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AMERICAN BAR ASSOCIATION

NEW YORK STATE BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- 1 RESOLVED, That consistent with the direction given by the Supreme Court in *Boumediene v.*
2 *Bush*, the procedural framework for habeas petitions brought by those detained at the
3 Guantanamo Naval Base at Guantanamo Bay, Cuba should be determined by the District Court,
4 with rights of appeal, rather than by Congress;
5
6 FURTHER RESOLVED, That, in recognizing the right of each detainee to be given a
7 meaningful hearing on the basis of his detention and the Government's legitimate national
8 security concerns, U.S. courts should grant to the detainees all rights granted to habeas
9 petitioners consistent with Federal statutory habeas and informed by the Uniform Code of
10 Military Justice and criminal law principles where applicable, appropriate to the facts and
11 circumstances of that petitioner's case.

REPORT

I. INTRODUCTION

On June 12, 2008, the Supreme Court in *Boumediene v. Bush* invalidated the habeas stripping provisions of the Military Commissions Act of 2006 (“MCA”) as an unconstitutional suspension of the writ of habeas corpus. *Boumediene* held that non-citizens detained as enemy combatants at the Guantanamo Naval Base at Guantanamo Bay, Cuba (“Guantanamo”) have the right to challenge their detentions under the Suspension Clause and that the procedures established under the Detainee Treatment Act of 2005 (“DTA”) for review of Combatant Status Review Tribunal (“CSRT”) enemy combatant determinations were not an adequate habeas substitute. In doing so, the Court reaffirmed in no uncertain terms our nation’s long-standing commitment to the rule of law, explaining that “liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be part of that framework, a part of that law.”¹

This Report addresses one of the most pressing and immediate questions left open by the *Boumediene* decision - the procedural framework for Guantanamo habeas petitions pending in the D.C. District Court. Although *Boumediene* established that Guantanamo detainees can challenge their detention, it explicitly declined to identify the process due to detainees in habeas proceedings. Our analysis leads us to first conclude that the American Bar Association should support the District Court, not Congress nor the Executive, as the proper forum to address the procedural standards applicable to Guantanamo detainee habeas proceedings. Assessment of habeas procedural rights falls within the practical and traditional providence of the judicial branch and any intrusion by the political branches raises serious separation of powers issues. Second, in light of the substantial liberty interests and the Government’s legitimate national security concerns at issue, we conclude that the ABA should support that Guantanamo detainee habeas petitioners be generally afforded (1) the procedural rights ordinarily available to federal habeas petitioners under the Federal Habeas Statutes and accompanying rules, such as discovery, an evidentiary hearing and compulsory process, (2) the right to exculpatory *Brady* information and (3) the right to confront the witnesses against them, *unless* the Government can demonstrate exigent circumstances outweighing provision of these procedural safeguards. In any event, the Government should bear the burden of justifying the petitioner’s detention and hearsay should be generally inadmissible unless it falls within an established exception and supported by sufficient indicia of reliability. Finally, the discovery and admissibility of classified information should be guided by the rules and precedent under the Classified Information Protection Act.

II. BACKGROUND - *BOUMEDIENE* AND THE IMMEDIATE AFTERMATH

Boumediene was the Court’s latest statement in the ongoing constitutional dialogue between the Judicial, Executive and Legislative branches concerning Executive detention in the global war on terror and the role of habeas corpus. Beginning in January 2002, the U.S. detained hundreds of individuals at Guantanamo as “enemy combatants” and – at least initially – asserted that they fell outside the purview of the U.S. judicial system. In response to several Supreme Court decisions concerning the detention of enemy combatants, the Administration created the CSRTs to

¹ *Boumediene v. Bush*, 128 S.Ct. 2229, 2277 (2008). We note that this Report was completed on July 28, 2008.

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determine whether Guantanamo detainees were enemy combatants.² Under the DTA,³ Congress limited review of the CSRT decisions to review by the D.C. Circuit Court of Appeals and stripped federal courts of jurisdiction to hear Guantanamo habeas petitions. But the Supreme Court held in *Hamdan v. Rumsfeld* that the DTA's habeas stripping provisions did not apply to cases pending when the DTA was enacted.⁴ Within months of the *Hamdan* decision, Congress passed the MCA wherein Section 7 explicitly stripped federal courts of jurisdiction to hear any Guantanamo detainee habeas petitions.⁵

In determining the constitutionality of Section 7 of the MCA, the *Boumediene* Court addressed (1) whether Guantanamo detainees have the constitutional privilege of habeas corpus and, if so (2) whether the DTA constituted an adequate and effective habeas substitute.⁶ The Court made clear from the onset that its analysis was grounded in separation-of-powers and checks and balances principles, stating: “the suspension clause is designed to protect against cyclical abuses” of the writ by the political branches, and “ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device [] to maintain the delicate balance of governance that is itself the surest safeguard of liberty.”⁷ Viewed through this lens, the Court emphatically rejected the Government's sovereignty-based habeas test.⁸ Rather, the Court found that “questions of extraterritoriality turn on objective factors and practical concerns,”⁹ and fashioned a three-factor test for determining whether habeas would reach abroad: (1) “the citizenship and status of the detainee and the adequacy of the process through which that status determination was made;” (2) “the nature of the sites where apprehension and then detention took place;” and (3) “the practical obstacles inherent in resolving the prisoner's entitlement to the writ.”¹⁰ Applying this test, the petitioners were entitled to the writ because (1) the detainees' status was in controversy, and the CSRTs fell “well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review,” (2) Guantanamo was in every practical sense “not abroad” because of the Government's indefinite and exclusive control over the island, and (3) the Government presented no evidence that the military mission would be compromised if habeas courts had jurisdiction to hear the detainees' claims.¹¹

The Court then analyzed whether the D.C. Circuit's review of the CSRT decisions under the DTA was an adequate habeas substitute. While not offering a comprehensive summary of the

² *Hamdi v. Rumsfeld*, 542 U.S. 507, 508 (2004) (upholding U.S. citizen's right to challenge indefinite detention as an “enemy combatant” in federal court); *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (holding that non-citizens detained at Guantanamo as enemy combatants had a right to challenge their detention under federal habeas statute).

³ Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557, 558 (2006).

⁵ Military Commissions Act of 2006 § 7, Pub. L. No. 109-366, 120 Stat. 2600 (2006). For a detailed review of the events leading up to *Boumediene*, see the NYSBA Comm. on Civil Rights *Report on Executive Detention, Habeas Corpus, and the Military Commissions Act of 2006*, available at <http://www.nysba.org/civilrightsreportJune08>.

⁶ *Boumediene*, 128 S.Ct. at 2240.

⁷ *Id.* at 2247 (internal citations and quotations omitted).

