LEGAL LIMBO: WHERE SHOULD THE GUANTANAMO UIGHURS BE RELEASED?

William L. Tucker*

I. INTRODUCTION

The September 11, 2001 attacks on the United States shocked the world's conscience and changed the American public's feeling of vulnerability. Following the events that unfolded on September 11, the United States took drastic steps to help insure a terrorist attack of that magnitude would not happen again. On September 18, 2001, Congress issued a Joint Resolution pertaining to the Authorization for Use of Military

* The author is a J.D. Candidate, May 2011, Nova Southeastern University, Shepard Broad Law Center. William L. Tucker has a B.A. in Business Management from Norwich University. The author wishes to thank his family for their love and support. He would also like to thank Donna Ziccardy for her encouragement and support, and the members of the ILSA Journal of International & Comparative Law at Nova Southeastern University for their hard work and dedication.
Force (AUMF). The immediate action taken by Congress gave the President the power to:

[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Following the September 18, 2001 Joint Resolution, the United States military commenced aggressive attacks on Taliban and Al-Qaeda forces in Afghanistan. Fighting a non-traditional war, the United States found it necessary to implement new procedures that would enable the military to gather information from captured enemies in hopes of preventing additional attacks. Using the power authorized by the AUMF, the President published a military order on November 13, 2001, regulating the “Detention, Treatment, and Trial of Certain Non-citizens in the War against Terrorism.” The President’s military order led to the capture and detention of over 500 enemy combatants at Guantanamo Bay, Cuba (GTMO).

The Bush administration established the “enemy combatant” designation to prevent prisoners captured in the “war on terror” from obtaining the legal authority to challenge their detention. As a result, the military stripped the detainees of rights protected by the U.S. courts, the judicial systems of their home countries, and the protection of international laws such as the Geneva Conventions. On July 7, 2004, Deputy Secretary

2. See id.
6. Hemingway, supra note 3, at 64 (citing to Scott McClellan, Press Briefing, White House (June 21, 2005)).
8. See generally id.
of Defense, Paul Wolfowitz, issued a memorandum defining an “enemy combatant” as anyone who:

[W]as 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.9

Following the Wolfowitz memorandum, the Joint Chiefs of Staff published an expanded definition of the “enemy combatant” designation that stated, for the purposes of the “war on terror,” an enemy combatant includes, but is not necessarily limited to, a member or agent of Al-Qaeda, Taliban, or another international terrorist organization against which the United States is engaged in an armed conflict.10

When the numbers of detainees rose in GTMO, humanitarian proponents and those in the international legal community took notice and began questioning the legality of the “enemy combatant” designation and whether it violated international law.11 With the help of pro bono counsel, detainees soon began filing writs of habeas corpus in U.S. federal court.12 The detainees wanted to challenge the legality of their detention under the “enemy combatant” designation;13 reasoning that because they were not enemy combatants and had not committed offenses under the international laws of war, they were held unlawfully.14 The detainees’ counsel based the challenges on the failure of the United States to charge them with any offenses and to provide them with access to counsel and the courts.15

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9. Memorandum from the Assistant Sec’y of Defense to the Sec’y of the Navy on the Order Establishing Combatant Status Review Tribunal (July 7, 2004).
10. See id. ¶ 1–12.
11. Eley, supra note 7.
13. Id.
15. See Hamdi, 316 F.3d at 459; Padilla, 352 F.3d at 698; Al Odah, 321 F.3d at 1135.
II. ESTABLISHING THE RIGHTS OF ALIEN DETAINEES: RECENT CASE LAW

The Bush administration’s attempts to limit the rights of GTMO detainees helped the federal courts establish case precedent regarding detainees’ rights.

A. The Bush Administration: Attempting to Strip Habeas Corpus Rights

*Rasul v. Bush* was a landmark decision rendered by the United States Supreme Court (Supreme Court) on June 28, 2004. At the time, the Supreme Court’s decision gave all detainees at GTMO access to the federal court system through habeas corpus petitions. Shafiq Rasul was a British national who allegedly traveled to Pakistan and then Afghanistan in 2001 to aid in humanitarian efforts following the September 11, 2001 terrorist attacks. Rasul was captured by bounty hunters in Afghanistan and turned over to U.S. forces for a reward. U.S. forces eventually transferred Rasul to GTMO in January of 2002, where he remained until his release in 2004. It was during his detention in GTMO that the Center for Constitutional Rights filed a petition on behalf of Rasul for his release. Rasul was released before the petition made its way to the Supreme Court; however, certiorari was granted because other detainees who had been captured with Rasul were still detained in GTMO. In issuing its opinion, the Supreme Court established that non-resident aliens held by the United States in foreign territories retained habeas corpus rights. The Supreme Court explained that although the United States does not have ultimate sovereignty at the GTMO camp in Cuba, it does have exclusive and plenary

17. See generally id.
23. Id. at 480–81.
jurisdiction as outlined in the land use lease agreement between the United States and Cuba. This decision afforded many detainees held at GTMO the opportunity to file petitions for habeas corpus relief.

