

## ***Boumediene v. Bush: The Court is Back***

by

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Two years ago, I took a bold step. Although a mere intellectual property professor, with no credible claim to expertise in constitutional or international law, I ventured to critique<sup>1</sup> the U.S. Supreme Court's decision in *Hamdan v. Rumsfeld*.<sup>2</sup> I justified my hubris by citing the case's importance to constitutional law and human rights.<sup>3</sup> If I, who had devoted 32 years to the study, practice and teaching of law generally (although not to those particular fields) couldn't appreciate the decision, then how could the nation and the world?<sup>4</sup>

My critique of *Hamdan* was more about style than substance. I agreed, and still agree, with its result. But I faulted the Court for three reasons. First, the various splintered opinions were far too long. All together, they exceeded the length of our entire Constitution by a factor of eight.<sup>5</sup> Second, their reasoning was mind-numbingly technical and formalistic. To the untrained reader, they had barely a hint of the grave and historic issues at stake: the balance between security and the rule of law on which great jurists have opined since the Magna Carta.<sup>6</sup> Finally, in declining to address those issues directly, or even to put its technical discussion in their context, the Court had missed a "teachable moment" and had failed in its duty as a national educator.<sup>7</sup> The overall effect of this judicial timidity, I argued, was a loss of judicial prestige and power and a weakening of the judicial branch.<sup>8</sup>

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<sup>1</sup> See Jay Dratler, Jr., A Brief Lament on *Hamdan*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=913822](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913822) (last visited June 13, 2008) [hereinafter "*Hamdan Critique*"].

<sup>2</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>3</sup> See *Hamdan Critique* at 1-2.

<sup>4</sup> See also, *id.* at 5 (lamenting that judicial opinions were so complex and technical that the public and even the media must "must rely on commentators and intermediaries, as if the Justices were high priests of some obscure religion").

<sup>5</sup> See *id.* at 5 n.11 (reporting word counts for various *Hamdan* opinions and our Constitution).

<sup>6</sup> See *id.* at 1-2, 5-6.

<sup>7</sup> See *id.* at 3-4 (comparing *Hamdan* opinions unfavorably with Justice Kennedy's rich and deliberate exploitation of the "teachable moment" in *Texas v. Johnson*, 491 U.S. 397, 418 (1989), the flag burning case).

<sup>8</sup> See *id.* at 7-8.

Well, I'm pleased to report that the Court is back. In its decision in *Boumediene v. Bush*,<sup>9</sup> the Court not only reached the right result—that *habeas corpus* is a constitutional right extending to aliens held by the United States outside its territory when circumstances so justify.<sup>10</sup> It also took the opportunity to teach the nation and the world about the glorious history of human rights in Anglo-American societies and to put the dispute in that context.

The main issue in the case was the Constitution's Suspension Clause. Under its protection, the Great Writ of *habeas corpus* "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>11</sup> By a 5-4 majority, the *Boumediene* Court decided that the great Writ can apply to aliens outside the United States,<sup>12</sup> and that the Court itself has a role in deciding under what circumstances.<sup>13</sup>

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<sup>9</sup> *Boumediene v. Bush*, \_\_\_ U.S. \_\_\_, 2008 U.S. LEXIS 4887 (June 12, 2008).

<sup>10</sup> See *id.*, 2008 U.S. LEXIS 4887 at \*83 ("We hold that . . . [i]f the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause"); *id.* at 129 ("We hold that petitioners may invoke the fundamental procedural protections of habeas corpus"). For discussion of the circumstances, see n.13 *infra*.

<sup>11</sup> U.S. Const., Art. 1, § 9, cl.2.

<sup>12</sup> See n.10 *supra*.

<sup>13</sup> Under *Boumediene*, there are three levels of circumstances that a court must consider before granting a Great Writ under the Suspension Clause in the absence of congressional authorization. First, the court must consider whether the circumstances justify application of the Suspension Clause at all. See *Boumediene*, 2008 U.S. LEXIS 4887 at \*52-84 (exhaustively reviewing precedent for aliens detained abroad). The court must take into account "practical considerations," including (if the petitioners are aliens detained abroad) whether the United States exercises *de facto* sovereignty, not just *de jure* sovereignty, over the place of their detention. See *id.* at \*52-74 (considering at length, and rejecting, government's argument that it could avoid Suspension Clause's application by disclaiming *de jure* sovereignty over Guantánamo); *id.* at \*56-72 (refusing to hold that Cuba's bare *de jure* sovereignty over Guantánamo deprives courts of constitutional *habeas* jurisdiction, where treaty gave United States right to deprive Cuba of exercise of sovereignty indefinitely and United States in fact had exercised every practical incident of sovereignty).

Second, if the Suspension Clause applies, the court must consider whether the political branches have invoked it by recognizing an "invasion" or "rebellion." Finally, if the Suspension Clause applies and the political branches have not properly suspended the Writ, the courts must consider whether any alternative procedural protections that they have provided are adequate substitutes for those that would be available under the Writ. See *id.* at \*84 ("In light of this holding [that the Suspension Clause applies and was not invoked] the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus").

