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THE SUPREME COURT'S DECISION IN *BOUMEDIENE V. BUSH*: THE MILITARY COMMISSIONS ACT OF 2006 AND HABEAS CORPUS JURISDICTION

A. Hays Butler[1]

The writ of habeas corpus is perhaps the most fundamental guarantee of liberty in a democracy. The United States' federal habeas corpus statute was first enacted as part of the Judiciary Act of 1789.[2] As Justice Stevens has noted, habeas corpus is "however, 'a writ antecedent to statute . . . throwing its root deep into the genius of our common law.' The writ appeared in English law several centuries ago, became 'an integral part of our common-law heritage' by the time the Colonies achieved independence . . . ."[3] One of the most significant features of the Military Commissions Act ("MCA") is its elimination of jurisdiction by any court over habeas corpus applications filed 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."[4] In *Boumediene II*, the Supreme Court decided that the MCA's elimination of habeas corpus rights violates the

[1] Associate Professor and Law Librarian, Rutgers University School of Law, Camden. I am grateful for the assistance of Prof. Roger Clark in drafting this article.

[2] Judiciary Act of 1789, 1 Stat. 73, ch. 20, § 14.

[3] Rasul v. Bush, 542 U.S. 466, 473-74 (2004) (quoting Williams v. Kaiser, 323 U.S. 471, 484 n.2 (1945), Preiser v. Rodriguez, 411 U.S. 475, 485 (1973)).

[4] Military Commissions Act of 2006, Pub. L. No. 109-366 § 950j(b), 120 Stat. 2600, 2622-23 (amending 10 U.S.C.A. § 950j(b) (2008)).

Suspension Clause of the U.S. Constitution.[5] This case note will evaluate some of the potential impacts of the decision.

EARLIER PROCEEDINGS

In 2002, a number of habeas corpus petitions were filed with the U.S. District Court for the District of Columbia on behalf of two Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban to challenge the legality of their detention at Guantanamo Bay. The District Court dismissed the cases based on a finding that *Johnson v. Eisentrager*[6] barred claims of an alien seeking to enforce the U.S. Constitution in a habeas proceeding unless the alien is in custody in sovereign United States territory.[7] The U.S. Court of Appeals affirmed the District Court's decision.[8]

In *Rasul v. Bush*, the Supreme Court considered "whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty,'" and reversed the District Court's decision.[9] The Court held that "[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under [the habeas statute]."[10]

On the same day *Rasul* was decided, the Supreme Court considered in *Hamdi v. Rumsfeld* an American citizen's due process challenge to his designation as an "enemy combatant" by the military.[11] The government classified Hamdi, who was

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[5] Boumediene v. Bush, 128 S. Ct. 2229, 2242 (2008) [hereinafter *Boumediene II*].

[6] 339 U.S. 763 (1950).

[7] Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002).

[8] Al Odah v. United States, 321 F.3d 1134 (2003).

[9] *Rasul*, 542 U.S. at 475.

[10] *Id.* at 468.

[11] Hamdi v. Rumsfeld, 542 U.S. 507, 507 (2004).

captured during the war in Afghanistan and detained in a naval brig in Charleston, N.C. as an "enemy combatant" for allegedly taking up arms with the Taliban. Hamdi's father filed a habeas corpus petition. The U.S. Court of Appeals held that no factual inquiry or evidentiary hearing was necessary to rebut the government's assertions and dismissed the habeas petition.[12] The Supreme Court reversed. Emphasizing the importance of maintaining due process safeguards during periods when the national security is threatened, the Court held "that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[13]

As a response to the *Rasul* and *Hamdi* decisions, the Deputy Secretary of Defense announced the establishment of Combatant Status Review Tribunals (CSRTs) to review determinations by the Department of Defense that the detainees were "enemy combatants."[14] Section 1005 of the Detainee Treatment Act of 2005 (DTA) provides that the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a CSRT that an alien is properly detained as an enemy combatant.[15] The scope of such an appeal is further limited to a consideration of whether the status determination of the CSRT is consistent with the standards and procedures specified by the Department of Defense for CSRTs.[16]

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[12] Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).

[13] *Hamdi*, 542 U.S. at 533.

[14] Memorandum from Paul Wolfowitz, Deputy Sec'y of Def. to the Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707 review.pdf.

[15] Detainee Treatment Act of 2005, Pub. L. 109-148 § 1005, 119 Stat. 2680, 2740 (2005).

[16] *See* § 1005(e)(2)(C)(i), 119 Stat. at 2742. Section 1005(e)(2)(C)(ii) also permits the court to consider whether the CSRT's determination is "consistent with the Constitution and laws of the United States, to the extent they are applicable."

