



## **Terror Detentions and the Rule of Law: US & UK Perspectives**

by Robert H. Wagstaff,  
©Oxford University Press, 2014

What is "The Rule of Law"?	2
Guantanamo Bay Camp Delta: "Strawberry Fields"	4
"Enhanced Interrogation"	6
The Brits "Do It Better": War Paradigm v. Criminal Law	9
Selected Post-9/11 Counter-Terrorism Measures	11
Judicial Review of Terror Detentions	12
Habeas Procedures: Judicial Reality in the Post- <i>Boumediene</i> World	14
Further Reading	15

*The power of the Executive to cast a man in prison without formulating any charge known to the law, and particularly to deny him the judgment of his peers is in the highest degree odious and is the foundation of all totalitarian government, whether Nazi or Communist.*

*~Cable from Winston Churchill to British Home Secretary Morrison, November 21, 1943*



## What is “The Rule of Law”

As the late former UK Law Lord Tom Bingham said in a 2006 lecture at Cambridge, while the expression “the rule of law” is constantly on people’s lips he was not quite sure what it meant and he was not sure that all those who used the expression knew what it meant either. Tom Bingham set about writing a book entitled “The Rule of Law” which was published in 2010 and it is perhaps the most succinct and thorough consideration of the history and meaning of the concept.

**Tom Bingham’s central premise** defining the Rule of Law is that *‘all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts’*. Tom Bingham lists the following fundamental precepts of the Rule of Law:

1. The law must be accessible and intelligible;
2. Disputes must be resolved by application of the law rather than exercise of discretion;
3. The law must apply equally to all;
4. It must protect fundamental human rights;
5. Disputes should be resolved without prohibitive cost or inordinate delay;
6. Public officials must use power reasonably and not exceed their powers;
7. The system for resolving differences must be fair;
8. A state must comply with its international law obligations.

**Ronald Dworkin:** For the late Ronald Dworkin, one of the most distinguished legal philosophers of our time, *the Rule of Law relates first and foremost to integrity and equality*.

- Political integrity means equality before the law—equal protection of the law—beyond simply law being enforced as written ‘but in the more consequential sense that government must govern under a set of principles in principle applicable to all’.
- Dworkin sees this fundamental precept of equality and integrity as the fountainhead source of human rights. This conception of the Rule of Law takes the view that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole.
- These moral and political rights are recognized in positive law, so that they may be judicially enforced by individual citizens.
- The Rule of Law is an enforceable framework of liberty, equality, and due process upon which a democratic government is built.

### **As defined by the US Army:**

- Rule of law is a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles.
- It also requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decisionmaking, and legal certainty.
- Such measures also help to avoid arbitrariness as well as promote procedural and legal transparency. U.S. Department of the Army, *Counterinsurgency Field Manual* (Washington, DC, 2006).

## SELECTED READING:

- Alford, RP. 'The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens' (2011) 2011 *Utah Law Review* 1203.
- Andenas, M. and Fairgrieve, D. (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford University Press, Oxford 2009).
- Bedner, A. 'An Elementary Approach to the Rule of Law' (2010) 2 *Hague Journal on the Rule of Law* 48.
- Bingham, T. *The Rule of Law* (Allen Lane, London 2010).
- Bingham, T, 'Dicey Revisited' [2002] *Public Law* 39.
- Carothers, T. *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace, Washington DC 2006)
- Cole, D. *Enemy Aliens* (The New Press, New York 2003).
- Cole, D, and Lobel, J. *Less Safe, Less Free: Why America Is Losing the War on Terror* (New Press, New York 2007).
- Craig, P. 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467.
- Dworkin, R. 'Terror and the Attack on Civil Liberties' *New York Review of Books* (November 6, 2003).
- Higgins, R. 'The ICJ, the United Nations System, and the Rule of Law' (Speech given by Judge Rosalyn Higgins at LSE (November 13, 2006).  
<[http://www2.lse.ac.uk/PublicEvents/pdf/20061113\\_Higgins.pdf](http://www2.lse.ac.uk/PublicEvents/pdf/20061113_Higgins.pdf)>
- Margulies, J. *Guantánamo and the Abuse of Presidential Power* (Simon & Schuster, New York 2006).
- Sands, P. *Lawless World* (Allen Lane, London 2005).
- Steyn, J. 'Guantanamo Bay: The Legal Black Hole', Twenty-Seventh FA Mann Lecture (November 25, 2003). <<http://www.adminlaw.org.uk/docs/FA%20Mann%20lecture.doc>>
- Vaughan, B and Kilcommins, S. *Terrorism, Rights and the Rule of Law: Negotiating Justice in Ireland* (Cullompton, Devon, UK 2008).



