detention in the present case. The Court noted that the need for habeas corpus is greater where detention is pursuant to an executive order.

155. Id. at 2246–47.
156. See BLACk’s LAW DICTIONARY 1430 (8th ed. 2004) (“Supreme dominion, authority, or rule.”).
157. Boumediene, 128 S. Ct. at 2248–62. The Court stated that the United States “maintains de facto sovereignty over [GTMO].” Id. at 2253.
158. Id. at 2253.
159. Id. at 2259.
160. Id. In Eisentrager, the detainees did not dispute the Government’s labeling of them as “enemy aliens,” unlike the present case, in which the detainees dispute being “enemy combatants.” Id.
161. Id. at 2260 (“Unlike its present control over the naval station [at GTMO], the United States’ control over the prison in Germany was neither absolute nor indefinite.”).
162. Boumediene, 128 S. Ct. at 2261 (“Habeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks. While we are sensitive to these concerns, we do not find them dispositive.”).
164. Id.
165. Id. at 2268.
166. Id.
Accordingly, the Court reviewed CSRT procedures and accepted petitioners’ argument that CSRTs are deficient fact-finding forums. The Court criticized that a GTMO detainee is limited in his ability to find or present evidence to rebut the Government’s case, does not have an attorney present to explain allegations or present exculpatory evidence, and is not protected by the evidence rules that prohibit hearsay. The Court stated that:

[E]ven when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal’s findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is “closed and accusatorial” (citation omitted). And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.

The Court concluded that the DTA does not allow petitioners to challenge the President’s authority to detain them indefinitely under the AUMF, the Court of Appeals to review evidence outside the record of the CSRT—evidence that may be exculpatory, or the petitioner to request release. Therefore, the DTA hinders petitioners’ ability to participate in adequate appellate review, thus rendering MCA § 7 an unconstitutional suspension of the writ of habeas corpus.

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168. Id. at 2269–70.
169. See FED. R. EVID. 802. Though the detainee may confront a witness testifying against him during a CSRT, hearsay is admissible during a CSRT hearing if the tribunal determines that the testimony is “relevant and helpful.” Boumediene, 128 S. Ct. at 2269.
170. Boumediene, 128 S. Ct. at 2269. The Government’s counterargument was that the CSRTs were established in accordance with the Supreme Court’s suggestions detailed in Hamdi. Id.
171. Id. at 2270.
172. Id. at 2271–72.
173. Id. at 2273. Evidence considered to be outside the record includes evidence obtained after the CSRT hearing. Exculpatory evidence obtained after the CSRT hearing “may be critical to the detainee’s argument that he is not an enemy combatant and there is no cause to detain him.” Id. The Government argued that if a detainee obtains exculpatory evidence after his CSRT, the DTA allows the detainee to request that the Deputy Secretary of Defense order a new tribunal. Since the convening of a new tribunal is at the discretion of the Deputy Secretary of Defense, however, the Court determined that the current review process is inadequate. Id.
174. Id. at 2274.
175. Boumediene, 128 S. Ct. at 2274.
Finally, the Court then held that, despite the Government’s interpretation of the DTA, petitioners may bypass CSRT review in the Court of Appeals and bring habeas actions immediately in district court.\(^\text{176}\) In making this holding, the Court considered the several years these detainees have been imprisoned,\(^\text{177}\) and the unresponsiveness of the Court of Appeals to process the CSRT reviews.\(^\text{178}\) However, the Court also noted that the Executive is still permitted reasonable time to determine the detainee’s status at a CSRT before a detainee can file a habeas corpus petition.\(^\text{179}\)

In his dissent, Justice Scalia asserted that the majority erroneously violated the precedent set forth in *Eisentrager*.\(^\text{180}\) Scalia stated that *Eisentrager* “held—held beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign.”\(^\text{181}\) The Justice continued that “[t]he writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application [at GTMO], and the Court’s intervention in this military matter is entirely [beyond the Court’s power].”\(^\text{182}\)

\(^{176}\) Id. at 2275.

