Forgotten at Guantánamo: The *Boumediene* Decision and Its Implications for Refugees at the Base Under the Obama Administration

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INTRODUCTION

On January 22, 2009, newly inaugurated President Barack Obama signed an Executive Order calling for the closure of Guantánamo Bay Naval Base in response to longstanding criticisms of the Bush Administration’s Guantánamo policy.¹ The Order requires review of detention and prompt disposition of all cases involving Guantánamo detainees. It was meticulously drafted to apply to all “individuals currently detained by the Department of Defense in facilities at the Guantánamo Bay Naval Base whom the Department of Defense has ever determined to be, or treated as, enemy combatants.”² The Order attempts to bring U.S. policy into compliance with both international law and domestic law, invoking the detainee protections of both the Geneva Conventions and U.S. domestic law.³ It also acknowledges the momentous 2008 decision *Boumediene v. Bush*, in which the Supreme Court held that the right to constitutional habeas extends to alleged enemy combatant detainees at Guantánamo, and that it does so by virtue of de facto U.S. sovereignty over the territory.⁴

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2. *Id.* § 1(a), 74 Fed. Reg. at 4897.
Yet, however thoroughly the Order may respond to the dictates of international and domestic law with regard to the alleged enemy combatants in detention, it contains a subtle but significant gap: it fails to address the legal rights of another group of individuals detained at Guantánamo—a group that has been entirely ignored, or, perhaps worse, forgotten. This other population consists of bona fide refugees from Cuba and Haiti, consigned indefinitely to Guantánamo and denied access to the American legal system. Unfortunately for these individuals, intense litigation in the 1980s and 1990s established a rigid precedent that U.S. laws did not extend to individuals detained at Guantánamo because it was not U.S. territory, extinguishing any chance of deriving protection under U.S. laws or the Constitution. Indeed, this precedent contributed to the Bush Administration’s confident determination that Guantánamo was “outside the territorial jurisdiction of any court of the United States.”

Little is known about the conditions surrounding refugee detention at Guantánamo. The rationale for the refugee detention is “to discourage illegal and dangerous voyages by sea and to encourage future migrants to pursue safe and legal migration options.” In line with this policy, the United States keeps

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5. In using the term ‘bona fide refugee’ in this sentence, the author means to convey the legal term “refugee,” as distinguished from the common usage of the word, which is often employed to describe any migrant, including economic migrants. See United Nations High Commissioner for Refugees, Basic Definitions, http://www.unhcr.org.au/basicdef.shtml (last visited Jan. 20, 2010). A legally recognized refugee is an individual who is unable or unwilling to return to his or her country on account of a “well-founded fear” of persecution. Id. In contrast, many migrants are able to return to their countries and choose to move for reasons unrelated to persecution, such as economic opportunity, or flee their country or origin due to generalized violence or environmental disaster. Id. In the remainder of this Comment, the author refers to the legally recognized refugees who are the subject of this Comment as “refugees.” The U.S. government officially calls these individuals “protected migrants” but for all intents and purposes they are “refugees” in the legal sense of the term, because, like refugees, they are a protected group of persons who have a well-founded fear of persecution upon return. The U.S. government defines a protected migrant as “an individual interdicted at sea who is determined to have a ‘well-founded fear’ of persecution, or is more likely than not to face torture if he/she returns to his/her country of origin, and whom the U.S. Government houses and cares for at its Migrant Operation Center on the Guantánamo Naval Base while it finds a third country in which to resettle him/her. See Bureau of Population, Refugees, and Migration, U.S. Dep’t of State, Glossary, http://www.state.gov/g/prm/c26475.htm (last visited Mar. 13, 2010). Presumably, the United States does not wish to refer to the individuals by the term “refugees” because it would invoke U.S. obligations to comply with international and domestic law on refugees. See infra Part I.B. for a discussion of the rights accorded to refugees under international law and U.S. domestic law.


7. This information was previously available on the website of U.S. Immigration and
refugees at Guantánamo, forcing them to wait for months and sometimes years before a third country decides to resettle them. United States Immigration and Customs Enforcement ("ICE") has claimed that the refugees are not being detained because they can move about in a "relatively unrestricted environment" and are "free to return to their country of origin upon request."8

This Comment argues that the refugees are, in fact, being detained in contravention of U.S. laws, treaties, and the Constitution. In particular, it argues that the holding in Boumediene v. Bush, extending the right of habeas corpus to individuals detained at Guantánamo,9 applies to the refugees at the base10 and that the refugees should be entitled to, at a minimum, the same rights as the government has recognized for the alleged enemy combatants at Guantánamo.

Although the current refugee population at Guantánamo is relatively small, the precarious political situations in Haiti and Cuba could produce additional refugees in the Caribbean at any moment.11 But regardless of the number of refugees confined at Guantánamo, it is illogical and anomalous to recognize the rights of the alleged enemy combatants and not those of the refugees. If the Obama Administration truly wishes to reform the United States’ policy vis-à-vis Guantánamo, it must address the plight of all of the individuals held there.

Part I of this Comment sets the stage for understanding why refugees are detained at Guantánamo. It describes the population currently at Guantánamo and examines the rights accorded to refugees under the U.S. legal framework. It then discusses the stream of refugee litigation that established the recently changed judicial precedent regarding Guantánamo.

Part II considers the holdings in Rasul v. Bush12 and Boumediene, two cases that have transformed the legal status of Guantánamo. It also examines the struggle that occurred at the time of these decisions—between, on the one side, Congress and the Executive, and, on the other, the Supreme Court—over Guantánamo’s legal status. Part III argues that the refugees are detained in contravention of U.S. laws and treaty obligations, thus falling within the class

8. Id.
10. Habeas actions generally require the court to rule on three different aspects: jurisdiction, substantive rights, and procedural rights. This Comment does not address the underlying substantive rights of the refugees at Guantánamo, but instead limits itself to the argument that, as a procedural right, the refugees at Guantánamo are entitled to avail themselves of the writ of habeas corpus. See Richard H. Fallon, Jr. & Daniel J. Meltzer, Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror, 120 Harvard Law Review 2029, 2037 (2007).
11. See infra Part I.A.
of arbitrarily detained individuals whom statutory and constitutional habeas are intended to protect. Part IV posits that, in light of the holdings in Rasul and Boumediene, the jurisdictional hurdle refugees faced during the litigation of the 1980s and 1990s has been removed, entitling them to the writ of habeas corpus on both statutory and constitutional grounds.

Part V provides insight into the legal obstacles awaiting Guantánamo refugees by examining the legal challenges confronted by a population of Chinese Uighurs, detained in the War on Terror, as they struggled to convince the federal courts to rectify years of wrongful detention at Guantánamo. If the Guantánamo refugees were to litigate their case, they would likely encounter many of the same legal obstacles faced by the Uighers and potentially by other alleged enemy combatants in future litigation. But these obstacles must not obscure the basic illegality of the refugees’ detention or deter the refugees from vindicating their rights.

I

THE ORIGINS OF U.S. POLICY ON GUANTÁNAMO

U.S. courts have a long record of refusing to recognize the rights of individuals interdicted\(^\text{13}\) at sea or detained at Guantánamo. Since the 1990s, there have been numerous cases challenging the U.S. interdiction program on behalf of both Cubans and Haitians. Until Boumediene and Rasul, U.S. courts effectively precluded the possibility of redress for Cuban and Haitian refugees interdicted at sea and held at Guantánamo.

This Part details the circumstances that led to the detention of refugees at Guantánamo and the judicial decisions that kept them there. It first describes the refugees currently detained at Guantánamo as part of the U.S. interdiction program, followed by a brief outline of the rights generally accorded to refugees under U.S. law. It then follows the line of cases, preceding Boumediene, that first established the extraterritorial nature of Guantánamo. These cases resulted in both the indefinite detention of refugees at Guantánamo and the Bush Administration’s decision to place alleged enemy combatant detainees at Guantánamo.

A. Who Are the Guantánamo Refugees and Why Were They Interdicted at Sea?

Since the 1990s, the refugee population at Guantánamo has fluctuated greatly and has included individuals from Haiti, Cuba, and at least one other

\[^{13}\] “Migrant Interdiction” is the term employed by the U.S. Coast Guard for its patrol operations that apprehend vessels in international waters to question and remove migrants traveling for the purpose of illegally entering a country that is not their own. See United States Coast Guard Alien Migrant Interdiction [hereinafter Coast Guard on Alien Migrant Interdiction], http://www.uscg.mil/hq/cg5/cg531/amio.asp (last visited Jan. 21, 2010). The United States has formal interdiction programs with both Cuba and Haiti. See infra note 30 (providing details on the origins of the programs).
country. Today, the government continues to run the Migrant Operations Center (“MOC”) and the refugee population is comprised of approximately one dozen Cubans. As recently as 2004, the refugee population was substantially larger than it is today, numbering thirty-nine Cubans, fourteen Haitians, and one individual of unidentified origin.

The availability of public information regarding the refugees at Guantánamo is extremely limited. There is information neither on the asylum claims of the refugees themselves, nor on the process used to determine whether they indeed have a valid fear of persecution. Rather, the refugees at Guantánamo are a well-kept secret that the government quietly manages in the face of heated debate and vigorous litigation over Guantánamo.