## **Guantanamo Bay Camp Delta: Strawberry Fields Forever**

### **“Honor Bound to Defend Freedom”**

**History:** After the Spanish-American War of 1898, the Cuban-American Treaty (1903) was signed, leasing Guantanamo Bay indefinitely to the United States for use as a Naval Station Cuba.

**A legal black hole:** The US Naval Base at Guantanamo Bay was chosen purposefully by the Bush administration because it was considered to be outside the sovereign territory of the US. The Bush administration believed that because of this, all legal protection would be removed, thus creating a “legal black hole” where neither domestic nor international law applied.

**Customary International Law:** Bush maintained that the US federal courts had no jurisdiction over the US Navy Base and that international treaties including the Convention Against Torture, the Geneva Conventions, and the International Covenant on Civil and Political Rights did not apply to the detainees held there. Cynically, Guantanamo was nicknamed ‘Strawberry Fields’ by the CIA—after the Beatles’ song—because the detainees would be held there forever.

**Global criticism:** In November 2003, Lord Steyn delivered the annual F.A. Mann Lecture at the British Institute of International and Comparative Law alleging that: “The purpose of holding the prisoners at Guantanamo Bay was and is to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors... Trials of the type contemplated by the United States government would be a stain on United States justice. The only thing that could be worse is simply to leave the prisoners in their black hole indefinitely.” Ten years on, Lord Steyn has been proven correct.

**Torture and mistreatment:** Detainees at Guantanamo were routinely subjected to extremes of light and heat, threatened with attack dogs, hooding, stripping, and shackling in painful positions. Additional techniques utilized included sleep deprivation, interrogation lasting up to 20 hours, frequent interruptions in assignments of cells (‘the frequent flyer program’), hog-tying, chaining detainees, not allowing use of toilet facilities resulting in soiling, mocking of detainees’ religious practices, and positions of forced nudity. Three detainees killed themselves. The US military declared these suicides were not acts of desperation, but rather ‘act[s] of asymmetric warfare waged against us’. The suicides themselves were referred to as ‘manipulative self injurious behaviour’.

**Obstacles to closure:** In 2009, torture and abuse of prisoners came to an end. The release of prisoners slowed significantly, principally due to Congressional opposition. Recently there have been some additional transfers to Algeria and Slovakia. The US paid these countries to accept the prisoners. In March 2009, President Obama stated that his administration would not be releasing any prisoners who posed a danger to the public and who could not be tried. Trials cannot be held because of evidence obtained by torture and/or the lack of evidence altogether.



**SELECTED READING:**

Bravin, J., *Terror Courts: Rough Justice at Guantanamo Bay* (Yale University Press, New Haven CT 2013).

Denbeaux, MP, and Hafetz, J (eds). *The Guantanamo Lawyers: Inside a Prison Outside the Law* (New York University Press, New York 2009).

International Committee of the Red Cross. '*Report on the Treatment of Fourteen 'High Value' Detainees in CIA Custody*' (ICRC, Geneva 2007).

Otty, T. 'Honour Bound to Defend Freedom? The Guantanamo Bay litigation and the fight for fundamental values in the War of Terror' [2008] *European Human Rights Law Review* 433.

Rose, D. *Guantanamo: America's War on Human Rights* (Faber & Faber, London 2004).

Smith, CS. *Bad Men: Guantanamo Bay and the Secret Prisons* (Weidenfeld and Nicolson, London 2007).

United States. Department of Justice. *Final Report: Guantanamo Review Task Force Report*, January 22, 2010.

**Miami Herald website:** <http://www.miamiherald.com/guantanamo/>

In depth review of Guantanamo captives, Courts, costs and more. Updated periodically.



