

# Substantive Detention Law Matters: The Big Questions About Guantanamo the Supreme Court Should Answer

Justin Florence<sup>1</sup>

Whom can the United States legally hold as an “enemy combatant” at Guantanamo Bay? What actions must an individual take to be subject to detention for the remainder of the “war on terror”? Whom has Congress authorized the President to detain? Whose detention violates the laws of war or the Constitution? These are the big legal questions raised by President Bush’s Guantanamo Bay detention policy, and by his Administration’s larger theory of a war on terror.

Even though the Supreme Court will weigh in on Guantanamo for the third time since 9/11 this Term, and even though the parties in the cases before it – *Boumediene v. Bush* and *al Odah v. United States*<sup>2</sup> – briefed these issues in detail, the Court seems unlikely to address these questions in its decision.<sup>3</sup> Oral argument in the Court’s latest cases ignored the substantive question of whom the President has the power to detain. The Justices never asked the questions that opened this Essay. They never asked what the definition of an “enemy combatant” is, where that definition comes from, or what an individual must do to become an enemy combatant.

Instead, the Justices used their questions to get at another issue: what remedial process, if any, is available to the detainees to challenge their captivity. The Justices’ approach to this case – to first figure out the remedy, and leave the question of the underlying substantive law of detention for another day – is not illogical. If the federal courts lack jurisdiction to hear the challenges of the detainees, then it does not much matter whether the Administration has legal authority to detain them, or whether the detainees have substantive rights to their freedom or criminal trials.

But, as this Essay explains, it would be a mistake for a number of reasons for the Court to fail to address in *Boumediene* the substantive question of whom the Government can detain as an enemy combatant at Guantanamo Bay. First, it would be unfair to the detainees in that it would create a much longer delay before their status will finally be resolved. Second, it would prevent the detainees – and the Government – from knowing exactly what facts they must establish in any sort of habeas proceeding. Third, if the Court does not settle what the Government must establish in order to hold a detainee, it will be more difficult for the Court to determine a sufficient process to test whether the necessary facts have been established. And fourth, the Court’s silence on the substantive law of detention would perpetuate the confusion and uncertainty in ongoing policy debates about creating a new terrorist detention regime.

This Essay begins with a brief recap of the Court’s prior post-9/11 rulings on enemy combatants and the issues in *Boumediene*. It then explains that there are two different types of reasons why some detentions might be unauthorized – one legal, the other factual. It then surveys the various substantive legal issues at stake with respect to who can be held as an

---

<sup>1</sup> Justin Florence is a Fellow at the Georgetown Center on National Security and the Law. He assisted in writing an amicus curiae brief filed on behalf of Salim Hamdan in *Boumediene* and *al-Odah*.

<sup>2</sup> *Boumediene v. Bush*, 127 S. Ct. 3078 (2007), *Al Odah v. United States*, 127 S. Ct. 3067 (2007) Nos. 06-1195, 06-1196 (U.S. argued Dec. 5, 2007).

<sup>3</sup> In neither of its two already released Guantanamo cases – *Rasul v. Bush*, 542 U.S. 466 (2004) and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) – has the Court addressed the major underlying substantive issue of who may be detained at Guantanamo Bay.

enemy combatant. Finally, the Essay notes some problems with leaving these substantive issues for another day.

## The Supreme Court's Detainee Cases

A little background on how the Supreme Court got to this point in the legal wrangling over the Guantanamo detainees sets the stage for the issues in *Boumediene*. Only once since 9/11 has the Supreme Court directly addressed the substantive issue of who may be detained as an enemy combatant. In 2004, in *Hamdi v. Rumsfeld*,<sup>4</sup> the Supreme Court upheld the detention of a U.S. citizen captured on the battlefield in Afghanistan and held at a military brig inside the continental United States. The Government offered evidence that Hamdi had “affiliated with a Taliban military unit and received weapons training,” that he “took up arms with the Taliban,” and that he “engaged in armed conflict against the United States” in Afghanistan, where he was captured on the battlefield.<sup>5</sup>

Justice O'Connor's plurality opinion in the case held that Congress, in its 2001 Authorization for the Use of Military Force, had authorized the President to detain as enemy combatants people meeting the description the Government provided of Hamdi.<sup>6</sup> The Court offered little explanation for what exactly made Hamdi an enemy combatant, and instead explained that he could be detained as an enemy combatant because he fit “in the narrow category” of individuals who were “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.”<sup>7</sup>

Rather than providing a clear explanation for why Hamdi fit into this “narrow category” or offering clear or explicit rules or standards for who is an enemy combatant, the plurality dropped a cryptic footnote:

Here the basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield; that is, that he was an enemy combatant. The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.<sup>8</sup>

Some lower courts have attempted to define the permissible bounds of the category with respect to people captured and detained in the United States.<sup>9</sup> The Supreme Court, however, has yet to return to this question.