While the *Rasul* and *Hamdi* cases were making their way through the courts, the Bush administration also established a system of military commissions to try detainees for war crimes and began trial procedures before these commissions.[17] The validity of these military commissions was challenged in *Hamdan v. Rumsfeld*,[18] the case that led to enactment of the Military Commissions Act. The Supreme Court held, inter alia, (1) that the military commissions established by President Bush to try detainees were not expressly authorized by any congressional act; (2) that the procedures of the military commissions violated the Uniform Code of Military Justice; and (3) that the military commissions did not satisfy the Geneva Conventions.[19] President Bush responded to the *Hamdan* decision by proposing the Military Commissions Act which was enacted by Congress in October 2006.[20]

THE HABEAS CORPUS PROVISIONS OF THE MILITARY COMMISSIONS ACT

The *Rasul* case leaves unanswered whether, if Congress were to amend the habeas statute so as to deny its application to persons held on Guantanamo, such a law would violate the Constitution. The MCA puts this question directly in issue. The MCA eliminates any statutory right to habeas corpus for aliens determined by the government to be enemy combatants. Specifically, § 7(a) contains a new provision for § 2241 of Title 28 of the U.S. Code stating that

> [n]o 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

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[17] *See* Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001); *see also* Department of Defense, Military Commission Order No. 1 (Mar. 21, 2002), superseded by Military Commission Order No. 1 (Aug. 31, 2005).

[18] 546 U.S. 557 (2006).

[19] *Id.*

[20] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28 and 42 U.S.C.).

> 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.[21]

That amendment also adds that:

> Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 USC 801 note), no court, justice, or judge shall have the 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.[22]

BOUMEDIENE V. BUSH: LOWER COURT PROCEEDINGS

The question of whether MCA § 7 violates the Suspension Clause came before the United States Court of Appeals in *Boumediene v. Bush*.[23] Foreign nationals held at Guantanamo Bay had filed petitions for writs of habeas corpus alleging violations of the Constitution, treaties, statutes, the common law and the law of nations. In the *Al Odah* cases, which consisted of eleven cases involving 56 detainees, Judge Green denied the government's motion to dismiss with respect to claims arising from alleged violations of the Fifth Amendment's Due Process Clause and the Third Geneva Convention but dismissed all other claims.[24] In the "Boumediene" cases – two cases involving

[21] 28 U.S.C.A. § 2241(e)(1) (2008).

[22] *Id.* at (e)(2).

[23] Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007) [hereinafter *Boumediene I*].

[24] In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005).

seven detainees – Judge Leon granted the government's motion and dismissed the cases in their entirety.[25] These cases were consolidated on appeal. Having decided several subsidiary issues, the Court of Appeals reached the question of whether the MCA in depriving courts of jurisdiction over detainees' habeas petitions violates the Suspension Clause of the Constitution. The majority concluded that the MCA does not violate the Suspension Clause. The Court noted that the Suspension Clause protects the writ as it existed in 1789 when the first Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus. After reviewing a number of common law cases the majority concluded that "[g]iven the history of the writ in England prior to the founding, habeas corpus would not have been available in 1789 to aliens without presence or property within the United States."[26] The Court also relied on *Johnson v. Eisentrager*[27] and other cases for the proposition that the Constitution does not confer rights on aliens without property or presence in the United States. Judge Rogers dissented.[28] The Supreme Court granted certiorari.[29]

THE SUPREME COURT DECISION

On June 12, 2008, the Court announced its decision in *Boumediene v. Bush*.[30] In a 5-4 decision, the Court held that the detainees at Guantanamo Bay have the habeas corpus privilege. In addition, the Court further held that the CSRT procedures did not constitute an adequate substitute for habeas corpus and that § 7 of the MCA operated as an unconstitutional suspension of the writ.

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[25] *See* Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005); In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005).

[26] *Boumediene I*, 476 F.3d at 990.

[27] Johnson v. Eisentrager, 339 U.S. 763 (1950).

[28] *Boumediene I* , 476 F.3d at 995.

[29] 127 S. Ct. 3078 (2007).

[30] *Boumediene II*, 128 S. Ct. 2229 (2008).

Out the outset of the majority opinion, Justice Kennedy emphasized the importance of the Suspension Clause to the separation of powers doctrine:

> The Clause protects the rights of the detained by means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of government" that is itself the surest safeguard of liberty . . . . The Clause protects the rights of the detained by affirming the duty and authority of the judiciary to call the jailer to account . . . . The separation of powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.[31]

The Court next addressed the Government's contention that the Suspension Clause affords the detainees no rights because the United States does not claim sovereignty in Guantanamo Bay. The Court began its analysis by noting that the Court's jurisprudence on the extraterritorial application of the Constitution undermined the Government's argument. In the *Insular Cases*, the Court held that the Constitution had "independent force" in a number of territories of the U.S., such as the Philippines and Puerto Rico, but also noted that its individual provisions did not necessarily apply in every situation.[32] For example, the Philippines had a civil law system. Requiring a country with a civil law system to use jury trials would have been disruptive. As Justice Kennedy noted, "[t]he Court thus was reluctant to risk the uncertainty and instability that would result from a rule that displaced altogether the

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[31] *Id.* at 2247. The Court also reviewed the history of whether at common law foreign nationals, detained in foreign countries, could file for a writ of habeas corpus in common law courts. After reviewing the evidence on this question in detail, the court concluded that the evidence as to the geographical scope of the writ of habeas corpus at common law was ultimately ambiguous and not dispositive. *See id.* at 2248-51.

