DUE PROCESS IN AMERICAN MILITARY TRIBUNALS AFTER SEPTEMBER 11, 2001

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I. INTRODUCTION

The al-Qaeda attack on the United States on September 11, 2001, resulted in Congress passing a joint resolution, the Authorization for Use of Military Force ("AUMF"),[1] which authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."[2]

Pursuant to the AUMF, President Bush committed armed forces to Afghanistan in order to subdue al-Qaeda and the Taliban regime that supported al-Qaeda.[3] President Bush claimed that the AUMF granted him the authority to hold an "enemy combatant" who was captured, "without formal charges or proceedings," until a determination has been made "that access to counsel or further process is warranted."[4] This position gave rise to several cases in which the Supreme Court had to grapple with the issue of what process was due to captured enemy combatants.[5] Could they be held indefinitely

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[1] Authorization for Use of Military Force, 50 U.S.C. § 1541(c) (2006).

[2] *Id.*

[3] Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

[4] *Id.* at 510-11.

[5] *See generally* Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld,

without charges or proceedings being initiated? If proceedings had to be initiated, what process was due to the defendants? In determining the answers to these questions, the Supreme Court distinguished between two different categories—United States citizens who were deemed enemy combatants and non-citizens who were deemed enemy combatants.[6]

The recurring theme that arises in reading the Court's decisions resolving these issues is the power struggle between the Executive and Judicial branches of the United States Government as to which branch possesses the power to determine due process for enemy combatants.[7] Initially, the Executive claimed that it possessed the power to solely decide who was an enemy combatant as well as what process, if any, was due to the persons it determined were enemy combatants.[8] Ultimately, the Supreme Court found it unnecessary to decide the first question.[9] Moreover, the Court also rejected the latter position, determining that the Judiciary, not the Executive, was the arbiter of what process was due an enemy combatant.[10]

II. THE SUPREME COURT DECISIONS

A. Process Due to a United States Citizen Deemed an Enemy Combatant

In *Hamdi v. Rumsfeld*,[11] the Supreme Court dealt with the issue of what process is due to a United States citizen deemed to be an enemy combatant by the government.[12] Yaser Hamdi was a United

548 U.S. 557 (2006); *Hamdi*, 542 U.S. 507.

[6] *Compare Hamdi*, 542 U.S. at 516, *with* Rasul v. Bush, 542 U.S. 466, 470 (2004), *Hamdan*, 548 U.S. at 558, *and Boumediene*, 553 U.S. at 732 (comparing the difference between U.S. citizens and non-citizens being deemed enemy combatants).

[7] *See generally Boumediene*, 553 U.S. 723; *Hamdan*, 548 U.S. 557; *Hamdi*, 542 U.S. 507; *Rasul*, 542 U.S. 466.

[8] *See Hamdi*, 542 U.S. at 527-28 (arguing that courts have "limited institutional capabilities . . . in matters of military decision-making").

[9] *Id.* at 516-17.

[10] *Id.* at 535-37.

[11] 542 U.S. 507 (2004).

[12] *Id.* at 509.

States citizen living in Afghanistan in 2001.[13] "[H]e was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military."[14] Subsequently, he was transferred to a naval brig in the United States and held there.[15] The Government claimed that Hamdi had been fighting on behalf of the Taliban and was thus an enemy combatant who could be held as described above.[16]

Hamdi's father filed a petition for a writ of habeas corpus as a next friend in the Eastern District of Virginia, arguing that Hamdi's indefinite detention without charges, access to an impartial tribunal, or assistance of counsel violated Hamdi's right to due process.[17] "The District Court found that Hamdi's father was a proper next friend, appointed the federal public defender as counsel for the petitioners, and ordered that counsel be given access to Hamdi."[18] The United States Court of Appeals for the Fourth Circuit reversed, claiming that the district court had failed to properly consider the "Government's security and intelligence interests."[19] It remanded the case, instructing the district court "to conduct a deferential inquiry into Hamdi's status."[20]

On remand, the Government moved to dismiss the petition.[21] Its sole evidence that Hamdi was an enemy combatant consisted of a declaration from Michael Mobbs, who was identified as a Special Advisor to the Under Secretary of Defense for Policy regarding detention of enemy combatants.[22] "The [Mobbs] declaration state[d] that Hamdi 'traveled to Afghanistan' in July or August of 2001 . . . 'affiliated with a Taliban military unit and received weapons training,' "[23] and that when the Taliban engaged in battle with the Northern Alliance, Hamdi's military unit surrendered and Hamdi turned

13 *Id.* at 510.

