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Due Process; A Detached Judge; And Enemy Combatants

By Julian Mann, III*

Abstract

In the landmark administrative law decision of *Goldberg v. Kelly*, Justice Brennan stated that an “impartial decision maker is essential” to procedural due process. As a corollary, in the more recent decision of *Hamdi v. Rumsfeld*, Justice O’Connor stated that “due process requires a neutral and a detached judge in the first instance.” Thus, the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution require that the essential element of neutrality remain an integral part of any administrative hearing. There can be no departure from this fundamental guarantee of constitutional due process for the administrative hearings accorded to enemy combatants.

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Due Process of Law encompasses a broad range of concepts and definitions, but within the framework of this article, due process will refer to procedural due process,¹ not substantive due process.² The genesis of due process in American jurisprudence originated in the United States Constitution followed by a long history of Supreme Court interpretations.³ Additionally, conforming references are found in the various state constitutions with corresponding state court decisions.⁴ More specifically, the words, “due process,” were written into the Bill of Rights as found in the Fifth Amendment to the United States Constitution—“[n]o person shall be...deprived of life, liberty, or

1. See BLACK'S LAW DICTIONARY 1083 (5th ed. 1979). Procedural due process is defined as:

Those safeguards to one's liberty and property mandated by the 14th Amend., U.S. Const., such as the right to counsel appointed for one who is indigent, the right to a copy of a transcript, the right of confrontation; all of which are specifically provided for in the 6th Amendment and made applicable to the states' procedure by the 14th Amendment.

Central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must be notified. *Parham v. Cortese*, 407 U.S. 67, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556. Reasonable notice and opportunity to be heard and present any claim or defense are embodied in the term “procedural due process.” *In re Nelson*, 78 N.M. 739, 437 P.2d 1008.

2. *Id.* at 1281. Substantive due process is defined as: “[t]he constitutional guarantee that no person shall be arbitrarily deprived of his life, liberty or property; the essence of substantive due process is protection from arbitrary and unreasonable action. *Babineaux v. Judiciary Commission, La.*, 341 So.2d 396, 400.”

3. See generally J.A.C. Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931).

4. See *infra* text p. 4 noting that all of the pre-1787 State Constitutions referred to the Law of the Land and not due process, but the terms are commonly interchangeable. Sidney A. Shapiro and Richard E. Levy noted that “[a]fter Sir Edward Coke declared ‘law of the land’ to be synonymous with ‘due process of law,’ prominent American commentators, including Kent, Storey, and Cooley, continued this association, thereby suggesting to early American lawyers that the concept of ‘due process of law’ was derived from the Magna Carta.” See Sidney A. Shapiro & Richard E. Levy, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Due Process*, 57 ADMIN. L. REV. 112, n. 21 (2005) (citing Edward S. Corwin, *Due Process of Law before the Civil War*, 24 HARV. L. REV. 366, 368 (1911)).

property without *due process* of law[.]”⁵ Some of the original states insisted upon the inclusion of the Bill of Rights in the Constitution, including the more specific reference to the due process clause in the Fifth Amendment, before those states would ratify the United States Constitution.⁶ The right to due process provided by the Fifth Amendment applies to Federal Government action. The Civil War amendments made the right to due process applicable to the states through the Fourteenth Amendment which states “nor shall any state deprive any person of life, liberty, or property, without *due process of law*[.]”⁷

Due process procedures are defined by ages of judicial development, dating back to the English Magna Carta in the 13th century.

XXIX (39). No Free-man’s body shall be taken nor imprisoned, nor disseised nor outlawed, nor banished, nor in any ways be damaged, nor shall the King send him to prison by force, excepting by the Judgment of his Peers and by the *law of the land*.

...

XXV (52) If anyone have been dispossessed or deprived by the King without judgment of his lands, his liberties or his rights, they shall be immediately restored;⁸

The first known reference to the words, “due process,” was found in the English Statute of 1354: “[t]hat no man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law.”⁹

5. U.S. CONST. amend. V (emphasis added).

6. Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 974-77 (1990).

7. U.S. CONST. amend. XIV, § 1 (emphasis added).

8. Magna Carta, ch. 39 & 52 (1215) (emphasis added). The Barons did not demand an adjudication by one of King John’s judges—apparently, they demanded a jury trial.

9. Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941 (1990) (quoting 28 Edw. 3, ch. 3 (1354) (noting that due process seems to require

Lord Edward Coke in 1628 connected the identification of due process and the Law of the Land provision.¹⁰ In 1692, a Massachusetts Act contained the first known reference to due process of law in an American document.¹¹ All of the pre-1787 State Constitutions referred to the Law of the Land and not due process.¹²

Due process of law and its application have been historically restricted to what occurs in judicial courts. In contrast to these ancient English authorities and their impact upon the development of due process in constitutional courts, most of today's authorities agree that the progeny of the modern administrative law due process rights arose following *Goldberg v. Kelly*.¹³ Justice Brennan defined the issue in *Goldberg* as follows: "[t]he constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing *before* the termination of benefits."¹⁴ Based upon eight hundred years of evolving jurisprudence and over two hundred years under the U.S. Constitution, a deprivation of a property interest by the sovereign expanded from the exclusive domain of judicial branch courts to quasi-judicial hearings in

that the appropriate Writ be used to summon the accused before the court to answer the complaint, i.e. Notice)).

10. 2 E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (1628).

11. See Raoul Berger, "*Law of the Land*" Reconsidered, 74 N.W. U. L. REV. 1, 8 (1979-80) (citing R. MOTT, DUE PROCESS OF LAW 97 (1926)). Section 1 of the Massachusetts Act provided: "[t]hat no freeman shall be taken or imprisoned or be disseized of his freehold..., nor shall be...condemned, but by the lawful judgment of his peers or the law of this province." R. MOTT, DUE PROCESS OF LAW 97 n.43 (1926) (quoting 1692 MASS. ACTS § 1).

12. See, e.g., N.C. CONST. § 19:

Law of the land; equal protection of the laws.

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the *law of the land*. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

(emphasis added); see generally Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 974-7 (1990).

13. 397 U.S. 254 (1970).

