TORTURE, JUDICIAL REVIEW, AND THE REGULATION OF CUSTODIAL INTERROGATIONS

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INTRODUCTION

Since September 11, the Bush administration has developed an unprecedented global detention system, designed to operate outside any established legal framework or independent oversight. By evading existing constraints on custodial interrogations under domestic and international law, this detention system has undermined the United States' longstanding commitment to the prohibition against torture and other abuse.

Post-September 11 detentions have commonly been described as preventive, or, as the government sometimes calls them, "simple war measure[s]" intended to prevent a combatant's return to the battlefield.[1] This characterization obscures reality for several reasons. To begin with, many detainees are not accused of committing any hostile act against the United States or allied forces and were seized outside the context of armed combat.[2] Also, the Bush administration has invoked the law of war (or international humanitarian law) as a basis for detaining so-called "enemy combatants,"[3] but

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1. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion) (citation omitted).

2. Mark Denbeaux & Joshua Denbeaux, Report on Guantánamo Detainees: The Government Story 2-3 (Feb. 8, 2006) (summarizing findings about Guantánamo detainees), *available at* http://law.shu.edu/news/Guantánamo_report_final_2_08_06.pdf.

3. The administration has never provided a consistent definition of "enemy combatant" but, rather, has repeatedly altered its meaning across different cases and situations. *See Hamdi*, 542 U.S. at 516 (plurality opinion) ("[T]he Government has never provided any court with the full criteria that it uses in classifying individuals as ['enemy combatants']."). *Compare* Memorandum from Paul Wolfowitz, Deputy Secretary for the Navy, to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal ¶ a (July 7, 2004) [hereinafter Order Establishing CSRT] ("[T]he term 'enemy combatant' shall mean an individual who was part

has consistently refused to apply the law of war's protections, particularly those provided under the Geneva Conventions and customary international law.[4] Further, as a series of government memoranda and reports suggest,[5] post-September 11 detentions have been motivated in large part by the desire to avoid established restrictions on custodial interrogations and, in turn, to keep the methods of those interrogations secret.[6] The resulting abuses are now legion, including the torture and other mistreatment at the Guantánamo Bay Naval Base, at Abu Ghraib in Iraq, and at the network of CIA-run "black sites" or secret prisons, where some of the most coercive interrogations have been carried out.

In explaining the cause of these abuses, and in fashioning a solution,[7] it is important to recognize the abandonment or dilution

of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf, *with* News Briefing on Military Commission by William J. Haynes II, General Counsel of the Department of Defense (Mar. 21, 2002) (describing "enemy combatants" as individuals "captured *on the battlefield* seeking to harm U.S. soldiers or allies"), *available at* http://www.defenselink.mil/news/Mar2002/t03212002_t0321sd.html (emphasis added).

4. Memorandum from President George W. Bush to the Vice President et al. (Feb. 7, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 134-35 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (concluding that Geneva Conventions do not cover al Qaeda or Taliban prisoners and asserting that those prisoners would be treated consistently with the Conventions only "to the extent appropriate and consistent with military necessity"); *Hamdi*, 542 U.S. at 549-50 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (describing how failure to apply Geneva Conventions and customary international law undercuts administration's argument that it is "acting in accordance with customary law of war").

5. Most of the memoranda and reports addressing U.S. interrogation policy, torture, and treatment of detainees have been collected in THE TORTURE PAPERS, *supra* note 4. R

6. *See generally, e.g.*, JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER (forthcoming 2006) (manuscript on file with author) (detailing how desire to avoid limits on interrogation techniques and other legal protections prompted creation and development of a detention center at Guantánamo); David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1452-56 (2005) (describing how secret legal memoranda undermined protections against torture and contributed to the creation of "a torture culture" and the use of coercive interrogation tactics on detainees).

7. This article does not address the question of whether torture is an effective means of preventing terrorism. *Compare* Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51, 65-66 (describing case in which use of coercive interrogation caused suspect to reveal plot to kidnap students), *with* Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106 (citing statement by former FBI counter-terrorism investigator that "you never get good information" by torturing

of substantive standards, a process I will describe as norm distortion. The President's decision not to apply the Geneva Conventions to al Qaeda or Taliban captives,[8] for example, helped pave the way for detainee abuse, as did the administration's attempted evisceration of the definition of torture;[9] the assertion by top government lawyers that applying the federal criminal statute prohibiting torture[10] to interrogations authorized by the President in the exercise of his commander-in-chief authority would be unconstitutional;[11] and the contention that the United States' obligation not to engage in cruel, inhuman, and degrading treatment did not extend to interrogations overseas.[12] However, these abuses resulted not only from executive construction of normative obligations but also from the lack of meaningful judicial review over detention decisions. In particular, courts have not had the opportunity to apply anti-torture rules in given cases, nor have they had the benefit of a fair fact-finding process to probe the government's evidence. Indeed, the array of post-September 11 abuses underscores the risks of leaving the development and application of anti-torture rules for counterterrorism detentions in the hands of the Executive Branch

suspects). Rather, this article accepts the premise that the United States should not engage in torture and other cruel, inhuman, or degrading treatment because they are contrary to law, values, and official policy. The article argues that meaningful judicial review is an important part of enforcing the prohibition against torture and other abuse—in other words, of ensuring that law and policy become reality.

8. *See supra* note 4. R

9. Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., U.S. Dep't of Justice Office of Legal Counsel to Alberto R. Gonzalez, Counsel to the President (Aug. 1, 2002), *in* THE TORTURE PAPERS, *supra* note 4, at 172, 176 (determining that infliction of pain constitutes torture only if it is as severe as that accompanying "death, organ failure, or serious impairment of bodily functions"). The Department of Justice repudiated this memorandum following the Abu Ghraib scandal. *See* Memorandum from Daniel Levin, Acting Assistant Attorney Gen., U.S. Dep't of Justice Office of Legal Counsel, to James B. Comey, Deputy Attorney Gen. (Dec. 30, 2004), *available at* http://www.usdoj.gov/olc/dagmemo.pdf. For a critique of the superceding memorandum and its continuation of the erosion of the prohibition on torture, see Luban, *supra* note 6, at 1456-58. R R

10. 18 U.S.C. § 2340A (2000) (criminal prohibition on commission of torture outside the United States).

11. Memorandum from John C. Yoo to Alberto R. Gonzalez, *supra* note 9, at 173.

12. *See* Luban, *supra* note 6, at 1458-59 (describing and critiquing administration's refusals to ban cruel, inhuman, and degrading treatment abroad). Cruel, inhuman, or degrading treatment describes abuse that, though illegal under domestic and international law, is formally distinguished from torture. R

without effective judicial oversight, and highlights the potential consequences for individual rights and government misconduct.[13]

This article discusses the relationship between norm distortion and judicial review and the implications for regulating custodial interrogations in the counterterrorism detention operations. It first provides an overview of the overlapping prohibitions against torture and other cruel, inhuman, or degrading treatment under domestic, international, and military law, as well as the prohibitions against the use of evidence secured by such illicit means. It then examines the role courts have played in developing and enforcing prohibitions against torture and other abuse of detainees in the United States. The article next turns to judicial review of post-September 11 detentions and Congress' attempts to curtail review over detentions at Guantánamo. Specifically, the article describes two parts of the Detainee Treatment Act of 2005:[14] one reaffirming the prohibition against detainee mistreatment,[15] the other curtailing jurisdiction over habeas corpus petitions filed on behalf of non-citizens detained at Guantánamo.[16] The article also considers the recently enacted Military Commissions Act of 2006, which similarly seeks to prohibit habeas corpus review over certain non-citizens detained as "enemy combatants."[17] It concludes that standards prohibiting abuse, without a meaningful judicial inquiry into the factual and legal basis for a prisoner's detention, are insufficient to effectively regulate custodial interrogations of prisoners held

13. *See generally* Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 677 (2005) (stating that "[a]s the Office of Legal Counsel's 'torture memos' illustrate, there are substantial risks associated with executive decisionmaking on fundamental questions of executive power and individual rights," as these questions evade judicial review). As I suggest in this article, the enforcement of anti-torture rules is based on decades of judicial experience in the United States, and is not a situation, as it may be elsewhere, where "Congress or the Executive . . . have the best insight into how the Constitution balances competing principles." Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 355 (1994).

14. Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-44 (2005).

15. *Id.* § 1003(a), 119 Stat. at 2739 (to be codified at 42 U.S.C. § 2000dd) ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.").

16. Pub. L. No. 109-149, § 1005(e), 119 Stat. at 2742-43 (to be codified at 28 U.S.C. § 2241).

17. Pub. L. No. 109-366, § 7, 120 Stat. at 2600 (2006) [hereinafter MCA]. The MCA was enacted as this article was going to press; therefore, it is addressed only briefly here.

outside the established frameworks of domestic or international law.

