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Boumediene v. Bush: Flashpoint in the Ongoing Struggle to Determine the Rights of Guantanamo Detainees

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BOUMEDIENE v. BUSH: FLASHPOINT IN THE
ONGOING STRUGGLE TO DETERMINE THE RIGHTS
OF GUANTANAMO DETAINEES

Michael Anderson

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BOUMEDIENE v. BUSH: FLASHPOINT IN THE ONGOING STRUGGLE TO DETERMINE THE RIGHTS OF GUANTANAMO DETAINEES

Michael Anderson*

I. INTRODUCTION

Following the harrowing events of September 11, 2001, and pursuant to the Authorization for Use of Military Force¹ (AUMF) passed soon thereafter by Congress, the United States Armed Forces began capturing and detaining individuals at the Naval Air Base in Guantanamo Bay, Cuba. The choice of where to house these detainees was not random. Internal memoranda from the Justice Department reveal that the Naval Base was selected as a means of avoiding any legal entanglements that might ensue from such imprisonment.² What resulted was what some commentators have called a “legal black hole”³ at Guantanamo, a place where any individual meeting the government’s vague definition of “enemy combatant”⁴ could be detained indefinitely and, in many cases, without formal charges.

As news of these detentions started to become public, and the detainees themselves began to initiate court proceedings to challenge the legality of their detention, a lively interplay between the Executive, the Judiciary, and later, the Legislature, began as a means of determining precisely what rights, if any, these

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1. Pub. L. No. 107-40, §§ 1-2, 115 Stat. 224 (2001). The AUMF states, in relevant part: [T]he 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.

Id. § 2(a).

2. Memorandum from Patrick F. Philbin & John C. Yoo to William J. Haynes, II, Gen. Counsel, Dep’t of Def. (Dec. 28, 2001), available at http://www.library.law.pace.edu/research/011228_philbinmemo.pdf (“We conclude that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at GBC.”). See also JOHN YOO, WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR 142 (2006) (“No location was perfect, but the U.S. Naval Station at Guantanamo Bay, Cuba, seemed to fit the bill. . . . [T]he federal courts probably wouldn’t consider Gitmo as falling within their habeas jurisdiction . . .”).

3. See Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1 (2004); Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantanamo*, 5 CARDOZO PUB. L., POL’Y & ETHICS J. 127, 128 (2006).

4. A 2004 memorandum from the Department of Defense defines “enemy combatant” as [A]n 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. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy (Jul. 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> [hereinafter CSRT Order].

detainees possessed. For its part, the Supreme Court, on several occasions, while recognizing the valid role of Executive powers under such circumstances, defended the rule of law and incrementally carved out legal protections for the detainees at Guantanamo.⁵ Such protections have not been absolute, however, and Congress recently entered the fray when it enacted the Military Commissions Act of 2006 (MCA),⁶ which purports to strip federal court jurisdiction over the habeas corpus claims of the Guantanamo detainees.

The constitutionality of this legislation was considered by the Court of Appeals for the District of Columbia in the recent case of *Boumediene v. Bush*.⁷ The *Boumediene* court determined that the Guantanamo detainees had no rights, either at common law or under the Constitution, to federal habeas relief, and thus implicitly affirmed the validity of the MCA.⁸ It is the purpose of this Note to suggest that in so doing, the court foreclosed to the detainees any meaningful ability to challenge the lawfulness of their detention, leaving only very narrow judicial review of their continued status as “enemy combatants.”

In considering this issue, Part II of this Note examines the extensive jurisprudential and legislative precedent to the *Boumediene* decision as a means of analyzing the evolution of legal arguments and issues that culminated in the passage of the MCA. Part III is devoted to a thorough analysis of the *Boumediene* opinion. Part IV critiques the *Boumediene* majority and poses an argument that the Supreme Court has, through its prior holdings, indicated that habeas rights do in fact extend to these detainees. Based on the existence of these rights, Part IV continues by arguing that the passage of the MCA was indeed an unconstitutional affront to the Suspension Clause of the Constitution.⁹ This Note concludes by recommending that the Supreme Court clarify its prior holdings and firmly establish the rights of the detainees held at Guantanamo.¹⁰

II. BACKGROUND OF GUANTANAMO HABEAS LITIGATION

A. Habeas Corpus and the Suspension Clause

Habeas corpus enjoys a unique status in American history as the only common law writ specifically mentioned in the Constitution.¹¹ It was incorporated into American colonial law after developing in England, where the first origins of the writ were written into the Magna Carta, stating, “No free man shall be taken or imprisoned or dispossessed or outlawed, or banished, or in any way destroyed, nor will we go upon

5. For a discussion of the Court’s decisions in *Rasul v. Bush*, 542 U.S. 466 (2004) and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), see Parts II.B, C of this Note.

6. Pub. L. No. 109-366, 120 Stat. 2600.

7. 476 F.3d 981 (D.C. Cir. 2007).

8. *Id.* at 988-92.

9. U.S. CONST. art. I, § 9, cl. 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.”).

10. The Supreme Court granted a petition for writ of certiorari in *Boumediene* on June, 29, 2007, reversing course from an earlier denial. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (vacating *Boumediene v. Bush*, 127 S. Ct. 1478 (2007)).

11. ROBERT SEARLES WALKER, *HABEAS CORPUS: WRIT OF LIBERTY* 104 (2006).

him, nor send upon him, except by the legal judgment of his peers and by the law of the land.”¹² After codification by statute in England in 1679, the writ was included in the United States Constitution through the Suspension Clause, which was, like so many constitutional rights, a limitation on governmental action rather than a positive grant of a specific right.¹³ The power to grant writs of habeas corpus was given to federal courts upon their establishment by the Judiciary Act of 1789,¹⁴ and this power remains a part our modern statutory scheme.¹⁵

As explained by Chief Justice John Marshall in an early habeas opinion, “The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment.”¹⁶ The Supreme Court later defined the most important aspect of habeas as its ability “to afford a swift and imperative remedy in all cases of illegal restraint upon personal liberty.”¹⁷ Thus, at its most basic level, habeas corpus serves the crucial function of ensuring that individuals confined by the government have a fair opportunity to challenge the circumstances of their detention.

The Supreme Court has clearly articulated the important function of habeas in securing personal freedom, particularly under circumstances of imprisonment at the behest of the Executive branch. Indeed, the Court has stated that “[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.”¹⁸ Moreover, in the recent decision of *Hamdi v. Rumsfeld*,¹⁹ the Court clarified that “unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining [a] delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.”²⁰

The Suspension Clause commands that Congress cannot suspend the writ of habeas “unless when in Cases of Rebellion or Invasion, the public Safety may require it.”²¹ Furthermore, an effective suspension of the writ can be made only through “specific and unambiguous” statutory language.²² The habeas jurisprudence of the Supreme Court, however, has indicated that Congress need not invoke the Suspension Clause for every legislative alteration made to habeas relief. The Court held in *Swain v. Pressley*²³ that “the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person’s detention does not constitute a

12. *Id.* at 8.

13. *Id.* at 104-05; *see also supra* note 9.

14. Ch. 20, § 14, 1 Stat. 73, 81-82.

15. *See* 28 U.S.C. § 2241 (2000).

16. *Ex parte Watkins*, 28 U.S. 193, 202 (1830).

17. *Price v. Johnson*, 334 U.S. 266, 283 (1948).

18. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

19. 542 U.S. 507 (2004).

20. *Id.* at 536 (plurality opinion).

21. U.S. CONST. art. I, § 9, cl. 2.

22. *St. Cyr*, 533 U.S. at 299.

