The Federalist Society Online Debate Series

Boumediene v. Bush

December 3, 2007

Boumediene v. Bush arises on a writ of habeas corpus filed on behalf of Lakmar Boumediene and other detainees currently being held by the United States at the Guantanamo Bay Naval Base in Cuba. These detainees challenge the legality and constitutionality of their detention as enemy combatants pursuant to the Military Commissions Act of 2006.

Cato's Director of the Criminal Project **Timothy Lynch**, Sidley & Austin's **Brad Berenson**, Wiley Rein's **Andrew McBride**, and Georgetown Law professor **Marty Lederman** discuss the case, which will be argued in front of the Supreme Court on December 5. This debate is to be continued.

UPDATE! 6/13/08

Read the debate for post decision insights. You can access the decision HERE.

Andrew G. McBride

New Post Decision Analysis! 6/13/08

Bio

Undoubtedly the Supreme Court's decision in Boumediene v. Bush will be hailed in many quarters as a great victory for civil rights and the rule of law. It is not. In fact, it represents a watershed in judicial hubris and in the continuing trend in our society to convert every form of decision making into a lawsuit. For the first time in our Nation's history, the Supreme Court has rejected the considered judgment of both the Congress and the President on an issue of national security. The Great Writ, a bulwark of domestic liberty, has been extended to foreign nationals whose only connection to the United States is their capture by our military.

Justice Kennedy's majority opinion is fraught with the confusion between the civilian criminal justice system and the waging of war. In the area of criminal justice, the Framers placed many roadblocks in the path of a conviction and the concomitant loss of life or liberty. The guarantee of counsel, the right to subpoena witnesses, the right of confrontation of adverse witnesses in open court, and the suppression of evidence gathered in violation of law, all make sense in the context of domestic law enforcement. In order to protect liberty, we are willing to sacrifice some efficiency in our criminal justice system. Our motto remains: Let 100 guilty men go free before one innocent man is convicted.

The situation is entirely different when the Nation faces an external threat. There is no reason for the Judicial Branch to "check" the effectiveness of the political branches in fighting our enemy. The idea of our judiciary protecting the "rights" of the Nazis or the Viet Cong from Executive overreaching is every bit as absurd as it sounds. But had Boumediene been decided in 1940, a right to go to court to challenge their detention would have extended to the over 400,000 axis troops held over 500 military facilities in this country during the war.

Nor is the judiciary competent to make judgments about who is or is not an enemy combatant or, more generally, a threat to the United States. The imposition of the civilian criminal justice model on decisions regarding potentially hostile aliens raises a host of questions which the Court does not even attempt to answer in Boumediene. Must military personnel make notes in the field regarding the location, dress, and comportment of captives for later use in the "trials" mandated by the Supreme Court? Must a chain of custody be preserved on a firearm or bomb seized from an enemy combatant? When does the right to file a habeas action accrue; immediately upon arriving at a U.S. military base like Guantano Bay?

The Boumediene majority answers none of these questions. The decision usurps to the judiciary decisions that should be made by the military. Those decisions require training, experience, access to and understanding of intelligence and prudent judgment. They cannot be reduced to a particular standard of proof in a courtroom setting. The military has made mistakes at Guantanamo, among them releasing some detainees who have

returned to attack American troops in Afganistan or Iraq. God help us if the judiciary makes such a mistake and releases the next Mohammad Atta into our midst.

Timothy Lynch

The original debate begins here.

Bio

Let me begin with some brief background information so that the casual reader can get a better handle on the legal arguments that will follow. There are a host of legal issues that have arisen over the last six years, but this case is not about the PATRIOT Act, the so-called "alternative interrogation" methods, or trials before military tribunals. This case is about prisoners in U.S. military custody and the legal procedures that may or may not be in place to review the legality of a person's incarceration.

The Bush administration initially advanced the claim that because the President is the Commander-in-Chief, neither the Congress, nor the courts could "intrude" on his power to incarcerate persons that he calls "enemy combatants." In effect, this meant that the president could imprison any person in the world and deny that person access to family, counsel, and an impartial judicial hearing in civilian court. This novel view of the separation of powers principle startled most of the legal community, including members of the Supreme Court. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), Justice O'Connor observed, "We have long since made clear that a state of war is not a blank check for the President when it comes to the Nation's citizens." Justice Scalia went further in a separate opinion. Justice Scalia recognized that even though President Bush and his lawyers were well-intentioned, their legal claim was profoundly misguided: "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite detention at the will of the Executive." Hamdi was captured in Afghanistan and transferred to Guantanamo Bay along with approximately 400 other prisoners. When the military discovered that Hamdi was an American citizen, he was moved to a military brig in the U.S. He was deported to Saudi Arabia shortly after the Supreme Court ruling.

After *Hamdi*, President Bush's fallback position has been that whatever may be law with respect to American citizens, the Congress and the courts cannot "intrude" upon the Commander-in-Chief's power to imprison foreign nationals at Guantanamo Bay. This claim was also rejected by the Supreme Court. In *Rasul v. Bush*, 542 U.S. 466 (2004), the Court ruled that the federal habeas statute, 28 U.S.C. sec. 2241, extends to prisoners held by the U.S. military at Guantanamo. To be clear, no one was challenging the authority of the president and the military to engage al-qaeda fighters in battle in Afghanistan, or to take suspected members of hostile forces into custody. The dispute was whether Congress had a role in setting prisoner policy and what the role of the courts were with respect to habeas corpus petitions by prisoners who claimed that they had never been a combatant against the U.S.