I.
THE STANDARDS PROHIBITING COERCIVE AND ABUSIVE CUSTODIAL INTERROGATIONS

The prohibition against torture traces its roots to the common law,[18] which viewed coerced confessions as inherently untrustworthy.[19] Torture has long been illegal in the United States.[20] The Eighth Amendment to the Constitution prohibits the use of torture as punishment.[21] Torture is also prohibited under the Due Process Clause of the Fifth Amendment, and the fruits of torture or other conduct that "shocks the conscience" may not be introduced at trial.[22] As the Supreme Court has repeatedly stated, statements obtained by coercion not only are inherently unreliable[23] but also "offend the community's sense of fair play and decency"[24] and are "universally condemned by the law."[25] The Due Process Clause also prohibits torture even where no information is ever introduced at

18. *See* A v. Sec'y of State, [2005] UKHL 71, 51 (Eng.) ("[T]he common law has regarded torture and its fruits with abhorrence for over 500 years . . . ."), *available at* http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand.pdf; *see also* Proceedings Against John Felton, 3 Howell's St. Tr. 367, 371 (1628) (unanimous opinion of common law judges that "no [torture] is known or allowed by our law").

19. *See, e.g.*, R v. Rudd, [1783] 168 Eng. Rep. 160, 161 (K.B.).

20. *See, e.g.*, 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447 (1836) ("What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment.") (quoting Patrick Henry); s*ee also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1782 (5th ed. 1891) ("[The Self-Incrimination Clause] is but an affirmance of a common law privilege. But it is of inestimable value [since it] is well known, that in some countries, not only are criminals compelled to give evidence against themselves, but are subjected to the rack or torture in order to procure a confession of guilt.").

21. U.S. CONST. amend. VIII; Estelle v. Gamble, 429 U.S. 97, 102 (1976) (proscribing torture and barbarous punishment was "the primary concern of the drafters" of the Eighth Amendment) (citation omitted).

22. Rochin v. California, 342 U.S. 165, 172 (1952) (forcibly pumping stomach to obtain narcotics); *see also* Irvine v. California, 347 U.S. 128, 133 (1954) (substantive due process protects against "coercion, violence or brutality to the person").

23. Spano v. New York, 360 U.S. 315, 320 (1959).

24. *Rochin*, 342 U.S. at 173; *see also Spano*, 360 U.S. at 320-21 ("[I]n the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.").

25. Stein v. New York, 346 U.S. 156, 182 (1953), *overruled in part by* Jackson v. Denno, 378 U.S. 368 (1964).

trial.[26] And, the Fifth Amendment privilege against self-incrimination prohibits the use of statements at trial involuntarily obtained from the accused, including statements obtained through coercion.[27]

International humanitarian law, international human rights law, and U.S. military law all also regulate custodial interrogations within their respective spheres in order to prevent torture and other abuse. International humanitarian law prohibits torture and other cruel, inhuman, or degrading treatment regardless of the detainee's legal status. Specifically, the Third Geneva Convention Relative to the Treatment of Prisoners of War prohibits physical or mental torture, or any other form of coercion to secure information of any kind.[28] The Fourth Geneva Convention, which protects civilians detained by an adverse or occupying power, prohibits physical or moral coercion against protected persons to obtain information.[29] The Additional Protocol I to the Geneva Conventions, which applies to unlawful combatants, prohibits torture or other outrages upon personal dignity, in particular humiliating and degrading treatment.[30] Lastly, Common Article 3 of the Geneva Conventions[31] sets forth minimum standards for international and non-international conflicts and expressly prohibits torture and other

26. Chavez v. Martinez, 538 U.S. 760, 773 (2003) (plurality opinion) (holding that torture or other abuse that results in a confession is constitutionally impermissible even if the confession is not used at trial); Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 294 (2003) ("Although neither the Self-Incrimination Clause nor the Eighth Amendment apply by their own force to investigatory torture, brutal inquisition violates the Constitution as a substantive matter if its brutality 'shocks the conscience of the court.'").

27. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

28. Geneva Convention Relative to the Treatment of Prisoners of War art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Prisoners of War Geneva Convention].

29. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 31, Aug. 12, 1949, 6 U.S.T. 3516, 3538, 75 U.N.T.S. 287, 308.

30. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, adopted June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391.

31. It is referred to as "Common Article 3" because it is contained in all four Geneva Conventions. Common Article 3 is also considered customary international law. *See, e.g.*, LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 86-88 (2002); *see also* INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Rule 87 (2005) ("Civilians and persons hors de combat must be treated humanely.").

mistreatment.[32] International humanitarian law also prohibits the use of evidence secured by torture.[33]

United States military law similarly prohibits the mistreatment of individuals in U.S. custody. The U.S. Army Interrogation Field Manual has long outlawed the use of "force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind."[34] The Manual also cautions that the "use of force is a poor technique [to gain information], as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear."[35] Further, the Uniform Code of Military Justice prohibits the use of evidence secured by coercion in courts-martial.[36]

International human rights law also prohibits torture and other cruel, inhuman, or degrading treatment. This prohibition is contained in the Convention Against Torture,[37] the International

32. Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 12 (2006).

33. *See* Prisoners of War Geneva Convention, *supra* note 28, at art. 102 ("A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed."); *id.* at art. 3 (prohibiting sentences unless "pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples").

34. U.S. Dep't of the Army, Field Manual 34-52: Intelligence Interrogation (1987), *available at* http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/index.html.

35. *Id.*

36. 10 U.S.C. § 831(d) (2006) ("No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial."); Mil. R. of Evid. 304(c)(2) cmt. 3 (listing examples of involuntary statements as those resulting from coercion, unlawful influence, and unlawful inducement).

37. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]. The United States' reservations attached to its ratification of the Convention Against Torture provided that its understanding of American obligations under international law did not reach anything beyond the existing constitutional prohibitions under the Fifth, Eighth, and Fourteenth Amendments to the Constitution. *See* Declarations and Reservations, *available at* http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm.
Those reservations further provided that the United States did not consider the provisions of the Convention Against Torture to be self-executing, and thus any legal obligations under the treaty required the passage of implementing legislation by Congress. *See id.*

Covenant on Civil and Political Rights[38] and other treaties and instruments.[39] Torture and other cruel, inhuman, or degrading treatment are also illegal under customary international law.[40] Since the ban on torture cannot be derogated, no claim of public emergency or necessity can ever justify deviating from it.[41] Further, the use of evidence obtained by torture is prohibited,[42] and while the use of evidence obtained by other cruel, inhuman, or degrading treatment is not categorically excluded under the Convention Against Torture,[43] such evidence could be precluded under domestic law.[44]

In short, the prohibition against torture and other cruel, inhuman, or degrading treatment is clearly established under numerous sources of law. How then did the abuse of prisoners at Guantánamo, Abu Ghraib, and other post-September 11 detention centers occur? The answer lies in the administration's adoption of policies designed to avoid both the web of anti-torture rules and meaningful judicial review of detention decisions. Before turning to post-September 11 detentions, however, it is useful to consider how judicial review previously contributed to the regulation of custodial interrogation and the development of anti-torture rules in the United States.

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38. International Covenant on Civil and Political Rights art. 7, adopted on Dec. 19, 1966, S. Exec. Doc. F. 95-2, 999 U.N.T.S. 171 [hereinafter ICCPR].

39. *See, e.g.*, American Convention on Human Rights art. 5, Nov. 22, 1969, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 5, 1950, 213 U.N.T.S. 222; Universal Declaration of Human Rights, G.A. Res. 217A at 773, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

40. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (torture); 1 JEAN-MARIE HECKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW RULE 90 (2005) (cruel, inhuman, or degrading treatment); Doe v. Qi, 349 F. Supp. 2d 1258, 1321-22 (N.D. Cal. 2004) (same).

41. *See, e.g.*, ICCPR, *supra* note 39, at art. 42; *see also* U.N. International Covenant on Civil and Political Rights Human Rights Committee, General Comment 29, States of Emergency, art. 4, para. 13(b), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) ("[t]he prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation," and are "absolute . . . even in times of emergency"). R

42. Convention against Torture, *supra* note 37, at art. 15. R

43. *Id.* at art. 16; *see also* Kim Lane Scheppele, *The Metastasis of Torture: Circulating Coerced Knowledge in the Anti-Terror Campaign*, 7-8 (April 2006) (unpublished manuscript, *available at* http://www.law.columbia.edu/jurisprudence?#rtregion: main) (describing limits on use of evidence secured by cruel, inhuman, or degrading treatment under international law).

