

HOPE METCALF & JUDITH RESNIK

## *Gideon* at Guantánamo: Democratic and Despotic Detention

**ABSTRACT.** One measure of *Gideon v. Wainwright* is that it made the U.S. government's efforts to isolate 9/11 detainees from all outsiders at Guantánamo Bay conceptually and legally unsustainable. *Gideon*, along with *Miranda v. Arizona*, is part of a democratic narrative shaped over decades to insist that, unlike totalitarian regimes, the United States has constitutional obligations to equip individuals with third parties—lawyers—to inhibit (if not to prevent) coercion. Both *Gideon* and *Miranda* recognize the relationship between the dignity of individuals in their encounter with the state and the legitimacy of state processes. Both decisions locate enforcement authority in courts. Both rely on lawyers, deployed as witnesses to interrogation and as advocates, and both impose obligations that, when necessary, governments subsidize lawyers.

Conflicts in the post-9/11 era over the boundaries of *Gideon* and *Miranda* illuminate what is at stake: whether aspirations remain that detention and interrogation of individuals—even the reviled—could possibly merit the adjective “democratic” to reflect constitutional commitments that all persons are rights-bearers who cannot be left alone and subject to state power closed off from public oversight.

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*[I]n any case which a person is being held he has a right to counsel.*

–Robert Doumar, U.S. District Court Judge, Eastern District of Virginia, commenting at the May 29, 2002, hearing in *Hamdi v. Rumsfeld*

*Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.*

–Justice Stevens, dissenting in 2004 in *Rumsfeld v. Padilla*

## I. THE GIDEON EFFECT

What did *Gideon* promise, and to whom? Soon after 9/11 and some forty years after the Supreme Court’s decision in *Gideon v. Wainwright*,<sup>1</sup> the federal government brought individuals alleged to be terrorists to Guantánamo Bay, to Norfolk, Virginia, and to Charleston, South Carolina. In all three sites, the government asserted the legal authority to impose an interrogation and detention system outside the purview of courts, lawyers, and rights. The Department of Defense announced in Order No. 1 in 2002 that, as the “Appointing Authority,” the Department was empowered to make all decisions about process and outcome without permitting individuals recourse anywhere.<sup>2</sup> The Administration refused to provide lawyers, argued against judges doing so, and prevented lawyers who had been appointed by courts or retained by family from having any contact with the individuals who were their “clients.”<sup>3</sup>

As has become familiar, national and international objections erupted. The 2003 cover of the *Economist* announced, “Unjust, unwise, unAmerican: Why terrorist tribunals are wrong,” and displayed a blindfolded Justice, draped in Grecian robes, holding scales and sword, and seen in the cross hairs of the scope of a rifle aimed at her heart.<sup>4</sup> Lawyers became high-profile participants, filing cases on behalf of individuals with whom, for a period of time, the government would not permit them to communicate. While raising puzzles about what it meant for lawyers to “represent” clients, those filings opened up

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1. 372 U.S. 335 (1963).

2. Dep’t of Def., Military Commission Order No. 1 (Mar. 21, 2002), <http://www.defense.gov/news/Mar2002/d20020321ord.pdf>.

3. See David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981 (2008).

4. See Ivan Allen, *Justice in the Cross Hairs* (cover image), *ECONOMIST*, July 12, 2003, reprinted in JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS*, at xviii fig.1 (2011).

to public scrutiny the otherwise closed and totalizing authority of the state over detained individuals. In 2004, in *Hamdi v. Rumsfeld*, the Supreme Court ruled aspects of the government’s system unconstitutional.<sup>5</sup>

The 1963 decision in *Gideon v. Wainwright* was part of what made the exclusion of lawyers, process, the public, and rights unsustainable, both politically and legally. (Indeed, the networks of attorneys for detainees at Guantánamo have resulted in some detainees receiving more lawyering resources than many indigent defendants in ordinary criminal proceedings.) Yet even after 2004, when the Supreme Court insisted on process for detainees and third-party participation, *Gideon*-esque battles continued. The government claimed that it had the power to monitor attorney-client communications, and judges acceded in part by imposing “significant limitations” on lawyer-client exchanges.<sup>6</sup> In 2012, *Gideon*’s saliency—and the legal puzzles of the scope of detainees’ rights to counsel and to courts—returned when the federal government argued that, aside from those with pending or proposed habeas petitions, it had authority over detainees’ access to counsel.

Guantánamo detainees sit in limbo, doctrinally and literally. They are neither ordinary *Gideon* Sixth Amendment rights-bearers awaiting criminal prosecution, nor are they postconviction prisoners who, under current doctrine, have rights to employ counsel (albeit without state funding)<sup>7</sup> and rights of access to courts.<sup>8</sup> And most 9/11 detainees are not being subjected to military commissions, for which Congress has by statute authorized that

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5. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *see also* *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).
  6. *Al Odah v. United States*, 346 F. Supp. 2d 1, 13 (D.D.C. 2004). The government had argued for complete monitoring. The district court’s “proposed” alternative, to which habeas counsel acceded, was to structure unmonitored meetings, subject to the government’s review of the information that habeas counsel had before counsel could disclose it to “law firm colleagues or support staff.” *Id.* at 13. To mitigate the risk of government use of the lawyer-client exchanges, the government was to designate specialized staff (who were not to participate in detention decisions) to review detainees’ exchanges with their lawyers. *Id.* at 3 n.2.
  7. *Gideon* applies to criminal defendants facing time incarcerated and to the as-of-right appeals of convicted defendants. The Court has not read *Gideon* to require court-funded counsel for postconviction discretionary habeas petitions. *See* *Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Murray v. Giarratano*, 492 U.S. 1 (1989). If a petitioner has a lawyer in a habeas proceeding, equity requires that the lawyer not, through abandonment of that client, prevent the habeas claims from being heard. *See, e.g.,* *Maples v. Thomas*, 132 S. Ct. 912, 924 (2012); *Holland v. Florida*, 130 S. Ct. 2549, 2564-65 (2010).
  8. *Bounds v. Smith*, 430 U.S. 817 (1977), *as limited by* *Lewis v. Casey*, 518 U.S. 343 (1996), discussed *infra* note 30.

counsel be provided.<sup>9</sup>

That 9/11 detainees are positioned in this legal gap is not happenstance. The government has sought to avoid the packet of rights afforded defendants in criminal prosecutions, to block public knowledge about what has transpired, and to make lawful whatever treatment is accorded.<sup>10</sup> That courts recognize Guantánamo detainees as entitled to lawyers is part of the *Gideon* effect, captured in a district judge's reaction in 2002 (quoted at the outset) that "in any case which a person is being held he has a right to counsel."<sup>11</sup> In 2004, the Supreme Court's confirmation of detainees' rights to file habeas petitions<sup>12</sup> (a holding reiterated in 2006 and in 2008<sup>13</sup>) brought with it entitlements to retain

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9. See 10 U.S.C.A. §§ 948c, 948k, 949c(b) (West 2012). These rights may also be rooted in the government's prior practices for military tribunals and the rules governing courts-martial. As Eugene Fidell pointed out to us, the 1920 amendments to the Articles of War (which predate the Uniform Code of Military Justice (UCMJ)) specified that persons subject to a general or special court-martial had rights to have military defense counsel appointed. See Pub. L. No. 66-242, 41 Stat. 759, 789 (codified in the Articles of War, ch. II, art. 11 (superseded 1950)). Thereafter, the UCMJ provided for defense counsel, either "detailed" from the military to provide such services or "civilian counsel" if retained by the accused. 10 U.S.C. §§ 827 (a)(1), §838(b) (2006).

Military tribunals have also included appointed defense counsel. In the 1942 proceedings of *Ex parte Quirin*, 317 U.S. 1 (1942), President Roosevelt created an ad hoc military tribunal to sit outside the purview of the Articles of War and other precedents and to try alleged German saboteurs apprehended in the United States. See Proclamation 2561, Denying Certain Enemies Access to the Courts of the United States, 7 Fed. Reg. 5101 (July 7, 1942); LOUIS FISHER, CONG. RESEARCH SERV., RL 31340, MILITARY TRIBUNALS: THE *QUIRIN* PRECEDENT 3-7 (Mar. 26, 2002). President Roosevelt issued another order naming the commission members, prosecutors, and "defense counsel," all of whom were serving in the military. Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 8, 1942).

Another source for federal defendants to have counsel was the 1938 decision in *Johnson v. Zerbst*, 304 U.S. 458 (1938), holding that that federal felony defendants had such a right. In addition, a federal statute dating from 1790 provided that persons accused of treason or capital crimes were to have assigned counsel, albeit not generally compensated. Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112, 118-19.

10. As we discuss below, the problems facing 9/11 detainees and the challenges facing the government in maintaining security are not solely artifacts of 9/11 but are continuous with many other contexts. See Judith Resnik, *Detention, the War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 619-20 (2010).
11. Transcript of Proceedings of May 29, 2002, at 55, *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002) (No. 2:02-CV- 429), 2004 WL 1120871, in Joint Appendix, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 1120871, at \*94 [hereinafter *Hamdi* Transcript]; see also *Hamdi*, 243 F. Supp. 2d 527. The epigraph from Judge Doumar can be found in *Hamdi* Transcript, *supra*, at 55.
12. *Hamdi*, 542 U.S. 507; *Rasul v. Bush*, 542 U.S. 466 (2004).
13. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

and to see lawyers. Yet as contests about access to lawyers continue to erupt,<sup>14</sup> constitutional puzzles about the sources and scope of detainees' rights remain.

Does the Constitution require counsel and court access for these detainees? Are they able to invoke a range of rights because they are “persons subject to the jurisdiction” of the United States—phrasing from the Fourteenth Amendment understood to be incorporated in Fifth Amendment guarantees of due process? Does the Due Process Clause protect them from government mistreatment and produce rights to counsel—the “hallmark of due process,” as Justice Stevens counseled?<sup>15</sup> What role might Fourth Amendment standards on arrest and detention play?<sup>16</sup> Is the First Amendment’s petition right relevant? Could structural commitments to limited government and separation of powers generate counsel rights more generally? Or is the umbrella of the Suspension Clause’s protection of the writ of habeas corpus the detainees’ only shelter? And once efforts to obtain habeas are exhausted, are these individuals left dependent on whatever rights the executive branch accords them?

These treatment of 9/11 detainees puts into question the continuing vitality of the narrative, self-consciously shaped between the 1930s and the 1970s, about the scope of constitutional protections. In a series of decisions, the Supreme Court identified the United States as a country that, unlike totalitarian regimes, had constitutional obligations to constrain forms of interrogation and to equip individuals with third parties—lawyers—to inhibit (if not to prevent) coercion. In search of new meanings of the Constitution to respond to the subordination of racial minorities and to economic inequalities, courts articulated “American” constitutional procedural obligations against a backdrop of documented harms to individual liberty in fascist and Communist regimes.

*Gideon*, along with another icon of that era, *Miranda v. Arizona*,<sup>17</sup> recognized the dignity of individuals in their encounters with the state, and

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14. See, e.g., Emergency Motion Concerning Access to Counsel at 3-7, *Hatim v. Obama*, No. 05-1429 (D.D.C. filed May 22, 2013) (also filed on the same day in *In re Guantanamo Bay Detainee Continued Access to Counsel*, No. 12-398 (D.D.C.)) (explaining the chilling effect of new rules about the location of counsel meetings with clients that, by requiring transport to another area, would impose requirements of “an intrusive body search of the detainee,” and discussing government efforts to hold legal mail and “curtail flights to Guantánamo”).
  15. *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (Stevens, J., dissenting). Another “hallmark,” *Brady v. Maryland*, 373 U.S. 83 (1963), which, like *Gideon*, celebrates its fiftieth anniversary in 2013, obliges the government to disclose exculpatory information to criminal defendants. As Erwin Chemerinsky discussed at the Symposium, *Brady* has not drawn the attention in the 9/11 context akin to that accorded *Gideon* and *Miranda* rights.
  16. See, e.g., *Gerstein v. Pugh*, 420 U.S. 103 (1975).
  17. 384 U.S. 436 (1966).

required that a person cannot be left alone to be subjected to the totalizing power of the state. Both *Gideon* and *Miranda* deployed and subsidized lawyers to serve as witnesses to government interrogation and as advocates, buffering against abuses and bringing claims to public light through court filings. What we term “democratic detention” was the call for disciplined and accountable government action that stood in opposition to the unfettered intrusions that “despotic” regimes visited on people under their control.<sup>18</sup> Lawyers were a method to police the state by opening up closed encounters, and judges identified themselves as overseers to limit government misconduct. *Gideon* has become so entrenched that, although famously (and scandalously) underfunded, *Gideon* as an ideal is rarely challenged.<sup>19</sup>

*Gideon*’s wake shaped the rights of Guantánamo detainees, even if *Gideon* is cited only episodically in the 9/11 briefing, transcripts, and opinions. But the scope and sources of detainees’ rights remain underspecified, in part because aspects of the *Gideon* question were mooted when, three years after lawyers had volunteered to represent the 9/11 detainees, the government acceded to some forms of client contact.<sup>20</sup> Courts have not been put to the task of answering whether detainees are entitled to state-funded lawyers. The focus instead has been on whether the Constitution prohibits the government from imposing barriers to lawyer-client relationships and/or to courts altogether.

Above we flagged a series of questions about the sources of constitutional rights and, at the outset, a brief set of answers is in order. *Gideon* is one starting place. Although not currently read as a robust resource, the Sixth Amendment could be applied to persons facing criminal-like charges and detention.<sup>21</sup> The Suspension Clause provides another basis. Given detainees’ isolation and lack of English language skills, blocking lawyers could work a functional

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18. Muneer Ahmad has conceptualized this distinction under the rubric of rights against “dehumanization,” and the treatment of detainees at Guantánamo as a “project of dehumanization, in the literal sense.” See Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1687 (2009).
  19. In 2012, the Court addressed *Gideon*’s scope in the context of plea bargaining and held that defendants have rights to lawyers and therefore could bring challenges of ineffective assistance of counsel. See *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012). The failure to provide sufficient funds, in light of the great upswing in prosecutions, has occasionally prompted suggestions for limiting *Gideon*’s application. See, e.g., Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004).
  20. The issue of access to counsel had been raised in *Hamdi*. See Brief for Petitioners at i, *Hamdi v. Rumsfeld*, 542 U.S. 507 (No. 03-6696), 2004 WL 378715 (2004), at \*i; see also *infra* notes 136-142 and accompanying text.
  21. The Court recently rejected this approach. See *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011), discussed *infra* notes 33, 45 and accompanying text.

suspension of the writ of habeas corpus by preventing potential petitioners from being able to gather evidence or to marshal claims. But if rights to lawyers were tied only to habeas, they could be extinguished if petitions were denied. A broader reading of the Suspension Clause could encompass judicial authority to oversee executive detention; the need for ongoing oversight might make access to lawyers somewhat more durable.<sup>22</sup> In addition, government regulations, promulgated through an executive order, continue to provide a level of review (now termed “periodic”) of detention decisions at Guantánamo. That regulation permits detainees to be assisted by “private counsel, at no expense to the Government,”<sup>23</sup> in periodic review proceedings. The Executive Order both confirms that detainees have access-to-counsel rights and asserts that periodic review provisions creates no new enforceable “right or benefit.”<sup>24</sup> Preventing detainees from meeting counsel whose role is affirmatively recognized by the government would make banning access to lawyers arbitrary.

