ABSTRACT

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The Law in Extraordinary Times: U.S. Detention Policy and the Supreme Court

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U.S. detention policy is an extremely complex and controversial topic. The policy was developed through dialogue between the judicial and legislative branches. As such, the policy was developed piecemeal over time and is not a comprehensive policy. This thesis analyzes the three major Supreme Court opinions regarding alien detainees at Guantanamo Bay—*Rasul v. Bush* (2004), *Hamdan v. Rumsfeld* (2006), and *Boumediene v. Bush* (2008)—and looks at the congressional response to each decision in order to trace the development of detention policy and the clarification of the rights of detainees. In a century where wars are taking on an increasingly asymmetric character and some of the main belligerents are non-state actors, the limits on U.S. detention policy and the rights of detainees articulated by the U.S. Supreme Court affect U.S. actions far beyond the current wars.

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THE LAW IN EXTRAORDINARY TIMES:

U.S. DETENTION POLICY AND THE SUPREME COURT

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To three women who have shaped the way I see myself and the world—

Miss Gail Herman, Dr. Linda Adams, and Dr. Elizabeth Corey

CHAPTER ONE

Introduction

The images of September 11, 2001 are burned into the minds of Americans. The deaths of almost 3,000 people as a result of terrorist attacks on U.S. soil instilled a sense of vulnerability in the American public. In such times of crisis, there is an increased tension between individual liberty and national security. In the aftermath of 9/11, fifty-five percent of Americans believed it would be necessary to give up some civil liberties in order to prevent terrorist attacks, while only thirty-five percent believed it would not be necessary.[1] But how much liberty is a citizen willing to sacrifice in order to feel secure?

On September 18, 2001, only a week after the terrorist attacks of September 11, Congress passed a joint resolution authorizing 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 that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[2] This section of the 2001 Authorization for the Use of Military Force (AUMF) became the principal legal authority for the detention of enemy combatants in the war

1. Carroll Doherty, "Balancing Act: National Security and Civil Liberties in Post-9/11 Era," *Pew Research Center*, June 7, 2013, http://www.pewresearch.org/fact-tank/2013/06/07/balancing-act-national-security-and-civil-liberties-in-post-911-era/.

2. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

against terrorism and the conflict with Al-Qaeda.[3] Pursuant to this authorization, the President sent troops to Afghanistan to engage Al-Qaeda and the Taliban regime that aided the organization. During the hostilities between the United States military and the Taliban, many non-Americans were captured and detained at the Naval Base at Guantanamo Bay.

What rights detainees have, how detainees should be treated, and what access, if any, the detainees should have to federal courts are questions that have plagued the American public and decision-makers. For some, the images of Abu Ghraib and claims of torture at Guantanamo Bay mean that the United States is violating some kind of law, international or domestic, and something must be done to rectify the situation. For others, the protection of U.S. citizens from future terrorist attacks means that we must make tough choices. In a presentation delivered at the University of Tulsa College of Law in 2004, Bradford A. Berenson, former associate counsel to President George W. Bush, demonstrated this attitude. In discussing the legacy of the Supreme Court's decision in *Rasul v. Bush*, the first case involving noncitizen detainees at Guantanamo Bay, Berenson gives the example of detainees' pending Criminal Justice Act applications, which if granted would use taxpayer money to fund their access to counsel. Looking at this possibility, Berenson states "This would not demonstrate how enlightened and humane we are; it would instead demonstrate how warped our sensibilities have become, how little resolve we have left to do the tough things necessary to defend

3. Jennifer K. Elsea and Michael John Garcia, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, CRS Report R41156 (Washington, D.C.: Library of Congress, Congressional Research Service, 2012).

freedom against its most dangerous enemies."[4] While the choice of whether or not to allow detainees to funds to pay for counsel may seem trivial, Berenson's question and attitude is indicative of the numerous questions that will be raised by habeas litigation, questions the federal courts will have to make in the framework provided by the Supreme Court.

The security crisis in the wake of 9/11 is not the only time Americans have had to choose between security and liberty. Pearl Harbor created a similar security crisis. Months after the surprise attack by the Japanese, "almost 120,000 individuals of Japanese descent were forced to leave their homes in California, Washington, Oregon and Arizona" and were placed in internment camps by Executive order.[5] In 1944, the Supreme Court upheld the internments as constitutional, stating, "We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified."[6] One of the most quoted statements from the opinion reads, "But hardships are part of war, and war is an aggregation of hardships."[7] While that statement may be true, the question remains: do the hardships of war have to include the sacrifice of liberty?

The Court in *Boumediene v. Bush* took a different view. Writing for the majority, Justice Kennedy asserts, "The laws and Constitution are designed to survive, and remain

4. Bradford A. Berenson, "Uncertain Legacy of Rasul v. Bush, The," *Tulsa Journal of Comparative & International Law* 12 (2005 2004): 39, 47.

5. Geoffrey R. Stone, "National Security v. Civil Liberties," *California Law Review* 95, no. 6 (December 1, 2007): 2203–12, 2205.

6. *Korematsu v. United States*, 323 US 214, 224 (1944).

7. Ibid., 219.

in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law."[8]

The Court's ruling that alien enemy combatants detained at Guantanamo Bay had a constitutional right to habeas corpus was the culmination of three cases, *Rasul v. Bush* (2004), *Hamdan v. Rumsfeld* (2006), and *Boumediene v. Bush* (2008), heard by the Court regarding alien detainees. Many articles have been written analyzing the opinion in any one of the three cases individually, but very few works address all three cases together. In *Detention and Denial*, Benjamin Wittes looks at all three cases. However, he does not look at the opinions themselves to trace the development of detention policy; instead, he looks at how conducting detention in the shadows and denying the necessity of detention will hurt the United States in the future. He argues that candor is the better alternative and that the United States should acknowledge that detention is a legitimate means of fighting terrorist groups. The United States should also recognize that detention has its drawbacks, deal with those drawbacks, and develop clear rules to govern detention. Far from an academic analysis of *Rasul*, *Hamdan*, and *Boumediene*, Wittes's book strives to illustrate an approach to detention that is more open and seriously considers the issues that come with detaining suspected enemy combatants. In the third chapter, Wittes looks at the Guantanamo habeas corpus cases, "the current U.S. system for rule-making in counterterrorism detentions."[9] He argues, as do I, that the cases address only some of

8. *Boumediene v. Bush*, 553 US 723, 798 (2008).

9. Benjamin Wittes, *Detention and Denial: The Case for Candor after Guantánamo* (Washington, D.C: Brookings Institution Press, 2011), 11.

questions about detention, leaving many important questions unanswered. He also contends that the "cases are creating muddled rules," which is acutely demonstrated by the resulting district court decisions.[10]

In this thesis, I look at the Court's role in shaping U.S. detention policy and clarifying the rights of detainees. In the first chapter, I examine the history of habeas corpus. The Court interpreted each petition as a petition for a writ of habeas corpus. The history and intent of the writ informed the Court's interpretation of the reach and purpose of the modern-day writ. In order to provide the reader with a basic understanding of the function of the writ in the three cases analyzed in the following chapters, I discuss the origins of the writ of habeas corpus and its development in the American system of law.

In the next three chapters, I look at each of the major Supreme Court decisions regarding alien detainees held at Guantanamo Bay and the Congressional response to each decision. The decisions address different aspects of U.S. detention policy and detainee rights. *Rasul* found that the federal courts had jurisdiction over the habeas petitions of aliens detained at Guantanamo Bay on purely statutory grounds. *Hamdan* addressed whether the president had the authority to establish military commissions, and if so, whether the procedures and structure of the commissions met the requirements of applicable U.S. law and the law of war. The Court ruled that the president had the general authority to establish commissions, but lacked the specific authorization to establish the commissions to try enemy combatants. The justices also found the structure and procedures did not meet the requirements of either the Uniform Code of Military Justice or Common Article 3 of the Geneva Conventions. Finally, in *Boumediene*, the

10. Ibid.

Court decided aliens detained at Guantanamo Bay had constitutional rights and were entitled to the protection of the Suspension Clause.

Prior to *Rasul*, Congress had not articulated a detention policy. The executive branch virtually had the freedom to do whatever was deemed necessary without judicial oversight. After the Court became involved, insisting in *Rasul* that the judiciary could review the habeas petitions of detainees challenging the legality of their detention, Congress responded by enacting the Detainee Treatment Act of 2005 (DTA), stripping the federal courts of jurisdiction. In *Hamdan,* the Court avoided addressing the merits of the DTA because it was not applicable to cases pending at the time of its enactment. Congress then passed the Military Commissions Act of 2006 (MCA), stripping the courts of jurisdiction over pending and future cases. In *Boumediene*, the Court addressed the merits of the MCA, finding it to be an unconstitutional suspension of the writ of habeas corpus.

By analyzing the decisions of the Supreme Court and the responses of Congress, this thesis traces the development of detention policy and the expansion of the rights of detainees. The policy, as it stands, is not comprehensive; there are many questions that remain unresolved. However, since the Court's decision in *Rasul* in 2004, limits on the nature of U.S. detention have been set. The scope of the executive's authority to deny detainee's certain rights and carry out detentions without oversight was gradually narrowed with each decision. The Court recognized the need for national security and the danger potentially posed by the detainees, but the justices refused to sacrifice individual liberty for national security in the same way previous justices had in *Korematsu*. The Court in these cases have enjoined the legislative and executive

branches to continue developing U.S. detention policy within the bounds set by Supreme Court decisions.

The Court has not heard a case on Guantanamo Bay since *Boumediene* in 2008. In my conclusion, I look at where the policy stands now and how it could affect U.S. actions in the future. After over a decade of wars with non-state actors as primary combatants, it is not unrealistic to believe that many wars of this century will be of a similar character, making the decisions of the Court in *Rasul*, *Hamdan*, and *Boumediene* extremely important to the decisions of political and military leaders in the future.

CHAPTER TWO

Habeas Corpus

The Supreme Court interpreted the cases that arose from enemy combatants held at Guantanamo Bay as petitions for habeas corpus. As such the writ plays an important role both in the outcomes of the individual cases and, more generally, in the struggle between the Court and the legislature over the Court's shaping of U.S. detention policy. The Court, through its decisions, used habeas corpus to limit the nature of detention policy.

To understand the decisions in *Rasul, Hamdan*, and *Boumediene* and the significance of the rulings, one must first have a basic understanding of the writ of habeas corpus as the history of the writ and the framers' intent in protecting the writ informed the Court's reading of the reach and purpose of the modern-day writ. Both of which played pivotal roles in how the Court determined each case.

The Common Law History of the Writ

The writ of habeas corpus is part of the American legal system's English common law heritage and its English history is long and complicated. What follows is a brief history of the writ. While by no means complete, this history provides background necessary to understand the function of the writ today.