⁸ *See id.* at 2258-59. Despite the Government's insistence that habeas did not run to Guantanamo because the U.S. had disclaimed formal sovereignty, the Court said: “[t]o hold the political branches have the power to switch the Constitution on or off at will ... would permit a striking anomaly in our tripartite system of Government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’” *Id.* at 2258-59.

⁹ *Id.* at 2258.

¹⁰ *Id.* at 2259.

¹¹ *Boumediene*, 128 S.Ct. at 2260-61.

requisites for an adequate habeas substitute, the Court found certain guarantees uncontroversial such as the “meaningful opportunity” for a prisoner to challenge the legality of his detention.¹² Habeas corpus is an adaptable remedy and its precise application and scope changes with the circumstances.¹³ The Court recognized that considerable deference is owed to the judgment of a court of record, but such is not the case for executive detention, where “the need for collateral review is most pressing.”¹⁴ Nonetheless, while the writ must be effective, “[h]abeas corpus proceedings need not resemble a criminal trial, even when detention is by executive order.”¹⁵

The Court found that the CSRTs suffered from several deficiencies constraining the detainee’s ability to rebut the Government’s enemy combatant assertion, such as lack of counsel, limited means to find or present evidence, being unaware of the most critical allegations underlying detention, and, due to limitless admissibility of hearsay, only a “theoretical” opportunity to confront witnesses against him.¹⁶ But the Court did not go so far as to hold that the CSRTs failed to satisfy due process; rather, it found that “there is considerable risk of error in the tribunal’s findings of fact ... [a]nd given that the consequence of error may be detention of persons for the duration of the hostilities that may last a generation or more, this is a risk too significant to ignore.”¹⁷ Therefore, for the writ to be effective in this case, the reviewing court under the DTA must have the power to correct the CSRTs’ errors, including some ability to assess the sufficiency of the Government’s evidence as well as the authority to admit and consider relevant exculpatory evidence not introduced during the CSRTs.¹⁸ The DTA’s procedure for review did not pass constitutional muster because it failed to allow the Court of Appeals to admit and consider previously unavailable exculpatory evidence.¹⁹

Finally, the Court considered any prudential barriers to habeas review. In cases involving foreign citizens detained abroad by the Executive, habeas would not be immediately available and “proper deference can be accorded to reasonable procedures for screening and initial detention . . . for a *reasonable period of time*.”²⁰ But Guantanamo detainees were “entitled to a prompt habeas corpus hearing,” as some of these cases have endured for six years without judicial oversight.²¹ Although the Court recognized the need to secure national security, “[s]ecurity subsists, too, in fidelity to freedom’s first principles[; chief] among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.”²²

The D.C. District Court responded to *Boumediene* quickly. Chief Judge Royce Lamberth consolidated and assigned most of the pending habeas petitions to Senior Judge Thomas

¹² *Id.* at 2266.

¹³ *Id.* at 2267.

¹⁴ *Id.* at 2268-69.

¹⁵ *Id.* at 2269. Nor must an adequate habeas substitute mirror federal statutory habeas in all respects. *Id.* at 2270-71.

¹⁶ *Boumediene*, 128 S.Ct. at 2269.

¹⁷ *Id.* at 2270.

¹⁸ *See id.* at 2270-71.

¹⁹ *Id.* at 2272-74.

²⁰ *Id.* at 2275 (emphasis added).

²¹ *Boumediene*, 128 S.Ct. at 2275

²² *Id.* at 2277.

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Hogan.²³ On July 11, 2008, Judge Hogan issued an Order directing the Government and the habeas petitioners to file simultaneous briefs on procedural issues common to the set of cases by July 25 (“July 11 Order”).²⁴ The detainees argued for a broad and searching review of the Government’s basis for detention, while the Government proposed a more streamlined process substantially narrowing the court’s review.²⁵ Responses were due August 1.

Meanwhile, in *Parhat v. Gates*, the D.C. Circuit recently decided its first case under the DTA review of a CSRT enemy combatant determination. A CSRT panel found Huzaifa Parhat to be an enemy combatant based on his affiliation with an Uighur independence group based in China and the group’s alleged association with Al Qaeda and its alleged engagement in hostilities against the United States and its allies.²⁶ Parhat countered that he fled China because of the “oppression and torture imposed on [U]igh[u]r people by the Chinese Government.”²⁷ Parhat appealed under the DTA to the D.C. Circuit and a unanimous panel invalidated his enemy combatant determination. The court found that the documents principally relied on by the Government were qualified by such terms as “having ‘reportedly’ occurred” or “‘may’ be true or are ‘suspected of’ having taken place.”²⁸ Moreover, virtually all “the documents do not say who ‘reported’ or ‘said’ or ‘suspected’ those things ...nor [indicate] any assessment of the reliability of that reporting.”²⁹ Neither the CSRT nor the court could assess the reliability of the evidence presented against Parhat, and “because of this deficiency, those bare assertions cannot sustain the determination that Parhat is an enemy combatant.”³⁰ Accordingly, the court directed the Government to release Parhat, transfer him, or expeditiously convene a new CSRT.³¹

In a recent 216-page fractured 5-4 en banc decision including seven different opinions, the Fourth Circuit wrestled with the case of *al-Marri v. Pucciarelli*. Al-Marri, a citizen of Qatar and lawful U.S. resident under a student visa, was facing trial on charges of credit card fraud, when the Executive declared him an enemy combatant, removed him from the federal criminal justice system, and detained him indefinitely in a military brig in South Carolina.³² Judge Traxler and four judges held that the Authorization for Use of Military Force (“AUMF”) granted the Executive the power to indefinitely detain individuals such as al-Marri apprehended in the U.S.

²³ Press Release, U.S. District Court for the District of Columbia, DC Chief Judge Meets with Judges to Discuss District Court Procedures for Guantanamo Cases (July 2, 2008) available at <http://www.dcd.uscourts.gov/public-docs/node/10>. D.D.C. Judges Leon and Sullivan have retained their dozen or so cases and committed to speedy resolution of the petitioners’ claims as well. See Lyle Denniston, *Judge Leon: Decisions on Detainees by Year’s End* (July 10, 2008) available at <http://www.scotusblog.com/wp/judge-leon-decisions-on-detainees-by-years-end/>.

²⁴ *In re Guantanamo Bay Detainee Litigation*, No. 08-442 (D.D.C. July 11, 2008) (scheduling order). Judge Hogan also ordered the Government to file factual returns starting on August 29, 2008, and required good cause to file an amended factual return. *Id.*

²⁵ Brief for Petitioners, *In re Guantanamo Bay Detainee Litigation*, No. 08-442 (D.D.C. July 25, 2008); Brief for Government, *In re Guantanamo Bay Detainee Litigation*, No. 08-442 (D.D.C. July 25, 2008).

