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Boumediene v. Bush: Guantanamo Detainees' Right to *Habeas Corpus*

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Boumediene v. Bush: Guantanamo Detainees' Right to *Habeas Corpus*

Summary

In the consolidated cases of *Boumediene v. Bush* and *Al Odah v. United States*, decided June 12, 2008, the Supreme Court held in a 5-4 opinion that aliens designated as enemy combatants and detained at the U.S. Naval Station in Guantanamo Bay, Cuba, have the constitutional privilege of *habeas corpus*. The Court also found that § 7 of the Military Commissions Act (MCA), which limited judicial review of executive determinations of the petitioners' enemy combatant status, did not provide an adequate *habeas* substitute and therefore acted as an unconstitutional suspension of the writ of *habeas*. The immediate impact of the *Boumediene* decision is that detainees at Guantanamo may petition a federal district court for *habeas* review of the circumstances of their detention. This report summarizes the *Boumediene* decision and analyzes several of its major implications for the U.S. detention of alien enemy combatants and legislation that limits detainees' access to judicial review. For discussion of litigation challenging detention policy, see CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Kenneth R. Thomas.

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In the consolidated cases of *Boumediene v. Bush* and *Al Odah v. United States*,[1] decided June 12, 2008, the Supreme Court held in a 5-4 opinion that aliens designated as enemy combatants and detained at the U.S. Naval Station in Guantanamo Bay, Cuba, have the constitutional privilege of *habeas corpus*. The Court also found that § 7 of the Military Commissions Act (MCA),[2] which limited judicial review of executive determinations of the petitioners' enemy combatant status, did not provide an adequate *habeas* substitute and therefore acted as an unconstitutional suspension of the writ of *habeas*. The immediate impact of the *Boumediene* decision is that detainees at Guantanamo may petition a federal district court for *habeas* review of the circumstances of their detention.

Background

Following the terrorist attacks of 9/11, Congress passed the Authorization to Use Military Force (AUMF), which authorized the President "to use all necessary and appropriate force against those ... [who] planned, authorized, committed, or aided the terrorist attacks" against the United States."[3] As part of the subsequent "war on terror," many persons captured during military operations in Afghanistan and elsewhere were transferred to the U.S. Naval Station in Guantanamo Bay, Cuba, for detention and possible prosecution for war crimes. In the 2004 case of *Hamdi v. Rumsfeld*, a majority of the Supreme Court recognized that, as a necessary incident to the AUMF, the President was authorized to detain persons captured while fighting U.S. forces in Afghanistan for the duration of the conflict.[4] The Department of Defense thereafter established Combatant Status Review Tribunals (CSRTs) to assess whether persons detained at Guantanamo constituted "enemy combatants" who could be detained for the duration of the "war on terror" and prosecuted in military commissions for any war crimes committed.

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[1] Boumediene v. Bush, No. 06-1195 (U.S. Jun. 12, 2008).

[2] P.L. 109-366 (2006).

[3] P.L. 107-40,115 Stat. 224 (2001).

[4] Hamdi v. Rumsfeld, 542 U. S. 507, 518 (plurality opinion of O'Connor, J.); id. at 588-589 (Thomas, J., dissenting) (2004).

On the same day that *Hamdi* was decided, the Court issued an opinion in the case of *Rasul v. Bush*,[5] holding that the federal *habeas* statute, 28 U.S.C. § 2441, extended statutory *habeas* jurisdiction with respect to persons held in Guantanamo. Immediately thereafter, dozens of *habeas* petitions were filed on behalf of Guantanamo detainees in the U.S. District Court for the District of Columbia (District Court), where judges reached conflicting conclusions as to whether the detainees had any enforceable rights to challenge their treatment and detention.