23. 430 U.S. 372 (1977).

suspension of the writ of habeas corpus.”²⁴ Thus, Congress is free to create an “adequate” and “effective” substitute for habeas without running afoul of the Constitution. These principles play an important role in the analysis of the habeas petitions that have arisen out of Guantanamo Bay.

B. Origins of Guantanamo Habeas Petitions

The first habeas petitions arising out of detentions at Guantanamo were filed in the United States District Court in the District of Columbia in 2002.²⁵ Two separate groups of detainees from the United Kingdom, Australia, and Kuwait brought claims relating to their confinement at the naval base.²⁶ One group directly sought a petition for habeas corpus, while the other filed claims based on the Due Process Clause, the Alien Tort Claims Act, and the Administrative Procedure Act. Interpreting all of these claims as challenges to the lawfulness of the detainees’ confinement, the district court consolidated the cases as petitions for writs of habeas corpus.²⁷ The court granted the government’s motion to dismiss for lack of jurisdiction,²⁸ and the Court of Appeals for the District of Columbia Circuit affirmed,²⁹ relying primarily on the Supreme Court’s decision in *Johnson v. Eisentrager*.³⁰

In *Eisentrager*, the Supreme Court considered the habeas petitions of twenty-one German nationals who, after the surrender of Germany in World War II, were captured by U.S. forces in China and tried and convicted there for violations of the laws of war.³¹ Following their convictions, the petitioners were detained by the United States in Germany.³² Justice Jackson, writing for the *Eisentrager* majority, noted that “[w]e are cited to no instance where a court, in this or any other country where the writ [of habeas corpus] is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction.”³³ After an extensive examination of aliens’ constitutional rights generally, and *enemy* aliens specifically, Jackson concluded that “the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection.”³⁴ Jackson denied such protection to the German prisoners because “at no relevant time were [they] within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United

24. *Id.* at 381.

25. *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff’d sub nom.* *Al Odah v. United States*, 321 F.3d 1134, 1145 (D. C. Cir. 2003), *rev’d*, 542 U.S. 466 (2004).

26. *Id.* at 57-58.

27. *Id.* at 62-65.

28. *Id.* at 73.

29. *Al Odah*, 321 F.3d at 1145.

30. 339 U.S. 763 (1950).

31. *Id.* at 765-66. Specifically, the German soldiers were charged with furnishing intelligence regarding the movement of American forces in China to the Japanese government. *Id.*

32. *Id.* at 766.

33. *Id.* at 768.

34. *Id.* at 777-78.

States.”³⁵ Any other solution, Jackson argued, would “hamper our war effort or aid the enemy.”³⁶

The court of appeals, in considering the Guantanamo detainees habeas petitions, made much of the strict territorial analysis employed in *Eisentrager*. Initially, the court acknowledged that the detainees differed in several aspects from the prisoners in *Eisentrager*, specifically that they had been neither charged nor convicted of a crime, denied their enemy alien status, and were not citizens of countries currently at war with the United States.³⁷ Nevertheless, the court considered these distinctions to be of little consequence, finding that they in fact had “much in common” with the *Eisentrager* petitioners, particularly that “they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States.”³⁸ Holding that *Eisentrager* stands for the proposition that “constitutional rights . . . are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens,”³⁹ the court concluded that “no court in this country has jurisdiction to grant habeas relief [under the federal habeas statute] to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States.”⁴⁰

Importantly, in reaching this conclusion, the court disputed the detainees’ contention that Guantanamo Bay was, in effect, a territory of the United States and that the government exercised sovereignty over it.⁴¹ The court reviewed both the text of the leases between the United States and Cuba involving Guantanamo as well as federal court decisions on the subject.⁴² Defining “sovereignty” as “supreme dominion exercised by a nation,” the court held that this power lay with Cuba, not the United States.⁴³

The Supreme Court reversed the decision of the court of appeals in *Rasul v. Bush*.⁴⁴ Justice Stevens, writing for the majority, began by noting that the federal habeas statute⁴⁵ “granted district courts, ‘within their respective jurisdictions,’ the authority to hear applications for habeas corpus by any person who claims to be held ‘in custody in violation of the Constitution or laws or treaties of the United States,’”⁴⁶ and asserted that, historically, habeas protections have been strongest when reviewing

35. *Id.* at 778.

36. *Id.*

37. *Al Odah v. United States*, 321 F.3d 1134, 1139-40 (D.C. Cir. 2003).

38. *Id.* at 1140.

39. *Id.* at 1140-41. The court considered two recent decisions of the Supreme Court interpreting *Eisentrager*, including *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) and *Zadvydas v. Davis*, 533 U.S. 678 (2001), in support of its assertion that “certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.” *Al Odah*, 321 F.3d at 1141 (quoting *Zadvydas*, 533 U.S. at 693).

40. *Al Odah*, 321 F.3d at 1141.

41. *Id.* at 1142-43.

42. *Id.* at 1143-44.

43. *Id.*

44. 542 U.S. 466 (2004).

45. 28 U.S.C. § 2241 (2000).

46. *Rasul*, 542 U.S. at 473 (quoting 28 U.S.C. § 2241).

the legality of Executive detention.⁴⁷ Stevens then undermined the lower court's reliance on *Eisentrager*, starting with the factual distinctions between the Guantanamo detainees and the German prisoners that had been deemed unpersuasive by the court of appeals:

[The Guantanamo detainees] 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 they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.⁴⁸

Stevens stressed that the *Eisentrager* Court had placed much emphasis on the status of the German prisoners, as admitted enemy aliens tried and convicted of crimes of war, in determining that the right to habeas did not exist.⁴⁹

In further reasoning why *Eisentrager* was not controlling in the case at bar, Stevens indicated that the majority there focused almost exclusively on the prisoner's constitutional right to habeas while only briefly touching upon any statutory right that may exist.⁵⁰ Stevens asserted that the precedent relied on by the *Eisentrager* Court in holding that statutory rights to habeas did not extend to the prisoners, namely the Court's decision two years earlier in *Ahrens v. Clark*,⁵¹ had since been overruled.⁵² Specifically, Stevens cited to *Braden v. 30th Judicial Circuit Court of Kentucky*,⁵³ which reasoned that the "writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," and thus held that habeas may be granted in any situation where "the custodian can be reached by service of process."⁵⁴ Stevens reasoned that because *Braden* had undermined the "inflexible jurisdictional rule" set forth in *Ahrens*, then *Eisentrager*, which had in turn relied on *Ahrens*, "plainly does not preclude the exercise of [the federal habeas statute's] jurisdiction over petitioners' claims."⁵⁵

Stevens further departed from the court of appeals ruling by stating that the United States "exercises complete jurisdiction and control" over Guantanamo and that such control extended the reach of the federal habeas statute to its shores.⁵⁶ Concluding that "[p]etitioners contend that they are being held in federal custody in violation of the

47. *Id.* at 474 (citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

48. *Id.* at 476.

49. *Id.* at 475-76.

50. *Id.* at 476. Stevens quoted the only language devoted to statutory rights to habeas in *Eisentrager*: "Nothing in the test of the Constitution extends such a right, nor does anything in our statutes." *Id.* (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950)).

51. 335 U.S. 188 (1948). The *Ahrens* Court held that German immigrants detained at Ellis Island while awaiting deportation had no right to habeas based on the "within their respective jurisdictions" language of the federal habeas statute, and determined that the U.S. District Court for the District of Columbia, where the habeas petitions had been filed, lacked territorial jurisdiction to entertain the detainees' claims. *Id.* at 192.

52. *Rasul*, 542 U.S. at 476-79.

53. 410 U.S. 484 (1973).

