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LIBERTY, JUDICIAL REVIEW, AND THE RULE OF LAW AT GUANTANAMO: A BATTLE HALF WON

DOUGLASS CASSEL*

Abstract: In Boumediene v. Bush, 128 S. Ct. 2229 (2008), five members of the Supreme Court held that foreign prisoners at Guantanamo enjoy the constitutional privilege of habeas corpus; that their imprisonment had lasted too long for the Court to await completion of statutory review by lower courts of military tribunal findings that the prisoners were “enemy combatants”; and that the statutory judicial review was too deficient to substitute for the Great Writ.

Four Justices vigorously dissented. On the surface they differed on the history of the reach of the common law writ of habeas corpus, and on the procedural guarantees afforded by habeas, as compared to the new statutory procedures for judicial review.

More fundamentally, the controlling differences were on questions of constitutional priorities and separation of powers. In assessing judicial review of prolonged detentions at Guantanamo, which constitutional value matters more—liberty or security? Which is more at risk? And which branch—the judicial or one of the political branches—is more suited to making these judgments?

In assuring prisoners at Guantanamo access to habeas corpus, the majority extended a series of rulings in which the Court has defended individual liberty, judicial review of executive detentions, and ultimately the rule of law, against encroachments by an overzealous executive, joined in some cases by compliant congressional majorities.

But the battle is only half won. The majority left open critical substantive

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and procedural questions. For example: Is there any lawful basis for indefinite detention of persons captured outside traditional war zones? What is the government’s burden of proof in a habeas case from Guantanamo? How should the courts handle hearsay, classified evidence, and evidence obtained by coercive means?

Although lower courts have subsequently begun to grapple with these questions, definitive answers may depend on the future composition of the Court—unless President-elect Obama fulfills his stated intention to close the prison at Guantanamo, in which event the issues may become moot, and this offense against the rule of law brought finally to an end.

INTRODUCTION

The Supreme Court ruling in Boumediene v. Bush is the latest in a quartet of judgments in the last four years in which narrow Supreme Court majorities have defended individual liberty, judicial review of executive detentions, and ultimately the rule of law, against encroachments by an overzealous executive and, in the two most recent cases, by compliant congressional majorities as well.

In Boumediene, a bare majority of the Court ruled that foreign prisoners detained as unlawful “enemy combatants” at the U.S. Naval Base in Guantanamo Bay, Cuba, have a constitutional right to seek habeas corpus relief. The majority further held that the truncated judicial review invented by the Detainee Treatment Act of 2005 (“DTA”) for prisoners at Guantanamo is not an “adequate and effective” substitute for the Great Writ.

I. The Road to Boumediene

To appreciate the cumulative value of the successive stands now taken by the Court, one must recall the starting point. Before the Court first

2. Id. at 2240. Tracking the language of the Constitution, the Court’s judgment refers to the “[p]rivilege” of habeas corpus. Id. But this privilege is clearly the functional equivalent of a right; the majority found the judicial review provision of the Military Commissions Act of 2006 to be unconstitutional, precisely because it purported to take away habeas without providing an adequate substitute. Id. The majority mused, “[t]he word ‘privilege’ was used [in the Constitution], perhaps, to avoid mentioning some rights to the exclusion of others.” Id. at 2246.
ruled in 2004 in *Rasul v. Bush*, the stance of the Executive branch was breathtakingly lawless. The President asserted the right, on the basis of secret intelligence information, to imprison foreign citizens at Guantanamo indefinitely and to hold them until the "war on terrorism" is over—whenever that may be—without charging them with any offense, and without their ever having access to lawyers or courts. In other words, the President said, in effect, "Trust me to imprison human beings, potentially for life, with no judicial review."

This, in turn, reflected the Executive position that no U.S. law—no safeguard of the Constitution, no statute and no treaty—conferred any rights on the prisoners at Guantanamo. And since no Cuban law reached the U.S. Naval Base at Guantanamo either, the effect of the Executive’s legal theory was, as one British Court acidly observed, to convert Guantanamo into a "legal black hole."

Suspected enemy combatants were first sent to Guantanamo in January 2002. After some had been imprisoned there for two and a half years, the Court decided *Rasul*. By a 6-3 majority, the Court interpreted the federal habeas corpus statute, in light of the history of habeas at British common law, to extend habeas jurisdiction to foreign citizens held in a territory, specifically Guantanamo, "over which the United States exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty.’"

At the same time the Court addressed the rights of U.S. citizens held as enemy combatants in the U.S. In *Hamdi v. Rumsfeld*, eight Justices rejected the Executive claim of power to subject Americans to the same treatment it inflicted on foreigners at Guantanamo—to imprison them indefinitely as enemy combatants, with no hearings, no charges and no lawyers.