## **ENHANCED INTERROGATION, i.e. TORTURE**

### **Executive Power Memoranda**

While all the while declaring that “We do not torture”, the Bush administration determined that any means necessary must be used to obtain information from detainees in contravention of international and the US Constitution. Legal memorandums were authored by government officials John Yoo, Jay Bybee, Steven Bradbury and Alberto that described in detail and endorsed the use of “enhanced interrogation techniques” – i.e. torture.

### **International Committee of the Red Cross Investigation of Detainee Treatment**

The conclusion published in a 2007 Red Cross Report on the Treatment of “High Value Detainees” in CIA custody was that proof of torture by the US government was indisputable:

- Beginning in the spring of 2002 the United States government began to torture prisoners. This torture, approved by the President of the United States and monitored in its daily unfolding by senior officials, including the nation’s highest law enforcement officer, clearly violated major treaty obligations of the United States, including the Geneva Conventions and the Convention Against Torture, as well as US law.
- The most senior officers of the US government, President George W. Bush first among them, repeatedly and explicitly lied about this, both in reports to international institutions and directly to the public. The President lied about it in news conferences, interviews, and, most explicitly, in speeches expressly intended to set out the administration’s policy on interrogation before the people who had elected him.

### **Article VI of the US Constitution**

“... all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”

### **Treaties banning torture to which the US is a signatory**

- **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)** ratified by 136 countries, including the United States in 1994 provides that “No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture” (Art 2, § 2).
- **Universal Declaration of Human Rights, Article 5** states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”
- **International Covenant on Civil and Political Rights (ICCPR), article 7**, ratified by 153 countries, including the United States in 1992, and in the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture), ratified by 136 countries, including the United States in 1994.



**Common Article 3 to the Geneva Conventions** bans "violence of life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" as well as "outrages upon personal dignity, in particular humiliating and degrading treatment."

### **Torture Doesn't "Work"**

Matthew Alexander, US Air Force Reserve officer and an official interrogator in Iraq published a book in 2011 explaining why torture is not only dishonourable and immoral, it is counterproductive:

- The argument that the supporters of torture make is that torture and abuse are necessary to save lives. That is a lie.
- There is no evidence that torture and abuse are more effective or efficient than the techniques I discuss in this book. In fact, there's plenty of evidence to show that it slows the progress of the interrogation or results in bad information. Those are just the short-term problems that are created.
- The more significant issue is the long-term negative consequences of using torture and abuse, which are undeniable.

### **Accountability for torture**

- Charles Fried, Harvard law professor and Solicitor General under President Reagan, agrees with his philosopher son Gregory Fried, that torture can never be justified and that it is never a "lesser evil." They assert that the Bush administration broke the law in ordering torture, mocked the Constitution in its interpretation of executive authority, and outraged common decency. They maintain that if we do not condemn, prosecute, punish the torturers and those who ordered them to torture, we become accomplices after the fact.
- Gregory Fried argues for criminal prosecution now, and Charles Fried believes this is an option to consider but insists at a minimum there should be an accounting, exposure and repudiation. Instead, many US courts are shielding the perpetrators of abuse and torture with immunity, invoking the "state secrets" doctrine.
- The United Kingdom for its part is committed to conducting a public investigation as to what has occurred, and torture victim litigation seeking redress has been successful.

### **The Constitution Project's Task Force on Detainee Treatment (16 April 2013)**

This 577-page report on treatment of post-9/11 detainees, published by the nonpartisan independent organization, The Constitution Project, determined that:

- It is indisputable that the United States engaged in the practice of torture as official policy emanated from the highest levels of government, that is, President Bush, Vice President Cheney, Attorney General John Ashcroft, Secretary of Defense Donald Rumsfeld, and National Security Administration Advisor Condoleezza Rice.
- The report finds as a matter of fact that the interrogation methods violated not only international legal obligations, but also that there is "no firm or persuasive evidence" that torture produced any information that could not have been otherwise obtained.



- This torture was unjustified and has “damaged the standing of our nation, reduced our capacity to convey moral censure when necessary and potentially increased the danger to US military personnel taken captive.”
- The Task Force notes that never in the nation’s history has there been “the kind of considered and detailed discussions that occurred after September 11, directly involving a president and his top advisers on the wisdom, propriety and legality of inflicting pain and torment on some detainees in our custody.”

