

10-15-2009

"Yes, We Can" Grant Guantánamo Detainees Habeas Corpus Rights, in Boumediene v. Bush

Sarah Christian

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Recommended Citation

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“Yes, We Can”¹ Grant Guantánamo Detainees Habeas Corpus Rights, in *Boumediene v. Bush*

By Sarah Christian*

Table of Contents

I. INTRODUCTION	601
II. HISTORICAL BACKGROUND	603
A. <i>Habeas Corpus / Suspension Clause in the Constitution</i>	603
B. <i>President Lincoln Suspends Habeas Corpus</i>	604
C. <i>Relevant Case Law</i>	606
1. <i>Johnson v. Eisentrager</i> , 339 U.S. 763 (1950)	606
2. <i>Rasul v. Bush</i> , 542 U.S. 466 (2004)	608
3. <i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004)	610
4. <i>Hamdan v. Rumsfeld</i> , 548 U.S. 557 (2006)	611
D. <i>Authorization to Use Military Force (2001)</i>	613
E. <i>Combatant Status Review Tribunals</i>	614
F. <i>Detainee Treatment Act of 2005</i>	614
G. <i>Military Commissions Act of 2006</i>	615
III. FACTS	616
IV. ANALYSIS OF THE COURT’S OPINION	619
A. <i>Justice Kennedy’s Majority Opinion</i>	619
B. <i>Justice Souter’s Concurring Opinion</i>	624
C. <i>Chief Justice Roberts’s Dissenting Opinion</i>	625
D. <i>Justice Scalia’s Dissenting Opinion</i>	626
V. IMPACT OF THE COURT’S DECISION	628
A. <i>Legal Impact</i>	628

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1. See, e.g., Jay Newton-Small, *A Long Campaign, and a Changed Barack Obama*, TIME, Nov. 2, 2008, available at <http://www.time.com/time/politics/article/0,8599,1855677,00.html>. “Yes, We Can” was a campaign slogan widely used by Barack Obama in the 2008 presidential election. This title reflects Obama’s support of the *Boumediene* decision, and the steps he has taken to make changes at Guantánamo.

Table of Contents (cont.)

1.	Enemy Combatant Detention Review Act of 2008.....	628
2.	What <i>Boumediene</i> Means for Detainees, including Lakhdar Boumediene	629
3.	Unanswered Questions	631
B.	<i>Broad Impact</i>	631
1.	Presidential Election 2008, and the Makeup of the Supreme Court.....	631
2.	Closing Guantánamo Bay	637
3.	Checks and Balances on the Supreme Court.....	640
4.	Timing of the Decision	641
VI.	CONCLUSION	642

I. INTRODUCTION

Imagine being caged in a six-by-eight foot cell, for twenty-two hours a day, left with nothing to do but sleep, pray, and pace around the tiny space.² The hot Cuban air is thick with humidity as iguanas and banana rats run rampantly around your cell.³ You are given little more than a thin sleeping pad, a bath towel (to be used as a prayer mat), and a copy of the Koran or another book.⁴ Before President Obama's executive order was issued on January 22, 2009, approximately 245 detainees being held at Guantánamo Bay (or Guantánamo)⁵ were subjected to these conditions, without any notion of a release, or even a trial date.⁶ At the center of this controversy is

2. *Guantanamo Bay – Camp Delta*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/facility/guantanamo-bay.htm>; *US: Improve Prison Conditions at Guantanamo*, HUMAN RIGHTS WATCH, June 9, 2008, available at <http://www.hrw.org/en/news/2008/06/09/us-improve-prison-conditions-guantanamo>.

3. *Guantanamo Bay [GTMO] “GITMO,”* GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/facility/guantanamo-bay.htm>.

4. *US: Improve Prison Conditions at Guantanamo*, *supra* note 2. See also Mark Mazzetti & William Glaberson, *Obama Issues Directive to Shut down Guantánamo*, N.Y. TIMES, Jan. 21, 2009, available at <http://www.nytimes.com/2009/01/22/us/politics/22gitmo.html>. Since the opening of Guantánamo seven years ago, the prison has seen “four suicides, hunger strikes by scores of detainees, and accusations of extensive use of solitary confinement and abusive interrogations, which the Department of Defense has long denied.” *Id.* See also *Six Years from Home – Guantánamo Detainees from Bosnia and Herzegovina*, AMNESTY INTERNATIONAL, Jan. 18, 2008, available at <http://www.amnesty.org/en/news-and-updates/feature-stories/six-years-home-guantanamo-detainees-bosnia-and-herzegovina-20080118>.

Lakhdar Boumediene, the detainee for which this case is named, participated in at least a year-long hunger strike, as of January 18, 2008, to protest his detention. *Id.* He was force-fed daily by prison officials while strapped to a restraint chair. *Id.*

5. Throughout the text and source citations found in this article, Guantánamo is accented (or not accented) according the original source material, to promote the integrity of the sources.

6. See Mazzetti & Glaberson, *supra* note 4. As of January 21, 2009, the number of detainees had decreased from 770, at the highest point, to 244. *Id.*; Susan Candiotti, *Six Guantanamo Detainees Released*, CNN.COM, <http://www.cnn.com/2009/US/01/17/gitmo.detainees/index.html#cn-STCText>.

President Obama signed an executive order on his second full day in office, ordering the close of Guantánamo Bay within one year. As discussed later, this

the Supreme Court decision *Boumediene v. Bush*, decided in June 2008.⁷ *Boumediene*, along with other alien detainees being held as “enemy combatants” at Guantánamo Bay, won a victory in this case by gaining access to habeas corpus rights, allowing them to challenge the legality of their imprisonment.⁸

Habeas corpus is the “primary tool used to challenge the propriety of an individual’s detention.”⁹ It originated in fourteenth-century England to prevent kings from “imprisoning people indefinitely without charging them with a crime.”¹⁰ Habeas corpus rights in the United States can be attributed to the Suspension Clause in the Constitution, which states that habeas corpus shall not be suspended except in rare cases.¹¹ Habeas corpus has only been suspended in the rarest of times in United States history.¹² *Boumediene* and other decisions have made it apparent, however, that “there is no higher duty than to maintain [the writ of habeas corpus] unimpaired.”¹³

Since September 11, 2001, there have been several acts of Congress that have significantly impaired habeas corpus rights for detainees being held as potential enemies against the United States. Both Congress and former President George W. Bush were quick to enact legislation and protocols to manage enemy combatants and non-citizens being held at the United States naval base at Guantánamo Bay. Notable acts of Congress—to be discussed further below—include the Detainee Treatment Act of 2005,¹⁴ and the

executive order may have been a consequence of, or the Obama administration’s response to, the *Boumediene* decision. See *infra* notes 243-255 and accompanying text.

7. See generally *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

8. See *id.*; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); see also *infra* notes 106-107 and accompanying text.

9. Deva Solomon, *Can Government Indefinitely Detain Individuals Accused of Being Enemy Combatants?*, 34 WM. MITCHELL L. REV. 5155, 5158 (2008).

10. Alan Shapiro, *The Supreme Court, Habeas Corpus & Guantanamo*, TEACHABLE MOMENT, available at <http://www.teachablemoment.org/high/supremeshabeas.html>.

11. U.S. CONST. art. I, § 9, cl. 2; see also Shapiro, *supra* note 10.

12. See, e.g., *infra* notes 28-39 and accompanying text.

13. *Johnson v. Avery*, 393 U.S. 483, 485 (1969).

14. 28 U.S.C. § 2241(e) (2006).

Military Commissions Act of 2006,¹⁵ the latter of which stripped federal courts’ jurisdiction to hear habeas corpus petitions.¹⁶ The past several years have seen an excess of relevant cases that illustrates the progression of the United States’ treatment of habeas corpus rights, with regard to Guantánamo Bay detainees.

On June 12, 2008, the Supreme Court made clear its power and ability to challenge Congress and the President. *Boumediene* answered the question of whether alien detainees (held at Guantánamo) should have access to habeas corpus rights with a marginal yes.¹⁷ This case note analyzes the controversial *Boumediene* decision and its potentially far-reaching implications. Section II is a historical progression of relevant case law and congressional enactments, while Section III looks at the significant facts of the case. Section IV analyzes the majority and concurring opinions, by Justices Kennedy and Souter, respectively, as well as the two dissenting opinions by Chief Justice Roberts and Justice Scalia. Section V explores the probable impact of the decision in both a legal and a broader setting. Lastly, section VI concludes the note.

II. HISTORICAL BACKGROUND

A. Habeas Corpus / Suspension Clause in the Constitution

Habeas corpus is a Latin term that translates to “that you have the body.”¹⁸ The writ originated in English courts in an attempt to discourage the monarchy from holding an individual in custody indefinitely.¹⁹ The English Parliament passed the Habeas Corpus Act of 1641, which abolished the Court of Star Chamber, a court used to hear sedition cases at the request of the King, with no right to appeal.²⁰ Through the Habeas Corpus Act, Parliament established

15. See *supra* note 8.

16. *Habeas Corpus*, N.Y. TIMES, available at http://topics.nytimes.com/top/reference/timestopics/subjects/h/habeas_corpus/index.html.

17. *Boumediene*, 128 S. Ct. at 2240.

18. BLACK’S LAW DICTIONARY 728 (8th ed. 2004).

19. John A. Sholar, Jr., *Habeas Corpus and the War on Terror*, 45 DUQ. L. REV. 661, 668 (2007).

20. *Id.* at 669.

that the writ could be asserted against any detention ordered by the King.²¹

In the United States, habeas corpus is granted by the Suspension Clause in the Constitution, which states that “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.”²² The Suspension Clause is the root of the historical significance of habeas corpus, but the question of exactly what it protects is “a difficult puzzle.”²³ During the framing of the Constitution, the “founding fathers understood that the writ was an important part of the system of checks and balances created by the Constitution.”²⁴

A grant of habeas corpus confers the remedy of release upon those who invoke it, unless the Government can prove that the detention is indeed lawful.²⁵ The interpretation of habeas corpus has changed dramatically with the *Boumediene* decision, expanding the number of people that it protects.²⁶ Even in our current, uncertain times, as the United States battles the conflict known as the war on terror, “at the absolute minimum, the Suspension Clause protects the writ of habeas corpus ‘as it existed in 1789.’”²⁷

B. President Lincoln Suspends Habeas Corpus

Habeas corpus has been suspended only a number of times; arguably, the most notable occurrence was President Abraham Lincoln suspending the writ during the Civil War.²⁸ During the first

21. *Id.*

22. U.S. CONST. art. I, § 9, cl. 2.

23. Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War of Terror*, 120 HARV. L. REV. 2029, 2037 (2007).

24. Solomon, *supra* note 9, at 5160. *See also* Sholar, *supra* note 19, at 671. At the Constitutional Convention, Charles Pinckney of South Carolina moved that “[t]he privileges and benefit of the Writ of Habeas Corpus shall be enjoyed in this government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding months.” *Id.* at 672.

25. Fallon & Meltzer, *supra* note 23, at 2038.

26. *See Boumediene*, 128 S. Ct. at 2240.

27. *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001) (citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).