In general, a writ is an order issued by a court requiring some action to be taken. Specifically, the writ of habeas corpus is an order issued by the court to bring forth a

defendant. There were originally seven different writs of habeas corpus in England; however, only one has survived to the present—the writ of *habeas corpus ad subjiciendum,* or literally translated, have the body to submit.[1] This current writ developed over centuries. One of the first writs of habeas corpus was the writ of *habeas corpus ad respondendum*, literally translated to "have the body to answer." The writ of *habeas corpus ad respondendum,* was firmly established by 1230. It was the third step of the mesne process, or the process between the original and final process, of personal actions. Prior to the writ of *habeas corpus ad respondendum* issuing to the sheriff, a writ of summons was directed to the defendant. If he or she failed to answer the summons, the sheriff was instructed to put him or her under bail and sureties so that the defendant would appear before the magistrate on a specified day. If he or she still failed to appear, a writ to attach by better bail and sureties, or a writ requiring more bail and individuals to guarantee the appearance of the defendant by agreeing to pay if he or she did not appear, was issued. Finally, if the defendant defaulted a third time, the sheriff was issued a writ of *habeas corpus ad respondendum,* making him responsible for the production of the defendant before the court to answer the summons. The objective of the writ was simple: to compel the appearance of an unwilling defendant.[2]

During the fourteenth century, a second writ of habeas corpus developed, a combination of two writs—habeas corpus and a writ questiong the cause of a defendant's incarceration. This writ became known as the writ of *habeas corpus cum causa*, or have

1. Albert S. Glass, "Historical Aspects of Habeas Corpus," *St. John's Law Review* 9 (1934): 60.

2. William F. Duker, "The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame," *New York University Law Review* 53 (November 1978): 992.

the body with cause. This writ was issued in reponse to petitions by prisoners and required the sheriff to produce the detainee's body with the day and cause of his detention.[3] Significantly, *habeas corpus cum causa* presupposed the defendant had been detained. While the previous writ of habeas corpus demanded the appearance of a defendant, "whether the defendant was incarcerated had been irrelevant before the origin of the *cum causa* form of habeas corpus."[4] This writ of *habeas corpus cum causa* bears more similarity to the modern-day writ than the writ of *habeas corpus ad respondendum*, in that the former orders an official to bring an incarcerated defendant to the court, along with the date and cause of detention, while the latter simply orders a sheriff to bring the defendant to respond.

The writ of *habeas corpus ad subjiciendum* developed during the seventeenth century. While used to "independently inquire into the cause of detention in both criminal and civil case," the writ was limited in its effectiveness in its early development.[5] The writ was virtually ineffective against detention by the Crown or other executive entities, such as the Privy Council and the Star Chamber, until 1641 when Parliament abolished the Star Chamber, limited the jurisdiction of some of the councils, and allowed the common law courts to issue the writ as a remedy for executive detention.[6]

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3. Ibid., 1004.

4. Ibid.

5. Dallin H. Oaks, "Legal History in the High Court: Habeas Corpus," *Michigan Law Review* 64, No. 3 (Jan., 1966): 460.

6. Ibid.

Although progress was made towards a more effective writ by the changes made in 1641, there was still a considerable amount of jurisdictional confusion, exceptions, and ways to circumvent the writ. In order for the writ to be an effective remedy, Parliament had to make more reforms. In 1679, after the restoration of the Stuarts to the throne, Parliament enacted the Habeas Corpus Act. The act reformed the procedures governing the issuance of the writ, preventing evasion of it, and elucidating who precisely could issue the writ. However, despite all this it did not particularly expand the coverage of the writ.[7] In actuality, the act explicitly excluded individuals committed or detained for "felony or treason plainly expressed in the warrant of commitment" and "persons convict or in execution by legal process."[8] Even with the reforms in 1679, the writ was not the safeguard it is perceived as today. The writ continued to develop even after the passage of the Habeas Corpus Act.

As for the colonies, the provisions of the Habeas Corpus Act were not applicable until the early 1700s. In fact, "in the two decades before 1700 the Privy Council annulled attempts by the colonies of Massachusetts, New York and Pennsylvania to legislate its terms into effect."[9] However, during the 1700s, the provisions of the act became available to the colonists and would eventually serve as the foundation for federal statutes governing the writ of habeas corpus.

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7. Ibid.

8. Habeas Corpus Act, 31 Car. 2, c. 2, § 3 (1679).

9. Dallin H. Oaks, "Habeas Corpus in the States—1776-1865," *University of Chicago Law Review* 32, No. 2 (Winter 1965): 251.

Habeas Corpus and the Constitution

When the colonies won their independence from Britain, many rights "like trial by jury, or the right of confrontation…were expressly guaranteed in each of the original state constitutions. [However] the privilege of the writ of habeas corpus was transmitted into American law principally through tradition and the common law."[10] Only a handful of the original states mentioned habeas corpus in their constitutions. By the time of the Constitutional Convention in 1787, twelve of the thirteen states had written constitutions, but only four of them guaranteed habeas corpus, all four guaranteeing it affirmatively.[11]

In contrast to the affirmative guarantees of the states, the U.S. Constitution does not expressly grant the privilege of habeas corpus. Instead, Article 1, Section 9, Clause 2 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." The phrasing of this clause, known as the Suspension Clause, is odd. The clause is neither an affirmative protection of the privilege, nor an affirmative declaration of the power to suspend. Regardless of the negative phrasing, it is generally accepted that the Constitution does guarantee the privilege of habeas corpus, particularly when it is interpreted using an originalist approach. From the records of the Convention, the representatives of the states, rather than being concerned there was no explicit grant of the privilege, seemed to be concerned more with whether the writ was always to be available or if it could be suspended under specific circumstances. No state opposed the proposal for the routine

10. Ibid., 247.

11. Ibid.

availability of habeas corpus, but three states disagreed with the possibility of suspension under any circumstances.[12]

The right to the writ of habeas corpus continues to be almost universally accepted as constitutionally protected. Controversy arises when the privilege is suspended or arguments are made for the applicability or inapplicability of the privilege to certain groups of people (i.e. foreign nationals).

Historical Instances of Suspension

The privilege of the writ of habeas corpus has very rarely been suspended in U.S. history—only four times in over two hundred years. Only in cases of immediate emergency and when necessary to safeguard public safety, as outlined in the Suspension Clause, has the privilege of the writ actually been suspended.

The privilege was suspended several times during the Civil War. Lincoln first authorized the suspension of the privilege just over a month after he took office in 1861. In seven separate orders between April 24, 1861 and December 2, 1861, Lincoln authorized suspension in various places in that were undergoing unrest, such as Maryland and Missouri.[13] After Lincoln authorized the suspension of the writ in Maryland, John Merryman recruited a company of men to join the Confederate Army with himself as their Lieutenant Drill Master. He was arrested by the military on May 25, 1861. His defense counsel then requested a writ of habeas corpus from Chief Justice Taney, who

12. Francis Paschal, "The Constitution and Habeas Corpus," *Duke Law Journal* 1970, No. 4 (August 1970): 608-609, 611.

13. Sherrill Halbert, "Suspension of the Writ of Habeas Corpus by President Lincoln," *American Journal of Legal History* 2, No. 2 (April 1957): 104.

was acting as the Circuit Judge, alleging Merryman was being illegally held. Taney issued the writ to the commander of Fort McHenry where Merryman was being held. General George Cadwalader refused, claiming Lincoln had authorized the suspension of the writ. In response, Taney wrote one of his most famous opinions, *Ex parte Merryman,* arguing Lincoln could not suspend the writ; only Congress could suspend it. Lincoln ignored the opinion and continued to authorize the suspension of the writ.[14] During this period, the Court claimed Congress had exclusive power over the suspension of the writ of habeas corpus, the President claimed he had the authority to suspend the writ, and Congress remained largely silent on the matter. Congress did not address the issue of habeas corpus until March 3, 1863, when it enacted the Habeas Corpus Suspension Act, which stated, "That, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof."[15] With the enactment of the Habeas Corpus Suspension Act, Congress did not claim exclusive power over the writ; instead, it delegated the power of suspension to the President for the specified time of the "present rebellion." The Habeas Corpus Suspension Act set a precedent for suspension of the writ of habeas corpus. Subsequently, Congress would pass laws authorizing the President to suspend habeas corpus in certain locations due to emergency conditions for a limited duration.

14. Ibid., 99.

15. United States, *Acts and Resolutions of the Third Session of the Thirty-seventh Congress: Begun on Monday, December 1, 1862, and Ended in Wednesday March 4, 1863* (U.S. Government Printing Office, 1863), 154.

The writ has been suspended three other times, each time following the pattern set by the Habeas Corpus Suspension Act. Less than two decades after the Civil War, in 1871, President Ulysses S. Grant did so in several South Carolina counties during Reconstruction. Congress had previously enacted the Civil Rights Act of 1871, authorizing the President to suspend habeas corpus in the South due to Ku Klux Klan activities obstructing the dispensation of justice. Habeas corpus was also suspended in the early 1900s in the U.S. territory of the Philippines. Congress passed legislation in 1902 that authorized the governor to suspend the writ in cases of rebellion, insurrection, or invasion. Following this authorization, the governor suspended the writ in two provinces for several months due to armed violence by organized gangs. Finally, the privilege was suspended in Hawaii when martial law was declared in the aftermath of the attacks on Pearl Harbor. Before the attacks, Congress had enacted legislation similar to the act authorizing the suspension in the Philippines. After December 7, 1941, the governor, under that emergency suspension authority, declared martial law and suspended the writ, conditions which lasted until 1944.[16] All of these instances demonstrate that habeas corpus can be suspended and establish the accepted process of doing so.

16. Jonathan Hafetz, *Habeas Corpus after 9/11: Confronting America's New Global Detention System* (NYU Press, 2011), 89-90.

Habeas Corpus in Federal Statutes

Although the writ of habeas corpus is a historically common law writ, "it is largely governed by statute today."[17] In the United States, the writ of habeas corpus was first enshrined in the Judiciary Act of 1789. In section 14, the act provides that justices of the Supreme Court and judges of U.S. district courts have the power to grant writs of habeas corpus "for the purpose of an inquiry into the cause of commitment." The act limited the coverage of the issued writs only to prisoners imprisoned under the authority of the United States, awaiting trial before a court of the United States, or testifying before a court of the United States—essentially limiting the writ to federal prisoners.

