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# A Strategic Imperative: Legal Representation of Unprivileged Enemy Belligerents in Status Determination Proceedings

Kristine A. Huskey\*

Shortly before Geoff Corn was to present his article, *Unprivileged Belligerents, Preventive Detention, and Fundamental Fairness: Rethinking the Review Tribunal Representation Model*,<sup>1</sup> which queries whether detainees should have counsel during procedures that determine if they qualify for indefinite detention, the National Defense Authorization Act for Fiscal Year 2012 (NDAA 2012 or the Act) became law.<sup>2</sup> The Act—criticized for its indefinite detention and mandatory military custody provisions<sup>3</sup>—also contains a lesser-known provision that permits an “unprivileged enemy belligerent” (UEB) who is in “long-term detention” pursuant to the laws of war to be “represented by military counsel at proceedings for the determination of status of the belligerent.”<sup>4</sup> Accordingly, one must ask whether the recent legislation has superseded the Corn-Chickris article altogether. The answer is easily

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1. Geoffrey S. Corn & Peter A. Chickris, *Unprivileged Belligerents, Preventive Detention, and Fundamental Fairness: Rethinking the Review Tribunal Representation Model*, 11 SANTA CLARA J. INT’L L. 99 (2012).
2. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011).
3. See, e.g., *A Wrong Turn in Terror Fight*, L.A. TIMES (Dec. 16, 2011), <http://articles.latimes.com/2011/dec/16/opinion/la-ed-defense-20111216>; Charles C. Krulak & Joseph P. Hoar, *Guantánamo Forever?*, N.Y. TIMES (DEC. 12, 2011), <http://www.nytimes.com/2011/12/13/opinion/guantanamo-forever.html>.
4. National Defense Authorization Act for Fiscal Year 2012 § 1024(b)(2).

“no” for two main reasons. First, the NDAA 2012 provision allowing detainees the ability to elect military counsel is a statutory grant and, therefore, could be restricted by future legislation or even repealed by the next year’s NDAA. Second, the article is simply an important read. It is a comprehensive and well-constructed analysis of United States’ detention law and policy as it has developed since September 11, 2001. This is no easy task as detention law and policy has been shifting dramatically ever since, sometimes in different directions, as a result of various actions taken by the three branches of government. In laying out such a comprehensive review, the article also provides a meaningful and necessary historical record, or narrative, of the last decade.

The greater significance of the article, however, lies in the authors’ singularly strategic and practical approach—one rarely taken by legal scholars—to the question of the treatment of individuals detained in the “war on terror;”<sup>5</sup> specifically, whether they should be provided legal representation during review tribunals that ultimately decide whether detention continues. As a former litigator who represented Guantanamo detainees for ten years, I have much appreciation for a tactical approach to the very vexing issues involved in detainee treatment, which encompasses not only whether detainees are being ill-treated or given reading materials, but what procedural protections they are receiving. Legal scholars often ask—not incorrectly—what rights do detainees have under domestic and/or international law which would entitle them to various types of treatment, rather than what “treatment” (i.e., due process) they should receive in order to protect the integrity of the detentions and provide the greatest benefit to all parties. Thus, the Corn-Chickris article contains no lengthy mulling-over of whether there is a constitutional right to legal representation or whether international humanitarian law provides some guarantee under conventions or customary international law.

To the contrary, the authors pose the framing question as one driven by principle and practicality: “whether denying these captives legal representation is justified in light of the interests at stake in the detention review process.”<sup>6</sup> From there, the authors quest to discern the fundamental fairness in allowing (or denying) legal representation during proceedings that determine whether the individual will be subject to long-term preventive detention. The Scottsboro case,<sup>7</sup> *Gideon v. Wainright*,<sup>8</sup> *United States v. Salerno*,<sup>9</sup> and other Supreme Court opinions are discussed with the goal of looking closely at the meaning and effect of zealous representation and the theoretical foundations of the right to counsel. In this regard, the question is whether the underlying rationale in constitutional right-to-counsel cases is applicable, not as a matter of right but as one of analytical honesty, to long-term preventive detention cases. A more progressive way of looking at this would be to ask why some rights or protections in particular circumstances (e.g., incarceration) are considered “fundamental” and

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5. Individuals detained in the “war on terror” were referred to as “unlawful enemy combatants” during the Bush Administration and have been called “unprivileged enemy belligerents” during the Obama Administration. As discussed, neither term is necessarily limited to an individual picked up on an active or “hot” battlefield. See *infra* pp. 174–76.

6. Corn & Chickris, *supra* note 1, at 105.

7. *Powell v. Alabama*, 287 U.S. 45 (1932).