16. The U.S. government does not provide public information on the exact number of refugees at Guantánamo. An attorney at the United Nations High Commissioner for Refugees, in a personal interview on condition of anonymity, confirmed the number quoted above. Interview with Anonymous, Attorney, U.N. High Commissioner on Refugees (March 15, 2010) (on file with author). The existence of a small group of detained refugees is also confirmed by the following public sources, some of them from the government. See U.S. DEP’T OF STATE, MIGRATION AND REFUGEE ASSISTANCE EMERGENCY REFUGEE AND MIGRATION ASSISTANCE CONG. PRESENTATION DOC. 35–36 (2009), available at http://www.state.gov/g/prmrls/rpt/2009/124456.htm (noting that thirty-nine Cubans were resettled in third countries from the MOC in fiscal year 2008, and requesting funding for fiscal year 2010 “to meet the State Department’s commitment to support the needs of interdicted migrants at the Guantánamo Bay Naval Base under Executive Order 13276 . . . [for] migrants [that] have been found to be in need of protection as well as their initial resettlement in third countries”); RUTH ELLEN WASEM, CONGRESSIONAL RESEARCH SERVICE, CUBAN MIGRATION TO THE UNITED STATES: POLICY AND TRENDS 3 n.12, (2009) [hereinafter CRS REPORT ON CUBAN MIGRATION] available at http://assets.opencrs.com/rpts/R40566_20090602.pdf (“[Department of Homeland Security’s] Immigration and Customs Enforcement (ICE) continues to operate the Migrant Operations Center at Guantánamo. There are reportedly no more than 20-40 interdicted migrants detained at Guantánamo at any one time.”); Azadeh Dastyari, The Detained Refugees Obama Will Not Free, NAT’L TIMES, Nov. 24, 2008, http://www.theage.com.au/opinion/the-detained-refugees-obama-will-not-free-20081123-6et7.html?page=1 (“[I]t is increasingly difficult to find third countries willing to take [the refugees]”).


18. See Dastyari, supra note 16 (“Away from the prying eyes of the media, nongovernment organizations and other advocacy bodies, the treatment of this vulnerable group [of
Public records do, however, reveal some information on the interdiction program and the process of screening the refugees. Much of the rest of the picture can be gleaned from a brief look at the historical process of U.S. interdiction in the Caribbean and the history of Cuban and Haitian migration to the United States.

Cuban and Haitian migration to the United States is no new phenomenon. Since at least the 1980s, there has been a steady stream of illegal migration from Haiti and Cuba to the United States, escalating during periods of mass influx in direct response to the extreme political and economic turmoil that has enveloped both islands.19 The major episodes of Haitian migration occurred throughout the 1980s, in response to a series of brutal dictatorships, and again after the military coups of 1991 and 1994.20 Cuban migration peaked during two years,21 in 1980 and in 1994.22

The first “mass influx” of Cuban and Haitian migrants occurred in 1980 and is commonly referred to as the Mariel Boatlift, after the Mariel Harbor, from which most Cubans departed.23 The Mariel Boatlift was an immediate reaction to Fidel Castro’s abrupt announcement that Cubans, after years of being denied the right to leave, were free to leave the island.24 The ensuing exodus took place over a seven-month period, in which approximately 125,000 Cubans attempted to reach Florida by boat, joined by at least 25,000 Haitians.25 Since 1980, thousands more Cubans and Haitians have attempted to reach the United States by boat.26 Their efforts are often frustrated and, in many cases, fatal.27
After the Mariel Boatlift, and as ever-increasing numbers of migrants from Caribbean countries took to the seas, the United States implemented an interdiction program in the 1980s. The program authorized the Coast Guard to board boats in the Caribbean transporting Haitian migrants and to repatriate those on board. The program was expanded in 1995 to include the interdiction and repatriation of Cuban migrants. Pursuant to the interdiction program, interviewers from the U.S. Immigration and Naturalization Service (INS) accompanied the Coast Guard aboard the boats to ascertain asylum eligibility. The INS interviewers conducted cursory “credible fear” screenings—aimed at determining whether individuals had a credible fear of return. Initially, those found to have a credible fear were paroled into the United States for a more formal asylum interview, although this is no longer U.S. policy. Remarkably, the number of individuals found to meet the credible fear test was miniscule compared to the number of Haitians and Cubans interdicted at sea. For example, in the period from 1981 to 1990, only 6 Haitians of 21,000 interdicted passed the test.

With the advent of the U.S. interdiction program and an escalating number of fleeing Haitians and Cubans, the United States increasingly used the U.S. Naval Base at Guantánamo, a forty-five-mile stretch of land on the

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29. See Legomsky, supra note 20, at 679.

30. CRS REPORT ON CUBAN MIGRATION, supra note 16, at 4. An agreement signed by President Reagan and Jean-Claude Duvalier, then-dictator of Haiti, authorized the interdiction of Haitians. Id. Due to the United States’ unique relationship with Cuba, the scope of which is beyond this Comment, authorities did not complete an official interdiction agreement between the United States and Cuba until much later, under the Clinton Administration. See Letter from Subcommittee on Coast Guard and Maritime Transportation Staff to Members of the Subcommittee on Coast Guard and Maritime Transportation 11 (Mar. 9, 2009), available at http://transportation.house.gov/Media/file/Coast%20Guard/20090311/SSM_CG.pdf.

31. Later, the United States temporarily changed its Haitian migrants policy and forcibly repatriated all Haitians, without first providing credible fear determinations. Legomsky, supra note 20, at 680. This will be further discussed infra Part I.C.

32. Given the relatively low number of individuals who passed the credible fear test, there was concern among some human rights groups that the interviews provided were procedurally inadequate. See infra Part I.C.

33. See Legomsky, supra note 20, at 679 (providing the language from the original INS guidelines for the Haitian interdiction program, which reads: “If the interview suggests that a legitimate claim to refugee status exists, the person involved shall be removed from the interdicted vessel, and his or her passage to the United States shall be arranged.”). Under the current policy, refugees who meet the credible fear test are taken to Guantánamo for a further interview to determine if they have a “well-founded fear” of persecution if returned. See CANADIAN COUNCIL FOR REFUGEES, INTERDICATION AND REFUGEE PROTECTION: BRIDGING THE GAP 5 (2003), available at http://www.ccrweb.ca/interdictionproceedings.PDF (describing the well-founded fear interview). If they pass this test, they remain at Guantánamo, instead of being paroled into the United States. Id. at 15.

34. Legomsky, supra note 20, at 679.
southeast coast of Cuba, as a holding facility. In 1991, with the fall of Haiti’s President Aristide, thousands of Haitians, thought to be fleeing political persecution, were brought directly to Guantánamo for their credible fear determinations. Likewise, there were over 20,000 Cubans transported to Guantánamo in 1995.

In the mid-1990s, the U.S. government ceased to use the facilities at Guantánamo for mass-influx operations. Most of the Cubans ultimately gained entry into the United States, while nearly all of the Haitians were repatriated, many of them forcibly. After Guantánamo was “emptied” of the majority of individuals kept there in the early and mid-1990s, the U.S. government continued its interdiction program. It also continued to screen interdicted Cubans who expressed fear of persecution, though it temporarily halted the screening process for Haitians. The screening process for Haitians was resumed shortly thereafter, although procedures varied and continue to vary depending on the nationality of the interdicted individual.

Today the United States continues to use Guantánamo to confine the relatively small number of individuals who pass the credible fear test and are then determined to be refugees. Instead of being paroled into the United States,


36. Legomsky, supra note 20, at 680 (“[T]he sudden drop in boat traffic upon the election of Aristide followed by an equally sudden resumption upon his overthrow—strongly suggested, as refugee advocates had argued but as the US government had strenuously denied, that the main impetus for the outflow was political persecution rather than economics.”).


38. Cuban Am. Bar Ass’n, Inc. v. Christopher, 43 F.3d 1412, 1419 (11th Cir. 1995).


40. Id.; see also Legomsky, supra note 20 at 681 (noting that human rights groups decried the involuntary return of Haitian refugees from Guantánamo).


42. See Legomsky, supra note 20, at 680.

43. Cubans are automatically prompted to report any fears of returning to Cuba once they board Coast Guard Cutters. See HUMAN RIGHTS WATCH SUBMISSION TO THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION, supra note 14, at 13. Other indicted individuals, including Haitians, only receive credible fear determinations if they pass the “shout test,” which requires them to report fear of persecution spontaneously, without being prompted. Id.

44. See ICE Description of MOC, supra note 7.
these individuals remain at Guantánamo indefinitely and the U.S. government classifies them as “protected migrants,” presumably to avoid the legal obligations that would ensue were the government to call them “refugees.” This small population makes up the group discussed in this Comment.

Given that these select few are refugees and the U.S. government recognizes that they are in need of protection, it is unfathomable that the United States does not accord any rights to these individuals under U.S. refugee law. Instead of gaining access to the U.S. asylum system, these refugees are ordered to stay in a detention facility, where they remain for months, awaiting the chance that a third country may take pity and resettle them.

B. The Rights Accorded to Refugees Under U.S. Law

Although the term “refugee” is often used expansively to describe any person fleeing his or her country, the legal definition of a refugee is narrow and strictly applied. International law and most countries today adhere to the definition of refugees provided in the statute establishing the United Nations High Commissioner for Refugees, later incorporated into the Convention and Protocol Relating to the Status of Refugees (“Refugee Convention”). At the heart of the definition is the notion of non-refoulement, a prohibition on sending individuals back to a country where they fear persecution.

