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## The Mystery of Guantanamo Bay Jefferson Lecture - University of California, Berkeley - September 17, 2008

Linda Greenhouse

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# The Mystery of Guantánamo Bay

## Jefferson Lecture

### University of California, Berkeley

### September 17, 2008

Linda Greenhouse\*

On April 14, 2003, Justice Stephen G. Breyer delivered a lecture at the New York City Bar Association entitled “Liberty, Security, and the Courts.”<sup>1</sup> Justice Breyer is an optimistic person, and his presentation, nineteen months after the events of September 11, 2001, was suffused with the optimistic view that the American political and legal system, working together, would find a way to keep the country safe while not abandoning fundamental legal principles.

Justice Breyer emphasized that he did not know where the precise balance between liberty and security would eventually be struck. But “answers will be forthcoming,” he assured his audience. “Our judicial system is open.”<sup>2</sup>

Then he added the following sentences:

And, if the government claims that the court lacks jurisdiction to decide a particular matter, the court, not the government, will decide if that is so...

Moreover, in our system, habeas corpus represents the norm, lack-of-jurisdiction the exception. The theory of the ancient habeas corpus writ is that anyone in detention can challenge the lawfulness of that detention by getting word to a judge, who can order the sheriff or other jailer to ‘bring me the body.’ If exceptions exist, courts will determine their scope and whether particular circumstances fall within them . . .

Courts will decide how the law applies, what guarantees it provides, and whether the government has respected those guarantees.<sup>3</sup>

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\* Knight Distinguished Journalist-in-Residence and Joseph M. Goldstein Senior Fellow in Law at Yale Law School.

1. Stephen Breyer, “Liberty, Security, and the Courts,” Address before the Association of the Bar of the City of New York (Apr. 14, 2003), *available at* [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_04-15-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_04-15-03.html). The lecture was actually the Justice’s English translation of a lecture he had delivered in French to the Paris bar the previous November.

2. *Id.*

3. *Id.*

Let me stress that this was not Justice Breyer speaking as an advocate, arguing for one outcome or another in a particular case. Indeed, no post-9/11 cases had yet reached the Supreme Court. This was a Supreme Court Justice expressing what he assumed to be a foundational, incontestable proposition: that while the law that would eventually apply in this crisis would emerge through a process of “bubbling up” out of the interaction of all interested and affected parties,—“the democratic process at work,” as he put it—ultimately *the courts would decide*.

Looking back from the perspective of nearly five and a half years, years that have encompassed four major Supreme Court decisions,<sup>4</sup> two congressional efforts to strip federal judges of the authority to rule,<sup>5</sup> and a steady stream of Executive Branch actions aimed at maintaining the status quo while displaying the patina of accommodation,<sup>6</sup> Justice Breyer’s forecast appears to have been not only optimistic, but naïve. For anyone concerned about the rule of law, these have been disquieting years. What has “bubbled up” has not been agreement on shared values, but deeply disturbing revelations of extra-legal or illegal activity along with displays of Executive Branch intransigence bordering on defiance, congressional servility and, occasionally, judicial timidity.

The story of the Bush Administration’s post-9/11 detention policies and the litigation those policies engendered is rich, multi-faceted, and still unfolding, far too complex to be dissected in a single lecture. Indeed, it has produced a plentiful and growing literature.<sup>7</sup> My effort in our time together is more modest. It is to solve, or at least tackle, what I call the mystery of Guantánamo Bay: how can it be that nearly seven years after the first detainees arrived at the prison there—after numerous courtroom battles, the most significant of which resulted in de-

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4. *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

5. Detainee Treatment Act of 2005, Pub.L. 109-148, div. A, tit. X, §§ 1001-1006, 119 Stat. 2739; Military Commissions Act of 2006, Military Commissions Act of 2006, Pub. L. No. 109-366, 119 Stat. 2680, 10 USCS § 948(a).

6. See, e.g., Press Release, Department of Defense, Order Establishing Combatant Status Review Tribunals (July 7, 2004) [hereinafter Press Release, Department of Defense], available at <http://www.defenselink.mil/releases/release.aspx?releaseid=7530> (establishment of Combatant Status Review Tribunals within weeks after the court’s decisions in *Rasul* and *Hamdi*); Press Release, Department of Justice, Statement of Mark Corallo, Director of Public Affairs Regarding Yaser Hamdi (Sept. 22, 2004), available at [http://www.usdoj.gov/opa/pr/2004/September/04\\_opa\\_640.htm](http://www.usdoj.gov/opa/pr/2004/September/04_opa_640.htm) (the release of Yaser Esam Hamdi within months after the court ruled that as a United States citizen, he was entitled to due process); *Padilla v. Hanft*, 05-533, cert. denied, April 3, 2006 (the transfer of José Padilla to civilian custody as his petition for certiorari was pending at the Supreme Court); Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD JOURNAL OF LEGAL STUDIES 235 (2006) at 239-240 (“Could it be ... that the government feared a reversal by the Supreme Court?”).

7. E.g., LOUIS FISHER, *THE CONSTITUTION AND 9/11* (2008); HOWARD BALL, *BUSH, THE DETAINEES, AND THE CONSTITUTION* (2007); BENJAMIN WITTES, *LAW AND THE LONG WAR* (2008); JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007); JOHN YOO, *WAR BY OTHER MEANS* (2006); JOSEPH MARGUILES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006).

feats for the Bush Administration's position—not a single detainee has ever been released, by order of any court or any other body in a position of authority, against the wishes of the Administration?<sup>8</sup> How is it, in other words, that after all this time, all this spinning of wheels and running in place, nothing has happened?<sup>9</sup> And what does the performance of the institutions that have played a part in this saga tell us about the vitality of the rule of law in the United States today?

I should note that my focus is on the litigation-centered, institutional, and separation-of-powers issues raised by this episode, rather than on the human-rights issues so powerfully addressed by Jane Mayer and others.<sup>10</sup> To begin, it pays to follow an interesting but under-explored paper trail back to the earliest period of the formulation of Bush Administration policy. In the closing months of 2001, the Administration made two key determinations. One, announced in the President's military order of November 13, was to subject prisoners captured in the war that had been launched against the Taliban and Al Qaeda to trial by "military tribunals," commissions of military officers that would operate by rules yet to be determined, outside the normal processes of either civilian or military law.<sup>11</sup> The second was to establish a prison camp at the Guantánamo Bay Naval Base, in the belief that non-citizens held there would be outside the jurisdiction of the federal courts.