After *Rasul*, President Bush turned to the Congress and urged that it amend the habeas statute by enacting the Military Commissions Act (MCA). The MCA deprives courts of jurisdiction to consider habeas claims. The petitioners in Boumediene maintain that such deprivation is unconstitutional. The Bush administration, in turn, renews its argument that the courts cannot "intrude" on the power of the Executive to prosecute a war or on Congress's power to delineate the jurisdiction of the federal courts. Thus, the Supreme Court is now confronted with grave questions concerning separation of powers principles and the boundaries of the constitutional provision for the writ of habeas corpus.
Article I, section 9 of the Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." To get to bottom line quickly, Congress did not invoke one of the exceptions when it enacted the MCA. Thus, the MCA, which purports to withdraw the jurisdiction of federal courts over habeas claims, is unconstitutional.

Brad Berenson

Bio

I hate to start a debate quibbling over background, but I'm afraid in certain respects I can't agree with Tim's formulation of the issues. So let me first provide a slightly different

perspective on some of the things in Tim's scene-setting and then follow up with a few substantive points about the arguments in the case.

First, the Bush Administration never asserted the broad power to incarcerate anyone it deemed an enemy combatant free from supervision by the courts. The Hamdi decision was about the rights of U.S. citizens, and from the start, the Administration took the position that U.S. citizens had a right to habeas corpus review. The debate in Hamdi was over the scope of that right. The Administration took a narrow review of what habeas corpus proceedings should look like in the context of a U.S. citizen enemy combatant detention, likening it to judicial review of an administrative record to ensure that the detention was not arbitrary or unsupported by evidence. It did not believe trial-type adversary hearings were appropriate. The Supreme Court in Hamdi said that something more was required, but not much more -- really just notice of the basis for detention and an opportunity to contest it before a neutral decision maker.

The bigger fight has been over the rights to be accorded alien enemy combatants captured and held outside the United States. It is here that the Administration has taken the position that neither the habeas statute nor the Suspension Clause affords any procedural rights. (The Administration has not contended that alien ECs have no procedural rights or are in the proverbial "legal black hole," only that whatever rights they have derive from international law, not our own Constitution, which they of course aim to destroy.) In that, it is clearly supported by the Supreme Court's 1950 decision in *Johnson v. Eisentrager*. *Eisentrager* was implicitly overruled on its statutory holding in *Rasul*, but its constitutional holding remains fully intact. (*Rasul* did not concern "whether Congress had a role in setting prisoner policy." It clearly did and does under its constitutional authority to "make Rules concerning Captures on Land and Water" under Article I.) The real question -- or at least one of the real questions -- in *Boumedienne* is whether to overrule *Eisentrager's* constitutional holding and extend a constitutional right to habeas corpus to enemies of the United States across the globe.

The basic proposition that our constitution protects our citizens and aliens with a meaningful connection to this country or on our soil but does not extend to aliens outside our territory has been repeatedly reiterated by the Supreme Court in cases such as *Zadvydas* and *Verdugo-Urquidez*. The consequences of any contrary view would be to render the conduct of warfare impossible, as there is and can be precious little due process or just compensation on a battlefield.

This brings us to the issue in *Boumedienne*, which is whether Congress unconstitutionally deprived the suspected terrorists at Guantanamo of constitutional habeas corpus rights when it passed the MCA. That statute was passed not in the wake of *Rasul* but in the wake of *Hamdan*, which said the President could not establish military commissions to try suspected terrorists like the 9/11 plotters now held in Guantanamo without further statutory authority from Congress. Thus, in *Boumedienne*, the President is not claiming unilateral authority; he has worked with the other political branch of government to produce statutory law regulating the rights of Guantanamo detainees. Nor does the MCA purport to oust the jurisdiction of the courts. Although it eliminates the formal habeas corpus remedy, it substitutes in its place a new procedural regime, whereby Gauntanamo detainees get judicial review of the lawfulness and evidentiary basis for their detentions in the D.C. Circuit (and, as a discretionary matter, in the U.S. Supreme Court).

The last paragraph of Tim's post skips all of the questions really at issue in evaluating the constitutionality of Congress's work in the MCA. We cannot take as a given that Congress suspended the writ and simply ask whether Congress validly employed the Suspension Clause. Rather, the critical antecedent questions, all of which are directly at issue in this case, are as follows:

* Do alien al Qaeda and Taliban fighters held by the U.S. military abroad have rights under the U.S. Constitution, specifically including a constitutional right to a habeas corpus remedy in U.S. civilian courts?

* If not, should the part of Cuba that we currently occupy under lease be considered part of the United States for these purposes?

* If the answer to either of the first two questions is yes, does the MCA create an adequate substitute remedy for habeas corpus?

To kick off a discussion of these three questions, consider the following three propositions. They are, in a nutshell, why the U.S. should win in Boumedienne. (Whether it likely will is an entirely different question.)

1. No Anglo-American court has ever recognized a habeas corpus right in alien enemies held outside the territorial jurisdiction of the capturing state. Not one. Ever.

2. The United States holds Guantanamo Bay under lease, and its occupation of that part of Cuba differs from true sovereignty in vital respects. Among other things, the U.S. can use that territory only for specified purposes; cannot sell or sublease it; and cannot exclude Cuban commercial vessels from the Bay.
3. The Military Commissions Act creates the most generous set of procedural rights ever enjoyed by captured enemy alien fighters in the millenia-long history of warfare all across the globe. They are of course nothing like what we would expect in a civilian or domestic context, but they go far beyond what has customarily been available, under the Geneva Conventions or otherwise, for warriors who find themselves in the

unfortunate position of being captured by their adversary.