Shortly after the Supreme Court granted certiorari to hear a challenge by one of the detainees to his trial by military tribunal, Congress passed the Detainee Treatment Act of 2005 (DTA).[6] The DTA divested the courts of jurisdiction to hear challenges by Guantanamo detainees based on their treatment or living conditions, and eliminated federal courts' jurisdiction under 28 U.S.C. § 2441 to consider *habeas* claims by aliens challenging their detention at Guantanamo. The DTA provided the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) with exclusive jurisdiction to review detainee status determinations made by CSRTs or military commissions. In the 2006 case of *Hamdan v. Rumsfeld*,[7] the Court interpreted these provisions as being inapplicable to *habeas* cases pending at the time the DTA was enacted. In response, Congress passed the MCA, which amended the federal *habeas* statute to expressly eliminate court jurisdiction over all pending and future causes of action, other than pursuant to the limited review permitted under the DTA.

The petitioners in *Boumediene* are aliens detained at Guantanamo who sought *habeas* review of their continued detention and designation as enemy combatants by CSRTs in District Court. On appeal, the D.C. Circuit held that the MCA stripped it and all other federal courts of jurisdiction to consider petitioners' *habeas* applications. Relying upon its earlier opinion in *Al Odah v. United States* and the 1950 Supreme Court case *Johnson v. Eisentrager*,[8] in which the Supreme Court found that the constitutional writ of *habeas* did not apply to enemy aliens detained in post-WWII Germany, the D.C. Circuit held that the MCA's "court-stripping"[9] provision did not operate as an unconstitutional suspension of the writ, because aliens held by the U.S. in foreign territory do not have a constitutional right to *habeas*.[10]

Although the Supreme Court initially denied the petitioners' request for review, it subsequently reversed itself and granted certiorari in June 2007 to consider the consolidated cases of *Boumediene* and *Al Odah*. In an opinion by Justice Kennedy that was joined by Justices Breyer, Ginsburg, Souter, and Stevens, the Court reversed the D.C. Circuit and held that petitioners had a constitutional right to *habeas* that was

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[5] 542 U.S. 466 (2004).

[6] P.L. 109-148, Title X (2005).

[7] 321 F.3d 1134 (D.C. Cir 2003), *rev'd sub nom* Rasul v. Bush, 542 U.S. 466 (2004).

[8] 339 U.S. 763 (1950).

[9] The practice of divesting courts of jurisdiction over particular issues is sometimes referred to as "court-stripping."

[10] 476 F.3d 981 (D.C. Cir. 2007).

withdrawn by the MCA in violation of the Constitution's Suspension Clause.[11] Chief Justice Roberts and Justice Scalia wrote separate dissenting opinions, which were joined by the other and Justices Alito and Thomas. Justice Souter also wrote a brief concurring opinion, joined by Justices Breyer and Ginsburg, briefly disputing the dissenting opinions' purported characterization of the majority's decision.

Application of MCA to Pending *Habeas* Actions

Before assessing petitioners' constitutional claims, the Court briefly addressed petitioners' argument that MCA § 7 did not deny federal courts jurisdiction to consider *habeas* actions like those of petitioners, which were pending at the time that the MCA was enacted. The Court rejected this argument, finding that the structure of MCA § 7 and the Act's legislative history demonstrated that the MCA was intended to deprive federal courts of jurisdiction to consider *habeas* cases pending at the time of enactment.

Constitutional Right to *Habeas*

The Court next turned to the question of whether petitioners possess a constitutional privilege to seek the writ of *habeas corpus*. Petitioners argued that they possess a constitutional right to *habeas*, and that the MCA deprived them of this right in contravention of the Suspension Clause, which prohibits the suspension of the writ of *habeas* except "when in Cases of Rebellion or Invasion the public Safety may require it." The MCA did not expressly purport to be a formal suspension of the writ of *habeas*, and the government did not make such a claim to the Court. Instead, the government argued that aliens designated as enemy combatants and detained outside the *de jure* territory of the United States have no constitutional rights, including the constitutional privilege to *habeas*, and that therefore stripping the courts of jurisdiction to hear petitioners' *habeas* claims did not violate the Suspension Clause.