This latter policy decision was based on an analysis presented to the Pentagon by Justice Department lawyers, Deputy Assistant Attorneys General Patrick F. Philbin and John C. Yoo. In a December 28, 2001 memo to William J. Haynes II, General Counsel of the Defense Department, they concluded that because the Guantánamo Bay Naval Base was on territory leased from Cuba that was not part of the "sovereign territory" of the United States, it was highly unlikely that any federal court would have jurisdiction to entertain a habeas corpus petition from any of the detainees housed there.<sup>12</sup> They based their analysis

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8. On October 9, 2008, Judge Ricardo Urbina ordered the immediate release of 17 Uighers (members of a Turkish Muslim ethnic group) incarcerated at Guantánamo, observing that the government had conceded "that it would no longer consider the 17 Uigher detainees enemy combatants" and that further detention was unjustified. *In re Guantánamo Bay Detainee Litigation*, Civil Action No. 05-280 (GK) (D.D.C. Oct. 9, 2008). The District of Columbia Circuit promptly granted the government's motion for a stay pending appeal. Order Granting Motion For Stay Pending Appeal, *Kiyemba v. Bush*, No. 08-5424 (D.C. Cir. Oct. 20, 2008) (per curiam).

9. The government has released hundreds of detainees in the exercise of its own discretion, a process almost completely lacking in transparency. For example, the Department of Defense announced on September 2 that it had released three Guantánamo prisoners, one to Pakistan and two to Afghanistan, but it disclosed neither their names nor any details. See *US Releases 3 from Guantánamo; About 255 Left*, ASSOCIATED PRESS, Sept. 2, 2008.

10. JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008).

11. U.S. Presidential Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

12. Office of Legal Counsel, Department of Justice, Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, for William J. Haynes II, General Counsel of the

on a 1950 Supreme Court case, *Johnson v. Eisentrager*,<sup>13</sup> which rejected jurisdiction over habeas petitions filed by Germans who had been taken prisoner in China shortly after the German surrender in World War II. The Germans were tried and convicted by a military commission in Nanking of aiding the Japanese enemy, and imprisoned by the United States in Germany. The prisoners “at no relevant time were 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 the United States,” the Court said in *Eisentrager*.<sup>14</sup> The same reasoning should apply to the Guantánamo detainees, the Justice Department lawyers reasoned. The 1903 lease agreement between Cuba and the United States “specifically reserves sovereignty to Cuba” and is “thus definitive on the question of sovereignty and should not be subject to question in the courts,” they wrote.<sup>15</sup>

However, the nine-page memo contained a warning. The *Eisentrager* decision was not perfectly clear on the distinction, if any, between sovereignty and jurisdiction, the authors wrote, noting that it was theoretically possible for a country to retain sovereignty over its territory while permitting another country to exercise limited jurisdiction there. “A non-frivolous argument might be constructed” that the Guantánamo base was in fact “within the territorial jurisdiction of a federal court,” they concluded.<sup>16</sup>

So far, this was fairly routine analysis. The intriguing portion of the memo comes in a single sentence in the second-to-last paragraph. The authors asked: if habeas jurisdiction was found to exist, what rights would the detainees have as habeas corpus petitioners? Their answer: “We are aware of no basis on which a federal court would grant different litigant rights to a habeas petitioner simply because he is an enemy alien, other than to deny him habeas jurisdiction in the first place.”<sup>17</sup> In other words, in the worst-case analysis, once in federal court, a detainee-petitioner would be just another habeas petitioner, entitled to proceed as any other. This highly truncated analysis did not, of course, address the further question of whether the detainee-petitioner would be able to invoke the full panoply of rights, but the suggestion is unmistakable that something more than bare jurisdiction would follow, and that some claims would be cognizable. The habeas court’s jurisdiction would not be an empty vessel.

To return now to the second part of the early paper trail, the President’s Military Order of November 13, 2001, establishing military commissions to conduct war-crimes trials of the captured enemy combatants, engendered sub-

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Defense Department, re Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba (Dec. 28, 2001) [hereinafter Memorandum of Dec. 28, 2001].

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

14. *Id.* at 777-78.

15. Memorandum of Dec. 28, 2001, *supra* note 12, at 3.

16. *Id.* at 1.

17. *Id.* at 8.

stantial criticism from those who argued that the Administration was creating a parallel system of justice without sufficient justification, accountability, or transparency.<sup>18</sup>

On November 30, the White House Counsel, Alberto R. Gonzales, took the unusual step of publishing a defense of the Order on the Op-Ed page of *The New York Times*.<sup>19</sup> Although military commissions were in fact a rarity in American history and had not been used since the immediate aftermath of World War II, Gonzales structured his essay to make the establishment of such commissions seem normal, even routine. "Like presidents before him, President Bush has invoked his power to establish military commissions to try enemy belligerents who commit war crimes," Gonzales began. Leaving aside the fact that whether a defendant had *in fact* committed a war crime was presumably a matter to be determined after a trial, there is much to criticize in this brief, nine-paragraph essay. For example, taking on the critics, Gonzales wrote: "The suggestion that these commissions will afford only sham justice like that dispensed in dictatorial nations is an insult to our military justice system." In fact, the critics' point was not that there was anything wrong with "our military justice system," but rather that the military commission represented a deviation from the regular procedures and substantial protections afforded defendants—American military personnel—under the Uniform Code of Military Justice.

But for our purposes, the relevant paragraph was this one:

The order preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction *through a habeas corpus proceeding in federal court*. The language of the order is similar to the language of a military tribunal order issued by President Franklin Roosevelt that was construed by the Supreme Court to permit habeas corpus review.<sup>20</sup>

In other words, by the end of 2001, key players in the Bush Administration appeared to share Stephen Breyer's basic assumptions. The ability of a prisoner to get before a federal judge by means of a petition for habeas corpus was a default assumption. True, the Administration was making a big bet—although hardly an unfounded one, given the existing case law—that habeas jurisdiction would not extend to Guantánamo Bay. But it took that gamble on the assumption that the courts would eventually, and legitimately, decide whether its bet was correct, and that if the bet proved to be wrong, the detainees would be entitled to be treated as habeas petitioners like any others.

If the Administration had adopted and held to these positions, the history of the ensuing years might well have been very different. The Executive Branch, Congress, and the Supreme Court, along with other stakeholders, could have en-

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18. E.g., Anne-Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. TIMES, Nov. 17, 2001, at A23; Editorial, *Justice Deformed; War and the Constitution*, N.Y. TIMES, Dec. 2, 2001, at Sec. 4 p. 14.

19. Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.

20. *Id.* (emphasis added).

gaged in the kind of democratic conversation that Justice Breyer envisioned and eventually arrived at a center of gravity that, while not pleasing to all, would have been acceptable to most.

Instead, neither of the documents I have just discussed proved to embody the Bush Administration policy, and the Administration had no interest in accommodation. The notion that there could be any legal constraint on the President's wartime power as Commander in Chief was unacceptable to the culture deep inside the Administration, as Jack Goldsmith, the disaffected Former Head of the Office of Legal Counsel, has documented.<sup>21</sup> "The administration chose to push its legal discretion to its limit, and rejected any binding legal constraints on detainee treatment under the laws of war," Goldsmith writes of decisions made in late 2001 and early 2002.<sup>22</sup> His specific reference is to the decision to deny prisoner-of-war status to the Guantánamo detainees and to reject application of the Geneva Conventions, but the same attitude led to the conclusion that federal courts should not be made available as the ultimate arbiters of the treatment of the detainees.