Marty Lederman

[Picture Unavailable]

Bio

There are three primary questions before the Court in the Boumediene case to be argued on December 5th. The first question has gotten the lion's share of the attention; and the third is the most important. But, more than likely, the primary focus of the Supreme Court argument, and of the Court's opinions, will be on the second question.

The first question, stated most simply, is whether aliens who are being indefinitely detained by the military at Guantanamo have a constitutional right to challenge the legality of their detention in federal court. The Court will probably answer this question "yes," at least if its 2004 decision in *Rasul*, and Justice Kennedy's concurrences in Rasul and *Verdugo-Urquidez*, is any indication.

The Court will need to answer the second question only if, as expected; it answers the first question in the affirmative. That second question is whether Congress has provided an adequate alternative process, in lieu of the habeas procedure to which the petitioners would otherwise be entitled. In other words, does the appellate procedure established by the Detainee Treatment Act and Military Commissions Act—providing for a limited review of Pentagon detention determinations in the Court of Appeals for the District of Columbia Circuit—give the petitioners all of the protections the Constitution requires, or does it fall materially short of the review they would receive in a habeas proceeding? In this exchange, I suspect we will focus least of all on this second question, but our readers should be aware that it is likely to play a prominent role in the case itself.

The third question is the substantive merits issue that is perhaps the most important single question arising from the Bush Administration's treatment of the so-called "war on terror"—namely, has Congress authorized the Executive branch to detain persons based upon the broad definition of "enemy combatant" that the Bush Administration has employed? In other words: Who, exactly, may the Executive detain indefinitely in the armed conflict with al Qaeda? The Boumediene petitioners have specifically asked the Court to reach this issue (See Part II of their opening brief -- . I consulted on the Boumediene petitioners' briefs.). Because the court of appeals has not yet addressed that issue directly, the Government asked the Supreme Court not to grant cert. on it; but the Court granted the petition in its entirety.

It's possible the Court still might not reach this third question on the merits, but I hope we have a chance to discuss it here, because it really is the crux of the matter—in my view, the Bush Administration has not been authorized to detain the broad range of persons who come within its expansive definition of "enemy combatant." (Again, see Part II of the *Boumediene* opening brief.)

For now, however, I merely want to suggest that it is very difficult to understand the stakes of the first question (Should these petitioners be afforded habeas rights?) without some understanding of the facts underlying the third question (What is the category of persons that the Bush Administration has detained, and does it have legal authority to indefinitely detain all those persons?)

Notably, Brad's description of the case is not very far off from the account I've offered above. Except for one major difference: Brad assumes that the petitioners are "alien enemy combatants"—indeed, that they "of course aim to destroy" our Constitution.

But the whole point of the case is that these Petitioners claim to be no such thing and, perhaps even more importantly, the Bush Administration asserts the authority to detain them indefinitely even if they are not "combatants" in any usual sense, and even if they do not "aim to destroy" our Constitution or our way of life (or to destroy anything else, for that matter).

This explains the gulf between us. Brad is somewhat incredulous that all of a sudden, in this conflict like no other before it, there are a slew of military detainees challenging their detention in court. According to Brad, "[n]o Anglo-American court has ever recognized a habeas corpus right in alien enemies held outside the territorial jurisdiction of the capturing state. Not one. Ever."

There are two basic things wrong with this strong claim. The first is that it just isn't true. Last time I checked, the U.S. Supreme Court is, indeed, an Anglo-American court. In *Quirin* and in *Yamashita*, DOJ argued (as the SG and Brad do here) that the federal courts could not entertain habeas petitions by captured aliens suspected of being enemies. See, e.g., *Quirin*, 317 U.S. at 24 ("The Government . . . also insists that petitioners must be denied access to the courts, . . . because they are enemy aliens or have entered our territory as enemy belligerents."). In both cases, the Court (which was otherwise sympathetic to the government's claims)

unanimously rejected the government's arguments, and entertained the claims on the merits. See id. at 25; *Yamashita*, 327 U.S. at 9 (indicating that such enemy aliens have habeas rights until they are suspended by Congress); id. at 30 (Murphy, dissenting) ("This Court fortunately has taken the first and most important step toward insuring the supremacy of law and justice in the treatment of an enemy belligerent accused of violating the laws of war. Jurisdiction properly has been asserted to inquire into the cause of restraint of liberty of such a person. Thus the obnoxious doctrine asserted by the Government in this case, to the effect that restraints of liberty resulting from military trials of war criminals are political matters completely outside the arena of judicial review, has been rejected fully and unquestionably.")

There are other such historical cases, too (including Territo), discussed at pages 6-8 of the *Boumediene* Reply Brief.

So Brad's unequivocal historical claim is simply mistaken. His instinct, however, is understandable. After all, the U.S. presumably has detained thousands of persons in military conflicts throughout our history, and very, very few of them (other than the German saboteurs, *Yamashita*, *Territo*, etc.) have ever sought habeas relief. Doesn't that tell us something about how these petitioners should be treated?

Well, no, I don't think it says much about the detentions in this conflict, because here, unlike in previous military engagements, our military has engaged in widespread round-ups of persons who appear to be civilians, in civilian settings, and there is serious question of whether the Executive has the authority to detain such persons.

