

Boumediene v. Bush and Extraterritorial Habeas Corpus in Wartime

by RIDDHI DASGUPTA*

How did the United States Supreme Court, in *Boumediene v. Bush*,¹ come to the conclusion that the detention facility in Guantánamo Bay, Cuba, is indeed American territory for the purpose of habeas corpus? Why did the Court extend habeas to non-citizens as well? Which legal provisions and precedents guided the Supreme Court's analysis? The U.S. Constitution's Suspension Clause, precluding the suspension of habeas corpus except in well-defined and discrete national security urgencies, is the controlling trump card raised by the detainees. This Commentary sets the stage for a multivariable conversation about the interplay among separation of powers, rejection of executive supremacy, historic status of habeas corpus, and other factors that guided the Court.

The federal habeas statute, 28 U.S.C. § 2241, extends to Guantánamo because of practical considerations, not necessarily formal ones; and the consequences of excluding habeas corpus from Guantánamo would have been devastating for judicial independence. The Commentary also references English and American legal history transcending pre- and post-1789 to explore the competing merits on habeas's reach to Guantánamo. Furthermore, in the end, the cause of judicial restraint would be harmed by the mechanism of governmentally approved trials (with lives and freedom at stake) that treat citizens and non-citizens differently concerning the right of habeas corpus.

Finally, this Commentary also advances the overarching theme that *Boumediene* is essentially a civil liberties case and should be perceived as such for prudential reasons. *Boumediene* retains three central tenets: the

* Doctoral student, University of Cambridge. The author is a research assistant to Professor Neal Katyal, counsel to the petitioners in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) and in *Engquist v. Oregon Department of Agriculture*, 128 S. Ct. 2146 (2008). The author expresses his gratitude to Professor Katyal. Any views expressed here, however, are the author's own.

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

Suspension Clause prevents arbitrary suspensions of habeas; the right to have an impartial court evaluate the legality of the detention is preserved by the Suspension Clause; and habeas corpus applies both to U.S. citizens and to non-citizens. This last theme, equal protection of the laws guaranteed to litigants in federal claims through the Fifth Amendment's due process guarantee, is interspersed through the text of the Commentary and is the silent jugular of the *Boumediene* decision.

Introduction

On June 12, 2008, the Supreme Court of the United States decided the case of *Boumediene v Bush*,² holding that all prisoners, including foreigners labeled as "enemy combatants" and detained at the United States Naval Base in Guantánamo Bay, Cuba,³ are entitled to a writ of habeas corpus. *Boumediene* also held that the Military Commissions Act of 2006 ("MCA"),⁴ a federal law passed to negate this entitlement, is an unconstitutional suspension of the prisoner's right to the Great Writ. The MCA is a sequel to the Detainee Treatment Act of 2005 ("DTA"),⁵ first enacted to strip the Supreme Court and all federal courts of future subject-matter jurisdiction in detainee cases from Guantánamo Bay. Initially, the detainees were held by the president (leader of the Executive Branch in the United States government) in Guantánamo without any judicial process in United States courts.⁶ *Boumediene* is not the first case in the judicial dialogue about Guantánamo, but it is the Supreme Court's latest word.

The constitutional provision at issue in *Boumediene*, the Suspension Clause of the United States Constitution (located at Article 1, Section 9, Clause 2, and stating in relevant part that the "privilege" of habeas corpus⁷

2. *See id.*

3. Operated by Joint Task Force Guantánamo (JTF-GTMO), this U.S. detention center is located in Guantánamo Bay Naval Base, which is on the shore of Guantánamo Bay, Cuba. Since the commencement of the present U.S. hostilities in Afghanistan, 775 detainees have been brought to Guantánamo and 420 of those detainees have since been released. As of May 2008, 270 detainees remain.

4. Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948-50 (2006), 18 U.S.C. § 2441 (2006), 28 U.S.C. § 2241(c)-(e) (2006)).

5. Pub. L. No. 109-48, 119 Stat. 2680 (codified at 10 U.S.C.S. § 801 (LexisNexus 2009), 28 U.S.C. § 2241(e) (2006), 42 U.S.C.S. § 2000dd (LexisNexus 2009)).

6. *See, e.g.,* Neal Kumar Katyal, Commentary, *Hamdan v Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65 (2006); Terry Gill & Elies van Sliedregt, *Guantánamo Bay: A Reflection on the Legal Status and Rights of 'Unlawful Enemy Combatants'*, 1 UTRECHT L. REV. 28 (2005).

7. Access to federal habeas corpus available under 28 U.S.C. § 2241 is one form of judicial review codified by Congress. More common variants of collateral review familiar to federal

may not be suspended “unless when in cases of Rebellion or Invasion the public safety may require it”), pertains to a limitation on government power that may be waived only in specifically enumerated occasions of national emergency.⁸ In *Boumediene*, the baseline was the year 1789 (the year of the Constitution’s ratification).⁹ Executive or congressional efforts to truncate the essence of habeas corpus below what the writ was thought to privilege in 1789 would contravene the Constitution.¹⁰ If the federal statute is incompatible with the Constitution’s Suspension Clause, then it is the province of the Supreme Court and lower federal courts to nullify the former.¹¹ Nevertheless, the courts may elect to give the president and Congress some deference in wartime.¹² This Commentary sets the stage for a multivariable conversation about the interplay among separation of powers, rejection of executive supremacy, historic status of habeas corpus, and respect for civil liberties against the positions of the president and Congress. Given that the federal habeas statute, § 2241, extends to Guantánamo (as *Rasul v. Bush*¹³ prescribes) and that the military tribunals violate the traditional requirements of the common law of war (*Hamdan*), *Boumediene* was expected. Given the Supreme Court’s *Rasul-Hamdi-Hamdan* track record, it was unsurprising that the judiciary would reject yet another political attempt to exclude it from an imperative national conversation for this generation of American lawyers.

Specifically, this challenge by Lakhdar Boumediene, a forty-two-year-old citizen of Bosnia detained in Guantánamo Bay,¹⁴ and others similarly

courts are post-conviction relief motions filed by federal prisoners under 28 U.S.C. § 2255 and habeas corpus petitions filed by state prisoners under 28 U.S.C. § 2254(a).

8. See, e.g., ROBERT WALKER, *HABEAS CORPUS WRIT OF LIBERTY: ENGLISH AND AMERICAN ORIGINS AND DEVELOPMENT* (BookSurge Publishing 2006); 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 341, 438 (Max Farrand ed., rev. ed. 1987).

9. *Boumediene v. Bush*, 128 S. Ct. 2229, 2244 (2008).

10. *Id.*; *Solem v. Helm*, 463 U.S. 277, 286 (1983).

11. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 103–04 (1958); *Marbury v. Madison*, 5 U.S. 137, 178 (1803). With respect to federal jurisdiction, the federal court of original jurisdiction most pertinent to this note is the District Court for the District of Columbia. Directly above this district court is the U.S. Court of Appeals for the District of Columbia Circuit, the federal appellate court where most national security and military law federal actions are heard. The D.C. Circuit’s decisions can be reversed by that court itself or by the Supreme Court.

12. See generally *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Korematsu v. United States*, 323 U.S. 214 (1944).

13. See *Rasul v. Bush*, 542 U.S. 466, 481 (2004) (“Aliens held at . . . [Guantanamo], no less than American citizens, are entitled to invoke the federal courts’ authority under § 2241.”).

14. *Boumediene*, 128 S. Ct. at 2241; United States Department of Defense, List of Individuals Detained by the Department of Defense at Guantanamo Bay, Cuba from January 2002 through May 15, 2006, <http://www.defenselink.mil/news/May2006/d20060515%20List.pdf>.

situated¹⁵ raised the questions of whether these detainees were entitled to habeas corpus and whether the MCA-approved collateral review procedures accorded by the Combatant Status Review Tribunals (“CSRTs”) constituted an inadequate and ineffective substitute for habeas corpus.¹⁶ To both questions, the Supreme Court, divided by a close 5-4 vote margin, answered in the affirmative.¹⁷

Boumediene is directly linked to the current war against terrorism that the U.S. government and military are presently engaged in.¹⁸ Indeed, the detainees who were parties to the *Boumediene* lawsuit were rounded up in January 2002, during armed conflict and eventually sent to Guantánamo.¹⁹ Furthermore, support for the government’s position emanates in large part from the Authorization for the Use of Military Force (“AUMF”),²⁰ a joint resolution approved by Congress. *Boumediene* primarily is a civil liberties case because the historic reach of habeas corpus itself was at stake with the resolution of the case. *Munaf v. Geren*,²¹ a case decided by the Supreme Court the same day as *Boumediene*, supports this inference.

Section I of this Commentary provides a brief background to *Boumediene*. Section II explores in greater depth the Supreme Court’s reconciliation of their view in *Boumediene* with the precedent set out in *Johnson v. Eisentrager*.²² In particular, it scrutinizes the historical contention that at common law the reach of English courts extended to foreign subjects located in dominions within the Crown’s practical control (whatever the formal status of sovereignty and examines the deficiencies of the CSRT structure used to try the detainees. The Commentary then concludes.