28. *Habeas Corpus*, *supra* note 16.

few, crucial weeks of the Civil War, Lincoln suspended habeas corpus, and instructed that anyone suspected of subversive acts be arrested.²⁹ When John Merryman (of Baltimore) was subsequently arrested, then-Chief Justice Roger B. Taney ignored Lincoln's suspension of the writ and brought Merryman before the Court.³⁰ Taney demanded cause be shown for Merryman's arrest and then ruled Lincoln's suspension of the writ unconstitutional.³¹ Lincoln and the military simply disregarded Taney's ruling.³²

On September 24, 1862, Lincoln publicly announced the suspension of habeas corpus, in a proclamation in which he stated:

That the Writ of Habeas Corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority or by the sentence of any Court Martial or Military Commission.³³

Months later, Congress validated Lincoln's suspension of the writ with legislation, through the Habeas Corpus Act of 1863.³⁴ The Supreme Court never received the opportunity to decide whether Lincoln's suspension of the writ was an unconstitutional abuse of power, mainly because the Lincoln Administration did not let the issue reach the Court while the suspension was in place.³⁵ After the Civil War ended, the Supreme Court officially restored habeas

29. *Habeas Corpus*, THE AMERICAN CIVIL WAR, available at <http://www.etymonline.com/cw/habeas.htm>.

30. *Id.*

31. *Id.*

32. Robert Longley, *Bush and Lincoln Both Suspend Habeas Corpus*, ABOUT.COM, <http://usgovinfo.about.com/od/rightsandfreedoms/a/habeascorpus.htm>.

33. *Proclamation Suspending the Writ of Habeas Corpus*, TEACHINGAMERICANHISTORY.ORG, <http://www.teachingamericanhistory.org/library/index.asp?document=425>.

34. Habeas Corpus Act of 1863, 12 Stat. 755 (1863).

35. *Habeas Corpus*, *supra* note 29. The administration thought the Court would rule Lincoln's action unconstitutional, and "such a ruling would undermine the war effort." *Id.* Further, by "keeping the matter away from the Court, the administration could largely accomplish its policy." *Id.*

corpus, in *Ex parte Milligan*.³⁶ In this decision, all nine justices agreed that Lincoln did not have the constitutional authority to suspend habeas corpus, or to “establish a system of military justice in areas where civilian courts were open and operating.”³⁷ Interestingly, though, the Court admitted its own institutional confines in periods of crisis.³⁸ Due to this “self-conscious recognition,” some scholars believe *Milligan* “stands as a symbol of both judicial strength and judicial weakness in the face of executive national security claims.”³⁹

C. Relevant Case Law

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

In 1950, the Supreme Court addressed the issue of whether enemy aliens should have access to habeas corpus rights to challenge their convictions in *Johnson v. Eisentrager*.⁴⁰ The Court’s answer was no, in a decision authored by Justice Jackson.⁴¹ In *Johnson*, twenty-one German nationals engaged in espionage against the United States, in China.⁴² After being convicted by a United States

36. *Ex parte Milligan*, 71 U.S. 2, 3 (1866). Lincoln and Taney were both dead by this time. *Habeas Corpus*, *supra* note 16.

37. TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION 6 (Peter Berkowitz ed., Hoover Institution Press 2005); *Milligan*, 71 U.S. at 34.

38. *Milligan*, 71 U.S. at 109. The Court wrote:

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public safety is assured, this question, as well as others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.

Id.

39. TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION, *supra* note 37, at 7.

40. *Johnson v. Eisentrager*, 339 U.S. 763, 765 (1950).

41. *Id.* at 785.

42. *Id.* at 766. The prisoners were “convicted of violating laws of war, by engaging in . . . continued military activity against the United States[.] . . . Their

Military Commission in China, the prisoners were taken to Landsberg Prison in Germany to serve out their sentences.⁴³

The petitioners sought a writ of habeas corpus before a United States District Court.⁴⁴ Once the case reached the Supreme Court, the majority noted that there had been no instance in the United States (or any other country where habeas corpus existed), where the writ was issued to an enemy alien, who at no time during his or her captivity, had been within the country's territorial jurisdiction.⁴⁵ The Court stated six factors to overcome to determine whether a prisoner is entitled to habeas corpus rights, namely that he:

- (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.⁴⁶

As the prisoners "at no relevant time were within any territory over which the United States is sovereign," the Court gave further emphasis to the location element.⁴⁷ The Court also expressed deference to the Executive Branch, noting that the Executive Branch's "power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security."⁴⁸

Justice Black's dissent, joined by Justices Douglas and Burton, stressed "equal justice under law."⁴⁹ The dissent found it

hostile operations consisted principally of collecting furnishing intelligence concerning American forces and their movements to the Japanese armed forces." *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 768.

46. *Johnson*, 339 U.S. at 777. The Court found that the detainees were not entitled to habeas corpus, when looking to the above six factors. *Id.*

47. *Id.* at 778. The prisoners were beyond the territorial jurisdiction of the courts of the United States at all significant times. *Id.*

48. *Id.* at 774.

49. *Id.* at 791 (Black, J., dissenting).

counterintuitive that the majority opinion precluded the notion of even hearing a habeas petition solely because the imprisonment occurred outside the Court's jurisdiction.⁵⁰ The detainees could not expect to obtain relief from the German courts or any other branch of the German government; only United States courts could inquire as to the legality of the detainees' imprisonment.⁵¹ The dissent concluded with the notion that habeas corpus is an "instrument to protect against illegal imprisonment, [and] is written into the Constitution. . . . [O]ur courts [should] exercise it whenever any United States official illegally imprisons any person in any land we govern."⁵²

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

The first of the Guantánamo Bay detainee cases to reach the Supreme Court was *Rasul v. Bush*, in 2004.⁵³ This case involved two Australian and twelve Kuwaiti citizens captured abroad during hostilities between the United States and Taliban forces.⁵⁴ The Court extended habeas corpus rights to the non-citizen detainees.⁵⁵ Justice Stevens wrote the majority opinion that observed several key points which distinguished the case from *Eisentrager*.⁵⁶

The majority spent much time opining on the status of Guantánamo Bay, noting that while the United States does not exercise "ultimate sovereignty," it does exercise "plenary and exclusive jurisdiction" over the area.⁵⁷ This, combined with the

50. *Id.* at 792. Justice Black asked if a "prisoner's right to test [the] legality of a sentence [depends] on where the Government chooses to imprison him?" *Id.* at 795.

51. *Id.* at 797.

52. *Johnson*, 339 U.S. at 798 (Black, J., dissenting).

53. *See generally* *Rasul v. Bush*, 542 U.S. 466 (2004).

54. *Id.* at 470.

55. *Id.* at 481.

56. *Id.* at 476.

57. *Id.* at 475. Pursuant to a 1903 Lease Agreement executed between the United States and Cuba, the United States recognizes that Cuba exercises ultimate sovereignty over the leased area, while the United States enjoys "complete jurisdiction and control over and within said areas . . . [s]o long as the United States of America shall not abandon the . . . naval station of Guantamo." *Id.* at 471.

facts—that the detainees were not nationals of countries at war with the United States, had denied plotting acts of aggression against the United States, were never given access to a tribunal (or even charged and convicted), and had been imprisoned for over two years—was important because it distinguished these detainees from those in *Eisentrager*.⁵⁸ The Court noted that while *Eisentrager* categorically “excludes aliens detained in military custody outside the United States from the privilege of litigation in U.S. courts, . . . [t]he courts of the United States have traditionally been open to nonresident aliens.”⁵⁹

Justice Kennedy’s concurrence in the opinion further explained that Guantánamo Bay is in “every practical respect a United States territory.”⁶⁰ Justice Kennedy also acknowledged that while *Eisentrager* indicated that there was a “realm of political authority over military affairs where the judicial power may not enter,” there are “circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated.”⁶¹

Justice Scalia’s biting dissent scolded the majority for “contradict[ing] a half-century-old precedent on which the military undoubtedly relied.”⁶² Warning of the possible consequences, Justice Scalia contemplated that the decision would *always* give courts the authority to inquire into circumstances of confinement, and that the Executive would be “unable to know with certainty that any given prisoner-of-war camp is immune from writs of habeas corpus.”⁶³ Justice Scalia found it “breathtaking” that the Court “boldly

58. *Id.* at 476.

59. *Rasul*, 542 U.S. at 484.

60. *Id.* at 487 (Kennedy, J., concurring).

61. *Id.* Justice Kennedy recognized that *Eisentrager* was a separation-of-powers case, and that it should be applied to Guantánamo detainee cases; yet, *Eisentrager* should not preclude federal courts of all judicial review of Executive military power. *Id.*

62. *Id.* at 488 (Scalia, J., dissenting). Justice Scalia further maintained that the holding was an “irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field.” *Id.* at 489. This dissent holds many similar arguments made in Justice Scalia’s *Boumediene* dissent. See *infra* notes 168-176 and accompanying text.

63. *Rasul*, 542 U.S. at 495 n.4 (Scalia, J., dissenting).

extend[ed] the scope of [habeas] to the four corners of the earth,” and that it had overruled *Eisentrager* with no acknowledgment of such.⁶⁴

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

In *Hamdi v. Rumsfeld*, a United States citizen was captured in Afghanistan after he had allegedly taken up arms with the Taliban against the United States.⁶⁵ After being labeled an enemy combatant, Hamdi was taken to Guantánamo Bay; but, upon learning of his American citizenship, was transferred to a naval brig in South Carolina.⁶⁶

Justice O'Connor, writing for the plurality, first addressed the threshold question of whether the Executive Branch holds the authority to detain citizens as enemy combatants.⁶⁷ Justice O'Connor postured that while the Government has never given criteria for how it classifies individuals as such, that under the Authorization to Use Military Force,⁶⁸ Congress had at least authorized the detention of American citizens as enemy combatants.⁶⁹ The next query the Court addressed is the treatment of enemy combatants under due process.⁷⁰ Justice O'Connor turned to the Court's previous *Mathews v. Eldridge*⁷¹ analysis, which judiciously balanced an individual's private interests against those of the Government.⁷² With the

64. *Id.* at 495-99.

65. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

66. *Id.*

67. *Id.* at 516 (plurality opinion).

68. Pub. L. No. 107-40, 115 Stat. 224 (2001). *See also infra* notes 87-90 and accompanying text.

69. *Hamdi*, 542 U.S. at 517. Justice O'Connor added that there is “no bar to this Nation's holding one of its own citizens as an enemy combatant.” *Id.* at 519.

70. *Id.* at 524.

71. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

72. *Hamdi*, 542 U.S. at 529 (plurality opinion). Justice O'Connor shows true (and perhaps slightly naïve, or overly optimistic) confidence in the justice system when she adds that “[w]e have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.” *Id.* at 539. More discussion of this balance is revealed when Justice O'Connor wrote of the importance of striking a proper constitutional balance during this difficult

employment of this test, the Court "imposed upon itself a framework that would take into account both the liberty and the security interests at stake."⁷³

Justice Scalia's dissent, joined by Justices Thomas and Souter (in part), derisively disagreed with the plurality's analysis.⁷⁴ The dissent saw the relevant issue of the case as whether imprisonment of a citizen accused of wrongdoing lends itself to a different procedure from alien enemy combatants.⁷⁵ Justice Scalia suggested that it should, but thought the answer was to treat these citizens as traitors, subject to the criminal process.⁷⁶ He showed disdain for the plurality's "Mr. Fix-it Mentality," claiming that it "steps out of the courts' modest and limited role in a democratic society . . . [to do] what it thinks the political branches ought to do"⁷⁷

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

The Court, in *Hamdan v. Rumsfeld*, held that the military commissions thus far set up by the Executive Branch violated provisions found in both the Geneva Convention and the Uniform

period of conflict. *Id.* at 532. She added that the plurality thought it "unlikely that this basic process [of analysis] will have the dire impact on the central functions of warmaking." *Id.* at 534. However, Justice O'Connor stressed that the Court has "long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Id.* at 536.

73. TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION, *supra* note 37, at 14.

74. *Hamdi*, 542 U.S. at 558 (Scalia, J., dissenting).

75. *Id.*

76. *Id.* at 559. According to Justice Scalia, the Founding Fathers understood that "a citizen's levying war against the Government was to be punished criminally" as treason. *Id.* at 560. For Justice Scalia, Hamdi's situation was as black-and-white as granting Hamdi a habeas decree requiring his release, unless (1) criminal proceedings were promptly brought; or (2) Congress suspended habeas corpus, as qualified by the Suspension Clause in the Constitution. *Id.* at 573; U.S. CONST. art I, § 9, cl. 2.

77. *Hamdi*, 542 U.S. at 576-77 (Scalia, J., dissenting). He practically mocked the plurality's use of *Mathews v. Eldridge*, which was a withdrawal of disability benefits case. *Id.* at 575. Further, Justice Scalia called for action from Congress to ascribe conditions to suspension of habeas corpus, in the form of a Congressional enactment. *Id.* at 578.

Code of Military Justice.⁷⁸ Hamdan, a Yemeni national, had been charged for conspiracy, as he was allegedly Osama bin Laden's personal driver and bodyguard.⁷⁹ He was labeled as an enemy combatant in 2004 by a Combatant Status Review Tribunal (discussed below).⁸⁰

The majority opinion, authored by Justice Stevens, noted that while military commissions are obligatory in times of war, and "born of military necessity," these commissions must have basis in law.⁸¹ The Court felt that the type of commissions created by the Executive "risk[ed] concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution."⁸² The majority also reached the conclusion that the Detainee Treatment Act (discussed below) did not apply to the hundreds of cases pending at the time of its enactment; it would only apply to new cases.⁸³

In his concurrence, Justice Breyer added that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary."⁸⁴ Again, Justice Scalia presented a vicious

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

79. *Id.* at 566, 570.

80. *Id.* at 570.

81. *Id.* at 589-90. Justice Stevens wrote that the Uniform Code of Military Justice, the Authorization to Use Military Force, and the Detainee Treatment Act of 2005 (the latter two are discussed below) all acknowledge the President's authority to convene military commissions; yet, the Court must inquire whether the commissions are justified. *Id.* at 594-95. Critics argue that Justice Stevens's opinion is "remarkable for its lack of humility" in that it "shows little recognition of the President's unique role and capacities in foreign affairs." Douglas W. Kmiec, *The Rookie Year of the Roberts Court & A Look Ahead: The Separation of Powers: Hamdan v. Rumsfeld – the Anti-Roberts*, 34 PEPP. L. REV. 573, 575 (2007). This so-called lack of humility and perhaps lack of deference to the other two branches of the Government arguably continues with the majority's opinion in *Boumediene*. See also *infra* notes 131-156 and accompanying text.

82. *Hamdan*, 548 U.S. at 601. The Court essentially sends the matter of military commissions back to the Legislature, leaving Congress to change the laws that the Court interpreted. Congress promptly did so with the passage of the Military Commissions Act. See BENJAMIN WITTES, *LAW AND THE LONG WAR* 15 (The Penguin Press 2008); see also *infra* notes 105-108 and accompanying text.

83. See WITTES, *supra* note 82.

84. *Hamdan*, 548 U.S. at 636. Justice Breyer stressed that Congress had not issued the Executive a "blank check," as discussed in *Hamdi*. *Id.* In essence, the

dissent in which he criticized the majority for making “a mess of [the Detainee Treatment Act]” and further, that the majority did not give treatment to the consequences of the decision.⁸⁵ Justice Thomas wrote an additional dissent in which he asserted that the President’s decision to create and try detainees under military commissions should be “entitled to a heavy measure of deference.”⁸⁶

D. Authorization to Use Military Force (2001)

On September 18, 2001, a Joint Resolution of Congress was overwhelmingly passed, called the Authorization for Use of Military Force (AUMF).⁸⁷ AUMF gave 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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁸⁸

The resolution opened the door to former President Bush’s plan for military occupation of Afghanistan and to use military force against al Qaeda.⁸⁹ AUMF bolstered the American public’s response to al Qaeda by shifting the tone “decisively towards American military power.”⁹⁰

Court called for Congress to lay out legislative enactments that specifically describe military commissions that comply with not only the Constitution, but also international law. *Id.*

85. *Hamdan*, 548 U.S. at 669. Justice Scalia thought the majority was opening the door wide to a number of Guantánamo habeas corpus cases “sufficiently numerous to keep the courts busy for years to come.” *Id.*

86. *Id.* at 680 (Thomas, J., dissenting).

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

88. *Id.*

89. LOUIS FISHER, *THE CONSTITUTION AND 9/11* 292 (University Press of Kansas 2008).

90. WITTES, *supra* note 82, at 25.

E. Combatant Status Review Tribunals

In response to *Rasul* and *Hamdi*, the Bush Administration created a system of panels it dubbed as Combatant Status Review Tribunals (CSRTs).⁹¹ The CSRTs consisted of three military officers on a panel, to provide hearings for each detainee.⁹² The panels were not used to determine the detainees' innocence or guilt, but whether they were properly categorized as enemy combatants.⁹³ To make this determination, the CSRTs heard classified government evidence, in addition to directly hearing from the detainees in response to that evidence.⁹⁴

For those detainees that were deemed by the CSRTs to have been justifiably labeled as enemy combatants, the Administration formed another layer of review in the administrative review boards (ARBs).⁹⁵ The ARBs did not re-evaluate detainees' statuses; rather, they made annual assessments of whether a "particular detainee remain[ed] too dangerous to relinquish from American custody."⁹⁶ Determinations were made to either: (1) continue to hold the detainees; (2) transfer them to the custody of another country; (3) or release them.⁹⁷

F. Detainee Treatment Act of 2005

Ostensibly to comply with the rulings of *Rasul* and *Hamdi*, Congress enacted the Detainee Treatment Act (DTA) on December 30, 2005.⁹⁸ The DTA set up a framework to handle the detention of enemy combatants at Guantánamo Bay, "consistent with the procedures the government believed were required after *Hamdi*."⁹⁹ The purpose of the DTA's "jurisdiction-stripping provisions was to prevent detainees from challenging the legality and conditions of

91. *Id.* at 66.

92. FISHER, *supra* note 89, at 234. It was required that the presiding officers had nothing to do with the capture or interrogations of the detainees. *Id.*

93. WITTES, *supra* note 82, at 66.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. 28 U.S.C. § 2241(e) (2006); FISHER, *supra* note 89, at 243.

99. Solomon, *supra* note 9, at 5172.

their detention.”¹⁰⁰ Section 1005(e) of the DTA stated 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.”¹⁰¹

The DTA contained what became known as the McCain Anti-Torture Amendment, which was “intended to prevent abusive interrogations by both the military and the CIA in its detention facilities, which were then [in 2005] still nominally secret.”¹⁰² Senator McCain was himself the subject of torture in North Vietnam, and therefore took great effort to bar the “cruel, inhuman, or degrading” treatment of detainees.¹⁰³ Prohibited actions added to the DTA included forcing detainees to be naked or perform sexual acts, and waterboarding [simulated drowning].¹⁰⁴

G. Military Commissions Act of 2006

Congress’s response to *Hamdan*, which struck down provisions of the DTA, resulted in the enactment of the Military Commissions Act (MCA) in October, 2006.¹⁰⁵ The MCA provided congressional authorization for military commissions, and expanded and amended the DTA provisions regarding appellate review and habeas corpus jurisdiction.¹⁰⁶ Section 948 of the MCA distinguished between unlawful versus lawful enemy combatants.¹⁰⁷ Explicitly clear in

100. Sholar, *supra* note 19, at 664.

101. 28 U.S.C. § 2241(e) (2006).

102. WITTES, *supra* note 82, at 68.

103. FISHER, *supra* note 89, at 235-36.

104. *Id.* at 214.

105. Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Convention*, 101 AM. J. INT’L L. 322, 327 (2007).

106. *See generally* Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

107. Pub. L. No. 109-366, 120 Stat. at 2601. An unlawful enemy combatant was defined by the act as:

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (ii) a person who, before, on, or

section 7(a) was Congress's intent to strip courts of jurisdiction to hear habeas corpus petitions, and section 7(b) provided that this stripping "shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date . . . which relate to any aspect of the detention, transfer, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."¹⁰⁸

III. FACTS

In 2002, Lakhdar Boumediene (Boumediene) and five other Algerian natives, all having gained Bosnian citizenship, were seized by United States agents on suspicion of a plot to attack the United States Embassy in Sarajevo.¹⁰⁹ The men were transferred to Guantánamo Bay and endured six years of imprisonment without being charged or tried.¹¹⁰ The men were labeled as enemy combatants under the MCA.¹¹¹

after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal establish under the authority of the President or the Secretary of Defense.

Id.

A lawful enemy combatant was defined as:

(A) a member of the regular forces of a State party engaged in hostilities against the United States; (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distances, carry their arms openly, and abide by the law of war; or (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but recognized by the United States.

Id.

108. *Id.* at 2636.

109. Shapiro, *supra* note 10.

110. *Id.*

111. *See Boumediene*, 128 S. Ct. at 2240.

The case first reached the D.C. District Court, under Judge Richard J. Leon.¹¹² Boumediene and the other men filed habeas corpus petitions, and the Government moved to dismiss the claims, asserting there was no legal theory by which the court could issue a writ of habeas corpus.¹¹³ The court recognized that this case presented a novel issue of law: whether there was "any viable-legal theory under which a federal court could issue a writ of habeas corpus challenging the legality of the detention of non-resident aliens captured abroad and detained outside the territorial sovereignty of the United States, pursuant to lawful military orders, during a Congressionally authorized conflict."¹¹⁴

The court's conclusion for dismissing the case centered on the AUMF, noting that the resolution, in effect, gave the President "the power to capture and detain those who the military determined were either responsible for the 9/11 attacks or posed a threat of future terrorist attacks. Indeed, the President's war powers could not be reasonably interpreted otherwise."¹¹⁵ Because the AUMF indicates no geographic parameters, the fact that Boumediene and the other petitioners were arrested in Bosnia held no significance for the court.¹¹⁶ The court also found that non-resident aliens captured and detained outside the United States have no cognizable rights.¹¹⁷ Finally, the court could not find an international, or United States law or treaty, under which the court could issue a writ of habeas corpus.¹¹⁸ For the foregoing reasons, the court held that there was no viable legal theory upon which the court could issue a writ of habeas corpus, and granted the Government's motion to dismiss.¹¹⁹

112. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005) (*vacated*, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008)).

113. *Id.* at 314. The Government asserted that its motion to dismiss should be granted on several bases: "(1) non-resident aliens detained under these circumstances have no rights under the Constitution; (2) no existing federal law renders their custody unlawful; (3) no legally binding treaty is applicable; and (4) international law is not binding under these circumstances." *Id.*

114. *Id.*

115. *Id.* at 319.

116. *Khalid*, 355 F. Supp. 2d at 320.

117. *Id.*

118. *Id.* at 324.

119. *Id.* at 327.

