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## THE CONSTITUTION AND NATIONAL SECURITY

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*Boumediene v. Bush*<sup>1</sup> was decided on June 12th of this year. The case involved the constitutionality of provisions in the Detainee Treatment Act and the Military Commissions Act of 2006, which provide that noncitizens held as enemy combatants shall not have access to habeas corpus.<sup>2</sup> To understand this decision it is necessary to put the history, albeit recent, in context.

As soon as the first individuals were brought to Guantanamo in January of 2002, lawsuits began to be filed on their behalf.<sup>3</sup> The Supreme Court took up a group of these cases on behalf of Guantanamo detainees, ultimately leading to *Rasul v. Bush*<sup>4</sup> in June of 2004. The Bush Administration took the position in all of the Guantanamo litigation that Guantanamo detainees could not come to federal court via a writ of habeas corpus because habeas corpus did not apply outside of the United States.<sup>5</sup> The government relied on *John-*

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<sup>1</sup> 128 S. Ct. 2229 (2008).

<sup>2</sup> See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1001, 119 Stat. 2739 (codified primarily at 42 U.S.C. §§ 2000dd to 2000dd-1 (West 2008)); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2636 (2006) (codified in scattered sections of 10, 18, 28, and 42 U.S.C.A.).

<sup>3</sup> I should disclose here that I argued the first case on behalf of Guantanamo detainees in Federal District Court in February of 2000, and then in the Ninth Circuit in July of 2002. I have also been representing an individual Guantanamo detainee since the Summer of 2002.

<sup>4</sup> 542 U.S. 466 (2004).

<sup>5</sup> *Id.* at 472-73.

*son v. Eisentrager*,<sup>6</sup> a case decided in 1950. *Eisentrager* involved a group of German nationals who were apprehended in China at the end of World War II. The group was engaged in helping Japan in the war effort. These individuals were tried in military commissions, convicted, and sought access to federal court via the writ of habeas corpus.<sup>7</sup> The Supreme Court ruled against them.<sup>8</sup> Justice Jackson wrote the opinion for the Court and reasoned the United States had complied with a national law that these individuals receive due process in the form of military tribunals; they were individuals who had never been in the United States, were apprehended outside of the United States, were held outside of the United States, and therefore habeas corpus was not available.<sup>9</sup> In every Guantanamo case, the Bush Administration relied on *Eisentrager*; the government argued that those in Guantanamo should not have access to federal court via the writ of habeas corpus.<sup>10</sup> In fact, Paul Clement, then a deputy solicitor general, went everywhere in the country advancing this position on behalf of the United States against Guantanamo detainees.<sup>11</sup>

In June of 2004, the Supreme Court decided a number of Guantanamo cases.<sup>12</sup> The cases were argued in April and there were very dramatic exchanges between Justices Ginsburg and Breyer and

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<sup>6</sup> 339 U.S. 763 (1950).

<sup>7</sup> *Id.* at 765-66.

<sup>8</sup> *Id.* at 781 (“[W]e arrive at the same conclusion the Court reached in each of those cases, viz.: that no right to the writ of habeas corpus appears.”).

<sup>9</sup> *Id.* at 777-78.

<sup>10</sup> See, e.g., *Gherebi v. Bush*, 352 F.3d 1278, 1282 (9th Cir. 2003); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 448 (D.D.C. 2005). In these cases and many others, the government relied primarily on *Eisentrager*.

<sup>11</sup> See Vanessa Blum, *Point Man*, LEGAL TIMES, Jan. 16, 2004, available at <http://www.law.com/jsp/article.jsp?id=1073944820670>.

<sup>12</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul*, 542 U.S. at 466.

former Solicitor Generals Theodore Olson and Paul Clement. Justice Ginsburg asked whether the individuals in Guantanamo could ever have access to federal court?<sup>13</sup> Solicitor General Olson replied that habeas jurisdiction does not apply.<sup>14</sup> Justice Breyer then asked whether individuals could be held there for their entire lives and never have access to federal habeas corpus?<sup>15</sup> Solicitor General Olson stated he did not expect their detention to last that long. He added that nonetheless, he did not believe there was any jurisdiction over their claims.<sup>16</sup> Justice Ginsburg, perplexed, questioned the government's argument concerning whether the detainees would ever have access to federal courts through habeas corpus if they are tortured.<sup>17</sup> Solicitor General Clement responded by saying the American military would never engage in torture.<sup>18</sup> By pure coincidence, the night the oral argument was held was the same day first reports of torture at Abu Ghraib arose.<sup>19</sup> I have often wondered if that coincidence had any effect on the outcome of the case.