14. *Id.* at 260 (emphasis added).

the executive branch. The authority for the expansion was not by construction of a statute such as might be found in an Administrative Procedure Act (APA), but by construction of the constitutional right to due process.¹⁵ Suddenly, with the issuance of *Goldberg*, administrative law tribunals could also trace their lineage through twelve centuries of due process history back to the Magna Carta.¹⁶

Closely following the development of a legally protected property interest in governmentally created entitlements, the U.S. Supreme Court enunciated other protected property (and liberty) interests and accorded them protection through administrative proceedings grounded in the authority of the due process clauses of the Fifth and Fourteenth Amendments. This expansive interpretation of the interests protected by the due process clauses spawned the greatly expanded judicial type procedures found today in both state and federal administrative hearings. The rationale for the new governmentally-created property interest identified in *Goldberg* was closely followed by the Supreme Court in several other landmark cases including *Mathews v. Eldridge*,¹⁷ *Cleveland Board of Education v. Loudermill*,¹⁸ *Bell v. Burson*,¹⁹ *Withrow v. Larkin*,²⁰ and *Goss v. Lopez*.²¹ These cases clearly focused on the issue of how much process was due in relationship to a newly defined property interest and whether this process must occur before the taking or termination of the new property interest. After *Goldberg*,²² every administrative hearing procedure was potentially subject to judicial scrutiny to determine whether the administrative procedure was minimally compliant with the Due Process clauses of

15. *Id.* at 261.

16. Justice Brennan asserted in *Goldberg* that an impartial decision maker was essential to administrative law due process. The historical context of *Goldberg*, issued in 1970 at the height of the Vietnam War, was a grave mistrust by the American populace for the unquestioning authority of executive power.

17. 424 U.S. 319 (1976) (regarding disability benefits).

18. 470 U.S. 532 (1985) (regarding discharge from public employment).

19. 402 U.S. 535 (1971) (regarding suspension of driver's license).

20. 421 U.S. 35 (1975) (regarding professional licensing) (discussing the requirement for a neutral decision maker).

21. 419 U.S. 565 (1975) (regarding public education) (here, the Supreme Court was called upon to decide the question of how much process was due in the discharge of a pupil who possessed both a property interest and liberty interest in his education).

22. 397 U.S. 254 (1970).

the Fifth or Fourteenth Amendments. To avoid this judicial analysis on an *ad hoc* basis under the Fourteenth Amendment, many state legislatures ultimately drafted broad and uniform Administrative Procedure Acts (APAs) that satisfied the constitutional requirement of “due process” under one procedural umbrella that applied to a broad range of administrative hearings.²³ The state APAs generally provide for a judicial-type adversarial proceeding.²⁴ Without these uniform procedures, each administrative hearing could potentially be challenged as constitutionally infirm, reversed and remanded.

It was precisely the analysis in *Mathews v. Eldridge* that led to an *ad hoc* test to determine the application of procedural due process. The test balanced several interests:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁵

The nature of these procedural rights, as well as the issue of whether they should be accorded at all, and at what stage, seemed to flow from an individual analysis of the facts and circumstances unique to the factual issues before the appellate courts. Unmistakably, however, Justice Powell again reiterated Justice Brennan’s *Goldberg* rationale, that governmental entitlements are a “property” interest to be

23. See, e.g., N.C. GEN. STAT. § 150A, *et seq.* Charles E. Daye, *North Carolina’s New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C. L. REV. 833, 869, n. 177 (1975) (discussing generally the scope, purpose, and background of Chapter 150A).

24. Theodore Lowi postulates that the formality of an adversarial hearing under the federal APA is the ideal but seldom achieved, “[a]nd each agency, regulatory or not, disposes of the longest proportion of its cases without any procedure at all, least of all by formal adversary process.” See THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979).

25. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

protected under the Due Process Clauses: “[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the *Due Process Clause of the Fifth or Fourteenth Amendment*.”²⁶ *Mathews* followed *Goldberg* to affirm that the subject matter of an administrative hearing was “property” subject to due process protections.

Later, the Supreme Court brought further clarification to the identification of a protected property interest that the guarantee of due process arose out of a *predicate*. Such a predicate may originate, for example, in a right contained in a state statute, such as a professional license, public employment, or even a prison regulation. Other predicates flowed from public institutions such as a student’s right to an uninterrupted public education.²⁷

However, unlike the *ad hoc* procedures above, the administrative law judges who routinely try administrative cases are governed by established procedures describing when, what, and how much process is due.²⁸ Fortunately, administrative law judges are not required to analyze and determine the scope of the property interest or the amount of process due in routine administrative hearings; rather, they simply refer to their state’s legislatively enacted APAs. Some have observed that the uniform application of procedures have worked well for substantial property interests but were overly protective for an insubstantial property interest. Nevertheless, one APA size (usually) fits all.

In these U.S. Supreme Court decisions (mostly in the 1970s), much scrutiny was focused on the issue of when temporally the administrative due process protections must occur i.e., prior to the “taking,” subsequent to the “taking,” or at both times. Pre-termination procedural rights actually became the law of the land under the rationale of *Goldberg*.²⁹ In that case, the Supreme Court overturned a summary suspension of a welfare recipient’s right to continue receiving a benefit, although the recipient would later be granted a more complete administrative procedure to offer proof of why the denial was

26. *Id.* at 332 (emphasis in original text).

27. *See Goss supra* note 21.

28. *See, e.g.,* N.C. GEN. STAT. § 150B-1 *et seq.*

29. 397 U.S. 254 (1970).

unjustified.³⁰ The court focused on the imperatives of the pre-termination due process rights.³¹ The post-termination due process rights were assumed to be similar to judicial court due process rights. Much of the subsequent development of procedural due process lost sight of the distinction between pre and post due process.³² Remnants of pre-termination procedures are found in APA authorized temporary restraining orders, stays, preliminary injunctions and other emergency remedies to provide a means to terminate a governmentally conferred right prior to a post-termination hearing. In state administrative law, these situations commonly arise in professional licensing, particularly relating to the prehearing taking of a professional license to protect the public, for example, from a known and dangerous medical practitioner.

The discussion thus far has centered on the issue of the existence and definition of a property interest. Judicial opinions, both federal and state, continue today to address the existence of a property interest and the due process procedures that are required. Arising from the Federal Circuits, the United States Supreme Court has extended the property analysis to liberty interests in an administrative law context that are subject to the procedural due process rights. The United States Supreme Court addressed these rights in *Hewitt v. Helms*,³³ *Sandin v. Conner*,³⁴ and *Wilkinson v. Austin*.³⁵

In *Sandin v. Conner*, the Supreme Court, in reversing the Ninth Circuit, decided that Sandin had not articulated a liberty interest to be free of segregated confinement, because his loss of liberty did not substantially differ from his status as any other inmate in a correctional institution. Therefore, the Court did not reach the question of whether a substantive predicate existed for Conner, who based his assertion upon a due process right allegedly found in a prison regulation.³⁶ However, the *Wilkinson* Court found that segregated confinement in an Ohio “Supermax” security prison,

30. *Goldberg*, 397 U.S. at 266.