\(^{177}\) Id. (“In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands . . . To require these detainees to complete DTA review before proceeding with their habeas corpus actions would be to require additional months, if not years of delay.”).

\(^{178}\) Id.

\(^{179}\) *Boumediene*, 128 S. Ct. at 2276. The Court concluded the majority opinion with dictum: “In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches.” Id. at 2276 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)). The Court then noted that “few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.” Id. at 2277.

In a concurring opinion, Justice Souter, joined by Ginsburg and Breyer, stated that “legislation eliminated the statutory habeas jurisdiction over the [GTMO detention] claims, so that now there must be constitutionally based jurisdiction or none at all.” Id. at 2278 (Souter, J., concurring). Additionally, after considering the length of the petitioners’ detention, Souter rejected the dissents argument that “these cases should be seen as a judicial victory in a contest for power between the Court and the political branches.” Id. at 2278–79 (“[T]oday’s decision is no judicial victory, but an act of perseverance in trying to make habeas reviews, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation.”).

\(^{180}\) Id. at 2298–99.

\(^{181}\) Id.; see *supra* Part II.A. Scalia notes that the majority “admits that it cannot determine whether the writ [of habeas corpus] historically extended to aliens held abroad, and it concedes (necessarily) that Guantanamo Bay lies outside the sovereign territory of the United States.” Id. at 2297.

\(^{182}\) *Boumediene*, 128 S. Ct. at 2294 (Scalia, J., dissenting). Chief Justice Roberts, Justice Alito, and Justice Thomas joined Scalia’s dissent. Id.
dissent, Scalia criticized that the majority’s opinion decreases the
security of U.S. soldiers by allowing GTMO detainees to return to the
field of battle, and foolishly places the authority over enemy
prisoners in the hands of the judiciary instead of the political
branches. Moreover, he complained that the majority irrationally
provided more judicial remedy for enemy prisoners detained in areas
of U.S. control than enemies sentenced to death and established “an
inflated notion of judicial supremacy.”

In reaching his conclusions, Scalia focused on what he called
the “legal errors” of the majority opinion. However, Scalia’s
analysis of the “legal errors” opens with the following narrative:

America is at war with radical Islamists. The enemy
began by killing Americans and American allies
abroad: 241 at the Marine barracks in Lebanon, 19 at
the Khobar Towers in Dhahran, 224 at our embassies in
Dar es Salaam and Nairobi, and 17 on the USS Cole in
Yemen (citation omitted). On September 11, 2001, the
enemy brought the battle to American soil, killing 2,749
at the Twin Towers in New York City, 184 at the
Pentagon in Washington, D. C., and 40 in Pennsylvania
(citation omitted). It has threatened further attacks
against our homeland; one need only walk about
buttressed and barricaded Washington, or board a plane
anywhere in the country, to know that the threat is a
serious one. Our Armed Forces are now in the field

183. Id. at 2294–95 (“At least 30 of those prisoners hitherto released from Guantanamo
Bay have returned to the battlefield . . . [One] former detainee promptly resumed his post as a
senior Taliban commander and murdered a United Nations engineer . . . [Another] released
detainee carried out a suicide bombing against Iraqi soldiers . . . ”).

184. Id. at 2296 (“Henceforth, as today’s [majority] opinion makes unnervingly clear,
how to handle enemy prisoners in this war will ultimately lie with the [judicial] branch that
knows least about the national security concerns that the subject entails.”).

185. Id. at 2302. Scalia writes:
The Court’s analysis produces a crazy result: Whereas those convicted and
sentenced to death for war crimes are without judicial remedy, all enemy
combatants detained during a war, at least insofar as they are confined in
an area away from the battlefield over which the United States exercises
“absolute and indefinite” control, may seek a writ of habeas corpus in
federal court.

Id.