[32] *See, e.g.*, Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138, 143-144 (1901).

existing legal system in three newly acquired Territories."[33] The result of these considerations was the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated territories which become states, but only in part in unincorporated territories.[34] The Court noted that practical considerations continued to inform whether the Constitution applied in particular situations.

Justice Kennedy also found that practical considerations were important in *Johnson v. Eisentrager*.[35] In *Eisentrager*, German nationals held in custody by the U.S. Army filed habeas corpus petitions. The prisoners were detained at Landsberg prison in Germany after World War II. A military commission convicted them of war crimes arising from military activity against the United States in China. They claimed that their convictions violated various provisions of the U.S. Constitution and the Geneva Conventions. The Court of Appeals had found jurisdiction to consider the petitions, holding that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ."[36] In reversing that determination, the Court summarized the six critical facts in the case:

> We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a basic constitutional right, to sue in some court of the United States for a writ of habeas corpus. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (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

[33] *Boumediene II*, 128 S. Ct. at 2254.

[34] *See Dorr*, 195 U.S. at 143.

[35] 339 U.S. 763 (1950).

[36] Eisentrager v. Forrestal, 174 F.2d 961, 963 (1949).

> 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.[37]

On this set of facts the Court concluded there was no right of habeas corpus. The Court rejected the proposition "that the Fifth Amendment confers its rights on all persons, whatever their nationality, wherever they are located and whatever their offenses . . . ."[38]

Eisentrager was central to the Government's contention in *Boumediene II* that the reach of the Suspension Clause should depend solely on whether the United States has formal sovereignty over Guantanamo Bay. The Court rejected the Government's contention and found that a number of factors were relevant in addition to sovereignty. One of these practical considerations involved military concerns:

> The prisoners [in *Eisentrager*] were detained at Landsberg Prison in Germany during the Allied Powers' postwar occupation. The Court stressed the difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding. It "would require allocation of shipping space, guarding personnel, billeting and rations" and would damage the prestige of military commanders at a sensitive time.[39]

In rejecting the Government's contention, the Court emphasized that its interpretation was more consistent with the *Insular Cases* and that the Court in *Eisentrager* did not use the term "sovereignty only in a narrow technical sense."[40]

Separation of powers concerns also influenced the Court's rejection of the government's sovereignty based test. The Court

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[37] 339 U.S. at 777.

[38] 339 U.S. at 783.

[39] *Boumediene II*, 128 S. Ct. at 2257.

[40] *Id.* at 2257-58.

would not allow the Executive to contract away basic constitutional rights by surrendering formal sovereignty over Guantanamo Bay:

> These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.[41]

Based on the factors considered by the Court in *Eisentrager* and the reasoning in the extraterritorial opinions the Court concluded "that at least three factors are relevant in determining 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 the apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[42] Applying this framework, the Court noted that the detainees disputed their status (unlike the petitioners in *Eisentrager* who conceded they were enemy aliens). The procedural protections extended to aliens in the CSRT process were quite limited, and "fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."[43] With respect to the second factor, the site of the detention of the *Eisentrager* petitioners was outside of U.S. sovereign territory like the detainees at Guantanamo Bay. However, United States control over the prison in Germany was neither absolute nor indefinite. The Court's holding in *Eisentrager* was consistent with the *Insular Cases* which held that there was no need to extend full

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[41] *Id.* at 2259.

[42] *Id.*

[43] *Id.* at 2260. The Court stressed, in particular, that detainees were not represented by counsel, that the government's evidence is accorded a presumption of validity and finally that the ability to rebut evidence of detainees against them is limited by circumstances of confinement.

constitutional protection to territory the United States did not intend to govern indefinitely. By contrast, Guantanamo Bay was not a transient possession. Finally, the Court found that unlike the situation in *Eisentrager* "[t]he Government presents no credible arguments that the military mission at Guantanamo Bay would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."[44]

The second question addressed by the majority opinion was whether § 7 of the MCA (stripping the courts of jurisdiction to issue the writ of habeas corpus) avoids the Suspension Clause mandate because Congress had provided adequate procedures for habeas corpus. "[H]abeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."[45] The Court found there are a number of constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant including in particular the lack of assistance of counsel, and the fact that the detainee "may not be aware of the most critical allegations that the Government relied upon to order his detention."[46] Finally, the Court concluded that the review of CSRT proceedings permitted by the DTA in the Court of Appeals was not an adequate substitute for habeas corpus.[47]

All these concerns were contested by the dissenting Justices. The Chief Justice was sharply critical of the failure of the majority to respect the system designed by the political branches to protect the detainees' rights.[48] Detainees have the right to call witnesses, introduce evidence, question the witnesses called by the Government and be represented by a "Personal Representative."[49] The Chief Justice emphasized that it was

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[44] *Id.* at 2261.