The *Boumediene* Court gave guidance only as to the first level of circumstances. It pronounced a three-part test for "practical circumstances" permitting application of the Suspension Clause:

Justice Kennedy wrote the majority opinion. He began where he ought, with the Magna Carta—the ultimate wellspring of the Anglo-American rule of law.<sup>14</sup> He explained how the Great Writ had arisen as a means of enforcing the Magna Carta’s decree that (in his

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“[W]e conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the [\*76] writ.”

*Id.* at 75-76. The Court made clear that the touchstone of the analysis is practical effect, not formalism. See *id.*, at \*72 (“questions of extraterritoriality turn on objective factors and practical concerns, not formalism”); *id.* at \*76-84 (applying three factors to case at hand).

The *Boumediene* Court did not address the second level of circumstances because the government did not assert a formal suspension of the Writ. See *id.* at \*84. As for the third level, the Court provided little precise guidance. See *id.* at \*96 (“We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus”). The court held “uncontroversial” requirements for judicial review of “the erroneous application or interpretation of relevant law” and the remedy of conditional release if imprisonment is found unlawful, but it also noted that “more may be required.” *Id.* at \*96-97 (internal quotation marks and citations omitted). It opined that the full procedural protection of a normal criminal trial would suffice. See *id.* at 1-7 (“that the prisoners were detained pursuant to the most rigorous proceedings imaginable, a full criminal trial, would have been enough to render any habeas substitute acceptable per se”).

In the case at hand, the Court held the statute alleged to be a substitute inadequate primarily because it failed to provide for introducing evidence newly discovered between the military tribunal hearing and appeal. See *id.* at \*112-118. Yet it also discussed a number of other possible deficiencies or requirements without characterizing their effect on adequacy, except perhaps in the aggregate. See *id.* at \*77-78, 104-105 (possible deficiencies: provision of “personal representative” who was not lawyer, practical limitations on evidence petitioner could introduce, admissibility of hearsay, and limitations of review on appeal); *id.* at \*107-108 (same: practical risk of factual errors); *id.* at 109 (requirement: “some authority to assess the sufficiency of the Government’s evidence against the detainee”); *id.* at 111 (noting absence of explicit provision for remedy of release but finding it implied); *id.* at 112-113 (questioning appellate court’s ability to “make requisite findings of fact” and to “review or correct the [tribunal’s] determinations, as opposed to merely certifying that the tribunal applied the correct standard of proof[,]” but abandoning discussion to consider question of newly discovered evidence). See also, *id.* at \*119-120 (expressing reluctance to read procedural protections of general *habeas* statute into alleged substitute, opining that they are not all necessary anyway, and concluding that petitioners had met their burden of proving inadequacy).

As a result, the Court appeared to leave the precise test for an adequate substitute to be determined on a case-by-case basis—a point the Chief Justice impliedly criticized in dissent. See *id.* at \*163-164 (noting absence of clear objections to adequacy other than failure to permit introduction of newly discovered exculpatory evidence).

<sup>14</sup> See *Boumediene*, 2008 U.S. LEXIS 4887 at \*30-32.

words) “no man would be imprisoned contrary to the law of the land.”<sup>15</sup> From his first paragraphs, Justice Kennedy thus placed the issue and the case where they belong, on the bedrock of Anglo-American democracy. He gave early notice that this was no ordinary case, but one for the ages—one involving the millennial struggles of free people to stay free.

Justice Kennedy’s review of history made two important points. First, it demonstrated that the Great Writ is and has been a vital bulwark against the abuse of executive power. It quoted Alexander Hamilton—a Founder best known for his advocacy of strong central government. “[T]he practice of arbitrary imprisonments,” Hamilton wrote, “have been, in all ages, the favorite and most formidable instruments of tyranny.”<sup>16</sup> The Court also recognized this fact in its reasoning: it based its decision to afford *habeas corpus* to Guantánamo’s prisoners in part on the separation of powers, which helps restrain executive abuse.<sup>17</sup>

The second point of the majority’s review of history was that there is nothing new about the current tension between security and the rule of law. It outlined the development of the Great Writ in the British Isles and in both British and American precedent applying it.<sup>18</sup> As that review demonstrated, the Writ has often been controversial in times of stress. But only rarely in U.S. history has it been suspended.<sup>19</sup> In a notable exception, President Lincoln suspended it during the Civil War—a paradigmatic “Rebellion” under the Suspension Clause.<sup>20</sup>

Like a flower growing toward the sun, the Writ has become taller and stronger after bouts of darkness. There is a reason for this steady growth. As sober reflection in the later luxury of peace reveals, taking time to treat prisoners fairly is rarely so subversive of security as failing to do so is subversive of liberty and the rule of law. We Americans learned that lesson painfully when we confessed our error in interning, during the heat of

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<sup>15</sup> *Id.* at \*31.

<sup>16</sup> The Federalist No. 84, C. Rossiter ed., at 512 (1961), quoted with approval in *Boumediene*, 2008 U.S. LEXIS 4887 at \*31.

<sup>17</sup> See *Boumediene*, 2008 U.S. LEXIS 4887 at \*35-40, 56, 72-74.

<sup>18</sup> See *id.* at \*41-52, 56-72.

<sup>19</sup> See *id.* at \*87 (citations omitted.):

“Our case law does not contain extensive discussion of standards defining suspension of the writ or of circumstances under which suspension has occurred. This simply confirms the care Congress has taken throughout our Nation’s history to preserve the writ and its function. Indeed, most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ’s protection but to expand it or to hasten resolution of prisoners’ claims.”

