

# NO END IN SIGHT: THE EFFECT OF THE BOUMEDIENE DECISION ON DETAINEES HELD BY THE UNITED STATES AT GUANTÁNAMO BAY, CUBA

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## I. INTRODUCTION

Imagine that you are looking for a better life. You immigrate to a new country and fourteen years later you become a citizen. You work, travel, go to church, and perform humanitarian work for non-profit organizations like the Red Cross. One day after reading the newspaper, you photocopy an article describing a terrorist attack and then you are arrested. The Supreme Court of your adoptive country finds the charges unfounded and orders you released, but upon your release a peace-keeping force of a foreign government steps in and arrests you. You are being detained without being charged and the only

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evidence against you is the copy of the article in your pocket and statements from various unidentified “sources.”<sup>1</sup>

This is what happened to Lakhdar Boumediene, a Bosnian-Algerian national, who in late 2001 was arrested by local Bosnian police on suspicion of plotting an attack on the United States embassy in Sarajevo.<sup>2</sup> After a three-month international investigation he was released for lack of evidence.<sup>3</sup> Upon his release, the United States military immediately transported him to Guantánamo Bay, Cuba, where he has been held ever since without being charged with any crime.<sup>4</sup> Since his arrest, Boumediene has been contesting the basis for his detention in habeas corpus proceedings in U.S. courts. On June 12, 2008, in *Boumediene v. Bush*,<sup>5</sup> the U.S. Supreme Court ruled that the enemy combatants detained at Guantánamo Bay have a constitutional right to file petitions for habeas corpus in U.S. federal courts challenging the lawfulness of their detention; that the Detainee Treatment Act of 2005 (DTA) procedures for review of their status “are not an adequate and effective substitute for habeas corpus;” and that the Military Commissions Act of 2006 (MCA) “operates as an unconstitutional suspension of the writ.”<sup>6</sup>

This article analyzes the likely effect of the *Boumediene* decision on the approximately 265 current Guantánamo Bay detainees.<sup>7</sup> The discussion begins with a brief overview of habeas corpus, its application during times of war, and the assumptions generally made regarding the Suspension Clause. Then, the article references a new “functional” test and applies the test factors to the facts

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1. See DEP’T OF DEFENSE, OFFICE FOR THE ADMIN. REVIEW OF THE DETENTION OF ENEMY COMBATANTS AT U.S. NAVAL BASE GUANTÁNAMO BAY, CUBA, UNCLASSIFIED SUMMARY OF EVIDENCE FOR ADMINISTRATIVE REVIEW BOARD IN THE CASE OF BOUMEDIENE, LAKHDAR 1–2 (Oct. 20, 2006), available at [http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/ARB\\_Round\\_2\\_Factors\\_900-1009.pdf#105](http://www.dod.mil/pubs/foi/detainees/csrt_arb/ARB_Round_2_Factors_900-1009.pdf#105) (last visited Aug. 1, 2008) (listing the factors favoring Boumediene’s detention, release or transfer).

2. Jackie Northam, *Tapes Provide First Glimpse of Secret Gitmo Panels*, NAT’L PUB. RADIO, Nov. 21, 2006, at ¶ 11, available at <http://www.npr.org/templates/story/story.php?storyId=6514923> (last visited July 31, 2008) (referring to the six Bosnian-Algerians arrested on suspicion of plotting to bomb the American Embassy in Sarajevo). The six Algerians are: Belkacem Bensayah, Saber Lahmar, Mohamed Nechla, Mustafa Ait Idir, Hadj Boudella, and Lakhdar Boumediene. Memorandum from Stephen Oleskey, Esq., Robert Kirsch, Esq., Doug Curtis, Esq. & Melissa Hoffer, Esq. to the Office for the Admin. Review of the Det. of the Enemy, Admin. Review Bds., U.S. Naval Base Guantanamo Bay, Cuba (Mar. 30, 2005) available at [http://www.npr.org/documents/2006/nov/bosnia\\_detainees.pdf](http://www.npr.org/documents/2006/nov/bosnia_detainees.pdf) (last visited July 31, 2008).

3. Northam, *supra* note 2, ¶ 12.

4. *Id.*

5. 128 S. Ct. 2229 (2008) (consolidating matters of *Boumediene v. Bush*, No. 06-1195, and *Al-Odah v. U.S.*, No. 06-1196, both on certiorari to the same court).

6. *Id.* at 2240.

7. GlobalSecurity.org, *Guantánamo Bay Detainees*, July 2, 2008, [http://www.globalsecurity.org/military/facility/Guantánamo-bay\\_detainees.htm](http://www.globalsecurity.org/military/facility/Guantánamo-bay_detainees.htm) (last visited July 7, 2008).

in this consolidated case.<sup>8</sup> Further, the discussion presents the *Boumediene* opinion on the judicial review shortcomings of the substitute for habeas corpus as implemented by the United States during the war on terror. Next, the paper will analyze the legal impact of the *Boumediene* decision on the Guantánamo Bay detainees and others in a similar situation, as well as the likelihood of their timely release. Finally, the article will present some of the questions left unanswered by *Boumediene* decision and the vast latitude for its interpretation.

