

Habeas Schmabeas: Should The Great Writ Be Suspended?

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The United States Supreme Court decided on June 12, 2008 that Guantánamo Bay detainees Al Odah and Boumediene¹ have the affirmative right to the Great Writ of *habeas corpus*.² The Court decided it was unconstitutional for the President to have the power to imprison people he considers enemy combatants indefinitely, without charging them with a crime, and to deny them any hope of meaningfully challenging the legality of their detention before a neutral court of law. Although the President originally imprisoned the detainees on his general constitutional authority as Commander in Chief,³ he was denying them *habeas* relief via Presidential order⁴ and on the authority granted by Congress through the Military Commissions Act of 2006 [hereinafter MCA].⁵ The MCA provides that “no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of *habeas corpus* filed by or on behalf of an alien detained 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.”⁶

In *Rasul v. Bush*, the Court ruled that Executive imprisonment without trial “has been considered oppressive and lawless”⁷ since the signing of the Magna Carta in 1215 A.D. Indeed, the Supreme Court in *Rasul* upheld the right of those detained at Guantánamo Bay to have their

¹ *Boumediene v. Bush*, 128 S.Ct. 2229 (2008) hereinafter Boumediene.

² A writ directed to someone detaining another person and commanding that the detainee be brought to court, to ensure that the party’s imprisonment is legal (*habeas corpus ad subjiciendum*). BLACK’S LAW DICTIONARY 728 (8th ed. 2004).

³ U.S. Const. art. II, § 2, cl. 1 (The President shall be commander in chief of the Army and Navy of the United States); see also *Ex parte Milligan*, 71 U.S. (4 Wall) 2, 139-40 (1866) “[t]he power to make the necessary laws [regarding military commissions] is in Congress; the power to execute in the President.”

⁴ Military Order of November 13, 2001, 66 Fed. Reg. Sec. 7. (b)(2) at 57835, 6 (the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.) [hereinafter Military Order].

⁵ Military Commissions Act of 2006, Pub. L. No. 109-366 120 Stat. 2600.

⁶ MCA, *supra* note 5, 10 USCA § 950j (b).

⁷ 542 U.S. 466, 474 (2004).

petitions for *habeas corpus* heard by United States courts, under the federal *habeas* statute.⁸ One of the founding fathers of this country, Alexander Hamilton, warned that “the practice of arbitrary imprisonments has been, in all ages, the favorite and most formidable instrument of tyranny.”⁹ The *Boumediene* Court, quoting eminent British legal scholar Sir William Blackstone¹⁰ said, “To bereave a man of life ... without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny ...; but confinement of the person, by secretly hurrying him to jail, ... is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.”¹¹ So, based on the opinions of the aforementioned legal scholars and Supreme Court holdings, the suspension of the Writ declared in the MCA is tyrannical and unconstitutional.

The United Nations’ Human Rights Committee, formed to monitor compliance with the International Covenant on Civil and Political Rights¹² treaty [hereinafter ICCPR], recognizes that *habeas* may not be restricted even in times of emergency.¹³ The Committee noted that anyone deprived of their liberty shall be entitled to petition a court “in order that the court decide without delay on the lawfulness of his detention.”¹⁴ Access to courts for judicial determination of rights

⁸ *Id.* at 478; see also Marjorie Cohn, *Why Boumediene Was Wrongly Decided*, Jurist Legal News & Research (Feb. 27, 2007), available at <http://jurist.law.pitt.edu/forumy/2007/02/why-boumediene-was-wrongly-decided.php> (last visited Jul. 4, 2008).

⁹ THE FEDERALIST NO. 84, at 533 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

¹⁰ Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. Rev. 1405, 1441 & note 117 (1987) (limitations on government... spring from the same ground that gave rise to [portions of] the Bill of Rights... taken from summaries of the common law in Blackstone’s Commentaries); see also Michael Kent Curtis, *Historical Linguistics, Inkblots and Life After Death: The Privileges and Immunities of Citizens of the United States*, 78 NCLR 1071, 1096 (2000) (Sir William Blackstone wrote that the rights and liberties of “every Englishman” had been set out in the Magna Carta, The English Bill of Rights and the Habeas Corpus Act... rights similar to those in the American Bill of Rights).

¹¹ *Boumediene*, *supra* note 1, at 2247.

¹² International Covenant on Civil and Political Rights, a treaty ratified by the U.S. in 1992, 138 Cong. Rec. 8071 (1992), 999 U.N.T.S. 171 (entered into force Mar. 3, 1976).

¹³ U.N. Human Rights Comm., General Comment Art. 4, n. 9, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) (the right to habeas corpus should not be limited in situations of emergency) available at <http://www1.umn.edu/humanrts/gencomm/hrc29.html> (last visited 12/26/07).