In *Hamdi*, the plurality also concluded that people like Hamdi were entitled to some process to challenge their detention. The Court offered some broad suggestions for how this procedure might work: hearsay evidence might be admissible and the Government's evidence would be entitled to a presumption of accuracy.<sup>10</sup> Because the Court determined that if the

---

<sup>4</sup> 542 U.S. 507 (2004).

<sup>5</sup> *Id.* at 510, 513, 516 (internal quotation marks omitted).

<sup>6</sup> *Id.* (“Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”).

<sup>7</sup> *Id.* at 516-17 (plurality) (internal quotation marks omitted).

<sup>8</sup> *Id.* at 522 n.1.

<sup>9</sup> This has largely been limited to the Fourth Circuit, which held that Jose Padilla did fit within this category, but Ali al-Marri did not. *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), *vacated and reh'g en banc granted*, No. 06-7427 (4th Cir. Aug. 22, 2007); *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

<sup>10</sup> *Hamdi*, 542 U.S. at 533-34.

allegations against *Hamdi* were true, then Hamdi could legally be detained, the sole purpose of this process was to allow Hamdi to challenge the accuracy of the factual evidence against him.<sup>11</sup>

In the same Term that the Court decided *Hamdi*, it also concluded in *Rasul v. Bush*,<sup>12</sup> that federal courts had jurisdiction – through the federal habeas statute – to consider petitions for habeas corpus from the detainees held at Guantanamo Bay.<sup>13</sup> The Court left the matter there though, concluding, “Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners’ claims are matters that we need not address now.”<sup>14</sup> Thus, the Supreme Court in *Rasul* not only stayed away from the substantive law governing detention, it also declined to prescribe procedures for hearing the detainees’ claims.

*Rasul* kicked off an exchange between the Court and Congress on whether federal courts have jurisdiction over the detainees’ petitions – a skirmish that *Boumediene* is likely to resolve. Following *Rasul*, Congress passed the Detainee Treatment Act (DTA),<sup>15</sup> which amended the federal habeas statute to strip jurisdiction from federal courts over claims filed by Guantanamo detainees. In June 2006, in *Hamdan v. Rumsfeld* – a case which on its merits concerned penal prosecution of detainees in military commissions, not the legality of their detention – the Court held that the DTA did not apply to pending cases.<sup>16</sup> Congress responded in the fall of 2006 by passing the Military Commissions Act (MCA), which removed jurisdiction, including over pending cases.<sup>17</sup>

The petitioners in *Boumediene* are challenging the constitutionality of the MCA. The D.C. Circuit panel agreed with the Government’s view in *Boumediene* that the Constitution, including the right to habeas corpus, does not extend to the Guantanamo detainees, and upheld the MCA’s jurisdiction-stripping provisions.<sup>18</sup> The detainees are arguing before the Court that they do have a constitutional right to habeas, and that Congress can only take away courts’ jurisdiction over their claims by formally suspending the writ of habeas corpus or by providing an adequate alternative, which the detainees believe Congress has not done. If the Court agrees that the detainees have a constitutional right to habeas – and it seems likely that the Justices decided to hear the case because they do agree with this – the Court must consider what this habeas right entitles them to. The Government argues that even if the detainees have a habeas right, the Combatant Status Review Tribunals (CSRTs) that detainees were given at Guantanamo, combined with the narrow judicial review the DTA makes available, provides the adequate alternative to federal habeas proceedings. The detainees respond that since Congress did not believe the detainees had a right to habeas, it never intended the CSRT process to be an adequate substitute.

But there is more at issue in the case. The detainees also argue that their detentions are unauthorized and illegal; the Government, of course, disagrees. The oral argument in

---

<sup>11</sup> *Id.* Hamdi never got to this point, however, because the Administration worked out a deal to send him to Yemen.

<sup>12</sup> 542 U.S. 466 (2004).