14 *Id.*

15 *Id.*

16 *Hamdi*, 542 U.S. at 510-11.

17 *Id.* at 511.

18 *Id.* at 512.

19 *Id.* (citing Hamdi v. Rumsfeld, 296 F.3d 278, 279, 283 (4th Cir. 2002)).

20 *Id.*

21 *Hamdi*, 542 U.S. at 512.

22 *Id.*

23 *Id.* at 512-13 (quoting Joint Appendix at 148, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 1120871).

over his weapon to the Northern Alliance.[24] The Mobbs declaration further asserted "that Hamdi was labeled an enemy combatant '[b]ased upon his interviews and in light of his association with the Taliban.' "[25] The declaration stated that "a series of 'U. S. military screening team[s]' determined that Hamdi met the 'criteria for enemy combatants,' and '[a] subsequent interview . . . confirmed the fact that he surrendered' " to the Northern Alliance and gave them his weapon.[26] The district court thus held "that the Mobbs declaration fell 'far short' of supporting Hamdi's detention."[27] The Fourth Circuit reversed, holding that the declaration, "if accurate," was sufficient to support the Executive's decision to detain Hamdi.[28]

There were two issues before the Supreme Court in *Hamdi*. The initial issue was whether the Executive had plenary power to detain enemy combatants.[29] The second issue was what process, if any, was due to persons who were detained as enemy combatants.[30] The Supreme Court was badly splintered on how to resolve these two issues. Justice O'Connor issued a plurality opinion, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, in which she announced the judgment of the Court; Justice Souter, joined by Justice Ginsburg, concurred in part and dissented in part; Justice Scalia, joined by Justice Stevens, dissented; and Justice Thomas dissented.[31]

The Court ultimately concluded that it did not have to decide the first issue, finding that Congress had authorized the Executive to detain enemy combatants.[32] Five Justices (O'Connor, the justices joining her plurality opinion, and Justice Thomas) concluded that the AUMF authorized the detention.[33] The plurality made clear, howev-

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[24] *Id.* at 513.

[25] *Id.* (quoting Joint Appendix, *supra* note 23, at 149).

[26] *Hamdi*, 542 U.S. at 513 (quoting Joint Appendix, *supra* note 23, at 149-50).

[27] *Id.* (quoting Joint Appendix at 292, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 1123351, at *292).

[28] *Id.* at 514 (quoting *Hamdi*, 316 F.3d 450, 473 (4th Cir. 2004)).

[29] *Id.* at 516.

[30] *Id.* at 524.

[31] *Hamdi*, 542 U.S. at 508, 539, 554, 579.

[32] *Id.* at 516-18.

[33] *See id.* at 519 (concluding that although the AUMF did not explicitly speak of detention, detention was necessary to prevent an enemy combatant from returning to battle). Thus, because the AUMF permitted "the use of 'necessary and appropriate force,' " the plurality concluded that this authorized detention under the circumstances in Hamdi's case. *Id.* (quoting Joint Appendix, *supra* note 27, at

er, that detention was only authorized when it was "sufficiently clear that the individual is, in fact, an enemy combatant."[34] This reasoning required that a determination be made as to whether there was sufficient evidence that an individual is an enemy combatant, which necessarily raised the issue of what process is due to an individual in the determination as to whether he was an enemy combatant.[35]

In resolving what process was due, two sub-issues needed to be settled. The first was which branch was to decide the process due to the detained individuals.[36] The second was what process was in fact due in determining whether an individual was being properly detained.[37] Regarding the issue of who decided what process was due, the Executive's position was that under the doctrines of separation of powers and political question—in this case, the Supreme Court's lack of qualifications in "matters of military decision-making"—the Judiciary was limited only to determining whether authorization existed "for the broader detention scheme" and had no authority to determine the propriety of individual detentions.[38] Alternatively, the Executive argued that the Court "should review . . . [the Executive's] determination that a . . . [person] is an enemy combatant under a very deferential . . . standard."[39] A majority of the Court (Justice O'Connor, the justices joining her plurality opinion, and Justice Scalia, joined by Justice Stevens in his dissent) rejected both of these positions, ruling

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284). Justice Thomas, in his dissent, accepted the essence of this analysis. *Id.* at 587 (Thomas, J., dissenting).

