U.S. Army (Jon Soucy)

U.S. Soldier stands guard at detention center on Naval Base Guantanamo Bay, November 2006

HABEAS CORPUS and the Detention of Enemy Combatants in the War on Terror

By JAMES P. TERRY

Since the al Qaeda attacks on the World Trade Center and Pentagon on September 11, 2001, the United States has been engaged in an armed conflict that rivals more traditional conflicts in its brutality and carnage. Like other enemies we have faced in the past—the North Vietnamese, North Koreans, Japanese, and Germans—al Qaeda and its affiliates possess both the ability and the intention to inflict catastrophic harm, if not on this nation, then on its citizens. But unlike our more conventional enemies, al Qaeda members show no respect for either the humanitarian law applicable to the victims of conflict reflected in the 1929 and 1949 Geneva Conventions or the laws applicable to the conduct of hostilities found in The Hague Conventions of 1899 and 1907.

Al Qaeda forces are, in fact, specifically organized to violate the precepts of the law of armed conflict: they do not wear uniforms; they do not carry arms openly; they do not have an organized command structure; and, most importantly, they direct their attacks against noncombatants (that is, innocent civilians). Considering the nature of this adversary, we cannot expect that this conflict will conclude around a negotiating table.

Recognizing this threat and moving to preclude further attacks on our homeland, U.S. forces have captured enemy combatants and terrorists on battlefields in Africa and Europe, as well as in Afghanistan, Iraq, and Southwest Asia. Patterning its actions on past conflicts, the United States has determined it necessary to detain these combatants until the conclusion of hostilities, if only to preclude their return to the battlefield. Soon after the September 11 attacks, the Bush administration determined the need to establish a detention facility outside American territory at the U.S. Naval Base at Guantanamo Bay. This would permit effective detention without the legal requirement to entertain continual court suits by the detainees. Prior to this conflict, alien detainees held on foreign soil were denied access to U.S. Federal courts to contest detention (habeas corpus). The spate of lawsuits and legislation arising from the detention of alien combatants at Guantanamo since 2002 has led, over the last 5 years, to refinement in the law regarding detainees and further explication of the law of habeas corpus during armed conflict. This paper explains that process.

Colonel James P. Terry, USMC (Ret.), is the Chairman of the Board of Veterans Appeals in the Department of Veterans Affairs. He previously served as Principal Deputy Assistant Secretary and Deputy Assistant Secretary in the Department of State and as Legal Counsel to the Chairman of the Joint Chiefs of Staff.

Historical Antecedents

In U.S. history, aliens held by our military forces in foreign territory have not been entitled to the civilian remedy of habeas corpus in the Federal Courts because these courts had no jurisdiction over the land on which they were being held. As the Supreme Court explained over 50 years ago in *Johnson v. Eisentrager*,[1] "[w]e are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an enemy alien who, at no relevant time and in no stage of his captivity, has been within the territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything

in our statutes."[2] The implementing legislation, 28 U.S.C. 2241, similarly limited access to the courts to those within its jurisdiction.[3]

An underlying concern in granting access to U.S. courts to alien combatants detained abroad during armed conflict, quite apart from the jurisdictional element, relates to the nature of warfare. The witnesses who would be needed to provide personal testimony and rebut the aliens' contentions in a judicial forum, as opposed to an administrative one, are engaged in military operations or subject to commitment to combat. Requiring them to leave their units and appear in habeas proceedings would be both disruptive and divisive. The original documents necessary to present the Government's position would likely not be available until all hostilities are concluded. Identification and transport of foreign witnesses demanded by the detainees for in-person testimony would often prove infeasible, if not logistically impossible. Moreover, there is no authority over such foreign witnesses and their appearance could not be assured.

In fact, the historical common law underpinnings of the legal right to habeas corpus, and its limitations, reflect many of the tenets of the *Eisentrager* case. The history of habeas corpus as the "symbol and guardian of individual liberty"[4] for English and now American citizens is well established. What we know now as the "Great Writ" originated as the "prerogative writ of the Crown,"[5] its original purpose being to bring people *within the jurisdiction* into court, rather than out of imprisonment.[6] By the early 13th century, the use of the writ to bring people to court was a commonly invoked aspect of English law.[7]

The reformation of the writ to one in which freedom from incarceration was the focus can be traced to the 14th century when, as an aspect of the Norman conquest, the French developed a centralized judicial framework over existing local courts. During this period, prisoners began to initiate habeas proceedings to challenge the legality of their detention. The first such use was by members of the privileged class who raised habeas claims in the superior central courts to challenge their convictions in the local inferior courts. The central courts would often grant such writs to assert the primacy of their jurisdiction. Thus, the rationale behind the grant of these writs more often focused on the jurisdiction of the particular court than concerns over the liberty of the petitioners.