## **Selected Reading**

### Torture memoranda (Department of Justice, Office of Legal Counsel):

‘Memorandum for Alberto R Gonzales from Jay S. Bybee *re Standards of Conduct for Interrogation under 18 USC §2340-2340’A* (August 1, 2002).

‘Memorandum for Alberto R Gonzales’ from John Yoo and Robert Delahunty (October 23, 2001).

‘Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, *Re Interrogation of al Qaeda Operative*’ (Aug. 1, 2002).

‘Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Application of 18 U.S.C. §§2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value Al Qaeda Detainee*’ (May 10, 2005).

‘Memorandum for the President from Alberto Gonzales *Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict With al Qaeda and the Taliban*’ (25 January 2002).

‘Memorandum for William J Haynes II from John Yoo *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States*’ (March 14, 2003).

### Reports

The Constitution Project. *The Report of the Constitution Project’s Task Force on Detainee Treatment* (The Constitution Project, Washington DC, 2013).

International Committee of the Red Cross. ‘*Report on the Treatment of Fourteen ‘High Value’ Detainees in CIA Custody*’ (ICRC, Geneva 2007).

United States. Central Intelligence Agency. ‘Background Paper on CIA’s Combined Use of Interrogation Techniques’ (December 30, 2004).

US Senate Intelligence Committee. “Study of the Central Intelligence Agency’s Detention and Interrogation” (December 13, 2012 the Committee voted to release the Report).

### Books

Brecher, B. *Torture and the Ticking Bomb* (Blackwell Publishing, Oxford 2007).

Fried, C, and Fried, G. *Because It Is Wrong: Torture, Privacy, and Presidential Power in the Age of Terror* (WW Norton, New York 2010).

Sands, P. *Torture Team* (Allen Lane, London 2008).



## **THE BRITS DO IT BETTER**

### **War Paradigm v Criminal Law**

Since the 9/11 attacks, the United Kingdom has had significant success in prosecuting alleged domestic terrorists under ordinary criminal law, while the United States has, with some exceptions, less successfully focused primarily on a 'war on terror'. **Testimony before the US Senate Subcommittee on Homeland Security in hearings held shortly after the July 7, 2005, London bombings reflects the divergent approaches of the US and UK.**

**'Catching Terrorists: The British System versus the US System':** The hearings featured the testimony of Richard Posner and John Yoo, both strident supporters of the war paradigm, preventive detention and presidential power. Both stressed the necessity of the use of military force, which has become an increasingly popular US activity of first reaction.

- Former British counterterrorism official Thomas Parker also testified, and apparently surprising to the Senate Committee, he insisted that it was important to treat terrorists as what they were—criminals—and not military threats. He described the success of Scotland Yard not as a preemptive force, but rather the users of good solid police work consisting of long-term surveillance, gathering evidence before arrest, and acquiring invaluable intelligence.
- Parker explained that the United Kingdom had tried a preemptive military approach during the 1970s in Northern Ireland, complete with suspect roundups without trial and the use of harsh interrogation techniques. These served only to increase support for the IRA and unite Irish Catholics against the British.
- Parker's advice and experience fell upon deaf ears.

#### **Binyam Mohamed: UK settles claims for torture and abuse**

- On August 7, 2007, Binyam Mohamed, a British resident, was one of five Guantanamo detainees the British Foreign Secretary David Miliband requested be freed.
- On June 28, 2008, the *New York Times* reported that the UK government had sent a letter to Mohamed's attorney, Clive Stafford-Smith, confirming they had information about Binyam Mohamed's allegations of torture and abuse in the US.
- In October 2008 the US charges against Mohamed and four other captives at Guantanamo were dropped.
- On February 23, 2009, almost seven years after his arrest, Mohamed was returned to the United Kingdom where he was released after questioning.
- Shortly thereafter Mohamed publicly claimed that British intelligence had colluded with his US interrogators in his torture and abuse, which had led him to make false confessions and Mohamed sought public release of the discovery materials to support that claim.
- In October 2010, the UK Court of Appeal (Civil Division) ruled that details of 'the cruel, inhuman and degrading treatment' administered to the prisoner by American officials were to be made public inasmuch as the public had a right to know. 'State secrets' were not recognized.
- On November 16, 2010, the UK government announced it had agreed to pay Binyam Mohamed and 15 other British citizens and residents multiple millions pounds sterling in settlement of their claims for the United Kingdom's complicity in their torture and abuse at Guantanamo and rendered US secret sites.