54. *Rasul*, 542 U.S. at 478-79 (quoting *Braden*, 410 U.S. at 494-95).

55. *Id.* at 479.

56. *Id.* at 480-82.

laws of the United States,” and that “[n]o party questions the District Court’s jurisdiction over petitioners’ custodians,” Stevens asserted that the federal habeas statute “confers on the District Court jurisdiction to hear petitioners’ habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.”⁵⁷

While the holding of *Rasul* spoke directly only to the territorial reach of the federal habeas statute, the Court suggested in a footnote that the detainees retained rights beyond the statute itself:

Petitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—*unquestionably describe “custody in violation of the Constitution or laws or treaties of the United States.”*⁵⁸

Such language suggests that the detainees’ right to habeas relief is rooted in more fundamental due process rights guaranteed by the Constitution.⁵⁹ Not surprisingly, “footnote 15” has received much scrutiny as to its overall impact from courts⁶⁰ as well as commentators.⁶¹

Only nine days after the decision in *Rasul* was handed down, the Government responded to the holding by establishing the Combatant Status Review Tribunal (CSRT) as a means of allowing certain detainees at Guantanamo to challenge their status as enemy combatants.⁶² The CSRT, comprised of “three neutral commissioned officers of the U.S. Armed Forces,” does not allow the detainees access to counsel or to all of the evidence against them.⁶³ In making its determination, the CSRT considers all “reasonably available” information as compiled by a “Recorder,” including “any reasonably available records, determinations, or reports generated in connection” with the initial holding of the detainee as an enemy combatant.⁶⁴ Furthermore, the CSRT

57. *Id.* at 483-84.

58. *Id.* at 483 n.15 (quoting 28 U.S.C. § 2241(c)(3) (2000)) (emphasis added).

59. See Hafetz, *supra* note 3, at 139 (noting that footnote 15 of *Rasul* suggests that “the principal constitutional right at issue in the Guantanamo detainee litigation—due process—is fundamental”).

60. See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 463 (D.D.C. 2005) (“[I]t is difficult to imagine that the Justices would have remarked that the petitions ‘unquestionably describe “custody in violation of the Constitution or laws or treaties of the United States”’ unless they considered the [detainees] to be within a territory in which constitutional rights are guaranteed.”). For a more thorough discussion of this district court opinion, see *infra* Part II.C.

61. See, e.g., Hafetz, *supra* note 3, at 139; Elizabeth A. Wilson, *The War on Terrorism and “The Water’s Edge”: Sovereignty, “Territorial Jurisdiction,” and the Reach of the U.S. Constitution in the Guantanamo Detainee Litigation*, 8 U. PA. J. CONST. L. 165, 171 (2006). For a more detailed discussion of the impact of footnote 15 on analysis of habeas claims originating out of Guantanamo see *infra* Part IV.A.

62. CSRT Order, *supra* note 4.

63. *Id.* at 1. As opposed to legal counsel, the detainees were appointed a “military officer, with the appropriate security clearance, as a personal representative for the purpose of assisting the detainee in connection with the review process described herein.” *Id.* The personal representative is permitted to review relevant evidence and share information with the detainee with the exception of any classified information against him. *Id.*

64. *Id.* at 2.

is not bound by the Federal Rules of Evidence and can consider “any information [that] it deems relevant and helpful to a resolution of the issue before it.”⁶⁵

C. *Procedural History of Boumediene*

In the wake of the Supreme Court’s recognition of jurisdiction over detainees’ habeas claims in *Rasul*, two separate sets of claims made their way to the United States District Court, District of Columbia, each producing drastically different results. In *Khalid v. Bush*,⁶⁶ Judge Leon dismissed the habeas petitions of seven Guantanamo detainees, holding that “no viable legal theory exists by which it could issue a writ of habeas corpus under these circumstances.”⁶⁷ The petitioners in *Khalid* challenged both the Executive authority to order their detention and, if such authority was legal, challenged the lawfulness of their detention under the Constitution, the laws of the United States, and international law.⁶⁸ In addressing the first argument, the court found the appropriate Executive authority under the AUMF, passed immediately following the events of 9/11.⁶⁹

Turning next to the constitutional arguments, Judge Leon relied heavily on *Eisentrager* and its progeny, reaffirming the Supreme Court’s “unequivocal and repeated denial” of substantive constitutional rights to non-resident aliens.⁷⁰ The court indicated that *Rasul* did not alter *Eisentrager* but rather “limited its inquiry to whether non-resident aliens detained at Guantanamo have a right to judicial review of the legality of their detention under the habeas statute” and “did not concern itself with whether the petitioners had any independent constitutional rights.”⁷¹ In addressing the brief suggestion in *Rasul* that the detainees may indeed possess fundamental rights under the Constitution,⁷² Judge Leon asserted that such language must be read in the context of the *Rasul* Court’s limitation of its holding to jurisdictional grounds.⁷³ After finding no domestic or international law upon which to base the petitioners’ claims,⁷⁴ the court granted the government’s motion to dismiss.⁷⁵

Twelve days after the district court issued its opinion in *Khalid*, the very same court issued a strikingly contrasting decision on similar facts in *In re Guantanamo Detainee Cases*.⁷⁶ There, Judge Joyce Hens Green considered the government’s motion to dismiss the habeas petitions filed by detainees in eleven consolidated cases.⁷⁷

65. *Id.* at 3.

66. 355 F. Supp. 2d 311 (D.D.C. 2005), *aff’d sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).

67. *Id.* at 314.

68. *Id.* at 316.

69. *Id.* at 317-20.

70. *Id.* at 320-21.

71. *Id.* at 322 (citing *Rasul v. Bush*, 542 U.S. 466, 475-76 (2004)).

72. See *supra* notes 58-61 and accompanying text.

73. *Khalid*, 355 F. Supp. 2d at 323 (“[I]n its own words, the Supreme Court chose to only answer the question of jurisdiction, and not the question of whether these same individuals possess any substantive rights on the merits of their claims.”).

74. *Id.* at 324-28.

75. *Id.* at 330.

76. 355 F. Supp. 2d 443 (D.C. Cir. 2005), *rev’d sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).

77. *Id.* at 452.

As in *Khalid*, all of the detainees alleged that their detention constituted violations of rights guaranteed under the Fifth Amendment, while asserting a variety of other claims based on federal and international law.⁷⁸ The government again argued that *Rasul* determined only that the detainees had a right to allege detention in violation of the Constitution and other laws, but was silent as to whether they possessed any “underlying substantive rights.”⁷⁹ The government further asserted that Supreme Court precedent prior to *Rasul* firmly established that no such rights existed as to non-resident aliens.⁸⁰

Judge Green rejected these arguments, interpreting *Rasul*, “in conjunction with other precedent, to require the recognition that the detainees at Guantanamo Bay possess enforceable constitutional rights.”⁸¹ In support of that interpretation, Judge Green first noted that the Court in *Rasul* had expressly recognized that Guantanamo was a territory “over which the United States exercises exclusive jurisdiction and control”⁸² and concluded that such language by itself “would be sufficient for this Court to recognize the special nature of the Guantanamo Bay and . . . treat it as the equivalent of sovereign U.S. territory where fundamental constitutional rights exist.”⁸³ Rather than ending the analysis there, however, the court gave significant weight to the *Rasul* Court’s recognition in footnote 15 that the detention of the detainees was unquestionably “in violation of the Constitution . . . of the United States.”⁸⁴

Upon concluding that the detainees possessed fundamental due process rights under the Constitution as a result of their detention at Guantanamo, Judge Green went on to hold that the CSRT procedures established by the government in response to *Rasul* did not satisfy these rights.⁸⁵ The court specifically cited the failure to provide the detainees access to material evidence, denial of assistance of counsel, reliance on information obtained through torture, and an overly broad definition of “enemy combatant” as specific defects in the CSRT procedures.⁸⁶

D. Legislative Precedent to Boumediene

While the appeals of both *Khalid* and *In re Guantanamo Detainee Cases* were pending in the United States Circuit Court, District of Columbia Circuit, two pieces of legislation were passed by Congress that would dramatically affect the detainees’ habeas claims. First, Congress passed the Detainee Treatment Act of 2005 (DTA).⁸⁷ The DTA amended the federal habeas statute by adding a subsection (e) to 28 U.S.C. § 2241.⁸⁸ This new subsection provided that “[e]xcept as provided in section 1005 of the [DTA], no court, justice, or judge shall have jurisdiction to hear or consider”:

78. *Id.* at 452-53.

