

The Anomaly of Guantanamo: Two Innocent Men Caught in a Devastating Legal Limbo

By, Lauren Elfant

. “[A’del] has no visitor save his lawyers. He has no news in his native language, Uighur. He cannot speak to his wife, his children, his parents. When I first met him on July 15, in a grim place they call Camp Echo, his leg was chained to the floor. I brought photographs of his children to another visit, but I had to take them away again. They were ‘contraband,’ and he was forbidden to receive them from me.”¹ A’del Abdu Al-Hakim is one of the many prisoners detained unlawfully under the new rules of the Bush Administration’s “War on Terrorism”.² Al Hakim, along with a fellow Uighur detainee Abu Bakker Qassim, are among the innocent at Guantanamo Bay Naval Base.³ Both men went in front of a military tribunal, plead not guilty, and were found innocent. The military determined that they posed absolutely no threat to national security; the Bush Administration had made a mistake.⁴ Today, months after their official exoneration, these two men are still in Guantanamo, entrapped in a continuous legal battle for their freedom, with no end in sight

Al-Hakim and Qassim were brought to Guantanamo in the months immediately following the terrorist attacks of September 11, 2001.⁵ They are among hundreds of others detained by the Bush Administration in a recent effort to crack down on terrorism. Both Al-Hakim and Qassim were virtually kidnapped by Pakistani bounty hunters, sold

¹ Sabin Willet, *Detainees Deserve Court Trials*, WASHINGTON POST, Nov. 14, 2005, at A21.

² *All Things Considered: Uighurs Pose Challenge in Guantanamo* by Michele Norris (NPR radio broadcast Aug. 10 2005).

³ *Id.*

⁴ *Id.*

⁵ *Qassim v. Bush*, 382 F. Supp. 2d 126, 126 (D.C.Cir. 2005).

to the United States government, and sent to Guantanamo, where they could be held indefinitely, without any evidence of wrongdoing.⁶ Guantanamo detainees cannot appeal to international law, as they are alleged to be “enemy combatants” and to fall outside the jurisdictional scope of legal instruments such as the Geneva Conventions.⁷ In addition, they cannot appeal to domestic criminal laws because Guantanamo is not considered U.S. sovereign territory and thus detainees do not have any rights under U.S. law. Few detainees have been lucky enough to go in front of Combatant Status Review Tribunals where they have had the meager opportunity to contest their unlawful detention. For Al-Hakim and Qassim, however, even an official acknowledgment of innocence has not secured their freedom.

Both Al-Hakim and Qassim are Uighurs,⁸ a minority group whose members are fleeing China because of systematic persecution by the Chinese government. International law forbids the U.S. from sending refugees back to countries where they will be persecuted. The government justifies the two men’s imprisonment by the fact that they cannot legally be repatriated to China.⁹ The Bush Administration admits that the situation is unfortunate, and purports that it is employing all possible means of finding a

⁶ WILLET, *supra* note 4.

⁷ Brett Shumate, *New Rules for a New War: The Applicability of the Geneva Conventions to Al-Qaeda and Taliban Detainees Captured in Afghanistan*, 18 N.Y. INT’L L. REV. 1, 6-7 (2005). See Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy (July 7, 2004) (defining the 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. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”) This is the first time the official government has formally defined the term enemy combatant. In re Guantanamo Detainee Cases, 355 F. Supp.2d 443, 450 (D.D.C. 2005).

⁸ The term Uighur is spelled one of two ways, Uighur and Uyghur. For the purpose of this paper, I will consistently use the spelling Uighur.

⁹ *Morning Edition: Chinese Detainees at Guantanamo get a Hearing by Jackie Northam* (NPR radio broadcast Aug. 25, 2005).

suitable third country to relocate the two Uighurs. Among the 25 countries approached, however, so far none has been willing.¹⁰ Meanwhile, these men remain imprisoned.

An alternative solution, posed by counsel to Al-Hakim and Qassim, is to grant the men asylum and permit them into the United States pending a more favorable solution. The United States government opposes an asylum claim, however, arguing that refugees cannot petition for asylum from outside United States jurisdiction because it is against the procedural regulations.¹¹ Is it not also against the rules to imprison individuals indefinitely that have committed no crime?

The government should be reminded that asylum is a discretionary function, one in which necessity plays a critical role in the determination. The fact that the alternative is, in effect, keeping these men shackled to cement floors in Guantanamo, is a very persuasive factor in favor of granting asylum. Permitting Al-Hakim and Qassim to enter the United States in no way compensates them for the immeasurable injustice they have faced, but can at least provide them a temporary reprieve from further injustice.

Al-Hakim and Qassim represent a larger systematic problem, one that occurs when the government disposes of essential legal protections that are integral to a system of justice. It is beyond the scope of this paper to address all of the due process concerns raised by conditions at Guantanamo, enemy combatant status, and other decisions under the War on Terrorism that curb due process rights.¹² However, the story of Al Hakim and Qassim is a microcosm of the larger problems caused when the U.S. government sets

¹⁰ *Id.*

¹¹ All Things Considered, *supra* note 1.

¹² See e.g. David Cole & James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (Los Angeles, CA: First Amendment Foundation 1999); David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York; London: New Press; New York) (2003).

aside due process, international law, and concerns for justice and fairness in the name of the War on Terrorism.

Background

On September 18, 2001, just seven days after the terrorist attacks of September 11, 2001, Congress enacted the Authorization for Use of Military Force Joint Resolution [AUMF],¹³ which permits the United States Armed Forces to use the necessary force to apprehend those responsible for the violent attacks on the United States.¹⁴ This legislation authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States”¹⁵

Only two months later, pursuant to the authority vested in the president by AUMF, President George Bush issued an executive military order regarding the detention, treatment, and trial of non-citizens in the War on Terrorism.¹⁶ In the order, President Bush declared that, due to the gravity of the situation that the United States now faces as a nation under attack, he must be given authority as Commander in Chief to use the armed forces to identify potential terrorists and eliminate their capacity for destruction.¹⁷ In order to do this effectively, the President stated that “the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts” could not be applied to the measures dictated in this order.¹⁸

¹³ Authorization For Use of Military Force, PL 107-40, 115 Stat 224 (2001).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Exec. Order: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

¹⁷ *Id.* at 57833.

¹⁸ *Id.*

In a broadly discretionary and unilateral move, President Bush defined the individuals subject to this order as

[A]ny individual who is not a United States citizen with respect to whom I determine from time to time in writing that: (1) there is reason to believe that such individual, at the relevant times, (i) is or was a member of the organization known as Al Qaeda; (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”¹⁹

Those individuals who fall within this category may be detained at an “appropriate location” at the President’s discretion and will be tried, “*when tried*,”²⁰ by a military commission which shall have exclusive jurisdiction.²¹ As a result of this order, the United States began a full-scale attack on the Taliban and Al-Qaeda forces including the detention of numerous people such as Al-Hakim and Qassim.²² Ironically, the operation was dubbed “Enduring Freedom.”²³

Initially the administration intended to provide these individuals with trials by military commissions, by working within the framework set up by President Bush’s executive order. However, once military officials realized that they did not have sufficient evidence to prosecute many of those detained in Guantanamo, President Bush changed the rules once again by reclassifying the status of the detainees.²⁴

Denying the detainees a trial by military commission is a clear violation of international law under the Geneva Convention,²⁵ thus requiring the President to redefine

¹⁹ *Id.* at 57834.

²⁰ *Id.* (*Emphasis added*)

²¹ Executive Order, Nov. 13, 2001, *supra* note 16, at 57835.

²² *Id.*

²³ Shumate, *supra* note 7, at 1-6.

²⁴ *Id.* at 7.

²⁵ Joshua S. Clover, “Remember, We’re the Good Guys”: *The Classification and Trial of the Guantanamo Bay Detainees*, 45 S. TEX. L. REV. 351, 355 (Spring 2004). The Geneva Conventions, drafted in 1942

the detainees as something other than Prisoners of War [POW] in order to bypass the laws of the Geneva Convention.²⁶ In February of 2002, President Bush did just that. By declaring that members of Al-Qaeda were no longer POWs, but Enemy Combatants, Bush effectively placed the detainees outside the scope of protection under the Geneva Convention.²⁷ Without these protections the detainees were no longer entitled to humane treatment, limitations on interrogation techniques, due process, communication with outside agencies, or automatic release upon the conclusion of the conflict.²⁸ Thus, “by executive order, military regulation, and other unilateral methods, the Bush Administration . . . created the status of enemy combatant to deny alleged terrorists essential rights under the Constitution and the Geneva Conventions”²⁹

As a result of the lack of legal requirements applicable to detainees labeled as Enemy Combatants, friends and relatives began to file petitions for writs of habeas corpus³⁰ on behalf of those imprisoned.³¹ Two of these men were actually American

consist of four separate treaties, which establish limits and boundaries on wartime behavior between nation-states. Shumate *supra* note 7, at 10-14. The four treaties include: (1) Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, (2) Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, (3) Convention Relative to the Treatment of Prisoners of War, and (4) Convention Relative to the Protection of Civilian Persons in Time of War. *Id.* The one guideline common to all four conventions is Article 3, which requires that all nation states party to the conventions must abide by the guidelines regardless of whether the other part in conflict is party to the conventions. *Id.*

²⁶ Clover, *supra* note 25, at 393.

²⁷ White House Press Secretary Ari Fleischer, Special White House Announcement Re: Application of Geneva Conventions in Afghanistan (Feb. 7, 2002), in Federal News Service, Feb. 7, 2002, available on LEXIS, Legis Library, Fednew File.

²⁸ Shumate, *supra* note 7, at 21.

²⁹ Michael Greenberger, *Congress has Shirked its Constitutional Duties and Floundered in the War on Terror*, 2005 OCT LEGAFF 32, 32-33 (Sept./Oct. 2005).

³⁰ 28 U.S.C.A. § 2241 (1948): “(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had. (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it. (c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

citizens.³² These cases began the United States Supreme Court’s long journey of “asserting a role for itself” in the War on Terrorism by defining the war powers of the Executive.³³ Through a number of integral cases, the Court began its analysis of what it means to be designated an enemy combatant and what legal rights, if any, should be granted to the detainees presently confined in Guantanamo. In *Hamdi v. Rumsfeld*,³⁴ in a case involving a detainee who was an American citizen, Justice O’Connor announced the decision of the court holding that, in this narrowly prescribed circumstance, U.S. citizens detained as enemy combatants deserve the opportunity to be heard before a neutral body in order to contest the basis for their detention.³⁵ On the same day that *Hamdi* was decided, the Supreme Court held in *Rasul* that the United States federal courts have jurisdiction to hear cases involving the potentially indefinite detention of foreign nationals in Guantanamo.³⁶

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.”

³¹ Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1061, 1063 (2005).

³² *Id.* at 1063.

³³ *Id.* at 1063.

³⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *vacated and remanded Hamdi v. Rumsfeld*, 378 F.3d 426 (4th Cir. Aug. 06, 2004).

³⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 507 (2004).

³⁶ *Rasul v. Bush*, 542 U.S. 466, 485 (June 28, 2004).