As the *Boumediene* brief describes the contrast:

"Unsurprisingly, admitted prisoners of war rarely brought habeas petitions and, when they did, rarely succeed on the merits. This historical fact reflects the reality that such persons (most of who were captured while in uniform on a battlefield) usually had no basis or incentive to contest prisoner-of-war status; indeed, they frequently desired it. But when a prisoner has denied that he is a detainable prisoner of war, habeas courts have consistently exercised jurisdiction to determine that issue."

That is to say: In a traditional military conflict, most detentions occur on a battlefield, and the persons detained are obviously enemy combatants (typically in uniform) who would prefer to be detained, and be afforded POW treatment, rather than the alternative (namely, being shot on sight).

In this conflict, by contrast, our military has detained many persons who are not combatants in the colloquial sense (or who, in any event, contest that designation). This is not only because of the nature of the enemy (non-uniformed; hiding amidst civilian populations)—which makes mistaken detention much more likely—but also because the Bush Administration has been employing a definition of "enemy combatants" that goes far beyond the traditional battlefield combatant. As the government puts it, the CSRT definition of a detainable "enemy combatant" authorizes the detention of "any individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners, including [but, importantly, not limited to] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."

How does this claimed detention authority work in practice? Well, let's take the case of the *Boumediene* petitioners themselves. They were not captured fighting U.S. forces in Afghanistan or, like *Hamdi*, surrendering a weapon there. Instead, they are Algerians who immigrated to Bosnia and Herzegovina during the 1990's. Five of them are Bosnian citizens. On 9/11/01, each was living with his family in Bosnia. None is alleged to have waged war or committed belligerent acts against the United States or its allies. According to the *Boumediene* brief, they were arrested by Bosnian police in October 2001, purportedly on suspicion of plotting to attack the U.S. Embassy in Sarajevo. But the Bosnian authorities had no evidence for this charge; instead, they acted under pressure from U.S. officials, who threatened to cease diplomatic relations with Bosnia if Petitioners were not arrested. On January 17, 2002, the Supreme Court of the Federation of Bosnia and Herzegovina, acting with the concurrence of the Bosnian prosecutor, ordered Petitioners released because a three-month international investigation (with collaboration from the U.S. Embassy and Interpol) had failed to support the charges on which Petitioners had been arrested. On the same day, the Human Rights Chamber for Bosnia and Herzegovina, established under the U.S.-brokered Dayton Peace Agreement and staffed by judges from several European countries, issued an order forbidding the prisoners' removal from Bosnia. Later that day, however, as the Boumediene Petitioners were being released from a prison in Sarajevo, Bosnian police acting at the behest of U.S. officials (and in defiance of the Human Rights Chamber's order), re-seized them and delivered them to U.S. military personnel, who transported them to Guantanamo, where they have been held for the past six years, without contact with their families.

That is to say, these petitioners are citizens of a friendly nation, seized far from any battlefield, and not engaged in any belligerent acts, let alone belligerent acts on behalf of those responsible for the 9/11 attacks. Perhaps they are agents of al Qaeda, bent on (in Brad's words) "destroying our Constitution." But perhaps not. I have no idea. But the facts of their detention certainly raise a serious question about whether that detention (now going on six years) was lawful. All they are seeking is a determination by a fair and impartial tribunal on the question of whether they in fact fall within the category of persons whose detention Congress authorized when

it gave the President the power to use "necessary and appropriate force" against those responsible for the September 11th attacks.
That doesn't sound so unreasonable, does it?

Timothy Lynch

Bio

Several points in response to Brad's initial post.

First, Brad claims the Bush administration took the position that U.S. citizens had a right to habeas corpus review and that the debate in Hamdi was over the scope of that right. In fact, the administration opposed Hamdi's application by urging the court to summarily dismiss the habeas application. In other words, the DOJ argued that habeas petitions could be filed with the courts as long as those petitions were promptly thrown out! See Hamdi v. Rumsfeld, 296 F.3d 278, 283 (2002)("The government [argues that the courts] may not review at all its designation of an American citizen as an enemy combatant—that its determination on this score are the first and final word.").

Next, Brad implies that I was inaccurate when he writes that "Rasul did not concern 'whether Congress had a role in setting prisoner policy.'" Careful readers will note that my initial post summarized Bush administration claims in addition to Supreme Court action. Brad tries to shift attention away from the administration's claims and to the Supreme Court's ruling in Rasul. But, again, the DOJ claims are a matter of record. Here is the claim advanced by the Bush administration: "[T]he Constitution would limit the ability of Congress to extend federal court jurisdiction into areas that interfered with the core executive responsibilities." Brief for United States at 57, Rasul v. Bush, 542 U.S. 466 (2004). That is an argument denying a role for Congress in setting prisoner policy. It is not the law, but it is among the many sweeping claims of executive power that have been advanced by the Bush administration.

Moving on to the Boumediene case …It is regrettable that the law pertaining to habeas corpus is in such poor shape. Brad is right that there is a basis in the case law to deny habeas where Congress creates an "adequate substitute remedy." However, this is the sort of constitutional improvisation that Federalists typically abhor. The Constitution does not say anything about habeas "substitutions." The next question is whether habeas has been suspended, or not. The DOJ brief in Boumediene does not advance a suspension claim. Instead, the DOJ brief argues that the Guantanamo prisoners are ineligible for habeas relief.