I. The Background to *Boumediene*

Immediately following the attacks of September 11, 2001, the U.S. Congress passed the AUMF joint resolution, empowering the president to

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 2240–41, 2251; Daniel Williams, *Who Got Game? Boumediene v. Bush and the Judicial Gamesmanship of Enemy-Combatant Detention*, 41 NEW ENG. L. REV. (forthcoming).

19. This group is both known as the “Algerian Six” and composed of six Algeria-born Muslim men who are either naturalized Bosnian citizens or permanent residents. In 2004, Bansayah Belkacem, Lahmar Saber, Mustafa Ait Idir, Hadz Boudella, Lakhdar Boumediene, and Mohamed Nechle were categorized as “enemy combatants,” on the basis of classified evidence, by a Combatant Status Review Tribunal (“CSRT”) consisting of three military officers.

20. See Authorization for Use of Military Force, 50 U.S.C.S. § 1541 (LexisNexis 2009).

21. See *Munaf v. Geren*, 128 S. Ct. 2207 (2008).

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

“use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks [of September 11, 2001] . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”²³ Three years later, it was for the Supreme Court to decide to what extent the AUMF was sufficient to protect executive detentions from all further legal review. In *Hamdi v. Rumsfeld*,²⁴ the Supreme Court’s plurality opinion by Justice O’Connor held that “due process [under the Fifth and Fourteenth Amendments to the U.S. Constitution] demands that a *citizen* held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”²⁵ Justice O’Connor further stated that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”²⁶ Notably the plurality expressed no view, ratio or obiter, on what rights, if any, non-citizens held in Guantánamo or other facilities retain. Nor was the *Hamdi* opinion precise about what constituted a “meaningful opportunity” of judicial access or what characteristics a “neutral decisionmaker” must have.

On the same day as the Court’s decision in *Hamdi* was published, the Court also announced its decision in *Rasul*, holding that United States “federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.”²⁷ This decision was premised on the prevailing federal statute on habeas corpus, 28 U.S.C. § 2241,²⁸ which authorizes district courts, “within their respective jurisdictions,” to entertain habeas corpus applications by persons claiming to be held ‘in custody in violation of the . . . laws . . . of the United States.’²⁹

Rather than permitting district courts to entertain habeas corpus actions brought by citizens under *Hamdi* and foreign nationals under *Rasul*,

23. 50 U.S.C.S. § 1541 (LexisNexus 2009).

24. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

25. *Id.* at 533 (emphasis added).

26. *Id.* at 536. To this extent, *Hamdi* truncated the already-depreciated precedential worth of *Korematsu v. United States*, 323 U.S. 214 (1944), the World War II-Era decision constitutionalizing the internment of an ethnic group, based on the unsubstantiated threat of espionage or other treasonous activities. Ironically, *Korematsu* helped strengthen “strict scrutiny” as the proper judicial standard in cases where individuals are singled out for disfavored treatment based on their race or ethnicity. See *id.* at 216 (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”).

27. *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

28. See *supra* note 8.

29. 28 U.S.C § 2241(a), (c)(3) (2006).

the Department of Defense instead established Combatant Status Review Tribunals. The function of the CSRTs, created at the direction of President George W. Bush, was to determine whether individuals detained at Guantánamo were “enemy combatants” who had taken up arms against the United States.³⁰ The president also created military commissions, as opposed to a regime for courts martial, to try the accused enemy combatants without the Sixth Amendment guarantee of a speedy trial.³¹ Since Article II of the Constitution vests in the Executive Branch authority in foreign affairs and war-related matters, the president unsuccessfully asserted the *unitary executive* theory and his own categorical supremacy over Congress and the Judiciary, his two coordinate and coequal branches, in this area of the law.³²

The *Boumediene* petitioners were aliens captured abroad (in Afghanistan, Bosnia, or elsewhere), detained in Guantánamo, and identified as enemy combatants by CSRTs. Seeking habeas corpus relief from the district court, each petitioner denied being a member of both the al Qaeda terrorist network that executed the September 11 attacks and the Taliban regime that received its help.³³ The district court dismissed their cases (then part of the *Rasul* litigation) and their prayers for habeas corpus relief for want of jurisdiction on the rationale that Guantánamo falls outside U.S. sovereign territory.³⁴ On appeal, the D.C. Circuit affirmed the district

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

31. Brief for the Boumediene Petitioners at 31, *Boumediene*, 128 S. Ct. 2229 (No. 06-1195) (Aug. 24, 2007).

32. This philosophy was summed up by Justice Thomas in his dissent in *Hamdan v. Rumsfeld*:

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But “Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act,” and “[s]uch failure of Congress . . . does not, ‘especially . . . in the areas of foreign policy and national security,’ imply ‘congressional disapproval’ of action taken by the Executive.”

Hamdan v. Rumsfeld, 548 U.S. 557, 679 (2006) (Thomas, J., dissenting) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981)); see Christopher Yoo, Steven Calabresi, & Anthony Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601 (2005); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001); Steven Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1555 (1992). But see Peter Irons, “*The Constitution is Just a Scrap of Paper*”: *Empire versus Democracy*, 73 U. CIN. L. REV. 1081, 1091 (2005); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270 (1996); Steven G. Calabresi, *Thayer’s Clear Mistake*, 88 NW. U. L. REV. 269, 275 (1993).

33. *Boumediene*, 128 S. Ct. at 2241.

34. *Rasul v. Bush*, 215 F. Supp. 2d 55, 72–73 (D.D.C. 2002).

court's findings.³⁵ The Supreme Court in *Rasul* reversed the D.C. Circuit and held that federal law extended habeas corpus jurisdiction to Guantánamo, but the *Rasul* Court had no occasion to decide whether the Suspension Clause of the U.S. Constitution permitted the suspension of habeas corpus petitions.³⁶

Subsequently, the *Boumediene* petitioners' cases were consolidated into two proceedings.³⁷ In the first, the district judge granted the government's motion to dismiss the detainees' claims, holding that the detainees had no legal or constitutional privileges that could be vindicated by a habeas corpus action.³⁸ In the second, the coordinating judge held that the detainees retained due process rights under the Fifth Amendment.³⁹ In fact, as the Supreme Court noted in *Rasul*, when a detainee claims to have

engaged neither in combat nor in acts of terrorism against the United States . . . [and yet has] been held in Executive detention for [a substantial period of time] in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing . . . [the detainee has] unquestionably [been held in] 'custody in violation of the Constitution or laws or treaties of the United States,' [as] 28 U.S.C. § 2241(c)(3) [forbids].⁴⁰

Therefore, the *Boumediene* petitioners were entitled to the determination that statutory habeas corpus extends to Guantánamo.

In 2006, while the cases were pending, this saga was complicated by congressional action. Four years after Guantánamo opened, Congress finally broke its legislative silence and passed the DTA,⁴¹ which, according

35. *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003).

36. *Rasul v. Bush*, 542 U.S. 466, 483 (2004).

37. *Boumediene*, 128 S. Ct. at 2241. The statutory jurisdiction recognized in *Rasul* rendered the petitioners victorious on the narrow point of 28 U.S.C. § 2241's command that habeas corpus runs to Guantánamo. However, the constitutional question central to *Boumediene* was not reached in *Rasul*, and these new proceedings in the district court were commenced to determine if the writ should in fact issue.

38. *Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (D.D.C. 2005).

39. *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005) (“[A]ll [Guantánamo] detainees possess Fifth Amendment due process rights.”). In relevant part, the Fifth Amendment states “nor shall [any person] . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. Since the Supreme Court in *Boumediene* invalidated the operative MCA provision, § 7, on Suspension Clause grounds, it proved unnecessary to resort to a due process analysis.

40. *Rasul*, 542 U.S. at 473 (2004).

41. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (codified at 10 U.S.C. § 801 (2000), 28 U.S.C. § 2241(e) (2006), 42 U.S.C.S. § 2000dd (LexisNexus 2009)).

to the government, effectively stripped the Supreme Court of subject-matter jurisdiction to entertain suits from Guantánamo. Section 1005(e) of the DTA amended the habeas corpus statute (28 U.S.C. § 2241) to provide that “no court, justice, or judge shall have jurisdiction to . . . consider . . . an application for . . . habeas corpus filed by or on behalf of an alien detained . . . at Guantánamo.”⁴² Furthermore, section 1005(e) accorded the D.C. Circuit “exclusive” jurisdiction to review “enemy combatant” designations made by the CSRTs.⁴³ Upon deciding that the detainees were entitled to habeas corpus, the question in *Boumediene* focused on whether the new procedure, which limited judicial review to the D.C. Circuit’s capacity to review “enemy combatant” determinations, was constitutionally sufficient under the Suspension Clause.⁴⁴

In the meantime, *Hamdan v. Rumsfeld*⁴⁵ was climbing up the judicial ladder. Petitioner Salim Ahmed Hamdan’s contention before the Supreme Court in *Hamdan* was plain: the president’s military commissions were incompatible with federal statutes 10 U.S.C. §§ 836 and 821⁴⁶ and Article 21 of the Uniform Code of Military Justice (“UCMJ”).⁴⁷ This is because in comparison the commissions provided fewer jury members; provided distinctive rules of evidence (including allowing hearsay in certain situations), and; provided greater flexibility regarding the defendant’s presence at trial.⁴⁸ Hamdan also claimed that the international law obligations of the United States, specifically Common Article 3 of the

42. 28 U.S.C. § 2241 (2006).