79. *Id.* at 454.

80. *Id.*

81. *Id.*

82. *Id.* at 462 (quoting *Rasul v. Bush*, 542 U.S. 466, 476 (2004)).

83. *Id.* at 462-63.

84. *Id.* at 463 (quoting *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004)).

85. *Id.* at 472.

86. *See id.* at 468-78.

87. Pub. L. No. 109-148, §§ 1001-06, 119 Stat. 2680, 2739-45.

88. *Id.* § 1005(e)(1).

- (1) 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; or
- (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who
 - (A) is currently in military custody; or
 - (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.⁸⁹

The “except as provided” language referred to subsections (e)(2) and (e)(3) of section 1005 of the DTA, which granted limited review to the D.C. Circuit over CSRT determinations and final military commission decisions.⁹⁰ The DTA specifically indicated that subsections (e)(2) and (e)(3) “shall apply with respect to any claim . . . that is pending on or after the date of the enactment of this Act.”⁹¹

The jurisdiction stripping language of the DTA was challenged in the Supreme Court in *Hamdan v. Rumsfeld*.⁹² In *Hamdan*, the government moved to dismiss the habeas claim of a Yemeni national detained at Guantanamo, claiming that the recently enacted DTA applied retroactively to all habeas claims pending at the time of its passage.⁹³ In rejecting this argument, the Court noted that the retroactivity provision of the DTA, by its terms, only included subsections (e)(2) and (e)(3), noticeably excluding subsection (e)(1) (dealing with habeas claims),⁹⁴ and held that “a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.”⁹⁵ The Court, in addressing the merits of *Hamdan*’s challenge, held the Executive branch lacked “specific congressional authorization” to convene the military commission that was to try him.⁹⁶ In invalidating the commission, the Court found that its procedures violated both the Uniform Code of Military Justice⁹⁷ and the Geneva Conventions.⁹⁸

In a rapid response to the *Hamdan* decision, Congress passed the MCA. Section 7 of the MCA struck the amendment to subsection (e) of the federal habeas statute made by the DTA and inserted new language:

89. *Id.*

90. *Id.* §§ 1005(e)(2), (3). The DTA limits review of any CSRT determination to whether such determination “was consistent with the standards and procedures specified by the Secretary of Defense,” including “the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government’s evidence.” *Id.* § 1005(e)(2)(C)(i). In addition, the reviewing court may consider, “to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.” *Id.* § 1005(e)(2)(C)(ii). The DTA offers similar review for final decisions of military commissions. *See id.* § 1005(e)(3).

91. *Id.* § 1005(h)(2).

92. 126 S. Ct. 2749 (2006).

93. *Id.* at 2752-53.

94. *Id.* at 2763; *see supra* notes 87-90 and accompanying text.

95. *Id.* at 2765 (citing *Lindh v. Murphy*, 521 U.S. 320, 330 (1997)).

96. *Id.* at 2775.

97. *Id.* at 2787-93.

98. *Id.* at 2794-96.

(1) 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 United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.⁹⁹

Furthermore, the Act established that the amendment “shall apply to *all cases, without exception, pending on or after the date of the enactment of this Act* which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.”¹⁰⁰ Thus, the MCA broadened the limited retroactivity of the DTA as interpreted by the *Hamdan* Court and removed federal court jurisdiction from *all* pending habeas petitions of the Guantanamo detainees. After five years in imprisonment, in many cases without any formal charges, Congress had effectively slammed the courthouse doors shut on hundreds of prisoners held at the naval base.

III. THE *BOUMEDIENE* DECISION

By the time the MCA was enacted, the pending appeals from the conflicting district court decisions in *Khalid* and *In Re Guantanamo Detainees* had been consolidated and all parties had filed briefs in reaction to the legislation.¹⁰¹ The detainees advanced two principal arguments that the MCA did not impede their ability to file a habeas writ in federal court: first, that the MCA, by its terms, did not repeal jurisdiction over the pending habeas claims¹⁰² and, second, that to the extent that it succeeded in stripping district court jurisdiction over the pending habeas claims, it violated the Suspension Clause of the U.S. Constitution.¹⁰³ The Government, in turn, argued that the MCA expressly eliminated district court jurisdiction over the detainees’ claims.¹⁰⁴

Noting initially that “Congress must articulate specific and unambiguous statutory directives to effect a repeal” of habeas corpus,¹⁰⁵ the detainees relied on statutory

99. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2636.

100. *Id.* § 7(b) (emphasis added).

101. See Supplemental Brief of Petitioners Boumediene, et al., and Khalid Regarding the Military Commissions Act of 2006, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) (Nos. 05-5062 & 05-5063), [hereinafter *Boumediene Brief*]; The Guantanamo Detainees’ Supplemental Brief Addressing the Military Commissions Act of 2006, 476 F.3d 981 (D.C. Cir. 2007) (Nos. 05-5095 through 5116), [hereinafter *Guantanamo Detainees Brief*]; Government’s Supplemental Brief Addressing the Military Commissions Act, 476 F.3d 981 (D.C. Cir. 2007) (Nos. 05-5062 through 05-5116), [hereinafter *Government Brief*].

102. *Boumediene Brief*, *supra* note 101, at 3-6.

103. *Id.* at 6-20.

104. *Government Brief*, *supra* note 101, at 4-12.

105. *Boumediene Brief*, *supra* note 101, at 3 (quoting *INS v. St. Cyr*, 533 U.S. 289, 299 (2001)).

construction to assert that the MCA, like the DTA before it, did not apply retroactively to habeas petitions.¹⁰⁶ Specifically, the detainees referred to section 7(a) of the MCA, which strips jurisdiction over two distinct categories of cases, habeas claims and the broader category “any other action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement.”¹⁰⁷ In contrast, the detainees noted that the retroactivity clause of the MCA applied specifically to cases “which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention.”¹⁰⁸ Thus, much like the “negative inference” drawn by the *Hamdan* Court in construing the DTA, the detainees argued that the MCA similarly failed to apply retroactively to pending habeas claims.¹⁰⁹

In support of their argument that the MCA, if construed to strip federal courts of habeas jurisdiction, violated the Suspension Clause, the detainees initially asserted that their right to habeas was protected by the Constitution.¹¹⁰ Noting that Supreme Court precedent established that “at the absolute minimum, the Suspension Clause protects the writ [of habeas] ‘as it existed in 1789,’”¹¹¹ the detainees interpreted *Rasul* as establishing that similarly situated prisoners would have possessed such a right at common law from the time of the signing of the Constitution.¹¹² Thus, as an initial matter, the detainees argued that the MCA denied them a constitutionally guaranteed right to habeas.¹¹³

After arguing for entitlement to habeas, the detainees asserted that Supreme Court precedent established that Congress cannot suspend the writ in accordance with the Suspension Clause without allowing for an adequate substitute remedy.¹¹⁴ The detainees argued that the proper test for determining whether such an alternative was adequate hinged upon whether the substitute remedy was both commensurate in scope with habeas and an adequate and effective means of testing the legality of the detention at issue.¹¹⁵ Noting that judicial review under the DTA was the only substitute for habeas provided by Congress in the wake of the MCA,¹¹⁶ the detainees asserted that such review fell well short of the scope and rigor of protections offered by habeas corpus.¹¹⁷ In particular, the detainees argued that, historically, habeas required a particularly “searching” review when the claim involved, as here, Executive detention.¹¹⁸

106. *Id.* at 3-6.