<sup>20</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 563, 567 (2004) (Scalia and Stevens, JJ., dissenting) (noting that Lincoln’s unilateral suspension was later endorsed by Congress).

World War II, tens of thousands of innocent citizens of Japanese descent without the slightest evidence of their disloyalty.

The Court's historical review also served another purpose. It showed the lack of any precise precedent for today's predicament. As the majority put it:

“Each side in the present matter argues that the very lack of a precedent on point supports its position. \* \* \*”

“Both arguments are premised, however, upon the assumption that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us. There are reasons to doubt both assumptions. Recent scholarship points to the inherent shortcomings in the historical record. . . . And given the unique status of Guantánamo Bay and the particular dangers of terrorism in the modern age, the common-law courts [\*52] simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on point.”<sup>21</sup>

That point should be obvious to anyone who has followed the news for the nearly seven years since 9/11. Our enemy—Al Qaeda—is a non-state actor, responsible to no head of state and to no people, including its own members. Yet it has formally declared war on us, in a purported *fatwa* of February 1998. That declaration encompasses civilians, pronouncing a duty of all Muslims to “kill the Americans and their allies—civilians and military—. . . in any country in which it is possible to do it[.]”<sup>22</sup> After successfully attacking several of our installations abroad, Al Qaeda managed to do what no enemy since the British has ever done: successfully attack our major commercial city and the citadel or our military command, killing nearly 3,000 innocent civilians. It was as if Pancho Villa had declared war on our civilians and then had managed to sack New York and Washington, D.C.

It goes without saying that we have never been in this spot before. So precedent from earlier wars is of limited value.

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<sup>21</sup> *Boumediene*, 2008 U.S. LEXIS 4887 at \*51-52.

<sup>22</sup> World Islamic Front Statement, Jihad Against Jews and Crusaders (Feb. 23, 1998), available in English translation at <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm> (visited June 13, 2008). The statement is a “purported” *fatwa* because its authors had no evident officially recognized religious authority to issue it.

The dissenters failed to recognize this point. The heart of their legal argument was their interpretation of a single precedent, *Johnson v. Eisentrager*.<sup>23</sup> In their view, that case established a bright-line rule depriving aliens held outside United States' territory of the Great Writ.<sup>24</sup>

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<sup>23</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950). See *Boumediene*, 2008 U.S. LEXIS 4887 at \*134-135 (Roberts, C.J., agreeing with Justice Scalia's dissent on this point); *id.*, at \*189-203 (analyzing *Eisentrager* and precedents construing it and concluding, at \*202, that "[t]here is simply no support for the Court's assertion that constitutional rights extend to aliens held outside U.S. sovereign territory").

Apart from policy, the dissenters attacked the majority's analysis for several other reasons. They asserted that: (1) the majority erroneously applied general principles of "separation of powers," rather than the specific prohibitions on the exercise of power that the Constitution explicitly states, see *id.* at \*185-189 (Scalia, J.); (2) any Suspension-Clause challenge to the relevant statute was premature because the petitioners had not exhausted their appeal rights under the statute, see *id.* at \*137-154 (Roberts, C.J.); (3) the majority construed the statute too narrowly in concluding that it denied important procedural rights, see *id.* at \*146-163, 173-176 (Roberts, C.J.) (4) the statute contemplates satisfactory substitutes for introducing newly discovered evidence, and a facial challenge based on the contrary view is inappropriate, see *id.* at \*163-169 (Roberts, C.J.); (5) the majority's imprecise standards would encourage litigation that would cause delay and impair the national security, see *id.* at \*176 (Roberts, C.J.) and (5) the majority asserted "an inflated notion of judicial supremacy," see *id.* at \*203-205 (Scalia, J.). Since all dissenters wrote or joined both dissents, it is appropriate to consider both together. See n.24 *infra*.

<sup>24</sup> This point was the heart of both dissents. That bright line rule, in the dissenters' view, creates a judicial power vacuum, giving the executive unchallenged power to manage foreign affairs involving aliens abroad, such as those at Guantánamo, without interference from the courts.

Justice Scalia best revealed this position in a sarcastic assertion that the majority's rule would do much the same thing, albeit less universally and less clearly. See *id.* at 204-205 (Scalia, J., dissenting):

"[S]o long as there are some places to which habeas does not run—so long [\*205] as the Court's new 'functional' test will not be satisfied in every case—then there will be circumstances in which 'it would be possible for the political branches to govern without legal constraint.' Or, to put it more impartially, areas in which the legal determinations of the other branches will be (shudder!) supreme. In other words, judicial supremacy is not really assured by the constitutional rule that the Court creates. The gap between rationale and rule leads me to conclude that the Court's ultimate, unexpressed goal is to preserve the power to review the confinement of enemy prisoners held by the Executive anywhere in the world."

In this passage, Justice Scalia appears to assert that, with respect to aliens held abroad, either the executive or the courts must be emperor—that power cannot be shared.

But we who teach the law take pains to instruct students that precedential decisions are not statutes. Even when rendered by our highest court, they do not stand for simply-stated abstract propositions. Seldom do they pronounce bright-line rules, least of all in complex and historically fraught fields like *habeas corpus*. Instead, they govern only insofar as their facts justify.