In my view, these are the three pertinent threshold questions: (1) Can the "adequate substitute remedy" be reconciled with the original understanding of the Constitution?; (2) Does the MCA suspend the writ of habeas corpus?; and (3) If the MCA is not clear, should the judiciary adopt a clear statement rule for such a circumstance?

Andrew McBride

Bio

Let me start with what I believe to be the central question in this case: "Does the constitutional right of habeas corpus extend to foreign nationals detained by the United States military as enemy combatants?" As others have noted, this question is the fulcrum upon which the need to answer any of the other questions in the case depends. If *Boumediene et al.* can claim a right to constitutional habeas, I agree that Congress has not properly suspended the writ and the only question that remains is whether the procedures that are substituted for habeas are robust enough to constitute a valid alternative to habeas.

At the outset, we must note that these individuals are foreign nationals, whom military personnel of the Executive Branch have determined to be enemy combatants. No one could dispute that the detention of hostile aliens bearing arms against the United States lies within the province of the Executive Branch. Detention of hostile aliens is part of the war effort itself; its main goal is to incapacitate a

portion of the enemy forces for the duration of the conflict. While Congress has the power to declare war, the President, as Commander-in-Chief, has the sole authority to determine the means of prosecuting a war in progress. That this war is of indeterminate duration is irrelevant—every war is of indeterminate duration while it is being fought. That the forces of Islamo-terrorism are not part of an organized nation state and do not wear uniforms is also irrelevant to the constitutional question at hand. Warfare against irregular forces is not new in United States history; there are numerous historical examples, including the Barbary pirates, numerous Indian wars, and even the armed conflict in Viet Nam. Nor does it matter where these individuals were captured. A red coat captured on Capitol Hill during the war of 1812 was an enemy combatant—because of his nationality and his relationship toward this polity (i.e., hostile).

There has been some discussion in the prior postings about the Executive's allegedly overblown claims of exclusive and unreviewable authority in the area of the identification and detention of foreign enemy combatants. I would argue that the Executive was and is right. When the Executive is acting as Commander-in-Chief in the prosecution of war, his sphere is limited, but his authority is plenary. This is because the two main attributes of Executive Power as the Framers understood it, are necessary to this enterprise: judgment and swift action. See, e.g., The Federalist No. 74, at 447 (Clinton Rossiter ed., 1961) ("Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.").

Intelligence suggesting that a person in Iraq is part of Al-Qaeda in Iraq cannot be reduced to some evidentiary standard and sifted through like the facts of an auto accident. Judgment is required, judgment that the Executive is granted under the Constitution and for the execution of which he must answer to the body politic. "Checks and balances" makes no sense in the context of confronting a foreign enemy—why would the Framers have wished to use the judiciary to "check" the President's effectiveness in defeating an enemy bent on the destruction of our Republic? Those who wave the flag of "checks and balances" at every turn fail to recognize that our constitutional system of separate and coordinate branches of government necessarily involves an acceptance of limited spheres of exclusive power that theoretically can be abused. The "check" that guards against abuse of Executive power is a political one. The President must answer to the People; he or his supporters ultimately may be voted out of or removed from office.

A previous writer cites the text of the Suspension Clause, but makes no attempt at textual analysis. But the text itself confirms the guarantee's internal, domestic focus. "Rebellion" and "Invasion" are both domestic occurrences and there is no evidence that the scope of the writ extends beyond the scope of the legislative power to suspend it. The Suspension Clause also speaks of "the Public safety," again a domestic focus. This makes sense, for at the time of the framing, it was clear that enemy combatants did not have access to the writ. See *Moxon v. The Fanny*, 17 F. Cas. (2 Pet. Adm.) 942, 947 (D. Pa. 1793) ("The courts of England, though they decide freely on all matters of internal police, will not meddle with these rights of the sovereign. They will not even grant a habeas corpus in the case of a prisoner of war, because the decision on this question is in another place, being part of the rights of sovereignty."). The idea that the judiciary would have any role in deciding whether foreign nationals were enemy combatants would have been utterly incomprehensible to our Framers. These were quintessentially "political questions" having elements of both war powers and foreign affairs beyond judicial ken or competence.

The right to invoke the constitutional writ of heabeas corpus (and the constitutional guarantees it is designed to help enforce) is limited to those who have voluntarily created some peaceable relationship with this body politic. Someone whose only connection to this country is having been captured by our military while trying to harm it or its interests has no more right to invoke the writ of habeas corpus than he does to invoke a Second Amendment right to bear arms. A U.S. Citizen has the right to be tried for treason in a civilian court with the two witness rule in effect. A foreign national has no such right because he never swore any allegiance to the principles of this Country and cannot be punished for breach of any duty. He did his duty to our enemy, we just want to detain him so he can't do it again.

That doesn't sound so unreasonable, does it?

Will the Supreme Court come out this way. As others have noted, it seems unlikely, but will depend entirely upon Justice Kennedy. Some tidbits of his *Rasul* concurrence can be read to support the analysis I have laid out above. See *Rasul v. Bush*, 542 U.S. 466, 486 (2004) (Kennedy, J., concurring in the judgment) (noting "'ascending scale of rights' that courts have recognized for individuals depending on their connection to the United States"); id. at 487 ("The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter."). However, I think Justice Kennedy will come out as to constitutional habeas the same way he did as to statutory habeas in *Rasul*. That makes the real question in this case the one I hope to address in my next post, viz. does the process provided for by the MCA, including a form of limited judicial review, satisfy the Suspension Clause and/or the Due Process Clause. I believe it does and I believe this is where the United States will garner its five votes in this case (with a healthy dose of *Youngstown Steel* thrown in).

