BOUMEDIENE v. BUSH: ANOTHER CHAPTER IN THE COURT'S JURISPRUDENCE ON CIVIL LIBERTIES AT GUANTANAMO BAY

AMANDA MCRAE*

I. INTRODUCTION

On November 13, 2001, the President issued an Executive Military Order that gave him the power to declare individuals unlawful combatants and detain them indefinitely, thus curtailing their rights with respect to criminal charges, a trial, and legal counsel.[1] This Order began the infamous detentions at Guantanamo Bay, Cuba, a base over which the United States has overall "control and jurisdiction," but where "ultimate sovereignty" remains with the Cuban government.[2] Over the past seven years, the Supreme Court has consistently questioned the legality of indefinite detentions of enemy combatants at Guantanamo because of the base's geographic and historical relationship to the United States.

After the Court's decisions in *Hamdi v. Rumsfeld*,[3] *Rasul v. Bush*,[4] and *Hamdan v. Rumsfeld*,[5] all of which conferred certain fundamental rights on detainees held at Guantanamo or within the UNITED

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1. Notice, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

2. Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, T.S. No. 418 (Feb. 23, 1903).

3. Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that U.S. citizens detained as enemy combatants must, for due process reasons, be given an opportunity to challenge their detentions before a neutral body).

4. Rasul v. Bush, 542 U.S. 466 (2004) (holding that non-citizens may pursue habeas corpus claims).

5. Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (finding that the military commissions violated portions of the Geneva Conventions and that the Detainee Treatment Act did not apply to cases already pending).

STATES during the War on Terror, Congress reacted to once again curtail those rights. Congress passed, first, the Detainee Treatment Act of 2005 ("DTA"),[6] and second, the Military Commissions Act of 2006 ("MCA"),[7] both of which sought to strip federal courts of jurisdiction to hear habeas petitions filed by aliens detained at Guantanamo.[8] In doing so, Congress amended the *statutory* right to habeas corpus, which the Court in *Rasul* had ruled extended to detainees at Guantanamo Bay.[9]

In *Boumediene v. Bush*, the Court determined whether detainees at Guantanamo Bay have a *constitutional* right to habeas corpus, and if so, whether the process available to detainees to review their detentions under the DTA and the MCA is an adequate substitute to the regular habeas corpus process.[10] In holding that Guantanamo detainees do in fact have a constitutional right to habeas corpus, and that the process available to challenge their detentions is inadequate, the Court challenged the Executive's role in waging war and vindicated the civil liberties of the detainees.

II. FACTUAL BACKGROUND

This case consists of two consolidated cases from the District of Columbia Circuit: *Boumediene v. Bush*[11] and *Al-Odah v. United States*[12]. Petitioners in both cases sought habeas corpus review of the legality of their indefinite detentions at Guantanamo Bay. The *Boumediene* petitioners were six Algerian nationals who were also permanent residents of Bosnia.[13] They were arrested by Bosnian officials in October of 2001 and accused of plotting to bomb the United States Embassy in Sarajevo.[14] In January 2002, they were

6. Detainee Treatment Act of 2005, PL 109-148, 119 Stat. 2680 (2005) (codified at 10 U.S.C.A. § 801 (West 2008); 42 U.S.C.A. § 2000dd (West 2008); 42 U.S.C.A. § 2241 (West 2008)).

7. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10 U.S.C.A. (West 2008)).

8. *See* 28 U.S.C.A. § 2241(e) (West 2008) ("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.").

9. *Rasul*, 542 U.S. at 480–82.

10. Boumediene v. Bush, 128 S. Ct. 2229, 2241 (2008).

11. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).

12. Al-Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).

13. Brief for Petitioners at 1, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (No. 06-1195) [hereinafter Brief for Boumediene Petitioners].

14. *Id.* at 2.

transferred into United States custody and were then taken to Guantanamo Bay.[15] The *Al-Odah* petitioners consisted of four Kuwaiti citizens and twelve Yemeni citizens who were detained at Guantanamo Bay for varying lengths of time over the past seven years.[16]

The *Boumediene* petitioners commenced habeas corpus proceedings in July 2004,[17] while the *Al-Odah* petitioners sought habeas corpus review starting in 2002[18]. While these cases made their way through the federal courts, Congress passed the Detainee Treatment Act of 2005, which stripped the federal courts of jurisdiction to entertain habeas corpus petitions filed by alien detainees held at Guantanamo Bay,[19] and the Military Commissions Act of 2006, which applied the DTA retroactively.[20] The DTA and the MCA effectively shut down the habeas corpus actions of both the *Boumediene* and *Al-Odah* petitioners.[21]