107. *Id.* at 3-4.

108. *Id.*

109. *Id.* at 5-6.

110. Guantanamo Detainees Brief, *supra* note 101, at 6-7.

111. *Id.* (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

112. *Id.* In support of this point, the detainees cited a portion of *Rasul* in which Justice Stevens engages in a brief discussion of the history of the writ, and concludes that “[a]pplication of the habeas statute to persons detained at [Guantanamo] is consistent with the historical reach of the writ of habeas corpus.” *Rasul v. Bush*, 542 U.S. 466, 481 (2004).

113. Guantanamo Detainees Brief, *supra* note 101, at 6-7.

114. *Id.* at 7-9 (citing *Swain v. Pressley*, 430 U.S. 372 (1977)).

115. *Id.*

116. *Id.* at 10. For a discussion of the judicial review provided by the DTA see *infra* notes 175-82 and accompanying text.

117. *Id.* at 10-12.

118. *Id.* at 12-18.

In response, the Government argued that the language of the MCA was unequivocal in its intent to strip federal court jurisdiction over pending habeas claims originating out of Guantanamo.¹¹⁹ Specifically, the Government argued that the application of the retroactivity clause of the Act to “all cases, without exception . . . which relate to any aspect of the detention” of those held at Guantanamo implicitly included habeas claims within its scope.¹²⁰ In countering the detainees claim that the MCA violated the Suspension Clause, the Government asserted that *Eisentrager* expressly held that aliens detained as enemies outside of the United States were not entitled to habeas relief.¹²¹ Furthermore, the Government distinguished *Rasul*, limiting that holding to a determination of a statutory right to habeas, a right that had been expressly revoked by the MCA.¹²²

In *Boumediene*, a divided three judge panel of the Court of Appeals for the District of Columbia Circuit dismissed the detainees’ petitions for habeas corpus based on lack of jurisdiction.¹²³ At the outset, the court accepted the government’s argument that habeas claims invariably were “aspects of detention” and thus fell within the ambit of the MCA’s retroactivity clause.¹²⁴ Finding no ambiguity in the Congressional intent to revoke federal court jurisdiction over the habeas claims, the court turned to the constitutional issues.

Noting that the Suspension Clause protected the writ “as it existed in 1789,” the court engaged in a lengthy historical analysis in an attempt to determine the scope of the writ in relation to the detainees.¹²⁵ The court examined the 18th century English cases proffered by the detainees and, after determining that none of them “involved an alien outside the territory of the sovereign,” concluded that “[the detainees] cite no case and no historical treatise showing that the English common law writ of habeas corpus extended to aliens beyond the Crown’s dominions.”¹²⁶ Citing its own historical precedent, the court asserted that not only did the writ not extend outside of England’s borders, but that government actors took full advantage of that reality in choosing where to detain prisoners.¹²⁷ The court concluded that “given the history of the writ in England prior to the founding, habeas corpus would not have been available in 1789 to aliens without presence or property within the United States.”¹²⁸

The majority bolstered its argument by relying heavily on *Eisentrager*, stating that the holding of that case “ends any doubt about the scope of common law habeas.”¹²⁹ Furthermore, the court looked to *Eisentrager* in foreclosing any constitutional rights

119. Government Brief, *supra* note 101, at 4.

120. *Id.* at 6-7. The Government also urged a contextual argument that stressed that it would be nonsensical to conclude that, in the wake of the Court’s holding in *Hamdan*, Congress would pass legislation that was, in relation to habeas jurisdiction, redundant of the DTA. *Id.* at 8-10.

121. *Id.* at 14 n.7.

122. *Id.* at 15 n.8.

123. *Boumediene v. Bush*, 476 F.3d 981, 994 (D.C. Cir. 2007).

124. *Id.* at 986-91.

125. *Id.* at 988 (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

126. *Id.* at 989.

127. *Id.* (“When agents of the Crown detained prisoners outside the Crown’s dominions, it was understood that they were outside the jurisdiction of the writ.”).

128. *Id.* at 990.

129. *Id.*

that might extend to the detainees, interpreting that case to stand for the proposition that “the Constitution does not confer rights on aliens without property or presence within the United States.”¹³⁰ Thus, on the basis of *Eisentrager*’s strict territorial rule, the court concluded that there was no Suspension Clause violation and, in light of the clear language of the MCA, no federal court could properly hear the detainees’ habeas claims.¹³¹

In a sharply written dissent, Judge Rogers agreed with the majority that the text of the MCA was clear in its intent to withdraw federal jurisdiction from the detainees’ claims, but departed with regard to whether that withdrawal withstood scrutiny under the Suspension Clause.¹³² The dissent argued that the Suspension Clause operated as a limitation on congressional power and not a grant of individual constitutional rights,¹³³ thus eliminating the need to inquire into the actual status or location of the detainees in regard to the sovereign authority of the United States.¹³⁴ Based on that assumption, Judge Rogers criticized the majority’s emphasis on the historical reach of the writ. Furthermore, the dissent took the majority to task for “ignoring the Supreme Court’s well-considered and binding dictum in [*Rasul*], that the writ at common law would have extended to the detainees.”¹³⁵

After concluding that the writ would have extended to the detainees at common law and was thus protected by the Suspension Clause, Judge Rogers noted that Congress had not invoked its power to suspend the writ under the exception laid out in the Constitution, namely “in Cases of Rebellion or Invasion.”¹³⁶ Thus, the dissent concluded, under Supreme Court precedent, suspension of the writ was unconstitutional absent an “adequate alternative procedure for challenging detention.”¹³⁷ Judge Rogers found the CSRT review provided by the DTA, the only substitute offered by Congress in the wake of revoking habeas jurisdiction, “neither adequate to test whether detention is unlawful nor directed toward releasing those who are unlawfully held.”¹³⁸ Specifically, Judge Rogers considered the detainees’ inability to present evidence, the highly deferential review required under the DTA, and the availability of evidence acquired through torture.¹³⁹ Judge Rogers argued that all of these conditions fell well short of the relief provided under habeas.¹⁴⁰ In addition, the dissent pointed out that while the traditional remedy to unlawful detention under a habeas petition was release,

130. *Id.* at 991-94.

131. *Id.* at 993.

132. *Id.* at 994-95.

133. *Id.*

134. *Id.* at 1004. Judge Rogers noted:

The detainees do not here contend that the Constitution accords them a positive right to the writ but rather that the Suspension Clause restricts Congress’s power to eliminate a preexisting statutory right. To answer that question does not entail looking to the extent of the detainees’ ties to the United States but rather requires understanding the scope of the writ of habeas corpus at common law in 1789.

Id.

135. *Id.* at 995.

136. *Id.* at 1007 (quoting U.S. CONST. art. I, § 9, cl. 2).

137. *Id.* at 1004.

138. *Id.* at 1005.

139. *Id.* at 1006.