The federal courts did not have the power to issue writs of habeas corpus and review the cause of detention for state prisoners until the Habeas Corpus Act of 1867. The Habeas Corpus Act increased habeas corpus protections in two very important ways. First, it made the writ an instrument of trial and conviction review. Prior to 1867, the writ was only a means of questioning the legality of executive detention; it could not be used as a challenge to a conviction. Only after the passage of the act could habeas corpus be used for post-trial review, both of federal and *state* convictions. The second major change brought about under the Habeas Corpus Act concerned the applicability of federally issued writs of habeas corpus to states' prisoners. After 1867, individuals convicted of a crime in a state court could petition for a writ of habeas corpus from a federal court and have his or her case reviewed for alleged violations of constitutional

17. William H. Bizzell, "Writ of Habeas Corpus," *Mississippi Law Journal* 24, No. 1 (December 1952): 58.

rights.[18] In these ways, the act greatly expanded the coverage of the writ of habeas corpus issued by federal courts.

Today, habeas corpus is governed by Title 28 of the U.S. Code, Chapter 153. Section 2241 provides for federal jurisdiction. This section gives the power to grant the writ to the Supreme Court, the district courts and any circuit judge within their respective jurisdictions. It is particularly important to note that the petitioners in all three cases were held at Guantanamo Bay detention camp, a location outside of any federal or state judicial district. Because of this irregularity, jurisdictional questions would play an important role in the review of the cases.

Section 2241 also delineates the specific conditions a prisoner must meet in order to be covered by a federally issued writ of habeas corpus. Five separate conditions are given. For the writ of habeas corpus to extend to a prisoner, one of the five conditions must be met. In addition to the aforementioned conditions, section 2241 was amended by the Detainee Treatment Act of 2005 to include an exclusion of enemy combatants. The statute was again amended by the Military Commissions Act of 2006 to read:

> (e)(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 paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005, 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. [19]

18. William M. Wiecek, "The Great Writ and Reconstruction: The Habeas Corpus Act of 1867," *The Journal of Southern History* 36, No. 4 (November 1970): 531-532.

19. 28 U.S.C. §2241

The amended statute and the Military Commissions Act read as stripping the federal judiciary of jurisdiction over enemy combatants' habeas petitions. The issue of jurisdiction was generally addressed in *Rasul v. Bush*. The Military Commissions Act is specifically addressed in *Boumediene v. Bush*.

Conclusion

The writ of habeas corpus developed over many centuries in England before becoming an important part of the American judicial system. It continued to develop during the early history of the United States, gradually expanding from pre-trial protections for federal prisoners to include post-conviction protections of both federal and state prisoners. After 9/11, with the opening of the Guantanamo Bay detention camp and creation of enemy combatant status, the coverage of the writ of habeas corpus was challenged. The jurisdiction of the federal judiciary over enemy combatants' habeas petitions was challenged in *Rasul v. Bush*. A few years later, the Military Commissions Act was passed by Congress. Its provision stripping the federal judiciary of jurisdiction was quickly challenged in *Boumediene v. Bush*. The writ of habeas corpus plays an important role in the Supreme Court's shaping of U.S. detention policy and became an effective weapon in the ensuing battle between the Court and the legislature over the Court's shaping of the policy.

CHAPTER THREE

Rasul v. Bush

After the terrorist attacks of September 11, Congress passed a resolution authorizing 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 that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[1] It is this Authorization for the Use of Military Force upon which the Executive branch bases its detention authority.[2]

Prior to the Supreme Court's decision in *Rasul v. Bush* in 2004, the paragraph above was the only guideline for U.S. detention policy. With its decision in *Rasul*, the Supreme Court stepped into the role of policymaker, a role which the Court is ill-equipped to fill due to the inherent nature of the judicial system. Because courts can only decide the issues brought before them, the policy guidelines established in the *Rasul* decision are necessarily incomplete. While the Court decided that the federal judiciary has jurisdiction over habeas corpus petitions of aliens detained at Guantanamo Bay, it did not clarify how far the jurisdiction extended. Also left unanswered are the questions of the constitutional rights of aliens, substantive rights,[3] procedural protections, and access

1. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

2. United States Department of Justice, "Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay," *In re Guantanamo Bay Detainee Litigation* (March 13, 2009), 1.

3. According to the Merriam-Webster Dictionary, a substantive right is "a right…held to exist for its own sake and to constitute part of the normal legal order of society."

to counsel and the right to counsel. These questions and others that will arise will have to be decided by lower courts, ensuring detention policy, as determined by the court system, will be a patchwork of court decisions, leaving many situations with unclear resolutions.

The Case and its Precedent

In 2002, fourteen foreign nationals held in Guantanamo Bay—two Australian citizens and twelve Kuwaiti citizens—filed several actions in the U.S. District Court for the District of Columbia challenging the legality of their detention. Mamdouh Habib and David Hicks, the two Australians, "each filed a petition for writ of habeas corpus, seeking release from custody, access to counsel, freedom from interrogations, and other relief."[4] Fawzi Khalid Abdullah Fahad Al Odah and the other Kuwaitis filed a complaint asking to meet with their families and legal counsel, to be informed of the charges brought against them, and to have access to the court system or some other impartial tribunal. The District Court interpreted all three petitions as petitions for writs of habeas corpus. With this understanding and relying on the precedent of *Johnson v. Eisentrager,* the court dismissed the actions because it lacked jurisdiction.

In 1950, the Supreme Court heard *Johnson v. Eisentrager*, a case involving twenty-one German nationals of disputed affiliation (affiliation with both civilian agencies and the military was claimed). The petitioners were convicted of violating laws of war "by engaging in, permitting or ordering continued military activity against the United States" after the act of unconditional surrender was executed by the German High Command on May 8, 1945, "which expressly [obligated] all forces under German control

4. *Rasul v. Bush*, 542 U.S. 466, 472 (2004).

at once to cease active hostilities."[5] They were convicted by an American military commission in China, repatriated to Germany and incarcerated in Landsberg Prison, which was used by the United States military to house German war criminals. The appellants petitioned the District Court for a writ of habeas corpus. The petition was dismissed. The Court of Appeals reversed and remanded for further proceedings.

In the majority opinion, Justice Jackson identifies "the ultimate question in this case [as] one of jurisdiction of civil courts of the United States vis-a-vis military authorities in dealing with enemy aliens overseas."[6] Do the petitioners, as enemy foreign nationals, held by U.S. military officials in a prison outside of U.S. territory for war crimes committed in foreign territory, have the right to a writ of habeas corpus and access to the federal judicial system? In *Eisentrager*, the Court ruled "[N]othing in the text of the Constitution extends such a right, nor does anything in our statutes."[7]

In trying to apply the precedent of *Johnson v. Eisentrager* to *Rasul v. Bush*, specific differences must be noted. In *Eisentrager*, the Court addresses the applicability of the writ of habeas corpus to a petitioner who "(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 by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United

5. *Johnson v. Eisentrager*, 399 U.S. 763, 767 (1950).

6. Ibid., 765.

7. Ibid., 768.

States."[8] In *Rasul*, the petitioners are citizens of Australia and Kuwait, countries that are not at war with the United States. While the petitioners were captured outside U.S. territory, they are held at Guantanamo Bay, territory over which the United States has exclusive jurisdiction. The petitioners in *Rasul* also differ from the petitioners in *Eisentrager* in that they have not been charged with anything, let alone tried and convicted before a military tribunal. The Court in *Rasul* briefly mentions these differences before launching into a discussion of a more critical element of the case: the Court in *Eisentrager* "made it quite clear that all six of the facts critical to its disposition were relevant only to the question of the petitioners' *constitutional* entitlement to habeas review."[9] It is from this fact that the Court in *Rasul* argues that the conclusion in *Eisentrager* is not applicable to the facts presented in *Rasul*.

While the Court in *Eisentrager* discusses the lack of a constitutional right to habeas corpus in detail, it glosses over the lack of a statutory right, dismissing the claim on the basis of *Ahrens v. Clark*, which the Court deemed an important precedent in deciding *Eisentrager,* as it defined territorial jurisdiction as deriving from the location of the detained. In *Ahrens*, the Court had heard arguments regarding the habeas corpus petitions of Germans awaiting deportation at Ellis Island. The Court interpreted the habeas statute's phrase "within their respective jurisdictions" as requiring the petitioner's presence in the territorial jurisdiction of the district court.

In the majority opinion in *Rasul*, the Court claims the Court of Appeals in *Eisentrager* "concluded that the habeas statute, as construed in *Ahrens*, had created an

8. Ibid., 777.

9. *Rasul*, 476.

unconstitutional gap that had to be filled by reference to 'fundamentals.'"[10] The Supreme Court in *Eisentrager* seemed to agree and evaluated the Court of Appeals' use of "fundamentals." However, the Court in *Rasul* found that decisions after *Ahrens* and *Eisentrager* have filed the statutory gap. The most important decision being *Braden v. 30th Judicial Circuit Court of Ky.*, which held that

> the language of § 2241 (a) requires nothing more than the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.[11]

In *Rasul*, the Court reasoned that "*Braden* overruled the statutory predicate to *Eisentrager's* holding, [therefore], *Eisentrager* plainly does not preclude the exercise of §2241 jurisdiction over petitioners' claims."[12] Using this reasoning, the Court addressed the habeas corpus petitions of the fourteen alien detainees in light of §2241. As no party to the suit disagree with the claim that the District Court has jurisdiction over the petitioners' custodians, and the government, as the respondents, concede the federal judiciary would have jurisdiction of the habeas claims of an American citizen detained at Guantanamo Bay, §2241 clearly gives the District Court jurisdiction to entertain the habeas corpus petitions of the petitioners' challenging the legality of their detention at Guantanamo Bay.[13]

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10. *Rasul*, 478.

11. *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U.S. 484, 495 (1973).

12. *Rasul*, 479.

13. Ibid, 481, 483.

Unanswered Questions

The decision of the Supreme Court in *Rasul v. Bush*, while ruling enemy combatants detained at Guantanamo Bay were entitled to habeas review by the federal judicial system, left many unanswered questions. Among these questions are questions over the extent of jurisdiction, constitutional rights of aliens, substantive rights, and questions regarding a detainee's right and access to counsel.

The first major unanswered question is how far federal judiciary's jurisdiction over habeas corpus petitions extends. Does it only reach Guantanamo Bay? Or does it extend to other places where detainees are in the custody of the U.S. military, such as a military prison in Afghanistan? There are two ways to interpret the extent of jurisdiction. The first is the framework laid out by the discussion of the special status of Guantanamo Bay. The Court states "the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base," and as such clearly falls into the territorial jurisdiction of the United States.[14] Using this interpretation, many questions arise that will have to be determined by lower courts. One such question is where the United States has "complete jurisdiction and control" necessary for habeas jurisdiction.

