Examining the Legal Foundations of Boumediene v. Bush

Dan Castellano
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by Dan Castellano*

I. INTRODUCTION

In Boumediene v. Bush, decided June 12, 2008, the Supreme Court held 5-4 that enemy combatants detained at Guantanamo Bay, Cuba, were entitled to the constitutional right of habeas corpus and that the Combatant Status Review Tribunal (CSRT) combined with the Detainee Treatment Act (DTA) review process inadequately substitutes for habeas corpus. As a result, Guantanamo detainees may now petition the federal district court for a writ of review.

This monumental decision not only influenced the closing of the Guantanamo facility, but demonstrated the Supreme Court’s willingness to go beyond the boundaries of law to define its role and assert its power. The DTA system instituted by Congress constitutionally, and adequately substituted for habeas corpus; however, the court provided inadequate reasons for striking down the DTA review system. In addition, the decision neither improved the Guantanamo detainees’ situation, nor did it speed up the process they must go through to obtain judicial review. By examining the arguments made by both sides and reviewing the Supreme Court’s majority opinion,

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I will show that the DTA had provided a review system that was a constitutionally adequate substitute for habeas corpus.

After the attacks of September 11, 2001, Congress passed The Authorization for Use of Military Force, which approved the use of U.S. Armed Forces against “those responsible for the recent attacks launched against the United States.” This law justified President Bush’s detention of suspected terrorists and ordered military tribunals to conduct governmental prosecutions of the detainees.

Furthermore, president Bush cited *Johnson v. Eisentrager* as precedent to establish the prison at Guantanamo Bay. In *Johnson*, the Court decided that the U.S. judicial system did have jurisdiction over German criminals of war detained in U.S. prisons in Germany. As of October 2009, 221 detainees remain in Guantanamo Bay.

In 2002 however, several detainees began disputing the legality of their detentions including *Rasul v. Bush*, which was the first case to go to the Supreme Court for review. Rasul claimed that he was entitled to habeas corpus review and challenged his status as an enemy combatant. Although the district court previously dismissed Rasul’s claims on the grounds of a lack of jurisdiction, the Supreme Court, in a 6-3 decision, reversed the district court’s decision and granted judicial review.
In *Hamdi v. Rumsfeld*, 11 decided shortly after *Rasul v. Bush*, the Court reviewed the denial of habeas corpus to Hamdi, an American citizen held at Guantanamo. Hamdi was captured in Afghanistan like Rasul; however, unlike Rasul, Hamdi was an American citizen.12 The majority held that “the Constitution guaranteed an American citizen challenging his detention as an enemy combatant the right to notice of the factual basis for his classification.”13 The majority also stated that a “constitutionally adequate collateral process could be provided by an appropriately authorized and properly constituted military tribunal.”14 The process that was struck down as inadequate in *Boumediene* provided a tribunal that met these conditions, as will be shown hereafter.

In response to the Supreme Court’s decisions in *Rasul* and *Hamdi*, Congress established the Combatant Status Review Tribunal (CSRT). The CSRT permitted detainees to “contest their designation as an enemy combatant.” This law allowed detainees to participate in the proceedings by calling witnesses and presenting evidence.15 CSRT proceedings have resulted in the release of a few detainees, but the majority of proceedings affirmed the detainees’ status as enemy combatants.16

Congress passed the Detainee Treatment Act of 2005 (DTA) to prevent federal courts from having jurisdiction over petitions from detainees at Guantanamo.17 The DTA provided 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

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12 Id.
13 Id. at 533.
14 Id. at 533, 538.
detained at Guantanamo Bay.”\textsuperscript{18} Guantanamo detainees were thus prohibited from invoking habeas corpus.