United States courts, however, have not uniformly interpreted the Supreme Court's decision in *Rasul*, and thus the full implications of the decision are yet to be known. For example, on January 19, 2005, Judge Leon of the United States District Court for the District of Columbia, held in *Khalid v. Bush* that non-resident aliens detained in a prison outside of the jurisdiction of the United States have no constitutional rights.³⁷ Judge Leon rejected what he described as the petitioner's "expansive interpretation" of the Supreme Court's decision in *Rasul*, insisting that the Supreme Court has made it clear that non-resident aliens captured and detained outside the United States, pursuant to executive authority, have no constitutional basis to petition for writs of habeas corpus.³⁸ Leon stated that the *Rasul* decision was limited to answering the question of whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detentions of people who claim innocence.³⁹ He asserted that the majority in *Rasul* failed to address whether or not the detainees actually possessed individual substantive constitutional rights by declining to rule on the merits of the petitioner's asserted claims.⁴⁰ In addition, Judge Leon rejected petitioner's claim that Guantanamo is effectively US sovereign territory despite the United States' plenary and exclusive control over Guantanamo.⁴¹

In contrast to *Khalid v. Bush*, Judge Green in *In Re Guantanamo*⁴² held that detainees have a fundamental right not to be deprived of liberty without due process.⁴³ Judge Green declined to interpret *Rasul* so narrowly as to assert that the holding merely

³⁷ *Khalid v. Bush*, 355 F. Supp. 2d 311, 311 (D.D.C. 2005).

³⁸ *Id.* at 321.

³⁹ *Id.* at 323.

⁴⁰ *Id.*

⁴¹ *Id.* at 322.

⁴² *In re Guantanamo Detainee Cases*, 355 F. Supp.2d 443 (D.D.C. 2005).

⁴³ *Id.* at 443.

conferred habeas jurisdiction to the federal courts without declaring that Petitioners had substantive rights as well.⁴⁴ In addition, Judge Green acknowledged the special nature of Guantanamo and implied in dicta that Guantanamo, although a unique entity, should be considered equivalent to U.S. territory.”⁴⁵ The decisions in *Khalid* and *In re Guantanamo*, have been consolidated on appeal and are pending in the United States Court of Appeals.⁴⁶

On July 7, 2004, less than a week following the Supreme Court’s decision in *Rasul*, the Deputy Secretary of Defense issued an order establishing Combatant Status Review Tribunals (CSRT). The rights provided in the order are (1) notification, within 10 days of the right to contest designation as an enemy combatant and to seek a writ of habeas corpus in United States Courts, (2) designation of a “personal representative,” (3) the opportunity to review all relevant, available information before contesting their detention in front of a tribunal, (4) and “neutral commissions officers” as the tribunal.⁴⁷ If the tribunal determines that the detainee is no longer a threat to the United States and should be not classified enemy combatant, the Secretary of Defense will then coordinate the release of the detainee.⁴⁸ Later court cases, such as *Khalid v. Bush*, seem to dilute the potency of Bush’s executive order by concluding that enemy combatants who are not American citizens “lack any viable theory under the United States Constitution to challenge the lawfulness of their continued detention.”⁴⁹ However, because the decision

⁴⁴ *Id.* at 454.

⁴⁵ *Id.* at 463.

⁴⁶ *Qassim v. Bush*, 382 F.Supp.2d 126, 128 (D.D.C. 2005)

⁴⁷ Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy (July 7, 2004).

⁴⁸ Yin, *supra* note 31, at 1100.

⁴⁹ *Khalid v. Bush*, 355 F. Supp. 2d 311, 323 (D.D.C. 2005).

is currently pending appeal, it is difficult to speculate about the actual repercussions of decisions such as *Khalid*.⁵⁰

Even assuming these tribunals truly pass constitutional muster, for example, that the “neutral” decision makers will be truly unbiased,⁵¹ what will happen to those such as Al-Hakim and Qassim, whose status of enemy combatant has been revoked and who cannot return to their home country, is of immediate concern. Qassim and Al-Hakim are Uighurs, a group of people whose members are being systematically oppressed and persecuted by the Chinese government.⁵² This comment addresses specifically the issue of what happens to the innocent, when the U.S. government divorces concepts such as due process and fairness from the anti-terrorism dialogue.

Al-Hakim and Qassim are not the only Uighur detainees who are faced with this predicament and we have no way of knowing how many more alleged terrorists will be determined to be innocent. The Bush Administration requires that the Secretary of Defense coordinate the release of detainees who no longer, or never did, pose a risk to the United States, yet Al-Hakim and Qassim have not yet been released. There are no guidelines or rules in this new War on Terrorism concerning detainees who have been declassified as enemy combatants and who are unable to return to their native countries. Thus for the moment, Qassim and Al-Hakim remain in a devastating and frustrating legal limbo.

⁵⁰ *Qassim*, 382 F.Supp.2d at 128.

⁵¹ Yin, *supra* note 31, at 1101. *See also In re Guantanamo Detainee Cases*, 355 F. Supp.2d 443, 468-475 (D.D.C. 2005) (discussing the grave potential for bias in the CSRT determination process).

⁵² Amnesty International, People’s Republic of China Uighurs fleeing persecution as China wages it “war on terror” 2 (July 7, 2004), <http://web.amnesty.org/library/index/engasa170212004>.

Uighur Background

The Uighurs are Turkic speaking Chinese Muslims who have made their home in East Turkistan, also known as the Xinjiang Uighur Autonomous Region of China, for over 4000 years.⁵³ East Turkistan lies in the heart of Asia, with Kazakstan, Kyrgyzstan, Afganistan, and Tajikistan to the West; Pakistan and India to the Southwest; Tibet to the South; Russia and Mongolia to the North; and China to the East.⁵⁴ The Uighurs comprise the majority of the Muslim population in East Turkistan, consisting of approximately 8.68 million in numbers.⁵⁵ Uighurs are considered indigenous peoples of East Turkistan, with a history rich in culture, religion and tradition.⁵⁶ Although the Uighur people have subscribed to numerous religious traditions in the last 4,000 years, including Shamanism, Buddhism and Christianity, they ultimately embraced the theology of Islam.⁵⁷

While East Turkistan historically lay outside the boundaries of China, in 1911 Chinese Nationalists overthrew the Manchu Empire,⁵⁸ which had annexed East Turkistan in 1876, and the Uighur people came under Chinese control.⁵⁹ The Uighurs have staged numerous uprisings and revolts against China and claimed their independence twice, once in 1933 and again in 1944. The relationship between the Chinese government and the Uighur people has remained tenuous, with the Uighur people continually attempting to

⁵³ Uighur American Association, *About Uyghur*, http://www.uyghuramerican.org/index.php/uaa/about_uyghurs/ (last visited Dec. 28, 2005).

⁵⁴ Uighur American Association, *Geography*, http://www.uyghuramerican.org/index.php/uaa/about_uyghurs/geography/ (last visited Dec. 28, 2005).

⁵⁵ Uighur American Association, *About Uyghur*, http://www.uyghuramerican.org/index.php/uaa/about_uyghurs/ (last visited Dec. 28, 2005).

⁵⁶ Uighur American Association, *History*, http://www.uyghuramerican.org/index.php/uaa/about_uyghurs/history/ (last visited Dec. 28, 2005).

⁵⁷ Uighur American Association, *Culture*, http://www.uyghuramerican.org/index.php/uaa/about_uyghurs/culture/ (last visited Dec. 28, 2005).

⁵⁸ *Id.*

⁵⁹ Uighur American Association, *About Uyghur*, http://www.uyghuramerican.org/index.php/uaa/about_uyghurs/ (last visited Dec. 28, 2005).

exert their autonomy and political freedom.⁶⁰ As a result of this continuous power struggle, extreme political and religious repression has become common practice by the Chinese government, and the Uighur people have been exposed to severe human rights abuses and violations.⁶¹ The Chinese government has justified this use of violence by classifying the Uighur people as “religious extremist forces” and “violent terrorists.”⁶²

According to the U.S. Department of State, the Chinese government has historically had a poor record with regards to human rights violations, and tolerance for religious and political freedom is substantially deteriorating.⁶³ The U.S. Bureau of Democracy, Human Rights and Labor has noted abuses by the Chinese government including “extrajudicial killings; torture and mistreatment of prisoners, leading to numerous deaths in custody; coerced confessions; arbitrary arrest and detention; and incommunicado detention.”⁶⁴ Those Uighurs who have been classified as political separatists have been exposed to abbreviated trials and executions that often occur immediately preceding convictions or denials of appeals.⁶⁵ Credible Uighur detainees who have been released have told of torture methods employed by Chinese officials, such as shock therapy, solitary confinement, beatings, and numerous other forms of abuse.⁶⁶ The Chinese government has also instituted a religious regulation measure that requires all religious groups to register with the State Administration for Religious Affairs.

⁶⁰ *Id.*

⁶¹ *Id.* (“Reports from Xinjiang document a pattern of abuse, including political imprisonment, torture, and disappearance. Mosques are summarily closed and the Uyghur language is banned from use in universities. Uyghurs are subjected to compulsory unpaid labor in the construction of a pipeline planned to export local petroleum resources to other parts of China. Uyghurs also continue to be the only population in China consistently subjected to executions for political crimes, and these executions are often both summary and public.”)

⁶² *Id.*

⁶³ U.S. Department of State, Country Reports on Human Rights Practices on China 2004, (Feb. 28 2005) <http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

Muslim Uighurs who have failed to register are experiencing official interference, repression and harassment.⁶⁷

Since September 11, 2001, the Chinese government has been cracking down even harder on ethnic minority groups such as the Uighurs, using the terrorist attacks as a pretext for harsher penalties and decreasing tolerance of Uighur separatists, many of whom have been promoting peaceful expressions of dissent.⁶⁸ Although the government has consolidated these efforts under the guise of a campaign to stabilize Xinjiang by cracking down on the “three evils of extremism, splittism, and terrorism,” it is unclear whether these measures are targeting violent Uighur separatists or peaceful dissenters.⁶⁹ For example, the government has created a list of “terrorist organizations” and among which are the World Uighur Youth Congress and the East Turkestan Information Center. Although both organizations are advocates of independence, neither has been linked with promoting violent means to achieve this goal.⁷⁰ Even workers whose jobs are primarily categorized as promoting Uighur cultural awareness and identity have been harassed and detained by the government.⁷¹

While the United States government acknowledges that certain Uighur political separatists may pose a violent threat to the People’s Republic of China as well as to the United States,⁷² the administration also recognizes the massive human rights violations

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ U.S. Department of State, Country Reports on Human Rights Practices on China 2004, (Feb. 28 2005) <http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² CRS Report for Congress RS21995, *U.S.-China Counter-Terrorism Cooperation: Issues for U.S. Policy*, by Shirley Kan (May 12, 2005) <http://www.fas.org/sgp/crs/row/RS21995.pdf>.

imposed on Uighur separatists who are not violent protesters.⁷³ Although it is clear that the Uighur people have actively opposed Chinese rule throughout history, the Uighur resistance movements have received very little international support and attention until recently.⁷⁴

After September 11, the United States employed the help of the Chinese government to collaborate in the fight against terrorism and thus sparked an international interest in alleged links between Uighur groups and radical Islamic groups in Central Asia.⁷⁵ Of particular interest have been allegedly violent political groups such as the Organization for the Liberation of Uighurstan, Wolves of Lop Nor, and Home of East Turkistan Youth.⁷⁶ Despite affiliations between the aforementioned groups and the Uighur autonomous movement, the United States acknowledges that there are many Uighur groups who advocate independence through peaceful measures.⁷⁷

As a result of the new global collaboration against terrorism, researchers for the Congressional Research Service claim that it has become difficult for the United States to “balance its needs to create a broad-based multi-state coalition to fight against terrorism with traditional American obligations to protect and defend religious freedoms and human rights.”⁷⁸ In October, 2001, President Bush definitively stated that the United States did not support China’s policies against many ethnic minorities such as the Uighurs and that the War on Terrorism should not be used as a pretext for cracking down

⁷³ U.S. Department of State, Country Reports on Human Rights Practices on China 2004, (Feb. 28 2005) <http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm>.

