

**THE TERRORIST DETENTION REVIEW REFORM
ACT: DETENTION POLICY AND POLITICAL
REALITY**

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I. AUTHORITY TO DETAIN 227

A. Congressional Reaffirmation of Detention Authority 230

B. Defining the Class of Detainable Individuals 231

C. Defining “associated forces” 234

D. Potential Criticism of Detention Power Reaffirmation 235

II. HABEAS PROCEDURES 237

A. Covered Individuals 238

B. Burden of Proof 240

C. Evidentiary Presumptions 242

D. Mosaic Theory 243

E. Presumptions Related to Membership 245

F. Discovery and Classified Information Protection 250

G. Witness Production 254

H. Hearsay 255

I. Coerced Statements 256

J. Voluntariness 257

K. Particular Statements Against Interest 259

L. Habeas for Detainees Tried or Convicted by Military
Commission or Subject to Executive Transfer Efforts 261

M. Limits on Second or Successive Habeas Applications 263

N. Prohibition on Release into the United States 264

III. SOME REMAINING ISSUES FOR CONGRESS AFTER
TDERRA 266

IV. CONCLUSION 270

Between 2005 and 2009, the Detainee Treatment Act of 2005¹

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(hereinafter “DTA”), Military Commissions Act of 2006² (hereinafter “MCA06”), and Military Commissions Act of 2009³ (hereinafter “MCA09”) were each passed by Congress and signed into law by either President Bush or President Obama. Add to that threesome the Authorization for Use of Military Force⁴ (hereinafter “AUMF”), and you have the complete legislative underpinnings of military detention in the War on Terror. Despite two attempts by Congress and the President to block the judiciary from significant involvement (or interference, depending on one’s point of view) in the detention of terrorism suspects, the judiciary grasped control through a series of Supreme Court decisions. Since the last of these decisions, *Boumediene v. Bush*,⁵ which granted Guantanamo Bay detainees habeas corpus rights, Congress and the President have largely abdicated control over the rules of detention to the judiciary, other than the notable exception of reforming the military commissions system in 2009.

With terrorism policy often dominating the headlines and political discussion in Washington, the premise that Congress and the Executive have abdicated the issue to the courts may seem farfetched. Indeed, it seems there are daily newspaper articles and congressional discussions about the best way to detain, interrogate, and try terrorism suspects. Unfortunately, though, all of this talk and coverage increasingly leads to partisans retreating to their respective corners to score political points off of heated national security and civil-liberties rhetoric. While Congress and the President argue back and forth about the particular terrorism case of the day, unelected federal judges are left the unenviable, and to some judges, unwanted, task of de facto legislating lasting detention policy.

If one accepts the premise that all the talk in the halls of Congress regarding detention policy is just that — talk — the question becomes,

and comments, and Ben Wittes and Robert Chesney for their advice in drafting the Terrorist Detention Review Reform Act.

¹ Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-06, 119 Stat. 2680, 2739-44 (2005).

² Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

³ Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801-07, 123 Stat. 2190, 2574-2614 (2009).

⁴ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (authorizing “all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001. . .”).

⁵ *Boumediene v. Bush*, 553 U.S. 723 (2008).

2011 *TERRORIST DETENTION REVIEW REFORM ACT* 223

given the clear congressional interest in the issue, why the inertia on legislative progress? The transfer of power from President Bush to President Obama in 2009 gave many Obama supporters the hope that he would dramatically alter detention policy and move to a law enforcement model where all suspects would be tried or released.⁶ Much to their disappointment, President Obama has found it prudent to continue many of the detention policies of his predecessor, including indefinite detention without trial.⁷ At least with respect to the policies that President Obama has chosen to continue, there appears to be some degree of broad agreement in Congress. Congressional proponents of a “try or release” policy, for example, are now few and far between.⁸ With the universe of disagreement shrinking and federal judges asking for legislative guidance,⁹ it must be asked why there has been no action on

⁶ See, e.g., Press Release, Am. Civil Liberties Union, *Obama Should Not Delay Closure of Guantanamo and Military Comm’ns, Says ACLU* (Jan. 12, 2009), available at <http://www.aclu.org/national-security/obama-should-not-delay-closure-guantanamo-and-military-commissions-says-aclu> (“[D]etainees should be prosecuted in our traditional courts, which are the best in the world and fully capable of handling sensitive national security issues without compromising fundamental rights. If there is not [sufficient evidence], detainees should be repatriated to countries that don’t practice torture. Fundamental and transformative change is neither incremental nor tentative.”).

⁷ In his speech at the National Archives, President Obama endorsed military detention for those detainees “who cannot be prosecuted for past crimes, but who nonetheless pose a threat to the security of the United States,” and received criticism from civil liberties organizations. Peter Finn, *Obama Endorses Indefinite Detention Without Trial for Some*, WASH. POST, May 22, 2009, <http://www.washingtonpost.com/wpdyn/content/article/2009/05/21/AR2009052104045.html>. In March 2011, President Obama issued an executive order governing long-term detention review for Guantanamo detainees. Press Release, The White House, Office of the Press Sec’y, *Executive Order — Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force* (Mar. 7, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava> (at the time of publication the Executive Order had not yet been published in the Federal Register).

⁸ *But cf.* David Cole, *Out of the Shadows: Preventative Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 727 (2009) (noting that some human rights groups maintain that the government must “try or release” military detainees).

⁹ Several District of Columbia District Court judges have been vocal in urging Congress to provide guidance on habeas procedures and expressing trepidation with the current process. Judge Thomas F. Hogan, who coordinates the detainee cases, has stated that “[i]t is unfortunate, in my view, that the Legislative Branch of the government, and the Executive Branch, have not moved more strongly to provide uniform, clear rules and laws for handling these cases,” and “I think that would have been best for the Legislature to have passed new rules and procedures and rules of evidence to handle these cases.” Lyle Denniston, *Commentary: Did Boumediene Leave Too Much Undone?*, SCOTUSBLOG, (Dec. 22, 2009, 5:20 PM), <http://www.scotusblog.com/2009/12/commentary-did-boumediene-leave-too->

the part of Congress?

Undoubtedly, for some in Congress, detention policy is worth more as a political issue than as a potential policy accomplishment. That is, even if one could wave a magic wand and instantly create a policy compromise that left all parties satisfied, some in Congress might decline in order to keep the political issue alive. While the specter of our legislative representatives playing politics with war policy is cynical and depressing, that motivation cannot be discounted. Similarly, detention issues may reemerge in the news with each foiled attack and judicial order of release, giving politicians an opportunity to demagogue and attack the other side while avoiding any responsibility for the consequences of policy decisions. In sum, by allowing the judiciary to take the lead on detention policy, Congress avoids the tough decisions and responsibility that comes therewith, while keeping a potent political issue alive.

What, then, of the President? During his campaign, President Obama certainly had harsh words for President Bush on his handling of detention policy,¹⁰ and action was quick once the new administration was installed. The Obama administration began with an executive order setting a deadline for the closing of the detention center at Guantanamo Bay.¹¹ President Obama basked in applause¹² as he ordered the closing of

much-undone/. Judge Reggie Walton said, "It should be Congress that decides a policy such as this that has a monumental impact on our society and makes a monumental impression on the world community." Chief Judge Royce Lamberth said, "How confident can I be that if I make the wrong choice that he won't be the one that blows up the Washington Monument or the Capitol?" Chisun Lee, *Judges Urge Congress to Act on Indefinite Terrorism Detentions*, PROPUBLICA (Jan. 22, 2010), <http://www.propublica.org/article/judges-urge-congress-to-act-on-indefinite-terrorism-detentions-122>.

¹⁰ See Sam Graham-Felsen, *Obama Statement on Today's Supreme Court Decision*, ORG. FOR AM. (June 12, 2008, 4:16:05 PM), <http://my.barackobama.com/page/community/post/samgrahamfelsen/gG5Gz5> ("The Court's [*Boumediene*] decision is a rejection of the Bush Administration's attempt to create a legal black hole at Guantanamo. . .").

¹¹ Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

¹² See, e.g., Press Release, Am. Civil Liberties Union, President Obama Orders Guantanamo Closed and End to Torture (Jan. 22, 2009), available at <http://www.aclu.org/national-security/president-obama-orders-guantanamo-closed-and-end-torture> (quoting Anthony D. Romero, Executive Director of the ACLU, as saying, "President Obama should be highly commended for this bold and decisive action so early in his administration on an issue so critical to restoring an America we can be proud of again," and Caroline Fredrickson, Director of the ACLU Washington Legislative Office as saying, "[b]y shutting Guantanamo, ending torture, and closing the CIA secret prisons abroad, President Obama has given America a much-needed and significant break from the Bush administration policies that, with utter disregard for our Constitution, trampled our nation's values and ideals.").

a prison that both his predecessor and election opponent aspired to close as well.¹³ Meanwhile, the administration avoided answering the questions that would have set the stage for fulfillment of the executive order's deadline. Task forces were formed¹⁴ and prosecution protocols were issued,¹⁵ but basic policy questions were left to the future and the courts. Who may the President detain, for how long, and under what evidentiary standard? What process will detainees receive beyond their habeas proceedings? How will the administration respond to a court order of release into the United States?

Rather than answer these questions through a comprehensive plan, the administration decided to allow litigation to drive the policy process, deciding issues on an ad hoc basis. Surely, one of the reasons for this course was President Obama's desire to avoid alienating his supporters by validating President Bush's detention theory. The few decisions President Obama made in this area, such as negotiating and embracing the MCA09, nibbled around the edges of President Bush's military detention and trial policy, but certainly did not reject it wholesale.¹⁶

The current political environment creates incentives for both Congress and the President to abdicate their responsibility for legislating detention policy to the judiciary. As a result of *Boumediene*, federal courts are more involved in military detention than ever, and

¹³ Maria Bartiromo, *The Unvarnished McCain*, BUSINESSWEEK, June 4, 2007, http://www.businessweek.com/magazine/content/07_23/b4037095.htm (quoting Senator McCain as saying, "[w]hen I'm President, I will close Guantanamo Bay."); Melissa McNamara, *Bush Says He Wants to Close Guantanamo*, CBS NEWS (May 8, 2006), <http://www.cbsnews.com/stories/2006/05/08/politics/main1596464.shtml> (quoting President Bush as saying, "I very much would like to end Guantanamo.").

¹⁴ Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009) (creating a task force to review "the status of each individual currently detained at Guantanamo. . . ."); Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009) (creating a task force to review future detention policy); see Aziz Z. Huq, *What Good is Habeas?*, 26 CONST. COMMENT. 385, 419 (2010) ("[T]he Obama White House crafted a mechanism for detention policy-making to reflect this political pressure: Delegating the hard decisions to someone else who would take the political heat.").

¹⁵ DEP'T OF DEF. & DEP'T OF JUSTICE, DETERMINATION OF GUANTANAMO CASES REFERRED FOR PROSECUTION (2009), available at <http://www.justice.gov/opa/documents/ta-ba-prel-rpt-dptf-072009.pdf>.

¹⁶ The MCA09 altered a number of provisions of the MCA06, including changes in nomenclature, hearsay and voluntariness standards, and the prohibition of the use of statements elicited through torture or cruel, inhuman, or degrading treatment. See JENNIFER ELSEA, CONG. RESEARCH SERV., R 41163, THE MILITARY COMMISSIONS ACT OF 2009: OVERVIEW AND LEGAL ISSUES (2010), available at <http://www.fas.org/sgp/crs/natsec/R41163.pdf> (comparing the provisions of MCA06 to MCA09).

they are doing their best to fashion reasonable detention rules in the absence of guidance by either the Supreme Court or the political branches of government.¹⁷ Federal judges, though, do not have expertise in military or intelligence matters, and they do not answer to the electorate. American citizens and soldiers deserve greater input from the political branches.¹⁸ Policymaking by the judiciary in this area leads to inconsistent, ad hoc decisions that are opaque to the average voter. While Candidate Obama argued that detention policy was a “legal black hole” under President Bush,¹⁹ the issue has become a political black hole under President Obama.

This article will focus on the reforms to military detention policy proposed in the Terrorist Detention Review Reform Act (hereinafter “TDERRA”).²⁰ Part I will examine the President’s authority to detain enemy belligerents in the War on Terror. Part II will discuss the procedures of the habeas corpus proceedings for current and future enemy belligerents. Finally, Part III will consider additional issues that are not addressed in TDERRA — the process for enemy belligerents determined to be lawfully held by a habeas court and the future of the Guantanamo Bay detention center.

¹⁷ While I argue that the procedures for military detention should be created by Congress and the President, some commentators argue that the Supreme Court should have been more detailed in its discussion of the habeas right recognized in *Boumediene*. One of such commentators has written:

The net result of *Boumediene*, therefore, was to leave the substantive law of executive detention incrementally murkier than before. While doctrinal ambiguity is often one outcome of Supreme Court review, it is at last peculiar that an opinion justified as a means to promote legal certainty would leave so much for subsequent resolution through an inevitably fragmented process of district court resolution and appellate clarification. *Boumediene*, that is, can be criticized for failing to promote the legal clarity that was one of its central normative premises. It was, from on one view, an exercise in legality without law.

Huq, *supra* note 14, at 412.

¹⁸ See Cole, *supra* note 8, at 694. I do not argue that the government lacks “existing laws and authorities...to effectuate preventive detention,” which Professor Cole comments is “overstat[ing] the case.” *Id.* Rather, I agree that there is existing authority for preventive detention, but the procedures for implementing preventive detention are being designed by federal judges, rather than Congress and the President. The greatest benefit of new legislation would be refining the operation of preventive detention, not creating a prevention regime where there was none before.

¹⁹ E.g. Graham-Felsen, *supra* note 10.

²⁰ S. 3707, 111th Cong. (2010); see also Detention of Unprivileged Enemy Belligerents Act, S. 553, 112th Cong. (2011) (incorporating a number of alterations designed to attract broader Republican support in the Senate).

I. AUTHORITY TO DETAIN

In *Hamdi v. Rumsfeld*,²¹ the Supreme Court held that the AUMF granted the President the authority to detain individuals, including citizens, in the War on Terror.²² In addition to relying on the AUMF as the source of detention authority, the Bush administration relied on the presidential authority inherent in Article II.²³ This practice was in keeping with that administration's (possibly shortsighted)²⁴ desire to expand the power of the presidency and involve Congress as little as possible in wartime decision-making. From the executive system of military commissions that was struck down by *Hamdan v. Rumsfeld*,²⁵ to opposition to congressional limitations on the interrogation of terrorism suspects,²⁶ to reliance on executive power as a means to detain, the Bush administration was consistent in its desire to rely upon its Article II power to the fullest.

