Boumediene v. Bush

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(Editor's notes: This paper by Justin Lerche is the winner of the LCSR Program Director's Award for the best paper dealing with a social problem in the 2008 issue of the Agora*. Justin's professor, Dr. Lorna Dawson, explains the assignment that Justin was completing as follows:*

In February 2007, the D.C. Court of Appeals held that Congress, by passing the Military Commissions Act (MCA) in 2006, had validly stripped Federal Courts of jurisdiction to hear habeas petitions filed by foreign detainees because the MCA did not violate the suspension clause of the Constitution (Article I, Section 9, clause 2: "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"). Boumediene petitioned to have his case heard on appeal by the Supreme Court. In April 2007, the Court denied his petition, but in a surprising move, reversed itself in June 2007, and heard oral arguments on December 5, 2007. At the time that Justin Lerche wrote his essay below, the Court had not yet issued its opinion. The main question posed by *Boumediene* v. *Bush* is whether alien detainees held at Guantanamo Bay, Cuba, have the protection of habeas corpus – the right not to be detained indefinitely without charges – either by virtue of the non-suspension clause of the Constitution or at common law. The detainees contend that because the Supreme Court has already ruled in *Rasul* v. *Bush* (2004) that Guantanamo Bay is under the effective control of the United States, the Military Commissions Act (2006) unconstitutionally deprives them of habeas; alternatively, they contend that they have the right to habeas by virtue of the common law. On the other side, the Government argues that foreigners who have never been on American soil and are

without presence or property in the United States have no Constitutional claims to habeas, that the Military Commissions Act (2006) constitutionally denies detainees the right to petition for habeas in Federal Courts, and that detainees would have had no habeas protection under the common law at the time the Constitution was adopted. Based upon his examination of the lower court's Opinion and briefs filed by both sides, Mr. Lerche, writing as a Supreme Court Justice, provides one possible outcome of the Court's holding in this pivotal case.

Justin Lerche writes:)

This case before the Court, *Boumediene v. Bush*, concerns several important Constitutional questions that can be effectively resolved by today's opinion. The case deals with the detention of aliens seized outside the United States on suspicion of being enemy combatants and the Constitutional recourses available to these aliens who have neither "presence nor property" in the United States. Specifically, the foremost concern in this case is the question of whether the Military Commissions Act of 2006 strips the courts of jurisdiction to consider habeas petitions by detainees held in Guantanamo Bay, Cuba, and if so, whether that denial of habeas is Constitutional. Further, the Court will also ascertain whether the detainees are legally held by the United States. Therefore, in reaching a decision today, the Court will determine several factors concerning the status of aliens at Guantanamo Bay that have been disputed for over five years, the implications of previous decisions of this Court, and the interpretation of certain clauses in the Constitution. Namely, the Court will decide whether aliens held outside the sovereign territory of the United States have the Constitutional right to file habeas claims in federal courts, the limitations upon the writ of

habeas corpus, the intent of the founders in Article I, Section 9, Clause 2 (Suspension Clause), and whether the current detainees are legally detained by the executive.

The threshold question of this case that logically must be answered first is whether the Military Commissions Act effectively strips federal court jurisdiction over habeas claims filed by detainees held at Guantanamo Bay, Cuba. The Court holds that it does not. The Military Commissions Act (MCA) is an unconstitutional suspension of the writ of habeas corpus in violation of the Suspension Clause of the Constitution and as such, the MCA can be reviewed by the judiciary. The Court must then consider whether this Constitutional right to the writ of habeas corpus extends to detainees held in Guantanamo Bay. The Court holds that the writ is extended to these detainees. Alternatively, Congress may suspend the writ if it presents adequate alternatives available to a habeas court. The Court holds that the current system in place to hear claims of detainees is an insufficient alternative to habeas courts.

The first place the Court must look in defending these assertions is to the actual text of the Suspension Clause. While respondents claim that the Suspension Clause is an individual right conferred only to citizens of the United States, and is as such inapplicable to the detainees on Guantanamo Bay, the actual words of the Suspension Clause tell a different story: “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” (US Const., art. 1, sec. 9, cl. 2). The Court maintains that the Suspension Clause as intended by the founders was meant to be a limitation upon the power of Congress and not a right conferred upon individuals. Indeed, nowhere in the Suspension Clause are the words “individual” or “citizen” even mentioned. Further, the placement of the Suspension Clause in Article I, Section 9 of the Constitution casts increased doubt on the respondents’ position. In all of Section 9, the word

"individual" is not mentioned a single time, and all other clauses in that section deal wholly with express bans on activities into which the legislature shall not engage. In further support of this position, the sentiments of the founders were expressed by Alexander Hamilton in *Federalist 78:*