There are so many important factual differences between *Eisentrager* and Guantánamo that it is difficult to know where to begin. The facts underlying *Eisentrager* occurred in the aftermath of the greatest war in human history. Estimates suggest that fifty million or more people died in that war; American fatalities alone were about half a million.<sup>25</sup> Sacrifice and suffering had been universal, and Americans had not escaped. Even those at home had suffered shortages and rationing of gasoline, tires, and foodstuffs, *inter alia*: they had made do with their own personal “Victory Gardens.” In order not to cast doubt upon their patriotism or loyalty, many citizens of Japanese descent had suffered the Internment without question or complaint.

The prisoners seeking *habeas corpus* in *Eisentrager* were admitted German nationals.<sup>26</sup> They had been arrested for conspiring with the Japanese enemy in China after their government had surrendered unconditionally and before the Allies’ victory over Japan.<sup>27</sup> As the *Eisentrager* Court noted, the dictates of both sovereignty and the concept of “total war” which then had devastated large parts of the world expected citizens of enemy nations—and sometimes compelled them—to partake in hostilities against the Allies whether they wanted to or not.<sup>28</sup> In this sort of “total war,” a national of an enemy nation was presumed to be an enemy, and that presumption was an explicit part of the

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Chief Justice Roberts and Justice Scalia joined each other’s dissents, and the two remaining dissenting justices, Thomas and Alito, joined both. See *id.* at \*133-134, 177. See also, *id.* at \*135 (Roberts, C.J.: although finding issue of detainees’ entitlement to habeas a “difficult one,” stating that “I nonetheless agree with Justice Scalia’s analysis of our precedents and the pertinent history of the writ, and accordingly join his dissent”). The other five justices joined or wrote the majority opinion, and Justice Souter, Joined by Justices Ginsburg and Breyer, wrote a separate concurrence emphasizing the long delay in providing justice that had already occurred. See *id.* at \*133 (Souter, J., concurring: “After six years of sustained executive detentions in Guantanamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today’s decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation”).

<sup>25</sup> See <http://www.historyplace.com/worldwar2/timeline/statistics.htm> (last visited June 13, 2008).

<sup>26</sup> See *Eisentrager*, 339 U.S. at 765; *id.* at 784 (“the petition of these prisoners admits . . . that they are really alien enemies”).

<sup>27</sup> See *id.*, 339 U.S. at 765-766.

<sup>28</sup> See *id.* at 772-773.

*Eisentrager* Court’s reasoning.<sup>29</sup> Under these circumstances of total, worldwide war—in which nationals of enemies are presumed enemies<sup>30</sup>—plus universal suffering and sacrifice, it is not hard to see how the Court might deny our constitutional protection to admitted enemy nationals arrested abroad.

The situation at Guantánamo could hardly be more different. The prisoners there are stateless persons<sup>31</sup> or nationals of nations like Saudi Arabia, Yemen, Pakistan and Afghanistan, all of which are friendly with the United States. The *Eisentrager* Court’s presumption of enmity arising from nationality in an enemy nation during a conventional war simply doesn’t apply to them.

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<sup>29</sup> See esp. *id.* at 772, citing *Griswold v. Waddington*, 16 Johns. (N. Y.) 438, 480, 1818 N.Y. LEXIS 151 (1891), and *The Rapid*, 8 Cranch (12 U.S.) 155, 161, 3 L.Ed. 520 (1814) (other citations omitted; emphasis added):

“Chancellor Kent, after considering the leading authorities of his time, declared the law to be that ‘. . . in war, the subjects of each country were enemies to each other, and bound to regard and treat each other as such.’ . . . If this was ever something of a fiction, it is one *validated by the actualities of modern total warfare*. Conscription, compulsory service and measures to mobilize every human and material resource and to *utilize nationals*—wherever they may be—in arms, intrigue and sabotage, attest the prophetic realism of what once may have seemed a doctrinaire and artificial principle. With confirmation of recent history, we may reiterate this Court’s earlier teaching that in war ‘every individual of the one nation must acknowledge every individual *of the other nation* as his own enemy—because the enemy of his country.’”

This point is hardly *dictum* or an offhand remark. The entire first section of the Court’s opinion—some ten pages in the U.S. Reports—expands on this principle, its derivation and its corollaries. See *id.* at 768-777.

<sup>30</sup> See n. 29 *supra*.

In this regard the *Eisentrager* opinion contains an interesting logical flaw. At the time of the German prisoners’ allegedly inimical activities, Nazi Germany had surrendered unconditionally to the Allies. Therefore, technically speaking, they were no longer nationals of an enemy nation.

The Court addresses this point only indirectly, later referring to “the present twilight between war and peace[.]” *id.* at 779, and noting (in discussing issues other than *habeas*) that “[t]he jurisdiction of military authorities, during *or following* hostilities, to punish those guilty of offenses against the laws of war is long-established.” *Id.* at 786 (emphasis added). The implication is that the *Eisentrager* prisoners’ status as enemies *solely by virtue of being nationals of an enemy nation* carried over into the post-surrender period.

<sup>31</sup> Osama bin Laden himself is probably also a stateless person. His Saudi passport was revoked in 1994, and Sudan expelled him. See Lawrence Wright, *The Looming Tower* 195, 221-223 (Alfred A. Knopf 2006). He chose Afghanistan for residence precisely because it was in chaos. See *id.* at 222-223. After 2001, no nation was or is eager to grant him citizenship.