<sup>13</sup> The *Hamdi* and *Rasul* opinions were both released on the same day, June 28, 2004. The Court released a third enemy combatant case the same day, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), but did not reach the merits there.

<sup>14</sup> *Rasul* 542 U.S. at 485.

<sup>15</sup> Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2741-42.

<sup>16</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2762-69 (2006). *Hamdan* held on the merits that Bush lacked the authority to establish military commissions to try persons for certain offenses under law of war. In response, Congress passed the Military Commissions Act (MCA) authorizing the President to establish military commissions. The legality of those commissions is now being litigated at Guantanamo and in the lower federal courts.

<sup>17</sup> MCA, Pub. L. No. 109-366 § 7(b), 120 Stat. 2600, 2636.

<sup>18</sup> *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

*Boumediene*, however, focused only on the questions of the scope of constitutional habeas and whether the CSRT/DTA process provided an adequate substitute.<sup>19</sup> At oral argument, the Justices never connected the dots back to *Hamdi* and asked about who could be detained as an enemy combatant.<sup>20</sup>

## The Two Types of Unauthorized Detentions

If the Court decides, as seems likely, that the detainees are entitled to some sort of additional process to challenge the legality of their detentions, it follows that the Court believes that at least some detentions are illegal. Otherwise, *Boumediene* – and *Hamdan* and *Rasul* before it – would be a giant charade: why go to such great lengths to give the detainees their day in court, only to have judges throw up their hands when the detainees arrive with their petitions for relief? Assuming, then, that some (at least hypothetical, if not actual) detainees cannot be held as enemy combatants at Guantanamo, the obvious question becomes which ones. There are two broad ways in which the detention of particular individuals at Guantanamo Bay could be unlawful.

The first of these we might call factual errors – these are people who, assuming they did everything the Government believes, would indeed be enemy combatants whom the President has authority to hold as such. The question is whether the Government's facts are right. As an example of a factual detention error, the detainees' counsel in *Boumediene*, Seth Waxman, used his rebuttal at oral argument to tell the story of a detainee who had been held for associating with a supposed terrorist who later turned out not to have been a terrorist at all.<sup>21</sup>

The second type of unauthorized detentions we might call legal errors. These are people who, even if everything the Government says about them is true, still might not be enemy combatants as a matter of law.<sup>22</sup> As an example, imagine that the Administration decided to detain one of the attorneys of the Guantanamo detainees as an enemy combatant – on the grounds that he was “supporting” al Qaeda.<sup>23</sup> In that case, the Court should be able to say, from the outset, that even if the Government's allegations against this person are true, the President does not have authority to detain him as an enemy combatant.

Although the Government has not (yet) made enemy combatants out of the detainees' lawyers, there is still reason to believe that some of the prisoners held at Guantanamo are being improperly detained as a matter of law, for the Government adheres to a much broader definition of “enemy combatant” than the Supreme Court acknowledged in *Hamdi*. In that case, the Court classified Hamdi as an enemy combatant because he carried a weapon against the

---

<sup>19</sup> Transcript of Oral Argument, *Boumediene*, No. 06-1195 (U.S. argued Dec. 5, 2007), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/06-1195.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1195.pdf)

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 75-76. Another, related, example is the case of *El-Masri v. U.S.*, 479 F.3d 296 (4th Cir. 2007), cert. denied, 128 S.Ct. 373 (2007), in which it appears that the Government renditioned the wrong person because of a mistaken spelling of his last name.

<sup>22</sup> As a matter of logic, if some detentions are unlawful, by definition there must be some boundaries to the scope of people who can be detained as enemy combatants. Otherwise, detentions based on factual mistakes would still always be lawful; for the Government could always respond that even if its original set of facts about the detainee were wrong, there is some other reason for the detention based on indisputable facts – for example, that the detainee lives in Bosnia.

<sup>23</sup> Or, imagine that after the Oklahoma City bombing, President Clinton had sent Terry Nichols and Timothy McVeigh to a military brig without any trial, asserting that they were enemy combatants who had taken up arms and engaged in hostilities against the Government of the United States. Even if the Government had extensive evidence that this was true, it would not mean that Nichols and McVeigh could be held as enemy combatants, entitled to only a narrow hearing to rebut the factual accuracy of the Government's evidence.