B. The Bush Administration: Subsequent Attempts to Strip Habeas Corpus Rights

Responding to the Supreme Court opinion in Rasul, President Bush signed the Detainee Treatment Act of 2005 (DTA). The DTA prohibited inhumane treatment of prisoners, required that interrogations comply with U.S. Army regulations, and stripped federal courts of jurisdiction to hear habeas corpus petitions from GTMO detainees. The latter of the three provisions was specifically outlined in subsection (e) and stated that, “no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed on behalf of an alien detained by the United States” at Guantanamo Bay, Cuba. The Executive branch wanted to limit the protections established for alien detainees by the Rasul decision by taking away habeas corpus relief and although the DTA succeeded the result was short-lived.

In June of 2006, the Supreme Court heard Hamdan v. Rumsfeld and declared that the DTA had only a prospective effect. Hamdan was of Yemini decent and was captured during the United States invasion of Afghanistan. Hamdan admitted that he was Osama Bin Laden’s personal driver and bodyguard. Hamdan was one of the original detainees at GTMO and legal efforts on his behalf led to a land mark case that derailed President Bush’s efforts to strip alien detainees in GTMO of habeas corpus relief. Following the Hamdan decision, the Bush administration went back to the drawing board and established The Military Commissions Act

27. See Detainee Treatment Act of 2005 § 1002(a), 1003(a) (2005).
30. Id. at 558.
31. Id. at 557.
32. Id. at 570.
33. See Hamdan, 548 U.S. at 575–76.
of 2006 (MCA). The MCA further defined the “enemy combatant” designation and stripped access to habeas relief for any alien detainee who was classified as an “enemy combatant” under the definition outlined in the MCA. Responding to Hamdan, the Bush administration clearly defined what type of detainee was stripped of habeas relief and the resulting MCA gave enough breathing room for those aliens not classified as “enemy combatants” access to the federal courts through habeas petitions.

Again, the Bush administration’s attempt to strip the habeas corpus rights of detainees was short-lived when the Supreme Court issued the opinion in Boumediene v. Bush. Lakhdar Boumediene was a non-resident alien designated an “enemy combatant” and detained at Guantanamo. Boumediene challenged the United States government’s attempt to strip him of habeas corpus relief during his detention. The Court found § 7 of the MCA to be unconstitutional because it violated Article I, § 9 of the U.S. Constitution without creating a new provision or highlighting an existing provision that would act as an adequate substitute for habeas corpus relief.

Article I, Section 9 requires that the “Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion of the public Safety may require it”. The Court held that alien detainees although non-citizens held outside United States borders, were afforded the protections of the United States Constitution, including habeas corpus rights. The Court recognized that Article I, Section 9 has not been extended to protect non-resident aliens held outside United States territories. Guantanamo is outside the United States; however, the Court made a distinction from prior cases because the United States government exerts complete control over the territory and the Cuban government has no judicial jurisdiction. After recognizing that Guantanamo detainees retain

35. Id.
36. Id.; see generally Hamdan, 548 U.S. at 567.
38. Id. at 2240.
39. Id.
40. Id. at 2274.
41. U.S. CONSt. art. 1, § 9, cl. 2.
42. Boumediene, 128 S.Ct. at 2262.
43. Id. at 2260.
44. See id. at 2261.
their habeas corpus rights, the Court moved forward to determine whether the detainees had an adequate substitute.\textsuperscript{45}

The Bush administration attempted to establish substitute procedures called Combatant Status Review Tribunals (CSRT) under the DTA.\textsuperscript{46} The DTA also gave review jurisdiction of CSRT proceedings to the D.C. Circuit Court.\textsuperscript{47} The Court, however, found the CSRT flawed and the judicial review process an insufficient substitute for habeas corpus rights.\textsuperscript{48} The CSRT was incomplete because it provided no right to council, the detainee had a limited right to see the evidence against him, and was limited in the evidence he could present.\textsuperscript{49} After discussing the CSRT flaws the Court moved to an evaluation of whether the D.C. Circuit Court’s ability to engage in judicial review was adequate to substitute for habeas corpus rights.\textsuperscript{50}

"For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occur during the CSRT proceedings."\textsuperscript{51} The Court went on to explain that the judicial body making the review must have "some authority to assess the sufficiency of the Government’s evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding".\textsuperscript{52} The Court found that the DTA did not allow for a judicial review that could include "newly discovered evidence or make a finding that the detainee was improperly designated as an enemy combatant".\textsuperscript{53} The review procedures for the CSRT’s, outlined in the DTA, do not afford the necessary authorities and are an "unconstitutional suspension of the writ".\textsuperscript{54} The Boumediene ruling established that detainees “should be entitled to challenge both the

\begin{itemize}
\item \textsuperscript{45} Id.
\item \textsuperscript{47} § 2241.
\item \textsuperscript{48} Boumediene, 128 S.Ct. at 2274.
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Boumediene, 128 S.Ct. at 2269.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Cohn, supra note 49.
\item \textsuperscript{54} Boumediene, 128 S.Ct at 2274.
\end{itemize}
government's definition of an enemy combatant and the factual basis of their arrest".55

III. THE UIGHURS ROAD TO GUANTANAMO

The Uighur population is a predominately Muslim community established in the Xinjiang region of Western China56 that has come under fire during the "war on terror."