**In stark contrast, the US offered no redress to Binyam Mohamed embracing the excuse of the state secrets doctrine:**

- On September 8, 2010, an en banc panel of the Ninth US Circuit Court of Appeals ruled 6-5 in *Mohamed v Jeppesen Dataplan, Inc.* 614 F3d 1070 (9th Cir 2010), cert. denied 131 SCt 2442 (2011), that Binyam Mohamed and four other detainees could not proceed with a private civil suit against Jeppesen Dataplan, a subsidiary of the Boeing Company, because of the 'state secrets doctrine' per *US v Reynolds*.
- Mohamed et al. initiated their lawsuit under the Alien Tort Statute in 2007 against Jeppesen. Jeppesen had arranged for rendition flights that flew Mohamed and the others to Morocco, Egypt, and Afghanistan to be tortured.
- The US government intervened in the litigation, asserting the state secrets privilege. The merits of the case were never heard because the Bush administration argued that any evidence would violate the state secrets privilege. A three-judge appeals panel held against Bush and that the suits could proceed
- During his first presidential campaign, Barack Obama asserted that he opposed government secrecy. Nonetheless, the Obama DOJ sought rehearing en banc urging that the claims be dismissed, invoking the state secrets doctrine.
- The court's one-judge en banc majority held that 'that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets'

**Jose Padilla also sued and was refused redress:**

- Jose Padilla, an American citizen arrested at Chicago's O'Hare airport and held incommunicado for years, sued John Yoo, alleging legal responsibility for being held incommunicado in military detention, subjected to coercive interrogation, and detained under harsh conditions in violation of his constitutional and statutory rights.
- Padilla's mother sought damages on his behalf for John Yoo's role in authorizing torture.
- The Ninth Circuit held that: "[A]lthough it has been clearly established for decades that torture of an American citizen violates the Constitution, and we assume without deciding that Padilla's alleged treatment rose to the level of torture, that such treatment *was* torture was not clearly established in 2001-03." *Padilla v. Yoo*, 678 F3d 748, 705 (9th Cir. 2012).

#### **SELECTED READING:**

Alexander, Y, and Brenner, E (eds). *The United Kingdom's Legal Responses to Terrorism* (Cavendish Publishing Ltd, London 2003).

Baker, N. *General Ashcroft: Attorney at War* (University Press of Kansas, Lawrence 2006).

Cole, D. 'The Brits Do It Better', *New York Review of Books* (June 12, 2008).



## **SELECTED POST 9/11 COUNTER-TERRORISM MEASURES (UK)**

Anti-Terrorism, Crime & Security Act 2001

Anti-Terrorism Act 2006

Prevention of Terrorism Act 2005

Serious Organised Crime and Police Act 2005

Terrorism Act 2000

## **SELECTED POST 9/11 COUNTER-TERRORISM MEASURES (US)**

Authorization for Use of Military Force Pub L 107-40, §2(a), 115 Stat. 224 (2001)

Detainee Treatment Act of 2005, Pub L 109-48, 119 Stat 2680 (Dec 30, 2005)

Military Order of November 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism (Federal Register. Vol. 66, No. 222. Friday, November 16, 2001)

Military Commissions Act of 2006, Pub L 109-366, 120 Stat 2600 (October 17, 2006)

Military Commissions Act of 2009, Pub L 111-84, 123 Stat 2190 (October 28, 2009)

National Defense Authorization Act for Fiscal Year 2012

National Defense Authorization Act for Fiscal Year 2013

National Defense Authorization Act for Fiscal Year 2014

USA Patriot Act, Pub L 107-56, 115 Stat 272 (Oct 26, 2001)