In June of 2004, by a six-to-three decision, the Supreme Court held those who were held in Guantanamo do have access to federal

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<sup>13</sup> Transcript of Oral Argument at 25, *Rasul*, 542 U.S. 466 (Nos. 03-334, 03-343); *see also* Erwin Chemerinsky, *Detainees*, 68 ALB. L. REV. 1119, 1121-22 (2005) (describing the colloquy).

<sup>14</sup> Chemerinsky, *supra* note 13, at 1121-22.

<sup>15</sup> Transcript of Oral Arguments at 26, *Hamdi*, 542 U.S. 507 (No. 03-6696).

<sup>16</sup> Transcript of Oral Argument at 22, *Rasul*, 542 U.S. 466.

<sup>17</sup> Transcript of Oral Arguments at 26, *Hamdi*, 542 U.S. 507.

<sup>18</sup> *Id.*

<sup>19</sup> 60 Minutes II was the first of many media outlets who reported on torture at Abu Ghraib. A transcript of the broadcast can be viewed on the CBS website, <http://www.cbsnews.com> (search "Abuse of Iraqi POWs by GIs Probed" and follow hyperlink).

court via habeas corpus.<sup>20</sup> Justice Stevens wrote the opinion for the Court. The three dissenters were Chief Justice Rehnquist, Justice Scalia, and Justice Thomas.<sup>21</sup> Justice Stevens' opinion distinguished *Eisentrager*. He pointed out that Johnson had been tried in a military tribunal, whereas those held at Guantanamo had not received any trial at all.<sup>22</sup> He also pointed out that Guantanamo is functionally an American sovereignty, whereas the territory where the individuals were apprehended in *Eisentrager* was not.<sup>23</sup>

Justice Kennedy wrote a concurring opinion in which he stressed the functional difference between Guantanamo and *Eisentrager*, or other foreign battlefields.<sup>24</sup> Justice Kennedy was concerned about anyone held by the American military as a prisoner of war anywhere in the world having access to federal habeas corpus.<sup>25</sup> For him, what made this case different was the ways in which Guantanamo is functionally part of American sovereignty. Six-to-three, the Supreme Court held that those in Guantanamo shall have access to federal court via the writ of habeas corpus.<sup>26</sup> At this point, all of the cases were in the United States District Court for the District of Columbia.<sup>27</sup>

The district court judges in the District of Columbia got together and decided it made sense to consolidate the cases for pur-

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<sup>20</sup> *Rasul*, 542 U.S. at 473, 484.

<sup>21</sup> *Id.* at 488.

<sup>22</sup> *Id.* at 476.

<sup>23</sup> *Id.* at 480-82.

<sup>24</sup> *Id.* at 487-88 (Kennedy, J., concurring).

<sup>25</sup> *Rasul*, 542 U.S. at 486, 488.

<sup>26</sup> *Id.* at 468, 485 (majority opinion).

<sup>27</sup> *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 443.

poses of pretrial proceedings before one judge, rather than have almost every judge on the District of Columbia District Court handling the same procedural motions.<sup>28</sup> There were enough of these cases, probably seventy altogether, that almost every one of the district court judges had some of them.<sup>29</sup> All of the cases were consolidated before Judge Joyce Hens Green, except that no judge was forced to relinquish his other cases.<sup>30</sup> One judge, Judge Richard Leon, refused to do so.<sup>31</sup> There were two judges hearing these cases for the District of Columbia district court. Judge Green was hearing approximately sixty of them labeled together under *Khalid v. Bush*,<sup>32</sup> and Judge Leon was hearing about ten of them under the label *Boumediene v. Bush*. The United States Government moved to dismiss all of the cases on the grounds that there was no cause of action either under the Constitution or under international law.<sup>33</sup>

Judge Leon granted the government's motion to dismiss in January of 2005.<sup>34</sup> Judge Green denied the motion to dismiss finding a cause of action under both the Federal Constitution and international law. Green did however grant an interlocutory review. She certified the questions to the District of Columbia Circuit.<sup>35</sup> The cases were heard in the District of Columbia Circuit Court on December 8, 2005, and everyone anxiously awaited the decision. Not

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<sup>28</sup> *Id.* at 451.

<sup>29</sup> See Judges-U.S District Court, Washington, DC, <http://www.dcd.uscourts.gov/judge-info.html>.

<sup>30</sup> *Boumediene*, 128 S. Ct. at 2241.

<sup>31</sup> *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 452 n.14.

<sup>32</sup> 355 F. Supp. 2d 311 (D.D.C. 2005).

<sup>33</sup> See, e.g., *Khalid*, 355 F. Supp. 2d at 314.

<sup>34</sup> *Id.* at 330.