A. The Uighurs

Over the last thirty years the Han Chinese, who comprise ninety-eight percent of China's population, have been migrating into the Xinjiang region of Western China.57 Some Uighurs believe the Republic of China is attempting to "refashion their cultural and religious identity."58 The Han Chinese are China's ethnic majority and some Uighurs feel the communist government of China has encouraged the migration to promote Buddhism, which is China's predominant religion.59 In addition, the Han migrants flowing into the region have drained the already limited land and water the Uighur territory possesses.60 The increasing flow of Han Chinese into the region resulted in some Uighurs calling for an independent Uighur state.61 Other portions of the Uighur population chose to leave the Xinjiang territory and cross the border into the neighboring countries of Afghanistan and Pakistan.62 Some of those who crossed into Afghanistan and Pakistan were exposed to Islamic extremists groups, such as the Taliban and the Northern Alliance (the anti-Taliban opposition force), while others used the new territory to start an independent life.63

57. Id. at 2.
58. Id.
59. See generally Bhattacharji, supra note 56.
60. Id.
62. See id. at 4.
63. Id.
B. How the Uighurs Became Caught up in the "War on Terror"

During the offensive by the United States in Afghanistan following the September 11, 2001 terrorist attacks, a village on the outskirts of Tora Bora was bombed and twenty-two Uighurs fled the village.\(^{64}\) After fleeing the village in Tora Bora, the Uighurs were taken into custody by Pakistani bounty hunters and turned over to U.S. forces for a cash reward.\(^{65}\) While the group was held in a United States detention camp, the U.S. government took advantage of the opportunity to question the Chinese nationals in hopes of acquiring information about the Chinese government.\(^{66}\) Pentagon officials justified the detention by claiming the area the Uighurs fled "was a separatist training camp with loose ties to the Taliban."\(^{67}\) The United States claimed the Uighurs were linked to a Muslim separatist group, Eastern Turkestan Islamic Movement (ETMI), that received weapons training in Afghanistan to fight the Republic of China.\(^{68}\) However, critics of the Uighurs detention believe the U.S. government agreed to list ETMI as a terrorist group to gain Chinese approval for the invasion of Iraq.\(^{69}\) By 2003, counsel for the Uighurs in GTMO argued that the camp they fled was an "innocent handful of houses bisected by dirt tracks."\(^{70}\) Furthermore, the attorneys explained that the only "[w]eaponry . . . consisted of a single Kalashnikov rifle and a pistol."\(^{71}\) In response, the Pentagon reviewed the twenty-two Uighur detainees and determined that five posed no threat and should be released.\(^{72}\)

\(^{64}\) See Timeline, supra note 19.

\(^{65}\) Id.


\(^{67}\) Timeline, supra note 19.


\(^{71}\) Id.

\(^{72}\) Id.
IV. LEGAL LIMBO: WHERE SHOULD THE UIGHURS BE RELEASED?

China has demanded that the United States repatriate the Uighurs detained at GTMO. The United States has refused to send the Uighurs back to China because of the persecution they would likely face. Therefore, the United States has attempted to transfer the Uighurs to other foreign nations but many have been hesitant to accept them.

A. China Demands Repatriation

China wants the Uighurs returned to their native country. The international War on Terror has allowed oppressive governments to label any type of anti-state movement as a terrorist activity and China has taken this opportunity to single out Uighurs. The Chinese government considers the Uighurs as separatists and feels the population is a terrorist group. After the September 11, 2001 attacks on the United States, “China identified itself as a victim of international terrorism and the Uighur separatist movement as its own al-Qaeda.” China claims that the Uighurs are an extremist group who have plotted and carried out numerous terrorist attacks on Chinese government officials since the early 1990’s. The tension that exists between a portion of the Uighur population and the Chinese government is never far from the surface. Leading up to the 2008 Olympic Games in Beijing, the Chinese government reported an increase in secret separatist activity that it attributed to the Uighur population. The Chinese government believes that the active separatists in the Uighur population have established a goal of disrupting the communist government of China in hopes of gaining an independent Uighur state in the Xinjiang region. A flurry of terrorist plots by the Uighurs were reported prior to the opening of the Olympic Games; however, many in the international community believed the reports were exaggerated to justify restrictive

74. Kuhn, supra note 69.
76. Id.
77. Id.
78. Id.
79. Id.
80. Parry, supra note 75.
security at the Games. Many who thought the threats were overplayed by the Chinese government were shocked by a bombing and knife attack led by two Uighur men that killed sixteen Chinese government police officers right before the Games began. The initial attack was followed by two additional attacks that also led to fatalities of Chinese government officials.