31. *Dixon v. Love*, 431 U.S. 105 (1977).

32. *Fuentes v. Shevin*, 407 U.S. 67 (1972). The Supreme Court, however, followed the *Goldberg* rationale in deciding the prejudgment replevin procedures for household goods in Florida and Pennsylvania as unconstitutional.

33. 459 U.S. 460 (1982).

34. 515 U.S. 472 (1995).

35. 545 U.S. 209 (2005).

36. *Id.* at 489.

under extreme conditions, did involve a liberty interest under the Fourteenth Amendment, but that Ohio had issued regulations that satisfied the three-pronged *Mathews* test for procedural due process.³⁷ Similar issues pertaining to due process rights have been raised under 42 U.S.C. § 1983 claims when plaintiffs allege deprivations of constitutional rights under the due process clause in employment discharge cases.³⁸

As stated previously,³⁹ due process and its application have been historically restricted to what occurs in the judicial courts, but now, clearly, the Supreme Court applied similar due process rights to executive branch proceedings. However, when the bundle of judicial due process rights is transferred into the quasi-judicial executive branch proceedings, they do not always neatly fit.⁴⁰ The complete panoply of judicial due process rights has never been fully transferred into the administrative hearings process, but the judicial due process procedures are so closely akin to the administrative due process procedures that the two systems have become almost indistinguishable. Administrative litigants, confronting agency action, receive most, if not all, trial-type due process rights, i.e., the right to an informative notice of allegations, the right to a neutral and detached judge, the right to counsel, the right to call witnesses,⁴¹ the right to cross examine adverse witnesses, the right to a transcript, and the right to judicial review. Although not completely in step with full judicial due process rights,⁴² the inescapable conclusion is that administrative hearings require a trial very similar in process to that found in judicial courts.⁴³ The executive branch trial involves the

37. 545 U.S. 209 (2005).

38. *See, e.g.,* *Holland v. Rimmer*, 25 F.3d. 1251 (4th Cir. 1994); *Dionne v. Mayor & City Council of Baltimore*, 40 F.3d. 677 (4th Cir. 1994).

39. *See supra* text p. 4.

40. Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976).

41. Confrontation of adverse witnesses seems to be a hallmark of due process. *See Goldberg v. Kelly*, 397 U.S. 254 (1970). (“In the present context, these principles require...an effective opportunity to defend by confronting any adverse witness.”)

42. For example, one such variation from due process is the noticeable absence of a right to a jury trial—what the Barons demanded before being disseized.

43. *See* CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 6.1 (1985); *see also* Frederick Davis, *Judicialization of Administrative Law: The Trial-*

deprivation of a defined property or liberty interest as much as these deprivations would occur in a judicial branch court and with the same constitutional consequences as it would in a judicial court.

Military litigation by enemy combatants involves the assertion of a clear deprivation of a liberty interest, but not the residual liberty interest addressed in both *Sandin*⁴⁴ and *Wilkinson*⁴⁵ by incarcerated inmates challenging compliance with prison regulations establishing their due process rights prior to their more restricted incarceration in segregated confinement. This residual liberty interest was based on a prison regulatory predicate which assertedly required an administrative hearing under the protections of the Fifth and Fourteenth Amendments as distinguished from a more direct liberty interest challenging the continued detainment of alleged enemy combatants under the protections of the same due process clauses or under a *habeas corpus writ*. Such a jurisprudential leap of this magnitude in administrative law was unprecedented. The question for enemy combatants detained at Guantanamo Bay, Cuba, who have never had a prior judicial trial and whose confinement rests upon a legal interest so remarkably different from a citizen's challenge to the deprivation of a property interest entitlement or a liberty interest based upon an inmate's challenge to segregated confinement, is whether denial of such a substantial liberty interest by a military tribunal comports with the minimum administrative law due process test under *Mathews* for hearings ordered by the executive who defines, with Congressional sanction, these administrative procedures. The analysis of this question will address recent federal statutory enactments, recent United States Supreme Court decisions, and cases now pending before the Supreme Court.⁴⁶

The constitutionally significant Supreme Court decision in *Hamdi v. Rumsfeld*⁴⁷ in 2004 turned surprisingly upon the application and construction of the due process clauses as applied in the *Mathews v. Eldridge* administrative law test.⁴⁸ The plurality followed

Type Hearing and the Changing Status of the Hearing Officer, 1977 DUKE L.J. 389 (1977).

44. 515 U.S. 472 (1995).

45. 545 U.S. 209 (2005).

46. See *infra* text pp. 10-22.

47. 542 U.S. 507 (2004) (plurality opinion).

48. See *supra* text p. 6.

administrative law precedents to define the degree of procedural due process to be accorded a U.S. citizen who challenged his status as an enemy combatant by way of a petition for habeas corpus.⁴⁹ The plurality's resolution of the issue was not decided upon resort to judicial remedies or even habeas corpus remedies. The executive had contended that constitutional executive power trumped formal due process procedures and permitted an unlimited deprivation of a citizen's liberty interests with no trial-type hearing or recourse to the courts.⁵⁰ The indefinite detention of a U.S. citizen was justified solely by the government's affidavit. Justice O'Connor, however, writing for the plurality, found the deprivation of this liberty interest sufficient to require the application of due process protections, not in Article III Constitutional Courts to resolve the habeas corpus petition, but under administrative law principles in a military-type quasi-judicial hearing.⁵¹ The facts in *Hamdi* called for the application of the administrative law *Mathew's* calculus. The plurality emphasized this application as Justice Scalia termed it in his dissent, joined by Justice Stevens, to be based upon "a case involving...*the withdrawal of disability benefits*" spurning the more traditional judicial remedies of habeas corpus and criminal treason.⁵² For the court, Justice O'Connor stated the Supreme Court's *holding* as follows: "[w]e therefore *hold* that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and a *fair* opportunity to rebut the

49. "A petition for a writ of habeas corpus provides the procedure by which an individual in custody may seek judicial review of the lawfulness of that custody." Benjamin J. Priester, *Return of the Great Writ*, 37 RUTGERS L.J. 68 (2005-06).

50. *Id.* at 527.