<sup>35</sup> *Abdah v. Bush*, No. Civ.A. 04-1254(HHK), 2005 WL 711814, at \*2 (D.D.C. 2005).

that long after though, Congress passed the Detainee Treatment Act of 2005.<sup>36</sup>

The Detainee Treatment Act stated that noncitizens held as enemy combatants shall not have access to federal court via habeas corpus.<sup>37</sup> They would have to go through a military proceeding, and then go to the District of Columbia Circuit Court for review.<sup>38</sup> In the District of Columbia Circuit Court, review can be based only upon claims made under the Constitution and government statute; the court could not hear claims based on international law like the Geneva courts.<sup>39</sup> In June of 2006, in *Hamdan v. Rumsfeld*,<sup>40</sup> the Supreme Court ruled five-to-three that the Detainee Treatment Act applied only prospectively.<sup>41</sup> It did not apply retroactively to individuals who were already at Guantanamo.<sup>42</sup> It appeared the Guantanamo cases pending before the District of Columbia Circuit Court could finally proceed.

In October of 2006, Congress passed the Military Commissions Act of 2006.<sup>43</sup> The Military Commissions Act states that non-citizens held as enemy combatants shall not have access to federal courts via habeas corpus or otherwise; however, if there is a military tribunal, detainees could seek review of the tribunal's decision in the

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<sup>36</sup> Pub. L. No. 109-163, § 1405, 119 Stat. 3136.

<sup>37</sup> *Id.* § 1405(e)(1)(e).

<sup>38</sup> *Id.* § 1405(e)(2)(A-B).

<sup>39</sup> *Id.* § 1405(e)(3)(D).

<sup>40</sup> 548 U.S. 557 (2006).

<sup>41</sup> *Id.* at 576.

<sup>42</sup> *Id.* at 576, 578.

<sup>43</sup> Military Commissions Act of 2006, Pub. L. No. 109-366 § 3(a)(1), 10 U.S.C.A. §§ 948-50, 2000dd-0 (2006).

District of Columbia Circuit Court.<sup>44</sup> The way the law is written, a military commission or tribunal is never required; it simply states that if there is one, then there can be a review in the District of Columbia Circuit Court. Similar to the Detainee Treatment Act, the Military Commissions Act says review can only be based on the Constitution and federal statute—it cannot be based on international law like the Geneva courts.<sup>45</sup>

In February of 2007, the District of Columbia Circuit Court, in a two-to-one decision, upheld the constitutionality of the law, rejecting the argument that it is an unconstitutional suspension of the writ of habeas corpus.<sup>46</sup> In April of 2007, the Supreme Court denied certiorari. Justices Ginsburg and Souter said they would grant expedited review, and Justice Breyer said he would grant certiorari; so there were three votes for certiorari, but not the necessary four.<sup>47</sup> Justices Stevens and Kennedy joined an opinion respecting the denial of certiorari. They agreed these individuals should go through the military tribunal, and then go to the District of Columbia Circuit Court for review where they could raise their constitutional issues.<sup>48</sup>

The attorneys for the detainees then made an unusual decision. They asked the Supreme Court to reverse itself, and grant certiorari even after it had been denied.<sup>49</sup> It had been at least sixty years

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<sup>44</sup> *Id.* §§ 950g(a), 950j(b).

<sup>45</sup> *Id.* at §§ 948b(g), 950g(c), § 2241(5)(a).

<sup>46</sup> *Boumediene v. Bush*, 476 F.3d 981, 989 (D.C. Cir. 2007).

<sup>47</sup> *Boumediene v. Bush*, 127 S. Ct. 1478, 1479 (2007).

<sup>48</sup> *Id.* at 1478.

<sup>49</sup> *Boumediene v. Bush*, 127 S. Ct. 3078 (2007); *Boumediene v. Bush*, 127 S. Ct. 1725, 1726 (2007).

since the Supreme Court last granted certiorari in this manner.<sup>50</sup> The Guantanamo lawyers felt they had no alternative, as the process offered was deficient, and they were concerned that the issue had not been reported in the press.<sup>51</sup> The Justice Department informed the attorneys for all of the Guantanamo detainees that if the District of Columbia Circuit were affirmed, they would no longer represent those in Guantanamo.<sup>52</sup> All of the lawyers, including myself, are habeas lawyers. If there is no habeas petition pending, we are no longer the attorneys for these individuals, and they are only entitled to military lawyers. It is possible the military lawyers are wonderful lawyers, but the detainees would be deprived of the firms that were representing them as habeas lawyers. That gave the lawyers for the detainees further incentive to make the unusual request of asking the Supreme Court to reverse itself.

