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# BOUMEDIENE V. BUSH, THE GREAT WRIT, AND THE POWER TO “SAY WHAT THE LAW IS”

Emily Garcia Uhrig\*

## I. INTRODUCTION

At the conference for this symposium issue, I spoke on the constitutionality of section 7 of the Military Commissions Act of 2006 (“MCA”),<sup>1</sup> which by its terms stripped the privilege of habeas corpus from foreign national detainees held in Guantanamo Bay, Cuba.<sup>2</sup> At the time of the conference, the D.C. Circuit, in *Boumediene v. Bush*,<sup>3</sup> had upheld the provision against constitutional challenge under the Suspension Clause of the U.S. Constitution.<sup>4</sup> The Supreme Court declined to review the decision.<sup>5</sup> My remarks were made in that context. Two months after the symposium, the Supreme Court reversed course and granted review of the D.C. Circuit’s decision.<sup>6</sup> On June 12, 2008, the Supreme Court issued a lengthy, divided opinion concluding in part that MCA section 7 violates the Suspension Clause and conflicts with the separation of powers structure of government enshrined in the Constitution.<sup>7</sup>

This article provides a brief overview of the history of litigation that led to the enactment of section 7 of the MCA, and an assessment of the

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1. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36, *invalidated by* *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

2. *See id.*

3. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev’d*, 128 S. Ct. 2229 (2008).

4. *Id.* at 992, 994. The Suspension Clause states that “[t]he 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.” U.S. CONST. art. I, § 9, cl. 2.

5. *Boumediene v. Bush*, 127 S. Ct. 1478 (2007).

6. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007).

7. *Boumediene v. Bush*, 128 S. Ct. 2229, 2240, 2277 (2008).

Supreme Court's analysis in *Boumediene* regarding the reach of the Suspension Clause. The decision, at its core, is an affirmation of separation of powers principles.<sup>8</sup> It affirms the Framers' creation of a tripartite system of government in which each branch checks and balances the others. Section 7 of the MCA was an effort by the legislative and executive branches to excise the judiciary in order to avoid the "inconvenience" of judicial review of individual decisions to detain foreign nationals at Guantanamo Bay. The Court struck down the effort as constitutionally untenable.<sup>9</sup>

## II. BACKGROUND

### A. Legislative and Litigation History

On September 11, 2001, members of the al Qaeda terrorist network used hijacked commercial airliners as missiles to attack the World Trade Center towers and the Pentagon.<sup>10</sup> Approximately 3,000 people lost their lives in the attacks.<sup>11</sup> A week later, Congress passed the "Authorization for Use of Military Force" ("AUMF")<sup>12</sup> resolution, which empowered the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . 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."<sup>13</sup> Shortly thereafter, President Bush invoked his authority under the AUMF to deploy U.S. military forces to Afghanistan to battle "al Qaeda and the Taliban regime that had supported it."<sup>14</sup> Hundreds of foreign nationals were captured abroad by U.S. forces during these hostilities, or captured and handed over to U.S. forces by the Northern Alliance and others, and removed for detention at the U.S. Naval Base at Guantanamo Bay, Cuba.<sup>15</sup>

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8. *Id.* at 2247.

9. *Id.* at 2240.

10. *Rasul v. Bush*, 542 U.S. 466, 470 (2004).

11. *Id.*

12. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

13. *Id.* § 2(a), 115 Stat. at 224.

14. *Rasul*, 542 U.S. at 470.

15. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *as recognized in* *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

The base at Guantanamo occupies forty-five "square miles of land and water along the southeastern coast of Cuba."<sup>16</sup> Pursuant to a 1903 Lease Agreement with Cuba, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas], while 'the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.'"<sup>17</sup> In 1934, the United States and Cuba entered into a treaty providing that, unless the parties agreed otherwise, the lease would continue as long as the United States did not abandon the Guantanamo naval base.<sup>18</sup>

On November 13, 2001, President Bush issued a comprehensive military order entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."<sup>19</sup> The order governed any noncitizen for whom the President determined that "there is reason to believe" that he or she (1) "is or was" a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States.<sup>20</sup> Any such person "shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death."<sup>21</sup>

In 2002, a number of foreign nationals detained at Guantanamo Bay initiated legal proceedings in federal district court raising claims related to the legality of their respective detentions.<sup>22</sup> The district court

16. *Rasul*, 542 U.S. at 471.

17. *Id.* (alterations in original) (quoting Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 23, 1903, T.S. No. 418).

18. *Id.* (citing Treaty Defining Relations with Cuba, U.S.-Cuba, art. III, May 29, 1934, 48 Stat. 1682, 1683).

19. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), *reprinted in* 10 U.S.C. § 801 (2006).

20. *Id.* § 2, 3 C.F.R. at 919.

21. *Id.* § 4, 3 C.F.R. at 919-20.

22. See *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004); *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), *rev'd sub nom. Al Odah v. United States*, 103 Fed. App'x 676 (D.C. Cir. 2004) (*per curiam*); *Habib v. Bush*, No. 02-5284 (D.C. Cir. June 10, 2002). In *Al Odah*, family members of twelve Kuwaiti national detainees sought a declaratory judgment and an injunction ordering that they be informed of the charges against them and be permitted to consult with legal counsel. *Al Odah*, 321 F.3d at 1136. In *Rasul*, three detainees, through next friend relatives, challenged the legality of their detentions under the Due Process Clauses of the Fifth and Fourteenth Amendment, international law, military regulations,

concluded that all of the detainees' claims implicated the lawfulness of their custody, and thus were cognizable only in habeas corpus.<sup>23</sup> The court thereupon dismissed the claims for lack of jurisdiction.<sup>24</sup> Citing *Johnson v. Eisentrager*,<sup>25</sup> the court concluded that it did not have jurisdiction to issue writs of habeas corpus for any aliens detained outside the sovereign territory of the United States.<sup>26</sup> At that time, 28 U.S.C. § 2241(a), the habeas statute, provided that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."<sup>27</sup>

On appeal, the D.C. Circuit affirmed, holding "that no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees."<sup>28</sup> The court of appeals reasoned that because Guantanamo Bay was not part of the sovereign territory of the United States, but rather, was on land leased from Cuba, it was not within the "respective jurisdictions" of the district court or any other court in the United States.<sup>29</sup>

The U.S. Supreme Court reversed in *Rasul v. Bush*,<sup>30</sup> holding that § 2241 extends to aliens detained at Guantanamo Bay.<sup>31</sup> The Court held that although the detainees were beyond the district court's jurisdiction, the district court's jurisdiction over the detainees' custodians was sufficient to provide subject matter jurisdiction under § 2241.<sup>32</sup> The

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the War Powers Clause, and Article I of the Constitution due to the President's alleged suspension of the writ of habeas corpus. *Id.* at 1136-37. In *Habib*, the detainee sought habeas relief under "the Due Process Clause of the Fifth Amendment and other constitutional provisions, the Alien Tort Act, the Administrative Procedure Act, due process under international law, and United States military regulations." *Id.* at 1137.

23. *Rasul*, 215 F. Supp. 2d at 62-64.

24. *Id.* at 56.

25. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

26. *Rasul*, 215 F. Supp. 2d at 72-73.

27. 28 U.S.C. § 2241(a) (2000).

28. *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004).

29. *Id.* at 1141-43. The court also dismissed the non-habeas claims, holding that the "privilege of litigation" does not apply to aliens in military custody outside of "any territory over which the United States is sovereign." *Id.* at 1144 (quoting *Eisentrager*, 339 U.S. at 777-78).

30. *Rasul v. Bush*, 542 U.S. 466 (2004).

31. *Id.* at 484.

32. *Id.* at 483-84. The Court also reversed the lower court's finding that it lacked jurisdiction over the non-habeas claims because the federal question statute and Alien Tort Act lacked any provision that categorically excludes aliens outside of the United

Court remanded the cases to the D.C. Circuit,<sup>33</sup> which in turn remanded to the district court.<sup>34</sup>

Congress responded to *Rasul* by passing the Detainee Treatment Act of 2005 ("DTA"),<sup>35</sup> which was signed into law on December 30, 2005.<sup>36</sup> The DTA amended 28 U.S.C. § 2241 to include subsection (e), which stated that "[e]xcept as provided in section 1005 of the [DTA], no court, justice, or judge" has jurisdiction over

- (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
- (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who
  - (A) is currently in military custody; or
  - (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit . . . to have been properly detained as an enemy combatant.<sup>37</sup>

Subsections (e)(2) and (e)(3) of section 1005 provide the D.C. Circuit with exclusive judicial review over decisions by the Combatant Status Review Tribunal ("CSRTs") and military commissions.<sup>38</sup>

In June 2006, the Supreme Court decided *Hamdan v. Rumsfeld*,<sup>39</sup>

States from bringing such claims. *Id.* at 484-85.

33. *Id.* at 485.

34. See *Al Odah v. United States*, 103 Fed. App'x 676 (D.C. Cir. 2004).

35. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified as amended in scattered sections of 10, 28, 42 U.S.C.).

36. *Id.*

37. *Id.* § 1005(e)(1), 119 Stat. at 2742 (codified as amended at 28 U.S.C. § 2241 (2006)).