## II. THE WRIT OF HABEAS CORPUS AND THE SUSPENSION CLAUSE

Habeas corpus is an indispensable judicial “procedural mechanism” with a dual purpose.<sup>9</sup> First, it ensures that the executive branch of the government cannot “impose detention except as authorized by law,” and it seeks to maintain a proper system of checks and balances that constrains government power while allowing the government sufficient power to discharge its duties.<sup>10</sup> Second, it protects citizens from arbitrary detention by having a court rule on the lawfulness of their detention.<sup>11</sup>

The system of checks and balances divides the power of the government between the branches and establishes them so to prevent concentrations of power. This system is achieved by separating the powers in such a way that government duties and responsibilities would be carried out by the branch best able to perform them.<sup>12</sup>

For almost one hundred years since the adoption of the Constitution, the writ was largely restricted to prisoners in federal custody.<sup>13</sup> When Congress codified the habeas corpus as part of the post-Civil War Reconstruction, federal

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8. *Boumediene*, 128 S. Ct. at 2258–59.

9. Richard H. Fallon, Jr., *Habeas Corpus Jurisdiction, Substantive Rights, and the War On Terror*, 120 HARV. L. REV. 2029, 2032 (2007).

10. *Id.*

11. *Id.*

12. The separation of powers as it relates to foreign territory is especially critical in determining jurisdiction and is being addressed in the article. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (this landmark case established the judicial review process).

The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. . . . To hold that the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’

*Boumediene*, 128 S. Ct. at 2259 (quoting *Marbury*, 5 U.S. at 177).

13. Fallon, *supra* note 9, at 2037–38.

courts were granted review authority over claims of prisoners in state custody.<sup>14</sup> This authority has been interpreted broadly to allow the writ to be used to challenge convictions or sentences in violation of a defendant's constitutional rights where no other remedy was available.<sup>15</sup>

Prior to the *Boumediene* ruling, the Supreme Court had never viewed the writ to apply to aliens held abroad. In *Eisentrager*, a World War II case which the *Boumediene* decision distinguishes, the Court held that habeas corpus did not apply to German nationals detained by the U.S. Army in then U.S. occupied Germany, or where the duration of the conflict at the time of trial was unknown.<sup>16</sup>

The Suspension Clause in the U.S. Constitution 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."<sup>17</sup> A strict textual interpretation shows the great importance of the writ by making the writ extremely difficult to suspend. The only circumstances justifying an appropriate suspension of the writ is for the protection of the "public" or during a "rebellion" or an "invasion".<sup>18</sup>

Courts faced with habeas petitions, including the *Boumediene* Court, confront jurisdictional, procedural, and substantive issues.<sup>19</sup> The jurisdictional issues involve "the authority of a court to entertain a detainee's petition".<sup>20</sup> The procedural questions involve "the lawfulness of the administrative procedures followed by the executive in classifying particular individuals as subject to detention or in trying them for war crimes," as well as "the appropriate scope of judicial review of decisions by executive officials or military tribunals".<sup>21</sup> Other substantive questions, such as "whether the Executive has lawful

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14. *Id.* Current Habeas Corpus Statute applicable to detainees in custody of the state seeking remedies in federal courts is 28 U.S.C.A. § 2254 (West 2008). The habeas corpus statute codifying the power to grant the writ on September 11, 2001 was 28 U.S.C.A. § 2241(a),(c) (West 2000), and it is still valid with its subsequent amendments, except for § 2241(e)(2) which has been held unconstitutional by *Boumediene*. 128 S. Ct. at 2275.

15. *Waley v. Johnston*, 316 U.S. 101, 104–05 (1942).

16. *Johnson v. Eisentrager*, 339 U.S. 763, 781 (1950). Unlike the German detainees in World War II, the detainees at Guantánamo Bay deny the allegations of acts of aggression against the United States, have not been granted access to any tribunal, have not been charged with any wrongdoing, and have been detained on territory over which U.S. has exclusive jurisdiction and control. *See, e.g., Boumediene*, 128 S. Ct. 2229.

17. U.S. CONST. art. I, § 9, cl. 2 (The Suspension Clause).

18. Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 583 (2008).

19. Fallon, *supra* note 9, at 2034.

20. *Id.*

21. *Id.*

authority to detain particular categories of prisoners in the absence of trial before an ordinary civilian court,"<sup>22</sup> have not been answered by *Boumediene*.

### III. THE NEW "FUNCTIONAL" TEST

The *Boumediene* Court introduced a new "functional" test to answer the jurisdictional and procedural questions posed by the detainees' habeas petition: whether the Guantánamo Bay detainees are entitled to habeas corpus and the protections of the Suspension Clause<sup>23</sup> and, if so, whether the Combatant Status Review Tribunal (CSRT) procedures and their limited review in federal court are an adequate substitute to habeas corpus review.<sup>24</sup>

This new test, derived by the Court from the *Eisentrager* decision, lists three factors the courts will employ in determining the extraterritorial reach of the Suspension Clause (emphasizing the first two):

- 1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made;
- 2) the nature of the sites where apprehension and then detention took place;
- 3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.<sup>25</sup>

#### A. Citizenship, Status, and Adequacy of Process

In response to the September 11, 2001 terrorist attacks, Congress enacted the Authorization for Use of Military Force (AUMF), which authorized the President, as Commander in Chief, to issue military orders authorizing the

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22. *Id.*

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

24. *Id.* at 2260.

