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The Executive's Authority over Enemy Combatants: Due Process and Its Limits.

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BARRY SULLIVAN & MEGAN CANTY

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Professor Barry Sullivan* and Megan Canty**

Introduction

For almost a decade, the US judicial system has had to deal with what might be called the legal "fall-out" from the "war on terror." This fall-out has manifested itself in a myriad of legal issues ranging from government secrecy to presidential power, but no issues have received greater attention than those surrounding the detention of "enemy combatants."[1] Beginning with *Hamdi v. Rumsfeld*[2] in 2004, the US Supreme Court has wrestled with who may be detained, in what circumstances, under what conditions, and for what length of time. In addition, the Court has been presented with questions as to who may decide whether someone should be detained, what procedural requirements and standards of proof should govern those decisions, and what, if any, level of judicial review should apply to those decisions. In several cases, the answers have turned on the citizenship of the detainees and the situs of their detentions. In 2008, the Court resolved one basic question by holding in *Boumediene v. Bush*[3] that non-citizens held at Guantanamo Bay, Cuba, were constitutionally entitled to seek habeas corpus relief in the federal courts.[4]

Boumediene seemed like a major victory for the Guantanamo detainees, many of whom had been held for years without any impartial determination as to the legitimacy of their detentions. Since *Boumediene*, several habeas petitions have been heard in the

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1 "Enemy combatant" is a relatively recent term. *See* Brief for American Bar Association as Amicus Curiae at 9-10, *Hamdi v. Rumsfeld*, 553 US 507 (2004) (No.03-6696) (explaining distinction between "lawful" and "unlawful" combatants), available at http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/158amicusCuriae_AmericanBarAssociation.pdf. Since 2001, the Government and the courts have defined "enemy combatant" in various ways. The Bush administration defined an "enemy combatant" as someone who supported the Taliban or al-Qaeda; the Obama Administration has specified "substantial" support. *See* A J Radsan, "Bush and Obama Fight Terrorists Outside Justice Jackson's Twilight Zone" (2010) 26 Const. Comment. 551, 575.

2 542 US 507 (2004). *Hamdi* and *Rumsfeld v. Padilla*, 542 US 426 (2004) (a companion case decided the same day) both involved US citizens detained on the US mainland. Hamdi had been seized in Afghanistan, while Padilla was arrested in Chicago. A third case decided the same day, *Rasul v. Bush,* 542 U.S. 466 (2004), involved non-citizens held at Guantanamo. *See* B Sullivan, "Book Review" (2005) 27 D.U.L.J. 431, 431-35 (detailing early legal developments).

3 553 US 723 (2008).

4 *Ibid.,* p.766.

federal courts in the District of Columbia,[5] and some detainees have been released. On the same day it decided *Boumediene*, however, the Court also decided *Munaf v. Geren*,[6] a case that received much less attention, but was far more favorable to the Government. In *Munaf*, the Court held that the decision to transfer a detainee from US custody to that of another nation was committed to the Executive and substantially immune from judicial review.[7]

The upshot of the decisions in *Boumediene* and *Munaf*, taken together, is that individuals detained by the Government may petition the courts for release while in US custody, but lack legal recourse if the Executive transfers them to the custody of another State. *Munaf* may not have seemed problematic at the time: the detainees involved allegedly had committed crimes in Iraq and were being handed over for prosecution by Iraq, in recognition of that country's sovereignty.[8] Broadly construed, however, *Munaf* invests the Executive with enormous power. *Boumediene* may have authorised the courts to review the status of enemy combatants, but *Munaf* effectively empowered the Executive to evade such review by turning over a detainee to another country. To understand the present state of the law, it is necessary to examine the development of the Supreme Court's habeas jurisprudence, beginning with *Hamdi*, and ending with several petitions for review that the Court will soon consider.