[34] *Hamdi*, 542 U.S. at 523 (plurality opinion).

> To be clear, our opinion only finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, in fact, an enemy combatant; whether that is established by concession or by some other process that verifies this fact with sufficient certainty seems beside the point.

Id. Although Justice Thomas agreed with the plurality that the Government "has power to detain those that the Executive branch determines to be enemy combatants," he disagreed with the plurality about the Judiciary's authority to determine whether or not the defendant was "actually an enemy combatant." *Id.* at 585-86, 589 (Thomas, J., dissenting). Justice Thomas believed that the Judiciary lacked the expertise and capacity to "second-guess" a determination by the Executive that the defendant was an enemy combatant. *Id.* at 585, 589.

[35] *Id.* at 524 (plurality opinion).

[36] *Hamdi*, 542 U.S. at 525-26.

[37] *Id.* at 524.

[38] *Id.* at 527.

[39] *Id.*

that it is the Judiciary that makes these determinations.[40]

However, the Court did not agree on how the determination as to what process is due should be made.[41] The plurality stated that the determination should be made by adopting the balancing test from *Mathews v. Eldridge*.[42] In *Mathews*, the Supreme Court balanced three factors in deciding what process is due in a given circumstance.[43] The first factor to be considered is the "private interest that will be affected by the [governmental] action."[44] In *Hamdi*, it is the detainee's liberty, a very important interest.[45] The second factor is the government's interest and the burden that would be placed on the government in providing greater process.[46] The plurality noted the weight of the Government's interest in preventing enemy combatants from returning to do battle against the United States, but stated this did not outweigh the individual's liberty interest to such an extent that it allowed for unchallenged detention.[47] The third factor is "the risk of an erroneous deprivation" of the defendant's liberty interest and what the probable value of additional or substitute safeguards would be.[48] The plurality stated that when the interests of the individual and government were balanced against each other, "the risk of

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[40] Justice O'Connor's plurality decision explicitly rejected the Executive's argument that separation of powers circumscribed the Judiciary's role in assessing the process due an individual in Hamdi's circumstances. *Id.* at 535-36. Focusing on the respective roles of the branches, O'Connor stated that "unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi*, 542 U.S. at 536. Justice Scalia, in his dissent, concluded that the Executive did not have the sole power to determine the propriety of detention, stating that Hamdi should be released unless criminal charges were brought against him (which would involve the judiciary) or "Congress ha[d] suspended the writ of habeas corpus." *Id.* at 573 (Scalia, J., dissenting). Scalia concluded that Congress had not done so simply by passing the AUMF and thus, the Executive did not have the authority to detain Hamdi. *Id.* at 573-75.

[41] *Compare id.* at 528-29 (plurality opinion), *with id.* at 583 (Thomas, J., dissenting) (discussing due process and concerns of national security).

[42] 424 U.S. 319 (1976); *Hamdi*, 542 U.S. at 528-29 (plurality opinion) (citing *Mathews*, 424 U.S. at 335).

[43] *Mathews*, 424 U.S. at 335; *see also Hamdi*, 542 U.S. at 529.

[44] *Mathews*, 424 U.S. at 335; *see also Hamdi*, 542 U.S. at 529.

[45] *Hamdi*, 542 U.S. at 529.

[46] *Mathews*, 424 U.S. at 335; *see also Hamdi*, 542 U.S. at 529.

[47] *Hamdi*, 542 U.S. at 531-32.