⁷⁴ *Id.*

⁷⁵ CRS Report for Congress RS31213, *China’s Relations with central Asian States and Problem’s with Terrorism* 7 (Dec. 17, 2001) <http://fpc.state.gov/documents/organization/7945.pdf>.

⁷⁶ *Id.* at 8-9.

⁷⁷ *Id.* at 12.

⁷⁸ *Id.* at 3.

on political separatists.⁷⁹ However, international reports show that thousands of Uighur activists have been detained using the War on Terrorism as justification and the United States has muted its former criticism of human rights violations by the Chinese government.⁸⁰

The conflict posed by the desire to end terrorism while at the same time promote human rights is crystallized by the situation of the Uighur prisoners currently detained in Guantanamo, who remain in legal limbo. The Uighur men in Guantanamo were initially detained in the effort to thwart terrorism. Now that the government no longer classifies them as enemy combatants, they should be returned to their home country. However, if the U.S. government was to return these men to a country where they will be inevitably imprisoned and persecuted, the return itself would be in violation of international human rights laws. As a result, they remain imprisoned in Guantanamo.

Abu Bakker Qassim and A'del Abdu Al-Hakim

Mr. Abu Bakker Qassim, age 36 and Mr. A'del Abdu Al-Hakim, age 31, are both Turskistani Uighurs (natives of East Turkistan), and are currently being detained at Guantanamo Bay.⁸¹ Both men have been found by the United States government to pose no risk to the United States; however, the Bush administration cannot send them back to China for fear that they will be imprisoned or killed by the Chinese government.⁸²

Very little information concerning these men is available to the public.⁸³ Qassim is married and has three children, two of whom are twins whom he has never seen or

⁷⁹ *Id.* at 7.

⁸⁰ Angelina Snodgrass Godoy, *Converging on the Poles: Contemporary Punishment and Democracy in Hemispheric Perspective*, 30 LAW & SOC. INQUIRY. 515, 543 n.21 (2005).

⁸¹ Memorandum in Support of Petitioners' Emergency Motion to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners at 4, *Qassim*, 382 F.Supp.2d 126 (No. 05 Civ. 0497).

⁸² Morning Edition, *supra* note 9.

⁸³ *Id.*

spoken with.⁸⁴ Al-Hakim is also married with three children, one of whom he has never seen.⁸⁵ Both men were attempting to flee persecution of the Chinese government when they were seized by Pakistani Security Forces in late 2001 or early 2002 and turned over to United States Security Forces. They were then held in Afghanistan and ultimately brought to Guantanamo in June of 2002.⁸⁶ According to their lawyers, neither man harbored any negative feelings towards the United States, although they staunchly opposed the actions of the Chinese Government and are believed to have received some weapons training in Afghanistan under the Taliban.⁸⁷

Although the exact date is unknown, sometime around late 2004 or early 2005, both Qassim and Al-Hakim appeared before a Combatant Status Review Tribunal (CSRT) and were found to be No Longer Enemy Combatants (NLEC). Currently fifteen Chinese Muslims (Uighurs) are still detained at Guantanamo Bay. Five of the men were found to be “in the wrong place at the wrong time” while ten were later determined to be low-risk detainees.⁸⁸

On March 10, 2005, Qassim and Al-Hakim (hereinafter Petitioners) jointly petitioned for writs of habeas corpus from Guantanamo Bay military detention facility.⁸⁹ They were represented by Sabin Willett and Susan Baker Manning from Bingham McCutchen LLP and Barbara Olshansky from the Center for Constitutional Rights.⁹⁰ In the petition, the Petitioners alleged that they were being detained unlawfully, without

⁸⁴ Memorandum in Support of Petitioners’ Emergency Motion to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners at 4, *Qassim*, 382 F.Supp.2d 126 (No. 05 Civ. 0497).

⁸⁵ *Id.* at 5.

⁸⁶ *Id.* at 5-6.

⁸⁷ *Id.* at 5.

⁸⁸ Robin Wright, *Chinese Detainees Are Men Without a County*, WASHINGTON POST, (Aug. 24, 2005), at A01.

⁸⁹ *Qassim v. Bush*, 382 F. Supp. 2d 126, 126 (D.C.Cir. 2005).

⁹⁰ *Id.*

charge, without access to counsel, and in violation of their due process rights.⁹¹ The writ also requested that the government release them pending the establishment of a legitimate, lawful basis for detention.⁹² The Respondents in the case are President George W. Bush, Secretary of Defense Donald Rumsfeld, Commander of Joint Task Force GTMO Brigadier Gen. Jay Hood, and Commander of Joint Detention Operations Group and the JTF-GTMO detention camps Col. Brice Gyursko. Counsel for Respondents include Terry M. Henry, Robert J. Katerberg, Joseph Hunt and Vincent Garvey from the United States Dept. of Justice.⁹³ At the time the writ was filed, neither Petitioners' counsel, nor Judge Robertson of the United States District Court for the District of Columbia, were aware that Petitioners had already gone before a CSRT and found to be NLEC.⁹⁴

In response to the suit, the Government immediately moved for a stay of proceedings pending the Court of Appeals decision in the consolidated appeals of *Khalid*

⁹¹ Petition for Writs of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *Qassim*, 382 F.Supp.2d 126 (No. 05 Civ. 0497); The Petitioners alleged that the named respondents were holding them in unlawful detention based on the following causes of action: (1, 2) unlawful deprivation of liberty and unlawful conditions of confinement, based on the common law notion of due process and due process under the 5th amendment, (3) arbitrary denial of due process under the Geneva conventions, (4) arbitrary denial of due process according to international humanitarian and human rights laws, (5,6,7,8) war crimes, cruel and inhuman treatment, arbitrary and prolonged detention, and enforced disappearance under the Alien Tort Statue, (9) unlawful detention under Article II of the United States Constitution, (10,11,12) arbitrary and capricious unlawful detention, denial of due process, torture and cruel, inhuman or degrading treatment, under the Administrative Procedures Act, (13, 14, 15) risk of rendition under the due process clause, the Convention against Torture and the Convention relating to the Statutes of Refugees and Geneva Convention, and the Habeas Corpus and Alien Tort Claims Statute, (16, 17) and lastly declaratory relief and declaratory judgment under the Declaratory Judgment Act. *Id.* at 12-24. In the writ, the Petitioners also described the details of their confinement at Guantanamo, asserting that their detainment, in complete isolation from the outside world, was a violation of their constitutional and international rights to dignity and freedom from torture, inhumane or degrading treatment and punishment, etc. In addition the writ contained allegations outlining some of the tortuous techniques employed by officers at Guantanamo, such as “twenty-four hour plus interrogations involving temperature extremes, dogs, prolonged isolation, and loud music,” “extreme and prolonged stress positions, sleep deprivation, sensory assaults, removal of clothing, hooding, and the use of dogs to create anxiety and terror,” and psychological abuse that was “tantamount to torture.” *Id.* at 7.

⁹² *Id.* at 2.

⁹³ *Id.* at 3.

⁹⁴ *Qassim v. Bush*, 382 F. Supp. 2d 126, 126 (D.C.Cir. 2005).

*v. Bush*⁹⁵ and *In re Guantanamo Detainee Cases*.⁹⁶ At this point in the proceedings the Government was aware that the Petitioners had been officially determined to be NLECs, but did not inform Petitioners' counsel or the judge of this determination.⁹⁷ Ignorant of the Petitioners' changed status, on April 13, 2005, Judge Robertson granted the stay of proceedings.⁹⁸ It was not until mid-July that counsel learned of their clients' status. When they ultimately became aware that their clients had been determined innocent, they immediately filed an emergency order to vacate the stay order,⁹⁹ asserting that, given CSRT findings of innocence, the Petitioners should be released immediately.¹⁰⁰

In the emergency order, Petitioners' counsel argued that, at the time Petitioners filed the writ for habeas corpus, counsel had no communications with the men and thus had no way of knowing their status.¹⁰¹ Although press reports in March of 2005 alleged that "the Pentagon determined last year that half of the two dozen Uighur Chinese captured in the War on Terrorism have no intelligence value and should be released,"¹⁰² at no point did the government inform Petitioners' counsel of the CSRT results. During this time, to no avail, the Petitioners' counsel on two separate occasions sought information from the government concerning their clients' status.¹⁰³ The government did not respond to these requests and it was not until mid-July, during counsel's first face-to-face interview with their clients that they discovered that Petitioners had been found NLEC, information that they confirmed with a JAG officer at Guantanamo Bay on July

⁹⁵ *Khalid v. Bush*, 355 F. Supp. 2d 311, 311 (D.D.C. 2005).

⁹⁶ *In re Guantanamo Detainee Cases*, 355 F. Supp.2d 443, 450 (D.D.C. 2005).

⁹⁷ *Qassim v. Bush*, 382 F. Supp. 2d 126, 127 (D.C.Cir. 2005).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Memorandum in Support of Petitioners' Emergency Motion to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners at 1*Qassim*, 382 F.Supp.2d 126 (No. 05 Civ. 0497).

¹⁰¹ *Id.* at 2.

¹⁰² *Id.* at 2 (quoting *Uighurs face return from Guantanamo*, FINANCIAL TIMES, Mar. 16 2005).

¹⁰³ *Qassim v. Bush*, 382 F. Supp. 2d 126, 127 (D.C.Cir. 2005).

14, 2005.¹⁰⁴ Counsel later learned that it was sometime in late 2004 or early 2005, that the Petitioners had received written statements with the results of the CRST decisions. Although both Petitioners wrote their counsel to inform them of the results, counsel never received this notification.¹⁰⁵

Petitioners' counsel contended that not only did the government ignore their requests for information, but actually implied the opposite – that Qassim and Al-Hakim had been found to be Enemy Combatants.¹⁰⁶ In the emergency motion to vacate the stay, Petitioners' counsel provided an example of the government's misleading conduct. On March, 29, 2005 in an official government filing, the government noted that “[a] factual record for a petitioner in a Guantanamo Bay detainee case typically has consisted of the record of proceedings for the Combatant Status Review Tribunal that *confirmed petitioner's status as an enemy combatant properly subject to detention.*”¹⁰⁷ Counsel contended that this was misleading, given the government's knowledge of Petitioners' status.¹⁰⁸

In the emergency motion to vacate the stay, Petitioners contended that, while it is unclear whether the CSRT process is actually lawful to begin with,¹⁰⁹ even under the current system “it must follow that when the executive branch determines a person *not* to be an enemy combatant, no extrajudicial basis remains to justify imprisonment.”¹¹⁰ In

¹⁰⁴ Memorandum in Support of Petitioners' Emergency Motion to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners at 5, *Qassim*, 382 F.Supp.2d 126 (No. 05 Civ. 0497).

¹⁰⁵ *Id.* at 5.

¹⁰⁶ *Id.* at 2.

¹⁰⁷ *Id.* at 3 (*Emphasis added*).

¹⁰⁸ *Id.* at 3.

¹⁰⁹ *Id.* at 8.