Under Vice President Cheney's counsel, David Addington, the Administration chose to pursue a "relentlessly unilateral approach," which encompassed "hostility to working with Congress" and a refusal to anticipate or take steps to avoid possible negative responses from the Supreme Court.<sup>23</sup> As Goldsmith describes Addington's position toward any suggestion of accommodation from others in the Administration: "We're going to push and push and push until some larger force makes us stop."<sup>24</sup> (David Addington's role in this crucial early period of policy formulation was unknown, even to the informed public. Steven Brill's well-regarded account of the government's response to 9/11 during the first year after the attacks does not mention him.)<sup>25</sup>

The Administration quickly arrived at the position that the treatment of the Guantánamo detainees was outside the jurisdiction of the federal courts. It is important to understand the sweeping nature of this conclusion. The Administration's position was not limited to the sovereignty issue the Supreme Court had addressed in the *Eisentrager* case, nor to the position that the federal habeas corpus statute, as a matter of statutory interpretation, does not apply to a naval base in Cuba. (That statute grants to federal District Courts, "within their respective jurisdictions," the authority to entertain petitions from any person who claims to be held in custody "in violation of the Constitution or laws or treaties of the United States."<sup>26</sup>) Rather, the position was that as a matter of the separation of powers, how to handle those captured in the "war on terror" was for the

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21. GOLDSMITH, *supra* note 7.

22. *Id.* at 119-20.

23. *Id.* at 125-26.

24. *Id.* at 126.

25. STEVEN BRILL, *AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA* (2003).

26. 28 U.S.C. §§2241 (a), (c)(3).

political branches and not for the courts. Arguing in District Court in June, 2002 for the dismissal of habeas petitions filed on behalf of two groups of Guantánamo detainees, the Administration insisted that whatever rights the detainees might have, “the scope of those rights are for the military and political branches to determine.”<sup>27</sup>

Both the District Court, in granting the government’s motion to dismiss,<sup>28</sup> and the Court of Appeals, in affirming,<sup>29</sup> based their rulings on *Eisentrager* and avoided confronting the Administration’s views on presidential power. In opposing Supreme Court review in October 2003, the Administration was not content to rest on those victories. The Solicitor General used the brief in opposition to certiorari to express the full scope of the Administration’s position:

The extraordinary circumstances in which this litigation arises and the particular relief that petitioners seek implicate core political questions that the Constitution leaves to the President as Commander in Chief. Petitioners ask the courts to opine on the legality of the President’s ongoing military operations and to release individuals who were captured during hostilities and who the military has determined should be detained. Particularly where hostilities remain ongoing, the courts have no jurisdiction, and no judicially-manageable standards, to evaluate or second-guess the conduct of the President and the military. These questions are constitutionally committed to the Executive Branch.<sup>30</sup>

In fact, the government substantially mischaracterized the relief sought by at least one of the two groups of petitioners. The *Al Odah* petitioners, a group of Kuwaitis, had told the Court in their petition for certiorari:

Petitioners do not contend that the government lacked power to detain them, nor do they ask for their immediate release. They ask only that, subject to reasonable security measures, they be allowed to meet with their families, consult with counsel, and obtain the judgment of some impartial tribunal as to whether there is cause to detain them. In short, they ask only that the court ensure that adequate procedures are in place so that their detentions are not arbitrary.<sup>31</sup>

It was widely assumed that, with many other detainee-related cases in the pipeline, the Justices would stand back, at least at this early stage. One recent account of another of the cases, *Hamdan v. Rumsfeld*, describes one detainee lawyer emailing another after learning, on the morning of November 10, 2003, that certiorari had been granted in the *Rasul* and *Al Odah* cases: “I still cannot believe certiorari has been granted, but wow.”<sup>32</sup>

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27. *Rasul v. Bush*, 215 F.Supp. 2d 55, 56 (D.D.C. 2005) (citing Transcript of Motion Hearing, June 26, 2002, at 91). Judge Green’s opinion, along with other opinions and pleadings cited in this article, is included in *THE ENEMY COMBATANT PAPERS: AMERICAN JUSTICE, THE COURTS, AND THE WAR ON TERROR* 110-132 (Karen J. Greenberg & Joshua L. Dratel eds., 2008).

28. *Rasul*, 215 F.Supp. 2d 55.

29. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

30. Brief in Opposition to Certiorari at 20 n.8, *Rasul v. Bush*, No. 03-334 (D.C. Cir. October 2003); *Al Odah v. United States*, No. 03-343 (D.C. Cir. 2003).

31. Petition for Writ of Certiorari at 13, *Al Odah v. United States*, No. 03-343 (D.C. Cir. September 2, 2003).

32. JONATHAN MAHLER, *THE CHALLENGE: HAMDAN V. RUMSFELD AND THE FIGHT OVER*



There is no way for us to know whether it was the government's aggressive argument that got the Court's attention, or whether the Justices would have been persuaded in any event of the significance of the issue presented and the desirability of the Court asserting a role in resolving it. (Recall Justice Breyer's confident declaration just eight months earlier: "Our judicial system is open.")<sup>33</sup> It is clear, regardless, that in deciding to grant review the Court took great care to proceed on its own terms, and not the government's. The Solicitor General had framed the question as whether "United States courts lack jurisdiction to consider challenges to the legality of the detention of aliens captured abroad in connection with ongoing hostilities and *held outside the sovereign territory* of the United States at the Guantánamo Bay Naval Base, Cuba."<sup>34</sup> But the Court rewrote the question in a neutral way that rejected any assumption about the status of Guantánamo. Its order of November 10 announced that the two petitions were consolidated and granted, "limited to the following Question: Whether United States Courts lack jurisdiction to consider challenges to the legality of the detention of the foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base, Cuba."<sup>35</sup> Sovereignty, *vel non*, would be for the Supreme Court to decide.

If the change in the wording of the question was intended as a hint to the Administration that the Court was looking for a less tendentious presentation, it was one the Administration did not take. If the Court envisioned the grant of certiorari as the opening round of an inter-branch dialogue, as I believe it did, the dialogue would prove to be all one way, with the Court consistently offering flexibility and accommodation, and the Administration demanding nothing less than total deference. Remarkably, this one-way dialogue is still ongoing, nearly five years later.

The Court's early willingness to accommodate the Administration's concerns is revealed by Justice Breyer's comments to Solicitor General Theodore B. Olson during the *Rasul* argument on April 20, 2004:

It seems rather contrary to an idea of a Constitution with three branches that the Executive would be free to do whatever they want, whatever they want without a check. That's problem one.

Problem two is that we have several hundred years of British history where the cases interpreting habeas corpus said to the contrary anyway. And then we have *the possibility of really helping you with what you're really worried about* [emphasis added], which is undue court interference, by shaping the substantive right to deal with all those problems that led you to begin your talk by reminding us of those problems.