Part I

Yaser Hamdi, the detainee on whose behalf the *Hamdi* habeas petition was filed, was born in the US, but taken by his parents to Saudi Arabia at an early age.[9] In 2001, when he was 20 years old, he went to Afghanistan, where he was captured by the Northern Alliance and then turned over to the US.[10] Hamdi was initially detained and interrogated in Afghanistan.[11] He was then transported to Guantanamo, where he was held briefly before being taken to Virginia for confinement in a naval brig.[12] First in Virginia, and then for a shorter time in South Carolina, the Government held Hamdi incommunicado for almost two years.[13]

Hamdi's father brought a habeas petition on Hamdi's behalf in the US District Court for the Eastern District of Virginia, which eventually held that the Government's evidence (a nine-paragraph "declaration" in which a lower-ranking Government official asserted that he had reviewed records showing that Hamdi was an enemy

5 S.1005 of the DTA provides that the District of Columbia courts shall have exclusive jurisdiction to review decisions of the Combatant Status Review Tribunals. Detainee Treatment Act of 2005, 42 USC § 2000dd.
6 553 US 674 (2008).
7 *Ibid.,* p.705.
8 *Ibid.*
9 *Hamdi,* 542 US 426, 510.
10 *Ibid.*
11 *Ibid.*
12 *Ibid.* See also B J Priester, "Return of the Great Writ: Judicial Review, Due Process, and the Detention of Alleged Terrorists as Enemy Combatants" (2010) 37 Rutgers L.J. 39, 62.
13 *Hamdi*, 542 US 426, 511.

combatant[14]) was legally insufficient to justify his detention.[15] The US Court of Appeals for the Fourth Circuit reversed, holding that the Authorization for the Use of Military Force Resolution (AUMF),[16] which Congress passed shortly after the September 11 attacks, gave the Executive authority to denominate and detain enemy combatants as an inherent part of its authorisation to wage war. The Fourth Circuit also upheld the sufficiency of the declaration, observing that Hamdi's failure to dispute the fact that he had been captured in a war zone gave further credence to the declaration, and finding that being captured in a war zone was sufficient to demonstrate that Hamdi was an enemy combatant.[17] (Of course, Hamdi had not initiated the proceeding, and the Government allegedly had prevented him from communicating with his father or with the lawyer acting on his behalf.)[18]

On further review, the Supreme Court held that Congress had "clearly and unmistakably" authorised the Executive to detain enemy combatants when it enacted the AUMF.[19] The Court also accepted the Government's definition of an enemy combatant as one who is "part of or supporting forces hostile to the United States … and who engaged in an armed conflict against the United States."[20] As a matter of constitutional due process, however, the Court held that US citizens were entitled to notice and an opportunity to rebut the factual basis of their detention, although the Executive's determinations were entitled to "great deference" and the procedures to be applied might be substantially circumscribed.[21] The Court remanded for further proceedings with respect to the constitutionality of Hamdi's detention,[22] but the Executive subsequently decided to deport Hamdi, rather than defend its decision.[23]

On the same day the Court decided *Hamdi*, it also decided *Rasul v. Bush*.[24] Shafiq Rasul, a noncitizen who was captured overseas and detained at Guantanamo,[25] brought suit in the US District Court for the District of Columbia. The District Court found that the suits sought habeas relief and dismissed them for lack of jurisdiction, holding

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14 Declaration of Michael H Mobbs, Special Advisor to the Under Secretary of Defense for Policy (July 24, 2002), available at http:// www.cbsnews.com/htdocs/pdf/hamdimobbs2.pdf.

15 *Hamdi*, 542 US, 426, 513.

16 *Authorization for Use of Military Force*, Pub. L. No.107-40, 115 Stat 224 (Sept. 18, 2001) (50 USCA § 1541 Note).

17 *Hamdi*, 542 US 426, 514.

18 *Ibid.,* p.511. The complete procedural history in the lower courts can be found at *Hamdi*, 542 US 507, 511-16.

19 *Ibid.,* p.519. See also N H Nesbitt, "Meeting *Boumediene*'s Challenge: The Emergence of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation" (2010) 95 Minn. L. Rev. 244, 249-50.

20 *Hamdi*, 542 US, 426, 521.

21 *Ibid.,* pp.533-34. See also A R Gonzales, "Waging War Within the Constitution" (2010) 42 Tex. Tech. L. Rev. 843, 872.

22 *Hamdi*, 542 US, 426, 539.

23 See J Brinkley, "Deportation Delayed for 'Enemy Combatant'" New York Times (1 October 2004), available at http://www.nytimes.com/2004/10/01/politics/01hamdi.html ; J Brinkley, "From Afghanistan to Saudi Arabia" New York Times (16 October 2004), available at http://query.nytimes.com/gst/abstract.html?res=F60D14FD3F5E0C758DDDA90994DC404482 .