Detainees could, however, be viewed as more than bodies held under U.S. control and therefore possess rights independent of and in addition to those sourced in the Sixth Amendment and the Suspension Clause.<sup>25</sup> Both federal and state law regularly reference the right to bring claims to courts, and many state constitutions have textual commitments to open courts and rights-to-remedies.<sup>26</sup> Those historical precepts (echoing the Magna Carta) are now coupled with twentieth-century egalitarianism, reaching beyond the scope of

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22. See, e.g., Stephen I. Vladeck, Boumediene’s *Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107 (2009). Under this account, lawyers support separation-of-powers values by equipping judges with the requisite information to assess the legitimacy of the detention. Further, given that under *Tarble’s Case*, 80 U.S. (13 Wall.) 397 (1872), state courts cannot order relief for those in federal detention, limits on federal authority would preclude all judicial remedies. Vladeck, *supra*, at 2138-39.
  23. Exec. Order 13,567, § 3(a)(2), 76 Fed. Reg. 13,277, 13,278 (Mar. 10, 2011). That order provides that periodic review is discretionary, *id.* §1, 76 Fed. Reg. at 13,277, and requires that even if detainees do not want to participate, appointed personal representatives shall do so on their behalf. See Directive-Type Memorandum (DTM) 12-005, Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay Per Executive Order 13567, at 10, § 5(f)(2), (g) (May 9, 2012), <http://www.dtic.mil/whs/directives/corres/pdf/DTM-12-005.pdf>.
  24. Exec. Order 13,567, § 10(c), 76 Fed. Reg. at 13,280; see *id.* § 1(b), 76 Fed. Reg. at 13,277.
  25. Some decisions from the D.C. Circuit appear to assume detainees’ rights to be limited to habeas filings. See, e.g., *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009) (declining to decide “whether *Boumediene* portends application of the Due Process Clause and the Cruel and Unusual Punishment Clause to Guantanamo detainees”); *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009) (describing earlier case law as not applying due process protections to “aliens without property or presence in the sovereign territory of the United States”).
  26. An overview is provided in Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 964-72 (2012).

English subjects' rights. Given contemporary understandings that the Fourteenth Amendment's command, incorporated in the Fifth Amendment, requires that "any person" ought to be accorded equal protection of the laws and not be deprived of life, liberty, or property without due process, 9/11 detainees could rely on these propositions for court access. First Amendment petition rights (depending on how "the people" is defined) could be a resource as well.<sup>27</sup>

Another question remains—about rights to government funds to implement the protections that we have catalogued. Outside of *Gideon*, courts have relied on the interaction between due process and equal protection to hold that filing and transcript fees are impermissible barriers, unfairly precluding certain categories of individuals from asserting rights that others, with means, can claim.<sup>28</sup> Thus, a line of cases recognizes (and debates) subsidies, including for prisoners to access courts through state-funded law libraries, legal research aides, or by permitting (albeit not necessarily paying for) prisoners to meet with lawyers.<sup>29</sup>

These affirmative obligations are deeply contested.<sup>30</sup> In 1963, *Gideon* mandated state subsidies for poor criminal defendants as essential to the legitimacy of adversarial criminal process. A thin reading confines the constitutional obligation to that setting. Another approach sees *Gideon* as launching a wider understanding of government provisioning, expanded in the

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27. Whether this right is only a right to bring claims if independently based in positive law or whether it is a right to have rights (to borrow from Hannah Arendt) is not clear. *Cf.* Vladeck, *supra* note 22, at 2122-26.
  28. *See, e.g.,* M.L.B. v. S.L.J., 519 U.S. 102 (1996); *Boddie v. Connecticut*, 401 U.S. 371 (1971). *See generally* Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011).
  29. *Bounds v. Smith*, 430 U.S. 817 (1977), as limited by *Lewis v. Casey*, 518 U.S. 343 (1996). In *Bounds*, the Court relied upon *Gideon* when explaining that states had affirmative obligations to make meaningful the right of access to courts for indigent people in their custody. *Bounds*, 430 U.S. at 824-25. As discussed *infra* notes 124-127, 156-160 and accompanying text, in the lower courts, judges also located their authority for detainees to meet with lawyers in statutory rights to habeas and in their discretion under the All Writs Act, appointing counsel "in aid of their jurisdiction." *See, e.g., In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d. 8 (D.D.C. 2012); *Al Odah v. United States*, 346 F. Supp. 2d 1 (D.D.C. 2004).
  30. For example, in *Lewis v. Casey*, Justice Scalia commented that a "healthy inmate" could not claim a "constitutional violation because of the inadequacy of the prison infirmary." *Lewis*, 518 U.S. at 351. The Supreme Court has held, however, that deliberate indifference to known medical needs violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Thus, prison systems have to provide some medical services; Justice Scalia's assertion that keeping healthy inmates from becoming unwell is not part of "deliberate indifference" raises, but does not decide, that constitutional question.

1974 federal statutory subsidy for indigent civil litigants to make claims in courts.<sup>31</sup> A “civil *Gideon*” movement followed, calling for the recognition of rights to state-funded lawyers in cases about health, housing, and family life.<sup>32</sup>

The Supreme Court has not yet embraced that proposition. Indeed, the Court declined in 2011 to require counsel for a person facing, at the behest of a private opponent, civil contempt and twelve months of incarceration for failure to pay child support.<sup>33</sup> But many other jurists have championed rights to state-paid counsel. New York State’s Chief Judge Jonathan Lippman explained that *Gideon* was “not just about the constitutional right to counsel for criminal defendants but also a clarion call to recognize our societal obligation to give legal assistance to human beings facing life transforming crises in our courts.”<sup>34</sup> Under this approach, the right of court access thereby entails (rather than is conflated with) subsidies for lawyers because, “in civil proceedings involving fundamental human needs, it is extremely difficult, if not impossible, for a person to be assured a fair outcome without a lawyer’s help.”<sup>35</sup> In short, when 9/11 detainees invoke the “civil” remedy of habeas corpus or otherwise bring cases,<sup>36</sup> they could be seen as “civil *Gideon*” claimants (although surely not the kinds of recipients of state subsidies that the movement’s proponents would foreground).

*Gideon* at Guantánamo is thus both a site-specific conflict and part of an ongoing debate across various contexts about American conceptions of the relationship between individual and the state. Despite the initial efforts to keep

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31. See Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. §§ 2996-2996l (2006)). The 1966 revisions of the class action rule offered another route, permitting plaintiffs to cross-subsidize each other. Fee-shifting statutes, such as the Civil Rights Attorney Fee Act of 1976, were yet another means of enabling access. See Resnik, *supra* note 28, at 105-06.
  32. See ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings (Aug. 2010), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/lis\\_sclaid\\_105\\_revised\\_final\\_aug\\_2010.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lis_sclaid_105_revised_final_aug_2010.authcheckdam.pdf).
  33. Whether due process would require counsel if the opponent were the state, seeking jail time, was not decided. See *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011), discussed *supra* note 21, *infra* note 45, and accompanying text.
  34. Jonathan Lippman, *Equal Justice at Risk: Confronting the Crisis in Civil Legal Services*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 247, 253 (2012).
  35. Jonathan Lippman, Remarks on Law Day: Law in the 21st Century: Enduring Traditions, Emerging Challenges 3 (May 3, 2010) (transcript available at <http://www.nycourts.gov/whatsnew/pdf/Law%20Day%202010.pdf>).
  36. Under current law, challenges to conditions of confinement have been barred—whether constitutionally so or not. See 28 U.S.C. § 2241(e)(2) (2006). Courts have relied on this bar to preclude lawsuits, including a wrongful death action. See *Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012).

lawyers out, *Gideon* (along with *Miranda* and the access-to-court cases predating and following 1963<sup>37</sup>) provided the paradigm under which both detainees and lawmakers operated.<sup>38</sup> Even as *Gideon* has been formally cabined to criminal defendants and even as the Court has permitted erosion of *Miranda* protections,<sup>39</sup> both decisions continue to structure current debates.<sup>40</sup> The Detainee Treatment Act of 2005 and the Military Commissions Acts of 2006 and 2009 reflect *Miranda*'s reach and its vulnerability, as these statutes specify detainee rights to noncoercion, yet recognize the possibility of evidence produced through coercion<sup>41</sup> as the statutes also preclude civil remedies for

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37. See Vladeck, *supra* note 22, at 2115-19.

38. *Gideon*'s footprints (as well as pre-*Gideon* practices in some twentieth century military tribunals, see *supra* note 6) can be found in the Military Commissions Act of 2009, which provides that, for those charged with offenses prosecuted in that system, the accused has a right to state-provided military counsel, as well as to retain a civilian lawyer (if meeting security clearance and other qualifications) and to self-representation. See 10 U.S.C.A. §§ 948c, 948k, 949c(b) (West 2012).

39. See, e.g., *Maryland v. Shatzer*, 559 U.S. 98 (2010); *Montejo v. Louisiana*, 556 U.S. 778 (2009). See generally Peter Brooks, *Speech, Silence, the Body*, in *SPEECH AND SILENCE IN AMERICAN LAW* 190, 197 (Austin Sarat ed., 2010); Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519 (2008).

40. Indeed, *Miranda*'s continuing authority has been cited as a reason why criminal courts are not appropriate venues. As one senator explained, the government "ought to be able to gather intelligence before [one] did anything else, because what I want to know more about this guy is not how he committed the crime, but what led him to commit the crime and who he worked with, and *Miranda* warnings are counterproductive, in my view." *Terrorists and Guns: The Nature of the Threat and Proposed Reforms: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 111th Cong. 18 (2010) (statement of Sen. Lindsey Graham).

Aspects of that approach became law. The National Defense Authorization Act of 2010 included a provision entitled "No Miranda Warnings for Al Qaeda Terrorists" that mandates:

[N]o official or employee of the Department of Defense or a component of the intelligence community (other than the Department of Justice) may read to a foreign national who is captured or detained outside the United States as an enemy belligerent and is in the custody or under the effective control of the Department of Defense or otherwise under detention in a Department of Defense facility the statement required by *Miranda v. Arizona*, or otherwise inform such an individual of any rights that the individual may or may not have to counsel or to remain silent consistent with *Miranda v. Arizona*.

Pub. L. No. 111-84, 123 Stat. 2190, 2454 (2009) (codified at 10 U.S.C.A § 801 note (West 2012)) (citations omitted).

41. The Military Commissions Act (MCA) of 2006 barred statements "obtained by use of torture" if the actions took place after the passage of the Detainee Treatment Act of 2005. Where, however, the "degree of coercion" was "disputed," the MCA of 2006 permitted admission of a statement if the "totality of the circumstances" made it "reliable"; "if the

coercion.<sup>42</sup>

Below, we sketch the backdrop that produced *Gideon*, *Miranda*, and the contemporary 9/11 jurisprudence on rights of access to courts and to counsel. As we detail, practices in other countries contributed to the framing of criminal procedure rights in the mid-twentieth century, just as events offshore today are invoked to explain domestic legal developments. The specter of the despotic “other” once sparked judicial discussion of a distinctive American identity, marked in part by provision of criminal defendants’ rights, even as those fears also authorized domestic surveillance.<sup>43</sup> The contemporary contrast is with a

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interests of justice would best be served by admission of the statement into evidence”; and if the coercive practices used to force such statements did not “amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.” Pub. L. No. 109-366, § 948r, 120 Stat. 2600, 2607 (2006) (codified at 10 U.S.C. §948r (2006)). The MCA of 2009 barred all statements “obtained by the use of torture” or through “cruel, inhuman, or degrading treatment,” as prohibited by the DTA, regardless of when the torture took place. Pub. L. No. 111-84, § 948r(a), 123 Stat. 2190, 2580 (2009) (codified at 10 U.S.C.A. § 948r(a) (West 2012)). The formulation about admissibility comes close to pre-*Miranda* criteria. Statements obtained through coercive methods—so long as they do not amount to torture or cruel, inhuman, or degrading treatment—are admissible if the “totality of the circumstances” demonstrates their reliability (as in the MCA of 2006) and if “the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or the statement was voluntarily given.” *Id.* § 948r(c), 123 Stat. at 2580; see JENNIFER K. ELSEA, CONG. RESEARCH SERV., R41163, THE MILITARY COMMISSIONS ACT OF 2009: OVERVIEW AND LEGAL ISSUES 25 (Apr. 6, 2010).

42. An amendment to the Detainee Treatment Act of 2005 stated that federal courts lacked jurisdiction over claims by current or former detainees under habeas as well as “any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense. . . .” Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A., tit. X, § 1005(e), (h), 119 Stat. 2739, 2742-44. That prohibition was reiterated in the Military Commissions Act of 2006 and, although the Court refused to apply the habeas bar retroactively and the 2009 MCA modified the habeas provisions, the other preclusion remains. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 28 U.S.C. § 2241(e)(2) (2012)).
43. As Herbert Packer explained, the “distinctively American institution of judicial review” occasioned oversight of the criminal justice process. See Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 22 (1964); see also George C. Thomas III, *Improving American Justice by Looking at the World*, 91 J. CRIM. L. & CRIMINOLOGY 791, 816 (2001) (reviewing CRIMINAL PROCEDURE: A WORLDWIDE STUDY (Craig M. Bradley ed., 1999)). *Gideon*’s bright-line rule remains unusual. Article 6 of the European Convention on Human Rights provides that every defendant has the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.” Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221. The European Court of Human Rights has cited different factors relevant to the “interest of justice inquiry,” including the complexity of the case, the ability of the defendant

stateless terrorist, and that threat has been used to license retreats from the idea of all individuals as rights-bearers and of a government obliged to account publicly for its actions.<sup>44</sup>

Conflicts in the wake of 9/11 about the boundaries of both *Gideon* and *Miranda* underscore the two decisions' interdependencies as well as the stakes of their evisceration. Those two judgments mark a democratic understanding that all individuals—even the reviled—are rights-bearers who cannot be left alone, to be subjected to state power, sealed off from lawyers and others able to make public how the state is exercising its control.

The experiences of 9/11 reaffirm the utilities of judicial intervention to insist on lawyers-as-buffers and the importance of courts as public venues. Lawyers—acting as witnesses, litigators, and warning sirens—interrupted the most egregious forms of torture at Guantánamo and elsewhere. As a result, many detainees were eventually released. Lawyering has also contributed to the debates about the morality and the legality of continuing to detain some individuals—potentially indefinitely—without trial.