But the Justices could not agree on a majority opinion. A four-Justice plurality held that the President had lawful authority to detain indefinitely U.S. citizens captured in connection with hostilities in Afghanistan, but

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6. See id. at 483 n.15.
only pursuant to constitutionally mandated procedures.\(^\text{11}\) They held that due process requires, at minimum, that a citizen detainee "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."\(^\text{12}\)

Four justices denied the premise: In their view, the President had no authority to detain U.S. citizens indefinitely as enemy combatants.\(^\text{13}\) Justices Scalia and Stevens held this view on constitutional grounds.\(^\text{14}\) The Constitution, they argued in dissent, bars indefinite detention in U.S. territory of U.S. citizens not charged with crimes, unless Congress suspends the right of habeas corpus, which it had not done.\(^\text{15}\)

Justices Souter and Ginsburg disputed the President's authority to detain on statutory grounds: They believed that Congress had not only failed to authorize, but had in fact prohibited such detentions.\(^\text{16}\) Nonetheless, they reluctantly concurred in the plurality judgment, solely in order to create a majority result that would at least require a remand for the due process protections required by the plurality.\(^\text{17}\)

The Pentagon responded to Rasul and Hamdi by establishing Combatant Status Review Tribunals ("CSRTs"): panels of military officers who afford detainees at Guantanamo hearings to determine whether they are "enemy combatants."\(^\text{18}\) Despite numerous procedural shortcomings,\(^\text{19}\) the military contended that CSRTs satisfied even the due process standards for U.S. citizens set forth by the plurality in Hamdi. In other words, CSRTs supposedly provide a "meaningful" opportunity for detainees to contest the "factual basis" for detention before a "neutral" decisionmaker.\(^\text{20}\)

Once these new administrative procedures were in place, Congress in 2005 passed the DTA, which revised the statutory procedures for judicial review. Attempting to nullify Rasul, Congress amended the habeas statute

\begin{flushleft}
11. \textit{Id.}
12. \textit{Id.} at 533.
13. \textit{Id.} at 554, 573, 577 (Scalia, J., dissenting).
14. \textit{Id.}
15. \textit{Id.}
17. \textit{Hamdi}, 542 U.S. at 553-54 (Souter, J., concurring in part, dissenting in part, and concurring in judgment).
19. See \textit{infra} Part II.B.2.
\end{flushleft}
to exclude jurisdiction over foreign detainees at Guantanamo.\textsuperscript{21} It offered them instead a limited form of judicial review of the determinations of CSRTs.\textsuperscript{22}

In 2006, a 5-4 majority of the Court—the Rasul majority, minus the now departed Justice Sandra Day O’Connor—decided \textit{Hamdan v. Rumsfeld}.\textsuperscript{23} The now reduced majority interpreted the provision of the DTA denying habeas not to apply to cases pending when the DTA was passed.

On the eve of the 2006 elections, Congress responded to this ruling by passing the Military Commissions Act of 2006 (“MCA”).\textsuperscript{24} Among other provisions, the MCA purported to deny habeas to all Guantanamo prisoners who then had pending habeas petitions.\textsuperscript{25} This set the stage for \textit{Boumediene}.

\textbf{DISCUSSION}

\textbf{II. Showdown at \textit{Boumediene}}

The main issues on the merits in \textit{Boumediene} were constitutional.\textsuperscript{26} First, does the Constitution afford foreign prisoners at Guantanamo a right to habeas corpus?\textsuperscript{27} If so, that right cannot be withdrawn, except pursuant to the Suspension Clause, Article I, Section 9, Clause 2 of the Constitution, which provides, “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.”\textsuperscript{28} No one contended that the MCA suspended habeas.

The second constitutional question, which then arose only if the Court ruled that the right of habeas indeed extends to prisoners at Guantanamo,
was whether the alternative DTA judicial review is an adequate substitute for habeas.29

There was also a preliminary, prudential issue: Should the Court refrain from deciding these constitutional issues? The first judicial reviews of CSRT findings under the DTA were pending before the United States Court of Appeals for the District of Columbia Circuit.30 Under doctrines of exhaustion of statutory remedies, and avoidance of unnecessary constitutional issues, the Court would not ordinarily hear a habeas petition while statutory procedures below were pending.31 Should it do so now?

A five-member majority of the Court—the same five who decided Hamdan (Justices Breyer, Ginsburg, Kennedy, Souter and Stevens)—answered all three questions in favor of the petitioning prisoners. They held that the prisoners, some of whom had been imprisoned for six years without a final judicial determination, had waited too long for the Court to defer hearing the case any longer.32 They ruled that the constitutional right to habeas, at least, extends to foreign citizens detained at Guantanamo, where the U.S. has de facto, if not de jure, sovereignty.33 And they decided that the combination of CSRTs and limited judicial review under the DTA were not adequate substitutes for habeas.34

The dissenters took opposing views on all three questions. In a dissent authored by Chief Justice Roberts and joined by Justices Alito, Scalia and Thomas, they argued that the majority was precipitous in bypassing the proceedings below and reaching the constitutional questions,35 and further that DTA judicial review is, in any event, an adequate substitute for habeas.36 In a separate dissent written by Justice Scalia and joined by the other three Justices, they argued that foreign citizens at Guantanamo have no constitutional right to habeas.37

Both sides offered lengthy analyses of the historical reach of habeas, as well as detailed assessments of the CSRT and DTA review procedures,

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29. Boumediene, 128 S. Ct. at 2243-44.
32. Boumediene, 128 S. Ct. at 2275.
33. Id. at 2253.
34. Id. at 2272.
35. Id. at 2280-81 (Roberts, C.J., dissenting).
36. Id. at 2280.
37. Id. at 2302 (Scalia, J., dissenting).
which shaped their views on whether the Court should reach the constitutional questions or, instead, await the outcome of the pending DTA judicial review in the court of appeals.