51. *Id.* at 533. "Hamdi's 'private interest...affected by the official action,' *ibid.*, is the most elemental of liberty interests—the interest in being free from physical detention by one's government." *Id.* at 529 (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Parham v. J.R.*, 442 U.S. 584, 600 (1979); *U.S. v. Salerno*, 481 U.S. 739, 755 (1987); *Jones v. U.S.*, 463 U.S. 354, 361 (1983); *Carey v. Phipus*, 435 U.S. 247, 259 (1978)).

52. *Hamdi*, 542 U.S. at 575 (emphasis in original text). In Justice Scalia's dissent he rejected the *Mathews* analysis for a due process liberty interest and, instead, insisted that habeas corpus was *Hamdi's* constitutional remedy unless Congress invoked the "Suspension Clause." Justice Souter's concurring opinion: "[w]e are heirs to a tradition given voice 800 years ago by the Magna Carta, which on the barons' insistence confined executive power by "the law of the land."

government's factual assertions *before a neutral decision maker*.”⁵³ Besides *Mathews*, Justice O'Connor cited *Cleveland Board of Education v. Loudermill*,⁵⁴ *Mullane v. Central Hanover Bank & Trust Co.*,⁵⁵ *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*,⁵⁶ *Fuentes v. Shevin*,⁵⁷ and *Armstrong v. Manzo*.⁵⁸ From *Concrete Pipe*, Justice O'Connor quoted the following: “[d]ue Process requires a neutral and *detached judge* in the first instance.”⁵⁹ From *Armstrong*, she recites: “[a] fundamental requirement of due process is the opportunity to be heard. It is an opportunity that must be granted at a meaningful time and in a meaningful manner.”⁶⁰ The case was ultimately remanded to the district court for the implementation and compliance with the *Mathews* test. Contrary to the holding, had the executive in *Hamdi* been allowed to unilaterally dictate the due process procedures without judicial oversight, *Hamdi* would likely remain incarcerated today in Charleston, South Carolina, instead of being freed by a negotiated plea.⁶¹ However, once *Hamdi's* due process rights were secured, the executive decided not to determine the merits of his status before a military tribunal, yet to be created. The existence of the proposed detached and neutral tribunal might have tipped the scales in favor of a negotiated plea.

In response to *Hamdi* and followed the same day by *Rasul v. Bush*,⁶² which applied the habeas writ to aliens, the Department of Defense (DOD) on July 7, 2004, via a Pentagon memorandum,

53. *Id.* (emphasis added). The plurality court seemed to not only focus on the due process right to a fair adjudication, but the requirement of notice (citing *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 1 Wall 223, 233 (1864) “For more than a century the central meaning of procedural due process has been clear: parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.”)

54. 470 U.S. 532 (1985).

55. 339 U.S. 306 (1950).

56. 508 U.S. 602 (1993).

57. 407 U.S. 67 (1972).

58. 380 U.S. 545 (1965).

59. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (emphasis added).

60. *Id.*

61. However, *Hamdi* forfeited his rights as a U.S. citizen and was expelled.

62. *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

established procedures for Combatant Status Review Tribunals (CSRTs).⁶³ This Department of Defense memorandum, a four page document, entitled “Order Establishing Combatant Status Review Tribunal,” outlined the administrative procedures and defined “Enemy Combatant.”⁶⁴ The provision for notice required that the detainee be notified that he was to be designated as an enemy combatant.⁶⁵ It also provided each detainee with an assignment of a military officer; an opportunity to review reasonable available information in the possession of the Department of Defense.⁶⁶ In summary, the significant procedures provided that “[t]he Tribunal, through its Recorder, shall have access to and consider any reasonable information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent review of that determination, as well as any reasonably available record, determinations, or reports generated in connection therewith[;]”⁶⁷ a tribunal composed of three neutral commissioned officers of the U.S. Armed Forces;⁶⁸ the Convening Authority was to be the Secretary of the Navy who would make the appointments.⁶⁹ The procedures included notice of the unclassified factual basis for the detainees designation; a recorder whose job was to summarize the

63. Memorandum from the Deputy Secretary of Defense, to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), available

<http://www.globalsecurity.org/security/library/policy/dod/d20040707review.pdf>.

Note: the due process procedures were specified in an order, not a federal regulation, statute or other more recognizable form of law.

64. Enemy Combatant is defined as:

[A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.

Id. at p. 1.

65. *Id.*

66. *Id.*

67. *Id.* at p. 2.

68. *Id.* at p. 1.

69. *Id.* at p. 2.

testimony of the witnesses and report the Tribunal's decision; allowing the detainee to attend all the proceedings along with a personal representative; the provision of an interpreter; advising the detainee of the nature of the proceedings; access to the available information generated in connection with the review determinations; the right to call reasonably available witnesses; there were no formal rules of evidence but permitting consideration of any information deemed relevant and helpful to the resolution of the issue including hearsay; the right of the detainee to testify; the right not to be compelled to testify against himself; and the right to review the testimony and documents after the hearing.⁷⁰ The Tribunal was to determine detainee status by majority vote based on the preponderance of the evidence.⁷¹ The Staff Judge Advocate for the Convening Authority was to review the record for legal sufficiency and make a recommendation to the Convening Authority; the Convening Authority who thereafter reviewed and could approve the Tribunal's decision or return the record to the Tribunal for further proceedings.⁷² If the decision was in favor of the detainee, a provision for the release of the non-enemy combatant to his country of citizenship and a declaration that the order does not create any rights or benefits and does not otherwise limit the authority of the President of the United States.⁷³ These are the procedures that were to govern the trials of all the detainees at Guantanamo Bay.

The procedures were later supplemented by an implementing directive from the DOD dated July 14, 2006. After *Hamdi* and *Rasul* and clearly in response thereto, not unlike what the states did in enacting APAs after *Goldberg* and *Matthews*, Congress passed the Detainee Treatment Act of 2005 (DTA).⁷⁴ The Act later required the

70. *Id.* at pp. 2-3.

71. *Id.* at p. 3. See also text *infra* p. 17. The last two provisions triggered the D.C. Circuit Court of Appeals to order the government to release at least to the court all reasonable information not included in CSRT's record in order for the court to determine on appeal whether the preponderance of the evidence established the fact which supported the conclusions.

72. See Memorandum from the Deputy Secretary of Defense, to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal at p. 3 (July 7, 2004), *available at* <http://www.globalsecurity.org/security/library/policy/dod/d20040707review.pdf>.

73. *Id.* at p. 4.