²⁶ *Parhat v. Gates*, No. 06-1397, 2008 WL 2576977, at *3 (D.C. Cir. June 30, 2008).

²⁷ *Id.* at *2. (citing CSRT record)

²⁸ *Id.* at *11.

²⁹ *Id.* Parhat argued that the information actually came from the Chinese government. *Id.* at *12.

³⁰ *Id.* at *11.

³¹ *Parhat*, 2008 WL 2576977, at *15.

³² See *al-Marri v. Pucciarelli*, No. 06-7427, 2008 WL 2736787, at *3-4 (4th Cir. July 15, 2008) (per curiam). Al-Marri appealed the district court’s denial of his habeas petition to the Fourth Circuit, which initially reversed the district court’s denial of the writ but then voted to rehear en banc. *Id.* at *4-5.

classified as enemy combatants.³³ However, Judge Traxler and four different judges held al-Marri had not been afforded sufficient process in his habeas proceeding challenging his enemy combatant classification and due process under *Hamdi* demanded more procedural safeguards.³⁴

Finally, in response to *Boumediene*, on July 21, the U.S. Attorney General presented a plan for Congress to limit enemy combatants' access to federal courts by, among other things: (1) forbidding courts from ordering detainees to be brought into the United States for legal proceedings, (2) requiring that all challenges to detention be heard exclusively by one district court judge, and (3) barring detainees' access to classified intelligence information about them.³⁵

III. DISTRICT COURT IS THE PROPER FORUM TO DETERMINE THE PROCEDURAL FRAMEWORK FOR GUANTANAMO HABEAS PETITIONS

Although *Boumediene* left open the issue of the procedural framework for Guantanamo detainees' habeas petitions, it explicitly stated that determination of that framework was well "within the expertise and competence of the District Court to address in the first instance."³⁶ The Court came to a similar conclusion in *Hamdi* "anticipat[ing] that a District Court will proceed with caution ... necessary in this setting, engaging in a factfinding process that is both prudent and incremental," and it had "no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties."³⁷

The Attorney General's recommendation that Congress should address the questions left open by *Boumediene* at this time is therefore unwarranted. First, it runs counter to the clear Supreme Court guidance stated above. Second, adopting the Attorney General's course would remove the determination of habeas procedures from their traditional forum. Federal courts have long "review[ed] applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace."³⁸ District courts have years of experience and a library of precedent to rely on in balancing due process rights when assessing habeas petitions. Moreover, the D.C. District Court has largely already implemented two of the Attorney General's proposals without any guidance from the political branches – deferring habeas petitions from Guantanamo detainees challenging trial by military commission until completion of the trial and funneling almost all habeas petitions through a single district court judge.

Intrusion by the political branches could also raise serious separation-of-powers issues. For 150 years, the Supreme Court has resisted Congressional attempts to impose procedural rules

³³ *Id.* at *37-9 (Traxler, J., concurring); *see also id.* at *59-64 (Williams, C. J., concurring in part and dissenting in part); *68-118 (Wilkinson, J., concurring in part and dissenting in part).

³⁴ *Id.* at *1 (per curiam); *see also id.* at *42-51 (Traxler, J., concurring); *id.* at *2-3 (Motz, J. concurring).

³⁵ Michael B. Mukasey, U.S. Attorney Gen., Remarks at a Forum at the American Enterprise Institute (July 21, 2008), available at <http://www.scotusblog.com/wp/mukasey-curb-courts-powers-on-detainees>. Mukasey also called for Congress to: (1) restrict the courts' review of habeas petitions filed by detainees facing military commission until completion of trial, (2) limit the availability of CSRT challenges to habeas petitions, and (3) allow the government to hold foreign nationals as detainees until the end of the "War on Terror." *Id.*

³⁶ *Boumediene*, 128 S.Ct. at 2276.

³⁷ *Hamdi*, 542 U.S. at 538-39.

³⁸ *Rasul*, 542 U.S. at 474.

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affecting ongoing litigation.³⁹ Two principles have developed over time to check congressional reach into judicial decision-making: (1) Congress cannot explicitly legislate a rule of decision in an ongoing case without amending the underlying substantive law⁴⁰ and (2) Congress can not amend the underlying substantive law that applies in a pending case more broadly or narrowly than the specific application at issue in that case.⁴¹ Because the Guantanamo detainees' habeas petitions are already pending, any congressional action dictating the procedural framework the district court must use could potentially determine the resolution of a habeas petition and/or be tailored to only apply to those habeas petitions. Legislation of this ilk falls far outside prior amendments to the federal habeas statute.⁴²

IV. GUANTANAMO PETITIONERS SHOULD BE GENERALLY AFFORDED PROCESS CONSISTENT WITH FEDERAL STATUTORY HABEAS

As a roadmap for the process due Guantanamo habeas petitioners, we rely on Judge Hogan's July 11 Order. The July 11 Order identified five issues to be briefed concerning the procedural framework for Guantanamo habeas proceedings: (1) burden of proof; (2) standard for obtaining an evidentiary hearing; (3) scope of discovery; (4) admissibility of hearsay; and (5) confrontation and compulsory rights. We first review the relevant due process balancing test in *Hamdi v. Rumsfeld* and then address each procedural point in turn below, including an additional category not raised by in the July 11 Order – access to classified information.

A. Hamdi/Matthews Balancing Test

The Fourth Circuit recently noted in *al-Marri*, “the question of what process is constitutionally due to a [person] who disputes his enemy combatant status begins with consideration of the Supreme Court’s decision in *Hamdi [v. Rumsfeld]*...”⁴³ *Hamdi* addressed the constitutionality of the Government’s detention of a United States citizen detained within the U.S. as an enemy combatant after his capture in Afghanistan during the conflict with the Taliban.⁴⁴ In confirming the petitioner’s right to challenge his detention under habeas,⁴⁵ the plurality highlighted the minimum amount of process due, beginning with the recognition that the federal habeas statute “section 2241 and its companion provisions provide at least a skeletal outline of the procedures afforded in federal habeas review.”⁴⁶

The *Hamdi* plurality concluded that determining the procedure due required a balancing of two “serious competing interests:”⁴⁷ (1) the habeas petitioner’s “most elemental of liberty interests –

³⁹ *E.g.*, *U.S. v. Klein*, 80 U.S. 128, 146 (1871) (Congress could not “prescribe rules of decision to the Judicial Department of the government in cases pending before it.”); *see also* Christopher A. Chrisman, *Article III Goes to War: A Case for a Separate Federal Circuit for Enemy Combatant Habeas Cases*, 21 J.L. & POL. 31, 85 (2005).