25. *Id.* at 2259. The precedent cited is *Eisentrager*, concerning German nationals in custody of the U.S. Army in Germany, convicted by military commission of having engaged in military activity against the U.S. in China after surrender of Germany in World War II. The Court relied on the following paragraph of the decision:

We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of 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.

*Eisentrager*, 339 U.S. at 777.

arrest and detainment of noncitizens suspected of terrorism.<sup>26</sup> There has never been a question that U.S. citizens detained on U.S. soil have the right to habeas corpus. The Supreme Court indicated in *Hamdi v. Rumsfeld* that a U.S. citizen being detained in the United States as an enemy combatant is, as a matter of due process, entitled to “notice of the factual basis for his classification [as an enemy combatant] and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”<sup>27</sup> In *Rasul v. Bush*, the Supreme Court decided that the federal habeas corpus statute allowed non-U.S. citizens detained as enemy combatants at Guantánamo Bay to challenge the legality of their detention in federal court in Washington, D.C.<sup>28</sup> Noncitizens determined to be enemy aliens may be detained at Guantánamo Bay,<sup>29</sup> in the United States,<sup>30</sup> or elsewhere outside the United States.<sup>31</sup> The Guantánamo Bay detainees may also be categorized as challenging their detention<sup>32</sup> and as challenging their pending trial by military commission.<sup>33</sup> These decisions only prove that the citizenship of the detainee is not the determinative factor, but rather must be considered with the status of the detainee and the adequacy of process.

The status of the detainee is critical. According to the 1949 Geneva Conventions and its Additional Protocols,<sup>34</sup> a prisoner of war designation would

26. Authorization for Use of Military Force, 50 U.S.C.A. § 1541(a) (2001) [hereinafter AUMF].  
The statute states:

That the President is authorized 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. § 1541(a).

27. 542 U.S. 507, 533 (2004).
28. 542 U.S. 466, 484 (2004).
29. See, e.g., *Boumediene*, 128 S. Ct. at 2229 (mentioning that both detainees in this consolidated case are non-citizens held at Guantánamo Bay).
30. See *Al-Marri v. Rumsfeld*, 360 F.3d 707, 708 (7th Cir. 2004) (stating that the detainee is held at the Naval Brig, in Charleston, South Carolina).
31. See, e.g., Del Quentin Wilber, *In Courts, Afghanistan Air Base May Become Next Guantanamo*, WASH. POST, June 29, 2008, at A14, [www.washingtonpost.com/wp-dyn/content/article/2008/06/28/AR2008062801638\\_Inform.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/06/28/AR2008062801638_Inform.html) (last visited Aug. 1, 2008).
32. *Boumediene*, 128 S. Ct. at 2240.
33. *Hamdan v. Rumsfeld*, 548 U.S. 557, 567–69 (2006).
34. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; [Collectively referred to as the Geneva Conventions]; Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol 1]. The United States is a signatory of these Geneva Conventions, but not Protocol 1. See International Committee of the Red

entitle a detainee held at a U.S. detention facility to habeas corpus relief at least until his/her status is determined by a competent tribunal, whether the facility is on U.S. soil or not.<sup>35</sup> Likewise, a terrorist designation would allow the federal criminal courts to try a detainee under anti-terrorism laws and would entitle the detainee to habeas relief.<sup>36</sup> Unlike these two designations, an enemy combatant, unlawful enemy combatant, or other belligerent classification provides limited protection for the detainee, depending on the definition employed by the courts.

In July 2004, the U.S. Secretary of Defense established the CSRT to determine whether the Guantánamo Bay detainees were properly classified as “enemy combatants” and to permit them an opportunity to rebut such a designation.<sup>37</sup> “Enemy combatant” is defined as an “individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners,” including anyone who has committed a belligerent act or has supported hostilities in aid of enemy armed forces.<sup>38</sup> Once detainees are assigned “enemy combatant” status, their only recourse, absent habeas corpus relief, is to challenge their status designation and, thus, the process determining their status is of paramount importance.<sup>39</sup>

The process by which the status of the detainee is determined is next to be evaluated. The CSRT order provides that each detainee shall be assigned a military officer as a personal representative, who is neither an attorney nor the detainee’s advocate.<sup>40</sup> The personal representative may review any “reasonably available” information in the Department of Defense’s possession that may be *relevant* to a determination of the detainee’s enemy combatant designation, but

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Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977 – *State Signatories*, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=S>, (last visited Aug. 1, 2008).

35. See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 173 (D.D.C. 2004); 42 U.S.C.A. §1981(a).

36. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 102, 110 Stat. 1214 (1996) [hereinafter AEDPA]. The relevant habeas corpus sections of the law are amending scattered sections of 28 U.S.C. § 2244. *Id.*

37. Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, for The Secretary of the Navy (July 7, 2004) [hereinafter *Wolfowitz*], available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (last visited Aug. 1, 2008). The currently applicable procedures can be found at Memorandum from Gordon England, Deputy Secretary of Defense, to Secretaries of the Military Departments Chairman of the Joint Chiefs of Staff Under Secretary of Defense for Policy (Jul. 14, 2006) [hereinafter *England*], available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf> (last visited Aug. 1, 2008).

38. *Wolfowitz*, *supra* note 37, at (a).