74. Detainee Treatment Act of 2005, Tit. X, 119 Stat. 2739 [hereinafter DTA].

Defense Department to submit to the Congressional Armed Services and Judiciary Committees the procedural rules for determining detainee status. The Act did not otherwise specify procedures but required: “the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay or to provide an annual review to determine the need to continue to detain an alien who is a detainee[.]”⁷⁵ This Act did statutorily supplement the DOD procedures as contained in the previously referenced DOD orders to require the designation of a civilian official as the final review authority within the Department of Defense instead of the convening authority appointed by the Secretary of the Navy. This official was defined as one to which appointments are required by law to be made by the president, by and with the advice and consent of the senate.⁷⁶ The DTA also provided for the limitation on statutory habeas corpus in the following way: “no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay[.]”⁷⁷ It further outlines that judicial review of the decisions of Combatant Status Review Tribunals placing this review in the exclusive appellate jurisdiction for the District of Columbia Circuit in order to: “[d]etermine the validity of any final decision of a Combatant Status Review Tribunal and that an alien is properly detained as an Enemy Combatant.”⁷⁸ The jurisdiction of this court was to be limited to claims as to persons actually detained by the Department of Defense and for whom a Combatant Status Review Tribunal has been conducted pursuant to applicable procedures as specified by the Secretary of Defense. And, further, whether the status determination was made “consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals” and that such determination “be supported

75. DTA § 1005(a)(1)(A).

76. The failure of Congress to statutorily enact the procedures could be interpreted as an attempt to deprive the detainees of a statutory predicate to due process of law.

77. DTA § 1005(e)(1)(e).

78. DTA § 1005(e)(2)(A).

by a preponderance of the evidence and allowing a rebuttable presumption in favor of the government's evidence."⁷⁹ With the procedures thus established, these tribunals, began on a course of quasi administrative adjudication over a course of many months. A complete record of the evidence was not made at the hearings so unless an appeal was taken to the D.C. Circuit, little was known about the evidence. The DOD was required by the DTA to maintain the evidentiary record, such as it was.

According to a document prepared by Seaton Hall Law entitled "No-Hearing Hearings CSRT: The Modern Habeas Corpus?,"⁸⁰ the authors, reviewed the transcripts and records of the CSRT process, the following is quoted from page six of the report:

In sum, while the promise procedures stated that the detainees were allowed to present evidence (witnesses and documents), the only evidence that the detainees were permitted to offer in the vast majority of the cases was their own testimony. As a result, the only option available to the detainee was to make a statement attempting to rebut what he could glean from the summary of classified evidence that he could not see. In 81% of the cases reviewed, the Tribunals made their decisions the same day as the hearing. Among the 102 records reviewed for this report, the ultimate decision was always unanimous, and all detainees reviewed were ultimately found to be enemy combatants. It is true that Government statements indicate that 38 of 558 detainees were ultimately found not/no longer to be enemy combatants, but no such determinations are found in the full CSRT records reviewed.

79. DTA § 1005(e)(2)(C)(i). Both the DOD procedures and the DTA rejected a model based on the Uniform Code of Military Justice with a history dating back to George Washington and a reputation for adjudicatory independence as Judges who preside over military court marshals, as recently noted by the D.C. Circuit Court of Appeals in their October 3, 2007 Reconsideration Order in *Bismullah v. Gates*, 2007 U.S. App. LEXIS 23609 (D.C. Cir. Oct. 3, 2007).

80. Mark Denbeaux & Joshua W. Denbeaux, *No-Hearings Hearings CRST: The Modern Habeas Corpus?*, available at http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

...

While all detainees reviewed were ultimately found to be enemy combatants, not all tribunals found the detainee to be an enemy combatant. On a few occasions, a tribunal initially found that the detainee was not/no longer an enemy combatant. In such cases, the detainee was never told of this decision. Instead, the Tribunal's decision was reviewed at multiple levels in the Defense Department chain of command and eventually a new Tribunal was convened. However, some detainees were still found not/no longer to be enemy combatants. At least one detainee's record indicates that after a second Tribunal found him no longer an enemy combatant, the process was repealed and sent back for a third Tribunal which found him to be an enemy combatant.

In *Boumediene v. Bush*,⁸¹ the D.C. Circuit Court of Appeals denied the petitioner's petition for habeas corpus to challenge his determination as an enemy combatant. A majority of the circuit judges found that Congress had successfully cut off this Petitioner's right to habeas corpus jurisdiction in that circuit court. The United States Supreme Court initially denied Petitioner's request for review,⁸² with three justices dissenting to the denial. Justice Stevens, joined by Justice Kennedy, issued a statement explaining their view that "[d]espite the obvious importance of the issues raised[,]""⁸³ "the petitioner should first exhaust remedies available under the DTA unless the petitioners can show that the government is causing delay or some other ongoing injury that would make these remedies inadequate."⁸⁴ In the event of such injury, Justice Stevens wrote that

81. 375 U.S. App. D.C. 48, 476 F.3d 981 (D.C. Cir. 2007).

82. 127 S. Ct. 1478 (2007).

83. *Id.*

84. Jennifer K. Elsea & Kenneth R. Thomas, *CRS Report for Congress: Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court* (July 5, 2007), available at <http://www.fas.org/sgp/crs/natsec/RL33180.pdf>. Note: The exhaustion requirement in administrative law requires the completion of the administrative hearing before there can be pendent or ancillary trials of other judicial causes of action. The administrative remedy, distinct from the protections

“an alternative exist [for the Court] to consider [its] jurisdiction over the allegations . . .”⁸⁵ In June, 2007 the Court reversed its earlier denial and granted certiorari to hear the consolidated petitions,⁸⁶ although most of the issues in both *Boumediene*⁸⁷ and *Al Odah*⁸⁸ pertained to the issue of habeas corpus. However, both the Petitioners and Respondents argue the issue in their *Al Odah* briefs as to whether the DTA is an adequate substitute for habeas corpus.⁸⁹ These arguments could require the Court to examine and discuss whether the procedures of the Department of Defense referenced in the Detainee Treatment Act meet the administrative law analysis prescribed in *Hamdi* under the *Mathews* Test. The issues facing the Supreme Court, however, look chiefly to the applicability of habeas corpus to detainees as the exclusive constitutional, statutory and common law remedy, all relegated to judicial courts and whether the habeas jurisdiction has been stripped or otherwise suspended by Congress under the DTA or MCA because the DTA procedures provided an adequate substitute.⁹⁰

granted in a judicial court is, therefore, all the constitutional due process that one receives, subject to a record appeal under a differential standard of review in a judicial court. See CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 13.21-13.25 (1997).