⁴⁰ *See Klein*, 80 U.S. at 141-44; *Roeder v. Islamic Republic of Iran*, 195 F.Supp.2d 140, 164 (D.D.C. 2002).

⁴¹ *See Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992) (recognizing but declining to resolve the issue); *Roeder*, 195 F.Supp.2d at 164.

⁴² *See, e.g.*, *Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997) (except for select provisions, Anti-Terrorism and Effective Death Penalty Act of 1996 amendments to statutory habeas not applicable to pending habeas petitions).

⁴³ *al-Marri*, 2008 WL 2736787, *40 (Traxler, J., concurring) (internal quotations and citations omitted).

⁴⁴ *Hamdi*, 542 U.S. at 507.

⁴⁵ *Id.* at 536.

⁴⁶ *Id.* at 525; *al-Marri*, 2008 WL 2576977 at *40 (Traxler, J., concurring).

⁴⁷ *Hamdi*, 542 U.S. at 529 (citing *Matthews v. Eldridge*, 424 U.S. 319 (1976)).

the interest in being free from physical detention” and (2) the Government’s interest in “detaining those who actually pose an imminent threat to the national security of the United States during ongoing conflict... [and] ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States.”⁴⁸ Accordingly, the *Hamdi* plurality relied on the time-tested *Mathews v. Eldridge* balancing test to reach the minimal process due, namely weighing the private interest affected by the Government action against the Government’s interest and the burden faced by the Government in providing greater process.⁴⁹ Key to the *Mathews* test is balancing “the risk of an erroneous deprivation” if the process were reduced and the “probable value, if any, of additional or substitute procedural safeguards.”⁵⁰

Neither the government’s deferential standard nor the district court’s criminal-like process struck the appropriate balance under *Mathews*.⁵¹ Rather, the Court found that at a minimum a habeas petitioner challenging his enemy combatant classification must receive: (1) “notice of the factual basis for his classification;” (2) “a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker;” and (3) “the right to notice and opportunity to be heard . . . at a meaningful time and in a meaningful manner.”⁵² However, the plurality also held that “at the same time, exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”⁵³

B. Burdens of Proof and Production and Burden Shifting

Hamdi applied the *Mathews* balancing test to propose a burden of proof paradigm. The Court concluded that the “Constitution would not be offended by a presumption in favor of the Government’s evidence so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided . . . [and] once the Government puts forth credible evidence that the habeas petitioner meets the enemy combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.”⁵⁴ Notably, the *Hamdi* plurality took great pains to indicate that its proposed burden shifting framework was in the context of *Hamdi*’s particular case – an active combat zone capture.⁵⁵ In assessing the risk of error, it highlighted the goal of “ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error,”⁵⁶ and reviewed the burdens attendant to the Government in the context of battlefield captures.⁵⁷

⁴⁸ *Id.* at 530-31.

⁴⁹ *See id.* at 529.

⁵⁰ *Id.* at 529-30.

⁵¹ *Id.* at 532-33.

⁵² *Hamdi*, 542 U.S. at 533 (internal citations and quotations omitted).

⁵³ *Id.* at 533.

⁵⁴ *Id.* at 533-34.

⁵⁵ *See id.* at 516 (stating that “for the purposes of this case, the ‘enemy combatant’ . . . is an individual who [the government] alleges, was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there”) (internal citations omitted).

⁵⁶ *Id.* at 534.

⁵⁷ *Id.*; *see also id.* at 536 (referencing military regulations providing the process available to enemy detainees asserting prisoner-of-war status under the 1949 Geneva Conventions) (citations omitted).

Here, *Boumediene* explicitly reserved for the district court “the extent of the showing required of the Government in these cases.”⁵⁸ Given the “risk of error in the tribunal’s findings of fact,”⁵⁹ and the fact that the CSRTs do not warrant a presumption of reliability similar to state court post-conviction challenges,⁶⁰ the Government should clearly bear the burden of demonstrating the lawfulness of the detention. However, the burden of proof the Government must meet may vary depending on the circumstances of the petitioner’s case. So far as the petitioner was a battlefield capture,⁶¹ the district court should rely on the *Hamdi* plurality’s burden shifting framework. However, *Hamdi* cannot extend to *all* habeas petitions,⁶² especially where the petitioner was not a battlefield capture. *Hamdi* was a battlefield case that presumed that the process due to a detainee varies with the facts surrounding the detention and the precise governmental burdens that result from providing normal constitutional procedures.⁶³

In the cases of non-battlefield captures, the *Mathews* calculus should decidedly shift in favor of the petitioner and his paramount interest in being free from erroneous or arbitrary detention. In other administrative detention contexts where the Government seeks to impose a similar substantial deprivation of liberty, the Supreme Court has applied a clear and convincing burden of proof.⁶⁴ Unless the Government can identify “exigent circumstances” such as a battlefield capture, the Guantanamo petitioners should be entitled to full due process procedural rights,⁶⁵ including a burden of proof to justify detention greater than a preponderance but less than reasonable doubt. *Boumediene* emphasized habeas’ traditional role as an adaptable remedy whose “precise application and scope depend[s] on the changing circumstances,” and depending on those circumstances, “more may be required.”⁶⁶ A non-battlefield capture should be given more process than one apprehended in a foreign active combat zone, a sphere peculiarly within the ken of the Executive.

C. Right to Evidentiary Hearing

Hamdi and *Boumediene* clearly contemplate some form of an evidentiary hearing for petitioners to challenge their enemy combatant classification. Under *Hamdi*, the Government must first come forth with “meaningful support for its conclusion that the detainee is in fact an enemy

⁵⁸ *Boumediene*, 128 S.Ct. at 2271; see Pet.’s Br. at 9-14 (arguing for Government burden of clear and convincing in all cases); Govt.’s Br. at 14-15 (proposing deferential *Hamdi* standard for all cases).

⁵⁹ *Boumediene*, 128 S.Ct. at 2270; see, e.g., The McClatchy Report, *Guantanamo: Beyond the Law*, June 15, 2008.

⁶⁰ *Boumediene*, 128 S.Ct. at 2268.

⁶¹ Although we recognize the definition of “battlefield” may be subject to debate, for the purpose of this Report we adopt the use of the term “battlefield” employed in *Hamdi*: “a zone of active combat in a foreign theater of conflict” where individuals are “engaged in armed conflict against the United States.” *Hamdi*, 542 U.S. at 514-16.

⁶² *al-Marri*, 2008 WL 2736787, at *45 (Traxler, J., concurring) (*Hamdi* “neither said nor implied that normal procedures and evidentiary demands would be lessened in *every* enemy-combatant habeas case, regardless of the circumstances.”) (emphasis in original).