Yet *Gideon* at Guantánamo also underscores the limits of lawyering, which is the leitmotif of discussions about *Gideon* more generally. Lawyers are one “hallmark of due process” (to borrow again from Justice Stevens), yet that role

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to present the case adequately without assistance, and the seriousness of any possible sanction. NUALA MOLE & CATHARINA HARBY, *THE RIGHT TO A FAIR TRIAL: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 64 (2d ed. 2006), [http://book.coe.int/sysmodules/RBS\\_fichier/admin/download.php?fileid=3014](http://book.coe.int/sysmodules/RBS_fichier/admin/download.php?fileid=3014). As of this writing, the European Commission is considering a directive on counsel rights in criminal proceedings. See Hanns Peter Nehl & Debbie Sayers, *Article 48 of the Charter: Presumption of Innocence and Right of Defence*, COMMENTARY ON THE EU CHARTER OF FUNDAMENTAL RIGHTS (Tamara Hervey, Jeffrey Kenner, Steve Peers & Angela Ward eds., forthcoming 2013) (manuscript on file with authors); see also Jacqueline S. Hodgson, *Safeguarding Suspects' Rights in Europe: A Comparative Perspective*, 14 *NEW CRIM. L. REV.* 611 (2011) (describing intra-European diversity in procedural protections for criminal defendants). The European Court of Human Rights has recognized that suspects generally have the right to have counsel present at the time of interrogation. *Salduz v. Turkey*, 49 Eur. Ct. H.R. 421 (2008); see also *Cadder v. Her Majesty's Advocate* [2010] UKSC 43 (appeal taken from Scot.).

44. For example, a federal district judge, writing in 2006 about efforts by Maher Arar to obtain remedies for the torture he had suffered, stated:

This case undoubtedly presents broad questions touching on the role of the Executive branch in combating terrorist forces—namely the prevention of future terrorist attacks within U.S. borders by capturing or containing members of those groups who seek to inflict damage on this country and its people. . . . [C]ourts must proceed cautiously in reviewing constitutional and statutory claims in that arena . . . .

*Arar v. Ashcroft*, 414 F. Supp. 2d 250, 281 (E.D.N.Y. 2006), *aff'd*, 532 F.3d 157 (2d Cir. 2008), *aff'd*, 585 F.3d 559 (2009) (en banc).

has not yet become firmly constitutionalized as a substantive due process right to counsel funded by the state when an individual is detained by the state.<sup>45</sup> Justice requires more, including constraints on prosecutors in their charging and bargaining, on judges in their sentencing, and on legislatures in their criminalizing conduct and authorizing surveillance.

Many detainees remain in indefinite detention, and conflicts continue about whether detainees have any rights independent of government largess. When faced with painful evidence of torture, the courts have been unwilling to permit the possibility of remedies for a series of civil rights claimants.<sup>46</sup> Echoing the inequities in indigent defense more generally,<sup>47</sup> post-9/11 detention reveals the incompleteness of contemporary constitutional protections and practices, which have yet to limit governmental powers and to make clear that all individuals under the control of the United States are persons, entitled to seek redress through public proceedings in courts.

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45. The Court's decision in *Turner v. Rogers*, 131 S. Ct. 2507 (2011), rejected a reading of *Gideon* to apply beyond criminal defendants. Even as the Court insisted on "fairness" as a constitutional right when a person was detained at a private party's behest for civil contempt, the Court did not require state-funded counsel. Instead, the Court licensed alternative methods to ensure fairness and launched a case-by-case inquiry as to their sufficiency. In contrast, our argument would ground counsel rights in substantive due process, intersecting with a broader reading of the Sixth Amendment for all detained by the state. See *supra* notes 21, 33 and accompanying text.
  46. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc); *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir.), *cert. denied*, 132 S. Ct. 2751 (2012); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).
  47. See, e.g., Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150 (2013); Gabriel M. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L. J. 2236 (2013).

## II. *GIDEON AND MIRANDA: LIBERTY, COERCION, AND AMERICAN IDENTITY*

In 1961, Clarence Earl Gideon told a trial judge in Panama City, Florida, that “[t]he United States Supreme Court says I am entitled to be represented by Counsel.”<sup>48</sup> Florida declined to provide one, and Mr. Gideon was convicted, without a lawyer, of felony charges alleging breaking and entering and sentenced to five years in prison. Lawyer-less, he pursued his claim of right until 1962, when the Supreme Court granted certiorari and appointed counsel.<sup>49</sup>

By then, the United States Supreme Court had held that criminal defendants facing felony charges in federal courts had rights to appointed counsel,<sup>50</sup> and dozens of states had also come to provide free legal assistance to indigent felony defendants.<sup>51</sup> Twenty-two states sided with Mr. Gideon in their amicus brief,<sup>52</sup> while Florida, joined by Alabama and North Carolina, argued that the Sixth Amendment did not mandate a blanket right to counsel and that judges could appoint a lawyer based on “the totality of facts in a given case.”<sup>53</sup> (Of “the multitude of criminal trials which have been conducted in state courts throughout the nation, absent the assistance of defense counsel, only a relatively few have been attacked successfully on the ground that they were ‘shocking to the universal sense of justice.’”<sup>54</sup>)

The Court disagreed and held that indigent state felony defendants, like their federal counterparts, had a right to appointed counsel under the Sixth

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48. *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963) (quoting trial court transcript); ANTHONY LEWIS, *GIDEON’S TRUMPET* 10 (1964). Gideon was convicted on August 25, 1961. Brief for the Petitioner at 3, *Gideon*, 372 U.S. 335 (No. 155), 1962 WL 115120, at \*3.

49. See *Gideon v. Cochran*, 370 U.S. 908 (1962). The Court appointed Abe Fortas, who was joined by a summer associate, John Hart Ely. *Gideon v. Cochran*, 370 U.S. 932 (1962); LEWIS, *supra* note 48, at 50-51, 127-32.

50. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

51. According to the brief filed on Gideon’s behalf, by 1962, thirty-seven states “expressly” provided “for the designation of counsel” for “destitute defendants”; counsel was “mandatory in all felony cases if requested by the defendant.” Another thirteen states generally provided counsel. Brief for the Petitioner at 30, *Gideon v. Wainwright*, 372 U.S. 335, 1962 WL 75206. (When filed, the brief was under the case’s original name, *Gideon v. Cochran*. See *supra* note 49.)

52. Brief for the State Government Amici Curiae, *Gideon*, 372 U.S. 335, 1962 WL 75209. See generally William M. Beane, *The Right to Counsel: Past, Present, and Future*, 49 VA. L. REV. 1150 (1963).

53. Amicus Curiae Brief for the State of Alabama at 4, *Gideon*, 372 U.S. 335, 1962 WL 115123, at \*4.

54. *Id.* at 6, 1962 WL 115123, at \*6 (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)).

Amendment.<sup>55</sup> The “obvious truth” was that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>56</sup>

*Gideon* is sometimes set into a silo of Sixth Amendment cases<sup>57</sup> rather than read in conjunction with case law reinterpreting the Fourth, Fifth, and Fourteenth Amendments in efforts to redress the specific challenges facing defendants of color, the risks posed by state coercion, and the interrelationships of race and poverty. A brief excursion into pre-*Gideon* case law illuminates that ideas about American commitments to liberty, equality, and dignity were the conceptual wellsprings that produced *Gideon* and other rules equipping individuals with resources when encountering the state.

A right to a lawyer was the basis of the 1932 ruling in *Powell v. Alabama*, reversing the conviction of nine young black men found guilty of the rape of

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55. *Gideon*, 372 U.S. at 342.

56. *Id.* at 344.

57. See Tracey L. Meares, *What’s Wrong with Gideon*, 70 U. CHI. L. REV. 215 (2003). An earlier reading that understood *Gideon* to have a broad meaning was an essay, written in 1964, that posited *Gideon* as a “watershed”—the “longest single step taken” and likely the “most durable”—toward moving the criminal justice system away from a “Crime Control Model” and towards a “Due Process Model.” See Packer, *supra* note 43.

Packer argued that the Crime Control Model focused on the efficacy of criminal law enforcement to maximize social welfare and aimed for speed and finality through high rates of apprehension and conviction. Administrative factfinding was the method relied upon either to exonerate or to induce guilty pleas. In contrast, the risk of error was the foundation of the Due Process Model, which imposed obstacles to guard against mistakes borne of “official oppression of the individual.” *Id.* at 16. Packer argued that courts were moving from the Crime Control Model toward the Due Process Model, in which lawyers were the “hinge” that linked obligations and enforcement. *Id.* at 21-23. (He predicted that *Gideon* would likely be applied to plea bargaining, which it was in 2012. See *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafley v. Cooper*, 132 S. Ct. 1376 (2012).)

Race played some role, and poverty more, in Packer’s analysis. Packer read *Gideon* as exemplary of a then-new element—equality—in the Due Process Model. Packer, *supra* note 43, at 62 n.16. Further, the “plight of the Negro as criminal defendant out of all proportion to his numbers in the population,” *id.* at 65, was noted, as was the risk that the Crime Control Model could be used discriminatorily against “the poor, the ignorant, the illiterate, [and] the unpopular,” *id.* at 27.

Criticizing the analysis, John Griffiths argued that Packer’s two models were one, sharing the premise of a “battle” and that a genuine alternative model was the “family,” which accorded respect to defendants as persons. John Griffiths, *Ideology in Criminal Procedure or A Third “Model” of the Criminal Process*, 79 YALE L.J. 359 (1970). Neither Packer nor Griffiths considered the Court’s role in articulating a set of American constitutional practices divergent from those of other countries, a theme that emerged in scholarship of a later era. See, e.g., Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

two white women.<sup>58</sup> The trial and conviction of this group (the “Scottsboro Boys”) brought national and international approbation (as have Guantánamo detentions) to the United States, as reflected in the 1923 poem *Justice*, by Langston Hughes:

That Justice is a blind goddess  
Is a thing to which we black are wise  
Her bandage hides two festering sores  
That once perhaps were eyes.<sup>59</sup>

The United States Supreme Court responded, holding in *Powell* that the failure to provide the defendants facing capital charges with lawyers violated the Due Process Clause.<sup>60</sup> The quiet reference to race in the opinion (“the attitude . . . of great hostility”<sup>61</sup>) was coupled with a comment that this right to counsel fell within the set of “certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.”<sup>62</sup>

The idea that a “free government” had to treat criminal defendants differently than would countries less committed to liberty became a refrain in

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

59. The poem first appeared in the *Amsterdam News* on April 25, 1923, and eight years later, in Hughes’s anthology *Scottsboro Limited*, was published with three others: *Scottsboro*, *Christ in Alabama*, and *The Town of Scottsboro*. See JOSEPH McLAREN, LANGTON HUGHES: FOLK DRAMATIST IN THE PROTEST TRADITION, 1929-1943, at 33-40 (1997).

60. *Powell*, 287 U.S. at 71 (“All that it is necessary now to decide . . . is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.”).

61. *Id.* at 45.

62. *Id.* at 71-72 (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898)). *Holden* upheld enforcement of a Utah law limiting the hours of mine workers. Extolling due process protections of a free government, the decision affirmed an evolutionary narrative that permitted regulation of contracts as property rights. A line of “free government” references in due process cases cited the rights of “every English subject” under a natural rights tradition. In the mid-twentieth century, Justices used the phrase in contrast to “despotic power.” See, e.g., *Feldman v. United States*, 322 U.S. 487, 502 (1944) (Black, J., dissenting). At issue in *Feldman* was the admission of a defendant’s confession. Justice Black argued that a broad construction of the Fifth Amendment was necessary for the “full preservation of the basic safeguards of liberty specifically enumerated in the Bill of Rights. The protections . . . represent a large part of the characteristics which distinguish free from totalitarian government.”

decisions during the World War II and the Cold War eras.<sup>63</sup> In 1943, for example, the U.S. Supreme Court insisted that individuals detained by the police had a constitutional right to be brought before a neutral third party.<sup>64</sup> Justice Frankfurter’s majority opinion in *McNabb v. United States* stressed the need for a prompt appearance because a “democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process.”<sup>65</sup> In 1944, in *Ashcraft v. Tennessee*, Justice Black reiterated that concern, as he distinguished the United States from “certain foreign nations” that would “wring from [detainees] confessions by physical or mental torture.”<sup>66</sup>

The theme of a democratic—as opposed to a “despotic”—criminal justice system was replayed in the 1951 decision of *United States v. Carignan*,<sup>67</sup> upholding the reversal of a conviction because the defendant was not permitted to testify before a jury about the “involuntary character” of his confession.<sup>68</sup> Given the kinds of horrific treatment that 9/11 has made familiar, the details of the unconstitutional coercion of Mr. Carignan seem relatively mild. No evidence was presented “of violence, of persistent questioning, or of deprivation of food or rest.”<sup>69</sup> However, as Justice Douglas explained in his concurrence,

the accused is under the exclusive control of the police, subject to their mercy, and beyond the reach of counsel or of friends. What happens

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63. See Kim L. Scheppelle, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1 INT’L J. CONST. L. 296, 313 (2003); see also Vicki C. Jackson, *The Early Hours of the Post-World War II Model of Constitutional Federalism: The Warren Court and the World*, in EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW 137 (Harry N. Scheiber ed., 2007).

64. *McNabb v. United States*, 318 U.S. 332, 342 (1943).

65. *Id.* at 343. The use of the term “dignity” in relationship to individual rights was one of the earliest deployments of the word by the U.S. Supreme Court, which had before then used the term “dignity” in terms of the respect due to the state (i.e., the “peace and dignity of the state”) but not in terms of individual rights. See Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003).

66. *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944). That case concluded that “[t]he Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession.” *Id.*

67. *United States v. Carignan*, 342 U.S. 36 (1951).

68. *Id.* at 38.

69. *Id.* at 40. The defendant was isolated, except for a meeting with a priest, and confessed only after a court officer assured him that no one had been hung in the past twenty-seven years. *Id.* at 40-41.

behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country—the free as well as the despotic, the modern as well as the ancient.<sup>70</sup>

While, Justice Douglas explained, coercive interrogations might be efficient, “[w]e in this country . . . early made the choice—that the dignity and privacy of the individual were worth more to society than an all-powerful police.”<sup>71</sup> The linkage of criminal defendants’ rights and American identity was a repeated motif in the decisions of several Justices,<sup>72</sup> in lower federal and state courts,<sup>73</sup> and in commentary.<sup>74</sup>

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70. *Id.* at 46 (Douglas, J., concurring).

71. *Id.*

72. Through a search of Westlaw and LexisNexis for U.S. Supreme Court cases between 1930 and 1970, using terms such as “prison,” “torture,” “Nazi,” “Stalin,” “fascist,” “totalitarian,” “internment,” and the like, Charles W. Tyler located twenty-nine Supreme Court decisions in which such references were made. Justices Frankfurter, Black, and Douglas wrote nineteen of the decisions. Other Justices using such comparisons included Justices Jackson, Murphy, Roberts, Fortas, Brennan, and Goldberg, and Chief Justice Warren. See Charles W. Tyler, *Models of Detention* (Dec. 2012) (unpublished manuscript) (on file with authors).

73. For example, a 1955 Second Circuit decision chastised the police for the treatment of Santo Caminito, who had been interrogated while held “incommunicado” for twenty-seven hours. *United States ex rel. Caminito v. Murphy*, 222 F.2d 698, 700-01 (2d Cir. 1955). Caminito, alongside co-defendants Frank Bonino and Charles Noia, had in the 1940s been convicted, based in large part on their confessions, of felony murder and sentenced to life imprisonment. The Second Circuit detailed that the New York police refused “to allow [Caminito’s] lawyer, his family, and his friends to consult with him” and their continual questioning made “sleep virtually impossible.” *Caminito*, 222 F.2d at 701. Judge Jerome Frank explained that “[a]ll decent Americans soundly condemn satanic practices,” which were methods used by “totalitarian regimes” that did not “comport with the barest minimum of civilized principles of justice.”<sup>73</sup> Fourteen years after conviction, Caminito was released, followed soon thereafter by one of his co-defendants, Frank Bonino. Chief Judge Clark concurred but objected to his colleagues’ criticism of the police. *Id.* at 706 (Clark, C.J., concurring). See generally Larry Yackle, *The Story of Fay v. Noia: Another Case About Another Federalism*, in *FEDERAL COURTS STORIES* 191 (Vicki C. Jackson & Judith Resnik eds., 2010).