[45] Boumediene v. Bush, 128 S. Ct. 2229, 2266 (2008) (quoting INS v. St. Cyr, 533 U.S. 289, 302 (2001)).

[46] *Id.* at 2269.

[47] *Id.* at 2272-74. The Court found the DTA was constitutionally infirm in failing to allow the detainees to present relevant exculpatory evidence that was not made part of the record in earlier proceedings.

[48] *See id.* at 2279 (Roberts, C.J., dissenting).

[49] *See id.* at 2293 (Roberts, C.J., dissenting).

inappropriate to provide detainees with access to classified evidence: "What alternative does the Court propose? Allow free access to classified information and ignore the risk the prisoner may eventually convey what he learns to parties hostile to this country, with deadly consequences for those who helped apprehend the detainee?"[50]

The majority is on firmer ground than the Chief Justice. In a CSRT proceeding it is virtually impossible for a prisoner to challenge the basis for his detention. While the Government's case to the tribunal may consist of both classified and unclassified evidence, the detainee only has access to unclassified evidence.[51] There is a rebuttable presumption that the Government's evidence is genuine and accurate.[52] Therefore, unlike a habeas proceeding, the burden is effectively on the prisoner to prove why he should not be detained. Moreover he has no opportunity to challenge the portion of the Government's case that is based on classified evidence. These problems are further exacerbated because the case is heard by military officers who are subject to command influence.[53]

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[50] *Id*. at 2288 (Roberts, C.J., dissenting).

[51] Memorandum from Gordon England, Sec'y of the Navy E-1, ¶ H(5) (July 29, 2004), *available at* http://www.defenselink.mil/news/Jul2004/ d200407 30comb.pdf. In a July 2004 Memorandum for the Secretary of the Navy, the Secretary of Defense established skeletal procedures for the conduct of CSRT proceedings with respect to foreign nationals held at Guantanamo "to review the detainees' status as enemy combatants." Memorandum from Paul Wolfowitz, Deputy Sec'y of Defense 1 (July 7, 2004), *available at* www.defenselink.mil/news/Jul2004/d20040707review.pdf. The Secretary of the Navy, who was appointed to operate and oversee the CSRT process, promptly issued a Memorandum specifying detailed procedures which are still in effect. Memorandum from Gordon England, *supra*. The Secretary of the Navy attached to his memorandum three enclosures which are referred to in this article as "E-1", "E-2", and "E-3".

[52] Memorandum from Gordon England, *supra* note 51, at E-1, ¶ G(11).

[53] The military officers who staff CSRTs are far less insulated from command influence than a military judge. A military judge has been certified for judicial duties by the Judge Advocate General for the officer's Armed Service. To protect their independence military judges are responsible to the Judge Advocate General. This system is designed to protect military judges from command influence and preserves their impartiality. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 647-49 (2004) (Kennedy, J., concurring); *see also* Weiss v. United States, 510 U.S. 163, 179-81 (1994) (discussing provisions that "insulate military judges from effects of command influence").

The absurdity of a detainee attempting to defend himself against evidence which has not been disclosed to him is illustrated by the example of one of the CSRT proceedings given by Judge Green in *In re Guantanamo Detainee Cases*:

> In reading a list of allegations forming the basis for the detention of Mustafa Ait Idr, a petitioner in *Boumediene v. Bush*, 04-CV-1166 (RJL), the Recorder of the CSRT asserted, "While living in Bosnia, the Detainee associated with a known Al Qaida operative." In response the following exchange occurred:
>
> Detainee: Give me his name.
>
> Tribunal President: I do not know.
>
> Detainee: How can I respond to this?
>
> Tribunal President: Did you know [the name] of anybody that was a member of Al Qaida?
>
> Detainee: No, no.
>
> . . . .
>
> Tribunal President: No?
>
> Detainee: No. . . . I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. . . . But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.[54]

To be sure, as the Chief Justice argued, the government should be reluctant to share classified evidence with a person suspected of terrorism. Indeed in his view it was generous to

[54] *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 468-69 (D.D.C. 2005).

share classified evidence with the detainee's Personal Representative.[55] The Chief Justice ignored the key point that the Personal Representative is not a lawyer. Under the rules governing the CSRT proceedings, the detainee is not allowed to be represented by counsel. Rather than providing the prisoner with counsel, the rules provide for a Personal Representative who is a commissioned officer.[56] He is not an attorney and does not have a confidential relationship with the prisoner.[57] While the Personal Representative has access to classified evidence, he is not permitted to disclose it to the detainee.[58] Thus, it is not possible to view the Personal Representative as a surrogate for the detainee. Judge Green noted these problems in her opinion in *In re Guantanamo Detainee Cases*:

> The CSRT regulations do acknowledge to some extent the detainees' need for assistance during the tribunal process, but they fall far short of the procedural protections that would have existed had counsel been permitted to participate. The implementing regulations create the position of "Personal Representative" for the purpose of "assist[ing] the detainee in reviewing all relevant unclassified information, in preparing and presenting information, and in questioning witnesses at the CSRT." But notwithstanding the fact that the Personal Representative may review classified information considered by the tribunal, that person is neither a lawyer nor an advocate and thus cannot be considered an effective surrogate to compensate for a detainee's inability to personally review and contest classified evidence against him.[59]

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[55] *Boumediene II*, 128 S. Ct. at 2288 (Roberts, C.J., dissenting).