Starting in 2005, the Department of Defense implemented Combatant Status Review Tribunals ("CSRTs").[22] During these tribunals, detainees could challenge their designations as "enemy combatants" and thus their indefinite detentions at Guantanamo Bay in front of a military commission that provided some, though limited, judicial procedures.[23] After the passage of the MCA, the CSRT procedure was the only option remaining for Guantanamo Bay detainees under which they could challenge the legality of their detentions. Although the CSRT procedure included limited review in the D.C. Circuit Court of Appeals, it did not include a formal habeas corpus proceeding.[24]

In February 2007, the D.C. Circuit Court of Appeals dismissed the *Boumediene* petitioners' habeas corpus actions, ruling that the MCA

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15. *Id.*

16. Brief for Petitioners at 2, Al Odah v. U.S., 128 S. Ct. 2229 (2008) (No. 06-1196) [hereinafter Brief for Al Odah Petitioners].

17. Brief for Boumediene Petitioners, *supra* note 13, at 3.

18. Brief for Al Odah Petitioners, *supra* note 16, at 3.

19. Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2742 §1005(e)(1) (2005).

20. *See* Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2636 § 7(a) (2006).

21. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).

22. Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, July 7, 2004, *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

23. *Id.*

24. 10 U.S.C.A. § 950(g) (West 2008) (providing for review of CSRT determinations in the D.C. Circuit but no right to habeas corpus).

stripped the court of jurisdiction to hear their habeas corpus petitions.[25] The D.C. Circuit concluded that the Suspension Clause[26], which formed the basis for the petitioners' claims, did not at the time of the ratification of the Constitution in 1789 apply to aliens outside the "sovereign territory" of the United States and that aliens without connections to the United States did not have any rights under the Clause.[27]

The Al-Odah case took a much more circuitous path. This habeas corpus case was first filed on February 19, 2002.[28] The Supreme Court considered the Al-Odah habeas petition along with *Rasul v. Bush* in the Court's 2004 opinion.[29] After *Rasul*, the *Al-Odah* case was remanded to the District Court, where it became part of the *In re Guantanamo Detainees Cases* decided in 2005.[30] After the passage of the DTA and MCA, the D.C. Circuit dismissed the Al-Odah petitioners' claims at the same time it dismissed the claims for the *Boumediene* petitioners.[31]

Both sets of detainees petitioned for certiorari in the Supreme Court.[32] The Court initially denied cert in April 2007,[33] but on June 29, 2007, the Court, in a rare move,[34] reopened the petitions and granted cert for the October 2007 term.[35] Oral arguments occurred on December 5, 2007.

III. LEGAL BACKGROUND

There were three main questions in front of the Supreme Court in *Boumediene v. Bush*: (1) whether alien detainees at Guantanamo Bay have a constitutional right to habeas corpus review; (2) whether, if

25. Brief for Boumediene Petitioners, *supra* note 13,at 6.

26. U.S. CONST. art. 1 § 9, cl. 2 ("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.").

27. Boumediene v. Bush, 476 F.3d 981, 990–91 (D.C. Cir. 2007).

28. Petition for Writ of Certiorari, Al-Odah v. United States, 128 S. Ct. 2229 (Mar. 5, 2007) (No. 06-1196).

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

30. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005).

31. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).

32. Petition for Writ of Certiorari, Boumediene v. Bush, 128 U.S. 2229 (March 5, 2007) (No. 06-1195); Petition for Writ of Certiorari, *supra* note 28.

33. Boumediene v. Bush, 127 S. Ct. 1725 (Apr. 2, 2007) (denying cert.).

34. *See* William Glaberson, "In Shift, Justices Agree to Hear Detainees' Case," N.Y. TIMES (June 30, 2007), *available at* http://www.nytimes.com/2007/06/30/washington/30scotus.html?_r=1&scp=1&sq=Boumediene&st=nyt (reporting on the rarity of the Court overturning its own decision not to grant certiorari).

35. Boumediene v. Bush, 127 S. Ct. 3078 (Jun. 29, 2007) (granting cert.).

detainees do have this constitutional right, the MCA is an unconstitutional suspension of the Writ of Habeas Corpus; and (3) if the detainees have a constitutional right to habeas corpus review, whether the CSRT review process provides an adequate and effective substitute for that review.[36] In all of the litigation surrounding the detainees at Guantanamo, the Court had yet to answer these three essential questions.

A. The Basics of Habeas Corpus

At its most basic level, the Writ of Habeas Corpus protects individuals from illegal executive detention.[37] The Writ is considered "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action."[38] Thus the Writ maintains an important place in the operation of a free society, guaranteeing the liberty such a society promises.