[The Solicitor General had opened his argument with the declaration: "The

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PRESIDENTIAL POWER 67 (2008) (describing e-mail from Neal Katyal to Charles Swift).

33. Breyer, *supra* note 1.

34. Brief in Opposition to Certiorari, *supra* note 30, at 1 (emphasis added).

35. Supreme Court Order Granting Certiorari, at 1; *Rasul v. Bush*, 542 U.S. 466 (No. 03-334) (Nov. 10, 2003).

United States is at war.”<sup>36</sup>] So if that’s the choice, why not say, sure, you get your foot in the door, prisoners in Guantánamo, and we’ll use the substantive rights to work out something that’s protective but practical?”<sup>37</sup>

Mr. Olson replied that the question had been resolved in the government’s favor half a century earlier by *Eisenrager*.<sup>38</sup> Justice Breyer, determined to offer the Court’s services as the Administration’s partner rather than its adversary, pressed on:

I grant you this. My question has to assume that *Eisenrager* is ambiguous and not clearly determinative yet. But then on that assumption, I’m still honestly most worried about the fact that there would be a large category of unchecked and uncheckable actions dealing with the detention of individuals that are being held in a place where America has power to do everything. Now that’s what’s worrying me because of Article III, and the other thing on the opposite side, as I said, is *it’s possible to tailor the substance to take care of the problems that are worrying you*. [emphasis added]<sup>39</sup>

But the Solicitor General stood firm: there was no “substance” to discuss. There was no jurisdiction.<sup>40</sup>

In *Rasul*, issued two months later, the Supreme Court held to the contrary by a vote of 6 to 3.<sup>41</sup> *Eisenrager* was not overruled, but distinguished on several grounds, including the fact that unlike the German prisoners in the earlier decision, who were formally charged with war crimes and convicted by a military tribunal, these detainees were being held in open-ended detention without charges or the prospect of a hearing.<sup>42</sup> But the principal basis for jurisdiction, Justice Stevens wrote for the majority, was that Guantánamo Bay was “territory over which the United States exercises exclusive jurisdiction and control.”<sup>43</sup>

*Rasul* was a modest decision, another step by the Court on what I believe it viewed as a road to accommodation. The Court avoided any constitutional judgment, limiting its holding to the scope of the habeas corpus statute.<sup>44</sup> And it was silent on how the District Court should approach the merits of the petitioners’ claims: “Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners’ claims are matters

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36. Transcript of Oral Argument at 21, *Rasul v. Bush* 542 U.S. 466 (No. 03-334) (Apr. 20, 2004).

37. *Id.* at 36-37.

38. *Id.* at 37.

39. *Id.* at 38-39.

40. *Id.* at 39-47.

41. *Rasul*, 542 U.S. 466.

42. *Id.* at 475-77.

43. *Id.* at 476.

44. As Prof. Jenny S. Martinez has observed: “By limiting the question presented in *Rasul* in 2004 to the statutory jurisdiction issue, but then rendering a decision full of hints about the merits, the Court seems to have intended to use ‘process as signaling,’ but the signal was not clear enough.” Jenny S. Martinez, *Process and Substance in the ‘War on Terror,’* 108 COLUM. L. REV. 1013, 1053 (June 2008).

that we need not address now.”<sup>45</sup>

The unlikely outcome that Patrick F. Philbin and John C. Yoo had warned of two and one-half years earlier had come to pass. Recall their further warning that if habeas jurisdiction were found to exist, the Guantánamo petitioners would not have “litigant rights” different from those of other habeas petitioners.<sup>46</sup> But that is not what the Administration told the district judges who now had to consider the remanded *Rasul* and *Al Odah* cases as well as a dozen other pending habeas petitions. Immediately renewing its motions to dismiss the petitions, the government proceeded as if *Rasul* had not been decided—or as if that decision had been a victory rather than a repudiation of the very basis for transferring the prisoners to Guantánamo in the first place.

In a filing on October 4, 2004, the Administration made the remarkable assertion that:

On a fundamental level, petitioners’ objection to the Executive’s power to capture and detain alien enemy combatants in foreign territory during ongoing hostilities is flatly inconsistent with the historical understanding of the President’s role as Commander in Chief of the Armed Forces, and runs counter to Congress’s specific authorization to the President ‘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.’<sup>47</sup>

To recognize any substantive rights on the part of the petitioners “would improperly embroil the court in second-guessing decisions on sensitive issues that the Constitution entrusts to the Executive Branch,” the government’s motion insisted.<sup>48</sup> Then it added: “Because overseas aliens are not a part of the contract that created the United States, they are not beneficiaries of its protections.”<sup>49</sup>

It is worth pausing to consider that statement. First, the Supreme Court had just ruled that the aliens held at Guantánamo Bay were not, as a functional matter, “overseas;” that was the basis for its jurisdictional holding. And second, the identity of who was or was not “a part of the contract that created the United States” is far less relevant than the nature of the social compact, based on adherence to the rule of law, that binds residents of the United States today. From this perspective, the events I am relating have less to do with Guantánamo detainees’ rights than with the vitality of the legal principles that protect us all. To quote Owen Fiss: “The obligations imposed on the government by the Bill of Rights

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45. *Id.* at 485.

46. Memorandum of Dec. 28, 2001, *supra* note 12.

47. Response to Petition for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support at 2, *Abdah v. Bush*, No. 04-CV-1254 (D.D.C. Oct. 4, 2004). The reference was to the Authorization for Use of Military Force Resolution (AUMF), that Congress passed on September 18, 2001, authorizing military action against the Taliban and Al Qaeda, Pub. L. No. 107-40 S.J. Res. 23 (2001).

48. *Id.* at 2.

49. *Id.* at 21.

are not a quid pro quo offered to its subjects, but the expression of principles of right behavior.”<sup>50</sup>

District judges responded to the government’s position in diametrically opposite ways. On January 19, 2005, Judge Richard Leon dismissed one set of petitions on the ground that there was “no viable legal theory” on which they could be granted. The petitioners had no rights to be vindicated in federal court and any implication from *Rasul* to the contrary was incorrect, Judge Leon said, explaining: “The Founders allocated the war powers among Congress and the Executive, not the Judiciary. As a general rule, therefore, the Judiciary should not insinuate itself into foreign affairs and national security issues.”<sup>51</sup>

Two weeks later, on January 31, Judge Joyce Hens Green ruled in another set of petitions that, to the contrary, “the petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and that the procedures implemented by the government to confirm that the petitioners are ‘enemy combatants’ subject to indefinite detention violate the petitioners’ rights to due process of law.”<sup>52</sup> As for the Supreme Court’s intention on remand, Judge Green said that “careful examination of the specific language used in *Rasul* reveals an implicit, if not express, mandate to uphold the existence of fundamental rights....”<sup>53</sup> (Judge Green’s reference to “procedures” was to something new, which the Supreme Court had never considered. Nine days after the decisions in *Rasul* and in another detainee case decided the same day, *Hamdi v. Rumsfeld*,<sup>54</sup> Paul Wolfowitz, the Deputy Secretary of Defense, issued an order that defined “enemy combatant” and established a new body, the Combatant Status Review Tribunal (CSRT), composed of three military officers, who would decide whether each detainee’s classification as an enemy combatant was correct.<sup>55</sup> The Supreme Court would later have occasion to consider the adequacy of this substitute for federal court review, but more than three years would go by in the meantime.)<sup>56</sup>

50. Fiss, *supra* note 6, at 254.

51. *Khalid v. Bush*, 355 F. Supp. 2d 311, 329 (D.D.C. 2005).