⁶³ *Id.* at *46. For instance in *al-Marri*, the court found that the locus of *al-Marri*’s seizure was factor in determining whether the Government met its initial burden in providing “credible evidence” that he was an enemy combatant. *Id.*

⁶⁴ See Pet.’s Br. at 12, citing *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 286 (1966) (deportation); *Schneiderman v. United States*, 320 U.S. 118, 122-23 (1943) (denaturalization); *Kansas v. Hendricks*, 521 U.S. 346, 353 (1997) (indefinite civil commitment of sex offender); *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (continued commitment of criminal defendant found not guilty by reason of insanity); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (pre-trial detention based on dangerousness).

⁶⁵ *al-Marri*, 2008 WL 2736787, at *49 (Traxler, J., concurring).

⁶⁶ *Boumediene*, 128 S.Ct. at 2267.

combatant” and the petitioner then has an opportunity to rebut that evidence.⁶⁷ Similarly, *Boumediene* explains that the Guantanamo habeas petitioner is entitled to a “meaningful opportunity to demonstrate that he is being held” unlawfully.⁶⁸ *Boumediene* explicitly held that the habeas court must have the “ability to assess the sufficiency of the government’s evidence [and] the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.”⁶⁹ “[M]eaningful opportunity” necessarily demands some form of an evidentiary hearing to test the Government’s assertions and allow the petitioner to put forth his evidence to the contrary. Moreover, the fact that *none* of the Guantanamo habeas petitioners had access to counsel during the CSRT suggests that *all* of the CSRT’s evidentiary proceedings lacked the “necessary adversarial character” to warrant any deference.⁷⁰

The key question is whether petitioners are entitled to a *live* evidentiary hearing or judicial review of the evidence by written submission.⁷¹ Applying the federal statutory habeas framework as recommended by *Hamdi*, the first step in habeas review is the filing of the Government’s factual return underlying the cause of the detention.⁷² Here, that is essentially the CSRT transcript.⁷³ At that point the Guantanamo habeas petitioner should have the opportunity to assess whether discovery is needed to challenge the allegations in the return, or if discovery is unnecessary and he can apply for relief based on the legal insufficiencies of the return.⁷⁴

At the conclusion of discovery and after review of the written submissions, the court should then determine whether a live evidentiary hearing is necessary. Here, the court can turn to the federal statutory habeas framework for review of state-court convictions for guidance. Under traditional application of habeas rules and precedent, “the decision to grant an evidentiary hearing [is] generally left to the sound discretion of district courts.”⁷⁵ An evidentiary hearing is generally considered mandatory if (1) the petitioner alleges facts that, if proved, entitle him to relief; (2) the petitioner’s factual allegations survive dismissal because they are not palpably incredible or patently frivolous; *and* (3) for reasons beyond control of the petitioner or counsel, the contested factual issues were not the subject of a full and fair hearing in the state court.⁷⁶ On the other hand, federal courts are generally prohibited from holding evidentiary hearings when the petitioner is to blame for failing to develop the facts in state court unless he can show “by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”⁷⁷

⁶⁷ *Hamdi*, 542 U.S. at 534.

⁶⁸ *Boumediene*, 128 S.Ct. at 2266.

⁶⁹ *Id.* at 2270.

⁷⁰ *Id.* at 2273.

⁷¹ See Pet.’s Br. at 7-9 (arguing for presumptive evidentiary hearings); Govt. Br. at 30-33 (petitioners are not entitled to evidentiary hearing unless review of the written evidentiary submissions weighs in favor of petitioner).

⁷² 28 U.S.C. § 2243.

⁷³ See Pet.’s Br. at 15; see also Order Directing Filing of Returns, 128 S.Ct. 2229 (July 10, 2008) (No. 06-1195).

⁷⁴ See, e.g., *Parhat*, 2008 WL 2576977, at *11 (evidence supporting CSRT insufficient to support detention).

⁷⁵ *Schriro v. Landrigan*, 127 S.Ct. 1933, 1939 (2007); see also Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts. Although these rules were developed where the petitioner had been granted procedural safeguards, they can help as guideposts for the bar petitioners should meet for an evidentiary hearing.

⁷⁶ LIEBMAN & HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, at 892-894, nn.27-30 (5d. 2005) (collecting cases).

⁷⁷ 28 U.S.C. § 2254(e)(2).

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These rules set forth appropriate guidelines for when to grant or deny a habeas evidentiary hearing. They provide the proper flexibility to grant a live hearing if genuine material factual issues relating to the enemy combatant designation are in dispute, as well as deny a live hearing when the written submissions conclusively establish the lawful basis for detention. Such adaptability is consistent with *Boumediene*'s requirement to strike an appropriate balance between the petitioner's need for searching review of the facts justifying his detention and the Government's "legitimate interest in protecting sources and methods of intelligence gathering,"⁷⁸ as well as *Hamdi*'s direction that courts should create a "process that is both prudent and incremental."⁷⁹

D. Scope of Discovery

Boumediene teaches that habeas procedural rights, such as the scope of discovery attendant to a habeas proceeding, "depend[] on the circumstances."⁸⁰ For instance, as explained in *al-Marri*, the discovery due to an enemy combatant apprehended in the United States may likely be greater than one captured on a foreign battlefield because of a lesser burden on the Government in collecting information.⁸¹ Relying on Section 2246 of the federal habeas statute, *al-Marri* had sought expansive discovery of, among other things, all documents relied on by the Government to designate him as an enemy combatant.⁸² Although the Fourth Circuit did not confirm that this discovery was due to *al-Marri*, it found that he was entitled to ordinary discovery process unless the Government showed that it would be "impractical, outweighed by national security interests, or otherwise unduly burdensome...."⁸³

Habeas Rule 6: *Al-Marri*'s approach is consistent with Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts which provides that "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." The purpose of habeas discovery is to ensure "that a fair and meaningful evidentiary hearing may be held."⁸⁴ In the seminal case of *Harris v. Nelson*, the Court instructed that "[w]here specific allegations . . . show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally [], it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry."⁸⁵ Habeas Rule 6 is intended to be consistent with *Harris*.⁸⁶ However, the rules do not grant a petitioner discovery carte blanche, rather they require that "[a] party requesting discovery ... must provide reasons for the request" and demonstrate good cause.⁸⁷ Courts typically require

⁷⁸ *Boumediene*, 128 S.Ct. at 2276.

⁷⁹ *Hamdi*, 542 U.S. at 539.

⁸⁰ *Boumediene*, 128 S.Ct. at 2267.

⁸¹ *al-Marri*, 2008 WL 2736787, at *46-48 (J. Traxler, concurring).