85. *Boumediene v. Bush*, 549 U.S., slip op. at 2 (citing the All Writs Act, 28 U.S.C. § 1651, and the *habeas corpus* statute, 28 U.S.C. § 2241). See *Reply Br.* 41-43.

86. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (granting petitions for rehearing and certiorari); *Al Odah v. United States*, 127 S. Ct. 3067 (2007) (granting petitions for rehearing and certiorari).

87. 127 S. Ct. 3078 (2007).

88. *Al Odah v. United States*, 124 S. Ct. 524 (2003).

89. Brief for the Petitioner, *Al Odah v. United States*, 124 S. Ct. 524 (No. 06-1196).

90. In a reply brief in opposition to Petitioner’s request of rehearing for reconsideration for granting certiorari in *Al Odah v. United States* on Petition for Writ of Certiorari to the United Court of Appeals from the District of Columbia Circuit, Reply in Opposition to Petition for Rehearing, No. 06-1196, on p. 4, paragraph 4, the following is quoted:

Finally, it is now clear that, not only is the remedy provided by the DTA inadequate, but also the underlying CSRT process was an irremediable sham. A courageous Military Officer, Lt. Colonel Stephen Abraham, United States Arm Reserve, has come forward with a declaration responding to assertions about the adequacy of the CSRT process made on behalf of the government by Rear

Admiral (retired) James M. McGarrah in the *Bismullah* case. Based on his personal experience, first as a factual investigator and then as a member of a CSRT Tribunal, Lt. Colonel Abraham avers that, in every phase, the CSRT process was infected with command influence and an illusion. See annexed Declaration of Stephen Abraham. I, Stephen Abraham, hereby declare as follows:

1. I am a Lt. Colonel in the United States Army Reserve, having been commissioned in 1981 as an officer in Intelligence Corps. I have served as an Intelligence Officer from 1982 to the present during periods of both reserve and active duty, including mobilization in 1990 (“Operation Desert Storm”) and twice again following 9-11. In my civilian occupation I am an attorney with the law firm Fink & Abraham LLP in Newport Beach, California.

...

7. The Recorders exercised little control over the process of accumulating information to be presented to the CSRT Board Members. Rather, the information was typically aggregated by individuals identified as case writers who, in most instances, had the same limited degree of knowledge and experience relating to the Intelligence Community and Intelligence Products. The case writers, and not the recorders, were primarily responsible for accumulating documents, including assembling documents to be used in the drafting of an unclassified summary of the factual basis for the detainee’s designation as an enemy combatant.

...

9. Beyond “generic” information, the case writer would frequently rely upon information contained within the Joint Detainee Information Management System (“JDIMS”). The subset of that system available to the case writers was limited in terms of the scope of information, typically excluding information that was characterized as highly sensitive law enforcement information, highly classified information, or information not voluntarily released by the originating agency. In that regard, JDIMS did not constitute a complete repository, although this limitation was frequently not understood by individuals with access to or who relied upon the system as a source of information. Other data bases available to the case writer were similarly deficient. The case writers and Recorders did not have access to numerous information sources generally available within the intelligence community.

...

11. During my trips to the participating organizations I was allowed only limited access to information, typically pre-screened and filtered. I was not permitted to see any information other than that specifically prepared in advance of my visit. I was not permitted to request that further searches be performed. I was given

no assurance that the information provided for my examination represented a complete compilation of information or that any summary of information constituted an accurate distillation of the body of available information relating to the subject.

12. I was specifically told on a number of occasions that the information provided to me was all that I would be shown, but I was never told that the information that was provided constituted all available information. On those occasions when I asked that a representative of the organization provide a written statement that there was no exculpatory evidence, the requests were summarily denied.

13. At one point, following a review of information, I asked the Office of General of the Intelligence Organization that I was visiting for a statement that no exculpatory information had been withheld. I explained that I was tasked to review all available materials and to reach conclusion regarding the non-existence of exculpatory information, and that I could not do so without knowing that I had seen all the information.

14. The request was denied, coupled with a refusal even to acknowledge whether there existed additional information that I was not permitted review. In short, based upon the selected review that I was permitted, I was left to “infer” from the absence of exculpatory information in the materials. I was allowed to review that no such information existed in materials I was not allowed to review.

15. Following that exchange, I communicated to Rear Admiral McGarrah and then the OARDEC Deputy Director. The fundamental limitations imposed upon my review of the organization’s files and inability to state conclusively that no exculpatory information existed relating to the CSRT subject. It was not possible for me to certify or validate the non-existence of exculpatory evidence as related to any individual undergoing the CSRT process.

16. The content of intelligence products, including data-bases, made available to case writers, Recorders, or liaisons officers, was often left entirely to the discretion of the organizations providing the information. What information was not included in the bodies of intelligence products was typically unknown to the case writers and Reporters, as was the bases for limiting the information. In other words, the person preparing materials for use by the CSRT Board Members did not know whether they had examined all

available information or even why they possessed some pieces of information but not others.

...

19. Following the quality assurance process, the unclassified summary and the information assembled by the case writer in support of the summary would then be forwarded to the Recorder. It was very rare that a Recorder or a personal representative would seek additional information beyond that information provided by the case writer.

20. It was not apparent to me how assignments to CSRT panels were made, nor was I personally involved in that process. Nevertheless, I discerned the determinations of who would be assigned to any particular position, whether as a member of a CSRT or to some other position, to be largely the product of an ad hoc decisions by a relatively small group of individuals. All CSRT panel members were assigned to OARDEC and reported ultimately to Rear Admiral McGarrah. It was well known by the officers in OARDEC that any time a CSRT panel determined that a detainee was not properly classified as an enemy combatant, the panel members would have to explain their findings to OARDEC Deputy Director. There would be intensive scrutiny of the findings by Rear Admiral McGarrah who would, in turn have to explain the findings to his superiors, including the Under Secretary of the Navy.

21. On one occasion, I was assigned to a CSRT panel with two other officers, an Air Force colonel and an Air Force major, the latter understood by me to be a judge advocate. We reviewed evidence presented to us regarding the recommended status of a detainee. All of us found the information presented to lack substance.

...