52. *In re Detainee Cases*, 355 F. Supp. 2d 443, 445 (D.D.C. 2005).

53. *Id.* at 461.

54. *Hamdi*, 542 U.S. at 507 (2004).

55. *In re Guantánamo Detainee Cases*, 355 F.Supp. 2d 443, 450 (“The term ‘enemy combatant’ shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” (quoting Order of July 7, 2004)). In an order issued on Oct. 27, 2008, Judge Richard Leon formally adopted the Pentagon’s definition of “enemy combatant” as the definition that would govern the 24 remanded habeas cases over which he was presiding. *Boumediene v. Bush*, 04-1166 (D.D.C. Oct. 27, 2008).

56. *Boumediene v. Bush*, 128 S. Ct. 2229, 2260 (2008) (“[T]he procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.”)

Judge Green's decision received attention across the country and the world. But despite her strong language, no relief was forthcoming for any of the detainees in the eleven habeas cases in which she had ruled. Instead, four days later, she granted the government's motion for a stay pending appeal.<sup>57</sup> Judge Green blinked—something the Administration almost never did.<sup>58</sup> And then the moment passed. Before the District of Columbia Circuit could review the appeals from the two opposing District Court rulings, the landscape changed, freezing everything in place and pushing relief for the detainees further out of reach.<sup>59</sup>

On December 30, 2005, President Bush signed into law the Detainee Treatment Act of 2005.<sup>60</sup> This statute, key portions of which were passed without hearings during the rush to the year-end Congressional recess, had several interrelated provisions. Section 1005(e)(2)(c) sets out a process by which the District of Columbia Circuit was to review the validity of enemy-combatant status made by the Combatant Status Review Tribunals. Section 1005(e)(1) provided that, with the exception of that specific review provision, "no court, justice, or judge shall have jurisdiction to hear or consider" a petition for habeas corpus from an alien detained at Guantánamo Bay.<sup>61</sup> This jurisdiction-stripping provision, which had been sponsored by one of the Administration's strongest allies in the Senate, Lindsey Graham of South Carolina, purported to apply to pending petitions as well as future ones. The Administration moved immediately to dismiss all the petitions then pending in District Court—some 180 petitions filed on behalf of 300 detainees, roughly half the population of the Guantánamo prison. The Administration also promptly filed a motion at the Supreme Court, asking the Justices to dismiss a case they had agreed to hear two months earlier, a challenge by Osama bin Laden's former chauffeur, a Yemeni named Salim Ahmed Hamdan, to the validity of the military commission that was due to conduct his war crimes trial.<sup>62</sup>

*Hamdan* provided the next occasion for the Supreme Court to attempt to accommodate the Administration. At first this did not appear to be the case. The Court granted Hamdan's certiorari petition over the Solicitor General's vigorous opposition. The appeal was not ripe, the government argued; the ruling by the Court of Appeals simply lifted the District Court's "ill-considered and un-

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57. *In re Guantánamo Detainee Cases*, 2005 U.S. Dist. LEXIS 5295, 5295 (D.D.C. Feb. 3, 2005).

58. *But see* Press Release, Department of Defense, *supra* note 6.

59. In the Court of Appeals, the cases were styled as *Al Odah v. United States*, Nos. 05-5064, 05-5095 through 05-5116, and *Boumediene v. Bush*, Nos. 05-5062 & 05-5063. More than two years later, after two oral arguments and four rounds of briefing, the court eventually decided them as *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) on Feb. 20, 2007, dismissing the consolidated petitions for lack of jurisdiction.

60. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005).

61. *Id.*

62. *Hamdan v. Rumsfeld*, 344 F.Supp. 2d 152 (D.D.C. 2004), *cert. granted* 546 U.S. 1002 (2005); Respondent's Motion to Dismiss for Lack of Jurisdiction, *Hamdan v. Rumsfeld*, No. 05-184 (D.C. Cir. Jan. 12, 2006).

precedented injunction” against proceeding with the military commission, and no trial had yet begun.<sup>63</sup> Hamdan’s challenge to his military commission had been filed as a petition for habeas corpus, and “the habeas statute is merely a grant of jurisdiction ... [that] does not create any substantive rights.”<sup>64</sup> Finally, the Solicitor General argued that Hamdan, who by then had been held at Guantánamo for more than three years, would suffer no prejudice from further delay in resolving his claims because he was “subject to detention as an enemy combatant regardless of the outcome of this litigation or whether he is ultimately convicted of a specific war crime.”<sup>65</sup>

The Detainee Treatment Act proved to be a distraction rather than the obstacle to deciding the case that it had first appeared to be. The Supreme Court held that as a matter of statutory interpretation, the jurisdiction-stripping section did not apply to habeas corpus petitions that were pending on the date of its enactment. Nor, Justice Stevens said for the majority, was the government’s reasoning persuasive in asking the Court to refrain from deciding the case: “To the contrary, Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law and operates free from many of the procedural rules prescribed by Congress for courts-martial—rules intended to safeguard the accused and ensure the reliability of any conviction.”<sup>66</sup>

On the merits, the Court held that the military commission framework, as promulgated unilaterally by the Executive Branch, did in fact lack a basis in law, and that “the rules specified for Hamdan’s trial are illegal.”<sup>67</sup> The decision rejected the Administration’s claim that the President possessed inherent authority to proceed as he wished.

My focus is not on the Court’s reasoning, but on its expectation of what would happen next. As in *Rasul* almost exactly two years earlier, the Court did not behave as if it assumed that its word would be the last. Rather, the Court be-

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63. Brief for the Respondents in Opposition to Petition for Writ of Certiorari at 16, *Hamdan v. Rumsfeld*, No. 05-184 (D.C. Cir. Sept. 2005). The court of appeals decision is reported at 415 F.3d 33 (D.C. Cir. 2005), reversing 344 F.Supp. 2d 152 (D.D.C. 2004).

64. *Id.* at 19.