38. *Id.* § 1005(e)(2)-(3), 119 Stat. at 2742-43. "CSRTs are used to determine whether individual detainees should continue to be classified as enemy combatants." Dimitri D. Portnoi, *Resorting to Extraordinary Writs: How the All Writs Act Rises to Fill the Gaps in the Rights of Enemy Combatants*, 83 N.Y.U. L. REV. 293, 315 n.133 (2008).

39. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *as recognized in* *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). Salim Ahmed Hamdan, a Yemeni national, had been captured during hostilities between the United States and the Taliban in November 2001 and transported to Guantanamo Bay in June 2002. *Id.* at 566. "Over a year later, the President deemed him eligible for trial by military commission for then-unspecified crimes. After another year had passed, Hamdan was charged with one count of conspiracy 'to commit . . . offenses triable by military commission.'" *Id.*

which held, in relevant part, that the DTA did not strip habeas jurisdiction from federal courts for cases pending at the time of the DTA's enactment.<sup>40</sup> Rather, § 2241, as amended, only applied prospectively.<sup>41</sup>

In response to *Hamdan*, Congress passed the Military Commissions Act of 2006 ("MCA"),<sup>42</sup> which President Bush signed into law on October 17, 2006.<sup>43</sup> Section 7(a) of the MCA, entitled "Habeas Corpus Matters," amended § 2241(e) to provide:

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in [sections 1005(e)(2) and (e)(3) of the DTA] no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.<sup>44</sup>

Section 7(b) of the MCA made subsection (a) applicable "to all cases, without exception, pending on or after the date of the enactment of [the MCA] which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."<sup>45</sup>

On appeal, the D.C. Circuit held, as a threshold matter, that the MCA applied to the detainees' petitions in that their "lawsuits fall within the subject matter covered by the amended § 2241(e); each case relates to an 'aspect' of detention and each deals with the detention of an 'alien' after September 11, 2001."<sup>46</sup> The court turned next to the question of whether

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40. *Id.* at 584.

41. *Id.*

42. Military Commissions Act, 120 Stat. 2600.

43. *Id.*

44. *Id.* § 7(a), 120 Stat. at 2635-36, *invalidated by Boumediene*, 128 S. Ct. 2229.

45. *Id.* § 7(b), 120 Stat. at 2636, *invalidated by Boumediene*, 128 S. Ct. 2229.

46. *Boumediene v. Bush*, 476 F.3d 981, 986 (D.C. Cir. 2007), *rev'd on other grounds*,

the MCA was an unconstitutional suspension of the writ of habeas corpus.<sup>47</sup> A two-judge majority of the court of appeals concluded it was not.<sup>48</sup>

The majority reasoned that the Suspension Clause protects only “the writ ‘as it existed in 1789,’ when the first Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus.”<sup>49</sup> The court concluded that the historical reach of the writ in England prior to 1789 would not have extended the privilege to aliens outside of the United States.<sup>50</sup> The majority further cited *Johnson v. Eisentrager*<sup>51</sup> as “end[ing] any doubt about the scope of common law habeas” in that the *Eisentrager* court observed:

We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.<sup>52</sup>

The court rejected the detainees’ attempt to distinguish *Eisentrager*, which involved German nationals captured, convicted of war crimes, and detained at a U.S. military base in Germany who sought a writ of habeas corpus.<sup>53</sup> The court concluded that “[a]ny distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held, is immaterial to the application of the Suspension Clause.”<sup>54</sup> “The ‘determination of sovereignty over an area . . . is for the legislative and executive departments.’”<sup>55</sup> Here, under the terms of the DTA, “‘United States,’ when used in a geographic sense[,] . . . does not include the United States Naval Station,

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128 S. Ct. 2229 (2008) (noting that “[e]veryone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule *Hamdan*”).

47. *Id.* at 988.

48. *Id.* at 994.

49. *Id.* at 988 (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

50. *Id.* at 990.

51. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

52. *Eisentrager*, 339 U.S. at 768.

53. *Id.* at 991-92.

54. *Id.* at 992.

55. *Id.* (quoting *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948)).