More important, the radically new concept of war wrought by Al Qaeda totally undermines the conceptual basis of *Eisentrager*. Al Qaeda is a non-state, transnational organization, with “members” or affiliates in a number of different nations, nearly all of which are friendly to the United States. In determining who are its “members” or supporters, nationality, citizenship, passport, language, dress and ethnicity mean little or nothing. To assess “membership” in or complicity with Al Qaeda, you must analyze a suspect’s actions or look into his heart.

And that is precisely the point. Some Guantánamo prisoners claimed they were utterly innocent, i.e., that they had no relationship with or sympathy for Al Qaeda and had taken no hostile action against the United States. They were, they claimed, victims of mistaken identity, false evidence provided by personal, political or tribal enemies, or simply being in the wrong place at the wrong time. To the extent these claims are factually correct, none of the rationale of *Eisentrager*, whether based on presumably inimical nationality or hostile acts, applies to them.

The prisoners’ factual claims of innocence are an essential threshold question that the dissenters in *Boumediene* would ignore. Yet they are classic human pleas for justice that deserve to be heard. An innocent man is not an “enemy combatant.”

Imprisonment or punishment based on mistaken identity or false witness is the nightmare of every free society. It is one reason why the Great Writ has survived and grown in stature over the eight centuries since Magna Carta. Every human being who claims to have been caught in a false web desires—and deserves—to have those claims heard by a neutral judge as far removed as possible, in authority and mindset, from the persons and institutions that imprisoned him.

For these claims of innocence, a military tribunal is not good enough. Although ostensibly neutral, military judges are in the chain of command, and the command may have many reasons, unrelated to justice, for continuing to hold an innocent person. Among them are: avoiding an appearance of weakness or incompetence, covering up mistakes, indulging unjustified hopes of extracting useful intelligence, putting pressure on *other* inmates to provide intelligence, and seeking to minimize logistical expense and trouble for such things as transport and repatriation. None of these points is justification for holding an innocent person, but all can influence the military’s decision whether or not to release him.<sup>32</sup> Equally important, all can create an *appearance* of bias,

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<sup>32</sup> From a practical standpoint, the most persuasive of these points are those relating to intelligence. Yet an innocent person is unlikely to have useful intelligence. Any that he has he is likely to divulge voluntarily, and relatively quickly (if indeed he is innocent). To the extent he does have important intelligence, that fact alone may tend to disprove his innocence; and a *habeas* court could consider its general nature or (in secret) its details in assessing his claims to innocence. Holding an innocent person who has voluntarily divulged all he appears to know

undermining the United States' reputation for fairness and the rule of law and subverting our effort to win Muslims' hearts and minds.<sup>33</sup>

The situation is different when a prisoner has admitted an affiliation with or sympathy for Al Qaeda or hostile action against the United States, as did Khalid Sheikh Mohammed, the mastermind of 9/11. In that case, the conceptual basis of *Eisentrager* is satisfied *a fortiori*. *Eisentrager* presumed that enemy nationality means enmity and derived that presumption in part from the notion that enemy nations might compel cooperation. But where a suspect admits sympathy to or complicity with—let alone actual assistance to—a hostile agency, no compulsion is necessary. Therefore no presumption is needed to justify the conclusion of enmity that underlay *Eisentrager*.

Logistical and institutional concerns also underlay *Eisentrager*. Chief among these were the expense and disruption of transporting prisoners and witnesses from foreign venues for trial during wartime and the fear that judicial second-guessing would disrupt the military chain of command and undermine the prestige of the U.S. military and respect for its authority.<sup>34</sup>

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solely for the purpose of putting later-acquired pieces of intelligence together or of coercing others to speak is not something that a just and free society should countenance. Nor is continuing to hold an innocent person because his interrogators, through incompetent questioning, allowed him to gain some inkling of the sources of their concern.

<sup>33</sup> In his dissent, Chief Justice Roberts cited hostile acts of some 30 Guantánamo prisoners, after their release *by the executive*, as reason to defer *to the executive* in determining whom to release. See *Boumediene*, 2008 U.S. LEXIS 4887 at \*179-181 (Roberts, C.J.). This logic is a non-sequitur for two reasons. First, the executive itself released these hostile prisoners, without *habeas corpus*. Apparently Roberts believes the release was a mistake, but he provides no reason to suspect, let alone believe, that *habeas* courts would do any worse. Conscious of the practical risks of erroneous release of prisoners and of their relative institutional incompetence, *habeas* courts might well require stronger evidence of innocence than either the executive or the military. Cf. *Boumediene*, 2008 U.S. LEXIS 4887 at \*126 (“We recognize . . . that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible”). They would, however, have a crucial advantage from the perspective of justice and human rights: they would be neutral and therefore not swayed by various practical ulterior motives that might influence military tribunals. See the text at n.32 *supra*.

Second, Roberts neglects the effect of imprisonment itself on the prisoners' state of mind. I am a scholar and intellectual, not a violent man. But if I felt I had been imprisoned for six years without cause during the flower of my youth I might well take up arms against the power that imprisoned me. At the very least, I would write inimical tracts. Roberts neglects the very real risk that innocent people, imprisoned by mistake or through false evidence, might become radicalized or radicalize others.