The United States, a signatory to the 1967 Protocol to the Refugee Convention, incorporated mandatory withholding of removal into U.S. statutory law with the passage of the Refugee Act of 1980, amending the Immigration and Nationality Act of 1952 (INA). Indeed, the 1980 Refugee Act

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45. ICE Description of MOC, supra note 7. See infra Part I.B. for a discussion of the rights accorded to refugees under international law and U.S. domestic law.
46. See infra Part I.B.
49. This Comment will refer to both the Convention and the Protocol as “the Refugee Convention.”
50. INS v. Cardoza-Fonseca, 480 U.S. 421, 429 (1987). Withholding of removal is similar to asylum in that it prohibits the government from forcibly repatriating the individual. See EXEC. OFFICE FOR IMMIGRATION REVIEW, U. S. DEP’T OF JUSTICE, FACT SHEET. ASYLUM AND WITHHOLDING OF REMOVAL RELIEF. CONVENTION AGAINST TORTURE PROTECTION 6 (2009), available at http://www.justice.gov/oeiir/press/09/AsylumWithholdingCAT protections.pdf. To win withholding status, an individual must demonstrate that he or she is “more likely than not to face persecution if returned to his or her country.” See id.
was specifically passed to ensure that U.S. domestic law was in line with its international obligations. The Act prohibits the government from deporting an alien to his or her home country if it is “more likely than not” that he or she would be persecuted upon return. The Act also provides for a discretionary grant of asylum if an alien demonstrates a “well-founded” fear of persecution in his or her country.

In the United States, individuals are generally not given access to the U.S. asylum system until they touch American soil. In most cases, aliens either arriving at the border or temporarily paroled into the country undergo an admissibility hearing before an immigration judge. These aliens may then request asylum or withholding of deportation as a defense against removal.

But the U.S. government has consistently refused to apply U.S. refugee law and international standards to individuals detained at Guantánamo. The government argues that its legal obligations to protect refugees apply to individuals only after they reach the territory of the United States, and that Guantánamo is not U.S. territory. A number of federal courts steadfastly supported this view in the 1990s. For example, the Eleventh Circuit in *Cuban American Bar Ass’n, Inc v. Christopher* rejected “the argument that our leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are ‘functional[ly] equivalent’ to being land borders or ports of entry of the United States or otherwise within the United States.”

According to this reasoning, as long as individuals who pass the credible fear test are either interdicted at sea or kept at Guantánamo, the United States has no legal duty to assist them, or even to provide them safe harbor. Despite this argument, the United States apparently understands that it has a duty; otherwise it would not attempt to keep the refugees at Guantánamo in the first place and would more likely forcibly repatriate them. Today, given the holding

52. *Cardoza-Foneca*, 480 U.S. at 436–37 (“If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . .”).

53. The Act now provides: “[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3)(A) (2006).


55. See Cuban Am. Bar Ass’n, Inc v. Christopher, 43 F.3d 1412, 1426 (11th Cir. 1995) (finding in favor of the government and asserting that the Refugee Convention, the 1980 Refugee Act, and other applicable laws “bind the government only when the refugees are at or within the borders of the United States”).


57. *Id.*

58. Cuban Am. Bar Ass’n, Inc., 43 F.3d at 1425–26 (noting that Guantánamo is not U.S. territory and therefore the laws “which govern repatriation of refugees, bind the government only when the refugees are at or within the borders of the United States”).

59. *Id.* at 1425.
in *Boumediene*—that the right to constitutional habeas extends to alleged enemy combatant detainees at Guantánamo by virtue of de facto U.S. sovereignty over the territory\(^{60}\)—the government can no longer hide behind the notion that Guantánamo is a “legal vacuum”\(^{61}\) that allows the United States to disregard its legal obligations.

**C. The Law Before Boumediene**

Several key incidents in the history of the U.S. interdiction program led to judicial precedent that supported the U.S. government’s position on the refugees at Guantánamo. Executive Order 12324—the “Alien Interdiction Order” issued by President Reagan in 1981—resulted in the first series of lawsuits, brought on behalf of Haitians consequently interdicted at sea and repatriated.\(^{62}\) The Alien Interdiction Order was the first Executive Order that authorized the Coast Guard to board vessels “engaged in the irregular transportation of persons” and to repatriate those vessels and their passengers.\(^{63}\) In recognition of U.S. obligations toward refugees, the Order contained a provision requiring the Coast Guard to obtain the consent of those deemed refugees before repatriating them.\(^{64}\)

In the first of these cases, *Haitian Refugee Center, Inc. v. Gracey*, the Haitian Refugee Center (HRC) claimed that the Alien Interdiction Order violated the Refugee Convention and other treaties by ignoring U.S. obligations to protect refugees.\(^{65}\) The court found that U.S. refugee law and the relevant conventions ratified by the United States did not apply outside of U.S. territory, and it dismissed the case.\(^{66}\)

HRC soon brought another case, *Haitian Refugee Center Inc. v. Baker*, challenging the adequacy of the credible fear test.\(^{67}\) The HRC claimed that the duration of the credible fear interviews and the atmosphere in which they were conducted were in violation of the INA, Article 33 of the Refugee Convention, and the Fifth Amendment of the Constitution.\(^{68}\) The Eleventh Circuit held that the Haitians in question had no right to judicial review of INS procedures...
because the INS interviews were fully discretionary.\textsuperscript{69}

The \textit{Baker} court went on to uphold the precedent to that point. It reaffirmed the decision in \textit{Gracey} that the Refugee Act of 1980 was inapplicable outside of U.S. territory.\textsuperscript{70} Additionally, the court approved the district court’s holding that it was "settled law" that the Constitution did not apply outside of the United States and, therefore, the Fifth Amendment claim failed as well.\textsuperscript{71} Finally, the court affirmed its earlier decision that the Refugee Convention could not apply because its provisions were not self-executing and, therefore, individuals could assert no claims or rights pursuant to it.\textsuperscript{72}

In 1992, President George H.W. Bush issued Executive Order 12807 (the "Kennebunkport Order"), which replaced the policy embodied in the Alien Interdiction Order and called for all interdicted Haitians to be repatriated automatically, \textit{without receiving refugee status determinations}.\textsuperscript{73} In the immediate aftermath of the Kennebunkport Order, the Bush administration was confronted with a multitude of accusations that the Order contravened the United States’ international obligations of non-refoulement pursuant to Article 33 of the Refugee Convention, as reflected in the INA.\textsuperscript{74}

With the election of President Bill Clinton, Haitian rights advocates waited for the reversal of the Kennebunkport Order’s interdiction policy. Although he had earlier condemned the Kennebunkport Order, President Clinton continued the Haitian interdiction policy established by his predecessor,\textsuperscript{75} based on the assumption that U.S. law was inapplicable to individuals interdicted on the high seas.\textsuperscript{76}

\begin{itemize}
\item \textsuperscript{69} Id. at 1506.
\item \textsuperscript{70} Id. at 1510.
\item \textsuperscript{71} Id. at 1503.
\item \textsuperscript{72} Id. at 1504.
\item \textsuperscript{73} See Palmer, supra note 27, at 1574–76.
\item \textsuperscript{74} See, e.g., \textit{Amnesty Intl. United States of America: Forcible Return of Haitian Asylum-Seekers by the United States} (1994), available at http://www-secure.amnesty.org/en/library/info/AMR5100071994/en ("Amnesty International . . . believes that the US policy of intercepting and summarily returning to Haiti those who leave the country by sea is a gross violation of the internationally-recognized principle of non-refoulement and, specifically, the obligations of the US as party to the 1967 United Nations Protocol relating to the Status of Refugees").
\item \textsuperscript{75} President Clinton stated the following in a speech given shortly after the Kennebunkport Order was issued: "I am appalled by the decision of the Bush administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti before considering their claim to political asylum. . . . This policy must not stand." Harold Hongju Koh, \textit{The "Haiti Paradigm" in United States Human Rights Policy}, 103 \textit{Yale L.J.} 2391, 2397 n.29 (1994) (discussing President Clinton’s changed stance vis-à-vis the Bush administration’s interdiction policy pursuant to the Kennebunkport Order).
\item \textsuperscript{76} See Harold Hongju Koh, \textit{Reflections on Refoulement and Haitian Centers Council}, 35 \textit{Harv. Int'l L.J.} 1, 13 (1994) ("It soon became clear that the Clinton Administration would defend both the summary return policy and the legality of the Guantánamo interment in court, adopting the Bush rationale that the Haitians had no legal rights outside the United States.").
\end{itemize}
The Supreme Court eventually accepted a petition for certiorari in the case of Sale v. Haitian Centers Council to provide a final interpretation on the extraterritorial application of the INA and the United States’ non-refoulement obligations. The Court concluded that neither the INA nor the Refugee Convention applied outside of U.S. territory.

The Court read the INA extremely narrowly. First, it relied on the presumption that congressional acts are not meant to operate outside of U.S. territory unless the act specifically requires it. Second, the Court interpreted the language “[t]he Attorney General shall not deport or return any alien” as narrowly as possible, to mean that the alien had to first come to the United States in order to be deported or returned. Finally, the Court limited the statute’s authority to acts taken by the Attorney General, finding that the statute had no bearing on the President’s and the Coast Guard’s actions.

The Court also declined to find that U.S. obligations under the Refugee Convention extended outside of U.S. territory. The Court reasoned that the drafters of the Convention did not contemplate the applicability of the Convention to an interdiction program and that such applicability could not be extrapolated. It further interpreted the word “refouler” as exclusively signifying expulsion or return from a country to which the alien had already been admitted.

In an irate dissent, Justice Blackmun wrote:

Today’s majority nevertheless decides that the forced repatriation of the Haitian refugees is perfectly legal, because the word “return” does not mean return . . . because the opposite of “within the United States” is not outside the United States . . . and because the official charged with controlling immigration has no role in enforcing an order to control immigration . . .

Justice Blackmun was adamant in his belief that the INA had been crafted specifically to comply with the Refugee Convention and that Congress, upon drafting, had been aware of its potential application outside of U.S. territory.