The third defendant, Noia, had not appealed, out of fear that, were the conviction reversed, he risked being sentenced to death. *Fay v. Noia*, 372 U.S. 391, 397 n.3 (1963). But the 1955 circuit opinion paved a way to the Supreme Court, which, in an opinion written by Justice Brennan and issued alongside *Gideon* on March 18, 1963, concluded that Noia’s failure to appeal in state court did not absolutely bar federal habeas corpus review. Absent a deliberate bypass of available state remedies by a criminal defendant, state procedural errors did not cut off access by way of habeas to the federal courts. *Id.* at 433, 439. Two years later, Justice Brennan applied that approach on direct review. *Henry v. Mississippi*, 379 U.S. 443, 449-53 (1965); see also *Lee v. Kemna*, 534 U.S. 362 (2002). The rule in *Fay v. Noia* has since been overturned. See *Coleman v. Thompson*, 501 U.S. 722, 749-51 (1991).

The effort to mark as American special attitudes toward detention framed the briefing on behalf of Ernesto Miranda, who argued that the police had violated his Fifth Amendment right against self-incrimination. Miranda's lawyer, John Frank, detailed how Miranda, a mentally ill twenty-three-year-old with little education, was placed in a room with two police officers and then signed a confession.<sup>75</sup> After quoting Justice Douglas's *Carignan* concurrence, Frank added: "We are not talking with some learned historicity about the *lettre de cachet* of pre-Revolutionary France or the secret prisons of a distant Russia. We are talking about conditions in the United States, in the Twentieth Century, and now."<sup>76</sup>

Chief Justice Warren, who wrote the five-person majority decision,<sup>77</sup> put the constitutional prohibition against compelled self-incrimination into a political-historical account of "inquisitorial and manifestly unjust methods of interrogating" detainees.<sup>78</sup> The Chief Justice's opinion discussed police who "resorted to physical brutality—beatings, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions."<sup>79</sup> Further, Chief Justice Warren cited police manuals suggesting that officers isolate individuals to deprive them of "outside support."<sup>80</sup> Because

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74. See, e.g., Jerome Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133 (1953). Hall argued that, while "private interrogation of suspects immediately after their arrest is essential in any system of effective detection . . . one cannot avoid the duty to subject law-enforcement, including interrogation, to democratic ideals." *Id.* at 176.
75. Brief for Petitioner at 3-5, *Miranda v. Arizona*, 384 U.S. 436 (1966) (No. 759), 1966 WL 100543, at \*3-5.
76. *Id.* at 47, 1966 WL 100543, at \*47.
77. In 1968, Congress responded with a statute seeking to overturn the requirements of warnings. See 18 U.S.C. § 3501 (2006). For decades, the Justice Department viewed the provision as constitutionally suspect and did not invoke it. After a federal circuit relied on it, the Supreme Court—in an opinion by Chief Justice Rehnquist—held that *Miranda* warnings were a kind of constitutional rule not subject to a legislative override. See *Dickerson v. United States*, 530 U.S. 428, 432 (2000).
78. *Miranda*, 384 U.S. at 442 (citing *Brown v. Walker*, 161 U.S. 591, 596-97 (1896)). The Court ruled on four consolidated cases—three state and one federal—dealing with substantially similar issues. In contrast to the invocation of foreign practices as negative referents in *McNabb*, *Ashcroft*, *Carignan*, and the *Miranda* brief, Chief Justice Warren reported as positive exemplars the legal safeguards for interrogation provided in England, Scotland, India, and Ceylon, as well as by the United States FBI and the Uniform Code of Military Justice. *Id.* at 484-90. In dissent, Justice Harlan did not object to the Court's references to foreign law but rather disagreed with its assessment: "none of these jurisdictions has struck so one-sided a balance as the Court does today." *Id.* at 521 (Harlan, J., dissenting).
79. *Id.* at 446 (majority opinion).
80. *Id.* at 455.

genuine individual privacy was the “hallmark of our democracy,”<sup>81</sup> “mental” coercion, like physical coercion, was unacceptable.<sup>82</sup>

The rule that emerged from *Miranda* prohibited the use of defendants’ statements, if obtained from coercion, as evidence in court. The Court imposed the burden on the prosecution to demonstrate protection of the “privilege against self-incrimination,” and explained that the obligation attached for “custodial interrogation[s] . . . initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”<sup>83</sup> The mechanism for enforcement was (absent the fashioning of “other fully effective means”) to inform the person of rights to remain silent and to be addressed in “the presence of an attorney, either retained or appointed.”<sup>84</sup>

Keenly aware that many of those subjected to interrogation could not “afford a retained attorney,” the *Miranda* Court invoked *Gideon*.<sup>85</sup> Equality among defendants required that the *Miranda* mandate be independent of the “financial ability of the individual,” for

the privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance . . . Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial . . . struck down in *Gideon v. Wainwright* . . . .<sup>86</sup>

To whom does such an obligation run? The rights articulated could be

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81. *Id.* (quoting *United States v. Grunewald*, 233 F.2d 556, 582 (2d Cir. 1956) (Frank, J., dissenting), *rev’d*, 353 U.S. 391 (1957)).

82. *Id.* at 448 (“[T]he blood of the accused is not the only hallmark of an unconstitutional inquisition.” (quoting *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960))).

83. *Id.* at 444.

84. *Id.*

85. *Id.* at 472.

86. *Id.* at 472-73 (citing *Gideon*, 372 U.S. 335 (1963)). In dissent, Justice Harlan took exception, arguing that the Court had incorrectly conflated the right to counsel at trial and the right to counsel in an interrogation: “While the Court finds no pertinent difference between judicial proceedings and police interrogation, I believe the differences are so vast as to disqualify wholly the Sixth Amendment precedents as suitable analogies in the present cases.” *Id.* at 513-14 (Harlan, J., dissenting).

argued not to embrace all held under the umbrella of 9/11, for the *Miranda* Court mixed language that “all individuals” had such rights with a narrower statement about “the respect a government—state or federal—must accord to the dignity and integrity of its citizens.”<sup>87</sup> Citizenship (and the lack thereof) thus became one of the bases (in combination with location, kind of enemy status, and the forms of process accorded) on which the United States government premised its authority to work outside the purviews of *Gideon* and of *Miranda*.

### III. KEEPING LAWYERS AT BAY: 9/11 AND ACCESS TO THE COURTS

Fast-forward to the decade since 9/11, and to a world replete with questions about the rights of detainees and the relevance of *Gideon* and *Miranda*. Between 2001 and 2004, the federal government sought to prevent access—by lawyers, the press, and the public—to detainees. The lawyers appointed by courts or retained by families found themselves in the peculiar position of being barred from talking with individuals who were nominally their “clients.”

That lack of contact could be styled as part of the exotica of Guantánamo and therefore far afield from contemporary *Gideon* questions. Yet many issues raised in the context of Guantánamo have analogues to experiences involving criminal defendants. Indeed, a lack of interaction between lawyer and client is not unique to 9/11 detention, nor are claims of a lack of meaningful lawyering. The law on ineffective assistance of counsel is filled with instances in which ordinary defendants have little or no relationship with their lawyers.<sup>88</sup> Given the workload demands on many public defenders, even diligent lawyers may not be able to provide much help,<sup>89</sup> Thus, the challenges of fulfilling *Gideon*'s

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87. *Miranda*, 384 U.S. at 460.

88. See, e.g., *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012); *Holland v. Florida*, 130 S. Ct. 2549, 2555 (2010); *Williams v. Taylor*, 529 U.S. 362, 390 (2000). The lack of implementation of *Gideon* can be traced in part to the Supreme Court's limited willingness to insist on effective representation. See *Strickland v. Washington*, 466 U.S. 668 (1984). Thereafter, the Court repeatedly declined to find instances of ineffective assistance of counsel. See John H. Blume & Stacey D. Neumann, “It's Like *Deja Vu* All over Again”: *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and *A (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127, 134 (2007).

89. For example, in the fall of 2012, the Supreme Court of Missouri agreed with that state's public defenders that lawyers could decline assignments when their caseloads became too high. *State ex rel. Missouri Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 597 (Mo. 2012); see also *Hurrell-Harring v. State*, 930 N.E.2d 217, 225 (N.Y. 2010) (holding that deficiencies in the New York public defender system created such an unacceptable risk of a violation of Sixth Amendment rights that they amounted to a constructive violation of *Gideon*).

legacy – a legal-political imperative for equipage – in the face of a limited will to support that mandate stretch from courts around the country to Guantánamo Bay.<sup>90</sup>

The questions in these sites are the same: What is the state's obligation? What equipage (investigators, translators, experts) and what services for legal needs other than defense must be provided? How much can lawyers serve as a buffer against coercion, and what is the will (popular and legal) for them to play that role? When does lawyer involvement create an aura of legitimacy for irremediably flawed procedures that fail to grapple with state prosecutorial powers?<sup>91</sup> Tracking the interaction over the last decade between Guantánamo and *Gideon-Miranda* has much to teach about whether the enforcement of constitutional obligations can shape forms of detention and interrogation that merit the possibility of attaching the adjective “democratic” to them.

Soon after 9/11, government lawyers sought to prevent detainees from being treated as rights-bearers under either domestic or international law. Justice Department lawyers advised the government that federal court scrutiny would “interfere with the operation of the system that has been developed to address the detainment and trial of detainees.”<sup>92</sup> The methods were to create a

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90. The United States is not the only court system to consider executive efforts to detain individuals outside the reach of lawyers, nor to condone limits on lawyer access. In *Marab v. IDF Commander in the West Bank*, the Supreme Court of Israel held it could entertain claims of unlawful executive detention and struck down military orders authorizing detention for twelve or eighteen days without “judicial oversight.” H CJ 3239/02 *Marab v. IDF Commander in the West Bank* 57(2) PD 349 [2002] (Isr.), [http://www.hamoked.org/files/2012/3720\\_eng.pdf](http://www.hamoked.org/files/2012/3720_eng.pdf). See generally Shiri Krebs, *Lifting the Veil of Secrecy: Judicial Review of Administrative Decisions in the Israeli Supreme Court*, 45 VAND. J. TRANSNAT'L L. 639, 662 (2012). The court relied on the Fourth Geneva Convention, decisions of the European Court of Human Rights, and Israeli law, which provides for judicial review within twenty-four hours for criminal detainees. See *Marab, supra*, paras. 26-28. The decision also upheld limits that the military orders imposed on access to counsel, who were barred for two days in all cases and potentially for another thirty days with the authorization of the head of the investigation and an “approving authority.” *Id.* paras. 37-40. The court found “no flaws” with this arrangement. *Id.* para. 45.
91. Several critiques have been leveled that the responses to 9/11 detention have been overly concerned with process and separation-of-powers principles and have failed to address difficult questions related to First Amendment speech rights, due process rights to be free from torture, and the law governing military tribunals. See, e.g., Ahmad, *supra* note 18; Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887 (2012); Alexandra D. Lahav, *Rites Without Rights: A Tale of Two Military Commissions*, 24 YALE J.L. & HUMAN. 639 (2012); Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 J. LEGAL EDUC. 433 (2011); Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013 (2008).
92. See Memorandum from Patrick Philbin, Deputy Assistant Att’y Gen. & John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep’t

new nomenclature—“enemy combatant,” “unlawful enemy combatant,” “illegal enemy belligerent” —and new venues of detention, either offshore or, in a few cases, on military bases within the continental United States—all, the government argued, beyond the reach of courts.

Some unknown number (likely in the thousands) of individuals have been held at the Bagram Airfield in Afghanistan, at prisons in Iraq (including, most notoriously, Abu Ghraib), at other CIA or military detention sites around the world, and in prisons run by other countries.<sup>93</sup> Estimates are that about 770 people were brought to Guantánamo Bay;<sup>94</sup> the first arrived in January 2002. Who they were was not disclosed,<sup>95</sup> but pictures were proffered of men with faces covered, dressed in orange jumpsuits, shackled, and surrounded by razor wire.

A handful of the men designated “enemy combatants,” including Yaser Esam Hamdi and José Padilla, drew special treatment because they were citizens held on U.S. soil.<sup>96</sup> Mr. Hamdi, born in Louisiana, was seized in the fall of 2001 by U.S. officers in Afghanistan. As the Fourth Circuit would later explain, in April 2002, “[a]fter it came to light that he was born in Louisiana

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of Def., (Dec. 28, 2001), *reprinted in* KAREN J. GREENBERG & JOSHUA L. DRATEL, *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 36 (2005); *see also, e.g.*, Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, to Alberto Gonzalez, Counsel to the President & William J. Haynes II, General Counsel, Dep’t of Def. (Jan. 22, 2002), <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf> (seeking to deny prisoner-of-war status to detainees).

93. OPEN JUSTICE SOCIETY INITIATIVE, *GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION* (2013).
94. *See* ANDY WORTHINGTON, *THE GUANTÁNAMO FILES: THE STORIES OF THE 774 DETAINEES IN AMERICA’S ILLEGAL PRISON* (2007); *The Guantánamo Docket: A History of the Detainee Population*, N.Y. TIMES, Dec. 11, 2012, <http://projects.nytimes.com/guantanamo>. As of 2012, some 166 detainees remained. The vast majority of men who have left did so through executive decisions. *See* Letter from President Barack Obama to Speaker John Boehner (Dec. 14, 2012), <http://www.whitehouse.gov/the-press-office/2012/12/14/letter-president-war-powers-resolution>; *Guantanamo Habeas Scorecard*, CENTER FOR CONST. RTS. (May 30, 2012), <http://ccrjustice.org/files/2012-05-30%20Updated%20Habeas%20SCORECARD.pdf>.
95. Luban, *supra* note 3, at 1987.
96. A third man, Ali Saleh Kahlal al-Marri, was also transferred from the civilian criminal justice system to the military’s Charleston Brig. Al-Marri, a Qatari, was lawfully present in the United States when he was seized and charged with credit card fraud. In 2003, al-Marri’s defense counsel filed a habeas petition when al-Marri was transferred from the Central District of Illinois to military custody. In 2009, the government returned al-Marri to the criminal justice system, where he pled guilty to one count of providing material support to terrorism and was sentenced to eight years in prison. *See* al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007), *aff’d en banc sub nom.* al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008), *vacated as moot*, al-Marri v. Spagone, 555 U.S. 1220 (2009); John Schwartz, *Admitted Qaeda Agent Receives Prison Sentence*, N.Y. TIMES, Oct. 29, 2009, <http://www.nytimes.com/2009/10/30/us/30marri.html>.

and may not have renounced his American citizenship,” Mr. Hamdi was transferred from Guantánamo to the Norfolk Naval Station Brig in Virginia.<sup>97</sup> Mr. Padilla, born in Brooklyn, New York, traveled to Chicago in May 2002. Federal agents, acting on a grand jury warrant issued in New York, arrested Mr. Padilla at Chicago’s O’Hare airport and brought him to the Manhattan Detention Center, where he was held as a material witness.<sup>98</sup>

Publicity and proximity (to family and to U.S. courts) brought these men lawyers, arguing for rights, as well as judges, acknowledging that they had some. In May of 2002, Frank Dunham, a federal public defender in the Eastern District of Virginia, filed a next-friend habeas petition on Mr. Hamdi’s behalf. Mr. Hamdi’s father, Esam Fouad Hamdi, did so later that month. The district court authorized Dunham and then Mr. Hamdi’s father to proceed, appointed Dunham as counsel, and ordered “unmonitored access” to Mr. Hamdi for his lawyer.<sup>99</sup> In July 2002, the Fourth Circuit agreed only that the father could serve as next friend and remanded for further inquiries about whether to permit direct contact between lawyer and client.<sup>100</sup>

In *Gideon*, the Supreme Court insisted that indigent defendants were entitled to voice, and that the state was obliged to make legitimate decisions predicated on adversarial exchanges. Providing lawyers was in service of these two functions: equality and legitimacy. In *Miranda*, the Supreme Court again had two predicates – to prevent coercion and to respect individual dignity – and again dispatched lawyers as the vehicles to do so. In the 9/11 context, the United States government tried to put lawyers in a different posture, as interlopers who would disrupt the “relationship” of questioner to detainee and thereby obstruct necessary interrogations, as potential pawns raising national security risks, and as unnecessary appendages to government decisionmaking.<sup>101</sup>

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97. *Hamdi v. Rumsfeld*, 294 F.3d 598, 601 (4th Cir. 2002).