The Court began its analysis by surveying the history and origins of the writ of *habeas*, emphasizing the importance placed on the writ for the Framers. The Court noted that protection of the *habeas* privilege was one of the few safeguards to individual liberty contained in the Constitution prior to the addition of the Bill of Rights, and the Suspension Clause permits suspension of the writ only in the rare instance where public safety may require it as a result of invasion or rebellion. The Court characterized the Suspension Clause as not only a "vital instrument" for protecting individual liberty, but also a means to ensure that the judiciary branch would have, except in cases of formal suspension, "a time-tested device, the writ, to maintain the delicate balance of governance" between the branches and prevent "cyclical abuses" of the writ by the executive and legislative branches.[12] The Court stated that the separation-of-powers doctrine and the history shaping the design of the

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[11] U.S. CONST. Art. 1, § 9, cl. 2.

[12] *Boumediene*, at 15.

Suspension Clause informed its interpretation of the reach and purpose of the Clause and the constitutional writ of *habeas*.

While the Court considered the history and function of the writ to be central to its analysis of the writ's application, it also sought guidance from founding-era authorities as to whether the constitutional writ of *habeas* was understood to cover foreign nationals apprehended and detained abroad during a time of serious threat to the country's security. While the Court cautioned that its jurisprudence "had been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ,"[13] at minimum the Clause would be deemed to protect the writ as it was recognized at the time the Constitution was drafted and ratified. The Court found the historical record to be inconclusive in resolving the issue before it, and suggested that "given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age ... common-law courts simply may not have confronted cases with close parallels to this one."[14]

Nonetheless, the Court interpreted the Suspension Clause as having full effect at Guantanamo, rejecting the government's position that the Clause did not cover petitioners because the United States did not assert legal sovereignty over the territory where they were detained. While the Court did not question the government's position that Cuba maintains legal sovereignty over Guantanamo under the terms of the 1903 lease giving the U.S. plenary control over the territory, it disagreed with the government's position that "at least when applied to non-citizens, the Constitution necessarily stops where *de jure* sovereignty ends."[15]

Instead, the Court characterized its prior jurisprudence as recognizing that the Constitution's extraterritorial application turns on "objective factors and practical concerns."[16] Here, the Court emphasized the functional approach taken in the *Insular Cases*, where it had assessed the availability of constitutional rights in incorporated and unincorporated territories under the control of United States.[17] Although the government argued that the Court's subsequent decision in *Eisentrager* stood for the proposition that the constitutional writ of *habeas* does not extend to enemy aliens captured and detained abroad, the Court found this reading to be overly constrained. According to the Court, interpreting the *Eisentrager* ruling in this formalistic manner would be inconsistent with the functional approach taken by the Court in other cases concerning the Constitution's extraterritorial application,[18] and would disregard the

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[13] Id. at 15-16 (citing INS v. St. Cyr, 533 U. S. 289, 300 — 301(2001)).

[14] Id. at 22.

[15] Id. at 25.

[16] Id. at 34.

[17] See De Lima v. Bidwell, 182 U. S. 1 (1901); Dooley v. United States, 182 U. S. 222 (1901); Armstrong v. United States, 182 U. S. 243 (1901); Downes v. Bidwell, 182 U. S. 244; Hawaii v. Mankichi, 190 U. S. 197 (1903); Dorr v. United States, 195 U. S. 138 (1904).

[18] *Boumediene*, at 29-32, 34 (discussing plurality opinion in Reid v. Covert, 354 U. S. 1 (continued...)

practical considerations that informed the *Eisentrager* Court's decision that the petitioners were precluded from seeking *habeas*.