More recently, conflict between the Uighur separatists and China have resulted in over 140 deaths, China’s worst riots since the Tiananmen Square massacre. The international community has limited information on many of the claims made by China in regards to the Uighurs and it has been hard to determine to what extent the Uighurs are responsible for attacks they have been named in. Gardner Bovingdon, a professor at Indiana University who is an expert on the Uighur population, has explained that the group is often misunderstood or suffers from broad generalizations made by the Chinese government. Bovingdon has explained that misconceptions about the Uighur population stem from the group’s “political views that run the gamut from Islam to nationalism, peaceful to violent resistance, and autonomy to independence.” Likewise, many humanitarian watch dog groups believe the majority of the Uighur population is a peaceful group who wish to practice their religion free of censorship and the political oppressions of China. International human rights organizations have voiced concern that the Uighur population as a whole has been cast in an unfair light and the “Chinese anti-terror campaign has blurred the lines between genuine men of violence and those who peacefully support independence.”

Irrespective of the international view, China has been adamant that the detained Uighurs be returned to their home country. The Chinese government wants the United States to repatriate those detained in GTMO because China considers them terrorists who are active in the separatist

81. Id.
82. Id.
83. Id.
84. Id.
85. See generally Parry, supra note 75.
86. Kuhn, supra note 69.
87. Id.
88. Parry, supra note 75.
89. Id.
movement against China.\textsuperscript{91} China claims that the United States' refusal to return the Uighurs flies in the face of active resolutions of the United Nations Security Council and also violates the rules governing international anti-terrorism.\textsuperscript{92} The Chinese government wants the men returned to face trial for their alleged separatist activities against the ruling government.\textsuperscript{93} In 2005, five of the Uighurs originally captured by bounty hunters in Afghanistan and turned over to American forces were cleared by the United States and released to Albania.\textsuperscript{94} China responded by sharply criticizing the United States for releasing five individuals who the Chinese government considered dangerous terrorists.\textsuperscript{95} China has gone further and made it clear that they oppose any country that is willing to offer the detained Uighurs political asylum.\textsuperscript{96} China has taken the position that by refusing to repatriate the Uighurs, the United States is sheltering a group that threatens Chinese national security.\textsuperscript{97} China believes the international community has a duty to return the Uighurs\textsuperscript{98} and has argued the reaction would be quite different if China was harboring a group that threatened the national security of the United States.\textsuperscript{99} The Chinese government has voiced its disapproval of the United States' refusal to return the Uighurs and has also stated that they, China, oppose any other third country accepting the Uighur detainees.\textsuperscript{100}

\subsection*{B. The United States Will Not Send the Uighurs to China}

The United States has rejected attempts by the Chinese government to have the detained Uighurs returned.\textsuperscript{101} The Uighurs currently detained in GTMO cannot be returned to China because there is a strong likelihood that

\begin{itemize}
\item \textsuperscript{91} Zhen & Blanchard, supra note 73.
\item \textsuperscript{92} Id.
\item \textsuperscript{93} Spiegel & Demick, supra note 90 at A5.
\item \textsuperscript{95} See Spiegel & Demick, supra note 90, at A5.
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Zhen & Blanchard, supra note 73.
\item \textsuperscript{98} Id.
\item \textsuperscript{99} Kuhn, supra note 69.
\item \textsuperscript{100} Zhen & Blanchard, supra note 73.
\end{itemize}
they would be subjected to torture or unfair persecution. The treaty obligations of the United States prevent the government from transferring a detainee to any State where that detainee would face persecution. Under the United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment (CAT), the United States is prohibited from sending the Uighurs back to China because they would be subject to arrest, torture, or execution. Part I Article 1 of the CAT defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The CAT does not only prohibit the direct torture of individuals, but it also forbids the transfer of an individual to a country where they would be subjected to any type of activity that would be considered torture pursuant to the outlined definition. Part I Article 3 of the CAT states that, "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

All indications from humanitarian groups and United Nations officials portray a Chinese State that is marked by human rights violations that rise