98. Donna R. Newman, *The Jose Padilla Story*, 48 N.Y.L. SCH. L. REV. 39, 41 (2003).

99. Order, *Hamdi v. Rumsfeld*, No. 2:02cv439 (E.D. Va. June 11, 2002) (on file with authors). In August 2002, the district court described the case as “the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States, without charges, without any finding by a military tribunal, and without access to a lawyer.” *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002).

100. The government lost its objection to Dunham’s petition in the district court, *Hamdi v. Rumsfeld*, No. 2:02cv348 (E.D. Va. May 29, 2002), but succeeded on appeal in June 2002, *Hamdi*, 294 F.3d 598. The order permitting Hamdi’s father to proceed as next friend is reprinted at Joint Appendix at 113-16, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 1120871, at \*113-16.

101. *Hamdi* Transcript, *supra* note 11, at 16-17.

The government succeeded in part in the Fourth Circuit, which reversed the trial court.<sup>102</sup> Although reluctant to “embrac[e] [the] sweeping proposition . . . that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government’s say-so,”<sup>103</sup> the court worried about “what effect petitioner’s unmonitored access to counsel might have upon the government’s ongoing gathering of intelligence.”<sup>104</sup> On remand, the government reprised its argument that *Gideon* had no application because of “the entirely different paradigm” of “wartime detention of combatants,”<sup>105</sup> and reiterated that the “moment access is granted to counsel . . . it irreparably affects the relationship [of interrogator and detainee].”<sup>106</sup>

Once again, the district court championed the right to counsel over the government’s claims of no rights, no need, and national security.<sup>107</sup> District Judge Robert Doumar insisted that courts had a role and that judges needed lawyers to function: “the judiciary is entitled to a meaningful judicial review of those [enemy combatant] designations when they substantially infringe on the individual liberties, guaranteed by the United States Constitution, of American citizens.”<sup>108</sup> To proceed with a habeas hearing without access to counsel was an

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102. *Hamdi v. Rumsfeld*, 296 F.3d 278, 284 (4th Cir. 2002).

103. *Id.* at 283.

104. *Id.* at 282.

105. Brief for Respondents-Appellants at 22, *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (No. 02-7338), 2002 WL 33962807. An amicus brief filed on behalf of twenty organizations and 140 law professors reiterated the view that *Gideon* was a source of the right to have a lawyer if detention was unlawful. Brief Submitted on Behalf of the Center for Constitutional Rights, 140 Law Professors and 19 Interested Organizations as Amici Curiae Supporting Yaser Esam Hamdi’s Request for Affirmance at 2, *Hamdi*, 316 F.3d 450, 2002 WL 33962809.

106. *Hamdi* Transcript, *supra* note 11, at 50-51.

107. The claims were that Hamdi was outside the purview of the Fifth and Sixth Amendments because his status as an “enemy combatant” was not a category for which history provided a “right to prompt charges or counsel.” Respondents’ Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus, *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002), *reprinted in* Joint Appendix, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696) 2004 WL 1120871, at \*127-28. Moreover, a lawyer would have nothing to do, for the government’s claims sufficed to prove the legality of Hamdi’s detention. *Id.* at \*139-40. Further, the military “has generally determined that allowing other visitors—including lawyers—to have access to detained enemy combatants would jeopardize national security interests by interfering with ongoing intelligence gathering efforts and possibly allowing detainees to pass concealed messages about, *inter alia*, the security in the facilities where they have been detained.” *Id.*, 2004 WL 1120871, at \*143.

108. *Hamdi*, 243 F. Supp. 2d at 532.

“absurdity.”<sup>109</sup>

What were the legal sources for the ruling? Judge Doumar explained that executive detention without such process would “have grave consequences for numerous Supreme Court precedents and their progeny”—citing, *inter alia*, *Miranda* and *Gideon*.<sup>110</sup> Further, even though the 1942 decision in *Ex Parte Quirin* permitted citizens to be subjected to truncated procedures because of wartime,<sup>111</sup> the court invoked *Quirin* for the proposition that those detainees had appointed lawyers.<sup>112</sup>

But the government refused to permit Mr. Dunham to meet with Mr.

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109. In oral argument before the district court on May 29, 2002, Hamdi’s lawyer argued that detainees had counsel in other cases involving military tribunals and cited *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex parte Quirin*, 317 U.S. 1 (1942); and *In re Yamashita*, 327 U.S. 1 (1946). *Hamdi* Transcript, *supra* note 11, at 45. The court asked whether “the United States feels that under its Constitution it’s fair and just that a person may be typed an enemy combatant no matter who or what they are, whether they are a citizen of the United States or somewhere else, and as such he’s not entitled to counsel; is that correct?” After the government responded in the affirmative, the court said: “Every time I raise one of these absurdities, and I raise them because they are absurd and nobody would ever believe that that could be the case, but, if your position is correct, that absurdity would be the case. Think about it a minute.” *Id.* at 30-31.
110. Certification Order and Stay at 6, *Hamdi v. Rumsfeld*, No. 2:02cv439 (E.D. Va. Aug. 21, 2002). The court also cited *In re Medley*, 134 U.S. 160 (1890), a decision finding that solitary confinement—in that instance for four weeks by Colorado—violated the Eighth Amendment. In May 2002, in oral argument, the district court gave the government seventy-two hours to permit Dunham to interview Hamdi, if Hamdi wanted to be interviewed, absent “any other court order overruling” that ruling. *Hamdi* Transcript, *supra* note 11, at 52. The court rejected the government’s proposal for a “special administrative order” and insisted on providing Dunham with “access as any lawyer would have,” including an interpreter. The court also forbade recording devices and “hidden microphones.” *Id.* at 53-54.
111. The *Quirin* case involved alleged German saboteurs, including an American citizen, who were tried in Washington, D.C., and sentenced and put to death within a few months by a closed military commission. Long maligned because the Supreme Court dealt with the matter hastily in the summer and published its decision months after several of the individuals had been put to death, this “unhappy precedent” has since been read to stand for judicial habeas jurisdiction, despite executive efforts to bar review. *See* *Rasul v. Bush*, 542 U.S. 466, 474-75 (2004); Louis Fisher, *Military Tribunals: A Sorry History*, 33 PRESIDENTIAL STUD. Q. 484, 494 (2003); Carlos M. Vasquez, *Not a Happy Precedent: The Story of Ex Parte Quirin*, in *FEDERAL COURT STORIES* 219, 246 (Vicki C. Jackson and Judith Resnik eds., 2010).
112. *Hamdi* Transcript, *supra* note 11, at 43. The government attempted to distinguish *Quirin* because Hamdi had not been charged with violations of the laws of war. *Id.* at 49. Another basis—proposed by Hamdi’s counsel but not clearly adopted by the court, *see id.* at 46—was the Criminal Justice Act (CJA), the federal statute providing for criminal defense counsel, which gives judges the discretion in the “interests of justice” to appoint counsel for habeas petitions, 18 U.S.C. § 3006A(a)(2)(B) (2006).

Hamdi, and it appealed and won.<sup>113</sup> The Fourth Circuit agreed with the government that “[t]he safeguards that all Americans have come to expect in criminal prosecutions do not translate neatly to the arena of armed conflict.”<sup>114</sup> The panel held that the government’s averments sufficed to support Mr. Hamdi’s detention and that judges should do no more.<sup>115</sup> In 2003, Mr. Hamdi remained without communication with his lawyer—or anyone else other than persons whom the government selected to interact with him.

José Padilla’s experiences were, initially, different. When first detained in New York City, the district court appointed a lawyer, Donna Newman, with whom he had contact.<sup>116</sup> Newman challenged Mr. Padilla’s detention as a material witness for a grand jury.<sup>117</sup> However, on June 9, 2002, the President designated Mr. Padilla an “enemy combatant” and ordered his immediate transfer to the Consolidated Naval Brig in Charleston, South Carolina.<sup>118</sup> Learning of the transfer from New York to South Carolina, Ms. Newman filed a habeas petition in the federal court in New York.<sup>119</sup> The government’s response paralleled its claims in Mr. Hamdi’s case. Then-District Judge Michael Mukasey (who later served as President Bush’s Attorney General) concluded that Mr. Padilla was entitled to judicial review and to consult with his lawyer.<sup>120</sup>

Again the government disagreed<sup>121</sup> and refused to provide access, even as

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113. Brief for Respondents-Appellants at 1-4, *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (No. 02-6895), 2002 WL 32728567.

114. *Hamdi v. Rumsfeld*, 316 F.3d 450, 465 (4th Cir. 2003). The panel referred in passing to *Gideon* and noted that, “if he had been charged with a crime,” Hamdi would have had the right to counsel, *inter alia*. *Id.* at 475. But, given Hamdi’s status as “an enemy combatant pursuant to the well-established laws and customs of war,” such protections did not apply. *Id.*

115. *Id.* at 472.

116. See 18 U.S.C. § 3006A(1)(G) (authorizing the appointment of counsel “for any financially eligible person who . . . is in custody as a material witness”).

117. Newman, *supra* note 98, at 41.

118. Memorandum from President George W. Bush to Donald Rumsfeld, Sec’y of Def. (June 9, 2002), as reprinted in Padilla v. Rumsfeld, 352 F.3d 695 app. A (2d Cir. 2003).

119. Newman, *supra* note 98, at 42-43.

120. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 569 (S.D.N.Y. 2002), *adhered to on reconsideration sub nom.* Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y. 2003).

121. As in *Hamdi*, the government argued that any access to counsel would “jeopardize the two core purposes of detaining enemy combatants—gathering intelligence about the enemy, and preventing the detainee from aiding in any further attacks against America.” Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d at 603 (quoting the government’s briefing). The district court responded that “Padilla’s statutorily granted right to present facts to the court in connection with this petition will be destroyed utterly if he is not allowed to consult with counsel.” *Id.* at 604.

the district court held that Mr. Padilla had a statutory right to pursue his habeas petition and had “no practical way to vindicate that right other than through a lawyer.”<sup>122</sup> Yet, based on the government’s rationale of a risk that a lawyer might be an unknowing conduit of information, Judge Mukasey also licensed the government to monitor attorney-client contact.<sup>123</sup> Even so, the government refused to comply with the court’s provisions.

The government correctly identified lawyers as information conduits. While the stated fear was that lawyers might unwittingly convey information to enemies, the government may also have feared what the lawyers did do—which was to help the world understand the treatment accorded 9/11 detainees. Detainees’ lawyers forced the government to respond, and the public forum that courts provide permitted glimpses at what was transpiring.

As this sketch has detailed, the efforts to represent Mr. Hamdi and Mr. Padilla, both of whom were on the U.S. mainland, were remarkably challenging. Lawyers hoping to help detainees at Guantánamo had yet more challenges, including identifying and contacting the men detained. The government refused to release the names of prisoners whom it was holding incommunicado.<sup>124</sup> Several lawsuits sought to obtain names and protection for those detained.<sup>125</sup> After the United States permitted the Red Cross to notify captives’ families, other cases were filed, including a 2002 petition on behalf of Shafiq Rasul and several others.<sup>126</sup>

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122. Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d at 54.

123. Unlike the district judge in *Hamdi*, who had specified unmonitored access, Judge Mukasey authorized “military personnel” to “monitor Padilla’s contacts with counsel, so long as those who participate in the monitoring are insulated from any activity in connection with this petition, or in connection with a future criminal prosecution of Padilla, if there should ever be one.” Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d at 604 (citing 28 C.F.R. § 501.3 (a) (2002), which permits the Bureau of Prisons to restrict and monitor communications if there is a “substantial risk” that they could result in serious harm to persons). Judge Mukasey noted that “Padilla’s situation appears to differ from Hamdi’s in that he had access to counsel after his capture but before his designation as an enemy combatant, and thus no potential prophylactic effect of an order barring access by counsel could have been lost.” *Id.* at 605.

124. Luban, *supra* note 3, at 1989.

125. One suit was filed by scholars, clergy, and counsel on behalf of detainees. Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002). The district court dismissed the petition for lack of “next-friend” standing, and the Ninth Circuit affirmed. Coalition of Clergy v. Bush, 310 F.3d 1153 (9th Cir. 2002). Another lawsuit attempted, unsuccessfully, to obtain names by way of the Freedom of Information Act. Ctr. for Nat’l Sec. Studies v. Dep’t of Justice, 331 F.3d 918 (D.C. Cir. 2003).

126. Families of several detainees came into contact with the Center for Constitutional Rights and a handful of other organizations. Luban, *supra* note 3, at 1988–89. Two of the first cases filed in the District of Columbia, *Rasul v. Bush* and *Al Odah v. United States*, were consolidated. See *Rasul v. Bush*, 215 F. Supp. 2d 55, 57–59 (D.D.C. 2002) (discussing Al

As in *Hamdi* and *Padilla*, the government opposed access to counsel for Guantánamo detainees; in addition, the government disputed courts' authority to hear the cases. In July 2002, District Judge Colleen Kollar-Kotelly agreed, and the D.C. Circuit later affirmed, that the "critical distinction between citizens and aliens" prohibited judges from entertaining claims from noncitizens held at Guantánamo.<sup>127</sup>

The Ninth Circuit, in a case filed on behalf of Faleh Gherebi in the Central District of California, disagreed.<sup>128</sup> Writing for the panel, Judge Stephen Reinhardt framed the inquiry as "whether the Executive Branch may hold uncharged citizens of foreign nations in indefinite detention in territory under the 'complete jurisdiction and control' of the United States while effectively denying them the right to challenge their detention in any tribunal anywhere, including the courts of the U.S."<sup>129</sup> As recounted in a first opinion, in December 2003, the Justice Department lawyer argued that the government was free to imprison anyone it deemed an "enemy combatant" and that no court had the power to oversee that detention.