8. 372 U.S. 335 (1963).

9. 481 U.S. 739 (1987).

why, under the given rationale, any individual in similar circumstances, regardless of citizenship, should not have access to those rights or protections. Certainly citizenship, or lack thereof, does not make a right any less fundamental. In the case of the Guantanamo detainees in the pre-*Boumediene* era, the popular response to this type of question was that constitutional rights, such as habeas corpus, do not apply to non-citizens because only Americans (and legal residents) enjoy constitutional rights.<sup>10</sup> Of course, this is a *pro forma* response and begs the question as to *why* certain constitutional rights are considered fundamental.

In reviewing the Supreme Court's reasoning in the aforementioned counsel cases, Corn and Chickris get at the heart of this question without resorting to heavy-handed persuasion. The reader must inevitably deduce, as the authors do, that "[z]ealous representation thus represents something so closely related to due process as to be nearly inseparable."<sup>11</sup> The question of why due process is critical in the UEB status determination hearings is not answered as effortlessly, requiring much more than analysis of precedential caselaw, perhaps partly explaining the lengthy history of detention law and policy. The authors must necessarily proceed to addressing the question of insufficiency (in the case of denying counsel in status determination hearings) as part of the due process analysis. Lastly, while not essential to that analysis but relevant for the ultimate conclusion, the article takes on the question of feasibility (in the case of allowing counsel). In tying the two together—theoretical underpinnings and practical outcomes—the article achieves its overarching goal: effectively demonstrating the “strategic imperative” in allowing an individual access to counsel during a proceeding where the consequences involve a severe, if not lifelong, deprivation of liberty.<sup>12</sup>

Drawing on the Corn-Chickris article, this Comment addresses the thorny question of *why* due process or, more specifically, legal representation, is critical in the status determination hearings of UEBs. I will first touch upon *Hamdi v. Rumsfeld*,<sup>13</sup> highlighting some of the general circumstances and realities in the U.S. approach to al-Qaeda and related terrorism threats (otherwise known as the “war on terror”<sup>14</sup>), which *must* be taken into account, and

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10. See, e.g., Andrew C. McCarthy, *The New Detainee Law Does Not Deny Habeas Corpus*, NAT'L REV. ONLINE (Oct. 3, 2006), <http://www.nationalreview.com/articles/218885/new-detainee-law-does-not-deny-habeas-corpus/andrew-c-mccarthy#>.

11. Corn & Chickris, *supra* note 1, at 138.

12. Though the Corn-Chickris article does not use the term “strategic imperative,” Corn opened his presentation at the 2012 *Santa Clara Journal of International Law* Symposium, *Emerging Issues in International Humanitarian Law*, by framing the legal representation issue as one of “strategic imperative.” This term seems very fitting as it connotes both a sense of operational necessity in the status hearings and crucial, longer-term objectives relating to U.S. interests in the “war on terror.”

13. 542 U.S. 507 (2004).

14. During the Bush Administration, this “engagement” was referred to as the GWOT or Global War on Terror. For many years, I despised the term because the mere phrase was used to invoke fear and provide justification to the American public for using only the advantageous portions of the laws of armed conflict (LOAC). In early 2009, the Obama Administration decided it would not use the “GWOT” phrase, opting for something more technical. *Obama Scraps 'Global War on Terror' for 'Overseas Contingency Operation'*, FOXNEWS (Mar. 25, 2009), <http://www.foxnews.com/politics/2009/03/25/obama-scraps-global-war-terror-overseas-contingency-operation/>. By 2009, however, the “war on terror” language had become fairly commonplace; now, it seems to be no longer used derisively by those who had previously done so with reference to the “GWOT,” including myself. Despite its 2009 edict, the Obama Administration frequently uses “war”

then address specific considerations that arise in these types of status determinations, which also indicate the need for legal representation.