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78. Id.
79. Id. at 173; see also Michael W. Lind, Cuban Refugees at Sea: A Legal Twilight Zone, 24 CAP. U.L. REV. 789, 800–01 (1995) (analyzing the Sale decision).
81. Sale 509 U.S. at 174 (emphasis added).
82. Id. at 173.
83. Id. at 179 (“[B]oth the text and negotiating history of Article 33 [of the Refugee Convention] affirmatively indicate that it was not intended to have extraterritorial effect.”).
84. Lind, supra note 79, at 802.
85. Sale, 509 U.S. at 182.
86. Id. at 188–89.
87. Id. at 206.
In Cuban American Bar Ass'n v. Christopher, brought soon after Sale, plaintiffs were Haitians and Cubans detained at Guantánamo as part of the U.S. interdiction program. Unlike the previous cases, which focused primarily on the application of U.S. law and obligations to aliens on the high seas, the plaintiffs in Cuban American Bar Ass'n claimed more specifically that U.S. laws and obligations applied to individuals detained at Guantánamo.

The case was brought after the Clinton administration concluded an agreement with Cuba allowing 20,000 Cubans to immigrate annually to the United States directly from Cuba. The agreement further provided that those interdicted at sea and detained at Guantánamo for protection were ineligible for U.S. asylum or U.S. visas, and instead were to await third-country resettlement if they did not wish to return to Cuba. In 1994, the time of the case, the United States government housed over 20,000 Cubans at Guantánamo and at military installations in Panama, and over 16,800 Haitians at Guantánamo.

Plaintiffs requested declaratory and injunctive relief under the First and Fifth Amendments, the INA, and Article 33 of the Refugee Convention. In its ruling, the Eleventh Circuit proved unwilling to extend the protection of U.S. laws to the claimants, finding that Guantánamo did not constitute U.S. territory and that U.S. laws did not apply extraterritorially. The court also found

88. 43 F.3d 1412, 1417 (11th Cir. 1995).
89. Note that plaintiffs' claims in Sale also challenged the legality of screening procedures used at Guantánamo, but the Court never specifically addressed Guantánamo in its decision. See generally Sale, 509 U.S. 155.
90. Cuban Am. Bar Ass'n, 43 F.3d at 1424.
91. Id. at 1418.
92. Id.
93. Id. at 1419.
94. Id.
96. While these acts acknowledge the political climate in Cuba, provide for economic sanctions for dealing with Cuba, and allow for certain rights for Cubans who reach the United States, they do not address the rights of Cuban migrants to enter or to seek entry to the United States initially, nor do they confer directly any rights upon the Cuban migrants outside the United States.
97. Id.
98. Cuban Am. Bar Ass'n, 43 F.3d at 1426. In May 1995, shortly after the decision, the Clinton Administration announced its new policy, commonly referred to as the “Wet Foot/Dry Foot” policy. See Alberto J. Perez, Wet Foot, Dry Foot, No Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy, 28 Nova L. Rev. 437, 455 (2004). The policy, which is still in effect today, provides that the Cuban Adjustment Act applies to Cubans who reach U.S. soil, but not to those who are interdicted at sea. Id.
that the Cuban Refugee Adjustment Act and the Cuban Democracy Act provided no additional protections or rights for Cubans outside the United States.\textsuperscript{98}

\textit{Cuban American Bar Ass’n} was the last of the line of cases challenging the lack of rights of Cubans and Haitians interdicted at sea and detained at Guantánamo. In each case, U.S. courts rejected an extraterritorial application of U.S. laws and treaty obligations to the high seas and to Guantánamo. Since the early and mid-1990s, when these cases were heard, most of the individuals at Guantánamo not classified as refugees were repatriated.\textsuperscript{99} The small number of recognized refugees who remain at the base have been forgotten by the world and obscured by the stories of the alleged enemy combatant detainees.

After more than a decade of judicial and political refusal to recognize Guantánamo as U.S. territory, \textit{Rasul} and \textit{Boumediene} entered the scene, sweeping away judicial precedent and providing a contrary interpretation of Guantánamo’s territorial status and the applicability of U.S. laws. The implications of these two decisions may dislodge the reasoning of the courts in the 1990s cases, and provide relief to refugees having as much, if not more, claim to the protections of the U.S. legal system as their neighboring detainees at Guantánamo.

\section{Rasul, Boumediene, and the Struggle Between the Three Branches}

The events of September 2001 led to a clash between Congress, the Executive, and the Supreme Court over the rights and status of alleged enemy combatants held at Guantánamo. This Part will first examine \textit{Rasul}, a case that continues to have important implications for the refugees in spite of a later action by Congress to “undo” its holding. It will then consider, in detail, \textit{Boumediene} and its application to the refugee situation.

\subsection{A. Rasul: A First Step Toward Challenging the Notion of Guantánamo as a Lawless Zone}

In response to the tragedies of 9/11, Congress enacted the Authorization for Use of Military Force (AUMF), which provided the President with the ability to use “all necessary and appropriate force” against individuals and organizations determined to have assisted or committed the terrorist acts against the United States on September 11, 2001.\textsuperscript{100} Pursuant to the Act, the U.S. government captured and detained hundreds of individuals suspected of having ties to Al Qaeda and the Taliban regime.\textsuperscript{101} Guantánamo was strategically

\begin{itemize}
  \item \textsuperscript{98} Cuban Refugee Act, 8 \textsuperscript{th} U.S.C. 1255 (2006); Cuban Democracy Act, 22 U.S.C. §§ 6001–10 (2006); see also Cuban Am. Bar Ass’n, 43 F.3d at 1429.
  \item \textsuperscript{99} See supra Part I.A.
  \item \textsuperscript{101} Al Odah v. United States, 346 F. Supp. 2d 1, 2 (D.D.C. 2004) (describing the Bush administration’s actions subsequent to the enactment of the AUMF).
\end{itemize}
selected as a holding facility, given its history of eluding U.S. courts.\footnote{102}

From the beginning, several Guantánamo detainees challenged the legality of their detention, filing habeas petitions with the assistance of the Center for Constitutional Rights in 2002.\footnote{103} Early on, lower courts’ insistence that they lacked territorial jurisdiction over the detainees frustrated any attempt to seek judicial redress.\footnote{104}

In \textit{Rasul v. Bush}, the Supreme Court accepted \textit{certiorari} to determine whether detainees at Guantánamo were entitled to statutory habeas corpus, which again required the Court to assess whether Guantánamo was within the reach of U.S. courts and laws.\footnote{105} The Court held that U.S. laws, including statutory habeas, did apply to Guantánamo. Unfortunately, the \textit{Rasul} victory was short-lived, due to Congress’s immediate passage of a statute reversing \textit{Rasul’s} holding as applied to alleged enemy combatants at Guantánamo.\footnote{106} However, as this Comment will argue, the decision in \textit{Rasul} continues to have important, although perhaps unforeseen, implications for the refugees at Guantánamo because they do not fall within the scope of the statutory response to \textit{Rasul}.

Petitioners in \textit{Rasul} were two Australians and twelve Kuwaitis who had been captured in the midst of the Taliban conflict.\footnote{107} They had been detained at Guantánamo since 2002.\footnote{108} All of the petitioners claimed rights pursuant to the U.S. Constitution, laws, and treaty obligations.\footnote{109} Both the district court and the appellate court construed all of the filed actions as writs for habeas.\footnote{110} Following the precedent that U.S. courts lacked jurisdiction over habeas claims of aliens detained “outside the sovereign territory of the United States,”\footnote{111} both courts dismissed the claims.

The lower courts primarily relied on \textit{Johnson v. Eisentrager},\footnote{112} a case that the government had depended on heavily in its initial determination that Guantánamo was unreachable by U.S. courts.\footnote{113} In \textit{Eisentrager}, the Supreme

\footnote{102. See December 2001 Justice Department Memorandum, \textit{supra} note 6, at 4 (listing prior cases that “conclude[d] that the United States does not exercise sovereignty over [Guantánamo]” including \textit{Vermilya-Brown Co. v. Connell}, 335 U.S. 377 (1948), and \textit{Cuban Am. Bar Ass’n v. Christopher}, 43 F.3d 1412 (11th Cir. 1995)).


104. \textit{Id.}


108. \textit{Id.} at 471.

109. \textit{Id.} at 472.

110. \textit{Id.} at 472–73.


113. See December 2001 Justice Department Memorandum, \textit{supra} note 6, at 1 (“The basis for denying jurisdiction to entertain a habeas petition filed by an alien held at GBC rests on
Court declined to extend the jurisdiction of U.S. federal courts to habeas claims made by German citizens imprisoned in Landsberg Prison in Germany by the U.S. military.\(^{114}\) The Court in *Eisentrager* focused on six factors in coming to its conclusion. The prisoners: (1) were enemy aliens; (2) had never been to or resided in the United States; (3) were captured outside of U.S. territory; (4) were tried and convicted by a Military Commission sitting outside the United States; (5) were tried for offenses under laws of war, committed outside the United States, and; (6) were at all times imprisoned outside of the United States.\(^{115}\)

The *Rasul* Court distinguished *Eisentrager* on the facts as well as on the basis that the *Eisentrager* decision had limited its discussion to constitutional habeas.\(^{116}\) The *Rasul* Court instead focused its analysis on the availability of statutory habeas to the detainees in question, which may have been an effort to avoid the question of constitutional habeas that the Court would confront squarely in *Boumediene*.\(^{117}\)

Perhaps most importantly, the Court dispelled the seemingly well-entrenched notion that Guantánamo was outside the territorial jurisdiction of the United States in the first place. The Court stated:

> Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within the “territorial jurisdiction” of the United States. . . . By the express terms of its agreements with Cuba, the United States exercises “complete jurisdiction and control” over the Guantánamo Bay Naval Base. . . .\(^{118}\)

The Court’s holding in *Rasul* was to engender an escalating legal struggle between Congress and the Judiciary. The next Part of this Comment will consider the evolution of this inter-branch conflict.