44. *See supra* note 22 and accompanying text (describing Due Process Clause jurisprudence). R

II.
TORTURE AND JUDICIAL REGULATION OF CUSTODIAL INTERROGATIONS IN THE UNITED STATES

In the United States, at least before September 11, torture was commonly viewed as the barbaric practice of a distant, less-enlightened era—a relic from the time of the divine right of kings and the Star Chamber.[45] Yet, while torture has long been outlawed, it was never eliminated; to the contrary, the use of physical and mental abuse to obtain confessions remained an important part of law enforcement in the United States well into the twentieth century. In 1931, for example, the National Commission on Law Observance and Enforcement (popularly known as the Wickersham Commission) concluded based upon its examination of the conduct of law enforcement officers that "[t]he third degree—that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions—is widespread."[46] As the Wickersham Commission and numerous cases thereafter showed, police often beat and abused suspects to obtain confessions.[47]

The most notorious instances of forced confessions through violence and torture occurred in the Jim Crow South.[48] To take a well-known example, in *Brown v. Mississippi*, black suspects were brutally beaten to make them falsely confess to a murder.[49] One defendant was "hanged . . . by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let

45. *See generally* David Hope, *Torture*, 53 INT'L & COMP. L.Q. 807, 809-10 (2004).

46. NATIONAL COMMITTEE ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 4 (1931) [herinafter Wickersham Report]. Prevailing interrogation methods included "[t]he application of rubber hose to the back or pit of the stomach, kicks in the shins, the beating of the shins with a club, blows struck with a telephone book on the side of a victim's head . . . . [which] may stun a man without leaving a mark." *Id.* at 126. By the time of the Wickersham Report, many states had already passed statutes banning the "third degree." William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 801 (2006) (citing examples). While these statutes revealed majoritarian support for anti-torture rules, the ongoing use of torture suggested the need for greater judicial oversight through federal court review of constitutional violates.

47. Miranda v. Arizona, 384 U.S. 436, 446 n.6 (1966) (citing cases in which "police resorted to physical brutality—beating, hanging, whipping—and to sustained and protracted questioning *incommunicado* in order to extort confessions").

48. *See* John H. Blume, Sheri Lynn Johnson & Ross Feldmann, *Education and Interrogation: Comparing* Brown *and* Miranda, 90 CORNELL L. REV. 321, 328-29 (2005).

49. 297 U.S. 278 (1936).

down the second time, and he still protested his innocence, he was tied to a tree and whipped."[50] Two other individuals were "made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it," and were told that "the whipping would be continued unless and until they confessed . . . in every matter of detail as demanded by those present."[51]

Yet, if *Brown* illustrated the prevalence of torture, it also helped prompt federal judicial oversight of police interrogations by prohibiting the use of coerced confessions to obtain convictions.[52] In *Brown*, the Supreme Court overturned the convictions and threw out the unlawfully obtained confessions, stating that "[t]he due process clause requires 'that state action . . . shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[53] After *Brown*, federal courts continued to review custodial interrogations by local and state police, excluding confessions that were the result of violence or other forms of coercion, which made them involuntary.[54] To determine whether a statement was voluntary or the product of abuse, the Supreme Court adopted a "totality of the circumstances" test, which considered the overall context in which statements were made.[55] Convictions were invalidated under the Due Process Clause if, for example, they resulted from techniques like *incommunicado* confinement and sleep deprivation.[56] *Brown* and the coerced confession cases that followed reflected an increasing

50. *Id.* at 281.

51. *Id.* at 282.

52. *See generally* Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195, 2203-04 (1996) (discussing the justifications made in the *Brown* opinion for prohibiting the use of coerced confessions at trial).

53. *Brown*, 297 U.S. at 286 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

54. *See, e.g.*, Malinski v. New York, 324 U.S. 401, 407 (1945) (defendant stripped naked for several hours and later confined in his underwear to instill fear that he would "get a shellacking"); Ward v. Texas, 316 U.S. 547, 555 (1942) (citing evidence that defendant was beaten, whipped, and burned with a cigarette); Chambers v. Florida, 309 U.S. 227, 239-40 (1940) (defendants subjected to interrogation for five days and "haunting fear of mob violence was around them in an atm sphere charged with excitement and public indignation").

55. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 513-14 (1963); *see also* Dickerson v. United States, 530 U.S. 428, 434 (2000) (describing the Court's application of the "totality of the circumstances" test).

56. Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) (holding that a thirty-six hour interrogation was "inherently coercive"). The Due Process Clause also forbids the use of evidence obtained by coercion because it "shocks the conscience." Rochin v. California, 342 U.S. 165, 172 (1952) (holding that narcotics obtained by

emphasis on professionalism and revulsion from police brutality.[57] The unreliability of the coerced confession was thus only part of the reason it violated due process; the police misconduct, as the Supreme Court consistently maintained, also violated fundamental social values and legal norms.[58]

To be sure, the due process analysis was an imperfect mechanism for regulating law enforcement, and confessions were sometimes upheld despite evidence that defendants had been beaten and abused.[59] One effect of *Brown* "was to discourage law enforcement officials from candidly reporting the circumstances of interrogation, leaving trial courts to decide the issue based on credibility determinations . . . [w]ith predominantly black defendants pitted against predominantly white police officers . . . ."[60] As a result, the Supreme Court's due process analysis was consistently recalibrated over time, allowing for the application of anti-torture rules to new coerced confession cases.[61]

The Supreme Court eventually abandoned the Due Process Clause as the principal means of regulating custodial interrogations of criminal defendants in *Miranda v. Arizona*.[62] In contrast to the due process analysis under *Brown* and its progeny, which involved a case-by-case inquiry to determine whether a statement was voluntary, *Miranda* created a set of uniform, prophylactic rules to regu-

forcibly pumping the suspect's stomach were inadmissible as evidence because the manner in which they were obtained shocked the conscience).

57. David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1730 (2005).

58. *Brown*, 297 U.S. at 285 (police interrogation methods violate "principle of justice so rooted in the tradition and conscience of people as to be ranked as fundamental"); *see also, e.g.*, Spano v. New York, 360 U.S. 315, 320 (1959) ("The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness."); *see also* Rochin v. California, 342 U.S. 165, 173 (1952) "[The u]se of involuntary verbal confessions . . . is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency.").

59. *See* Hancock, *supra* note 52, at 2210. R

60. Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1401 (2004).

61. For example, one barrier to relief lay in the Supreme Court's refusal to consider claims of coercion that rested upon "disputed facts." Hancock, *supra* note 52, at 2210. Over time, the Court worked around the "disputed fact" rule by "focus[ing] its Due Process inquiry upon the undisputed tip of police activities." *Id.* at 2224; *see also id.* at 2230.

62. 384 U.S. 436 (1966).

late custodial interrogation in order to vindicate the Fifth Amendment privilege against self-incrimination.[63] Specifically, *Miranda* required that police warn individuals in custody of their right to remain silent and their right to have an attorney present during questioning.[64] The *Miranda* Court was influenced by the historical and continuing problem of the abusive treatment of individuals in police custody,[65] especially the use of increasingly sophisticated psychological techniques developed to evade due process scrutiny.[66] It concluded that the coercion inherent in custodial interrogation blurred the line between voluntary and involuntary statements.[67] The Court found that the fact-intensive nature of the "totality of the circumstances" test limited judges' ability to effectively regulate law enforcement interrogations.[68] The Court also recognized the difficulty of a *post hoc* inquiry into the circumstances of a police interrogation.[69] Accordingly, the Court imposed bright-line rules—the famous *Miranda* warnings—in order to secure the Fifth Amendment privilege against self-incrimination by ensuring that any statements made during interrogations were voluntary and not the product of abuse or duress.[70]

63. *Id.* at 467 (explaining need to protect Fifth Amendment privilege against self-incrimination outside courtroom); *id.* at 457 (describing need for "appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice"); *see also* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975) (describing development of detailed rules through constitutional common law).

64. *Miranda*, 348 U.S. at 478-79 ("[An individual in police custody] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.").

65. *Id.* at 447 (noting that while police brutality is "the exception now," it is nonetheless "sufficiently widespread to be the object of concern," and that without "a proper limitation upon custodial interrogation . . . there can be no assurance that practices of this nature will be eradicated in the foreseeable future").

66. *Id.* at 448.

67. *Id.* at 458; *see also* United States v. Patane, 542 U.S. 630, 639 (2004) ("[I]n *Miranda*, the Court concluded that the possibility of coercion inherent in custodial interrogation unacceptably raises the risk that a suspect's privilege against self-incrimination might be violated.").

68. *Miranda*, 384 U.S. at 457; *see also* Dickerson v. United States, 530 U.S. 428, 442 (2000) (describing *Miranda* Court's concerns about the "totality-of-the-circumstances" test as a means of regulating custodial interrogations).

69. *See, e.g.*, Missouri v. Siebert, 542 U.S. 600, 608 (2004).

70. *See* Withrow v. Williams, 507 U.S. 680, 691-92 (1993) (discussing the importance of the privilege protected by *Miranda*); Johnson v. New Jersey, 384 U.S. 719, 730 (1966) (*Miranda* "guard[s] against the possibility of unreliable statements in every instance of in-custody interrogation.").