Another question is how "complete jurisdiction and control" can be gained. In the case of Guantanamo Bay, it is specified in 1903 lease agreement with Cuba. But does it have to come from formal documents? Can this status be granted to the United States through other terms? Does the status have to be granted formally? Is military control

14. Ibid., 480.

over a territory the equivalent of the status of Guantanamo Bay?[15] These are all questions that will have to be decided by lower courts as they are adjudicated in the future.

The second way to interpret the extent of jurisdiction is to claim that jurisdiction over aliens' habeas petitions extends to wherever there is jurisdiction over citizens' habeas petitions. Writing for the majority, Justice Stevens states,

> Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under §2241.[16]

The language chosen by Stevens seems to extend the habeas jurisdiction of the federal judiciary far beyond Guantanamo Bay to anywhere a U.S. citizen detained under U.S. authority is entitled to habeas statute protections. This interpretation can be read as a global jurisdiction that would open the federal judiciary up to habeas petitions from detainees in U.S. custody all over the world. In his dissent, Justice Scalia indicates he believes the Court's interpretation does just that. He writes that in departing from the precedent of *Eisentrager*, "the Court boldly extends the scope of the habeas statute to the four corners of the earth."[17] The exact meaning of both of the Court's approaches to the extent of habeas jurisdiction will have to be clarified by lower courts and will probably be debated for years to come.

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15. Randolph N. Jonakait, "Rasul V. Bush: Unanswered Questions," *William & Mary Bill of Rights Journal* 13 (2005): 1129, 1136.

16. *Rasul,* 481.

17. *Rasul v. Bush*, 542 US 466, 498 (2004) (Scalia, J., dissenting opinion).

A third unanswered question is the question of the constitutional rights of alien detainees. A question that must be answered is whether Guantanamo Bay should be considered American territory for the purpose of constitutional rights. It is generally held that aliens who have never had a presence in the United States do not have rights under the Constitution. If Guantanamo is not U.S. territory for the purposes of constitutional rights, then the aliens detained there are not entitled to constitutional protections, including the right of due process. In contrast, if (as the Court seems to indicate in its discussion of Guantanamo Bay's special status) Guantanamo Bay is considered U.S. territory, the detainees held there are entitled to the protections and rights guaranteed in the Constitution.[18]

However, the nature of the process is required by the Fifth Amendment's Due Process Clause remains unclear. On the same day the Court decided *Rasul*, it also decided *Hamdi v. Rumsfeld*, a case involving the detention of an American citizen. In the plurality opinion, it was concluded that Hamdi was entitled to due process, but that the requirement for due process could be fulfilled by procedures that fall short of the procedures normally required by the Fifth Amendment. The Court remanded *Hamdi* back to the lower court, allowing it to decide what process was due a detained citizen. As the Fifth Amendment Due Process Clause makes no distinction between citizen and alien, and if Guantanamo is a U.S. territory for the purpose of constitutional protections, then the lower courts will also have to decide what process is due to alien detainees held at Guantanamo Bay.[19]

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18. Jonakait, "Unanswered Questions," 1141.

19. Ibid., 1142-43.

Also left unanswered is the question of procedural protections. While the Court ruled that alien detainees are entitled to procedural protections, "the Court left the level of procedural protections afforded to alien detainees to the determination of the lower courts."[20] A defendant in an ordinary criminal trial under federal jurisdiction would be afforded the protections of the Federal Rules of Criminal Procedure. As the U.S. Constitution is the supreme law of the land, the protections included meet the minimum protections guaranteed by the Constitution, such as the right to due process and equal protection under the laws, the right to legal counsel, the right to confront witnesses, the right to a trial by jury, and the right against self-incrimination. Additionally, the Federal Rules of Criminal Procedure impose procedural rules in excess of the guarantees of the Constitution, dealing with the disclosure of evidence to the defendants and other aspects of a criminal trial.

Since alien detainees are situated differently from defendants in ordinary federal criminal trials, they are in limbo with respect to procedural protections. If the due process requirement can be met by procedures that would not normally meet the rigid standards of the Fifth Amendment, then perhaps the procedural protections to which alien detainees are entitled do not have to meet the minimum guarantees of the U.S. Constitution either. If this is the case, the government will have to enact procedural protections and the lower courts will rule on them as they are challenged, ensuring a tumultuous time for U.S. detention policy as the government and the courts slowly determine the nature of the procedural protections required for alien detainees.

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20. Meredith B. Osborn, "Rasul V. Bush: Federal Courts Have Jurisdiction over Habeas Challenges and Other Claims Brought by Guantanamo Detainees," *Harvard Civil Rights-Civil Liberties Law Review* 40 (2005): 265, 265.

In addition to the unaddressed issues of constitutional and procedural rights of aliens, in *Rasul* the Court did not answer the question of substantive rights. If, indeed, the protections of the writ of habeas corpus is extended to aliens anywhere it is extended to U.S. citizens, substantive rights become a vital issue. "Accepted doctrine…says that aliens outside U.S. territory do not have rights under the U.S. Constitution;" therefore, even if aliens detained outside U.S. territory can file habeas petitions in federal courts, they do not have constitutional rights, including the right to due process.[21] However, in hearing these petitions, the lower courts must consider whether there is another source of rights the petitioners can assert. Are there substantive, human rights that apply to all individuals? Can petitioners assert these rights, such as "the right not to be wantonly deprived of life and liberty" in habeas petitions to a federal court?[22] These questions are especially important to individuals detained somewhere other than Guantanamo Bay. They could also be important if the Court rules that the habeas statute extends to Guantanamo Bay, but that it is not U.S. territory for the purpose of constitutional protections.

A final question concerns the right to counsel and access to counsel. The petitioners had filed a petition for writ of habeas corpus, in the case of the two Australians, and a complaint seeking access to counsel, in the case of the twelve Kuwaitis. The Supreme Court only addressed the issue of jurisdiction, ruling that the federal courts did have jurisdiction over the petitions, and remanding the case to the District Court to consider the merits of the petitioners' claims. As such, the lower courts

21. Ibid., 1144-45.

22. Ibid., 1144.

will be responsible for deciding if and when alien detainees should have the right and access to counsel.

After the Court remanded *Rasul* back to the district court in Washington D.C., the government provided the detainees with access to counsel for the habeas proceedings. However, the access was conditioned on monitoring of writings to detainees and in some instances, monitoring of the attorney-client meetings. The monitoring was struck down by Judge Kollar-Kotelly, who ultimately ruled detainees must have unmonitored access to counsel, giving detainees the same right to counsel as civilian prisoners in the American criminal justice system.[23] Some lawyers have argued that the standards of criminal law cannot be imposed unchanged on military detentions and "what may be a perfectly reasonable, common sense proposition in the context of an ordinary criminal trial may be a dangerous and nonsensical one as applied to captures and detentions occurring in the course of armed conflict."[24] Whether this is an accurate portrayal of the issue is again a question the lower courts will have to decide as cases arise.

A particularly problematic aspect of this question of right to counsel is when the right to counsel attaches. Does the right to counsel attach immediately or is there a delay? Can detainees be interrogated for actionable intelligence before they are entitled to a lawyer? An argument can be made that the detainees are combatants in an asymmetric war and could possibly provide U.S. forces with valuable information if they were questioned without the presence of counsel. Arguments can also be made that the

23. Bradford A. Berenson, "Uncertain Legacy of Rasul V. Bush, The," *Tulsa Journal of Comparative & International Law* 12 (2005): 39, 46.

24. Ibid., 47.

detainees are entitled to counsel as soon as they are captured in order to prevent infringement of their rights—constitutional, procedural, or substantive, whatever they may be. The lower courts will have to carefully weigh the needs of the U.S. military in a time of war against the rights of the detained individual. Because this is a very subjective balancing test, conflicting decisions are certain to arise.

Clearly, this is not an exhaustive list of the questions the Court left unanswered in *Rasul.* As habeas petitions are filed by detainees, other issues will require adjudication by the Courts. As the cases are decided, case law will develop that will in essence provide more of a guideline for U.S. detention policy; however, it will be a piecemeal policy, not a comprehensive and cohesive policy.

The Response to Rasul v. Bush

In response to the Supreme Court's decision in *Rasul v. Bush*, Congress passed the Detainee Treatment Act of 2005, which was included as Title X of the Department of Defense Appropriations Act, 2006. In §1005(e), entitled "Judicial Review of Detention of Enemy Combatants," Congress essentially stripped the federal court system of jurisdiction over the habeas petitions of Guantanamo Bay detainees. The act amended the Habeas Statute to include

> (e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—
>
> (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.[25]

Additionally, the act provided the D.C. Circuit Court of Appeals with exclusive, but limited, jurisdiction to "determine the validity of any final determination of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," meaning the D.C. Circuit could only consider whether the CSRT followed the procedures established by the Department of Defense and "to the extent that the Constitution and the laws of the United States are applicable, whether the use of such standards and procedures…is consistent with the Constitution and the laws of the United States."[26]

The DTA appears to be a direct attempt of Congress to regain control of U.S. detention policy. Because Congress had never detailed a policy, the government had great discretion with regards to the treatment of detainees. With the ruling of the Supreme Court in *Rasul*, that discretion was lessened. The DTA endeavors to reclaim the government's latitude in detention policy by restricting the federal judiciary's ability to hear claims made by Guantanamo detainees to a final review of CSRT procedures under standards set by the Department of Defense, essentially eliminating detainees' access to the federal court system.

25. Detainee Treatment Act of 2005, Public Law 109-148, *US Statues at Large* 119 (2005): 2680, 2742.

26. Ibid.

Conclusion

While *Rasul* served as a step towards an identifiable detention policy with clear and legal guidelines, it was not the comprehensive and cohesive policy needed by the government, the military, or the detainees. There is now at least a clear guideline—that the federal judiciary has jurisdiction over habeas corpus petitions of Guantanamo Bay detainees—but it is not clear whether that jurisdiction extends elsewhere. The Court does not address the substantive or constitutional rights of the detainees. Neither does the Court's ruling adequately address the procedural protections the government is required to afford to alien detainees, leaving the government to fumble in the dark and the lower court to provide guidance as claims are adjudicated, ensuring an even more imprecise policy as conflicting rulings arise. Of particular importance, the Court does not speak to the detainee's right to counsel, access to counsel, or when the right to counsel attaches. All of these unanswered questions add up to a policy guideline that is incredibly unhelpful to all parties involved. It also allows for legislation like the Detainee Treatment Act of 2005, which brings the issue of detainees' rights back to the Supreme Court in *Hamdan v. Rumsfeld* in 2006.