105. CAT, supra note 104, art. I.


107. CAT, supra note 105, art. III.
to the level outlined in the CAT.\textsuperscript{108} Evidence provided by Amnesty International and the United Nations detail systematic torture techniques employed by Chinese officials against Uighurs that are violations of the CAT.\textsuperscript{109} In a 2005 report, “Manfred Nowak, the United Nations Special Reporter on Torture, confirmed that ‘torture was wide spread’ in China.”\textsuperscript{110} Additionally, Mr. Nowak explained that there was a “consistent and systematic pattern of torture related to ethnic minorities, particularly Tibetans and Uyghurs.”\textsuperscript{111} Mr. Nowak cited electric shock, guard instructed beatings, and submersion in water or sewerage among the forms of torture employed by Chinese officials against Uighurs detained in China.\textsuperscript{112} There have been further indications that Uighurs returned to China not only face torture but may also be subject to execution at the hands of the Chinese government.\textsuperscript{113} China is known for frequent executions of people opposing the communist regime, and the Xinjiang region that is home to the Uighurs is said to have the greatest number of these executions.\textsuperscript{114} Multiple human rights organizations have detailed accounts of Uighurs being executed under death sentences resulting from unfair trials alleging separatist or terrorist activities.\textsuperscript{115}

In addition to the CAT, the United States must also adhere to the United Nations Convention relating to the Status of Refugees (Convention).\textsuperscript{116} The Convention is the basis for all international protection given to refugees and has been signed by 144 independent States.\textsuperscript{117} Additionally, the U.N. General Assembly Resolution section 8 (I) of 1946 states that, “no refugees or displaced persons who have finally and definitely . . . expressed valid objections to returning to their countries of


\textsuperscript{109} Id.

\textsuperscript{110} Id.

\textsuperscript{111} Id.

\textsuperscript{112} Id.


\textsuperscript{114} Id.

\textsuperscript{115} Id.


\textsuperscript{117} Goodwin-Gill, supra note 116, at 1.
origin . . . shall be compelled to return . . . .” According to Senior Research Fellow at Oxford University, Guy Goodwin-Gill, a refugee is “any person who is outside their country of origin and unable or unwilling to return there or to avail themselves of its protection, on account of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular group, or political opinion.” To be considered a refugee under the Convention, the person must have crossed a physical border leaving the origin country behind. The motivation behind fleeing the origin country does not have to be rooted in experiencing persecution but must be based on a well-founded fear of persecution. Although the Convention does not specifically outline what is considered persecution, the Convention does refer to those people whose “life or freedom ‘was’ or ‘would be’ threatened, so clearly it includes the threat of death, or the threat of torture, or cruel, inhumane or degrading treatment or punishment.” The incidents of torture and execution highlighted in this section placed the Uighurs in fear of the persecution that may result from repatriation. Some of the detained Uighurs explained that they would prefer to remain in GTMO because “[g]oing back to China would more than double the suffering of the Uighur People’s spirits . . . .” Although China has demanded the detained Uighurs be returned, the United States must adhere to the CAT and the Convention by refusing repatriation.

C. Steps the United States has Taken in the Past to Release Detained Uighurs

The United States has recognized the need to resettle the detained Uighurs in a safe third country and the first foreign nation to accept a portion of the detained Uighurs was Albania in 2006. The United States has attempted to negotiate the release of detained Uighurs with over 100 foreign nations and territories since 2004 and on May 5, 2006, five Uighurs

118. Id. (referencing G.A. Res. 8 (I) of Feb. 12, 1946).
119. Id. at 3 (referencing Convention Relating to Status of Refugees, supra note 116, at art. 1).
120. Id. (referencing Convention Relating to Status of Refugees, supra note 116, at art. 1).
121. Id. (referencing Convention Relating to Status of Refugees, supra note 116, at art. 1).
124. Id.
125. Tim Golden, Chinese Leave Guantánamo for Albanian Limbo, N.Y. TIMES, June 10, 2007, at 1; see also Worthington, supra note 66.
were the first of twenty-two Uighur detainees released from GTMO.\textsuperscript{126} The United States believed this would be the first in a series of foreign nations that would accept the detained Uighurs; however, other countries have not come forward and the results of the five that were transferred to Albania have not given hope to the thirteen that remain in GTMO.\textsuperscript{127} Hopes of transferring the additional Uighurs to Albania were quashed when the Chinese government reacted sharply to the country’s willingness to accept five men that Chinese officials consider terrorists.\textsuperscript{128} Additionally, recent reports from the five men transferred to Albania in 2006 have proved to be surprisingly bleak.\textsuperscript{129} The five Uighur men now living in Albania have said that their time in Albania has been worse than the time spent in GTMO.\textsuperscript{130} The men have been housed in an Albanian refugee camp since May of 2006 and promises of job training and monthly stipends from the United States and the United Nations have not materialized.\textsuperscript{131} The reports show that there has been no progress made in reuniting the Uighurs with their families, nor have they received a grant of political asylum that was part of the deal brokered between the United States and Albania.\textsuperscript{132} The failures of the deal between the United States and Albania have resulted in the five Uighur men asking to be moved to another country, which casts doubt on how successful the United States will be in finding adequate accommodations for the Uighurs in third countries.\textsuperscript{133} After seven years of detention in GTMO, four more of the seventeen Uighurs originally captured in Afghanistan were also released and flown to Bermuda on June 11, 2009.\textsuperscript{134} Releasing the men from prison and

\textsuperscript{126.} \textit{Id.}

\textsuperscript{127.} \textit{Id.}


\textsuperscript{129.} \textit{Id.}


\textsuperscript{131.} Worthington, \textit{supra} note 66.