[56] Memorandum from Gordon England, *supra* note 51, at E-3, ¶ A(1).

[57] *Id.*

[58] *Id.* at E-3, ¶ C(4).

[59] *In re* Guantanamo Detainee Cases, 355 F. Supp. at 471-72 (quoting Memorandum from Gordon England, *supra* note 51, at E-1, ¶ C(3)).

THE SIGNIFICANCE OF *BOUMEDIENE V. BUSH*

There are four specific areas in which it appears that the *Boumediene II* decision will have particularly notable impacts.

THE SEPARATION OF POWERS DOCTRINE.

The *Boumediene II* decision is one of the most important cases ever decided by the Supreme Court involving the separation of powers. The Congress created the CSRT system to place the determination as to whether a person should be classified as an enemy combatant within the jurisdiction of military tribunals with a very limited review by the courts. In addition, the Congress stripped the judiciary of habeas corpus jurisdiction over the detainees. Ultimately, this framework reflected a judgment by the Congress that the enemy combatant determination must be a military decision in order to protect the national security of the United States.[60] The Court determined that this system was ultimately inconsistent with the separation of powers doctrine. One of the critical aspects of this doctrine is the right to habeas corpus which has historically provided the courts with the power to determine whether the detention of individuals by the Executive is legally justified.

The relationship between national security and habeas corpus jurisdiction was at the heart of the disagreement between the dissents and the majority opinion. The dissenters passionately argued that the Court's decision threatened the national security of the United States. Justice Scalia declared:

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[60] During the Senate debate on the MCA, Senator Graham stated:

> In my opinion, the fundamental question for the Senate to answer when it comes to determining enemy combatant status is, Who should make that determination? Should that be a military decision or should it be a judicial decision? I am firmly in the camp that when it comes to determining who an enemy of the United States is, one who has taken up arms and who presents a threat to our Nation, that is not something judges are trained to do, nor should they be doing. That is something our military should do.

152 CONG. REC. S10,266-01 (daily ed. Sept. 27, 2006) (statement of Sen. Graham).

> America is at war with radical Islamists . . . .
>
> The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed . . . .
>
> . . . [T]he Court today raises the bar, requiring military officials to appear before civilian courts and defend their decisions under procedural and evidentiary rules that go beyond what Congress has specified. As THE CHIEF JUSTICE's dissent makes clear, we have no idea what those procedural and evidentiary rules are, but they will be determined by civil courts and (in the Court's contemplation at least) will be more detainee-friendly than those now applied, since otherwise there would [be] no reason to hold the congressionally prescribed procedures unconstitutional.[61]

In contrast to Justice Scalia's dissent, Justice Kennedy's majority opinion emphasizes the need to adhere to separation of powers principles and the right to habeas corpus:

> Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.[62]

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[61] *Boumediene II*, 128 S. Ct. at 2294-95 (Scalia, J., dissenting).

[62] *Id.* at 2277 (majority opinion).

The majority, in contrast to the dissenters, believed it is possible for the courts to reconcile the national security needs of the United States with the need to protect fundamental constitutional rights. The majority decision reflects a much higher level of concern with the protection of fundamental human rights than the dissent. Indeed, it is troubling to reflect on the consequences of accepting the Government's position. As one scholar has noted:

> If the Due Process Clause does not apply to detainees at Guantanamo, then the Government effectively has discretion to starve them, to beat them, to maim them, or to kill them, with or without hearings and with or without evidence of any wrongdoing. It can convict them on rumor and imprison them indefinitely, out of abundance of caution, or to deter others, or to reassure the public, or to conceal prior errors . . . .
>
> If no constitutional rights apply to offshore detainees, merely by reason of their nationality and location, then the [G]overnment is equally free to mistreat interdicted refugees, suspected drug smugglers, or any other alleged violators of its laws. The Government may erect extraterritorial courts and extraterritorial prisons to punish extraterritorial crimes without legal oversight or legal constraint.[63]

The majority was also sensitive to the need to protect the national security of the United States. In establishing a framework for considering the reach of the Suspension Clause, the Court emphasized the need to take into account military considerations.[64] While the Court noted that the military had not made a persuasive case that military considerations justified not granting habeas corpus rights to the detainees at

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[63] Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 52-53 (2004) (footnotes omitted).

[64] *Boumediene II*, 128 S. Ct. at 2261.

