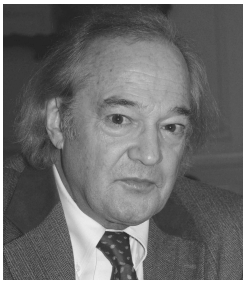
In the Wake of *Boumediene*

The International Rule of Law Remains in Jeopardy

by Robert H. Wagstaff



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The landmark U.S. Supreme Court decision of *Boumediene v. Bush,* 553 U.S. 723 (2008), holding that Guantanamo detainees were entitled to habeas corpus was seen as a watershed victory for the rule of law. *Boumediene* focused on the due process and fair trial requirements of the rule of law and was based on the habeas corpus clause of the United States Constitution of 1789, which traces its origins to the 1215 Magna Carta of England. In an earlier parallel decision, *A & Others v. Secretary of State for the Home Department,*[1] the highest United Kingdom court ruled that it was illegal and disproportionate to detain in Belmarsh Prison nondeportable aliens suspected of having terrorist ties with a suspicious organization. *A & Others* was based on the Human Rights Act 1998 and the enforceable European Convention on Human Rights. Despite the rulings in *Boumediene* and the preceding U.S. Supreme Court Guantanamo detainee cases,[2] many ongoing U.S. lower court decisions are in conflict with the rule of law and with human rights and humanitarian principles embodied in customary international law. There is no certainty that any of these post-*Boumediene* decisions will ultimately be reviewed by the U.S. Supreme Court, and some have already been denied review.

In the United States, political and ideological influences unfortunately affect judicial review of executive and legislative actions. The U.S. Supreme Court is sharply divided — one vote made the difference in *Boumediene*. Many lifetime legacy appointees in the lower federal courts support the concept of unbridled unitary executive power, and the Supreme Court is parsimonious in granting review. Many of the George W. Bush administration policies and positions have been retained by the current administration, and the residual consequences are grave. Many detainees who were abused and tortured remain in U.S. custody. The Obama administration has thus far not sought to hold anyone responsible for indefinite detention without charge or for torture and abuse; it has not even held an investigation to determine what occurred. The overall prospects for imposing meaningful and effective judicial limits on counterterrorism operations remain somewhat limited.

The United Kingdom and United States have taken somewhat dissimilar approaches in countering terrorism. The Bush war on terror, conjured in the wake of the attacks of September 11, 2001, served as a useful rhetorical and political tool, but it has no standing in law or fact. Nonetheless, the U.S. counterterrorism strategy is being carried out within a war paradigm. In the United Kingdom, on the other hand, strong lessons were learned during the Troubles in Northern Ireland, when the use of the military proved to be counterproductive and served principally to enhance the Irish Republican Army. Thus the United Kingdom determined to use principally the criminal law, involving long-term police operations, surveillance, arrest, and trial. The U.K. courts directly consider the issues presented for review within the context of the Human Rights Act 1998 and international human rights law, particularly the European Convention on Human Rights. The U.S. courts consider customary international law less directly, as it is not as embedded in domestic law.[3]

The United States' war paradigm was strongly condemned in a 2009 Report by the International Commission of Jurists:[4]

> The U.S.'s war paradigm has created fundamental problems. Among the most serious is

> that the U.S. has applied war rules to persons not involved in situations of armed conflict, and in genuine situations of warfare, it has distorted, selectively applied and ignored otherwise binding rules, including fundamental guarantees of human rights laws. This has not only had draconian consequences for the persons concerned, but also has utterly distorted humanitarian law's customary and treaty-based field of application.[5]

Nonetheless, the Obama administration continues to use the war paradigm. In May 2009, President Obama announced that:

> Al-Qaeda terrorists and their affiliates are at war with the United States, and those that we capture — like other prisoners of war — must be prevented from attacking us again. ... [T]here remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people. ... [W]e are not going to release anyone if it would not endanger our national security, nor will we release detainees within the United States who endanger the American people.[6]

For President Obama, prevention includes targeted killings, use of remotely controlled Predator drones, and the inevitable resultant collateral damage.