Guantanamo Bay, Cuba.”<sup>56</sup>

The majority further rejected the detainees’ claims to constitutional rights, observing that “[t]he law of this circuit is that a ‘foreign entity without property or presence in this country has no constitutional rights, under the Due Process Clause or otherwise.’”<sup>57</sup> In so ruling, the majority rejected the detainees’ argument that the Suspension Clause functions as a limitation on congressional power rather than a constitutional right.<sup>58</sup>

In a strong dissent, Judge Rogers rejected the majority’s conclusion that the MCA’s withdrawal of federal jurisdiction over Guantanamo-detainee habeas petitions can be reconciled with the Suspension Clause.<sup>59</sup> She agreed with the detainees that the Suspension Clause operates as a constraint on Congress’s powers, limiting removal of the writ to times of rebellion or invasion unless Congress provides for an adequate, alternative remedy.<sup>60</sup> Thus, because Congress had neither set forth an adequate, alternative remedy in the DTA, nor made the requisite findings to suspend the writ, the MCA was void as unconstitutional.<sup>61</sup>

The detainees filed a petition for certiorari with the Supreme Court.<sup>62</sup> On April 2, 2007, the Court denied the petition, by a vote of six to three.<sup>63</sup> Justices Stevens and Kennedy wrote in explanation of the denial that “[d]espite the obvious importance of the issues raised in these cases, we are persuaded 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” warranted denial of the petition at that juncture.<sup>64</sup> But the Justices noted that if the detainees “later seek to establish that the Government has unreasonably delayed proceedings under the [DTA], or some other and ongoing injury, alternative means exist for us to consider our jurisdiction over the allegations made by petitioners before the [c]ourt of [a]ppeals.”<sup>65</sup> The

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56. *Id.* (quoting Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005(g), 119 Stat. 2739, 2743 (codified as amended at 10 U.S.C. § 801 note (2006))).

57. *Id.* (quoting *People’s Mohahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)).

58. *Id.* at 993.

59. *Id.* at 994-95 (Rogers, J., dissenting).

60. *Id.* at 995.

61. *Id.*

62. *Boumediene v. Bush*, 127 S. Ct. 1478 (2007).

63. *Id.*

64. *Id.* (citation omitted).

65. *Id.* (citation omitted).

Justices further underscored that, as always, the denial of certiorari was not an indication of any opinion as to the merits of the cases.<sup>66</sup>

Justice Breyer, joined by Justices Souter and Ginsburg, dissented from the denial of certiorari.<sup>67</sup> They felt that the questions as to whether the MCA deprives federal courts of jurisdiction to consider the detainees' habeas claims and, if so, whether that deprivation is constitutional, warranted the Court's "immediate attention."<sup>68</sup> The dissent noted that "the 'province' of the Great Writ, 'shaped to guarantee the most fundamental of all rights, is to provide an effective *and speedy* instrument by which judicial inquiry may be had into the legality of the detention of a person.'"<sup>69</sup> Yet, the petitioners had been held for more than five years without judicial review of their habeas claims.<sup>70</sup> First, immediate review could either prevent further, unjustified detention or could provide clarification of the parameters of the Suspension Clause and the writ of habeas corpus with respect to the detainees.<sup>71</sup> Second, the dissent noted the "plausible" argument that the D.C. Circuit's opinion was contrary to *Rasul v. Bush*, in which the Court observed "that Guantanamo was under the complete control and jurisdiction of the United States."<sup>72</sup> Notably, the Court in *Rasul* had observed that the "[a]pplication of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus."<sup>73</sup> The dissent also noted that the fact that the petitioners in *Boumediene* were foreign nationals of countries other than Afghanistan who were seized outside of the theatre of hostilities with al Qaeda and the Taliban may impact the availability of habeas corpus.<sup>74</sup>

Finally, the dissent observed that if petitioners have the right to seek a writ of habeas corpus in federal court, the Court would have to consider whether the procedures set forth in the DTA that provide for review in the D.C. Circuit are a constitutionally adequate substitute for habeas corpus.<sup>75</sup> The D.C. Circuit in *Boumediene* had not reached this issue.<sup>76</sup>

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66. *Id.*

67. *Id.* at 1479 (Breyer, J., dissenting).

68. *Id.*

69. *Id.* (quoting *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968)).

70. *Id.*

71. *Id.*

72. *Id.* (citing *Rasul v. Bush*, 542 U.S. 466, 480-81 (2004)).

73. *Id.* (quoting *Rasul*, 542 U.S. at 481-82).

74. *Id.* at 1480.