The Obama administration, on the other hand, has relied on the AUMF as the President's sole source of power to detain enemy belligerents.²⁷ This is not surprising, given President Obama's intention to distance his administration from the terrorism policies of the Bush administration that he so roundly criticized as a presidential

²¹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

²² *Id.* at 518.

²³ *E.g.* Brief for the Respondents at 13-14, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2003 U.S. Briefs 6696.

²⁴ *See* JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 212 (2007) (“[T]he Bush administration’s strategy is guaranteed not to work, and is certain to destroy trust altogether. When an administration makes little attempt to work with the other institutions of our government and makes it a public priority to emphasize that its aim is to expand its power, Congress, the courts, and the public listen carefully, and worry.”).

²⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

²⁶ *See* Charlie Savage, *Bush Could Bypass New Torture Ban*, *BOS. GLOBE*, Jan. 4, 2006, http://www.boston.com/news/nation/articles/2006/01/04/bush_could_bypass_new_torture_ban/ (“The White House tried hard to kill the McCain amendment [banning cruel, inhuman, and degrading treatment of detainees].”).

²⁷ *E.g.*, Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Litig.*, No. 08-442 (D.D.C. Mar. 13, 2009), available at <http://www.wcl.american.edu/nimj/documents/BatesRevisedDetAuthFINAL.pdf?rd=1> [hereinafter Memorandum of Respondents].

candidate.²⁸ While relying solely on statutory authority for its detention power and changing some of the legal nomenclature that retained political baggage from the Bush years,²⁹ the Obama administration did not reject Bush's detention policy. The administration continued to detain individuals under the law of war, albeit while aggressively attempting to transfer many detainees to other countries and refusing to add new detainees to the Guantanamo population.³⁰ Even these policies, though, were not drastic changes from the Bush administration. After all, President Bush announced his intention to close Guantanamo Bay, and new transfers to the detention center largely halted in 2004.³¹ Indeed, the Obama administration's most controversial departure from existing detainee policy occurred when Attorney General Eric Holder announced that Khalid Sheikh Mohammed and the other 9/11 co-conspirators held at Guantanamo Bay would be tried in civilian courts in New York,³² but that decision was widely criticized by Congress³³ and the American people,³⁴ and it was reevaluated in short order.³⁵

²⁸ See, e.g., Graham-Felsen, *supra* note 10.

²⁹ Both the MCA09 and the March 13, 2009 detention definition submitted by the government abandoned the term "enemy combatant," with the MCA09 using "enemy belligerent" in its stead. Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801-07, 123 Stat. 2190, 2574-2614 (2009); see also Memorandum of Respondents, *supra* note 27, at 1-3, 7, 8, 11-12.

³⁰ The success of the Obama administration in transferring and releasing detainees is debatable. As of April 2010, fifty-two detainees were released post-*Boumediene*, but the annualized number of releases dropped after the decision. Huq, *supra* note 14, at 408, 418.

³¹ *Id.* at 405 ("Anecdotal information suggests that inflows to the base in fact largely dried up in 2004, after the Supreme Court's first interventions in the field.").

³² Charlie Savage, *Accused 9/11 Mastermind to Face Civilian Trial in N.Y.*, N.Y. TIMES, Nov. 13, 2009, <http://www.nytimes.com/2009/11/14/us/14terror.html>.

³³ Eighteen senators introduced an amendment to deny the Department of Justice funding for the trials, but it failed to get the sixty votes necessary for passage in November 2009. There is press speculation that if offered again, the legislation may receive enough votes for passage. See Kasie Hunt, *Senators Try to Block Khalid Sheikh Mohammed Trial*, POLITICO, Feb. 2, 2010, <http://www.politico.com/news/stories/0210/32382.html>; Michael Isikoff, *No KSM in NYC?*, NEWSWEEK, Jan. 16, 2010, <http://www.newsweek.com/blogs/declassified/2010/01/15/no-ksm-in-nyc.html>.

³⁴ See Lydia Saad, *Americans at Odds With Recent Terror Trial Decisions*, GALLUP (Nov. 27, 2009), <http://www.gallup.com/poll/124493/Americans-Odds-Recent-Terror-Trial-Decisions.aspx?CSTS=tagrss> (discussing a poll showing that a majority of Americans believed that Khalid Sheikh Mohammed should be tried by military commission outside of New York City, and were "very concerned" or "somewhat concerned" that a trial would give KSM a forum to further his cause).

³⁵ Anne E. Kornblut & Peter Finn, *Obama Advisers Set to Recommend Military*

The Obama administration has avoided testing the breadth of executive detention power in two areas that the Bush administration at least initially embraced — the detention of both American citizens and permanent legal residents captured in the United States. In the *Rumsfeld v. Padilla*³⁶ and *al-Marri v. Pucciarelli*³⁷ cases, respectively, the Bush administration detained a citizen and a permanent legal resident captured in the United States under the law of war. *Padilla* was litigated before the Supreme Court (and remanded on jurisdictional grounds)³⁸ before the Fourth Circuit affirmed the power of the executive to detain citizens captured in the United States.³⁹ Before the case could reach the Supreme Court again, it was rendered moot by the Bush administration's decision to transfer Padilla to the criminal justice system, albeit not without controversy.⁴⁰ The Fourth Circuit opinion, however, was not vacated by the Supreme Court, so the judicially-recognized power of the President to detain citizens captured in the United States remains on the books.

In *al-Marri*, the Fourth Circuit affirmed the power of the President to detain legal permanent residents captured in the United States.⁴¹ Again, after certiorari had been granted by the Supreme Court, the case was rendered moot when the government, this time led by President Obama, transferred al-Marri to the criminal justice system.⁴² However, unlike *Padilla*, the Supreme Court vacated the Fourth Circuit decision in *al-Marri*.⁴³

Without Supreme Court guidance on *Padilla* and *al-Marri*, multiple questions regarding the extent of the President's authority to detain combatants in the War on Terror remain. While the Fourth Circuit decision in *Padilla* still stands, whether the Supreme Court

Tribunals for Alleged 9/11 Plotters, WASH. POST, Mar. 5, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/03/04/AR2010030405209.html>.

³⁶ *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004).

³⁷ *al-Marri v. Pucciarelli*, 534 F.3d 213, 219 (4th Cir. 2008) (en banc) (per curiam), *vacated as moot sub nom.* *al-Marri v. Spagone*, 129 S. Ct. 1545 (2009).

³⁸ *Padilla*, 542 U.S. at 443.

³⁹ *Padilla v. Hanft*, 423 F.3d 386, 397 (4th Cir. 2005).

⁴⁰ The Fourth Circuit denied the government's motion to transfer Padilla to civilian law enforcement custody as an attempt to avoid Supreme Court review. The Supreme Court ultimately allowed the transfer. *Padilla v. Hanft*, 432 F.3d 582, 587 (4th Cir. 2005), *overruled by Hanft v. Padilla*, 546 U.S. 1084, 1084-85 (2006).

⁴¹ *Pucciarelli*, 534 F.3d at 216.

⁴² *Spagone*, 129 S. Ct. 1545.

⁴³ *Compare id.*, with *Padilla*, 546 U.S. at 1084.

would ultimately ratify that decision remains up for debate. Likewise, with the Fourth Circuit decision in *al-Marri* vacated, it is unclear whether the President has the power to detain legal permanent residents captured in the United States as part of the ongoing conflict against Al Qaeda, the Taliban, and associated forces. Further, it is uncertain if the President has that authority, whether that authority is derived from the AUMF, the President's inherent authority under Article II of the Constitution, or both.

A. Congressional Reaffirmation of Detention Authority

Given the uncertainty in this area, Congress and the President should provide statutory guidance to the courts regarding their view of the President's detention power. This need not be done in the form of a new congressional authorization, nor as an attempt to define the outer limits of the President's inherent authority under Article II of the Constitution. Indeed, attempting the former would be politically impossible,⁴⁴ and attempting the latter would be foolhardy, lest it bind the President in future conflicts. Instead, TDERRA would reaffirm the basic premise of the AUMF — that the United States is at war — and therefore the President is authorized to detain enemy belligerents as part of that war, regardless of the place of capture.⁴⁵

The statement of detention power is couched as a reaffirmation of the power that the AUMF already gives the President, not a new authorization, so as to dispel the impression that this is a new power and avoid a political firestorm over congressional broadening of the AUMF. This reaffirmation would demonstrate to the courts that Congress intended to provide the President with detention power in the AUMF, applicable to cases like *Padilla* and *al-Marri*. Whether the government should ever use that power to detain citizens or legal permanent residents captured in the United States as a matter of policy is a question for President Obama and future presidents. Congress and the President, though, should clarify the scope of the detention power in the AUMF and remove that consideration to the greatest extent possible from the

⁴⁴ Some in Congress have attempted to repeal the existing AUMF. *See, e.g.*, Iraq War Powers Repeal Act of 2006, H.R. 5875, 109th Cong. (2006); *see* Shailagh Murray & Jonathan Weisman, *Democrats Seek to Repeal 2002 War Authorization*, WASH. POST, Feb. 23, 2007, <http://www.washingtonpost.com/wpdyn/content/article/2007/02/22/AR2007022201743.html>.

⁴⁵ S. 3707, 111th Cong. § 2(b) (2010).

judiciary.⁴⁶ Such a reaffirmation has been proposed in the past, and it should be considered anew.⁴⁷ The AUMF was an authorization of power from one branch of the government, Congress, to another, the President.⁴⁸ It is incumbent, therefore, upon those two branches to define the nature of that authorization. To this point, Congress and the President have purposefully avoided addressing the ambiguities in the AUMF on a statutory level, leaving its interpretation to the judiciary. Given the stakes involved, asking the judiciary to fill in the known holes of a vague authorization is unwise and shortsighted.

B. Defining the Class of Detainable Individuals

Beyond the source of detention authority, the Obama administration has also differed, albeit slightly, from the Bush administration's claim of the scope of the power. While the Bush administration asserted that it had the power to detain both members and supporters of Al Qaeda, the Taliban, and associated forces,⁴⁹ the Obama administration altered the definition slightly to include members and "substantial[]" supporters.⁵⁰ Historically, habeas courts interpreted

⁴⁶ See Cole, *supra* note 8, at 732 (discussing the problems caused by a lack of clarity as to the scope of executive detention power). Professor Cole has expressed this view:

[T]he only congressional statement on [the scope of the detention power] is the AUMF, which does not even mention detention....If preventive detention of 'enemy combatants' is to continue, it should be defined - and carefully circumscribed - by legislation. The power to hold a human being indefinitely is too grave to delegate to executive experimentation. Such a statute would have to address both the proper substantive scope of the detention power, and the procedural guarantees available to those subjected to it.

Id.

⁴⁷ Enemy Combatant Detention Review Act of 2008, S. 3401, 110th Cong. (2008).

⁴⁸ Section 2(a) of the AUMF is an authorization to the President:

(a) IN GENERAL- That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

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

⁴⁹ See *Al-Bihani v. Obama*, 590 F.3d 866, 870 (D.C. Cir. 2010) (discussing the initial detention standard offered by the government).

⁵⁰ *Id.* at 870 n.1 ("[T]he government modified the definition in its initial habeas return to replace the term 'support' with 'substantially supported.'"); Memorandum of Respondents, *supra* note 27, at 3.

the detention power in numerous ways.⁵¹ The United States Court of Appeals for the District of Columbia (hereinafter “D.C. Circuit Court”) settled this issue — at least temporarily — by interpreting the AUMF as supporting both the Bush and Obama definitions of detainable individuals.⁵² Ultimately, *Al-Bihani* held that under the MCA09, both members and supporters of enemy groups are subject to the jurisdiction of the military commissions system, and the executive’s detention power must be at least as broad as the jurisdictional basis of the MCA09.⁵³ In an attempt to answer another question vexing the habeas courts, the extent of contact with enemy groups necessary to subject an individual to the detention authority, *Al-Bihani* stated that an individual lodging with, or participating in training with an enemy group would likely be sufficient.⁵⁴ That interpretation was explicitly affirmed in *Al-Adahi v. Obama*, which held that proof of a detainee staying at an Al Qaeda guesthouse and training at an Al Qaeda camp was “overwhelming” evidence in favor of detention.⁵⁵

TDERRA’s reaffirmation of detention authority would serve two purposes: 1) providing guidance to the judiciary that the AUMF authorizes the detention of citizens and permanent legal residents, regardless of the place of capture; and 2) defining the level of participation or contact with an enemy group necessary on the part of an individual to be subject to the detention authority. As previously discussed, the first goal could be accomplished without extending the

⁵¹ Before *Al-Bihani*, district court judges differed in their interpretations of whether the AUMF allowed the detention of supporters of enemy groups and what constituted membership and support. See BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, BROOKINGS INST., THE EMERGING LAW OF DETENTION, THE GUANTANAMO HABEAS CASES AS LAWMAKING 18-20 (2010), available at http://www.brookings.edu/~media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf.

⁵² *Al-Bihani*, 590 F.3d at 872.

⁵³ *Al-Bihani*, 590 F.3d at 872. The Court stated:

The provisions of the 2006 and 2009 MCAs are illuminating in this case because the government’s detention authority logically covers a category of persons no narrower than is covered by its military commission authority. Detention authority in fact sweeps wider, also extending at least to traditional P.O.W.s... and arguably to other categories of persons.

Id. at 872.

⁵⁴ *Id.* at 873 n.2 (“[E]vidence supporting the military’s reasonable belief of either [attending Al Qaeda training camps or visiting Al Qaeda guesthouses] with respect to a non-citizen seized abroad during the ongoing war on terror would seem to overwhelmingly, if not definitively, justify the government’s detention ...”).

⁵⁵ *Al-Adahi v. Obama*, 613 F.3d 1102, 1109 (D.C. Cir. 2010).

2011 *TERRORIST DETENTION REVIEW REFORM ACT* 233

existing AUMF, leaving the decision of whether, as a matter of policy, to detain citizens and legal permanent residents captured in the United States to President Obama and future presidents. Fulfilling the second goal would finally provide guidance to the judiciary as to the individuals Congress and the President view as sufficiently part of the enemy war effort to justify detention.