United States on a foreign battlefield.<sup>24</sup> According to the Government, in contrast, an “enemy combatant” is “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”<sup>25</sup>

In earlier stages of the Guantanamo litigation, the Government has argued based on this definition that “the Executive has the authority to detain the following individuals until the conclusion of the war on terrorism: ‘[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities,’ a person who teaches English to the son of an al Qaeda member, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.”<sup>26</sup> Although they may not be in these categories, the *Boumediene* petitioners – unlike Hamdi – were not all in Afghanistan and did not all carry arms against the United States. As a judge on the district court noted about the Government’s definition, “Use of the word ‘includes’ indicates that the government interprets the AUMF to permit the indefinite detention of individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies.”<sup>27</sup>

While the *Boumediene* petitioners (if the allegations against them are true) fit within the Government’s definition of who can be lawfully detained as an enemy combatant, it is less certain that the Government’s definition is correct. The following section surveys the various legal issues that the Supreme Court would need to consider in order to determine whether the Government’s definition of “enemy combatant” is correct or, as a matter of law, is overly broad.

### **Whom Can the President Detain as an Enemy Combatant at Guantanamo Bay?**

For the Court to address the underlying substantive law at issue in *Boumediene* – the scope of people whom the President can legally detain as enemy combatants – it would have to confront a variety of complex issues. There are two ways of looking at substantive detention law – in terms of powers and rights. From one perspective, the question is whom the President may lawfully detain, either because Congress granted him the authority, or because the Constitution gives him this authority as commander-in-chief. Viewed from the other side of the coin, the substantive issue for the Court is whether the detainees have rights to their freedom or to criminal trials – arising from the laws of war and the Geneva Conventions, or from the Constitution’s Due Process or Habeas Clauses.<sup>28</sup>

---

<sup>24</sup> *Hamdi*, 542 U.S. at 526.

<sup>25</sup> Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

<sup>26</sup> *In re Guantanamo Bay Detainees*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (internal citations omitted).

<sup>27</sup> *Id.*

<sup>28</sup> These issues are the subject of extensive scholarly debate, which I lack space to fully survey here. See, e.g., Curtis A Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (discussing the scope of the AUMF); Ryan Goodman and Derek Jinks, *Replies: International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653 (2005) (considering the meaning of participating actively or directly in hostilities in the law of armed conflict); Trevor W. Morrison, *Hamdi’s Habeas Puzzle: Suspension as Authorization?* 91 CORN. L. REV. 411 (2006) (examining the connection between the Suspension Clause and the authorization of detentions). Also, to be clear, the discussion in this section concerns non-resident aliens captured and detained at Guantanamo Bay or elsewhere outside the sovereign United States; the capture and detention of an individual inside the United States might raise different issues, or at least lead to different answers to these questions.

To begin, the Court must look at the powers Congress granted to the President to detain people, most specifically in the 2001 Authorization for the Use of Military Force (AUMF).<sup>29</sup> The Government's definition of "enemy combatants" relies on a broad and assertedly literal reading of the words in the AUMF. The text of the AUMF gives the President the power to use "necessary and appropriate" force against the "nations, organizations, and persons" responsible for the 9/11 attacks.<sup>30</sup> In the Government's view, al Qaeda and the Taliban were responsible for 9/11, and so Congress has authorized the detention of all people who have in any way associated with al Qaeda or the Taliban (or any other nation or organization in any way responsible for 9/11) – whether or not those individuals themselves have any connection to 9/11 or any other hostilities against the United States.<sup>31</sup>

As the *Hamdi* Court recognized, however, the AUMF does not explicitly provide for the detention of anybody. The *Hamdi* Court nonetheless explained that "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here."<sup>32</sup> But, the Court emphasized elsewhere that it "only finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, in fact, an enemy combatant."<sup>33</sup> The Government's reliance on the broad, literal language in the AUMF is thus inconsistent with *Hamdi*, which held that the AUMF did not create the category of enemy combatants, but rather imported that concept and definition from elsewhere (most likely its views on the laws of war and what is "a fundamental incident of waging war," as further discussed below).

If the Court disagrees that the AUMF authorizes the Government to detain as enemy combatants the broad class of people that the Government claims it can, the Court would also consider whether the President has "inherent" constitutional authority to classify and detain people as enemy combatants.<sup>34</sup> Supreme Court decisions have held that the Constitution gives the President broad authority overseas, and the Court might conclude that whatever detention Congress has authorized is inconsequential, because the President's own authority is all that matters.