186. Boumediene, 128 S. Ct. at 2302.

187. Id. at 2294.
against the enemy, in Afghanistan and Iraq. Last week, 13 of our countrymen in arms were killed.\^{188}

IV. ANALYSIS

Justice Scalia’s choice of language in the beginning of his dissent suggests that his opinion is fueled by fear of an unfamiliar race with unique religious practices.\^{189} His demonstrated fear may not be unfounded, especially after the attacks that took place on September 11, 2001.\^{190} However, the demonstration of fear of an unfamiliar race or religion is unprecedented in previous habeas corpus jurisprudence—including Scalia’s previous dissents in Guantanamo detention habeas corpus cases.\^{191} Scalia may have included this fearful language as a last-ditch effort—after taking into consideration the long line of GTMO habeas corpus jurisprudence—to influence the courts’ future habeas corpus opinions to subscribe to his conservative viewpoint.\^{192}

\^{188} Id. at 2294 (Scalia, J., dissenting). Chief Justice Roberts’ dissent, joined by Justice Scalia, states that the DTA system for testing the legality of the detainees’ imprisonment at GTMO created by the political branches adequately protects constitutional rights of detainees. Id. at 2280. Robert’s contends that the majority’s refusal to force petitioners to exhaust their statutory remedies, places the Court in the awkward position of prematurely deciding whether the DTA extends habeas corpus rights to the GTMO detainees, when the system the political branches created would answer that same question in due time. Id. at 2283. Additionally, Roberts states that the majority fails to articulate the detainees’ rights that cannot be preserved by the DTA system. Id. Roberts adds that the majority is contradicting the plurality opinion in Hamdi, which states that “enemy combatants” are entitled to limited process—like the process offered through CSRTs. Id. at 2283.

\^{189} See id. at 2294 (“America is at war with radical Islamists.”). Justice Scalia is a devout Catholic. MARK TUHNET, A COURT DIVIDED 35 (2005).

\^{190} See infra Part IV.A.

\^{191} See infra Part IV.B. While narratives like Scalia’s do not appear in other habeas corpus cases, other American jurisprudence has surely been influenced by fear of unfamiliar races and religions. See Geary Act (Chinese Exclusion), 27 Stat. 25 (1892) (“An act to prohibit the coming of Chinese persons into the United States.”); Korematsu v. United States, 323 U.S. 214, 215–16, 224 (1944) (affirming the conviction of an American citizen of Japanese ancestry who violated Civilian Exclusion Order No. 34—excluding persons of Japanese descent from “military areas”); Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (upholding the constitutionality of segregation in public rail cars that are “separate but equal”); Reynolds v. United States, 98 U.S. 145, 153 (1878) (affirming the conviction of a polygamist despite evidence of a partial jury and the defendant’s belief that plural marriage was his religious duty).

\^{192} See infra Part IV.C. Mark Tushnet questions Scalia’s intelligence and criticizes his writing style. See TUSHNET, supra note 189 at 148–49. [Scalia’s opinions are] strongly stated, [use] catchy examples and phrases, and cast aspersions on his opponents’ honesty. He had familiarized himself with that style as a member of the editorial board of the magazine Regulation… Regulation’s articles were designed to catch readers’ attention with horror stories… The articles’ real audience was opinion
A. Scalia’s Fear of an Unfamiliar Race and Religion May Not be Unfounded

Perhaps Scalia’s narrative is not completely unfounded. On September 11, 2001, radical Islamists hijacked four airplanes used as weapons during a terrorist attack against the United States, killing approximately 3,000 innocent people. Some authors suggest that the hijackers were exercising their religious beliefs through “jihad.” One interpretation of the language of the Qur’an, the Islamic scripture, would suggest that “jihad” is a violent exercise of makers who would read not the articles themselves but the summaries that appeared in leading newspapers, summaries that predictably focused on the horror stories and played down the typically more complicated and qualified academic analysis. Some law professors and an even larger number of journalists praised Scalia for his literary style. That style isn’t as distinctive as it seems at first. Certainly it’s distinctive among Supreme Court justices. But everyone has heard Scalia’s style. It’s the sound bite style of Crossfire, highly quotable, reducing complex issues to simple—and often misleading—phrases.