In several recent decisions discussed below, the U.S. lower courts continue to operate within a war paradigm, affirming the assertion of the state secrets doctrine and denying *Bivens* claims[7] to those who seek redress for harm suffered.

El-Masri v. Tenet

El-Masri, a German citizen, was detained in Macedonia, rendered to the Central Intelligence Agency, and taken to a detention centre near Kabul, Afghanistan, where he was held incommunicado for months, beaten, and otherwise mistreated and abused. Five months after his detention, the CIA determined it was a case of mistaken identity and El-Masri was transferred to a deserted road in Albania and released. He made his way back to Germany on his own. He sued the CIA and the United States, claiming damages for kidnapping and abuse. The federal district court dismissed his claim, holding it could not be tried without revealing "state secrets" relating to the CIA. The U.S. Circuit Court of Appeals for the Fourth Circuit affirmed and the U.S. Supreme Court declined to hear the case:[8]

> Under the state secrets doctrine, the United States may prevent the disclosure of information in a judicial proceeding if "there is a reasonable danger" that such disclosure "will expose military matters which, in the interest of national security, should not be divulged." *United States v. Reynolds,* 345 U.S. 1, 10, 73 S.Ct. 528, 97 L.Ed. 727 (1953).[9]

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"Reasonable danger" is broad enough for a coach and four. The courts' decisions translate to a no-go abdication, inconsistent with the rule of law's requirements for legal responsibility and accountability. The U.S. government is thus effectively put above the law.

Arar v. Ashcroft

Maher Arar was born in Syria and had been a citizen of Canada for seventeen years when, in 2002, he was questioned by U.S. authorities at John F. Kennedy International Airport in New York while returning to Canada. He was detained based on information given by the Canadian police, denied counsel and consul, and deported to Syria, where he was imprisoned in a grave-like cell and tortured. After a year of this unproductive abuse, the Syrians released him and he returned to Canada. The Canadian government conducted a judicial inquiry and concluded that Arar was actually innocent of any wrongdoing and was a victim of combined misfeasance by U.S., Syrian, and Canadian officials. The commissioner of the Canadian police resigned, and compensation was paid to Arar in the amount of ten million Canadian dollars. Arar brought a parallel action against the U.S. government in the U.S. courts, yet once again the state secrets doctrine was asserted and upheld by the courts.[10] In a sua sponte en banc 7-4 decision, the U.S. Court of Appeals for the Second Circuit dismissed Arar's claim. Dissenting judge and legal scholar Guido Calabresi wrote:

> [B]ecause I believe that when the history of this distinguished court is written, today's majority decision will be viewed with dismay,

> I add a few words of my own, "... more in sorrow than in anger." *Hamlet,* act 1, sc. 2. … In its utter subservience to the executive branch, its distortion of *Bivens* doctrine, its unrealistic pleading standards, its misunderstanding of the [Torture Victim Protection Act] and of § 1983, as well as in its persistent choice of broad dicta where narrow analysis would have sufficed, the majority opinion goes seriously astray. It does so, moreover, with the result that a person — whom we must assume (a) was totally innocent and (b) was made to suffer excruciatingly (c) through the misguided deeds of individuals acting under colour of federal law — is effectively left without a U.S. remedy.[11]

A *New York Times* editorial decried the subsequent denial of certiorari by the Supreme Court as "a bitterly disappointing abdication of duty."[12] The Obama administration opposed certiorari.