39. See generally *id.*

40. See *England*, *supra* note 37, at Enclosure 3(D).

may not share *classified* information with the detainee.<sup>41</sup> Under the CSRT process, Guantánamo Bay detainees are given an unclassified description of the factual basis for their classification as enemy combatants.<sup>42</sup> The detainee is allowed to call witnesses, if reasonably available, whose testimony is considered by the tribunal to be relevant, but excludes members of the U.S. Armed Forces if deemed unavailable by their commanders.<sup>43</sup>

If the detainee is determined by the tribunal to no longer be an enemy combatant, the detainee will be transferred to be released to the detainee's country of citizenship or other disposition consistent with international obligations and the foreign policy of the United States.<sup>44</sup> Yearly, Administrative Review Boards established by the Department of Defense conduct a review of all Guantánamo Bay detainees to determine whether they should continue to be held, released, or transferred to the custody of another country.<sup>45</sup>

The Supreme Court found that the CSRT hearing process "falls short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review,"<sup>46</sup> specifically due to the lack of a true advocate, the inability to fully rebut government's evidence, the presumption of validity given to the government's evidence, and the lack of complete appellate review.<sup>47</sup> The Court agreed with the detainees 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."<sup>48</sup> In light of the consequence of possible errors, the risk is too significant to ignore where

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41. Memorandum from The Secretary of the Navy, Implementation of Combatant Status review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba (Jul. 29, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> (last visited Aug. 1, 2008).

42. See England, *supra* note 37, at Enclosure 3(C)(4); Wolfowitz, *supra* note 37, at (3)(C)(4).

43. See England, *supra* note 37, at Enclosure 1(G)(9).

44. *Id.* at (I)(9–10). See also Wolfowitz, *supra* note 37, at (i).

45. Memorandum from Gordon England, Deputy Secretary of Defense, to Secretaries of the Military Departments Chairman of the Joint Chiefs of Staff Under Secretary of Defense for Policy 1. Intro. (a), (c) (July 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf> [hereinafter ARB Memo] (last visited Aug. 1, 2008). The Administrative Review Board assesses whether the detainee is

... a continuing threat to the U.S. or its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters (e.g., Taliban), and whether there are other factors that could form the basis for continued detention (e.g., the enemy combatant's intelligence value and any law enforcement interest in the detainee).

*Id.*

46. *Boumediene*, 128 S. Ct. at 2260.

47. *Id.*

48. *Id.* at 2270.

detention of persons for the duration of hostilities may last a generation or more.<sup>49</sup>

### *B. Nature of Apprehension and Detention Sites*

In early 2002, the government began imprisoning detainees at the Guantánamo Bay naval station in Cuba.<sup>50</sup> In February 2002, almost immediately, the first legal actions commenced.<sup>51</sup> Based on the apprehension site, the place in which they were captured, most Guantánamo Bay detainees fall into two categories: those apprehended on the battlefield, like Al-Odah,<sup>52</sup> and those apprehended away from the battlefield or in unusual circumstances, like Boumediene.<sup>53</sup>

Being held at Guantánamo Bay, these detainees are being held outside the United States, but in a territory over which the United States exercises plenary control without claiming sovereignty.<sup>54</sup> The location is a military base on leased land in a sovereign nation.<sup>55</sup> Under the lease agreement, reaffirmed by treaty, the United States has complete jurisdiction and control over the land, but recognizes the ultimate sovereignty of Cuba over the leased areas.<sup>56</sup>

Both Boumediene and Al-Odah received CSRT hearings and both were designated enemy combatants.<sup>57</sup> Following the hearing, each detainee filed a habeas petition in the District Court for the District of Columbia.<sup>58</sup> In a similar case, the Supreme Court reversed lower court decisions dismissing the cases for lack of jurisdiction<sup>59</sup> and held that the habeas corpus statute<sup>60</sup> extended statutory habeas corpus jurisdiction to Guantánamo Bay because the United States has jurisdiction and control even though the location falls on sovereign territory.<sup>61</sup>

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49. *Id.*

50. See Steve Vogel, *Afghan Prisoners Going to Gray Area; Military Unsure What Follows Transfer to U.S. Base in Cuba*, WASH. POST, Jan. 9, 2002, at A1.

51. *Rasul v. Bush*, 215 F. Supp. 2d 55, 57 (2002) (showing a filing date of Feb. 19, 2002).

52. *Id.* at 60–61.

53. See Northam, *supra* note 2.

54. *Boumediene*, 128 S. Ct. at 2258.

55. See Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, Feb. 23, 1903, T.S. No. 418 [hereinafter Lease Agreement], available at <http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba002.htm> (last visited July 31, 2008).

56. *Id.* at Art. III.

57. *Boumediene*, 128 S. Ct. at 2241.

58. *Id.*

59. *Rasul*, 215 F. Supp. at 56.

60. 28 U.S.C.A. § 2241 (2008).