CHAPTER FOUR

Hamdan v. Rumsfeld

Two years after the Court addressed the issue of alien detainees in *Rasul*, the Court took up the issue again in *Hamdan v. Rumsfeld*, this time addressing not simply the authority of the federal courts to consider the habeas petitions of alien detainees, but more substantively, the procedural protections to which detainees are entitled. *Hamdan* presented the Court with complex constitutional questions, resulting in an opinion for the Court that was a majority opinion only in part, with two concurring opinions and three separate dissents. In deciding the case, the justices had to consider whether the Detainee Treatment Act (DTA) stripped the Court of jurisdiction over Hamdan's claims, if the executive branch had the authority to establish military commissions, and if so, whether the structure and procedures of the commission at issue met the requirements of U.S. law and the law of war. As the Court answered these questions, it also illuminated some of the protections to which detainees are entitled, answering some of the questions left unresolved by *Rasul*. However, even in deciding this, the second case addressing alien detainees, the Court did not settle the many uncertainties of U.S. detention policy.

The Facts of the Case and its Background

On November 13, 2001, President George W. Bush issued a military order entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against

Terrorism."[1] In the order, the President outlined who was subject to the order—any non-citizen about whom the President determines:

> there is reason to believe that such an individual, at the relevant times,
> (i) is or was a member of the organization known as al Qaida;
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation thereof, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
> (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(i) of this order[2]

The President further elucidated that any individual meeting that criteria "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 imprisonment or death."[3]

Hamdan was one such individual deemed subject to the President's order. He was a Yemeni national captured by militia forces in Afghanistan in November 2001 and handed over to U.S. military forces. In June 2002, he was moved to Guantanamo Bay. In 2003, the President determined Hamdan was subject to the November 13 order and could be tried by a military commission. A year later, only after Hamdan had filed a petition for habeas corpus in the District Court for the Western District of Washington,

1. Military Order of November 13, 2001, 66 Fed. Reg. 578333 (Nov. 16, 2001).

2. Ibid., 57834.

3. Ibid.

was he finally charged with conspiracy "to commit…offenses triable by military commission."[4]

The charging document, after reciting the authority for jurisdiction exercised by the commission and elaborating on eleven years of al Qaeda's activities, utilizes its final two paragraphs to assert that Hamdan "willfully and knowingly" joined a criminal enterprise, namely al Qaeda, and conspired to commit the "following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism."[5] In support of the charges, the document alleges four overt acts committed between 1996 and November 2001: (1) he was Osama bin Laden's bodyguard and driver; (2) he arranged for transportation of, or transported himself, weapons for al Qaeda members and bin Laden's bodyguards; (3) he visited al Qaeda training camps and events with bin Laden; and (4) he trained at the al Qaeda camps.[6]

The procedures for the commission are outlined in the March 21, 2002 Department of Defense Military Commission Order No.1. It provides that any evidence shall be admitted if, in the opinion of the presiding officer, "the evidence would have probative value to a reasonable person."[7] It also allows the Authorizing Authority or presiding officer to close proceedings on such grounds as "the protection of information classified or classifiable…; information protected by law or rule from unauthorized

4. *Hamdan v. Rumsfeld*, 548 US 557, 566 (2006).

5. Ibid., 569-70.

6. Ibid., 570.

7. Department of Defense, "Military Commission Order No. 1," March 22, 2002, §6(D)(1).

disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests."[8] Should the proceedings be closed, only the accused's appointed military defense counsel may be present; the accused and his civilian counsel are excluded. The military defense counsel is also prohibited from disclosing any evidence or information presented in a closed proceeding to the accused or civilian counsel.

When Hamdan challenged the intended trial by military commission, he did so with two main objections. His first objection was that trial by military commission for conspiracy is supported by neither an act of Congress nor the common law of war. His other objection was that the procedures of the commission violated both military and international law, most prominently the basic legal principle that a defendant is entitled to see and hear the evidence against him.[9]

The Opinion of the Court

In *Hamdan,* the Court addressed five questions. First, did the Detainee Treatment Act (DTA) deprive the Court of jurisdiction over the case? In a 5-3 decision, the Court ruled that it did not, as the jurisdiction stripping clause did not apply to cases pending at the time of its enactment. Second, should the Court abstain from ruling in the case? Again, the Court ruled that abstention was not appropriate because the petitioner, Hamdan, was not a member of the U.S. military, nor was the military commission part of

8. Ibid., §6(B)(3).

9. *Hamdan,* 567.

the established military judicial system.[10] Third, was the military commission explicitly authorized by an act of Congress? The Court decided that neither the Authorization for Use of Military Force (AUMF) nor the DTA provided the necessary authorization for the military commission to try Hamdan. Fourth, did the military commission violate the Uniform Code of Military Justice (UCMJ)? The Court ruled that the commission's procedures did violate the UCMJ. Finally, did the military commission violate the Geneva Conventions? According to the Court, the military commission also violated the Geneva Conventions because it did not meet the minimum requirements of Common Article 3 and it was not a "regularly constituted court."[11]

Before considering the merits of Hamdan's claim, the Court first had to address the Government's motion to dismiss based on the Detainee Treatment Act of 2005 (DTA). The Government argued that DTA §1005(e)(1), which provides that "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 Department of Defense at Guantanamo Bay, Cuba," applied to cases pending at the time of its enactment.[12] The Court, however, disagreed, based on the explicit provision of DTA §1005(h)(2) applying §1005(e)(2) and (3) to any claim pending on the DTA's effective date. Because the legislative history shows that Congress rejected earlier versions of the statute that would

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10. Julia Y. Capozzi, "Hamdan v. Rumsfeld: A Short-Lived Decision," *Whittier Law Review* 28 (2007): 1303, 1306.

11. International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, Art. 3, available at: http://www.refworld.org/docid/3ae6b36c8.html [accessed 15 April 2014]

12. Detainee Treatment Act of 2005, Public Law 109-148, *US Statues at Large* 119 (2005): 2680, 2742.

have applied paragraph (1) to pending claims, the Court concluded that Congress did not intend to strip the Court of jurisdiction over cases pending at the time the DTA was enacted. The Court used a principle from its prior decision in *Lindh v. Murphy* to support its reading of the DTA—"a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."[13]

After reviewing the literal text of the act, precedents regarding the retroactivity of legislation, and the legislative history of the DTA, the Court denied the Government's motion, concluding that §1005(e)(1) did not strip the federal judiciary of the jurisdiction over cases pending on the date of the act's enactment. Having reached this conclusion, the Court leaves off considering the DTA without ever addressing the constitutionality of the act itself.

The Court also briefly addressed the Government's argument for abstention on the grounds of *Schlesinger v. Councilman*, a case in which an army officer brought suit in federal court to prevent his court-martial from proceeding. In *Councilman*, the Court ruled that based on the need for military discipline and out of respect for the military courts and review procedures establish by Congress, the "federal courts should normally abstain from intervening in pending court-martial proceedings."[14] With regards to this argument, the Court makes two distinctions between *Councilman* and the facts in *Hamdan*. First, Hamdan is not a member of the U.S. military, so no need for military discipline or efficient operation applies. Second, the military commission convened to

13. *Hamdan,* 578.

14. Ibid., 585.

try Hamdan is not part of the Congressionally-established system of military courts and review procedures; it is outside civilian review, as appeal is only to a panel of military officers, the Secretary of Defense, and the President. As such, the Court ruled that *Councilman* had no bearing on the case and abstention was not appropriate action for the Court.

After establishing its jurisdiction over the case, the Supreme Court turned to the merits and the overarching question of whether the military commission established to try Hamdan was constitutional. Military commissions are never mentioned in the Constitution nor are they created by statute, but rather they arose out of the exigencies of war.[15] However, as Justice Stevens writes in *Hamdan*, "Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, §8 and Article III, §1 of the Constitution unless some other part of that document authorizes a response to the felt need;" so the "authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war."[16] In 1942, in *Ex parte Quirin*, the Court held that Congress had sanctioned the use of military commissions for the trial of unlawful combatants under appropriate circumstances in Article 15 of the Articles of War. After World War II, Congress replaced the Articles of War with the UCMJ; however, as the Court indicates in *Hamdan*, the language of Article 21 is "substantially identical to the old Article 15."[17] Article 21 of the UCMJ states that "the provisions of this code conferring jurisdiction upon courts-martial shall not be construed

15. Ibid., 590.

16. Ibid., 591.

17. Ibid., 592.

as depriving military commissions…of concurrent jurisdiction in respect to offenders or offenses that by statute or by the law of war may be tried by such military commissions…"[18] As the Court interpreted Article 15 in *Quirin* as acknowledgment of the general Presidential authority to establish military commission and not authorization for the specific commission at issue, so too did the Court in *Hamdan* interpret Article 21of the UCMJ.

The Government argued that both the DTA and the AUMF specifically authorize the military commission convened to try Hamdan. The Court does not agree. With respect to the AUMF, the Court assumes that it "activated the President's war powers…and that those powers include the authority to convene military commissions in appropriate circumstances," but the Court also contends that "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ."[19] The Court interprets the DTA similarly. The DTA does not authorize the military commission convened to try Hamdan, it merely "'recognizes' the existence of the Guantanamo Bay commissions."[20]

As neither the AUMF nor the DTA provide specific authorization for the military commission, the Court followed the precedent of *Ex parte Quirin* and inquired as to whether the commission complied with the common law of war and, additionally, the governing UCMJ. A plurality came to the conclusion that the military commission did not comply with the common law governing military commissions. Three general

18. 10 U.S.C. §821

19. *Hamdan*, 594.

20. Ibid.

situations justifying military commissions are identified by the Court—as substitution in areas where martial law has been declared, as part of temporary military government in occupied enemy territory, or as an during a time of war to try enemy soldiers who have violated the law of war. As Guantanamo Bay is neither under martial law, nor occupied enemy territory, the third model of commission is the only model appropriate.[21]

In order to determine whether the commission to try Hamdan was justified, the justices turned to Colonel William Winthrop, the "Blackstone of Military Law." Winthrop identifies "at least four preconditions for exercise of jurisdiction" by a law-of-war commission.[22] First, a commission only has jurisdiction over offenses committed in a theater of war "within the field of the command of the convening officer."[23] Second, the offense must have been committed during the period of war; "a military commission cannot…legally assume jurisdiction of…an offence committed before or after the war."[24] Third, unless the commission is established under martial law or an occupation, it may only try groups of people: members of the enemy army who have committed acts of illegitimate warfare or acts that violate the laws of war and members of its own army who commit offenses that cannot be tried in criminal courts or in military courts.[25] Finally, the commission only has jurisdiction over two types of offense. It can try "violations of the laws and usages of war cognizable by military tribunals only" and "breaches of

21. Ibid., 597.

22. Ibid.

23. William Winthrop, *Military Law and Precedents* (Washington, D.C.: G.P.O., 1920), 836.

24. Ibid., 837.

25. *Hamdan,* 597-8.

military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war."[26] For four of the justices, the charging document makes it clear that these preconditions were not met. The commission was not convened by a commander in the theater of war, but rather by a retired major general at Guantanamo Bay, half a world away from hostilities.[27] The document charges Hamdan with conspiracy from 1996 to November 2001, a time period that, excluding the last two months, occurred before the time of war, and therefore outside the jurisdiction of the military commission. The plurality opinion emphasizes that none of the overt acts were "alleged to have occurred in a theater of war or on any specified date after September 11, 2001."[28] The time and place of the alleged offenses exclude them from the jurisdiction of the commission. However, more importantly, the offense itself is not triable by the commission. Conspiracy is not defined as a war crime by statute or treaty. In such instances, the Court has stated to be triable by commission, "the precedent must be plain and unambiguous."[29] Neither the Geneva Conventions nor the Hague Conventions recognize conspiracy as a war crime and there is little if any precedent of military commissions exercising only law-of-war jurisdiction trying an offense of conspiracy as a violation of the law of war.[30] Due to all of these circumstances, the commission lacked the necessary jurisdiction to try Hamdan.

