Boumediene v. Bush: Legal Realism and the War on Terror

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I. Introduction

On June 12, 2008, in *Boumediene v. Bush*, the United States Supreme Court ruled 5-4 that prisoners in Guantanamo Bay have a common law right to the writ of habeas corpus, and that the Combatant Status Review Tribunal procedures currently in place are inadequate substitutes for this most fundamental right.[1] The media reported that the decision heralded the end of the detention facility at Guantanamo.[2] In reality, the end of Guantanamo was on the horizon before this landmark opinion. The estimated number of detainees at the prison has shrunk from over 700 to over 200 in the last six years.[3] President Bush indicated that he wanted to close Guantanamo two years before the decision was announced.[4] President Obama has pledged to close Guantanamo.[5] Though the decision arguably hastened the end of Guantanamo, its days were numbered before *Boumediene*.

The significance of the decision goes beyond the logistics of the military facility. This case is about endurance of the separation of powers scheme. With *Boumediene*, the Court asserted its role in the War on Terror. In order to insert itself in the conflict, the Court abandoned formalism and wrote a legal realist opinion. Legal realism understands the law as indeterminate, necessitating judges to look to extralegal considerations.[6] Legal realists have argued that judges should consider the practices and values of the system at large in order to be truly responsive to the issue before them.[7] In this case, the majority looked beyond precedent and procedure and considered both the reality of combatant detention at Guantanamo and the separation of powers. Had the Court not allowed these issues to influence its

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

[2] *See, e.g.*, David Cole, *Closing the Law-Free Zone*, The Guardian.co.uk, June 13, 2008, http://www.guardian.co.uk/commentisfree/2008/jun/13/guantanamo.terrorism1.

[3] David Bowker & David Kaye, *Guantanamo by the Numbers*, N.Y. Times, Nov. 10, 2007, at A15; Jennifer Daskal & Stacy Sullivan, *The Insanity Inside Guantanamo*, Salon, June 10, 2008, http://www.salon.com/news/feature/2008/06/10/guantanamo_mental.

[4] President George W. Bush, Press Conference (June 14, 2006) (transcript available at http://www.whitehouse.gov/news/releases/2006/06/20060614.html).

[5] *60 Minutes* (NBC television broadcast Nov. 16, 2008).

[6] Michael Steven Green, *Legal Realism as Theory of Law*, 46 Wm. & Mary L. Rev. 1915, 1922 (2005).

[7] Rogers M. Smith, *Constitutional Interpretation & Political Theory: American Legal Realism's Continuing Search for Standards*, 15 Polity 492, 511 (1983).

decision, it would have essentially removed the judicial branch from occupying any oversight role over cases in which terrorists are detained.

Part II will detail the history that informed the decision. The Court decided *Boumediene* after previous repeated attempts to fashion limits on executive detention during the War on Terror. Part III will explore the reasoning of the decision, in which the Court abandoned formalism in order to definitively insert itself into the national discourse. Part IV will explain how policy concerns informed the decision, and why the outcome was necessary.

II. The Case in Context

On September 11, 2001, the United States suffered the most devastating domestic attack in its history.[8] The al-Qaeda terrorist network, under the direction of Osama Bin Ladin, orchestrated the attacks on the World Trade Center and the Pentagon that led to the death of approximately 3,000 Americans.[9] In response to the attacks, Congress passed a joint resolution on September 18, 2001, authorizing "the use of United States Armed Forces against those responsible for the recent attacks launched against the United States."[10] The Authorization for Use of Military Force ("AUMF") granted the President the authority to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[11]

Two days later, armed with this authority from the legislative branch, President Bush launched the "War on Terror."[12] As part of this effort, President Bush issued a military order on November 13, 2001, authorizing the indefinite detainment of suspected terrorists.[13] In the event that the government chose to prosecute the detainees, President Bush ordered that military tribunals would conduct the trials.[14] The proceedings were to be conducted in secret, and the detainee had no right to an appeal.[15] In order to avoid the constitutional challenges that would inevitably result from such indefinite detention by the U.S. government, President Bush sought a detention facility outside the jurisdiction of the federal courts.[16]

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[8] Nat'l Comm'n on Terrorist Attacks upon the U.S., The 9/11 Commission Report xv (2004).

[9] *Id.* at 153-73, 311.

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

[11] *Id.* § 2(a).

[12] Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1348 (Sept. 20, 2001).

[13] Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 37 Weekly Comp. Pres.Doc. 1665 (Nov. 13, 2001).

[14] *Id.* at 1666-68.

[15] Philip Bobbitt, Terror and Consent: The Wars for the Twenty-First Century 268 (2008).

[16] *See id.* at 264; Jane Mayer, The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals 147 (2008).