61. See *Rasul v. Bush*, 542 U.S. 466, 473 (2004).

Congress reacted to the Supreme Court's ruling by enacting the DTA, which states explicitly 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 . . . at Guantánamo Bay, Cuba."<sup>62</sup> Aside from prohibiting the aliens' habeas petitions, the DTA further established that the District of Columbia Court of Appeals has "exclusive" jurisdiction to review CSRT decisions.<sup>63</sup> The jurisdiction question has been resolved by the *Boumediene* decision. The Supreme Court rejected the government's argument that the Constitution has no effect at Guantánamo Bay,<sup>64</sup> "at least as to noncitizens, because the United States disclaimed sovereignty"<sup>65</sup> and held that "there are few practical barriers to the running of the writ,"<sup>66</sup> as the United States has exercised complete control at Guantánamo Bay for over a century.<sup>67</sup>

### C. Practical Obstacles in Determining the Petitioners' Right to Habeas Corpus

The *Boumediene* Court did not place much emphasis on the practical obstacles inherent in determining the petitioners' habeas corpus right. Although the Court acknowledged costs associated with habeas proceedings and compliance with the judicial process, and distinguished *Eisentrager*, it did not find these concerns dispositive.<sup>68</sup>

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62. Detainee Treatment Act of 2005, Pub. L. No. 109-148 § 1005(e)(1), 119 Stat. 2680, 2741–42 (2005) [hereinafter DTA] (amending 28 U.S.C. § 2241).

63. DTA, § 1005(e)(3)(A).

64. *Boumediene*, 128 S. Ct. at 2258.

65. *Id.* Although the U.S. has maintained complete and uninterrupted control of Guantánamo Bay for more than 100 years, the Government's view is that the Constitution has no effect there, at least as pertaining to noncitizens, because the U.S. disclaimed formal sovereignty in its 1903 lease with Cuba. See Lease Agreement, *supra* note 55, at Art. III.

66. *Boumediene*, 128 S. Ct. at 2262. By finding that Guantánamo Bay is subject to U.S. laws, the ruling strips Guantánamo of its main reason to exist: holding detainees without lawyers and access to the courts. See Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, Office of Legal Counsel, *Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba* (Dec. 28, 2001).

67. *Boumediene*, 128 S. Ct. at 2258.

68. *Id.* at 2237. The Court distinguished Landsberg Prison in *Eisentrager* from Guantánamo Bay in *Boumediene* and found that Guantánamo Bay is not close to an active theater of war. *Id.* at 2260. But see Justice Scalia's dissent discussing *Eisentrager*. *Id.* at 2294, 2298–302.

## IV. REVIEW PROCESS ADEQUACY AND HABEAS CORPUS SUBSTITUTE

In 2006, the Supreme Court in *Hamdan* ruled that the Military Commissions for Guantánamo Bay were unconstitutional<sup>69</sup> and that the Geneva Conventions did apply.<sup>70</sup> The Court concluded that the DTA did not apply to pending cases, including the one before the Court.<sup>71</sup> Further, the Court found that the military commissions established after September 11, 2001 violated Congressional restrictions placed on the use of military commissions, interpreting Section 836 of the Uniform Code of Military Justice (UCMJ) as requiring that military commissions be held to the same standard as courts-martial, unless impracticable.<sup>72</sup> As to Section 821 of the UCMJ, the Court held that the “law of war” reference required compliance with procedural requirements of Article 3 of the Geneva Convention, because “conflict not of an international character” means a conflict that is not between states and, thus, encompasses even a cross-border conflict between a state and a non-state terrorist organization.<sup>73</sup>

Interpretation is the pivotal issue. Unlike the Supreme Court, the White House interpreted the phrase as not applying to the conflicts with Taliban and al Qaeda because these conflicts are “international in scope.”<sup>74</sup> It further interpreted Article 3 of the Geneva Conventions as not applying to al Qaeda since al Qaeda is not a party to the Conventions, or to the Taliban soldiers in Afghanistan because they did not comply with the requirements for prisoner of war status under the Convention.<sup>75</sup>

Congress attempted to fix the shortcomings determined by the Supreme Court in *Hamdan* by passing the MCA.<sup>76</sup> The MCA establishes a new alien “unlawful enemy combatant” status and defines an individual falling into that category as someone 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 who, before, on, or after the date of the MCA’s enactment, “has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent

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69. *Hamdan*, 548 U.S. at 593–94.

70. *Id.* at 613.

71. *Id.* at 576.

72. *Id.* at 622.

73. *Id.* at 629.

74. Memorandum from The White House on Humane Treatment of Taliban and al Qaeda Detainees 2(c) (Feb. 7, 2002), available at [www.pegc.us/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf) (last visited Aug. 1, 2008).

75. *Id.* at 2(a).

76. See 10 U.S.C.A. § 948a (2008).

tribunal established under the authority of the President or the Secretary of Defense.”<sup>77</sup>

The MCA acknowledges the Geneva Conventions several times. It states that the newly coined “unlawful enemy combatants” cannot invoke the Geneva Conventions as a source of rights in habeas corpus or other similar proceedings.<sup>78</sup> It further states that military commissions are “regularly constituted court[s]” satisfying the requirements set forth by Article 3 of the Geneva Conventions.<sup>79</sup>

By far the most notable change instituted by the MCA is the amendment of the habeas corpus statute. Although the MCA does not mention suspension of habeas corpus, its changes have the effect of suspension. First and foremost, the MCA is applicable to pending cases.<sup>80</sup> It substantially modifies the review process by limiting its availability only to the U.S. Court of Appeals for the District of Columbia and for two strict purposes: review of the final decision of enemy combatant status<sup>81</sup> and whether the proceeding was consistent with the standards and procedures, and to the extent applicable, the Constitution and U.S. laws.<sup>82</sup>