The case was brought back before the D.C. District Court several weeks later, before Judge Joyce Hens Green, in combination with other Guantánamo detainee cases.¹²⁰ Again, the Government filed a motion to dismiss that the court granted in part and dismissed in part.¹²¹ The court found that the petitioners did have a Fifth Amendment right to due process and that the Government's holding them indefinitely as enemy combatants violated the prisoners' due process of law.¹²² Further, the court found that the Geneva Convention applied to the Taliban detainees, but not the al Qaeda detainees.¹²³ Judge Green expressed that the term enemy combatant was a vague term that needed further explication.¹²⁴

In 2007, *Boumediene* reached the federal Court of Appeals for the D.C. Circuit.¹²⁵ In light of *Rasul*, *Hamdi*, and *Hamdan*,¹²⁶ the majority ruled that the MCA, which deprived courts of jurisdiction to hear habeas corpus claims of enemy combatants at Guantánamo, did not violate the Constitution's Suspension Clause.¹²⁷ The dissent noted that the implementation of the CSRTs was not an adequate substitution for habeas corpus, and that the detainees should be entitled to a hearing on a habeas petition.¹²⁸ The detainees appealed and the Supreme Court granted certiorari.¹²⁹ Thus, *Boumediene* was brought to its apex, and was decided by the Supreme Court on June 12, 2008.¹³⁰

120. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) (*vacated*, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008)).

121. *Id.*

122. *Id.* at 445.

123. *Id.*

124. *Id.* at 475.

125. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) (*rev'd*, 128 S. Ct. 2228 (2008)).

126. *See supra* notes 53-86 and accompanying text.

127. *Boumediene*, 476 F.3d at 981.

128. *Id.* at 994-1011.

129. *Boumediene*, 128 S. Ct. at 2242.

130. *See id.*

IV. ANALYSIS OF THE COURT'S OPINION

A. Justice Kennedy's Majority Opinion

Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer, presents the majority opinion of the Court.¹³¹ Justice Kennedy begins the opinion by presenting and answering the key issue of whether petitioners have a constitutional right to habeas corpus, not to be withdrawn, unless the action conformed with the Suspension Clause.¹³² The majority holds that aliens at Guantánamo do indeed have the privilege of habeas corpus.¹³³ Further, the procedures for review set forth by the DTA are an inadequate substitute for habeas corpus; therefore, § 7 of the MCA operates as an unconstitutional suspension of the writ.¹³⁴

Part one of the opinion cites AUMF, *Hamdi*, *Rasul*, and *Hamdan*; Justice Kennedy discusses the relevant elements of each, with regard to Boumediene and Guantánamo Bay detainees.¹³⁵ Part two opens with the analysis of the threshold question of whether the MCA § 7

131. *Id.* at 2240.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Boumediene*, 128 S. Ct. at 2240-42. Justice Kennedy recognizes that AUMF authorizes the President "to use all necessary and appropriate force against those nations, organizations, and persons . . ." believed to have been involved with the September 11, 2001 attacks on the United States. *See supra* note 87 and accompanying text.

In *Hamdi*, a plurality of the Court recognized that detaining individuals had been authorized by the AUMF; yet, there needed to be a system in place to accurately label individuals as enemy combatants. *Hamdi*, 542 U.S. at 507 (plurality opinion). Thus, the CSRTs were created. *Boumediene*, 128 S. Ct. at 2241. The *Boumediene* petitioners all denied membership in al Qaeda, and yet had all been labeled enemy combatants before separate CSRTs. *Id.* Each sought a writ of habeas corpus before a D.C. District Court judge. *Id.*

The Court extended statutory habeas corpus rights in *Rasul*; the constitutional issue presented in *Boumediene* was not reached in *Rasul*. *Id.* After *Rasul*, Congress passed the DTA, which the Court held did not apply to cases pending at the time of its enactment, in *Hamdan*. 28 U.S.C. § 2241(e) (2006). Justice Kennedy notes that the *Hamdan* concurrence opened the door for Congress to authorize military commissions; however, nothing in *Hamdan* "can be construed as an invitation for Congress to suspend the writ [of habeas corpus.]" *Boumediene*, 128 S. Ct. at 2242.

“denies the federal courts jurisdiction to hear habeas corpus actions pending at the time of its enactment.”¹³⁶ The Court acknowledges that the legislative history prompted Congress to pass the MCA and that members of Congress, “determined the amended statute to be a lawful one.”¹³⁷ The Court’s duty, however, is to proceed on its own independent judgment; and in that judgment, the majority finds that the MCA deprived courts’ jurisdiction to entertain habeas corpus petitions.¹³⁸

Part three of the majority opinion discusses whether petitioners are barred from seeking habeas corpus either because there are enemy combatants, or because they are located at Guantánamo Bay; this section is split into two subparts.¹³⁹ First, Justice Kennedy outlines the history of the writ of habeas corpus, from its historical roots in England to American jurisprudence, focusing on the writ to aliens and territories outside the United States.¹⁴⁰ He then addresses

136. *Boumediene*, 128 S. Ct. at 2242. Justice Kennedy notes that the majority holds that the statute does deny such jurisdiction, “so that, if that statute is valid, petitioners’ cases must be dismissed.” *Id.*

137. *Id.* at 2244.

138. *Id.*

139. *Id.*

140. *Id.* at 2244-51. Justice Kennedy stresses that the “Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.” *Id.* at 2244. He reaches even further back than the framing of the Constitution. He begins his historical progression with the declaration of the Magna Carta “that no man would be imprisoned contrary to the law of the land.” *Id.* Even the King was subject to the law, as the writ was viewed as a restraint of the King’s power; however, the writ “proved to be an imperfect check.” *Id.* The Habeas Corpus Act “was the model upon which the habeas statutes of the [thirteen] American Colonies were based.” *Id.*

The Framers of the Constitution were weary and distrustful of government, which was the driving force behind the separation of powers doctrine. This doctrine provides “Government accountab[ility] but also [secures] individual liberty.” *Id.* According to Justice Kennedy, this doctrine, as well as the substantive guarantees of the Fifth and Fourteenth Amendments “protects persons as well as citizens, [thus,] foreign nationals who have the privilege of litigating in our courts can seek to enforce” the separation of powers principles. *Id.* When the Suspension Clause, *supra* note 11, was adopted, it was understood that it “not only protects against arbitrary suspensions of the writ but also guarantees an affirmative right to judicial inquiry into the causes of detention.” *Boumediene*, 128 S. Ct. at 2246.

the question of the extension of the entitlement of habeas corpus, focusing on territories such as Guantánamo Bay.¹⁴¹ The Government argued that "there is no evidence that a court sitting in England granted habeas relief to an enemy alien detained abroad;" petitioners argued to the contrary, that "there is no evidence that a court refused to do so for lack of jurisdiction."¹⁴² Justice Kennedy notes that there are "reasons to doubt both assumptions."¹⁴³

Section four of the majority opinion begins with a discussion of the status of Cuba as it relates to the United States and whether detainees held there are afforded any rights at all.¹⁴⁴ Justice Kennedy immediately recognizes that "Guantanamo Bay is not formally part of the United States," yet through a long historical recount and

Justice Kennedy stresses that the Suspension Clause is "designed to protect against these cyclical abuses" and protects detainees' rights "by a means consistent with the essential design of the Constitution. It ensures that, except during period of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty." *Id.* at 2247.

141. *Boumediene*, 128 S. Ct. at 2248. The majority briefly looks to common law, where habeas corpus applied only to British subjects, and notes that while the geographic scope of the common law writ is informative, it is not dispositive. Justice Kennedy notes that the common law writ ran to territories outside England, like the Channel Islands and India. *Id.* at 2249. He distinguishes these jurisdictions from Guantánamo by saying that while the former were "not in theory part of the realm of England, were nonetheless under the Crown's control." *Id.* The United States, though, does *not* maintain formal sovereignty over Guantánamo. The Government urged the Court to view Guantánamo like Scotland at common law, where English courts lacked the power to issue the writ. Justice Kennedy dismisses this argument by noting that "Scotland was no longer a 'foreign' country vis-à-vis England-at least not in the sense in which Cuba is a foreign country vis-à-vis the United States." *Id.* at 2250. He continues by explaining that British law did not generally apply in Scotland; but, has "no reason to believe an order from a federal court would be disobeyed at Guantánamo." *Id.* at 2251.

Justice Kennedy then remarks, in comments reminiscent of Justice Black's *Eisenrager* dissent (see *supra* note 51 and accompanying text), that "[n]o Cuban court has jurisdiction to hear these petitioners' claims, and no law other than the laws of the United States applies at the naval station. . . . This is reason enough for us to discount the relevance of the Government's analogy" of Guantánamo to Scotland. *Boumediene*, 128 S. Ct. at 2251.

142. *Boumediene*, 128 S. Ct. at 2251.

143. *Id.* As a result, Justice Kennedy declined to infer too much, one way or the other. *Id.*

144. *Id.*

analysis, qualifies it as a *de jure* sovereignty of the United States.¹⁴⁵ He notes further that “[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.”¹⁴⁶ Concluding this section, the majority holds that the Suspension Clause has full effect at Guantánamo Bay, and as such, detainees are entitled to habeas corpus to challenge the legality of their detentions.¹⁴⁷

Section five of the majority opinion addresses the question of whether Congress has provided an adequate substitute for habeas

145. *Id.* Justice Kennedy references the lease agreement between the United States and Cuba (*see supra* note 57 and accompanying text), in which Cuba retains “ultimate sovereignty” while the United States exercises “complete jurisdiction and control.” *Boumediene*, 128 S. Ct. at 2252. Justice Kennedy rebuts the Government’s assertion that the United States does not enjoy ultimate sovereignty, and concludes that this does not end the analysis. *Id.* Again, the Court looks to historical American exploration, noting that when “Congress exercised its power to create new territories, it guaranteed constitutional protections to the inhabitants by statute.” *Id.* at 2253. The majority looks to noncontiguous United States territories such as Puerto Rico, Guam, and the Philippines and opines that “[i]t may well be over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance.” *Id.* at 2255.

The majority then distinguishes *Eisentrager* in a rather novel approach. Justice Kennedy hones in on the fact that the United States lacked *de jure* sovereignty and plenary control over Landsberg Prison, where the *Eisentrager* detainees were held. *See supra* notes 43-47 and accompanying text. Justice Kennedy maintains that:

[E]ven if we assume the *Eisentrager* Court considered the United States’ lack of formal legal sovereignty over Landsberg Prison as the decisive factor in that case, its holding is not inconsistent with a functional approach to questions of extraterritoriality. The formal legal status of a given territory affects, at least to some extent, the political branches’ control over that territory. *De jure* sovereignty is a factor that bears upon which constitutional guarantees apply there.

Boumediene, 128 S. Ct. at 2258. With these few sentences, the majority basically overrules *Eisentrager* without explicitly saying so. Essentially, Justice Kennedy calls the *Eisentrager* opinion flexible as to a functional test to each case. It is doubtful that the majority justices in *Eisentrager* would be as quick to accept this functional test as it seems that opinion was definitive as to the status of alien detainees. Justice Kennedy asserts that “[n]othing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus.” *Id.*

146. *Boumediene*, 128 S. Ct. at 2261.