¹¹⁰ Memorandum in Support of Petitioners' Emergency Motion to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners at 8, *Qassim*, 382 F.Supp.2d 126 (No. 05 Civ. 0497).

the cases of Qassim and Al-Hakim there is no dispute that the Petitioners are not and were never Enemy Combatants.¹¹¹

Counsel also argued that public policy requires that the government not illegally detain people found to be wholly innocent.¹¹² “The public has a strong interest in ensuring that its laws do not subject individuals to indefinite detention without due process; [i]t is always in the public interest to prevent the violation of a party’s constitutional rights.”¹¹³

While Petitioners’ counsel acknowledged that there are practical problems with the case at hand, such as finding a suitable country to accept the two Petitioners, they strongly asserted, “being a refugee is not a crime justifying indefinite detention.”¹¹⁴ Whether or not another country will be ultimately willing to accept them, the United States must find a suitable alternative to maximum-security prison.¹¹⁵

The Government opposed the Petitioners’ emergency motion to vacate the stay and a hearing was set before Judge Robertson for August 1, 2005.¹¹⁶ At the hearing P. Sabin Willet, Esquire, counsel for the Petitioners, recapped much of his argument in the emergency motion. In addition, he conceded that if Respondents were not willing to

¹¹¹ *Id.* at 8. See also Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy (July 7, 2004) (ordering that “*Non Enemy Combatant Determination*: If the tribunal determines that the detainee shall no longer be classified as an enemy combatant, the written report of its decision shall be forwarded directly to the Secretary of Defense or his designee. The Secretary or his designee shall so advise the Secretary of State, in order to permit the Secretary of State to coordinate the transfer of the detainees for release to the detainee’s country of citizenship or other disposition consistent with domestic and international obligations and the foreign policy of the United States.”)

¹¹² Memorandum in Support of Petitioners’ Emergency Motion to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners at 9, *Qassim*, 382 F.Supp.2d 126 (No. 05 Civ. 0497).

¹¹³ *Id.* at 9 (quoting *Abdah v. Bush*, 2005 WL 711814 (D.D.C. 2005)).

¹¹⁴ *Id.* at 10.

¹¹⁵ *Id.*

¹¹⁶ *Qassim v. Bush*, 382 F. Supp. 2d 126, 127 (D.C.Cir. 2005).

immediately release Petitioners, there might be other viable solutions.¹¹⁷ For example, the Petitioners could be accommodated in the civilian area of the Guantanamo Base.¹¹⁸ Counsel argued that this has happened before in Guantanamo in the 1990s in the case of Haitian refugees who had been intercepted on the high seas. Like the Petitioners, these men had committed no crime and consequently were sent to the Marine barracks at Guantanamo pending their asylum requests.¹¹⁹ Another suggested alternative was requiring the physical presence of the Petitioners in the United States. Counsel argued that it is within a habeas judge's power to require that a person in a habeas case be brought physically to the courtroom.¹²⁰ If this were to happen while the case was pending, the Petitioners could be released, under supervisory conditions, into the Uighur community in the United States.¹²¹

Regardless of the government's practical dilemmas, counsel for the Petitioners strongly emphasized the unethical nature of continued detention.¹²² These men, he stated, "they are not soldiers, they're not criminals, they're just Uighur people . . . they are husbands, they are fathers, they are sons."¹²³ While counsel acknowledged that there had been positive changes in the conditions of the Petitioners' confinement, Willet reminded the court that his clients were still chained to the ground when he went to meet with them.¹²⁴ As he stated to the judge, during his first interview with his clients Willet observed, "a slight, gentle man with a shy smile chained to the floor, a man sitting in a

¹¹⁷ Transcripts of Motion Hearing Before the Honorable James Robertson United States District Judge (Aug. 1 2005), *Qassim*, 382 F.Supp.2d 126 (No. 05 Civ. 0497).

¹¹⁸ *Id.* at 8-9.

¹¹⁹ *Id.* at 8.

¹²⁰ *Id.* at 9.

¹²¹ *Id.* at 10.

¹²² *Id.*

¹²³ Transcripts of Motion Hearing Before the Honorable James Robertson United States District Judge (Aug. 1 2005) at 10, *Qassim*, 382 F.Supp.2d 126 (No. 05 Civ. 0497).

¹²⁴ *Id.* at 11.

box that had no windows.”¹²⁵ In addition, Willet informed the Judge that Al-Hakim had spoken by telephone with his sister, Kabsur Abdul Hakim, a Uighur refugee living in Sweden who had thought her brother to be dead.¹²⁶ “And she was right” argued Willet before the judge, “these people are dead to the outside world. They’re dead to their children, they’re dead to their wives, even their names are a secret.”¹²⁷ The delay in release in this case is the harm itself, and “every single day this continues is another small death.”¹²⁸

The government, represented by Terry M. Henry, responded that both requests, the lifting of the stay order and altered living conditions while in custody, should be dismissed.¹²⁹ In response to Petitioners’ allegations that there is no legal premise to continually detain these men, he argued that the “executive’s authority to make war includes the power to detain individuals as enemy combatants.”¹³⁰ This power extends authority to the executive to “wind up that detention in an orderly fashion.”¹³¹ Henry found support for this authority through historical precedent such as the end of World War II, the Korean War, and the Gulf War.¹³² He gave the example that after World War II there were numerous individuals detained who could not be repatriated for fear of persecution.¹³³ Henry analogized the situation despite the crucial distinguishing factor that, unlike AL-Hakim and Qassim, detainees during World War II were POWs.¹³⁴

¹²⁵ *Id.* at 10.

¹²⁶ *Id.* at 12.

¹²⁷ *Id.* at 12.

¹²⁸ *Id.*

¹²⁹ Transcripts of Motion Hearing Before the Honorable James Robertson United States District Judge (Aug. 1 2005) at 13, *Qassim*, 382 F.Supp.2d 126 (No. 05 Civ. 0497).

¹³⁰ *Id.* at 14.

¹³¹ *Id.* at 14.

¹³² *Id.* at 18.

¹³³ *Id.* at 18.

¹³⁴ *Id.* at 22.

This “wind up power” would include finding a suitable country in which to transfer the Petitioners. This is a long, ongoing process, and given that Petitioners cannot be returned to China, Henry contended that their continued detention is justified in the interim.¹³⁵ In addition, in response to the allegations that the living conditions of the Petitioners are unsuitable and that the courts should intervene, Henry argued that the court’s constitutional authority to intervene with the executive’s power to detain terrorists is currently on appeal in the D.C. Circuit and thus had no place to be deliberated in the case at hand.¹³⁶ Although acknowledging that the right to file a writ for habeas corpus was decided by the Supreme Court in *Rasul*, Henry stated that there was no indication of whether detainees actually possess any substantive rights once a writ is filed.¹³⁷

Regardless, Henry asserted that it would be impossible to move Petitioners to a less restricted living area. He explained that the situation with Haitian refugees, that Petitioners’ counsel had alluded to, was distinguishable. Unlike the Uighurs, the Haitians had been interdicted on the high seas had never been accused of any crime; were housed at Migrant Operations Center; had been through numerous background checks; and were awaiting pending asylum decisions or third party countries to accept them.¹³⁸ Some of these men were permitted to seek work at retail establishments at Guantanamo. The judge quickly reminded Henry that, although Petitioners were initially alleged to be enemy combatants, they were found to be NLEC and completely exonerated. Ultimately,

¹³⁵ Transcripts of Motion Hearing Before the Honorable James Robertson United States District Judge (Aug. 1 2005) at 17-18, *Qassim*, 382 F.Supp.2d 126 (No. 05 Civ. 0497).

¹³⁶ *Id.* at 15.

¹³⁷ *Id.* at 17.

¹³⁸ *Id.* at 24.

however, the judge agreed that moving Petitioners to civilian headquarters at Guantanamo would not be a suitable alternative due to logistical obstacles.¹³⁹

The government also responded to counsel's complaints that they were not informed of their clients' status as NLEC in a timely fashion. As Henry stated, "basically, we have 120 cases on behalf of more than 230 detainees. We receive requests as to informal discovery as to the status, all the kinds of aspects with respect to Petitioners, and we generally do not respond to those simply because we are not in the position to do it"¹⁴⁰ Mr. Henry, however, did not explain why the government was not in the position to respond to these requests. Judge Robertson, not satisfied with this response, elicited further justifications for this withholding of information to which Henry stated that generally the government does not inform counsel of intent to release detainees unless they are ready for immediate release.¹⁴¹

At this point in the hearing, counsel for the Petitioners was given the opportunity to rebut some of the statements by government's counsel. Willet's response to the concept of a "wind up power" was two-fold. First, he contended that there is no legal basis for this wind up theory, and that in *Zadvydas*, Justice Breyer for the Supreme Court found that six months is the longest you may detain an individual simply because they cannot be repatriated.¹⁴² Additionally, Willet argued that it remained unclear whether efforts to find Petitioners a third country to take them in had been instigated and were actually underway. Lastly, Willet made two requests. The first request was that telephone communications be permitted between Petitioners and their counsel and

¹³⁹ *Id.* at 31.

¹⁴⁰ Transcripts of Motion Hearing Before the Honorable James Robertson United States District Judge (Aug. 1 2005) at 16, *Qassim*, 382 F.Supp.2d 126 (No. 05 Civ. 0497).

¹⁴¹ *Id.* at 20.

¹⁴² *Id.* at 33.

Petitioners and their families. The second request was that an exception be made to the requirement that translators brought into Guantanamo be U.S. citizens and that Willet be permitted to provide his own interpreter.¹⁴³ Henry immediately rejected both of these requests. As a result, Judge Robertson requested both parties to submit supplemental briefs on those specific issues within five days, so that he could review them before the case came to court.¹⁴⁴

On August 19, 2005 the parties convened in the United States District Court for the District of Columbia to hear Judge Robertson's decision regarding the aforementioned issues.¹⁴⁵ In reference to the "wind up power," mentioned by government's counsel in the August 1 hearing, Judge Robertson declared that although it seemed to lack legal justification, the legality was irrelevant, given the desire by both parties for the release of the Petitioners.¹⁴⁶ The disagreement at issue concerned when the Petitioners would be released, where they would be placed, and what authority the courts had to adjudicate the issue.

The Judge began his analysis by agreeing with Petitioner's assertion that the stay should be lifted because the cases on appeal concern detainees that have been found to be Enemy Combatants. For practical purposes, however, he acknowledged that an order requiring immediate release of the Petitioners would be immediately appealed and the Court of Appeals would issue a stay.¹⁴⁷ In reference to Petitioners' contention that the court should order the Petitioners to be brought to court in the United States, Judge Robertson stated that the issue is no longer pertinent. When Petitioners introduced the

¹⁴³ *Id.* at 37.

¹⁴⁴ *Id.* at 40.

¹⁴⁵ *Qassim v. Bush*, 382 F. Supp. 2d 126, (D.C.Cir. 2005).

¹⁴⁶ *Id.* at 128.