However, for the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, “the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings.”<sup>83</sup> This includes some authority to assess the sufficiency of the government's evidence against the detainee.<sup>84</sup> “It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.”<sup>85</sup>

The *Boumediene* Court decided that the purpose of the DTA and MCA is to eliminate the habeas corpus option and to substitute it for a more summary procedure.<sup>86</sup> The Court did not state what procedure would be adequate, but stated that the current procedure fell short of a meaningful opportunity to demonstrate that *Boumediene* is “being held pursuant to ‘the erroneous application or interpretation’ of relevant law.”<sup>87</sup> Specifically, the Court found

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77. *Id.* § 948a(1)(i)–(ii).

78. *Id.* § 948b(g).

79. *Id.* § 948b(f).

80. 28 U.S.C.A. § 2241(e).

81. 10 U.S.C.A. § 950g(a) (2008).

82. *Id.* § 950g(c).

83. *Boumediene*, 128 S. Ct. at 2270.

84. *Id.*

85. *Id.*

86. *Id.* at 2266.

87. *Id.* (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 302 (2001)).

that the judicial officer must have the authority to make a determination in light of the relevant law and facts, as well as the power to order release of the detainee.<sup>88</sup> Moreover, the detainees are not held pursuant to prior adversarial proceedings before an independent and disinterested tribunal.<sup>89</sup>

*Boumediene* held that the CSRT procedures and the limited review process available in federal court is not an adequate substitute to habeas corpus review because the risk of error is too significant to ignore.<sup>90</sup> As such, the MCA is an unconstitutional suspension of the writ of habeas corpus in violation of the Suspension Clause.<sup>91</sup> Therefore, petitioners are entitled to the habeas privilege and if that privilege is denied to them, Congress must act in accordance with the Suspension Clause's requirements.<sup>92</sup>

## V. EFFECT OF THE DECISION

The *Boumediene* decision has had a major impact on the availability of habeas corpus and other constitutional challenges to detainees, as well as the likelihood of their release. It also significantly improves the international credibility of the United States and its efforts to defeat terrorism.

### A. Habeas Corpus Proceedings

The *Boumediene* decision is not a guaranteed release like the proverbial get-out-of-jail-free card. The decision does not require that the detainees be immediately released by having writs issued whereby ending their confinement, or that they be transferred. However, the decision does give the detainees the right to challenge the basis for their detention in habeas corpus proceedings in federal courts. Until now, the only recourse available to the detainees was challenging their enemy combatant status. The challenges available to the detainees rest largely on whether the federal courts will choose a broad or narrow interpretation of the *Boumediene* decision.<sup>93</sup> Because the military

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88. *Boumediene*, 128 S. Ct. at 2266.

89. *Id.* at 2269.

90. *Id.* at 2270.

91. *Id.* at 2274.

92. *Id.*; cf. *Hamdi*, 542 U.S. at 564. In his dissent, Justice Scalia stated that an "indefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the writ." *Id.*

93. Ruling on Def.'s Mot. Add'l Continuance, ¶¶ 3, 6, *U.S. v. Hamdan*, D-042 (U.S. Mil. Comm. June 26, 2008), [hereinafter Ruling] available at <http://www.defenselink.mil/news/D-042%20Final%20Ruling.pdf> (last visited Aug. 1, 2008).

commissions only have jurisdiction over unlawful enemy combatants, those not designated as such will not fall under the commission's jurisdiction.<sup>94</sup>

Following *Boumediene*, some habeas corpus petitions will be eligible for appeal and new petitions will be filed. A habeas corpus proceeding and any substitute must afford the petitioner an effective and meaningful ability to challenge his "enemy combatant" status, to challenge the sufficiency of the government's evidence, and to present exculpatory evidence not considered by the lower court.<sup>95</sup> The Supreme Court found that the DTA fails to be an adequate habeas corpus substitute, but it did not specify exactly what the review process should entail in order to be procedurally sound.<sup>96</sup>

As opposed to criminal proceedings where secret evidence is not permitted, the use of classified evidence in habeas corpus proceedings may be allowed.<sup>97</sup> The Court suggested that reliance on classified evidence may not be objectionable because "the Government has a legitimate interest in protecting sources and methods of intelligence gathering."<sup>98</sup> If the detainee would have the opportunity to present exculpatory evidence upon review, then the reviewing court would have to have "some authority to assess the sufficiency of the evidence against the detainee" in order to cure defects in previous proceedings, such as reliance on testimony obtained under torture or coercion.<sup>99</sup> Further, the ability to rebut "the Government's evidence . . . is limited by the circumstances of his confinement and his lack of counsel . . . ."<sup>100</sup>

Additionally, the Court's finding was based on the fact that personal representatives assigned to assist detainees during CSRT proceedings were neither lawyers nor advocates and that the "Government's evidence [was] accorded a presumption of validity."<sup>101</sup> This presumption of validity of evidence coupled with the inability of the detainees to rebut, and the reviewing court's inability to assess the sufficiency of the evidence coupled with an irrebuttable presumption of the detainee's guilt, accentuates the difference between criminal proceedings and the proceedings under military commissions. In its first case considering the merits of a petition to review a CSRT status determination under the DTA, the U.S. Court of Appeals for the District of Columbia found that the CSRT record was insufficient to support the

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94. Jurisdiction was already denied by the MCA when it amended the statute to include cases pending on or before the enactment of the amendment. See 28 U.S.C.A. § 2241(e).