The Court also found that accepting the government's sovereignty-based approach to the Constitution's applicability would raise significant separation-of-powers concerns, as the political branches would be free "to govern without legal constraint" in a territory like Guantanamo, where the U.S. disclaimed legal sovereignty but exercised plenary control:

> 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 may 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.... To hold that the political branches may switch the Constitution on and off at will would lead to a regime where they, not this Court, say what the law is.... These concerns have particular bearing upon the Suspension Clause ... for the writ 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.[19]

Based on the language found in the *Eisentrager* decision and other cases concerning the extraterritorial application of the Constitution, the Court deemed at least three factors to be relevant in assessing the extraterritorial scope of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the status determination process; (2) the nature of the site where the person is seized and detained; and (3) practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Applying this framework, the Court characterized petitioners' circumstances in the instant case as being significantly different from those of the detainees at issue in *Eisentrager*. Among other things, the Court noted that unlike the detainees in *Eisentrager*, the petitioners denied that they were enemy combatants, and the government's control of the post-WWII, occupied German territory in which the *Eisentrager* detainees were held was not nearly as significant nor secure as its control over the territory where the petitioners are located. The Court also found that the procedural protections afforded to Guantanamo detainees in CSRT hearings are "far more limited [than those afforded to the *Eisentrager* detainees tried by military commission], and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."[20]

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[18] (...continued)
(1957)). In his concurring opinion in *Reid*, Justice Harlan argued that whether a constitutional provision has extraterritorial effect depends upon the "particular circumstances, the practical necessities, and the possible alternatives which Congress had before it" and, in particular, whether judicial enforcement of the provision would be "impracticable and anomalous." *Reid*, 354 U.S. at 74 — 75 (Harlan, J., concurring in result).

[19] *Boumediene*, at 35-36 (internal quotations omitted).

[20] Id. at 37.

While acknowledging that it had never before held that noncitizens detained in another country's territory have any rights under the U.S. Constitution, the Court concluded that case before it "lack[ed] any precise historical parallel."[21] In particular, the Court noted that the Guantanamo detainees have been held for the duration of a conflict that is already one of the longest in U.S. history, in territory that, while not technically part of the United States, is subject to complete U.S. control. Based on these factors, the Court concluded that the Suspension Clause has full effect at Guantanamo.

In a dissenting opinion joined by Chief Justice Roberts and Justices Alito and Thomas, Justice Scalia argued that the constitutional writ of *habeas* "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*."[22] Justice Scalia further argued that the judiciary is ill-equipped to address the national security concerns raised by the detention of enemy combatants. According to the dissent, the procedural and evidentiary rules likely to be employed by the judiciary in reviewing a detainee's status would increase the likelihood that enemy combatants would mistakenly be released back into hostilities.

In a concurring opinion joined by Justices Breyer and Ginsburg, Justice Souter claimed that the Court's interpretation of the extraterritorial scope of the constitutional writ of *habeas* was not nearly as surprising as Justice Scalia's dissent suggested, given Court dictum in *Rasul v. Bush* stating that "[a]pplication of the habeas statute to persons detained at [Guantanamo] is consistent with the historical reach of the writ of habeas corpus."[23]

Adequacy of *Habeas Corpus* Substitute

Having decided that petitioners possessed a constitutional privilege to *habeas corpus*, the Court next assessed whether the court-stripping measure of MCA § 7 was impermissible under the Suspension Clause. Because the MCA did not purport to be a formal suspension of the writ, the question before the Court was whether Congress had provided an adequate substitute for *habeas corpus*. The government argued that the MCA complied with the Suspension Clause because it applied the DTA's review process to petitioners, which the government claimed was a constitutionally adequate *habeas* substitute.

Because the D.C. Circuit had found that the constitutional writ of *habeas* did not run to petitioners, it did not consider whether an adequate substitute was provided. While the Court noted that it generally remands cases back to the lower court for consideration of issues not addressed in the first instance, it found that the "exceptional" circumstances of the present case — including the separation-of-

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[21] Id. at 48.

[22] *Boumediene*, slip copy of dissenting opinion of Scalia, J., at 1.

[23] *Boumediene*, slip copy of concurring opinion of Souter, J., at 2 (citing *Rasul*, 542 U.S. at 481).

powers issues it raised and the fact that petitioners had been denied meaningful access to a judicial forum for a number of years — warranted a departure from ordinary practice. The Court also noted that an interim order by a three-judge D.C. Circuit panel in the case of *Bismullah v. Gates*[24] provided it with guidance as to the appellate court's construction of key DTA provisions.