24 *Rasul v. Bush*, 544 US 466 (2004).

25 *Ibid.,* p.471.

that aliens detained outside US sovereign territory may not seek habeas relief.[26] The US Court of Appeals for the District of Columbia Circuit affirmed,[27] and the Supreme Court granted review. The Government argued that US courts lack jurisdiction over such petitions because, although a 1903 treaty effectively invests the US with total control over Guantanamo, Cuba formally retains sovereignty.[28] Thus, the Government relied extensively on *Johnson v. Eisentrager*,[29] a 1950 case in which the Court held that aliens being detained overseas could not bring habeas claims, as no constitutional or statutory provisions permitted them to do so.[30] According to the Government, "sovereignty, not control, is the touchstone of [jurisdiction]."[31] The Supreme Court disagreed, holding that the federal habeas statute authorises US courts to hear habeas claims brought by aliens at Guantanamo.[32] The Court was persuaded by the fact that Guantanamo, while not a sovereign territory of the US, is a territory over which the US exercises "unchallenged and indefinite control." [33] Thus, the Court held that statutory habeas jurisdiction extends to Guantanamo under 28 USC § 2241, which provides that federal District Courts may hear habeas petitions by individuals who claim that they are being held "in custody in violation of the Constitution or laws or treaties of the United States."[34] Given its reliance on this statute, the Court was not required to decide whether the Constitution also authorises such suits.

Part II

In response to those decisions, the Executive implemented Combatant Status Review Tribunals (CSRTs), which served as review boards for evaluating detainee challenges to their classification and afforded additional procedural protections.[35] CSRTs, which are tribunals comprised of military personnel, are organised by the Office for the Administrative Review of the Detention of Enemy Combatants.[36] The tribunal members' identities are classified; only their ranks and service branches are disclosed.[37] The tribunals review all information related to a detainee to determine whether the enemy combatant classification is justified.[38] The Government's evidence is presumed to be accurate, and the tribunals are not bound by the rules of evidence.[39] Detainees may participate in the proceeding, but the tribunal may exclude them during the

26 *Ibid.,* pp.473-73.
27 *Ibid.,* p.473.
28 *Ibid.,* p.475.
29 339 US 763 (1950).
30 *Ibid* at 768.
31 Brief of Respondents at 14, *Rasul v. Bush*, 542 US 466, Nos. 03-334, 03-343 (2004).
32 *Rasul v. Bush,* 544 US 466, 484 (2004).
33 *Ibid.,* p.487.
34 *Ibid.,* p.473.
35 Nesbitt, fn. 21 *supra,* p.251.
36 See Combatant Status Review Tribunal Process, sec B, available at http:// www.defenselink.mil/news/Jul2004/d20040730comb.pdf.
37 *Ibid.*
38 *Ibid.*
39 *Ibid.*

presentation of classified information.[40] The detainee may only summon witnesses and offer evidence that the tribunal determines to be "reasonably available."[41] Detainees are not entitled to have the assistance of counsel.[42]

In 2005, Congress passed the Detainee Treatment Act (DTA).[43] The DTA prohibited inhumane treatment of prisoners and required military interrogations to follow the procedures laid out in the US Army Field Manual for Human Intelligence Collector Operations.[44] However, the DTA also declared that the federal courts lacked authority to hear habeas petitions brought by Guantanamo detainees, and it limited appellate review of CSRT decisions.[45] As a practical matter, the DTA overturned the Supreme Court's statute-based decision in *Rasul* and made CSRTs the primary avenue of recourse for Guantanamo detainees.[46] In effect, the military was empowered to review its own classification and detention decisions, subject only to the most limited judicial review.[47]

In 2006, these issues came before the Court once more. In *Hamdan v. Rumsfeld*,[48] habeas relief was sought by an alien captured in Afghanistan and detained at Guantanamo. Although his case had not yet been considered by a CSRT, Hamdan challenged the constitutionality (and conformity with international law) of the CSRT system.[49] The District Court granted Hamdan's petition and stayed the proceedings of the CSRT.[50] The US Court of Appeals for the District of Columbia Circuit reversed, holding that the President was authorised to establish CSRTs under the AUMF and had not usurped the power of Congress by doing so.[51] In fact, the court noted that Congress had specifically acknowledged that authority when it enacted the DTA.[52] Moreover, alien detainees could not invoke habeas corpus to vindicate their rights under the relevant Geneva Convention because the Convention was not judicially enforceable.[53]