In 1903, the United States leased about forty-five square miles of Guantanamo Bay from Cuba to serve as a coaling station for the U.S. Navy.[17] Under the agreement, the U.S. agreed to "recognize[ ] the continuance of the ultimate sovereignty of the Republic of Cuba" over Guantanamo, while Cuba "consent[ed] that during the period of occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas."[18] In 1934, the United States and Cuba entered into an agreement that the lease would remain in effect as long as the U.S. did not abandon the naval base on Guantanamo.[19] It was at this military base that the first of 774 detainees arrived on January 11, 2002.[20]

The Bush administration not only believed that the base was isolated from the reach of U.S. courts, but also believed that the Geneva Conventions did not apply to the detainees.[21] Basing its distinction on a technicality in the articles of the Conventions, the Administration classified the detainees as "enemy combatants" instead of prisoners of war.[22] Prior to the War on Terror, prisoners captured during a conflict were designated either prisoners of war or common prisoners.[23] The Geneva Conventions governed the prisoners of war, while the domestic law of the controlling country governed the common prisoners.[24] Classifying the detainees within neither of these categories allowed the creation of a "legal black hole," where neither U.S. law nor international treaties relating to the treatment of prisoners of war applied.[25]

Despite the Bush administration's efforts, legal challenges began almost immediately. A self-named "Coalition of Clergy, Lawyers, and Professors" filed a habeas petition on behalf of the detainees within a week of the first arrivals at Guantanamo.[26] The court relied on a procedural rule and dismissed the petition, stating that the Coalition had no relationship with any of the detainees.[27]

A year later, relatives of two Australian citizens and twelve Kuwaiti citizens who were detained at Guantanamo filed various actions in the U.S. District Court for the District of Columbia.[28] The plaintiffs challenged the

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[17] CLIVE STAFFORD SMITH, EIGHT O'CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE IN GUANTANAMO BAY 290-91 (2007).

[18] Lease of Coaling or Naval Stations, U.S.-Cuba, art. III, Feb. 16-23, 1903, T.S. No. 418 [hereinafter 1903 Lease Agreement].

[19] Treaty Defining Relations with Cuba, U.S.-Cuba, art. III, May 29, 1934, 48 Stat. 1683.

[20] ANDY WORTHINGTON, THE GUANTANAMO FILES: THE STORIES OF THE 774 DETAINEES IN AMERICA'S ILLEGAL PRISON xii (2007).

[21] *See* MAYER, *supra* note 16, at 183; Brief for the Respondents at 37, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (No. 06-1195), 2007 WL 2972541.

[22] Brief for Respondents, *supra* note 21, at 37.

[23] BOBBITT, *supra* note 15, at 265.

[24] *Id.*

[25] WORTHINGTON, *supra* note 20, at xii.

[26] *Id.* at 257.

[27] *Id.*

[28] Rasul v. Bush, 542 U.S. 466, 470-71 (2004).

legality of their relatives' detentions, claiming none had been charged with any crime, nor permitted to consult with counsel, and all were denied access to courts or military tribunals.[29] Though the basis of their claims differed, the district court construed all the actions to be petitions for the writ of habeas corpus and dismissed the claims for want of jurisdiction.[30] The Court of Appeals affirmed the decision.[31] The Supreme Court, however, in *Rasul v. Bush*, granted certiorari and reversed.[32] The Court looked to a federal statute that conferred habeas jurisdiction on federal district courts.[33] In a 6-3 split, the Court ruled that the habeas statute created 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.'"[34]

On the same day that the Court announced its decision in *Rasul*, the Court also issued another rebuke to the Administration's detention efforts. In *Hamdi v. Rumsfeld*, the Court reviewed the denial of habeas corpus to a U.S. citizen detained at Guantanamo.[35] Though no opinion commanded the majority, eight of the nine Justices agreed that a U.S. citizen could not be held indefinitely without due process.[36]

The Court, recognizing that the decisions were setbacks to the government's approach to national security, reiterated the judiciary's role in the separation of powers scheme.[37] The *Hamdi* Court wrote "we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts . . . this approach serves only to *condense* power into a single branch of government."[38] After almost three years of virtually unchecked executive branch power, the Court asserted its role as a limiting force.[39] Perhaps owing to the novelty of the circumstances, however, both decisions were careful to use limiting language in their holdings.[40]