43. *Id.*

44. *Boumediene v. Bush*, 128 S. Ct. 2229, 2244 (2008) (setting forth the issues proper for review with respect to the Suspension Clause), 2269 (commencing a constitutional review of the CSRT process).

45. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

46. 10 U.S.C. § 836(a) provides, in part, the following:

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.

10 U.S.C. § 836(a) (2000). In other words, § 836(a) allows the president to actuate the UCMJ’s framework in the context of military courts, but these procedures must conform to procedural rules commonplace in the district courts; must be consistent with the UCMJ itself, and; must, to the maximum “practicable” extent, mirror the procedures used in courts-martial. Furthermore, the complainant in *Hamdan* had not been charged with an “offense . . . that by the law of war may be tried by military commission.” 10 U.S.C. § 821(2000).

47. 10 U.S.C. § 801 (2000).

48. *Hamdan*, 548 U.S. at 571.

Geneva Conventions,⁴⁹ dictated the same result.⁵⁰ Moreover, he argued that neither the “common law of war,” which includes Common Article 3, nor the UCMJ permits trial by military commissions for the crime of conspiracy, the gravest transgression with which petitioner Salim Ahmad Hamdan, a former chauffeur to al Qaeda leader Osama bin Laden, was charged.⁵¹

Hamdan’s legal arguments had deep roots. The Geneva Conventions, adopted in 1949, concern the treatment of non-combatants and prisoners of war.⁵² Their precursors were the Hague Conventions of 1899 and 1907.⁵³ The UCMJ predates the founding of the American Republic and the Declaration of Independence. In 1775, the Continental Congress passed sixty-nine Articles of War to govern military conduct; in 1806, Congress first enacted 101 Articles of War into federal law; and, in 1951, the modern-day UCMJ became effective.⁵⁴ The *Rasul-Hamdi* line of precedent had traced the U.S. judicial decisions instrumental in developing this jurisprudence, and Hamdan hoped to convince the Court that this jurisprudence mandated that the military commissions alone were insufficient to protect a prisoner’s rights.⁵⁵

The Supreme Court in *Hamdan* asserted its jurisdiction to decide Guantánamo Bay cases. First, the Court adhered to *Rasul* in that Guantánamo is United States territory for all practical purposes and that habeas corpus applies. Second, drawing a “negative inference” from Congress’ failure to include the *Hamdan*-postured cases within the portion of the DTA that stripped federal courts of Guantánamo jurisdiction, the Supreme Court found no want of jurisdiction.⁵⁶ The Court found that the DTA did not strip from federal judicial dockets the cases pending at the time the DTA was enacted. Third, the UCMJ did not entitle the president to formulate trial procedures that “violate the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.”⁵⁷ Five Justices agreed with Hamdan’s claims and reversed the D.C. Circuit’s denial of relief on

49. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364 [hereinafter Third Geneva Convention].

50. *Hamdan*, 548 U.S. at 567.

51. *Id.*

52. Third Geneva Convention, *supra* note 52.

53. *Id.*

54. See, e.g., MICHAEL J. DAVIDSON, A GUIDE TO MILITARY CRIMINAL LAW: A PRACTICAL GUIDE FOR ALL THE SERVICES (Naval Institute Press 1999).

55. *Hamdan*, 548 U.S. at 567.

56. *Id.* at 578, 581, 584, n.15.

57. *Hamdi v. Rumsfeld*, 542 U.S. 559 (2004).

the merits.⁵⁸ Justice Kennedy's separate opinion expressly insisted on the constitutional separation of powers between the legislature and the executive, in light of the international law obligations of the United States.⁵⁹

However, the effect of *Hamdan* was stunted by the Executive Branch's decision to approach Congress for a new law. In *Hamdan*'s wake, Congress passed the Military Commissions Act ("MCA"). Section 7(a) of the MCA amended § 2241(e)(1) to deny federal courts jurisdiction in actions designed to secure habeas corpus rights for detained aliens adjudged by the CSRT to be enemy combatants.⁶⁰ The newly enacted § 2241(e)(2), likewise, denies jurisdiction as to "any other action against the United States . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of a detainee found to be an enemy combatant.⁶¹

Section 7(b) of the MCA states that this jurisdictional bar to § 2241(e) "shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after [that] date . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained . . . since September 11, 2001."⁶² The MCA was unambiguous about denying "federal courts jurisdiction to hear habeas actions, like the [*Boumediene*] cases, that were pending at the time of its enactment."⁶³ Since under section 7(b), habeas corpus is a type of action "relating to any aspect of . . . detention," if it were held that section 7 of the MCA is *not* an unconstitutional suspension of the writ of habeas corpus, the Guantánamo detainees would stand bereft of a judicial forum in the United States. The Supreme Court's grant of certiorari set the stage for a disposition on the merits.⁶⁴

Deciding the *Boumediene* cases on appeal from the district judges, the D.C. Circuit deduced from section 7 a strict rejection of all federal judicial intervention to consider the habeas corpus applications.⁶⁵ Accordingly, the D.C. Circuit held that the detainees could not seek refuge under habeas corpus or entreat the protections of the Suspension Clause.⁶⁶ Since the

58. *Hamdan*, 548 U.S. at 567.

59. *Hamdan*, 548 U.S. at 638 (Kennedy, J., concurring in part).

60. 28 U.S.C. § 2241(e)(1) (2006).

61. *Id.* § 2241(e)(2) (2006).

62. *Id.*

63. *Boumediene v. Bush*, 128 S. Ct. 2229, 2242 (2008).

64. *See Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (mem).

65. *Boumediene v. Bush*, 476 F. 3d 981, 987 (D.C. Cir. 2007).

66. *Id.* at 990–91.

D.C. Circuit found an impregnable bar on jurisdiction, that tribunal did not contemplate whether the DTA provided an adequate and effective substitute for habeas corpus.⁶⁷ The majority held that section 7 of the MCA conformed to the Suspension Clause because habeas corpus in 1789 did not apply to “aliens outside the sovereign’s territory.”⁶⁸ The Supreme Court reversed the D.C. Circuit’s conclusion, and found section 7 to work an unconstitutional denial of the detainees’ right to access habeas corpus.⁶⁹ The crux of the jurisdiction question raised profound issues about judicial authority and the Supreme Court’s time-honored prerogative to “say what the law is.”⁷⁰ The Supreme Court’s authority to preclude presidential or congressional actions that violate the Constitution is an ingredient of this prerogative. Article III, Section 1 vests such permanence in the Supreme Court, which Congress cannot withdraw by statute.⁷¹ For, as Justice Scalia’s *Boumediene* dissenting opinion commented, “The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them.”⁷²

On the same day as *Boumediene*, the Supreme Court also issued its opinion in *Munaf v Geren*.⁷³ *Munaf* held that although § 2241 reaches United States citizens held overseas by United States military forces, United States courts may not enjoin the United States from transferring alleged criminals accused of committing criminal acts within a sovereign’s territory; and, even though United States courts do retain habeas corpus jurisdiction in such circumstances, it cannot be invoked to defeat the right of a foreign sovereign, such as Iraq, to prosecute alleged criminals for crimes committed on its soil.⁷⁴ The importance of the *Munaf* case is highlighted in Section 2, and it goes to the core of *Boumediene*’s identity in America’s constitutional tradition.

The opinion of the *Boumediene* Court, authored by Justice Kennedy, was joined by Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer. Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice

67. *Id.*

68. *Id.*

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

70. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803).

71. As another hallmark of judicial independence, Article III, Section 1 confers that “[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior” and that judges are entitled to compensation that “shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 1.

72. *United States v. Raines* 362 U.S. 17, 20–21 (1960).

73. *Munaf v. Geren*, 128 S. Ct. 2207 (2008).

74. *Munaf*, 128 S. Ct. at 2213.

Alito dissented from the Court's disposition of *Boumediene*. The Chief Justice filed a dissenting opinion arguing that the DTA's limited review procedure, pertaining to the review of a CSRT designation that a detainee was an enemy combatant but not concerning whether the detention itself was lawful, was adequate.⁷⁵ Justice Scalia's dissent suggested that habeas corpus, preserved by the Suspension Clause, "does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application."⁷⁶ Moreover, Justice Scalia found the Supreme Court ill equipped to handle national security and military matters.⁷⁷ Justice Souter, joined by Justices Ginsburg and Breyer, authored a concurring opinion disputing Chief Justice Roberts's characterization that the Court was acting out of "judicial haste"⁷⁸ in invalidating MCA section 7.⁷⁹ In *Boumediene*'s aftermath, the District Court for the District of Columbia is processing the cases of the approximately two hundred remaining detainees, entitling them to habeas corpus review.