Miranda, of course, did not eliminate the problem of coercion in custodial interrogations,[71] and subsequent decisions have eroded its force through the creation of various exceptions to and limits on its application[72]—limits the Office of Legal Counsel of the Department of Justice underscored in seeking to insulate post-September 11 detentions and interrogations from judicial review.[73] Furthermore, the Supreme Court has increasingly shifted its focus away from regulating the process of interrogations to regulating the conditions under which evidence can be admitted at the trial of the interrogation subject.[74] Thus, there are limits to the potential implications of *Miranda* and its progeny for regulating custodial interrogations of counterterrorism detainees, where the coercive interrogation may be used merely for preventive purposes or as evidence to support confinement of others. Indeed, *Miranda* arguably offers little guidance in a system where detainees are rarely—if ever—tried, as has been the case at Guantánamo where only ten prisoners have been charged (all before a military commission) and none have been tried.[75]

Yet, the judicially-created *Miranda* standard did nevertheless have a significant impact in altering police practices, particularly in

71. *See, e.g.*, Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 460 (1987) ("[*Miranda*] did not eliminate all possibilities for abusive interrogation, and it stopped far short of barring all pressured or ill-considered waivers of fifth amendment rights. It did nothing at all about police dominance of the inevitable swearing contest over actual events in the interrogation room."); *see also* Blume et al., *supra* note 48, at 339-40 (describing shortcomings of *Miranda*). R

72. *See, e.g.*, *Patane*, 542 U.S. at 633 (failure to give *Miranda* warning does not require suppression of physical fruits of unwarned but voluntary statements); New York v. Quarles, 467 U.S. 649, 657-58 (1984) (finding "public safety" exception to requirement that *Miranda* warnings be given before suspect's answers may be admitted into evidence); Oregon v. Elstad, 470 U.S. 298, 318 (1985) (holding that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings").

73. *See generally*, Memorandum from President George W. Bush to the Vice President et al. (Feb. 7, 2002), THE TORTURE PAPERS, *supra* note 4, at 153 (claiming inapplicability of *Miranda* standards to interrogation by military and intelligence personnel for purposes of gathering intelligence).

74. *See, e.g.*, *Siebert*, 542 U.S. at 617 (2004) (finding that the tactic of questioning a suspect first and issuing warnings afterwards "threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted"); Chavez v. Martinez, 538 U.S. 760, 772-73 (2003) (explaining origins of *Miranda* as a prophylactic rule to prevent entering into evidence at trial confessions gained by coercive interrogations and finding no *Miranda* violation where coerced confession was not introduced at trial).

75. *See, e.g.*, Laura Parker, *Bush Offers No Timeline for Closing Gitmo Prison*, USA TODAY, June 15, 2006, at A2.

the first two decades after the Supreme Court's decision.[76] *Miranda* "has become embedded in routine police practice to the point where the warnings have become part of our national culture."[77] *Miranda*'s influence, therefore, suggests the important role judicial review can play by imposing a framework of legal constraints on custodial interrogations, even if the framework's purpose shifts over time from its anti-torture roots.

Moreover, the Due Process Clause remains an additional mechanism for judicial regulation of custodial interrogations.[78] While the *Miranda* warnings create a presumption that a statement was voluntary, that presumption can be overridden by demonstrating that the statement was nevertheless coerced, though such situations are rare in practice.[79] The Due Process Clause also provides a potential remedy in situations where *Miranda* might not apply, such as where the prosecution seeks to introduce statements made by a defendant in custody of a foreign government.[80] In *United States v. Abu Ali*, for example, a district court considered the defendant's motion to suppress statements made after his arrest in Saudi Arabia.[81] The motion to suppress was based on due process grounds: the defendant alleged he was tortured during interrogations.[82] While the court rejected the claim on the merits,[83] it nonetheless subjected the allegations of coercion to judicial review and a meaningful factual inquiry[84] to prevent "the taint of torture"[85] – some-

76. *See, e.g.,* Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-first Century*, 99 MICH. L. REV. 1000, 1027-28 (2001).

77. Dickerson v. United States, 530 U.S. 428, 443 (2000).

78. *See, e.g.*, *id.* at 434; Oregon v. Elstad, 470 U.S. 298, 304 (1985) ("The [Supreme] Court in *Miranda* required suppression of many statements that would have been admissible under traditional due process analysis by presuming that statements made while in custody and without adequate warnings were protected by the Fifth Amendment.").

79. Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984).

80. *See, e.g.*, United States v. Yousef, 327 F.3d 56, 145 (2d Cir. 2003) ("[S]tatements taken by foreign police in the absence of *Miranda* warnings are admissible if voluntary.").

81. 395 F. Supp. 2d 338 (E.D. Va. 2005).

82. *Id.* at 343.

83. *Id.* at 373 (finding statements were voluntary and allowing their admission at trial); *see also id.* at 380-81 (rejecting claim that admission of defendant's statements "shock[s] the conscience"). The court also rejected the defendant's *Miranda* claim. *Id.* at 381-83 (finding that United States officials did not actively participate in questioning by Saudi authorities under the "joint venture" doctrine and that the Saudi officials were not agents or virtual agents of the United States).

84. *Id.* at 380-83.

85. *Id.* at 379; *see also id.* ("This Court takes very seriously its solemn duty and unwavering responsibility to ensure that the human rights guarantees of the

thing no court has done in the case of any detainee held as an "enemy combatant."

Miranda and the coerced confession cases, therefore, illustrate the role courts play both in developing rules to regulate custodial interrogations and in adjusting those rules in response to their application in practice over time—an example of what Richard Fallon might describe as the crafting of constitutional doctrine to implement the Constitution successfully.[86] This jurisprudence also demonstrates how that regulatory role ultimately depends on the availability of a fact-finding process to apply anti-torture rules to a given set of circumstances and to help ensure their effective enforcement.[87]

At the same time, the law governing admissibility of confessions forms part of a broader framework of constitutional and evidentiary jurisprudence that similarly demonstrates the judicial role in implementing prohibitions against torture and other mistreatment. These guarantees include a prompt judicial hearing for detainees arrested without a warrant,[88] the right to discovery of exculpatory evidence,[89] the rule against the admission of hearsay evidence[90] and the right to confront and cross-examine witnesses.[91] While these features of criminal procedure are usually understood as securing a fair trial for the accused,[92] they also form a network of

United States Constitution and of those international documents on human rights to which the United States is a signatory, including the U.N. Convention Against Torture, are upheld in word, deed, and spirit.").

86. *See generally* Richard Fallon, *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56 (1996).

87. Miranda v. Arizona, 384 U.S. 436, 491-92 (describing trial testimony of interrogation and confession to demonstrate warnings were not given and statement was involuntary); *id.* at 494-95 (same); *Abu Ali*, 395 F. Supp. 2d at 372-79 (reviewing evidence from lengthy pre-trial suppression hearing, as well as foreign witness deposition testimony, in deciding defendant was not tortured and that confession was voluntary and thus admissible).

88. County of Riverside v. McLaughlin, 500 U.S. 44, 45 (1991).

89. Brady v. Maryland, 373 U.S. 83, 87 (1963); *see also* Roviaro v. United States, 353 U.S. 53, 60-61 (1957) (holding that if sensitive information is "relevant and helpful" to defendant or "essential to a fair determination of a cause," it must be disclosed to defendant).

90. FED. R. EVID. 801-04; *see also* Williamson v. United States, 512 U.S. 594, 598 (1994) (explaining that the rule against hearsay "is premised on the theory that out-of-court statements are subject to particular hazards").

91. Crawford v. Washington, 541 U.S. 36, 50-52 (2004).

92. *See, e.g.*, Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (right to probe witnesses essential to "ultimate integrity of the fact-finding process"); *Brady*, 373 U.S. at 87 ("[Disclosure of exculpatory evidence] is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society

anti-torture safeguards that help regulate the treatment of individuals in government custody. A central purpose of the right of confrontation and cross-examination, for example, was to prevent the use of *ex parte* testimony gained through custodial interrogations.[93] Similarly, the right to discovery of exculpatory evidence impeaching government witnesses[94] protects against evidence obtained through coercion. Like the rules governing admissibility of confessions, these protections demonstrate the role courts play in enforcing prohibitions against torture and other abuse.

In sum, the history of custodial interrogation in the United States suggests that torture and other coercive interrogation techniques have deep roots even in garden-variety law enforcement operations. This history also shows how federal courts have long sought to regulate custodial interrogations to prevent abuse, initially by inquiring into the voluntary nature of a suspect's statement and, later, by establishing bright-line prophylactic rules through a series of constitutionally-mandated warnings. The shift from due process analysis to *Miranda* and subsequent decisions within the *Miranda* framework suggest the ability to adapt rules to new circumstances and needs.[95] The point is not that a particular framework (e.g., *Miranda*) or test (e.g., "the totality of the circumstances") should reflexively be transported to the gamut of post-September 11 detentions across the globe but, rather, that judicial review is a critical part of the application, development, and enforcement of anti-torture rules.

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wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.").

93. *Crawford*, 541 U.S. at 50-51 (inferring that "*ex parte* examinations" made during custodial interrogations were the "principal evil" at which the right of confrontation was directed).