A. The Real Fault Lines

The fundamental, and probably controlling, differences between the two sides were on questions of constitutional priorities and separation of powers. In assessing judicial review of detentions at Guantanamo, which constitutional value matters more—liberty or security? Which is more at risk? And which branch is most appropriate to make this judgment—the judicial branch, traditional guardian of individual liberty, or the political branches, with their greater expertise and constitutional responsibility to defend national security?

These are the real fault lines that divided the majority and dissent in *Boumediene*, far more than their differing historical and procedural assessments. And these fault lines are likely to determine future cases. With one member of the majority now 88 years old, and others rumored to be ready to retire soon, the constitutional philosophies of the next appointments to the Court may be decisive for the important questions left undecided by *Boumediene*. Among them are the scope and standard of habeas review of factual determinations made by CSRTs, and whether there is any lawful basis for detentions at Guantanamo of persons (like Mr. Boumediene) captured outside traditional war zones.

I. Liberty and Security

Writing for the majority, Justice Kennedy was clear on priorities and trade-offs among constitutional values. The Framers, he began, "viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom." That was why habeas was "one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights."

Security matters too. But the government, wrote Justice Kennedy, advanced "no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the

39. *Boumediene*, 128 S. Ct. at 2271, 2277. Some petitioners in *Boumediene* were apprehended, not on the battlefield in Afghanistan, but "in places as far away from there as Bosnia and Gambia." *Id.* at 2241; see infra Part II.B.
40. *Id.* at 2244.
41. *Id.*
The detainees were "contained in a secure prison facility located on an isolated and heavily fortified military base," far from any "active theater of war."

Security, he acknowledged, requires sophisticated intelligence and a capable military. But security depends on more: "Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint...." In short: "The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law."

In dissent, Justice Scalia began by warning of the "disastrous consequences" of the majority ruling. "America is at war with radical Islamists," he reminded. Providing habeas review to prisoners at Guantanamo, he predicted, "will make the war harder on us. It will almost certainly cause more Americans to be killed."

Why? First, he argued, habeas review would set free increasing numbers of enemy combatants who will return to battle. Some thirty prisoners previously released by the military had already returned to fight, in some cases killing civilians and Afghan soldiers. If habeas sets the evidentiary bar higher in order to justify continued detention, he projected, the number of enemy fighters returned to combat "will obviously increase."

Second, information released "to the attorneys representing our enemies" in a habeas trial, as in earlier criminal trials, could compromise national security.

The dissenters' concerns are legitimate. But they overlook larger security issues. Does the worldwide condemnation of indefinite detentions at Guantanamo undermine our national security? Does it deter allies from cooperating with us in apprehending suspected terrorists and in sharing

42. Id. at 2261.
43. Id.
44. Id. at 2262.
45. Boumediene, 128 S. Ct. at 2277.
46. Id.
47. Id.
48. Id. at 2294 (Scalia, J., dissenting).
49. Id.
50. Id.
52. Id. at 2295.
53. Id.
intelligence? Does it enrage Muslims worldwide, generating far more new recruits for the “radical Islamists” than any plausible number of enemy combatants likely to be set free by habeas? Does restoring habeas for Guantanamo prisoners send a healthy signal to the world that we are who we say we are—defenders of liberty and the rule of law? Will rulings like those in Rasul, Hamdi, Hamdan and now Boumediene, preserve at least some of our honor and standing among allies whose assistance we need? Will these rulings ultimately make our model—the rule of law, enforced by independent courts—more attractive in the global contest for hearts and minds than a model of extremist theocracy?

Justice Scalia’s alarm bell also suffers from mundane methodological cracks. The Pentagon has already released most prisoners from Guantanamo to other governments. Some were then set free. It is likely that the prisoners who remain are, in general, detainees for whom the evidence is stronger that they should be kept in detention, because they are too dangerous. If so, then it is not at all “obvious” that granting them habeas review will lead to a high—let alone to a higher—release rate.

A second category of prisoners who remain at Guantanamo are not even enemy combatants, but simply have no other eligible government willing to receive them. Because the government concedes that seventeen Chinese Uighurs held at Guantanamo are not enemy combatants, but they cannot be returned to China where they risk being tortured, and no other government is yet willing to take them, a federal judge in October 2008 ordered that they be released into the U.S. After the government argued that the men were trained for armed insurrection against China, the court of appeals stayed the Order pending appeal. The government now argues that a U.S. judge has no authority to order their release from Guantanamo into the U.S. Yet the fact remains: not even the government contends that these prisoners are “enemy combatants.”