Rasul v. Myers

After prevailing in his 2004 Supreme Court Guantanamo habeas corpus case against President Bush,[13] Shafiq Rasul and others brought an action for damages against various government defendants.[14] They claimed that they had been tortured in violation of the Torture Victim Protection Act, the Geneva Conventions, and the Religious Freedom Restoration Act; that they had been denied due process of law guaranteed all "persons" by the Fifth Amendment; and that they were subjected to cruel and unusual punishment prohibited by the Eighth Amendment, thus giving rise to justiciable *Bivens* tort claims. But the U.S. Court of Appeals for the District of Columbia determined the officials were entitled to qualified immunity and the detainees were not protected persons under the Religious Freedom Restoration Act. The Supreme Court granted certiorari, vacated, and remanded for consideration in light of its opinion in *Boumediene.* On rehearing, the Court of Appeals held per curiam that *Boumediene* did not change the original result and the court reinstated its judgment.[15] Certiorari was then denied.[16] Once again the Obama administration opposed certiorari.

It stretches credulity to suggest that officials, who were legally required to know that torture was a U.S. war crime ...

On the remand, the Court of Appeals determined that prior to *Boumediene* it could not have been readily apparent to any of the defendants that the detainees in Guantanamo had any clearly established enforceable rights whatsoever. In other words, defendants had good cause to believe that Guantanamo was in fact a legal black hole:

> No reasonable government official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights. At the time of their detention, neither the Supreme Court nor this court had ever held that aliens captured on foreign soil and detained beyond sovereign U.S. territory had any constitutional rights — under the Fifth Amendment, the Eighth Amendment, or otherwise.[17]

It stretches credulity to suggest that officials, who were legally required to know that torture was a U.S. war crime,[18] had no inkling that a federal court would have jurisdiction to adjudicate a resulting tort occurring on a U.S. Navy base, and they were thus free to torture and abuse at will, leaving no remedy for Rasul. *Boumediene* only applied to the question of habeas jurisdiction — not the legality of torture and the efficacy of the Geneva Conventions.

Al-Bihani v. Obama

Boumediene specifically left it up to lower courts to fashion procedures for habeas corpus. While in theory this is a useful procedure from an administrative standpoint, it means that there will be additional litigation and, for those affected, there will not be a readily foreseeable end. *Al-Bihani v. Obama* is a court of appeals decision addressing post-*Boumediene* procedures to be applied in habeas corpus actions.[19] Al-Bihani is a Yemeni citizen held at Guantanamo since 2002. The court found that he was lawfully detained and that continuing detention was lawful, notwithstanding the use of a preponderance of evidence standard, a presumption the government's evidence was accurate, and hearsay evidence deemed admissible if it appeared more likely than not that an accuser who was not present and not cross-examinable was speaking accurately.

The court held that the war powers granted by the post-9/11 Authorization for the Use of Military Force (AUMF) are not limited by the international laws of war because the authoriza-

tion contained no actual statement that "Congress intended international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF"[20] and the laws of war as a whole have not been implemented domestically by Congress:

> [W]hile the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, *see Hamdi,* 542 U.S. at 520, 124 S.Ct. 2633, their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers. Therefore, putting aside that we find Al-Bihani's reading of international law to be unpersuasive, *we have no occasion here to quibble over the intricate application of vague treaty provisions and amorphous customary principles*. The sources we look to for resolution of Al-Bihani's case are the sources courts always look to: the text of relevant statutes and controlling domestic caselaw.[21]

The court of appeals is saying in part that while the scope of the AUMF may be limited, the president's powers cannot be limited by anything or anyone. Treaty provisions are cast as "vague" and customary international law as "amorphous." Speaking for the court, Judge Janice R. Brown professes dislike of "amorphous customary principles" and "vague treaty provisions" — the binding fundamental human and humanitarian rights contained in the 1949 Geneva Conventions, the 1966 United Nations International Covenant on Civil and Political Rights, the 1948 UN Universal Declaration of Human Rights, the 1984 UN Convention Against Torture, and customary international law. As of the date of this writing, a petition for certiorari has not been filed.