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[29] *Id.* at 471-72.
[30] *Id.* at 472.
[31] Al Odah v. United States, 321 F.3d 1134, 1145 (D.C. Cir. 2003).
[32] *Rasul*, 542 U.S. at 473.
[33] 28 U.S.C. § 2241(a), (c)(3) (2000).
[34] *Rasul*, 542 U.S. at 475 (quoting 1903 Lease Agreement, *supra* note 18, at art. III).
[35] At the time of the decision, Hamdi was no longer in Guantanamo; instead, he was being detained at a domestic U.S. base. He was moved to the United States from Guantanamo after it was discovered that he was an American citizen. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).
[36] *Id.*
[37] *Hamdi*, 542 U.S. at 535-36; *Rasul*, 542 U.S. at 484-85.
[38] 542 U.S. at 535-36.
[39] Mayer, *supra* note 16, at 301.
[40] In *Rasul*, the Court wrote: "Whether and what further proceedings may become necessary . . . are matters we need not address now. What is presently at stake is only whether the 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." 542 U.S. at 485. In *Hamdi*, Justice O'Connor's plurality opinion noted: "There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." 542 U.S. at 538.

On July 7, 2004—just nine days after the Supreme Court announced its decisions—Deputy Secretary of Defense Paul Wolfowitz issued an order establishing the Combatant Status Review Tribunal ("CSRT").[41] The Tribunals were to be composed of three officers of the U.S. Armed Forces.[42] The CSRT allowed a detainee the opportunity to "contest" her "designation as an enemy combatant" before the Tribunal, and the right to seek habeas review in U.S. courts.[43] The detainees were also granted the right to a "personal representative," defined as a "military officer" who would "assist[ ] the detainee" with the "review process."[44] The personal representative had the opportunity to "review any reasonably available information" held by the Department of Defense, and was permitted to share any non-classified information with the detainee.[45] The order granted the detainee the right to attend the proceedings unless they concerned "matters that would compromise national security."[46]

The CSRTs proved to be a less robust protection than Deputy Wolfowitz's order would suggest. The detainees were presumed guilty of being enemy combatants from the beginning of the review.[47] In addition to this presumption, the standard for determining whether the detainee was an enemy combatant was exceptionally low.[48] Traditional rules of evidence did not apply, and the government's evidence was presumed to be "genuine and accurate."[49] Only about 7% of the prisoners at Guantanamo were found to be "not enemy combatants" by the Tribunals.[50]

A few weeks after the CSRTs began, a Tribunal decided a Guantanamo prisoner named Salim Hamdan was eligible for trial before the military com-

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[41] Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to Gordon R. England, Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, at 1 (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

[42] Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to Gordon R. England, Secretary of the Navy, *Order Establishing Combatant Status Review Tribunal*, at 1 (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] SMITH, *supra* note 17, at 152.

[48] WORTHINGTON, *supra* note 20, at 264-65.

[49] JENNIFER ELSEA, DETAINEES AT GUANTANAMO BAY 3 (Cong. Research Serv., CRS Report for Congress RS 22173, July 20, 2005), *available at* http://www.fas.org/sgp/crs/natsec/RS22173.pdf.

[50] SMITH, *supra* note 17, at 153. To place this number in context, Seton Hall University Law School published a report profiling 517 Guantanamo detainees. The report found that 55% of the detainees were not determined to have committed any hostile acts against the U.S. or its allies. Only 8% could be characterized as being affiliated with al-Qaeda, while 40% had no definitive connection to al-Qaeda at all. Eighty-six percent of the detainees were not arrested by the United States, but instead handed over to the United States by Pakistan or Afghanistan's Northern Alliance at a time when the military offered large bounties. MARK DENBEAUX ET AL., REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 2-3, http://law.shu.edu/aaafinal.pdf (last visited Nov. 5, 2008).

mission.[51] Hamdan was brought before a military commission and charged with conspiracy "to commit . . . offenses triable by military commission."[52] Hamdan brought habeas and mandamus petitions to the district court, claiming that conspiracy was not a violation of the law of war and the procedures used to try him violated both military and international law.[53] The district court granted his petition for habeas, only to be reversed by the D.C. Circuit Court of Appeals.[54]

While the case was proceeding before the Supreme Court, Congress passed the Detainee Treatment Act of 2005 ("DTA").[55] Congress explicitly intended to remove the federal courts' jurisdiction over habeas petitions filed from Guantanamo. Section 1005 of the DTA amended the federal habeas statute to provide that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba . . . ."[56] To emphasize the point, Senators Jon Kyl and Lindsey Graham submitted an amicus brief to the Court, claiming Congress was aware when it enacted the DTA that the Supreme Court would lose jurisdiction over Guantanamo habeas petitions.[57]

In spite of the DTA, the Supreme Court concluded it had jurisdiction to hear habeas cases that were pending when the DTA was passed.[58] The Court went on to find that the President's authority to establish the military commissions absent congressional authorization was limited.[59] Moreover, under Article 21 of the Uniform Code of Military Justice, the military commissions must comply with the law of war.[60] The military commission used to try Hamdan was deemed invalid because it violated the Uniform Code of Military Justice and the Geneva Conventions.[61]

As with *Rasul* and *Hamdi*, the Justices attempted to temper a separation of powers crisis. In a concurring opinion joined by three Justices, Justice Breyer wrote that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary."[62] Justice Breyer further insisted that consultation with Congress "does not weaken our Nation's abil-

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[51] Worthington, *supra* note 20, at 266.