147. *Id.* at 2262.

corpus procedures.¹⁴⁸ The Court discusses the distinctions between a previous challenge to habeas corpus, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),¹⁴⁹ and the MCA.¹⁵⁰ Justice Kennedy also explains deficiencies in the DTA as a habeas corpus substitute and concludes that these insufficiencies are too great for minor tinkering.¹⁵¹ Thus, the majority holds, § 7 of the MCA "effects an unconstitutional [effect] of the writ."¹⁵²

Section six concludes the majority opinion and discusses the timing of habeas corpus review.¹⁵³ The majority notes that in some instances of the detainees at Guantánamo, six years have lapsed with no judicial oversight or an adequate habeas corpus substitute.¹⁵⁴ Justice Kennedy maintains that the "costs of delay can no longer be

148. *Id.*

149. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 28, and 42 U.S.C.).

150. *Boumediene*, 128 S. Ct. at 2263-66. Justice Kennedy explains the restrictions of AEDPA on habeas review were not a complete suspension on habeas corpus, as the Court held in *Felker v. Turpin*, 518 U.S. 651, 662-64 (1996), but simply procedural limitations, such as petitioner's ability to bring new and repetitive claims in multiple habeas corpus actions. *Boumediene*, 128 S. Ct. at 2264. The main distinction between the MCA and AEDPA, the majority continues, is that AEDPA applies in practice to those prisoners serving a sentence after having been tried in open court and whose sentences have been upheld on direct appeal, whereas the MCA eliminates habeas review to those detainees whose guilt has not yet been legally determined. *Id.* at 2266.

151. *Boumediene*, 128 S. Ct. at 2269-74. Justice Kennedy avoids making a judgment as to whether the CSRT procedures satisfy due process but does argue that "even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact." *Id.* at 2271. As for problems the majority finds with the DTA, Justice Kennedy remarks that the DTA "does not explicitly empower the Court of Appeals to order the applicant in a DTA review proceeding released should the court find that the standards and procedures used at his CSRT hearing were insufficient to justify detention" and that this is "troubling." *Id.* Further, the detainee would not have the opportunity to present evidence discovered after conclusion of the CSRT proceeding. *Id.* at 2272. Justice Kennedy is careful to point out that "[w]e do not imply DTA review would be constitutionally sufficient replacement for habeas corpus but for these limitations on the detainee's ability to present exculpatory evidence." *Id.* at 2274. This presents a clear message to Congress that the Court wants to scrap the DTA and start anew with different legislation.

152. *Id.* at 2274.

153. *Id.*

154. *Id.* at 2275.

borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing.”¹⁵⁵ The majority ends with a perhaps hopeful statement as to our history and future; Justice Kennedy writes “[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.”¹⁵⁶

B. Justice Souter’s Concurring Opinion

Justice Souter, joined by Justices Ginsburg and Breyer, submits a concurring opinion. The concurrence is quite short and emphasizes two key points.¹⁵⁷ First, Justice Souter purports that this case strongly asserts that habeas corpus reaches foreign nationals at Guantánamo Bay in not a statutory jurisdiction, but a jurisdiction that is constitutionally based.¹⁵⁸ Secondly, Justice Souter points out the considerable length of the detainees’ imprisonments, some of which measured over six years.¹⁵⁹ Ending his concurrence, Justice Souter remarks boldly, as a response to the dissent’s accusations, that “today’s decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation.”¹⁶⁰

155. *Id.*

156. *Id.* at 2277.

157. *Boumediene*, 128 S. Ct. at 2277-78 (Souter, J., concurring).

158. *Id.* at 2278. *Rasul* extended statutory habeas jurisdiction to Guantánamo Bay, and this jurisdiction was subsequently eliminated by legislation. *Boumediene* establishes that constitutional habeas jurisdiction does in fact exist for “aliens imprisoned by the military outside an area of *de jure* national sovereignty.” *Id.* Justice Souter notes that whether one agrees or disagrees with the *Boumediene* decision, it is certainly not “out of the blue.” *Id.*

159. *Id.* Justice Souter notes that the dissent tries to assert that *Boumediene* is symptomatic of “judicial haste,” yet he rebuts this argument by emphasizing the several years that petitioners have been incarcerated at Guantánamo. *Id.* at 2278 (Souter, J., concurring). *Rasul* “put everyone on notice that habeas . . . was available to Guantanamo prisoners,” and it still took years to achieve this decision. *Id.*

160. *Id.* at 2279 (Souter, J., concurring).

C. Chief Justice Roberts's Dissenting Opinion

Chief Justice Roberts presents a fairly reasonable dissenting opinion which Justices Scalia, Thomas, and Alito join.¹⁶¹ His main argument lies in asserting that the DTA and CSRTs adequately protect any constitutional rights to which aliens captured abroad are entitled, whether this relief is labeled as habeas corpus or something else.¹⁶² The protections afforded to these detainees are of a military, rather than judicial variety.¹⁶³ Chief Justice Roberts believes the majority's findings are "particularly egregious" because the majority strikes down the DTA as an inadequate substitute of habeas corpus; yet, "fails to show what rights the detainees have that cannot be vindicated by the DTA system."¹⁶⁴ He points out an inherent "Catch-22" in what he views as the majority's flawed reasoning; as the Chief Justice interprets the majority opinion, "any interpretation of the [DTA] that would make it an adequate substitute for habeas must be rejected, because Congress could not possibly have intended to enact an adequate substitute for habeas."¹⁶⁵ Chief Justice Roberts accuses the majority for resting its decision on "abstract and hypothetical concerns."¹⁶⁶ Ending his dissent, the Chief Justice forebodingly asks:

So who has won? Not the detainees. The Court's analysis leaves them with only the prospect of future

161. *Id.* Chief Justice Roberts finds the majority's approach to the case "misguided . . . [and] also fruitless." *Id.* at 2280 (Roberts, C.J., dissenting).

162. *Id.* at 2281.

163. *Boumediene*, 128 S. Ct. at 2281. Not only did the DTA provide an opportunity for the detainees to be heard in a CSRT panel, but also an opportunity for review by an Article III judge in the D.C. Circuit. Chief Justice Roberts opines that the Court's decision will only prolong the detainees' winding road through the legal process, as it "add[s] additional layers of quite possibly redundant review." *Id.* at 2282.

164. *Id.* at 2283. The Chief Justice added that:

Declaring that petitioners have a right to habeas in no way excuses the Court from explaining why the DTA does not protect whatever due process or statutory rights petitioners may have. Because if the DTA provides a mean for vindicating petitioners' rights, it is necessarily an adequate substitution for habeas corpus.

Id. at 2286-87.

165. *Id.* at 2292.

166. *Id.* at 2293 (Roberts, C.J., dissenting).

litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases. . . . Not the Great Writ, who majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law. . . . And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges.¹⁶⁷

D. Justice Scalia's Dissenting Opinion

Justice Scalia wrote a scathing dissent joined by Justices Thomas, Alito, and Chief Justice Roberts.¹⁶⁸ The entire dissent is emotionally charged and filled with harsh criticisms of the majority, as he speaks of "the disastrous consequences of what the Court has done today."¹⁶⁹ His essential argument is that habeas corpus does not extend—and never has been extended—to aliens abroad; therefore, the Suspension Clause is not applicable and "the Court's intervention in this military matter is entirely *ultra vires*."¹⁷⁰

Justice Scalia declares that "America is at war with radical Islamists."¹⁷¹ He also suggests that the Court's decision "will almost certainly cause more Americans to be killed."¹⁷² Justice Scalia calls

167. *Id.* Most of Chief Justice Roberts' dissent remains fairly even-tempered, until this last paragraph. These final words leak with emotion of worry and warning. On the whole, the Chief Justice's dissent presents a reasonable argument in distinguishing military from judicial channels for detainees' review. As he notes several times, whether it is titled habeas corpus or something else, the DTA adequately satisfied, and perhaps went far beyond, the most generous procedural protections that have ever been afforded to any alleged enemy detainees in the entirety of United States history. *See id.* at 2281, 2293.

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

169. *Boumediene*, 128 S. Ct. at 2294.

170. *Id.*

171. *Id.*

172. *Id.* He postures that the President and his legal counsel relied on "settled precedent" of *Eisentrager* when the administration established Guantánamo Bay to house alien prisoners. *Id.* He continues on that the decision "accomplishes little"

for “great deference” to the President and Congress; he asks “[w]hat competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever.”¹⁷³ According to Justice Scalia, “manipulation is what is afoot here.”¹⁷⁴ He maintains that there is no support for the Court’s determination that “constitutional rights extend to aliens outside U.S. sovereign territory,” and that the Court simply avoids discussing why *Eisentrager* should be overturned.¹⁷⁵ Justice Scalia ends his dissent with the ominous statement that “[t]he Nation will live to regret what the Court has done today.”¹⁷⁶

as even those who had been concluded *not* as enemy combatants had been released only to continue monstrous crimes. *Id.* at 2294-95.

173. *Id.* at 2296 (Scalia, J., dissenting). Justice Scalia seems outraged that the Court would take upon itself the power of this decision, and determine “how to handle enemy prisoners in this war [when it is] the branch that knows the least about [sic] national security concerns.” *Id.*

174. *Id.* at 2298. Justice Scalia believes that the majority opinion distorts the nature of the separation of powers doctrine inherently found in the Constitution. *Id.*

175. *Boumediene*, 128 S. Ct. at 2302. Justice Scalia adds that “[i]t is a sad day for the rule of law when such an important constitutional precedent is discarded without an *apologia*, much less an apology.” *Id.* He seems simply disgusted that at the heart of the *Boumediene* decision was “an inflated notion of judicial supremacy.” *Id.* In continuing his rant on the majority, Justice Scalia proclaims that:

Today the Court warps our Constitution in a way that goes beyond the narrow issue of the reach of the Suspension Clause, invoking judicially brain-stormed separation-of-powers principles to establish . . . habeas corpus. . . . It blatantly misdescribes important precedents. . . . And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

Id. at 2307.

176. *Id.*

V. IMPACT OF THE COURT'S DECISION

A. Legal Impact

1. Enemy Combatant Detention Review Act of 2008

In the wake of *Boumediene*, several Congressmen were quick to act in creating legislation that reflected the decision. The Enemy Combatant Detention Review Act of 2008 was introduced by Senator Lindsey Graham on July 31, 2008, to the Senate Judiciary Committee.¹⁷⁷ The Act was “designed to comply with and complement the edicts of the [Supreme] Court.”¹⁷⁸

The biggest impact of the bill, upon its passage, would be the streamlining of all Guantánamo Bay habeas petitions to the D.C. District Court.¹⁷⁹ The Government would have the burden of proof in validating the individual's detention.¹⁸⁰ If ordered to release a detainee from military custody, the Government would be prohibited from releasing the individual into the United States.¹⁸¹ Further, the prisoners would be transferred into the custody of the Department of Homeland Security, while the State Department secured an appropriate location for release.¹⁸² Ultimately, the bill did not make it out of the Judiciary Committee and therefore was not passed by the 110th Congress.¹⁸³

177. *Enemy Combatant Detention Review Act of 2008*, OPEN CONGRESS, available at <http://www.opencongress.org/bill/110-s3401/show>. The bill was co-sponsored by Senator Joe Lieberman, an Independent from Connecticut. *Id.*

178. *Enemy Combatant Detention Review Act*, JOE LIEBERMAN, available at <http://lieberman.senate.gov/documents/ecdra.pdf>. Graham and Lieberman's intent also wanted to provide Congressional input on how to handle habeas corpus petitions of Guantánamo detainees. *Id.*

179. *Id.* The D.C. District Court would be the exclusive venue to consider the petitions. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Enemy Combatant Detention Review Act of 2008*, *supra* note 177.