Al Maqaleh v. Gates

On 21 May 2010, the U.S. Court of Appeals for the District of Columbia determined that three persons who had been detained by the U.S. military without trial at Bagram Air Base in Afghanistan had no habeas corpus recourse to the U.S. courts.[22] A three-judge panel ruled unanimously that, inasmuch as Bagram was the sovereign territory of another government and there were "pragmatic obstacles" to giving hearings to detainees in an active war, *Boumediene* did not apply. According to the panel, Bagram is different from Guantanamo. This was the result argued for by both the Bush and Obama administrations. But the detainees at issue had been captured outside of Afghanistan and brought to Bagram for incarceration. If this opinion stands, the U.S. will have a free hand to kidnap persons from other parts of the world and lock them away indefinitely at Bagram.

President Bush's claim of extravagant executive power — effectively creating a law-free zone in Bagram — has been embraced by the Obama administration. The district court's decision was in fact quite narrow and applied to a relatively small number of persons imported to Bagram who had been held without charge. U.S. District Judge John D. Bates had recognized that Bagram was an active theatre of war, but felt that objection to review could not properly apply to a detainee who was intentionally imported into the war zone. As of this writing, a petition for certiorari has not been filed.

The Case of Binyam Mohamed: An Unflattering Comparison

In the U.K. case of Binyam Mohamed the state secrets doctrine did not prevail.[23] Mohamed is an Ethiopian national and a legal resident of the United Kingdom. In April 2002 while attempting to return to the United Kingdom using a false passport he was arrested at the Karachi airport, and was turned over to U.S. authorities. Subsequently, he was subjected to U.S. extraordinary rendition and incarcerated in prisons in Pakistan, Morocco, and Afghanistan. He alleges that while in Morocco interrogators tortured him using scalpels and razor blades, repeatedly cutting his penis and chest. He was next transferred to Guantanamo and allegedly subjected to continued abuse and humiliation.

On August 7, 2007, Mohamed was one of five Guantanamo detainees that British Foreign Secretary David Miliband requested be freed. On June 28, 2008, the *New York Times* reported that the U.K. government had sent a letter to Mohamed's U.K. attorney confirming they had information about Mohamed's allegations of abuse.[24] This spawned a lawsuit in the U.K. courts requesting that the Foreign Office be compelled to turn over their evidence.[25] On August 21, 2008, the U.K. trial court found in Mohamed's favor, ruling that the exculpatory material should be disclosed as it was essential for his defense in the United States.[26] The documents were in fact disclosed but they were not released to the public. In October 2008, it was announced that the U.S.

charges against Mohamed and four other captives at Guantanamo were being dropped.

On February 23, 2009, almost seven years after his arrest, Mohamed was returned to the United Kingdom where he was released after questioning.[27] Shortly thereafter, Mohamed publicly claimed that British intelligence had colluded with his U.S. interrogators in the torture and abuse that led him to make false confessions. Mohamed sought public release of the discovery materials to support his claim. The Obama administration requested that the discovery material not be released publicly because it would prejudice the special relationship between the two countries. The foreign secretary concurred. After intense American pressure, including warnings from U.S. Secretary of State Hillary Rodham Clinton, the Foreign Office argued that summary publication could cause irrevocable damage to intelligence sharing between the United States and Britain. Rejecting the government's protestations, the three-judge appeals panel ruled that seven paragraphs that give details of "the cruel, inhuman and degrading treatment" administered to Mohamed by American officials were to be made public inasmuch as the public had a right to know. State secrets were not recognized. The foreign secretary decided not to appeal. This was the first time that a British court had been so blunt about its disapproval of interrogation techniques utilized by the Bush administration. The court observed that had these techniques been carried out under the authority of British officials, they would be breaching international treaties:

> Although it is not necessary for us to categorise the treatment reported, it could easily be contended to be at the very least cruel, inhuman and degrading treatment of [Mohamed] by the United States authorities.[28]