<sup>34</sup> See *Eisentrager*, 339 U.S. at 778-779.

Here again the vastly different situations in *Eisentrager* and at Guantánamo provide a solid basis for distinction. World War II was the greatest military conflagration in world history. Even after it ended, millions of soldiers had to be demobilized, millions of POWs repatriated, and millions of refugees relocated. The War and its aftermath probably involved the greatest involuntary mass migration in human history. Justice Jackson, who presided at the Nuremberg war crimes trials and wrote the unanimous opinion in *Eisentrager*, was aware of the immense human scale of the war and its aftermath.

In contrast, Guantánamo involves nothing of the kind. At its fullest, it held about 750 prisoners<sup>35</sup>—a drop in the bucket of World War II’s mass displacement.

As for the so-called “war on terror,” it is not even really a war. Except perhaps in Iraq (whose relationship to the struggle with terrorism is controversial and disputed), the battle against terrorism is a matter of covert intelligence and police activities, limited special operations, and counterinsurgency. Most of these activities are limited in scope, secret, and far removed geographically from imprisonment and interrogation of suspects at places like Guantánamo. The dangers of disrupting the military chain of command are greatly reduced once a suspect has been removed from temporary battlefield custody and transferred to a permanent prison far from the conflict for holding and interrogation. The risk of impairing respect for military command and operations is minimal because the chain of command and the relevant operations are mostly secret—or at least unknown to the public and the enemy. *Habeas* proceedings also can be made secret in whole or in part as necessary. And the expense and trouble of transporting prisoners from places like China and Germany is far greater than transporting them from 90 miles off the Florida coast.

Like *Eisentrager*’s presumption of enmity from nationality, its logistical and institutional concerns have no application, or are greatly attenuated, in the context of Guantánamo. *Cessante ratione legis, cessat et ipsa lex.*

The dissenters in *Boumediene* considered none of this. To justify their bright-line rule that aliens abroad have no *habeas* rights, they took statements from *Eisentrager* out of context and gave them decisive weight. They ignored the thrust of *Eisentrager*’s analysis: that “*enemy* aliens, resident, captured and imprisoned abroad” have no right to *habeas*.<sup>36</sup> For prisoners who claim they are not enemies but were falsely identified or accused, a

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<sup>35</sup> See BBC News (online), “Profile: Guantánamo Bay” (Oct. 26, 2006), <http://news.bbc.co.uk/2/hi/americas/4720962.stm> (last visited June 14, 2008) (“By November 2002, the camp [at Guantánamo] held more than 750 detainees. Since then, hundreds have been either freed or handed over to their national governments”).

<sup>36</sup> *Eisentrager*, 339 U.S. at 777 (emphasis added). See also *id.* at 779 (“we could expect no reciprocity for placing the litigation weapon in unrestrained enemy hands”).

central precondition of *Eisentrager* is not met, because the *Eisentrager* presumption is inapplicable unless and until their factual claims are proved false.

There is one more important distinction between *Eisentrager* and Guantánamo which no justice in *Boumediene* mentioned. In *Eisentrager* self-evident wartime and practical needs justified the prisoners' places of initial detention, trial and final detention. They were apprehended in postwar China for acts allegedly committed there. They were tried in China under a pre-existing U.S. military command structure with pre-existing procedures. Upon conviction by military courts, they were transferred to a pre-existing military prison in Germany for incarceration and eventual repatriation.<sup>37</sup> The place of initial apprehension and trial had obvious practical justifications. The transfer to Germany no doubt reflected the chaos of postwar China. It also provided more humane treatment than continued incarceration in postwar China would have, and it facilitated the prisoners' eventual repatriation.

Guantánamo is as different as night from day. The facility at Guantánamo used for the *Boumediene* prisoners was no pre-existing prison, and the procedures used to decide the crucial factual questions no pre-existing product of wartime exigency. Both were specially designed and constructed, at considerable expense and under considerable legal and political controversy, for the very class of prisoners of whom the *Boumediene* petitioners were representative.

Furthermore, publicly available evidence now suggests that the primary reason and motivation for building the new prison facilities and creating the new procedures had nothing to do with wartime or practical exigencies but everything to do with *legal* exigencies perceived by the Executive. The executive appears to have built a brand new prison at Guantánamo in order to create a "Constitution-free" zone in which it could interrogate and handle the prisoners without any checks or balances. It appeared to want no judicial interference, whether in its interrogation or in determining whether the prisoners were indeed "enemy combatants" subject to interrogation at all. It did not provide *any* special procedures until judicial decisions forced it to do so, apparently preferring to hold the prisoners indefinitely without trial.<sup>38</sup> In other words, the executive built its prison and its special procedures to circumvent our Constitution and our laws. This is exactly the sort of arbitrary detention that *habeas* was meant to control.

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<sup>37</sup> See *id.* at 765-766.

<sup>38</sup> See *Boumediene*, 2008 U.S. LEXIS 4887 at \*74 (government's argument that lack of sovereignty divests *habeas* jurisdiction over aliens implies "that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint"); *id.* at \*73 ("Our basic charter cannot be contracted away like this").