2. What *Boumediene* Means for Detainees, including Lakhdar Boumediene

Several recent decisions have been made concerning Guantánamo detainees. In October 2008, Judge Ricardo M. Urbina (of the United States District Court in D.C.) ordered the release of seventeen men.¹⁸⁴ The men were Uighur Muslims, a minority group found in western China.¹⁸⁵ The men had been held at Guantánamo for nearly seven years.¹⁸⁶ Judge Urbina proclaimed that the men were not a threat and rejected the Bush Administration's claim that he lacked the power to set the men free into the United States.¹⁸⁷ The Government did concede that it was no longer attempting to prove that the Uighurs were enemy combatants, but did say that the men admitted to receiving weapons training by the Taliban in Afghanistan around September 11, 2001.¹⁸⁸ The Government vehemently argued against the release of the Uighurs into the United States, while defense counsel expressed concern at the men being taken into custody if they were released into the United States.¹⁸⁹ To this, Judge Urbina replied, "I do not expect these Uighurs will be molested by any member of the United States government. I'm a federal judge, and I've issued an order."¹⁹⁰

184. William Glaberson, *Judge Orders 17 Detainees at Guantánamo Freed*, N.Y. TIMES, Oct. 7, 2008, available at <http://www.nytimes.com/2008/10/08/washington/08detain.html>.

185. *Id.*

186. *Anger over Guantanamo Bay Ruling*, BBC NEWS, Oct. 7, 2008, available at <http://news.bbc.co.uk/2/hi/americas/7658045.stm>.

187. Glaberson, *supra* note 184. Judge Urbina added, "I think the moment has arrived for the court to shine the light of constitutionality on the reasons for detention." *Id.*

188. *Id.*

189. *Id.*

190. *Id.* Currently, four of the Uighur former detainees are in Bermuda, with the intent that they will gain Bermudian citizenship. The four express no interest in returning to China, their home country. Erik Eckholm, *Out of Guantánamo, Uighurs Bask in Bermuda*, N.Y. TIMES, June 14, 2009, available at <http://www.nytimes.com/2009/06/15/world/americas/15uighur.html>. The country of Palau has agreed to temporarily resettle the remaining Uighur detainees as a humanitarian gesture. Mark Landler, *Palau to Take Chinese Guantánamo Detainees*, N.Y. TIMES, June 9, 2009, available at <http://www.nytimes.com/2009/06/10/world/10palau.html>.

On November 20, 2008, Judge Leon (of the D.C. District Court) ordered the release of Lakhdar Boumediene and four other men.¹⁹¹ Judge Leon held that the central claim against the men, a “classified document from an unnamed source,” was not credible enough to keep the men in custody.¹⁹² Further, Judge Leon urged the Government not to appeal.¹⁹³ As a Bush appointee, Judge Leon was expected to be sympathetic to the Government’s case, so the decision was slightly surprising.¹⁹⁴ Boumediene and the others had been in custody for seven years.¹⁹⁵ The other man involved in the Boumediene case, Bensayah Belkacem, was found to be lawfully held, as there had been some evidence that linked him to a “senior al-Qaeda facilitator.”¹⁹⁶

As of December 15, 2008, the Bush Administration was preparing to send three of the illegally detained men back to Bosnia and Herzegovina, as ordered by Judge Leon.¹⁹⁷ The transfer may have been a sign that the Bush Administration was willing to accept defeat in the first of these habeas corpus petition cases, although two

As of October 20, 2009, the Supreme Court decided to hear the Uighurs’ case during its next term, and decide on the issue of whether federal courts are allowed to order prisoners held at Guantánamo released into the United States. Adam Liptak, *Justices to Decide on U.S. Release of Detainees*, N.Y. TIMES, Oct. 20, 2009, available at <http://www.nytimes.com/2009/10/21/us/21scotus.html>. The case concerns thirteen Uighurs who continue to be held although it has been ruled that they no longer pose a threat to the United States. *Id.* The case will be decided, despite the Justice Department’s assertion that the men are “free to leave Guantánamo Bay to go to any country that is willing to accept them, and in the meantime, they are housed in facilities separate from those for enemy combatants under the least restrictive conditions practicable.” *Id.*

191. William Glaberson, *Judge Declares Five Detainees Held Illegally*, N.Y. TIMES, Nov. 21, 2008, available at <http://www.nytimes.com/2008/11/21/us/21guantanamo.html>.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. Glaberson, *supra* note 191.

197. William Glaberson, *U.S. is Set to Release 3 Detainees from Base*, N.Y. TIMES, Dec. 15, 2008, available at <http://www.nytimes.com/2008/12/16/washington/16gitmo.html>.

men will remain at Guantánamo.¹⁹⁸ One of the two men not transferred was Boumediene himself, as his Bosnian citizenship was stripped at the time of his detainment, due to questions about how it was obtained.¹⁹⁹ Nevertheless, as of May 2009, Boumediene was released from Guantánamo Bay to France.²⁰⁰

3. Unanswered Questions

The Court left several issues unresolved after *Boumediene*, including whether habeas corpus rights extend to alien detainees at locations other than Guantánamo. The Court did not draw a bright line as to when detainees are actually being justifiably held. Further, the Court gave no indication as to what conditions the prisoners still being held should experience.²⁰¹ The Court has now shown, although marginally, its intention of allowing detainees habeas corpus rights in these tumultuous times of war and uncertainty; yet, *Boumediene* has created many new legal queries related to Guantánamo and its prisoners, as well as prisoners held at other locations.

B. Broad Impact

1. Presidential Election 2008, and the Makeup of the Supreme Court

Constitutional scholars argue whether the *Boumediene* decision signals a turn in the Court toward liberalism. Although the judiciary was designed to function without the influence of partisan politics, political undertones are evident when looking at the makeup of the

198. *Id.* The three men being transferred are Mohamed Nechle, Mustafa Ait Idir and Hadj Boudella. *Id.*

199. *Id.*

200. So far, Boumediene is the only Guantánamo detainee that French President Nicolas Sarkozy has agreed to accept. Steven Erlanger, *Ex-Detainee Describes His 7 Years at Guantánamo*, N.Y. TIMES, May 26, 2009, available at <http://www.nytimes.com/2009/05/27/world/europe/27paris.html>.

201. Tina Molly Lang, *White House Loses Boumediene Case: Supreme Court Sides Against Bush, Protects Habeas Corpus*, ASSOCIATED CONTENT, June 12, 2008, available at http://www.associatedcontent.com/article/818683/white_house_loses_boumediene_case_supreme.html.

current Supreme Court.²⁰² Many legal scholars postulate that there are four conservatives on the bench, four liberals, and one “swing vote” in Justice Kennedy.²⁰³ The conservative lineup consists of Justices Thomas, Scalia, Alito, and Chief Justice Roberts.²⁰⁴ The liberal wing includes Justices Stevens, Breyer, Souter, and Ginsburg.²⁰⁵ Justice Kennedy’s swing title is not simply an erroneous label; in the 2007 term, he joined the majority in *every* 5-4 decision.²⁰⁶ In contrast to the 2007 term’s twenty-four 5-4 decisions, the 2008 term held fewer; only eleven cases were decided by 5-4 majorities.²⁰⁷ Kennedy himself dislikes the term “swing justice,” as he believes it “implies vacillation.”²⁰⁸ He is, however, “at the fulcrum of most, if not all, close decisions.”²⁰⁹ *Boumediene* illustrates

202. See *High Court not Political, Justices Say*, ABOUT.COM, Dec. 12, 2000, available at <http://usgovinfo.about.com/library/weekly/aa121300a.htm>. When asked how much partisan politics factored in when deciding the *Bush v. Gore* decision, Justice Thomas replied, “Zero.” The 5-4 decision was hotly debated, and led to accusations by many that partisan politics affected the ruling. *Bush* split down ideological lines; the four dissenters were Justices Stevens, Breyer, Souter, and Ginsburg. *Id.*; *Bush v. Gore*, 531 U.S. 98 (2000).

203. See, e.g., Dennis Lythgoe, *Supreme Court More Political Than It Lets On, Lawyer-Writer Says*, DESERET NEWS, Oct. 14, 2007, available at <http://www.deseretnews.com/article/1,5143,695218152,00.html>. Jeffrey Toobin, Harvard-trained legal analyst, spent a year researching his book on the current justices that make up the Supreme Court, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT*. Toobin notes that Justice Kennedy “yields enormous power.” *Id.*

204. *Id.*

205. *Id.*

206. Marcia Coyle, *In Review of High Court Term, Justice Kennedy Still the Man in the Middle*, THE NATIONAL LAW JOURNAL, Aug. 8, 2008, <http://www.law.com/jsp/article.jsp?id=1202423612323>.

207. *Id.* There was also one 5-3 decision. Kennedy was in the majority of eight of the twelve 5-4 (or 5-3) decisions in the 2008 term. The number of cases in both the 2007 and 2008 terms remained equal, at sixty-seven in each term. *Id.*

208. Mark Sherman, *Justice Anthony Kennedy Has Cast Deciding Votes in High Court's 6 5-4 Decisions This Term*, DEMOCRATICUNDERGROUND.COM, Apr. 7, 2007, http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=132x3204761.

209. *Supreme Court Ends Term with String of Controversial Decisions*, FOXNEWS.COM, June 28, 2008, <http://www.foxnews.com/story/0,2933,373265,00.html>.

the divisive nature of the current Supreme Court. The decision is the “poster child for how delicately the Court is now balanced.”²¹⁰

On November 4, 2008, Barack Obama was elected the forty-fourth president of the United States.²¹¹ The election marked the end of a fierce campaign battle between President Obama and the Republican nominee, Arizona Senator John McCain.²¹² Voter turnout was high in an election with many crucial issues at stake, including taxes, health care, abortion, gay marriage, the economy, and the war on terror.²¹³ For some voters, the candidates’ possible appointments to the Supreme Court played a part in deciding for whom to vote.

During their respective campaigns, both Obama and McCain indicated the direction each would bring to the Supreme Court, in the potential justices they would appoint. Likewise, each had opinions on *Boumediene*, which revealed another indicator of what kind of justices each would appoint.²¹⁴ Senator McCain seemed very troubled by *Boumediene*, while then-Senator Obama praised the decision.²¹⁵ Both formerly advocated closing Guantánamo Bay, but expressed opposing viewpoints on *Boumediene*.²¹⁶ McCain remarked

210. Marjorie Cohn, *Supreme Court Checks and Balances in Boumediene*, USLAW.COM, June 16, 2008, http://www.uslaw.com/library/Human_Rights_Law/Supreme_Court_Checks_Balances_Boumediene.php?item=171794.

211. See, e.g., Alex Johnson, *Barack Obama Elected 44th President*, MSNBC, Nov. 5, 2008, <http://www.msnbc.msn.com/id/27531033/>.

212. *Id.*

213. See generally Peter Wallsten & Janet Hook, *Four Big Questions of the Presidential Election*, L.A. TIMES, Nov. 2, 2008, available at <http://www.latimes.com/news/politics/la-na-questions2-2008nov02,0,3848411.story?page=1>.

214. Kate Zernike, *McCain and Obama Split on Justices’ Guantánamo Ruling*, N.Y. TIMES, June 13, 2008, available at <http://www.nytimes.com/2008/06/13/us/politics/13candidates.html>.