A fair reading of the documents now produced supports the contention that, at best, the United Kingdom acquiesced to the U.S. programs of rendition and torture or, at worst, were eager participants.[29] More documents are to be released in the future, and that litigation continues. Meanwhile, British Prime Minister David W.D. Cameron has agreed to a judge-led inquiry into all of the pending claims that Britain's security forces were complicit with the United States in the torture and abuse of terrorism suspects.[30]

On November 16, 2010, the U.K. government announced it had agreed to pay Binyam Mohamed and fifteen other British citizens and residents several million pounds in settlement of their claims for the United Kingdom's complicity in torture and abuse they suffered at Guantanamo and rendered U.S. secret sites. The U.K. government will continue with plans for a formal judicial inquiry led by a retired appellate jurist.[31] Under these circumstances it will be difficult for the United States to continue to evade its responsibility for torture and abuse.

Mohamed v. Jeppesen Dataplan Inc.

On September 8, 2010, an en banc panel of the U.S. Court of Appeals for the Ninth Circuit ruled 6-5 in *Mohamed v. Jeppesen Dataplan Inc.*[32] that the same Binyam Mohamed and four other detainees could not proceed with a parallel private civil suit against Jeppesen Dataplan, a subsidiary of the Boeing Company, because of the state secrets doctrine enunciated in *U.S. v. Reynolds*.[33] Mohamed and others had initiated their lawsuit in 2007 under the Alien Tort Statute. Jeppesen Dataplan arranged the rendition flights that flew Mohamed and the others to Morocco, Egypt, and Afghanistan, where they were tortured. The U.S. government intervened in the litigation, asserting the state secrets doctrine. A three-judge appeals panel had held in August 2009 that the suits could proceed.[34] Invoking the state secrets doctrine, the U.S. Department of Justice sought rehearing en banc urging that the claims be dismissed.

The five-judge en banc dissent pointed out that the plaintiffs never had a chance to present nonsecret evidence. It was publicly disclosed that, according to the sworn nonsecret declaration of Robert W. Overby, the former director of Jeppesen International Trip Planning Services:

> "We do all the extraordinary rendition flights," which he also referred to as "the torture flights" or "spook flights." Belcher stated that "there were some employees who were not comfortable with that aspect of Jeppesen's business" because they knew "some of these flights end up" with the passengers being tortured. He noted that Overby had explained, "that's just the way it is, we're doing them" because "the rendition flights paid very well." [35]

The case was dismissed before Jeppesen had filed an answer to the plaintiff's complaint. The dissenters note:

> Plaintiffs have alleged facts, which must be taken as true for purposes of a motion to dismiss, that any reasonable person would agree to be gross violations of the norms of international law, remediable under the Alien Tort Statute. They have alleged in detail Jeppesen's complicity or recklessness in participating in these violations. The government intervened, and asserted that the suit would endanger state secrets. The majority opinion here accepts that threshold objection by the government, so Plaintiffs' attempt to prove their case in court is simply cut off. They are not even allowed to attempt to prove their case by the use of nonsecret evidence in their own hands or in the hands of third parties.[36]

The seemingly apologetic majority peculiarly awarded the losing plaintiffs all costs on appeal and suggested the alternate remedy of asking Congress for reparations as were awarded to the plaintiffs in *Korematsu*,[37] a remedy that occurred some fifty years after the fact. As of this writing no petition for certiorari has been filed.

Al-Kidd v. Ashcroft

In the September 4, 2009, decision in the case of Abdullah al-Kidd, an African American U.S. citizen born in Kansas and a successful college football athlete who converted to Islam, the Ninth U.S. Circuit Court of Appeals allowed a lawsuit to proceed against former attorney general John D. Ashcroft, alleging abuse of process through the material witness statute.[38] The statute permits the court to place restrictions on travel and residence of witnesses when there is a risk they will not be available for trial.[39] It does not permit detention for investigation. Nonetheless, al-Kidd was detained in jail for investigation under the pretext that he was a material witness in a criminal case. He has never been called as a witness or charged with a crime.