23. On the basis of the paucity and weakness of the information provided both during and after the CSRT hearing, we determined that there was no factual basis for concluding that the individual should be classified as an enemy combatant. Rear Admiral McGarrah and the Deputy Director immediately questioned the validity of our findings. They directed us to write out the specific questions that we had raised concerning the evidence to allow the Recorder an opportunity to provide further responses. We were then ordered to reopen the hearing to allow the Recorder to present further argument as to why the detainee should be classified as an enemy combatant. Ultimately, in the absence of any substantive response to the questions and no basis for concluding the additional information would be forthcoming, we did not change our determination that the detainee was not properly classified as an

Bismullah v. Gates/Parhat v. Gates,⁹¹ is another detainee case presently pending in the D.C. Circuit where certain discovery orders have been issued.⁹² The Petitioners challenged the government's finding of enemy combatant status under the DTA under the CSRT procedures. In order for the court to conduct judicial review, it first must determine the method and standard for judicial review of the CSRT record. Ultimately, the D.C. Circuit must examine the evidence available under the DTA in order to determine whether a preponderance of the evidence supports the CSRT determination. In order to make that determination, a complete record was required by the court which exceeded what Petitioners were permitted to access at hearing in contrast to the information reasonably available to the government at the CSRT hearing. At issue is the requirement to disclose to the court, in camera or ex parte, allegedly sensitive or classified information in the government's possession that was unavailable to the Petitioner at the hearing. Both Petitioners' and Respondents' briefs in *Bismullah* address the Supreme Court's consideration of *Boumediene* and *Al Odah* with respect to the issues pending in *Bismullah* which was decided by the Washington, D.C. Court July 20, 2007, order for rehearing denied, October 3, 2007.⁹³

If the United States Supreme Court in *Boumediene* rules outside of the context of the federal question of whether Congress statutorily suspended or stripped the federal courts of habeas corpus jurisdiction for Guantanamo detainees as addressed in the Constitution and at common law, then the Supreme Court may look to whether the DTA and CRST procedures meet the *Hamdi* test, constructed under *Mathews*. More likely, the Court will instead determine whether the

enemy combatant. OARDEC's response to the outcome was consistent with the view other instances of which a finding of "Not an Enemy Combatant" (NEC) had been reached by the CSRT boards. In each of the meetings that I attended the OARDEC leadership finding of NEC, the focus of inquiry on the part of the leadership was "what went wrong."

24. I was not assigned to another CSRT Panel.

91. 2007 U.S. App. LEXIS 17544 (D.C. Cir. July 20, 2007) (order on procedural motions No. 06-1197).

92. 2007 U.S. App. LEXIS 18265 (D.C. Cir. July 30, 2007).

93. 2007 U.S. App. LEXIS 23609 (D.C. Cir. Oct. 3, 2007).

El-Banna Br. 32 n. 30, *Al Odah* Br. § 32, R Br. 41 N. 16.

CRST procedures are an adequate substitute for habeas, and not whether the CRST procedures meet the *Mathews*' test. The suspension standard for habeas is a greater standard than the administrative law test of *Mathews*.

There can be no greater interest than a liberty interest (versus the property interest) that is subject to scrutiny for protection under the Due Process Clause. But, even under the *Mathews* test, the procedures that define and determine a detainee's liberty interest must be carefully balanced against the government's interest to detain suspected enemy combatants. The liberty interest protects one's freedom from false incarceration, and as a consequence, a heightened protective administrative procedure must be in place to prevent an erroneous deprivation. There are a number of infirmities which govern these procedures identified in the CSRT as permitted in the DTA. Unlike most state APAs, the CSRT procedures are not statutorily defined but are stated in policies promulgated by the Department of Defense, recognized by and subject to certain modifications that are contained in the DTA. The Supreme Court may also be tempted to peak at the totality of results found from the records of the cases in Guantanamo and the dispositions of those cases to determine the overall validity of these procedures to protect a liberty interest under either the Due Process Clause of the Fifth Amendment or the Suspension Clause.⁹⁴ The Supreme Court does not have before it presently an evidentiary record to review but must decide the question based upon a facial challenge to the procedures, prior to a requirement for exhaustion. At the time of *Hamdi* in 2004, the Supreme Court had no DOD administrative procedures before it to analyze (because there were none in existence), prior to the issuance of the CSRT procedures or the enactment of the DTA. However, the Supreme Court does now have both CSRT procedures and the DTA before the Court, in addition to the Military Commission's Act of 2006 (MCA). Aside from further addressing the habeas stripping provisions enacted in the MCA after *Hamdan v. Rumsfeld*,⁹⁵ these provisions are not subject to the balancing test articulated in *Hamdi* because the MCA involves a trial of enemy combatant for violation of the Articles of War, not a determination of

94. U.S. CONST. art. 1, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

95. 126 U.S. 2749 (2006).

the correctness of a detainee's status. The court may well determine that the interest of the government in determining enemy combatant status as balanced against a detainee's liberty interest is sufficient under the CSRT procedures employed and authorized by the DTA, both under the *Mathews* test and the habeas Suspension test.

The defect may not lie with the DTA or the CRST procedures.⁹⁶ The Supreme Court may very well determine that the administrative procedures authorized in the DTA meet the minimum constitutional test for an administrative adjudication under the *Mathews* test. Notwithstanding, under either test, a problem persists. The problem is, not solely the lack of minimum due process administrative procedures, but the apparent lack of a meaningful hearing, presided over by a neutral decision maker.

Detachment connotes a physical disconnect from the agency. It also connotes an emotional detachment from the case to reach the truth under law. Prior to *Goldberg*,⁹⁷ the agency hearing officer may have merely been an administrative functionary whose job it was to fulfill agency expectations. After *Goldberg*, the hearing officials, administrative law judges and military tribunals officers became the guardian of an individual's constitutional right to due process of law. These administrative adjudicators must remain free, detached and unfettered to decide the case solely under the facts as found in the record and then by application of the rule of law.

What the Supreme Court decides in *Boumediene* likely will not address the *Mathews* test and quasi-judicial administrative law issues, but likely will be decided under an analysis of the Great Writ.⁹⁸ The historical liberty interest protected by the Great Writ may be too significant of an interest to be left to executive branch administrative law procedures. Justice O'Connor, for the plurality in *Hamdi*, fashioned a model to follow. Joining in this plurality was one of the

96. Even given the infirmities and questionable use of information secured by torture which is not automatically excluded, the exclusion of legal counsel from the hearing, the use of a disinterested personal representative, the shifting burden, and the differential standard of review given to the government without the development of an adequate record.

97. 397 U.S. 254 (1970).