The availability and meaning of habeas corpus expanded in the 15th century. The writ became a favorite tool of both the judiciary and Parliament in contesting the Crown's assertion of unfettered power.[8] By the late 1600s, habeas corpus was "the most usual remedy by which a man is restored again to his liberty, if he has been against the law deprived of it."[9] Despite its status, it was not uncommon for the Crown to suspend the right during periods of insurrection, during conspiracies against the King (1688 and 1696), during the American Revolution, and during other periods in the 18th century.[10]

In the early American colonies, New Hampshire, Georgia, and Massachusetts adopted provisions in their constitutions prohibiting suspension of the right of habeas corpus for their citizens under nearly all circumstances.[11] During debate on the U.S. Constitution, some delegates in Philadelphia sought a guarantee of habeas corpus in the Federal Constitution.[12] The compromise that emerged forbade the suspension of habeas corpus unless necessary in the face of "rebellion or invasion."[13] Despite the compromise, habeas corpus remains the only writ at common law referenced in the Constitution. In section 14 of the Judiciary Act of 1789,[14] moreover, the Congress specifically gave authority to the newly created Federal courts to issue the writ.

Suspension of the writ had been authorized by Congress only four times in the Nation's history[15] prior to Congress' and the Court's consideration of the Guantanamo detainees. The first occurred during the Civil War when Congress, after the fact, gave approval to President Abraham Lincoln's earlier permission to his commanding General of the Army, Winfield Scott, to suspend the right between Washington and Philadelphia. This was in response to rioting by Southern sympathizers as Union troops moved down the coast.[16] The second occurred after the Civil War when Congress, in the Ku Klux Klan Act, gave President Ulysses Grant authority to suspend the writ in four South Carolina counties where rebellion was raging.[17] The third

an underlying concern in granting access to U.S. courts to alien combatants detained abroad during armed conflict relates to the nature of warfare


Executive Mansion,
Washington, May 13, 1863.
Hon. Secretary of War
My dear Sir
National Archives

Right: Abraham Lincoln's letter to Edwin M. Stanton, May 13, 1863, suspending writ of habeas corpus
Below: Detention compound for Cuban nationals captured during Operation *Urgent Fury*, October 1983


DOD (Gary Miller)

and fourth authorizations occurred in 1902 and 1941, respectively. During the insurrection in the Philippines following the Spanish-American War, President William McKinley sought and obtained congressional authorization to suspend the writ.[18] Similarly, in 1941, immediately after the Japanese attacked Pearl Harbor, President Franklin Roosevelt asked Congress to suspend habeas corpus throughout the islands, and that body authorized the territorial Governor of Hawaii to temporarily do so. Unlike the current circumstance involving the Guantanamo detainees, each of the prior suspensions of the right involved "rebellion or invasion," as required by Article I of the Constitution. *But rebellion or invasion has never been required to preclude habeas jurisdiction if the detainee was held outside U.S. territory*.

In each of the four instances cited, Congress was authorizing suspension of habeas corpus over territory in which the United States was sovereign. Conversely, in the 1950 *Eisentrager* decision, where the Supreme Court held that the right of judicial access in habeas cases did not extend beyond the territorial jurisdiction of the United States, the part of Germany where Eisentrager was held and the confinement facility in which he was incarcerated were under the complete control and authority of American forces, but it was not U.S. sovereign territory.