Finally, congress later passed the Military Commissions Act of 2006 (MCA),\textsuperscript{19} which “authorize[d] trial by military commission for violations of the law of war” and prevented the federal courts from hearing habeas corpus petitions from detainees.\textsuperscript{20}

\section*{II. Case and Decision}

In \textit{Boumediene}, the petitioners sought review in district court for two reasons: first, their lengthy detention without cause, and second, their designation as enemy combatants by military tribunals. The district court held that the MCA prevented all federal courts from hearing petitions by stripping them of jurisdiction.\textsuperscript{21} Soon afterwards the Court of Appeals upheld the dismissal for lack of jurisdiction.\textsuperscript{22} The Court of Appeals also held that the removal of jurisdiction by the MCA was legal because the petitioners were foreign nationals being held outside the United States.\textsuperscript{23}

On June 29, 2007, after an initial refusal to review the case, the Supreme Court granted certiorari. Detainees argued that the right to the writ of habeas corpus extends to detainees at Guantanamo Bay. In addition, the petitioners argued that by enacting the MCA Congress had violated the Suspension Clause, which prohibits the suspension of habeas corpus except under certain conditions.\textsuperscript{24} However, because detainees outside the de jure territory of the United States do not possess constitutional rights, including habeas corpus, the actions of Congress did not violate the Suspension Clause.

\begin{table}
\begin{tabular}{ll}
18 & \textit{Id.} \\
20 & \textit{Id.} \\
21 & \textit{Boumediene}, 476 F.3d 981, 994 (D.C. Cir. 2007). \\
22 & \textit{Id.} at 987-89. \\
23 & \textit{Id.} at 988-94. \\
24 & U.S. Const. art. 1, § 9, cl. 2.
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In their decision, the Court analyzed the history of the writ of habeas corpus and noted that the Suspension Clause permits suspension only when public safety requires it.\textsuperscript{25} The writ of habeas corpus protects individuals from unlawful imprisonment; the Court characterized it as a “vital instrument” and an “essential mechanism in the separation-of-powers scheme.”\textsuperscript{26} The Court then turned to the issue of whether the United States has legal sovereignty over Guantanamo Bay. After acknowledging that Cuba, and not the United States, retains de jure sovereignty over Guantanamo Bay, the Court held that the U.S. maintains de facto sovereignty over the territory.\textsuperscript{27} The Court held that the detainees have a right to review, and any abridgment of that right must follow the Suspension Clause.\textsuperscript{28}

The petitioners also argued that the CSRT procedures under the DTA inadequately replaced the writ.\textsuperscript{29} The government contended that the DTA created a more efficient procedure that adequately substituted for habeas corpus review.\textsuperscript{30} After examining the CSRT procedures in detail, the Court agreed with petitioners that the tribunal had the potential risk of detaining prisoners for unreasonably long periods.\textsuperscript{31} As a result, the Court held that the DTA review process was an inadequate substitute for habeas corpus review.

### III. Legal Merits of Decision

In their opinion, the majority acknowledged that “practical considerations principally influenced” its decision.\textsuperscript{32} One of those practical considerations was that a few of the petitioners had been detained for six years already and would likely be detained further if

\begin{itemize}
\item \textsuperscript{25} Id.
\item \textsuperscript{26} \textit{Boumediene}, 128 S. Ct. 2229, 2240 (2008).
\item \textsuperscript{27} See Rasul v. Bush, 542 U.S. 466, 480 (2004).
\item \textsuperscript{28} \textit{Boumediene}, 128 S. Ct. at 2262.
\item \textsuperscript{29} Br. for Petitioners, supra note 69, at 18-19.
\item \textsuperscript{30} \textit{Boumediene}, 128 S. Ct. at 2262.
\item \textsuperscript{31} Id. at 2256.
\item \textsuperscript{32} Id. at 2275.
\end{itemize}
the Court required them to complete the DTA review; the “costs of delay” were too high.\textsuperscript{33} In truth, the DTA procedures were adequate substitutes for habeas review because they met all the established requirements for a constitutionally adequate substitute. The majority made legally weak objections to the DTA, which I will examine for their legal merit.\textsuperscript{34}

The Supreme Court’s 5-4 decision held that the DTA was inadequate, but failed to specify which rights of detainees were not protected under the DTA. In addition, the DTA processes required less time than the new procedures. In describing these new processes, Justice Roberts and Justice Scalia pointed out in their dissenting opinion: “Before bringing their habeas petitions, detainees must … complete the CSRT process. Then, they may seek review in federal district court. Either success or failure there will surely result in an appeal to the D.C. Circuit—exactly where judicial review \textit{starts} under Congress’s system.”\textsuperscript{35} In essence, the Supreme Court’s decision added additional steps in the judicial review process for detainees, with the original system requiring less time than the new procedures.