¹⁴ See ICCPR, *supra* note 11, art. 9(4) available at <http://www1.umn.edu/humanrts/instr/b3ccpr.htm> (last visited

and the right to an effective remedy are also guaranteed more generally under Article 14(1) of the ICCPR. Yet, the MCA prohibits detainees from petitioning or having any access to a neutral court.¹⁵ Further, far from being without delay, “all [detainees] have been confined at Guantánamo for almost six years, yet not one has ever had meaningful notice of the factual grounds of [their] detention or a fair opportunity to dispute those grounds before a neutral decision-maker.”¹⁶ [And], “they have no prospect of getting that opportunity.”¹⁷ Based on these provisions, it is clear that the MCA violates the ICCPR treaty.

The MCA provision eliminating jurisdiction to hear *habeas* applications also violates the United Nations’ Universal Declaration of Human Rights treaty (hereinafter UDHR).¹⁸ The UDHR requires that defendants receive a public trial by “an independent and impartial tribunal.”¹⁹ Since, under the MCA, the Executive brings charges, chooses the judges, and has wide discretion to determine trial procedures,²⁰ it cannot be said that the tribunals created by the MCA are “independent and impartial.” On the contrary, the Executive controls the judge and jury, in effect ruling on his own decision to detain prisoners. Clearly therefore, the MCA violates the UDHR.

Moreover, any meaningful review of the legality of a prisoner’s detention is highly unlikely, to say the least, because the military tribunals set up to answer that question fail to meet the minimum requirements for “regularly constituted courts” as defined in the Geneva Conventions

12/26/07).

¹⁵ “No person may invoke the Geneva Conventions in any *habeas corpus*... as a source of rights in any court of the United States. MCA, *supra* note 5, § 5(a), 28 U.S.C. § 2241.

¹⁶ Oral argument before the U.S. Supreme Court, Seth Waxman 12/05/07 (hereinafter Waxman) available at http://www.oyez.org/cases/2000-2009/2007/2007_06_1195/argument/ (last visited 12/22/07).

¹⁷ *Id.*

¹⁸ Universal Declaration of Human Rights G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen., mtg., U.N. Doc. A/810, pmb. (Dec. 12, 1948).

¹⁹ *Id.* art. 10.

²⁰ *See* note 30 *infra*.

[hereinafter CA3].²¹ CA3 specifies that “each Party shall be bound to apply, as a minimum, a regularly constituted court affording all the judicial guarantees ... recognized as indispensable by civilized peoples.”²² Although CA3 did not define a “regularly constituted court,” the International Committee of the Red Cross' (hereinafter ICRC) explained that a court is regularly constituted if it has been established and organized in accordance with the “laws and procedures” already in force in a country.²³

The Supreme Court determines the “laws and procedures” in the United States and, in *Hamdan v. Rumsfeld*, construed the phrase “regularly constituted courts” to require the use of courts-martial.²⁴ Presidentially-created military commissions might qualify as “regularly constituted courts,” but only if such courts complied with Uniform Code of Military Justice Article 36's uniformity requirements²⁵ and “some practical need” explained any deviation from courts-martial practice.²⁶ Since the Administration had not justified the need for any such deviation, the Supreme Court ruled that the *Hamdan* military tribunal violated Article 36's mandates.²⁷ Because the MCA tribunal is essentially the same tribunal as that created for *Hamdan*,²⁸ the MCA tribunals

²¹ Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 Art. 3. (d).

²² *Id.*

²³ See David Glazier, *Full And Fair By What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. Int'l L.J. 55, 92 (2006) [hereinafter Glazier] citing Jean-Marie Henckaerts & Louise Doswald-Beck, Int'l Comm. of the Red Cross, 1 Customary International Humanitarian Law xxix (2005).

²⁴ Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case For Foreign Affairs Deference To The Executive Branch*, 23 Const. Comment. 179, 191 (citing *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797) (2006) [hereinafter Julian Ku].

²⁵ Uniform Code of Military Justice, art. 36, ((a) Pretrial, trial, and post trial procedures, including modes of proof, for cases arising under this chapter triable in ... military commissions and other military tribunals... may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter. (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress), available at <http://www.ucmj.us/uniform-code-of-military-justice/> (visited Apr, 8, 2007).

²⁶ *Hamdan* 126 S. Ct. at 2756-7 (Because UCMJ Article 36 has not been complied with here, the rules specified for Hamdan's commission trial are illegal.)

²⁷ *Id.* at 2797-98.