94. United States v. Bagley, 473 U.S. 667, 676 (1985); United States v. Giglio, 405 U.S. 150, 154 (1972).

95. *See* Dickerson v. United States, 530 U.S. 428, 441 (2000) ("No court laying down a general rule [like *Miranda*] can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision."). While subsequent caselaw has mostly acted to limit *Miranda*, *see supra* note 72, the decision has also been interpreted broadly in some respects. *See, e.g.*, Arizona v. Roberson, 486 U.S. 675, 680-88 (1988) (holding that once a suspect invokes his right to counsel after being given *Miranda* warnings as to one offense, he may not be interrogated about a different offense); Doyle v. Ohio, 426 U.S. 610 (1976) (holding that the government is not permitted to comment on or impeach criminal defendant at trial with his post-*Miranda* silence). R

III.
POST-SEPTEMBER 11 DETENTIONS

The use of torture and other coercive techniques since September 11 has been made possible by at least two factors: *first*, the norm distortion described above;[96] and *second*, the denial of an effective judicial remedy through a combination of jurisdictional limits and an absence of procedural safeguards. In 2005, Congress enacted the Detainee Treatment Act ("DTA") to address the first problem. The DTA prohibits the cruel, inhuman, or degrading treatment of any person in U.S. custody regardless of nationality or physical location.[97] But that prohibition was undercut by the Act's restrictions on habeas corpus jurisdiction over detentions at Guantánamo Bay,[98] which denied detainees the opportunity to show that their imprisonment was based on evidence obtained through torture and other abuse. Then, after the Supreme Court ruled that Congress did not eliminate habeas corpus jurisdiction over pending Guantánamo detainee cases, Congress passed the Military Commissions Act of 2006 ("MCA"), repealing habeas corpus for any alien detained by the United States who has "been properly detained as an enemy combatant or is awaiting such determination."[99] The meaning and lawfulness of this new legislation is being tested in several pending cases.[100]

Guantánamo powerfully illustrates the need for a meaningful judicial inquiry to regulate custodial interrogations and prevent abuse. The United States has held more than 700 detainees at Guantánamo since 2002 and continues to hold approximately 400 people there.[101] Most detainees have been confined at Guantánamo for more than four years; all have been denied the protections of any legal framework, including the Geneva Conventions and domestic law; and all have been detained indefinitely without charge, except for the handful of individuals charged before military commissions (and none of those individuals has yet been tried).[102] If courts are unable to regulate custodial interrogations

96. *See supra* notes 9-12 and accompanying text. R

97. Pub. L. No. 109-148, § 1003(a), 119 Stat. 2680, 2739 (2005).

98. *Id.* § 100(e), 119 Stat. 2742.

99. Pub. L. No. 109-366, § 7, 120 Stat. 2600 (2006).

100. *See* Boumediene v. Bush, Nos. 05-5062, 05-5063 (D.C. Cir. Dec. 29, 2006) (Guantánamo detainees); Al-Marri v. Wright, 443 F. Supp. 2d 774 (4th Cir. 2006) (alien arrested and detained in the United States).

101. Press Release, U.S. Dep't of Defense, Detainee Transfer Announced (Dec. 17, 2006), *available at* http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10301.

102. *See infra* notes 142-152 and accompanying text.

at a highly visible, if notorious, enclave like Guantánamo, over which the United States has exercised complete jurisdiction and control for more than a century,[103] they are less likely to exercise any meaningful oversight over other offshore U.S.-run detention facilities such as Bagram Air Base in Afghanistan.

Until 2004, the government vigorously asserted that there was no federal jurisdiction over detentions at Guantánamo, and, as a previously secret legal memorandum suggests, brought prisoners to Guantánamo deliberately to evade judicial review.[104] When the first habeas petitions were filed on behalf of Guantánamo detainees in 2002, the government argued that, as non-citizens detained outside the United States, the detainees had no right to judicial review under either the federal habeas corpus statute[105] or the Suspension Clause of the Constitution.[106] The government further asserted that any judicial interference with the Executive Branch's detention decisions would infringe the separation of powers.[107] Those arguments were squarely rejected by the Supreme Court in *Rasul v. Bush*.[108] In *Rasul*, the Court held that individuals at Guantánamo have the right to challenge their detention in federal court through the writ of habeas corpus.[109] On the same day, the Court held in *Hamdi v. Rumsfeld*[110] that a United States citizen detained by the Executive as an "enemy combatant" is entitled to fundamental due process in challenging his detention, including sufficient notice of the government's factual allegations and a fair opportunity to rebut them.[111] Through these two decisions, the Court sought to subject detentions at Guantánamo to a meaningful judicial inquiry and to provide prisoners there with an opportunity to test the legal and

103. *See* Rasul v. Bush, 542 U.S. 466, 476 (2004); *id.* at 487 (Kennedy, J., concurring).

104. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Patrick F. Philbin & John C. Yoo (Dec. 28, 2001), *reprinted in* THE TORTURE PAPERS, *supra* note 4, at 37. R

105. 28 U.S.C. § 2241 (2006).

106. U.S. CONST. art. I, § 9, cl. 2 ("The 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.").

107. *See generally* Brief for the Respondents in Rasul v. Bush, Nos. 03-334, 03-343, 542 U.S. 466 (2004), 2004 WL 425739 (Mar. 3, 2004); *see also id.* at 37 (describing "profound separation of powers difficulties occasioned by an exercise of judicial jurisdiction while hostilities are in progress") (internal quotation marks omitted).

108. 542 U.S. 466 (2004).

109. *Id.* at 483-84.

110. 542 U.S. 507 (2004).

111. *Id.* at 533 (plurality opinion).

factual bases for their confinement. *Hamdi* noted that, at least for battlefield captures like Hamdi's, this process could potentially be provided in the first instance by "an appropriately authorized and properly constituted military tribunal."[112] *Hamdi* and *Rasul* indicated, however, absent such process—a process never provided to Hamdi or to any Guantánamo detainee—a judicial inquiry was guaranteed by the Fifth Amendment,[113] by the habeas corpus statute,[114] and by the common law writ of habeas corpus which that statute codifies[115] and which the Suspension Clause protects.[116]

By affirming the right to habeas review and creating a judicial space for a meaningful fact-finding process, *Rasul* provided an oversight mechanism for custodial interrogations at Guantánamo. For example, in determining whether there was a lawful basis for a prisoner's detention, district courts could assess whether information on which the government relied had been obtained through torture or other coercion. In addition, courts could determine whether that conduct violated standards against torture and other abuse, regardless of the reliability *vel non* of any evidence obtained.

Yet, this promised window into interrogations has not yet materialized. Nine days after the Supreme Court decided *Rasul*, the Department of Defense issued an order establishing the Combatant Status Review Tribunal ("CSRT"), an *ad hoc* mechanism designed to determine whether individuals could be detained indefinitely as "enemy combatants."[117] The CSRT lacks the necessary procedural safeguards to provide for meaningful regulation of custodial inter-

112. *Id.* at 538 (citing Geneva Conventions and U.S. Army Regulation 190-8).

113. *Id.*; *Rasul*, 542 U.S. at 483 n.15 ("Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'") (citation omitted).

114. *Hamdi*, 542 U.S. at 525-26 (plurality opinion) ("The simple outline of [28 U.S.C.] § 2241 makes clear both that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process.").

115. *Rasul*, 542 U.S. at 473 ("Habeas corpus is, however, 'a writ antecedent to statute, . . . throwing its root deep into the genius of our common law.'") (citation omitted).

116. *See* INS v. St. Cyr, 533 U.S. 289, 301 (2001) ("[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789.") (citation omitted).

117. Order Establishing CSRT, *supra* note 3.

rogations or to ensure accountability for Executive Branch detentions. The CSRT, for example, denies detainees access to counsel and access to information used to classify them as "enemy combatants."[118] It also allows for the use of any evidence that is "relevant and helpful to resolution of the issue before it,"[119] while denying detainees the right to confront and cross-examine the government's witnesses. Thus, rather than facilitating meaningful judicial review, the CSRT was intended to frustrate it.

The CSRT's lack of adequate procedural safeguards was exacerbated by its sweeping definition of "enemy combatant," which subjects a broad range of individuals to detention and, in turn, custodial interrogation. In *Hamdi*, the plurality had carefully limited this term to individuals captured on an Afghani battlefield who were engaged in combat against American or coalition forces.[120] The CSRT, however, expanded the definition of "enemy combatant" to include individuals who were merely "associated" with Taliban or al Qaeda forces,[121] even if they never committed a belligerent act and never directly supported hostilities against the United States or its allies.[122] The CSRT's sweeping definition of "enemy combatant" not only contemplates dragnet powers to apprehend individuals in what the administration believes is a global "war on terrorism," but creates an increased risk that detentions may be based upon information obtained through coercive custodial interrogations as the administration seeks to detain individuals based upon suspected associations or affiliations rather than direct participation in armed combat.