Thus, most of what I have written above is nothing more than the outline of a Scalia dissent in part, likely for four Justices. That, however, does not make it any less right or any less fun to write.

Marty Lederman

[Picture Unavailable]

Bio

Andrew McBride addresses the first of the three principal questions in the case: Do alleged "enemy combatants" being detained at Guantanamo have a constitutional right to challenge the legality of their detention in federal court? Andrew agrees that the Court will probably answer this question "yes," but insists the Court will be wrong when it does so.

Andrew has two major rationales for this conclusion. His first, and broader, theory is that the Constitution simply does not protect aliens who have not "voluntarily created some peaceable relationship with this body politic." As he puts it: "Someone whose only connection to this country is having been captured by our military while trying to harm it or its interests has no more right to invoke the writ of habeas corpus than he does to invoke a Second Amendment right to bear arms."

I think this argument is mistaken on its merits—it is appropriate to view the Constitution, at least in some respects, as establishing structural limits on the federal government wherever it acts; it is not free to do whatever it likes to foreign persons. But whether I'm right about that or not, Andrew's argument simply doesn't track with longstanding established doctrine. The German saboteurs in Quirin, for example, were entitled to federal habeas rights, even though many of them had no ties with the United States at all until they alit on our shores with the intent to commit hostile acts here. To be sure, they were not entitled to the same degree of substantive constitutional rights to which U.S. citizens would be entitled; but neither were they denied constitutional protection altogether. If the plane transporting Boumediene from Bosnia had turned right at Florida, and landed at a military detention facility in South Carolina, I think there's little doubt Boumediene would be entitled to challenge his detention on habeas. (That's why the Vice President is so insistent on not moving the GTMO detainees to the United States—because in that case judicial process would uncontroversially attach.) The question is whether the Bush Administration can avoid that conclusion merely by having directed the plane to turn right instead of left, and to land at a base wholly owned and operated by the U.S., but just outside the U.S. mainland, rather than in South Carolina. I don't see much of a constitutional basis for allowing fundamental rights to turn on such a formalistic and arbitrary distinction.

Andrew's second argument is more interesting, and more provocative: As I read him, he is saying that it would simply make no sense to have federal courts entertain these habeas actions, because such review would invariably be futile: the detentions in question are automatically lawful by virtue of the President having said they are—or, at the very least, the courts may not second-guess the Executive's detention decisions, which are "beyond judicial ken or competence."

Here, I strongly disagree. Perhaps the courts should grant some degree of deference to the factual determinations of the Executive respecting such decisions (although the Pentagon's record on this score certainly doesn't inspire much confidence). And as the Court suggested in Hamdi, that deference will be greatest in the initial days of a detention, or when the detention is in the heat of battle. But these petitioners have been isolated at GTMO, far from any active battle, for six years. I just don't see why a federal court would be incapable of evaluating the government's habeas return and making the usual sort of factual determination that federal courts make as a matter of course on habeas petitions. Surely there is nothing in the Constitution that suggests any special judicial disability in this regard.

More importantly—and more pertinent to the present case—the courts can surely make the legal determination whether the Administration's operative category of the class of persons who may be indefinitely detained is consistent with the detention authority that Congress has afforded the President under the Authorization for Use of Military Force. The biggest problem with the Bush detention regime is the extraordinary and unjustifiable breadth of the Administration's definition of detainable "enemy combatants." The government claims authority to subject to indefinite military imprisonment any individual who is "part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners." This definition is not limited to those who have actually engaged in an armed conflict against the United States or its allies. Indeed, it even includes citizens of friendly nations who are not combatants at all and whose alleged "support" for al Qaeda or for an "associated force" is unintentional: The government's position is that the military could indefinitely detain "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities."

Congress has not authorized such a capacious and unprecedented detention authority. Instead, it has authorized detention (and military force more broadly) only against those "nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on

September 11, 2001, or harbored such organizations or persons." And as the plurality in Hamdi explained, this legislative authorization should be construed consistent with the scope of detention traditionally permitted under the laws of war. As Part II of the Boumediene brief explains, the Bush Administration category goes far beyond what the AUMF and the laws of war allow. There is no reason to think that courts cannot make this critical legal determination that the Administration's asserted detention power is unauthorized, which is essentially a matter of legislative intent (as informed by the laws of war).

Ah, but then Andrew pulls out his trump card—the claim that the President is not bound by any limits imposed by Congress and the laws of war. "While Congress has the power to declare war," he writes, "the President, as Commander-in-Chief, has the sole authority to determine the means of prosecuting a war in progress. . . . When the Executive is acting as Commander-in-Chief in the prosecution of war, his sphere is limited, but his authority is plenary."

This is recognizable, of course, as the Bush Administration's audacious view of a sweeping, preclusive Commander-in-Chief authority to disregard statutes and treaties that regulate his conduct of war—whether it be the Torture Act, or FISA, or the Uniform Code of Military Justice, or the War Crimes Act, or the AUMF, or the Geneva Conventions, the Habeas Act of 1867, proposed statutes that would require withdrawal from Iraq . . . the list, unfortunately, goes on. This is perhaps the most important constitutional question raised by this Administration. You won't be surprised to learn that I strongly disagree with Andrew on the answer. But I won't belabor the point here, for two reasons: First, the Solicitor General (wisely) is not making such an argument in Boumediene, and so it's not really germane to our discussion here. And second, together with David Barron I am publishing a very long, two-part article on precisely this question in the next couple of months; and so for now I think I'll simply beg the patience of readers interested in this question to be on the look-out.