Guantanamo Bay,[65] the Court clearly was prepared to reach a different conclusion if the circumstances warranted giving more deference to military concerns.

IMPACT OF DECISION ON U.S. DETENTION AND TORTURE PROGRAM.

The events of 9/11 represented one of the most massive intelligence failures in U.S. history. Thousands of Americans died in the 9/11 attacks. The reaction of the United States government was to radically change the legal environment for dealing with suspected terrorists. Traditionally, the government would have treated terrorists as criminals. They would have been arrested and prosecuted for violations of U.S. criminal law. Instead, the government began holding terrorists indefinitely without charges and without access to counsel. Suspected terrorists were arrested all over the world and held in many different prisons. Most ominously, the government decided that the most effective way to protect the United States from attacks such as those which occurred on 9/11 was to gather intelligence from suspected terrorists and to engage in highly coercive interrogations in order to gather this intelligence. Jane Mayer described this strategy in her recent book *The Dark Side*:

> [T]he overarching intent of the legal strategy was to transform the fight against terrorism from a criminal justice matter to a full-fledged military war, thereby allowing the CIA and Pentagon to kill or capture and question terrorist suspects as swiftly as possible, with as much latitude as possible. The assumption on all sides was that getting accurate, fast, "actionable" information would be the key to defeating the terrorists. By emphasizing interrogation over due process, the government intended to preempt future attacks before they materialized . . . . [T]he administration proclaimed that criminal and military courts, with their exacting standards of evidence and their emphasis on protecting defendants' rights,

[65] *Id.*

> including the right to remain silent, were too cumbersome.[66]

Suspected terrorists were isolated in prisons around the world in secrecy and denied access to family or counsel.[67] They were then subjected to months of torture and brutalization. The techniques of interrogation included waterboarding, isolation, beatings, sexual abuse, extremely painful stress positions and electric shock.[68] The obvious purpose of these techniques was to inflict extreme pain on the victims. Some individuals, after experiencing unbearable pain, actually died as a result of what was done to them.[69]

Sometimes, prisoners were sent to foreign countries, such as Egypt, where it was understood that the individuals would be subject to torture by the foreign governments.[70] Other individuals were held in prisons administered by the CIA. Initially, many of these prisons were in foreign countries.[71] Many detainees were also held in Guantanamo Bay in a prison administered by the U.S. Army. Eventually, these detainees were subjected to highly abusive interrogation techniques.[72]

There were hundreds of victims, perhaps thousands. Since the whole program was carried out in secrecy, the total number of victims may never be known. While some of the victims were members of al-Qaeda, others were completely innocent of any connection to al-Qaeda or any other terrorist organization.[73]

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[66] JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 52 (2008).

[67] *See id.* at 139-81.

[68] *Id.*

[69] *See id.* at 238-60.

[70] *See id.* at 101-39.

[71] *See id.* at 139-81.

[72] JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 52, 182-213 (2008).

[73] For example, Mandouh Habib, an Egyptian-born citizen of Australia who ran a coffee shop in Sydney, was apprehended in Pakistan in October of 2001. A spokesman for the Pentagon claimed that Habib was a terrorist who spent time in Afghanistan with supporting hostile forces or fighting illegally against the

A central feature of the program was denying the detainees access to courts or to legal counsel. Denying such access served two important purposes. First, the military believed their victims were more likely to provide useful information if they were held in isolation and secrecy without access to any other human beings except their abusers.[74] Second, the CIA and the military wanted total control over the detention and interrogation of prisoners without interference by the judiciary.[75]

Historically, the writ of habeas corpus was the primary vehicle for preventing the unlawful and arbitrary detention of individuals by the Executive. Therefore, the administration in its effort to prevent any access by prisoners to the courts sought to terminate any rights the detainees had to the writ. In restoring the habeas corpus jurisdiction of the courts, the Supreme Court has struck a crucial blow at the detention and torture program of the Bush administration. It will be more difficult for the military and the CIA to succeed in torturing detainees if they have access to the writ of habeas corpus. This kind of wholesale brutalization of human beings – easily, one of the most shameful and sordid chapters in our history – thrives on an atmosphere of secrecy and isolation. Habeas corpus is the central institution in our constitutional system designed to prevent this abuse of human rights by the Executive.

U.S. In 2008, after a three year ordeal, Habib was released without charges. A top Australian intelligence official who was intimately involved in the case indicated that Habib was of no intelligence value and knew nothing about terrorism. Habib claimed he was sent to Egypt by American authorities and was interrogated there for six months during which time he claimed that he was frequently beaten. *See* MAYER, *supra* note 66, at 125-26.

74 For example, in an affidavit, Lowell Jacoby, Director of the Defense Intelligence Agency, explained that, "[t]he detention program was aimed at holding suspects not for punishment, but rather for intelligence gathering . . . To succeed in harvesting this intelligence, detainees had to be kept in 'an atmosphere of dependency and trust between subject and interrogator', which required hermetic isolation from any human contact other than with the interrogator. For this reason, neither lawyers nor Red Cross would be allowed access. Nor could the detainee have communication with anyone else in the outside world." MAYER, *supra* note 66, at 199.