[52] Hamdan v. Rumsfeld, 548 U.S. 557, 566 (2006).

[53] *Id.* at 567.

[54] Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 173 (D.D.C. 2004), *rev'd*, 415 F.3d 33, 44 (D.C. Cir. 2005).

[55] Pub L. No. 109-148, 119 Stat. 2680 (2005) (codified at 28 U.S.C.A. § 2241(e) (2005) (amended 2006)).

[56] *Id.*

[57] Brief of Senators Graham and Kyl as Amicus Curiae in Support of Respondents at 21-22, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184).

[58] *Hamdan*, 548 U.S. at 574-77.

[59] *Id.* at 612.

[60] *Id.* at 602-03.

[61] *Id.* at 567.

[62] *Id.* at 636 (Breyer, J., concurring).

ity to deal with danger" and that the Court's decision was merely deferring to the democratic process.[63]

In direct response to the decision, Congress passed the Military Commissions Act of 2006 ("MCA").[64] The MCA's stated purpose was "[t]o authorize trial by military commission for violations of the law of war, and for other purposes."[65] In addition to authorizing military commissions, the MCA expressly stripped the federal courts of jurisdiction to hear habeas corpus petitions from detainees, even if the action was pending at the time the MCA was passed.[66] The law was trumpeted as a "stinging rebuke to the Supreme Court."[67]

III. The Case

Two years prior to the passage of the MCA, six Bosnian nationals detained at Guantanamo filed for writs of habeas corpus in federal district court.[68] The coordinating judge assigned by the federal court ordered that the government produce factual returns to the petitions.[69] The government submitted a record of the CSRT proceedings, and then moved to dismiss the petitions, claiming that the facts asserted did not warrant a grant of habeas.[70] The court granted the motion to dismiss, ruling that the AUMF authorized their detention, and that, as foreign nationals outside of the "sovereign United States territory," the detainees had no constitutional rights.[71]

The Court of Appeals vacated the district court's judgments, dismissing the cases for lack of jurisdiction.[72] The panel majority held that the MCA stripped their jurisdiction to hear habeas cases.[73] The majority also found that there was no constitutional problem with the MCA removal of habeas jurisdiction because the petitioners were foreign nationals outside the U.S., and thus any Suspension Clause arguments were irrelevant.[74]

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[63] *Id.*

[64] Pub. L. No. 109-366, 120 Stat. 2602 (to be codified at scattered sections of 10, 18, 24, and 42 U.S.C.).

[65] *Id.*

[66] *Id.* sec. 3, § 950j(b), 120 Stat. at 2623-24.

[67] John Yoo, Op-Ed., *Congress to Courts: Get Out of the War on Terror,* Wall St. J., Oct. 19, 2006, at A18. John Yoo worked in the Office of Legal Counsel for the Department of Justice and authored a now-infamous memorandum in 2003 outlining a legal justification for harsh interrogation techniques. Mayer, *supra* note 16, at 151.

[68] Petition for Writ of Habeas Corpus, Boumediene v. Bush, 476 F.3d 981 (D.D.C. 2004) (No. 04-1166).

[69] Brief for Petitioners at 3, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (No. 06-1195), 2007 WL 2441590.

[70] Supplemental Memorandum of Law in Support of Respondents' Motion to Dismiss or for Judgment as a Matter of Law Pursuant to Court's December 2, 2004 Order, Khalid v. Bush, Nos. 1:04-CV-1142 (RJL), 1:04-CV-1166 (RJL) (D.D.C. Dec. 13, 2004).

[71] Khalid v. Bush, 355 F. Supp. 2d 311, 329 (D.D.C. 2005).

[72] Boumediene v. Bush, 476 F.3d 981, 994 (D.C. Cir. 2007).

[73] *Id.* at 987-88.

[74] *Id.* at 988-94.