## **JUDICIAL REVIEW OF TERROR DETENTIONS IN THE UK & US**



## JUDICIAL REVIEW OF TERROR DETENTIONS IN THE UK & US

A series of post-9/11 landmark decisions by the US Supreme Court and the UK Appellate Committee of the House of Lords (now UK Supreme Court) address detentions of suspected alien terrorists in the Guantanamo Bay, Cuba, US Naval Base Prison and the UK Belmarsh Prison respectively. Four US Supreme Court cases address the issues of what legal rights the detainees at Guantanamo Bay possess and what actual constitutional authority the president has to detain them indefinitely. A series of judgments issued by the Appellate Committee of the House of Lords decided between 2004 and 2009 address the rights of persons detained for being suspected of having suspicious ties to suspicious organizations

### UK HOUSE OF LORDS BELMARSH DECISIONS\*

Belmarsh I: *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68

The court held that the detention provisions of ATCSA (Anti-Terrorism, Crime & Security Act 2001) were not in compliance with the ECHR (European Convention on Human Rights) and accordingly issued a declaration of incompatibility per the requirements of the Human Rights Act 1998.

Belmarsh II: *A v Secretary of State for the Home Department* [2005] UKHL 71, [2005] 2 AC 221

The court ruled that evidence obtained through torture was inadmissible as it was inherently unreliable, unfair, offensive to ordinary standards of humanity and decency, and incompatible with the principles on which courts should administer justice.

Belmarsh III (collectively): *Secretary of State for the Home Department v JJ & Ors* [2007] UKHL 45, [2008] 1 AC 385; *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46, [2008] AC 440; *Secretary of State for the Home Department v E* [2007] UKHL 47, [2008] 1 AC 499

These cases discuss “control orders” which include restrictions on both aliens and citizens for the purpose of preventing involvement in terrorist activities. Control orders involve house arrest, curfew, electronic tagging and restrictions on association.

Belmarsh IV: *Secretary of State for the Home Department v AF* [2009] UKHL 28

The court held that it is unlawful to use secret evidence to place persons under control, ruling that there is a fundamental right to disclosure of sufficient material to enable an answer to an accusation to effectively be made in defense.

\* These decisions are available on BAILII at <http://www.bailii.org/>



## US SUPREME COURT GUANTANAMO DECISIONS

### ***Rasul v Bush*, 542 US 466 (2004)**

In a 6-3 decision, the Supreme Court determined that the habeas corpus statute was applicable to aliens held at Guantanamo Bay. Even though Cuba had 'ultimate sovereignty', the United States had complete effective de facto jurisdiction and control over its naval base. Rasul had never been charged with any wrongdoing, was prohibited from seeing counsel, and was denied access to the courts or any tribunal. The Supreme Court found that under 28 USC 2241(a)(c)(3), which authorized district courts to 'entertain habeas applications by persons claiming to be held in custody in violation of the laws of the United States', the federal courts had jurisdiction. *Rasul* was a case of statutory interpretation, not one of constitutional law.

### ***Hamdi v Rumsfeld*, 542 US 507 (2004)**

The court held 6-3 that the military could detain Hamdi as an enemy combatant because Congress had impliedly authorized such detentions with the Authorization for Use of Military Force (AUMF). As it developed, Hamdi was legally a US citizen as he had been born in the United States of Saudi parents during a visit. As such, the court held Hamdi was entitled to a due process hearing as to justification for his detention. *Hamdi* contains significant analysis of the relationship of the branches of government in times of emergency, emphasizing separation of powers more than deference.

### ***Hamdan v Rumsfeld*, 548 US 557 (2006)**

The court ruled 5-3 rejecting the procedural contention that the Detainee Treatment Act left it without jurisdiction over existing habeas cases. The court also rejected Bush's argument that he had the authority to create military detention tribunals, holding this could only be done by Congress. The court found that the executive created military commissions established at Guantanamo violated military law, Common Article 3 of the Geneva Conventions, and customary international law as defined in Article 75 of Protocol I. *Hamdan* is once again a statutory ruling.

### ***Boumediene v Bush*, 553 US 723 (2008)**

The court ruled in a 5-4 decision that alien detainees in Guantanamo have a right under the US Constitution to habeas corpus and that detention in Guantanamo without habeas corpus and due process is unconstitutional. *Boumediene* is the only constitutionally based US Supreme Court decision relating to detention of foreign nationals in Guantanamo.