> A limited constitution [is] one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Hamilton mentions two actions by name: the express prohibition of Congress passing either ex post facto laws or bills of attainder. These two clauses forbidding the previously mentioned activities can be found in Section 9 of Article I along with the Suspension Clause. Further, the founders intended for the judiciary to be the venue for preserving these limitations on governmental action. Thus, it is clear that the founders' intention in placing the Suspension Clause in Section 9 of Article I and not in the Bill of Rights, where the protections for individuals against actions of the government are clearly expressed, was to place limitations on the powers of the government whatever the circumstances. Therefore, the Military Commissions Act is an unconstitutional suspension of habeas corpus, and it does not strip the courts of jurisdiction. The question now becomes whether the Constitutional writ of habeas corpus applies to foreign detainees, and it is the opinion of the Court that it does.

In looking at the writ of habeas corpus, it is first necessary to state that the Suspension Clause has always been decided by this Court to protect the writ as it existed at common law in 1789 (*INS* v. *St. Cyr*, 2001). Therefore, it must be demonstrated that the writ as applied in common law extends to detainees and that there is clear precedent from this Court and from the English courts prior to 1789 that detainees do have access to invoke the writ of habeas corpus. The key aspect of these precedents involves whether Guantanamo Bay, Cuba, is within the territorial jurisdiction of the United States because detainees would naturally be afforded the writ of habeas corpus if they were held in a state or territory of the United States. According to *Rasul* v. *Bush* (2004), "Guantanamo Bay is in every practical respect a United States territory and belongs to the United States" (Kennedy, J., concurring in the judgment). As a result, detainees do have access to file habeas petitions due to the understanding of the writ at common law. The respondents rebut this assertion by claiming that common law understandings of the writ did not apply to regions where the English government held de facto authority as opposed to formal sovereignty (as is the case in Guantanamo Bay); however, numerous decisions of the English courts refute this claim. Holdings by English courts also refute the claim that aliens in territories under de facto authority of the Crown did not have access to the writ. One particular area to look at in demonstrating these dual understandings of the writ at common law is in the English court's dealings with India. India did not become a formal territory of the Crown until 1813; however, English courts had issued the writ there as early as the 1770s. On numerous occasions, these issuances were on behalf of detained Indians. Therefore, the common law understanding of the nature and reach of the writ, taken with the Court's holding in *Rasul*,

affirms that detainees at Guantanamo Bay would have access to the writ as it existed in 1789 and therefore are covered by the Suspension Clause of the Constitution.

In response to this, the government offers the alternative position that the Court's holding in *Johnson* v. *Eisentrager* (1950) determines that alien detainees captured, tried, and imprisoned outside the sovereign territory of the United States have no positive rights under the Constitution. It is the opinion of the Court that *Eisentrager* does not control in this case as the two are materially different. This precedent has previously been established by holdings of the Court in *Rasul*. Therefore, respondent's reliance upon the decision in *Eisentrager* is of no relevance in this case.

At first glance, the situations of this case and of *Eisentrager* appear to be factually similar enough to warrant the holding of *Eisentrager* to apply in this case. However, as explained in *Rasul*, the actual situation of the petitioners in this case differs vastly from those in *Eisentrager*:

> They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years [now almost six] they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control. (*Rasul* v. *Bush* 2004, Stevens, J., opinion of the court)

Furthermore, the concurring opinion in *Rasul* mentioned earlier also makes clear that Guantanamo Bay is a territory over which the United States exercises de facto authority, and that "Indefinite detention without trial or other proceeding presents altogether different considerations…It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus" (*Rasul* v. *Bush* 2004, Kennedy, J., concurring in the opinion). With this firm precedent in place, the Court must hold that *Eisentrager* is not controlling in this case. Therefore, considering the common law application of the writ of

habeas corpus and the precedents of this Court, petitioners are covered by the Suspension Clause of the Constitution. Given that Congress can only suspend habeas corpus in times of invasion or rebellion (not applicable to this case) or when it provides adequate substitutes for habeas courts, it now must be determined if the Combat Status Review Tribunals and the review under the Detainee Treatment Act qualify as acceptable alternatives to a habeas court. The court holds that they do not qualify as such.