¹⁴⁷ *Id.* at 129.

idea at the August 1st hearing, they argued that bringing the Petitioners to the United States was a way to address the lack of telephonic communication, inadequate translators, and unfair conditions imposed upon the meetings between counsel and their clients.¹⁴⁸ The supplemental briefs submitted by government's counsel made large concessions on these points and thus Judge Robertson did not find it necessary to rule on the request.¹⁴⁹ Judge Robertson, however, alluded to the fact that the government's legal argument against the court's right to produce the body of a habeas petitioner circumvents the actual situation.¹⁵⁰ In response to the proposition that the Petitioners be moved to civilian headquarters at Guantanamo, Judge Robertson reiterated his position at the hearing that this was not practical.¹⁵¹ Lastly, despite the obvious sympathy Judge Robertson had for Petitioners, he did not see ordering their release as a viable option. Instead he ordered another hearing, set for August 25, 2005, to discuss the Petitioners' living conditions in the interim.¹⁵²

At the August 25 hearing, very little transpired. Again, Willet argued for the Petitioners that their indefinite detention was unjust and that while the living conditions had improved incrementally, they were still in prison, and thus that the changes were not adequate.¹⁵³ In addition, Willet argued that the relocation of his clients had apparently been in the works for over two years and that twenty-four countries have already declined the United States' request to house the Uighur refugees.¹⁵⁴ Willet acknowledged that,

¹⁴⁸ *Id.* at 129.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Qassim v. Bush*, 382 F. Supp. 2d 126, (D.C.Cir. 2005).

¹⁵² *Id.* at 129.

¹⁵³ Transcript of Status Conference before the Honorable James Robertson United States District Judge (Aug. 25, 2005) at 3, *Qassim*, 382 F.Supp.2d 126 (No. 05 Civ. 0497).

¹⁵⁴ *Id.* at 3. The government failed to inform the Petitioners' counsel that there was an ongoing effort to find a suitable third country will to house the Uighur refugees. *Id.*

while efforts were being made to relocate the Uighur Petitioners, nothing had worked yet. He went on to criticize the government's inaction, saying the effort is not "going to work next month, it's not going to work in six months, it's particularly not going to work if we just fluff up the pillows a little bit in Gitmo and leave them there."¹⁵⁵

Ignoring Willet's larger questions about an ultimate resolution to the problem, the Government responded by saying simply that the conditions had improved. The Petitioners had been granted the interpreter preferred by Willet, Al-Hakim had communicated with his family, and both men had been moved to a different camp at Guantanamo where the living conditions were improved and they could live communally with other NLECs.¹⁵⁶ While acknowledging that the phones calls were still restricted, Henry claimed that there is little that can be done about this.¹⁵⁷

Since the August 25, 2005, very little has changed for Al-Hakim and Qassim. During the August 19 hearing, Judge Robertson refused to adjudicate on Petitioners' motion to vacate the stay.¹⁵⁸ Robertson contended that since both parties desired the release of Al-Hakim and Qassim, and diplomatic efforts were underway to secure a third country host for the two men, deciding whether or not the government has legitimate "wind up power" was irrelevant.¹⁵⁹ Although the Government asserted at a hearing on Dec. 12, 2005 that progress was being made, it refused to elaborate on this progress for the court record.¹⁶⁰

¹⁵⁵ *Id.* at 20.

¹⁵⁶ *Id.* at 11.

¹⁵⁷ *Id.* at 14.

¹⁵⁸ Qassim v. Bush, No. 05-0497, slip op. 1, 1 (D.D.C. 2005).

¹⁵⁹ *Id.* at 1. The Judge did contend, however, that the government's argument was unpersuasive because even if he were to presume the legality of a "wind-up power," nine months in Guantanamo after a CSRT has made a determination of innocence far exceeds the reasonable time limit. *Id.*

¹⁶⁰ *Id.* at 2.

Lack of progress, coupled with the fear that Congress may be in the process of enacting legislation that would strip federal courts of habeas jurisdiction convinced Judge Robertson that it was time to make a decision.¹⁶¹ Judge Robertson stated that he would “rule in two weeks” on the questions of: (1) whether the government has the wind-up authority to indefinitely detain non-U.S. citizens in Guantanamo who have been found NLEC and (2) if not, whether a district court has the authority to provide relief.¹⁶² At a hearing on Dec. 22, 2005, Judge Robertson found that while indefinite imprisonment at Guantanamo is unlawful,¹⁶³ the separation of powers doctrine forbids a district judge from providing relief to the Petitioners.¹⁶⁴ The only viable relief would entail releasing Al-Hakim and Qassim. Judge Robertson held that the political ramifications and potential effects on national security of such relief are “beyond the competence of the courts.”¹⁶⁵

Effectively Al-Hakim’s and Qassim’s legal battle has come to an abrupt halt. The case lacks closure and both men continue to be held in Guantanamo indefinitely despite any indication of wrongdoing. Unfortunately, the situation that Al-Hakim and Qassim now face is indicative of what transpires when the rules of law and equity are divorced from criminal justice. Their case is a powerful example of systematic problems in the handling of political detainees. Had these two men had access to a hearing to determine their status upon arrival, perhaps they would not still be imprisoned in Guantanamo.

Regardless, ignoring the principles behind international humanitarian law and domestic

¹⁶¹ *Id.* at 2. The defense authorization bill, which was approved by Congress the week of Dec. 24, 2005, will greatly limit the access detainees have to U.S. courts. This amendment would effectively preclude Guantanamo detainees from filing writs of habeas in federal courts and would effectively overturn *Rasul*. Josh White, *Detainees Face Limited Access to Courts*, WASHINGTON POST, Dec. 24, 2005, at A04.

¹⁶² *Id.* at 2.

¹⁶³ *Qassim v. Bush*, No. 05-0497, slip op. 1, 3 (D.D.C. 2005).

¹⁶⁴ *Id.* at 4.

¹⁶⁵ *Id.* at 5.

criminal laws, the Bush Administration has thrown these two men into a legal black hole. Thus far, the Government has been either unable or unwilling to find a solution.

Principles Behind International Humanitarian and Domestic Criminal Laws

Al-Hakim and Qassim are not alone at Guantanamo. How many people are being held in Guantanamo right now? In the words of Erwin Chemerinsky, “unless you have classified information, you do not know.”¹⁶⁶ The reality is that nobody outside really knows what is going on inside Guantanamo Bay Naval Base. Currently there are estimated to be between 500 and 600 individuals detained, most of whom have no access to lawyers, friends or family and no means by which to contest their detention.¹⁶⁷ In other words, there are no methods in place to protect these individuals’ liberty or freedom despite the fact that these are concepts that are supposedly so integral to our national identity.

While those detained in Guantanamo might not fit our traditional ideas of the common criminal, and while the threat of terrorism may not mold to our traditional concept of war, it does not naturally follow that we should disregard our traditional notions of fairness and freedom. International and domestic laws regarding the treatment of alleged wrongdoers have evolved to protect these very notions and should be a crucial part of the discussion regarding the rights of the detainees in Guantanamo. Historically, it has been the United States that has shaped the very policies that we seem to be flagrantly ignoring today.

Humanitarian international law and domestic criminal laws together create a system of checks and balances designed to curb the “unbridled power” of states to detain

¹⁶⁶ Erwin Chemerinsky, *Detainees*, 68 ALB. L. REV. 1119, 1122 (2005).

¹⁶⁷ Stephen J. Schulhofer *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1907 (August 2004)

people indefinitely without just cause.¹⁶⁸ The important principles governing the advent of such laws are without question. They involve protecting an individual's right to freedom, personal liberty, reputation, and quality of life, all of which are rights that we, as a society, have a considerable interest in protecting.¹⁶⁹ International agreements, such as the Geneva Conventions, and domestic human and civil rights laws grounded in the constitution protect these interests, interests that are being unduly compromised in the treatment of prisoners in Guantanamo Bay.

The treatment of prisoners such as Al-Hakim and Qassim is indicative of this larger, systemic problem. Al-Hakim and Qassim have felt the consequences of what transpires when we ignore concepts such as due process in favor of considerations like logistical issue and convenience. Ironically Al-Hakim and Qassim, who were both deemed innocent by the government, are exactly those whom the laws aim to protect. The United States should release these two men immediately. If no other country will take them, the United States should grant them asylum and permit them to enter into the country, regardless of procedural barriers.

The Anomaly of Guantanamo

Guantanamo Bay Naval Base, home to Al-Hakim and Qassim for the last three to four years, is 45 square miles, and entirely self-sufficient. The base has its own water system, school system, transportation system, and other amenities equivalent to that of a small city.¹⁷⁰ The population on Guantanamo is approximately 6,000 and growing, and chain restaurants, such as McDonalds, Pizza Hut, Subway and KFC, have sprung up in

¹⁶⁸ Thomas M. Franck, *Criminal, Combatants, or What? An Examination of the Role of Law in responding the Threat of Terror*, 98 AM. J. INT'L L. 686, 686 (Oct. 2004)

¹⁶⁹ Stefan Trenchsel, *Human Rights in Criminal Proceedings*, 7 Oxford University Press, (2005).

¹⁷⁰ Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 35 (2004)

various locations.¹⁷¹ Guantanamo was initially acquired through an agreement with Cuba in 1903, in which Cuba agreed to lease the territory to the United States for 2,000 gold coins.¹⁷² Currently, the annual cost of the lease is \$4,085.¹⁷³

Guantanamo is considered a non-sovereign U.S. territory, which means that although the U.S. exercises “complete jurisdiction and control over and within said areas,” our government also recognizes Cuba’s ultimate sovereignty over the territory.¹⁷⁴ Both Cuba and the US recognize that the lease is indefinite in nature and can only be terminated by mutual consent or abandonment.¹⁷⁵

Guantanamo has historically been used as a naval base, and only in January of 2002, did Guantanamo began to serve in its current capacity as a military detention center in the War on Terrorism.¹⁷⁶ In the last three years, Guantanamo has become the home to approximately 660 “enemy combatants,” many of who are alleged to be Taliban and Al-Qaeda fighters who were captured in Afghanistan after September 11, 2001.¹⁷⁷ There are over 38 different nationalities represented among the Guantanamo detainees.¹⁷⁸ Since January of 2002, the government’s actions with regard to Guantanamo Bay have been

¹⁷¹ *Id.* at 35.

¹⁷² Rui Wang, *Assessing the Bush Administration’s Detention Policy for Taliban and Al-Qaeda Combatants at Guantanamo Bay in Light of Developing United States Case Law and International Humanitarian Law, Including the Geneva Conventions*, 22 ARIZ. J. INT’L & COMP. L. 413, 413 (Summer, 2005). See also Agreement Between the United States of America and the Republic of Cuba for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb 16-23, 1993, art. 3, T.S. No. 418, 1903 U.S.T.Lexis 26.

¹⁷³ Rui, *supra* note 172, at 413.

¹⁷⁴ Neuman, *supra* note 170, at 3.

¹⁷⁵ *Id.* at 3. Many have compared the unusual status of Guantanamo, a territory over which the United States exercises complete jurisdiction and control yet is not sovereign, to other like territories, such as the Canal Zone, the Trust Territory of the Pacific Islands, and the American sector in Berlin. Fundamental rights are generally recognized as applying to both aliens and citizens in these territories. *Id.* at 39.

¹⁷⁶ Eric Metcalfe, *Inequality of Arms: The Right to a Fair Trial in Guantanamo Bay*, 6 Eur. Hum. Rts. L. Rev. 573 (2003)

¹⁷⁷ *Id.* at 574.