215. *Id.*

216. *Id.*; see Ed Henry et al., *Obama Signs Order to Close Guantanamo Bay Facility*, CNNPOLITICS.COM, Jan. 22, 2009, <http://www.cnn.com/2009/POLITICS/01/22/guantanamo.order/index.html>. Obama’s executive order to close Guantánamo received support from McCain, although he noted concern that Obama should have considered where the prisoners would go before hastily closing the prison. On a January 22, 2009 taping of Larry King Live, McCain added, “So, the easy part, in all due respect, is to say we’re

that *Boumediene* “obviously concerns me. These are unlawful combatants; they’re not American citizens.”²¹⁷ McCain later added:

The Supreme Court rendered a decision which I think is one of the worst decisions in the history of this country. . . . Our first obligation is the safety of and security of this nation and the men and women who defend it. This decision will harm our ability to do that.²¹⁸

Obama, in contrast, said of the ruling:

This is an important first step toward re-establishing our credibility as a nation committed to the rule of law, and rejecting a false choice between fighting terrorism and respecting habeas corpus. Our courts have employed habeas corpus with rigor and fairness for more than two centuries, and we must continue to do as we defend the freedom that violent extremists seek to destroy.²¹⁹

With the delicate nature of the conservative/liberal split of the Court, the ideology of potential appointees could dramatically affect the makeup of the Court and future decisions. Replacing one Justice could shift the balance profoundly, as “today’s four dissenters could become tomorrow’s majority.”²²⁰ President Obama could be presented with three openings during his first term.²²¹ Justice

going to close Guantanamo. Then I think I would have said where they were going to be taken. Because you're going to run into a NIMBY [not in my backyard] problem here in the United States of America." *Id.* Republican congressmen expressed criticism at Obama's order, worrying that there is not a clear plan for detaining and interrogating terrorists. Democrats, on the other hand, lauded the decision, calling it "a first key step in restoring America's image and credibility in the world." *Id.* See also *infra* note 243 and accompanying text.

217. See Henry, *supra* note 216.

218. Shapiro, *supra* note 10.

219. *Id.* Obama also added that *Boumediene* is a “rejection of the Bush administration’s attempt to create a legal black hole at Guantanamo.” Zernike, *supra* note 214.

220. David Espo, *Analysis: Court’s Course in Next President’s Hands*, USATODAY.COM, June 12, 2008, http://www.usatoday.com/news/politics/2008-06-12-1099091214_x.htm.

221. Robert Barnes, *CAMPAIGN 2008: '08 Vote May Shift Balance on Court*, HOUS. CHRON., Oct. 6, 2008, at A3.

Stevens turned eighty-nine in December 2008.²²² There has been speculation that Justice Ginsburg may retire, especially after she was struck with pancreatic cancer in early 2009.²²³ It was also broadly rumored that Justice Souter wanted to retire so he could return to his home in New Hampshire; Justice Souter confirmed this rumor when he announced his retirement in April 2009.²²⁴ Prior to the election results, legal scholars noted that if McCain wins, “the liberals will stick it out as long as their health reasonably permits,” while in an Obama presidency, “the odds are these justices will take the opportunity to retire.”²²⁵ When faced with his first vacancy on the Supreme Court, President Obama nominated Judge Sonia Sotomayor of the Second Circuit Court of Appeals, who was confirmed August 2009.²²⁶

222. Mark Sherman, *High Court Opens, Overshadowed by Election; Nov. 4's Results May Prompt Some Justices to Retire*, HOUS. CHRON., Oct. 5, 2008, at A3. Justice Stevens fueled speculation as to his retirement when he hired only one law clerk for the 2010 term. Normally, Justice Stevens would have hired three or four law clerks for the upcoming year. David G. Savage, *Speculation Rises that Supreme Court Justice Stevens Will Retire*, L.A. TIMES, Sept. 3, 2009, available at <http://www.latimes.com/news/nationworld/nation/la-na-stevens3-2009sep03,0,5471894.story>.

223. Erwin Chemerinsky, *The Candidates and the Supreme Court*, L.A. TIMES, Oct. 7, 2008, available at <http://www.latimes.com/news/opinions/commentary/la-oe-chemerinsky7-2008oct07,0,7696721.story>; Bill Mears, *Justice Ginsburg has Surgery for Cancer*, CNN.COM, Feb. 6, 2009, <http://www.cnn.com/2009/CRIME/02/05/ginsberg.cancer.supreme.court/index.html>.

224. *Id.*; Sherman, *supra* note 222. See Nina Totenberg, *Supreme Court Justice Souter To Retire*, NPR.ORG, Apr. 30, 2009, <http://www.npr.org/templates/story/story.php?storyId=103694193>.

225. Sherman, *supra* note 222.

226. Charlie Savage, *Sotomayor Confirmed by Senate, 68-31*, N.Y. TIMES, Aug. 6, 2009, available at http://www.nytimes.com/2009/08/07/us/politics/07confirm.html?_r=1&hp. Justice Sotomayor is the third woman to serve on the Supreme Court, and the first Hispanic to serve. *Id.* Her confirmation was never much in doubt, due to the Democrats' numerical advantage in the Senate. *Id.* During her confirmation hearings, Sotomayor would only express that she accepts the Court's precedents, and did not indicate how she would rule on any given case or issue. *Sotomayor on the Issues*, N.Y. TIMES, July 15, 2009, available at <http://www.nytimes.com/2009/07/16/us/politics/16issues.html>.

During his presidential campaign, McCain noted that Chief Justice Roberts and Justice Alito would serve as models for his Supreme Court nominees.²²⁷ Obama voted against the confirmation of both Roberts and Alito and has said that his nominees would be more like Justices Ginsburg and Breyer.²²⁸ President Obama's appointees are crucial when looking to issues like abortion, for example, and whether the Supreme Court will ever overturn *Roe v. Wade*.²²⁹ Obama is pro-choice, and has said of abortion,

I think that most Americans recognize that this is a profoundly difficult issue for the women and families who make these decisions. They don't make them casually. And I trust women to make these decisions, in conjunction with their doctors and their families and their clergy, and I think that's where most Americans are.²³⁰

Other prevalent issues likely to be heard by the Supreme Court in the next few years besides abortion are gay marriage, school prayer, and more on the war on terror.²³¹ Many argue that the recent, controversial California vote on Proposition 8, banning gay marriage, will eventually make its way to the Court's docket.²³² A Supreme Court Justice is appointed for life; his or her appointment affects

227. Barnes, *supra* note 221.

228. Chemerinsky, *supra* note 223.

229. *See id.*

230. Katherine Q. Seelye et al., *NY Times on the Issues: Social Issues*, N.Y. TIMES, available at <http://elections.nytimes.com/2008/president/issues/abortion.htm>. McCain has stated his disagreement with *Roe v. Wade*, saying "I do not support *Roe versus Wade*. It should be overturned." *McCain Says Roe v. Wade Should Be Overturned*, MSNBC, Feb. 18, 2007, available at <http://www.msnbc.msn.com/id/17222147/>.

231. Patrick Healy, *Seeking to Shift Attention to Judicial Nominees*, N.Y. TIMES, Oct. 6, 2008, at A0.

232. Brian Gray, *A Federal Bailout for Prop. 8*, L.A. TIMES, Nov. 17, 2008, available at <http://www.latimes.com/news/opinion/la-oe-gray17-2008nov17,0,3307805.story>. Some legal scholars believe that there is an inherent Constitutional flaw in Prop. 8; it arguably violates the Fourteenth Amendment's Equal Protection clause. This Constitutional question could catapult the issue to the Supreme Court. *Id.* The Court heard a similar case, *Romer v. Evans*, 517 U.S. 620 (1996), based on a Colorado amendment which rejected gay rights. *Id.* In *Romer*, the Court ruled against the amendment. *Id.*

every American through the law that each Justice helps to interpret. Obama has described desired traits of his potential nominees:

What I do want is a judge who is sympathetic enough to those who are on the outside, those who are vulnerable, those who are powerless, those who can't have access to political power and as a consequence can't protect themselves from being . . . dealt with sometimes unfairly, that the courts become a refuge for justice.²³³

Hopefully the Court (including Justice Sotomayor and other future appointees) can truly become a “refuge for justice,” and lead the country in the right direction with regard to coming together, and working toward greater prosperity and peace.²³⁴

2. Closing Guantánamo Bay

Another result of the *Boumediene* decision is the now-imminent closing of Guantánamo Bay. The Supreme Court, in *Boumediene*, did not order all detainees who have not been charged, to be released, nor did it order that the base be shut down.²³⁵ The inhumane conditions, detainees being held there without being charged, and the enigmatic, controversial nature of the prison have all been factors in support of closing it.²³⁶ As of late October 2008, the Bush Administration expressed the desire to close Guantánamo before leaving office, but admitted that it was not going to happen during Bush's tenure as President.²³⁷ United States Defense Secretary Robert Gates remarked that the next congress and administration should “try again soon after they take office in January.”²³⁸ Bush's White House Press Secretary Dana Perino stated in October 2008,

233. See Healy, *supra* note 231.

234. *Id.*

235. James Ross, *Supreme Court to Bush: You're not Above the Law*, HUMAN RIGHTS WATCH, June 13, 2008, available at <http://hrw.org/enlgish/docs/2008/06/13/usint19126.htm>.

236. Al Pessin, *Guantanamo Alternative Eludes Bush Administration*, NEWSVOA.COM, Oct. 21, 2008, <http://www.voanews.com/English/2008-10-21-voa64.cfm>.

237. *Id.*

238. *Id.*

that “[t]he next president will come in and realize how complicated this issue is. . . . [I]t’s not as easy as just snapping your fingers and closing Guantanamo Bay.”²³⁹

In the period after Obama was elected, but had yet to take office, the new administration signaled its intent to close the prison immediately.²⁴⁰ While the decision to determine what to do with the current detainees posed a difficult query, the administration pronounced that closing Guantánamo would “create a global wave of diplomatic and popular goodwill that could accelerate the transfer of some detainees to other countries.”²⁴¹ The closing could also potentially impact how future captures of terrorism suspects are effectuated, and could even lead to outlawing all torture techniques employed by the United States.²⁴²

On President Obama’s second full day of office, January 22, 2009, he signed an executive order directing the Central Intelligence Agency to close down Guantánamo within one year.²⁴³ The order specifically states that the prison “shall be closed as soon as practicable, and no later than one year from the date of this order.”²⁴⁴ This order fell in line with Obama’s campaign promise to return America to a “moral high ground” with regard to the war on terrorism.²⁴⁵ President Obama said in his Inauguration speech, that

239. Dana Perino, White House Press Secretary, Remarks at a Press Conference (Oct. 21, 2008).

240. Peter Finn, *Guantanamo Closure Called Obama Priority*, WASH. POST, Nov. 12, 2008, at A01.

241. *Id.*

242. *Id.*

243. Mazzetti & Glaberson, *supra* note 4. Three other related executive orders were also signed at the same time. One order formally banned torture, requiring the use of the Army field manual as a guide for any terror interrogations; another order established an “inter-agency task force to lead a systematic review of detention policies and procedures and a review of all individual cases;” yet another order delayed the trial of Ali al-Marri, a legal U.S. resident who has been contesting his imprisonment for five years while being held without charges. Henry, *supra* note 216.

244. *USA: The Promise of Real Change. President Obama’s Executive Orders on Detentions and Interrogations*, AMNESTY INTERNATIONAL, Jan. 30, 2009, available at <http://www.amnesty.org/en/library/asset/AMR51/015/2009/en/7e94375c-eecc-11dd-b1bd-6368f1b61c3f/amr510152009eng.html>.