The foreign detention in *Eisentrager* had been informed by the Government's experience in two principal cases arising from World War II. In *Ex parte Quirin*,[19] a 1942 Supreme Court decision, German saboteurs were captured in the United States and tried before a military commission similar to that established for the Guantanamo detainees. The Presidential Proclamation establishing their military tribunal, by its terms, had precluded access to the Federal courts.[20] Held in a Federal confinement facility in Washington, DC, the saboteurs nevertheless sought relief through a petition for a writ of habeas corpus in the U.S. district court. The Supreme Court, in rejecting arguments by the Solicitor General that judicial access through a writ of habeas corpus was precluded by the Presidential Proclamation, stated that "neither the Proclamation nor the fact they are enemy aliens forecloses consideration by the courts of petitioners' contention that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."[21]

In 1948, in *Ahrens v. Clark*,[22] the Supreme Court addressed the habeas petitions of 120 German nationals held on Ellis Island in New York awaiting deportation to Germany. Filing their petitions in the U.S. District Court for the District of Columbia, the German petitioners named the Attorney General, located in the District, respondent in their suit under the theory that they were under his control. The Supreme Court dismissed. The court held that a district court may only grant a writ of habeas corpus to a prisoner confined within its territorial jurisdiction. The court addressed the "immediate custodian rule," discussed more fully below, only in passing. The ruling stated: "Since there is a defect in the jurisdiction of the District Court that remains uncured, we do not reach the question whether the Attorney General is the proper respondent."[23] The Court's reasoning in *Ahrens* concerning the locus of incarceration would be heavily relied upon by Justice William Rehnquist in his decision in *Padilla*, discussed below.[24]

In the current war on terror, the detainees held at Guantanamo are under the complete control of U.S. forces but on territory over which the Republic of Cuba is sovereign.[25] Until 2004, the Bush administration was successful, as reflected in *Al Odah v. United States*,[26] in precluding access to U.S. Federal courts on the part of detainees based on our lack of sovereignty over the Guantanamo Naval facility. This changed with the Supreme Court's decisions in the Enemy Combatant Cases of 2004.[27]

held in a Federal confinement facility in Washington, DC, the saboteurs nevertheless sought relief through a petition for a writ of habeas corpus in the U.S. district court

Enemy Combatant Cases

The Enemy Combatant Cases decided by the Supreme Court, *Rasul v. Bush*, *Padilla v. Rumsfeld*, and *Hamdi v. Rumsfeld*,[28] were collectively interpreted by many as strong judicial direction for the administration on its detainee policies. These cases addressed both foreign detention of enemy combatants and their detention within the United States. In ruling against the Government in *Rasul v. Bush*, the Supreme Court, per Justice John Paul Stevens, reversed the DC Circuit in *Al Odah v. United States*[29] and held that the Federal habeas statute, 22 U.S.C. 2241, extended to alien detainees[30] at Guantanamo. The Court decided "the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba."[31] Although the Guantanamo detainees themselves were held to be beyond the district court's jurisdiction, the Supreme Court determined that the district court's jurisdiction over the detainees' military custodians was sufficient to provide it subject matter jurisdiction over the aliens' habeas corpus claims under section 2241.[32] The Court also found subject matter jurisdiction over the detainees' non-habeas claims (5th Amendment) because it found that nothing in the Federal question statute[33] or the Alien Tort Act[34] excluded aliens outside the United States from bringing these claims in Federal court.[35]

In *Padilla v. Rumsfeld*, decided the same day, the Court, per Justice Rehnquist, determined that there was no jurisdiction in a New York District Court to hear the habeas petition of Jose Padilla, a U.S. citizen confined in a Charleston, South Carolina, naval brig

DOD (Robert D. Ward)

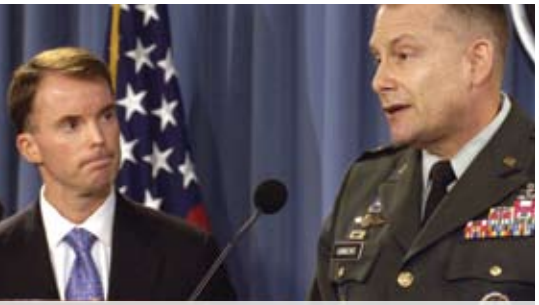
Brig Gen Thomas Hemingway, USAF, and DOD Principal Deputy General Counsel Dan Dell'Orto brief reporters about conduct of Military Commissions

after being transferred from New York as an alleged enemy combatant. The Supreme Court found that the only person who could be named as respondent in the habeas petition was the custodian of the Charleston brig, Commander Melanie Marr, as she was the only one of the named respondents who could produce the body. She, however, was not within the jurisdiction of the Southern District of New York. The Court, in dismissing the habeas petition, found that Secretary of Defense Donald Rumsfeld likewise could not be considered Padilla's custodian or named as respondent of the petition, as he did not qualify as such under the immediate custodian rule, nor was his Pentagon office within the jurisdiction of the District Court in New York.