II. The Implications of Habeas Corpus for Guantánamo Detainees

A. Impediments on Detainees' Access to Habeas Corpus

Section 7 of the MCA precludes detainees from supplicating U.S. federal courts for habeas corpus. Section 7(a) amends 28 U.S.C. § 2241(e)(1) to deny federal courts habeas corpus jurisdiction over detainees deemed enemy combatants, while § 2241(e)(2) denies jurisdiction for "any other action against the United States . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of a detained alien determined to be an enemy combatant. MCA section 7(b) provides that the 2241(e) amendments "shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after [that] date . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained . . . since September 11, 2001." Not only does section 7(a) bar judicial review to ascertain the legality of detention, section 7(b) also forbids courts from entertaining cases of physical abuse of detainees and denials of religious freedom.

75. *Boumediene v. Bush*, 128 S. Ct. 2229, 2280 (2008) (Roberts, C.J., dissenting).

76. *Id.* at 2294 (Scalia, J., dissenting).

77. *Id.* at 2299.

78. *Id.* at 2278 (Souter, J., concurring).

79. *Id.*

The question before the Supreme Court in *Boumediene* was whether the federal appellate court D.C. Circuit's review of the accuracy of a detainee's "enemy combatant" designation is an adequate and effective substitute for habeas.⁸⁰ The original (pre-DTA and pre-MCA) version of § 2241 authorized "any justice" or "circuit judge" to issue the writ, thus enabling fact finding to take place in a court of original jurisdiction if the circumstances so require.⁸¹ The DTA, however, forecloses that option by consolidating all authority in the D.C. Circuit.⁸² Moreover, the Circuit's authority is constrained to deciding whether the particular CSRT complied with the "standards and procedures specified by the Secretary of Defense"⁸³ and the DTA contained no exception carved out for special cases.⁸⁴ In the D.C. Circuit, which denied Lakhdar Boumediene's application for habeas, the dissenting judge commented that the DTA procedure to review the CSRT's findings is not designed to cure these inadequacies. The D.C. Circuit may review only the record developed by the CSRT to assess whether the CSRT has complied with its own standards. Because a detainee still has no means to present evidence rebutting the government's case—even assuming the detainee could learn of its contents—assessing whether the government has more evidence in its favor than the detainee is hardly the proper antidote.⁸⁵

In this case, however, because the D.C. Circuit had dismissed the lawsuits on the basis that the MCA was constitutional, it did not address whether the DTA substitute was sufficient.⁸⁶ The Supreme Court noted the inevitable delay that a remand would cause and reached the merits on its own instead.⁸⁷ The cardinal rule of judicial restraint—the *rule of prematurity*⁸⁸—was balanced with the reality that the individuals detained at Guantánamo had been denied substantive judicial access for years and

80. *Id.* at 2240 (majority opinion).

81. 28 U.S.C. § 2241 (2006).

82. *Boumediene*, 128 S. Ct. at 2276 (stating that the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(B)(i), 119 Stat. 2742 (2005), enables petitioners to request "review" of their CSRT determination in the court of appeals).

83. *Id.*

84. *Id.*

85. *Boumediene v. Bush*, 476 F.3d 981, 1006 (D.C. Cir. 2007) (Rogers, J., dissenting).

86. *Id.* at 990–91.

87. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262–63 (2008).

88. "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. and Phila. Steamship Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885)). Furthermore, the Court ordinarily abstains from needlessly "formulat[ing] a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* at 347.

that the problem raised important questions regarding the separation of powers.⁸⁹

Deficiencies contained in the CSRT structure, identified by the *Hamdan* Court two years ago, include the limitations placed upon the detainee's ability to rebut the facts on the basis of which the CSRT had designated him an enemy combatant.⁹⁰ The detainee and his civilian counsel faced obstacles that deterred him from obtaining or presenting evidence to challenge the government's case, precluding him from knowing the most damaging allegations the government relied on.⁹¹ The detainee's military counsel retained access to this information; but, at the presiding officer's discretion that the evidence was "probative," ("protected information"), he could not reveal the contents to the client.⁹² Indeed, "the rules only allowed [the detainees] to meet briefly with a 'Personal Representative,' who was not a lawyer, did not represent the detainee's interests, and could not have confidential communications with him."⁹³

In addition, the admissibility of hearsay (or evidence procured by torture or other coercive techniques) meant that the detainee was unable to meaningfully confront and cross-examine witnesses.⁹⁴ Neither witnesses' written statements nor live testimony need be sworn under oath.⁹⁵ Such an interrogative environment may induce the risk of factual error in confessions, testimony, or other evidence exacted from the accused.⁹⁶ In July 2008, military commission judge Navy Captain Keith Allred, presiding in the first Guantánamo trial, was compelled to exclude certain pieces of evidence because of "the highly coercive environments and conditions under which [the statements] were made."⁹⁷ Salim Hamdan, the defendant,⁹⁸ was "kept in isolation 24 hours a day with his hands and feet restrained, and armed soldiers prompted him to talk by kneeling him in the back. He says his captors at Panshir repeatedly tied him up, put a bag over his head and knocked him [to] the ground."⁹⁹ An overarching problem lay

89. *Hamdan v. Rumsfeld*, 548 U.S. 557, 600 (2006).

90. *Id.* at 606.

91. *Id.* at 607.

92. *Id.* at 608.

93. Brief for the Boumediene Petitioners, *supra* note 31, at 11.

94. *Hamdan*, 548 U.S. at 608.

95. *Id.*

96. *Id.*

97. USA Today.com, *Gitmo Trial Begins for Bin Laden's Driver*, http://www.usatoday.com/news/world/2008-07-29-Gitmo_N.htm (last visited Feb. 16, 2009).

98. This was the same individual who had served as petitioner in *Hamdan*, 548 U.S. 557, discussed earlier.

99. USA Today.com, *supra* note 97.

in the remarkable concentration of power in the structure of the military commissions.¹⁰⁰

[T]he Appointing Authority . . . who convenes and refers charges against individuals to the military commissions [also decides issues regarding the] establishment and proceedings of the commissions: to select members who vote on guilt or innocence, to oversee the chief prosecutor, to approve or disapprove plea agreements, to close commission proceedings, and to answer interlocutory questions from the presiding officer.¹⁰¹

These procedural guarantees embedded in American constitutional law and followed in civilian trials are not merely theoretical; rather, they form the backbone of a trial as free from unnecessary factual risks.¹⁰² If the repercussion of such error is the individual's detention in Guantánamo for the length of time in which the hostilities continue, that may obviate the core of habeas.¹⁰³ In order for habeas corpus or its adequate substitute to serve as an effectual remedy, the court collaterally inquiring into the lawfulness of the detention must be empowered to rectify errors, must independently evaluate the sufficiency of the evidence proffered by the government, and must consider pertinent exculpatory evidence.¹⁰⁴ These omissions in the design of the habeas substitute rendered the remedy provided by MCA section 7 constitutionally inadequate.¹⁰⁵

Chief Justice Roberts addressed the remedy aspect of the minority position, Justice Scalia having spoken on the history attending English common law. The question was narrower than constitutional issues of habeas corpus, Chief Justice Roberts suggested, because the "practical effects" of the DTA review process (challenging the "enemy combatant" designation in the D.C. Circuit) sufficiently safeguards any constitutional rights possessed by the detainees. If *Hamdi's* requirement of a "basic process"¹⁰⁶ and adjudication before a "neutral decisionmaker"¹⁰⁷ is

100. *Boumediene v. Bush*, 128 S. Ct. 2229, 2246, 2253 (2008).

101. *Hamdan v. Rumsfeld: Establishing a Constitutional Process, Hearing before the S. Comm. on the Judiciary*, 109th Cong. 4 (2006) (statement of Neal Katyal, Professor, Georgetown University Law Center).

102. *Boumediene*, 128 S. Ct. at 2276–77.

103. See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1509 n.329 (1987) ("[T]he non-suspension clause is the original Constitution's most explicit reference to remedies.").

104. *Boumediene*, 128 S. Ct. at 2266–67.

105. *Id.*

106. *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (emphasis added).

107. *Id.* at 533.

satisfied, then the Guantánamo military tribunals are valid.¹⁰⁸ Chief Justice Roberts chided the majority for striking down a scheme that would have satisfied even American citizens' due process rights; the "political branches crafted CSRT and D. C. Circuit review to operate together" and that choice should have been left intact.¹⁰⁹ Moreover, the Chief Justice contended that the Supreme Court "merely replace[d] a [limited DTA-MCA procedural] review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date."¹¹⁰

Like Justice Scalia, Chief Justice Roberts was concerned with the federal courts intervening in a military law question without the requisite expertise.¹¹¹ The majority, however, persuasively put the question within the competence of U.S. federal courts, by balancing the ambiguity offered by Founding Era history and practical "adaptable" considerations attending habeas at common law.¹¹² Even though the Exceptions Clause in Article III, Section 2, allows the Supreme Court's appellate jurisdiction to be compromised under "such Exceptions, and under such Regulations as the Congress shall make," the Supreme Court's *supremacy* (preserved in Article III, Section 1, Clause 1) to decide ultimate legal questions cannot be eroded.¹¹³ Moreover, at the Virginia ratifying convention Edmund Randolph considered the Suspension Clause an "exception" to the "power given to Congress to regulate courts."¹¹⁴ Moreover, Alexander Hamilton stated in *The Federalist* No. 84 an obvious preference for limited government, unsurprising for a generation aiming for libertarian constitutionalism.¹¹⁵ As noted by the New York Ratifying Convention, this Hamiltonian excerpt does not exclude non-citizens from habeas rights:

108. *Boumediene*, 128 S. Ct. 2229, 2269–70 (Roberts, C.J., dissenting).