### B. Congress and the Court Battle over Habeas Jurisdiction

Until *Rasul*, no Supreme Court decision had ever come close to recognizing Guantánamo as within the territorial jurisdiction of the United States, despite strong evidence of such in the text of the 1903 Lease Agreement itself.\(^{119}\) The Court’s decision in *Rasul* was a sudden and seemingly simple reversal of the Guantánamo policy that the U.S. government had pursued for decades.

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*Johnson v. Eisentrager.*

116. *Id.* at 476.
119. *See supra* note 35.
The reversal, however, was short-lived. Congress swiftly responded with the passage of the Detainee Treatment Act of 2005 (DTA), amending the habeas statute to strip federal courts of statutory jurisdiction to hear habeas claims by alleged enemy combatants at Guantánamo. The battle between Congress and the Court was not over yet, however. Soon after the passage of the DTA, the Supreme Court held in *Hamdan v. Rumsfeld* that the DTA did not apply to claims pending at the time of the DTA’s enactment.

In response to the Court’s decision in *Hamdan*, Congress passed the Military Commissions Act of 2006 (MCA). Section 7 of the Act stated that the jurisdiction-stripping amendment of the habeas statute applied “to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.”

This passage of the MCA elicited outcry across the United States and from within the government itself, as well as a flood of litigation on behalf of Guantánamo detainees challenging their detention and the Act. The litigation

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120. Section 1005(e) of the Act of 2005 (effective 2006), amended 28 U.S.C. § 2241(e) to read: “no court, justice, or judge shall have jurisdiction to hear or consider -- (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba; or (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantánamo Bay, Cuba, who--(A) is currently in military custody; or (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.” 28 U.S.C. § 2241(e) (2006).


124. In an interview, Senator Patrick Leahy explained, “[I]t’s a terrible bill . . . . Habeas corpus was first brought in the *Magna Carta* in the 1200s. It’s been a tenet of our rights as Americans. And what they’re saying is that if you’re an alien . . . if a determination is made by anybody in the executive that you may be a threat, they can hold you indefinitely, they could put you in Guantánamo, not bring any charges, not allow you to have a lawyer, not allow you to ever question what they’ve done, even in cases, as they now acknowledge, where they have large numbers of people in Guantánamo who are there by mistake . . . . You’re not even allowed to question it. It makes no difference. You have no recourse whatsoever.” Amy Goodman, “A Total Rollback of Everything This Country Has Stood For”: Sen. Patrick Leahy Blasts Congressional Approval, *DEMOCRACY NOW!*, Sept. 29, 2006, http://www.democracynow.org/2006/9/29/a_total_rollback_of_everything_this.

culminated in *Boumediene*, which the Supreme Court decided on June 12, 2008.

**C. Boumediene: The Final Step?**

*Boumediene v. Bush*\(^{126}\) addressed the specific question of whether the petitioners, enemy combatants detained at Guantánamo, had the *constitutional* privilege to petition for a writ of habeas corpus.\(^{127}\) The Court had to determine two aspects of constitutional habeas. First, the Court addressed whether the Constitution extended to Guantánamo.\(^{128}\) Second, the Court assessed whether, if the Constitution did apply, a suspension of the writ of habeas corpus\(^{129}\) with regard to the criminal detainee petitioners was proper.\(^{130}\) In this critical ruling, the Court held that the Constitution does extend to Guantánamo, and that the MCA’s suspension of the writ, as applied to Guantánamo detainees, was unconstitutional.\(^{131}\)

The first half of the *Boumediene* decision examined the application of the Constitution to Guantánamo, which necessarily involved a discussion of Guantánamo’s legal relationship with the United States. For its part, the government essentially maintained the position it had advocated in *Sale*, that the Constitution did not protect individuals at Guantánamo because Guantánamo was outside of the United States’ sovereign control.\(^{132}\)

The Court accepted the proposition that Cuba retained ultimate sovereignty over Guantánamo, but reasoned that the United States had “practical sovereignty” over Guantánamo.\(^{133}\) Therefore, the Court “[took] notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains de facto sovereignty over [Guantánamo].”\(^{134}\) The Court thus took a pragmatic view of sovereignty, rejecting the government’s formalistic theory and noting that “questions of extraterritoriality turn on objective factors and practical concerns.”\(^{135}\)

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127. *Id.* at 2240.
128. *Id.* at 2244–59.
129. The only mention of habeas in the Constitution is found in the Suspension Clause, which states, “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.” U.S. CONST., art. I, § 9, cl. 2. A point of contention among legal scholars centers on what exactly the Suspension Clause protects. Oxford law professor Timothy Endicott explains that the Framers of the Constitution presupposed that there was a right to habeas corpus. See Endicott, *supra* note 117, at 5. The Suspension Clause, which “protects” rather than establishes the writ, is based upon that presupposition. *Id.*
131. *Id.* at 2240.
132. *Id.* at 2251–52.
133. *Id.* at 2252 (“[I]t is not altogether uncommon for a territory to be under the de jure sovereignty of one nation, while under the plenary control, or practical sovereignty, of another.”).
134. *Id.* at 2253.
135. *Id.* at 2258–59.
The Court’s view was grounded in the historical relationship between the United States and Guantánamo as well as separation of powers concerns. From a historical perspective, the Court noted that the United States has had “complete and uninterrupted control” over Guantánamo for over one hundred years, since Spain surrendered the territory during the Spanish-American War in 1898.136 The Court observed that even after entering into a Lease Agreement with Cuba in 1903, whereby Cuba retained ultimate sovereignty, the United States continued to exercise the “plenary control” it has had over Guantánamo since 1898.137

With respect to the separation of powers concerns, the Court explained that if it were to subscribe to the government’s position that the United States could maintain complete control over Guantánamo, while keeping it outside of the jurisdictional reach of the U.S. courts and legal system, the political branches of the government would retain exclusive control.138 This would have severe separation of powers consequences.139 The Court opined that the Constitution is not something that can be “switched on and off” at the will of the Executive; rather, it is an instrument that restricts the United States’ actions, even outside of its borders.140

Having established that the Constitution applies to Guantánamo, the Court turned to the question of the applicability of the Suspension Clause.141 The Court established that three relevant factors must be considered: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.”142

Applying these factors to the Guantánamo detainees, the Court concluded that the Suspension Clause was applicable to Guantánamo and that the MCA, therefore, acted as an unconstitutional suspension of the writ.143 As to the first factor (status and adequacy of determination), the status of the detainees was disputed because they claimed not to be enemy combatants, contrary to the government’s contention.144 Further, the procedural protections afforded the

136. Id.
137. Id.
138. Id.
139. As Justice Kennedy explained, allowing the political branches to have complete control over Guantánamo “would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’” See id. at 2259. Justice Kennedy also noted that “the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.” Id.
140. Id.
141. Id. at 2259–62.
142. Id. at 2259.
143. Id. at 2262.
144. Id. at 2259.
detainees were limited, in particular because they lacked counsel.\(^{145}\) As to the second criterion (focusing primarily on the nature of the detention site), the Court distinguished territories that the United States intended to govern indefinitely from those areas where the United States engaged in short-term occupation, stating that “Guantánamo Bay . . . is no transient possession. In every practical sense Guantánamo is not abroad; it is within the constant jurisdiction of the United States.”\(^{146}\) With regard to the third factor (practicality), the Court found that any practical considerations, including extra expenditures required for federal courts to have habeas jurisdiction to hear detainees’ claims, were not enough to outweigh the need for habeas jurisdiction.\(^{147}\)

*Boumediene* is the first case where the Supreme Court definitively ruled that the U.S. Constitution applies to aliens outside of the traditional United States. The decision undermines previous case law in the area, such as the holding in *United States v. Verdugo-Urquidez* that the Fourth Amendment only extends to “the people” of the United States and does not, therefore, apply to aliens outside of the United States.\(^{148}\) In addition, *Boumediene* trounces the rationale serving as the basis for both the *Sale* and *Cuban American Bar Ass’n* holdings—that U.S. obligations do not extend to Guantánamo because it is not U.S. territory.\(^{149}\) The legal implication of the broad holding of *Boumediene* is that U.S. laws and the Constitution now apply to all individuals at Guantánamo, not because of the status of the individuals, but because of the legal status of Guantánamo. By extension, if *Boumediene* does apply to all individuals at Guantánamo, then it should be applicable to the refugees as well.

**III**

**ESTABLISHING DETENTION**

If the Guantánamo refugees wish to file habeas petitions—on either constitutional or statutory grounds—they will have to establish that they are being detained “in custody in violation of the Constitution or laws or treaties of the United States.”\(^{150}\) Proving detention will be the primary obstacle for the refugees. In truth, the refugees at Guantánamo are detained since (1) their freedom of movement is restricted to specified areas of a military installation; (2) they are, as a practical matter, unable to freely return to their country of origin, given their established credible fear of persecution upon return; and (3) they are kept on the base indefinitely.