⁸² *Id.* at *43, n.8. Section 2246 provides that "evidence may be taken orally or by deposition, or in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits." 28 U.S.C. § 2246.

⁸³ *al-Marri*, 2008 WL 2576977, at *49.

⁸⁴ *Harris v. Nelson*, 394 U.S. 286, 300 (1969).

⁸⁵ *Id.*

⁸⁶ *Bracy v. Gramley*, 520 U.S. 899, 909 (1997).

⁸⁷ Rule 6(c) of the Rules Governing Section 2254 Cases in the United States District Courts.

a specific explanation of the connection between the requested discovery and the claims at issue.⁸⁸

District courts should rely on Habeas Rule 6 as the governing standard in determining whether and what discovery to allow in the Guantanamo habeas proceedings.⁸⁹ Consistent with the writ’s adaptability, the flexibility of this standard allows courts to balance the petitioner’s need for a “fair and meaningful hearing”⁹⁰ with the Government’s burden in responding to a particular discovery request.⁹¹ It appropriately places the initial burden on the petitioner to present good cause for discovery and tailor it to the Government’s enemy combatant classification, which is particularly appropriate here where courts should weigh the “probable value” of a particular discovery request and the “burdens they may impose on the military.”⁹²

Exculpatory Evidence: Given the quasi-criminal nature of the Guantanamo petitioner’s detention and the potential indefinite detention if denied relief, a petitioner should be entitled to exculpatory evidence within the Government’s possession under *Brady v. Maryland*.⁹³ Courts should apply well established *Brady* jurisprudence limiting the defendant – or in this case the habeas petitioner – to material information favorable to the accused which is known to the Government agents or officers involved in the investigation, apprehension, or detention of the petitioner.⁹⁴

Although *Boumediene* counseled that habeas proceedings did not merit full criminal process, one of the grounds for finding the DTA an inadequate habeas substitute was the D.C. Circuit’s inability to hear exculpatory evidence.⁹⁵ Thus, the Court found that admission of available exculpatory evidence was necessary for a “meaningful opportunity” to challenge detention. The affirmative obligation under *Brady* and its progeny is the traditional vehicle for ensuring that individuals detained by the state have access to exculpatory evidence within the Government’s possession. The crucial question is whether production of all traditional *Brady* material in a given case would prove too burdensome. “[T]he Suspension Clause does not resist innovation in the field of habeas corpus,”⁹⁶ and in certain cases the court could properly limit *Brady* material to information readily available and already in possession of the Government and in other instances craft a broader obligation.

E. Hearsay

The general prohibition against hearsay is the “most characteristic rule of the Anglo-American Law of Evidence – a rule which may be esteemed, next to jury trial, the greatest contribution of

⁸⁸ LIEBMAN & HERTZ, *supra* note 76, at 876 (collecting supporting cases).

⁸⁹ See Govt.’s Br. at 25-29 (arguing in the alternative that discovery should only be allowed as a last resort and only then consistent with the requirements of Habeas Rule 6); Pet.’s Br. at 18-22 (petitioners are entitled to broad discovery with statutory habeas as the floor).

⁹⁰ *Harris*, 394 U.S. at 300.

⁹¹ *Hamdi*, 542 U.S. at 533-34.

⁹² *Id.* at 533 (internal citations and quotations omitted).

⁹³ 373 U.S. 83, 87 (1963); see Pet.’s Br. at 22-24; see Govt. Br. at 19-20 (Government will produce exculpatory evidence discovered by attorneys preparing petitioner’s return that materially undermines the facts in the return).

⁹⁴ See *United States v. Augurs*, 427 U.S. 97, 107 (1976); *Kyles v. Whitley*, 514 U.S. 419, 438-49 (1995).

⁹⁵ *Boumediene*, 128 S.Ct. at 2269-2270.

⁹⁶ *Id.* at 2276.

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that eminently practical legal system to the world's methods of procedure."⁹⁷ Hearsay is generally inadmissible under the rules of evidence because it cannot be tested by cross-examination and deprives the factfinder of the opportunity to judge the credibility of the hearsay declarant.⁹⁸ However, exceptions to the hearsay rule have existed as long as the rule itself with the common law and later the Federal Rules of Evidence ("FRE") recognizing exceptions for categories of statements which are relevant, are hard to reproduce, and bearing significant guarantees of trustworthiness.⁹⁹ The reliability of a hearsay statement is the key factor in determining whether hearsay should be accepted.¹⁰⁰

The Government has consistently argued that courts should presume the reliability and accuracy of its hearsay evidence underlying its detention of enemy combatants.¹⁰¹ In the battlefield context of *Hamdi*, the sole evidentiary support for Hamdi's detention was the Mobbs hearsay declaration.¹⁰² There, the Court found that a district court *may* accept such an affidavit "as the most reliable available evidence from the Government"¹⁰³ so long as the court weighed the wartime burdens of providing greater process against the detainee's liberty interest and the availability of additional or substitute evidence.¹⁰⁴ The Court made clear, however, that there must be a fair opportunity to challenge the contents of the hearsay.¹⁰⁵ In *al-Marri*, the Government relied solely on the Rapp Declaration to prove al-Marri's enemy combatant status.¹⁰⁶ The Fourth Circuit held that the Government should be required to demonstrate why "in balancing the liberty interest of the detainee and the heightened risk of erroneous deprivation, the Rapp Declaration should be accepted as the most reliable available evidence the government can produce without undue burden or serious jeopardy to either its war efforts or its efforts to ensure the national security of this nation."¹⁰⁷ In *Boumediene*, the Court criticized the CSRT's blanket rule allowing hearsay evidence, stating "the detainee's opportunity to question witnesses is likely to be more theoretical than real" because of the effect of limitless admission.¹⁰⁸ Finally, in reviewing the sufficiency of the CSRT determination in *Parhat*, the D.C. Circuit found the hearsay statements relied on by the Government as far too unreliable to justify detention.¹⁰⁹

In assessing the hearsay evidence proffered by the Government in the first instance, the district court can turn to the time-tested standards and rules set forth in FRE 801-804 and 807.¹¹⁰ In applying the FRE, the district court should take into consideration *Hamdi* and its progeny, which

⁹⁷ 5 WIGMORE, EVIDENCE § 1364, at 28 (Chadbourn rev. 1974).

⁹⁸ Anthony Bocchino & David Sonnenschein, *Rule 804(B)(6) – The Illegitimate Child of the Failed Liaison Between the Hearsay Rule and Confrontation Clause*, 73 MO. L. REV. 41, 44-45 fn 11 (2008).

⁹⁹ *Id.* at 47. See also FED. R. EVID. 803-04, 807 (hearsay exceptions).

¹⁰⁰ WIGMORE, *supra* note 97, at §1420 p. 251.