The court reported that, in oral argument, the government had taken the position that detainees would have no right to "consult counsel" and that no court would have authority to review challenges, including if "the claims were that [the government] was engaging in acts of torture or that it was summarily executing the detainees."<sup>130</sup> Judge Reinhardt wrote that, "to our knowledge, prior to the current detention of prisoners at Guantánamo, the U.S.

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*Odah v. United States*, No. 02-828 (filed May 1, 2002); *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd*, *Rasul v. Bush*, 542 U.S. 466 (2004).

127. *Rasul*, 215 F. Supp. 2d at 65-66, *aff'd*, *Al Odah*, 321 F.3d at 1138-1141.

128. Gherebi's brother filed in February 2003, and the district court dismissed for lack of jurisdiction. *Gherebi v. Bush*, 262 F. Supp. 2d 1064 (C.D. Cal. 2003), *rev'd*, 352 F.3d 1278 (9th Cir. 2003) (*Gherebi I*), *cert. granted and judgment vacated*, 542 U.S. 952 (2004) (citing *Padilla v. Rumsfeld*, 542 U.S. 426 (2004)).

129. *Gherebi v. Bush (Gherebi II)*, 374 F.3d 727, 728 (9th Cir. 2004), *amending Gherebi I*, 352 F.3d 1278. Judge Reinhardt's amended decision analyzed the jurisdictional precedents and concluded that federal courts had the power to hear the issues raised and that, in light of *Padilla*, venue was proper in the District of Columbia, to which the case was transferred. *Gherebi II*, 374 F.3d at 738-39.

In 2004, Judge Joyce Hens Green of the D.C. District Court held that the court could entertain his petition. *Gherebi v. Bush*, 338 F. Supp. 2d 91 (D.D.C. 2004). In 2009, Judge Reggie Walton held that Mr. Gherebi's detention was authorized under the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001). *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009). As of June 4, 2013, Gherebi has been detained at Guantánamo for eleven years and one month. See *The Guantánamo Docket: Salem Abdul Salem Ghereby*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/189-salem-abdul-salem-ghereby/documents/11> (last visited June 4, 2013).

130. *Gherebi I*, 352 F.3d at 1299-1300.

government has never before asserted such a grave and startling proposition.”<sup>131</sup> This view was “so extreme that it raises the gravest concerns under both American and international law.”<sup>132</sup>

The Ninth Circuit and, subsequently, the Supreme Court rejected that approach. The Supreme Court insisted that federal courts had the authority to entertain petitions from detainees at Guantánamo<sup>133</sup> and, under limited circumstances, from detainees held oceans away.<sup>134</sup> Framing those decisions were images from abroad. However, unlike the specter of Nazi Germany or Stalinist Russia that provided the backdrop for *Gideon* and *Miranda*, foregrounded after 9/11 were the fears of terrorism and, by 2004, the disclosures of torture. In May 2004, pictures of American soldiers torturing individuals held at Abu Ghraib shocked many a conscience.<sup>135</sup>

By then, the Supreme Court had agreed to decide whether, given that Mr. Padilla had been moved to South Carolina, the federal courts in New York had jurisdiction over his case.<sup>136</sup> The Court also took up the questions raised by *Hamdi* about whether the executive had the authority to detain a U.S. citizen “essentially incommunicado and deny him access to counsel, with no opportunity to question the factual basis for his detention before any impartial tribunal.”<sup>137</sup> The issue of access to counsel, however, became moot when, in March 2004, the government agreed (as a matter of its discretion) to permit

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131. *Id.* at 1300.

132. *Id.* In the *Hamdi* argument, the Solicitor General rejected the need for judicial supervision, in part by asserting that the United States did not engage in torture. Transcript of Oral Argument at 49-50, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/03-6696.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/03-6696.pdf) (“It’s also the judgment of those involved in this process that the last thing you want to do is torture somebody or try to do something along those lines.”); see also JONATHAN HAFETZ, HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA’S NEW GLOBAL DETENTION SYSTEM 11-17 (2011).

133. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (addressing a citizen detained at Guantánamo); *Gherebi II*, 374 F.3d at 737.

134. *Munaf v. Geren*, 553 U.S. 674 (2008).

135. Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, [http://www.newyorker.com/archive/2004/05/10/040510fa\\_fact](http://www.newyorker.com/archive/2004/05/10/040510fa_fact); Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge*, WASH. POST, May 21, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A43783-2004May20.html>.

136. Petition for Writ of Certiorari at 21-22, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 113598, at \*21-22.

137. Brief for Petitioners at i, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 378715 (2004), at \*i.

lawyers to meet with Mr. Hamdi and Mr. Padilla.<sup>138</sup> Thus, neither the 2004 decisions nor any Supreme Court decisions since have centered on questions of rights to counsel for those detained, whether classified as enemy combatants or held otherwise.<sup>139</sup>

But what the Court did decide—that detainees in Virginia, South Carolina, and Guantánamo had the right to file habeas petitions—produced rights to counsel. In *Hamdi*, Justice O’Connor, joined by Chief Justice Rehnquist, Justice Breyer, and Justice Kennedy, acceded to the government’s authority to hold individuals as enemy combatants but demurred on the procedures for doing so: “Plainly, the ‘process’ Hamdi has received is not that to which he is entitled under the Due Process Clause.”<sup>140</sup> While noting that the access-to-counsel issue had been resolved through appointed counsel and unmonitored meetings,<sup>141</sup> the plurality also commented that Mr. Hamdi “unquestionably has the right to access to counsel in connection with the proceedings on remand.”<sup>142</sup>

In *Rasul v. Bush*, issued on the same day as *Hamdi*, the Court concluded that because the United States had functional authority over Guantánamo Bay,

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138. See Press Release, Office of the Assistant Sec’y of Def., U.S. Dep’t of Def. (Pub. Affairs), DoD Announces Detainee Allowed Access to Lawyer (Dec. 2, 2003), <http://www.defense.gov/releases/release.aspx?releaseid=5831>; Press Release, Office of the Assistant Sec’y of Def. (Pub. Affairs), U.S. Dep’t of Def., Padilla Allowed Access to Lawyer (Feb. 11, 2004), <http://www.defense.gov/releases/release.aspx?releaseid=7070>. “Hamdi has met with counsel for petitioners on February 2 and March 2, 2004, at the Charleston Naval Brig. The latter visit was unmonitored.” Brief for Respondents at 9, *Hamdi*, 542 U.S. 507, 2004 WL 724020, at \*9; see *Hamdi*, 542 U.S. at 539.

139. Those facing military tribunal proceedings are provided, by statute, with lawyers. See *supra* note 9.

140. *Hamdi*, 542 U.S. at 538. Justice Souter, joined by Justice Ginsburg, dissented on the grounds that the Non-Detention Act, 18 U.S.C. §4001(a), barred indefinite detention of a U.S. citizen, and agreed that additional process would be necessary. *Id.* at 544 (Souter, J., concurring in part and dissenting in part). Justice Scalia, joined by Justice Stevens, would have held that Hamdi’s detention, as a U.S. citizen, was unlawful absent Congressional suspension of the writ of habeas corpus. They declined to endorse the process required by the plurality. *Id.* at 578 (Scalia, J., dissenting) (“If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.”). Justice Thomas dissented on the grounds that “[t]he plurality utterly fails to account for the Government’s compelling interests and for our own institutional inability to weigh competing concerns correctly.” *Id.* at 579 (Thomas, J., dissenting).

141. *Id.* at 539 (plurality opinion).

142. *Id.* Justices Souter and Ginsburg agreed “of course” with the “plurality’s affirmation of Hamdi’s right to counsel.” *Id.* at 553 (Souter, J., concurring in part and dissenting in part). As quoted in the epigraph and discussed *supra* note 15, *infra* note 211, and accompanying text, Justice Stevens made a similar point in his dissent in *Padilla*. *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting).

detention there was within the jurisdiction of the federal courts under 28 U.S.C. § 2241.<sup>143</sup> Writing for the majority, Justice Stevens noted that detention “without access to counsel and without being charged with any wrongdoing unquestionably describe[s] ‘custody in violation of the Constitution or laws or treaties of the United States.’”<sup>144</sup>

The *Gideon* conflict masked a *Miranda* conflict.<sup>145</sup> In June 2004, several weeks before the Court issued *Hamdi* and *Rasul*, Justice Department memoranda known as “The Torture Memos” were leaked to the press.<sup>146</sup> Those memoranda, later withdrawn by the Department,<sup>147</sup> revealed that in 2002 the Department’s Office of Legal Counsel had advised the military on the legal permissibility of the infliction of pain readily understood by many to be torture. Those memoranda aspired to give defenses to persons ordering or imposing such practices on persons within America’s control.<sup>148</sup> In South Carolina, Guantánamo, and elsewhere, and contrary to the precepts of *Miranda*, the United States government permitted abusive interrogations,

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143. *Rasul v. Bush*, 542 U.S. 466, 483 (2004).

144. *Id.* at 483 n.15 (quoting 28 U.S.C. § 2241(c)(3) and citing *United States v. Verdugo-Uriquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring)).

145. *Miranda* came to stand for the right to be free from torture, identified for those in custody with the Fifth Amendment as protected through the presence of lawyers and, if a trial were to be held, with the exclusion of information obtained through such means. The right to be free from torture is also premised on the Due Process Clause, the Eighth Amendment, federal statutes, and international treaty obligations. See U.S. CONST. amends. V, VIII, XIV; 18 U.S.C. §§ 2340, 2340A (2006) (implementing the Convention Against Torture); 18 U.S.C. § 2441(a)-(b) (2006) (criminalizing torture); International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20 (1967), 999 U.N.T.S. 171; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85. See generally DAVID LUBAN, TORTURE, POWER, AND LAW (forthcoming 2014) (manuscript on file with authors).

146. Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture: Justice Dept. Gave Advice in 2002*, WASH. POST, June 8, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html>; see Memorandum from Jay S. Bybee, Assistant Att’y General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), <http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf>.

147. Memorandum from Daniel Levin, Acting Assistant Att’y Gen., Office of Legal Counsel, to Deputy Att’y Gen., Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), <http://www.justice.gov/olc/18usc23402340a2.htm>.

148. Despite Judge Reinhardt’s optimism about what was conscionable in the United States, in December 2005 and again in 2006, Congress thereafter limited federal court jurisdiction to entertain challenges to such actions. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28 & 42 U.S.C.); Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A., tit. X, § 1005, 119 Stat. 2739, 2740-41 (codified as amended at 28 U.S.C. § 2241 (2006)).

including violent shaking, waterboarding, and other methods of torture described by the euphemisms of “enhanced” or “harsh interrogation.”<sup>149</sup>

After the disclosures, some former government officials defended techniques such as waterboarding,<sup>150</sup> even as others decried them as “wrong.”<sup>151</sup> Thus, the legal community reached the point of debating not only the process to insulate detainees against coercion (i.e., should *Miranda* warnings be given? Must lawyers be provided? What are the consequences of the failures to do so?), but also the levels of abuse and coercion—of torture—that are legally permissible.<sup>152</sup> After President Obama took office, his administration rejected the use of waterboarding and other forms of torture and cruel, inhuman, and degrading treatment.<sup>153</sup> The debate then shifted to whether such practices had helped the security of the country and whether anyone injured had rights to remedies.

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149. Lawyers advised the Attorney General of the United States that under federal law, “for an act to constitute torture . . . , it must inflict pain that is difficult to endure . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” Memorandum from Jay S. Bybee, *supra* note 146, at 1. Further, “[f]or purely mental pain or suffering to amount to torture . . . it must result in significant psychological harm of significant duration . . . lasting for months or even years.” *Id.*; see *US Could Use Harsh Interrogations Again: White House*, AFP, Feb. 6, 2008, <http://afp.google.com/article/ALeqM5h4U8FVhXOldAvFcCDWG2H2ku7pdA>. One United States official explained in 2008 that as long as waterboarding “doesn’t involve severe or physical pain and it doesn’t last very long,” and as long as “you would not expect that there would be prolonged mental harm,” it is not torture. *Justice Department’s Office of Legal Counsel: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 19 (Feb. 14, 2008) (testimony of Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice).

Extensive documentation of the license to use such practices can be found in THE REPORT OF THE CONSTITUTION PROJECT’S TASK FORCE ON DETAINEE TREATMENT (2013), <http://detainee-taskforce.org/read>.

150. Marc Santora, *3 Top Republican Candidates Take a Hard Line on the Interrogation of Detainees*, N.Y. TIMES, Nov. 3, 2007, <http://www.nytimes.com/2007/11/03/us/politics/03torture.html> (citing Rudolph Giuliani, Mitt Romney, and Fred Thompson as supportive of torture).

151. CHARLES FRIED & GREGORY FRIED, *BECAUSE IT IS WRONG: TORTURE, PRIVACY, AND PRESIDENTIAL POWER IN THE AGE OF TERROR* (2010).

152. See *THE TORTURE DEBATE IN AMERICA* (Karen J. Greenberg ed., 2006).

153. Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009) (requiring that detainees be “treated humanely” and that all interrogations carried out by U.S. officials conform to the Army Field Manual).

#### IV. LAWYERING WHILE HELD AT BAY

Many more cases followed the 2004 Supreme Court rulings, as detainees and their families, the media, lawyers, and individuals within the military fought against the government practices.<sup>154</sup> By 2008, volunteer lawyers represented all detainees who wanted counsel,<sup>155</sup> even as struggles over what it meant to be their lawyers continued.

After *Rasul*, the government agreed that detainees could meet with their lawyers, but only if subjected to restrictions the executive deemed necessary.<sup>156</sup> Judge Kollar-Kotelly disagreed, in part through reliance on the All Writs Act (which she read to empower her to appoint counsel in “aid of” the court’s statutory habeas jurisdiction) and the analogous discretionary authority under the Criminal Justice Act (CJA) to appoint counsel for habeas petitioners,<sup>157</sup> which also authorizes court funding.<sup>158</sup> Yet, while rejecting real-time

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154. In 2005, an officer at Guantánamo anonymously sent a list of detainees to lawyers. *Luban*, *supra* note 3, at 1989. In 2006, a district court judge granted a Freedom of Information Act request brought by the Association Press for the release of the names of all detainees. *Associated Press v. U.S. Dep’t of Def.*, 410 F. Supp. 2d 147, 149 (S.D.N.Y. 2006).

155. *Luban*, *supra* note 3, at 1989. Those participating ran from institutions such as the Center for Constitutional Rights and the ACLU to solo practitioners, federal defenders, and lawyers with large law firms. See generally *THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW* (Mark P. Denbeaux & Jonathan Hafetz eds., 2009).

156. *Al Odah v. United States*, 346 F. Supp. 2d 1, 2 (D.D.C. 2004).

157. 18 U.S.C. § 3006A(2) (2006) provides that “[w]henver the United States magistrate judge or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who . . . is seeking relief under section 2241, 2254, or 2255 of title 28.” The CJA applies if a court decides to appoint counsel. See 28 USC §§ 2254(h), 2255(g). As the district judge explained:

The Court has not found that Petitioners’ entitlement to counsel is grounded in the dictates of Criminal Justice Act; rather, the Court, acting pursuant to its discretionary authority to fashion procedures in aid of its jurisdiction over habeas actions, finds that the Criminal Justice Act provides a useful and persuasive procedural approach with which to inform its decision regarding representation by counsel for Petitioners.