Viewing substantive detention law with respect to individuals' rights not to be held without trial raises additional questions. For example, to what extent do the Fifth Amendment's Due Process Clause and other parts of the Bill of Rights (including the protections in the Fourth and Sixth Amendments) apply to the detainees at Guantanamo Bay? The detainees argue that they are entitled "to the fundamental protections of the Due Process Clause"<sup>35</sup> and that the "Petitioners' indefinite detention without a fair hearing violates the Fifth Amendment."<sup>36</sup> The Government responds that "as aliens captured and held outside the sovereign territory of the United States, petitioners have no due process or other constitutional rights."<sup>37</sup>

Next, on the issue of the rights of the detainees, the Court might consider whether the Constitution's habeas clause entails a substantive right to freedom from unauthorized detention or is merely a procedural vehicle to have a court consider one's claim. If only the latter, it offers no help to the detainees once they get into court. But perhaps the very notion of habeas corpus entails a right not to be arbitrarily or improperly detained, based on some substantive common

---

<sup>29</sup> Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. §1541 (Supp. I 2001)).

<sup>30</sup> *Id.* § 2(a).

<sup>31</sup> See Brief for Respondents at 62, *Boumediene* (No. 06-1195).

<sup>32</sup> *Hamdi*, 542 U.S. at 516-17.

<sup>33</sup> *Id.* at 523.

<sup>34</sup> Brief for Respondents at 66, *Boumediene* (No. 06-1195) ("[P]etitioners' detention is independently justified by the President's constitutional authority.").

<sup>35</sup> Brief for Petitioners at 44, *Boumediene* (No. 06-1195).

<sup>36</sup> *Id.* at 47.

<sup>37</sup> Brief for Respondents at 67-68, *Boumediene* (No. 06-1195).

law standards. Finally, the Court could consider whether the United States' international legal obligations – either through treaties or customary international law – confer an affirmative right to freedom or criminal trial for some of the detainees.<sup>38</sup>

The most interesting and difficult substantive issue for the Court might come at the intersection of the rights and powers inquiries. The Court suggested in *Hamdi* that it might look to the laws of war to define the category of people who could be detained as enemy combatants. Following the *Hamdi* decision, the Court's opinion in *Hamdan* indicated that one particular element of the laws of war, Common Article 3 of the Geneva Conventions, is relevant to the armed conflict between the United States and al Qaeda, at least in Afghanistan.<sup>39</sup> That Article, however, and other related provisions of the Geneva Conventions, neither explicitly authorize nor prohibit the detention of anybody; rather, they largely leave substantive detention rules to the domestic law of the detaining nation, or perhaps to the customary international law standard of who has "directly participated in hostilities."<sup>40</sup> This could bring the Court's inquiry full circle, back to determining what exactly Congress authorized in the AUMF.

### **The Problems with Dodging the Substantive Questions**

The proper legal definition of enemy combatants and the scope of the category of people who may be detained at Guantanamo are difficult issues, and I sympathize with the Court's reluctance to engage them directly.<sup>41</sup> But there are at least four reasons why this approach is mistaken and the Court should address substantive detention law in its opinion in *Boumediene*.

*First*, the delay that would result from failing to address these issues is unfair to the detainees. Many of these men have been at Guantanamo for six or more years; one detainee, in fact, recently died there of natural causes. Habeas is supposed to offer a speedy remedy. If the Court fails to state the permissible boundaries of the category of enemy combatants now, it could be years more before it ultimately reaches this question. The detainees would have to make their cases before administrative proceedings or lower courts, and their petitions would have to go all the way back up through the courts of appeals to the Supreme Court again. (It will be four years between the opinion in *Rasul*, released in 2004, and the Court's decision in *Boumediene*, expected in the spring of 2008.) Even if the Court does set substantive standards then, the case would likely be remanded to the lower courts to be implemented. This continued imprisonment is itself a substantial harm to the detainees.

*Second*, failure to declare the permissible scope of who can be detained as an enemy combatant will make it difficult for the detainees to develop a legal strategy for whatever procedures the Court makes available to them. If the detainees do not know what the standard for an enemy combatant is, they will not know what they need to establish. For example, while

---

<sup>38</sup> Note, however, that Congress, in section 5 of the MCA, explicitly stated that the Geneva Conventions could not be invoked as a source of rights by the detainees.