75. *Id.*

76. *Id.*

*B. The April 2007 Symposium*

Within weeks of the Court's denial of certiorari in *Boumediene*, the Oklahoma City University School of Law held its national symposium entitled *Congress's New—and Future—Law of Counterterrorism: Legislating Military Commissions, the Powers of Surveillance and the Role of the Courts in America's War on Terrorism*.<sup>77</sup> Recognizing the enormity of the questions left unresolved by the Court's denial of certiorari, the symposium included a panel entitled *The Law of Suspending the Law: When is Suspension of Habeas Corpus—or the Exercise of Other Emergency Powers—Compatible with the Constitution?* Professor Trevor Morrison of Columbia Law School and I participated on the panel.<sup>78</sup>

My comments aligned closely with Judge Rodgers' dissent in the D.C. Circuit, rather than the two-judge majority's opinion, in that I disagreed with the government's argument that Supreme Court precedent, i.e., the *Insular Cases* and *Johnson v. Eisentrager*, provided firm precedent for denying Guantanamo detainees the privilege of habeas corpus. Rather, I contended that the Suspension Clause does not permit such a measure by the legislative and executive branches. Habeas corpus gives muscle to the doctrine of separation of powers and the due process principle of fundamental fairness enshrined in the Constitution. Where the executive decides to detain an individual, absent extraordinary circumstances, such person is entitled to judicial review through exercise of the privilege of habeas corpus. Moreover, at its core, habeas corpus embodies the due process guarantee of fundamental fairness in that the writ shall issue and the detainee be released from custody if the government cannot show sufficient reason for that detention.

*C. Grant of Certiorari*

On June 29, 2007, less than three months after the symposium, the Supreme Court reversed itself and granted the detainees' petition for rehearing of the Court's April 2 denial of certiorari.<sup>79</sup> The Court agreed to review (1) whether the MCA's habeas-stripping provision applies to

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77. See OCU Law, Counterterrorism Symposium 2007, <http://www.okcu.edu/law/newsandevents/counterterrorism.php> (last visited Jan. 6, 2009) (providing information and an overview on the symposium).

78. *Id.*

79. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007).

cases pending on the date of enactment of that statute;<sup>80</sup> and (2) if so, whether the removal of habeas corpus as a remedy for alien detainees at Guantanamo violates the Suspension Clause of the Constitution.<sup>81</sup>

### III. *BOUMEDIENE V. BUSH*

On June 12, 2008, at the end of its term, the Court issued its decision reversing the D.C. Circuit's ruling.<sup>82</sup> The Court unanimously agreed with the D.C. Circuit that MCA section 7 denies federal courts jurisdiction over habeas corpus petitions filed by Guantanamo detainees that were pending on the date of its enactment.<sup>83</sup> Thus, if the statute is constitutionally sound, the D.C. Circuit's dismissal of the petitions would be proper.<sup>84</sup>

The Court then turned to the more difficult question: whether MCA section 7's denial of the privilege of habeas corpus to Guantanamo detainees violates the Suspension Clause of the Constitution.<sup>85</sup> In a seventy-page opinion, reflective of the complexity of the issue, a five-Justice majority concluded that it does.<sup>86</sup>

As a threshold matter, the Court concluded that the history of the privilege of habeas corpus in England and the doctrine of separation of powers in the U.S. Constitution inform the reach and purpose of the Suspension Clause.<sup>87</sup> The origins of the writ date to Magna Carta, which "decreed that no man would be imprisoned contrary to the law of the land."<sup>88</sup> The writ of habeas corpus became the mechanism for realizing Magna Carta's promise.<sup>89</sup> At first, the writ functioned only to gain compliance with the Crown's laws, rather than to protect the rights of individual citizens.<sup>90</sup> But by the 1600's, the writ had become "less an

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80. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2241-44 (2008).

81. See *id.* at 2240.

82. *Id.* at 2277.

83. *Id.* at 2242.

84. *Id.*

85. *Id.* at 2244.

86. *Id.* at 2240, 2262.

87. *Id.* at 2244.

88. *Id.* (citing Magna Carta, 1215, in *SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS* 1, 17 (Richard L. Perry ed., 1978)).

89. *Id.* (citing 9 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 112 (1926)).

90. *Id.* at 2244-45 (citing Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008)).

instrument of the King's power and more a restraint upon it."<sup>91</sup> English courts or Parliament, however, often suspended habeas corpus during periods "of political unrest, to the anguish of the imprisoned and the outrage of those in sympathy with them."<sup>92</sup> The King's abuse of authority, and the interregnum that ensued, ultimately led to Parliament's passage of the Habeas Corpus Act of 1679.<sup>93</sup> That Act, though vulnerable to further suspension in England, became the model for habeas statutes enacted in the thirteen American colonies.<sup>94</sup>

"The Framers 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."<sup>95</sup> The proven vulnerability of the Great Writ in England in part inspired the separation of powers structure of government enshrined in the Constitution.<sup>96</sup> The Court observed:

Th[e] history [of the writ] . . . no doubt confirmed [the Framers'] view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power. The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty.<sup>97</sup>

The Court noted that the ratification debates made clear the Framers' intent that, by ensuring the right of judicial review of executive decisions to detain individuals, the writ would function as a check on governmental power over the citizenry.<sup>98</sup> Alexander Hamilton warned that "the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny."<sup>99</sup> "The Clause protects

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91. *Id.* at 2245 (citing Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 336 (1952)).