The Court found its prior rulings addressing the adequacy of *habeas* substitutes enacted by Congress provided little guidance in assessing the adequacy of the jurisdiction-stripping provisions of the MCA and DTA. Prior congressional enactments typically attempted to streamline rather than circumscribe *habeas* review. In contrast, the intent of the MCA and DTA was to establish a more limited review procedure than *habeas*, as evidenced by, *inter alia*, the MCA's unequivocal jurisdiction-stripping language; the legislative history of both enactments; a comparison of the review permitted by the DTA and the unamended federal *habeas* statute; and the lack of a savings provision under either the DTA or MCA preserving *habeas* review as an avenue of last resort.

Though the Court declined to "offer a comprehensive summary of the requisites for an adequate substitute for *habeas corpus*," it nonetheless deemed the *habeas* privilege, at minimum, as entitling a prisoner "to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law," and empowering a court "to order the conditional release of an individual unlawfully detained," though release need not be the exclusive remedy or appropriate in every instance where the writ is granted.[25] Additionally, the necessary scope of *habeas* review may be broader, depending upon "the rigor of any earlier proceedings."[26]

The Court noted that petitioners identified a myriad of alleged deficiencies in the CSRT process which limited a detainee's ability to present evidence rebutting the government's claim that he is an enemy combatant. Among other things, cited deficiencies include constraints upon the detainee's ability to find and present evidence at the CSRT stage to challenge the government's case; the failure to provide a detainee with assistance of counsel; limiting the detainee's access to government records other than those that are unclassified, potentially resulting in a detainee being unaware of critical allegations relied upon by the government to order his detention; and the fact that the detainee's ability to confront witnesses may be "more theoretical than real,"[27] given the minimal limitations placed upon the admission of hearsay evidence.

While the Court did not determine whether the CSRTs, as presently constituted, satisfy due process standards, it agreed with petitioners that there was "considerable

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[24] 501 F.3d 137 (D.C. Cir. 2007), *reh'g denied*, 503 F.3d 137 (D.C. Cir. 2007).

[25] *Boumediene*, at 49-50.

[26] Id. at 52.

[27] Id. at 55.

risk of error in the tribunal's findings of fact."[28] "[G]iven that the consequence of error may be detention for the duration of hostilities that may last a generation or more, this is a risk too serious to ignore."[29] The Court held that for either the writ of *habeas* or an adequate substitute to function as an effective remedy for petitioners, a court conducting a collateral proceeding must have the ability to (1) correct errors in the CSRT process; (2) assess the sufficiency of the evidence against the detainee; and (3) admit and consider relevant exculpatory evidence that was not introduced in the prior proceeding.

The Court held that the DTA review process is a facially inadequate substitute for *habeas* review. It listed a number of potential constitutional infirmities in the review process, including the absence of provisions (1) empowering the D.C. Circuit to order release from detention; (2) permitting petitioners to challenge the President's authority to detain them indefinitely; (3) enabling the appellate court to review or correct the CSRT's findings of fact; and (4) permitting the detainee to present exculpatory evidence discovered after the conclusion of CSRT proceedings. The Court declined to read into the DTA each of the necessary procedures identified. As a result, the Court deemed MCA §7's application of the DTA review process to petitioners as failing to provide an adequate substitute for *habeas*, therefore effecting an unconstitutional suspension of the writ.