The US Supreme Court reversed, holding that the DTA did not apply to detainees whose claims were pending at the time the DTA was enacted.[54] The Court also held that the CSRT procedures failed to comply with the requirements of the Unified Code of Military Justice (UCMJ).[55] Specifically, the Court found that the procedures

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40 *Ibid.*
41 *Ibid.*
42 *Ibid.*
43 Detainee Treatment Act of 2005, 42 USC § 2000dd (2005); Nesbitt, fn. 21 *supra,* p.251.
44 Gonzales, fn. 21 *supra,* p.875.
45 *Ibid.*
46 *Ibid*., p.876.
47 *Ibid.*
48 548 US 557 (2006).
49 *Ibid.,* p.567. *See also* C Manelle, "*Boumediene v. Bush*: A Meaningful Defense of Human Rights or a Forced Response to the Guantanamo Bay Nightmare?" (2009) 11 Rutgers Race & L. Rev. 151,178.
50 *Hamdan v. Rumsfeld*, 548 US 557, 571 (2006).
51 *Hamdan v. Rumsfeld*, 415 F3d 33, 39 (DC Cir 2006).
52 *Ibid.*
53 *Ibid.,* p.40.
54 *Hamdan v. Rumsfeld*, 548 US 557, 584 (2006).
55 *Ibid.,* p.623. Art.36 places two restrictions on the Executive when enacting rules of procedure for courts-martial and military commissions. First, no procedural rule may be "contrary to or inconsistent

fell short by permitting evidence to be withheld from the detainee and his lawyer, and by authorising the admission of all "probative" evidence, including hearsay, unsworn live testimony, and statements secured by torture.[56] The procedures also fell short by allowing for appeals to be heard by Executive officials.[57]

Congress responded by enacting the Military Commissions Act of 2006 (MCA).[58] The MCA provided for a system of CSRTs similar to that designed by the Executive, but was specifically endorsed by Congress, as the Court had required.[59] The MCA also made clear that Congress intended retroactive application, so that the courts could not entertain any habeas petition filed by an alien held at Guantanamo.[60] The MCA, in concert with the DTA, barred any possible access to federal courts for alien detainees held at Guantanamo.[61]

Part III

With the enactment of the MCA, there was no further room for statutory arguments; the next question for the Court would be the constitutionality of the CSRT system. In 2008, the Court chose to decide that question in *Boumediene v. Bush*.[62]

Lakhdar Boumediene, an Algerian citizen, was arrested in Bosnia for planning to bomb the US Embassy in that country.[63] The Bosnian courts released Boumediene because of insufficient evidence, but he was seized by the US and transported to Guantanamo, based on an unidentified source who linked Boumediene to al-Qaeda.[64] The habeas case brought by Boumediene and others was originally heard in the Supreme Court as *Rasul v. Bush*, which reversed the US Court of Appeals for the District of Columbia Circuit on the ground that the federal courts' statutory habeas jurisdiction extended to Guantanamo.[65] After the case was remanded, Congress overruled that decision by passing the MCA. Following further proceedings in the District Court, the District of Columbia Circuit addressed the constitutional question, holding that the detainees were "not entitled to the privilege of the writ or the protections of the Suspension Clause, and, as a result, that it was unnecessary to consider whether

with" the UCMJ. Second, the rules must be "uniform insofar as practicable." That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable. *Hamdan v. Rumsfeld,* 548 US 557, 620 (2006).

56 *Hamdan v. Rumsfeld*, 548 US, 557, 614.

57 *Ibid.*

58 Military Commissions Act of 2006, Pub. L. No.109-366, 120 Stat 2600 (2006) (codified in scattered sections of 10, 18, and 28 USC); Manelle, fn.49 *supra*, p.179.

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

62 *Boumediene v. Bush*, 553 US 723 (2008).

63 *See* E F Sherman, "Terrorist and Detainee Policies: Can the Constitutional and International Law Principles of the *Boumediene* Precedents Survive Political Pressures?" (2010) 19 Tul. J. Int'l & Comp. L. 207, 219.