The government, however, would likely argue that the refugees are not in fact detained, and it will move to dismiss any petitions on this basis. Indeed, the

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145. *Id.* at 2260.
146. *Id.* at 2261.
147. *Id.*
149. *See supra* Part I.C.
government has already laid out this defense in public sources: the ICE website previously made several indicative statements. First, the website claimed that “the ‘protect’ population is not incarcerated or detained.”\textsuperscript{151} Second, it stated “[the ‘protect population’] live[s] in a relatively unrestricted environment.”\textsuperscript{152} Finally, it noted that the protect population has “substantial freedom of movement in that they are permitted to sign themselves in and out of the facility to participate in activities on the leeward side of the base.”\textsuperscript{153}

The refugees have two possible responses to this argument. First, U.S. jurisprudence has a relatively broad definition of detention, and it does not permit indefinite detention of aliens. Second, the detention of the refugees is impermissible under international norms, embodied in treaties to which the United States is a party, which define detention broadly and require judicial review of detention of asylum-seekers. This part addresses the concept of detention in both U.S. law and in international law.

\textit{A. Detention Under U.S. Law}

It is well established in U.S. jurisprudence that government conditions that “significantly confine and restrain . . . freedom” are equivalent to government custody of an individual.\textsuperscript{154} This definition undoubtedly applies to the refugees at Guantánamo. Guantánamo itself is a very small area of land, measuring just forty-five square miles,\textsuperscript{155} or the equivalent of less than one-sixth of New York City.\textsuperscript{156} Not only are the refugees limited to an area this size, but they are further confined within that area, as illustrated by the statement from the ICE website that the refugees must “sign out” when they wish to go to the other side of the base.\textsuperscript{157} Their movement is thus severely restricted and, given their fear of return to their home country (the one place that they could be transported outside of Guantánamo), they have no meaningful opportunity to leave.

Even prior to \textit{Boumediene}, U.S. jurisprudence held that indefinite detention of aliens is impermissible and that the writ of habeas is available. For example, in \textit{Zadvydas v. Davis}, the Supreme Court held that indefinite detention of an alien is unconstitutional under the Fifth Amendment’s Due Process Clause and that “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.”\textsuperscript{158}

\textsuperscript{151} ICE Description of MOC, supra note 7.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{157} ICE Description of MOC, supra note 7.
In Zadvydas, petitioners were aliens who, though they had entered the United States legally, became removable and were detained beyond the standard ninety-day removal period. Their confinement was authorized by a statute that allowed for potentially indefinite detention. The Court found that aliens could be detained for a "reasonably foreseeable" period, with a presumption that six months constituted such a period. Further, after the presumptive period of six months lapsed, the alien was entitled to seek conditional release if he proved that there was "no significant likelihood of removal in the reasonably foreseeable future."

In a subsequent case, Clark v. Martinez, the Court held that the statute it considered in Zadvydas also applied to inadmissible aliens, as did the six-month presumptive period. That case involved the detention of two men, paroled into the United States as part of the Mariel Boatlift, who later became inadmissible because of criminal convictions.

Although both Zadvydas and Clark concerned individuals detained within the United States, the decision in Boumediene implies that because Guantánamo is now legally equivalent to U.S. territory, the holdings in Zadvydas and Clark could be read more broadly to apply to aliens detained at Guantánamo. It is helpful in particular to contrast the individuals in Clark—convicted criminals with no claim to refugee status—with the individuals at Guantánamo, who are refugees. If the Supreme Court is willing to grant habeas relief to immigrants with criminal records, then surely U.S. courts should permit the refugees at Guantánamo to petition for the writ. These individuals are being held beyond the presumptive period, and there is no expectation that they will be removed in the "reasonably foreseeable" future. They are detained until resettled by a third country, an ad hoc process depending entirely on a third country's willingness to accept responsibility for resettlement—a process that contains no foreseeability. Further, the process of resettling the refugees will presumably receive less attention in the post-9/11 political climate than the resettlement of the alleged enemy combatants who have been granted habeas, which makes it all the more likely that the refugees will be detained for an unforeseeably prolonged period.

**B. Detention Under International Law**

International law similarly relies on broad definitions of "detention." One such definition is provided by the United Nations High Commissioner for Refugees ("UNHCR"): "[Detention is defined as] confinement within a..."
narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory."\textsuperscript{165}

Detention falling within the UNHCR’s definition is impermissible under Article 31 of the Refugee Convention, which prohibits States Parties (States that have ratified the Convention) from imposing penalties on refugees that are not lawfully in the country of refuge.\textsuperscript{166} The article clearly contemplates detention of asylum-seekers as one such penalty.\textsuperscript{167} Although it is well-entrenched in immigration law that States may detain aliens pending removal or entry, the Refugee Convention contemplates only temporary restriction of movement, and even such restriction of movement is subject to limitations.\textsuperscript{168}

An Executive Committee ("ExCom") Conclusion\textsuperscript{169} described four conditions under which temporary detention is permissible:

- to verify identity;
- to determine the elements on which the claim to refugee status or asylum is based;
- to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities.


\textsuperscript{166}. Art. 31, Refugee Convention, \textit{supra} note 48. Article 31 provides in full:

\begin{quote}
1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article I, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.
\end{quote}

\textit{Id.}


\textsuperscript{168}. \textit{Goodwin-Gill, supra} note 47, at 222. The author posits that 31(2) implies that “[a]fter detention for a few days] States may only impose restrictions on movement which are ‘necessary’, for example, on security grounds or in the special circumstances of a mass influx, although restrictions are generally to be applied only until status is regularized or admission obtained into another country.” \textit{Id.}

\textsuperscript{169}. The Executive Committee of the High Commissioner’s Programme is currently comprised of seventy-eight Member States. UNHCR, Executive Committee of the High Commissioner’s Programme (ExCom), \url{http://www.unhcr.org/pages/49e3646c83.html} (last visited Nov. 12, 2009). For each session, the Committee issues Conclusions on International Protection ("ExCom Conclusions") that represent the consensus of the Committee’s discussions. UNHCR, Conclusions on International Protection, \url{http://www.unhcr.org/pages/49e6e6d66.html} (last visited Nov. 12, 2009). Though not formally binding, the ExCom Conclusions are a persuasive authority in the international protection regime. \textit{Id.}
of the State in which they intend to claim asylum; or to protect national security or public order.\footnote{170}

Some commentators have argued that Article 31 was not intended to cover administrative detention.\footnote{171} However, in a paper commissioned by UNHCR, refugee law scholar Guy Goodwin-Gill argues that the line between criminal detention and administrative detention becomes irrelevant when minimum protections, such as judicial review, are lacking and when detention is excessively prolonged.\footnote{172} He suggests that “[i]t is necessary to look beyond the notion of criminal sanction and examine whether the measure is reasonable and necessary, or arbitrary and discriminatory, or in breach of human rights law.”\footnote{173}

A later ExCom Conclusion echoes this reasoning:

[We deplore] that many countries continue routinely to detain asylum-seekers . . . on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status; . . . such detention practices are inconsistent with established human rights standards and [we urge] States to explore more actively all feasible alternatives to detention.\footnote{174}

In addition to prohibiting prolonged detention of asylum-seekers and refugees, and under the conditions specified by UNHCR above, international law also calls for prompt review of the detention of asylum seekers and refugees. For example, the International Covenant on Civil and Political Rights (ICCPR),\footnote{175} to which the United States is a party,\footnote{176} provides that “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”\footnote{177}


\footnote{171} UNHCR, Article 31, supra note 167, at 194 (“The term ‘penalties’ is not defined in Article 31 and the question arises whether the term used in this context should only comprise criminal penalties, or whether it should also include administrative penalties (for example, administrative detention). Some argue that the drafters appear to have had in mind measures such as prosecution, fine, and imprisonment . . . .”).

\footnote{172} Id. at 196.

\footnote{173} Id.


\footnote{176} The U.S. Senate ratified the ICCPR with four declarations, five understandings, five reservations, and one proviso. 138 Cong. Rec. S4,783 (1992).

\footnote{177} International Covenant on Civil and Political Rights art. 9(4), Mar. 23, 1976, 999
Numerous States Parties to the ICCPR adhere to this requirement of judicial review. For example, in Denmark and France, detention of asylum seekers without review is allowed for maximum periods of three and four days, respectively. In some countries, detention of asylum-seekers triggers automatic judicial review. In view of the Refugee Convention’s broad intent to protect the fundamental liberties of refugees and asylum-seekers—which includes protection from penalization for their status and the ICCPR’s requirement of judicial review for asylum-seekers—the United States, as a party to the Refugee Convention’s Protocol and the ICCPR, is detaining the refugees at Guantánamo in contravention of its treaty obligations.

As individuals detained in violation of U.S. law and U.S. treaty obligations, the refugees at Guantánamo meet the threshold requirements to petition for the writ and should have a strong case for being granted habeas corpus. Until the court handed down its decisions in Boumediene and Rasul, the refugees, even though they may have been detained in violation of U.S. laws and treaties, were unable to avail themselves of statutory and constitutional protections, such as the writ of habeas corpus, because Guantánamo was considered unreachable. Boumediene and Rasul assist the refugees in overcoming this final jurisdictional hurdle that has thwarted their rights for far too long.

IV

APPLYING BOUMEDIENE AND RASUL

Together, Boumediene and Rasul open the door for the argument that all individuals detained at Guantánamo are entitled to the protections of U.S. law. The current situation is anomalous: refugees are provided with fewer rights and

U.N.T.S. 171.


179. Id. More specifically, in Denmark, detention without judicial review is allowed for a maximum of three days; in France, an entering asylum seeker can be detained for a maximum of four days, whereby further detention, up to twenty days, is only allowed by a court order. Other countries have similarly short maximum detention periods: in Germany, detention lasting no more than a day can be ordered only by local courts; in Ireland, a detained asylum seeker is brought automatically before a court; in the United Kingdom, asylum seekers can seek review of detention by an independent authority by submitting a request for a bail hearing. Id.