118. *In re* Guantánamo Detainee Cases, 355 F. Supp. 2d 443, 468-72 (D.D.C. 2005).

119. Order Establishing CSRT, *supra* note 3.

120. 542 U.S. at 516 (plurality opinion) (defining "enemy combatant" as an individual who was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in armed conflict against the United States there" (internal quotation marks omitted)).

121. Order Establishing CSRT, *supra* note 3 (defining term "enemy combatant" as "an individual who was part of *or* supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners") (emphasis added).

122. *Id.* As the government conceded, this thoroughly malleable definition would include the authority to detain the following individuals until the conclusion of the war on terrorism: "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [that] really is a front to finance al-Qaeda activities, . . . a person who teaches English to the son of an al Qaeda member . . . and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source." *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 475 (internal citations omitted).

The two courts that have thus far addressed the lawfulness of the CSRT's detention determinations have divided sharply.[123] In *In re Guantánamo Detainee Cases*,[124] District Judge Joyce Hens Green determined that the CSRT violated due process because it lacked adequate procedural safeguards[125] and because its definition of "enemy combatant" was overbroad.[126] Specifically, Judge Green found that the CSRT relied on secret evidence that a detainee could not see or challenge,[127] denied the assistance of counsel,[128] and relied on statements possibly obtained through torture or other coercion.[129] Drawing upon coerced confession cases,[130] Judge Green asserted not only that such statements were unreliable,[131] but also that their use violated fundamental societal values.[132] The CSRT, she explained, failed to adequately regulate custodial interrogations because it did not conduct "a thorough inquiry into the accuracy and reliability of statements alleged to have

123. A third district court addressed the CSRT in the context of a challenge to the military commissions established to try detainees at Guantánamo for violations of the laws of war. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev'd* 415 F.3d 33 (D.C. Cir.), *cert. granted* 126 S. Ct. 622 (2005). Specifically, District Judge James Robertson concluded that the CSRT did not constitute "a competent tribunal" within the meaning of Article 5 of Third Geneva Convention and U.S. Army Regulation 190-8, established to determine whether an individual qualifies as an enemy prisoner of war. *Hamdan*, 344 F. Supp. 2d at 161-62; *id.* at 162 ("There is nothing in this record to suggest that a competent tribunal has determined that Hamdan is not a prisoner-of-war under the Geneva Conventions."). As a result, Judge Robertson held that the petitioner could not be tried by military commission, since prisoners of war cannot be tried by military tribunal. *Id.* at 160. *But see Hamdan*, 415 F.3d at 43 (military tribunal constitutes a "competent tribunal," and Hamdan could raise claim to prisoner of war status there).

124. 355 F. Supp. 2d 443 (D.D.C. 2005).

125. *Id.* at 468-74. As a predicate to her finding regarding the CSRT's deficiencies, Judge Green concluded that Guantánamo detainees enjoy the protections of the Due Process Clause of the Fifth Amendment. *Id.* at 465.

126. *Id.* at 474-78.

127. *Id.* at 468-72.

128. *Id.* at 471-72.

129. *Id.* at 472-74. The CSRT also denies other safeguards to ensure against detention based upon coercive interrogation. For example, it allows for indefinite detention without charge, permits the use of hearsay, and does not require disclosure of exculpatory evidence (including impeachment evidence).

130. *Id.* at 472-73 (citing, *e.g.*, Jackson v. Denno, 378 U.S. 368 (1964)).

131. *Id.* at 472.

132. *Id.* at 472-73. Judge Green did, however, acknowledge that the latter concern might be less relevant in habeas cases challenging military detention than in criminal prosecutions in U.S. courts. *Id.* at 473.

been obtained through torture."[133] Judge Green then described the allegations of torture by individual detainees[134] and the evidence of abuse contained in FBI documents.[135] Judge Green's decision demonstrates the important role courts play in enforcing anti-torture rules, particularly by inquiring into the factual basis for a prisoner's detention.

In *Khalid v. Bush*,[136] by contrast, District Judge Richard Leon upheld the CSRT, ruling Guantánamo detainees have no cognizable rights to enforce under domestic or international law. Specifically, Judge Leon's opinion concluded that *Rasul* had addressed only whether federal courts had habeas jurisdiction over challenges by Guantánamo detainees, and "did not concern itself with whether the petitioners had any independent constitutional rights."[137] Judicial review, Judge Leon therefore asserted, was limited solely to the narrow question of whether the President possesses legal authority to detain non-citizen "enemy combatants" at Guantánamo.[138] He then concluded that since the President has that authority,[139] there was no viable theory under which the detainees could prevail and their petitions should be dismissed without further action.[140] Judge Leon further stated that enforcement of prohibitions against torture should be left entirely to the Executive Branch.[141] This constricted view of judicial review over detentions at Guantánamo, predicated on the underlying notion that detainees have no cognizable rights (including the constitutional right to be free from torture), would undermine regulation of custodial interrogation and effectively sanction detention based on torture or other cruel, inhuman, or degrading treatment by depriving prisoners of a remedy. From the perspective of developing and enforcing anti-torture

133. *Id.* at 473; *see also id.* ("[T]he CSRT did not sufficiently consider whether the evidence upon which the tribunal relied in making the 'enemy combatant' determination was coerced from the detainees.").

134. *Id.* at 472-73.

135. *Id.* at 474.

136. 355 F. Supp. 2d 311 (D.D.C. 2005). Appeals of the decisions in *Khalid* and *In re Guantánamo Detainee Cases* are pending in the U.S. Court of Appeals for the District of Columbia Circuit.

137. *Id.* at 323.

138. *Id.* at 317.

139. *Id.* at 320 (finding legal authority under Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001)).

140. *Id.* at 323 (no rights under U.S. Constitution); *id.* at 327 (no rights under international treaties); *id.* at 327-30 (no enforceable rights under international law given President's legal authority to detain petitioners).

141. *Id.* at 324-25 n.18 (citing U.S. policy against torture and prosecution by court-martial of a military reservist for detainee abuse at Abu Ghraib).

rules, review limited to whether the Executive Branch has legal authority to detain is no review at all.

The President's military commissions similarly demonstrate the importance of judicial review in regulating interrogations and prohibiting torture and other abuse. In November 2001, the President unilaterally established military commissions to try detainees at Guantánamo for violations of the laws of war.[142] The commissions, which could impose sentences of life imprisonment or death,[143] provided greater protections than the CSRT and, on the surface, resembled civilian criminal trials in some respects.[144] Also, while the CSRT can accept any evidence it deems reliable, the commissions barred statements obtained by torture under a rule promulgated shortly before the Supreme Court was scheduled to hear oral argument on the commissions' legality.[145]

Still, like the CSRT, the commissions failed to contain any effective mechanism to enforce anti-torture rules. The commissions, for example, permitted the use of hearsay and anonymous witnesses,[146] thus allowing for the introduction of unexamined interrogation reports from Guantánamo and Bagram Air Base in Afghanistan,[147] as well as from C.I.A.-operated secret prisons or "black sites,"[148] where the abuse of prisoners has been widely docu-

142. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, 57833 (proposed Nov. 13, 2001) (authorizing trial by military commission of non-citizens where there is reason to believe such individual: "(i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in . . . (i) or (ii) [above]").

143. *Id.* at 57834.

144. 32 C.F.R. § 9.4(c)(2)(iii) (2006) (providing for a defendant's right to counsel); *id.* § 9.5(c) (providing that defendant is presumed innocent and prosecution must prove its case beyond a reasonable doubt).

145. Jess Bravin, *White House Will Reverse Policy, Ban Evidence Elicited by Torture*, WALL STREET JOURNAL, at A3 (Mar. 22, 2006).

146. 32 C.F.R. § 9.6(d)(2)(iv) (2006).

147. SERRIN TURNER & STEPHEN J. SCHULHOFER, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, THE SECRECY PROBLEM IN TERRORISM TRIALS 66 (2005) (describing government's motions to introduce evidence in military commission of Salim Hamdan).

148. Dana Priest, *Foreign Network at Front of C.I.A.'s Terror Fight; Joint Facilities in Two Dozen Countries Account for Bulk of Agency's Post-9/11 Successes*, WASH. POST, Nov. 18, 2005, at A01.

mented.[149] The commissions also permitted the exclusion of the defendant and his civilian defense counsel from the court where "protected information" was introduced.[150] Because this term was expansively defined to include information "concerning intelligence and law enforcement sources, methods, or activities,"[151] or "other national security interests,"[152] it would allow for unexamined hearsay statements from custodial interrogations of other detainees. These procedural flaws compromise the integrity of the fact-finding process and open the door to the use of evidence obtained by torture or other mistreatment.