In reaffirming the detention authority of the President, TDERRA defines the power as extending to an individual who: 1) has engaged in hostilities against the United States or its coalition partners; 2) has purposefully and materially supported hostilities against the United States or its coalition partners; or 3) was a member of, part of, or operated in a clandestine, covert, or military capacity on behalf of the Taliban, Al Qaeda, or associated forces.⁵⁶ This definition is a melding of the Obama administration's detention definition from March 13, 2009,⁵⁷ the "unprivileged enemy belligerent" definition from the MCA09,⁵⁸ and new language designed to more clearly define the contacts and participation necessary to submit an individual to the government's detention authority.

The goal of TDERRA's definition of the President's detention power is clarification, not an extension of the detention power beyond what is already recognized by the courts. In addition to incorporating members of enemy groups and those who have engaged in hostilities against the United States or its partners, the proposed definition builds off the discussion in *Al-Bihani*: that the government's detention authority extends at least as far as the jurisdictional basis of the MCA09, and that those training and boarding with enemy groups would likely be covered.⁵⁹ Because individuals can be tried under the MCA09 for "purposefully and materially supporting" an enemy group,⁶⁰ it follows that such an action would be sufficient to trigger the government's detention power. Similarly, as *Al-Bihani* and *Al-Adahi* indicate that those who train or lodge with enemy groups are subject to the government's detention authority,⁶¹ surely those who "operate in a

⁵⁶ S. 3707, 111th Cong. § 2(a)(6) (2010).

⁵⁷ *Al-Bihani*, 590 F.3d at 870 n.1; Memorandum of Respondents, *supra* note 27.

⁵⁸ Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2647 (2009).

⁵⁹ *Al-Bihani*, 590 F.3d at 872-73.

⁶⁰ Military Commissions Act of 2009 § 1802.

⁶¹ *Al-Bihani*, 590 F.3d at 873 n.2; *Al-Adahi v. Obama*, 613 F.3d 1102, 1109 (D.C. Cir. 2010).

clandestine, covert, or military capacity” for such groups would be covered.⁶²

C. Defining “associated forces”

While defining the extent of contact that an individual must have with an enemy group to be covered under the President’s detention authority would help clarify the breadth of the detention power, Congress and the President should take the additional step of creating a system to define the “associated forces” hostile to the United States and its coalition. In short, this is the question of with whom the United States and its coalition forces are at war. As such, this question is properly answered by the political branches. There have been calls for the administration to publish a definitive list of organizations considered to be “associated forces.”⁶³ A list would certainly offer some degree of simplicity and transparency. However, at least three potential problems would accompany the implementation of such a list. First, new groups may emerge at any time, necessitating last minute additions to the list, which would likely be met with skepticism by the judiciary. Second, there may be logistical problems within the bureaucracy in clearing a group for inclusion on the list, which would be imperative if the list was considered definitive. Third, the public nature of such a list, while having the benefit of transparency, could also cause foreign policy challenges if, for example, a particular group to be considered an “associated force” is not viewed similarly by a coalition partner or friendly host country.

Instead of creating a comprehensive public list upon which the administration would rely in arguing to the courts that a particular organization is an “associated force” covered under the President’s detention power, TDERRA provides the administration with a statutory opportunity to certify to a habeas court that the administration considers a particular organization an “associated force[] of the Taliban or Al Qaeda.”⁶⁴ In turn, the bill directs the judiciary to give such a

⁶² S. 3707, 111th Cong. § 2(a)(6) (2010).

⁶³ See, e.g., BENJAMIN WITTES & COLLEEN A. PEPPARD, BROOKINGS INST., DESIGNING DETENTION, A MODEL LAW FOR TERRORIST INCAPACITATION 37 (2009), available at http://www.brookings.edu/~media/Files/rc/papers/2009/0626_detention_wittes/0626_detention_wittes.pdf.

⁶⁴ S. 3707, § 2(d).

determination by the executive “utmost deference.”⁶⁵ Such a procedure would retain the traditional power of the executive to determine with whom the United States is in hostilities, while allowing the judiciary to review such a finding for blatant misuse.

D. Potential Criticism of Detention Power Reaffirmation

Critics of TDERRA’s reaffirmation of the President’s detention power would likely argue that any such proposal would be in danger of: 1) establishing the outer bounds of the President’s inherent authority to detain enemy belligerents under Article II of the Constitution; or 2) expanding the statutory detention power granted in the AUMF. For the first, the concern on the political right that such a statute would bound the inherent authority of the President is relieved by a rule of construction that the statutory statement of authority should not be interpreted as limiting or affecting the inherent authority of the President under Article II.⁶⁶ For the second, the concern on the political left would likely be that such a statute would amount to a new authorization giving the President detention powers that are not granted by the AUMF.⁶⁷ The Fourth Circuit decision in *Padilla* that the President may detain an enemy belligerent citizen captured in the United States still stands,⁶⁸ so Congress and the President should embrace that judicially sanctioned power. It is possible that different habeas procedures would apply to individuals captured in the United States, including a higher standard of proof.⁶⁹

Those on the political left would also likely argue that the proposed definition of “unprivileged enemy belligerent,” including its incorporation of those who “operated in a clandestine, covert, or

⁶⁵ *Id.*

⁶⁶ *Id.* § 2(b)(3) (“The authority under this section shall not be construed to alter or limit the authority of the President under the Constitution of the United States to detain combatants in the continuing armed conflict with al Qaeda, the Taliban, and associated forces, or in any other armed conflict.”).

⁶⁷ See Huq, *supra* note 14, at 430 (lamenting that “the only kind of legislative action that could pass would expand detention authority and further restrict the fragmented and incomplete influence of habeas review.”).

⁶⁸ *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

⁶⁹ In *Al-Bihani*, the D.C. Circuit Court refused to state the minimum standard of proof required for non-citizens captured abroad, let alone citizens or non-citizens captured in the United States. See *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010) (“We emphasize our opinion does not endeavor to identify what standard would represent the minimum required by the Constitution.”).

military capacity” for enemy groups, would extend the detention power beyond the March 13, 2009, “substantial support” language.⁷⁰ While it is true that TDERRA’s definition is broader than the March 13 definition, it is well within the confines of the discussion in *Al-Bihani*.⁷¹ As previously discussed, the interpretation in *Al-Bihani* that the President’s detention power extends at least as far as the jurisdictional basis of the MCA09, and that individuals who trained or lodged with enemy groups are likely covered by the detention power, currently controls the habeas cases being litigated in the United States District Court for the District of Columbia (hereinafter “D.C. District Court”).

Some may argue that the extensive discussion of detention authority in *Al-Bihani* was dictum and that, in the end, the court ratified the administration’s detention definition.⁷² For example, in *Salahi v. Obama*, Judge Robertson stated that the standard approved in *Al-Bihani* was “those who purposefully and materially supported such forces *in hostilities against U.S. Coalition partners*.”⁷³ In fact, while *Al-Bihani* stated that the detention power extends at least as broadly as the jurisdictional basis of the MCA09, the original standard argued by the government in that case covered those who were “part of or supporting

⁷⁰ S. 3707 § 2(a)(6). The definitional framework of the government states:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

Memorandum of Respondents, *supra* note 27, at 3.

⁷¹ The jurisdictional basis of the MCA09 covers those who engaged in hostilities, purposefully and materially supported hostilities, and were part of Al Qaeda. The new language in the proposed definition, “was a member of, part of, or operated in a clandestine, covert, or military capacity on behalf of the Taliban, al Qaeda, or associated forces,” would be unlikely to encompass persons beyond the MCA09 definition, as “operating in a clandestine, covert, or military capacity” would overlap with “purposeful and material support.” See Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2647 (2009).

⁷² In regards to the *Al-Bihani* discussion on the force of international law, where the majority argued that “[t]he international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts,” a similar dictum argument has been made, most notably in a concurring opinion. Cf. *Al-Bihani*, 590 F.3d at 885 (Williams, J., concurring).

⁷³ *Salahi v. Obama*, 710 F. Supp. 2d 1, 5 (D.D.C. 2010) (citing *Al-Bihani*, 590 F.3d at 872), *vacated*, 625 F.3d 745 (D.C. Cir. 2010).

Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners,” and the ultimate standard replaced “support” with “substantially supported.”⁷⁴ In any case, Judge Robertson misconstrues the standard to require the individual’s acts to be in support of the hostilities, rather than allowing the acts to be generally in support of a group which is engaged in hostilities. Judge Robertson goes so far as to explicitly criticize the decision in *Al-Bihani* that the detention authority is at least as broad as the jurisdictional basis of the MCA09.⁷⁵ While *Salahi* is doubtless a notable post-*Al-Bihani* interpretation of the detention standard, it seems to be an outlier in that it is unlikely that other district court judges will disregard *Al-Bihani*’s strong statement in favor of a broad detention power.

Regardless of the inevitable criticism by some on both sides of the political spectrum, Congress and the President should take the opportunity to create a lasting vision for the President’s detention power in the War on Terror. For too long, the judiciary has been forced to muddle through the most basic of detention questions — the extent of the power to detain — before even considering the more intricate details of habeas proceedings such as which evidence to allow, vitiating of membership, and the use of the mosaic theory, among others. Although some in favor of statutory procedural rules for habeas proceedings may oppose a statement of detention authority for various reasons, TDERRA would finally clarify the extent of the authority already granted to the President.

II. HABEAS PROCEDURES

The judges of the D.C. District Court who have been adjudicating Guantanamo detainees’ habeas petitions have not been shy in asking Congress for assistance in providing clear rules for those proceedings.⁷⁶

⁷⁴ *Al-Bihani*, 590 F.3d at 870 n.1.

⁷⁵ *Salahi*, 710 F. Supp. 2d at 5 n.4. In criticizing the *Al-Bihani* decision, Judge Robertson stated:

The [*Al-Bihani*] panel concluded that ‘the government’s detention authority logically covers a category of persons no narrower than is covered by its military commission authority.’...Where, as here, the government clearly has no triable criminal case of ‘purposeful and material support’ against *Salahi*, the logic of that conclusion escapes me.

Id. (internal citation omitted).

⁷⁶ See discussion *supra* note 9.

Of course, many commentators have long advocated for congressional input in these rules as well.⁷⁷ Recognizing the potential problems with *Boumediene*'s open-ended invitation to trial courts to develop the operative habeas procedures,⁷⁸ some in Congress attempted to establish statutory rules shortly after the decision, making their best guess about which issues would most benefit from congressional guidance.⁷⁹ Basic issues, such as the burden of proof, scope of discovery, protection of classified information, proceeding logistics, and response to an order of release dominated one early proposal.⁸⁰ Since that time, though, much has happened in the world of detainee litigation. As of December 31, 2009, the courts had ruled on forty-one Guantanamo habeas cases, and fifty-two detainees had been released post-*Boumediene*, twenty-one of whom had prevailed in a habeas proceeding.⁸¹ In addition, the MCA09 was signed into law,⁸² and extensive studies have been done on the evidentiary and procedural rules emerging from the D.C. District Court.⁸³ From watching the process play out to this point and seeing the issues that have divided the district court judges, Congress is now in a much better position than it was in 2008 to enact rules governing detainee habeas proceedings.

A. Covered Individuals

The first question to answer when designing procedures to govern detainee habeas corpus petitions is to whom should the new procedures apply? Should legislation affect existing habeas petitions? Should the procedures apply only to current detainees at Guantanamo Bay, or should they also encompass other detainees, including individuals who have not yet been captured?

TDERRA applies new habeas procedures to all petitions pending

⁷⁷ E.g., WITTES ET AL., *supra* note 51, at 7; Cole, *supra* note 8, at 745.

⁷⁸ *Boumediene v. Bush*, 553 U.S. 723, 796 (2008) (“We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees’ habeas corpus proceedings....These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.”); see discussion *supra* note 17.

⁷⁹ E.g., Enemy Combatant Detention Review Act of 2008, S. 3401, 110th Cong. (2008).

⁸⁰ *Id.* § a(2).

⁸¹ Huq, *supra* note 14, at 408.

⁸² The MCA09 was signed into law on October 28, 2009. Warren Richey, *Obama Endorses Military Commissions for Guantanamo Detainees*, CHRISTIAN SCI. MONITOR, Oct. 29, 2009, <http://www.csmonitor.com/USA/Justice/2009/1029/p02s01-usju.html>.

⁸³ E.g. WITTES ET AL., *supra* note 51, at 18-20.

or filed on or after the date of enactment by individuals who are: 1) held by the United States at Guantanamo Bay or who the United States seeks to hold as an unprivileged enemy belligerent and 2) subject to the habeas corpus jurisdiction of the federal courts.⁸⁴ In practice, this would apply the new procedures to the current detainee population at Guantanamo Bay, any future detainees housed in Guantanamo Bay or the United States, and detainees held anywhere else that the courts extend habeas corpus. Since 2004, we have seen a halt in detainee transfers to Guantanamo Bay,⁸⁵ while detainees such as Padilla and al-Marri have been transferred to the criminal justice system. Meanwhile, there have been no individuals held under the law of war in the United States. Nevertheless, it is certainly possible — and perhaps likely — that the United States will eventually find itself needing to hold new law of war detainees, whether at Guantanamo Bay, in the United States, or elsewhere. Similarly, although the D.C. Circuit Court rejected the extension of habeas corpus jurisdiction to Bagram, Afghanistan, in *Al Maqaleh v. Gates*,⁸⁶ it is possible that the courts could extend extraterritorial habeas jurisdiction beyond Guantanamo in the future. In either case, TDERRA is designed with a backstop, so that its new procedures will automatically apply to individuals detained under the law of war wherever habeas jurisdiction exists. Like TDERRA's proposed definition of the class of individuals covered by the President's detention power, this provision applying the bill's habeas procedures to future detainees held wherever habeas jurisdiction exists is not meant to institutionalize long-term military detention beyond the President's already recognized power. It is merely meant to serve as a safety valve in case the courts extend habeas jurisdiction beyond its current geographic scope.

Rather than simply cover those currently and in the future held as “unprivileged enemy belligerents,” TDERRA expressly mentions the population at Guantanamo Bay because of the recent change in nomenclature from “unlawful enemy combatant” to “unprivileged enemy belligerent.”⁸⁷ Given that new status determinations for current

⁸⁴ S. 3707, 111th Cong. § 2(a)(3) (2010).