¹⁰¹ *Hamdi*, 542 U.S. at 527-28.

¹⁰² *Id.* at 512.

¹⁰³ *Id.* at 534.

¹⁰⁴ *Id.* at 529.

¹⁰⁵ *Id.* at 534.

¹⁰⁶ *al-Marri*, 2008 WL 2736787, at *47 (Traxler, J., concurring).

¹⁰⁷ *Id.*

¹⁰⁸ *Boumediene*, 128 S.Ct. at 2269.

¹⁰⁹ *Parhat*, 2008 WL 2576977, at *13-14.

¹¹⁰ See Pet.'s Br. at 24-26 (arguing that *Hamdi* did not overrule the FRE's application in habeas proceedings); Govt.'s Br. at 36 (contending that under *Hamdi*, hearsay is acceptable as the norm). Hearsay is also generally not allowed under the Military Rules of Evidence, which tracks the FRE and its exceptions. Mil. R. Evid. 505(g).

indicate that hearsay should not be accepted unless the Government demonstrates that given the circumstances of the particular detainee's case, the hearsay is the most reliable available evidence the Government can produce without undue burden or without compromising its war effort or national security. This process necessitates a searching inquiry by the court as to the real burdens in producing first-hand evidence as opposed to hearsay, and tasks the Government to come forward with indicia of the statement's reliability. If after such analysis the court admits the hearsay statement, it should grant the petitioner the opportunity to submit responding affidavits and/or interrogatories. This inquiry is particularly important in light of the risk that some statements were obtained through coercive means.¹¹¹ The court should adopt a blanket rule against hearsay statements obtained by coercion as inherently unreliable.¹¹²

F. Confrontation and Compulsory Process

In addition to reliability, whether the Government can proffer hearsay evidence will turn on the court's "inquiry into whether the provision of nonhearsay evidence would unduly burden the government."¹¹³ Chief among these concerns is whether providing petitioners with confrontation and compulsory rights presents an undue burden on the Government. Cross examination is the "crucible" where the reliability of evidence is assessed.¹¹⁴ The opportunity to confront witnesses is a crucial feature of the common law adversarial system and is not limited to the criminal context.¹¹⁵ District courts ordinarily have the power to compel attendance of witnesses within their jurisdiction and authorize depositions outside their jurisdiction.¹¹⁶ In criminal trials, a defendant has a Sixth Amendment right "to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor."¹¹⁷ The accused in a Courts Martial under the Uniform Code of Military Justice ("UCMJ") is generally afforded confrontation and compulsory process rights.¹¹⁸ However, in a UCMJ pre-charge Article 32 hearing, the defense only has the right to call "reasonably available" witnesses.¹¹⁹ Detainees should have some level of confrontation and compulsory rights.¹²⁰ In assessing these rights, the district court can first apply an ordinary burden versus benefit analysis under the Federal Rules and require the Government to demonstrate an undue burden in producing

¹¹¹ See Carol Rosenberg, *Bin Laden's Driver Gets a Six-Member Military Jury*, MIAMI HERALD.COM, July 21, 2008, available at <http://www.miamiherald.com/news/breaking-news/story/612725.html>. (reporting Hamdan military commission judge's exclusion of Hamdan's Afghan interrogations from trial because of the highly coercive environment and conditions under which they were made).

¹¹² Pet.'s Br. at 30-31 ("The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to . . . treat[] any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt" citing *Stein v. New York*, 346 U.S. 156, 182 (1953)).

¹¹³ *al-Marri*, 2008 WL 2736787, at *45 (Traxler, J., concurring).

¹¹⁴ *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

¹¹⁵ Pet.'s Br. at 33-34 (collecting civil cases applying confrontation rights).

¹¹⁶ FED. R. CIV. P. 45.

¹¹⁷ U.S. CONST. amend. VI.

¹¹⁸ R.C.M. 703 (codified at 10 U.S.C. §846).

¹¹⁹ R.C.M. 405(g). Reasonably available as "when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance." *Id.*

¹²⁰ Pet.'s Br. at 33-35 (petitioners have the right to cross-examine available witnesses and compulsory process); *contra* Govt.'s Br. at 34-36 (petitioners have no Fifth or Sixth Amendment rights).

Government agents with first-hand knowledge of the enemy combatant's detention. This holds especially true when the relevant personnel are present in the United States and his or her testimony would not interfere with ongoing military operations.¹²¹ However, if the Government agents operate or reside outside the United States, or even more problematic, are engaged in active combat operations, the district court can look to the "reasonably available" standard set forth in Article 32 for guidance or provide for them to testify by a secure video conference link.¹²² If the Government can demonstrate undue burden and provide sufficient indicia of reliability, the district court may accept first-hand affidavits from arresting or detaining officers and agents and allow a petitioner to propound written interrogatories under the Federal Rules.

G. Access to Classified Information

One issue not identified in Judge Hogan's July 11 Order, but sure to arise in the near future, is the handling of classified information. *Boumediene* explicitly recognized "the government['s] legitimate interest in protecting sources and methods of intelligence gathering" and expected "that the District Court will use its discretion to accommodate this interest to the greatest extent possible."¹²³ Rather than bar all access to classified information as proposed by the Attorney General, a habeas court can turn to the Classified Information Procedures Act ("CIPA"),¹²⁴ and federal precedent employing CIPA in criminal cases for the last thirty years. Federal courts have relied on CIPA to govern the discovery of classified information at the pre-trial stage as well as the admissibility of classified information at trial. CIPA encourages judges to use redaction, substitution and other means to reconcile a defendant's rights with the Government's interest in preserving secrecy of classified information.¹²⁵ During, discovery, if the court determines classified information must be disclosed without substitution or deletion, the court can limit such disclosure to only defense counsel with appropriate security clearance and prohibit disclosure to the defendant.¹²⁶ At trial, if the court determines classified information to be admissible, CIPA allows for its substitution in the form of a summary admitting relevant facts that the classified information would tend to prove.¹²⁷

"In the area of national security and the government's privilege to protect classified information from public disclosure, [courts] look to CIPA for appropriate procedures."¹²⁸ Although CIPA does not completely control here because "habeas corpus proceedings need not resemble a criminal trial,"¹²⁹ CIPA is particularly suited for the adaptable remedy of habeas because Congress passed the legislation with an eye toward courts "fashion[ing] creative and fair solutions" to the problems raised by the use of classified information.¹³⁰ For instance, although

¹²¹ *al-Marri*, 2008 WL 2576977, at *46 (J. Traxler, concurring).

¹²² See *Boumediene*, 128 S.Ct at 2276 ("Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ").

¹²³ *Id.*

¹²⁴ Pub. L. No. 96-456. 94 Stat. 2025, 2025-31 (1980) (codified at 18 U.S.C. App. 3) (CIPA).