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26. Winthrop, *Military Law and Precedents*, 838.

27. *Hamdan*, 612.

28. Ibid., 600.

29. Ibid., 602.

30. Ibid., 603-4.

While only four of the eight justices agreed that the commission was invalid because conspiracy was not a violation of the law of war, five justices determined that the commission lacked the authority to proceed because it did not comply with the UCMJ. Discussing the history of military commissions, the justices highlight that procedures governing military commissions have historically been the same as the procedures of courts-martial; the notable exception being the trial of General Yamashita in 1945, in which the procedures and rules of evidence departed significantly from those used in courts-martials. According to the Court in *Hamdan*, "the force of that precedent, however, has been seriously undermined by post-World War II developments."[31] When the Articles of War were codified into the UCMJ after World War II, Article 2 of the UCMJ made the UCMJ applicable to detainees in Yamashita's position. Article 2 states that the UCMJ is applicable to "prisoners of war in custody of the armed forces…" and "subject to any treaty or agreement to which the United States is or may be a party to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands."[32] As Guantanamo Bay is a leased base, Hamdan clearly falls into this category, making the UCMJ applicable to his trial.

The Court also notes that, while the uniformity principle is applicable to Hamdan, the uniformity principle itself is not completely inflexible. Departures from courts-

31. Ibid., 618.

32. 10 U.S.C. §802

martial procedures can be made if exigency demands it, but those departures are limited by the UCMJ. Article 36 states,

> (a) Pretrial, trial, and post trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
> (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.[33]

The Court ignored the "contrary to or inconsistent with" provision of the article, instead ruling "the 'practicability' determination the President has made is insufficient to justify variances from the procedures governing courts-martials."[34] In his November 13 Military Order, President Bush determined that "given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[35] The Court deferred to this determination, which satisfied the requirements of Article 36(a), but concluded that the President had not made an official determination with regards to Article 36(b), nor were the requirements of that subsection satisfied by the record—there was no indication that application of court-martial rules would be impracticable. Therefore, the procedures used for courts-martials were required

33. 10 U.S.C. §836

34. *Hamdan*, 622.

35. Military Order of November 13, 2001, §1(f).

to be used by the commission and "since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Article 36(b)."[36]

Additionally, the majority found Common Article 3 of the Geneva Conventions applicable to Hamdan's situation and judicially enforceable in federal court. Common Article 3 requires certain minimal protections be applied to non-combatants, including combatants placed outside of combat by detention, in a conflict that is not international in character and occurs in the territory of a signatory of the Conventions. Afghanistan is a signatory, but al Qaeda is not. As al Qaeda is not a state, the conflict in which Hamdan was captured was not international in character and Common Article 3 applies. Because "compliance with the law of war is the condition upon with the authority set forth in Article 21 is granted" and the Conventions are indisputably part of the law of war, the rights conveyed to Hamdan under Common Article 3 of the Geneva Conventions are judicially enforceable.[37] Common Article 3 requires that "Hamdan be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'"[38] In the United States, courts-martial are the regularly constituted military courts; a military commission "can be 'regularly constituted by the standards of our military justice system only if some practical need explains

36. *Hamdan*, 624.

37. Ibid., 628.

38. Ibid., 631-2.

deviation from court-martial," which the Court determined did not exist in the current situation.[39]

While the majority decided the military commission did not meet the standards of Common Article 3, the plurality went further to say the procedures utilized in the military commission, as provided by Commission Order. No. 1, did not meet the "judicial guarantees which are recognized as indispensable by civilized peoples" standards provided by the Convention. Article 75 of Protocol 1 to the Geneva Conventions of 1949, a protocol which the United States did not ratify, articulates the trial protections that are the bare minimum of those recognized as essential in customary international law. Included in this list is the accused's right to be present at his or her trial and have access to the evidence against him or her. The plurality concluded that, absent specific statutory authorization, evidence used to convict the accused must be disclosed to him or her.[40]

Filling the Gaps of Rasul*?*

In *Hamdan*, the Court filled some of the gaps left by the decision in *Rasul.* By deciding the UCMJ required that rules governing courts-martial also apply to military commissions unless exigent circumstances could be proven to justify departure, the Court provided more specific guidelines on what procedural protections should be afforded to detainees. The guideline was somewhat flexible as the government could deviate from courts-martial rules if it could prove circumstances made their application impracticable;

39. *Hamdan v. Rumsfeld*, 548 US 557, 645 (2006) (Kennedy, J., concurring opinion).

40. *Hamdan*, 635.

however, the guideline in *Hamdan* was much more specific than in *Rasul*. In *Rasul*, the Court ruled detainees were entitled to procedural protections but left the specifics up to the lower courts. In *Hamdan*, the Court, through the UCMJ, applied the protections found in the Manual for Courts-Martial (MCM) to the Guantanamo Bay detainees. These protections include the right to be present at all parts of the trial unless the accused voluntarily absents him- or herself or engages in disruptive conduct after being warned the conduct will result in his or her removal from the proceedings and the right to see and hear the evidence against him or her. The procedures outlined in Commission Order No. 1 depart significantly from the procedures prescribed in the MCM; the accused can be excluded from closed proceedings and the accused can be denied access to the evidence used against him or her. With the ruling in *Hamdan*, the Court invalidated the procedures of Commission Order No. 1 and delineated a set of minimum protections to be applied, absent a valid finding of impracticability.

In addition to answering the question of procedural protections, the Court also decided on the applicability of the Geneva Conventions. After *Hamdan*, Guantanamo Bay detainees would be entitled to the protections required in Common Article 3. No longer could the government claim the detainees, as unlawful enemy combatants, were excluded from the protections of the Geneva Conventions. While they are not entitled to the full protections, the Court ruled they were entitled to, at minimum, the protections of Common Article 3 and that those protections are judicially enforceable.

Even as the Court addressed some of the issues ignored in *Rasul*, the justices also left many unanswered questions in *Hamdan*. While the majority addressed the procedural protections to which detainees are entitled and the applicability of the Geneva

Conventions, many important issues did not arise in this case and were left unanswered. Hamdan had counsel, so the Court did not address the right to counsel or when that right attaches. Neither the constitutional rights, nor the substantive rights of Hamdan were questioned in this case. Additionally, the Court refused to address the ability of the government to hold detainees indefinitely without charges. The Court only ruled that if the government charged a detainee, the detainee was entitled to a fair trial in a "regularly constituted" court and certain procedural protections. Nothing was said to answer whether the government had to charge an individual detained at Guantanamo Bay. Perhaps, most importantly, the Court did not address the constitutionality of the DTA itself. Because Hamdan's petition was pending at the time of the DTA's enactment, the Court only addressed the applicability of the jurisdiction stripping provision of the DTA to pending cases, not the ability of Congress to strip the federal courts of jurisdiction.

The Military Commissions Act of 2006

The Military Commissions Act of 2006 (MCA) was a direct response to the Court's decision in *Hamdan*. With the decision in *Hamdan*, the Court had blocked a major portion of the government's detention policy—the policy on military commissions. Less than four months after the Court's decision, President George Bush signed the MCA into law. Included in the MCA were provisions directly counteracting the Court's major points in *Hamdan*. The act specifically authorized the use of military tribunals to try enemy combatants, negating the Court's assertion that the President did not have explicit authorization to convene the military commission to try alien detainees. The act also

stripped the courts of jurisdiction over any habeas corpus appeals from alien enemy combatants.

With respect to the Geneva Conventions, the act allowed the president to interpret what the Conventions meant and how they were to be applied. Furthermore, it declared that the military commissions convened under the authority of the MCA were "regularly constituted courts" required by Common Article 3 of the Geneva Conventions.[41] Moreover, the act provided that no individual subject to trial by military commission under the MCA may use the Conventions as a source of rights.[42]

Finally, a plurality of justices in *Hamdan* concluded that an individual could not be tried by military commission on a charge of conspiracy because conspiracy was not defined as a violation of the law of war by either statute or treaty. In the MCA, Congress explicitly defines conspiracy as a violation of the law of war triable by military commission.[43]

Hamdan was decided on statutory grounds, not constitutional grounds. Because of this, Congress effectively nullified the Court's decision in *Hamdan* by passing the MCA.

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41. James P. Pfiffner, *Power Play: The Bush Presidency and the Constitution* (Washington, D.C: Brookings Institution Press, 2008), 108-9.

42. Capozzi, "Hamdan v. Rumsfeld," 1331.

43. Ibid., 1332.

Conclusion

In *Hamdan v. Rumsfeld*, the Court enumerated some of the procedural protections to which alien detainees are entitled, answering some of the questions that were not addressed in *Rasul* two years before. A minimum standard was established, requiring military commissions, absent a valid finding of impracticability, to adhere to the UCMJ and, by extension, the MCM. The Court also required the protections of Common Article 3 be afforded to Guantanamo Bay detainees. Finally, the legal aspects of U.S. detention policy seemed to be becoming clearer.

Hamdan was an important precedent governing military commissions; however, its precedential value appeared to be short lived. When Congress passed the MCA, every major point on which the Court invalidated Hamdan's commission was addressed and nullified. With the MCA, detainees were stripped of the protections and rights afforded to them by *Hamdan*. Any progress made in clarifying U.S. detention policy and ensuring detainees had a minimum standard of protections was erased. Congress's enactment of the Military Commissions Act of 2006 as a response to the Court's decision in *Hamdan* would force the issue of alien detainees back onto the Court's docket in 2007 with *Boumediene v. Bush*.

CHAPTER FIVE

Boumediene v. Bush

Shortly after its enactment, the Military Commissions Act of 2006 was challenged in *Boumediene v. Bush*. In this case, the Court finally answers one of the most important questions left unresolved by previous cases—whether alien enemy combatants have the constitutional right to habeas corpus. Additionally the Court had to decide whether the review process established under the Detainee Treatment Act was an adequate substitute for habeas corpus and furthermore, whether §7 of the Military Commissions Act of 2006 (MCA) was an unconstitutional suspension of the writ of habeas corpus.