⁸⁵ See Huq, *supra* note 14, at 405 (“Anecdotal information suggests that inflows to the base in fact largely dried up in 2004, after the Supreme Court's first interventions in the field.”).

⁸⁶ *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

⁸⁷ See Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801-07, 123 Stat. 2190, 2574-2614 (2009); see also Memorandum of Respondents, *supra* note 27, at 1-3, 7, 8,

detainees have not taken place after the terminology change, the detainees at Guantanamo Bay are arguably held as “unlawful enemy combatants,” which was the label given at their status determination, or “unprivileged enemy belligerents,” if the “unlawful enemy combatant” determination is seen as fluidly moving to the new label. Because of this uncertainty, TDERRA explicitly names the Guantanamo Bay detainee population as covered individuals.

An argument could be made that Congress should not even hint in a statute that habeas jurisdiction extends further than Guantanamo Bay, lest the courts decide to interpret that as an invitation to do so. By applying the habeas procedures to all individuals detained as unprivileged enemy belligerents wherever habeas jurisdiction extends, Congress would not specifically mention detainees held in any particular part of the world, like Bagram. As such, it is unlikely that the courts would interpret such a provision as an invitation to extend habeas further than its current bounds. If such a provision was not included and habeas was extended or detainees were brought to the United States, different law of war detainees with access to habeas could be subject to different procedural rules based on their location. The benefit of having a backstop to prevent that outcome far outweighs the negligible danger of judges using the provision as a launching point for expanded habeas jurisdiction.

B. Burden of Proof

In *Hamdi*, the Supreme Court contemplated a burden shifting mechanism for determining whether an individual, including an American citizen, was lawfully held.⁸⁸ First, the government would have to present “credible evidence” that the individual met the detention definition.⁸⁹ Then, the detainee would have the opportunity to rebut with “more persuasive evidence.”⁹⁰ A previous legislative attempt to provide procedural rules for the habeas proceedings used this burden-shifting structure.⁹¹ Judge Hogan, however, held that the government bears a

11-12.

⁸⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (“[O]nce the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.”).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ While embracing the *Hamdi* burden-shifting framework, the Enemy Combatant

“preponderance of the evidence” burden in detainee habeas cases,⁹² and the rest of the D.C. District Court has followed his lead.⁹³

Even the D.C. Circuit decision in *Al-Bihani*, while discussing the *Hamdi* standard and hinting that a “some evidence, reasonable suspicion, or probable cause” standard of proof may suffice constitutionally,⁹⁴ argues that the *Hamdi* procedure “mirrors a preponderance standard.”⁹⁵ As some have argued, that is likely only true if the “credible evidence” standard at the beginning of the *Hamdi* burden shifting mechanism is actually a “preponderance” standard.⁹⁶ In *Al-Adahi*, the D.C. Circuit Court indicated a willingness to reconsider the preponderance standard as the applicable standard of proof.⁹⁷ The court requested supplemental briefs on the issue, and both the detainee and government agreed that the preponderance standard was appropriate.⁹⁸ The government argued that a different standard may be appropriate in a different case or context, but did not explain why that might be.⁹⁹ The court exhibited clear skepticism of the Constitution requiring the preponderance standard,¹⁰⁰ as it examined the evidentiary standards historically used, among them “some evidence” and “probable

Detention Review Act of 2008 also required habeas courts to make findings of fact by “a preponderance of the evidence.” *E.g.* Enemy Combatant Detention Review Act of 2008, S. 3401, 110th Cong. §2(d) (2008).

⁹² Case Management Order, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, 2008 WL 4858241 at *3 (D.D.C. Nov. 6, 2008), *amended by* 2008 WL 5245890 at *1 (D.D.C. Dec. 16, 2008) [hereinafter Case Management Order] (“The government bears the burden of proving by a preponderance of the evidence that the petitioner’s detention is lawful.”); *see* Matthew C. Waxman, *Guantanamo, Habeas Corpus, and Standards of Proof: Viewing the Law through Multiple Lenses*, 42 CASE W. RES. J. INT’L L. 245, 247-48 (2009) (describing the back and forth between the government and detainees’ counsel before Judge Hogan).

⁹³ WITTES ET AL., *supra* note 51, at 13 (citing *Awad v. Obama*, 646 F. Supp. 2d 20, 23-24 (D.D.C. 2009); *Ahmed v. Obama*, 613 F. Supp. 2d 51, 53 (D.D.C. 2009); *Al Odah v. Obama*, 648 F. Supp. 2d 1, 7-8 (D.D.C. 2009); *Hatim v. Obama*, No. 05-1429, slip op. at 31 (D.D.C. Dec. 16, 2009); *Boumediene v. Bush*, 579 F. Supp. 2d 191, 195-96 (D.D.C. 2008)).

⁹⁴ *Al-Bihani v. Obama*, 590 F.3d 866, 878 n.4 (D.C. Cir. 2010).

⁹⁵ *Id.* at 878.

⁹⁶ *E.g.* WITTES ET AL., *supra* note 51, at 14.

⁹⁷ *See Al-Adahi v. Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010).

⁹⁸ *Id.* at 1104-05.

⁹⁹ *Id.* at 1104.

¹⁰⁰ The court quoted *Boumediene*’s statement that the “extent of the showing required of the Government in these cases is a matter to be determined,” and charged that the district courts had accepted the preponderance standard without rationale. *Id.* (quoting *Boumediene v. Bush*, 553 U.S. 723, 787 (2008)).

cause.”¹⁰¹ While adopting the preponderance standard because of the lack of argument in favor of a more deferential standard, the court signaled to the government that a lesser standard may be permissible.¹⁰² One wonders if, when confronted with the opportunity to argue for a lesser standard, the government decided that it would be better to adopt the preponderance standard than risk an appeal to the Supreme Court on the issue.

Despite the hints in *Al-Bihani* and *Al-Adahi* that a lower evidentiary standard may be available, at this point, the district court judges have accepted the “preponderance” standard for the purposes of detainee habeas proceedings. Congress and the President would be wise to accept this as the standard because 1) it is unclear, as discussed in *Al-Bihani*, whether a lower standard of proof would be constitutionally permissible,¹⁰³ and 2) it would likely be politically impossible to statutorily create a lower standard for detention than the one currently being used, as many in Congress would not countenance a retreat from a standard of proof that has been uniformly accepted by the habeas courts.

C. Evidentiary Presumptions

In keeping with *Hamdi*'s burden-shifting vision of habeas proceedings, the government has repeatedly requested a presumption in favor of its evidence, as to both the authenticity and accuracy of the evidence.¹⁰⁴ While some habeas judges have granted a presumption in favor of the authenticity of the government's evidence, they have not accepted a presumption in favor of the accuracy of the government's evidence.¹⁰⁵ Doing so would counteract the standard of proof that the judges have accepted — a burden on the government to prove its case by a “preponderance of the evidence.”¹⁰⁶ Just as TDERRA accepts the “preponderance of the evidence” standard that the judges have installed,

¹⁰¹ The court found that habeas proceedings contesting deportation and selective service decision used a “some evidence” standard, while proceedings contesting arrest used a “probable cause” standard. *Id.*

¹⁰² *Id.* at 1105 (“Although we doubt...that the Suspension Clause requires the use of the preponderance standard...we will assume *arguendo* that the government must show by a preponderance of the evidence that *Al-Adahi* was part of al-Qaida.”).

¹⁰³ *Al-Bihani v. Obama*, 590 F.3d 866, 878 n.4 (D.C. Cir. 2010).

¹⁰⁴ WITTES ET AL., *supra* note 51, at 32.

¹⁰⁵ *Id.* at 34 (citing *Ahmed v. Obama*, 613 F. Supp. 2d 51, 54-55 (D.D.C. 2009); *Hatim v. Obama*, No. 05-1429, slip. op. at 13 (D.D.C. Dec. 16, 2009)).

¹⁰⁶ *Id.*

it also provides for a presumption in favor of the authenticity of the government's evidence, but not for the evidence's accuracy.¹⁰⁷

D. Mosaic Theory

The "mosaic theory" of evidence demonstrates the tension between intelligence gathering for the purposes of the executive branch and evidence gathering for the purpose of satisfying a judicial burden of proof. Under the mosaic theory, the "mosaic" of disparate pieces of information may in aggregate prove more than the sum of the individual pieces of evidence.¹⁰⁸ Stated differently, it is a "rough analogue for the use in courts of circumstantial evidence,"¹⁰⁹ and "the evidence meshes together to demonstrate" detainability.¹¹⁰ For example, in a case in which an individual lodged with an enemy group and associated with known members of that group for an extended period of time, the government might argue that the evidence viewed as a whole shows that the individual falls under the executive's detention authority.

Given that the intelligence community commonly uses the mosaic theory to analyze information,¹¹¹ and information from the intelligence community is used by the government to satisfy the burden of proof in detainee habeas cases, a rejection of the mosaic theory by the judiciary could hamstring the administration. In some cases, the D.C. District Court has rejected the mosaic approach and the government's argument in favor of examining the "evidence as a whole."¹¹² While recognizing the difference between evidence that the intelligence community and the courts might find satisfactory,¹¹³ in some cases the district court has

¹⁰⁷ S. 3707, 111th Cong. § 2(e)(1)(D) (2010). *But see* Enemy Combatant Detention Review Act of 2008, S. 3401, 110th Cong. § 2(d) (2008) (providing a presumption in favor of both the accuracy and authenticity of the government's evidence, and also adopting the *Hamdi* burden shifting framework, rather than a straight "preponderance of the evidence" standard).

¹⁰⁸ WITTES ET AL., *supra* note 51, at 61 (quoting David Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 630 (2005)).

¹⁰⁹ *Id.*

¹¹⁰ *Ali Ahmed v. Obama*, 613 F. Supp. 2d 51, 55-56 (D.D.C. 2009).

¹¹¹ *Id.* at 56 ("[U]se of the mosaic approach is a common and well-established mode of analysis in the intelligence community.").

¹¹² *Mohammed v. Obama*, 689 F. Supp. 2d 38, 44 (D.D.C. 2009).

¹¹³ *Ali Ahmed*, 613 F. Supp. 2d at 56 ("The kind and amount of evidence which satisfies the intelligence community in reaching final conclusions about the value of information it obtains may be very different, and certainly cannot govern the Court's ruling.").

indicated that evidence must “be carefully analyzed-major-issue-in-dispute by major-issue-in-dispute-since the whole cannot stand if its supporting components cannot survive scrutiny.”¹¹⁴ The D.C. Circuit Court harshly criticized the district court’s decision to analyze each piece of evidence individually without considering their inter-relationship.¹¹⁵ While not describing use of the mosaic theory as such, the D.C. Circuit Court stressed that the evidence should be considered as a whole, rather than as individual pieces standing alone.¹¹⁶

Statutorily enforcing use of the mosaic approach in detainee habeas cases is difficult at best and impossible at worst. Judges will decide for themselves the weight of particular evidence and whether the government has proven its case by a preponderance of the evidence. At a minimum, however, Congress should provide that district courts should consider the “totality of the circumstances” and the “evidence as a whole” in determining whether the government has met its burden. *Hamdi* and *Boumediene* both encourage habeas courts to consider the special circumstances of these cases in devising the procedural rules.¹¹⁷ When the government collects information on individuals involved in these cases, it is usually with an eye toward analysis by the intelligence community rather than the judiciary.¹¹⁸ Congress and the President should be cognizant of the different modes of analysis that are utilized by the intelligence community and judiciary, and TDERRA attempts to bridge that gap by directing district courts to consider the evidence as a whole when determining whether the government satisfied its burden of proof.¹¹⁹

¹¹⁴ *Mohammed*, 689 F. Supp. 2d at 67.

¹¹⁵ See *Al-Adahi v. Obama*, 613 F.3d 1102, 1105-06 (D.C. Cir. 2010).

¹¹⁶ *Id.*

¹¹⁷ *E.g. Boumediene v. Bush*, 553 U.S. 723, 795-96 (2008) (“Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (“[T]he exigencies of the circumstances may demand that...enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”).

¹¹⁸ As Professor Waxman argues, while questioned by some courts, mosaic evidence is used in a variety of other very important contexts, including informing life and death decisions. See Waxman, *supra* note 92, at 260-61 (“[I]t is sometimes those same ‘intelligence purposes’ viewed skeptically by the courts upon which the executive relies in making decisions of enormous military and humanitarian or liberty consequences. These include detention decisions in Afghanistan...[and] the application of lethal force.”).

¹¹⁹ S. 3707, 111th Cong. § 2(e)(1)(D) (2010).

E. Presumptions Related to Membership

The issue of vitiation is most vividly demonstrated in *Salahi*. In that post-*Al-Bihani* case, the detainee was alleged, among other actions, to have recruited two of the 9/11 hijackers and a coordinator of the plot to Al Qaeda.¹²⁰ While denying that he was a recruiter for the organization, *Salahi* conceded that he swore bayat to Al Qaeda and waged jihad against the Soviet Union in Afghanistan.¹²¹ *Salahi* argued that his association with Al Qaeda ended after 1992, well before his capture by the United States in 2001.¹²²

In considering the habeas petition, Judge Robertson rejected the government's argument that *Salahi* was covered under the "purposeful and material support" prong of the detention definition because any support he provided to Al Qaeda was sporadic, not occurring at the time of his capture, and not in furtherance of hostilities against the United States or its coalition partners.¹²³ Judge Robertson determined that he would consider *Salahi*'s support in determining whether he was "part of" Al Qaeda, applying Judge Bates' test from *Hamlily v. Obama*, namely, "whether the individual functions or participates within or under the command structure of the organization — i.e., whether he receives and executes orders or directions."¹²⁴ *Salahi* goes on to state that an individual may be "part of" an enemy organization even if he never fights for it.¹²⁵ Even a cook may be "part of" an enemy organization if he received and executed orders.¹²⁶ Further, *Salahi* recognized that under *Al-Bihani*, a sympathizer outside of the command structure may be "part of" the organization without having "[t]aken direct part in the hostilities."¹²⁷

The crux of the issue in *Salahi*, though, is determining when an individual must be a "part of" an enemy organization to be detainable, as it was undisputed that *Salahi* was a sworn member of Al Qaeda in the

¹²⁰ *Salahi v. Obama*, 710 F.Supp.2d 1, 10 (D.D.C. 2010), *vacated*, 625 F.3d 745 (D.C. Cir. 2010).