92. *Id.*

93. *Id.* at 2245-46.

94. *Id.* (citing Collings, Jr., *supra* note 91, at 338-39).

95. *Id.* at 2244.

96. *Id.* at 2246.

97. *Id.* (citing *Loving v. United States*, 517 U.S. 748, 756 (1996)).

98. *Id.* at 2246-47.

99. *Id.* at 2247 (quoting THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.”<sup>100</sup> “It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.”<sup>101</sup> In this approach, the Framers sought to avoid the cyclical abuses that the writ endured in England, where habeas corpus was not embedded in a government structure defined by the doctrine of separation of powers.<sup>102</sup>

After concluding that the writ is an integral component of separation of powers doctrine, the Court turned to the question of whether it protects foreign nationals detained in Guantanamo.<sup>103</sup> In 2001, the Court observed in *INS v. St. Cyr*,<sup>104</sup> that “at the absolute minimum, the Suspension Clause protects the writ ‘as it existed [when the Constitution was drafted and ratified].’”<sup>105</sup> Thus, again, the Court reviewed history to assess whether the Framers intended the writ to extend to foreign nationals captured and detained outside of the United States “during a time of serious threats to our Nation’s security.”<sup>106</sup> The Court noted it had to be “careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ.”<sup>107</sup> The Court concluded that the historical record of the writ in English common law was inconclusive.<sup>108</sup> It noted that “given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one.”<sup>109</sup>

With no clear directive from the Framers as to the geographic reach of the Great Writ, the Court evaluated the common law. The Court accepted the Government’s contention that Cuba, rather than “the United States, [has] *de jure* sovereignty over Guantanamo Bay.”<sup>110</sup> But as it had in *Rasul*, the Court noted “the obvious and uncontested fact that the

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100. *Id.* (citing *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973)).

101. *Id.* (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)).

102. *Id.*

103. *Id.* at 2248.

104. *INS v. St. Cyr*, 533 U.S. 289 (2001).

105. *Id.* at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)).

106. *See Boumediene*, 128 S. Ct. at 2248, 2248-51.

107. *Id.* at 2248 (citing *St. Cyr*, 533 U.S. at 300-01).

108. *Id.* at 2251.

109. *Id.*

110. *Id.* at 2253.

United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory."<sup>111</sup> Thus, the Court rejected the Government's argument that "the Constitution necessarily stops where *de jure* sovereignty ends."<sup>112</sup>

The Court evaluated the extraterritorial reach of habeas corpus under the common law.<sup>113</sup> The Court first grappled with the issue of extraterritorial application of the Constitution at the turn of the twentieth century by reviewing a series of cases now known as the Insular Cases.<sup>114</sup> In these cases, the Court considered the extent of the application of the Constitution to noncontiguous U.S. Territories, specifically, Puerto Rico, Guam, the Philippines, and Hawaii.<sup>115</sup> From the Insular Cases emerged "the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories."<sup>116</sup> In light of the "practical difficulties of enforcing all constitutional provisions 'always and everywhere,' the Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed."<sup>117</sup> But as early as "1922, the Court took for granted that even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants 'guarantees of certain fundamental personal rights declared in the Constitution.'"<sup>118</sup>

The Court has interpreted the Insular Cases to mean "that whether a constitutional provision has extraterritorial effect depends upon the 'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it' and, in particular, whether judicial enforcement of the provision would be 'impracticable and anomalous.'"<sup>119</sup> Thus, in *Reid v. Covert*,<sup>120</sup> a plurality of the Court concluded that the Fifth and Sixth Amendments apply to American citizens tried outside the United States.<sup>121</sup> Each Justice of the plurality

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111. *Id.* (emphasis omitted) (citing *Rasul v. Bush*, 542 U.S. 466, 480 (2004)).

112. *Id.*

113. *Id.*

114. *See id.* at 2253-54.

115. *Id.* at 2253.

116. *Id.* at 2254 (citing *Dorr v. United States*, 195 U.S. 138, 143 (1904)).

117. *Id.* at 2255 (citation omitted) (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)).

118. *Id.* (quoting *Balzac*, 258 U.S. at 312).

119. *Id.* (quoting *Reid v. Covert*, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring)).

120. *Reid*, 354 U.S. 1.