98. See William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765—1769* (1979) (describing the application of the Great Writ).

most skeptical of the *Mathews* detractors, then Chief Justice Rehnquist, who joined the middle ground between the unrestricted application of habeas relief in judicial courts for enemy combatants and the unfettered exercise of executive war powers by the Commander-in-Chief by adopting a position that resorted to administrative law precedents, ironically based upon *Mathews*. But it may now be too late to ever return to an administrative law analysis in *Boumediene*. Why? Administrative adjudication under DTA and DOD procedures may have failed to provide an unbiased decision-maker.⁹⁹

99. See Sidney A. Shapiro & Richard E. Levy, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Due Process*, 57 ADMIN. L. REV. 112 (2005), stating that:

Due process also incorporates a specific mechanism to ensure that the government acts in accordance with law – fair procedures. The requirements of notice and an opportunity to be heard by an unbiased decision-maker provide an effective means of constraining factual determinations and the application of the law to those facts.

See also Mark Denbeaux & Joshua Denbeaux, Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data. In their profile of 517 detainees, Mark and Joshua Denbeaux found:

1. Fifty-five percent (55%) of the detainees are not determined to have committed any hostile acts against the United States or its coalition allies.
2. Only 8% of the detainees were characterized as al Qaeda fighters. Of the remaining detainees, 40% have no definitive connection with al Qaeda at all and 18% are have no definitive affiliation with either al Qaeda or the Taliban.
3. The Government has detained numerous persons based on mere affiliations with a large number of groups that in fact, are not on the Department of Homeland Security terrorist watchlist. Moreover, the nexus between such a detainee and such organizations varies considerably. Eight percent are detained because they are deemed “fighter for,” 30% considered “members of,” a large majority – 60% – are detained merely because they are “associated with” a group or groups the Government asserts are terrorist organizations. For 2% of the prisoners their nexus to any terrorist group is unidentified.
4. Only 5% of the detainees were captured by United States forces. 86% of the detainees were arrested by either Pakistan or the Northern Alliance and turned over to United States custody.

The assurance of an impartial decision maker is a fundamental guarantee of procedural due process in all forums.¹⁰⁰ If administrative adjudications fail to afford litigants this fundamental guarantee, then quasi-judicial tribunals may not provide the required due process protections. Command influence over the decision makers, particularly as articulated by Lt. Col. Stephen Abraham in his affidavit, questions neutrality at its most fundamental level.

Administrative hearings are quasi-judicial, Courts are fully judicial. The decision to create a federal APA in the 1940s spurned the judicial model in deference to the quasi-judicial administrative hearings. Some commentators sided with President Roosevelt's preference for an APA as a measure to protect the President's implementation of his administration's New Deal policies, without unnecessary interference from the judiciary.¹⁰¹ If this is a correct assumption, then the very birth of the federal APA permitted deference to agency adjudication, a deference that arguably still historically exists.¹⁰² It was not until *Goldberg* that a constitutional connection was made to tie the subject matter of the quasi-judicial hearing to a skeptically defined property interest, but a property interest nevertheless, one specifically protected by the constitution.¹⁰³ However, this constitutional remedy remained in the executive branch's administrative hearing, not in a judicial branch court. After *Goldberg*, a historical line was drawn from the executive's administrative hearing along a parallel course of the judicial branch court back to the Law of the Land provision in the Magna Carta and the indispensable requirement of due process that was confined by the Rule

This 86% of the detainees captured by Pakistan or the Northern Alliance were handed over to the United States at a time in which the United States offered large bounties for capture of suspected enemies.

5. Finally, the population of persons deemed not to be enemy combatants – mostly Uighers – are in fact accused of more serious allegations than a great many persons still deemed to be enemy combatants.

100. An impartial decision maker prevents the government from providing a process that has predetermined outcomes.

101. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT § 1.04 (2D ED. 1972).

102. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

103. See Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975).

of Law. With *Goldberg* came a perceptible shift away from deference to neutrality. The Barons, knowing the sovereign's power to control or even dictate judicial outcomes, insisted that the King grant an assurance of neutrality that did not rest upon appointed judges but by the judgment of their peers.

The hallmark of judicial due process is the right to trial by jury.¹⁰⁴ The list of similarities between the due process rights of litigants in administrative hearings and judicial hearings does not include the right to trial by jury. Due to this absence, the burden placed on the administrative hearing official, who determines both the facts and the application of law to those facts, united in one official, increases the demand for neutrality. The interest adjudicated in *Mathews* was a newly articulated property interest, the deprivation of which often related only to a financial loss. The shift of the due process interest from property to liberty, further increased the pressure to require a neutral decision-maker because the risk of an erroneous deprivation was not just financial, but the more substantive liberty interest. Heretofore, the liberty interest cases involved administrative remedies for incarceration of inmates in segregated confinement. Full judicial protections under the Due Process Clause, including a right to trial by jury, had been available to these administrative litigants prior to incarceration. The Guantanamo detainees, prior to *Hamdi*, had been incarcerated and held solely upon the assertion of the executive that the detainee was an enemy combatant. This detainment could legally be maintained until the cessation of the war on terror.

The Magna Carta was referenced in Petitioners' Brief in *Al Odah Et. Al.* (*Al Odah* Br. 21) ("No freeman shall be taken, nor imprisoned, nor disseised, nor outlawed, nor banished..."). The Magna Carta, arguably the greatest writing in all jurisprudence, contemplates the loss of such a liberty interest only upon the adherence to the Law of the Land. At no juncture have the alleged detainees at Guantanamo been granted the highest due process protection, a right to a trial by jury, nor arguably should detainees have such a right. But they are entitled to a neutral decision-maker as both trier of fact and judge of the law. As a further protector of this liberty interest, the Great Writ became the bedrock of English Jurisprudence. The concept was so imbedded in English jurisprudence that it sailed with the English Colonist to the

104. III William Blackstone, *Commentaries on the Laws of England* (1765).

New World to be eventually encapsulated in the American Constitution.

Almost 800 years after *Runnymede*, the United States Supreme Court in *Boumediene* must square an innocent detainee's right to be free from a false incarceration against the executive's responsibility to imprison terrorists for the protection of U.S. citizens. Whether these protections are presided over by a judge in an administrative forum or by a judge (and jury) in a judicial branch court, due process demands a detached and neutral judge. The magnitude of such a liberty interest must not be left to military procedures found in a four-page memorandum, even if facially adequate under the litmus test of *Mathews*. Assuming the failure of suspension, the Supreme Court must reject administrative law due process procedures and return to the bedrock of Anglo-American Jurisprudence – The Great Writ!