<sup>39</sup> *Hamdan*, 126 S. Ct. at 2795-96 (2006) (holding that Geneva Convention provisions governing non-international conflicts apply to the detainees).

<sup>40</sup> See *al-Marri*, 487 F.3d at 160; see also Address of John B. Bellinger, Legal Adviser, U.S. Department of State (Dec. 10, 2007), available at <http://www.state.gov/s/l/rls/96687.htm> (citing gaps in the law of armed conflict about the proper scope of detention).

<sup>41</sup> To be sure, the Court might offer some justifications for refraining to address substantive detention law. For example, the Court might believe that it need not offer guidance on the proper scope of the enemy combatant category until all of the evidence is developed in a particular detainee's case in some lower court or administrative proceeding. But, this does not make sense for the "legal errors"; the posture in these cases is analogous to a Rule 12(b)(6) motion to dismiss a case for failure to state a claim. The detainees' view is that even taking the Government's allegations as true, the Government has still not made a case that they can be detained as enemy combatants. Accordingly, there is no need actually to evaluate the evidence; the detention should be unlawful as a matter of law.

challenging their detention in the administrative proceedings under one standard, certain detainees might end up admitting something that makes them subject to detention under whatever standard the Court ultimately settles on. This could also be prejudicial to the government, which might establish that a detainee fits within its current definition of an enemy combatant only to find out later that its definition is overbroad.

*Third*, the Court should consider the proper substantive detention law in order to determine what sort of process would be appropriate for the petitioners to challenge their detention. For the Court to limit its focus to the mere availability of habeas review would make sense if the Guantanamo detainees were all similarly situated to Yaser Hamdi – that is, if they were alleged to have been captured on the battlefield while fighting for the Taliban against the United States and its allies in Afghanistan. Then, since the *Hamdi* Court already determined the Government could detain such people, the Court’s only question would be whether the CSRT and DTA provide the kind of procedures *Hamdi* (or constitutional habeas) require for detainees to challenge the accuracy of this evidence.

But since each detainee has a different story, whoever designs the procedure in which the detainees may challenge their captivity – whether the Supreme Court, the lower courts, or Congress and the Administration – must take into account what it is that the Government must establish in order to hold the detainees. It is not very helpful to debate whether secret evidence can be used, lawyers must be available, magistrates must be neutral, witnesses can be confronted, hearsay can be admissible, or burdens of proof can be shifted unless the Court has decided what it wants the process to determine. If the Government needs to establish with a high level of certainty that a certain individual committed specific acts or had specific intentions, then it might select one kind of process. But if the Government need only establish that a person might have communicated or associated with some other person, then a different kind of process might be more appropriate. As one example, a problem with accepting the DTA-prescribed review of CSRTs as the sole judicial process available to the detainees is that it only allows for mistake of fact cases, and not mistake of law cases.<sup>42</sup>

*Fourth*, the Court should weigh in on the substantive boundaries of current detention law to inform a debate among commentators and within the Administration about creating a new terrorist detention regime. Proponents of a national security court or some other statutory preventive detention regime have, thus far, focused on what sort of procedures the regime would entail. But establishing such a regime also requires making policy decisions about who the United States wants to detain, within the constraints of any constitutional or international legal obligations. On the one hand, if the Court rules that a broad swath of people can be detained as enemy combatants, it could undermine the legal impetus for a new regime – since possibly dangerous individuals could be detained through the current military enemy combatant system. On the other hand, if the Court believes that the Constitution affirmatively prohibits the detention of certain people without trial, that would be important to know in setting up the rules for any new regime. Either way, the Court should address the substantive legal requirements of detention now, so that Congress and the nation can begin to assess its policy options.

## Conclusion

The Bush Administration began its Guantanamo Bay detentions six years ago. Its Guantanamo policy has become a symbol to the world of the Administration’s, and the country’s, response to the threat of terrorism. Whom the United States can lawfully detain as an enemy combatant in a “war on terror” is a hard legal issue, involving the powers of different

---

<sup>42</sup> See Transcript of Oral Argument at 39, *Boumediene* (No. 06-1195) (answering a question from Justice Souter about whether somebody could argue the detention is unlawful, Solicitor General Clement responded “I’m not sure he can make that argument [in the CSRT/DTA process]”).

branches of government, and the rights of people from around the world. It is also a question for which there is little direct precedent or law on the books. And that is precisely why the country requires answers from the Supreme Court.