140. *Id.* at 1005.

neither the DTA nor the MTA required release, and noted that detainees previously found not to be enemy combatants under the CSRT were merely subjected to additional CSRT proceedings.¹⁴¹

Judge Rogers continued her dissent by asserting that “the Court in *Rasul* held that federal court jurisdiction under [the federal habeas statute] is permitted for habeas petitions filed by detainees at Guantanamo, and this result is undisturbed because the MCA is void.”¹⁴² Relying heavily on the traditional reach and purpose of the writ, the dissent noted that “[s]o long as the Executive can convince an independent Article III habeas judge that it has not acted unlawfully, it may continue to detain those alien enemy combatants who pose a continuing threat during the active engagement of the United States in the war on terror.”¹⁴³ However, the judge concluded that the current conditions under the DTA and the MCA required no such showing and, perhaps most importantly, gave the detainees no opportunity to respond to the charges against them.¹⁴⁴ Such conditions, according to Judge Rogers, amounted to an unconstitutional suspension of the writ of habeas corpus.¹⁴⁵

IV. MISSED SIGNALS AND MISSED OPPORTUNITIES: A CRITICAL ANALYSIS OF *BOUMEDIENE*

After initially denying a petition for certiorari in *Boumediene*,¹⁴⁶ in June of 2007 the Supreme Court made a rare reversal of course and agreed to hear the case.¹⁴⁷ The Court thus has an opportunity to correct the grave errors of the D.C. circuit majority in *Boumediene* and grant to the Guantanamo detainees the right to meaningfully challenge their confinement. The Court should, as an initial matter, overturn the court of appeals and clarify its previous holdings suggesting that the right to habeas corpus is indeed available to the detainees. Having thus established a right to the writ, the Court should then address whether the review offered by the MCA and DTA provides an adequate substitute or if these statutory schemes in fact serve as an unconstitutional suspension of habeas corpus.

A. *Rasul and the Writ: A Proper Reading of Supreme Court Precedent*

The Supreme Court has held that “at the absolute minimum, the Suspension Clause protects the writ [of habeas corpus] ‘as it existed in 1789.’”¹⁴⁸ While both the majority

141. *Id.* at 1006.

142. *Id.* at 1011 (citations omitted).

143. *Id.*

144. *Id.*

145. *Id.* at 1011-12.

146. *Boumediene v. Bush*, 127 S. Ct. 1478 (2007).

147. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007). The impact of the grant of certiorari was immediately felt, as some district courts denied the government’s motions to dismiss in pending detainee habeas claims, recognizing that the Court would likely resolve issues highly relevant to those cases. *See, e.g., Al Maqaleh v. Gates*, No. 06-1669 (JDB), 2007 WL 2059128 (D.D.C. Jul. 18, 2007). *But see Qayed v. Bush*, No. 05-0454 (RMU) (D.D.C. Sep. 20, 2007), available at <http://www.scotusblog.com/movabletype/archives/Urbina%20order%20Sept.%2020%2007.pdf> (dismissing petitioner’s claim without prejudice based on the court of appeals’ decision in *Boumediene*).

148. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)). While the Court in *St. Cyr* did not reach the question of whether the Suspension Clause encompassed

and the dissent in *Boumediene* engaged in lengthy historical analyses of the reach of the writ, any such exercise was rendered immaterial by the language of the *Rasul* Court. Although the majority in *Rasul* clarified that the question before them was limited to whether the federal habeas statute conferred jurisdiction over habeas claims coming from Guantanamo,¹⁴⁹ the Court's subsequent analysis established a common law right to the writ as well. In its searching historical survey, the Court stated that the "[a]pplication of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus."¹⁵⁰ The Court further explained that "[a]t common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control."¹⁵¹ Such language expressly refutes the *Boumediene* majority's reasoning that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States."¹⁵²

Furthermore, the *Rasul* decision seriously undermines the significant reliance that the court in *Boumediene* placed on the strict territoriality rule expressed in *Eisentrager*.¹⁵³ The Court in *Rasul* expressly stated that the detainees there "differ from the *Eisentrager* detainees in important respects," including the fact that "they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control."¹⁵⁴ Justice Kennedy, concurring in the majority opinion, noted that "Guantanamo Bay is in every practical respect a United States territory."¹⁵⁵ On that basis, the Court, rather than overruling *Eisentrager*, simply distinguished it and

subsequent expansions of the writ, it has been suggested that its reach must have been intended by the Framers to reach future developments. See *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1269 (1970) ("While the framers probably could not have foreseen the extent to which the writ's function would expand, the history of two centuries of expansion through a combination of statutory and judicial innovation in England must have led them to understand habeas corpus as an inherently elastic concept not bound to its 1789 form. The suspension clause then could be read to protect the product of an evolving judicial process.") (citations omitted).

149. See *Rasul v. Bush*, 542 U.S. 466, 475 (2004).

150. *Id.* at 481.

151. *Id.* at 481-82 (footnotes omitted).

152. *Boumediene v. Bush*, 476 F.3d 981, 990 (D.C. Cir. 2007). The Court of Appeal's overt rejection of the majority's historical analysis is all the more surprising given the fact that, in coming to its own conclusions regarding the historical reach of the writ, the court placed emphasis on Justice Scalia's dissenting opinion in *Rasul*. *Id.* at 990-91 (citing *Rasul*, 542 U.S. at 502-05, n.5 (Scalia, J., dissenting)). This is particularly troubling considering that the *Rasul* majority expressly refused to follow Scalia's historical analysis. *Rasul*, 542 U.S. at 482-83 n.14; see also *Petition for Writ of Certiorari* at 16, *Boumediene v. Bush*, 127 S.Ct. 1478 (2007) (No. 06-1195).

153. The *Boumediene* court stated that *Eisentrager* "end[ed] any doubt about the scope of common law habeas." *Boumediene*, 476 F.3d at 990. In applying *Eisentrager*'s strict territoriality rule, the court then asserted that "under the common law [of habeas corpus], the dispositive fact was . . . [the petitioner's] lack of presence within any sovereign territory." *Id.* at n.8.

154. *Rasul*, 542 U.S. at 476.

155. *Id.* at 487 (Kennedy, J., concurring). Justice Kennedy's concurrence further provides a detailed explanation as to why a "faithful application" of *Eisentrager* "requires an initial inquiry into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts presented." *Id.* Kennedy considered the fact that the detainees were being "held indefinitely, and without benefit of any legal proceeding," compelled an application of the privilege of habeas to the detainees. *Id.* at 487-88.

rendered it inapplicable to the Guantanamo detainees, asserting that “the reach of the writ depend[s] not on formal notions of territorial sovereignty, but rather on the practical question of ‘the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.’”¹⁵⁶ Based on this reasoning by the *Rasul* Court, the *Boumediene* majority’s reliance on *Eisentrager* and its formal notions of a strict sovereignty rule was misguided.

The majority in *Rasul* offered additional evidence of its support for the proposition that the protection of the writ of habeas extended to the detainees at Guantanamo in its well-documented “footnote 15.”¹⁵⁷ While hardly explicit,¹⁵⁸ the majority suggested in this footnote that such protections may flow from the Constitution itself:

Petitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—*unquestionably describe “custody in violation of the Constitution or laws or treaties of the United States.”*¹⁵⁹

The footnote supports this conclusion by citing to Justice Kennedy’s concurring opinion in *United States v. Verdugo-Urquidez*¹⁶⁰ and cases cited therein, a fact that may be of considerable significance.