In *Hamdi v. Rumsfeld*, the third of the Enemy Combatant Cases, the Supreme Court provided clear guidance on the protections to be

afforded enemy combatants in custody. From the standpoint of jurisdiction, there were no significant issues raised in Hamdi's habeas petition, and the Supreme Court considered the case on its merits. The petitioner, Hamdi, a U.S. citizen of Saudi origin, was incarcerated in the brig at the U.S. Naval Base in Norfolk, Virginia, as an alleged enemy combatant serving in Afghanistan. The petition was filed in the Eastern District of Virginia, the locus of Secretary Rumsfeld (the Pentagon is in Arlington), and the commanding officer of the Norfolk brig, satisfying the immediate custodian rule. The case is significant in holding that enemy combatants detained by the U.S. military in furtherance of the war on terror are entitled to due process protections, specifically "notice of the factual basis for the classification, and a fair opportunity to rebut the Government's factual assertions."[36]

in Hamdi v. Rumsfeld, *the Supreme Court provided clear guidance on the protections to be afforded enemy combatants in custody*



DOD (Robert D. Ward)

ASD for Detainee Affairs Cully Stimson and Deputy Chief of Staff for Intelligence, LTG John Kimmons, USA, brief reporters on handling of detainees

Congressional Response

The Congress, at administration urging, responded quickly to the decision in *Rasul v. Bush* with the Detainee Treatment Act of 2005.[37] This legislation was designed to restore the status quo reflected in *Eisentrager*, at least with respect to Guantanamo detainees. In this act, Congress added a subsection (e) to 28 U.S.C. 2241, the habeas statute. This new provision stated that:

[e]xcept as provided in section 1005 of the Detainee Treatment Act, no court, justice, or judge may exercise jurisdiction over

(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of any alien at Guantanamo Bay, Cuba, who

(A) is currently in military custody; or

(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit . . . to have been properly detained as an enemy combatant.[38]

The act further provided in section 1005 for exclusive judicial review of Combatant Status Review Tribunal determinations and Military Commission decisions in the DC Circuit.[39] On its face, this legislation appeared to have undone the harm created by *Rasul* and restored the delicate balance created years earlier by *Eisentrager*.

In June 2006, however, the Supreme Court, in *Hamdan v. Rumsfeld*,[40] interpreted the Detainee Treatment Act restrictively, finding that it only applied prospectively from the date of enactment and did not remove jurisdiction from the Federal courts in habeas proceedings pending on that date. The Court pointed to section 1005(h) of the act, which states that subsections (e)(2) and (e)(3) of section 1005 "shall apply with respect to any claim . . . that is pending on or after the date of the enactment of this Act," and then compared this with subsection (e)(1). The Court found that no similar provision stated whether subsection (e)(1), the dispositive subsection, applied to pending habeas cases. Finding that Congress "chose not to so provide . . . after having been provided with the option," the Court concluded that "[t]he omission [wa]s an integral part of the statutory scheme."[41]

Frustrated once again, Congress quickly passed the Military Commissions Act of 2006,[42] which, in section 7, again amended section 2241(e) (habeas statute) to clearly provide that subsection (e)(1) "shall apply to all cases, without exception, pending on or after the date of enactment."[43] Both the proponents and opponents of section 7 understood the provision to eliminate habeas jurisdiction over pending detainee cases.

Nevertheless, the detainees in *Hamdan* were undeterred. Despite the fact that anyone who followed the interplay between Congress and the Supreme Court knew full well that the sole purpose of the 2006 Military Commissions Act was to overrule *Hamdan*, the detainees claimed otherwise. In *Boumediene v. Bush*,[44] the same detainees urged the DC Circuit to find that habeas jurisdiction had not been repealed. Arguing that if Congress had intended to remove jurisdiction in their cases, it should have expressly stated in section 7(b) that habeas cases were included among "all cases, without exception, pending on or after" the Military Commissions Act became law. Otherwise, they argued, the Military Commissions Act did not represent an "unambiguous statutory directive" to repeal habeas corpus jurisdiction.[45] The DC Circuit, however, made clear in its February 20, 2007, decision in *Boumediene* that the Military Commissions Act applied to the detainees' habeas petitions.