²⁸ Julian Ku, *supra* note 23, at 180.

violate the Geneva Conventions’ guarantee of “regularly constituted” courts under the Supreme Court’s ruling and are thus illegal.

The ICRC also noted that for a court to be “regularly constituted,” it “must be able to perform its functions independently of any other branch of the government, especially the Executive.”²⁹ In contradistinction to this requirement, the MCA grants considerable latitude to the Secretary of Defense to convene a tribunal and promulgate detailed rules governing its execution.³⁰ In fact, MCA tribunals are thoroughly compromised by Executive command influence. The multiple roles of the Secretary of Defense as appointing authority,³¹ adjudicator³² and self-evaluator,³³ strain any credulous definition of independence or impartiality. Thus, MCA tribunals are not independent and cannot be considered “regularly constituted courts.”

Besides requiring a “regularly constituted” court, the United Nations War Crimes Commission, in the 1947 “Justice Trial,” identified additional minimum standards for a lawful trial:

- (i) the right of the accused to know the charge against them at a reasonable time before the opening of the trial . . . ;

- (ii) the right of accused to the full aid of counsel of their own choice . . . ;

²⁹ Glazier, *supra* note 22, at 92 .

³⁰ MCA, *supra* note 5, § 948h (Military commissions ... may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose.).

³¹ *Id.*, §§ 948j, 949a (authorizing the Secretary of Defense to establish procedures for the appointment of commission judges, and to promulgate procedural rules for the commissions).

³² *Id.* § 948(a) Pretrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission ... may be prescribed by the Secretary of Defense, in consultation with the Attorney General.

³³ Br. of Amicus Curiae of the B. of the City of N.Y. in Support of Petr.-Appellee and Affirmance, *Hamdan v. Rumsfeld*, U.S. App. LEXIS 2474 (D.C. Cir. Feb. 11, 2005) (Once the Commission renders a decision, the case passes automatically to a Review Panel, which either recommends disposition to the Secretary of Defense or remands the case to the Commission for further proceedings. The Secretary of Defense ... either forwards the case to the President with a recommended disposition or remands the case to the Commission for further proceedings. The President may approve or disapprove the recommendation; change the conviction to one of a lesser included offense; mitigate, commute, defer or suspend the sentence imposed; or delegate his final authority to the Secretary of Defense.) (Author’s Note: So, the executive rules on its own determination that the defendants are guilty).

- (iii) the right of accused to give or introduce evidence . . . ;
- (iv) the right of accused to know the evidence against them . . . ;
- (v) the right to a hearing adequate for a full investigation of the case.³⁴

Not one detainee has ever had meaningful notice of the factual grounds of their detention or a fair opportunity to dispute those grounds before a neutral decision-maker.³⁵ De facto restrictions on the defendant's ability to employ counsel of choice, denial of the right to be present at their own hearing,³⁶ and of the right to hear all evidence against him³⁷ are additional aspects of the MCA tribunals that fall below these minimum standards.³⁸ Similarly, the practice of admitting into evidence confessions obtained through torture³⁹ deprives a defendant of a fair trial.⁴⁰ For these reasons as well as those described above, the MCA tribunals can not be fairly characterized as “regularly constituted” courts. They are “Kangaroo” Courts.⁴¹ So, even if they disregarded the MCA stricture suspending *habeas* and entertained jurisdiction, any decision regarding *habeas*

³⁴ Glazier, *supra* note 22, at 106 (citing 1 United Nations War Crimes Commission, Law Reports of Trials of War Criminals 23 (1947), reprinted in 1-5 United Nations War Crimes Commission, Law Reports of Trials of War Criminals (William S. Hein & Co., Inc. 1997)).

³⁵ See Waxman *supra* note 15.

³⁶ Marty Lederman, *Hamdan Summary -- And HUGE News*, Supreme Court of the United States BLOG (Jun. 29, 2006), (The right to be present... jettisoning of so basic a right cannot lightly be excused as “practicable,” the courts-martial rules must apply.) available at http://www.scotusblog.com/movabletype/archives/2006/06/hamdan_summary.html (last visited Apr. 8, 2007).

³⁷ See *Hamdan* at 2758 (Justice Stevens held the right of an accused to be privy to all of the evidence against him is “indisputably part of customary international law”).

³⁸ Jean-Marie Henckaerts & Louise Doswald-Beck, *Int'l Comm. of the Red Cross, 1 Customary International Humanitarian Law* xxix note 66, at 360-61, 366-67 (2005).

³⁹ MCA *supra* note 5, § 5(a), 10 U.S.C. § 948r (d)(3) (2006) (quotes to dispute added) (Statements obtained before December 30, 2005 in which the degree of coercion [torture] is “disputed,” may be admitted if the military judge finds that:

- (1) the totality of the circumstances renders the statement reliable and probative and
- (2) the interests of justice would best be served by admission of the statement).