\textsuperscript{133.} Golden, \textit{supra} note 125, at 1.

providing them with a chance for a normal life is the first priority for the Obama Administration. Under the agreement between the United States and Bermuda, the four Uighur men will be able to have their families come and visit, they will also receive housing, job training, and medical care if needed. The Bermudian government, which is a self-governing British overseas territory, negotiated the deal with the United States in secrecy and has cast light on some of the issues other territories may encounter if they accept the Uighur detainees. The British government learned about the agreement upon the detainees’ arrival and has criticized Bermudian officials for failing to discuss the agreement earlier. Bermuda was applauded for showing courage in the face of potential Chinese pressure; however, the move has had international repercussions. Britain voiced its displeasure with the secrecy with which the United States and Bermuda negotiated the transfer and has not been shy to admit the effect it will have on their international relations with China. Although the transfer is complete, and the United States has moved a portion of the detainees, the backdoor negotiation has not won much support for the United States from other countries. Bermuda and the United States have claimed that the move should not place Britain in a position to offend the Chinese but the final resettlement of the four Uighurs in Bermuda will depend on the British government giving its endorsement for naturalization—a move that will ultimately upset the Chinese. The transfer of four Uighur men to Bermuda is a step in the right direction for the United States, but the British reaction has also highlighted how difficult it will be to transfer the Uighurs who remain detained in GTMO.


136. Id.
137. Id.
138. Id.
139. James, supra note 134.
141. See generally id.
142. See generally id.
144. Human Rights Watch, supra note 135.
There are thirteen Uighurs still detained in GTMO and the United States believes it may have found a third country that is willing to resettle the men.\textsuperscript{145} On June 10, 2009, the small island nation of Palau announced that it would accept the seventeen Uighurs (four subsequently departed for Bermuda on June 11, 2009) who remained in detention at GTMO.\textsuperscript{146} The South Pacific island has stated that the “temporary resettlement of [the] detainees is a humanitarian gesture intended to [help] them be [free] from any further unnecessary incarceration and to restart their lives anew in as normal a fashion as possible.”\textsuperscript{147} The United States and Palauan officials are hopeful the details will work out, but both nations are taking the position that the negotiations are ongoing.\textsuperscript{148} Both sides are confident that they will come to an agreement, but a successful outcome may be derailed by an unlikely source—the detainees have expressed concern about a transfer to Palau.\textsuperscript{149} Only one of the thirteen Uighurs detained in GTMO has expressed an interest in being transferred to Palau.\textsuperscript{150} The Uighurs are concerned that they do not have a realistic prospect for economic or cultural success in Palau.\textsuperscript{151} The Uighurs remaining in GTMO have made it clear that they would like to be resettled in a place where they can interact with other Uighurs and have pointed to the failure of the Albanian transfer as an example of what they would like to avoid.\textsuperscript{152} The men worry that since they will not be issued Palauan passports they will not be able to travel and will not have an opportunity to see their families.\textsuperscript{153} Abu Bakker Qassim, one of the thirteen Uighurs detained in GTMO, has mentioned that “Palau might seem a paradise to some people but it’s just another kind of prison if you can’t travel. For us, getting a passport is the most important next step.”\textsuperscript{154} The proposed transfer to Palau is further complicated by fears that the


\textsuperscript{146} Demetri Sevastopulo, Palau to take Guantanamo Uighurs, FIN. TIMES, June 10, 2009.


\textsuperscript{148} Uighur Detainees, supra note 145.

\textsuperscript{149} Elizabeth Fry, US-held Uighurs Rebuff Move to Palau, FIN. TIMES, June 24, 2009, at 8.

\textsuperscript{150} Id.

\textsuperscript{151} Geoff Earle, Paradise ‘Lost’ for Gitmo Gang, N.Y. POST, June 11, 2009, at 8.

\textsuperscript{152} See generally id.

\textsuperscript{153} Fry, supra note 149 at 8.

\textsuperscript{154} Kerin Hope, Guantanamo Uighurs Find Freedom in Albania, FIN. TIMES, July 10, 2009, at 4.
island nation will not be able to adequately protect the Uighurs if and when they are transferred there.\footnote{155} The thirteen Uighurs have expressed fear that the island does not have a standing army or navy that would protect them if Chinese officials attempted to arrest them in Palau and extradite them to China.\footnote{156} Palau officials have assured the Uighurs that the country is under United States protection; however, the Uighurs are hesitant to agree to the transfer because of the islands close proximity to mainland China.\footnote{157}

