

[Back to Article](#)

Select 'Print' in your browser menu to print this document.

Print Options: [With Ads](#) | [Without Ads](#)

Font Size:

# Guantánamo. Forgotten.

Brent Rushforth, Robert L. Palmer, M. Alexander Bowie II and James G. Szymanski

The National Law Journal

10-02-2012

We represent, pro bono, two detainees at the U.S. Naval Station at Guantánamo Bay, Cuba, seeking writs of habeas corpus. We write to publish and to protest the de facto refusal of our judicial branch to provide any meaningful review of the legality of the detention of Guantánamo internees. Most recently the U.S. Supreme Court signaled its lack of interest (or fear of the issues?) in its June 11 refusal to review any of the seven appeals by other Guantánamo detainees challenging decisions of the U.S. Court of Appeals for the D.C. Circuit that had, for all practical purposes, closed the courts to Guantánamo detainee challenges by decreeing that government justifications for a detention were to be presumed true.

Most of the detainees now held at Guantánamo have, like our clients, been imprisoned there for more than a decade without ever being charged with any crime. Some, like our clients, would be on their way home but for events wholly unrelated to them, such as President Obama's current ban on returning detainees to Yemen, and face continued detention for an indefinite period of time even though all of our nation's military and intelligence authorities decided long ago that they should be released. Their habeas petitions ask the judicial branch to perform its constitutional duty to determine whether or not their detentions are lawful.

The founders of our nation well understood what Alexander Hamilton called the "fatal evil" of arbitrary confinement. They enshrined the "Great Writ" of habeas corpus — an individual right that preceded even the Bill of Rights — into Article 1, Section 9, of the Constitution. In Federalist No. 84, Hamilton expressed the founders' view that "arbitrary imprisonments" were "the favorite and most formidable instrument of tyranny" and that "confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government."

In 2008, in *Boumediene v. Bush*, the Supreme Court reaffirmed the judiciary's duty to scrutinize in a "meaningful" way the legality of the Guantánamo detentions. The detainees' habeas petitions are heard in the federal courts in the District of Columbia with appeals of their decisions heard by the D.C. Circuit. Post-*Boumediene*, the district court judges — Republican and Democratic appointees alike — adopted rules for these cases striking a fair balance between the detainees' need for information from the government to meaningfully challenge their detention and the government's need to protect sensitive information. Eyewitness testimony was not required, and usually inadmissible hearsay was allowed, subject to the judges' evaluation of its reliability. The burden of proof on the government was simply a "preponderance of the evidence" — a mere "more likely than not" that the detention was legal. After trials, the district court judges ruled on Guantánamo habeas petitions, granting some and denying others.

Then judges of the D.C. Circuit stepped in and overturned every writ granted by the district court judges that was appealed to them — not some, or even most, but every one — clearly intending to nullify *Boumediene*. In opinions and speeches they derided the Supreme Court's landmark *Boumediene* decision as "airy suppositions," a "defiant — if only theoretical — assertion of judicial supremacy," and an act similar to those of the characters in *The Great Gatsby* who break things and

leave the mess for others to clean up.

The circuit's decisions precluded any meaningful review by the judicial branch of the Guantánamo detentions. They did so by creating often counterfactual presumptions in the government's favor, culminating in a decision, *Latif v. Obama*, in which the circuit announced that the government's raw interrogation reports would be presumed accurate. This so-called presumption of "regularity" summarily overturned the conclusions of the district court judges who insisted on evaluating the reports on a report-by-report basis. Indeed, a group of highly credentialed intelligence professionals filed an amicus brief with the Supreme Court explaining that our intelligence agencies would never afford such low-level investigative/interrogation summaries any presumption of accuracy whatsoever. It was these decisions by the D.C. Circuit, including *Latif*, that the Supreme Court refused to hear on June 11.

In his inaugural address, President Obama "reject[ed] as false the choice between our safety and our ideals. Our Founding Fathers, faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man — a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience sake."

We believe that in Guantánamo, our nation has sacrificed sacred American ideals for expedience sake. But that is what politicians will do and that is why our nation's founders created our tripartite system of government — with our judicial branch designed to step in when our politicians are unable or unwilling to uphold our ideals. We view the Supreme Court's refusal to hear the Guantánamo appeals as an abdication of that vital function, an abdication that gifts our enemies with the argument that while we proclaim our ideals as universal, to us they are mere matters of convenience.

A curtain of utter darkness now threatens to fall over most of the 169 Guantánamo detainees, interned indefinitely without charge and without recourse, including our clients. Having reviled the Soviet Union for its gulags, we have, it seems, permanently institutionalized our own at Guantánamo. It is ironic but somehow fitting that we've managed to do this on the southeast coast of Cuba — adjacent to, indeed within, the territory of a despotic regime that we have opposed for several generations but now, sadly, choose to emulate in this disgraceful way.

*Brent Rushforth and Robert L. Palmer are partners at McKool Smith. M. Alexander Bowie II is a partner at Day Pitney, where James G. Szymanski recently retired as partner.*

---

Copyright 2012. ALM Media Properties, LLC. All rights reserved.