180. Ireland is one such country. See id.

protections than alleged terrorists and war criminals. Unlike the alleged terrorists, Guantánamo refugees are not even provided the opportunity to challenge their detention. Logic, fairness, and pragmatism dictate that the refugees should be entitled to seek habeas on a constitutional basis (in light of *Boumediene*) as well as on a statutory basis (in light of the broader holding of *Rasul*).

**A. Boumediene and Constitutional Habeas**

*Boumediene*’s holding provides that the Constitution extends to Guantánamo as a result of Guantánamo’s territorial status in relation to the United States. It further concludes that the current enemy combatant detainees are entitled to the writ of habeas on a constitutional basis. *Boumediene*’s holding entitles the refugees to a similar right to petition for the writ.

The *Boumediene* court focused its analysis on the legal status of Guantánamo itself, more so than the status of the petitioners. In no uncertain terms, the Court stated that the Constitution could not be switched on and off in a territory over which the United States maintains de facto control. The court’s holding thus extends to Guantánamo in its territorial capacity, such that all individuals at Guantánamo derive a right to the Constitution by way of their physical location at Guantánamo.

Thus, individuals not alleged to be enemy combatants should have the same constitutional privilege of the writ simply by virtue of their detention and physical location at Guantánamo. Whatever the status of the refugees, it should serve only to strengthen the argument that they are entitled to constitutional protections, such as applying for the writ of habeas. Unlike the alleged enemy combatant detainees, there is no allegation on the government’s part that these individuals present a danger to society or have any criminal involvement.

Thus, absent proof that the Suspension Clause applies to their case, refugees should be entitled to the writ. Such proof is extremely unlikely, given that the refugees are not part of any “rebellion” or “invasion of public safety.” Moreover, the three factors that *Boumediene* addressed, regarding the applicability of the Suspension Clause, lead to the conclusion that the Clause does not apply to the refugees. Those factors are: the legal status of the detainee, the site where apprehension and detention took place, and the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.

Applying those factors here, the refugees are non-citizens who have been given refugee status; the detention takes place on the military base at Guantánamo; and the practical obstacles to resolving the refugees’ entitlement to the writ are few. Because the number of refugees is quite small, the costs of
providing habeas jurisdiction would in turn be small. The additional time and attention required of government personnel would similarly be minimal when considering the size of the refugee population. For all these reasons, under Boumedine, it is doubtful that the Suspension Clause would apply to refugees petitioning for a writ of habeas corpus.

B. Rasul and Statutory Habeas

In addition to the argument that refugees at Guantánamo have a constitutional right to the writ of habeas, statutory habeas is arguably also available under Rasul. Although the DTA overruled the narrow holding in Rasul that extended statutory habeas jurisdiction to U.S. federal courts to hear claims of alleged enemy combatant detainees at Guantánamo, the language of the DTA applies only to alleged enemy combatants.\(^\text{186}\) For all other purposes, the broader holding, that the habeas statute confers jurisdiction on the district court to hear habeas challenges to the legality of detention at Guantánamo, could still apply to individuals who do not fall into the category of criminal detainees, such as the refugees detained at Guantánamo.\(^\text{187}\)

Indeed, this reading of Rasul follows naturally from the text of the habeas statute, itself: “The writ of habeas corpus shall not extend to a prisoner unless— (1) He is in custody under or by color of the authority of the United States . . . ; or . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States.”\(^\text{188}\) There is no question that the refugees at Guantánamo are in custody “under color” of the United States. Further, the detention of the refugees is “in violation” of both the Constitution and the U.N. Refugee Convention.\(^\text{189}\) As the Part III details, the major hurdle for the refugees to overcome will be to establish that they are “prisoners” for purposes of the habeas statute.

V
A PREVIEW OF THE OBSTACLES THE REFUGEES COULD FACE

The self-imposed deadline of the Obama Administration, to close down the enemy combatant detention facilities at Guantánamo within a year after the January 2009 Order,\(^\text{190}\) has proven to be unrealistic. Currently, just fewer than

\(^{186}\) See supra note 120 and accompanying text.

\(^{187}\) Attorneys for the Uighur detainees made this same argument in an October 2008 brief opposing the Government’s motion for a stay: “Each Appellee has the privilege of statutory as well as constitutional habeas. The ‘habeas strip’ of 28 U.S.C. 2241(c) never applied in the first place to persons not properly determined to have been 'properly detained as an enemy combatant' or 'awaiting such determination.'” Brief for Petitioners at 4 n.4, Kiyemba v. Bush, No. 08-5424, 2008 WL 4898963 (D.C. Cir. Oct., 24, 2008), available at http://www.scotusblog.com/wp/wp-content/uploads/2008/10/uighurs-opposition-to-stay-10-14-08.pdf.


\(^{189}\) See supra Part III.B.

\(^{190}\) See 2009 Executive Order, supra note 1.
two hundred detainees connected with the War on Terror remain at the base.191 Most of the detainees have habeas cases pending, all filed after Boumediene.192 In spite of the January 2009 Order, the federal courts hearing the habeas cases have been both sluggish and unprepared for the challenges posed by the detainee cases. In one particular case, that of the Uighurs, the D.C. Circuit has been remarkably reticent to dispense with the Bush Administration’s legacy of non-recognition of international law vis-à-vis detainees. Although a recent D.C. Circuit decision appeared as if it would pose an obstacle to the refugees if they successfully petitioned for the writ and were granted habeas relief, subsequent Supreme Court action has dispelled the threat for now.193

The Uighurs are a Chinese-Muslim group that has been persecuted in China for many years.194 Twenty-two Uighurs195 were captured in the War on Terror, primarily in Afghanistan and Pakistan, and brought to Guantánamo, where they were held indefinitely until a federal court established that they were not, in fact, enemy combatants.196 Accepting the high likelihood that the Uighurs would be persecuted or tortured if returned to China, the U.S. government made unsuccessful efforts to resettle them.197 This failure was of little surprise given China’s declared intention to retaliate diplomatically against any country that accepted the Uighurs.198 The Uighurs had a short-lived victory in October 2008, when a D.C. district court judge ordered their release into the United States.199

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193. See infra note 213.
194. The Uighurs are a Turkic speaking ethnic group that lives in the Xinjiang Uighur Autonomous Region (XUAR) (a semi-autonomous region), in Western China. There are widespread reports that they have been persecuted since the Chinese government undertook a campaign against terrorism, religious extremism, and separatism in the 1990s and began targeting this group, among others. See, e.g., Amnesty Int’l, Uighur Ethnic Identity Under Threat in China, Al Index AFR 17/010/2009Apr. 2009, available at http://www.amnesty.org/library/assets/ASA17/010/2009/en/e952496e-57bb-48eb-9741-e6b77ed2f2d4/asa170102009en.pdf (noting that since the mid-1990s, “increased numbers of Uighurs have been subjected to arbitrary arrests, unfair trials and torture, and their economic, social and cultural rights have been slowly eroded.”)
195. See China Demands US Return Uighurs, BBC NEWS, June 11, 2009, http://news.bbc.co.uk/2/hi/8094658.stm (“Some 22 Uighurs were captured by United States forces during their invasion of Afghanistan and taken to the detention base in Cuba but were found not to be enemy combatants four years ago.”).
199. Id. (discussing In re Guantánamo Bay Detainee Litig., 581 F. Supp. 2d 33 (D.D.C. 2008)).
Regrettably, a February 2009 D.C. Circuit decision, *Kiyemba v. Obama*, reversed the district court.\textsuperscript{200} The appellate court in *Kiyemba* held that it is within the “exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms.”\textsuperscript{201} According to the court, the habeas jurisdiction granted by *Boumediene* did not necessarily afford a court the ability to provide relief.\textsuperscript{202} Moreover, the court indicated that the district court had improperly concerned itself with the liberty interests of the Uighurs, which, according to the D.C. Circuit, did not conform to the dictates of federal jurisprudence on alien rights.\textsuperscript{203}

Although Judge Rogers concurred on the narrow ground that the district court had prematurely ordered the Uighurs’ release, she eloquently rebutted the majority’s arguments that the court was powerless to intervene in the case of the Uighurs:

Today the court . . . appears to conclude that a habeas court lacks authority to order that a non-‖enemy combatant‖ alien be released into the country (as distinct from be admitted under the immigration laws) when the Executive can point to no legal justification for detention and to no foreseeable path of release. I cannot join the court’s analysis because it is not faithful to *Boumediene* and would compromise both the Great Writ as a check on arbitrary detention and the balance of powers over exclusion and admission and release of aliens into the United States recognized by the Supreme Court to reside in the Congress, the Executive, and the habeas court.\textsuperscript{204}

Judge Rogers made two important points. First, relevant Supreme Court jurisprudence, such as *Clark v. Martinez*, clearly recognizes the authority of a habeas court to order release of an unadmitted alien where the Executive would detain that alien indefinitely.\textsuperscript{205} Second, the majority’s conclusion, that constitutional and statutory rights are inapplicable to the Uighurs by virtue of their physical location outside of the territorial United States, utterly disregarded the holding in *Boumediene*.\textsuperscript{206} Indeed, the majority noted that “the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States,”\textsuperscript{207} and an accompanying footnote stated that “the Guantánamo Naval Base is not part of the sovereign territory of the United States. Congress so determined in the Detainee Treatment Act of 2005 § 1005(g).”\textsuperscript{208} In effect, the D.C. Circuit recategorized Guantánamo as a legal black hole where U.S. rights and obligations do not apply. But, as this

\textsuperscript{200} Kiyemba v. Obama, 555 F.3d. 1022 (D.C. Cir. 2009).
\textsuperscript{201} Id. at 1025.
\textsuperscript{202} Id. at 1028.
\textsuperscript{203} Id.
\textsuperscript{204} Id. at 1032 (Rogers, J., concurring).
\textsuperscript{205} Kiyemba, 555 F.3d. at 1037–38.
\textsuperscript{206} Id. at 1038.
\textsuperscript{207} Id. at 1026.
\textsuperscript{208} Id. at 1027 n.9, 1028.
Comment argues, that position is no longer tenable post-*Boumediene*.