*Boumediene* specifically left it up to lower courts to fashion procedures for habeas corpus. While in theory this is a useful procedure from an administrative standpoint, in practice it has resulted in additional litigation, rulings adverse to petitioners, and denial of petitions for certiorari.



## HABEAS PROCEDURES: JUDICIAL REALITY IN THE POST-BOUMEDIENE WORLD

In May 2012, The Seton Hall University School of Law Center for Policy & Research published an analysis of what the DC Court of Appeals had done both before and after *Al-Adahi*. (Denbeaux, M. et al. 'No Hearing Habeas: D.C. Court Restricts Meaningful Review', Seton Hall Public Law Research Paper No. 2145554).

### The Report states:

- It is an open secret that *Boumediene v. Bush*'s promise of robust review of the legality of the Guantanamo detainees' detention has been effectively negated by decisions of the United States Court of Appeals for the District of Columbia Circuit, beginning with *Al-Adahi v. Obama*.
- There is a marked difference between the first 34 habeas decisions and the last 12 in both the number of times that detainees win habeas and the frequency in which the trial court has deferred to the government's factual allegations rather than reject them.
- The difference between these two groups of cases is that the first 34 were before and the remaining 12 were after the July 2010 grant reversal by the D.C. Circuit in *Al-Adahi*.
- Detainees won 59% of the first 34 habeas petitions.
- Detainees lost 92% of the last 12.

The differences were not limited merely to winning and losing. Significantly, the two sets of cases were different in the deference that the district courts accorded government allegations. In the 34 earlier cases, courts rejected the government's factual allegations 40% of the time. In the most recent 12 cases, however, the courts rejected only 14% of these allegations.

The effect of *Al-Adahi* on the habeas corpus litigation promised in *Boumediene* is clear. After *Al-Adahi*, the practice of careful judicial fact-finding was replaced by judicial deference to the government's allegations. Now the government wins every petition.

### Representative post-*Boumediene* DC Court of Appeals cases:

*Al-Adahi v Obama*, 613 F 3d 1102 (DC Cir .2010), cert. denied 131 SCt 1001 (2011)

*Al-Bihani v Obama*, 590 F 3d 866 (DC Cir. 2010), cert. denied 131 SCt 1814 (2011)

*Al Maqaleh v Gates*, 605 F 3d 84 (DC Cir 2010)

*Latif v Obama*, 677 F3d 1175 (DC Cir. 2012), cert. denied 132 SCt 2741 (2013)



## FURTHER READING:

Barak, A. *The Judge in a Democracy* (Princeton University Press, Princeton NJ 2006).

Bruff, H. *Bad Advice: Bush's Lawyers in the War on Terror* (University Press of Kansas, Lawrence 2009).

Chemerinsky, E. 'Civil Liberties and the War on Terror: Seven Years After 9/11 History Repeating: Due Process, Torture and Privacy During the War on Terror' (2009) 62 *Southern Methodist University Law Review* 3.

Dworkin, R. *Is Democracy Possible Here?* (Princeton University Press, Princeton NJ 2006).  
——— *Justice in Robes* (Belknap Press, Cambridge MA 2006).

——— *The Supreme Court Phalanx: The Court's New Right-wing Bloc* (New York Review of Books 2008).

Faludi, S. *The Terror Dream* (Metropolitan Books, New York 2007).

'From War to Law': *Liberty's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers 2010* (Liberty, London August 2010).

International Commission of Jurists. *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (International Commission of Jurists, Geneva 2009).

King, A. *The British Constitution* (Oxford University Press, Oxford 2007).

Lobel, J. 'The War on Terrorism and Civil Liberties' (2002) 63 *University of Pittsburgh Law Review* 767.

Mayer, J. *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals* (Doubleday, New York 2008).

Simpson, AWB. *Human Rights and the End of Empire* (Oxford University Press, Oxford 2001).

Steyn, J. 'Deference: A Tangled Story' [2005] *Public Law* 346.

United States. Department of Justice. Office of Legal Counsel, 'The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations' from Jay S. Bybee (March 13, 2002).

Yoo, J. *The Powers of War and Peace* (University of Chicago Press, Chicago 2005).