75 *See* MAYER, *supra* note 66.

IMPACT OF DECISION ON TRIALS IN THE MILITARY COMMISSION SYSTEM.

The Military Commissions Act severely restricts many of the traditional constitutional rights of criminal defendants.[76] While numerous instances might be cited, two examples can be given to demonstrate the tendency of the statute to significantly reduce the detainees' procedural rights. First, the Act removes the right to a speedy trial that a defendant would have in a court martial.[77] Removing the right to a speedy trial has the effect that a defendant can be held indefinitely in confinement without a finding of guilt.[78] Second, the Uniform Code of Military Justice's provisions against compulsory self-incrimination are replaced for commissions by 10 U.S.C. § 948r.[79] As Professor Roger Clark notes in his article *The Military Commissions Act of 2006: An Abject Abdication by Congress*, "[a] broad right not to incriminate oneself anywhere in the process gets narrowed to a right to refuse to testify against oneself at the commission itself. A broad Miranda right is simply removed. The rules against coercion are drastically reduced."[80]

One significant result of the *Boumediene II* decision was to raise the issue of whether these restrictions on the constitutional rights of the detainees are still valid. Now that the Court has found that the detainees have constitutional rights, it is open to question whether attempts to restrict the procedural rights which defendants would otherwise have now violate the constitution. This is a question which will be answered in the course of the military commission trials which are just beginning to take place.

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[76] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28 and 42 U.S.C.).

[77] Military Commissions Act § 948b(d)(1)(A) (amending 10 U.S.C.A. § 948b(d)(1)(A) (2008)).

[78] *See* Richard V. Meyer, *When a Rose is Not a Rose: Military Commissions v. Courts-Marital,* 5 J. INT'L CRIM. JUST. 48, 54 (2007).

[79] "No person shall be required to testify against himself at a proceeding of a military commission under this chapter." 10 U.S.C.A. § 948r(a) (2008).

[80] Roger Clark, *The Military Commissions Act of 2006: An Abject Abdication by Congress*, 6 RUTGERS J.L. & PUB. POL'Y 78, 118 (2008).

IMPACT OF DECISION ON THE EXTRATERRITORIAL APPLICATION OF THE U.S. CONSTITUTION.

The *Boumediene II* decision will have a significant impact on the Court's jurisprudence on the extraterritorial application of the U.S. Constitution. The Court's extraterritorial jurisprudence has had a long and complicated history. In discussing this aspect of the Court's decision, it is useful to identify three different approaches to the extraterritorial scope of the Constitution.[81] A first approach is what Professor Gerald Neuman has called the "mutuality of obligations" approach:

> [This] approach presumes that the extension of U.S. constitutional rights accompanies the assertion of an obligation to obey U.S. law, because the framework of rights is designed to legitimate government's claim to obedience. This correlation between rights and governing authority suggests that constitutional rights should presumptively apply to all persons within U.S. territory, and to all U.S. citizens in any location, but that extraterritorial rights of foreign nationals presumptively arise only in contexts where the United States seeks to impose and enforce its own law.[82]

One of the best explanations for this approach may be found in a dissenting opinion by Justice Brennan in *United States v. Verdugo-Urquidez.*[83] *Verdugo* involved the extraterritorial rights of aliens. The respondent was a Mexican drug-dealer being prosecuted for drug trafficking.[84] After his arrest in the United States, U.S. agent together with the Mexican police

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[81] These three approaches are outlined in Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology after Rasul v. Bush*, 153 U. PA. L. REV. 2073, 2075-77 (2005).

[82] *Id.* at 2076-77 (footnotes omitted).

[83] United States v. Verdugo-Urquidez, 494 U.S. 259, 279 (1990) (Brennan, J., dissenting).

[84] *Id.* at 262.

searched his home in Mexico without a search warrant.[85] The Court held that the respondent had no Fourth Amendment rights. Justice Brennan dissented:

> Respondent is entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws . . . . Fundamental fairness and the ideals underlying our Bill of Rights compel the conclusion that when we impose "societal obligations" . . . such as the obligation to comply with our criminal laws, on foreign nationals, we in turn are obliged to respect certain correlative rights, among them the Fourth Amendment.
>
> By concluding that respondent is not one of "the people" protected by the Fourth Amendment, the majority disregards basic notions of mutuality. If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them.[86]

A second approach is that adopted by Chief Justice Rehnquist in *Verdugo*.[87] Under this approach the U.S. Constitution applies to U.S. citizens, but not to foreign nationals. Chief Justice Rehnquist concluded that the defendant had specifically no Fourth Amendment rights.[88] He further concluded more generally that aliens have no constitutional rights whatsoever with regard to government action abroad.[89]

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[85] *Id.* at 262-63.

[86] *Id.* at 284 (Brennan, J., dissenting).