¹²¹ *Id.* at 4, 9-10.

¹²² *Id.* at 10.

¹²³ *Id.* at 4-5.

¹²⁴ *Id.* at 5 (citing *Hamlily v. Obama*, 616 F. Supp. 2d 63, 75 (D.D.C. 2009); *Awad v. Obama*, 646 F. Supp. 2d 20, 23 (D.D.C. 2009)).

¹²⁵ *Id.* at 4-5 (citing *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010)).

¹²⁶ *Salahi*, 710 F. Supp. 2d at 5 (citing *Gherebi v. Obama*, 609 F. Supp. 2d 43, 69 n.19 (D.D.C. 2009)).

¹²⁷ *Id.*

early 1990s.¹²⁸ Judge Robertson determined that it was not sufficient to prove that an individual was a member of an enemy group at some point.¹²⁹ Instead, the government bore the burden of proving that Salahi was “part of” Al Qaeda at the time of capture — November 2001, in Salahi’s case.¹³⁰ Judge Robertson explicitly rejected the government’s argument that once it proves that a detainee was a member of an enemy group at some point in the past, the burden shifts to the individual to prove affirmative acts of disassociation from that group.¹³¹ Instead, *Salahi* stands for the proposition that the government must prove that a detainee was “part of” an enemy group at the time of capture, and even if the individual was clearly “part of” the group at an earlier point, he need not prove overt acts of disassociation.

In sum, *Salahi* granted release to an individual who had — at least at one point in time — sworn allegiance to Al Qaeda, fought for the organization in Afghanistan, allegedly recruited participants in the 9/11 attacks (Ramzi bin al-Shibh, Marwan al-Shehhi, and Ziad Jarrah),¹³² and who was connected to Mohamed Atta by the 9/11 Commission Report.¹³³ This release was based on a finding that the United States government could not prove his detainability on the date of capture. The D.C. Circuit Court ultimately vacated and remanded *Salahi* because the district court treated its inquiry into whether Salahi received and executed orders as dispositive as to whether he was a “part of” Al Qaeda.¹³⁴ *Salahi* conflicted with the D.C. Circuit’s later decisions in *Bensayah v. Obama* and *Awad v. Obama*, which clarified that the determination of whether an individual is “part of” an enemy organization “must be made on a case-by-case basis” and participation in a group’s command structure is sufficient but not necessary for such a conclusion.¹³⁵ The appellate court did not, however, object to Judge

¹²⁸ *Id.* at 3.

¹²⁹ *Id.* at 5-6.

¹³⁰ *Id.*

¹³¹ *Id.* at 6 n.7 (“I have rejected the government’s broadest assertion, that Salahi’s concession of al-Qaida membership in the early 1990’s shifted the burden of proof, requiring that he prove affirmative acts of dis-association to show that he was *not* a member in 2001.”).

¹³² *Salahi*, 710 F. Supp. 2d at 10.

¹³³ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 165-66 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>.

¹³⁴ *Salahi v. Obama*, 625 F.3d 745, 752 (D.C. Cir. 2010).

¹³⁵ *Id.* at 752-53 (quoting *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010); *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010)).

2011 *TERRORIST DETENTION REVIEW REFORM ACT* 247

Robertson's refusal to shift the burden of proof to the defendant to prove vitiation.¹³⁶

Even before *Salahi*, habeas judges took differing approaches to the vitiation issue. Four judges ruled that the government may not detain someone whose relationship with an enemy group ended before capture.¹³⁷ The test employed by the judges considered the nature of the relationship in the first instance, the nature of intervening events or conduct, and the amount of time that elapsed between the relationship and initial custody.¹³⁸ Judge Hueville held that a detainee may even vitiate his relationship with an enemy group *after* capture, and that in that circumstance, a habeas court should consider the detainee's likelihood of rejoining the enemy.¹³⁹ The idea that a detainee can — while detained — reform, terminate his relationship with an enemy group, and separate himself from his pre-capture activity such that he would no longer be detainable, would almost certainly be rejected by the political branches. While political leaders viewing the habeas process from the outside may see an obvious answer to such issues, without statutory guidance, it should come as no surprise that district court judges come to varied conclusions.

Ironically, the same judge who authored the *Salahi* opinion, Judge Robertson, previously held that an individual's detainability turned not on future dangerousness, but on whether the individual was a member of an enemy group for some period of time.¹⁴⁰ In that case, Judge Robertson did not confront the vitiation issue, but he hinted that even pre-capture vitiation may not remove an individual from the government's detention power.¹⁴¹ This decision, of course, stands in

¹³⁶ The Court of Appeals recognized that shifting the burden to detainees to show vitiation "may be warranted in some cases," but determined that *Salahi's* 1991 membership in Al Qaeda was "insufficiently probative of his relationship with al-Qaida at the time of his capture in November 2001 to justify shifting the burden." *Id.* at 751.

¹³⁷ *Al Gingo v. Obama*, 626 F. Supp. 2d 123, 130 (D.D.C. 2009); *Khan v. Obama*, 646 F. Supp. 2d 6 (D.D.C. 2009); *Hatim v. Obama*, No. 05-1429, slip op. at 18 (D.D.C. Dec. 15, 2009); *Al Adahi*, No. 05-0280, slip op. at 40-42 (D.D.C. Aug. 17, 2009).

¹³⁸ WITTES ET AL., *supra* note 51, at 26 (citing *Al Gingo*, 626 F. Supp. 2d at 130; *Hatim*, No. 05-1429, slip op. at 18; *Al Adahi*, No. 05-0280, slip op. at 40-42).

¹³⁹ See *Basardh v. Obama*, 612 F. Supp. 2d 30, 34-35 (D.D.C. 2009) ("[T]he AUMF does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining the battle, and it certainly cannot be read to authorize detention where its purpose can no longer be attained.").

¹⁴⁰ *Awad v. Obama*, 646 F. Supp. 2d 20, 27 (D.D.C. 2010), *aff'd*, 608 F.3d 1 (D.C. Cir. 2010).

¹⁴¹ WITTES ET AL., *supra* note 51, at 31.

stark contrast to Judge Robertson's opinion in *Salahi*, which held not only that pre-capture vitiation is a valid basis for determining that a individual is not detainable, but also that a detainee need not affirmatively prove acts of vitiation, despite ample evidence that a strong prior association with an enemy group existed.¹⁴² As *Salahi* and *Awad* show, without statutory guidance, the same judge may come to differing conclusions on these difficult detention issues in different cases, let alone the variety of opinions that may exist among different judges.

After *Salahi*, Judge Robertson expounded upon his vitiation rule in *Khalifh v. Obama*.¹⁴³ While denying the habeas petition of a detainee he determined to be "part of" Al Qaeda on several evidentiary bases, Judge Robertson stated that a petitioner who was once a member of an enemy group can prove vitiation by showing that he took affirmative steps to abandon his membership.¹⁴⁴ Citing *Salahi*, the court also declared that a petitioner can show a lapse of membership without an affirmative act of severance if the evidence that the membership lapsed is "credible and significant."¹⁴⁵ The court notes, however, that the proposition of vitiation without proof of an affirmative act of separation rests on the unusual facts of *Salahi* — "a gap of nearly a decade between [Salahi's] activity in and his subsequent capture."¹⁴⁶ This indicates that a finding of vitiation absent proof of affirmative acts of disassociation will be an exception to the rule on vitiation, rather than the rule itself.

TDERRA confronts the vitiation issue by providing that once the government has proven by a preponderance of the evidence that a detainee was an unprivileged enemy belligerent at a particular time before capture,¹⁴⁷ there is a rebuttable presumption that the detainee remained an unprivileged enemy belligerent at the time of capture.¹⁴⁸ To rebut the presumption, a detainee would be required to show that he withdrew from the organization prior to capture.¹⁴⁹ Habeas courts would

¹⁴² *Salahi v. Obama*, 710 F. Supp. 2d 1, 6 n.7 (D.D.C. 2010), *vacated*, 625 F.3d 745 (D.C. Cir. 2010).

¹⁴³ *Khalifh v. Obama*, No. 05-CV-1189, 2010 WL 2382925, at *2 (D.D.C. May 28, 2010).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (citing *Salahi*, 710 F. Supp. 2d at 6 n.7).

¹⁴⁶ *Id.*

¹⁴⁷ S. 3707, 111th Cong. § 2(e)(1)(E)(ii) (2010).

¹⁴⁸ *Id.* § 2(e)(1)(E)(ii)(I).

¹⁴⁹ *Id.* § 2(e)(1)(E)(ii)(II).

reject any argument that a detainee withdrew from an enemy organization after capture.¹⁵⁰

This provision would solve the *Salahi* problem by requiring detainees to affirmatively prove that they withdrew from an enemy organization. Courts should not allow the absence of evidence of membership at the time of capture to eclipse substantial evidence from prior membership. While individuals must be allowed to prove that they reformed from prior associations with enemy groups, the government is entitled to some deference in using evidence of prior membership to prove detainability at the time of capture. This type of burden-shifting mechanism strikes the appropriate balance in proving membership in an enemy group at the time of capture.

With regard to consideration of post-capture vitiation in habeas proceedings, some may argue that a detainee should be able to contend that he has sufficiently separated himself from an enemy group such that rejoining the battle is unlikely. Like a common criminal presenting to a parole board, as the argument goes, detainees should be able to attempt to persuade a habeas judge that he has reformed and will not recidivate. Habeas proceedings are inquiries into the lawfulness of detention, though, and whether a detainee has reformed post-apprehension is immaterial to that consideration. Also, unlike common criminals pleading that they will not act unlawfully again, members of enemy groups are attached by ideology, in addition to actions. Regardless, post-apprehension vitiation is irrelevant to the question of whether detention is lawful. The proper venue for such an argument would be an administrative review board inquiring whether a detainee continues to pose a threat to the national security of the United States.¹⁵¹

Building off *Al-Bihani's* reasoning that a non-citizen captured abroad who trained at enemy camps would almost certainly be detainable,¹⁵² TDERRA also provides that upon a showing that an individual knowingly obtained training from an enemy group, there is a rebuttable presumption that the individual is an “unprivileged enemy

¹⁵⁰ *Id.* § 2(e)(1)(E)(ii)(III).

¹⁵¹ *See infra* text accompanying note 242.

¹⁵² *See Al-Bihani v. Obama*, 590 F.3d 866, 873 n.2 (D.C. Cir. 2010) (“[E]vidence supporting the military’s reasonable belief of either [attending Al Qaeda training camps or visiting Al Qaeda guesthouses] with respect to a non-citizen seized abroad during the ongoing war on terror would seem to overwhelmingly, if not definitively, justify the government’s detention ...”).

belligerent.”¹⁵³ This would settle the question of whether training with the enemy is alone sufficient to render an individual detainable. Habeas judges struggled with this issue before *Al-Bihani*'s clear suggestion (explicitly affirmed in *Al-Adahi*) that training with the enemy is sufficient to bring a person under the detention power. For example, Judge Bates and others have considered training (and other support) only in terms of determining whether an individual was “part of” an enemy organization.¹⁵⁴ Similarly, Judge Urbina has required the government to prove that an individual participated in the command structure of an enemy organization, with proof of training alone being insufficient to prove the ability to detain.¹⁵⁵ While the recent rulings in *Al-Bihani* and *Al-Adahi* may have clarified this issue for the district courts, Congress and the President should take the opportunity to affirm the view in those cases that training at an enemy camp alone is sufficient to trigger the executive's detention authority.

F. Discovery and Classified Information Protection

The extent of discovery rights and treatment of classified information in detainee habeas cases are of special national security and political importance.¹⁵⁶ If Congress and the President reform the applicable habeas procedures, defining the extent of discovery and bolstering the protection of classified information are two critical national security issues that must be proactively addressed. Comprehensive reform should address discovery and classified information procedures to mitigate the potential for damaging leaks, prevent the possibility of a judge allowing open-ended fishing expeditions into sensitive government information, and take the contentious political issue off the table.

The *Bismullah v. Gates* decision interpreting the discovery

¹⁵³ S. 3707, § 2(e)(1)(E)(i).

¹⁵⁴ WITTES ET AL., *supra* note 51, at 19 (citing *Hamlily v. Obama*, 616 F. Supp. 2d 63, 75 (D.D.C. 2009); *Anam v. Obama*, 653 F. Supp. 2d 62 (D.D.C. 2009); *Awad v. Obama*, 646 F. Supp. 2d 20, 23 (D.D.C. 2009); *Al Mutairi v. United States*, 644 F. Supp. 2d 78, 85 (D.D.C. 2009); *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C. 2009)).

¹⁵⁵ *Id.* at 19 (citing *Hatim v. Obama*, 667 F. Supp. 2d 1, 13 (D.D.C. 2009)).

¹⁵⁶ See Attorney Gen. Michael Mukasey, Remarks Prepared Before the American Enterprise Institute for Public Policy Research (July 21, 2008) *available at* <http://www.justice.gov/archive/ag/speeches/2008/ag-speech-0807213.html> (“For the sake of national security, we cannot turn habeas corpus proceedings into a smorgasbord of classified information for our enemies.”).

obligations in the review process of the DTA provides the most vivid example of the legal and political imperativeness of addressing discovery and classified information protection in legislation reforming habeas procedures.¹⁵⁷ Under the DTA, the D.C. Circuit Court had jurisdiction for a limited review of detainee status determinations.¹⁵⁸ In *Bismullah*, a D.C. Circuit Court panel held that in the DTA review process, the government's production of information from the Combatant Status Review Tribunals (hereinafter "CSRTs") was insufficient for "meaningful" review.¹⁵⁹ Instead, the court required the Department of Defense and other government agencies to produce a wide array of information about detainees,¹⁶⁰ leading to fears of sensitive classified information leaks, fishing expeditions into government files by detainee lawyers, and a debilitating logistical challenge for the Department of Defense and the intelligence agencies.¹⁶¹ Ultimately, of course, DTA review was eclipsed by the habeas right in *Boumediene*,¹⁶² and classified information problems have been relatively inconspicuous in the habeas process. Nevertheless, detainees have cited *Bismullah* for the proposition that the government must search all "reasonably available" information and disclose more than is required under habeas case management orders.¹⁶³ As *Bismullah* was based on a now-defunct

¹⁵⁷ *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), *vacated*, 554 U.S. 913 (2008).