In *Verdugo-Urquidez*, the Court considered a Fourth Amendment challenge by a Mexican citizen when U.S. Drug Enforcement Agents searched his home in Mexico and seized evidence pertinent to his trial.¹⁶¹ The majority held that the Fourth Amendment had no application to the search performed in Mexico, as the petitioner was a “citizen and resident of Mexico with no voluntary attachment to the United States.”¹⁶² Crucial to the majority analysis was the ability of the government to “function effectively in the company of sovereign nations.”¹⁶³ In concurrence, Justice Kennedy accepted the majority’s reasoning that the Fourth Amendment would not apply under the specific facts before the Court,¹⁶⁴ but refused to adopt any bright-line rule of strict territoriality when considering the application of the Constitution overseas.¹⁶⁵ Rather, Kennedy espoused a context specific analysis that would

156. *Id.* at 482 (quoting *Ex parte Mwenya*, 1 Q.B. 241, 303 (1960)).

157. *Id.* at 483 n.15.

158. Judge Green, relying on footnote 15 while ruling for the detainees in the district court below, wrote that she “would have welcomed a clearer declaration in the *Rasul* opinion regarding the specific constitutional and other substantive rights of the petitioners,” but that she nevertheless interpreted the opinion “to require the recognition that the detainees at Guantanamo Bay possess enforceable constitutional rights.” *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 454 (D.D.C. 2005).

159. *Rasul*, 542 U.S. at 483 n.15 (quoting 28 U.S.C. § 2241(c)(3) (2000)) (emphasis added).

160. 494 U.S. 259, 275-78 (1990) (Kennedy, J., concurring).

161. *Id.* at 262-63 (majority opinion).

162. *Id.* at 274-75.

163. *Id.* at 275 (quoting *Perez v. Brownell*, 356 U.S. 44 (1958)).

164. *Id.* at 278 (Kennedy, J., concurring). Justice Kennedy gave several reasons why the Fourth Amendment would not apply in *Verdugo-Urquidez*, including “[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable concepts of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials.” *Id.* It is worth noting that, arguably, none of these elements are applicable to the current situation in Guantanamo Bay.

165. *Id.* at 277-78 (Kennedy, J., concurring).

“interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad.”¹⁶⁶

The fact that the *Rasul* majority, in supporting its statement that the detainees’ circumstances “unquestionably describe[s] custody in violation of the Constitution or laws or treaties of the United States,”¹⁶⁷ cited not to the strict territorial approach of the majority in *Verdugo-Urquidez*, but rather to Kennedy’s contextual approach in concurrence (including his reliance on the *Insular Cases*), suggests that the Court may indeed be willing to apply fundamental constitutional protections, including Due Process, to the Guantanamo detainees.¹⁶⁸ Indeed, one of the two district court decisions that were ultimately reviewed by the court of appeals in *Boumediene* applied that precise analysis.¹⁶⁹

Thus, the holding of the *Boumediene* court seems to be in conflict with the Supreme Court holding in *Rasul*. The court’s application of *Eisentrager* to the Guantanamo detainees stands in sharp contrast to both the clear language of the *Rasul* majority (indicating that a common law right to habeas would have extended to similarly situated prisoners in 1789), and the suggestion that the Court was willing to endorse the contextual approach of Justice Kennedy in *Verdugo-Urquidez*, as opposed to the strict territoriality rule expressed in *Eisentrager*. By failing to consider the specific circumstances of the detainees confinement, most importantly that they, in the words of the *Rasul* majority, “have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control,”¹⁷⁰ the *Boumediene* court erred in failing to extend to them either common law or constitutional habeas protection.

B. Suspension of the Writ

Because the majority in *Boumediene* held, albeit erroneously, that the detainees before them had no common law or constitutional right to habeas corpus, the court did not reach the question of whether the passage of the MCA was a violation of the

166. *Id.* at 277. In support of this proposition, Kennedy cited to a group of cases decided at the turn of the 20th century collectively known as the *Insular Cases*. *Id.* (citing *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); and *Balzac v. Puerto Rico*, 258 U.S. 298 (1922)). The *Insular Cases* generally stand for the proposition that full constitutional rights only apply to incorporated territories, but in unincorporated territories, “fundamental” constitutional rights could apply depending on an objective determination of the level and character of control asserted there by the United States. See Wilson, *supra* note 61, at 169 n.19. These cases thus support Justice Kennedy’s broad proposition in *Verdugo-Urquidez* that the proper test for constitutional protection of aliens abroad is not a strict territorial rule, but rather a case-by-case consideration of the circumstances of the authority asserted by the United States in a given situation. See *id.* at 169.

167. *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004).

168. See Wilson, *supra* note 61, at 171; see also Hafetz, *supra* note 3, at 138-39.

169. See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 463 (D.D.C. 2005). The district court judge explained:

[R]ather than citing to *Eisentrager* or even the portion of *Verdugo-Urquidez* that referenced the “emphatic” inapplicability of the Fifth Amendment to aliens outside U.S. territory, the *Rasul* Court specifically referenced . . . Justice Kennedy’s concurring opinion. . . . This Court therefore interprets that portion of the opinion to require consideration of that precedent in the determination of the underlying rights of the detainees.

Id.

170. *Rasul*, 542 U.S. at 476.

Suspension Clause. As discussed previously, Supreme Court in *Swain* recognized that a congressional act that limited formal habeas rights but provided an “adequate” or “effective” substitute would not run afoul of the Suspension Clause.¹⁷¹ However, as the dissent in *Boumediene* recognized, a close analysis of remedies provided to the Guantanamo detainees by the DTA and the MCA reveals that these statutory schemes fall woefully short of this standard.¹⁷²

The Court has recognized that “[t]he writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action,”¹⁷³ and that “[p]etitioners in habeas corpus proceedings . . . are entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts.”¹⁷⁴ Indeed, the Court has made clear that “[t]he whole history of the writ—its unique development—refutes a construction of the federal courts’ habeas corpus powers that would assimilate their task to that of courts of appellate review,” and “the power of inquiry on federal habeas corpus is plenary.”¹⁷⁵

Held against these principles, the judicial review afforded by the DTA can hardly be said to be “adequate” or “effective” substitutes for habeas. The DTA grants the D.C. Circuit “exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.”¹⁷⁶ Such review is limited in scope to two specific inquiries, each of which in turn reveals the immense and ultimately unconstitutional gap between such review and the traditional protections of habeas corpus.

First, the court may consider whether the CSRT complied with its own standards and procedures, “including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government’s evidence.”¹⁷⁷ An analysis of the underlying CSRT procedures¹⁷⁸ reveals that such an inquiry is far from the traditional protections afforded by habeas. As the *Boumediene* dissent noted, under the CSRT process, “[t]he detainee need not be informed of the basis for his detention (which may be classified), need not be allowed to introduce rebuttal evidence (which is sometimes deemed by the CSRT too impractical to acquire), and must proceed without the benefit of his own counsel.”¹⁷⁹ Indeed, the Government’s most recent interpretation of the proper standard of review for the D.C. Circuit in undertaking CSRT review asserted that the court should limit its inquiry to “whether the CSRT ‘had enough information before’ it to conclude that the detainee is an enemy combatant, without judging the quality of that evidence.”¹⁸⁰ Based on these standards, a finding that the CSRT complied with its

171. *Swain v. Pressley*, 430 U.S. 372, 381 (1977); see also discussion *supra* Part II.A.

172. *Boumediene v. Bush*, 476 F.3d 981, 1004-07 (D.C. Cir. 2007) (Rogers, J., dissenting).

173. *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969).

174. *Id.* at 298.

175. *Townsend v. Sain*, 372 U.S. 293, 311-12 (1963).

176. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(A), 119 Stat. 2680, 2742.

177. *Id.* § 1005(e)(2)(C)(i).