Habeas corpus is guaranteed in two different ways in American federal law: in the Constitution and in the federal habeas corpus statute. Constitutional habeas corpus stems from the Suspension Clause, which states, "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."[39] This constitutional restriction on suspending habeas corpus underscores the importance of the right and places limits on both Congress and the Executive in exercising their powers. Constitutional habeas corpus applies to all United States citizens detained by the United States, regardless of the location of their detention, as well as to aliens detained within the "sovereign territory" of the United States.[40]

In addition to the Suspension Clause, federal legislation also has established the right to habeas corpus, beginning with the Judiciary Act of 1789.[41] The current federal habeas corpus statute, 28 U.S.C. § 2241, does not confer a right to habeas corpus but rather confers *jurisdiction* on the federal courts to determine the legality of a

36. Brief for Boumediene Petitioners, *supra* note 13, at i; Brief for Al-Odah Petitioners, *supra* note 16, at i; Brief of Respondent at I, Boumediene v. Bush, 128 U.S. 2229 (Nos. 06-1195, 06-1196).

37. Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus: Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2037 (2007).

38. Harris v. Nelson, 394 U.S. 286, 290–91 (1969).

39. U.S. CONST. art. 1 § 9, cl 2.

40. Rasul v. Bush, 542 U.S 466, 481–82 (2004).

41. An Act to Establish the Judicial Courts of the United States, ch. 20, § 14, 1 Stats. 81–82.

detention when a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States."[42] There are, however, currently several statutory restrictions on the right to habeas corpus for aliens.

B. Habeas for Aliens

1. Statutory Habeas

Statutory habeas extends to aliens, even those held outside the federal court jurisdiction in which they file, as long as the person under whose authority they are being held can be reached by service of process.[43] In *Rasul v. Bush,* the Court extended this logic by stating that this *statutory* right to file outside of the jurisdiction of detention applied to alien enemy combatants being held at Guantanamo Bay.[44] The Court justified this application of the Writ by analyzing its historical reach. For instance, the Court found that in England, prior to the American Revolution, the Writ applied in England's "dominions"[45] or anywhere "'under the subjection of the crown,'" not just within the state of England.[46] Because Guantanamo Bay Naval Base is under the "complete jurisdiction and control" of the United States,[47] it is, according to the Court in *Rasul*, essentially within the "dominions" of the United States and under its subjection.[48] Conferring a statutory right to habeas corpus under 28 U.S.C. § 2241 on alien detainees at Guantanamo was thus consistent with this historical application and in conformance with the federal habeas corpus statute.[49]

After 2004, however, statutory habeas no longer extended to aliens held at Guantanamo Bay because, in response to *Rasul*, Congress amended the federal habeas statute via the DTA and the MCA.[50] The DTA and the MCA stripped federal courts of jurisdiction to hear habeas corpus petitions from Guantanamo detainees, other

42. 28 U.S.C.A. § 2241(c)(3) (West 2008).
43. Braden v. 30th Judicial Cir. Ct. of Ky., 410 U.S. 484, 495 (1973).
44. *Rasul*, 542 U.S. at 473.
45. *Id.* at 481–82 (citing King v. Overton, 1 Sid. 387, 82 Eng. Rep. 1173 (K.B. 1668)).
46. *Id.* (quoting King v. Cowle, 2 Burr. 834, 854–55, 97 Eng. Rep. 587, 598–99 (K.B. 1759)).
47. Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, T.S. No. 418 (Feb, 23, 1903).
48. *Rasul*, 542 U.S. at 482–83.
49. *Id.* at 482.
50. Boumediene v. Bush, 476 F.3d 981, 986 (D.C. Cir. 2007).

aliens deemed "enemy combatants," or people awaiting such determination.[51] These laws dramatically limited any statutory habeas claims that alien prisoners at Guantanamo could bring, thus forcing them to rely either upon constitutional habeas protections or upon the CSRT process.[52]

2. Constitutional Habeas

How and whether constitutional habeas applies to aliens is unclear. The Court has determined that constitutional habeas means, at a minimum, the rights that existed in 1789 when the Constitution was ratified.[53] As the Court has long held, constitutional habeas review is available to aliens when they are detained within the clear boundaries of the United States because they can be reached by federal court jurisdiction.[54] When aliens are held outside the traditional geographic boundaries of the United States, however, it has been unclear how constitutional habeas applies.