65. *Id.* at 13. The question of when, or whether, Hamdan will be entitled to release assumed more than theoretical significance following the conclusion of his military commission trial. On Aug. 6, 2008, he was convicted of providing material support for terrorism, but acquitted on a more serious conspiracy charge. William Glaberson, *Panel Convicts bin Laden Driver in Split Verdict*, N.Y. TIMES, Aug. 7, 2008, at A1. The following day, the military judge, rejecting the prosecution’s proposed sentence of 30 years, sentenced Hamdan to 66 months in prison, with credit for 61 months of time served. It remains unclear what will happen at the end of his five months of further incarceration. William Glaberson, *Bin Laden Driver Sentenced to a Short Term*, N.Y. TIMES, Aug. 8, 2008, at A1. On October 28, 2008, Hamdan’s military commission rejected the government’s request to withdraw the credit for time served. Ruling on Motion for Reconsideration and Resentencing, *United States v. Hamdan*, P-009 (Oct. 28, 2008).

66. *Hamdan*, 548 U.S. at 590.

67. *Id.* at 625.

lieved once again that it was engaging in a dialogue, as demonstrated by Justice Breyer's concurring opinion that was also signed by Justices Kennedy, Souter, and Ginsburg:

Nothing prevents the President from returning to Congress to seek the authority he believes necessary.

Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine – through democratic means – how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.<sup>68</sup>

It was, Professor Jack Balkin wrote approvingly on his blog just hours after the ruling was handed down, “a democracy-forcing decision”:

What the Court has done is not so much countermajoritarian as *democracy forcing*. It has limited the President by forcing him to go back to Congress to ask for more authority than he already has, and if Congress gives it to him, then the Court will not stand in his way ... I repeat: nothing in *Hamdan* means that the President is constitutionally forbidden from doing what he wants to do. What the Court has done, rather is use the democratic process as a lever to discipline and constrain the President's possible overreaching.”<sup>69</sup>

Justice Breyer and Professor Balkin were expressing a democratic ideal. But, to use the vernacular, they and everyone else who cheered or at least expressed relief at the outcome of *Hamdan* got rolled. By the end of September, 2006, the Administration prevailed on the Republican majority in Congress to pass the Military Commissions Act (MCA), which not only authorized military commissions but once again stripped the federal courts of their habeas corpus jurisdiction—this time taking care to make the provision apply explicitly “to all cases, without exception, pending on or after the date of the enactment of this Act.”<sup>70</sup>

The message of the Military Commissions Act, which President Bush signed into law on October 15, 2006, was not subtle. “This time, Congress and the President did not take the court's power grab lying down,” John C. Yoo exulted in an on-line *Wall Street Journal* essay four days later.<sup>71</sup> Calling the new law “above all, a stinging rebuke to the Supreme Court,” the former Office of Legal Counsel lawyer said that Congress and the White House, together, had “told the courts, in effect, to get out of the war on terror, stripped them of habeas jurisdiction over alien enemy combatants, and said there was nothing wrong with the military commissions.”<sup>72</sup> The law, he added, “restores to the president

68. *Id.* at 636 (Breyer, J., concurring).

69. *Hamdan as a Democracy-Forcing Decision*, available at <http://balkin.blogspot.com/2006/06/hamdan-as-democracy-forcing-decision.html> (June 29, 2006).

70. Military Commissions Act of 2006, 10 U.S.C. 948a (2006).

71. John Yoo, *Sending a Message*, WALL ST. J., Oct. 19, 2006, available at <http://www.opinionjournal.com/editorial/feature.html?id=110009113>.

72. *Id.*

command over the management of the war on terror.”<sup>73</sup>

It also pushed further into an ever-receding future a moment at which the government might have to yield to judicial authority in its handling of the detainees. Once again, as after passage of the Detainee Treatment Act the previous year, the Administration moved to dismiss all pending habeas petitions filed by Guantánamo detainees. These included the cases on appeal to the District of Columbia Circuit from the conflicting rulings by Judges Leon and Green more than a year and a half earlier. On February 20, 2007, the appeals court, declaring that “Federal courts have no jurisdiction in these cases,” dismissed the two groups of petitions that had been filed on behalf of a number of detainees, all of whom by then had been in custody for more than five years.<sup>74</sup> The panel majority, with Judge Rogers dissenting, rejected the detainees’ argument that if the new provision succeeded in depriving the court of jurisdiction, then it amounted to an unconstitutional suspension of the writ of habeas corpus because the conditions set by the Constitution and Supreme Court precedent for congressional suspension of “the privilege of the writ of habeas corpus”<sup>75</sup> had not been met.

Less than two weeks later, lawyers for the detainees filed expedited appeals at the Supreme Court.<sup>76</sup> The events that rapidly ensued included one of the most startling procedural turn-about in Supreme Court history. Is it fanciful to suppose that at this point, the Administration might have acknowledged the significance of the suspension issue, and the desirability of a definitive resolution before more time passed, by acquiescing to certiorari? Once again, the Administration vigorously opposed review. “As aliens outside the sovereign territory of the United States, petitioners have no rights under the Suspension Clause, and, in any event, the habeas rights protected by that provision would not extend to aliens detained at Guantánamo Bay as enemy combatants,” the Solicitor General told the Justices.<sup>77</sup>

On April 2, the Court denied certiorari, over the dissents of Justices Breyer, Souter, and Ginsburg, and with an unusual written explanation by Justices Stevens and Kennedy of their own decision against voting to hear the cases. The dissenters stressed that “the questions presented are significant ones warranting our review,” and observed that the petitioners had “plausibly” argued that the appeals court’s decision was “contrary to this Court’s precedent,” namely *Rasul*’s recognition of habeas corpus jurisdiction over Guantánamo.<sup>78</sup>

73. *Id.*

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

75. U.S. CONST. Art. I, § 9, Cl. 2; *see also Boumediene*, 476 F.3d at 981.

76. Petition for Writ of Certiorari, *Boumediene*, No. 06-1195 (March 5, 2007); Petition for Writ of Certiorari, *Al Odah*, No. 06-1196 (March 5, 2007).

77. Brief for Respondent in Opposition to Petition for Writ of Certiorari at 8, *Boumediene v. Bush*, No. 06-1195 (Mar. 21, 2007).

78. *Boumediene*, 127 S.Ct. 1478, 1479-80 (2007) (mem.) (Breyer, J., dissenting from denial of certiorari).