121. *Id.* at 18-19.

considered the practical difficulties related to the place of confinement.<sup>122</sup>

Practical considerations were front and center in the Court's 1950 decision in *Johnson v. Eisentrager*.<sup>123</sup> There, the Court held that the privilege of habeas corpus did not extend to enemy aliens convicted of war crimes and detained at Landsberg prison in Germany during the Allied Powers' post-World War II occupation.<sup>124</sup> The Court underscored "the difficulties of ordering the Government to produce the prisoners in a habeas . . . proceeding."<sup>125</sup> The Court balanced "the constraints of military occupation with constitutional necessities."<sup>126</sup>

The Court in *Eisentrager* noted that the "prisoners at no relevant time were within any territory over which the United States is sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."<sup>127</sup> In *Boumediene*, the Court rejected the Government's argument that this language supports "a formalistic, sovereignty-based test" for assessing the Suspension Clause's scope.<sup>128</sup> The Court noted that the *Eisentrager* court understood sovereignty as "a multifaceted concept," in that its opinion reflected concern with both the formal legal status of the prison as a "German" prison and the actual degree of control the United States had over it.<sup>129</sup>

The Court in *Boumediene* noted further that the Government's argument, if adopted, would be at odds with the functional approach to the issues of extraterritorial application of the Constitution taken in the *Insular Cases* and *Reid*.<sup>130</sup> Thus, the "common thread" connecting the *Insular Cases*, *Eisentrager*, and *Reid* is "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."<sup>131</sup>

The Court observed that, by implication, the Government sought to have authority to govern an unincorporated territory "without legal constraint."<sup>132</sup> To accomplish this end, it need only surrender formal

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122. See *Boumediene*, 128 S. Ct. at 2256-57.

123. *Id.* at 2257.

124. *Id.*

125. *Id.*

126. *Id.* (citing *Johnson v. Eisentrager*, 339 U.S. 763, 769-79 (1950)).

127. *Eisentrager*, 339 U.S. at 778.

128. *Boumediene*, 128 S. Ct. at 2257-58.

129. *Id.*

130. *Id.* at 2258.

131. *Id.*

132. *Id.* at 2258-59.



sovereignty over an unincorporated territory to a third party and simultaneously lease it back under terms that provide it with total control.<sup>133</sup> The Court reacted to this implication in strong terms:

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. . . . Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another.<sup>134</sup>

The Court noted that the Government's position, if adopted, "would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'"<sup>135</sup> Thus, the Court emphasized the role of the Great Writ in enforcing separation of powers principles: "[T]he writ of habeas corpus 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.*"<sup>136</sup>

Drawing on *Eisentrager* and the other extraterritoriality opinions, the Court cited three factors as relevant in assessing the Suspension Clause's reach: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."<sup>137</sup>

With respect to the first factor, although the Guantanamo detainees are foreign nationals, their status as enemy combatants is in question.<sup>138</sup> In *Eisentrager*, the petitioners were indisputably enemy aliens, having had military trials and "rigorous adversarial process to test the legality of their detention."<sup>139</sup> They were formally charged with detailed factual

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133. *Id.*

134. *Id.* at 2259.

135. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

136. *Id.* (emphasis added).

137. *Id.*

138. *Id.*

139. *Id.* at 2259-60.

allegations, had assistance of counsel in defending against the charge, were able to “introduce evidence on their own behalf, and [were] permitted to cross-examine the prosecution’s witnesses.”<sup>140</sup>

By contrast, the Guantanamo Bay detainees deny they are enemy combatants and, though afforded some process in the CSRT proceedings, have not had trials by military commissions for violations of the laws of war.<sup>141</sup> The CSRT hearings “fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.”<sup>142</sup> A “Personal Representative” is provided to assist the detainee during the CSRT proceeding, but this individual “is not the detainee’s lawyer or even ‘advocate.’”<sup>143</sup> Further, the Government’s evidence receives a presumption of validity.<sup>144</sup> To rebut the presumption, the detainee may present “reasonably available” evidence, but this task is severely limited by the detainee’s confinement itself and lack of counsel.<sup>145</sup> Moreover, a detainee may seek review of his status determination before the court of appeals, but this review process is a limited one.<sup>146</sup>

As for the second relevant factor cited in *Boumediene*, the detainees, like the petitioners in *Eisentrager*, were captured and detained outside the sovereign territory of the United States.<sup>147</sup> But Guantanamo Bay is not similarly situated to Landsberg Prison in 1950.<sup>148</sup> In contrast to Guantanamo Bay, U.S. “control over the [Landsberg] prison . . . was neither absolute nor indefinite.”<sup>149</sup> The prison was under the jurisdiction of the combined Allied forces and those forces had no plan for a long-term occupation or displacement of German legal institutions.<sup>150</sup> By contrast, Guantanamo Bay “is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.”<sup>151</sup>

Regarding the third relevant factor, the Court was unpersuaded by

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140. *Id.* at 2260.