### ***Hamdi*, Changed Circumstances, and Current Realities**

As discussed in the article, the legal foundation for the preventive detention of enemy combatants/belligerents by the United States lies primarily in *Ex parte Quirin*<sup>15</sup> (a World War II case), and in the more recent post-9/11 case, *Hamdi v. Rumsfeld*.<sup>16</sup> Indeed, *Hamdi* serves as the legal grounding for the now commonly asserted proposition by lower courts and commentators alike that preventive/indefinite detention by the military of suspected terrorists in the “war on terror” is a permissible incident to war.<sup>17</sup> The *Hamdi* Court, however, was validating only the legality of preventive detention of the individual in the “narrow” category before it: “[A]n individual who . . . was ‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the United States’ there.”<sup>18</sup> Moreover, by “engaged in an armed conflict,” the Court was referring to the fact that Hamdi had been bearing arms as part of a Taliban military unit and was on a battlefield in Afghanistan.<sup>19</sup> As noted and well-demonstrated by Corn and Chickris, the United States—through court decisions and executive action—has extended the scope of detention authority well beyond the definition endorsed in *Hamdi*. Certainly, the Court explicitly left it up to the lower courts to “elaborate” upon the definition of the term, “enemy combatant,” that is, to define the permissible bounds of the category of who could be lawfully detained.<sup>20</sup> Yet, the article fails to note that the *Hamdi* Court also recognized the existence of some outer limit, restricting just how far that definition could be extended.

The Court first recognized the government’s position that the detention of Hamdi in the “war on terror” could be lifelong.<sup>21</sup> This recognition was not to put its imprimatur on

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language to justify military action against al-Qaeda, terrorists, and “stateless enemies.” See Att’y Gen. Eric Holder, Remarks as Prepared for Delivery at Northwestern University School of Law (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>; John Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, The Ethics and Efficacy of the President’s Counterterrorism Strategy, Remarks as Prepared for Delivery at the Woodrow Wilson Int’l Ctr. for Scholars (Apr. 30, 2012), available at <http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100>.

15. 317 U.S. 1 (1942).

16. 542 U.S. 507.

17. See *id.* at 518; see also *Al-Marri v. Hanft*, 378 F. Supp. 2d 673, 680 (D.S.C. 2005); Thomas F. Powers, *When to Hold ‘Em: The U.S. Should Detain Suspected Terrorists—Even If It Can’t Make a Case against Them in Court*, LEGAL AFF., Sept.–Oct. 2004, at 21, available at [http://www.legalaffairs.org/issues/September-October-2004/argument\\_powers\\_sepoct04.msp](http://www.legalaffairs.org/issues/September-October-2004/argument_powers_sepoct04.msp).

18. See *Hamdi*, 542 U.S. at 516 (emphasis added) (citation omitted).

19. *Id.* at 517–18.

20. *Id.* at 522 n.1.

21. *Id.* at 520. In considering Hamdi’s complaint about the indefinite nature of his detention and the government’s response that detentions of enemy combatants during World War II were similarly indefinite, the Court stated:

We take Hamdi’s objection to be not to the lack of certainty regarding the date on which the conflict will end, but to the substantial prospect of perpetual detention. We recognize that the national security underpinnings of the “war on terror,” although crucially important, are

indefinite preventive detention in an “unconventional war,” but rather to provide a potentially contrasting scenario to its limited holding. In concluding that the congressional grant of authority to use force under the Authorization for Use of Military Force (AUMF)<sup>22</sup> includes the authority to detain, the Court addressed at length the limiting circumstances:

[O]ur understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who “engaged in an armed conflict against the United States.” If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of “necessary and appropriate force,” and therefore are authorized by the AUMF.<sup>23</sup>

The Court emphasized two key and interdependent points: (1) its holding was based on law-of-war principles informed by traditional armed conflicts; and (2) it was authorizing indefinite detention in an armed conflict with the hallmarks of a traditional armed conflict—“active combat operations” with troops on the ground, on a battlefield in a specific geographical location. The Court’s conclusion—that its understanding of preventive detention would unravel if the practical circumstances were unlike those in a traditional armed conflict—is often overlooked by courts, commentators, and scholars. Would the *Hamdi* Court conclude today that its understanding of detention had “unraveled”? This author submits that it has become *undone* or, in the least, that the *Hamdi* law-of-war principles with respect to preventive detention are not nearly *as* applicable in the current U.S. engagement with al-Qaeda and related terrorist threats.<sup>24</sup>

There are significant factors in support of this proposition. Since *Hamdi* was decided in 2004, it has become increasingly patent that there are no temporal or geographical boundaries in the “war on terror.” Most obviously, there will not be a peace treaty with al-Qaeda or associated forces ending the “war,” and it is unlikely that the United States would ever consider terrorism (of the kind driven by Islamic extremists) eliminated entirely. The lack of a geographical restriction, which was present in *Hamdi*, is illustrated by some of the Guantanamo habeas cases and the well-known Bagram detention case, *Al Maqaleh v.*

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broad and malleable. As the Government concedes, “given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement.” The prospect *Hamdi* raises is therefore not farfetched. If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that *Hamdi* might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that *Hamdi*’s detention could last for the rest of his life.

*Id.* (citations omitted).