D. Safe Third Countries are Hesitant to Take the Uighurs

Since the Uighurs were reclassified as non-enemy combatants in 2004 the United States has been searching for a safe third country that would accept the detainees.\footnote{158} The United States has struggled to find a foreign nation that will accept the Uighurs for two primary reasons. First, China has made it clear that they oppose any country that is willing to take the Uighurs in as refugees or grant political asylum.\footnote{159} The Chinese government has not been candid about the situation and went as far as warning in February of 2009 that there would be repercussions if any country accepted the Uighurs seeking political asylum because they would be harboring terrorists.\footnote{160} Second, many U.S. allies have balked at the prospect of accepting any of the Uighurs because the United States has been adamant in refusing to admit any of the remaining detainees into the country.\footnote{161}

V. REALISTIC OPTIONS FOR THE UIGHURS RELEASE

Although the United States has transferred nine of the original twenty-two Uighurs captured in the “war on terror,” the majority of the international community does not consider these transfers successful and the likelihood of transferring the remaining detainees looks bleak. The
Albanian transfer has been criticized because of the failure of the United States and the United Nations in providing support and reintegration.\textsuperscript{162} The Bermudian transfer has also been criticized due to the temporary nature of the agreement and the displeasure of the British government surrounding the agreement.\textsuperscript{163} The United States is in a tight spot because the difficulty of finding a safe third country willing to accept the Uighur detainees\textsuperscript{164} and the prohibition of sending them back to China leaves only two options\textsuperscript{165} The United States can either unlawfully hold the Uighurs indefinitely until a safe third country comes forward or they can be admitted into the United States.

\textbf{A. Indefinite Detention}

The Geneva Convention and other international laws have outlined the humanitarian rules that apply to individuals affected by international conflict but not necessarily directly involved in the hostilities.\textsuperscript{166} There are also additional procedures that delineate protections available for aliens held outside the borders of their captive nation.\textsuperscript{167} These international provisions limit the ability of a nation to hold detainees indefinitely without charging them with a violation of law.\textsuperscript{168} These regulations prevent the United States from arbitrarily detaining GTMO prisoners.\textsuperscript{169} Relying on these provisions, counsel for two Uighur detainees filed habeas corpus petitions with the United States District Court demanding their clients’ release.\textsuperscript{170} In denying the petition, the Court offered answers to two fundamental questions regarding the legality of indefinite detention of GTMO detainees by the United States.\textsuperscript{171}

\textsuperscript{162} Worthington, supra note 128; see also Konviser, supra note 132.
\textsuperscript{164} Spiegel & Demick, supra note 90, at A5.
\textsuperscript{165} CAT, supra note 104, art. III.
\textsuperscript{168} Id.
\textsuperscript{169} See \textit{id}.
The Court first discussed whether or not the United States had the legal authority to indefinitely detain aliens who were not classified as enemy combatants. The Court explained that lawful detention is based on preventing the detainees from returning to active hostilities. The Court was convinced that the Uighur detainees did not harbor any ill will toward the United States and there was no likelihood that if released, they would engage in hostilities against the United States. The Court determined that the United States did not have the legal authority to indefinitely detain the Uighurs.

Next, the Court discussed whether or not the federal judicial system had the authority to offer an adequate remedy for the unlawful detention of the Uighur detainees. Counsel for the Uighurs asked the Court to order an immediate release if it found the detention to be unlawful. The Court explained that although it found the detention unlawful, it was powerless to issue a release order. Citing the separation of powers doctrine, the Court stated that the Executive branch had plenary powers over matters of foreign affairs. The Court recognized its ability to order the detainees release in a third country, but noted that the lack of a country willing to take the Uighurs left it powerless. With no third country offering to resettle the Uighurs, the only option the Court had was to release them into the United States and that decision would encroach on the plenary powers of the Executive branch. The opinion offered by the United States District Court made it clear that although the indefinite detention of the Uighurs was unlawful, the Court was powerless to offer adequate relief. However,
in its opinion, the Court did imply that adequate relief could be granted, but it would have to come from the Executive branch.\textsuperscript{182}

B. Political Asylum

Current international law gives states the right to grant asylum and aliens the right to request asylum.\textsuperscript{183} Although aliens have the right to request asylum, the right is not absolute.\textsuperscript{184} The Attorney General has the power to grant asylum to an alien if the alien satisfies the requirements of a refugee.\textsuperscript{185} The Uighur detainees fall within the definition of a refugee because they are beyond the borders of their country of origin and are unable to return to China because they would meet both religious and political persecution.\textsuperscript{186}