The general application of *any* constitutional right to aliens is a contentious issue. For example, the Court determined in *United States v. Verdugo-Urquidez* that aliens must have a "voluntary connection" to the United States and have accepted societal obligations within the country in order to have the constitutional Fourth Amendment protections against unreasonable searches and seizures.[55] *Verdugo-Urquidez* involved a Mexican national whose property in Mexico was searched.[56] Because the defendant in that case had not contributed to society in the United States, and the search of his premises occurred outside the United States, he did not have either the connections or the societal obligations that would confer on him Fourth Amendment rights.[57]

Verdugo-Urquidez, however, concerned events that occurred entirely within the sovereign territory of another country: Mexico. As Justice Kennedy noted in his concurring opinion, "the Constitution

51. *See* 28 U.S.C.A. § 2241(e)(1), (2) (West 2008).

52. This process is described in more detail *infra* notes 73–78 and accompanying text.

53. INS v. St. Cyr, 533 U.S. 289, 301 (2001).

54. *See Ex parte* Quirin, 317 U.S. 1 (1942) (stating that Court can entertain habeas petitions of German enemy aliens captured and detained in United States territory); *see also In re* Yamashita, 327 U.S. 1 (1946) (holding that the Court can entertain the habeas petition of an enemy alien being held in the Philippines, which was at the time a United States territorial possession).

55. United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990).

56. *Id.* at 262.

57. *Id.* at 273.

does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory."[58] Whether constitutional rights should apply in Guantanamo Bay, however—which under *Rasul* is considered within the control and jurisdiction of the United States—is necessarily different because Guantanamo is within the control and jurisdiction of the United States. According to Justice Kennedy, *Verdugo-Urquidez* stands for the proposition that the Court must interpret provisions of the Constitution, such as the Fourth Amendment, "in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad."[59] This left the door open for more liberal application of constitutional rights in places like Guantanamo Bay, especially for rights as fundamental as habeas corpus.

Justice Kennedy's concurring opinion in *Rasul* continued this line of logic.[60] Justice Kennedy asserted that aliens may have some constitutional habeas rights in a place like Guantanamo Bay, even though Guantanamo is, at least by contract, not in the "sovereign territory" of the United States.[61] Justice Kennedy, in distinguishing between the United States' involvement in Guantanamo Bay and its involvement in other sovereign territories, invoked *Johnson v. Eisentrager*, a case in which several German enemy combatants held by the United States in Germany attempted to petition the Court for habeas corpus.[62] In *Eisentrager*, the Court ruled that the petitioners were outside the realm of the Constitution, and that their detention and trial by military commission fell squarely within the wartime powers of the Executive Branch.[63] The Court enumerated six factors on which this decision depended, including that the detainee:

> (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted

58. *Id.* at 275 (Kennedy, J., concurring).

59. *Id.* at 277.

60. Rasul v. Bush, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring).

61. *Id.* (citing Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, Art. III, T.S. No. 418 (Feb. 23, 1903) (stating that sovereignty over Guantanamo Bay remains with Cuba)).

62. *Id.* at 487–88 (citing Johnson v. Eisentrager. 339 U.S. 763 (1950)).

63. Johnson v. Eisentrager, 399 U.S. 763, 789 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region . . . the issue tendered . . . involves a challenge to conduct of diplomatic and foreign affairs, for which the President is exclusively responsible.").

> by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the Untied States; (f) and is at all times imprisoned outside the United States.[64]

Justice Kennedy, in his *Rasul* concurrence, found that the situation of the detainees at Guantanamo differed from that of the detainees in *Eisentrager* in two important ways: (1) the *Rasul* detainees had not at all times been imprisoned outside the United States; and (2) the *Rasul* detainees had been held indefinitely without any legal proceedings to determine their status.[65] Noting that the agreement with Cuba for control of Guantanamo Bay was "no ordinary lease" because of the "unchallenged and indefinite control" it gave the United States, Kennedy concluded that Guantanamo Bay was "in every practical respect a United States territory," producing "a place that belongs to the United States, [and] extending the 'implied protection' of the United States to it."[66]

C. Adequate Substitute for Habeas Review

When a person has a constitutional right to habeas corpus, the government must either allow that person to file a habeas corpus petition in federal court or provide an "adequate and effective" substitute for the habeas corpus remedy.[67] In *Swain v. Pressley*, the case that set this rule for habeas corpus substitutes, the Court considered a law that Congress implemented in the District of Columbia that modified the procedure for petitioning the federal courts for habeas corpus relief.[68] In that case, however, the Superior Court in the District of Columbia provided procedures that were nearly identical to, if not entirely the same as, those in the previous, more traditional habeas corpus scheme.[69]

The only other case in which the procedure was deemed "adequate and effective" for replacing habeas was *United States v.*

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64. *Id.* at 777.
65. *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring).
66. *Id.* (citing *Eisentrager,* 339 U.S. at 777–78).
67. Swain v. Pressley, 430 U.S. 372, 381 (1977).
68. *Id.* at 381–82.
69. *See id.* at 377 n.9 (stating that the new procedures were "modeled on" the habeas statute with only "necessary technical changes" and that they contain "almost identical" language) (internal citation omitted); *see also* Brief for Boumediene Petitioners, *supra* note 13, at 18.