Brad Berenson

Bio

Let me make four brief observations in response to Marty's and Tim's posts. These observations will hardly settle the debate, and indeed, as a group, we've barely been able to canvass the issues in this complex and interesting case. But I hope these four observations will at least set the record straight on a couple points and allow our readers to have enough context to assess what the Supreme Court does with this case.

First, I stand by the assertion I made in my initial post that there is no precedent whatsoever for extending habeas corpus right to enemy aliens captured and held abroad by our military. Certainly, Quirin and Yamashita are not such examples.

Quirin was a case in which the enemy saboteurs were captured, held, and tried in the United States -- as Marty himself concedes, they "alit on our shores" to commit mayhem -- so they fell comfortably within the traditional territorial principle for extending habeas corpus rights. No one should be surprised that individuals held by the United States on U.S. soil have access to our courts. This principle explains why, for example, immigration detainees, even with no legal immigration status, have habeas corpus rights. Habeas rights cover our territory and our citizens; they do not cover our enemies in the territory of other nations. The only laws that stand between us and them in those foreign realms are the international laws of armed conflict (or perhaps in some circumstances the domestic laws of other countries).

Yamashita, too, provides no support for Marty's position, which can be seen from the very page of that opinion he cites. On that page, the Court makes clear that Yamashita was charged with war crimes committed while "occupying United States territory during time of war." Yamashita was captured, held, and tried in the Philippines, which in the immediate aftermath of World War II continued to be a U.S. territory. (The order in question authorizing military commission by its terms applied to U.S. territories and possessions.) The Philippines did not achieve independence from the United States until after the war ended, on July 4, 1946. Thus, Yamashita is like the many cases that arose in sovereign territories of the British Empire where alien enemies of England did indeed have habeas corpus rights. But these cases, involving actual U.S. or British sovereign territory, even if outside the U.S. mainland or the British Isles, prove my point, not Marty's. Territory = habeas.

Second, let me address the notion that the availability of a constitutional right of habeas corpus depends on how sure we are at the outset that those we've captured are actually enemies. Marty makes an appealing argument from common sense that, given the uncertain status of the terrorist irregulars we're currently fighting, and the greater risk of error attendant to these captures, habeas corpus should be available. But this collapses the jurisdictional question and the merits. A greater risk of error on the merits may mean that the

need for or potential benefits of habeas corpus are greater, but that does not mean that the Constitution means something different than it says or than it has always been interpreted to mean.

I acknowledge Marty's point that the risk of erroneous capture in this conflict is higher than in conventional wars, but that is not our fault; it is the fault of our enemies. To extend constitutional protections to them on this basis would be to reward the very civilian disguises that make their belligerency unlawful and so uniquely dangerous to real civilians, ours and other nations'. Moreover, a higher risk of error is hardly unique to this conflict. Any guerrilla war carries similar risks. There were probably similarly high risks of error in captures of suspected Viet Cong in the Viet Nam war. And even in World War II, it's worth remembering that we held hundreds of thousands of captured German POWs, many of whom claimed to hate the Nazis and love the United States, arguing that they had been conscripted into forced labor battalions against their will as Nazi armies swept through Eastern Europe. Yet habeas rights were not extended to the people who made such claims, even though they may have been telling the truth, and relief was not granted.

It is an ugly but unavoidable fact of war, like so many others, that we accept risks of error with the lives and liberties of innocents during an armed conflict that we would never accept during normal times. Every time we drop a bomb or fire a weapon, we do just that. Civilian life and the U.S. Constitution admits of no concept of "collateral damage." But the effective conduct of hostilities inevitably entails inflicting collateral damage virtually every day.

Third, the issue Marty seems most eager to discuss, the substantive definition of enemy combatants under the AUMF and the scope of the Administration's power to detain enemy combatants really isn't ripe in Boumedienne, and I consider it very unlikely to be addressed. The D.C. Circuit did not address it below, and if the Military Commissions Act is constitutional, claims of this sort can be presented to the D.C. circuit on review of detention decisions by the Combatant Status Review Tribunals. It's premature and unnecessary for the Supreme Court to wade into this one. All I'll say on the subject is that the definition being applied by the Administration, which embraces those actively supporting al Qaeda or the Taliban or associated with enemy forces is pretty traditional stuff under the international laws of armed conflict. There's plenty of precedent in international law for holding not only enemy forces but those that supply, support, and actively associate with them.

Finally, I can only lament that, as a group, we haven't spent much time at all discussing what I agree is likely to be the central issue in Boumedienne: the procedural adequacy of the MCA's alternative to a habeas corpus remedy. I expect much of the petitioners' arguments during oral argument will focus on procedural horror stories relating to CSRT proceedings, in an effort to stimulate sympathy from our naturally process-loving Justices. On the other side, the government will need to help the Court understand that the baseline against which procedural regularity is measured in this unique context is quite different from the familiar baselines from the civilian context. In the end, the outcome of the case will likely turn on this debate. We haven't really had it, but it's interesting and complicated, and our readers should watch for it.