In *Hamdan v. Rumsfeld*,[153] the Supreme Court struck down the President's military commissions, finding that they violated the Uniform Code of Military Justice ("UCMJ") and Common Article 3 of the 1949 Geneva Conventions. Specifically, the Court determined that the commissions impermissibly deviated from courts-martial procedure.[154] Among the violations were the commissions' denial of defendants' right to be present at trial[155] and the use, at trial, of hearsay and evidence obtained through coercion.[156] The Court also determined that the commissions violated Common Article 3 of the Geneva Conventions, which requires that all trials be conducted by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[157] Because the "regularly constituted [military] courts" in the United States are courts-martial, the Supreme Court concluded, the President's commissions violated Common Article 3.[158]

149. *See, e.g.*, David Johnston, *C.I.A. Tells of Bush's Directive on the Handling of Detainees*, N.Y. TIMES, Nov. 15, 2006, at A14 (reporting that the C.I.A. acknowledged the existence of a directive signed by President Bush that grants the C.I.A. authority to establish detention facilities outside the United States and outlines interrogation methods that may be used against detainees); Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo*, N.Y. TIMES, Jan. 1, 2005, at A11; Carlotta Gall, *The Reach of War: Detainees; Rights Group Reports Afghanistan Torture*, N.Y. TIMES, Dec. 19, 2005, at A14; Douglas Jehl, *Report Warned C.I.A. on Tactics in Interrogation*, N.Y. TIMES, Nov. 9, 2005, at A1.

150. 32 C.F.R. § 9.6(d)(5) (2006).

151. *Id.* § 9.6(d)(5)(i)(D).

152. *Id.* § 9.6(d)(5)(i)(E).

153. 126 S. Ct. 2749 (2006).

154. *Id.* at 2755-56 (finding that the commissions failed to satisfy UCMJ Article 36(b)'s requirement that their rules be "uniform insofar as practicable").

155. *Id.* at 2756.

156. *Id.* at 2755.

157. *Id.* at 2757.

158. *Id.*; *id.* at 2758 (Kennedy, J., concurring). Writing for four Justices, Justice Stevens further concluded that the commissions did not afford all the guarantees recognized as indispensable by civilized peoples. *See id.* at 2797-98.

Although *Hamdan* was decided based on the absence of congressional authorization for the President's commissions, concerns about the use of fruits gained through coercive interrogations at military trials influenced and informed the Court's separation of power analysis. The President's commissions differed from courts-martial in a myriad of ways, as the district court in *Hamdan* had observed.[159] But, the Supreme Court focused particularly on the commissions' use of testimonial hearsay and evidence gained by coercion,[160] as well as its denial of a defendant's right to be present at his trial. As the Court suggested, the use of multiple hearsay and unsworn statements could provide a means of laundering evidence obtained by coercion or other unlawful means, even though the commissions' rules formally prohibited the use of evidence obtained through torture.[161] *Hamdan* thus bespeaks the Court's recognition of the importance of procedural and evidentiary safeguards as a check on illegal custodial interrogations and of judicial review in enforcing anti-torture rules.

The domestic detention of alleged "enemy combatants" similarly demonstrates the importance of adequate judicial review and safeguards in regulating custodial interrogations. In three known cases, those of Jose Padilla,[162] Yasir Hamdi,[163] and Ali Saleh Kahlah al-Marri,[164] the President unilaterally declared individuals "enemy combatants" and sought to detain them indefinitely at a military brig in the United States.[165] Unlike with respect to the military detentions and trials at Guantánamo, the United States did not argue that federal courts lacked jurisdiction over the habeas petitions nor did it dispute that the petitioners possessed constitutional rights. Yet, the government pressed for a "judicial enquiry so limited [as to

159. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 166 n.12 (D.D.C. 2004).

160. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2786 (2006).

161. *Id.* at 2808.

162. Rumsfeld v. Padilla, 542 U.S. 426 (2004).

163. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

164. Al-Marri v. Hanft, 378 F. Supp. 2d 673 (D.S.C. 2005), appeal pending *sub nom*, Al-Marri v. Wright, 443 F. Supp. 2d 774 (4th Cir. 2006). The author is lead counsel for Mr. al-Marri.

165. Padilla was initially arrested in Chicago as a material witness and detained in the civilian justice system in New York. *Padilla*, 542 U.S. at 530-31. Hamdi was captured in Afghanistan, brought to Guantánamo, and, after the military discovered he was a U.S. citizen, transferred to a military brig in Norfolk, Virginia, where he remained until he was transferred to a brig in Charleston, South Carolina. *Hamdi*, 542 U.S. at 510. Al-Marri, who had lawfully entered the United States with his family, was arrested in Peoria, Illinois, detained as a material witness and criminally charged, before being declared an "enemy combatant" shortly before his trial was scheduled to commence. *Al-Marri*, 378 F. Supp. 2d at 674-75.

be] virtually worthless."[166] Specifically, the government claimed that it could detain the petitioners *incommunicado*, including without access to counsel, interrogate them without external interference or restriction, and insulate from judicial review the circumstances surrounding the interrogation of both the petitioner-enemy combatant and other detainees who made statements against them. Further, the government asserted that any interference by a court or by counsel would undermine the necessary conditions for successful interrogation of the detainees.[167] The government, in short, claimed the legal authority to create precisely the type of coercive conditions outlawed by the Due Process Clause and *Miranda* in police stations and, moreover, to subject detainees to those conditions for extended periods of time without oversight.[168]

The government instead asserted that judicial review was limited to whether there was "some evidence" to support the prisoner's detention as an "enemy combatant."[169] In making that assessment, the government contended, the court could examine only the "evidence" submitted by the government—i.e., the multiple hearsay declaration of a single federal agent.[170] The detainee would have no opportunity to present his own evidence or to challenge the accuracy and reliability of the government's submission.[171] Under this "some evidence" test, a court could unwittingly rely on the fruits of prolonged custodial interrogation without any inquiry into the circumstances around which statements were made, thus effectively insulating torture and mistreatment from meaningful judicial scrutiny.

The government's "some evidence" test was rejected by the Supreme Court in *Hamdi*. There, the Court mandated that the petitioner be given a meaningful opportunity to be heard and a fair opportunity to rebut the government's allegations,[172] thus providing some protection against the use of coerced testimony through a

166. *Hamdi*, 542 U.S. at 541 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

167. Padilla ex rel. Newman v. Rumsfeld, 243 F. Supp. 2d 42, 49-51 (S.D.N.Y. 2003) (describing Jacoby Declaration).

168. *See generally* Charles D. Weisselberg, *The Detention and Treatment of Aliens Three Years After September 11: A New, New World?*, 38 U.C. DAVIS L. REV. 815, 844-46 (2005).

169. *Hamdi*, 542 U.S. at 527-28 (plurality opinion).

170. *Id.* (describing Mobbs Declaration).

171. *Id.* at 528-29 (describing Hamdi's argument).

172. *Id.* at 533; *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

judicial fact-finding process. An individual held as an "enemy combatant," for example, would thus have an opportunity to testify that statements he made were the product of abuse and to rebut the evidence that the government presented to justify his detention by showing it had been obtained by torture or other forms of coercion. The Court further stated that prolonged detention for the purpose of interrogation was prohibited.[173]

The impact of these anti-torture safeguards was potentially blunted, however, by the *Hamdi* plurality's suggestion in dicta that hearsay might need to be accepted as "the most reliable available evidence"[174] and that there could be a "presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal was provided."[175] This dicta should be limited, as the plurality clearly intended, to traditional battlefield captures of enemy soldiers like Hamdi,[176] where the Geneva Conventions[177] and the military's own rules and regulations[178] carefully regulate interrogations and prohibit the mistreatment of those captured by the United States, assuming those safeguards are applied in the first instance. If, however, this dicta were extended beyond those narrow, traditional parameters to non-battlefield captures and detentions in counterterrorism operations (including to many detentions at Guantánamo), or if it were applied to a battlefield capture where the government had failed to apply the Geneva Conventions or U.S. Army regulations (as in *Hamdi* and many Guantánamo detainee cases), it would effectively allow for the use of evidence obtained by torture and other coercive measures.

Subsequent legislation underscores the limited utility of articulating legal standards for the treatment of post-September 11 detainees without adequate judicial safeguards to ensure their

173. *Id.* at 521 (plurality opinion); *id.* at 539 ("[Hamdi] unquestionably has the right to access to counsel in connection with the proceedings on remand.")

174. *Id.* at 533-34 (plurality opinion).

175. *Id.* at 534.

176. *See, e.g.*, *id.* at 512-13, 516 (describing circumstances of Hamdi's capture).