245. Henry, *supra* note 216. Obama’s reasoning for closing Guantánamo was to “restore the standards of due process and the core constitutional values that have

"[o]ur Founding Fathers, faced with perils we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience's sake."²⁴⁶

The main concern that closing the prison presents is where to house the remaining detainees.²⁴⁷ Secretary of Defense Robert Gates (who remains in his post from the position under Bush) explained that the current administration has "developed some options in terms of how many we think could be returned to other countries to take them. That diplomatic initiative has not started. That will await work in carrying out the executive order."²⁴⁸ Prison location options inside the United States include military prisons Fort Leavenworth, Kansas; Camp Pendleton, California; and Charleston, South Carolina.²⁴⁹ Also under consideration is the Supermax prison in Florence, Colorado.²⁵⁰ There is a possibility that sixty to one hundred twenty detainees might be considered "low-threat detainees" and transferred to other countries.²⁵¹ Yet another possibility is to transfer detainees back to their home nations for imprisonment.²⁵² As for the detainees being imprisoned in the United States, many members of Congress vehemently oppose that plan.²⁵³ Gates said that of the potential prisons identified in the United States for transfer of the detainees, that he has "heard from members of Congress [representing] where all those prisons are located. Their enthusiasm is limited."²⁵⁴ As of

made this country great even in the midst of war, even in dealing with terrorism." *Id.*

246. Paula Newton, *Open or Closed, Guantanamo Hurts U.S., Ex-Inmate Says*, CNNPOLITICS.COM, Jan. 22, 2009, <http://www.cnn.com/2009/POLITICS/01/21/guantanamo.justice/index.html>.

247. Henry, *supra* note 216.

248. *Id.*

249. David Espo, *Obama to Sign Order Shutting Gitmo*, AOL NEWS, Jan. 21, 2009, available at <http://news.aol.com/article/obama-moves-to-suspend-gitmo-trials/310186>.

250. *Id.*

251. *Id.* As of January, 2009, only Portugal has agreed to take the detainees, though "diplomatic discussions [with other countries] are ongoing." *Id.*

252. *Id.*

253. *Id.*

254. Henry, *supra* note 216. Most congressional critics of housing the detainees in the United States note concern that the transfer will give the detainees

September 2009, Guantánamo Bay remains open, as the Obama Administration struggles with the “legal, political, and logistical problems” in attempting to close the detention center.²⁵⁵

3. Checks and Balances on the Supreme Court

Boumediene begs speculation as to the extent of the Supreme Court’s power. Article III of the Constitution sets up the Judiciary, within a system of checks and balances among the Executive and Legislative branches.²⁵⁶ In *Boumediene*, the Court struck down an act of Congress (the MCA), and made jabs at the Bush Administration and its war on terror.²⁵⁷ While many liberals may wax lyrical at the *Boumediene* decision, many conservatives are weary that the Court is overstepping its bounds as an impartial judiciary.²⁵⁸ However, inherent in the Constitution is a separation of powers among the three branches, so that no one branch may overreach its power.²⁵⁹ The Legislative branch makes the laws; the Executive branch enforces the laws; the Judiciary interprets the laws.²⁶⁰

full constitutional rights, and further question what the detainees’ legal status will be. *Id.*

255. David Johnston and Elisabeth Bumiller, *Obama Faces Hurdles in Closing Guantánamo*, N.Y. TIMES, July 13, 2009, available at <http://www.nytimes.com/2009/07/14/us/politics/14gitmo.html>. Although there is growing concern that President Obama will not meet his January, 2010 deadline of closing Guantánamo, Defense Department General Counsel Jeh Johnson said in September, 2009, that “[w]e [the administration] remains committed to doing this on the deadline the president set [despite] many challenges.” Josh Gerstein, *Obama Admin Still “Committed” to January Gitmo Closing*, POLITICO, Sept. 10, 2009, available at http://www.politico.com/blogs/joshgerstein/0909/Obama_admin_still_committed_to_January_Gitmo_closing.html.

256. *Constitutional Topic: Checks and Balances*, U.S. CONSTITUTION ONLINE, http://www.usconstitution.net/consttop_cnb.html.

257. See generally *Boumediene*, 128 S. Ct. at 2240.

258. Michael C. Dorf, *Did the Supreme Court Violate or Vindicate the Constitution in the Latest Guantánamo Bay Decision? The Difference Between Separation of Powers and Checks and Balances*, FINDLAW.COM, June 16, 2008, <http://writ.lp.findlaw.com/dorf/20080616.html>.

259. *Id.*

260. *Id.*

Boumediene’s dissenters argue that despite separation of powers, courts typically give deference to the other political branches in wartime.²⁶¹ The majority declined to give any notion of deference.²⁶² While the dissent wanted to place trust in Congress and the President to make right decisions in times of war, the majority in *Boumediene* believed that “Congress and especially this particular President had shown themselves unworthy of that trust.”²⁶³ Despite the decision and the seemingly apparent affront by the Court, President Bush has agreed to honor the ruling.²⁶⁴

4. Timing of the Decision

Historically, Congress and the Supreme Court have deferred to popular presidents, such as Franklin Roosevelt (FDR), or John F. Kennedy (JFK).²⁶⁵ In times of politically weak presidents, the other

261. *Id.*

262. *See Boumediene*, 128 S. Ct. at 2240-78.

263. Dorf, *supra* note 258.

264. Ross, *supra* note 235. President Bush disagreed with the ruling but said “we will abide by the court’s decision.” *Id.*

265. *Franklin Delano Roosevelt, A Life in Brief*, AMERICAN PRESIDENT – AN ONLINE REFERENCE RESOURCE, MILLER CENTER OF PUBLIC AFFAIRS, *available at* <http://millercenter.org/academic/americanpresident/fdroosevelt/essays/biography/1>. FDR’s presidency centered on the Great Depression and World War II. His presidency was so popular that he remained in office for twelve years. FDR’s New Deal policies legislation to reform the banking sector, in attempts to “resuscitate American industry.” *Id.* FDR also committed the United States to war against Germany and its allies in World War II. “Under Roosevelt’s leadership, the United States emerged from World War II as the world’s foremost economic, political, and military power.” *Id.*

It is rather easy to state that FDR is one of the most popular presidents in United States history. Notwithstanding this fact, FDR issued an executive order during World War II which authorized the removal of people of Japanese descent from the Pacific Coast. *TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION*, *supra* note 37, at 9. As the war continued, the Supreme Court found the curfews and exclusions to be constitutional. *Id.*; *Korematsu v. United States*, 323 U.S. 214, 217 (1944). Justice Hugo Black wrote for the majority, that the Court was “unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.” *Korematsu*, 323 U.S. at 217-18.

See Michael Martin, *The Turbulent Term of President Kennedy*, THE HISTORY PLACE,

branches attempt to compensate, and sometimes make decisions that disagree with the Executive Branch.²⁶⁶ The Supreme Court essentially used *Boumediene* to give the Bush Administration, and Congress, a legal lecture, or even a slap on the wrist.

The timing of the decision, almost seven years after the events of September 11, 2001, is interesting when looking at the decision's majority opinion. It is hard to imagine that in the months following the attacks on the Twin Towers and the Pentagon, when national solidarity soared, that any justice would have decided *Boumediene* the way the majority did. Thousands of American citizens were killed on September 11, and the nation was looking for someone to blame. Emotions were running high at that time; would the outcome of *Boumediene* been the same years earlier?

Thoughts turn to different times in history; would this judiciary have extended habeas corpus to others in previous times of war? It is unlikely that during World War II, or the Vietnam War, that any Nazi or Vietcong war criminals would have been afforded habeas corpus rights. The current distinction lies in the fact that the United States is not at war with a singular country, but a hidden enemy, called al Qaeda, or even terrorism at large. This broad enemy is not a specified target, like Germany or North Vietnam. Moreover, Guantánamo Bay (in its current function) was not in existence in historical times of war, so any answer to the question of whether habeas corpus would have existed then is mere speculation at best.

VI. CONCLUSION

While some may view the *Boumediene* decision as a positive step for civil rights, others may be terrified by the possibility of it emboldening terrorists. The ongoing struggle of civil liberties versus national security rages on; yet, those touting the civil liberty scale

<http://www.k12.nf.ca/gc/SocialStudies/whist3201/World%20History/MMartin/turbulentterm.htm>. JFK's presidency is known as "The New Frontier." Congress passed legislation that was sponsored by the administration. Congress and the Court supported JFK through a very difficult presidency, which included turbulent trials such as the Bay of Pigs Invasion in Cuba, the Cuban Missile Crisis, Civil Rights and the Space Race. *Id.*

266. See, e.g., *Franklin Delano Roosevelt, A Life in Brief*, *supra* note 265 and accompanying text.

won a victory in this case. *Boumediene* held that anyone being held in a de facto United States territory is permitted to challenge his detention through habeas corpus.²⁶⁷

The actions thus far of federal judges, such as Judges Urbina and Leon, could “set the stage for the release of dozens more detained” at Guantánamo in the near future.²⁶⁸ Further, with the executive orders issued by President Obama forty-eight hours after he had taken office, the closing of Guantánamo is inevitable.²⁶⁹ Groups such as Amnesty International urge the administration to use all due urgency to close the prison, as fair trials for the current detainees are years overdue.²⁷⁰ Further, the prison has become a “damaging symbol to the world.”²⁷¹

Closing Guantánamo Bay presents many issues and questions, mainly: where will the current detainees be placed?²⁷² There are many options for the placement of the detainees, including transfer to prisons inside the United States, to other countries such as Portugal, or back to their home countries.²⁷³ More detainees may even be released entirely.²⁷⁴

More than one year after the *Boumediene* ruling, “a majority of the Guantánamo detainees have not yet had a habeas corpus hearing on the merits of their claims.”²⁷⁵ This may have been symptomatic of the previous administration’s unwillingness to cooperate with the ruling, simply slow movement of the Government, or perhaps valid discussion on what to do with the detainees. Much is still uncertain regarding the detainees and how the war on terror will continue.

267. Ross, *supra* note 235.

268. *Anger over Guantanamo Bay Ruling*, *supra* note 186.

269. *See supra* notes 243-246 and accompanying text.

270. *USA: The Promise of Real Change. President Obama’s Executive Orders on Detentions and Interrogations*, *supra* note 244.

271. Mazzetti & Glaberson, *supra* note 4. *See* Newton, *supra* note 246. Former Guantánamo inmate Moazzam Begg remarked that Guantánamo is the “most notorious prison on earth.” *Id.* Begg also observed that Guantánamo serves as a “radicalizing force for militants around the world.” *Id.*

272. *See supra* notes 247-255 and accompanying text.

273. *See supra* notes 249-255 and accompanying text.

274. *See supra* notes 249-255 and accompanying text.

275. *USA: The Promise of Real Change. President Obama’s Executive Orders on Detentions and Interrogations*, *supra* note 244.

What is certain, however, is that *Boumediene* illustrates the Supreme Court's willingness to strike down actions of an unpopular President and Congress.²⁷⁶ The decision may signal a movement toward the left on the Court, a heightened exertion of its own power, or, perhaps, is just one decision that the Court happened to decide liberally. The country will wait with hope for the Supreme Court's next term, more justices to be appointed in President Obama's tenure, the fates of the remaining detainees to be determined in the near future, and the closing of Guantánamo Bay.

276. See *supra* note 257 and accompanying text.