In light of this conclusion, the Court held that petitioners could immediately pursue *habeas* review in federal district court, without first obtaining review of their CSRT designations from the D.C. Circuit as would otherwise be required under the DTA review process. While prior jurisprudence recognized that prisoners are generally required to exhaust alternative remedies before seeking federal *habeas* relief, the Court found that petitioners in the instant case were entitled to a prompt *habeas* hearing, given the fact that they had been detained for years without access to judicial oversight to which they were constitutionally privileged. The Court stressed, however, that except in cases of undue delay, federal courts should generally refrain from considering *habeas* petitions of detainees being held as enemy combatants until after the CSRT had an opportunity to review their status. Acknowledging that the government possesses a "legitimate interest in protecting sources and methods of intelligence gathering," the Court announced that it expected courts reviewing Guantanamo detainees *habeas* claims to use "discretion to accommodate this interest to the greatest extent possible," so as to avoid "widespread dissemination of classified information."[30]

In a dissenting opinion, Chief Justice Roberts — joined by Justices Alito, Thomas, and Scalia — argued that the DTA review process adequately protects any constitutional rights that aliens detained abroad as enemy combatants may enjoy, and criticized the majority for replacing the DTA review system with "a set of shapeless

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[28] Id. at 56.

[29] Id. at 56-57.

[30] Id. at 67.

procedures to be defined by federal courts at some future date."[31] Chief Justice Roberts argued that the Court should not have granted certiorari to review petitioners' claims until the D.C. Circuit had the opportunity to assess whether the remedies available under the DTA review process vindicated whatever constitutional and statutory rights petitioners' may possess. In a concurring opinion, Justice Souter argued that the dissenting justices' criticism of the majority's decision to permit detainees to immediate petition for *habeas* failed to sufficiently consider the duration that petitioners' had been denied meaningful judicial review of their claims.

Implications of *Boumediene*

As a result of the *Boumediene* decision, detainees currently held at Guantanamo may petition a federal district court for *habeas* review of status determinations made by a CSRT. However, the full consequences of the *Boumediene* decision are likely to be significantly broader. While the petitioners in *Boumediene* sought *habeas* review of their designation as enemy combatants, the Court's ruling that the constitutional writ of *habeas* extends to Guantanamo suggests that detainees may also seek judicial review of claims concerning unlawful conditions of treatment or confinement or to protest a planned transfer to the custody of another country.[32] Some 200 habeas petitions were filed in the District Court prior to the *Boumediene* ruling, and in the wake of decision the District Court's judges are considering how best to manage the impending litigation.[33] For discussion of litigation challenging detention policy, see CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Kenneth R. Thomas.

The conduct of trials before military commissions at Guantanamo may also be affected by *Boumediene*, as enemy combatants may now potentially raise constitutional arguments against their trial and conviction. Aliens convicted of war crimes before military commissions may also potentially seek *habeas* review of their designation as an enemy combatant by the CSRT, a designation that served as a legal requisite for their subsequent prosecution before a military commission.

Although the *Boumediene* Court held that DTA review procedures were an inadequate substitute for *habeas*, it expressly declined to assess "the content of the law that governs" the detention of aliens at Guantanamo.[34] The majority opinion noted that it made "no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards," and emphasized that "both the DTA and the CSRT

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[31] *Boumediene*, slip copy of dissenting opinion of Roberts, C.J., at 1.

[32] See *Boumediene*, at 64 ("In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.").

[33] Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantánamo*, N.Y. TIMES, Jun. 13, 2008, at A 1.

[34] *Boumediene*, at 67.

process remain intact."[35] Whether these procedures violate due process standards, facially or as applied in a given case, and whether a particular detainee is being unlawfully held, are issues that will be addressed by the District Court when reviewing the *habeas* claims of Guantanamo detainees. Prior to the DTA and MCA's elimination of statutory jurisdiction over Guantanamo detainees' *habeas* claims, District Court judges reached inconsistent conclusions regarding the degree to which detainees could challenge their treatment and detention. In the aftermath of *Boumediene*, it is possible that continued disagreement between lower court judges concerning the scope of rights and remedies owed to Guantanamo detainees will eventually lead to a more definitive pronouncement by the Supreme Court.