Hayman.[70] In that case, the Supreme Court did not provide any additional clarification as to what constitutes an "adequate and effective" substitute for habeas.[71] Therefore, prior to *Boumediene*, the Court had not determined whether a process that provides substantially or even marginally fewer procedural safetguards than traditional habeas corpus review could still serve as an adequate and effective substitute.[72]

In response to *Hamdi* and *Rasul*, the Executive branch created the Combatant Status Review Tribunal (CSRT) process, which is a substitute for habeas corpus.[73] Modeled on the Article 5 tribunals in the Third Geneva Convention, the CSRTs are intended to be "a formal review of all information related to a detainee to determine whether each person meets the criteria to be designated as an enemy combatant."[74] At these proceedings, the detainees are afforded notice and an unclassified summary of information against them, as well as an opportunity to present reasonably available evidence.[75] The detainee also receives a personal representative, though not a lawyer, to help the detainee present his or her case.[76] The tribunal itself

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70. United States v. Hayman, 342 U.S. 205 (1952); *see also* Brief for Boumediene Petitioners, *supra* note 13, at 18.

71. *See Hayman*, 342 U.S. at 223 (stating that the court did not have to reach the constitutional question on "adequate and effective" review procedures because the applicable law creating a habeas corpus substitute allowed for habeas corpus review if the procedure was deemed inadequate or ineffective).

72. Hamdi v. Rumsfeld, 542 U.S. 507 (2004), provides some clues as to what the Supreme Court would rule is the constitutionally "adequate and effective" procedure required for determining the combatant status of detainees; however, the part of the opinion dealing with determining combatant status is likely dicta, as *Hamdi* was not essentially concerned with what is considered adequate process. Hamdi was a United States citizen captured on the battlefield in Afghanistan and subsequently detained first at Guantanamo Bay and then Norfolk, Virginia, and finally Charleston, South Carolina. *Id.* at 510. In his challenge to this detention, a plurality of the Court commented on the process required for making a constitutional enemy combatant determination, including "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 533. The Court also mentioned that "access to counsel in connection with the proceedings" was essential. *Id.* at 539. Note, however, that Hamdi was a citizen of the United States and thus may be afforded more rights under the Constitution because of his citizenship. The Court's analysis, however, remains instructive in that it shows what the Court deems to be "adequate" process with regards to the legality of detention of enemy combatants in the War on Terror.

73. Boumediene v. Bush, 476 F.3d 981, 986–87 (D.C. Cir. 2007).

74. Department of Defense, "Guantanamo Detainee Processes" (Oct. 2, 2007), *available at* http://www.defenselink.mil/news/Sep2005/d20050908process.pdf.

75. Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, 1–2, July 7, 2004, *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

76. *Id.* at 1.

consists of three military officers uninvolved in the capture, detention, or interrogation of the detainee.[77] Independent review of the CSRT's decision, based on the record provided by the CSRT, is provided in the D.C. Circuit Court of Appeals.[78]

IV. HOLDING

In a 5-4 decision, a majority of the Court, in an opinion written by Justice Kennedy, held that all detainees at Guantanamo Bay have a constitutional right to habeas corpus review of their detentions; that Section 7 of the MCA, which denied detainees at Guantanamo access to the federal courts, was an unconstitutional suspension of that right; and that the CSRT proceedings were not an adequate substitute for habeas review.[79]

In deciding that Guantanamo detainees have a constitutional right to habeas review, the Court focused on two main questions it had yet to resolve: whether the detainees are barred from seeking habeas corpus review because of either (1) their enemy combatant status or (2) their physical location.[80] To answer the first question, the majority relied on both the history of the Constitution and the history of habeas corpus as it stood in 1789.[81] The majority found that "[t]he 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."[82] Within the Court's historical analysis of the Writ prior to 1789, the Court found less support for its constitutional interpretation of the Suspension Clause. It did, however, note that although historical authorities "suggest the common-law courts abstained altogether from matters involving prisoners of war, there was greater justification for doing so in the context of *declared* wars with *other nation states*."[83] The War on Terror, which was not formally declared a war by Congress and is being fought against militia groups not traditionally aligned with a state, is not this type of war. Finally,

77. *Id.* at 1–2.