Respondents make the claim that detainees are granted acceptable alternatives to habeas courts for two reasons: they are given notice of the factual basis for their designation as enemy combatants, and they have the opportunity to rebut governmental assertions before a neutral decision-maker. However, these bare minimum requirements fall far short of the legal protections afforded to those filing petitions in habeas courts. The most logical way to reach the conclusion that the current system afforded to detainees at Guantanamo Bay is not a suitable alternative to a habeas court is a side-by-side analysis of the two. This analysis reveals severe deficiencies between what protections a habeas court offers and what protections detainees are currently afforded. The most relevant difference between the two processes is that Combat Status Review Tribunals presume the guilt of detainees, placing the burden of proof upon the detainees to prove that they are not enemy combatants, whereas the opposite relationship exists in habeas courts. This difference is further complicated by three other crucial factors. First, detainees are not allowed to view the specific evidence against them, but rather they are presented with a summary of the "relevant" facts with any "classified" elements omitted from the reports, and detainees in many cases are not even aware of any of the evidence against them as it all may be classified ("Brief for Petitioners," 16). Nevertheless, somehow they must present a case demonstrating their innocence, often to

unknown charges as the burden of proof is on detainees. The second factor further obscures the process for detainees. In attempting to prove against unknown evidence that they are not enemy combatants, detainees are not even afforded the ability to present evidence on their own behalf if it is deemed by the Combat Status Review Tribunal too impractical to acquire ("Brief for Petitioners," 17). Thirdly, detainees must proceed without the benefit of a legal counsel ("Brief for Petitioners," 18). Also, these procedures take place before a board of military judges subject to the chain of command ("Brief for Petitioners," 19). If this is not enough to show the severe divergences between habeas courts and the procedures afforded to detainees, evidence can be used against detainees that was obtained by torture, a medieval practice that one would not generally associate with the United States. Finally, the very nature of a habeas court, which would grant release of the petitioner upon a finding of innocence, is not even guaranteed by the DTA or MCA. Instead, the Combat Status Review Tribunals (CSRT) can reconvene until a guilty verdict is reached. It is abundantly clear that not even the bare minimum criteria of a habeas court are met by the CSRTs and that their very structure was created for the specific purpose of ensuring the inability of detainees to secure their release. Therefore, the CSRTs are not an adequate alternative to habeas courts.

It is thus clear that Congress has unconstitutionally suspended the writ of habeas corpus for detainees at Guantanamo Bay. In addition, Congress has not provided adequate alternatives to habeas courts for detainees. Consequently, the Court concludes that Congress must either allow detainees access to habeas courts or present an adequate alternative to these courts. In this ruling, the Court realizes that there is a balance that must be struck between ensuring the continued preservation of our national security and in ensuring that the provisions of our Constitution are upheld. The atypical nature of the war the United States is

currently engaged in presents threats never foreseen by the founders. This new situation, however, does not mean that they would approve of a trampling of the Constitution in the name of national security. Congress and the President must attempt to find a way to reconcile the provisions of the Constitution with the defense of the nation so that no clauses of the Constitution are merely cast aside. The executive still maintains broad authority to conduct the current war in which the United States is engaged. This brings the Court to the final question of the case: whether or not the executive detention of suspected "enemy combatants" is legal. The court holds that detentions are legal exercises of executive authority during wartime.

The key distinction in the ruling of the Court today is that while the executive is free during wartime to detain any alien or citizen he suspects to be an "enemy combatant," these detainees have the ability to contest this judgment in a habeas court or such arena that is equivalent to it. The ruling today affords detainees with no rights of due process under the Fifth Amendment, but rather upholds the limitations upon the government in restricting access to the writ of habeas corpus as well as demonstrating the reach and breadth of the Great writ. The differentiation is that the Bill of Rights applies to citizens of the United States and to those with "presence or property" in the United States, while the suspension of the writ of habeas corpus by Congress is allowable if and only if "in Cases of Rebellion or Invasion the public Safety may require it" or when Congress presents adequate alternatives. Likewise, common law understanding of the writ would have granted it to the petitioners. Therefore, the government may detain those suspected of being "enemy combatants," and if these designations as enemy combatants are factual as determined in a habeas or habeas-equivalent court, their detention shall last as long as deemed necessary by the executive

pursuant to the Authorization for the Use of Military Force (AUMF) and Court precedent established in *Hamdi* v. *Rumsfeld* (2004). In that decision the Court made clear that the government merely needs to "put forth credible evidence that the [detainee] meets the enemy-combatant criteria" (*Hamdi*, O'Connor, J., opinion of the court) and that their Constitutional requirements are satisfied. Therefore, if that evidence is sufficient to convince a habeas or habeas-equivalent court of the detainee's affiliation as an enemy combatant, government detention is protected for the length of relevant military operations in the war on terror. The ruling today merely establishes the right of these detainees to have their petitions for habeas heard in a habeas or habeas-equivalent court. The ruling of the lower court is reversed and remanded.

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