For their part, Justices Stevens and Kennedy said that “[d]espite the obvious importance of the issues raised in these cases,” the Court should follow its usual practice of withholding review until “the exhaustion of available remedies.”<sup>79</sup> The remedy at issue was the limited review that the Detainee Treatment Act provided in the District of Columbia Circuit of determinations by the Combatant Status Review Tribunals that the individual detainees had been properly classified as enemy combatants.<sup>80</sup> The two Justices held out the possibility that the Supreme Court would waive the exhaustion requirement if it turned out that the government “has unreasonably delayed proceedings” or caused “some other and ongoing injury” to the petitioners.<sup>81</sup>

Here, indeed, was a puzzle. Justice Stevens, the author of the majority opinions in both *Rasul* and *Hamdan*, surely agreed with the Breyer Three that Supreme Court review was appropriate at this stage. His agreement would have provided a fourth vote, the number necessary for a grant of certiorari. The only plausible explanation is that Justice Kennedy, who had voted with the majority in the earlier two cases, was wavering this time. If he could not be counted on, there was nothing to be gained and much to lose by pushing him. Justice Stevens must have decided to withhold his own vote and play for time.<sup>82</sup>

In late April the detainees’ lawyers filed petitions for rehearing—that is, for reconsideration of the denial of certiorari—which the Administration, not surprisingly, opposed. On June 22, with only days to go until the end of the term, the lawyers filed replies to the government’s opposition. To their reply brief, the lawyers for the Al Odah petitioners attached a document the court had not yet seen. It was a sworn declaration filed in the District of Columbia Circuit, in another case, by Lieutenant Colonel Stephen Abraham, a lawyer in private practice and an intelligence officer in the Army Reserve.<sup>83</sup> During a tour of active duty, from September 2004 until March 2005, he served at Guantánamo Bay as a member of a Combatant Status Review Tribunal.<sup>84</sup> His seven-page declaration recounted his experience and his conclusions about the serious deficiencies of the process—the use of generic, often outdated intelligence; the denial of his request to see exculpatory information and even a refusal by the government to acknowledge the existence of any exculpatory evidence.<sup>85</sup> “What were purported to be specific statements of fact lacked even the most fundamental ear-

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79. *Id.* at 1479 (statement of Stevens and Kennedy, JJ. respecting the denial of certiorari).

80. Detainee Treatment Act § 1005 (e)(2)(c), 119 Stat. 2742, which the Court in *Boumediene* would find inadequate as a substitute for habeas corpus.

81. *Id.*

82. See Linda Greenhouse, *Supreme Court Turns Down Detainees’ Habeas Corpus Case*, N.Y. TIMES, April 3, 2007, at A1.

83. Reply to Opposition to Petition for Rehearing at i, *Al Odah v. United States*, No. 06-1196 (2007) (Decl. of Stephen Abraham, which had been filed by petitioners in a case then pending in the appeals court, *Bismullah v. Gates*, 510 F.3d 178 (2007) (No. 06-1197)).

84. *Id.*

85. *Id.*

marks of objectively credible evidence,” Lieut. Col. Abraham reported.<sup>86</sup>

In their brief, the Al Odah lawyers told the Court that as the result of the Abraham declaration, “it is now clear that, not only is the remedy provided by the DTA inadequate, but also the underlying CSRT process was an irremediable sham.”<sup>87</sup> A grant of certiorari should not await exhaustion of this flawed process, the brief maintained.<sup>88</sup>

Justice Kennedy – perhaps others as well—was evidently now persuaded. The Court granted rehearing on the final day of its term, June 29, 2007.<sup>89</sup> It is extremely unusual for the Court to reconsider a denial of certiorari in the absence of an intervening court decision or some other landscape-changing development. The 2007 edition of the authoritative *Supreme Court Practice*, noting the grant of rehearing in these cases, calls it one of “the rare exceptions” in which such a petition has succeeded.<sup>90</sup> Only two other examples are cited, one from 1930 and the other from 1947.<sup>91</sup> A petition for rehearing requires a majority vote rather than the ordinary “rule of four.”<sup>92</sup> So the Administration was now on notice that a majority of the Court was sufficiently concerned by the sequence of events to make a once-in-a-generation reversal of course. In granting certiorari, the Court vindicated Justice Breyer’s declaration of more than five years earlier: “Our judicial system is open.”<sup>93</sup>

From the opening pages of Justice Kennedy’s 70-page opinion for the 5-to-4 court in *Boumediene v. Bush*, it is apparent that something has changed. Gone is the modulated tone of the earlier opinions, replaced by one of exasperation and something close to distress. In recounting the procedural history of the case, for example, Justice Kennedy refers to Justice Breyer’s concurring opinion two years earlier in *Hamdan*, which he had joined, recalling that the opinion invited the President to go to Congress “to seek the authority he believes necessary.”<sup>94</sup> (This was the “democracy-forcing” aspect of *Hamdan* that Professor Balkin celebrated at the time.<sup>95</sup>) Justice Kennedy makes it clear that in the Court’s view, the President and Congress misused, or at least misconstrued that invitation: “The authority to which the concurring opinion referred was the authority to ‘create military commissions of the kind at issue’ in the case. Nothing in that

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86. *Id.* at vi.

87. Reply to Opposition to Petition for Rehearing at 4, Al Odah (No. 06-1196).

88. *Id.*

89. On the same day, the Court granted petitioners Boumediene and Al-Odah’s petitions for rehearing, 551 U.S. 1 (June 29, 2007) (mem.), and ordered consolidation for argument.

90. EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 821 (9th ed. 2007).

91. *Id.*

92. *Id.* (citing *Morgan v. Georgia*, 441 U.S. 967, 444 U.S. 976 (1979)) (“A majority of the participating Justices must agree to rehear a decision denying certiorari.”).

93. Breyer, *supra* note 1.

94. *Hamdan*, 548 U.S. 557 at 636 (Breyer, J., concurring); *Boumediene*, 128 S.Ct. 2229 at 2242.

95. Military Commissions Act of 2006, *supra* note 70.

opinion can be construed as an invitation for Congress to suspend the writ.”<sup>96</sup>

The change from the earlier opinions to *Boumediene* is much deeper than one of tone, however. It is clear that the government’s intransigence, its refusal to take a polite hint, forced the Court to dig deeper than it originally cared to go, into the bedrock of separation-of-powers doctrine and the sources of its own authority.

From this perspective, *Boumediene* is more than the third chapter in the Court’s confrontation with the post-9/11 world. It is among the Court’s most important modern statements on the separation of powers, on the order of the *Chadha* decision twenty-five years earlier, which struck down the legislative-veto device as violative of the separation of powers.<sup>97</sup> As a judicial check on unbridled executive power, Justice Kennedy says, the writ of habeas corpus was seen by the framers as “an essential mechanism in the separation-of-powers scheme” and as part of the “essential design of the Constitution.”<sup>98</sup> The Constitution’s separation-of-powers design “protects persons as well as citizens,” Justice Kennedy says; just as Jagdish Rai Chadha, a non-citizen, was entitled to invoke separation-of-powers principles in challenging Congress’s unilateral veto of the “suspension of deportation” he had been granted by the Executive Branch, so too can the non-citizens held at Guantánamo invoke those principles in asserting access to habeas corpus.<sup>99</sup>

Chadha, a Kenyan student who overstayed his visa, was of course within the sovereign territory of the United States – as the Guantánamo detainees concededly are not—when he challenged the legislative veto. In *Boumediene*, the Court finally makes explicit what was implicit in *Rasul*: that the test for where the Constitution applies outside the country’s borders is a functional and not a formal one. Justice Kennedy says that the Administration’s continued insistence that because Cuba retains formal sovereignty over Guantánamo, the Constitution is inapplicable there despite the government’s exercise of functional control “raises troubling separation-of-powers concerns.” Such a limited understanding of the reach of the Constitution would, he warns, make it “possible for the political branches to govern without legal constraint.” He adds:

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply... Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another... leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’

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96. *Boumediene*, 128 S. Ct. 2229, 2242.