Petitioners appealed to the Supreme Court. On April 2, 2007, the Court denied review of the case[75] over the dissent of three justices.[76] Justice Stevens and Justice Kennedy signed a "statement . . . respecting the denial" of certiorari, stating that the detainees had to contest the CSRT findings in the appeals court before going to the Supreme Court.[77] On June 29, 2007, the Supreme Court, in a rare move, vacated this order and granted certiorari in the case, consolidating it with another habeas challenge brought by Guantanamo detainees.[78]

Petitioners argued that a common law right to the writ of habeas corpus exists under the Constitution,[79] that that writ extends to the detainees in Guantanamo through the decision in *Rasul*.[80] Under the Suspension Clause, petitioners argued, Congress cannot suspend the writ to the detainees absent rebellion or invasion, and thus the MCA's removal of habeas jurisdiction was unconstitutional.[81]

Petitioners went further, arguing that the CSRT procedures under DTA were not a sufficient substitute for the writ.[82] Under the Supreme Court's decision in *Swain v. Pressley*, the government may repeal access to habeas in circumstances other than rebellion or invasion if the government could prove the existence of an "adequate and effective substitute."[83] Petitioners argued that an adequate substitute for habeas would allow the detainees to "present evidence demonstrating the unlawfulness of detention; a neutral and plenary review of all the evidence; a court empowered to order release; speedy resolution of claims; and full representation of counsel."[84] The CSRT procedures under the DTA had no such protections.[85]

The Government responded that the MCA jurisdiction-stripping provision was valid because the detainees in Guantanamo, as foreign nationals outside the United States, had no common law access to habeas.[86] Without this common law right, there could be no Suspension Clause violation.[87] Even if the detainees had access to habeas at common law, the government argued that the DTA procedures were valid substitutes.[88] Noting that the detainees "enjoy more procedural protections than any other captured enemy combatants in the history of warfare," the government argued the DTA pro-

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[75] Boumediene v. Bush, 127 S. Ct. 1478 (2007) (mem.), *reh'g granted and vacated*, 127 S. Ct. 3078 (2007) (mem.).

[76] *Id.* at 1479 (Breyer, J., dissenting).

[77] *Id.* at 1478 (Stevens and Kennedy, JJ., statement respecting denial of cert.).

[78] Boumediene v. Bush, 127 S. Ct. 3078 (2007) (mem.).

[79] Transcript of Oral Argument at 10:6-8, *Boumediene*, 128 S. Ct. 2229 (No. 06-1195).

[80] Brief for Petitioners, *supra* note 69, at 9-10.

[81] *Id.*

[82] *Id.* at 18-19.

[83] 430 U.S. 372, 381 (1977).

[84] Brief for Petitioners, *supra* note 69, at 19.

[85] *Id.*

[86] Brief for Respondents, *supra* note 21, at 27-33.

[87] *Id.* at 14.

[88] *Id.* at 40.

cedures represented the best efforts of the legislative and executive branches to strike a balance between national security and any rights of the detainees to procedural protection.[89]

Writing for the majority, Justice Kennedy began the Court's analysis by noting that the MCA denied the federal courts jurisdiction to hear the case at all.[90] He wrote that "respect[ing]" the "ongoing dialogue between and among the branches of Government" required the Court to acknowledge that "the MCA was a direct response to *Hamdan*'s holding that the DTA's jurisdiction-stripping provision had no application to pending cases."[91] Thus, absent a finding that the Guantanamo prisoners have a common law right to habeas, the Court was stripped of jurisdiction.

The Court then detailed the history of the writ in an effort to identify a historical basis for finding that a common law right existed.[92] Noting the importance of the writ as "an essential mechanism in the separation-of-powers scheme,"[93] the Court traced its development from English law, only to conclude that there were "no certain conclusions" about whether the writ traditionally could extend to aliens outside the sovereignty of the Crown.[94] The Court, however, acknowledged that the "unique status" of Guantanamo and the "particular dangers of terrorism in the modern age" together created an extraordinary situation that common law courts may not have faced.[95] The Court relied heavily on the novelty of the situation to justify its analysis. For instance, the Court distilled the habeas case law simply: "questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[96] The Court then articulated its "practical concerns." Allowing the MCA to strip jurisdiction from the federal courts would allow the "political branches to have the power to switch the Constitution on or off at will."[97] The scope of the writ, the Court held, "must not be subject to manipulation by those whose power it is designed to restrain."[98]

As in prior cases, the Court found the novelty of Guantanamo relevant. While acknowledging that it had never held that aliens detained in a foreign country have constitutional rights, the Court spoke of the unique situation before them.[99] The majority noted that the detainees are held under a conflict that is already one of the longest wars in our history.[100] The Court then

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[89] *Id.* at 9-11.
[90] *Boumediene*, 128 S. Ct. at 2234.
[91] *Id.* at 2243.
[92] *Id.* at 2244-57.
[93] *Id.* at 2246.
[94] *Id.* at 2248.
[95] *Id.* at 2251.
[96] *Id.* at 2258.
[97] *Id.* at 2259.
[98] *Id.*
[99] *Id.* at 2262.
[100] *Id.*

concluded that the detainees have a right to habeas review and any abridgement of that right must be done in accordance with the Suspension Clause.[101]

