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Case # 4: *Boumediene v. Bush* (2008) Supreme Court Decision

Directions: Review the excerpts of the Supreme Court opinion(s) and then compare each Justice's reasoning with your own.

Background

In a 5-4 decision in favor of Boumediene's access to *habeas corpus* protection, Justice Anthony Kennedy authored the Court's opinion. The Court found that the Military Commissions Act of 2006 was an unconstitutional suspension of *habeas corpus*, and that the Detainee Treatment Act was not an adequate substitute for the *habeas* writ. Enemy combatants detained at the Guantanamo Bay detention facility were entitled to the Fifth Amendment's protection of due process.

Justice Kennedy's Opinion

"The detainees...are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government..."

"We hold that Article I, Section 9, Clause 2, of the Constitution has full effect at Guantanamo Bay. If 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. ...Petitioners, therefore, are entitled to the privilege of *habeas corpus* to challenge the legality of their detention..."

"The necessary implication of the [government's argument that the protection of *habeas corpus* did not apply because the Guantanamo facility is not on American soil] is 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.

"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. Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.' *Murphy v. Ramsey*, (1985) 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..."

"These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for 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..."

We do consider it uncontroversial...that the privilege of *habeas corpus* entitles the prisoner to a meaningful opportunity to demonstrate he is being [unlawfully] held... The *habeas* court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain..."

"[W]e agree with petitioners that, even when all the parties involved in this process act with

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diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is "closed and accusatorial." And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore...

"We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering...The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security..."

"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..."

"The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism...The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that *habeas corpus*, a right of first importance, must be a part of that framework..."

Justice Scalia's Dissent (Joined by Chief Justice Roberts and Justices Thomas and Alito)

"Today, for the first time in our Nation's history, the Court confers a constitutional right to *habeas*

corpus on alien enemies detained abroad by our military forces in the course of an ongoing war. The Chief Justice's dissent, which I join, shows that the procedures prescribed by Congress in the Detainee Treatment Act provide the essential protections that *habeas corpus* guarantees; there has thus been no suspension of the writ, and no basis exists for judicial intervention beyond what the Act allows. My problem with today's opinion is more fundamental still: The writ of *habeas corpus* does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely *ultra vires* [beyond the powers of the Court]..."

"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...The President relied on our settled precedent in *Johnson v. Eisentrager*, (1950), when he established the prison at Guantanamo Bay for enemy aliens [having been assured by advisers that] a federal district court could not properly exercise habeas jurisdiction over an alien detained [there]... At least 30 ... prisoners hitherto released from Guantanamo Bay have returned to the battlefield. [Justice Scalia provides several examples of this point.]

"...What competence does the Court have to second-guess the judgment of Congress and the President on [the process of identifying enemy combatants]? None whatever. But the Court blunders in nonetheless. Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails..."

"Today the Court warps our Constitution in a way that goes beyond the narrow issue of the reach of the Suspension Clause, invoking judicially brainstormed separation-of-powers principles to [provide] for the extraterritorial reach of *habeas corpus* (and, no doubt, for the extraterritorial

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reach of other constitutional protections as well). It blatantly misdescribes important precedents, most conspicuously Justice Jackson's opinion for the Court in *Johnson v. Eisentrager*. It breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization. And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

"The Nation will live to regret what the Court has done today. I dissent."

Chief Justice Roberts's Dissent

"Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. The Court rejects them today out of hand, without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law's operation. And to what

effect? The majority merely replaces 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. One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants...

"*Hamdi* concluded that American citizens detained as enemy combatants are entitled to only limited process, and that much of that process could be supplied by a military tribunal, with review to follow in an Article III court. That is precisely the system we have here. It is adequate to vindicate whatever due process rights petitioners may have...

"[The American people] today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges."

Follow-up

On November 20, 2008, a federal judge ruled that Boumediene's detention unlawful and ordered his release. Freed on May 15, 2009, he settled with his family in France.