With the MCA, Congress effectively undid all of the progress made in clarifying the limits of U.S. detention policy and the rights of detainees; in *Boumediene*, the Court regained some lost ground by identifying a constitutional right to habeas review for noncitizens detained at Guantanamo Bay. However, just as in *Rasul* and *Hamdan*, the Court left many questions to be answered by the lower courts at a later date. Moreover, two of the same questions left unresolved in *Rasul* are again left unanswered in *Boumediene*: the reach of the writ and the procedural and other rules to govern the habeas proceedings.

The Judicial History of the Case

Boumediene v. Bush is the third important case in the Supreme Court's alien detainee jurisprudence. The case the result of consolidation of several cases heard at the

district court level. *Al Odah v. United States* was one of the consolidated cases in *Rasul* that were remanded back to the lower courts. Judge Joyce Hens Green for the District Court for the District of Columbia denied the government's motion to dismiss the remaining habeas cases, ruling that the detainees had a constitutional right to due process under the Fifth Amendment. At the same time, Judge Richard J. Leon, also for the District Court for the District of Columbia, heard oral arguments for *Khalid v. Bush* and *Boumediene v. Bush*, holding that alien enemy combatants had no "rights that could be vindicated in a habeas corpus action."[1] Both sets of cases were appealed. While appeals were pending both the DTA and MCA were passed. The Court of Appeals decided that §7 of the MCA stripped the federal judiciary of jurisdiction over any and all habeas corpus applications of enemy combatants, eliminating the statutory right to habeas corpus that had been articulated in *Rasul*. Furthermore, alien enemy combatants had neither a constitutional right to the writ of habeas corpus, nor a constitutional right to the protection of the Suspension Clause. The Supreme Court granted certiorari in June 2007.

The Opinion of the Court

The first question the Court looks at in *Boumediene* is whether §7 of the MCA strips the federal courts of jurisdiction to hear habeas corpus actions that were pending when the law was enacted. This question is the same question the Court asked of the DTA in *Hamdan*; however, in *Boumediene* the justices reach the opposite conclusion of what they decided in *Hamdan*. Unlike the DTA, the MCA was applicable to pending

1. *Boumediene v. Bush*, 553 US 723 (2008), 734.

cases. The text of this section is substantially similar to §1005(e) of the DTA. It amends 28 USC §2241, which governs the writ of habeas corpus, to read,

> (e)(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 paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005, 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. [2]

The most important difference between the similar sections of the DTA and the MCA is that the MCA explicitly provided that the amendment in its entirety would "apply to all cases, without exception, pending on or after the date of the enactment" of the MCA.[3]

While the textual argument is clearly in favor of applicability of the statute to pending cases, the Court also acknowledges the events that led to the enactment of the MCA. The MCA was enacted as Congress's response to the Court's decision in *Hamdan*. In support of this conclusion the Court points to the clear statement rule, an interpretative rule that can be used to interpret a statute in such a way as to avoid constitutional difficulties in the absence of an explicit statement by Congress of what it intended with the statute.[4] The Court considers this rule to engender dialogue between the branches of government. And it was as a part of this ongoing dialogue that Congress enacted the MCA to unambiguously deprive the federal judiciary of jurisdiction over the

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2. 28 U.S.C. §2241

3. Military Commissions Act of 2006, Public Law 109-366, *US Statutes at Large* 120 (2006): 2600-2637, 2636.

4. *Boumediene*, 738.

habeas actions of detainees after the Court interpreted the DTA's jurisdiction-stripping provision as applicable only to cases filed after the date of enactment.

Once the Court determined that the MCA did indeed deprive the federal judiciary of jurisdiction over the actions filed by detainees, the Court proceeded to determine if §7 of the MCA was valid. The first question the justices ask in their determination of validity is whether detainees are "barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status…as enemy combatants, or their physical location, *i.e.,* their presence at Guantanamo Bay."[5] To answer this question, the Court looked at the origin of the writ and the history of its jurisdiction. After a detailed analysis, the Court identified three factors, found in *Eisentrager*, necessary for a determination of "the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which the 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."[6]

With regards to the first factor, the Court noted the controversy over the status of the detainees. They are not American citizens and while the government has labeled them as enemy combatants, the detainees deny they fall under this label. Concerning the adequacy of procedures to determine status, the Court observes the lack of an adversarial process to challenge the detention. The majority concluded the procedural protections

5. Ibid., 739.

6. Ibid., 766.

given to detainees by the Combatant Status Review Tribunal (CSRT) hearings were not of a nature to substitute as habeas corpus review.[7]

The second factor is the locale of detention. Just as the petitioners in *Eisentrager* were detained in Germany at Landsberg Prison outside the United States, the petitioners in *Boumediene* were held at Guantanamo Bay, a locale outside the sovereign territory of the United States. In *Eisentrager*, this factor was important in finding that the petitioners did not have a constitutional right to habeas corpus. However, in *Boumediene*, the Court emphasizes the differences between Landsberg Prison and Guantanamo Bay. Landsberg Prison was under Allied control after World War II and Allied jurisdiction over German territory was only temporary. Unlike Landsberg though, U.S. possession of Guantanamo Bay is permanent; "in every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States."[8]

The third factor is the practical concern of extending the protection of the Suspension Clause to military detainees abroad. As far as the Court in *Boumediene* was concerned, there were no apparent security threats that would arise from allowing detainees access to the writ of habeas corpus. The Court recognized that, while few practical barriers existed to prevent the writ from extending to detainees at Guantanamo, barriers could arise in the future. In acknowledgement of this, the Court stated that "to the extent barriers arise, habeas corpus procedures likely can be modified to address them."[9]

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7. Ibid., 766-7.

8. Ibid., 769.

9. Ibid., 770.

After looking at each of the three factors, the Court held that the Suspension Clause had "full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees…Congress must act in accordance with the requirements of the Suspension Clause."[10] Furthermore, the Court concluded that "the MCA does not purport to be a formal suspension of the writ…Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention."[11]

As the detainees have a constitutional right to habeas corpus and are entitled to the protection of the Suspension Clause, the Court moved onto the next question of whether the process established by the DTA is an adequate substitute for habeas corpus. The DTA granted jurisdiction to the Court of Appeals for the District of Colombia to review, insofar as the Constitution was applicable, whether the procedures used by the CSRT to determine the status of a detainee were consistent with the Constitution.[12] The Court of appeals did not review the adequacy of the procedures because it found that the writ of habeas corpus did not extend to alien detainees. The Court, instead of remanding this issue to the Court of Appeals, deemed the circumstances exceptional, allowing the justices to address the issue without prior consideration of the issue by lower courts.

There is very little case law to guide the Court's analysis of the adequacy of the substitute procedures. The Court points to *Swain v. Pressley* and *United States v. Hayman* as "the two leading cases addressing habeas substitutes;" however, the statutes

10. Ibid., 771.

11. Ibid.

12. Detainee Treatment Act of 2005, Public Law 109-148, *US Statues at Large* 119 (2005): 2680, 2743.

challenged were "attempts to streamline habeas corpus relief, not to cut it back."[13] Most significantly, both statutes explicitly provided "that a writ of habeas corpus would be available if the alternative process proved inadequate or ineffective."[14]

With the passage of both the DTA and MCA, however, Congress clearly meant to limit habeas review. §7 of the MCA unambiguously strips the federal courts of any jurisdiction over habeas petitions of aliens detained at Guantanamo Bay. Furthermore, unlike the broad remedial powers granted to the judicial system by the statutes in *Swain* and *Hayman*, in the DTA, Congress granted jurisdiction to the Court of Appeals to evaluate only whether the CSRT acted in accordance with the standards and procedures stipulated by the Secretary of Defense and if said standards were legal; the Court of Appeals was not authorized to question the legality of the detention.[15] Clearly, Congress intended to restrict access to habeas review and create a more limited substitute procedure. With the intent of Congress in mind, the Court proceeded to decide whether the process established by the DTA is an adequate substitute for habeas corpus.

The Court begins this process by determining what exactly an adequate habeas corpus substitute should look like. The Court identified two incontrovertible aspects of a habeas corpus substitute: a "meaningful opportunity" for the detainee to show that "he is being held pursuant to 'the erroneous application or interpretation' of relevant law" and the ability of the habeas court "to order the conditional release of an individual

13. *Boumediene*, 774.

14. Ibid., 776.

15. Ibid., 777.

unlawfully detained."[16] While these two elements are required elements of habeas review, the actual "necessary scope of habeas review in part depends upon the rigor of any earlier proceedings."[17]

The Court assessed the rigor of the CSRT process in order to ascertain the needed scope of habeas corpus review. One particularly relevant deficiency was found—"the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant."[18] At the CSRT stage, the detainee lacks access to counsel and cannot review the classified information used to justify his detention. While, theoretically, he has the right to confront the witnesses against him, practically, the allowed admission of hearsay evidence nullifies this right. Additionally, should an error in classification be made at the CSRT stage, an innocent person could be held for the duration of a war that has no foreseeable end. [19]

Due to these factors, the Court found additional requirements for an effective habeas substitute in this context. The reviewing court must be able to evaluate the sufficiency of the evidence used to classify the detainee as an unlawful enemy combatant. It must also be able to hear exculpatory evidence that was not admitted in prior proceedings.[20]

16. Ibid., 779.

17. Ibid., 781.

18. Ibid., 783.

19. Ibid., 783-4.

20. Ibid., 786.

According to the majority, the DTA did not allow for proceedings meeting these standards to be conducted. There is not explicit grant to the Court of Appeals the power to order the release of a detainee, nor is there explicit allowance of all legal challenges, including challenges of the president's authority to carry out indefinite detentions under the AUMF. The Court accepted a reading of the statute that implied both a release remedy and allowance of all challenges, but the justices, nevertheless, found other deficiencies.[21]

The statute does not provide the requisite opportunity for the detainee to introduce new, exculpatory evidence. Several different readings of the statute are given, the most generous of which is that the DTA allows the Court of Appeals to review all evidence available to the government when the CSRT occurred, regardless of whether the evidence was part of the record. However, even this generous reading forecloses the possibility of the detainee to present evidence obtained after the CSRT.[22]

Due to the deficiency of the procedures of the DTA, it is an inadequate substitute for habeas corpus. Consequently, MCA §7 serves as an unconstitutional suspension of the writ. The Court is decidedly unambiguous in its holding. Justice Kennedy writes, "Our decision today holds only that the petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus…The only law we identify as unconstitutional is MCA §7…Accordingly, both the DTA and the CSRT process remain intact."[23] The ruling entitles the petitioners to seek the writ of

21. Ibid., 787-8

22. Ibid., 789-90.

23. Ibid., 795.

habeas corpus; it does not guarantee the petitioners will gain the relief they asked for. The decision only requires that habeas relief be allowed to Guantanamo Bay detainees as a way to challenge their detention. The government can continue to use the CSRTs to make status determinations. The provisions of the DTA remain applicable. Only one thing has changed. No longer can Congress deprive Guantanamo detainees of habeas relief by amending the habeas statute. To exclude detainees from habeas relief, Congress must suspend the writ in accordance with the requirements of the Suspension Clause.