On June 20, 2007, the Court of Appeals for the DC Circuit further denied the appellant Boumediene's motion to hold the collected cases in abeyance and to stay issuance of the mandate.[46] This followed the Supreme Court's April 2, 2007, denial of the appellants' petition for a writ of certiorari.[47] On June 29, 2007, however, the Supreme Court vacated its prior denial and granted the detainees' petition for a writ of certiorari. As of this writing, the outcome of the detainees' jurisdictional arguments awaits the Fall 2007/Spring 2008 terms of the Court.

Suspension Clause Relationship to Detainees

Separate from, but related to, the jurisdictional arguments of the detainees are their claims under the Suspension Clause[48] of the Constitution. The Supreme Court held in 2001 that the Suspension Clause protects the writ of habeas corpus "as it existed in 1789," when the first Judiciary Act created the Federal court system and granted jurisdiction to those courts to issue writs of habeas corpus. Before the DC Circuit in the *Boumediene* appeal, however, appellants argued that in 1789, the privilege of the writ extended to aliens outside the sovereign's territory.

Unfortunately, in none of the cases cited by appellants were the aliens outside the territory of the sovereign. More significantly, the historical antecedents in England upon which U.S. practice is based show that the writ was simply not available in any land not the sovereign territory of the Crown. As Lord Mansfield explained in *Rex v. Cowle*,[49] cited with authority in *Boumediene*, "To foreign dominions . . . this Court has no power to send any writ of

any kind. We cannot send a habeas corpus to Scotland, or to the electorate; but to Ireland, the Isle of Man, the plantations [American colonies] . . . we may." Each territory that Lord Mansfield cited as a jurisdiction to which the writ extended was a sovereign territory of the Crown at the time.

Given the clear history of the writ in England prior to the founding of this country, habeas corpus would not have been available to aliens in the United States in 1789 without presence or property within its territory. This is borne out by the Supreme Court's 1950 decision in *Johnson v. Eisentrager*, noted earlier, where the Court said, "Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." Similarly, the majority in *Boumediene* in 2007 observed, "We are aware of no case prior to 1789 going the detainees' way, and we are convinced that the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government."

The Way Forward

The limitations inherent in the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 are obvious. Their provisions only address detention of enemy combatants at the U.S. Naval Base at Guantanamo. The requirements inherent in the war on terror will likely warrant expansion of habeas corpus limitations through broader congressional mandates and further amendment of 22 U.S.C. 2241 (habeas statute). It is clear, for example, that challenges to the detention of enemy combatants in Iraq held by the U.S. Government will be the next step in the detainee litigation process.

The provisions of the Military Detainees Act and the Military Commissions Act, having solved half the problem (possibly less depending on the resolution of the writ of certiorari in *Boumediene*), nevertheless provide the legislative roadmap to proscribe habeas jurisdiction for enemy combatants held elsewhere in the current conflict. For those enemy combatants held in U.S. custody in Iraq and/or Afghanistan, it is hard to believe that U.S. courts, now that the distinction of foreign confinement is removed, will not have to face the question of whether the insurgency in either or both nations currently constitutes a "rebellion or invasion" vis-à-vis the United States. If it does not, without legislation applicable to the specific incarceration facilities in Baghdad or Kabul, for example, *Rasul* would appear to dictate that these petitioners would have access to any of the U.S. district courts.

The lack of any restriction on enemy combatants in terms of the forum in which they can challenge their foreign confinement stands in stark contrast to the jurisdictional limits for domestic confinees, including U.S. citizens, who are limited to the district court in the jurisdiction of their confinement. Not only does the Court's interpretation of 22 U.S.C 2241 in *Rasul* appear to grant foreign detainees access to any of the 94 Federal district courts, as the key to jurisdiction is now the custodian and not the detainee, but it also invites forum shopping in the most liberal fora.

A more fundamental problem arises from the impact of bringing the cumbersome machinery of our domestic courts into military affairs. The obvious potentially harmful effect of the recent decisions on the Nation's conduct of war is reflected in the judicial adventurism of *Rasul* and *Hamdi*, where heretofore authorized actions in furtherance of the war effort are now subject to judicial direction. This new approach by the courts, unless halted, threatens the historic division among the three branches and will frustrate our military leaders' traditional reliance upon clearly stated prior law. **JFQ**

NOTES

[1] 339 U.S. 763 (1950).