95. *Boumediene*, 128 S. Ct. at 2270.

96. *Id.* at 2240.

97. See *id.* at 2276.

98. *Id.*

99. *Id.* at 2269.

100. *Boumediene*, 128 S. Ct. at 2260.

101. *Id.*

conclusion that the detainee was an enemy combatant, because the evidence the government submitted to the Tribunal did not permit the Tribunal to make the necessary assessment and, further, because the record does not permit the review court to do so either.<sup>102</sup> The Appellate Court strongly held that Congress did not direct them under the DTA to place a judicial stamp of approval “on an act of essentially unreviewable executive discretion” when it authorized judicial review of enemy combatant determinations.<sup>103</sup> This decision highlights the grave “separation-of-powers issues raised by these cases” and emphasized in *Boumediene*.<sup>104</sup>

### B. Constitutional Challenges

The first criminal trial arising out of the war on terror and the first interpretation of the *Boumediene* decision began on July 21, 2008 with *U.S. v. Hamdan*.<sup>105</sup> While the Court held that Guantánamo Bay detainees are entitled to constitutional protections, it did not specify the extent to which the protections apply.<sup>106</sup> In *Hamdan*, the judge denied the defense’s motion for continuance, a motion largely based on the constitutional protections perceived applicable by the defense after *Boumediene*.<sup>107</sup> The difference in interpretation of the Supreme Court’s ruling between the prosecution and the defense is significant once again in anticipating the reach of the decision and its effect on the pending and future cases of other detainees.

Relying on a broad interpretation of *Boumediene*, Hamdan’s defense alleged many violations of substantive and procedural constitutional protections at Guantánamo Bay. Hamdan alleges that he is entitled to legal constitutional protections and that any trial before a military commission violates the Equal Protection Clause of the Fifth Amendment.<sup>108</sup> In addition, he alleges that: coercion during interrogation violated his constitutionally protected right against self-incrimination;<sup>109</sup> the use of testimony obtained by coercion or torture and the denial of access to documents about Guantánamo Bay conditions

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102. Parhat v. Gates, 532 F.3d 834, 836 (D.C. Cir. 2008).

103. *Id.*

104. *Boumediene*, 128 S. Ct. at 2263.

105. 548 U.S. 557 (2006).

106. *See generally id.*

107. *See Ruling, supra* note 93.

108. *See* Def.’s Mot. Add’l Continuance ¶ 6(B), *U.S. v. Hamdan* (U.S. Mil. Comm. June 19, 2008), [hereinafter Motion], available at <http://www.defenselink.mil/news/Motion%20for%20Cont.pdf> (last visited Aug. 1, 2008) (stating that “Because the Constitution’s separation-of-powers structure, like the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles.”).

109. *Id.* § (6)(B)(2).

violated the Due Process Clause;<sup>110</sup> the restrictive access to high-value-detainees at Guantánamo Bay violated his right to call witnesses in his defense;<sup>111</sup> the Guantánamo Bay conditions inhibiting attorney-client relationships violated his right to an attorney;<sup>112</sup> the prosecution's plans to offer "hearsay evidence" at trial violated his right to confront witnesses;<sup>113</sup> the mode and scheduling of military commission trials violated his right to a speedy and public trial;<sup>114</sup> being charged by Government prosecutors violated his right to be charged by a grand jury;<sup>115</sup> and lastly, that he is accused of a crime for actions not criminal at the time of occurrence, in violation of the Ex Post Facto Clause.<sup>116</sup>

The government's contention is that the *Boumediene* holding is narrow and means only that the detainees have the right to pursue habeas corpus petitions in federal court and that preventing further delay is of great importance.<sup>117</sup> The government's main argument is that the cases are not analogous as Hamdan was charged with war crimes while *Boumediene* was not.<sup>118</sup> This argument is likely to arise often as the detainees' circumstances vary greatly.

In denying Hamdan's motion for continuance, the judge found the Supreme Court's holding in *Boumediene* to be narrow in that it did not hold "that any other provision of the Constitution will protect the detainees at Guantánamo Bay."<sup>119</sup> However, the judge specified the commission's particular interest in "the parties' views on whether other constitutional provisions, such as those the defense intends to raise, apply at Guantánamo Bay."<sup>120</sup> This could be interpreted to mean that the Commission may interpret the narrow *Boumediene* decision as applying broadly to other constitutional rights raised by the detainees.

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110. *Id.*

111. *Id.* § (6)(B)(4).

112. *Id.* § (6)(B)(5).

113. Motion, *supra* note 108, § (6)(B)(6).

114. *Id.* § (6)(B)(7) (citing *Boumediene*, 128 S. Ct. at 2275, holding that aliens at Guantánamo Bay are entitled to prompt habeas corpus hearings and need not first exhaust procedures by seeking review of their status as determined by the CSRT in the Court of Appeals).

115. *Id.* § (6)(B)(8).