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

23. *Hamdi*, 542 U.S. at 521 (citations omitted).

24. See generally Laurie R. Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS L. REV. 1169 (2011); Kristine A. Huskey, *Guantanamo and Beyond: Reflections on the Past, Present, and Future of Preventive Detention*, 9 UNIV. N.H. L. REV. 183, 201-05 (2011).

*Gates*,<sup>25</sup> all litigated well after *Hamdi*. In those cases, the detainees were captured in places far from Afghanistan, such as Bosnia, Mauritania, and Thailand, and brought to military detention centers in Guantanamo and Afghanistan.<sup>26</sup> Additionally, the drone strikes in Pakistan and Yemen, together with the recent speech by Attorney General Eric Holder, further confirm the United States' position that no geographical limitation exists with respect to the armed conflict against al-Qaeda and associated forces.<sup>27</sup> Lastly, in the eyes of many, including some influential congressional leaders, this "battlefield" extends to even inside the United States. Senator Lindsey Graham was heard to say on the floor of the Senate during the debate over the recent National Defense Authorization Act that "[t]he enemy is all over the world," including "[h]ere at home."<sup>28</sup>

Additionally, exactly who falls into the category of unprivileged enemy belligerent, that is, who can be detained, is and always has been a fairly broad and vague category. As detailed in the Corn-Chickris article, the definition of "unlawful enemy combatant"/"unprivileged enemy belligerent" has gone through several, though similar, variations since 9/11.<sup>29</sup> Most recently, Congress set forth the definition of who can be preventively (and indefinitely) detained pursuant to the laws of war as including "person[s] who [were] a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."<sup>30</sup> This

25. 604 F.Supp. 2d 205 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

26. *See, e.g.*, *Salahi v. Obama*, 625 F.3d 745, 750 (D.C. Cir. 2010) (Mauritania); *Bensayah v. Obama*, 610 F.3d 718, 720 (D.C. Cir. 2010) (Bosnia); *Al Maqaleh*, 604 F. Supp. 2d 205 (Thailand).

27. *See* Robert Naiman, *Could We Stop 'Signature' Drone Strikes in Yemen and Pakistan?*, HUFFINGTON POST (Apr. 27, 2012), [http://www.huffingtonpost.com/robert-naiman/drones-yemen\\_b\\_1458668.html](http://www.huffingtonpost.com/robert-naiman/drones-yemen_b_1458668.html). *See also* Holder, *supra* note 14. Specifically, Holder asserted:

In response to the attacks perpetrated—and the continuing threat posed—by al Qaeda, the Taliban, and associated forces, Congress has authorized the President to use all necessary and appropriate force against those groups. Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law. The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And international law recognizes the inherent right of national self-defense. None of this is changed by the fact that we are not in a conventional war.

Our legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our federal courts has limited the geographic scope of our ability to use force to the current conflict in Afghanistan. We are at war with a stateless enemy, prone to shifting operations from country to country.

*Id.*

28. Michael McAuliff & Jennifer Bendery, *Senate Votes to Let Military Detain Americans Indefinitely, White House Threatens Veto*, HUFFINGTON POST (Nov. 29, 2011), [http://www.huffingtonpost.com/2011/11/29/senate-votes-to-let-military-detain-americans-indefinitely\\_n\\_1119473.html](http://www.huffingtonpost.com/2011/11/29/senate-votes-to-let-military-detain-americans-indefinitely_n_1119473.html). During the floor debate, Senator Kelly Ayotte made a similar statement: "America is part of the battlefield." Matt Taibbi, *Indefinite Detention of American Citizens: Coming Soon to Battlefield U.S.A.*, ROLLING STONE (Dec. 9, 2011), <http://www.rollingstone.com/politics/blogs/taibblog/indefinite-detention-of-american-citizens-coming-soon-to-battlefield-u-s-a-20111209>.

29. *See* Corn & Chickris, *supra* note 1, at 121–26, 129–30.

30. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(a), (b), 125 Stat. 1298, 1562 (2011). Additionally, under § 1021, persons can be detained "who planned, authorized, committed, or aided . . . or harbored those responsible" for the attacks occurring on September 11, 2001. *Id.*

definition is essentially the same one the D.C. District and Circuit Courts have been using since *Boumediene*<sup>31</sup> to put the “flesh” on the *Hamdi* “bones.”<sup>32</sup>

While the contours continue to be developed and the courts identify particular factors that implicate membership in al-Qaeda, such as staying at guests’ houses and training camps, one thing is certain: every individual “captured” or picked up for detention purposes (or targeted for killing) was dressed as a civilian. Indeed, that the Guantanamo detainees were “indistinguishable” from civilians was one factor, among others, relied upon by the Bush Administration to deny them legal protections under the Geneva Conventions, including denying an Article 5 hearing to determine their status in the first place.<sup>33</sup> As it turned out, many individuals picked up and detained at Guantanamo and elsewhere were, in fact, civilians and not combatants.<sup>34</sup> It would, of course, be unrealistic to expect the military (and even the CIA) to make precision “captures” or not to err on the side of caution in picking up individuals suspected of engaging in or supporting hostilities against the United States. But, it is worth noting that the point of status determinations is to mitigate the effects of this approach.