2. Separation of Powers

A related fault line separating the majority from the dissent has to do with the proper conception of separation of powers. "In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches," Justice Kennedy recognized for the majority.\(^5\) "The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security."\(^6\) But, he added, "[w]ithin the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person."\(^6\)

Some prisoners had been at Guantanamo "for six years with no definitive judicial determination."\(^6\) Their access to habeas was now a "necessity" in order to determine whether they were lawfully held, "even if, in the end, they do not obtain the relief they seek."\(^6\)

Justice Kennedy thus invoked the traditional role of the courts as independent guardian of the rights of unpopular individuals and minorities who often cannot expect adequate protection from the majoritarian branches.\(^6\)

In contrast, Chief Justice Roberts’ dissenting opinion focused on the role of courts, not so much as guardians of individual rights, but as meddlers in foreign policy. He lamented that the American people "today lose a bit more control over the conduct of this Nation’s foreign policy to unelected, politically unaccountable judges."\(^6\)

Justice Scalia was more concerned about the majority’s poking its nose into military matters. Dismissing Justice Kennedy’s conclusion that allowing habeas at Guantanamo would not harm the military mission, Justice Scalia asked and answered, "What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever."\(^6\)

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60. Id. at 2276-77.
61. Id. at 2277.
62. Id.
63. Id.
64. In an oft-cited dictum in U.S. v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), the Court acknowledged that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."
66. Id. at 2296 (Scalia, J., dissenting).
Despite these differing perspectives, there is significant common ground. No one questions that the Constitution assigns the political branches, not the Judiciary, primary responsibility for national security. Likewise few doubt that the Judiciary has a duty to protect the rights of unpopular individuals and groups—and who is more unpopular than suspected terrorists?—from the majoritarian branches.

The dispute is over the relative importance of these roles in the context of detentions at Guantanamo. In discounting any serious security threat posed by extending habeas to Guantanamo, the majority relied not so much on its own judgment, as on the fact that the Executive put forward “no credible arguments” of any threat to security. Surely if there were such a threat, the Executive had both a duty and the expertise to bring it forcefully to the Court’s attention.

If the threat to security was slight, in the majority’s view, the threat to liberty was grave: some detainees had been imprisoned for six years with no final ruling on their status. Moreover, the DTA review procedures were not likely to lead to reliable determinations of their status.

For the majority, then, the security argument was weak, the liberty argument strong. In order to adjust the balance, Justice Scalia outdid the Executive in predicting a security threat, while Justice Roberts downplayed the threat to liberty, by focusing on the formalities—but not the realities—of DTA judicial review. Their arguments suggest a general inclination to give more weight to security, and less to liberty (at least for foreign citizens), than would the majority. They also reflect a general view that courts should defer to the political branches, even when liberty is at stake, at least in cases involving foreign policy or national security.

But the debate over separation of powers went even further than these familiar philosophical differences: Each side made startling accusations of usurpation of powers. The majority warned that the Judiciary could not allow the Constitution to be “contracted away.” In other words, the Judiciary could not permit the Executive to surrender formal sovereignty, while keeping “plenary control” over a territory like Guantanamo, and thereby to enable “the political branches to govern without legal

67. *Id.* at 2261 (majority opinion).
68. See *infra* Part II.B.2.
69. See *infra* Part II.B.2.
70. Justice Scalia’s opinion defends habeas jurisdiction over U.S. detentions of U.S. citizens abroad, but not over U.S. detentions of aliens, who, he explains, are not part of a “system in which rule is derived from the consent of the governed, and in which citizens (not ‘subjects’) are afforded defined protections against the Government.” *Boumediene*, 128 S. Ct. at 2306.
71. *Id.* at 2259 (majority opinion).
constraint.\textsuperscript{72}  

If this is true of the Constitution generally, the majority admonished, it is even truer of habeas corpus. The Great Writ "is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain."\textsuperscript{73}  

Did the majority mean to imply that the Executive maintained its lease for Guantanamo precisely in order to hold on to a law-free zone? Or, more modestly, that if the Court were to allow a formalistic reservation of de jure sovereignty to knock out habeas at Guantanamo, would such a ruling encourage the Executive to utilize formal reservations of sovereignty to "contract away" the Constitution elsewhere too?  

Either way, the suggestion of executive "manipulation" seems extraordinary. It can probably best be understood in the context of the events which led the Court to take the \textit{Boumediene} case in the first place.\textsuperscript{74}  

It may also reflect the evidence, widely reported by 2008, that a belief that federal court jurisdiction did not extend to Guantanamo was at least one important reason why the Executive originally chose to detain post-9/11 prisoners there.\textsuperscript{75}  

\begin{thebibliography}{99}
\bibitem{72} \textit{Id.} at 2258-59.
\bibitem{73} \textit{Id.} at 2259.
\bibitem{74} \textit{See infra} Part II.C.
\bibitem{75} Major U.S. media had long reported explanations by government officials that Guantanamo was chosen because it is the "legal equivalent of outer space." Jess Bravin, \textit{Guantanamo Bay Detainees Seek Hearings – Lawyers Question Holding Suspected Terrorists Without Offering Legal Case Against Them}, \textit{WALL ST. J.}, July 3, 2002, at A4 (stating that Guantanamo was chosen over military bases on U.S. territories in the Pacific, which are under the jurisdiction of the United States Court of Appeals for the Ninth Circuit); ABCNews.com, \textit{Detention Dilemma: Two Years After 9/11, Guantanamo Prisoners Remain in Legal Limbo}, June 25, 2004, http://web.archive.org/web/20040625184522/http://abcnews.go.com/sections/2020/US/2020_guantanamo_040625-1.html ("Guantanamo had been chosen deliberately. It was, one official said, the ‘legal equivalent of outer space.’"); Michael Isikoff, Stuart Taylor & Daniel Klaidman, \textit{The Guantanamo Fallout}, \textit{NEWSWEEK}, July 17, 2006, at 30-31 (citing State Department lawyer David Bowker, a member of the Bush Administration “working group” on detainees, who recalled that "a colleague explained the goal: to ‘find the legal equivalent of outer space’ – a ‘lawless’ universe. As Bowker understood it, the idea was to create a system where detainees would have no legal rights and U.S. courts would have no power to intervene.").