For purposes of this essay, it doesn't matter whether these charges are all correct. It is enough that there is substantial evidence to support them, which there is. For the Court to ignore that evidence would be to encourage the executive to manipulate facts on the ground for the primary or sole purpose of depriving the Court of *habeas* jurisdiction, which not even Congress can do. Tolerating that ploy would amount to wholesale abdication of the Court's power and responsibility.

No doubt that is what the *Boumediene* majority had in mind when it referred repeatedly to the separation of powers<sup>39</sup> and to the Court's authority and responsibility to decide "what the law is."<sup>40</sup> If the executive could defeat the Great Writ and the Court's authority by the simple expedient of building a new prison in a legally unique territory and decreeing its own arbitrary procedures by regulation, then the separation of powers and the Great Writ that helps enforce it would mean nothing.

The dissenters appeared to tolerate and encourage—even to desire—this result. They relied on the foreign character of both the prisoners and the prison, ignoring *Eisentrager*'s emphasis on their enmity and apparently viewing the Executive's power over foreign affairs as absolute. They saw handling of aliens abroad as quintessentially a foreign issue, and therefore under the executive's exclusive control, whether or not the aliens are friendly and erroneously accused.

Besides its logic, there is a practical problem with this view. Mistreatment of foreigners is not without consequence, including domestic consequence. Denying innocent foreigners from friendly countries a chance to prove their innocence in an atmosphere untainted by military necessity or potential bias may come back to bite our citizens both at home and abroad. We have seen this phenomenon repeatedly. It appears in the recruiting boost that the War in Iraq has given Al Qaeda. It appears in the opposition, disdain and occasional enmity that our executive's unilateralism has evoked, even among

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<sup>39</sup> See *id.* at \*74 ("the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain"); *id.* at 127:

"Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives."

<sup>40</sup> *Id.* at \*74 ("To hold the political branches have the power to switch the Constitution on or off at will [by manipulating location or sovereignty] . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is'"), quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

our erstwhile allies. In some future conflict we may yet see it in the retaliatory torture that John McCain so rightly fears.

In a flat, globalized world, it is folly to suppose that we can draw a sharp line between foreign and domestic affairs. How we handle ourselves abroad—especially with friendly parties—has a direct effect on how others treat us both at home and abroad, economically, socially, and militarily. To hold that our courts can have no say over acts abroad, even those involving innocent nationals of friendly countries, and even though they may ultimately have profound effects on citizens at home, is to abdicate judicial power to guard the rule of law.

These were not the dissenters' only errors. Both Chief Justice Roberts and Justice Scalia unwittingly revealed their penchant for judicial activism. Justice Scalia devoted the whole first section of his dissenting opinion to reaffirming and praising the balance between security and civil rights that the executive had struck.<sup>41</sup> He spent literally pages describing the dangers that Al Qaeda poses and the need for the executive to confront it unhindered by judges whose expertise lies elsewhere.<sup>42</sup> Chief Justice Roberts did much the same. He went so far as to recount the hostile activities in which former Guantánamo prisoners had engaged after being released *by the executive* on its own accord, without judicial intervention.<sup>43</sup>

These points are self-evidently matters of policy, beyond the scope of judicial review. It is not the courts' job to address them, whether to affirm, second-guess, or reject the executive's policy balance. It *is* the courts' job to make sure that constitutional principles of eight centuries' standing, like *habeas corpus*, find their proper way into that balance.

The *Boumediene* majority found the relevant federal statute unconstitutional because, *inter alia*, it did not provide for proper judicial review of the most fundamental factual issue facing the Guantánamo prisoners: whether they are indeed "enemy combatants." This was the issue that the *Eisentrager* Court (under vastly different circumstances) had in part presumed. The dissenters would have upheld the statute not because it met

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<sup>41</sup> See *Boumediene*, 2008 LEXIS 4887 at \*178-185.

<sup>42</sup> For the first sentence of this section, Justice Scalia wrote, "America is at war with radical Islamists." *Id.* at \*178. See also, *id.* ("The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed"); *id.* at \*184-185 ("What competence does the Court have to second-guess the judgment of Congress and the President on such a point [that *habeas* proceedings would compromise the military mission at Guantánamo]? None whatever. But the Court blunders in nonetheless").

<sup>43</sup> See *id.* at \*179-181. For a critique of Roberts' logic, see n.33 *supra*.

minimum constitutional requirements, which they were unwilling to define, but because, they said, it provided aliens more procedural rights than ever before.<sup>44</sup>

The logic of this points escapes me even now. If the current situation is unique, then what relevance does this fact have? More to the point, if the issue is whether the prisoners were in fact “prisoners of war,” which in the past always meant enemy soldiers of nations at war with the United States, what relevance does it have to a different issue: the prisoners’ claims of non-affiliation with an historically unique non-state, transnational organization of terrorists?

The dissenters’ own prose condemned them as judicial activists. Although they accused the majority as such,<sup>45</sup> it was they who devoted substantial parts of their dissents to policy. The majority wrote nary a word about policy, except to reaffirm the executive’s control over it and the executive’s broad discretion to set it.<sup>46</sup> The majority devoted its opinion entirely to relevant history and law.

Had the dissenters’ prevailed, the effect of their view would have been to enhance the power of the executive and weaken the Great Writ which, for nearly 800 years, has helped hold executive abuses in check. Their view would have granted our executive, in our name, the power of a tyrant over aliens apprehended and detained abroad. Yet the notion that absolute power doesn’t matter when it affects only aliens abroad is patently false. It affects our international moral standing and how foreigners see us. More to the point, it can engender foreign angst, resistance, enmity, hatred and retaliation.