109. *Id.*

110. *Id.* at 2279.

111. *Id.*

112. *Id.* at 2267 (majority opinion).

113. See, e.g., Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1008 (2007) ("Article III permit[s] Congress to move cases back and forth between the Supreme Court's original and appellate jurisdiction but not to remove cases from that jurisdiction altogether."); Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59 (2007); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 648–49 (2004).

114. See 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 460–64 (Jonathan Elliot ed., 2d ed. 1891).

115. *Boumediene*, 128 S. Ct. at 2247.

[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone . . . are well worthy of recital: “To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.” And as a remedy for this fatal evil he is everywhere peculiarly emphatical [*sic*] in his encomiums on the *habeas corpus* act, which in one place he calls ‘the bulwark of the British Constitution.’¹¹⁶

In his separate concurring opinion in *Boumediene*, Justice Souter broached the issue of speed: the D.C. Circuit had had four years since *Rasul* to do so; at some point, a prompt hearing is necessary.¹¹⁷ The detainees could now apply directly to federal courts for habeas corpus relief, thus circumventing the D.C. Circuit procedure to question, as the DTA threshold requires, their very designations as enemy combatants.¹¹⁸ The detainees, moreover, were entitled to a prompt hearing on their habeas corpus applications since they had endured years of detention without judicial oversight.¹¹⁹ To reduce excessive onus on the military, including the “legitimate interest in protecting sources and methods of intelligence gathering” and avoiding the “widespread dissemination of classified information,”¹²⁰ *Boumediene* allowed innovative methods to entertain the habeas challenges without offending the central purpose of habeas. The Supreme Court concluded with the limiting principle that the *Boumediene* opinion concerned jurisdiction, not merits; “the content of the law that governs”¹²¹ detentions at Guantánamo was not at the heart of the *Boumediene* opinion.¹²² Any reliance in a future case would be dictum, not ratio. After allowing the access to habeas, the Court remanded the case to the district court to decide whether particular individuals, based on their acts, were in fact entitled to the writ.¹²³

116. THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *136; 4 *id.* at *438).

117. *Boumediene*, 128 S. Ct. 2229, 2278–79 (Souter, J., concurring).

118. *Id.* at 2276 (majority opinion).

119. *Id.* at 2278–79.

120. *Id.* at 2276.

121. *Id.* at 2277.

122. *Id.*

123. *Id.*

B. Does Common Law Habeas Corpus Extend to Non-Citizens in Guantánamo?

No clear answer suffices here. Historic as well as practical considerations governed the *Boumediene* exercise, and the former of those conclusions could not definitively say whether enemy aliens would be entitled to the writ at common law.¹²⁴ The Supreme Court attempted to evaluate whether historically, at English common law, habeas corpus was understood to extend to territories within the Crown's actual control, whatever the formal status of the area. When adjudicating constitutional claims rooted in the Magna Carta or other common law institutions, the Court noted, "[O]ne of the consistent themes of the era was that Americans had all the rights of English subjects."¹²⁵

The evolving office of the Great Writ in English and American history was painstakingly traced by the *Boumediene* opinion. The *Boumediene* Court presupposed that "this history was known to the Framers [of the American Constitution]. It no doubt confirmed their view that the pendular swings to, and away from, individual liberty were endemic to undivided, uncontrolled power."¹²⁶ Even though the Magna Carta asserted that no person would be unlawfully imprisoned,¹²⁷ the lack of an enforcement provision and absence of a legal process to bridge the gap between the protections and their fruition exacerbated arbitrary detentions.¹²⁸ Habeas initially was "used to protect not the rights of citizens but those of the King and his courts. The early courts were considered agents of the Crown, designed to assist the King in the exercise of his power."¹²⁹

124. *Id.* at 2251.

125. *Solem v. Helm*, 463 U.S. at 286; *see, e.g.*, 1 J. CONTINENTAL CONG. 83 (Worthington C. Ford ed. 1904) ("[W]e claim all the benefits secured to the subject by the English constitution."); 1 AMERICAN ARCHIVES 700 (4th series 1837) (Address to the People of Great Britain, Sept. 5, 1774) (Georgia Resolutions, Aug. 10, 1774) ("[H]is Majesty's subjects in *America* . . . are entitled to the same rights, privileges, and immunities with their fellow subjects in *Great Britain*.").

126. *Boumediene*, 128 S. Ct. at 2246.

127. Magna Carta, art. 39, *reprinted in* SOURCES OF OUR LIBERTIES 17 (Richard L. Perry & John C. Cooper eds., 1959) ("No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.")

128. *See, e.g.*, 9 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 112 (1926).

129. *Boumediene*, 128 S. Ct. at 2244 (citing J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 38–39 (4th ed. 2002)).

By the seventeenth century, habeas corpus had come to entail constraints on government power.¹³⁰ In spite of these developments, political unrest and fear of mass agitation led to judicial denial or parliamentary suspension of habeas.¹³¹ Upon Charles I's issuance of a warrant to arrest those who refused to lend him money, the court denied the supplicant's habeas corpus application in *Darnel's Case*.¹³² The House of Commons, responding to the public chorus of disapproval, swiftly enacted the Petition of Right,¹³³ condemning executive enforced "imprison[ment] without any cause" shown, and declared that "no freeman in any such manner as is before mencioned [shall] be imprisoned or detained."¹³⁴ By that time, the Stuart king's authority had again become abusive, and Parliament was dissolved.¹³⁵ Upon reconvening, Parliament moved to preserve habeas corpus through the Act of 1640,¹³⁶ enabling persons to have impartial courts examine the legality of their imprisonment by the order or warrant of the Privy Council or the monarch himself.¹³⁷ Soon followed a period of internal tension, called the *Interregnum*. In 1679, Parliament secured procedures for *accessing* the writ, through the Habeas Corpus Act of 1679.¹³⁸ This Act, which William Blackstone later considered the "stable bulwark of our liberties,"¹³⁹ served as the paradigm for the habeas laws of the original thirteen American colonies.¹⁴⁰ The New York convention deliberating over the fate of the Constitution in July 1788 expressed the following sentiment:

[E]very *person* restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and that such inquiry or removal ought not to be denied or delayed,

130. See, e.g., Rex A. Collings, Jr. *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace*, 40 CAL. L. REV. 335, 336 (1952) (The writ was "the appropriate process for checking illegal imprisonment by public officials.").

131. WALTER P. HALL & ROBERT G. ALBION, *A HISTORY OF ENGLAND AND THE BRITISH EMPIRE* 328 (3d ed. 1953).

132. *Darnel's Case*, 3 How. St. Tr. 1 (1627) (The Five Knights' Case).

133. See Petition of Rights, 3 Car. 1, ch. 1 (1627), *reprinted in* 5 STATUTES OF THE REALM 23–24 (1963).

134. *Id.*

135. Charles A. Wright, *Habeas Corpus: Its History and Future*, 81 MICH. L. REV. 802 (1983).

136. See 5 STATUTES OF THE REALM 110 (G. Eyre & A. Strahan, eds., 1810–22).

137. William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983 (1978).

138. The Habeas Corpus Act of 1679, 31 Car. 2, ch. 2.

139. WILLIAM BLACKSTONE, 1 COMMENTARIES *138.

140. See Collings, *supra* note 130, at 338–39.

except when, on account of public danger, the Congress shall suspend . . . habeas corpus.¹⁴¹

The word “person,” as opposed to the more limiting term “citizen,” informs the universal character of the privilege, irrespective of the detainee’s citizenship status.

Justice Scalia’s dissenting opinion in *Boumediene* disputed the existence of a “constitutional right to habeas corpus [for] alien enemies detained abroad by [U.S.] military forces.”¹⁴² This approach endangers Justice Scalia’s own advocacy of judicial restraint, as defended here in *Boumediene* and elsewhere.¹⁴³ “Standard checks on government abuse, such as political accountability, fail to operate,” as Professor Neal Katyal suggests, when the only victims of certain legislation are those lacking voting rights in the United States: “20 million [U.S. permanent residents] and 5 billion people across the planet.”¹⁴⁴ Judicial deference owed to Congress (as to the States) is conditioned on the assumption that the Legislature will not prefer one group of persons to another and will debate the merits of an issue with impartiality.¹⁴⁵ As a result, selective and targeted infliction of punishments as serious as those dispensed by a criminal trial upon persons without political potency (exercised through the franchise) registers equal-protection concerns.¹⁴⁶

Neither Justice Scalia nor the other *Boumediene* dissenters addressed this paradox underlying the possibility that judicial restraint’s long-run

141. See *Resolution of the New York Ratifying Convention* (July 26, 1788), reprinted in 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 328 (Jonathan Elliot ed., 2d ed. 1891) (emphasis added).