These recollections are supported by contemporaneous documents. On December 28, 2001, shortly before the first detainees were transferred to Guantanamo, the Office of Legal Counsel of the Justice Department advised the Department of Defense that "the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at GBC [Guantanamo Bay, Cuba]. Nonetheless, we cannot say with absolute certainty that any such petition would be dismissed for lack of
The dissenters responded with accusations, not of executive, but of judicial manipulation. Justice Scalia claimed that if habeas was designed to restrain the Executive, then the limits on habeas—which, he argued, the majority exceeded—were "just as much 'designed to restrain' the incursions of the Third Branch."  

His parallelism makes for good rhetoric, but bad history. The thrust of the historical development of habeas corpus was to check arbitrary executive detentions. Geographic limits on the scope of habeas reflected, not separation of judicial and executive powers, but the practical reality that the Court could not rule where its writ could not reach, coupled with comity toward the prerogative of foreign governments to govern in their own territories. At Guantanamo, neither historical concern applies: U.S. power controls the base without question, and no foreign government exercises any rights that must be respected.  

Justice Scalia also made a separate, functional claim: "'Manipulation' of the territorial reach of the writ by the Judiciary poses just as much a threat to the proper separation of powers as 'manipulation' by the Executive." In theory, this could be a valid claim. For example, if the Judiciary were to require immediate habeas corpus review of battlefield captures of enemy combatants in foreign lands, that would amount to manipulation of a writ never intended to reach so far. But Justice Kennedy was careful to rule out such imprudence. When foreign citizens are detained abroad, he cautioned, "it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody."
Moreover, Guantanamo is no battlefield. Habeas for prisoners at Guantanamo, albeit unprecedented, is not judicial manipulation. Justice Scalia's effort to convert the moderate Justice Kennedy into a judicial power-grabber lacks credibility.

B. The Merits: Formalism vs. Practical Realism

In addressing both the reach of habeas jurisdiction and the adequacy of alternative judicial review under the DTA, the majority stressed practical realities, while the dissenters leaned on formalistic concerns.

1. Habeas Jurisdiction over Foreign Detainees at Guantanamo

In reviewing common law precedents for habeas jurisdiction over detentions of foreign nationals in marginal territories, as well as precedents for extraterritorial applications of the Constitution, Justice Kennedy's opinion was as candid as it was pragmatic. There simply is no precise precedent. Earlier cases involve pre-Revolutionary British habeas jurisdiction (or lack thereof) over Scotland, Ireland or the Channel Isles; constitutional protections for American overseas territories; the rights of spouses of American service members overseas or of Americans whose homes are searched in other countries; and the denial of habeas review for foreign citizens convicted after full military commission trials overseas and held in prisons where the U.S. shared jurisdiction with other detaining powers during World War II. None of these disparate cases directly answers the question of whether habeas jurisdiction extends over executive detentions of foreign citizens in a territory, like Guantanamo, where the U.S. exercises plenary, de facto jurisdiction, but not formal de jure sovereignty.

"In the end," concluded Justice Kennedy, "a categorical or formal conception of sovereignty does not provide a comprehensive or altogether satisfactory explanation" for the territorial scope of habeas at British common law. Likewise the "common thread" uniting precedents on extraterritorial application of the Constitution is "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not

80. Justice Kennedy explained: "[It] is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel." Id. at 2262.
81. Id. at 2248-51, 2253-58, 2259-62.
82. Boumediene, 128 S. Ct. at 2253.
83. Id. at 2250.
formalism."

Dismissing the practical realities underlying the precedents, Justice Scalia’s reply was unrelentingly binary: territory is either sovereign or not. There was no precedent to exercise habeas jurisdiction over detentions of “aliens abroad” or of foreign citizens in “foreign lands.”

True enough, but that argument overlooks the unique character of Guantanamo—a territory where the U.S. exercises plenary control, has done so for more than a century, and can continue to do so for as long as it chooses; and where the formally sovereign (Cuban) government cannot so much as set foot. Such a place is not, in any meaningful sense, a “foreign land.”

2. Adequacy of DTA Review as a Substitute for Habeas Corpus

Practical realities similarly informed Justice Kennedy’s assessment of DTA judicial review of CSRT findings as a substitute for habeas. Common law habeas, he observed, was an “adaptable remedy. Its precise application and scope changed depending upon the circumstances.” Above all, habeas must afford the prisoner a “meaningful opportunity” to demonstrate that he is held unlawfully. The necessary scope of habeas review “depends upon the rigor of any earlier proceedings.” “Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for habeas corpus is more urgent.” This, of course, is precisely the situation at Guantanamo.