*Al Odah*, 346 F. Supp. 2d at 7 n.9. Federal capital defendants have rights to appointed counsel for habeas cases. See 28 U.S.C. § 2251; 18 USC § 3559(a)(2) (2006). Motions for substitution of counsel in capital habeas cases are covered by the CJA’s “in the interests of justice” standard. *Martel v. Clair*, 132 S. Ct. 1276 (2012); 18 U.S.C. § 3006A (2006).

158. As far as we are aware, most of the lawyers for habeas petitioners have not been compensated for their time; some have been reimbursed for expenses such as experts and translators. A few federal defenders have received federal funds for work. E-mail from Jonathan Hafetz to authors (Feb. 11, 2013) (on file with authors); E-mail from Ramzi Kassem to authors (Feb. 11, 2013) (on file with authors).

government monitoring of attorney-client communications,<sup>159</sup> the court entered a protective order to which lawyers had to accede and which entailed what the court described as “significant limitations” on counsel.<sup>160</sup>

More limitations came by way of executive and congressional efforts to eliminate habeas jurisdiction and thereby remove one basis for access to counsel. The Executive created an administrative process, called Combatant Status Review Tribunals (CSRTs), comprised of military officers, to determine whether detainees were “enemy combatants.”<sup>161</sup> That term was variously defined and included those who were part of or directly supported the Taliban and al-Qaeda forces<sup>162</sup> or those with connections to a long list of organizations

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159. *Al Odah*, 346 F. Supp. 2d at 9.

160. *Id.* at 13. The court authorized “one attorney to meet with each Petitioner, and the attorney-client privilege would cover their communications,” but if the lawyer wanted to disclose the information to colleagues or support staff, the government would be permitted to review notes and would not “approve or prohibit the disclosure, if based on properly asserted national security concerns.” *Id.*

161. That term is an innovation, in that during World War II, the Government had used the phrase “unlawful belligerents.” See *Ex parte Quirin*, 317 U.S. 1, 35 (1942) (“Our Government, by . . . defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege . . .”).

162. The provisions included those who have been “a part of or supporting the Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners,” as well as “any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces,” *Guantánamo Detainee Processes*, U.S. DEP’T OF DEF. (Oct. 2, 2007), <http://www.defense.gov/news/Sep2005/d20050908process.pdf>. These definitions were revised in the MCA of 2009, which used the term “enemy belligerent,” which it further divided into “privileged belligerent,” and “unprivileged enemy belligerent.” Pub. L. No. 111-84, tit. XVIII, § 948(a), 123 Stat. 2574, 2475 (codified at 10 U.S.C.A. § 948(a) (West 2012)). The former referred to “an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War,” while the latter term includes

an individual (other than a privileged belligerent) who—(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.

*Id.* The scope of the definition has been the subject of litigation. See *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010) (holding that “any person subject to a military commission trial is also subject to detention, and that category of persons includes those who are part of forces associated with Al Qaeda or the Taliban or those who purposefully and materially support such forces in hostilities against U.S. Coalition partners”), *cert. denied*, 131 S. Ct. 1814 (2011). The standard differs from that proposed by the Obama Administration, which would have required a showing of “substantial support.” Brief for Appellees at 16, *Al-Bihani*, 590 F.3d 886 (No. 09-5051), 2009 WL 2957826. Subsequent decisions have applied the “part of” test rather than the

and entities, set forth in another Executive Order.<sup>163</sup> Another process, by an Administrative Review Board (ARB), was to be conducted “annually to determine whether each detainee should be released, transferred or further detained.”<sup>164</sup> The government described ARBs as a “discretionary and unprecedented process,” not “required by the Geneva Conventions or by U.S. or international law,” and creating no enforceable rights.<sup>165</sup> Detainees’ lawyers were not permitted to participate in either CSRTs or ARBs.

How were classification decisions made? Defense Department rules provided that detainees and their personal representatives could see only unclassified summaries of the evidence used.<sup>166</sup> According to lawyers involved in representing detainees, in practice virtually all of the evidence relied on by the government and put before military decisionmakers was marked classified.<sup>167</sup>

Detainees seeking to object faced the restrictions of the Detainee Treatment Act of 2005 (DTA), which responded in part to Abu Ghraib by declaring that “[n]o individual in the custody or under the physical control of the United States Government . . . shall be subject to cruel, inhuman, or degrading treatment or punishment.”<sup>168</sup> But the Act also permitted the CSRTs

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government’s “substantial support” test. *See, e.g.,* *Obaydullah v. Obama*, 744 F. Supp. 2d 344, 348 (D.D.C. 2010) (quoting *Boumediene v. Bush*, 583 F. Supp. 2d 133, 135 (D.D.C. 2008)).

163. *See* Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001), *amended by* Exec. Order No. 13,268, 67 Fed. Reg. 44,751 (July 2, 2002).
164. Press Release, U.S. Dep’t of Def., Guantánamo Bay Detainee Administrative Review Board Decisions Completed (Feb. 9, 2006), <http://www.defense.gov/releases/release.aspx?releaseid=9302>.
165. Paul Wolfowitz, Deputy Sec’y of Def., Order, Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantánamo Bay Naval Base, Cuba (May 11, 2004), <http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf>. Under a 2011 executive order, “periodic reviews” are undertaken. *See* Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011).
166. Memorandum from Gordon R. England, Deputy Sec’y of Def, to Sec’ys for the Military Dep’ts, Chairman of the Joint Chiefs of Staff & Under Sec’y of Def. for Policy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base at Guantánamo Bay, Cuba enclosure 1 at 4, 7-8 (Jul. 14, 2006), <http://www.defense.gov/news/Aug2006/d20060809CSRTProcedures.pdf>; Memorandum from Gordon R. England, Deputy Sec’y of Defense, to Sec’ys for the Military Dep’ts, Chairman of the Joint Chiefs of Staff & Under Sec’y of Def. for Policy, Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base at Guantánamo Bay, Cuba enclosure 4 at 1-2 (Jul. 14, 2006), <http://www.defense.gov/news/Aug2006/d20060809ARBProceduresMemo.pdf>.
167. Randolph S. Sergeant & Brian D. Maddox, *No Muscle in the System: Seeking A Hearing for Guantánamo Detainees*, LITIGATION, Fall 2007, at 8, 11.
168. Detainee Treatment Act (DTA) of 2005, Pub. L. No. 109-148, div. A., tit. X, § 1003(a), 119 Stat. 2739, 2739-40 (codified at 42 U.S.C. § 2000dd(a) (2006)).

and ARBs to use information obtained through coercion as long as military officials found that it had probative value.<sup>169</sup> Further, Congress imposed limits on federal court review by amending the habeas statute to deny jurisdiction “for a writ of habeas corpus filed by or on behalf of an alien detained . . . at Guantanamo” and channeling narrow questions to the D.C. Circuit.<sup>170</sup>

After the Supreme Court decided that the DTA’s jurisdiction-stripping provisions did not apply to pending cases,<sup>171</sup> Congress enacted the Military Commissions Act (MCA) of 2006, which sought to deny habeas jurisdiction for all detainees<sup>172</sup> and which continued the efforts of the DTA to immunize

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169. Section 1405(b) of the DTA, entitled “Consideration of statements derived with coercion,” stipulates that

[t]he procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess – (A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and (B) the probative value, if any, of any such statement.

Pub. L. No. 109-163, tit. XIV, § 1405(b), 119 Stat. 3474, 3476-77 (codified at 10 U.S.C. § 801 note (2006)). The Military Commissions Act of 2006 similarly addresses statements obtained by “coercion,” and differentiates between statements obtained before and after the enactment of the DTA. The Act provides that a statement obtained before December 30, 2005, (the date of the enactment of the Defense Treatment Act of 2005) “in which the degree of coercion is disputed” may be admitted if the military judge finds that “the totality of the circumstances renders the statement reliable and possessing sufficient probative value” and “the interests of justice would best be served by admission of the statement into evidence.” The Act provides that a statement obtained on or after December 30, 2005, “in which the degree of coercion is disputed” may be admitted only if the military judge finds that “the totality of the circumstances renders the statement reliable and possessing sufficient probative value” and “the interests of justice would best be served by admission of the statement into evidence” and “the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.” Military Commissions Act of 2006, Pub. L. No. 109-366, § 948r, 120 Stat. 2600, 2607 (codified at 10 U.S.C. § 948r (2006)).

170. DTA §§ 1005(e)(1),(2), 119 Stat. at 2741-42 (codified at 28 U.S.C. § 2241 (2006)). The D.C. Circuit could only consider whether the CSRT’s designation of an individual as an enemy combatant was “consistent with the standards and procedures specified by the Secretary of Defense.” *Id.* § 1005(e)(2)(C)(i), 119 Stat. at 2742.
171. *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006).
172. Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at scattered sections of 9, 10, 18, 28 & 42 U.S.C.); see 28 U.S.C. § 2241(e)(1) (2006) (providing that, “[e]xcept as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider” any habeas petition or other action brought by an alien detained at Guantánamo Bay). The 2006 MCA also denied jurisdiction for “any other action against the United States . . . relating to any aspect of the detention, transfer, treatment,

individuals who did violence to detainees<sup>173</sup> and to preclude detainees from filing cases based on the conditions of confinement.<sup>174</sup> Detainees challenged the constitutionality of that act, and in 2008, in *Boumediene v. Bush*,<sup>175</sup> the Supreme Court responded.<sup>176</sup>

The Court held, five to four, that the 2006 MCA was an unconstitutional suspension of the writ of habeas corpus.<sup>177</sup> Without referencing *Gideon* and without mandating lawyers at classification hearings, the Court referenced the lack of assistance of counsel<sup>178</sup> and commented that the CSRTs lacked “an

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trial, or conditions of confinement” of a detained alien enemy combatant. 28 U.S.C. § 2241(e)(2).

173. See DTA §§ 1005(e),(h), 119 Stat. at 2742 (codified at 42 U.S.C. § 2000odd-1(a) (2006)) (“In any civil action or criminal prosecution against an . . . agent of the United States . . . arising out of the . . . agent’s engaging in [the] detention and interrogation of [suspected alien enemy combatants] . . . , it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.”).
174. DTA § 1005(e)(1), 119 Stat. at 2742 (“[N]o court, justice, or judge shall have jurisdiction to hear or consider . . . any other action against the United States . . . relating to any aspect of the detention . . . of an alien at Guantanamo Bay, Cuba”).
175. 553 U.S. 723 (2008).
176. The record included insights from one lawyer, a civilian serving in the reserves, Stephen Abraham, who had prepared information for CSRTs and sat as a decisionmaker on one. See Declaration of Stephen Abraham, Lieutenant Colonel, U.S. Army Reserve, *in Reply to Opposition to Petition for Rehearing app., Al Odah v. United States*, 551 U.S. 1161 (2007) (No. 06-1196). Abraham explained the poverty of the “information used to prepare the files [that] . . . frequently consisted of finished intelligence products of a generalized nature—often outdated, often ‘generic,’ rarely specifically relating to the individual subjects of the CSRTs or to the circumstances related to those individuals’ status.” *Id.* ¶ 8. The one CSRT on which Abraham sat “determined that there was no factual basis for concluding that the individual should be classified as an enemy combatant.” After being ordered to “reopen the hearing,” the panel did not change its ruling. Abraham was not again assigned to sit on a CSRT. *Id.* ¶¶ 23-24.
177. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).
178. See, e.g., *id.* at 783-84 (“[A]t the CSRT stage the detainee has limited means to find or present evidence to challenge the Government’s case against him. He does not have the assistance of counsel, and may not be aware of the most critical allegations that the Government relied upon to order his detention.”). Further, the Court commented that the “detainee is allowed to present ‘reasonably available’ evidence, but his ability to rebut the Government’s evidence against him is limited by the circumstances of his confinement and his lack of counsel at this stage.” *Id.* at 767 (citation omitted). The Court also noted that counsel had been provided to petitioners in the military cases relied upon by the government. *Id.* at 786-87.

In the briefing before the Supreme Court and before the D.C. Circuit, petitioners and several amici invoked *Gideon* as the hallmark of fair process. See Corrected Joint Brief of Appellants at 33, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) (Nos. 05-5062 & 05-5063), 2005 WL 1410197, at \*33; Brief of Amicus Curiae the Association of the Bar of the

adversarial structure” sufficient to displace habeas.<sup>179</sup> The Court’s recognition of the right to file habeas petitions entailed, again, rights to counsel. By 2008, about five hundred lawyers were involved,<sup>180</sup> albeit often facing logistical, political, and legal difficulties in maintaining contact from afar.<sup>181</sup> Aside for a few federal defenders in habeas cases and the lawyers serving the small number of individuals in the military tribunal process, all the lawyering was, unlike that mandated by *Gideon*, uncompensated by the government.

Furthermore, the sources of rights to lawyers remained underspecified and contested. The 2009 Military Commissions Act calls for state-provided military counsel for those facing charges by military tribunals; such tribunal defendants may also retain a civilian lawyer (if meeting security clearance and other qualifications) or represent themselves.<sup>182</sup> The vast majority of those held at Guantánamo are not, however, part of a military tribunal process.<sup>183</sup> Their access to counsel, which began under the 2004 district court order,<sup>184</sup> was reformulated in 2008 under an umbrella protective order issued in consolidated cases by Judge Thomas Hogan of the District Court for the District of

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City of New York in Support of Petitioners at 10, *Boumediene*, 533 U.S. 723 (Nos. 06-1195 & 06-1196), 2007 WL 2414901, at \*10; Brief Amicus Curiae of United States Senator Arlen Specter in Support of Petitioners at 19, *Boumediene*, 533 U.S. 723, 2007 WL 2441578, at \*19.

179. *Boumediene*, 533 U.S. at 786.

180. Luban, *supra* note 3, at 1989.

181. For example, Al Odah’s counsel sought to develop relationships with detainee clients by proposing to send Arabic-English dictionaries and basic legal texts so that the petitioners could know more and participate in decisions about representation. The government refused. See Reply to Defendants-Respondents’ Opposition to Motion To Enforce Court’s Order of October 20, 2004, on Access to Counsel and for Appointment of Special Master 2-8, *Al Odah v. United States*, No. 1:02-cv-00828 (D.D.C. filed Mar. 23, 2005), 2005 WL 3487675.

182. See 10 U.S.C.A. §§ 948c, 948k, § 949c (West 2012). See generally JENNIFER K. ELSEA, CONG. RESEARCH SERV., R40932, COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT (Feb. 28, 2013), <http://www.fas.org/sgp/crs/natsec/R40932.pdf>. Rule 502 of the Military Commission Rules of Evidence provides lawyer-client privilege rules akin to those available for courts martial. The privilege does not apply “[i]f the communication clearly contemplated the future commission of a fraud or crime or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.” MIL. COMM’N R. EVID. 502(d)(1), [http://www.defense.gov/pubs/pdfs/Part%20III%20-%20MCREs%20\(FINAL\).pdf](http://www.defense.gov/pubs/pdfs/Part%20III%20-%20MCREs%20(FINAL).pdf). The rules in effect as of this writing do not address ongoing monitoring of communication.