Having determined that the detainees had a right to habeas at common law, standard procedure would dictate that the case be remanded to the circuit court to determine whether or not the procedures in place were an adequate substitute for habeas.[102] The Court, however, departed from formal procedure, explaining that the "gravity of the separation of powers issues raised by the cases" made the circumstances "exceptional" enough to be decided by the Supreme Court, even though they had been unresolved in the earlier proceedings.[103] The Court also noted that the petitioners had been detained for a number of years and might suffer "harms" from "additional delay."[104]

The Court acknowledged that Congress enacted the DTA to create a "more limited procedure" than traditional habeas.[105] Noting that the detainees are constrained in presenting evidence to combat the government's charge that they are enemy combatants, the Court found the DTA procedures to be an inadequate substitute for the writ.[106] The Court considered again the length of the detention, acknowledging that the "consequence of error" in the military review proceedings was the "detention of persons for the duration of hostilities that may last a generation or more."[107] Access to federal courts would allow an adversarial process that could guard against this error.[108] As a result, the Court declared that the section of the Military Commissions Act that suspended federal jurisdiction for habeas was unconstitutional.[109] The Court reiterated that practical considerations principally influenced the reach of the writ.[110] The fact that the petitioners had been detained for six years already and would face additional delay if the Court had required them to complete the DTA review before seeking habeas was relevant to the majority.[111] These "costs of delay" were too high.[112]

In granting the right of habeas corpus to the detainees at Guantanamo Bay, the Court asserted it was not eroding the power of the President as Commander in Chief.[113] The Court placed the decision in the larger constitutional separation of powers arrangement, writing that "few exercises of judicial power are as legitimate or as necessary as the responsibility to hear

[101] *Id.*
[102] *Id.*
[103] *Id.* at 2263.
[104] *Id.*
[105] *Id.* at 2266.
[106] *Id.* at 2272.
[107] *Id.* at 2270.
[108] *See id.* at 2270-71.
[109] *Id.* at 2274.
[110] *Id.* at 2275.
[111] *Id.*
[112] *See id.*
[113] *Id.* at 2277.

challenges to the authority of the Executive to imprison a person."[114] In so doing, it asserted the role of the judiciary in national security.

Justice Souter wrote a brief concurrence, emphasizing the practical considerations at play.[115] He stressed the length of the detention to rebut the dissents' argument that the Supreme Court was preempting claims that should be handled by the military.[116] He noted that allowing practical considerations to factor into granting detainees habeas rights also had an advantage: national security interests could be considered by the judge when reviewing whether or not to grant habeas.[117]

Both Chief Justice Roberts's and Justice Scalia's dissents argued for a more formalist interpretation of the writ. Chief Justice Roberts focused on procedure first, arguing that certiorari should never have been granted in the case because the detainees had not exhausted their remedies under the CSRT procedures.[118] In the absence of review by the lower courts of the remedies available under the DTA, Chief Justice Roberts argued that the question of habeas rights for detainees was "speculative."[119] He cited precedents counseling against "deciding such hypothetical questions of constitutional law."[120] Roberts also warned against diverging from conventional practice when faced with grave or novel issues, claiming such departures constitute judicial activism.[121]

In addition to his procedural objections, Chief Justice Roberts also argued that the majority misunderstood the protections provided by the DTA. Under *Hamdi*, he wrote, the DTA procedures satisfied any rights the detainees might have, while protecting the national security interests at stake.[122] He detailed the protections afforded detainees under the existing statutes and argued that the majority's decision "rests . . . on abstract and hypothetical concerns."[123]

In his own dissent, Justice Scalia echoed Chief Justice Roberts's argument that the issues reached are speculative.[124] Because there is no clear answer at common law about the territorial reach of the writ, Justice Scalia argued that the Court must affirm the decision of the Court of Appeals.[125] He noted that the petitioners failed to identify a case that supported their claim that the Court had jurisdiction over the detainees.[126] Justice Scalia insisted that the majority's decision was motivated by its reluctance to accept

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[114] *Id.*
[115] *Id.* at 2278 (Souter, J., concurring).
[116] *Id.*
[117] *Id.*
[118] *Id.* at 2280 (Roberts, C.J., dissenting).
[119] *Id.* at 2281.
[120] *Id.*
[121] *See id.* at 2282.
[122] *Id.* at 2287.
[123] *Id.* at 2293.
[124] *See id.* at 2296 (Scalia, J., dissenting).
[125] *Id.* at 2297.
[126] *Id.* at 2305.

that the political branches of government have supremacy in this area of law.[127] The functional test the Court designed to determine the reach of habeas, he argued, was based on "judicially brainstormed separation-of-powers principles."[128] Like Chief Justice Roberts, Justice Scalia believed the opinion amounted to judicial activism. Though both Chief Justice Roberts and Justice Scalia noted real-world consequences to the decision,[129] they looked to text and precedent, not practical considerations, in order to find their answer. They criticized the Court for going beyond the boundaries of the law in order to define its role.