¹⁵⁸ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2741-44 (2005).

¹⁵⁹ *Bismullah*, 501 F.3d at 180.

¹⁶⁰ The court stated:

[T]he record on review consists of all the information a [CSRT] is authorized to obtain and consider... 'such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant,' which includes any information presented to the Tribunal by the detainee or his Personal Representative.

Id.

¹⁶¹ See Lyle Denniston, *Government Duty in Detainee Cases Narrowed*, SCOTUSBLOG, (Oct. 3, 2007, 6:52 PM), <http://www.scotusblog.com/2007/10/government-duty-in-detainee-cases-narrowed/> (describing the government's reaction to the *Bismullah* decision as "strongly worded statements by all top-echelon intelligence officials, warn[ing] that the July 20 decision would impose a mountainous burden on the government to gather all information in any agency's hands about detainees — a task which would divert officials from such critical tasks as waging the 'war on terrorism.'").

¹⁶² *But see* Huq, *supra* note 14, at 10 (arguing that Detainee Treatment Act review after *Bismullah* was so broad that *Boumediene* "was only a change in the kind of judicial oversight, not an absolute shift in its availability.").

¹⁶³ *E.g.*, *Bensayah v. Obama*, 610 F.3d 718, 723-24 (D.C. Cir. 2010).

review system under the DTA, such claims made by detainees have failed.¹⁶⁴ If Congress is to broadly reform the habeas procedures, though, it must concomitantly shore up the discovery and classified information procedures. This is necessary to ensure the protection of our national security interests, and avoid the possible firestorm of another *Bismullah*-type decision.

The case management order governing most detainee habeas proceedings compels the government to disclose “all reasonably available evidence in its possession that tends materially to undermine the information presented to support the government’s justification for detaining the petitioner.”¹⁶⁵ “Reasonably available evidence” means “evidence contained in any information reviewed by attorneys preparing factual returns for all detainees,” as well as “any other evidence the government discovers while litigating habeas corpus petitions filed by detainees at Guantanamo Bay.”¹⁶⁶ In addition, if requested by the detainee,¹⁶⁷ the government must disclose:

1. any documents and objects in the government’s possession that the government relies on to justify detention;
2. all statements, in whatever form, made or adopted by the petitioner that the government relies on to justify detention; and
3. information about the circumstances in which such statements of the petitioner were made or adopted.”¹⁶⁸

TDERRA defines detainees’ discovery rights as the ability to review:

- i) any documents or objects directly and specifically referenced in the return submitted by the Government;
- ii) any evidence known to the attorney for the Government that tends materially to undermine evidence presented in the return submitted by the Government; and

¹⁶⁴ *Id.*

¹⁶⁵ *In re Guantanamo Bay Detainee Litigation*, No. 08-0442, 2008 WL 5245890, at *1 (D.D.C. Dec. 16, 2008); Case Management Order, *supra* note 92, at *1.

¹⁶⁶ *In re Guantanamo Bay Litigation*, 2008 WL 5245890, at *1.

¹⁶⁷ Discovery requests must be:

- (1) be narrowly tailored, not open-ended; (2) specify the discovery sought; (3) explain why the request, if granted, is likely to produce evidence that demonstrates that the petitioner’s detention is unlawful; and (4) explain why the requested discovery will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting or unduly burdening the government.

Case Management Order, *supra* note 92, at *2.

¹⁶⁸ *Id.* at *2.

iii) all statements, whether oral, written, or recorded, made or adopted by the covered individual that are known to the attorney for the Government and directly related to the information in the return submitted by the Government.¹⁶⁹

The two filters of this discovery obligation are: 1) whether the attorney for the government, rather than anyone in the government, knows of its existence, and 2) the information sought by the detainee must relate to the information in the government's return.

The first filter in this discovery formulation prevents the sort of open-ended obligation contemplated by *Bismullah* on the part of the government's agencies and actors to exhaustively sort through all of its information on a particular detainee.¹⁷⁰ If the attorney for the government is not aware of a particular piece of information, but a low-level intelligence analyst is, the government is not required to produce the information. More important perhaps than preventing the production of the information in that situation is that the government is not obligated to determine whether the low-level intelligence analyst knows of the information. It is that type of exhaustive search for information that the government argued would be debilitating after *Bismullah*.

The second filter is that the information sought by the detainee must relate to the information in the government's return. Like the first filter, this requirement removes the government's obligation to exhaustively sort through all of its information, which could be spread throughout different agencies, on a particular detainee. In creating its return, the government could limit its discovery obligation to known and related information. This certainty would protect sensitive information, speed the process to the benefit of both the government and the detainee, and be contrary to the much criticized mandate in *Bismullah*.

TDERRA's provisions concerning the protection of classified information strive to: 1) protect classified information from all disclosure to unprivileged enemy belligerents, 2) provide the petitioner or his cleared attorney with access to the information necessary to

¹⁶⁹ S. 3707, 111th Cong. § 2(e)(2)(A) (2010).

¹⁷⁰ In its later denial of the government's motion for rehearing, the D.C. Circuit held that the government's disclosure obligation was not as broad as the government feared, but only to the information that was "reasonably available." *But see* *Bismullah v. Gates*, 503 F.3d 137, 141 (D.C. Cir. 2007) ("The Government, it seems is overreading *Bismullah I* A search for information without regard to whether it is 'reasonably available' is clearly not required by *Bismullah I*.").

present their case, either in unclassified substitute or original classified form, respectively, 3) safeguard classified sources and methods of intelligence gathering, 4) allow ex parte and in camera review of a government motion to protect certain classified information, and 5) allow the government the right to interlocutory appeal of a decision relating of the trial court relating to the disclosure of classified information.¹⁷¹ These goals are largely the same as those of the case management order currently governing most detainee habeas petitions.¹⁷² For national security reasons, the protection of classified information must be absolutely paramount in these proceedings. Detainees should be provided relevant, unclassified information to the extent that doing so is consistent with protecting national security. Detainees' cleared counsel should be privy to appropriate classified information necessary to make his or her client's case. However, proponents can bolster their argument for reform by ensuring that classified sources and methods are protected from disclosure, enemy belligerents are not provided with any classified information,¹⁷³ and the government retains procedural options as a backstop against the inappropriate disclosure of classified information. Indeed, without strong classified information provisions, comprehensive reform would almost certainly not become law.

G. Witness Production

One persistent fear of *Boumediene* critics was that United States soldiers and intelligence officers would be called off the battlefield to testify in habeas proceedings for Guantanamo detainees.¹⁷⁴ In practice, the petitions have been primarily adjudicated on the basis of written submissions.¹⁷⁵ Like the proposed classified information section,

¹⁷¹ S. 3707, § 2(e)(2)(B).

¹⁷² *In re Guantanamo Bay Detainee Litigation*, No. 08-0442, 2008 WL 5245890, at *2 (D.D.C. Dec. 16, 2008);

¹⁷³ Those concerned about the disclosure of classified information in detainee habeas cases often cite the 1995 prosecution of Omar Abdel Rahman, when the unindicted co-conspirators list made its way to Osama Bin Laden. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 829-30 (2008) (Scalia, J., dissenting).

¹⁷⁴ *Id.* ("One escalation of procedures that the Court is clear about is affording the detainees increased access to witnesses (perhaps troops serving in Afghanistan?) and to classified information.").

¹⁷⁵ *But see* Lyle Denniston, *Analysis: Major Fight Brews on Munaf*, SCOTUSBLOG, (July 1, 2010, 8:23 PM), <http://www.scotusblog.com/2010/07/analysis-major-fight-brews-on-munaf/> (discussing *Mohammed*, a case in which Judge Kessler ordered "the top U.S. diplomat in charge of detainee transfers to other countries" to testify regarding a proposed

addressing the potential for soldiers and intelligence officers to be called off the battlefield to testify is critical for national security reasons. TDERRA explicitly provides that to the maximum extent possible, detainee habeas petitions will be adjudicated on the basis of the written returns and declarations, and the Federal Rules of Civil Procedure and their civil counterpart do not control.¹⁷⁶ Further, the district court may only require oral testimony if it “finds by clear and convincing evidence that military and intelligence operations would not be harmed by the production of the witness and oral testimony would be likely to provide a material benefit.”¹⁷⁷ These provisions should allay fears that adjudicating detainee habeas claims will harm military and intelligence operations and clarify for judges the evidentiary basis upon which to make findings.

H. Hearsay

The Supreme Court expressly invited the use of hearsay evidence in *Hamdi*.¹⁷⁸ Before *Al-Bihani*, habeas judges agreed that hearsay needed to be reliable to factor into the court’s analysis, but disagreed on whether the evidence’s reliability is a threshold matter of admissibility, or simply relevant to the weight to be given the evidence.¹⁷⁹ The D.C. Circuit Court settled this issue in *Al-Bihani* by holding that all hearsay is admissible, and reliability is relevant only to the weight to be given to the evidence.¹⁸⁰ In doing so, *Al-Bihani* noted that an inquiry into the reliability of hearsay evidence, rather than its admissibility, comports with the requirements of *Hamdi* and the fact that district court judges are sophisticated finders of fact.¹⁸¹ TDERRA embraces this holding by providing that in detainee habeas proceedings the district court may review all probative evidence, including hearsay, and an inquiry into the reliability of hearsay evidence is only relevant to the probative weight

transfer, and the D.C. Circuit Court barred Judge Kessler from requiring such testimony.).

¹⁷⁶ S. 3707, § 2(e)(3)(A).

¹⁷⁷ *Id.* § 2(e)(3)(B).

¹⁷⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-34 (2004) (“Hearsay, for example, may need to be accepted as the most reliable evidence from the Government in such a proceeding.”).

¹⁷⁹ *WITTES ET AL.*, *supra* note 51, at 35.

¹⁸⁰ *Al-Bihani v. Obama*, 590 F.3d 866, 879 (D.C. Cir. 2010) (“[T]he question a habeas court must ask when presented with hearsay is not whether it is admissible—it is always admissible— but what probative weight to ascribe to whatever indicia of reliability it exhibits.”).

¹⁸¹ *Id.* at 880.

of the evidence, rather than its admissibility.¹⁸²

I. Coerced Statements

One criticism of the military commissions established by the MCA06 was that some evidence obtained through cruel, inhuman, or degrading treatment could be admitted if they had sufficient reliability and probative value.¹⁸³ The MCA06 did not completely exclude this type of statement from consideration.¹⁸⁴ It is possible that a military judge would not have allowed such evidence to be admitted, but the government would not rule out its use.¹⁸⁵ The issue was eventually resolved by a statutory change in the MCA09,¹⁸⁶ but not before it festered and persuaded some that military commissions in general were illegitimate proceedings. The decision by the government not to rule out using evidence obtained through cruel, inhuman, or degrading treatment not only damaged the military commissions authorized by the MCA06, but also fostered misperceptions and mistrust about the reformed commissions authorized by the MCA09. Even after passage of the MCA09, critics misunderstand the constitutional requirements for the commissions and assail the provisions related to voluntariness and

¹⁸² S. 3707, § 2(e)(3)(A). *Contra* Cole, *supra* note 8, at 743 (“[H]earsay should be admitted only where it is ‘the most reliable available evidence’ and its use does not defeat the detainee’s meaningful opportunity to defend himself.”).

¹⁸³ Senator Feingold expressed this criticism during a congressional debate:

According to the legislation, statements obtained through cruel, inhuman, or degrading treatment, as long as it was obtained prior to December 2005, when the McCain amendment became law, would apparently be admissible in many instances in these military commissions. Now, it is true that the bill would require the commission to find these statements have sufficient and probative value. But why would we go down this road of trying to convict people based on statements obtained through cruel, inhuman, or degrading interrogation techniques? Either we are a nation that stands against this type of cruelty and for the rule of law or we are not. We cannot have it both ways.

109 CONG. REC. S10,360 (daily ed. Sept. 28, 2006) (statement of Sen. Feingold).

¹⁸⁴ While barring the admission of statements obtained by torture, the MCA06 created a bifurcated system for admission of other statements, where statements obtained after enactment of the DTA were barred if resulting from cruel, inhuman, or degrading treatment. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2580 (2009).

¹⁸⁵ See *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and Is an End in Sight?: Hearing Before the Subcomm. on Terrorism, Tech. and Homeland Sec., S. Comm. on the Judiciary*, 110th Cong. 11-12 (2007) (statement of Gen. Thomas W. Hartmann).

¹⁸⁶ §1802, 123 Stat. at 2580.

coerced testimony, as well as the legitimacy of military commissions in general.¹⁸⁷

TDERRA adopts the express exclusion of statements obtained through torture or cruel, inhuman, or degrading treatment in the MCA09.¹⁸⁸ As previously discussed, the potential use of such statements was a longstanding criticism of military commissions before the MCA09. In any comprehensive reform, legislation adopting rules favorable to the government, Congress and the President would be wise to expressly prohibit the use of such statements to prevent similar complaints.

J. Voluntariness

Like many other issues, habeas judges have applied multiple tests to distinguish between voluntary and involuntary (and thus, admissible and inadmissible) statements.¹⁸⁹ All judges agree that being in long-term detention without access to counsel does not in-and-of-itself render statements inadmissible.¹⁹⁰ They also agree that prior abuse can taint subsequent statements and that the “totality of the circumstances” controls whether a statement is voluntary and admissible.¹⁹¹ Judges differ, though, on what is to be considered in the “totality of the circumstances” test.¹⁹² While the passage of time and the question of whether the circumstances of interrogation have changed are common inquiries in the “totality of circumstances” test; other factors such as interrogators’ knowledge of prior statements made pursuant to abuse,

¹⁸⁷ *E.g.*, Press Release, Am. Civil Liberties Union, House Passes Changes To Guantanamo Military Comm’ns (Oct. 8, 2009), *available at* <http://www.aclu.org/national-security/house-passes-changes-guantanamo-military-commissions>. The American Civil Liberties Union is one such critic:

The [MCA09] revises the Military Commissions Act of 2006 to remove some of its worst violations of due process, but the legislation still falls far short of the requirements imposed by the Constitution and Geneva Conventions.... [I]t does not completely bar all coerced testimony as required by the Constitution.... [T]he military commissions, even as reconstituted, are inherently illegitimate and should be shut down for good.... Because of their tainted history, these proceedings, if carried on in any form, would continue to be stigmatized as unfair and inadequate, would be plagued by delay and controversy.