178. See *supra* notes 62-65 and accompanying text.

179. *Boumediene v. Bush*, 476 F.3d 981, 1005 (D.C. Cir. 2007).

180. Corrected Brief for Respondent Addressing Pending Preliminary Motions at 26, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Apr. 10, 2007) (quoting *People’s Mojahedin Organization of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 25 (D.C. Cir. 2003)). The Government further asserted, based on the clear pronouncement in *Boumediene* that the Constitution does not apply to the Guantanamo detainees, that there

own heavily weighted standards and supported its decision by a preponderance of evidence largely supplied by the Government is hardly the searching inquiry into contested Executive detention that habeas requires.

Second, the D.C. Circuit is permitted, under the DTA, to consider “*to the extent the Constitution and laws of the United States are applicable*, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.”¹⁸¹ However, as Justice Breyer noted in his dissent from the Court’s initial denial of certiorari in *Boumediene*, the court of appeals there “expressly indicated that *no constitutional rights . . . extend to the Guantanamo detainees*,” thus rendering this statutory provision “a nullity.”¹⁸² Based on the holding of *Boumediene*, Justice Breyer stressed that “[i]t is unreasonable to suggest that the D.C. Circuit in future proceedings under the DTA will provide review that affords petitioners the rights that the Circuit has already concluded they do not have.”¹⁸³

The recent decision of *Bismullah v. Gates*¹⁸⁴ exemplifies Justice Breyer’s concerns. In *Bismullah*, the D.C. Circuit for the first time attempted to discern the specific procedures and precise scope of review of CSRT determinations under the DTA.¹⁸⁵ Bound by the *Boumediene* decision, the court did not address constitutional ramifications of the CSRT process, and was left only to consider whether such determinations were made consistently with the standards and procedures set forth by the Executive.¹⁸⁶ *Bismullah* held that the proper record of review in such proceedings “consists of all the information a [CSRT] is authorized to obtain and consider” and not, as the Government urged, only that information actually presented to the CSRT panel.¹⁸⁷ The court defined the authorized information according to the CSRT rules as laid out by the Secretary of Defense, specifically “such *reasonably available information in the possession of the U.S. Government* bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant,” including “any information presented to the Tribunal by the detainee or his Personal Representative.”¹⁸⁸

While the *Bismullah* court thus allowed a court conducting a CSRT review under the DTA to examine all of the evidence *collected by the government*, it expressly refused the detainees request for additional discovery as part of the D.C. Circuit review.¹⁸⁹

is no Sixth Amendment right to counsel or Fifth Amendment Due Process rights applicable to the underlying CSRT procedures. *Id.* at 24.

181. Detainee Treatment Act § 1005(e)(2)(C)(ii) (emphasis added).

182. *Boumediene v. Bush*, 127 S. Ct. 1478, 1480 (2007) (Breyer, J., dissenting).

183. *Id.*

184. *Bismullah v. Gates*, Nos. 06-1197, 06-1397, 2007 WL 2067938 (D.C. Cir. July 20, 2007).

185. In its grant of certiorari in *Boumediene*, the Supreme Court noted that “it would be of material assistance to consult” *Bismullah*, which was then pending in the D.C. Circuit. *Boumediene v. Bush*, 127 S. Ct. 3078, 3078 (2007).

186. *Bismullah*, 2007 WL 2067938, at *7 (“[O]ur jurisdiction under the Act is expressly ‘limited to the consideration of’ whether a detainee’s status determination was ‘consistent with the standards and procedures specified by the Secretary of Defense for [a CSRT].’” (quoting DTA § 1005(e)(2)(C)(i), 119 Stat. at 2742)).

187. *Id.* at *1.

188. *Id.* (emphasis added).

189. *Id.* at *7-8. The court did not entirely foreclose the possibility of additional discovery, holding only that the particular detainees before them did not make “a showing sufficient to justify compelling discovery at this stage of these proceedings.” *Id.* at *7.

As the concurrence in *Bismullah* indicated, relying on the record as so defined “reinforce[s] concerns about the adequacy of actions under the DTA as a substitute for the writ of habeas corpus.”¹⁹⁰ Specifically, the concurrence noted that the CSRT procedures required a detainee to identify and present to the Tribunal exculpatory evidence without any assistance of counsel and without access to classified information being used to form the case against him.¹⁹¹ Perhaps more importantly, limiting the record to “reasonably available information in the possession of the U.S. Government” allows for unilateral control of that record by the Executive branch, as determinations of precisely what is “reasonably available” rest with the Recorder responsible for compiling the evidence.¹⁹²

The *Bismullah* decision makes clear the impact of the court of appeals decision in *Boumediene*. In holding that the Guantanamo detainees possess no constitutional rights, the *Boumediene* majority ensured that any CSRT review pursuant to the DTA will involve only a determination, based on a potentially incomplete record, that the CSRT played by its own established rules. Such a narrow review offers little opportunity for a detainee, represented by counsel for the first time before the D.C. Circuit, to adequately contest the legality of his confinement. In short, such review can hardly be construed as an adequate substitute for habeas corpus.

V. CONCLUSION

The majority in *Boumediene* erred in its consideration of the Guantanamo detainees’ underlying rights to habeas corpus. By relying heavily on the requirement of sovereign jurisdiction as a condition precedent for constitutional protection espoused in *Eisentrager*, the court largely ignored the considerable language of *Rasul* that diminished such bright-line determinations as applied to the detainees. Moreover, by invoking a strict territorial analysis, the majority failed to consider whether the passage of the MCA was void as an unconstitutional suspension of the writ of habeas corpus. Both the dissent in *Boumediene* and the district court in *In re Guantanamo Detainee Cases* viewed the issue through the proper lens and, as a result, called for a consideration of the detainees’ habeas petitions on the merits, something that the Supreme Court mandated over two years ago in *Rasul* and which has yet to proceed.

Considering the grievous errors of the *Boumediene* majority and the hasty and ultimately unconstitutional actions of Congress in enacting the MCA,¹⁹³ the Supreme Court should clarify its reasoning in *Rasul* and overturn the *Boumediene* decision. Given the limited and unsatisfactory statutory remedies made available to the detainees

190. *Id.* at *15.

191. *Id.* at *14.

192. *Id.*; see also CSRT Order, *supra* note 4, at 2 (“The Tribunal, through its Recorder, shall have access to and consider any reasonably available information generated in connection with the initial determination to hold the detainee as an enemy combatant . . . as well as any reasonably available records, determinations, or reports generated in connection therewith.”).

193. Some members of Congress have already begun efforts to undo the effects of the MCA. For example, on January 16, 2007, Senator Arlen Specter introduced the “Habeas Corpus Restoration Act of 2007,” which would effectively repeal all of the jurisdiction stripping language inserted into the federal habeas statute by the MCA. S. 185, 110th Cong. (2007); see also S. 1876, 110th Cong. § 301 (2007) (striking subsection (e) of 28 U.S.C. § 2241 and expressly granting the District Court for the District of Columbia jurisdiction to hear habeas claims of detainees determined to be enemy combatants).

by Congress under the DTA and the MCA, anything less will only further allow the Government to avoid its duty to defend its detention decisions before a federal court. Furthermore, a failure by the Supreme Court to forcefully weigh in on the issues at hand will only serve to lengthen the imprisonment of the Guantanamo detainees, which for some has endured for over five years, without any meaningful opportunity to contest the validity of their confinement. *Boumediene* stands as an important flash-point in the ongoing struggle to define the rights of the Guantanamo detainees, and as such it offers the Court an opportunity to remove from Guantanamo Bay the dubious label, “legal black hole.”