78. Detainee Treatment Act § 1005, Pub. L. No. 109-148, 119 Stat. 2740 (2005); Military Commissions Act § 3(a)(1), Pub. L. No. 109-366, 120 Stat. 2603 (Oct. 28, 2006).

79. Boumediene v. Bush, 128 S. Ct. 2229, 2240 (2008).

80. *Id.* at 2244.

81. *Id.* at 2244–45.

82. *Id.* at 2244.

83. *Id.* at 2248–49 (emphasis added).

because there were seemingly no cases analogous to the situation of the detainees at Guantanamo Bay, the Court declined to place great importance on the historical record.[84]

To answer the second question, whether the detainees' physical location at Guantanamo Bay barred them from constitutional habeas corpus rights, the Court reviewed its precedent with regards to applying constitutional rights to those held or captured outside the territory of the United States. The Court found, taking particular note of *Johnson v. Eisentrager*, that within its own precedent, the application of such rights often depended on the practicality of the application rather than any formal legal restriction.[85] The Court concluded that although the petitioners in *Eisentrager* were denied access to the federal courts for their habeas corpus claims, the holding in that case did not conflict with the idea of granting habeas corpus rights to detainees at Guantanamo, as practical considerations, not a strict adherence to formal sovereignty, motivate the process of applying constitutional rights outside the territory of the United States.[86] The Court then analyzed the physical and legal relationship between the territory of Guantanamo Bay and the United States, examining the history of the territory and United States control of the base there.[87] From the historical record, the Court found that Guantanamo Bay and the United States have a special relationship: although the United States does not maintain *de jure* sovereign control over Guantanamo, "by virtue of its complete jurisdiction and control over the base, [it] maintains *de facto* sovereignty over this territory."[88]

To synthesize its analysis of the scope of the right to habeas corpus, the majority relied heavily on a comparison of the facts of *Boumediene* to those of *Eisentrager*. According to the Court, three considerations were important to determining the scope of habeas corpus and the Suspension Clause under *Eisentrager*: "(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)

84. *Id.* at 2251.
85. *Id.* at 2255–56.
86. *Id.* at 2258.
87. *Id.* at 2251–53.
88. *Id.* at 2253 (citing Rasul v. Bush, 542 U.S. 466, 480 (2004)).

the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[89]

The status of the *Boumediene* petitioners, based on this criteria, is significantly different from and more contentious than that of the World War II prisoners in *Eisentrager*.[90] The *Eisentrager* petitioners, prior to filing for habeas corpus review, had undergone a rigorous, adversarial proceeding to determine their enemy combatant status; in comparison, the CSRT process provided to the *Boumediene* petitioners was much more limited.[91] As to the second factor, the location where the petitioners were captured and detained, the Court found that although both sets of petitioners were apprehended outside of the United States, the detention of the *Boumediene* petitioners—in the *de facto* sovereign territory of the United States—contrasted significantly from the detention of the *Eisentrager* petitioners in Germany.[92] Finally, the nature of the *Boumediene* petitioners' detention, in a peaceful territory both close to and under the *de facto* sovereign control of the United States, reduced the threat that the extension of constitutional rights to detainees at Guantanamo would disrupt the military mission in the War on Terror.[93] These major distinctions from the *Eisentrager* detainees indicated that application of the Suspension Clause and constitutional habeas corpus rights to detainees at Guantanamo Bay was both fairer and more practical than it would have been to apply such rights to the detainees in *Eisentrager*.[94]

As a result of the Court's holding that the Constitution applied to detainees at Guantanamo Bay, the Court found that in order for Congress to strip detainees of their constitutional entitlement to habeas corpus rights, Congress had to invoke the Suspension Clause.[95] Congress stripped the detainees of any rights to access the federal courts for habeas review by passing the Military Commissions Act, but in order for the suspension to have been constitutional, the Court's precedent dictated that Congress must also have provided an adequate substitute for habeas review.[96] The Court went on to analyze

89. *Id.* at 2259.
90. *Id.* at 2259–60.
91. *Id.* at 2260; *see also infra* notes 97–99 and accompanying text.
92. *Boumediene*, 128 S. Ct. at 2260.
93. *Id.* at 2261.
94. *Id.*
95. *Id.*
96. *Id.* at 2262.