Id.

¹⁸⁸ S. 3707, 111th Cong. § 2(e)(4)(A) (2010).

¹⁸⁹ WITTES ET AL., *supra* note 51, at 51.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 52.

¹⁹² *Id.*

have also been considered.¹⁹³ One judge has required compliance with the Army Field Manual and Geneva Conventions for statements to be admissible,¹⁹⁴ and another has questioned the reliability of statements merely made at a site where abuse was taking place, regardless of whether the abuse involved the detainee in question.¹⁹⁵

The MCA09 allows the admission of detainee statements upon a finding that “the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement” or “the statement was voluntarily given.”¹⁹⁶ The first avenue of admission — a finding that a statement was made incident to lawful conduct at the point of capture or soon thereafter — was created in recognition of the fact that military activities are inherently coercive to some degree, and statements given on the battlefield deserve special dispensation when considering voluntariness.

If the first avenue does not apply, the commission will consider:

1. The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities.
2. The characteristics of the accused, such as military training, age, and education level.
3. The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.¹⁹⁷

Again, these considerations direct a commission considering voluntariness to be especially cognizant of the difficulty and reality of military and intelligence operations in a time of war. Considering the characteristics of the accused allows the commission to give special scrutiny to statements like those of Omar Khadr, who was a minor when he was captured by the United States.¹⁹⁸ Finally, the direction concerning

¹⁹³ *Id.* at 55.

¹⁹⁴ *Id.* at 56 (citing *Al Rabiah v. U.S.*, 658 F. Supp. 2d 11 (D.D.C. 2009)).

¹⁹⁵ WITTES ET AL., *supra* note 51, at 58 (citing *Ahmed v. Obama*, 613 F. Supp. 2d 51, 58 (D.D.C. 2009)).

¹⁹⁶ Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2580 (2009).

¹⁹⁷ *Id.*

¹⁹⁸ See Peter Finn, *Former Boy Soldier, Youngest Guantanamo Detainee, Heads Toward Military Tribunal*, WASH. POST, Feb. 10, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/02/09/AR2010020904020.html>.

the lapse of time, change in place, and change in identity of the questioners between interrogations relates to the idea of tainted interrogation statements. For example, if an abusive interrogation that elicited a statement was followed shortly by a lawful interrogation informed by the statement gleaned through abuse, the commission should consider that string of events in determining the voluntariness of a statement given in the second interrogation. Likewise, detainee arguments that a particular statement was involuntary should be considered in the context of prior events. Even if an abusive interrogation occurred, if a subsequent statement occurred after a long lapse in time, in a different place, with different questioners, and uninformed by statements made in the previous, abusive interrogation, that statement should likely be admitted.

TDERRA adopts the voluntariness standard of the MCA09¹⁹⁹ because it 1) represents a reasoned attempt to deal with the difficulties of voluntariness inquiries in the context of active military operations and 2) was vetted and cleared by both Congress and the President after extensive discussions, making passage and signing much easier than the creation of a new standard. Inevitably, a new standard would cause political questions about how it would treat particular statements differently than the MCA09 test. More importantly, though, there is no substantive reason to deviate from the MCA09 standard at this point. The standard passed in the MCA09 represents Congress' and the President's reasoning on the subject as of 2009, and no problems have emerged in the military commissions as of the writing of this article that would recommend altering that test.

K. Particular Statements Against Interest

In addition to the general test for determining the voluntariness of particular statements, TDERRA provides a presumption in favor of the voluntariness and reliability of statements against interest given before CSRTs, Administrative Review Boards (hereinafter "ARBs"), and in compliance with the Army Field Manual (hereinafter "AFM").²⁰⁰ These bright lines will help habeas judges sort through the tangle of statements to determine which should be admissible and which should not.

CSRTs were designed as a "formal review of all the information

¹⁹⁹ S. 3707, 111th Cong. § 2(e)(4)(B)-(C) (2010).

²⁰⁰ *Id.* § 2(e)(4)(D).

related to a detainee to determine whether each person meets the criteria to be designated as an enemy combatant.”²⁰¹ Military officers presided at the CSRTs, and the detainee had a personal representative to view classified information and assist him in presenting “reasonably available” information to the tribunal, but not act as an advocate.²⁰² The government was required to present all of its evidence relevant to the detainee’s combatant status, including evidence that tended to negate the detainee’s status as a combatant, and the tribunal made its determination by a preponderance of the evidence.²⁰³ The tribunals were modeled on Army regulation 190-8, which concerns military tribunals used to make determinations in compliance with Article 5 of the Third Geneva Convention, because *Hamdi* suggested that “a process based on existing military regulations . . . might be sufficient to meet due process standards.”²⁰⁴

After the one-time CSRT process, ARBs conducted an annual review of detainees to determine whether each detainee “should be released, transferred or further detained.”²⁰⁵ Like CSRTs, detainees were allowed to appear before the military officers who made up the board and present evidence with the assistance of a personal representative.²⁰⁶ The determinations of ARBs were “based primarily on threat assessment and intelligence value of each detainee.”²⁰⁷

The relatively formal CSRT and ARB processes provided detainees an opportunity to state their case before a decision-making body with no fear of coercion. Given the incentive for detainees to be forthcoming and honest with the CSRTs and ARBs, and the boards’ goal to either determine combatant status or make a dispensation

²⁰¹ *Guantanamo Detainee Processes*, DEP’T OF DEF. (Oct. 7, 2007), <http://www.defense.gov/news/Sep2005/d20050908process.pdf>.

²⁰² JENNIFER ELSEA, CONG. RESEARCH SERV., R22173, *DETAINEES AT GUANTANAMO BAY 2-3* (2005), available at <http://www.fas.org/sgp/crs/natsec/RS22173.pdf>.

²⁰³ *Id.*

²⁰⁴ Gordon England, Sec’y of the Navy, U.S. Dep’t of Def. News Briefing: Special Briefing on Combatant Status Review Tribunals (March 29, 2005), available at http://www.usembassy.it/viewer/article.asp?article=/file2005_03/alia/a5033003.htm.

²⁰⁵ Press Release, Dep’t of Def., Guantanamo Bay Detainee Administrative Review Board Decisions Completed (Feb. 9, 2006), available at <http://www.defense.gov/releases/release.aspx?releaseid=9302>. The Obama administration’s March 2011 executive order creates a similar review process for Guantanamo detainees, but with file reviews occurring every six months and full reviews every three years. Press Release, The White House, *supra* note 7.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

decision, detainee statements against interest before these bodies should be entitled to a presumption of voluntariness and reliability.

With regard to statements made in compliance with the AFM, one habeas judge has declared unreliable all evidence resulting from interrogations not in compliance with the AFM.²⁰⁸ This goes too far, as statements that are not taken in compliance with the AFM should be evaluated on a case-by-case basis. The ruling speaks, however, to the important difference between AFM and non-AFM statements. For better or worse, the AFM is now the gold standard for American interrogation,²⁰⁹ and statements taken in compliance with it should be considered free of the possible taint of coercion. Thus, statements against interest given in compliance with the AFM should be entitled to a presumption in favor of their voluntariness and reliability.

L. Habeas for Detainees Tried or Convicted by Military Commission or Subject to Executive Transfer Efforts

TDERRA includes a stay of habeas applications for detainees for whom charges have been sworn or those who have been convicted under the MCA09.²¹⁰ The goal is to allow military commission proceedings to continue without parallel litigation in habeas proceedings. On January 22, 2009, President Obama issued the executive order directing the Attorney General to conduct a “review of the status of each individual currently detained at Guantanamo [Bay].”²¹¹ New charges in military commissions were suspended pending the review.²¹² As of the date of this article, the suspension has

²⁰⁸ See WITTES ET AL., *supra* note 51, at 56 (citing *Al Rabiah v. U.S.*, 658 F. Supp. 2d 11 (D.D.C. 2009)).

²⁰⁹ See Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009). Executive Order No. 13,491 sets forth the importance of the Army Field Manual:

[A]n individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3[.]

Id.

²¹⁰ S. 3707, 111th Cong. § 2(f) (2010).

²¹¹ Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009) (creating a task force to review “the status of each individual currently detained at Guantanamo. . .”).

²¹² See *Obaydullah v. Obama*, 609 F.3d 444 (D.C. Cir. 2010).

been lifted,²¹³ but no new charges have yet been sworn and referred.²¹⁴

In *Obaydullah v. Obama*, the D.C. Circuit Court considered the appeal of a detainee who was charged before a military commission with “conspiracy to provide and providing material support for terrorism.”²¹⁵ While charged in 2008, no military commission proceeding had begun as of February 2010, when the D.C. Circuit Court decided whether to continue a stay issued by the district court pending military commissions proceedings.²¹⁶ The court held that when charges have not yet been referred and the government can provide no evidence to the court that military commission proceedings are imminent, such that the possibility of such proceedings is speculative, a stay is not appropriate.²¹⁷ The court made clear that a stay may be appropriate “in anticipation of an imminent military commission proceeding,” but it found that such a situation did not exist in the case at issue.²¹⁸

TDERRA does not seek to institute a stay of habeas petitions pending military commissions proceedings as a tool to indefinitely avoid habeas review. Rather, the stay is intended to allow the government to begin military commission proceedings without the fear of interference or parallel habeas litigation. Detainees should not be forced to wait for years while charges are sworn but not acted upon. On the other hand, the Obama administration should be encouraged to use the military commissions system it helped create in the MCA09 because detention pursuant to a war crimes conviction is more certain in terms of its ending point and proven to a higher standard of proof than law of war detention. The burden of carrying on habeas litigation simultaneously with military commission proceedings would be a disincentive for the use of military commissions because an entire trial

²¹³ Press Release, The White House, Office of the Press Secretary, Fact Sheet: New Actions on Guantanamo and Detainee Policy (Mar. 7, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guantanamo-and-detainee-policy> (“The Secretary of Defense will issue an order rescinding his prior suspension on the swearing and referring of new charges in the military commissions.”).

²¹⁴ During the suspension on new military commission charges, some guilty pleas were reached on existing charges. *E.g.* Ben Fox, *Terrorism Suspect Reaches Plea Deal in Guantanamo Trial*, BOS. GLOBE, July 8, 2010, http://www.boston.com/news/nation/articles/2010/07/08/us_reaches_plea_deal_at_guantanamo_military_trial/.

²¹⁵ *Obaydullah*, 609 F.3d at 446.

²¹⁶ *Id.*

²¹⁷ *Id.* at 448.

²¹⁸ *Id.* at 449.

could be undermined by an adverse habeas ruling at any moment. If, however, the administration is certain that habeas petitions will be stayed pending military commission trial and sentence, it would be more likely to try appropriate cases by military commission.

M. Limits on Second or Successive Habeas Applications

The Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter “AEDPA”) limits second or successive habeas petitions by state and federal prisoners.²¹⁹ TDERRA uses²²⁰ those AEDPA restrictions as a model for limits on second or successive habeas petitions by covered individuals.²²¹ The goal, to the extent possible, is to make detainees’ habeas review a one-shot process, to be followed by a periodic administrative review process for those individuals whose detainability is affirmed by the habeas court and who are subject to long-term detention.

TDERRA requires second and successive habeas claims that were presented in previous petitions to be dismissed.²²² It also requires the district court to dismiss habeas claims that were not presented in previous petitions unless there is a prima facie showing that 1) “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence” and 2) “the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found that the covered individual was lawfully detained.”²²³ The government could “take an interlocutory appeal from a decision by the district court to grant consideration of a second or successive habeas petition.”²²⁴

These restrictions are modeled off of the AEDPA reforms and would limit the responsibility of the D.C. District Court to adjudicate habeas claims that had either already been heard or could have previously brought with proper due diligence.²²⁵ The reforms will create

²¹⁹ 28 U.S.C. § 2244(b) (2010).

²²⁰ S. 3707, 111th Cong. § 2(g) (2010).

²²¹ See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 106, 110 Stat. 1214 (1996).

²²² S. 3707, 111th Cong. § 2(g)(1) (2010).

²²³ *Id.* § 2(g)(2).

²²⁴ *Id.* § 2(g)(3)(B).

²²⁵ See Antiterrorism and Effective Death Penalty Act of 1996 § 106.

incentives for detainees and their counsel to ensure that all of their relevant claims are adjudicated in the first instance, and will help clear the backlog of cases from the D.C. District Court.²²⁶ The Guantanamo Bay habeas cases have crowded out other litigation on the D.C. District Court's docket, as seen by Chief Judge Lamberth's statement in March 2009 that the court would not try any civil cases during the spring or summer of 2009.²²⁷ While detainee habeas petitions should be adjudicated fairly and promptly, other pending litigation deserves the same treatment. AEDPA-style reforms will ensure efficiency in the adjudication of habeas claims, allow administrative proceedings to control after initial Article III review of detainability, and streamline the D.C. District Court's docket.

N. Prohibition on Release into the United States

Finally, TDERRA clearly prohibits the release of detainees into the United States.²²⁸ Instead of outright release, the bill provides for a detainee released by a habeas court to be transferred into the custody of the Department of Homeland Security (hereinafter "DHS") "for the purpose of transferring the individual to the country of citizenship of the individual or to another country."²²⁹ The legislation requires DHS to house individuals whose habeas petitions are granted separately from those detained as "unprivileged enemy belligerents," and to effectuate a transfer "as expeditiously as possible," consistent with national security and the ban on transferring individuals to countries where they will likely be tortured.²³⁰ In addition to alleviating fears that terrorists will be released into America's neighborhoods,²³¹ such an outright ban would also provide clarity for the habeas judges, who are nervous about the

²²⁶ *Id.*

²²⁷ Jordan Weissman, *Chief Judge: D.C. District Court Will Postpone Civil Trials to Handle Gitmo Cases*, THE BLT: THE BLOG OF LEGAL TIMES (Mar. 17, 2009, 11:50 AM), <http://legaltimes.typepad.com/blt/2009/03/chief-judge-dc-district-court-will-postpone-civil-trials-to-handle-gitmo-cases.html>.

²²⁸ S. 3707, § 2(h)(1)(A) ("No court shall order the release of a covered individual into the United States, its territories, or possessions.").

²²⁹ *Id.* § 2(h)(2)(A).

²³⁰ *Id.* § 2(h)(2)(B).