Id.


194. See Lieutenant Colonel Joseph P. “Dutch” Bialke, Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict, 55 A.F. L. REV. 1, 39 (“Al-Qaeda has shown that it is ready and willing to use all means necessary through jihad, an Islamic holy war, to achieve its stated theocratic-political Islamist vision.”); Lawrence Wright, The Master Plan, THE NEW YORKER, Sept. 11, 2006, available at http://www.newyorker.com/archive/2006/09/11/060911fact3 (suggesting that al Qaeda is just the beginning in the minds of jihad theorists).

195. See 9 ENCYCLOPEDIA BRITANNICA 866 (15th ed. 1993) (“[The Qur’an is] the sacred scripture of Islam, regarded by Muslims as the infallible Word of God . . . Qur’anic recitation has always been an important aspect of Muslim piety. As the paramount authority for the Muslim community, the Qur’an is the ultimate source and continual inspiration of Islam.”).

religious faith, while another interpretation would suggest quite the contrary. For instance, one passage from the Qur’an suggests that jihad is a violent calling:

Fight against... those who have been given the [Islamic] Scripture [and] believe not in Allah [the Islamic God] nor the Last Day, and forbid not that which Allah hath forbidden by His messenger [Mohammed], and follow not the [Muslim] religion of truth, until they pay the tribute readily, being brought low.

Furthermore, another passage reads, “[w]hoso fighteth [on behalf] of Allah, be he slain or be he victorious, on him We shall bestow a vast reward.”

Contrarily, another passage suggests that jihad is not an aggressive violence, stating “[f]ight in the way of Allah against those who fight against you, but begin not hostilities. Lo! Allah loveth not aggressors.” This passage implies that jihad is only practiced as a self-defense method and that aggression is frowned upon within the Islamic faith. Meanwhile, other passages from the Qur’an regarding jihad are rather vague and could imply that the words “fight” or “strive,” as used in the scripture, only propose that followers of

197. See id. at 196 (“O ye who believe! Fight those of the disbelievers who are near to you, and let them find harshness in you, and know that Allah is with those who keep their duty (unto Him).”). Another passage from the Qur’an reads:
   Now when ye meet in battle those who disbelieve [in Islam], then it is smiting of the necks until, when ye have routed them, then making fast of bonds; and afterward either grace or ransom till the war lay down its burdens. That (is the ordinance). And if Allah willed He could have punished them (without you) but (thus it is ordained) that He may try some of you by means of others. And those who fought in the way of Allah, He rendereth not their actions vain.
   Id. at 553.

198. See id. at 173 (suggesting that if the enemy ceases, followers of Islam should stop aggression); see also id. at 343 (suggesting that fighting is only appropriate in cases of self-defense).

This paper takes no position on the true definition of jihad. Readers are left to interpret the scripture themselves. Nor does this paper, by any means, intend to suggest that all Muslims exercise their faith in the same manner. This section is only intended to lay a foundation for the possible source of fear seemingly demonstrated in Scalia’s dissent in Boumediene.

199. Id. at 182.

200. Id. at 85.

201. PICKTHALL, supra note 196, at 190 (emphasis added).

202. See supra text accompanying note 201.
Islam should resist disbelievers by continuing to have faith in Allah and Muhammad, the Muslim prophet.  