142. *Boumediene v. Bush*, 128 S. Ct. 2229, 2293–94 (2008) (Scalia, J., dissenting).

143. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring and dissenting) (“[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, . . . the Court merely prolongs and intensifies the anguish.”).

144. See, e.g., Neal Kumar Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1367 (2007); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 161–62 (Harvard University Press 1980); Steven Calabresi, *The Supreme Court: 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 92–93 (1991).

145. See, e.g., *Romer v. Evans*, 517 U.S. 620, 622 (1996) (describing “a commitment to the law’s neutrality where the rights of persons are at stake”); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring) (stating that constitutional constraints “include[e] elements of legitimacy and neutrality that must always characterize the performance of the sovereign’s duty to govern impartially”).

146. See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 n.22 (1976) (stating that non-citizens are a “class . . . whose members suffer special disabilities.”). Cf. Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 952, 994 (2002).

aims (which they champion) would be disserved by a ruling against the *Boumediene* petitioners (as they preferred). The Fifth Amendment's guarantee of due process is the traditional candidate for federal equal-protection challenges.¹⁴⁷ Justice Scalia has previously argued that "[o]ur salvation is . . . [e]qual [p]rotection [principle], which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me."¹⁴⁸ Traditionally in American law, Chief Justice Marshall,¹⁴⁹ Justice Jackson,¹⁵⁰ and the Enforcement Act of 1870¹⁵¹ have all appreciated the logic of equality to ensure equity: legislation or rules that society is compelled to inflict upon *everyone* will not be harshly imposed on any one entity. It is difficult to reconcile the Constitution's equality instruction as the "salvation" against inequities with corresponding weak enforcement of that constitutional guarantee (especially when the group singled out for unique treatment (in this case foreigners) lacks even the political agency to make waves electorally). If legislative changes cannot be made by the aggrieved group through democratic means, then the doctrinal foundation of the judicial restraint philosophy suffers a setback.

Justice Scalia also disputed the *Boumediene* Court's reading of the 1679 Act: "The Act," he said, "did not extend the writ [beyond the Crown's sovereign territory], even though the existence of other places to which British prisoners could be sent was recognized by the Act."¹⁵² Furthermore, Justice Scalia explained that the Act compelled judicial

147. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Bolling v. Sharpe*, 347 U.S. 497 (1955).

148. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990).

149. *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819) (a state tax applied equally to in-state and out-of-state companies is non-discriminatory and thus constitutional under the Commerce Clause).

150. *Railway Express Agency v. New York* states the following:

[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Ry. Express Agency v. New York, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring):

151. Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 (codified at 42 U.S.C. § 1981 (2007)) states the following:

[A]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind.

152. *Boumediene v. Bush*, 128 S. Ct. 2229, 2304 (2008) (Scalia, J., dissenting).

review “not by expanding the writ abroad, but by forbidding . . . the shipment of prisoners to places where the writ did not run or where its execution would be difficult.”¹⁵³ The statement does not dispute that the aim of the 1679 Act was to render the authority holding the prisoner accountable to a court of competent jurisdiction. Yet the dissent does not clarify what must be done when the prisoners *are* indeed shipped to a “plac[e] where the writ did not run” and where no other law prevailed.¹⁵⁴ Justice Scalia’s passionate defense of American citizens’ right to a fair and speedy trial in *Hamdi*¹⁵⁵ four years ago produces the inference that the distinction is based only on the basis of citizenship.

To allay the concern that military courts might not be able to coexist with civilian courts, the *Boumediene* majority cited the American cases of *Duncan v. Kahanamoku*¹⁵⁶ and *Ex parte Milligan*.¹⁵⁷ In the *Kahanamoku* case, the Supreme Court stated that while the “military [must] act vigorously for the maintenance of an orderly civil government and for the defense of the [region] against actual or threatened rebellion or invasion, [the law does not permit the] supplanting of courts by military tribunals.”¹⁵⁸

Likewise, in *Milligan*, the Court struck down a conviction by a military commission in a state where the civilian courts were efficaciously functioning.¹⁵⁹ These decisions, while accommodating the military legal system into the judicial fold, express a preference for civilian courts, if possible.¹⁶⁰

Historically, prerogative writs, empowered with an “extraordinary territorial ambit,” could be issued to all lands where the Crown was sovereign.¹⁶¹ This precept applies to Guantánamo. The 1903 Lease Agreement between the governments of the United States and Cuba governing Guantánamo’s territorial relationship to the United States cedes to the United States “complete jurisdiction and control” over the naval

153. *Id.*

154. *Id.*

155. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

156. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

157. *Ex parte Milligan*, 71 U.S. 2 (1866).

158. *Kahanamoku*, 327 U.S. at 319–24.

159. *Ex parte Milligan*, 71 U.S. at 130–31.

160. At common law, civilian justice had to be privileged over military law “when the king’s courts [were] open for all persons to receive justice according to the laws of the land.” WILLIAM BLACKSTONE, 2 COMMENTARIES *413–14; *see also* MATTHEW HALE, HISTORY OF THE COMMON LAW OF ENGLAND 25–27 (Charles Gray ed., 1971).

161. ROBERT J. SHARPE, THE LAW OF HABEAS CORPUS 188 (Oxford: Clarendon Press, 2d ed. 1989) (1976).

base.¹⁶² The United States has “treated Guantánamo as if it were subject to American sovereignty: [it has] acted as if [it] intend[s] to retain the Base permanently, and ha[s] exercised the exclusive, unlimited right to use it.”¹⁶³

The practice of English judges mandating habeas corpus rights (circa 1789) points, functionally, towards “the exact extent and nature of the jurisdiction or dominion exercised *in fact* by the Crown.”¹⁶⁴ Post-1789 judicial activity in England was understood by *Boumediene* as confirmatory evidence that practical authority of the ruling power was the touchstone of sovereignty.¹⁶⁵ British judges often granted the common law writ to Indian petitioners held by either Indian sovereign princes or the East India Company.¹⁶⁶ This occurred even when the Crown had not yet asserted formal control over India.¹⁶⁷ Indeed, according to the Treaty of Allahabad (signed in 1765), to which the Crown and the Mughal Emperor in Delhi were the signatories, the latter retained sovereignty (though nominal) over India.¹⁶⁸ Still, it was the practical jurisdiction and control which mattered, and British judges in India issued common law writs binding on Indian soil.¹⁶⁹ Courts in the new United States adopted the same common law canon of interpretation.¹⁷⁰ But the *Boumediene* Court found the “analogy to . . . break [] down” because the Supreme Court of Judicature was a tribunal set up by the Parliament to function specifically in India.¹⁷¹

The government made the fair point that alleged enemy aliens had never been granted habeas privileges by common law courts.¹⁷² In *Boumediene*, the Court acknowledged as much.¹⁷³ The government advanced the analogy of English courts’ relationships with the reach of habeas to Scotland and Hanover, not India, as better mirroring the relationship of United States courts with Guantánamo. Scotland and

162. *Gherebi v. Bush*, 352 F.3d 1278, 1286 (9th Cir. 2003).

163. *Gherebi*, 352 F.3d at 1287.

164. *Ex parte Mwenya*, [1960] 1 Q.B. 241, 303 (C.A.) (emphasis added); *see also* *King v. The Earl of Crewe ex parte Sekgome*, [1910] 2 K.B. 576, 606 (C.A.).

165. *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008).

166. Brief for the *Boumediene* Petitioners, *supra* note 31, at 11–13.

167. *Id.* at 12 (citing the Charter Act, 1813, 53 Geo. 3, c. 155, § XCV).

168. *Id.*; *see also* H.V. BOWEN, *THE BUSINESS OF EMPIRE: THE EAST INDIA COMPANY AND IMPERIAL BRITAIN, 1756–1833* 10 (Cambridge University Press 2006); PETER ANTHONY HOWELL, *THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, 1833–1876: ITS ORIGINS, STRUCTURE AND DEVELOPMENT* 9 (Cambridge University Press 1979).

169. *Boumediene*, 128 S. Ct. at 2249.

170. Brief for the *Boumediene* Petitioners, *supra* note 31, at 11–12 n.7.

171. *Boumediene*, 128 S. Ct. at 2249.

172. *Id.* 2249–50.

173. *Id.*

Hanover were not formally part of England but were controlled by the English monarch, simulating American relationship to the Guantánamo Bay territory. The *Boumediene* decision also acknowledged Lord Mansfield's admission that English courts are without power to issue habeas corpus to the "foreign" territories of Scotland and Hanover.¹⁷⁴ But the Court could not overlook that

prudential considerations would have weighed heavily when courts sitting in England received habeas petitions from Scotland or [Hanover]. Common-law decisions withholding the writ from prisoners detained in these places easily could be explained as efforts to avoid either or both of two embarrassments: conflict with the judgments of another court of competent jurisdiction; or the practical inability, by reason of distance, of the English courts to enforce their judgments outside their territorial jurisdiction.¹⁷⁵

The Founding Era history was, at best, inconclusive, and "given the unique status of Guantánamo Bay and the particular dangers of terrorism in the modern age, the common law courts simply may not have confronted cases with close parallels to this one."¹⁷⁶ The Court "decline[d], therefore, to infer too much, one way or the other, from the lack of historical evidence on point."¹⁷⁷ In short, the *Boumediene* Court favored *Rasul's* understanding of Guantánamo's status as within American control for practical purposes. Federal courts are not divested of jurisdiction here, as "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."¹⁷⁸ And reviewing its case law annals for resolution of the constitutional issue, the *Boumediene* Court evinced a clear pattern: "[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism."¹⁷⁹

C. The *Eisentrager* Dilemma

In *Boumediene*, the United States argued that *Johnson v. Eisentrager* disqualified the Guantánamo Bay detainees from bringing federal judicial actions disputing the legality of their detentions because they were

174. *Id.*

175. *Id.* at 2250.