[2] Ibid., 768.

[3] The habeas statute states that "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." See 28 U.S.C. 2241(a).

[4] See *Peyton v. Rowe*, 391 U.S. 54, 59, 88 S.Ct. 1549, 20 L.Ed. 2d. 426 (1968).

[5] The phrase *habeas corpus* refers to the common law writ of habeas corpus, or the "Great Writ." *Preiser v. Rodriguez*, 411 U.S. 475, 484–485, and n. 2, 93 S.Ct. 1827, 36 L.Ed. 2d. 439 (1973), citing *Ex Parte Bollman*, 8 U.S.C. (4 Cranch) 75, 95, 2 L.Ed. 554 (1807).

[6] See Alan Clarke, "Habeas Corpus: The Historical Debate," *New York Law School Journal of Human Rights* 14 (1998), 375, 378; William F. Duker, *A Constitutional History of Habeas Corpus* (Westport, CT: Greenwood Press, 1980).

[7] Clarke, 378.

[8] Ibid., n. 8, 380.

[9] *Bushell's Case*, Vaughan 135, 136, 124 Eng. Rep. 1006, 1007 (1670).

[10] See Rex A. Collins, Jr., "Habeas Corpus for Convicts—Constitutional Right or Legislative Grace," *California Law Review* 40, no. 3 (Autumn 1952), 335, 339.

[11] Max Rosenn, "The Great Writ—A Reflection of Societal Change," *Ohio State Law Journal* 44 (1983), 337, 338, n. 14.

[12] Erwin Chemerinsky, "Thinking about Habeas Corpus," *Case Western Reserve Law Review* 37 (1987), 748, 752.

[13] U.S. Const., art. 1, sec. 9, cl. 2.

[14] Act of September 24, 1789, ch. 20, sec. 14, 1 Stat. 73, 81.

[15] Duker, n. 7, 149.

[16] Act of March 3, 1863, 12 Stat. 755.

[17] Duker, n. 7, 178; n. 190.

[18] Act of July 1, 1902, ch. 1369, 32 Stat. 691.

[19] 317 U.S. 1 (1942).

[20] *Quirin*, 317 U.S. at 20–24.

[21] Ibid. at 25. The German saboteurs were convicted by the Military Commission and executed.

[22] 335 U.S. 188 (1948).

[23] Ibid., 193.

[24] See *Padilla v. Rumsfeld*, 542 U.S. 426 (2004).

[25] Lease of Lands for Coaling and Naval Stations, February 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418. The leasehold has no termination date.

[26] 355 U.S. App. D.C. 189, 321 F.3d 1134 (D.C. Cir. 2003).

[27] *Rasul v. Bush*, 542 U.S. 466 (2004); *Padilla v. Rumsfeld*, 542 U.S. 426 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

[28] Ibid.

[29] 355 U.S. App. D.C. 189 (D.C. Cir. 2003).

[30] These are unlawful alien combatants but not technically enemy aliens since they do not represent any country with which the United States is at war.

[31] *Rasul*, 542 U.S. at 470.

[32] Ibid., 483–484.

[33] 28 U.S.C. 1331.

[34] Ibid.

[35] *Rasul*, 542 U.S. at 484–485.

[36] *Hamdi*, 542 U.S. at 533.

[37] Public Law No. 109–148, 119 Stat 2680 (2005). Signed into law December 30, 2005.

[38] Detainee Treatment Act, sec. 1005 (e)(1).

[39] Ibid., sec. 1005(e)(2), (e)(3).

[40] 126 S.Ct. 2749, 165 L.Ed. 2d. 723 (2006).

[41] Ibid., 2769.

[42] Public Law No. 109–366, 120 Stat. 2600 (2006).

[43] Military Commissions Act, sec. 7, note 51.

[44] 476 F. 3d 981 (2007).

[45] Ibid.

[46] *Boumediene v. Bush*, 2007 U.S. App. LEXUS 14883, June 20, 2007.

[47] *Certiorari* is the writ that an appellate court issues to a lower court in order to review its judgment for legal error and review, where no appeal is available as a matter of right.

[48] The Suspension Clause in Article I, sec. 9, cl. 2, directs that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

[49] 97 Eng. Rep. (2 Burr.) 587 (K.B. 1759).