In evaluating the adequacy of alternative judicial review under the DTA, explained Justice Kennedy, what matters is the “sum total of procedural protections afforded to the detainee at all stages, direct and collateral.” The majority opinion thus assesses the procedural protections afforded detainees both before the CSRT and in the subsequent DTA judicial review.

The majority identified numerous deficiencies in the CSRT proceedings. The detainee:

84. Id. at 2258.
85. Id. at 2294, 2301-02, 2306 (Scalia, J., dissenting).
86. Id. at 2267 (majority opinion).
87. Id. at 2266.
88. Boumediene, 128 S. Ct. at 2268.
89. Id. at 2269.
90. Id.
91. Id.
Has limited means to find or present evidence to challenge the government's case against him; he can call witnesses only if "reasonably available" to Guantanamo;

Has no assistance of counsel;

May not be aware of the most critical allegations against him, since he can access only the "unclassified portion" of the government's information;

Can be determined to be an enemy combatant on the basis of hearsay; and

Faces a "closed and accusatorial" process.\footnote{Id. at 2269-70 (citation omitted).}

Given these shortcomings of the CSRT process, meaningful judicial review becomes all the more important. Yet the majority found troubling deficiencies in the DTA judicial review as well:\footnote{Id. at 2271-74.}

The court of appeals is not explicitly empowered to order release of the detainee.

The court of appeals is not explicitly empowered to review or correct CSRT factual determinations, or to make findings of fact. Its scope of review is limited to whether the CSRTs followed their own "standards and procedures" and whether those standards and procedures are lawful.\footnote{\textit{Boumediene}, 128 S. Ct. at 2272 (quoting Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(C)(i), 119 Stat. 2739, 2742 (codified as amended at 28 U.S.C. § 2241(e)(1))). The majority did find one opening for factual review; one of the Pentagon standards requires that the CSRT conclusion "be supported by a preponderance of the evidence... allowing a rebuttable presumption in favor of the Government's evidence." \textit{Id.} (quoting DTA § 1005(e)(C)(i)).}

The detainee cannot present relevant exculpatory evidence that was not made part of the record in the CSRT proceedings. Although the court of appeals decided that the DTA allows it to order production of all "reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets
the criteria to be designated as an enemy combatant, even this did not give the detainee an opportunity to present evidence “discovered after the CSRT proceedings concluded.”

The majority was prepared to assume that the DTA could be construed to cure the first two defects (release orders and review of findings of fact), but not the third—the detainee’s inability to present newly discovered or available evidence. This deficiency sufficed, by itself, to conclude that DTA judicial review “falls short of being a constitutionally adequate substitute” for habeas. Moreover, even if this deficiency were to be cured, the “cumulative effect” of the DTA deficiencies would still be constitutionally fatal: the DTA could not fairly be read to cure them all, because to do so would “come close” to reinstating the very habeas procedure Congress sought to foreclose.

Denouncing the majority’s procedural standards as a “bait-and-switch,” Justice Scalia complained that the majority had upped the ante since the 2004 Hamdi decision. There the plurality held that due process requires that a citizen detainee “must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” Now the majority was requiring far more, including an opportunity to present newly discovered evidence on review, and was requiring all this for non-citizens.

In fact, Justice Scalia was comparing apples and oranges. As the majority pointed out, the Hamdi plurality focused on what due process required of executive detention procedures, in a context (detention of a U.S. citizen in the U.S.) where subsequent judicial review by means of habeas corpus was not in question. The issue in Boumediene was different: What form of judicial review is an adequate substitute for habeas corpus? Habeas is a writ designed to “cut through all forms”; its requirements in a given case might well be stricter than the minimum allowed by due process.

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96. Id.
97. Id. at 2271-72.
98. Id. at 2272.
99. Id. at 2274.
100. Id. at 2294 (Scalia, J., dissenting).
103. Id. at 2270 (quoting Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting)).
of law. While the majority ruled that CSRTs coupled with DTA judicial review were not adequate substitutes for habeas, it expressly declined to rule on "whether the CSRTs, as currently constituted, satisfy due process standards."\textsuperscript{104}

Chief Justice Roberts' dissent focused on a different point: He objected that the majority had struck down "the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants."\textsuperscript{105} True, but that begs the question of what is the proper reference point for comparison—military hearings to determine prisoner of war status in a combat zone, or habeas corpus? As the majority noted, the DTA procedures were not more "generous" than habeas review,\textsuperscript{106} far from it.

The Chief Justice was also unrealistic in assessing the "generous" procedural rights afforded detainees before CSRTs. A good example is one he selected: "Take witness availability. What makes the majority think witnesses will become magically available when the review procedure is labeled 'habeas'?\textsuperscript{107}

Two answers come readily to mind: Detainees in habeas proceedings, unlike CSRT proceedings, are not denied the assistance of counsel. Counsel, in turn, are not held essentially \textit{incommunicado} on an inaccessible island outpost. Unlike the detainee before the CSRT, counsel before a habeas court can travel to the detainee's home country or to other distant lands to locate and persuade exculpatory witnesses to agree to testify.