The Uighurs petitioned for a writ of certiorari to the Supreme Court and the Court agreed to hear the case.\(^{209}\) In the meantime, the government hurried to resettle the Uighurs who remained at Guantánamo, and attempted to dissuade the Court from hearing the case.\(^{210}\) The government was ultimately successful in its resettlement efforts, and all but five Uighurs have been resettled in third countries.\(^{211}\) The remaining five were unwilling to be resettled to the third countries that agreed to accept them.\(^{212}\)

Instead of dismissing the case as “improvidently granted,” which would have left the appellate court’s decision intact, the Supreme Court vacated and remanded the decision to the appellate court.\(^{213}\) The Court’s per curiam opinion instructed the appellate court to “determine, in the first instance, what further proceedings in that court or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the new developments.”\(^{214}\)

As it stands now, the law is unclear as to whether a U.S. court has the authority to order unlawfully detained aliens into the United States from Guantánamo. The issue may be clarified by the remand in *Kiyemba* or in later litigation involving alleged enemy combatants other than the Uighurs.\(^{215}\) If the courts ultimately rule that they have the power to release alleged enemy combatants into the United States, the ruling will bolster the argument in favor of similar judicial power with regard to refugees.

\(^{209}\) See Petition for Writ of Certiorari, *Kiyemba* v. Obama, 130 S. Ct. 458 (2009) (No. 08-1234), available at [http://ccrjustice.org/files/kiyemba%20cert%20petition%20website.pdf](http://ccrjustice.org/files/kiyemba%20cert%20petition%20website.pdf). Note also that the Uighurs sustained a second loss in the D.C. Circuit in a related April 2009 decision, where the court held that the Government was not required to provide a thirty-day notice to the Uighurs before transferring them to a third country if it found a country willing to resettle the Uighurs. *Kiyemba* v. Obama, 561 F.3d 509, 516 (D.C. Cir. 2009).

\(^{210}\) Supreme Court expert Linda Greenhouse, noting that the government succeeded in finding at least one resettlement option for each of the Uighurs at Guantánamo at the very last minute, observed: “As the previous administration demonstrated on similar occasions, nothing concentrates the mind like an imminent deadline for explaining oneself to the Supreme Court.” *See* Linda Greenhouse, *Saved by the Swiss*, *N.Y. Times*, Feb. 11, 2010, [http://opinionator.blogs.nytimes.com/2010/02/11/saved-by-the-swiss/](http://opinionator.blogs.nytimes.com/2010/02/11/saved-by-the-swiss/) (describing the government’s efforts to resettle the Uighurs and convince the Supreme Court to dismiss the case).


\(^{212}\) Id.

\(^{213}\) Id.; compare Los Angeles County v. Davis, 440 U.S. 625, 634, n.6 (“Of necessity our decision ‘vacating the judgment of the Court of Appeals deprives that court’s opinion of precedential effect.’”), with Greenhouse, supra note 210 (noting that dismissing a case as “improvidently granted,” as the government had urged the Supreme Court to do “simply returns a case to the posture it would have had if no Supreme Court appeal had ever been filed”).

\(^{214}\) See *Kiyemba* v. Obama, 130 S. Ct. at 1235.

\(^{215}\) See Adam Liptak, *Supreme Court Refuses to Rule on Chinese Uighurs Held at Guantánamo*, *N.Y. Times*, Mar. 1, 2010, at A16 (noting that the issue of the authority of U.S. courts to order Guantánamo detainees to be admitted into the United States “is likely to reach the court again, as there remain other cases in which prisoners cleared for release with nowhere to go remain at Guantánamo.”).
In any event, even if the courts rule against such relief for detainees of the War on Terror such as the Uighurs, the situation of the refugees would be distinguishable on several grounds. First, the refugees have no link to the War on Terror. Second, it remains unclear whether the admission into the United States of alleged combatants is permissible under immigration laws, due to their activities and association with terrorist groups. In contrast, government officials have recognized the Cuban and Haitian detainees as refugees and have chosen to hold them at Guantánamo, in lieu of sending them back to their homes in violation of the principle of non-refoulement. Given their recognized status as refugees, the Cuban and Haitian detainees would not face the same obstacles under U.S. immigration laws as the alleged enemy combatants. Finally, the public’s fear of individuals connected with terrorism undoubtedly played a significant role in the D.C. Circuit’s hesitation to allow the Uighurs into the United States, and would likely play a similar role in future litigation regarding alleged enemy combatants. There would be less public alarm at the prospect of allowing the refugees into the United States, given the refugees’ lack of any terrorist connection.

Notwithstanding the D.C. Circuit’s misguided ruling concerning the Uighurs, a strong case can be made that a court should order the refugees released into the U.S. mainland. Short of that, a court should at the very least order the government to review formally their detention in a hearing providing full due process.

CONCLUSION

The habeas decisions that will be handed down in the coming months will undeniably impact the refugees at Guantánamo. Even if the refugees are given the right to petition for the writ of habeas corpus, and they successfully obtain habeas relief, the question of where to resettle them—in a third country versus in the United States—may hinge on the decisions made on remand in the Uighur case or in future litigation concerning alleged enemy combatants at Guantánamo. Ultimately, however, the refugees are a separate detainee

216. Although the U.S. Government claimed that the Uighurs resided in Taliban-supported terrorist camps in Afghanistan, the nature of the camps and their exact connection to the Taliban was never definitively settled in litigation. See In re Guantánamo Bay Detainee Litig., 581 F. Supp. 2d 33, 34–35 (D.D.C. 2008).


218. See supra note 5 (discussing the precise legal status of the refugees).

219. See supra Part I.A.
population that has no link to the War on Terror and whose cases should be
decided based on the specific facts. Given the holding in Boumediene and the
current atmosphere of political contempt for Guantánamo, the refugees
detained there present a compelling case, both legal and humanitarian, for the
right to petition for the writ of habeas.

In some ways, the refugees’ case is simpler than that of the alleged enemy
combatants, given that there are no criminal claims against them. However, the
refugees’ case presents some complicated policy considerations. The U.S.
government will inevitably raise the concern that granting habeas as well as
allowing the refugees access to the U.S. asylum system would encourage other
individuals in Caribbean countries to attempt to reach the United States.
Consequently, the numbers of individuals taking to the seas to reach the U.S.
mainland or even Guantánamo might conceivably increase. Given the extreme
danger of the voyage from the Caribbean to the United States, as well as the
U.S. desire to curb immigration, this could be disastrous for all involved.

However, the number of refugees coming out of Cuba, Haiti, and other
Caribbean countries is relatively small, and this Comment urges application
of Boumediene and Rasul to refugees alone. The U.S. Government’s rationale
for placing the refugees in detention does not take into account the very low
number of individuals who legally qualify as refugees, but rather focuses on a
fear that there would be an outpouring of individuals who wish to migrate to
the United States for a variety of reasons unrelated to persecution such as
economic motivations. However, of those individuals, very few will qualify as
refugees. A short-term solution of allowing the release of the small number of
refugees currently at Guantánamo is the only humanitarian option. In the long-
term, the United States should focus on assisting Caribbean countries in
becoming stabilized, democratic places that will cease to produce refugees.

Ultimately, the situation of the refugees will have to be resolved. In light
of the momentum toward closing down the Guantánamo detention facilities for
enemy combatants, and the Obama Administration’s declared intentions to
comply with international law regarding the treatment of the alleged enemy
combatant detainees at Guantánamo, it would be disingenuous, to say the
least, to continue the decades-old policy of detaining refugees at Guantánamo.
In truth, the government has relied on Guantánamo as a lawless zone for

See supra note 16 and accompanying text (describing the small number of individuals
detained at Guantánamo who the government considers to be refugees).

221. In his speech for receipt of the Nobel Peace Prize, President Obama urged that
“[w]here force is necessary, we have a moral and strategic interest in binding ourselves to certain
rules of conduct . . . . That is what makes us different from those whom we fight. That is a source
of our strength. That is why I prohibited torture. That is why I ordered the prison at Guantánamo
Bay closed. And that is why I have reaffirmed America’s commitment to abide by the Geneva
Conventions. We lose ourselves when we compromise the very ideals that we fight to defend. And
we honor those ideals by upholding them not just when it is easy, but when it is hard.” President
Barack Obama, Nobel Peace Prize Acceptance Speech (Dec. 10 2009), available at
decades, and has used the base to conceal numerous groups of individuals it considers a threat—or, in the case of the refugees, a mere nuisance.

As Senator Leahy stated in June 2005:

Guantánamo Bay . . . is a national disgrace, an international embarrassment to us and to our ideals, and a festering threat to our security. It is a legal black hole that dishonors our principles. America was once viewed as a leader in human rights and the rule of law, but Guantánamo has drained our leadership, our credibility and the world’s goodwill for America at alarming rates.222

If the Obama Administration truly wishes to repair the damage caused by U.S. policy on Guantánamo, it must comply with the dictates of international law and the judicial mandates of Boumediene. In its ongoing efforts to regain its position as a protector of human rights, the United States must provide a remedy to the refugees at Guantánamo. This should include, at a minimum, providing the refugees their right to challenge their detention by petitioning for the writ of habeas corpus—a right that they have been denied for far too long.