183. *The Guantánamo Docket*, *supra* note 94.

184. *Al Odah v. United States*, 346 F. Supp. 2d 1, 7 (D.D.C. 2004); see *supra* notes 124-127, 156-160 and accompanying text.

Columbia<sup>185</sup> and, in 2012, reaffirmed by Chief Judge Royce Lamberth. The court management of attorney-client contact documents the difficulties lawyers have in meeting detainees at Guantánamo but, again, is not sui generis to that setting. All who visit jails and prisons know well that formal rights to counsel do not always produce easy methods of seeing incarcerated clients.

The saliency of counsel rights reemerged in 2012, when a few detainees who had lost habeas claims on appeal filed for dismissal at the district court of the pending petitions and asserted that their rights to counsel continued after dismissal.<sup>186</sup> The government argued that lawyer-rights depended on “a pending or imminent habeas petition” and ended when petitions were dismissed. The government asserted its control over lawyer access and offered a memorandum of understanding requiring lawyers to acknowledge that operational logistics were to be prioritized over their meeting clients.<sup>187</sup>

Chief Judge Lamberth rejected the claim that counsel rights expired when habeas petitioning ends. He relied on the constitutional case law on prisoners’ rights to court access<sup>188</sup> and concluded (as had most trial-level judges ruling on 9/11 petitions) that “access to the court means nothing without access to counsel.”<sup>189</sup> Finding the government’s position that detainees unable to speak English could proceed pro se to be “preposterous,” the court held that the 2008 protective order continued to govern for all detainees.<sup>190</sup> The government did not pursue an appeal.<sup>191</sup>

Thus, after a decade of struggle, detainees’ lawyers have become a part of

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185. See *In re Guantanamo Bay Detainee Litigation*, 577 F. Supp. 2d 143, 156-64 (D.D.C. 2008) (replacing the 2004 *Al Odah* protective order and updating procedures in light of the Court’s decision in *Boumediene v. Bush*). All pending habeas petitions were consolidated for purposes of the protective order. *Id.* at 145.

186. *In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d. 8, 10 & n.5 (D.D.C. 2012).

187. *Id.* at 11-13; see Memorandum of Understanding Governing Continued Contact Between Counsel/Translator and Detainee Following Termination of the Detainee’s Habeas Case, <http://www.lawfareblog.com/wp-content/uploads/2012/07/Post-Habeas-MOU.pdf>.

188. *In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d. at 17 (citing *Lewis v. Casey*, 518 U.S. 343 (1996); *Bounds v. Smith*, 430 U.S. 817 (1977); *Ex parte Hull*, 312 U.S. 546, 549 (1941)); see also Vladeck, *supra* note 22, at 2115-25.

189. *In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d. at 23 (quoting *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 22 (D.D.C. 2005)); see Steven Vladeck, *Access to Counsel, Res Judicata, and the Future of Habeas at Guantanamo*, 161 U. PA. L. REV. PENNUMBRA 78 (2012), <http://www.pennumbra.com/responses/12-2012/Vladeck.pdf>.

190. *In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d. at 26.

191. See Steve Vladeck, *DOJ Comes to its Senses; Drops Guantanamo MOU Appeal*, LAWFARE (Dec. 15, 2012, 9:55 AM), <http://www.lawfareblog.com/2012/12/doj-comes-to-its-senses-drops-guantanamo-mou-appeal>.

the functional operations of Guantánamo Bay. The military overseers accommodate their travel and communications, just as they ensure that the base has food and medical services.<sup>192</sup> Yet lawyer access has remained shrouded in claims of ongoing government interference: that some exchanges have been monitored through listening devices, that new procedures have been put into place to chill contact, and that e-mails have been shared with the prosecution.<sup>193</sup> Further, in 2013, when the Boston Marathon was bombed, lawyers for the surviving defendant were again held at bay—in Boston—while he was questioned before receiving *Miranda* rights and meeting his court-assigned lawyer.<sup>194</sup>

## V. FROM *GIDEON* TO 9/11: UTILITIES, USELESSNESS, AND THE HALLMARKS OF OUR DEMOCRACY

*Gideon*'s promise made unsustainable lawyer-less detention for individuals held at Guantánamo. Those lawyers, joining the press and detainees' families, have been able to expose oppressive treatment through claiming legal rights. The courts have served as a public forum, enabling what Jeremy Bentham termed "publicity."<sup>195</sup> The interaction among the participants and the audience (Bentham's "public-opinion tribunal"<sup>196</sup>) in turn prompted the (re)establishment of access rights to courts and to lawyers as well as legal (re)commitments to the prohibition on torture.<sup>197</sup>

Guantánamo once held almost eight hundred men. As of the spring of 2013,

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192. THE GUANTÁNAMO LAWYERS, *supra* note 155; Luban, *supra* note 3.

193. See, e.g., Emergency Motion Concerning Access to Counsel, *supra* note 14; Peter Finn, At Guantánamo, Microphones Hidden in Attorney-Client Meeting Rooms, WASH. POST, Feb. 12, 2013, [http://articles.washingtonpost.com/2013-02-12/world/37055150\\_1\\_defense-lawyers-attorney-client-communications-military-judge](http://articles.washingtonpost.com/2013-02-12/world/37055150_1_defense-lawyers-attorney-client-communications-military-judge); Peter Finn, Guantánamo Dogged by New Controversy After Mishandling of E-mails, WASH. POST, Apr. 11, 2013, [http://articles.washingtonpost.com/2013-04-11/national/38458944\\_1\\_defense-attorneys-defense-lawyers-defense-counsel](http://articles.washingtonpost.com/2013-04-11/national/38458944_1_defense-attorneys-defense-lawyers-defense-counsel).

194. Charlie Savage, Debate Over Delaying of Miranda Warning, N.Y. TIMES, Apr. 20, 2013, <http://www.nytimes.com/2013/04/21/us/a-debate-over-delaying-suspects-miranda-rights.html>.

195. Jeremy Bentham, *Bentham's Draught for the Organization of Judicial Establishments, Compared with That of the National Assembly, with a Commentary on the Same*, in 4 THE WORKS OF JEREMY BENTHAM 305, 316 (John Bowring ed., Edinburgh, William Tait 1843). See generally Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 4 (2011).

196. Jeremy Bentham, *Public-Opinion Tribunal*, in 9 THE WORKS OF JEREMY BENTHAM, *supra* note 195, at 41, 41; see also FREDERICK ROSEN, JEREMY BENTHAM AND REPRESENTATIVE DEMOCRACY: A STUDY OF THE CONSTITUTIONAL CODE 26-29 (1983).

197. See Remarks of President Barack Obama (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama>).

the population was down to around 160. Most of those who have left have done so by executive orders, issued in the wake of the contestation about the legitimacy of detention.<sup>198</sup> The intense litigation produced, according to a 2012 count, more than 60 decided habeas cases as well as many civil rights, FOIA, and other filings. Detainees won more grants of relief at the district court than they lost,<sup>199</sup> and lost several of those wins in the D.C. Circuit.<sup>200</sup> Some release orders were snagged when the government reported it had nowhere to send individuals and refused to bring them on shore.<sup>201</sup>

Rights of access to courts and to lawyers have therefore produced a great deal of activity, occasioned the release of some individuals, prompted congressional hearings and legislation, garnered sustained publicity, and changed a good many practices. But the litigation has not, thus far, stopped the detention of those who remain, many of whom have resorted to hunger strikes to protest their conditions.<sup>202</sup> Neither has the litigation produced apologies for those wrongfully harmed or rights of redress for torture, wrongful deaths, and needless suffering. While the *Boumediene* Court insisted that jailors had to be “call[ed] to account” for detention,<sup>203</sup> courts have refused to permit inquiries to hold accountable those custodians permitting and inflicting grievous

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198. *The Guantánamo Docket*, *supra* note 94. For about half of those left, the government determined that no national interest required their detention but has not located a place to send them. Guantanamo Review Task Force, *Final Report*, U.S. DEP’T OF JUST. 9-11 (Jan. 22, 2010), <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.
199. Of the sixty-three merits decisions as of 2012, thirty-eight granted habeas petitions and twenty-five denied them. E-mail from Stephen Vladeck to authors (Feb. 20, 2013) (on file with authors).
200. See Mark Denbeaux, Jonathan Hafetz, Sara Ben-David, Nicholas Stratton & Lauren Winchester, *No Hearing Habeas: D.C. Circuit Restricts Meaningful Review*, SETON HALL CENTER FOR POL’Y & RES. 5 (May 1, 2012), <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/hearing-habeas.pdf>. A pivotal constraint came in the decision in *Al-Adahi, v. Obama*, 613 F.3d 1102 (2010), in which the D.C. Circuit reversed a habeas grant to a Guantánamo detainee and constrained the role of the district court. Before *Al-Adahi*, district court judges granted habeas petitions more often than they denied; after *Al-Adahi*, they have almost always denied. See Denbeaux et al., *supra*, at 4-5.
201. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010), *reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1631 (2011); *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 130 S.Ct. 1880 (2010).
202. See Charlie Savage, *More Join Hunger Strike at Guantánamo Prison*, N.Y. TIMES, Mar. 25, 2013, <http://www.nytimes.com/2013/03/26/us/guantanamo-hunger-strike-appears-to-widen.html>. As of May 24, 2013, more than one hundred of the 166 men detained on the base were reported to be striking. *Tracking the Hunger Strike*, MIAMI HERALD, [http://www.miamiherald.com/static/media/projects/gitmo\\_chart](http://www.miamiherald.com/static/media/projects/gitmo_chart) (last visited May 24, 2013).
203. See *Boumediene v. Bush*, 553 U.S. 723, 745 (2008).

injuries.<sup>204</sup> Instead, the remaining detainees sit in indefinite preventive detention,<sup>205</sup> albeit with some lawyer access—in contrast to those held in prisons further afield (such as Bagram), where, thus far, they are without access rights to U.S. courts and without recourse to lawyers outside what the military might afford.<sup>206</sup>

This picture of a thin understanding of *Gideon*'s promise can be transposed from the 9/11 detainees to many ordinary defendants, for whom the underfunded obligation to provide counsel provides a facade of regularity to a deeply unequal and unfair process. Money is not the only source of limits. Mandatory sentences, coupled with no control over prosecutorial charging, have reduced the role of defense lawyers and eroded a plausible claim to the adversarial production of outcomes, let alone just results.

A broader reading of *Gideon*, coupled with *Miranda* and other decisions, suggested more: detention and interrogation without lawyers were portrayed as acts outside the parameters of American values. To limit state coercive powers, lawyers were to be interposed as soon as persons stood accused of charges.<sup>207</sup> Those obligations were translated into affirmative obligations to supply lawyers for individuals in custody and without resources. In the decades

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204. Examples of cases denying remedies despite allegations (and in many instances detailed proof of) torture are set forth *supra* note 46.

205. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693 (2009); Jonathan Hafetz, *Detention Without End? Reexamining the Indefinite Confinement of Terrorism Suspects Through the Lens of Criminal Sentencing*, 61 UCLA L. REV. (forthcoming 2014).

206. *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (denying habeas jurisdiction); *Al Maqaleh v. Gates*, No. 08-1307, 2012 WL 5077483 (D.D.C. Oct. 19, 2012) (finding no changed circumstances sufficient to revisit the D.C. Circuit decision). In *Munaf v. Geren*, 553 U.S. 674 (2008), the Court ruled that citizens held abroad by the United States could bring habeas claims.

In the National Defense Authorization Act for Fiscal Year 2012, Congress directed the Department of Defense to develop procedures for the classification of remaining detainees, including at Bagram, except those “for whom habeas corpus review is available in a Federal court.” Pub. L. No. 112-81, § 1024, 125 Stat. 1298, 1565 (2011) (codified at 10 U.S.C. § 801 note). The statute requires that reviews be conducted by a military judge and that “an unprivileged enemy belligerent may, at the election of the belligerent, be represented by military counsel at proceedings for the determination of status of the belligerent.” *Id.* § 1024(b)(1), 125 Stat. at 1565.

207. Defendants must be provided counsel at the first appearance before a magistrate. *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008); *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977). Just what constitutes “custody” for the purposes of warning suspects of their rights under *Miranda* has been the subject of a series of decisions and varies depending on the context. *See, e.g.*, *Howes v. Fields*, 132 S. Ct. 1181 (2012); *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011); *California v. Beheler*, 463 U.S. 1121 (1983); *Orozco v. Texas*, 394 U.S. 324 (1969).

that followed, the paradigm of entitled-yet-under-resourced individuals came to embrace some civil litigants, struggling to maintain or reorganize families, keep their homes, and protect their health and livelihoods.<sup>208</sup>

During the two time periods that we have sketched—the Cold War and civil rights eras, and then the 9/11 decade—references to actors beyond the country’s borders were proffered as justifications for legal developments. Our multidecade foray illuminates the range of choices in generating meaning for domestic rights.<sup>209</sup> Rejection of totalitarian practices supported solicitude for criminal defendants’ rights. Yet other legal developments undermined liberties through licensing the surveillance of aliens, the curtailment of First Amendment rights of both citizens and noncitizens, and the internment of citizens. Thereafter, repudiation of some of those actions, coupled with acknowledgment of domestic inequalities and racism, produced other readings of what the Constitution must mean. The “foreign” has throughout framed both law and practice as, in the more recent decades, fears of terror mixed with fears of torture.

The sign over the Guantánamo Bay Commissions Building reads “Honor Bound to Defend Freedom.” The Department of Defense named the base “Camp Justice” and laid out a room in a court-like fashion. The logo of the Office of Military Commissions features an eagle with talons at the center of scales; the words “Freedom through Justice” are at the bottom.<sup>210</sup> The U.S. Supreme Court has another text—“Equal Justice Under Law”—above its door.

*Gideon* and *Miranda* seemed to offer some of the requirements of that equal justice under law. Lawyers had a role to play in the United States system of justice, and that function was what the *Miranda* majority described as the “hallmark of our democracy.” Forty years later, in 2004, Justice Stevens returned to the contrast between totalitarian and free governments, as he protested that “unconstrained executive detention for the purpose of investigating and preventing subversive activity” was the “hallmark of the Star Chamber,” while “[a]ccess to counsel” was the “hallmark of due process.”<sup>211</sup>

The will to want a system that could be comprehended as democratic in its apprehension, interrogation, and detention requires an appreciation that a

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208. See generally Symposium, *Toward a Civil Gideon: The Future of American Legal Services*, 7 HARV. L. & POL’Y REV. 1 (2013).

209. See generally VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010).

210. Pictures of these buildings, logos, and signs can be found in RESNIK & CURTIS, *supra* note 4, at 328–33. Analyses of the failings of the Guantanamo military commissions are provided in Eugene R. Fidell, *Charm Offensive in Lilliput: Military Commissions* 3.1, 56 ST. LOUIS U. L.J. 1177 (2012).

211. *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (Stevens, J., dissenting).

government (federal or state, secure or fearful, well-intentioned or not) cannot have unchecked dominion over human beings but must recognize them as rights-bearers, in need of state support and of buffers against its aggression.