B. Fear of Unfamiliar Races and Religions Has Not Influenced Previous Habeas Corpus Jurisprudence—Even Scalia’s Previous Dissents

Little, if any, evidence exists to support that habeas corpus cases before the September 11 attacks were influenced by fear of unfamiliar races or religious practices. The opinion in *Ex parte Milligan* made no mention of the petitioner’s race or religion, probably because petitioner was a Caucasian United States citizen. Likewise, though petitioners in *Ex parte Quirin* and *Eisentrager* were of German descent and denied the right to the writ of habeas corpus, neither opinion seems influenced by fear of an unfamiliar race or religious practice. In fact, in *Eisentrager*, the Court stated that the “provisions [of the United States Constitution] are universal in their application, to all persons within the territorial jurisdiction [of the United States], without regard to any differences of race, of color, or of nationality . . . .” The majority opinions in *Quirin* and *Eisentrager* denied petitioners the right to the writ of habeas corpus not because petitioners were German or Christian, but because the United States was at war with Germany during WWII and petitioners were determined to be “enemy belligerents.”

Habeas corpus jurisprudence post-September 11, 2001 does not, on its face, appear to be influenced by fear of unfamiliar races and religious practice either. On its face, the passing of the Authorization for Use of Military Force appears to be motivated only by self-

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203. See Pickthall, supra note 196, at 375 (“So obey not the disbelievers [of the Muslim faith], but strive against them herewith with a great endeavor.”).

204. See supra Part II.A.


208. See *Ex parte Quirin*, 317 U.S. 1, 31 (1942) (“Unlawful combatants are . . . subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”); *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950) (“We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.”).
defense, and not fear of an unfamiliar race or religious practice. In President George W. Bush’s executive order establishing military commissions for the GTMO detainees, he actually protects against racial and religious classifications by stating that any individual subject to his order shall be “treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria.” The majority opinion in Rasul was in favor of the Australian and Kuwaiti petitioners, and made no mention of petitioners’ religious practices; the same is true for the majority opinion in Hamdi, despite petitioner’s connection to Afghanistan and Saudi Arabia—the historical home of Islam. Likewise, the Detainee Treatment Act prevents federal courts from having jurisdiction over habeas corpus actions of GTMO detainees classified as enemy combatants, but makes no mention of race or religious belief; and the holding in Hamdan was in favor of petitioner, despite his Middle Eastern origin. Arguably, the Military Commissions Act (MCA) targets people of Afghan and Islamic descent because the MCA specifically highlights that members of the Taliban and al Qaeda are


210. Military Order No. 3 C.F.R. 918 (Nov. 16, 2001). President Bush also “allowed the free exercise of religion consistent with the requirements of such detention.” Id.


212. See Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that a citizen being held in the United States labeled as an “enemy combatant” has a right to be tried before a neutral decisionmaker); see also supra note 111–12 and accompanying text. “Saudi Arabia is the historical home of Islam.” 10 ENCYCLOPEDIA BRITANNICA 473 (15th ed. 1993).


214. See Hamdan v. Rumsfeld, 548 U.S. 557, 575–76 (2006) (holding that the DTA’s jurisdiction stripping language had no effect on pending cases). The Court of Appeals thought that Common Article 3 of the Geneva Conventions, which grants minimum protections to individuals not affiliated with a nation that signed the Geneva Convention, does not apply to Hamdan. The Court of Appeals reasoned that the conflict with al Qaeda, “being ‘international in scope’ does not qualify as a ‘conflict not of an international character,’” as Article 3 requires. Id. at 630 (quoting Hamdan v. Rumsfeld, 415 F.3d 33, 41 (D.C. Cir. 2005)). The Supreme Court rejected the Court of Appeals’ reasoning by asserting that the commentaries associated with Common Article 3 make it obvious that the “scope of application” of Article 3 must be wide. Id. at 630–31 (quoting GCIII Commentary 36). To support its assertion, the Court noted that the drafters of Common Article 3 omitted language from the final version of Article 3—“especially [to] cases of civil war, colonial conflicts, or wars of religion”—that would have broadened the scope of Article 3 further. Id. (emphasis added). However, the Court does not classify Hamdan into one of the three categories that the omitted language enumerates. See id.
included in the definition of “unlawful enemy combatant.”\textsuperscript{215} However, little, if any, evidence suggests that Congress’ intent in passing the MCA was anything other than to strip federal courts of jurisdiction over GTMO habeas action in response to the Supreme Court’s holding in \textit{Hamdan}.\textsuperscript{216}