As the majority noted, a case in point may already have occurred: One detainee asked the CSRT to call his employer as a witness to corroborate his claim that he had no affiliation with Al Qaeda. The CSRT found that the employer was not reasonably available. Once the case went before the court of appeals, however, and the detainee was assisted by counsel for the first time, counsel reported that the employer was indeed available.\textsuperscript{108} But by then it was too late: under DTA review, unlike habeas review, the reviewing court cannot consider evidence not reasonably available to the government at the CSRT stage.

The Chief Justice was on stronger ground in pointing out that the majority had left future habeas procedures murky. It had replaced DTA review "with a set of shapeless procedures to be defined by federal courts at some future date."\textsuperscript{109}

\textsuperscript{104} \textit{Id}.
\textsuperscript{105} \textit{Id}. at 2279 (Roberts, C.J., dissenting).
\textsuperscript{106} See supra note 97 and accompanying text.
\textsuperscript{107} \textit{Boumediene}, 128 S. Ct. at 2292 (Roberts, C.J., dissenting).
\textsuperscript{108} \textit{Id}. at 2273 (majority opinion).
\textsuperscript{109} \textit{Id}. at 2279 (Roberts, C.J., dissenting).
The majority indeed left many questions to be answered by lower courts on remand. For example, it “ma[de] no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise” on remand.¹¹⁰

In a sense this was understandable and even laudable: it reflects traditional principles of judicial restraint, as well as Justice Kennedy’s instinctive caution. Unfortunately, as the Chief Justice points out, it will mean further delay for the very detainees whose already long imprisonment without a final judicial determination of their status so troubles the majority.¹¹¹

Within months of the judgment in Boumediene, lower courts resolved, in the first instance, many of the questions left open by the Supreme Court. They decided that in habeas proceedings brought by prisoners at Guantanamo, the government bears the burden of proof to justify detention by a preponderance of the evidence,¹¹² they adopted the government’s own definition of “enemy combatant”;¹¹³ they required the government to produce unclassified versions of its proof and to provide classified versions to properly cleared attorneys for the prisoners and, where the government declined to do so for reasons of national security, to produce the secret evidence in camera to the court, which might then order its release or require the government to forego reliance upon it;¹¹⁴ they authorized the prisoner to conduct broad discovery of the government’s evidence and to present his own evidence;¹¹⁵ they required the government to disclose exculpatory evidence,¹¹⁶ including in some cases evidence of coercion or torture;¹¹⁷ they allowed reliance on hearsay, subject to conditions of

¹¹⁰ Id. at 2276 (majority opinion).
¹¹¹ Id. at 2282, 2293 (Roberts, C.J., dissenting).
¹¹² E.g., In re Guantanamo Bay Litigation, No. 05-1509, 2008 U.S. Dist. LEXIS 97434, at *103-04 (D.D.C. Oct. 9, 2008) [hereinafter “Guantanamo”].
¹¹³ Boumediene v. Bush, No. 04-1166, 2008 U.S. Dist. LEXIS 87133 (D.D.C. Oct. 27, 2008). Under the definition adopted, an “enemy combatant” is “an 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.” Id. at *7.
¹¹⁴ E.g., Guantanamo, supra note 112, at *98, *101-03.
¹¹⁶ E.g., Guantanamo, supra note 112, at *98-99.
¹¹⁷ Dhiab, supra note 115, at *5-6 (Exculpatory evidence “includes any evidence of abusive treatment, torture, mental incapacity, or physical incapacity which could affect the credibility and/or reliability of evidence being offered.”).
necessity and reliability, they granted a rebuttable presumption of authenticity to the government’s evidence; where material issues of fact could not be resolved on the papers, they conducted evidentiary hearings; they ordered the release (as of this writing) of seventeen Uighurs no longer deemed to be enemy combatants, as well as of five of the six prisoners involved in the Boumediene case, and they authorized continued detention of the sixth Boumediene prisoner as an “enemy combatant,” even though he was captured outside a traditional war zone, because he was planning to take up arms against the U.S. and to facilitate the travel of others to join the fight against the U.S. in Afghanistan.

All these rulings are, eventually, subject to appeal. They could well be decided in the last instance by the Supreme Court. In that event, the Court’s ruling in Boumediene will have left the habeas battle at Guantanamo only half won: whoever occupies the next vacancies on the Supreme Court may determine the final outcome.

Alternatively, these issues could be left without Supreme Court resolution, in the event that President-elect Barack Obama, as he has stated he will, decides to close Guantanamo, thus potentially rendering the questions moot.

C. Why Did the Court Take the Case?

The Court initially declined to hear Boumediene: on April 2, 2007, over dissents by Justices Breyer, Ginsburg and Souter, the Court denied the petitions for certiorari. In a joint statement on the denial, Justices Kennedy and Stevens stated that “traditional rules governing our decision of constitutional questions, and our practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus, make it appropriate to deny these

118. E.g., Guantanamo, supra note 112, at *105-06.
119. Compare id., at *104 (“rebuttable presumption of accuracy and authenticity”) with Dhiab, supra note 115, at *12 (“rebuttable presumption of authenticity, and only authenticity”).
123. Id. at *19-21.
petitions at this time."^{126}

Yet only two months later, on June 4, the Court surprised observers by inviting the government to respond to the petition for rehearing of the denial of certiorari.\(^{127}\) One month later, the Court on rehearing agreed to take the case.\(^{128}\) What happened to make at least one,\(^{129}\) and perhaps both,\(^{130}\) Justices Kennedy and Stevens reverse course in the space of two or three months?