Unresolved Questions

By enacting the MCA in 2006, Congress essentially nullified the Court's prior rulings. Where the Court had previously vested a detainee's right to habeas review in the habeas statute, 28 U.S. §2241, the DTA and MCA excluded alien enemy combatants from the statute's coverage. While the Court had established minimum procedural protections to which detainees were entitled in *Hamdan*, the MCA negated most of the Court's findings. With *Boumediene* the Court returned to the beginning, ruling noncitizens detained at Guantanamo Bay had a constitutional right to habeas corpus. However, just as in *Rasul*, the justices left some important matters unresolved.

First, the Court was not clear what other locales, if any, this constitutional right extended to. The Court used three factors distilled from the *Eisentrager* decision to create "a functional, multifactor, extraterritorial habeas corpus framework;" however, while the justices applied the framework to *Boumediene* proper, they provided virtually

no guidance on how to apply the framework to different detention sites.[24] The Court "did not explain how to weigh the factors, identify which practical obstacles should matter, or explain how much control was necessary to a finding of *de facto* sovereignty."[25] As the Court did not provide much guidance on the application of the framework, conflicting decisions are certain to occur as lower courts attempt to apply the framework to habeas petitions from detainees held in other detention facilities.

The conflicting approaches of the District Court and Court of Appeals in *Al Maqaleh v. Gates*, a case concerning detainees held at Bagram, bears this out. The District Court conducted an exhaustive analysis of the different relevant factors, including "a thorough and nuanced examination of the degree of objective control that the United States had over Bagram" and found that the writ extended to Bagram.[26] In contrast, the Court of Appeals weighted the two factors of location of apprehension and detention and the practical obstacles more heavily and "focused solely on indicators of U.S. territorial sovereignty over Bagram," concluding the writ did not extend to Bagram.[27]

The lack of guidance from the Supreme Court and the many different ways the framework can be applied do not provide a clearly defined standard. Yes, noncitizens detained at Guantanamo Bay have a constitutional right to habeas review, but what about

24. Jose F. Irias, "Wartime Detention and the Extraterritorial Habeas Corpus Doctrine: Refining the Boumediene Framework in Light of Its Goals and Its Failures," *New York University Law Review* 88 (2013): 1348, 1358.

25. Ibid., 1361.

26. Ibid., 1366.

27. Ibid.

other individuals who are similarly situated, except for the fact, they are detained somewhere besides Cuba? As of now, the Court of Appeals has denied the writ to detainees at Bagram, but does that denial extend to other locales. The Court's framework lacks clarity and until clarity is provided, there will be conflicting and confusing decisions made on where exactly the constitutional right to habeas corpus manifests outside of U.S. territory.

A second subject the Court left unaddressed is the "procedural, evidentiary, and even substantive rules to govern the detainees' claims."[28] The Court left these rules to be developed by the lower courts, unambiguously stating that the "opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined."[29] What standard of proof is the government required to meet? What evidence can be entered into the record? As a practical matter, what will the habeas procedure look like for detainees? Do detainees have a right to counsel? What does that look like? The Court answered the overarching question of whether the Guantanamo detainees have a constitutional right to habeas corpus, but left the details to the lower courts.

Conclusion

The decision, while very narrow, is incredibly significant because, for the first time, the Supreme Court grants constitutional rights to non-U.S. citizens outside of U.S.

28. Stephen I. Vladeck, "D.C. Circuit after Boumediene, The," *Seton Hall Law Review* 41 (2011): 1451, 1453.

29. *Boumediene*, 798.

territory. It imposes explicit constitutional limits on U.S. detention policy, at least policy pertaining to Guantanamo Bay. Whether those limits apply to executive detentions carried out elsewhere in the world, only time will tell.

In *Boumediene*, the Court reclaimed some of the ground lost with the enactment of the MCA, but it left many of the particulars to be decided through litigation at the lower court level. While the Court imposed a clear guideline regarding Guantanamo detainees' right to habeas review, none of the other issues that need to be resolved in order to have a comprehensive, intelligible detention policy were addressed. The Court leaves numerous matters to the lower courts and invites the political branches "to engage in a genuine debate about how to best preserve constitutional values while protecting the Nation from terrorism."[30] To date, the political branches have not fashioned a complete, cohesive policy. Instead, the guidelines have come from the decisions of the District Court for the District of Columbia and the D.C. Court of Appeals. This is the legacy of *Boumediene*.

30. Ibid.

CHAPTER SIX

Conclusion

Rasul, Hamdan, and *Boumediene* and the resulting actions of Congress create an arc of protections for detainees and limits on detention policy. *Rasul* recognized that Guantanamo detainees have a statutory right to habeas corpus. *Hamdan*, representing the pinnacle of the arc, established a minimum standard of procedural protections to be afforded to detainees. The Detainee Treatment Act and the Military Commissions Act reversed this progress. *Boumediene* reestablished the right to habeas corpus for Guantanamo detainees, rooting the right in the Constitution rather than in a statute easily amended by Congress. The legacy of *Boumediene* is found near the end, when Kennedy writes, "The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law."[1] Habeas corpus, long considered "the bulwark of personal liberty," was extended to noncitizens detained at Guantanamo Bay.[2]

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1. *Boumediene v. Bush*, 553 US 723, 798 (2008).

2. Joseph Story, *Commentaries on the Constitution of the United States; with a Preliminary Review of the Constitutional History of the Colonies and States, before the Adoption of the Constitution.* (Boston: Hilliard, Gray, 1833), 3:203, accessed April 12, 2014, http://hdl.handle.net/2027/nyp .3343308176 7448.

With the starting point of a constitutionally guaranteed right to habeas corpus, the lower courts now have the responsibility to give substance to the Court's ruling and determine what particular procedural and substantive protections Guantanamo detainees are entitled to. There are many decisions the lower courts have to make. If the burden of proof is placed on the government, what is the standard? For many of the district court judges, it appears to be a standard of a preponderance of evidence; meanwhile, the Court of Appeals seems open to a lower standard, questioning whether the preponderance standard is constitutionally required.[3]

Another question the lower courts have answered with conflicting decisions is whether time or intervening circumstances can make a once lawful detention unlawful. In a decision made at the district court level and upheld by the D.C. Circuit, Judge James Robertson found that evidence, no matter how thin, that justified the original detention, justified continuing detention until the end of the conflict. Other judges indicate that simply because evidence justified the original detention does not mean it justifies continued detention. Additionally, some judges, namely Judge Ellen Segal Huvelle ruled that events that occurred subsequent to detention, such as a detainee becoming a cooperating witness, could serve to make the detention unlawful. Many other judges disagree with her view, seeing the circumstances at the time of capture as the only relevant facts.[4]

The lower court judges also disagree on more procedural issues. The D.C. Circuit has ruled "that hearsay is always admissible and that is reliability affects only the weight

3. Benjamin Wittes, *Detention and Denial: The Case for Candor after Guantánamo* (Washington, D.C: Brookings Institution Press, 2011), 66-7.

4. Ibid., 72-3.

that the evidence will receive;" however, the judges have different ideas of what makes hearsay reliable.[5] The judges disagree on how to read evidence as well. Some judges "disaggregate evidence" and look at the pieces on a more individualized basis, others "view [the evidence] as an impressionistic whole, looking at probability."[6]

Looking at the district court's judgments in the Guantanamo Bay habeas appeals post-*Boumediene*, one can decipher another legacy of *Rasul, Hamdan,* and *Boumediene*—a disjointed system of rules created by judges secondary result of their decisions in individual cases. The system is incredibly unhelpful to all involved. Neither the government nor detainees are certain to which standards their case will be held, as that depends on the judge to which it is assigned. Detainees "lucky" enough to be detained at Guantanamo Bay are ensured at least a right to habeas corpus, while others detained elsewhere do not have even that guarantee. The members of the military who make the decision whether to detain individuals captured in the field "have today no idea of the substantive or evidentiary standards that they have to meet."[7] No one is well served by the system now in place.

At the moment, the force of the Court's decisions seem to be confined to Guantanamo Bay or future detention sites that are similarly situated. In May 2010, the D.C. Circuit Court of Appeals decided *Al Maqaleh v. Gates*, concluding that the habeas corpus jurisdiction defined by the Supreme Court did not include Bagram detainees.[8]

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5. Ibid., 76.

6. Ibid., 84.

7. Ibid. 92.

8. *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

And while this distinction could continue to be drawn in the future, the Court could continue to expand the breadth of its jurisdiction. The Guantanamo Bay cases could be "a historical blip, an event in legal history that took place in response to the unique nature of a particular base and the special affront to some sensibilities created by the activity in which a particular administration engaged there" or they could "turn out to be the beginning of judicial supervision of certain overseas detention activity, supervision that will grow over time."[9] Should this happen, the rulings in the Guantanamo Bay cases will govern detentions in an ever-expanding list of locales. At the very least, if habeas jurisdiction remains confined to Guantanamo Bay or similar locations, the rulings will affect where future detentions take place in order to avoid judicial oversight.

In a century where wars are taking on an increasingly asymmetric character and some of the main belligerents are non-state actors, the limits on U.S. detention policy and the rights of detainees articulated by the U.S. Supreme Court will affect U.S. actions far beyond the currents wars. In the instances where the Court clearly delineates what actions can be taken within the bounds of the Constitution, the executive branch, including the military, will be constrained to act in accordance with those limits. In the less defined areas, the government will make decisions as needs arise and the courts will eventually rule on the constitutionality of those decisions.

There are two legacies of the Court's role in shaping detention policy—the reconciliation of liberty and security through the extension of habeas corpus to detainees and the chaotic system created by that reconciliation. The former will have lasting

9. Wittes, 126-7.

effects on both detention and military policies in the currents wars and in wars yet to even be imagined. Without the cooperation of Congress, the latter will have lasting effects as well. Developing a system of rules through the adjudication of individual cases will be a long and tedious process filled with conflicting decisions, but unless Congress develops a comprehensive policy following the guidelines provided by the Court, sparse though they are, the system developed ad hoc by the district courts and court of appeals will be the system left for future generations to utilize.

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