The DTA review process also adequately protected the detainees’ constitutional right of habeas corpus, which exists for the purpose of testing the legality of executive detention.\textsuperscript{36} The DTA effectively protected this important right by providing an Article III court that possessed the power to hear claims and order the release of detainees. The majority admitted that the DTA provided an Article III court with the power to order release, but disputed the process.\textsuperscript{37} However, in \textit{Hamdi}, the majority held that “an appropriately authorized and properly constituted military tribunal” provided a constitutionally adequate process.\textsuperscript{38} This is exactly what the DTA provided and therefore, adequately safeguarded detainees’ habeas corpus rights.

\begin{itemize}
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.} at 2274.
\item \textsuperscript{35} \textit{Boumediene}, 128 S. Ct. 2229, 2272 (2008).
\item \textsuperscript{36} \textit{Id.} at 2273.
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} \textit{Hamdi}, 542 U.S. 507, 533 (2004).
\end{itemize}
Furthermore, the majority mistakenly concluded that DTA review was the only opportunity available to Guantanamo detainees to challenge their enemy combatant status; the majority also wrongly characterized the CSRT process as a quick review of the Executive’s battlefield determination.\textsuperscript{39} In reality, the Executive’s determination of a detainee’s status is only made after a lengthy process involving “multiple levels of review by military officers and officials of the Department of Defense.” In addition, the CSRT functions in essentially the same manner as a court would: it gathers evidence, calls witnesses, hears testimonies, and makes decisions based on the legality of the detention.\textsuperscript{41} In addition, the CSRT has the power to order a detainee released if it finds he or she has been illegally held—a requirement for a satisfactory substitute of habeas corpus.\textsuperscript{42}

There is more to the DTA system than just CSRT review. As Justice Roberts pointed out in his dissent, “CSRT review is just the first tier of collateral review in the DTA system.”\textsuperscript{43} The statute of the DTA gives the D.C. Circuit the power to consider whether the determination of a detainee’s status is “consistent with the Constitution and laws of the United States.”\textsuperscript{44} A separate court then determines whether the CSRT procedures are constitutional and whether the procedures are followed correctly. According to \textit{Hamdi v. Rumsfeld}, this review process adequately satisfies any due process requirement.\textsuperscript{45}

The majority in \textit{Boumediene v. Bush} continued to justify its dismissal of the DTA system by alleging supposed limitations of

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\item \textsuperscript{39} \textit{Boumediene}, 128 S. Ct. 2229, 2284 (2008).
\item \textsuperscript{40} Memorandum of the Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base (July 29, 2004), App. J to Pet. for Cert. in No. 06-1196, p 150
\item \textsuperscript{41} See Implementation Memo, App. J to Pet. for Cert. in No. 06-1196, at 153-162.
\item \textsuperscript{42} \textit{Id.} at 164.
\item \textsuperscript{43} \textit{Boumediene}, 128 S. Ct. 2229, 2285 (2008).
\item \textsuperscript{45} \textit{Hamdi}, 542 U. S. 507, 510 (2004).
\end{itemize}
the system. In truth, closer examination of the DTA system shows that the majority’s argument lacks factual support. They argued that evidentiary limitations and the lack of legal counsel for detainees made the DTA unsatisfactory. They further argued that permissible evidence is limited to that which is “reasonably available.” The majority added that the DTA system was inadequate due to the inherent difficulties in obtaining evidence for enemy combatants detained abroad. Yet in reality, evidence will be difficult to obtain regardless of whether it is done under habeas corpus review or the DTA because often the evidence must be obtained from distant or war-torn countries. Therefore, it makes sense that evidence would be limited to that which is “reasonably available.” In addition, the DTA system permits detainees to present evidence, call witnesses, question witnesses, and testify in court. The court’s conclusion that the DTA system is insufficient lacks supports as it creates supposed “limitations” that do not actually exist.