[48] *Id.* at 529 (quoting *Mathews*, 424 U.S. at 335).

an erroneous deprivation . . . [was] unacceptably high," unless the citizen-detainee was entitled to "notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[49] Although not adopting the plurality's reasoning that *Mathews* applied, Justice Souter, joined by Justice Ginsburg, concurred that detainees were entitled to this process, creating a majority on these points.[50]

The plurality then went on to state that it might be appropriate to admit hearsay evidence "as the most reliable available evidence" at the hearings.[51] No other justices adopted this position, although none explicitly rejected it. The plurality further stated that it might be permissible for there to be "a presumption in favor of the Government's evidence, so long as" there was a fair opportunity for the detainee to rebut the presumption.[52] Justice Souter, joined by Justice Ginsburg, explicitly rejected this standard and no other justices agreed to it.[53]

Therefore, the only process which a majority of the Court agreed was necessary was (a) notice of the factual basis for his classification, and (b) a fair opportunity to rebut the Government's factual assertions before a neutral decision maker.[54] Justices Scalia, Stevens, and Thomas failed to address any of the specifics regarding process discussed above. Justice Scalia, joined by Justice Stevens, concluded that enemy combatants should be tried in the criminal court system.[55] Scalia argued that unless Congress suspends the writ of habeas corpus, the criminal justice system is the only available method for incapacitating and punishing those accused of treason[56] and concluded that the AUMF did not suspend the writ of habeas corpus.[57] Consequently, he did not address the specifics as to what process would be due in military tribunals. Justice Thomas concluded that it was not appropriate for the Judiciary to consider the issues presented in *Ham-*

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[49] *Id.* at 532-33 (quoting *Mathews*, 424 U.S. at 335).
[50] *Id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).
[51] *Id.* at 533-34 (plurality opinion).
[52] *Hamdi*, 542 U.S. at 534.
[53] *Id.* at 553-54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).
[54] *Id.*
[55] *Id.* at 564, 568 (Scalia, J., dissenting).
[56] *Id.*
[57] *Hamdi*, 542 U.S. at 573-75.

di, concluding that the Court was precluded from adjudicating by the doctrine of political question.[58] Therefore, he also did not address the specific aspects of due process in military tribunals.

B. Process Due to Non-Citizen Aliens Deemed Enemy Combatants

The battle to determine the extent of Executive power vis-à-vis Congress as well as the Supreme Court's power to determine what process is due continued through three more cases, *Rasul v. Bush*,[59] *Hamdan v. Rumsfeld*,[60] and *Boumediene v. Bush*.[61] These three cases differ from *Hamdi* in that *Hamdi* deals with a United States citizen being held in the United States whereas, *Rasul*, *Hamdan*, and *Boumediene* deal with non-United States citizens being held at the United States Naval Station in Guantánamo Bay, Cuba.[62]

In *Rasul*, the Court specifically dealt with the preliminary issue of whether or not United States courts had "jurisdiction to consider challenges to the" detention of non-United States citizens captured in connection with hostilities outside the United States who were then incarcerated at Guantánamo.[63] In a 6-3 decision, the Supreme Court held that pursuant to Section 2241 of the federal habeas statute, federal courts have jurisdiction over extraterritorial habeas petitioners in Guantánamo.[64] This ruling opened the door to the issue of what process is due to such detainees. In *Hamdan* and *Boumediene*, the Supreme Court dealt with the process due to non-US citizens being detained as enemy combatants.[65]

In *Hamdan*, the Court dealt with the issue of whether military tribunals created by an Executive Order of President Bush provided

[58] *Id.* at 585-86 (Thomas, J., dissenting).
[59] 542 U.S. 466 (2004).
[60] 548 U.S. 557 (2006).
[61] 553 U.S. 723 (2008).
[62] *Compare Hamdi*, 542 U.S. at 510 (plurality opinion) (stating that Hamdi was a citizen of the United States), *with Rasul*, 542 U.S. at 470-71 (stating that petitioners were Australian and Kuwaiti citizens), *Hamdan*, 548 U.S. at 566 (stating petitioner was a Yemeni national), *and Boumediene*, 553 U.S. at 732 (stating petitioners were aliens).
[63] *Rasul*, 542 U.S. at 470.
[64] *Id.* at 484-85.
[65] *Hamdan*, 548 U.S. at 567; *Boumediene*, 553 U.S. at 732.