Once an alien is classified as a refugee, the Attorney General has the power to grant asylum, if the alien satisfies four requirements.\textsuperscript{187} First, the individual seeking asylum must prove a well founded fear of persecution or show a history of past persecution.\textsuperscript{188} Persecution has been defined as, “a threat to the life or freedom of those who differ from the persecutor...”\textsuperscript{189} where death, torture, or confinement is considered an example.\textsuperscript{190} The Uighurs would be able to meet this first element because their past experience with the Chinese government has created a well-founded fear of persecution.\textsuperscript{191} The Uighurs fear of execution and torture would be

\begin{footnotes}
\item[182] See generally \textit{id.} at 200–01 (noting the Uighur detention is unlawful but the court lacks power to order release).
\item[184] \textit{Id.} at 9.
\item[189] 3A AM. JUR. 2d \textit{Aliens and Citizens} § 1006 (West 2008).
\item[191] See Lipes, \textit{supra} note 123. See also Convention Relating to Status of Refugees, \textit{supra} note 117, art. 1.
\end{footnotes}
considered well-founded because China has a well established history of executing and torturing Uighurs.\textsuperscript{192}

Second, the persecution needs to be based on race, religion, nationality, or membership in a specific social or political group.\textsuperscript{193} The Uighurs fear of persecution is founded on their religious and political beliefs as both Muslims and separatists.\textsuperscript{194} The Chinese government opposes the separatist movement of the Uighurs and has employed forced immigration into the Uighur region of China in hopes of extinguishing the predominant Muslim practice of the Uighur people.\textsuperscript{195}

Third, any alien requesting asylum from the United States must be physically present within the United States.\textsuperscript{196} The United States Immigration and Nationality Act requires that an alien be physically present in the United States, at a land border, or port of entry to be eligible for asylum.\textsuperscript{197} The third element, requiring physical presence, is where the Uighurs may fail in securing political asylum from the United States. The Uighurs are housed at GTMO which is located in Cuba and is held under the sovereign power of Cuba.\textsuperscript{198} Cuba is an independent island country that does not share a land border or port of entry with the United States. Although the naval base at GTMO is considered part of Cuba and not the United States,\textsuperscript{199} the Uighurs may still be able to present a valid argument for satisfying the physical presence element required for asylum.

The Supreme Court decisions in \textit{Boumediene v. Bush} and \textit{Rasul v. Bush} have established case precedent supporting the contention that GTMO is under complete control of the United States and those detained there are afforded protection under the laws of the United States.\textsuperscript{200} In \textit{Rasul}, the Court held that the United States history of uncontested control at GTMO has extended the implied protections of American laws to those detained within the territory.\textsuperscript{201} \textit{Boumediene} reinforced the \textit{Rasul} decision, holding

\begin{itemize}
\item \textsuperscript{192} See Torture against Uighurs, \textit{supra} note 89.
\item \textsuperscript{193} Convention Relating to Status of Refugees, \textit{supra} note 116, art. 1.
\item \textsuperscript{194} Kuhn, \textit{supra} note 69; Parry, \textit{supra} note 75 (noting China’s hostility towards Chinese Muslims for separatist activities).
\item \textsuperscript{195} Bhattacharji, \textit{supra} note 56.
\item \textsuperscript{196} See 8 U.S.C. § 1158(a)(1) (requiring physical presence for the asylum application).
\item \textsuperscript{197} See \textit{id.}
\item \textsuperscript{199} Id.
\item \textsuperscript{200} \textit{Rasul}, 542 U.S. at 480–81; \textit{Boumediene}, 128 S. Ct. at 2240 (holding petitioners do have a right to habeas corpus review).
\item \textsuperscript{201} \textit{Rasul}, 542 U.S. at 487.
\end{itemize}
that Congress’s attempt to strip habeas rights from detainees was unconstitutional.\footnote{Boumediene, 128 S. Ct. at 2240 (holding the Military Commissions Act was an unconstitutional striping of the habeas writ).} Additionally, GTMO must be regarded as a U.S. territory, applying basic constitutional rights to all persons within the base’s walls, and is strikingly similar to that of a domestic United States territory.\footnote{In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 463 (noting American control over Guantanamo Bay distinct from Cuban law).} Furthermore, American authorities stationed at GTMO are not subject to Cuban law, nor are there any indications of Cuban culture or tradition.\footnote{Id.} With the exclusive control the United States exerts over the area, the applicability of American law, and extension of the jurisdiction of U.S. courts, the Uighurs may satisfy the physical presence requirement for political asylum.\footnote{See Torruella, supra note 198, at 705–06 (arguing United States exercises sovereign powers over Guantanamo Bay); Hecht, supra note 147, at 83 (examining Supreme Court’s decision to allow jurisdiction over detainees at Guantanamo Bay); Rasul, 542 U.S. at 480–81 (recognizing territorial nature of Guantanamo Bay).}

VI. CONCLUSION

The Uighur detainees held at GTMO are an international dilemma that necessitates an international response. According to the U.S. federal courts, the arbitrary and indefinite detention of the Uighurs is unlawful. Therefore, the U.S. Executive branch must release the Uighurs from GTMO while also ensuring they are shielded from Chinese control. Ultimately, the United States has two options. The current administration can allow the unlawful detention to continue until a safe third country is found, or grant the Uighur detainees political asylum. Consequently, the Executive branch must choose between offending the principles of international law or admitting GTMO detainees, once considered terrorists, into the United States.