[87] *See* Neuman, *supra* note 81, at 2075-76.

[88] *Verdugo-Urquidez*, 494 U.S. at 274-75.

[89] *Id.* at 273.

This second alternative is basically the approach taken by the dissenting justices in *Boumediene II*.[90] Under this second approach, the U.S. Constitution "does not apply fully and literally overseas," but only partially.[91] As the Chief Justice noted in *Verdugo*, quoting the concurrence of Justices Harlan in *Reid v. Covert*, U.S. citizens are not entitled to the full range of constitutional protections in all overseas criminal prosecutions.[92]

A third alternative, denominated by Professor Neuman as the "global due process model," is the approach taken by the majority in *Boumediene II*.[93] Justice Kennedy supported this approach in his concurring opinion in *Verdugo*, in which he too cited Justice Harlan's concurrence in *Reid v. Covert*.[94] Under this approach, the appropriate analysis would inquire which provisions of the Constitution should apply in light of "the particular local setting, the practical necessities, and the possible alternatives"[95] and whether conditions "would make adherence to a specific guarantee altogether impracticable and anomalous."[96] This approach originated in Justice White's opinion in one of the early *Insular Cases*, *Downes v. Bidwell.* There, he proposed that the Constitution is applicable "everywhere" that the U.S. exercises sovereign power but that the determination of whether a "particular provision of the Constitution is applicable" involves "an inquiry into the situation of the territory and its relations to the United States."[97]

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[90] *See* Boumediene v. Bush, 128 S. Ct. 2229, 2298-2302 (2008) (Scalia, J., dissenting).

[91] *See* Neuman, *supra* note 81, at 2075-76.

[92] *Verdugo-Urquidez*, 494 U.S. at 270; *see also* Reid v. Covert, 354 U.S. 1, 65 (1957) (Harlan, J., concurring).

[93] *See* Neuman, *supra* note 81, at 2076.

[94] *See Verdugo*, 494 U.S. at 277 (Kennedy, J., concurring).

[95] *Reid*, 354 U.S. at 75 (Harlan, J., concurring).

[96] *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (citing *Reid*, 354 U.S. at 74-75 (Harlan, J., concurring)).

[97] Downes v. Bidwell, 182 U.S. 244, 293 (1901) (White, J., concurring).

One of the most significant outcomes of the *Boumediene* decision may be the application of the global due process model to the extraterritorial application of the Constitution. This decision will have impacts in many areas of constitutional law beyond the situation of the detainees at Guantanamo Bay, such as in the procedural rights of foreign nationals with respect to the activities of American police abroad, as in *Verdugo*. Unlike the approach of Justice Scalia's dissent in *Boumediene II*, this approach recognizes that when the U.S. exercises sovereign power over aliens, those aliens have fundamental constitutional rights. Nevertheless, the model has been criticized for being extremely permissive and vague:

> The global due process approach embodies judicial discretion to reject, after deferential inquiry, the applicability of constitutional rights to government action abroad in situations where they would appear "impracticable and anomalous." The precise content of this standard cannot presently be specified, but its permissiveness may best be illustrated by Frankfurter and Harlan's conclusion that military trials are permissible for noncapital cases involving civilians abroad and by their view that it justifies the departures from constitutional practice approved in the Insular Cases.[98]

While the global due process model is imprecise and vague, it balances the national security concerns inherent in *Boumediene II* with human rights concerns by giving the Court flexibility to take into account military considerations in determining whether to apply the Constitution in extraterritorial situations. The great virtue of the Court's decision is that it "recognize[s] that the exercise of sovereign power, not nominal sovereignty, makes the United States responsible for recognizing fundamental rights."[99] As noted, if the Constitution does not apply to detainees at Guantanamo Bay, the government has the very troubling discretion to "starve them, to beat them, to maim

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[98] GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 114 (1996) (footnotes omitted).

[99] Neuman, *supra* note 63, at 65.

them, or to kill them, with or without hearings and with or without evidence of any wrongdoing" and could imprison them indefinitely for any variety of other motives that do not provide adequate and lawful justifications for their imprisonment.[100]

CONCLUSION

The *Boumediene II* decision will have significant ramifications in at least four areas. First, it is a landmark case concerning the separation of powers doctrine. By holding that habeas jurisdiction extends to non-citizens at Guantanamo Bay the Court preserved the freedom from arbitrary and unlawful detention that is secured by the separation of powers and specifically by the writ of habeas corpus. Secondly, the Court's decision, at least to some extent, protects detainees from the regime of coercive interrogation established by the Bush administration by securing prisoners access to the habeas jurisdiction of the courts. Thirdly, the opinion raises significant questions concerning the provisions in the MCA depriving detainees of constitutional procedural rights in military commission trials. Finally, the decision significantly affects the court's jurisprudence concerning the extraterritorial scope of the Constitution by choosing the global due process model which significantly protects, to a greater extent than other approaches, the fundamental constitutional rights of non-citizens detained by the United States government.

[100] *Id.* at 52.