Because the dissenters chastised the majority for overriding prudential doctrines of restraint and taking the case,\(^{131}\) the question is not one of mere historical curiosity. Moreover, the reasons that likely motivated the majority to take the case—disturbing information about Guantanamo detentions and CSRTs publicized in May and June of 2007—probably also informed aspects of the eventual ruling on the merits.

This writer is of course not privy to what changed the mind of Justices Kennedy or Stevens or both. But five days before the Court surprisingly asked the government to respond to the petition for rehearing, a prisoner at Guantanamo committed suicide. A Washington Post account noted that this was the fourth suicide at the base and that there had been more than forty suicide attempts. "Attorneys for detainees[...]") it reported, "have talked emotionally about the desperation their clients feel and have railed against what they consider worsening conditions ... ."\(^{132}\) A New York Times story added, "[s]everal of the detainees’ lawyers have said in recent months that the psychological condition of many of the detainees was markedly deteriorating. They said that some of the detainees had begun to feel that they would never emerge alive from Guantanamo ... ."\(^{133}\)

One must wonder whether these reports prompted Justices Kennedy and Stevens to decide that the detainees—as the majority opinion later

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126. Id. at 1478 (citations omitted).
129. Cornell University Law School, Legal Information Institute, Certiorari, available at http://topics.law.cornell.edu/wex/certiorari (last visited Dec. 17, 2008) ("Under long-standing internal Court practice if four justices favor granting a petition for cert. it will be granted.").
131. See id. at 2280 (Roberts, C.J., dissenting).
stressed—had waited too long for a definitive judicial ruling.

At least three reports about CSRTs and DTA reviews, also published in May and June of 2007, may have undermined the Justices’ willingness to await the outcomes of those substitutes for habeas:

1. On May 23, 2007, the Washington Post ran an opinion column that commented on the court of appeals hearings on the CSRTs. The columnist wrote, “[d]etainees have the burden of proving they are not enemy combatants—but have little practical ability to obtain helpful evidence.” The columnist quoted several critical statements by Chief Judge Douglas Ginsburg of the court of appeals, including, “I don’t see how there can be any meaningful review,” and “[w]hat you’re describing is a complete, [] wholesale [] departure from any kind of adversarial system.”

2. On the same day the Court asked the government to respond to the petition for rehearing in Boumediene, a military judge dismissed all charges against a detainee at Guantanamo, because the CSRT had determined only that he was an “enemy combatant,” not whether he was an “unlawful” enemy combatant.

3. Six days before the Court granted rehearing and certiorari, the Washington Post reported on an affidavit filed by Stephen Abraham, a Lieutenant Colonel in the Army Reserve, who was also a lawyer and had served on a CSRT. He described the CSRT process as “fundamentally flawed.” According to the Post, he said that the evidence before CSRTs “lacked specificity”; that “exculpatory information about the detainees was unavailable and possibly withheld”; that the government’s hearsay evidence was like a “game of telephone”; that there was “considerable pressure from commanders for officers serving on the tribunals to determine that the detainees were enemy fighters”; and that what were “purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence.”


135. See White, supra note 132.

If Justices Kennedy and Stevens read these reports, any confidence they might have had in the CSRT and DTA alternative review must have been shaken—enough, perhaps, for them to conclude that ordinary rules of avoiding constitutional questions and exhausting alternative remedies no longer justified their deferring habeas review. And, although the majority opinion nowhere mentions these new reports, one may wonder whether they informed the majority’s skepticism about the fairness of CSRT proceedings and the adequacy of DTA judicial review.

CONCLUSION

The majority ruling in Boumediene is the latest victory in a battle half won for meaningful judicial review of detentions of supposed “unlawful enemy combatants” at Guantanamo. To date the Court has brought honor where the Executive brought shame and the Congress disappointment. Much more remains to be decided by the Supreme Court. Can persons captured outside traditional battlefields (like Mr. Boumediene, who was apprehended in Bosnia) be lawfully imprisoned without charge at Guantanamo? How much evidence that a person is an “enemy combatant” does the government need to produce to justify continued detention before a habeas court? What access, if any, will the detainee or his lawyer have to classified information, when that information is the basis for his detention? Given the bare 5-4 majorities in Hamdan and Boumediene, and the prospect of imminent departures of one or more members of the majority, the final outcome may turn on who are the next nominees to the Court. Or the matter might become moot before the cases return to the Supreme Court—if President-elect Obama, as he has said he will, takes the long overdue step of closing Guantanamo, thus finally bringing to an end this offense against our nation’s commitment to the rule of law.


137. The Lieutenant Colonel’s affidavit was made a part of the record before the Court and brought to the Court’s attention in the Al Odah Petitioner’s Initial Brief. Brief of Petitioner Al Odah at 4-5, Al Odah v. United States, No. 06-1196 (Aug. 24, 2007).

138. Following Boumediene, these and other questions have now been resolved in the first instance by the district courts. See supra notes 112-23 and accompanying text.

139. E.g., Glaberson, supra note 124.