176. *Id.* at 2251.

177. *Id.*

178. *Id.* at 2259.

179. *Id.* at 2258.

foreigners outside the sovereign territory of the United States.¹⁸⁰ *Eisentrager* involved German nationals found guilty of violating the stipulations of Germany's surrender in the waning days of World War II; they had continued active hostilities, despite the German High Command's unconditional surrender to the Allies.¹⁸¹ A U.S. military commission based in China had convicted the *Eisentrager* appellants of violating the laws of war by taking part in continued military activity against the United States after German surrender but before Japanese surrender.¹⁸² The appellants were removed to Landsberg Prison in Germany and imprisoned under the custody of the United States Army.¹⁸³ They filed habeas corpus petitions and, on judicial review, the Supreme Court held that the appellants did not have the right to review because "the [U.S.] Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States."¹⁸⁴

In making this determination, *Eisentrager* articulated six factors in its holding that deprived the German nationals of habeas review in U.S. courts:

[The detainee] (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted 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 States.¹⁸⁵

To the Supreme Court sitting to decide *Boumediene* almost six decades later, *Eisentrager* was distinguishable for a number of reasons. Unlike the Germans in *Eisentrager*, the *Boumediene* petitioners were not nationals of countries at war with the United States.¹⁸⁶ They denied having engaged in, or plotted acts of aggression against, the United States.¹⁸⁷ In

180. *Id.* at 2257–58 (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

181. *Id.* at 2261 (citing Yale Law School–The Avalon Project, Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany (June 5, 1945), <http://avalon.law.yale.edu/wwii/ger01.asp>).

182. *Johnson*, 339 U.S. at 766.

183. *Id.*

184. *Id.* at 785.

185. *Id.* at 777.

186. *Boumediene v. Bush*, 128 S. Ct. 2229, 2259–60 (2008).

187. *Id.* at 2260.

addition, they had never been afforded access to any tribunal,¹⁸⁸ and, for two years or longer, they had been detained in territory over which that the United States employs exclusive control and jurisdiction.¹⁸⁹ Moreover, in contrast to the *Eisentrager* tribunal, the Guantánamo military commissions had been held in *Hamdan* to be unlawfully constituted and, American control over Landsberg in 1950 was “neither absolute nor indefinite,” as Guantánamo is in 2008.¹⁹⁰

Finally, when *Eisentrager* was decided in 1950, *Ahrens v. Clark*,¹⁹¹ was governing law. *Ahrens* refused habeas corpus jurisdiction under § 2241 in cases where the detainees were not being held within the territorial jurisdiction of the pertinent district court.¹⁹² Following *Ahrens*, the *Eisentrager* Court decided to deny itself and lower federal courts habeas corpus jurisdiction.¹⁹³ On that basis, the president’s Office of Legal Counsel advised him “that the great weight of legal authority indicates that a district court could not properly exercise habeas jurisdiction over an alien detained at [Guantánamo Bay].”¹⁹⁴ In his *Boumediene* dissent, Justice Scalia made the interesting case that if the government believed *Eisentrager* to no longer be an impediment to habeas, then “the military surely would not have transported prisoners there, but would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention. Those other facilities might well have been worse for the detainees themselves.”¹⁹⁵ Nevertheless, intervening years and the case of *Braden v. 30th Judicial Circuit Court of*

188. *Id.* at 2263.

189. *Id.* at 2278 (Souter, J., concurring).

190. *Id.* at 2257.

191. *Ahrens v. Clark*, 335 U.S. 188 (1948).

192. *Id.*

193. Even though the *Eisentrager* majority opinion made only oblique references to 28 U.S.C. § 2241 and presumably based the decision on constitutional considerations, it is beyond cavil that the appellants’ lack of statutory entitlement (at least under *Ahrens* as prevailing law) prescribed the result in *Eisentrager*. See generally, *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950)). In addition, while it is true that *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), also barred a particular district court from considering a detention challenge from Guantánamo, the Court’s opinion and Justice Kennedy’s concurrence made clear that the District Court for the Southern District of New York was the wrong court for the suit to be entertained only because an equally competent (and more venue-consistent) court in South Carolina was available. This was not an effort to resuscitate *Ahrens*.

194. See Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to William J. Haynes II, Gen. Counsel, Dep’t. of Def. on Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba (Dec. 28, 2001), <http://www.texscience.org/reform/torture>.

195. *Boumediene v. Bush*, 128 S. Ct. 2229, 2294 (2008) (Scalia, J., dissenting).

*Kentucky*¹⁹⁶ had altered the rules of the game by the time the Guantánamo cases came around.¹⁹⁷

Instead of the *Eisentrager* test, now the three new benchmarks consistent with post-*Braden* habeas law to decide the extraterritorial capacity of the Suspension Clause are (a) the detainee's citizenship and status as well as the sufficiency of the status determination process; (b) the type of place where the detainee is being held, and; (c) the logistical and practical considerations impeding the detainee's access to habeas corpus.¹⁹⁸ First, these considerations militated in favor of the *Boumediene* detainees' habeas claims. Even though the *Boumediene* detainees were non-citizens, like those *actually* charged in *Eisentrager*, the former (unlike the latter) deny that they are enemy combatants.¹⁹⁹ Unlike the *Eisentrager* prisoners, the *Boumediene* detainees had never had a military commission trial for violating the laws of war.²⁰⁰ In comparison, the *Eisentrager* prisoners had received representation by counsel, and were permitted to introduce evidence in their own defense and allowed to cross-examine witnesses.²⁰¹ The *Boumediene* detainees' inability to rebut the evidence offered against them and the presumption of validity accorded the government's information could not be cured by the review given in the D.C. Circuit.²⁰²

Second is the venue of confinement that is central to the reach of habeas.²⁰³ While "the Allies had not planned a long-term occupation of Germany [where the Landsberg prison was located], nor did they intend to displace all German institutions even during the period of occupation,"²⁰⁴ Guantánamo was within the "constant jurisdiction of the United States."²⁰⁵

196. *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484 (1973).

197. *See generally id.* If doubt remained that *Eisentrager* no longer was good law, then *Braden* delivered the final coup de grâce. *Braden* stated that the physical location of the detainee "is not 'an invariable prerequisite' to the exercise of [28 U.S.C.] § 2241 jurisdiction because habeas acts upon the person holding the prisoner, not the prisoner himself, so that the court acts 'within [its] respective jurisdiction' if the custodian can be reached by service of process." *Id.* at 495–96 (emphasis added). Since *Braden* had overruled *Ahrens* and thus qualified the "statutory predicate" underlying *Eisentrager*, the status quo prevailing at the time of *Hamdan* or *Boumediene* did not render habeas corpus inaccessible to the detainees.

198. *Boumediene*, 128 S. Ct. at 2259.

199. *Id.*

200. *Id.*

201. *Id.* at 2260.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 2261.

Third, the logistical impediments blocking resolution of the *Eisenstrager* detainees' habeas claims did not plague Guantánamo.²⁰⁶

Unlike the European occupation zone (covering over 57,000 square miles with a population of eighteen million),²⁰⁷ created in the wake of World War II, and the incessant threats of enemy resurgence, Guantánamo encompasses 45 square miles²⁰⁸ and detains persons in a "secure prison facility located on an isolated and heavily fortified military base."²⁰⁹ Most importantly, perhaps,

[A]djudging a habeas corpus petition would cause friction with the host government. No Cuban court has jurisdiction over American military personnel at Guantánamo or the enemy combatants detained there. While obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base.²¹⁰

D. *Munaf* Does Not Compromise *Boumediene*

The calculus is even more interesting when engaging with claimants who are neither Americans nor citizens of allied nations. On the other hand, recognizing *Boumediene* as a civil liberties question, insofar as the Supreme Court's construction of the Suspension Clause and the federal habeas statute are concerned, helps cast the dispute on universalistic terms. This helps connect the inferences derived from *Boumediene* to the rights of Americans and non-American residents alike.²¹¹ Had the government's interpretation of § 2241 prevailed unqualifiedly to evade "service of process,"²¹² many citizens or permanent resident non-citizens could theoretically have been removed to Guantánamo or other locations beyond the formal territory of the United States. *Munaf*, read in light of

206. *Id.* at 2261–62.