Even in his previous dissents regarding GTMO detainee habeas corpus actions, Justice Scalia avoided discussing race or religion all together. In \textit{Rasul}, Scalia argued that the majority contradicted precedent in \textit{Eisentrager}, but limited his discussion to the legal faults the majority made with respect to the jurisdiction of federal courts over the detainees’ actions.\textsuperscript{217} In \textit{Hamdi}, Scalia argued that for the American petitioner’s detainment to be constitutional, criminal proceedings must occur or Congress must suspend the writ of habeas corpus.\textsuperscript{218} Though Scalia essentially accused Hamdi of treason, he avoided any discussion of race and religion.\textsuperscript{219} Finally, in \textit{Hamdan}, Justice Scalia argued that the majority’s conclusion that the DTA did not apply to pending cases was “patently erroneous;”\textsuperscript{220} that an enemy alien held outside the United States’ jurisdiction has no rights under the Suspension Clause;\textsuperscript{221} and, lastly, that the military commissions at GTMO should not be subject to judicial oversight because they have yet to complete their review.\textsuperscript{222} As shown, Scalia did not touch upon petitioner’s race or religious practices.\textsuperscript{223}

\begin{itemize}
\item \textsuperscript{216} See Ahmad, supra note 19, at 7.
\item \textsuperscript{217} See Rasul v. Bush, 542 U.S. 466, 488-89 (2004) (Scalia, J., dissenting) (“This is an irresponsible overturning of settled law [in \textit{Eisentrager}] in a matter of extreme importance to our forces currently in the field. I would leave it to Congress to change §2241, and dissent from the Court’s unprecedented holding.”). Scalia states that the opinion in \textit{Rasul} “overrules \textit{Eisentrager}; [the \textit{Rasul}] opinion, and [the \textit{Rasul}] opinion alone, extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the Unites States and beyond the territorial jurisdiction of its courts.” Id. at 497.
\item \textsuperscript{218} Hamdi v. Rumsfeld, 542 U.S. 507, 573 (2004) (Scalia, J., dissenting).
\item \textsuperscript{219} See id. at 559-61 (Scalia, J., dissenting) (“Citizens aiding the enemy have been treated as traitors subject to the criminal process.”). At first glance, it appears that Scalia actually argued in favor of the American petitioner despite his connection to the Middle East and practice of Islam. See id. at 573. However, some legal scholars suggest that Scalia wanted to try Hamdi for treason. See Carl Takei, \textit{Terrorizing Justice: An Argument that Plea Bargains Struck Under the Threat of “Enemy Combatant” Detention Violate the Right to Due Process}, 48 B.C. L. Rev. 581, 606 n.144 (2006) (“Yet as Justice Scalia pointed out in his dissent in \textit{Hamdi}, the grounds for designating Hamdi... as [an enemy combatant] overlapped significantly with the grounds for prosecuting a citizen for treason.”).
\item \textsuperscript{220} Hamdan v. Rumsfeld, 548 U.S. 557, 655 (2006) (Scalia, J., dissenting). Scalia argued that statutes take “immediate effect in pending cases.” Id. at 659.
\item \textsuperscript{221} Id. at 670.
\item \textsuperscript{222} Id. at 673-78.
\item \textsuperscript{223} See supra Part II.B.
\end{itemize}
C. Scalia May Have Demonstrated His Fear to Influence Future Habeas Corpus Opinions