The record showed that Ashcroft had previously announced publicly that he would employ the material witness statute to prevent "new attacks." Federal Bureau of Investigation director Robert S. Mueller III publicly identified al-Kidd as a "major success" in "identifying and dismantling terrorist networks." Al-Kidd was detained in a maximum security facility, shackled, repeatedly strip-searched, and released from his twenty-four-hour illuminated cell for only one to two hours per day. Subsequently he was effectively placed under house arrest, separated from his wife and two children, and lost his job. His detention was based on an FBI affidavit that said he had a one-way $5,000 first-class ticket to Saudi Arabia and that he was believed to have information critical to a prosecution. That information has never been identified. In fact, al-Kidd was going to Saudi Arabia to study Islam and had a $1,700 round-trip coach ticket. The affidavit failed to disclose that he was married and had two children, that all were U.S. citizens, and that he had fully cooperated with the FBI in the past.

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Al-Kidd's subsequent civil action seeks to hold Ashcroft personally liable in tort for abuse of process. Ashcroft claimed absolute prosecutorial immunity. In a 2–1 decision in al-Kidd's favor, the Ninth Circuit disagreed. Certiorari was granted on October 18, 2010.[40] U.S. Supreme Court Justice Elena Kagan recused herself. Justice Anthony M. Kennedy appears to be the swing justice. A 4–4 split would result in affirmance.

Unlike in the United Kingdom, the U.S. administration, Congress, and many courts have steadfastly declined to make any investigation or inquiry into U.S.-sanctioned torture and abuse, notwithstanding that it is only through such a review and allocation of responsibilities that steps can be taken to insure their nonrepetition. The public has extracted no political price for torture and there appears to be no interest in assessing the consequences. Enhanced interrogation primarily affects foreign nonwhite Muslims. Most of the public appears ignorant of the issues and satisfied with the refrains of the apologists that torture works and the detainees are the worst of the worst, despite evidence to the contrary and notwithstanding that Article 12 of the Convention Against Torture, a treaty ratified by the U.S. Senate, requires the United States to "proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

President Obama has recently authorized the targeted killing of an American citizen, Anwar Al-Aulaqi, in Yemen.[41] The American Civil Liberties Union and the Center for Constitutional Rights have brought suit to enjoin the government from extrajudicially executing a citizen by such an ex parte executive fiat.[42] The Department of Justice has moved for dismissal, claiming, among other things, that the decision to target and kill an American citizen is a "political question" and that information "properly protected by the military and state secrets doctrine" would be revealed.[43] There are no public guidelines for targeted killings, there is no limitation to targets of last resort, and there is no judicial or independent oversight.[44]

Although the United Kingdom is not doing everything perfectly,[45] as David Cole suggests, "The Brits Do It Better."[46] Perhaps Edward Coke's "gladsome light of jurisprudence"[47] may in the end shine on the United States from across the pond, exposing the extent of the torture and abuse officially sanctioned at the highest levels of government under the Bush administration. ⚖

Endnotes:

1 [2004] UKHL 56, [2005] 2 AC 68.
2 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush,* 542 U.S. 466 (2004); *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006).
3 But *see Hamdan* (n 2).
4 Nongovermental organization based in Geneva, devoted to promoting the understanding and observance of the rule of law and the legal protection of human rights throughout the world. Mary Robinson, president of the International Commission of Jurists, is the former president of Ireland and the former United Nations high commissioner for human rights. She was awarded the Presidential Medal of Freedom by President Obama in July 2009.
5 *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counterterrorism and Human Right*s, (Executive Summary, Geneva, 2009), at 9.
6 Remarks by the president on national security, May 21, 2009 http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/
7 *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).
8 *El-Masri v. Tenet,* 437 F. Supp. 2d 530 (ED Va 2006), Order affirmed by 479 F.3d 296 (4th Cir 2007), cert. denied 552 U.S. 947 (2007).
9 *El-Masri v. U.S.,* 479 F.3d 296 (4th Cir 2007), 302.
10 *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir 2009), cert. denied 130 S.Ct. 3409.
11 Ibid 630.
12 "No price to pay for torture," *New York Times,* 15 June 2010.
13 *Rasul v. Bush*, 542 U.S. 466, 124 S.Ct. 2686 (2004).
14 *Rasul v. Myers,* 512 F.3d 644 (D.C. Cir. 2008).
15 *Rasul v. Myers*, 563 F.3d 527 (CA DC 2009).
16 *Rasul v. Myers,* 130 S.Ct. 1013 (2009).
17 *Rasul v. Myers* (n 15) 530 (2009) (footnotes omitted).
18 18 USC § 2441.
19 *Al-Bihani v. Obama*, 590 F.3d 866, 870 (DC Cir 2010), rehearing en banc denied by 619 F.3d 1 (D.C. Cir. August 31, 2010).
20 Ibid.
21 Ibid 871-2 (DC Cir 2010) (emphasis added).
22 *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).
23 *Mohamed, R (on the application of) v. Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65.
24 http://www.nytimes.com/2008/06/21/world/europe/21gitmo.html?_r=1&ref=raymond_bonner
25 http://jurist.law.pitt.edu/paperchase/2008/07/uk-guantanamo-detainee-asks-court-to.php
26 *Mohamed, R v. Secretary of State for Foreign & Commonwealth Affairs* [2008] EWHC 2048 (Admin); *Mohamed, R v. Secretary of State for Foreign & Commonwealth Affairs* [2008] EWHC 2100 (Admin).
27 http://www.guardian.co.uk/uk/2009/feb/23/binyam-mohamed-guantanamo-plane-lands
28 *Mohamed*, (n 23) Appendix (x).
29 http://www.guardian.co.uk/law/interactive/2010/jul/14/toture-files-key-passages
30 Wintour, P and Cobain, I, "David Cameron agrees terms of British Torture inquiry" The Guardian (29 June 2010). http://www.guardian.co.uk/uk/2010/jun/29/david-cameron-uk-torture-inquiry
31 "Government to compensate ex-Guantánamo Detainees," BBC (16 November 2010).
32 614 F.3d 1070 (9th Cir. 2010).
33 345 U.S. 1 (1953).
34 *Mohamed v. Jeppesen Dataplan Inc.,* 579 F.3d 943.
35 *Mohamed* (n 32) 1096 FN 5.
36 Ibid 1094.
37 323 U.S. 214 (1944).
38 *Al-Kidd v. Ashcroft,* 580 F.3d 949 (9th Cir. 2009).
39 18 USC § 3144.
40 Ashcroft v. al-Kidd, 79 USLW 3062.
41 S. Shane, "U.S. Decision to Approve Killing of Cleric Causes Unease" New York Times 13 May 2010 http://www.nytimes.com/2010/05/14/world/14awlaki.html
42 *Al-Aulaqi (al-Awlaki) v. Obama,* 10cv1469, U.S. District Court, District of Columbia (Washington) Complaint for Declaratory and Injunctive Relief <http://216.86.138.142/complaint.pdf>.
43 *Al-Aulaqi (al-Awlaki) v. Obama,* 10cv1469, U.S. District Court, District of Columbia (Washington), Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss http://216.86.138.142/dojmtd.pdf
44 "Lethal Force Under the Law," *New York Times* (October 9, 2010).
45 Many of the U.K. legal processes are infected with the virus of secrecy. Control orders, preventive detention, special advocates, and the Special Immigration Appeals Commission are still operative. Secret evidence is being used with increasing frequency in deportation hearings, control order proceedings, parole board cases, asset freezing applications, precharge detention hearings in terrorism cases, employment tribunals, and even before planning tribunals. In some criminal cases secret evidence is never made public and anonymous testimony is presented.
46 D. Cole, *The Brits Do It Better*, *New York Review of Books*, 12 June 2008.
47 Edward Coke, *First Institute*, Epilogue.