¹⁷⁸ *Id.* at 574

clouded in secrecy.¹⁷⁹ Most people in the United States do not know or understand the purpose of the Guantanamo Naval Base, let alone who is being detained there, what rights the detainees may be entitled to, and what military techniques are being employed.¹⁸⁰ Recent reports insinuate that many of those currently detained in Guantanamo, like Al-Hakim and Qassim, may not actually be “enemy combatants” and may not have been captured on the battlefields in Afghanistan.¹⁸¹ In fact, some of the detainees may be actually innocent civilians with little or no ties to terrorist groups.¹⁸²

Regardless, Guantanamo Bay has become a very convenient place for the United States to house detainees during the alleged War on Terrorism as there seems to be a complete absence of legal constraints on government action inside the base.¹⁸³ By and large, Guantanamo Bay has become a virtual “rights-free zone” or “legal black hole.”¹⁸⁴ Although this may not be entirely accurate, Guantanamo Bay does seem to fall conveniently outside the scope of both international and domestic law.

Guantanamo detainees lack the ordinary rights of POWs. Generally, detainees captured in a time of war are entitled to certain protections, whether in accordance with international human rights laws or with domestic criminal law.¹⁸⁵ The Bush administration, however, has declined to apply these protections to persons detained in the War on Terrorism, arguing that it is a new kind of war, one that justifies a different set of rules and regulations.¹⁸⁶ International humanitarian rules regarding appropriate conduct in war have been generally codified in treaties, primarily in the four 1949

¹⁷⁹ Neuman, *supra* note 170, at 1.

¹⁸⁰ *Id.* at 2.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 4.

¹⁸⁵ Shumate, *supra* note 7, at 11.

¹⁸⁶ *Id.* at 3.

Geneva Conventions and the two 1977 Additional Protocols.¹⁸⁷ These international agreements are specifically relevant to Guantanamo detainees, or at least they ought to be. The Geneva Conventions and the Protocols have specifically established guidelines for the treatment of combatants and victims of war.¹⁸⁸ Article 2, common to all of the Geneva Conventions, states that the guidelines are applicable to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”¹⁸⁹ The war on terror would seem to fall within the purview of armed conflict. Even if one of the parties of the armed conflict is not a party to the Geneva Conventions, Article 3, also common to all of the Geneva Conventions, suggest that the contracting parties abide by the Geneva rules.¹⁹⁰

The Geneva Conventions have established various guidelines for international armed conflicts by creating two categories of “protected persons”: combatants - which may be further defined as lawful or unlawful - and civilians.¹⁹¹ Lawful Combatants are generally defined as “members of the armed forces of a party to the international armed conflict.”¹⁹² This can include both members of regular armed forces as well as members of militias or other volunteer corps so long as they fulfill specific criteria.¹⁹³ This latter group of individuals may openly participate in the conflict and may not be punished for

¹⁸⁷ Marco Sassoli, *Use and Abuse of the Laws in the War on Terrorism*, 22 LAW & INEQ. 195

¹⁸⁸ Shumate, *supra* note 7, at 11.

¹⁸⁹ *Id.* at 11 quoting; Sassoli, *supra* note 187, at 199.

¹⁹⁰ *Id.* at 12.

¹⁹¹ *Id.* at 13.

¹⁹² Shumate, *supra* note 7, at 14.

¹⁹³ *Id.* at 14-15. In order for a combatant member of a militia or a volunteer corp. to be considered a POW they must “(1) belong to an organized group, (2) the groups must belong to a party of the conflict, (3) the groups must be commanded by a person responsible for his subordinates, (4) the group must ensure that its members have a fixed, distinctive sign recognizable from a distance, (5) the group must ensure that its members carry their arms openly; and (6) the group must ensure that its members conduct their operations in accordance with the laws and customs of war.” *Id.* at 15.

it, yet they can also be attacked.¹⁹⁴ When combatants fall into the hands of an enemy, so long as they have complied up to that point with the laws of war, they become POWs.¹⁹⁵ POWs are generally afforded the highest level of protections under the Geneva Conventions.¹⁹⁶ Once POW status has been determined, detainees are entitled to combat immunity, which means they may not be punished for participating in the conflict and they have the right to humane treatment.¹⁹⁷ POWs, however, may be detained for the duration of the conflict so as to prevent them from returning to fight alongside the enemy.¹⁹⁸

Generally, those who are not classified as POWs are deemed civilians and are protected under the Civilian Convention, part of Geneva Convention.¹⁹⁹ Civilians are defined as protected persons who “at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not national.”²⁰⁰ Civilians may not participate in the hostilities and may only be detained for “(1) punishment of criminal offenses under domestic legislation and (2) urgent security reasons.”²⁰¹ Under the Fourth Geneva Convention, civilians are entitled to a regular trial with representation by counsel who may frequently visit the accused.²⁰² Treatment of civilian detainees must follow very

¹⁹⁴ Sassoli, *supra* note 187, at 204.

¹⁹⁵ Shumate, *supra* note 7, at 13

¹⁹⁶ *Id.* at 14.

¹⁹⁷ *Id.* at 19.

¹⁹⁸ *Id.* at 19-20.

¹⁹⁹ *Id.* at 20-21.

²⁰⁰ *Id.* at 20-21. Generally, those classified as civilians, may not be nationals of a “co-belligerent” state or “nationals of neutral states in the home territory of a party to the conflict, as long as such states have “normal diplomatic representations in the State in whose hands [the nationals] are. *Id.*

²⁰¹ Shumate, *supra* note 7, at 21.

²⁰² *Id.* at 22.

strict and detailed provisions of the Fourth Convention and the cases must be reviewed every six months.²⁰³

Detainees who are currently housed at Guantanamo Bay, like Al-Hakim and Qassim, are not classified as either Legal Combatants or Civilians. Instead, they fall under the new designation of Enemy or Unlawful Combatants.²⁰⁴ Unlawful combatants are generally thought of as guerrilla fighters, partisans, and members of resistance movements, and historically have been entitled to at least some protections under the Geneva Conventions.²⁰⁵ The Bush administration, however, denies that those captured in the War on Terrorism should receive protection under any of the four Geneva Conventions.²⁰⁶ The administration argues that this is a new kind of war and requires new rules.²⁰⁷ They argue that the framers of the original Geneva Conventions could not have envisioned this type of conflict, and thus the rules of the convention cannot and should not be presumed to apply to the current War on Terrorism.²⁰⁸ In addition, they claim that the detainees are not part of any state and thus are not even privy to the Conventions.²⁰⁹ Lastly, they argue that members of Al-Qaeda and the Taliban specifically are not entitled to POW status.²¹⁰

Article 5 of the Geneva Conventions requires all detainees to be considered POWs by default, and that if there is any doubt as to their status, a competent tribunal must make the determination as to their status.²¹¹ The Bush Administration has bypassed

²⁰³ Sassoli, *supra* note 183, at 206.

²⁰⁴ *Id.* at 208.

²⁰⁵ Shumate, *supra* note 7, at 13.

²⁰⁶ Sassoli, *supra* note 183, at 208.

²⁰⁷ Shumate, *supra* note 7, at 3.

²⁰⁸ *Id.* at 9

²⁰⁹ *Id.* at 8.

²¹⁰ *Id.* at 8-9.

²¹¹ *Id.* at 19. *See also* Metcalfe *supra* note 176, at 580.

this requirement and made its own determinations, concluding that those detained at Guantanamo are enemy combatants, not deserving of POW status.²¹² Al Hakim and Qassim fell within this category by default, and it was not until years after their initial capture that a combatant status review tribunal found them to be innocent of any charges.

Many legal scholars argue that regardless of this classification scheme, all detainees captured during wartime should be entitled to rights under the Fourth Geneva Convention,²¹³ such as individualized determinations of the circumstances specific to their detention.²¹⁴ It is exactly this review that allowed Al-Hakim and Qassim to show that they were not involved in Al Qaeda and in the Afghanistan war.

For some it may seem a bit unorthodox to argue that “lawful combatants,” those who when captured become POWs because they have followed the laws of war, can be detained indefinitely without access to judicial determinations, while “unlawful or enemy combatants” should be entitled to individualized determinations. These requirements, however, are in place to ensure that mistakes are not made and that innocent people like Qassim and Al-Hakim, are not imprisoned. Lawful Combatants, for example, are easy to distinguish; they will often concede their participation in the conflict and they often are found wearing uniforms, etc.²¹⁵ Thus, the likelihood of erroneously detaining innocent people as lawful combatants is small.²¹⁶ In contrast, the chance of erroneous detentions of unlawful or enemy combatants is much higher because it is difficult to determine their

²¹² Shumate, *supra* note 7, at 7.

²¹³ Sassoli, *supra* note 183, at 209. For example, the Legal Advisor for the US State Department admitted that “unlawful combatants” should be protected by the Fourth Convention. *Id.* Many assert that “every person in enemy hands must have some status under international law; he is either a POW, as such, covered by Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention.” *Id.* at 208.

²¹⁴ *Id.* at 209.

²¹⁵ *Id.* at 210.

²¹⁶ *Id.* at 210.

status. To date, nobody actually knows for certain how many innocent people, such as Al-Hakim and Qassim, are being unlawfully detained because there is very little information made available to the public.²¹⁷ By creating a category of combatants, outside the scope of any detention guidelines, the Bush administration has been able to detain virtually anyone, for an indefinite time, without providing the person with a venue for contestation.²¹⁸

Given the reluctance of the Bush administration to apply international rules of law to the War on Terrorism, advocates for those currently detained in Guantanamo have alternatively proposed that detainees be given access to United States courts to contest their detention. Such access would ensure that the right to be free from unlawful detention would not be eroded without due process. Ultimately, this right is only meaningful if an individual has access to United States court, or in other words, the right to petition for writs of habeas corpus.²¹⁹ In reference to the right to habeas relief, Sabin Willet, counsel for Al-Hakim and Qassim stated, “Only habeas got Adel [, another Uighur detainee,] a chance to tell a federal judge what had happened. Only habeas corpus revealed that it wasn’t just Adel who was innocent – it was Abu Bakker and Ahmet and Ayoub and Zakerjain and Sadiq – all Guantanamo “terrorist” whom the military has found innocent.”²²⁰

²¹⁷ Morning Edition, *supra* note 9.

²¹⁸ Sassouli, *supra* note 183, at 210.

²¹⁹ Jill M. Marks, *Jurisdiction of Federal Court to Grant Writ of Habeas Corpus in Proceeding Concerning Alien detainees Held Outside the United States* 192 A.L.R. FED. 595, §2. The Writ of Habeas Corpus is “the protection of individuals against the erosion of their right to be free from wrongful restraints on their liberty.” The constitution provides that the writ for habeas can only be suspended when it necessary for public safety. Congress has granted the federal courts jurisdiction over these petitions through the enactment of a statute. When a judge grants a writ of habeas under the statute, it essentially means that whoever is responsible for the detention of the petitioner is required to demonstrate that it is lawful. *Id.* at §2 and § 3.

²²⁰ Sabin Willet, *Detainees Deserve Court Trials*, WASHINGTON POST, Nov. 14, 2005, at A21.