The majority then argued that the DTA system is inadequate because it does not allow detainees access to classified material. The court reasoned that there is the possibility of exculpatory evidence being found within classified documents. In truth, exculpatory evidence inside classified material was wholly available at the CSRT stage. Each detainee is granted a personal representative who can review classified material and search for any such evidence. The detainee’s personal representative may assist in arranging witnesses, gathering evidence, and other procedures. The court failed to appreciate the fact that CSRT procedures granted detainees adequate access to classified material through their personal representative.

When examined more closely, it becomes clear that the judicial review privileges under the CSRT process are actually greater than those afforded to prisoners of war. Under the Geneva Convention,

prisoners of war are not granted access to classified material. Since it should not be expected that enemy combatants be granted greater access to classified material than prisoners of war in full compliance with the Geneva Convention, how can the majority criticize Guantánamo detainee’s lack of access to such material? Furthermore, detainees at Guantánamo Bay have been determined to be unlawful enemy combatants, and as such should not be entitled to the same rights as prisoners of war under the Geneva Convention. Detainees at Guantánamo Bay are afforded equal or greater access to classified material than prisoners of war and for this reason the DTA system cannot be struck down as inadequate.

It is important to remember that all of this occurs at the CSRT stage. Detainees receive an additional review process before the D.C. Circuit. At this stage detainees are granted full access to appellate counsel and may challenge the legal and factual basis of their detentions. The majority is well aware that access to classified material has never been granted to alien enemy combatants. Therefore, the court’s difficulty with the lack of access to classified material is insufficient and irrelevant.

An argument of the majority was that detainees may not introduce newly discovered exculpatory evidence after their CSRT proceedings have finished. The CSRT procedures grant detainees the ability to introduce exculpatory evidence before military tribunals if this ability is denied contrary to the Constitution or the laws of the United States; the D.C. Circuit has the authority to correct the problem. The Court seems to fear a situation in which the CSRT process confirms a detainee’s status as an enemy combatant based upon evidence that is later shown to be false. The Court wrongfully supposes that an enemy combatant would have no means of redress.

52 Id.
54 Id. at 2290.
This hypothetical situation that the Court fears has yet to come to pass. Even if this situation were to occur, both the petitioners and the Solicitor General agree that the DTA system allows the D.C. Circuit to remand the case back to the CSRT stage.\textsuperscript{55}

There exists another possible solution to the Court’s hypothetical situation: when new evidence is discovered, the Secretary of Defense can “direct that a CSRT convene to reconsider the basis of the detainee’s... status in light of the new information.”\textsuperscript{56} In fact, the DTA statute specifically directs the Secretary of Defense to “provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee.”\textsuperscript{57} As Chief Justice Roberts wrote, “if this is the most the Court can muster, the ice beneath its feet is thin indeed.”\textsuperscript{58}

\section*{IV. Conclusion}

The Court’s decision in \textit{Boumediene v. Bush} to grant habeas corpus privileges to enemy combatants detained at Guantanamo Bay rests on a weak legal foundation. The Court failed to understand and evaluate the DTA system as a legal and adequate substitute for habeas corpus review.Closer examination shows that the Court’s decision was not based on solid legal precedent but must have been influenced by non-legal considerations. Therefore, it is imperative that judges rely more on legal precedent in making their decisions. The DTA system provided an Article III court with the power to order release and allowed detainees to present evidence, question witnesses, and testify with the assistance of a personal representative at the CSRT review stage. It also contained adequate protections for detainees


\textsuperscript{57} Detainee Treatment Act of 2005, ß 1005(a)(3).

\textsuperscript{58} Boumediene, 128 S. Ct. 2229, 2289 (2008).
who might be wrongfully determined to be enemy combatants at the CSRT stage. Nevertheless, the Court’s decision to strike down the DTA as inadequate will force detainees to follow a new process: detainees will now be required to complete the CSRT process before bringing their claim to the federal district court and eventually to the D.C. Circuit. This new process guarantees additional delay by increasing redundancy to an already difficult process.