adequate process to the alien defendant.[66] In Afghanistan in 2001, militia forces captured petitioner Hamdan, a Yemeni national, and turned him over to the United States military.[67] In 2002, he was transported to prison in Guantánamo.[68] "Over a year later, the President deemed [Hamdan] eligible for trial by military commission for then-unspecified crimes."[69]

In a 5-3 decision, the Supreme Court held that the system of military tribunals was illegal in that the procedures utilized therein contravened the Uniform Code of Military Justice ("UCMJ") as well as the Geneva Conventions.[70] Although the Government argued that the President had executive authority to convene such military commissions, Justice Stevens, writing for the majority, reasoned that there was no need to decide this issue because Congress had authorized military commissions in Article 21 of the UCMJ and neither the AUMF nor the Detainee Treatment Act ("DTA")[71] had authorized the President to expand or alter the provisions set forth in the UCMJ.[72]

Article 36 of the UCMJ requires that "[a]ll rules and regulations made under the [UCMJ] shall be uniform insofar as practicable . . . ."[73] The Court determined that the procedures set forth in the Executive Order were significantly inconsistent with the UCMJ.[74] Although the procedures required that the accused be presented with a copy of the charges against him, be presumed innocent, and receive "certain other rights typically afforded criminal defendants in civilian courts and courts-martial," the Court stated that these protections were undercut by other provisions.[75] These provisions included the fact that the presiding officer could exclude the defendant and his civilian counsel from certain portions of the proceedings, did not per-

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[66] *Hamdan*, 548 U.S. at 566-67; *see also* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,833 (Nov. 13, 2001).

[67] *Hamdan*, 548 U.S. at 566.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 564, 567 (indicating Chief Justice Roberts did not participate).

[71] *See* Detainee Treatment Act of 2005, H.R. 2863, 109th Cong. § 1001 (2005) (providing no authorization for the Executive branch regarding the provisions set forth in the UCMJ).

[72] *Hamdan*, 548 U.S. at 594-95.

[73] Uniform Code of Military Justice, 10 U.S.C. § 836 (2006).

[74] *Hamdan*, 548 U.S. at 624.

[75] *Id.* at 613-14.

mit the defendant to examine all the evidence against him, permitted the introduction of both hearsay evidence and evidence obtained from coercion, and did not require that live testimony nor written statements be sworn.[76] The Court also noted that both the accused and his counsel might be denied access to relevant evidence deemed to be "protected information."[77] Concluding that these provisions significantly deviated from the procedures set forth in the UCMJ and that the Executive had failed to show adequate justification for these variations, the Court held that Hamdan's military commission was illegal.[78]

The Supreme Court's decisions in *Hamdi* and *Hamdan* triggered responses from the other branches of government. In 2004, the Deputy Secretary of Defense (in response to the Court's decision in *Hamdi*) established Combatant Status Review Tribunals ("CSRTs") with jurisdiction to determine whether individuals detained at Guantánamo were enemy combatants.[79] The order set forth the procedures governing the hearings.[80] Congress also passed the Detainee Treatment Act, which set forth standards for review of the decisions from CSRTs.[81] In response to *Hamdan*, Congress passed the Military Commissions Act ("MCA")[82] in 2006, which stripped federal courts

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[76] *Id.* at 614.

[77] *Id.* at 613-14. The Court further elaborated:

> "[P]rotected information" . . . includes classified information as well as "information protected by law or rule from unauthorized disclosure" and "information concerning other national security interests," . . . so long as the presiding officer concludes that the evidence is "probative" . . . and that its admission without the accused's knowledge would not "result in the denial of a full and fair trial."

Id. at 614 (quoting U.S. DEP'T OF DEF., MILITARY COMMISSION ORDER NO. 1, §§ 6(D)(5)(a)–(b) (Aug. 31, 2005), *available at* http://www.mc.mil/Portals/0/MCO%20No.%201%20(Aug%2031,%202005).pdf).

[78] *Hamdan*, 548 U.S. at 624-25. The Court went on to find that the military commissions also violate the Geneva Conventions, although there was no majority opinion as to the manner by which the Geneva Conventions were violated. *Id.* at 625-26.