whether the CSRT process provides such a substitute.[97] In doing so, the Court laid out two main criteria for assessing the adequacy of a substitute for habeas: (1) it must provide a "meaningful opportunity" for the prisoner to show that he is being held in violation of the law; and (2) it must provide a mechanism by which the adjudicative body can order the release of the detainee if he or she is being unlawfully detained.[98] According to the Court, the rigor of the proceedings available to the prisoner also played a role in determining whether there was a "meaningful opportunity" to challenge the prisoner's detention, as those initial proceedings will determine the content of the record on review.[99]

As the Court noted earlier in its opinion, the CSRT proceedings provided no lawyer for the detainee and gave only limited access to evidence to be used in his defense.[100] Additionally, government-provided evidence in these proceedings was presumed to be accurate.[101] And although the detainee could ask the D.C. Circuit Court of Appeals to review the enemy combatant status determination made by the CSRT, "that review process cannot cure all defects in the earlier proceedings."[102] The CSRT proceedings had many procedural defects, but even if one presumed that these proceedings met due process standards, the Court stated that it would still find that the CSRTs lacked the adversarial quality required for an adequate substitute for habeas corpus review.[103] Thus, the Court found that Section 7 of the Military Commissions Act was an unconstitutional suspension of habeas corpus rights.

In the dissent authored by Chief Justice Roberts and joined by Justices Alito, Thomas, and Scalia, the dissenters criticized the majority opinion on the grounds that the Court should not involve itself in the wartime decisions of Congress and the Executive branch.[104] Citing separation of powers concerns, the Roberts dissenters stated that the Court was not in a position to decide whether and what process is available to detainees; rather, the Court's

97. *Id.* at 2263.
98. *Id.* at 2266 (citations omitted).
99. *Id.* at 2268.
100. *Id.* at 2260.
101. *Id.*
102. *Id.*
103. *Id.* at 2270–71.
104. *Id.* at 2279 (Roberts, C.J., dissenting).

role was only to determine whether the system created by the political branches protects the rights the detainees possess.[105]

The other dissenting opinion, authored by Justice Scalia and joined by Chief Justice Roberts and Justices Alito and Thomas, was much more virulent, noting the "disastrous consequences" the Court's opinion will have on the War on Terror.[106] The Scalia dissenters stated that:

> The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional Republic. But it is this Court's blatant *abandonment* of such a principle that produces the decision today.[107]

Although this dissent went on to criticize the historical analysis the majority used in its opinion,[108] it is certainly this passionate passage that will be remembered.

V. ANALYSIS

The Court's holding in *Boumediene v. Bush*, though characterized by the dissenters as a violation of the separation of powers, is in line with recent precedent and is a plausible interpretation of the Court's past treatment of the habeas corpus issue. Additionally, the majority's emphasis on practicality within the holding puts it in line with the Court's precedent concerning procedural due process. The outcome in *Boumediene* can also be justified using the *Mathews v. Eldridge* procedural balancing test, by asking the question, should detainees have access to the federal courts to review their habeas claims? An analysis based on the *Eldridge* test, which requires balancing the government's interest against the individual's interests in purported rights, demonstrates that the detainees' interest in accessing the federal courts for habeas corpus review outweighed the government's interest in denying them such access and thus provides further support for the Court's majority opinion in *Boumediene*.

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105. *Id.*
106. *Id.* at 2294 (Scalia, J., dissenting).
107. *Id.* (emphasis included).
108. *Id.* at 2296–2303.

A. Alien Detainee Rights

The Writ of Habeas Corpus is one of the most fundamental rights a person can have because it protects against arbitrary and unlawful executive action by providing people with the right to challenge the lawfulness of their detentions.[109] As the Court noted in *Verdugo-Urquidez*, not every constitutional right is integral to the operation of a free society, and thus not every right should be applied to aliens without connections to the Untied States, but those that are fundamental should be given greater deference.[110] The fundamental nature of the right to habeas corpus alone should be enough to override even a strong government interest.

B. The Government's Interest

The Executive, however, undoubtedly has an interest in detaining many of the people held at Guantanamo Bay, particularly in light of national security interests related to the War on Terror. The Authorization for Use of Military Force grants the President the ability to use "all necessary and appropriate force" to fight this war and to vindicate the people killed on 9/11.[111] Generally, in a time of war, the national security powers of the Executive extend to military detentions of enemy combatants until the war is over so that the combatants do not return to the battlefield;[112] there is a strong national security interest in leaving this Executive power in place.

Additionally, allowing detainees unlimited habeas review of their status as enemy combatants may tie up courts and divert executive and military resources from the current conflict. Also, as the government in the *Boumediene* case consistently argued, allowing the detainees to have such review would go well beyond any rights

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109. *See supra* notes 37–38 and accompanying text.

110. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (noting that although Fourth Amendment rights were not applicable to an alien who was captured and searched abroad, other rights, such as Fifth Amendment rights against self-incrimination, are more fundamental trial rights and thus may require a different analysis).

111. Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, § 2(a), 116 Stat. 224 (2001).

112. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (stating that the detention of enemies captured on the battlefield "is so fundamental and accepted an incident of war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." (quoting 18 U.S.C.A. § 4001(a) (West 2008)).

detainees have had in past wars.[113] The government argued that the War on Terror is of a different character than past wars, and that it is providing more rights and more process than in past wars to detainees, particularly at Guantanamo Bay.[114]

Furthermore, removing the determination of combatant status from the Executive and military personnel currently in charge of the CSRTs and giving it to the judiciary is a risky move, particularly because the Executive has more information and expertise in fighting wars and conducting foreign relations.[115] To involve the courts in the combatant status determination, particularly through mechanisms like habeas review, would essentially give the judiciary war-fighting powers that are constitutionally reserved for the Executive and Congress.[116]

Finally, Congress expressed its consent to this use of Executive power when it passed the DTA and MCA, which undoubtedly showed Congress's intent to strip aliens at Guantanamo Bay of any right to habeas review in federal courts. When the Executive acts with the authorization of Congress, his powers are at their zenith.[117] When the Court decided *Rasul*, Congress had not yet authorized stripping habeas review from detainees at Guantanamo. But because Congress, after *Rasul*, passed legislation in support of stripping habeas rights from detainees at Guantanamo, the separation of powers argument that Justice Kennedy used in his concurrence in *Rasul*[118] no longer applies. In a time of war, the Executive's powers are inarguably stronger than during a time of peace, and the assent of Congress to further expand those powers creates a presumption in the Executive's favor. The Court should thus defer to Executive decisions, supported by Congress, instead of taking on a "war-making" power of its own.

C. The Balance of Detainee and Government Interests

Undoubtedly, the government retains a strong interest in indefinitely holding some of the detainees for which it has strong

113. *See* Brief of Respondent at 9, Boumediene v. Bush, 128 U.S. 2229 (2008) (Nos. 06-1195, 06-1196).

114. *Id.*

115. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 321 (1936).

116. *Id.* at 318–21.

117. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring).

118. Rasul v. Bush, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring).

evidence of terrorist involvement while it fights the War on Terror. Despite this interest, however, the potentially indefinite nature of the war, combined with the detainees' interest in freedom from arbitrary detention causes the balance between the detainees' rights and the government's interest, in *Boumediene* as well as in any other related instance of detention, to tip in favor of the detainees.

Although we know little about the detainees at Guantanamo, we can assume for the purpose of argument that many of them were picked up on the battlefield in Afghanistan or Iraq. Several of these detainees, however, were not apprehended on the battlefield, including some of the petitioners in *Boumediene* who were instead picked up in Bosnia for allegedly plotting to bomb the United States Embassy in Sarajevo.[119] Although one could argue that the entire world constitutes the battlefield in the War on Terror, the Court has not expanded the scope of the battlefield beyond Afghanistan.[120] In a battlefield context, the military and the Executive need to determine more quickly the status of the people they wish to detain, and this urgency often means that government authorities have fewer constitutional restraints placed upon their determinations concerning a prisoner's combatant status. When a person is picked up outside of the battlefield context, however, there is less urgency to make that combatant status determination. And when the military moves that person to a neutral location for detention, that urgency decreases further and the argument for depriving the person of the rights provided by the Constitution diminishes.

VI. CONCLUSION

The nature of detention in the War on Terror, which has the potential to deprive people deemed enemy combatants of their liberty for decades, provided a novel and unique legal conundrum for the Court. In the *Boumediene v. Bush* decision, the Court implicitly balanced the interests of the government in fighting this war against those of detainees whose liberty was indefinitely in jeopardy. This indefinite deprivation of liberty, combined with the lack of practical obstacles to giving these detainees access to the federal courts, shifted the balance between national security and habeas rights under the

119. *See supra* notes 14–15 and accompanying text.

120. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that the scope of the Authorization for Use of Military Force extends only to Afghanistan).

Constitution in the direction of the detainees. Because applying habeas corpus and due process rights was both practical and necessary for the detainees at Guantanamo Bay, the Court correctly chose to err on the side of liberty. Although the Court's more conservative members might vehemently disagree, such a choice by the Court in a time of fear is both brave and reassuring to all who face deprivations of their civil liberties.