²³¹ See *House Democrats Leave Gitmo Closing Money out of Bill*, USA TODAY, May 4, 2009, http://www.usatoday.com/news/washington/2009-05-04-gitmo-congress_N.htm (quoting Senate Minority Leader Mitch McConnell as saying, "[t]he American people want to keep the terrorists at Guantanamo out of their neighborhoods and off of the battlefield.").

possibility of releasing dangerous individuals.²³²

Some may argue that an outright ban on release into the United States is a solution in search of a problem, as no detainees have been released into the United States at this point. As of February 16, 2011, detainees have been quite successful in their habeas petitions and in gaining release. Up to that point, detainees prevailed in thirty-eight of fifty-one habeas proceedings.²³³ Still, though, no detainees have been released into the United States, and the release orders issued in cases won by detainees have not called for physical release.²³⁴ Instead, they have generally required the government to engage in “all necessary and appropriate diplomatic steps to facilitate” release.²³⁵

That said, the possibility of a constitutional conflict between the judiciary and the executive relating to a detainee release into the United States remains. The Supreme Court accepted certiorari in *Kiyemba v. Obama*, which concerned the release of Chinese Uighur detainees.²³⁶ In that case, the D.C. Circuit Court held that the judiciary does not have power to order the release of a Guantanamo detainee into the United States.²³⁷ The Supreme Court ultimately remanded the case back to the D.C. Circuit Court after all the detainees in question received at least one offer of resettlement, some of which were accepted, others which were not.²³⁸ In the process, the Supreme Court vacated the D.C. Circuit decision holding that the judiciary lacks the power to grant detainees release into the United States.²³⁹ Thus, the legal issue of whether such power exists is still very much alive.²⁴⁰ One could imagine, for example, a case in which a habeas court orders the release an individual whom the Executive views as dangerous. If the Supreme Court denies the authority of the courts to order release, the detainee in question would have the right to habeas corpus, but no effective remedy. On the other hand, if the Supreme Court accepts the authority of courts to order

²³² See Lee, *supra* note 9.

²³³ Larkin Reynolds, *GTMO Habeas Numbers Update*, LAWFARE (Feb. 16, 2011, 2:52 PM), <http://www.lawfareblog.com/2011/02/gtmo-habeas-numbers-update/>.

²³⁴ See Huq, *supra* note 14, at 419.

²³⁵ *Id.*

²³⁶ *Kiyemba v. Obama*, 130 S. Ct. 458 (2009).

²³⁷ *Kiyemba v. Obama*, 555 F.3d 1022, 1028-29 (D.C. Cir. 2009).

²³⁸ *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (per curiam).

²³⁹ *Id.*

²⁴⁰ A related issue is what immigration status, if any, released detainees would possess upon entry into the United States.

release, the executive could be forced to release an individual that the administration sees as dangerous to Americans. Taken even further, even if the judiciary has the authority to order release, the Executive could simply refuse to effectuate the order, leading to a balance of powers crisis.

To avoid the scenarios outlined above, TDERRA attempts to provide a measured, reasonable approach to dealing with detainees ordered released by the courts. That is, upon an order of release, the detainee in question is separated from those held as unprivileged enemy belligerents and held by DHS pending release.²⁴¹ The administration must attempt to transfer or release the detainee to another country as soon as possible, while protecting national security. Habeas judges would no longer fear the potential negative national security impact of their decision in favor of a detainee, and the executive would have time to wind down detention in a reasonable manner.

Another potential criticism of a broad statement against release into the United States is that it does not make an exception for American citizen detainees who are held on United States soil. The argument is that for citizens held in the country, at least, it is beyond the authority of Congress to forbid courts from ordering those detainees released. First, in response, while the reaffirmation of the authority to detain in TDERRA allows the President to detain citizens in the United States under the law of war, such as Padilla, whether to use that authority would be up to the President. Given the courts' skepticism of the detention of both Padilla, a citizen, and al-Marri, a permanent legal resident captured in the United States, future Presidents may not see the need to use that authority. Second, beyond holding citizens in the United States, it is speculative that this or future administrations will hold any unprivileged enemy belligerents in the United States. Third, even if citizens are held in the United States under the law of war, it is possible that the courts would view this instruction as they likely would in application to non-citizens held at Guantanamo — as a reasonable (and compliant with constitutional due process guarantees) way to effectuate a release order of the judiciary without abrogating the responsibility of the executive to protect national security.

III. SOME REMAINING ISSUES FOR CONGRESS AFTER

²⁴¹ S. 3707, 111th Cong. § 2(h) (2010).

TDERRA

TDERRA deals exclusively with the problems posed by the habeas proceedings for current and future law of war detainees. By reforming the procedures by which such habeas petitions are adjudicated, the proceedings will take on added legitimacy with the input of Congress and the President. Judges will be relieved of the duty to create procedural rules and will be able to focus on applying the new legislation to the cases before them, and the dicey political and legal problems posed by the possibility of a detainee being ordered released into the United States are defused. While accomplishing those goals would be no small feat, the legislation does not touch the even more contentious issues of congressional backing for administrative long-term detention procedures and the closing of Guantanamo Bay. These issues will likely remain for the foreseeable future, as there is little evidence that there is the political will on the part of Congress and the President to confront them. If Congress and the President decline to answer the call of the habeas judges and fail to pass TDERRA or similar legislation (which many may see as necessary, even if they disagree on the details), one imagines that legislation on long-term detention and closure of Guantanamo Bay will not be signed in the foreseeable future. This is not to say that these are the only two issues that will remain to be addressed after passage of the TDERRA or similar legislation, but they are certainly two prominent examples.

Long-term detention of unprivileged enemy belligerents by the United States is ongoing.²⁴² The ARB process of annual review was a process for annual reevaluation of detainees to determine whether detention was still necessary.²⁴³ ARBs are no longer occurring,²⁴⁴ but in March 2011, the Obama administration issued an executive order to establish a similar review process.²⁴⁵ The administration is decreasing

²⁴² See generally *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Eric H. Holder, Jr., Attorney Gen.) [hereinafter *Oversight*] (discussing detainees who will be neither tried nor released).

²⁴³ News Release, Dep't of Def., Administrative Review Implementation Directive Issued (Sept. 15, 2004), available at <http://www.defense.gov/releases/release.aspx?releaseid=7737>.

²⁴⁴ A Department of Defense publication indicates that the last ARB occurred in February 2009. DEP'T OF DEF., ADMINISTRATIVE REVIEW BOARD SUMMARY (2009), available at <http://www.defense.gov/news/arb4.pdf>; See also Charlie Savage, *Detainee Review Proposal is Prepared for Obama*, N.Y. TIMES, Dec. 21, 2010, <http://www.nytimes.com/2010/12/22/us/22gitmo.html>.

²⁴⁵ Press Release, The White House, *supra* note 7.

the population at Guantanamo Bay largely through transfers to other countries, but officials believe that there are forty-eight detainees who will likely not be released because they pose too great of a national security risk.²⁴⁶ Whether or not that prediction ends up being true, those detainees should be reviewed at least annually to determine whether there is still a need to detain them. Such a review should be administrative, with the decision-making board made of the various relevant agencies (DHS, Department of Defense, Department of Justice, Director of National Intelligence, etc.), and the detainee should be provided a personal representative. The key inquiries for such a review board should be whether the detainee has intelligence value and continues to pose a threat to the national security of the United States,²⁴⁷ and the detainee should be allowed to provide evidence of steps taken post-capture to reform and separate himself from enemy groups. With such a review in place, the American people and the world could rest assured that these detainees will not serve a de facto life sentence without an opportunity for release.²⁴⁸

Political resistance to a congressionally-required review of this sort would likely come from those who claim to have detainees' best interests at heart. For some on the political left, the negative of statutorily enshrining a system of long-term detention would outweigh the benefit of the review that would run to the detainees.²⁴⁹ In fact, though, long-term detention of law of war detainees is currently

²⁴⁶ *Oversight*, *supra* note 242 (statement of Eric H. Holder, Jr., Att'y Gen.).

²⁴⁷ This standard would be in contrast to the standard before the habeas courts, which is whether a detainee is covered by the detention authority of the President. It would be a shift in focus, from whether a particular detainee could be detained, to whether he should be detained.

²⁴⁸ The review system established by the Obama administration satisfies several desired criteria. However, one notable deviation from the ARB process is the standard for determining whether continued detention is warranted, which is whether it is "necessary to protect against a significant threat to the security of the United States." Press Release, The White House, *supra* note 7. That standard omits threats to United States allies and consideration of a detainee's intelligence value. *Id.* It also includes considerable vagueness in the undefined terms "necessary" and "significant." *Id.* It remains to be seen how that standard will be instituted in practice. *See id.*

²⁴⁹ *E.g.* Press Release, Am. Civil Liberties Union, President Obama Issues Executive Order Institutionalizing Indefinite Detention (Mar. 7, 2011), *available at* <http://www.aclu.org/national-security/president-obama-issues-executive-order-institutionalizing-indefinite-detention> ("While appearing to be a step in the right direction, providing more process to Guantánamo detainees is just window dressing for the reality that today's executive order institutionalizes indefinite detention, which is unlawful, unwise and un-American.").

ongoing and has been for some time. Given that, it seems that statutorily requiring an annual administrative review would be to the clear benefit of the detainees and the transparency of the detention system.

As for closing Guantanamo Bay, despite the President's executive order at the beginning of his Presidency,²⁵⁰ there remains a deep divide in Congress over the wisdom of moving detainees to the United States, and there is no foreseeable approval for appropriations for such a purpose.²⁵¹ One reason for this is that the legal rights of detainees who are moved from Guantanamo Bay to the United States remain unclear. Without some degree of certainty that detainees will not gain additional rights upon their entry into the United States, the outlook for closing Guantanamo Bay will remain bleak. Of particular concern is the potential ability of transferred detainees to be released into the United States if successful in their habeas petitions. Even though the *Kiyemba* decision in the D.C. Circuit Court was vacated,²⁵² it provides a basis for believing that detainees at Guantanamo Bay will not actually be released into the United States, at least absent a decision by the Supreme Court.

While Congress debates the closing of Guantanamo Bay, the fact remains that new detainee transfers to the prison have largely halted since 2004.²⁵³ Because our military and intelligence services have no

²⁵⁰ Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

²⁵¹ In considering the 2011 National Defense Authorization Act, both the Senate and House Armed Services Committees rejected the administration's request for funds to renovate the prison at Thomson, Illinois, as an ultimate transfer site for Guantanamo detainees. See Charlie Savage, *Closing Guantanamo Fades as a Priority*, N.Y. TIMES, June 25, 2010, <http://www.nytimes.com/2010/06/26/us/politics/26gitmo.html>. The 2011 National Defense Authorization Act prohibited the use of fiscal year 2011 Department of Defense funds to transfer Guantanamo detainees to the United States, despite protest from President Obama and Attorney General Eric Holder. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137 (2010); Press Release, The White House, Office of the Press Sec'y, Statement by the President on H.R. 6523 (Jan. 7, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/07/statement-president-hr-6523> ("Section 1032 [barring the use of funds to transfer detainees into the United States] represents a dangerous and unprecedented challenge to critical executive branch authority to determine when and where to prosecute Guantanamo detainees."); see Peter Landers, *Congress Bars Gitmo Transfers*, WALL ST. J., Dec. 23, 2010, <http://online.wsj.com/article/SB10001424052748704774604576036520690885858.html>.

²⁵² *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (per curiam).

²⁵³ See Huq, *supra* note 14, at 405 ("Anecdotal information suggests that inflows to the base in fact largely dried up in 2004, after the Supreme Court's first interventions in the field.").

prison in which to hold high-value detainees,²⁵⁴ one wonders whether our forces are capturing (and interrogating) all of the enemies that they could be, and likewise, whether our forces are killing more enemies than they should be.²⁵⁵ It is unacceptable to risk losing valuable intelligence and to create ethical dilemmas for our military because policymakers lack the political will to provide a prison to hold law of war detainees.

IV. CONCLUSION

Despite an early flurry of activity and a deadline imposed to close the detention center at Guantanamo Bay, the Obama administration has shown little appetite for confronting the difficult issues relating to detention in the War on Terror. Other than a relatively minor revamping of the military commissions system, President Obama's pre-election criticism of Bush administration policies and post-election discussion of charting a new course in detention policy has dissolved into paralysis and procrastination. Political demagoguery and legitimate policy differences among senators and congressmen create an environment inhospitable to the development of consensus detention legislation, but those obstacles could be overcome with leadership from the President. Without that leadership, though, detention policy has merely become a tool used by those on both the political left and right for their own electoral reasons.

With the political branches unwilling or unable to confront detention policy in a serious and substantive way, day-to-day policymaking has largely fallen to the federal judiciary. This abdication serves those politicians interested in detention policy only as a political issue, as they can periodically score points off of the latest developments while avoiding the responsibility of legislating. In fact, the very reasons that make the avoidance of detention policy attractive — responsibility for a complex policy implicating national security and civil liberties — demand the input of all branches of government. When

²⁵⁴ Charley Keyes, *Gates: Prospects for closing Guantanamo 'very, very low'*, CNN, Feb. 17, 2011, http://articles.cnn.com/2011-02-17/politics/senate.gates.gitmo_1_terrorists-detention-center-military-commissions?_s=PM:POLITICS ("Asked about what the United States would do about holding so-called high-value targets... [Secretary of Defense] Gates responded, 'I think the honest answer to that is, we don't know.'").

²⁵⁵ See Cole, *supra* note 8, at 695-96 ("[A]rguments [that there is no place for detention of combatants in an armed conflict with foes such as al Qaeda or the Taliban] may be the perverse effect of encouraging states to use lethal force.").

2011 *TERRORIST DETENTION REVIEW REFORM ACT* 271

a detainee is released or determined to be lawfully held, the American people should be confident that the decision was a result of a policy developed through thoughtful interaction between the branches of government. Currently, that is not the case.

If enacted, TDERRA or similar legislation would provide much-needed congressional and presidential input into detainee habeas proceedings. Undoubtedly, the issues are complex, the stakes are high, and the politics are potent, but Congress and the President should coalesce to bless some form of procedural rules for these proceedings. In their absence, habeas petitions continue to be adjudicated with the judges suffering from a lack of procedural clarity, the litigants unable to expect decisional consistency, and the American people impacted by detention policy written by a single, unelected branch of government.