The “dressed as civilians” factor, the expansive and vague category of who can be detained, and the absence of temporal and geographical limitations are not discussed here to argue in favor of eliminating preventive detention altogether. Though arguably, these three factors have moved far from the circumstances presented in *Hamdi* such that preventive detention under current circumstances might not be sanctioned by the *Hamdi* Court. *Hamdi* aside, these current realities simply demonstrate a need for greater due process in order to reach an accurate determination. As fully developed in the Corn-Chickris article, legal representation during the status determination hearings is one such necessary due process protection. The analogy to Article 5 tribunal hearings in the Geneva Conventions and the limited procedural protections therein is a false one, not merely due to the “definitional uncertainty” in the scope of detention authority, as pointed out by the authors, but also due to the expanded nature of the “armed conflict” against al-Qaeda and associated forces. This is not to say that the Geneva Conventions are “quaint” and “obsolete”<sup>35</sup> but rather to suggest that the

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

32. Corn & Chickris, *supra* note 1, at 119.

33. See Office of the Press Secretary, The White House, Statement by the Press Secretary on the Geneva Convention (Feb. 7, 2002), available at <http://www.state.gov/s/1/38727.htm>. See also John Bellinger, *Unlawful Enemy Combatants*, OPINIO JURIS (Jan. 17, 2007, 7:01 AM), <http://opiniojuris.org/2007/01/17/unlawful-enemy-combatants>; Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba, Inter-American Commission on Human Rights, Apr. 15, 2002, 41 I.L.M. 1015, 1023 (2002).

34. See, e.g., *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008); El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007); see also Michael Luciano, *Guantanamo Bay is Still Open, and Barack Obama is Still Assaulting the Bill of Rights*, POLICYMIC (May 2012), <http://www.policymic.com/articles/8047/guantanamo-bay-is-still-open-and-barack-obama-is-still-assaulting-the-bill-of-rights>; Andy Worthington, *Guantánamo Habeas Results: The Definitive List*, <http://www.andyworthington.co.uk/guantanamo-habeas-results-the-definitive-list/> (last visited Aug. 11, 2012).

35. Draft Memorandum from Alberto R. Gonzales, Counsel to the President, to the President of the United States 2 (Jan. 25, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf> (under the subject “Decision re application of the Geneva Convention on prisoners of war to the conflict with al Qaeda and the

understanding under traditional law-of-war principles with respect to legal representation has similarly “unraveled.” Ultimately, the aforementioned factors have not only changed the “armed conflict” such that the application of preventive detention under *Hamdi* is somewhat limited, but they also present practical circumstances that must factor into the due process analysis.

### The Combatant Status Review Tribunals—A Comparison

Established by the Department of Defense as administrative proceedings in direct response to the Supreme Court opinions in *Rasul v. Bush*<sup>36</sup> and *Hamdi*, the Combatant Status Review Tribunals (CSRTs)<sup>37</sup> held at Guantanamo provide an excellent point of comparison to the detainee review tribunals<sup>38</sup> operating in Afghanistan. While there is some divergence between the two procedures, which will be discussed below, many features of the detainee review tribunals were and are still similar to the CSRTs, including, to wit, the use of a personal representative—the nonlawyer representative assigned to assist the detainee with his status determination hearing.<sup>39</sup>

### The Importance of *Boumediene*

The starting point is *Boumediene*, in which the Supreme Court starkly criticized the CSRTs, finding that, “even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal’s findings of fact.”<sup>40</sup> Specifically, the Court compared the procedural protections afforded the *Eisentrager*<sup>41</sup> petitioners to those provided to detainees in their CSRTs, pointing out that the detainee’s personal representative was neither his lawyer nor his advocate.<sup>42</sup> Further, despite its assertion that it would not revisit *Yamashita* and *Quirin*, the Court later noted that General

Taliban,” the President’s counsel proposes that the war on terrorism “renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions”).

36. 542 U.S. 466 (2004).