Surprisingly, on June 29, 2007, the Supreme Court reversed itself and granted certiorari. Oral arguments were held on December 6, 2007. On June 12, 2008, the decision came down.<sup>53</sup> Consistent with the theme of this term, it was five-to-four, and Justice Kennedy wrote the opinion for the Court. He was joined by Justices Souter, Stevens, Ginsburg, and Breyer.<sup>54</sup> He said the Constitution, in Article I, Section 9, allows Congress to suspend the writ of habeas corpus in

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<sup>50</sup> Frank J. Williams et al., *Still a Frightening Unknown: Achieving a Constitutional Balance Between Civil Liberties and National Security During the War on Terror*, 12 ROGER WILLIAMS U. L. REV. 675, 680 (2007).

<sup>51</sup> Mehmet Münür, Note, *The Future of Judicial Review for the Detainees of the War on Terrorism After Hamdan v. Rumsfeld*, 36 CAP. U. L. REV. 159, 201 n.361 (2007).

<sup>52</sup> Carrie Newton Lyons et al., *National Security*, 42 INT'L LAW. 811, 812 (2008).

<sup>53</sup> *Boumediene*, 128 S. Ct. at 2229.

<sup>54</sup> *Id.* at 2239.

cases of rebellion and invasion. He said the instant case is not of rebellion or invasion, rather it is a suspension of the writ of habeas corpus.<sup>55</sup> The Military Commissions Act and the Detainee Treatment Act by their very terms say that individuals cannot go to federal court with a writ of habeas corpus.<sup>56</sup> He stressed, as he did in *Rasul*, that Guantanamo is functionally under United States sovereignty.<sup>57</sup> His opinions traced in some detail the history of Guantanamo.

Justice Kennedy's opinion explained why this statute was not an adequate substitute, though he did not say there can never be an adequate substitute.<sup>58</sup> I think the question is, if there were an alternative procedure that supplies everything that habeas supplies, would it still be a suspension of the writ of habeas corpus? The Court did not have to deal with that here. Justice Kennedy went on to explain why the review in the District of Columbia Circuit is an inadequate substitute for habeas corpus.<sup>59</sup>

Finally, he said the provisions that are allowed to provide for review in the statute, and review in the District of Columbia Circuit in military proceeding decisions, do not substitute for writ of habeas corpus.<sup>60</sup> Towards the end of his opinion, in language similar to that which he uses in other cases, he talked about how the Constitution has to be followed even in times of crisis.<sup>61</sup> Constitutional values

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<sup>55</sup> *Id.* at 2246.

<sup>56</sup> *Id.* at 2240.

<sup>57</sup> *Id.* at 2252-53.

<sup>58</sup> *Boumediene*, 128 S. Ct. at 2274.

<sup>59</sup> *Id.* at 2272.

<sup>60</sup> *Id.* at 2272-73.

<sup>61</sup> *Id.* at 2277 (“The laws and Constitution are designed to survive, and remain in force, in extraordinary times.”).

must be preserved; the rules of law must be applied, even in the context of the war on terrorism, the Constitution does not allow a suspension of the great writ—the writ of habeas corpus.<sup>62</sup>

Chief Justice Roberts and Justice Scalia wrote dissenting opinions, in which both Justices Thomas and Alito joined.<sup>63</sup> Justice Scalia's opinion was particularly vehement. He said people will die as a result of this decision.<sup>64</sup> He said individuals will be released from Guantanamo, and they will "return to kill" and commit further acts of terrorism.<sup>65</sup> He said this is not an appropriate place for the federal courts to get involved. This is a matter appropriately left to the President and Congress.<sup>66</sup> The courts get involved not just at their peril, but at the peril of the entire nation.<sup>67</sup>

Underlying both the majority and the dissent were different perspectives about the appropriate role of the federal courts in the war on terror. For the five Justices of the majority, it was essential that the Supreme Court and federal court be involved to insure compliance with the Constitution and rule of law.<sup>68</sup> For Justice Scalia in the dissent, this is an issue in which the federal judiciary has no business being involved.<sup>69</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Boumediene*, 128 S. Ct. at 2279, 2293 (Roberts, C.J., dissenting).

<sup>64</sup> *Id.* at 2294-95 ("[The decision] will *almost certainly* cause more Americans to be killed.") (Scalia, J., dissenting) (emphasis added).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 2296 ("What competence does the Court have to second-guess the judgment of Congress and the President on such a point?").

<sup>67</sup> *See id.*

<sup>68</sup> *Boumediene*, 128 S. Ct. at 2259 (majority opinion).

<sup>69</sup> *Id.* at 2296 (Scalia, J., dissenting).