

Boumediene v. Bush
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Supreme Court Politics

Throughout the enduring battle of wills between President Bush's administration and the Guantanamo Bay detainees in the recent case of *Boumediene v. Bush*, the question has centered around the individual rights of detainees and the extent of power granted to the national government during times of war and national emergency. During the current war on terror, it is worth pondering whether prisoners outside the jurisdiction of the United States have the right to challenge their detainment, and whether they are guaranteed basic Constitutional rights. Ultimately, the central issues here regard the fundamental human rights of prisoners of war, the extent of U.S. jurisdiction, and the degree to which the executive branch can use its power to indefinitely imprison those it suspects of suspicious activity.

The issue of Guantanamo Bay detainees has arisen first of all due to the Bush Administration's role in the current "war on terror." Congress has the power to initially declare war, and in doing so grants the executive branch the power to carry out the war and to thus detain aliens who bear arms against the U.S. In the case at hand, Congress has authorized the executive branch to detain those who were somehow involved in the September 11 attacks. However, President Bush has asserted that, as Commander-in-Chief, he has the authority to indefinitely detain any foreign nationals he classifies as "enemy combatants." This definition is tremendously broad and even pertains to those who have not necessarily performed acts of violence against the U.S. When the definition is used inappropriately, it results in an unprecedented and sweeping authority of the Commander-in-Chief to conduct war. Throughout the case of *Boumediene*, the Bush administration maintains that the courts cannot "intrude" upon the executive's power to conduct war or upon Congress's right to decide upon the jurisdiction of the federal courts; thus, this case implicitly contains a major separation of powers issue (Lynch 1).

This case primarily concerns the rights of Lakhdar Boumediene and five other Algerians, who were caught by the Bosnian police in 2002 when U.S. Intelligence suspected that the men were planning an attack on the U.S. Embassy in Sarajevo. Bosnian officials had no concrete evidence behind their arrest, doing so only because of a U.S. threat to halt diplomatic relations with Bosnia if they did not carry out the arrest. The U.S. then classified these men as "enemy combatants" and detained them in Guantanamo Bay, a military base located on land that the U.S.

leases from Cuba. According to the executive branch, Guantanamo Bay is clearly not considered a sovereign part of the United States. The men have been detained there for almost six years, but throughout that time have never received a factual explanation of their confinement, and have not been allowed legal representation. Thus, Boumediene filed a petition for a writ of habeas corpus because he believed that he was denied the due process of the law. A writ of habeas corpus is essentially the right to trial by jury; it is a judicial mandate to a prison official ordering that an inmate be brought before the court in order to determine whether he or she has been imprisoned lawfully, and whether the prisoner can be released (“Habeas Corpus”). The writ is essentially a check on the executive branch and a guardian of individual rights. However, the district court denied Boumediene the right to file this petition, as he was an alien detained in an “overseas military base” and the U.S. did not have jurisdiction to consider his claims (“Boumediene v. Bush”). The U.S. Court of Appeals in D.C. also affirmed the dismissal of Boumediene’s claim.

On the other hand, the Supreme Court reversed by overruling a precedent, *Rasul v. Bush* (2004), in which it had ruled that the United States does in fact have jurisdiction over “legal appeals filed on behalf of foreign citizens held by the United States military in Guantanamo Bay Naval base” (“*Rasul v. Bush*”). The opinion, written by Justice John Paul Stevens, essentially confirmed that the right to habeas corpus can be exercised in all United States territories; in this case, the U.S. ultimately exercised sovereignty over the naval base although Cuba technically owned the land. Secondly, Stevens concluded that the right to habeas corpus “is not dependent on citizenship status” (“*Rasul v. Bush*”). Thus, detainees at Guantanamo Bay were free to file a petition for a writ of habeas corpus in order to challenge their imprisonment. The congressional response to the decision in *Rasul v. Bush* was to pass the Detainee Treatment Act of 2005 (DTA), which added a subsection to the habeas statute. This addition stated that no court had jurisdiction over habeas corpus writs filed by aliens detained at Guantanamo Bay, or over any other action against the U.S. by Guantanamo Bay detainees classified as enemy combatants. However, in *Hamdan v. Rumsfeld*, the Supreme Court held that the DTA did not apply to habeas corpus petitions pending at the time of the act’s passage (“*Boumediene, Lakhdar*”).

Consequently, directly in response to the decision in *Hamdan*, Congress passed the Military Commissions Act of 2006 (MCA), a backwards step declaring that no courts, justices, or judges have jurisdiction over habeas corpus petitions filed on the behalf of not only those

already classified as enemy combatants, but *also* those awaiting “such determination” (*Lakhdar* - No 05-5062, p. 8). Thus, federal courts could no longer hear pending petitions from detainees, nor could they hear any other action against the U.S. filed by an alien detainee whose habeas corpus petition is pending. The MCA applied to all cases, without exception, which relating to any aspect of detention of an alien by the U.S. after September 11, 2001.