Justice Scalia may have demonstrated his fear of an unfamiliar race and religion in *Boumediene* in a last-ditch effort to influence courts to subscribe to his conservative viewpoint in future habeas corpus opinions. After a long line of GTMO habeas corpus jurisprudence, Scalia finally recognized that the majority of the Supreme Court Justices refuse to take Congress' cue to allow the political branches to manage the detention of enemy combatants at Guantanamo Bay. As a result, Scalia resorted to a severe departure from his normal opinion writing practice by starting his opinion with “America is at war with radical Islamists.” Perhaps Scalia demonstrated his own fear with an unfamiliar race and religion in an effort to strike fear into district court judges who, as a result of the majority's opinion in *Boumediene*, will find themselves presiding over yet another GTMO habeas corpus case in the near future. Scalia is afraid that district court judges will subscribe to the majority's liberal theory in *Boumediene*, sympathize with the detainees, and release the detainees from GTMO. Scalia fears that

224. See supra note 184 and accompanying text.
225. *Boumediene* v. Bush, 128 S. Ct. 2229, 2294 (2008) (Scalia, J., dissenting) (“I shall devote most of what will be a lengthy opinion to the legal errors contained in the opinion of the Court. Contrary to my usual practice, however, I think it appropriate to begin with a description of the disastrous consequences of what the Court has done today.”).
226. Id.
227. Id. at 2275 (stating that detainees need not wait for the completion of review of their CSRT in the Court of Appeals before bringing a habeas action in federal district court).
228. See infra note 229 and accompanying text.

On November 6, 2008, United States District Judge Richard Leon presided over the case *Boumediene v. Bush* in the United States District Court for the District of Columbia. See *Boumediene v. Bush*, No. 579 F.Supp. 2d 191 (D.D.C. 2008). Lakhdar Boumediene, along with five other petitioners, alleged that President George W. Bush was unlawfully detaining them at GTMO. Id. at 192-93. The Government representatives–relying upon classified government evidence–argued that the six petitioners intended to travel to Afghanistan in 2001 to take up arms against the United States. Id. at 196. On November 20, 2008, Judge Leon ordered the release of five of the petitioners from GTMO stating that he could not “adequately
some of the released detainees will return to the battlefield in the Middle East, or even worse, coordinate another attack like the one executed on September 11, 2001. Scalia is worried about the potential loss of more American lives.

V. CONCLUSION

Justice Scalia’s language in his Boumediene dissent is influenced by fear of an unfamiliar race and its religious practices. Though Scalia’s fear is not unfounded considering the September 11, 2001 attacks, Scalia’s demonstration of that fear in his dissent is unprecedented in previous habeas corpus jurisprudence. Perhaps Scalia’s demonstrated fear of an unfamiliar race and religion in Boumediene was a last-ditch effort to influence courts’ future habeas corpus opinions. The storied history of habeas corpus jurisprudence in the United States—especially the chess match that the Supreme Court and Congress have played with the Guantanamo Bay detainee...
pawns—should lead us to believe that we will know soon enough whether Scalia’s last-ditch effort will be persuasive in the courts’ future habeas corpus opinions.\textsuperscript{237}

The guiding principles for closing the center should be protecting [sic] our national security, respecting the Geneva Conventions and the rule of law, and respecting the existing institutions of justice in this country. I also believe we should revitalize efforts to transfer detainees to their countries of origin or other countries whenever that would be consistent with these principles. Closing this center and satisfying these principles will take time, and is the work of many departments and agencies.

\textit{Id.}

\textsuperscript{237} See supra notes 227–29 and accompanying text. The President of the United States appoints Supreme Court Justices. U.S. CONST. art II, § 2. With the retirement of Supreme Court Justices David Souter and John Paul Stevens, and the possible retirement of current Justice Ruth Bader Ginsburg, age 75, the election of President Barack Obama has given hope to democrats that the conservative justices of the Supreme Court—such as Justice Scalia—will be balanced by three liberal nominees. David G. Savage, \textit{Obama and the Supreme Court}, L.A. TIMES, Nov. 17, 2008; Robert Barnes, \textit{Analysis: Justice Souter's Retirement, Likely Replacements on Supreme Court}, WASH. POST, May 1, 2009, available at http://www.washingtonpost.com/wp-dyn/content/discussion/2009/05/01/D12009050101585.html.