207. *Id.* at 2261 (citing *Letter from President Truman to Sec'y of State Byrnes* (Nov. 28, 1945), in 8 DOCUMENTS ON AMERICAN FOREIGN RELATIONS 257 (R. Dennett & R. Turner eds., 1948)); James K. Pollock, *A Territorial Pattern for the Military Occupation of Germany*, 38 AM. POL. SCI. REV. 970, 975 (1944).

208. *Id.* (citing Official U.S. Navy Website Navy–Naval Station Guantanamo Bay, History of Guantanamo Bay, <https://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistgeneral>).

209. *Id.* at 2261.

210. *Id.*

211. See generally MUNEER I. AHMAD, AMERICAN CONSTITUTIONAL SOC'Y FOR LAW AND POLICY, GUANTÁNAMO IS HERE: THE MILITARY COMMISSIONS ACT AND NONCITIZEN VULNERABILITY, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY (2007), <http://www.acslaw.org/node/5792>; Theresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003).

212. *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 494–95 (1973).

Boumediene, does not permit this.²¹³ Indeed, *Munaf* can be understood to delineate *Boumediene*'s own holding.

It might be tempting to state that the *Munaf* decision, which prohibits U.S. courts from stopping the U.S. government's detainee transfers to friendly sovereigns, undercuts the natural reading of *Boumediene*.²¹⁴ On a surface level, this hypothesis is belied by the fact that the two cases were decided on the same day; each member of the *Boumediene* majority joined the *Munaf* majority. More substantively, none of *Boumediene*'s three central tenets was compromised by *Munaf*: the Suspension Clause prevents arbitrary suspensions of habeas; the "affirmative right to judicial inquiry into the causes of detention"²¹⁵ is preserved by the Suspension Clause, and; habeas corpus applies both to U.S. citizens and to non-citizens.²¹⁶ What is more, *Munaf* recognizes that "'prudential concerns' . . . such as comity and the orderly administration of criminal justice"²¹⁷ impact the scope of habeas jurisdiction, and when such limitations are absent, habeas may issue. The *Boumediene* Court cited the Scotland-Hanover example to make this point.²¹⁸

With respect to the first concern, *Munaf* expressly affirms the right of persons held "in custody under or by color of the authority of the United States" to challenge their detentions in U.S. courts.²¹⁹ Even a detainee held by the Multinational Force-Iraq ("MNI-F"), an international coalition joining 26 countries, may petition U.S. courts because his detention was supervised by a unified command led by the U.S. military.²²⁰ Second, *Munaf* continues to allow habeas courts to inquire into the detention's legality and permit the United States to transfer detainees for foreign criminal prosecution, limited to cases where the crime itself has been committed within that foreign power's territory.²²¹ Third, *Munaf* did not concern non-citizens, and given *Boumediene*'s historical referencing (not to mention the holding itself), such a distinction drawn on the basis of citizenship status would not withstand scrutiny.²²² Equality and its constitutional underpinnings are the silent jugular here.

213. *Munaf v. Geren*, 128 S. Ct. 2207, 2213 (2008).

214. *Id.* at 2228 (Souter, J., concurring).

215. *Boumediene v. Bush*, 128 S. Ct. 2229, 2246 (2008).

216. *Id.* at 2240.

217. *Munaf*, 128 S. Ct. 2207, 2220.

218. *Boumediene*, 128 S. Ct. 2229, 2249–50.

219. *Munaf*, 128 S. Ct. 2207, 2216 (quoting 28 U.S.C. § 2241(c)(1) (2006)).

220. *Id.* at 2213.

221. *Id.*

222. *See, e.g., Boumediene*, 128 S. Ct. at 2259; *see also* Magna Carta, *supra* note 127.

Conclusion

Boumediene stands as a reminder that Framers of the American Constitution appreciated the vital need for ensconcing with some permanence this guarantee against detention under the Executive Branch's authority (even with legislative approval), for history had proved less stringent means to be ineffective. Nor are vague and unspecified emergency powers approved by the Constitution.²²³ For instance, the Suspension Clause requires specific exigencies for habeas to be suspended.²²⁴ Similarly, the Fourth Amendment forbids unreasonable searches and seizures and the issuance of warrants "but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."²²⁵ This level of specificity was ensconced in the text by the authors of the Bill of Rights, for they "viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom."²²⁶ *Boumediene's* legal underpinnings are driven by the reality that because constitutional provisions are not self-executing, without a robust and enforceable protection of habeas this "fundamental precept of liberty" might prove hollow.

However, extending habeas corpus to foreigners detained at Guantánamo concerns more than just the legality of their detentions. Detainees might be allowed to seek federal judicial review of unlawful confinement or treatment (including physical abuse, constraints on religious expression, needless intrusions and searches of the detainees' persons, and other constitutional violations) or to complain against being transferred to the custody of another nation. The Supreme Court left undisturbed the CSRT system itself, remanding the issue to the district court along with the task of deciding whether particular detainees are entitled to habeas. Prior to *Boumediene*, nearly two hundred habeas applications had accumulated in the district court,²²⁷ and *Boumediene* now

223. See, e.g., Jules Lobel, *Preventive Detention: Prisoners, Suspected Terrorists, and Permanent Emergency*, 25 T. JEFFERSON L. REV. 389, 410–11 (2003); Michal R. Belknap, *Historical Observation: The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67, 77 (1983).

224. *Boumediene*, 128 S. Ct. at 2229, 2259, 2277.

225. U.S. CONST. amend. IV.

226. *Boumediene*, 128 S. Ct. at 2244.

227. Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantánamo*, N.Y. TIMES, June 13, 2008, <http://www.nytimes.com/2008/06/13/washington/13scotus.html?pagewanted=all>.

renders the issue ripe for individualized, case-by-case resolution.²²⁸ In order to comply with *Boumediene*, habeas review must satisfy several attributes: promptness (timely consideration of claims such that indefinite or long-term detention does not occur); comprehensiveness (the habeas court must be empowered to correct errors in enemy designations); rebuttal of the prosecutorial evidence; assistance of counsel; a determination of the lawfulness of confinement; and the prospect of conditional or complete release as a distinct possibility if no grounds for detention suffice.

Further inconsistency might encourage the Supreme Court to clarify the parameters of a habeas-consistent trial owed the detainees. Nor did the Supreme Court in *Boumediene* resolve whether detainees held in some other extraterritorial location are entitled to the protections of habeas. The functional test to be employed for such determinations

include the degree and likely duration of U.S. control over the location where the alien is held; the costs of holding the Suspension Clause applicable in a given situation, including . . . the likelihood that the proceedings would compromise or divert attention from a military mission; and the possibility that adjudicating a habeas petition would cause friction with the host government.²²⁹

Finally, the proper understanding of *Boumediene* is as a civil liberties case resultant from martial circumstances, rather than as a war case through and through. But “[w]hat’s in a name? That which we call a rose/By any other name would smell as sweet.”²³⁰ Why should it matter whether *Boumediene* is called a civil liberties case or a war case? Surely the decision’s text and its stare decisis value remain unaltered.

The answer has to do with the Constitution’s protection of equality. Equality is the silent jugular in this constitutional calculus. The Court reaffirmed the core of habeas corpus, a common law writ with roots extending back to 1215.²³¹ Habeas corpus affects citizens as well as non-citizens in times of war and peace.²³² It denotes the power of courts to question the legality of a detention, and it entitles the detainee to seek such

228. See JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., ENEMY COMBATANT DETAINEES: *HABEAS CORPUS* CHALLENGES IN FEDERAL COURT (updated Sept. 10, 2008), <http://www.fas.org/sgp/crs/natsec/RL33180.pdf>.

229. See MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., *BOUMEDIENE V. BUSH: GUANTANOMO DETAINEES’ RIGHT TO HABEAS CORPUS* 10 (updated Sept. 8, 2008), <http://ftp.fas.org/sgp/crs/natsec/RL34536.pdf>.

230. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2.

231. See sources cited *supra* note 8.

232. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) (holding that Article I, Section 2, Clause 2 of the United States Constitution “has full effect at Guantánamo Bay”).

a judgment from an impartial tribunal.²³³ Habeas traditionally has made no distinction between citizens and non-citizens, so long as a competent tribunal could practicably follow up with ensuring that a detention complies with the laws to which a jurisdiction is subject.²³⁴ In that sense, *Boumediene*, though a product of September 11 and ensuing hostilities, has had consequences far wider in American constitutional law, not just military or national security law. Classifying this decision as a war case evokes martial images somehow pertinent only to a few, thus distancing the full impact of *Boumediene* from the polity's routine and collective existence. *Boumediene* represents, in the words of one commentator,

[I]mmutable principles of man and the rights attending our existence. It was . . . about our willingness to live under such conditions as we would impose on others. Ultimately, it was not about detainees by whatever names we may give them, but about every one of us and the inevitability of the consequences of our embracing of two standards of justice.²³⁵

233. *Id.*

234. *See Boumediene*, 128 S. Ct. at 2244.

235. Stephen Abraham, Op-Ed., *Getting Back on Track After Boumediene*, JURIST, June 29, 2008, <http://jurist.law.pitt.edu/forumy/2008/06/getting-back-on-track-after-boumediene.php>.