37. Order Establishing Combatant Status Review Tribunal from Paul Wolfowitz, Deputy Sec’y of Def., to Gordon R. England, Sec’y of the Navy (July 7, 2004), available at <http://www.defense.gov/news/Jul2004/d20040707review.pdf>.

38. The proceedings used to determine the status of detainees in Afghanistan have changed names over the last ten years. This Commentary will use “detainee review tribunal” to refer generally to the status determination proceedings that have occurred and are presently occurring in Afghanistan, unless specifically noted otherwise.

39. See Corn & Chickris, *supra* note 1, at 151–52.

40. *Boumediene v. Bush*, 553 U.S. 723, 785 (2008).

41. In *Johnson v. Eisentrager* (a WWII case), petitioners were German soldiers who, after having been tried by military commissions and convicted outside the United States, petitioned a U.S. court for habeas corpus. 339 U.S. 763 (1950). The Supreme Court concluded they had no right of habeas, relying, in part, on the “enemy alien” status of the Germans and the lack of sovereignty over the territory in which they had been captured, tried and were being held. *Id.* at 777–78. *Eisentrager* has been oft-cited by the government, courts and commentators for the proposition that enemy aliens, unlawful enemy combatants, and/or unlawful enemy belligerents have no right of habeas when detained in locations over which the U.S. has no sovereignty. See, e.g., *Boumediene*, 553 U.S. at 762–65; *Boumediene v. Bush*, 476 F.3d 981, 990–92 (D.C. Cir. 2007); Brief for the Respondents in Opposition, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334), available at [http://supreme.lp.findlaw.com/supreme\\_court/briefs/03-334/03-334.resp.html](http://supreme.lp.findlaw.com/supreme_court/briefs/03-334/03-334.resp.html).

42. *Boumediene*, 553 U.S. at 767.

Yamashita was represented by six military lawyers who demonstrated skill, resourcefulness, and zeal for his defense and that counsel had been appointed to the German saboteurs in *Quirin*.<sup>43</sup> The Court ultimately concluded that the CSRT procedures were more limited than those in *Eisentrager* and fell “well short” of adversarial mechanisms that would eliminate the need for habeas.<sup>44</sup>

On the one hand, the Court’s reference to the criminal trials, which are adversarial in nature, could be read to infer that CSRTs and detainee review tribunals need not contain the same procedural protections (e.g., legal representation) *because* they are administrative hearings and not adversarial in nature.<sup>45</sup> To some degree, Corn and Chickris appear to be making this suggestion in noting that while General Yamashita and the *Quirin* defendants received counsel, their proceedings were adversarial and, in contrast, Boumediene’s CSRT was not.<sup>46</sup> Further, the authors refrain from delving into what the *Boumediene* Court was conveying when it twice raised the existence of counsel and adversarial nature of the criminal proceedings in juxtaposition to the CSRTs. Rather than suggesting that non-adversarial proceedings do not require counsel, the Court was proposing that the CSRTs were inadequate *because* they were a far cry from an adversarial process with the attendant procedural protections. Indeed, in comparing the Guantanamo detainees to the *Eisentrager* defendants, the Court pointed out that:

They have been afforded some process in CSRT proceedings to determine their status; but, unlike in *Eisentrager*, there has been no trial by military commission for violations of the laws of war. *The difference is not trivial.* The records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, *there had been a rigorous adversarial process to test the legality of their detention . . .* To rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution’s witnesses.<sup>47</sup>

Therefore, it seems reasonable to suggest that the *Boumediene* Court would find fault with the positive emphasis placed by some on the non-adversarial nature of the detainee review tribunals in Afghanistan.<sup>48</sup>

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43. *Id.* at 786–87.

44. *Id.* at 767.

45. See generally Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, ARMY LAW., June 2010, at 9. Bovarnick goes to great lengths to emphasize the non-adversarial nature of the detainee review boards in Afghanistan seemingly to suggest that the detainees have little need for procedural protections. *Id.* at 22, 30. Further, in response to criticism that the detainee’s personal representative is a nonlawyer, he also argues that the laws of war applicable to the U.S. conflict in Afghanistan, implemented by Army Regulation 190-8, do not require lawyers. *Id.* at 39, 42. Corn and Chickris deftly counter this rationale in their article. See Corn & Chickris, *supra* note 1, at 145–49.

46. Corn & Chickris, *supra* note 1, at 153 n.195 (citing *Boumediene*, 553 U.S. at 767, 787).

47. *Boumediene*, 553 U.S. at 766–67 (emphasis added) (citation omitted).