Whether or not detainees held in Guantanamo have the right to seek a writ of habeas corpus has been a question of intense debate in the Supreme Court.²²¹ The determining factor, as decided by the Supreme Court in *Johnson v. Eisentrager*,²²² has been whether or not Guantanamo is considered a sovereign territory of the United States. As a result, the United States courts, have repeatedly denied detainees in Guantanamo the right to petition for writs of habeas.²²³

While the right to petition for a writ of habeas from a non-sovereign United States territory was explicitly rejected by the Supreme Court in *Johnson*, the scope has been redefined by a more recent Supreme Court decision, *Rasul v. Bush*. In *Rasul*, the Court analyzed the right to petition for a writ of habeas corpus not from the petitioner's perspective but from the perspective of the person responsible for the detention. This means that the Court effectively bypassed the issue of whether or not Guantanamo Bay is United States Sovereign territory, and instead focused on the jurisdictional location of the person purported to be holding the prisoner unlawfully.²²⁴

²²¹ Marks, *supra* note 215, at §2. See *Johnson v. Eisentrager*, 330 U.S. 763 (1950) (holding that German prisoners detained abroad had no legal right to contest their detention and thus not right see a writ of habeas corpus because at no time were the detainees in sovereign United States territory). *Johnson* also discussed the implications of permitting prisoners outside the sovereign United States to petition for writs of habeas which included transportation costs, for both the Petitioners and possible witnesses, a hampering of security progress, etc. Captain Christopher M. Shumann "Bring it on: The Supreme Court Opens the Floodgates with *Rasul v. Bush*" 55 A.F.L. REV. 349, 349 (2004) (referring to dicta in the *Johnson* decision).

²²² *Johnson v. Eisentrager*, 330 U.S. 763 (1950).

²²³ *Id.* at. §2. Since *Johnson*, there have been many cases involving detainees in United States courts, and while many of them failed to explicitly reaffirm the holding in *Johnson*, all of the courts implied that the *Johnson* holding was still sound. See *Clergy v. Bush* 189 F.Supp. 2d 1036 (C.D. Cal. 2002), *aff'd* in part, *rev'd* in part on other grounds, 310 F.3d 1153 (9th Cir. 2002), cert. denied, 123 S. Ct. 2073, 155 L.Ed. 2d 1060 (U.S. 2003) (holding that friends of combatants detained outside the United States in Cuba lacked standing to petition for writs of habeas corpus on behalf of detainees and stating that the *Johnson* holding "represent a formidable obstacle to the rights of detainees ... to the writ of habeas corpus"); *Odah v. United States*, 321 F.3d 1134, 192 A.L.R. Fed. 775 (D.C. Cir. 2003), cert. granted, 124 S. Ct. 534 (U.S. 2003) and cert. granted in part, 124 S. Ct. 534 (U.S. 2003) (following the decision in *Johnson*, determined that Guantanamo is not a sovereign territory and thus detainees located in Guantanamo did not have the right to petition for a writ of habeas corpus.)

²²⁴ Marks, *supra* note 215, at § 3.

The court in *Rasul* ultimately held that “the Federal habeas statute conferred on the district court jurisdiction to hear the challenges of aliens who were captured abroad in connection with hostilities arising from the September 11, 2001, terrorist attacks within the United States, and subject to executive detention at the United States Naval Base at Guantanamo Bay, Cuba, to the legality of their detentions; even though Cuba had ultimate sovereignty over the naval base area leased from Cuba, the United States exercised plenary and exclusive jurisdiction over that territory.”²²⁵ Although this is the current Supreme Court ruling, the decision has been interpreted in various ways and it is unclear how the district courts will apply it.²²⁶ At the moment, Guantanamo detainees have no clearly defined right to petition for writs of habeas and although this right is what ultimately allowed Al-Hakim and Qassim to contest their detention after being found innocent. There is a possibility that it could be revoked as a result of future litigation.²²⁷

While clearly the rights of detainees in Guantanamo, under either international humanitarian laws or domestic criminal laws, are in a state of flux, the Bush administration has created some measures through which detainees can seek relief such as Combatant Status Review Tribunals.²²⁸ On July 7, 2004, the Bush Administration determined that all detainees have a right to a military tribunal to contest their status as enemy combatants.²²⁹ Proponents of the CSRTs argue that trying terrorist matters in civilian courts would “expose civilian judges, jurors and courts to threats and reprisals

²²⁵ *Id.* at §3 citing *Rasul v Bush*, 542 U.S. 466 (June 28, 2004).

²²⁶ John R. Crook, *Conflicting District Court Decisions on Guantanamo Bay Detainees*, 99 AM. J. INT’L L. 485, 485 (April 2005). *See e.g.* *Khalid v. Bush*, 355 F. Supp. 2d 311, 311 (D.D.C. 2005). (holding that “no viable theory exists” under which a court could grant Guantanamo detainees writs of habeas corpus’) *but see In Re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) (finding that a groups of 54 Guantanamo detainees were entitled to petition for writs of habeas corpus).

²²⁷ Josh White, *Detainees Face Limited Access to Courts*, WASHINGTON POST, Dec. 24, 2005, at A04.

²²⁸ Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy (July 7, 2004)

²²⁹ *Id.*

from terrorist groups,” while military commissions, “permit speedy, secure, fair and flexible proceedings, in a variety of locations, that would make it possible to minimize these risks.”²³⁰ In addition, military tribunals permit the use of confidential information and are not restricted by the rules of evidence, which allow the tribunals to hear all probative evidence.²³¹ The current proposals suggest that: (1) CSRTs should be composed of three neutral commissioned officers, (2) detainees should be forewarned of the allegations against them (3) detainees should be provided an interpreter, (4) detainees must have permission to attend the hearing as well as testify on their behalf, and lastly and perhaps most important, (5) “preponderance of evidence shall be used in reaching [the determination of whether the detainee is properly detained as an enemy combatant], but there shall be a rebuttable presumption in favor of the Government’s evidence.”²³²

Although very few would argue that the conception of the military tribunal is inherently unconstitutional,²³³ the currently proposed tribunals have been under attack and it is unclear whether they will pass constitutional muster.²³⁴

²³⁰ Metcalfe *supra* note 176, at 574.

²³¹ *Id.* 578

²³² Kent Roach & Gary Trotter, *Miscarriages of Justice in the War on Terror*, 109 PENN ST. L. REV. 967, 1019-1020 (Spring 2002); Professor Ruth Wedgewood, a fervent proponent of the military tribunals and a former federal prosecutor and currently a professor of international law at Yale and John Hopkins, argues that normal due process requirements should not apply to detainees. “U.S. Marines may have to burrow down an Afgan cave to smoke out leadership of al Qaeda. It would be ludicrous to ask that they pause in the dark to pull an Afgan-language Miranda care from their kit bag. This is war, not a criminal case.”

²³³ Senator Carl Levin, Chairman to the Senate Armed Services Committee on Military Commissions, noted that “A number of people, the White House counsel included, have equated military commissions with our system of military justice, including court martial. This committee has jurisdiction over the uniformed Code of Military Justice, which is found in Title X of the United States Code. There is a difference between the high level of protections afforded our military personnel tried before courts-martial where the evidentiary rules and burden of proof are virtually identical to those in our federal district courts, and the procedural protections for individuals tried before military commissions. Speaking of them both in the same breath creates an enormous impression about both.” Metcalfe *supra* note 176, at 579 (quoting Senator Carl Levin at the “Hearings on Military Commissions, December 13, 2001.)

²³⁴ Metcalfe *supra* note 176, at 577. Judge Green discussed the constitutionality of military tribunals in depth in *In Re Guantanamo*. *In Re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). She claims that CSRT’s reliance on classified information in its determinations of enemy combatant status, the

Proponents argue that CSRTs provide only a minimal level of due process for individuals. They are not independent and impartial tribunals²³⁵ and they permit only a restrictive form of the right to counsel.²³⁶ In addition, they permit military jurisdiction over non-military criminal conduct, and do not grant Petitioners the right to appeal an unfavorable judgment.²³⁷ Lastly, and quite possibly most importantly, the standard and burden of proof requirement effectively requires the accused to prove that he is not an enemy combatant.²³⁸ As a result, the determinations made by the military commissions can produce false positives and negatives.²³⁹

As a result of this criticism, on November 7, 2005 the Supreme Court agreed to review a case regarding the constitutionality of Bush's military tribunals.²⁴⁰ In the interim, however, the safeguards provided by this process are responsible for the determination of Al-Hakim's and Qassim's innocence. These findings of innocence show the critical importance of maintaining at least the minimal protection offered by the CSRTs.

inability of detainees to review the classified evidence, and the deprivation of adequate counsel, denied detainees a fair opportunity to contest their detainment in violation of their due process rights. *Id.* at 468.

²³⁵ The CSRT itself is comprised of three US military offices. Roach & Trotter, *supra* note 232, at 1022.

²³⁶ The counsel designed to represent detainees under the CSRT procedure, who could potentially protect against tunnel vision, is merely a "personal representative," in other words, a military officer with a security clearance. Roach & Trotter, *supra* note 232, at 1022.

²³⁷ Metcalfe *supra* note 176, at 583-584

²³⁸ Roach & Trotter, *supra* note 232, at 1020-21. The Standard of proof requirement, "one of the important structural features of any legal proceeding" should generally be "beyond a reasonable doubt." The CSRT requires only a civil standard of proof, which, coupled with the presumption in favor of the government creates an almost tunnel vision that promotes the likelihood of disregarding exonerating evidence. *Id.* at 1021.

²³⁹ *Id.* at 1013. For example, the Department of Defense [DOD] claims that already 12 people released from Guantanamo have returned to terrorist activities. *Id.* Although the DOD uses this to promote the need for caution in releasing detainees, it also can be used to support the need for "full adversarial procedure" so as to correctly identify both the guilty and the innocent. *Id.* at 1014.

²⁴⁰ Linda Greenhouse, *Justices to Rule on a Challenge to U.S. Tribunals*, N.Y. TIMES, Nov. 8, 2005, at A1.

Preserving Procedural Safeguards of Justice

Since September 11, 2001 combating terrorism has jumped to the forefront of the nation's political agenda.²⁴¹ In response to the attacks, the Bush administration was forced to act quickly. Almost immediately it began implementing an anti-terrorism strategy that while quick and forceful, lacked legal standards of justice which are crucial to the success of such a strategy.²⁴² The detention of innocent people, such as Al-Hakim and Qassim, provides an appropriate example of the adverse consequences of such actions, which in fact serve to decrease the overall safety of U.S. citizens.²⁴³ If we view national security in a broader sense, it is imperative that the Bush administration accounts for these injustices in waging its War on Terrorism and attempt to maintain "legal standards of fair treatment . . . to ensure the just and accurate determination of individual responsibility."²⁴⁴

The Due Process clause of the fifth Amendment "is in many way the backbone of the rights guaranteed by the Constitution."²⁴⁵ Detainees in Guantanamo like Al-Hakim and Qassim, are long-term prisoners "subject to comprehensive and unceasing control in every aspect of their lives by United States' officials claiming justified authority over them by United States' law."²⁴⁶ The deprivation of life, liberty and property, even when

²⁴¹ Neuman, *supra* note 170, at 2.

²⁴² Roach & Trotter, *supra* note 232, at 973

²⁴³ *Id.* at 974. According to Trotter, in a "non-terrorism context, a miscarriage of justice imposed wrongs on those wrongfully convicted. Society also suffers because the wrongful conviction of an innocent person means, by definition, that a guilty person goes free." *Id.* at 974. In addition, Trotter poses that generally, the punishment of innocent people generally falls disproportionately on "less powerful groups" such as minority groups. *Id.* at 974.

²⁴⁴ *Id.* at 969.

²⁴⁵ Jesselyn A. Radack, *You say Defendant, I Say Combatant: Opportunistic Treatment of Terrorism Suspects Held in the United States and the Need for Due Process*, 29 N.Y.U. Rev. L. & Soc. Change 525 (2005).