⁴⁰ *Jackson v. Denno*, 378 U.S. 368, 376 (1964); see also 1 A.L.R.3d 1205 (2007); see also Restatement (Third) of Foreign Relations § 702 reporter's note 5, (listing human rights conventions prohibiting torture and noting that “confessions of crime obtained by torture are excluded” by the Fifth Amendment).

⁴¹ BLACK'S LAW DICTIONARY 382 (8th ed. 2004) (a mock court in which the principles of law and justice are disregarded, perverted or parodied).

relief by the tribunals would be wholly compromised by unlawful command influence and the abridgement of fundamental rights.

Proponents of suspending *habeas* might argue that post-9/11 circumstances permit Congress⁴² or the President⁴³ to suspend *habeas corpus*. The Suspension Clause of the Constitution states that, “the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”⁴⁴ One dictionary defines an “invasion” as “an armed attack on a large scale for conquest or other hostile purposes.”⁴⁵ “Armed” could encompass an airplane loaded with jet fuel in the context of the 9/11 attack. “Large scale” could refer to the damage wrought or the size of the belligerent force. The damage wrought, approximately 3,000 people dead⁴⁶ and nine buildings destroyed,⁴⁷ could arguably be considered large scale. “Conquest” does not seem to have been the terrorists’ intent since 19 soldiers could hardly have expected to take over the U.S. government. However, killing people certainly constitutes a “hostile purpose.” So, the 9/11 attack could be characterized as an “invasion” based on the hostile purpose and arguably “large-scale” damage. Given that there has been an invasion, the Constitution permits the government to suspend the privilege of the Great Writ until the invasion ends or the public safety is restored.⁴⁸

⁴² MCA, *supra* note 5, 10 USCA § 950j (b) (“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.”).

⁴³ Military Order *supra* note 4.

⁴⁴ U.S. Const. art. I, § 9, cl. 2 [hereinafter Suspension Clause].

⁴⁵ MACMILLAN DICTIONARY 540 (1979).

⁴⁶ September 11, 2001 Victims, available at

http://www.september11victims.com/september11victims/victims_list.htm (last visited 12/24/07).

⁴⁷ Federal Emergency Management Agency, World Trade Center Performance Survey, Executive Summary pp 3,4, available at http://www.fema.gov/pdf/library/fema403_execsum.pdf (last visited 12/24/07).

⁴⁸ See Suspension Clause *supra*, n. 44.

On the other hand, “large scale” doesn’t seem like an accurate description of the 9/11 attack. Although about three thousand people were killed, that number represents approximately .00001% of the 300,000,000 people living in the U.S. And, nine buildings cannot be characterized as large scale when compared to the number of buildings in the U.S. Further, in absolute terms, although the loss of 3,000 people is horrific, such a loss shouldn’t be called “large scale.” More than 10 times that number die from car accidents every year in the U.S.,⁴⁹ and accidents are not typically characterized as “large-scale” killers. In addition, 19 terrorists can hardly be viewed as a “large scale” belligerent force. Nineteen people do not even constitute a platoon, no less a brigade or army. Platoons cannot launch “large scale” attacks. So, whether looking at the number of belligerents or the amount of damage wrought, the 9/11 attack was not “large scale,” so it did not constitute an invasion.

Since the attack on 9/11 was not an invasion, Congress and the President have no legitimate authority under the Constitution to suspend the Writ of Habeas Corpus. Even if the 9/11 attack was an invasion, that event happened six years ago. There is no longer an invasion. So, suspending *habeas* is contrary to the temporary nature of any legal *habeas* suspension.⁵⁰ When one considers that the suspension also violates the UDHR, the ICCPR, the Geneva Conventions, and shows no sign of being abated after six years, the resolution to the conflict in the Boumediene and Al Odah case should have been self evident to all 9 justices. Instead, in a 5-4 decision, the Supreme Court ruled that the suspension of the Great Writ of *habeas corpus* by the Legislative branch, through the MCA, is unconstitutional.

⁴⁹ Ken Thomas, *U.S. Traffic Deaths on Rise*, Insurance Journal (2006) (43,443 people were killed on highways [in 2006]) available at <http://www.insurancejournal.com/news/national/2006/08/24/71690.htm> (last visited 12/25/07).

⁵⁰ See *I.N.S. v. St. Cyr*, 533 U.S. 289, 337 (2001) (quoting definitions of suspension that emphasize its transitory nature); see also Suspension Clause *supra* n. 44 (“until the public safety is restored”) (emphasis added).