[79] Joseph Blocher, Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667, 670 n.15 (2006); *see also Boumediene*, 553 U.S. at 733-34.

[80] Blocher, *supra* note 79, at 671, 674.

[81] *Id.*

[82] 28 U.S.C. § 2241(e)(1) (2006).

of jurisdiction to hear habeas corpus petitions pending at the time of its enactment.[83] In *Boumediene*, the Court held that because the DTA did not provide adequate review of CSRT decisions, the MCA was unconstitutional.[84]

In *Boumediene*, foreign nationals were detained at Guantánamo as enemy combatants.[85] They denied being enemy combatants.[86] They claimed the privilege of habeas corpus, alleging that the MCA could not constitutionally deprive courts of jurisdiction to hear habeas corpus petitions.[87]

The Court started by noting that the writ of habeas corpus applied to Guantánamo[88] and that Congress had not suspended the writ.[89] The Court then stated that absent such a suspension, Congress could only preclude habeas review if the DTA functioned as an effective substitute for habeas review.[90] The Court then concluded that the DTA did not so function.[91]

The Court started by looking at the constraints on the defendant's ability to rebut the government's assertion that he is an enemy combatant and noted the following deficiencies:

> [The detainee] does not have the assistance of counsel and may not be aware of the most critical allegations that the Government relied upon to order his detention. The detainee can confront witnesses that testify during the CSRT proceedings. But given that there are in effect no limits on the admission of hearsay evidence—the only requirement is that the tribunal deem the evidence "relevant and helpful," the detainee's opportunity to question witnesses is likely to be more theoretical than real.[92]

The Court then concluded that even if all parties acted in good faith, and with diligence, there was still "considerable risk of error in the

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[83] *Id.*
[84] *Boumediene*, 553 U.S. at 732-33.
[85] *Id.* at 732.
[86] *Id.* at 734.
[87] *Id.*
[88] *Id.* at 771.
[89] *Boumediene*, 553 U.S. at 771.
[90] *Id.* at 792.
[91] *Id.*
[92] *Id.* at 783-84 (citations omitted).

tribunal's findings of fact"[93] and stated that a functional equivalent of habeas corpus would need to provide the reviewing court the ability to correct such errors.[94]

The Court recognized that under the DTA the District of Columbia Court of Appeals had "the power to review CSRT determinations by assessing the legality of standards and procedures" and that this implied the power of the Court of Appeals "to inquire into what happened at the CSRT hearing and, perhaps, remedy certain deficiencies in that proceeding."[95] But the Court noted that this was the extent of the Court of Appeals' jurisdiction and that there was:

> [N]o language in the DTA that can be construed to allow the Court of Appeals to admit and consider newly discovered evidence that could not have been made part of the CSRT record because it was unavailable to either the Government or the detainee when the CSRT made its findings.[96]

The Court noted that such evidence might be "critical to the detainee's argument that he is not an enemy combatant" and should not be detained.[97]

Consequently, the DTA did not serve as an effective substitute for the writ of habeas corpus and Congress's attempt to strip the Court of habeas jurisdiction was invalid.[98] Although the Court held that non-US citizens at Guantánamo had the right to petition for a writ of habeas corpus, the Court explicitly stated that this was the extent of its holding and that it was not addressing what standards of law should govern review of the writ.[99]

III. CONCLUSION

The striking note that resounds from *Hamdi*, *Hamdan,* and *Boumediene* is the insistence of the Judiciary that it, not the Executive or the Legislature, controls the power to set standards for due

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[93] *Id.* at 785.
[94] *Boumediene*, 553 U.S. at 786.
[95] *Id.* at 789.
[96] *Id.* at 790.
[97] *Id.*
[98] *Id.* at 792.
[99] *Boumediene*, 553 U.S. at 795.

process.[100] Further, the Judiciary insisted on setting more stringent standards than the Executive was willing to set.[101] Given the passions aroused during times of strife, it makes sense that the branch of government least affected by politics, and therefore likely to be less affected by those passions, should set the standards protecting those accused of being foreign combatants.

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[100] *See, e.g.*, *id.* at 797-98.
[101] *Id.*