IV. The Concerns of the Court

The dissenting Justices correctly recognized that the Court was going beyond the traditional constraints of procedure. The majority abandoned such formalism for extra-legal concerns. The Court had two primary concerns motivating this departure. The first was the reality of Guantanamo. The detainees had been imprisoned for six years at a facility where prisoners were allegedly subject to harsh interrogation techniques and other abuses. Their only recourse was challenging their detention before military commissions, often without access to evidence or meaningful counsel. Whatever was promised, the Court was skeptical of the procedural protection afforded the detainees in practice. The second of the Court's concerns transcended Guantanamo. Separation of powers as a fundamental principle must be protected, even in times of novel conflict and even if it means abandoning the limits of formalism. I will examine these concerns in turn.

The Court looked at Guantanamo not just as a symbol of executive overreaching, but also as a real place where real people were suffering. Both the majority opinion and Justice Souter's concurrence cited the amount of time the petitioners had been kept at Guantanamo as a reason to reach the issue of whether or not the DTA procedures were adequate substitutes.[130] The petitioners had been imprisoned for six years at the time of the decision. The conditions of their detainment may also have played a role. Though the Court made only passing mention of the conditions under which the prison-

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[127] *Id.* at 2302-03.

[128] *Id.* at 2307.

[129] Chief Justice Roberts argued that the majority had erred by objecting to the procedures of the DTA without proposing "alternatives of its own." *Boumediene*, 128 S. Ct. at 2292 (Roberts, C.J., dissenting). He also noted that the "system the Court has launched. . .promises to take longer" than the review procedures in place. *Id.* at 2282. Calling his description of the consequences of the decision "contrary to [his] usual practice," Justice Scalia wrote: "America is at war with radical Islamists . . . Last week, 13 of our countrymen in arms were killed. 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." *Id.* at 2294 (Scalia, J., dissenting).

[130] *See id.* at 2238, 2275 (majority opinion); *id.* at 2278 (Souter, J., concurring).

ers have might have been maintained,[131] public reports of abuse at the prison may have inspired the sense of urgency in the majority's decision. Stories of the harsh interrogation tactics employed at Guantanamo were in the news,[132] and the media detailed detainee hunger strikes and suicides.[133] In the midst of these reports, evidence surfaced suggesting that the Administration was not only aware of the abuses at Guantanamo, but that it had authorized them.[134] The Court undoubtedly knew of such allegations, and that awareness might have inspired its reversal of its denial of certiorari and also the scope of its decision. The majority was concerned about the consequences of delay on the detainees.

The Court also considered the substance of the existing procedures available to the detainees. While Chief Justice Roberts emphasized the protections outlined in the statute itself, the majority considered the statute *in practice*.[135] The Court seemed skeptical that the procedural protections promised to the detainees were honored. The aftermath of the *Hamdi* decision may have influenced its skepticism; after the Court had ruled that Hamdi had the right to challenge his detention, the Government transported Hamdi to Saudi Arabia and released him.[136] Critics believed that the government wanted to avoid the scrutiny of open court.[137] Similarly, the Court's previous ruling that the detainees were entitled to lawyers was met with resistance from the Administration.[138] The Administration seemed reluctant to adopt meaningful rules for treatment of prisoners at Guantanamo.[139] Had the White House moderated its legal positions or established more political consensus, its policies might have received more deference and support from the Court.[140] When *Boumediene* appeared before the Court, however, it had

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[131] *Id.* at 2263 (majority opinion) (noting "the harms petitioners may endure from additional delay").

[132] *See*, *e.g.*, Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES, Nov. 30, 2004, at A1.

[133] *See*, *e.g.*, Tim Golden, *Guantanamo Detainees Stage Hunger Strike*, N.Y. TIMES, Apr. 9, 2007 at A12; James Risen & Tim Golden, *3 Prisoners Commit Suicide at Guantanamo*, N.Y. TIMES, June 11, 2006, at A1; *see also* WORTHINGTON, *supra* note 20, at 269-73.

[134] *See* MAYER, *supra* note 16, at 166-67, 193, 230; WORTHINGTON, *supra* note 20, at 199; Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

[135] There has been much public criticism of the military commissions as mere "kangaroo courts," providing no real protection or process for detainees. *See*, *e.g.*, David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 2014 (2008); Editorial, *Guantanamo Follies*, N.Y. TIMES, Apr. 6, 2007, at A18 (calling the proceedings before the Commission "show trials"); Jennifer Daskal, *The End of Bush's Kangaroo Courts?*, SALON, June 6, 2007, http://www.salon.com/opinion/feature/2007/06/06/gitmo_trials (describing the Commission as an "experimental system of quasi-justice" that was "dysfunctional").