177. *See* Prisoners of War Geneva Convention, *supra* note 28, art. 17 (narrowly circumscribing interrogation of prisoners of war and prohibiting abuse). R

178. *See supra* notes 34-35 and accompanying text; *see also* U.S. Dep't of the Army, Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees, § 5.1a(1) (1997) (prohibiting any "form of physical torture or moral coercion" against detainees), *available at* http://www.usapa.army.mil/pdffiles/r190_8.pdf. R

enforcement. In December 2005, Congress enacted the DTA.[179] The DTA simultaneously reaffirms substantive limits on custodial interrogations and undermines the force of those limits by purporting to eliminate habeas corpus jurisdiction over detentions at Guantánamo. Specifically, the Act prohibits the "cruel, inhuman, or degrading treatment or punishment" of any individual in U.S. custody regardless of nationality or physical location.[180] But the statute's prohibition on detainee abuse is undercut by a separate provision that eliminates habeas jurisdiction over the detention of non-citizens by the Department of Defense at Guantánamo[181] and bars "any other action" filed by non-citizen detainees at Guantánamo against the United States or its agents (such as actions for damages and/or injunctive relief to address torture by military or other government officials).[182] The DTA instead provides for "exclusive review" in the United States Court of Appeals for the District of Columbia Circuit.[183] Under this new provision, detainees may challenge whether the CSRT is consistent with the Constitution and laws of the United States, assuming the Constitution applies at Guantánamo.[184] Detainees may not, however, submit evidence demonstrating that their detention is unlawful because, for example, it was obtained through torture, as they can do in a habeas corpus proceeding.[185] In addition, the DTA establishes an affirma-

179. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(a), 119 Stat. 2680, 2739 (2005).

180. *Id.* 1003(a), 119 Stat. 2739. The term "cruel, inhuman, or degrading treatment or punishment" is defined under the Act as the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984. *Id.* § 1003 (d), 119 Stat. 2740.

181. *Id.* § 1005(e)(1), 119 Stat. 2742.

182. *Id.*

183. *Id.* § 1005(e)(2), 119 Stat. 2742.

184. *Id.* § 1005(e)(2)(C), 119 Stat. 2742. The government, however, continues to maintain that Guantánamo detainees do not have any constitutional rights. As a result, review under the DTA is limited to whether the CSRT followed its own procedures, a scope of review that provides no protection against the use of coerced evidence.

185. 28 U.S.C. § 2243 (2006) ("The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts . . . . The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."); *id.* § 2246 ("On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit."); Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004) (plurality

tive defense in civil and criminal prosecutions available to U.S. officials and agents for alleged mistreatment of detainees.[186]

The DTA underscores the problems of rights without remedies, and of anti-torture standards without an effective judicial enforcement mechanism in counter-terrorism detentions. By foreclosing any meaningful inquiry into the factual basis for detentions, the DTA curtails meaningful judicial oversight of custodial interrogations and jeopardizes enforcement of anti-torture rules. The DTA limits judicial review to the record of a fundamentally flawed process, the CSRT, locking into place a system of custodial interrogations conducted outside of domestic law, the Geneva Conventions, or any other established legal framework. Further, the DTA's elimination of habeas corpus jeopardizes access to counsel,[187] which helps protect against abusive custodial interrogation by facilitating a detainee's ability "to present the facts surrounding [his] confinement to the court."[188] Indeed, in response to the first—and only—petition brought under the DTA thus far, the government has sought to curtail attorney-client visits and communication[189] and contends that detainees cannot submit evidence under the DTA, even if it shows they are innocent.[190] The DTA's elimination of habeas further facilitates secret detention and interrogation by eradicating the basis for "next friend" standing, traditionally used by a third party to bring a habeas petition where the detainee himself is unable to seek relief.[191] At Guantánamo, for example,

opinion) (describing habeas process); *see also* R.J. Sharpe, THE LAW OF HABEAS CORPUS 66-68 (2d ed. 1989) (describing factual inquiry on habeas at common law); Brief Amicus Curiae of British and American Habeas Scholars at 8-12 (same), filed in Boumediene v. Bush, Nos. 05-5062, 05-5063 (D.C. Cir. Dec. 29, 2006), *available at* http://www.brennancenter.org/dynamic/subpages/download_file_48002.pdf.

186. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(a), 119 Stat. 2680, 2740 (2005) (establishing affirmative defense where U.S. official "did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful," and stating that "[g]ood faith reliance on advice of counsel should be an important factor, among others, to consider in [making that assessment]").

187. Al-Odah v. United States, 346 F. Supp. 2d 1, 6-8 (D.D.C. 2004).

188. *Id.* at 7.

189. *See* Geri L. Dreiling, *Changing the Ground Rules: DOJ proposes new limits on lawyer access to detainees*, A.B.A. JOURNAL EREPORT, Nov. 7, 2006, http://www.abanet.org/journal/redesign/n7terror.html.

190. *See* Supplemental Brief of Petitioners Boumediene, et. al. and Khalid Regarding the Military Commissions Act of 2006, at 11, Nos. 05-5064, 05-5116 (filed Nov. 1, 2006) (describing government's arguments in Bismullah v. Rumsfeld, No. 06-1197 (D.C. Cir.)), *available at* http://www.scotusblog.com/movabletype/archives/2006/11/first_new_brief.html.

191. *See generally* Whitmore v. Arizona, 495 U.S. 149, 161-63 (1992).

habeas petitions were initially brought by next friends because the government was holding detainees in secret and without access to courts and the outside world.[192] Absent habeas corpus, a new wave of secret detentions could go unchallenged and torture unchecked.

In *Hamdan v. Rumsfeld*, the Court held that the DTA's elimination of habeas corpus did not apply to pending cases filed on behalf of detainees at Guantánamo.[193] But future Guantánamo detainees would fall within the DTA's habeas-stripping provisions under *Hamdan*. Moreover, Congress subsequently passed the MCA, which repeals habeas over certain non-citizens detained as "enemy combatants" or awaiting such determination at Guantánamo and elsewhere, thus potentially precluding judicial review over detentions at other offshore prisons like Bagram Air Base.[194] In addition to repealing habeas corpus, the MCA contains other provisions that undermine judicial review of detentions and limit the ability to enforce anti-torture rules. For example, the MCA creates new military commissions, which limit a defendant's access to exculpatory evidence;[195] permit the use of evidence gained by cruel, inhuman, and degrading treatment committed before the DTA's passage;[196] allow for the use of hearsay;[197] and shield the C.I.A.'s abusive interrogation practices from scrutiny by classifiying them as "sources, methods, or activities" impervious to review.[198] The MCA, while improving military commissions in some respects from those created under the President's order,[199] nevertheless establishes a system under which individuals can be both detained indefinitely and tried based on information gained from torture without a meaningful judicial inquiry into the information's provenance.

CONCLUSION

The post-September 11 detention of "enemy combatants" has significantly eroded established limits on custodial investigations. Restrictions have been undermined not only by the dilution of existing legal standards, but also by the lack of adequate procedural

192. *See* Rasul v. Bush, 542 U.S. 466, 471 (2004).

193. 126 S. Ct. 2749, 2769 (2006).

194. Military Commissions Act of 2006, Pub. L. No. 109-366, § 948j(d), 120 Stat. 2615 (2006).

195. *Id.*

196. *Id.* § 948r(c), 120 Stat. at 2607.

197. *Id.* § 959a(b)(D), 120 Stat. at 1608-09.

198. *Id.* § 949d(d)(A), 120 Stat. at 2611.

199. *Id.* § 949a(b)(A), 120 Stat. at 2608 (allowing a defendant to examine and respond to evidence seen by the commission).

safeguards and judicial review. Congress has sought to restore normative clarity through a categorical prohibition on the mistreatment of prisoners in U.S. custody regardless of location or nationality. Yet, at the same time, the Congress has twice sought to curtail meaningful judicial review over post-September 11 detentions, including limiting review over whether or not evidence was obtained by torture or other abuse. That inquiry has long been part of federal courts' oversight of custodial interrogations by law enforcement in the United States, first under the Due Process Clause and subsequently through *Miranda*. This judicial oversight has helped lead to the development and enforcement of anti-torture rules, however imperfect. The DTA and MCA, however, do the opposite, effectively insulating from judicial review detentions based upon the use of the very coercive interrogation techniques the law prohibits.

Yale Kamisar famously explained that *Miranda* attempted to regulate custodial interrogations by bringing the "mansion" of criminal trial procedure to the "gatehouse" of the police station.[200] Yet, merely articulating or reaffirming rules for the "gatehouse" without an effective judicial enforcement mechanism is insufficient to prevent abuse. Anti-torture rules, in short, require the ongoing and active engagement of courts and adequate procedural safeguards to sufficiently develop the facts and to allow for their application and enforcement. Thus, just as courts developed rules to help regulate custodial interrogation of defendants by police in criminal cases, they must play a meaningful role in supervising post-September 11 counterterrorism detentions and interrogations if we are to take seriously our opposition to torture and other mistreatment.

200. YALE KAMISAR, EQUAL JUSTICE IN THE GATEHOUSES AND THE MANSIONS OF CRIMINAL PROCEDURE (1965), *reprinted in* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 27, 31-32 (1980) (footnotes omitted). In the police station, Kamisar explained, "the enemy of the state is a depersonalized 'subject' to be 'sized up' and subjected to 'interrogation tactics and techniques most appropriate for the occasion.'" *Id.*