²⁴⁶ Neuman, *supra* note 170, at 51.

dealing with alleged terrorists, cannot go unchecked.²⁴⁷ Although there may be certain scenarios justifying the limitation of procedural safeguards for a short period of time for enemy combatants, such as in countries where war is rampant and compromises of certain rights may be unavoidable, Guantanamo Bay does not fit this exception.²⁴⁸ Depriving Guantanamo detainees of due process rights permits the Bush Administration “discretion to starve them, to beat them, to maim them, or to kill them, with or without hearings and with or without evidence of any wrongdoings.”²⁴⁹

A system, such as the one designed by the Bush Administration to fight terrorism, which does not integrate notions of due process and fairness, is likely to have high rates of error.²⁵⁰ As a result, many detainees have been released after months or years in confinement when the government has determined their innocence.²⁵¹ Although the Administration argues that this demonstrates its willingness to correct its mistakes, it is arguable that simply releasing a detainee after potentially years of imprisonment, can never account for the grave injustice that person has faced, especially considering that our own government has determined they never should have been there in the first place.²⁵²

On this basis, Michael Ratner has argued:

Here were men who obviously should never have been taken to Guantanamo and yet they were imprisoned. Here were men who, had there been a hearing before some form of a tribunal, would have been freed long ago. Here were men, apparently released only because their government, a necessary ally of the United States in the War on Terrorism, insisted. There are surely many more such men suffering at Guantanamo. These stories of the innocent, of some detainees not involved in any fighting, of detainees that were no more than lowly foot soldiers, demonstrate the

²⁴⁷ Radnack, *supra* note 245, at 543-44.

²⁴⁸ Neuman, *supra* note 170, at 51.

²⁴⁹ *Id.* at 52.

²⁵⁰ Roach & Trotter, *supra* note 232, at 1013

²⁵¹ *Id.* at 1013.

²⁵² *Id.* at 1013.

importance of a legal process for determining the status of those imprisoned on Guantanamo. They demonstrate the wisdom of those who insist that the rule of law is a necessary component of human freedom.²⁵³

Mr. Abu Bakker Qassim, and Mr. A'del Abdu Al-Hakim are victims of this system. Unfortunately, they have yet to be released from their imprisonment. Here are men who have had a hearing in front of a CSRT and were found innocent; yet still remain in Guantanamo. This is precisely why the need for due process is imperative to any criminal justice system.

What is Next for Abu Baker Qassim and A'del Abdu Al-Hakim

While the government is willing to concede that the situation of Qassim and Al-Hakim is unfortunate, it has yet to provide a viable solution, and thus consequently, these two men remain imprisoned in Guantanamo. While the problem these two men face is indicative of a larger, systematic problem, the solution could be simple. These two men want to leave Guantanamo; they want their freedom and their liberty. They want to be able to speak with their families without a third party censoring their conversation. They want to eat their meals at their leisure. The United States government has the ability to make this happen simply by permitting them to apply for asylum in the United States until replacement in a third country becomes practical. Thus far, the government has refused to permit this. In the last four years the United States government has permitted between 700,000 and 1,000,000 immigrants into this country, yet in the case of Al-Hakim and Qassim they are refusing to permit entry to two more immigrants.²⁵⁴

²⁵³ Michael Ratner, *Moving Away from the Rule of Law: Military Tribunals, Executive Detention, and Torture*, 24 CARDOZO L. REV. 1513, 1520 (April 2003).

²⁵⁴ Homeland Security, Yearbook of Immigration Statistics: 2004 (Table 1), <http://uscis.gov/graphics/shared/statistics/yearbook/YrBk04Im.htm>. (last modified June 24, 2005).

Article 33(1) of the 1951 Refugee Convention forbids the United States from sending these two men back to China by stating that “no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.”²⁵⁵ The Uighur community in China faces systematic oppression and abuse from the Chinese government. Repatriation would put these men in grave danger.²⁵⁶ Thus the only other viable solution is to send Al-Hakim and Qassim to a third country that is willing to grant them refugee status. So far, however, the United States government has been unsuccessful in finding a country willing to grant them asylum, either through fear of political retaliation from the Chinese government, or from an unwillingness to believe that these men are truly innocent.²⁵⁷ The United States’ refusal to admit them into the United States further serves to solidify this doubt.

The right to “seek and enjoy” asylum in the United States is considered a fundamental right and is codified in many “legal instruments.”²⁵⁸ Although this right has clearly been diluted through domestic legislation and reform, the principles governing the laws of asylum are still central to our foreign policy and our concepts of human rights.²⁵⁹ The principles governing the right to asylum include but are not limited to the alleviation of global suffering, an appreciation for liberty and freedom, and a desire to create a global community that takes care of its members.²⁶⁰ What the Bush administration has

²⁵⁵ Thomas David Jones, *A Human Rights Tragedy: The Cuban and Haitian Refugee Crises Revisited*, 9 GEO. IMMIGR. L.J. 479, 481. (Summer 1995).

²⁵⁶ Morning Edition, *supra* note 9.

²⁵⁷ *Id.*

²⁵⁸ Jones, *supra* note 255, at 279.

²⁵⁹ *Id.* at 485.

²⁶⁰ *Id.*

done to Al-Hakim and Qassim puts our purported commitment to these principles in serious question. Unlawfully holding them in Guantanamo has already compromised their liberty and freedom, caused them massive emotional and physical suffering, and isolated them from their community. Granting them asylum, under the circumstances, would only incrementally compensate for their injuries, but it is the least we can do.

Furthermore Al-Hakim and Qassim are ideal candidates for asylum. According to the criteria for qualifying for asylum, petitioners must demonstrate that they fall within the statutory definition of a “refugee” and that they are eligible for asylum. In addition, since ultimately the granting of asylum is a discretionary function, there are many other weighted factors that can contribute to the final determination.²⁶¹

The statutory definition of refugee under the Immigration and Nationality Act (INA) contains three elements: (1) the individual must seek protection outside of his/her country, (2) the individual must have a well-grounded fear of persecution and (3) the persecution must be based on race, religion, nationality, social group or political opinion.²⁶² Because Al-Hakim and Qassim have been unlawfully imprisoned by the U.S. government in Guantanamo, they are clearly seeking asylum from outside their home country.²⁶³ Additionally, both men have a well grounded fear of persecution, which has been recognized by both international human rights groups and the U.S. Department of State, based on their social group and political opinions.²⁶⁴

The eligibility requirement, however, is where Al-Hakim and Qassim are barred from asylum. In order to be asylum ready, an individual must be a non-citizen, who

²⁶¹ Arthur C. Helton, *Criteria and Procedures for Refugee Protection in the United States*, 1340 *PLI/Corp* 221, 223 (Oct-Nov 2002).

²⁶² *Id.* at 223-233.

²⁶³ Morning Edition, *supra* nte 9.

²⁶⁴ *Id.*

arrives in the United States, who may *not* be returned safely to a third country.²⁶⁵ While both men are clearly non-citizens who cannot be repatriated to China, they are not technically in the United States.²⁶⁶ The jurisdictional requirement appears to be the only obstacle barring a successful asylum application. Although one could clearly make the argument that Guantanamo Bay is in every practical sense a United States territory, the debate on Guantanamo jurisdictional identity has been currently stalled in the Supreme Court.²⁶⁷

Under current asylum law, “immigration judges have broad discretion to either grant or deny refugee asylum.”²⁶⁸ The immigration judge’s determinations are generally weighed using a “totality of circumstances” approach.²⁶⁹ Factors to be considered include, but are not limited to: (1) how many countries the immigrant passed through on his way to the United States (2) whether he could have remained in one of the other countries, (3) whether this is his first attempt at asylum in the United States, (4) and whether he committed fraud in coming to the United States.²⁷⁰ The judge may deny the claim if sufficient adverse factors seem to outweigh the fear of persecution,²⁷¹ or may choose to disregard these factors and grant the claim using moral justifications.²⁷² Regardless of the “adverse factors” that might favor deportation or denial of asylum, “the

²⁶⁵ Helton, *supra* note 261, at 241

²⁶⁶ Morning Edition, *supra* note 9.

²⁶⁷ Memorandum in Support of Petitioners’ Emergency Motion to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners at 4, *Qassim*, 382 F.Supp.2d 126 (No. 05 Civ. 0497).

²⁶⁸ Kathryn Heebner, *Protecting the Truly Persecuted: Restructuring the Flawed Asylum System*, 39 U.S.F.L. Rev. 549, 550 (Winter 2005).

²⁶⁹ *Id.* at 557.

²⁷⁰ *Id.* at 557.

²⁷¹ Helton, *supra* note 261, at 242.

²⁷² See *Sale v. Haitian Refugee Counsel*, 509 U.S. 155, 159-160 (1993) (stating that since the granting of asylum is purely discretionary, even if an alien meets all the statutory requirements of a refugee, the attorney general may still deny them asylum).

danger of persecution should outweigh all but the most egregious adverse discretionary factors.”²⁷³

There is little doubt that granting Al Hakim and Qassim asylum is the right thing for the government to do. While there is absolutely no way to repay these men for what they have endured at the hands of the United State’s “War on Terrorism,” every single day that these men remain in Guantanamo, compounds the injustice they have faced. The United States has an obligation to do everything in its power to compensate these men for their loses, which at the very least requires their immediate release from Guantanamo.

Conclusion

The unjustdetention of Al -Hakim and Qassim is illustrative of what happens when a society becomes so entrapped in its own fears that it allows the government to evade the normal procedural safeguards that provide the minimal but necessary protection for the wrongly accused. In response to September 11 and the growing paranoia in the United States, the Bush administration has created a system to combat terrorism, which is designed to ensure quick and tangible results and immediately allay this country’s fear. This type of system, however, creates a false sense of security, for while we are locking up innocent men, such as Al-Hakim and Qassim, we are permitting those who actually do pose a threat to the United States to go undetected.

In unfamiliar times such as these, where the U.S. feels the most insecure, the most vulnerable, it is important to ask ourselves how much are we willing to compromise in order to create the image of safety and security. Would we be willing to compromise our own freedoms, our own liberties? The imprisonment of innocent fathers, innocent

²⁷³ Anwen Hughes, *Asylum and Withholding of Removal – A Brief Overview of the Substantive Law*, 1477 PLI/Corp 293, 313 (2005).

husbands, and innocent sons is not an acceptable compromise. The Uighur community, an already vulnerable minority lacking in resources and security, deserves the protections that our criminal justice system is designed to safeguard. The right to confront your accuser, the right to a fair and impartial trial, the right to due process, the right to petition for a writ of habeas, are all integral to preserving the integrity of the Bush Administration's systematic War on Terrorism.

Al-Hakim and Qassim are two of the many victims of this biased and unjust system. They were simply in the wrong place at the wrong time and as a result have now lost four years of their lives and potentially more. Although there is nothing that the Bush Administration can do to compensate these men for their injuries, it is unacceptable that they remain in Guantanamo.

Despite the inadequacy of the system, Al-Hakim and Qassim have managed to voice their plight to the international community and prove their innocence. Most Guantanamo detainees will not be so lucky. The continued confinement of two foreign nationals, who the U.S. government recognizes as innocent, is a grave miscarriage of justice. Short of releasing these men, there is little the Bush Administration can do to erase this embarrassing and horrific mistake. The notion of due process, however, must be woven back into the War on Terrorism before other irrevocable miscarriages of justice occur.