Marty Lederman

[Picture Unavailable]

Bio

First, my apologies to Brad: I simply overlooked his qualifier (which I actually quoted!) when he wrote that no court had ever entertained a habeas action for aliens held “outside the territorial jurisdiction of the capturing state.” It's Andrew, not Brad, who thinks that all suspected enemy aliens should be denied habeas, regardless of where they are held.

Brad would draw the line between those held within the U.S. territorial jurisdiction, and those who are not. As the Boumediene reply brief explains, it’s not true that no court has ever entertained habeas claims from aliens outside the state’s territorial jurisdiction. But be that as it may, even if one could come up with some good reason for such a constitutional line, the curious question is why GTMO should be deemed to fall on the non-habeas side of it. Is there anything about Guantanamo that materially distinguishes it from, e.g., the Philippines in the Yamashita case, in a way that points to such an important, all-or-nothing Suspension Clause distinction? (There is not, for instance, any question about impinging on Cuban prerogatives here, or any difficult questions about how U.S. and Cuban law interact.) And if Boumediene, et al., would have been entitled to petition for habeas had the plane carrying them landed in South Carolina (as Brad concedes would be the case), why should they be denied that right merely by virtue of the fact that the Administration decided to touch down instead a few miles from the Florida coast, at a base that is just as much controlled and operated by the U.S. (under U.S. law) as the brig in South Carolina—particularly where, as here, the Administration diverted the plane in that direction for the express purpose of avoiding judicial oversight?

Second, I agree that we ought to be focusing more on whether the DTA procedure is a constitutionally adequate substitute for habeas, because that will likely be the focus of the argument and opinions. Perhaps the oral argument itself will prompt us to devote more attention there. In the meantime, check out this post by Jonathan Hafetz about why the DTA procedure falls woefully short of what habeas would provide.

Updated to include reaction to oral argument:

Both Paul Clement and Seth Waxman were superlative -- two of the best at their very best.

The key to the case, I think, was a question of Justice Kennedy's about three-quarters of the way through (it'll be obvious on the tape and in the transcript), wondering why the D.C. Circuit could not adequately handle some of the trickier problems that the petitioners had raised. (The Solicitor General strongly implied on several occasions that to the extent the Court thinks the MCA/DTA procedure is inadequate, the Court could construe the statute to permit the D.C. Circuit the power to deal with the shortfall, e.g., to order release of a petitioner rather than simply remand to the CSRT).
Part of the answer to Justice Kennedy's question is simply "six years" (the phrase most often invoked in today's argument). That's how long these detainees have been held, and the Court obviously sees the potential prospect of a substantially longer delay if the government is given the opportunity to litigate each of these other difficult issues in the D.C. Circuit.

More importantly, Seth Waxman in rebuttal seized on Justice Kennedy's critical question, and, in my humble opinion, gave one of the more powerful and effective rebuttals I've ever seen -- one that addresses not only Justice Kennedy's question, but also goes to the heart of why, at least for these detainees (if not, perhaps for any future detainees, who might be the beneficiaries of a revamped system), this system of indefinite detention is fatally flawed. Listen for it.

Timothy Lynch

Updated 12/10/07

Bio

Andrew is right about one thing—the central question is whether the courts have habeas jurisdiction over prisoners held outside of U.S. territory. If the courts have jurisdiction, then the Military Commissions Act (MCA) is unconstitutional because Congress has not properly suspended the writ.

Although Andrew tries to frame this case in terms of the “rights of enemy combatants,” this case is best understood as a test of the separation of powers principle. As Marty notes, habeas jurisdiction is a structural limit on the power of the federal government. Judge Rogers also made this point in her dissenting opinion with the court of appeals.

If the Bush administration believes that (a) the Constitution does not apply to anyone that the executive has determined to be an “enemy combatant” and that (b) the courts should not entertain even colorable claims of innocence, it should have asked Congress to enact bills of attainder. A bill of attainder inflicts a legislative punishment upon a person without any trial at all. President Bush could have forwarded the roster of Guantanamo prisoners to Congress with a call for life imprisonment for these captured war criminals. This sort of summary punishment would be appropriate because, in Andrew’s words, “‘checks and balances’ make no sense in this context.”

What about the constitutional provision prohibiting bills of attainder (article I, section 9)? Well, according to Andrew’s reasoning, that provision simply does not apply to prisoners held outside of U.S. territory. Thus, if the political branches are seeking to limit the role of the courts, the bill of attainder is the perfect vehicle for that purpose.

Why didn’t the Bush administration choose the bill of attainder vehicle? Perhaps because it did not think the courts would accept an “enemy combatant” loophole to the Constitution’s prohibition. I think the courts would react in that way and rightly so. Will the administration succeed indirectly by attempting to withdraw the habeas jurisdiction of the courts. I doubt the Supreme Court will allow the Congress to accomplish indirectly what it may not do directly.

Brad and Andrew seem eager to argue that the MCA is an “adequate substitute” for habeas, but I will repeat

what I said in an earlier post: Where does the Constitution talk about habeas "substitutions"? There is a basis in the precedents, but those precedents are another example of constitutional improvisation.

Since Congress has not suspended the writ, the federal courts have jurisdiction over these petitions. The Supreme Court should remand to the district court so that the particular merits of the petitions can be argued. Whether any particular prisoner will be able to persuade a court that a mistake has been made remains to be seen.

For those interested in speculation about the outcome of the case, I'll offer my two cents. Justice Kennedy will tip the balance for a 5-4 vote. The Court's majority will rule that the MCA/CSRT procedures are not an "adequate substitute" for the writ of habeas corpus.

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