Evidence of this point arose just a week or so ago, half a world away, in South Korea. South Korean President Lee Myung Bak was once an immensely popular mayor of Seoul.

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<sup>44</sup> See *id.* at \*163 (Roberts, C.J., dissenting) (“The [statute] provides more opportunity and more process, in fact, than that afforded prisoners of war or any other alleged enemy combatants in history”). All four dissenters wrote or joined both dissents. See n.24 *supra*.

<sup>45</sup> See *id.* at 142 (Roberts, C.J.) (gently implying that majority’s failure to wait for statutory remedies to be exhausted was judicial activism); *id.* at \*203 (Scalia, J., dissenting: “[w]hat drives today’s decision is neither the meaning of the Suspension Clause, nor the principles of our precedents, but rather an inflated notion of judicial supremacy”).

<sup>46</sup> See *id.* at \*126-127 (majority opinion; citation omitted):

“In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. . . . Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the [\*127] Executive substantial authority to apprehend and detain those who pose a real danger to our security.”

Yet he became the object of the biggest and most passionate mass demonstrations in South Korean history, which may yet cause his government to fall.<sup>47</sup>

The immediate trigger for the popular unrest was Lee's decision to allow American beef back into Korea, despite Koreans' fear of mad cow disease. Yet many observers think the real reason for the popular uprising was Koreans' dislike of what they perceive as Lee's high-handedness. He made the decision to import the beef *before* entering trade discussions with our president, thereby giving up his only leverage and making what (from the South Korean perspective) was a blunder in bargaining. In the process, he treated our president as a loyal vassal treats a feudal lord. Lee's own high-handedness, plus his kowtowing to what is universally perceived abroad as our president's own, provoked the outrage. It was a case of popular reaction to international executive hubris on two continents, in a nation that is virtually a protectorate of ours.

Ironically, the Korean people could recognize executive high-handedness while four members of our highest Court did not. In establishing Guantánamo as a presumed "Constitution-free" zone, our executive did not ask the appropriate question. It did not enquire "how can we protect the American people consistently with our fundamental laws, our near millennial Anglo-American history, and our constitutional values?" Instead it asked, "how can we operate with minimal interference by the Constitution and the courts?" Its purpose and effect, the executive's approach was a power grab in the name of security from terror.

Fortunately, five members of the Court recognized it as such and acted accordingly. They reaffirmed *habeas* and the Court as the constitutional checks on high-handed executive power that they are both supposed to be. Yet their decision was mild and non-intrusive. All they upheld was courts' right—*after* the fact—to determine the legality of detaining persons held in the so-called "war on terror." They did so under a flexible, practical standard which gives ample room for the exigencies of war and intelligence, including exigencies that brook no delay.<sup>48</sup> Had the Court refused to take this mild

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<sup>47</sup> See Choe Sang-Hun, "Shaken Korean Leader Promises New Beginning," New York Times (June 12, 2008), available at [http://www.nytimes.com/2008/06/12/world/asia/12skorea.html?\\_r=1&scp=3&sq=lee%20myung%20bak&st=cse&oref=slogin](http://www.nytimes.com/2008/06/12/world/asia/12skorea.html?_r=1&scp=3&sq=lee%20myung%20bak&st=cse&oref=slogin) (visited June 12, 2008); Choe Sang-Hun, "Seoul protest threatens to topple government," International Herald Tribune (June 10, 2008), available at <http://iht.nytimes.com/articles/2008/06/10/asia/korea.php?scp=5&sq=lee%20myung%20bak&st=cse> (visited June 16, 2008).

<sup>48</sup> See *id.* at \*121-122 (majority opinion; citations omitted):

"In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody. If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures

measure to uphold the rule of law against executive high-handedness, it would have countenanced yet another step from democracy toward empire.

The majority deserves credit not only for the result, but for the pedagogic value of its opinion. Although perhaps too long,<sup>49</sup> the opinion amply demonstrated just how strongly nearly eight centuries of Anglo-American history support its conclusion, and just how vapid and unhelpful resort to “original intent” and inapplicable precedent can be. Unlike the *Hamdan* plurality, Justice Kennedy, writing for the *Boumediene* Court, did not miss this “teachable moment.”

So the Court is back. It has reassumed its role as a coequal branch of government, able and willing to keep the Executive within proper bounds. And it has returned to writing opinions that instruct the nation and the world on the rich and admirable history of Anglo-American rights and the rule of law.

If there is one dark cloud in this picture, it is that the Court’s return to active duty hung on a single vote. That fact shows just how important the coming presidential election will be, not just to arrest the slide of workers’ and abortion rights, but also to stem the much more terrifying prospect of descent into empire.

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for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time. Domestic exigencies, furthermore, might also impose such onerous burdens on the Government that here, too, the Judicial Branch would be required to devise sensible rules for staying habeas corpus proceedings until the Government [\*122] can comply with its requirements in a responsible way.”

<sup>49</sup> The majority opinion runs some 21,885 words. At that length, it is nearly three times as long as our entire Constitution—including obsolete language, the Bill of Rights and other amendments—which runs 7,503.