48. As mentioned above, Bovarnick seems to herald the detainee review boards’ non-adversarial nature as an advantage to the detainee, or at least as a neutral factor, as well as a formal justification that legal representation is not necessary. See *supra* note 45. Additionally, despite the proclamations that the detainee review boards are non-adversarial, they in fact have a number of characteristically “adversarial” features, such as the ability of the recorder to cross-examine and re-cross the detainee and the opportunity for rebuttal. Bovarnick, *supra* note 45, at 23, 30.

Indeed, in reviewing those early detainee review tribunals in Afghanistan, the D.C. Circuit in *Maqaleh* cited to the above passage in *Boumediene*, noting the importance the Supreme Court gave to the adversarial nature of the *Eisenrager* proceedings and the lack thereof in the CSRTs.<sup>49</sup> The D.C. Circuit went on to find that the Unlawful Enemy Combatant Review Boards “afford[ed] even less protection to the rights of detainees in the determination of status than was the case with the CSRT,” and therefore, the important adequacy of process factor more strongly favored the petitioners before them than those in *Boumediene*.<sup>50</sup> Thus, the lack of protections given a detainee in the initial status determination weighed in favor of a more adversarial process with procedural protections in a subsequent process that similarly tests the legality of detention.

It could be argued that it is *only* when a habeas right is implicated that the process need be rigorously adversarial, replete with legal representation and other procedural protections. To do so might be appropriate if it was purely a question of legal right, but it would ignore the underlying tenet regarding status determinations in *Boumediene* and *Maqaleh*. That is, the less adversarial the process used for testing the legality of the detention and the larger the deficit in protections such as access to counsel, the greater the need for habeas in order to reach an accurate result.<sup>51</sup> Rather than make a detainee’s legal right to habeas the contingent factor, the Corn-Chickris article proposes to endow the initial underlying status determination procedures with the hallmarks of due process in habeas proceedings or, in the very least, to allow the detainee access to legal representation in order to reach the most accurate result.

### ***Some Practical Considerations***

Comparing the CSRTs to the detainee status review tribunals also offers some practical insights into the ultimate, strategic question of whether denying these captives legal representation is justified in light of the interests at stake in the detention review process.<sup>52</sup> Several features of the two tribunals are similar, including the fact that in neither procedure does the detainee have access to a legal representative; rather, he is assigned a “personal representative” (PR). The Corn-Chickris article spends ample time demonstrating why

49. *Al Maqaleh v. Gates*, 605 F.3d 84, 96 (D.C. Cir. 2010).

50. *Id.*

51. Additionally, the pre-*Boumediene* cases filed in the D.C. Circuit Court pursuant to the Detainee Treatment Act (DTA) of 2005 were not habeas cases, nor was there any intent by Congress to fashion the DTA review procedures like habeas procedures. *See Boumediene*, 553 U.S. at 778. In those DTA review cases, however, the detainees were presumed to have access to counsel—not just so that counsel could file petitions in federal court, but meaningful access. Moreover, the D.C. Circuit highlighted the importance of counsel in these non-habeas cases, emphasizing the need for “full and frank communication” between a detainee and his counsel” and stating: “[w]e cannot discharge [our] responsibility under the DTA, particularly [our] responsibility to determine whether a preponderance of the evidence supports the Tribunal’s determination, unless a petitioner’s counsel has access to as much as is practical of the classified information regarding his client.” *Bismullah v. Gates*, 501 F.3d 178, 187, 189 (D.C. Cir. 2007).

52. Many of these related points I initially raised at the *Emerging Issues in International Humanitarian Law* symposium have been incorporated into the current version of the main article and, accordingly, I will only touch upon them briefly here as a means of highlighting the most relevant concerns.

zealous representation, which is integral to due process, can only be carried about by legal counsel, not by a lay representative. In contrast, one commentator presents a well-argued case for why a lay representative in the current detainee review tribunals is able to adequately assist the detainee in meaningfully challenging his detention.<sup>53</sup> For example, since July 2009, the PR has been required to “act in the best interests of the detainee”<sup>54</sup> and, since July 2010, the PR is bound by a non-disclosure policy not to communicate information gleaned from discussions with the detainee or discovered independently that might be detrimental to the detainee’s case.<sup>55</sup> These two significant features were not part of the CSRT procedures. However, the proof is in the proverbial pudding. In comparing two separate reports (both of which include case studies) of the two processes, the complaints by the detainees about the PR are eerily similar.<sup>56</sup> Though the “best interests” and “non-disclosure policy” features are somewhat new and arguably need to be “given a chance,” both had been part of the procedures when human rights monitors observed detainee review tribunals in Afghanistan.<sup>57</sup> Moreover, the common complaint about the PRs in the case of the detainee review tribunals in Afghanistan was not that the PRs disclosed adverse detainee communications, but that the PRs regularly failed to ask questions of the detainee at the hearing and offer independent evidence that was easily accessible.<sup>58</sup> Notably, the requirement that the PR “act in the best interest of the detainee” has been a feature of the detainee review tribunals since 2009 and, yet, it has not seemed to change the general behavior of the PR from the time the policy was first instituted in 2009 to status hearings in 2011.<sup>59</sup> More importantly, the nature of these complaints are very similar to the complaints that many detainees made about their PRs in the CSRTs<sup>60</sup>—the same CSRTs roundly