Ultimately, these arguments culminate in the fundamental constitutional questions presented in *Boumediene v. Bush*. First of all, do federal courts have the jurisdiction to hear petitions from detainees; does the U.S. have sovereignty over Guantanamo Bay though it is leased from Cuba? Second, is the MCA, in removing the courts’ jurisdiction over habeas corpus petitions on behalf of detainees, lawful, or does it violate the Suspension Clause of the Constitution? The Suspension Clause states, “The Privilege of the Writ of Habeas shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it” (*Lakhdar* - No 05-5062, p. 13). Finally, are Guantanamo Bay detainees are guaranteed basic Constitutional rights and freedoms, such as protection by the Fourth and Fifth Amendments?

The case was then appealed to the D.C. Circuit courts once again; in their arguments, the detainees argued that first, the MCA does not apply to their cases and petitions. Second, they argued that even if the MCA does apply, it is unconstitutional as it violates the Suspension Clause. However, the D.C. Circuit Court ruled in favor of the government and against the detainees upon several points. To begin, the Court ruled that the MCA applies to all cases, strictly without exception, and thus must also apply to the case of the detainees by definition. Second, it also held that the Suspension Clause only applies to the writ of habeas corpus as it had existed in 1789, when federal courts were first created. In response, the detainees cited three cases in an attempt to prove that prior to 1789, courts had had jurisdiction over writs of habeas corpus pertaining to foreign citizens outside of their sovereign territory. However, none of these cases directly involved an alien captured and detained outside the sovereign’s territory. Moreover, no cases were found before 1789 that would have supported the detainees’ argument. Furthermore, in accordance with England’s history and customs, there would have been countless problems if the writ were applied to foreign prisoners outside sovereign territory. Therefore, according to the historical reach of the writ, in 1789, aliens outside of U.S. territory without property or presence in the U.S. would not have been eligible to petition for a writ of habeas corpus. Before 1789, the Suspension Clause would not have applied to foreign detainees

at an overseas military base, the Court held. Finally, the D.C. Circuit yet again emphasized that Guantanamo Bay is outside the country's geographic borders, and thus federal courts do not have jurisdiction over this territory (*Lakhdar* - No 05-5062, p. 14-17). Justice Rogers, on the contrary, wrote a dissent stating that federal courts do not lack the power to consider the detainees' petitions. He stated that the Court misread the historical record and ignored the outcome of *Rasul v. Bush*. Finally, he felt that the Suspension Clause should still hold since the writ of habeas corpus had only been suspended only in dire times, in which there were clear cases of "Rebellion" or "Invasion" (*Lakhdar Boumediene* - No 05-5062, p. 26-30). This particular case, he felt, did not entail such a drastic act such as suspension of such a basic human right.

The final major question addressed in this case is whether the indefinite imprisonment of the petitioners is unlawful, particularly in regard to the Constitution's Fourth and Fifth Amendments. Were the detainees deprived of basic human rights? They were arrested without concrete evidence, were not given the chance to plead their case before a neutral third party, and were not allowed to contact their families. The Fourth Amendment guarantees protection against "unreasonable searches and seizures" ("Fourth Amendment"), while the Fifth Amendment states that no person shall be "deprived of life, liberty, or property, without due process of law" ("Fifth Amendment"). However, the D.C. Circuit concluded that these prisoners are not guaranteed even the most basic rights, as they are aliens without property or presence in the U.S. Is this decision correct, or should these men be granted a hearing in order to ensure that they were not arrested unlawfully? This is yet another question that the Supreme Court must struggle with.

Finally, numerous non-governmental organizations, international human rights groups, legal associations, and other interest groups have filed amicus curiae briefs on behalf of the petitioner. Amicus curiae briefs are commonly submitted in favor of a particular litigant, and can increase the chance of a grant of certiorari. Amicus briefs can signal to the justices how many interest groups are affected by a case, and also can provide useful information and a unique perspective that may augment a particular party's argument. Notable groups that filed amicus briefs in *Boumediene* include the United Nations High Commissioner for Human Rights, the American Bar Association, the American Civil Liberties Union, and Amnesty International. One unique perspective is that provided by the UN High Commissioner for Human Rights; this brief relies upon the International Covenant on Civil and Political Rights. The U.S. is a party to this Covenant, which guarantees the "right to be free from arbitrary arrest and detention and the right

to have a court determine whether a detention is lawful and, if it is not, order release” (Brief of *Amicus Curiae*, p. 14). The Covenant certainly applies to the detainees at Guantanamo Bay, and is universal, meaning that it applies even during times of armed conflict. A State cannot use its own laws in order to excuse its failure to abide by international laws or treaties; the U.S. had expressed respect for these rules, and is thus expected to comply by them.

Throughout the running narrative of this case, the court has struggled with the ultimate question of executive and legislative dominance. Should the Supreme Court grant to the Executive branch the overarching power to identify and indefinitely detain any it classifies as “enemy combatants” without allowing them fair representation without the law? The Court has the option of declaring the MCA constitutional, in which case federal courts would not have jurisdiction to hear habeas corpus petitions from Guantanamo Bay detainees. However, if the MCA is found to violate the Suspension Clause, the Court would acknowledge the core individual rights of the detainees by granting them due process of the law, and allowing them to challenge the lawfulness of their imprisonments. Ultimately, this is a case concerning the thin line between executive power and the government’s encroachment upon the most fundamental of human rights – and it is up to the Supreme Court to find the correct balance in between.