Another question left unresolved in the Court's discussion of the extraterritorial application of the Constitution is the degree to which the writ of *habeas* and other constitutional protections apply to aliens detained in foreign locations other than Guantanamo (e.g., at military facilities in Afghanistan and elsewhere, or at any undisclosed U.S. detention sites overseas). The *Boumediene* Court indicated that it would take a functional approach in resolving such issues, taking into account "objective factors and practical concerns" in deciding whether the writ extended to aliens detained outside U.S. territory. Practical concerns mentioned in the majority's opinion as relevant to an assessment of the writ's extraterritorial application include the degree and likely duration of U.S. control over the location where the alien is held; the costs of holding the Suspension Clause applicable in a given situation, including the expenditure of funds to permit *habeas* proceedings and the likelihood that the proceedings would compromise or divert attention from a military mission; and the possibility that adjudicating a *habeas* petition would cause friction with the host government.[36] Interestingly, the *Boumediene* did not overrule the Court's prior decision in *Eisentrager*, in which it found that enemy detainees held in post-WWII Germany were precluded from seeking *habeas* relief. Whether enemy aliens are held in conditions that more closely resemble those of the detainees at issue in *Eisentrager* or *Boumediene* may influence a reviewing court's assessment of whether they are owed the constitutional writ of *habeas*, as well as its assessment of the merits of any *habeas* claim deemed cognizable.

Although *Boumediene* deemed the limitations on judicial review imposed by the DTA and MCA to be an unconstitutional suspension of the writ of *habeas*, the Court did not foreclose all legislation altering the scope of review available in cases involving Guantanamo detainees. For example, the Court suggested that it would be a "legitimate objective" to channel all future cases involving Guantanamo detainees to one district court so as to reduce the administrative burdens upon the government.[37] The Court further acknowledged the government as having a legitimate interest in limiting the dissemination of classified intelligence-gathering information during the course of judicial hearings involving Guantanamo detainees.

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[35] Id. at 66.

[36] Id. at 38-41.

[37] Id. at 67. Indeed, the Court suggested that legislation that amended the federal habeas statute might not be necessary to effectuate this measure; if a detainee files a *habeas* petition in another judicial district, the government can move for change of venue to the U.S. District Court for D.C. Id.

While the Court urged reviewing courts to use their discretion to protect this interest "to the greatest extent possible,"[38] some in Congress may want to consider legislation to provide a statutory framework for the dissemination of classified information in cases involving Guantanamo detainees.

The Court's ruling in *Boumediene* did not necessarily bar all legislation that would limit judicial review of Guantanamo detainees' claims. Such legislation limiting judicial review a similar degree as the DTA or MCA might be deemed permissible if Congress also formally suspended the writ of *habeas* from being applied to Guantanamo detainees. It is far from certain, however, that a reviewing court would deem such legislation as compatible with Suspension Clause requirements. Assuming that the requirements of the Suspension Clause constituted a justiciable question, a reviewing court's assessment of the constitutionality of habeas-suspending legislation would likely turn on whether Al Qaeda's terrorist attacks upon the United States qualified as a "rebellion or invasion," and whether the court found that "the public safety" was therefore deemed to require the suspension of the writ in Guantanamo, where a number of suspected Al Qaeda members and supporters are being detained.

Congress may still be able to impose some limitations upon judicial review of CSRT determinations if it strengthens the procedural protections afforded to detainees in CSRT status hearings. The Supreme Court identified a number of potential deficiencies in the status review process that necessitated *habeas* review of CSRT determinations, including the detainee's lack of counsel during the hearings; the presumption of validity accorded to the government's evidence; procedural and practical limitations upon the detainee's ability to present evidence rebutting the government's charges against him and to confront witnesses; potential limitations on the detainee's ability to introduce exculpatory evidence; and limitations on the detainee's ability to learn about the nature of government's case against him to the extent that it is based upon classified evidence.[39] Legislation addressing some or all of these potential procedural inadequacies in the CSRT process might permit judicial review of CSRT determinations to be further streamlined.

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[38] Id. at 67.

[39] See *Boumediene*, at 37-38, 54-56.