¹²⁵ See Ellen C. Yaroshefsky, *The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and other Ethical Dilemmas*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 203, 209-10 (2006). Mil. R. Evid. 505 follows a similar give and take process and encourages substitution if appropriate for national security purposes.

¹²⁶ CIPA, at § 3.

¹²⁷ *Id.* at § 6(c)(1).

¹²⁸ *al-Marri*, 2008 WL 2736787, at *57 (Traxler, J., concurring) (citations omitted).

¹²⁹ *Boumediene*, 128 S.Ct. at 2269.

¹³⁰ *U.S. v. Rosen*, 520 F.Supp.2d 786, 796 (E.D. Va. 2007) (citations omitted).

not explicit in the statute, courts have limited disclosure of classified information to defense counsel and prohibited defendants from attending pre-trial CIPA hearings in terrorism cases.¹³¹ In light of CIPA's flexibility to adapt to the challenges raised by terrorism related cases, and the courts' experience and expertise in weighing individual rights against national security interests under its rubric, "CIPA can certainly guide the district court's considerations of" petitioner's discovery requests and use of any such classified information at any evidentiary hearing.¹³²

V. CONCLUSION

In holding that Guantanamo detainees had the fundamental procedural protections of habeas, *Boumediene* reminded us that there are "few exercises of judicial power [] as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person."¹³³ It is now the role of the district courts in the first instance to "address the content of the law that governs petitioners' detention."¹³⁴ Although habeas historically entitles a petitioner to a searching inquiry into the lawfulness of his detention,¹³⁵ "it does not follow that a habeas corpus court can disregard the dangers that detention in these cases was intended to prevent."¹³⁶ The ABA House of Delegates should adopt the proposed recommendations as the foregoing analysis shows that the existing federal statutory habeas framework provide guidelines for Guantanamo habeas proceedings that allows the court sufficient flexibility to take into account the "[p]ractical considerations and exigent circumstances [that] inform the definition and reach ... of habeas corpus."¹³⁷ Petitioner should be entitled to the procedural safeguards ordinarily available to other federal habeas petitioners unless the Government can demonstrate a real need to depart from them. In that instance, "[c]ertain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ."¹³⁸ Although common to all Guantanamo detainee habeas petitions, the precise application of these guidelines will naturally turn on the facts and circumstances of each petitioner's case.

Respectfully Submitted,
Bernice K. Leber, President
New York State Bar Association
February 2009

¹³¹ See, e.g., U.S. v. Moussaoui, No. CR. 01-455-A, 2002 WL 1987964, at * 1 (E.D.Va. Aug. 23, 2002); U.S. v. Bin Laden, No. S(7) 98 CR. 1023 LBS., 2001 WL 66393, at *2, 6-7 (S.D.N.Y. Jan. 25, 2001).

¹³² *al-Marri*, 2008 WL 2736787, at * 58.

¹³³ *Boumediene*, 128 S.Ct. at 2277.

¹³⁴ *Id.*

¹³⁵ *Ex parte Watkins*, 28 U.S. 193, 202 (1830) ("[T]he great object of [the writ] is the liberation of those . . . imprisoned without sufficient cause [and] to examine the legality of the commitment").

¹³⁶ *Boumediene*, 128 S. Ct. at 2275-76.

¹³⁷ *Id.*

¹³⁸ *Id.*

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GENERAL INFORMATION FORM

Submitting Entity: New York State Bar Association

Submitted By: Bernice K. Leber, President

1. Summary of Recommendation(s). In *Boumediene v. Bush*, decided by the United States Supreme Court on June 12, 2008, the Court held that detainees at the Guantanamo Naval Base in Guantanamo, Cuba have the right to petition the courts for a writ of habeas corpus. Consistent with the Court's decision, the procedural framework for pending habeas cases brought by detainees should be determined by the District Court rather than by Congress, since this is inherently a judicial function. Balancing the rights of detainees to be given meaningful hearings with the legitimate needs of the Government to protect classified information and conduct military operations, the courts should grant detainees all rights consistent with Federal statutory habeas and the Uniform Code of Military Justice.
2. Approval by Submitting Entity. This report was approved by the New York State Bar Association Executive Committee on August 4, 2008.
3. Has this or a similar recommendation been submitted to the House or Board previously? A similar resolution was submitted for the August 2008 meeting, but was withdrawn before being considered by the House.
4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

In February 2002 the ABA House of Delegates adopted a policy urging that proceedings before military tribunals guarantee the right to petition for habeas corpus.

5. What urgency exists which requires action at this meeting of the House?

In the wake of the *Boumediene* decision, courts are moving rapidly to address procedural issues relating to pending habeas petitions.

On July 31, 2008, Senator Lindsay Graham (R-SC) introduced the S.3401, the Enemy Combatant Detention Review Act, which, among other things, would have legislatively prescribed procedures for habeas review. Representative Lamar Smith (R-TX) introduced companion legislation (H.R. 6705) in the House on the same date. The bills were referred to the respective Senate and House Judiciary Committees but no further action was taken on them.

6. Status of Legislation. (If applicable.)

N/A

7. Cost to the Association. (Both direct and indirect costs.) None.

8. Disclosure of Interest. (If applicable.)

N/A

9. Referrals.

N/A

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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EXECUTIVE SUMMARY

SUMMARY OF THE RECOMMENDATION

In *Boumediene v. Bush*, decided by the United States Supreme Court on June 12, 2008, the Court held that detainees at the Guantanamo Naval Base in Guantanamo, Cuba have the right to petition the courts for a writ of habeas corpus. Consistent with the Court's decision, the procedural framework for pending habeas cases brought by detainees should be determined by the District Court rather than by Congress, since this is inherently a judicial function. Balancing the rights of detainees to be given meaningful hearings with the legitimate needs of the Government to protect classified information and conduct military operations, the courts should grant detainees all rights consistent with Federal statutory habeas and the Uniform Code of Military Justice.

SUMMARY OF THE ISSUE WHICH THE RECOMMENDATION ADDRESSES

The *Boumediene* decision left open the procedural framework to be applicable in detainees' habeas proceedings. This recommendation discusses recommended guidelines for courts to follow, recognizing that the application of guidelines turns on the facts and circumstances of each petitioner's case.

EXPLANATION OF HOW THE PROPOSED POLICY POSITION WILL ADDRESS THE ISSUE

This policy is needed for the ABA to express its views with respect to procedures used in connection with Guantanamo detainees' habeas petitions.

SUMMARY OF ANY MINORITY VIEWS OR OPPOSITION WHICH HAVE BEEN IDENTIFIED

No minority or opposing views have been identified.