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53. See generally Bovarnick, *supra* note 45, at 23, 30.
54. Policy Guideline on Detainee Review Procedures at Bagram Theater Internment Facility (BTIF), Afghanistan (U), *enclosed in* Letter from Phillip Carter, Deputy Assistant Sec’y of Def. for Detainee Policy, to Sen. Carl Levin, Chairman of the Senate Armed Servs. Comm. (July 14, 2009) (filed as addendum to Brief for Respondents-Appellants, *Al Maqaleh v. Gates*, 605 F.3d 84 (2010) (No. 09-5266), 2009 WL 6043972).
55. Declaration of Vice Admiral Robert S. Harward at ¶ 11 (attached to Motion to Dismiss for Lack of Jurisdiction, *Al Maqaleh v. Gates*, No. 06-CV-01669 (D.D.C. May 19, 2011)), *available at* <https://docs.google.com/viewer?a=v&pid=sites&srcid=aWpuZXR3b3JrLm9yZ3xiYWdyYW0tcHVibGljLWxpYnJhcnl8Z3g6NmEwZGVjZWQ1Njg1NWU2>.
56. See MARK DENBEAUX & JOSHUA DENBEAUX, NO-HEARING HEARINGS—CSRT: THE MODERN HABEAS CORPUS? AN ANALYSIS OF THE PROCEEDINGS OF THE GOVERNMENT’S COMBATANT STATUS REVIEW TRIBUNALS AT GUANTÁNAMO 3, 4, 6 (2006), *available at* [http://law.shu.edu/publications/guantanamoReports/final\\_no\\_hearing\\_hearings\\_report.pdf](http://law.shu.edu/publications/guantanamoReports/final_no_hearing_hearings_report.pdf); DAPHNE EVIATAR, HUMAN RIGHTS FIRST, DETAINED AND DENIED IN AFGHANISTAN: HOW TO MAKE U.S. DETENTION COMPLY WITH THE LAW 13–16 (Gabor Rona et al. eds., 2011) [hereinafter *DETAINED AND DENIED*], *available at* <http://www.humanrightsfirst.org/wp-content/uploads/pdf/Detained-Denied-in-Afghanistan.pdf>. See generally Kristine A. Huskey, *Standards and Procedures for Classifying “Enemy Combatants”: Congress, What Have You Done?*, 43 TEX. INT’L L.J. 41, 46–50 (2007) (providing case examples of deficiencies in CSRT hearings).
57. *DETAINED AND DENIED*, *supra* note 56, at About this Report (prologue).
58. *Id.* at 14–16. In addition to observing detainee review boards, Human Rights First interviewed eighteen detainees from late-2010 and early-2011, all of whom had been released within the previous year. *Id.* at About this Report (prologue).
59. *Id.* at 13.
60. Based on interviews with the author’s former clients, who were detained at Guantanamo at the time.

criticized by the Supreme Court and which proved to be a poor process for making accurate status determinations.

These case studies perhaps prove the Corn-Chickris point better than any constitutional case: only legal counsel can genuinely “act in the best interest” of the detainee and, therefore, provide the zealous representation crucial to due process.

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The National Defense Authorization Act of 2012 gives all detainees held in long-term detention pursuant to the laws of war the statutory right to counsel, even those for whom habeas may not be a right. Despite the fact that this right could be restricted in implementation, it does tend to legitimize the initial status determination process for all of the reasons set forth above—particularly both *Hamdi* and *Boumediene* pointing toward more, rather than less, protections given current circumstances in the conflict with al-Qaeda. Such protections, to include legal representation, would make a secondary process, such as habeas, perhaps less necessary for reaching accurate status determinations. And this seems to be the point of the article; that there is “strategic imperative”—a need driven by principles and practicalities and not contingent on a legal right—in affording more than a small measure of due process in proceedings which could result in the lifelong deprivation of liberty for an innocent person.