141. *Id.* at 2259-60.

142. *Id.* at 2260.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 2261 (citing *Rasul v. Bush*, 542 U.S. 466, 480 (2004)).

the costs associated with providing habeas corpus proceedings to the Guantanamo detainees.<sup>152</sup> Moreover, in light of the U.S.'s exclusive control over Guantanamo Bay, the privilege of habeas corpus poses no credible threat to the military mission there.<sup>153</sup>

*Eisentrager*, by contrast, arose during the U.S.'s occupation of 57,000 square miles inhabited by a population of 18 million, when the United States was supervising the massive reconstruction of Germany.<sup>154</sup> American forces in Germany still faced possible threats from the defeated enemy.<sup>155</sup> Therefore, "the Court was right to be concerned about judicial interference with the military's efforts to contain 'enemy elements, guerilla fighters, and 'were-wolves.'""<sup>156</sup> Thus, the Court concluded, practical considerations did not justify denying the privilege of habeas corpus to the Guantanamo detainees.<sup>157</sup>

The Court concluded that the Suspension Clause "of the Constitution has full effect at Guantanamo Bay."<sup>158</sup> Before denying the privilege to the detainees held there, "Congress must act in accordance with the requirements of the Suspension Clause."<sup>159</sup> Because "[t]he MCA does not purport to be a formal suspension of the writ," the detainees are entitled to pursue habeas proceedings "to challenge the legality of their detention."<sup>160</sup>

Lastly, the Court assessed whether the provision allowing for court of appeals review under the DTA provides an adequate substitute for habeas corpus.<sup>161</sup> In summary,<sup>162</sup> the Court noted the severe limitations of that review, particularly that the court of appeals lacks jurisdiction to assess the legality of the detention and may only evaluate whether the CSRT proceedings complied with the standards and procedures set forth

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152. *Id.*

153. *Id.*

154. *Id.* (citing Letter from President Truman to Secretary of State Byrnes (Nov. 28, 1945), in 8 DOCUMENTS ON AMERICAN FOREIGN RELATIONS, at 257 (Raymond Dennett & Robert K. Turner eds., 1948)).

155. *Id.*

156. *Id.* (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)).

157. *Id.* at 2262.

158. *Id.*

159. *Id.* (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 564 (2004) (Scalia, J., dissenting)).

160. *Id.*

161. *Id.*

162. The majority opinion in *Boumediene* compares, in great detail, the substantive effect of the DTA and CSRT procedures with habeas corpus proceedings. That analysis is beyond the scope of this essay.

under the DTA.<sup>163</sup> Moreover, the detainee's opportunity to challenge the legality of his or her detention during the CSRT proceedings is, itself, very restricted.<sup>164</sup> Consequently, the Court concluded that the DTA review process is not an adequate substitute for habeas corpus.<sup>165</sup>

#### IV. CONCLUSION

Immediately after the panel discussion, a military official in attendance approached me and indicated that he had participated in the initial decision to use Guantanamo Bay to detain foreign nationals seized in the conflict with al Qaeda and the Taliban. He suggested to me that perhaps the decision had been a mistake. He noted that the entire purpose behind establishing the detention facilities in Guantanamo in the first place was to avoid judicial review and intervention in the executive's detentions. It was apparent that the ensuing litigation had thwarted that executive purpose. My reply to him was simply that the executive does not have that right. The Framers recognized the critical role of checks and balances when defining the constitutional structure of our government. It is neither the executive's nor the legislature's prerogative to exempt itself from that structure. I suspect this will be the most enduring lesson of *Boumediene*. Indeed, as President Obama moves to shutter the Guantanamo Bay detention centers within the year,<sup>166</sup> it would be a mistake to read *Boumediene* as the Supreme Court's now-moot response to an ugly, yet soon-to-be closed chapter in U.S. history. In reminding us of the separation of powers principles that underpin our nation's identity and political structure and the critical role that the writ of habeas corpus plays in preserving them, the Court issued an emphatic affirmation of those fundamental principles.

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163. *Boumediene*, 128 S. Ct. at 2265.

164. *Id.* at 2260.

165. *Id.* at 2274.

166. On January 22, 2009, his second full day in office, President Obama signed an executive order to close the Guantanamo detention facilities within a year. See Rachel Weiner, *Guantanamo: Obama Executive Order to Close Prison Full Text*, HUFFINGTON POST, Jan. 23, 2009, [http://www.huffingtonpost.com/2009/01/22/guantanamo-obamas-executi\\_n\\_160054.html](http://www.huffingtonpost.com/2009/01/22/guantanamo-obamas-executi_n_160054.html).