116. *See id.* § (6)(B)(9). The Ex Post Facto claim would be a test of whether a military commission has jurisdiction because the accusations are not violations of the law of war.

117. *See* Petitioner's Response to Defendant's Motion for Additional Continuance, ¶ 5, U.S. v. Hamdan, D-042 (U.S. Mil. Comm. June 20, 2008), available at <http://www.defenselink.mil/news/Hamdan%20Gov%20Response.pdf> (last visited Aug. 1, 2008).

118. *Id.*

119. Ruling, *supra* note 93, at 3.

120. *Id.*

### C. Likelihood of Release

Considering the Court's opinion regarding the government's evidence and its presumption of validity without the possibility of rebuttal, the government will likely evaluate the release of those detainees against whom little evidence exists. To minimize the risk of error in detaining innocent people, the government will evaluate the significance of the threat that the detainee is currently posing and will likely release those presenting no further threat.

In evaluating the detainees' release, the government will have to consider their citizenship, their immigration status in the country they wish to return to, and the conditions in the country that will accept them. U.S. law prohibits the government from sending people to countries in which they could be persecuted or tortured; therefore, the U.S. government has the burden of finding countries that will not further mistreat the detainees or that will not forward the detainees to third countries engaging in such non-humanitarian practices.<sup>121</sup>

### D. United States' Credibility in the World

The *Boumediene* decision has already had a significant positive impact on the credibility of the United States in the international arena as a nation committed to due process and the rule of law. The Human Rights Watch found the Supreme Court's ruling to command respect worldwide and herald it as a "sign that the era of U.S. lawlessness in fighting terrorism is over."<sup>122</sup> The world may now have a basis for believing that the U.S. military will follow international laws regarding armed conflicts and treatment of prisoners in this unconventional war, and that the U.S. efforts to defeat terrorism deserve international support.

However, *Boumediene* does not prevent Congress from changing the current MCA procedures. In line with the government's national security concerns, a new system of preventive detention of individuals who are likely to pose a threat may include the shortcomings found by the Supreme Court. In the very near future, Congress may create new procedures governing detainee review, as well as a national security court to conduct that review. The legislature may define the burden of proof required in cases brought before these courts and the categories of people detainable in light of the new rules

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121. Some countries, such as Yemen, are refusing to accept former detainees by questioning the legality of citizenship. Other countries pose a threat to the detainee and those detainees are awaiting the acceptance of a third country. The situation is further complicated for those detainees who are immigrants and cannot return to their native country, yet may not be accepted by their new country for lack of citizenship. See Anthony Shahid, *Yemeni Languishes at Guantanamo Long After U.S. Approved Release*, WASH. POST, June 13, 2007, at A11.

122. Human Rights Watch, *US: Landmark Supreme Court Ruling on Detainees*, June 12, 2008, <http://www.hrw.org/english/docs/2008/06/12/usint19123.htm> (last visited July 30, 2008).

likely to be promulgated. Following the *Boumediene* decision, the courts will show a level of deference to national security proportional to the opportunities afforded the detainee to prove innocence before an independent decision maker.

## VI. OPEN QUESTIONS

Although *Boumediene* resolved critical issues affecting the Guantánamo Bay detainees' legal recourses, the Court did not address other major questions pertinent to the current conflict.

Specifically, the Supreme Court did not rule on the applicability of the Constitution to detainees held outside of Guantánamo Bay, in similar detention sites, with similar lease agreements, where the United States holds de facto control, and where practical considerations do not forego extending the protections of the writ.<sup>123</sup> Also, the Court did not state whether Guantánamo Bay should be closed, and left open the significant question of what law governs a petitioner's detention or which international law governs the authority of the United States to detain individuals not classified as terrorists or prisoners of war.

The decision did not "address whether the President has authority to detain these petitioners nor [did it] hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court."<sup>124</sup> The Supreme Court did not express an opinion on the definition of enemy combatants, or the other designations used by the government, and to what extent these definitions do not overlap with the international belligerent descriptions.

The decision did not address whether claims regarding conditions of treatment and confinement can be raised in subsequent habeas corpus proceedings, nor did the Court specify whether existing military commission proceedings must be stayed. Considering that the United States is at war, it is significant that the Supreme Court did not specify the standards to be applied during military operations or whether the rules of war need drastic modifications to accommodate global wars on multiple fronts between non-states.

## VII. CONCLUSION

The *Boumediene* ruling creates a precedent for the exercise of jurisdiction over detainees in places where the U.S. government has the equivalent of

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123. The U.S. Military prison in Bagram, Afghanistan has seen an increased number of detainees over the years and there are plans to increase the capacity of the facility. See Del Quentin Wilber, *In Courts, Afghanistan Air Base May Become Next Guantanamo*, WASH. POST, June 29, 2008, at A14.

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

sovereign authority and for the detainee's ability to challenge U.S. custody through a habeas petition.

As habeas relief is available only to those not yet charged with any crime, with a certain status, and who can show that their detentions are not warranted, it is unlikely that numerous habeas petitions will be initiated. Following its previous reactions, Congress may yet again develop a new legislative way of resolving most of the constitutional challenges. The new challenges will present the Supreme Court with ample opportunities to interpret the *Boumediene* decision.

Most importantly, *Boumediene* and other related cases may become a valuable study of the checks and balances between the U.S. government branches.