[136] MAYER, *supra* note 16, at 303.

[137] *Id.*

[138] *Id.* at 302.

[139] *Id.* at 303-05.

[140] *Id.* at 301.

been nearly seven years since 9/11, and, as petitioner's counsel said at oral arguments, "the time for experimentation [wa]s over."[141]

Had the Court decided that it had no jurisdiction to review habeas petitions of the detainees, the political branches would have successfully removed the judicial branch from the oversight of military detention. The practical consequences of this removal seemed troubling to the majority,[142] in part because the War on Terror is a potentially unending conflict. Detention authorized through the duration of hostilities means that the prisoners could spend the remainder of their lives in the facility.[143] By granting the political branches the sole authority over military detention, the Court would have no place to intervene in such cases. The only recourse for the detainees would then be the military procedures the Court found insufficient for meaningful review. By ruling that common law habeas both existed and extended to the prisoners, the Court ensured some judicial recourse for the detainees.

The crisis facing the Court was more than merely dealing with the effects of detention on the prisoners at Guantanamo. Both the executive and legislative branches were attempting to force the Court out of this area of national security law. While the Administration moved slowly with the judicially-mandated reforms, Congress explicitly and repeatedly attempted to remove the Court's jurisdiction. As the pre-*Boumediene* cases demonstrate, the Court's attempts to maintain its position in the separation of powers, while also deferring to legislative and executive judgment, were rebuked. With *Boumediene*, the Court chose to make a definitive statement about its role, not only in this case, but in all such issues in the War on Terror. To uphold a fundamental separation of powers principle, it had to abandon the constraints of formalism. To that end, the Court found a common law right to habeas extending to territories based on "objective factors and practical concerns."[144]

The case law did not definitively support extension of the writ in this instance; as Chief Justice Roberts noted,[145] this method of constitutional interpretation and decision-making is not in keeping with the tradition of the Court. Previous decisions have repeatedly espoused judicial restraint.[146] The majority in *Boumediene*, however, found the circumstances were unique

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[141] Transcript of Oral Argument, *supra* note 79, at 22.

[142] The Court wrote: "Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person . . . Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury." Boumediene v. Bush, 128 S. Ct. 2229, 2777 (2008).

[143] Alec Walen & Ingo Venzke, *Detention in the "War on Terror": Constitutional Interpretation Informed by the Law of War*, 14 ILSA J. INT'L & COMP. L. 45, 49 (2007).

[144] *Boumediene*, 128 S. Ct. at 2236.

[145] *Id.* at 2283 (Roberts, C.J., dissenting).

[146] *See, e.g.*, Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, PC, 467 U.S. 138, 157 (1984); Burton v. United States, 196 U.S. 283, 295 (1905).

enough to justify breaking with this tradition. Though the Court detailed the long history of the writ and the cases presented, it did not feel bound by the limits of that history, finding simply that "under these circumstances the lack of precedent on point is no barrier to our holding."[147] The Court was willing to abandon formalism in order to extend the writ, the means through which it could insert itself into executive detention.

After concluding habeas existed, the Court proceeded to address whether adequate substitute procedures were in place. Again, traditional Court practice counseled otherwise: this question should have been answered by the circuit court on remand. However, the Court recognized that further delay meant not only harmful consequences for the detainees, but also for the judiciary itself. Attempts to forestall and limit decisions in previous detainee cases had resulted in erosion of judicial power. Further delay with *Boumediene* could have contributed to the perception that the Court was irrelevant in this area. With this decision, the Court claimed it was defending a well-established principle found in *Marbury v. Madison*[148]: that it is the role of the Supreme Court to "say what the law is."[149] It actually established, however, what the *Court* is – namely, an indispensable check on both the executive and the legislature.

Through adoption of realist considerations, the Court recast itself as a normative body in this conflict, one capable of using defined constitutional principles to balance the power of the executive and legislature. All branches in the separation of powers scheme have a place in the War on Terror. By abandoning the constraints of formalism, the Court defended this fundamental principle.

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[147] *Boumediene*, 128 S. Ct. at 2262 (majority opinion).

[148] 5 U.S. (1 Cranch) 137 (1803).

[149] *Boumediene*, 128 S. Ct. at 2259 (citing *Marbury*, 5 U.S. (1 Cranch) at 177); *see also id.* at 2302-03 (Scalia, J., dissenting) (criticizing Court's claim in this regard).