97. *INS v. Chadha*, 462 U.S. 919 (1983). As a judge on the Ninth Circuit, Justice Kennedy had written the opinion that the Supreme Court affirmed in this case. *INS v. Chadha*, 634 F.2d 408 (9th Cir. 1980).

98. *Boumediene*, 128 S. Ct. 2229, 2246.

99. *Id.* (citing *Chadha*, 462 U.S. 919 at 958-9).

Repeating his earlier assertion that “the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers,”<sup>100</sup> Justice Kennedy concludes this portion of the opinion: “The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.”<sup>101</sup>

Applying this analysis to the question at hand, the Court concludes with a three-part holding: first, that the Suspension Clause has full effect at Guantánamo Bay, so that the detainees there must be afforded either access to the writ of habeas corpus or to an “adequate substitute”; second, that the review procedure provided by the Detainee Treatment Act is so truncated as not to be an adequate substitute; and third, that the jurisdiction-stripping provision of the Military Commissions Act therefore effects an unconstitutional suspension of the writ.

As to what rights the detainees can seek to vindicate through their habeas petitions, the Court is silent. “[O]ur opinion does not address the content of the law that governs petitioners’ detention,” Justice Kennedy says. “That is a matter yet to be determined.”<sup>102</sup> That silence leads Chief Justice Roberts, in his dissenting opinion, to mock the majority for having replaced “a review system designed by the people’s representatives with a set of shapeless procedures to be defined by federal courts at some future date.”<sup>103</sup>

But a more careful reading of the majority opinion shows that the procedures the Court regards as constitutionally required are not so shapeless. The habeas court “must have the power to order the conditional release of an individual unlawfully detained,” Justice Kennedy tells us, while noting that the remedy of release “is not the appropriate one in every case.”<sup>104</sup> And it is “constitutionally required” to permit detainees to introduce exculpatory evidence, to contest the sufficiency of the government’s evidence, and to supplement the record on review.<sup>105</sup>

Absent from the Court’s discussion is an injunction to the habeas court to defer to the findings below. This is striking, because Justice Kennedy is usually among the Justices who insist on deference by federal judges reviewing ordinary civilian convictions on habeas corpus.<sup>106</sup> He acknowledges this implicitly as he explains the difference: “A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this

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100. *Id.* at 2259.

101. *Id.*

102. *Id.* at 2277.

103. *Id.* at 2279 (Roberts, C.J., dissenting).

104. *Id.* at 2266.

105. *Id.* at 2271.

106. *See, e.g.,* *Uttecht v. Brown*, 127 S. Ct. 2218 (2007).

context the need for habeas corpus is more urgent.”<sup>107</sup>

It is startling to compare the *Boumediene* court’s insistence on this range of procedural rights for non-citizens held in Cuba with the Court’s response four years earlier to the claims of Yaser Esam Hamdi, a United States citizen detained as an enemy combatant in a naval brig in South Carolina. Hamdi was entitled to some version of a due-process hearing before a “neutral decision maker” or “an impartial adjudicator,” the Court held in a plurality opinion by Justice O’Connor.<sup>108</sup> But the decision maker need not be a federal judge and the process need not be a petition for habeas corpus; it could be a military tribunal.<sup>109</sup> Before the contours of the *Hamdi* decision could be fleshed out, the Administration shipped Hamdi back to Saudi Arabia, where his family lived and where he grew up.<sup>110</sup>

The *Hamdi* decision of 2004 was unstable, tentative in tone and lacked a majority. But eight Justices (all but Justice Thomas) nonetheless agreed that, contrary to the government’s position, Hamdi was entitled to some form of process. As reflected by Justice O’Connor’s widely quoted declaration that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens,”<sup>111</sup> the Court was seriously concerned by the implications of the government’s arguments. The Court’s concerns were to grow only deeper, eventually driving a majority toward a more expansive embrace of the territorial scope of habeas corpus than might reasonably have been predicted only a few years earlier.

I promised at the beginning to solve the mystery of Guantánamo Bay. How is it that the Administration has lost, and lost, and lost again, and still has not been ordered against its will to release a single detainee?

I think the answer lies in the competing trajectories pursued by the two principal actors in this drama, the Bush Administration and the Supreme Court. Each began from a position of relative modesty, as reflected by the early Administration documents on the one hand, and the Court’s initial, tentative steps in *Rasul* and *Hamdi*. The Administration’s rapid shift to a hard-line decision to “push and push and push”<sup>112</sup> in turn radicalized—for lack of a better word—a Court that, while inherently conservative, is hard-wired to protect its own prerogative to “say what the law is.”<sup>113</sup>

Had the Administration shown more receptivity to the Court’s concerns at the beginning, the Court probably would not have felt pressed to abandon its his-

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107. *Boumediene*, 128 S. Ct. 2229, 2269.

108. *Hamdi*, 542 U.S. 507, 533-37.

109. *Id.* at 538.

110. Press Release, Department of Justice, *supra* note 6.

111. *Hamdi*, 542 U.S. 507, 536.

112. GOLDSMITH, *supra* note 7.

113. *Boumediene*, 128 S. Ct. 2229, 2302 (Kennedy, J.) (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

toric posture of deference to the Executive in wartime. Conversely, had the Justices understood at the beginning that the Administration would never yield to modest decisions containing gentle hints, the Court might have acted more decisively early enough to persuade the Administration of the wisdom of compromise. At some point early in this narrative, the trajectories could have crossed, but the moment was quickly lost. The trench warfare continues, as lawyers for the detainees and the government battle in the District Court and the Court of Appeals over how to handle the revived habeas corpus petitions.<sup>114</sup>

There are no winners in this tale and, lacking a final chapter, its lessons remain obscure. “Answers will be forthcoming,” Justice Breyer told the New York lawyers on a spring morning more than five years ago.<sup>115</sup> We await those answers still.

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114. See, e.g., *In re Guantánamo Bay Detainee Litigation*, Civil Action No. 05-280 (GK) (2008); *Kiyemba*, No. 08-5424 (2008); *Boumediene*, No. 04-1166 (2008) (adopting the Pentagon’s definition of “enemy combatant” as governing 24 remanded habeas cases); Petition for Rehearing, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir., filed Oct. 6, 2008); *Basardh v. Gates*, No. 07-1192 (D.C. Cir. Nov. 4, 2008) (granting the government’s motion to “hold in abeyance” direct review in the appeals court of an appeal of a Combatant Status Review Tribunal determination, and raising “the distinct possibility that in light of *Boumediene* we have lost jurisdiction over Basardh’s petition and every other petition filed under the Detainee Treatment Act”).

115. Breyer, *supra* note 1.