64 *Ibid.*

65 *Ibid.*

Congress provided an adequate and effective substitute for habeas corpus in the DTA."[66] The Supreme Court exercised its discretion to review that determination.[67]

The Supreme Court first examined the history of habeas corpus, focusing on its availability extraterritorially and to aliens.[68] As in *Rasul*, the *Boumediene* Court once again analysed the jurisdictional issue in terms of control as well as sovereignty. While the lower courts in *Boumediene* had concluded that Guantanamo detainees had no constitutional habeas rights, the Supreme Court once more was persuaded by the complete military and civil jurisdiction and control which the US exercised over Guantanamo.[69] Thus, the Court held that all Guantanamo detainees were constitutionally entitled to seek habeas relief in the federal courts.[70] While Congress may bar habeas access for alien detainees, the Suspension Clause requires that it provide an adequate alternative.[71] The CSRTs failed to provide an adequate alternative and therefore violated the Suspension Clause.[72] For relief to be effective, the habeas court must have the ability to correct errors that occurred during the CSRT proceedings.[73] The court must have the authority to assess the sufficiency of the Government's evidence and to admit and consider relevant exculpatory evidence that was not introduced at the CSRT.[74] Federal habeas petitioners are usually permitted to supplement the record on review, even in the post-conviction habeas setting, and detainees must be afforded the same opportunity.[75] Here, the review proceeding was not a constitutionally adequate substitute, because detainees do not have the opportunity to present evidence discovered after the CSRT proceedings were concluded.[76]

The Supreme Court's main concern in *Boumediene* was the possibility that the Executive could classify someone as an enemy combatant and then detain him indefinitely, without affording him any meaningful opportunity to challenge his detention outside the CSRT system. The Court was concerned that the Executive not have the final word on the legitimacy of its own decisions. After *Boumediene*, it is clear that habeas relief may be sought by any detainee held at Guantanamo or in the US, regardless of citizenship. Yet *Boumediene* left many questions unanswered. Two of the most important involve the quantum and type of evidence necessary to justify a detention, and the possible availability of habeas relief at other detention facilities outside the US.

The latter question was addressed the next year. In 2009, in *Al-Maqaleh v. Gates*,[77] the District of Columbia District Court heard the case of four detainees who were

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66 *Boumediene,* 553 US 735-36.
67 *Ibid.,* p.736.
68 *Ibid.,* p.759.
69 *Ibid.,* p.765.
70 *Ibid.*
71 *Ibid.*
72 Nesbitt, fn. 21 *supra,* p.252.
73 *Boumediene v. Bush*, 553 US 723,789.
74 *Ibid.*
75 *Ibid.*
76 *Ibid.*
77 604 F Supp 2d 205 (DDC 2009).

captured outside Afghanistan, but later transferred to the Bagram Theater Internment Facility (BTIF) in Afghanistan.[78] The detainees (one was an Afghan citizen, but none was a US citizen) claimed the same habeas rights as the Guantanamo detainees.[79] The District Court decided the case by reference to a six-factor test, taking into account: "(1) the citizenship of the detainee; (2) the status of the detainee; (3) the adequacy of the process through which the status determination was made; (4) the nature of the site of apprehension; (5) the nature of the site of detention; and (6) the practical obstacles inherent in resolving the petitioner's entitlement to the writ."[80]

The District Court held that the detainees' position was "virtually identical to [that of] the detainees in *Boumediene*."[81] They were aliens captured in a foreign country and then brought to another foreign country for detention as enemy combatants.[82] The detainees all challenged their classifications, but lacked adequate means to dispute the factual basis for their detention.[83] According to the court, the US had a similar if not identical degree of control at BTIF and Guantanamo, but BTIF's location in an active war zone created more substantial "practical obstacles" to resolving the detainees' claims. On the other hand, those obstacles "certainly are not insurmountable" and existed only because the Executive chose to detain the prisoners at BTIF.[84] Essentially, the two cases posed the same basic question; the only difference was the location of the detention facility.

The District Court also explained that "the Suspension Clause was forged to guard against…Executive abuses, by protecting those detained through the assurance…that 'the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty.'"[85] The court further reasoned that, "in holding that the Suspension Clause applies to detainees held at Guantanamo, the [*Boumediene*] Court was clearly motivated, at least in part, by the prospect of indefinite Executive detention without judicial oversight."[86]

The District Court held that the three non-Afghan detainees were entitled to seek habeas relief.[87] However, the court held that it lacked jurisdiction over the fourth detainee, who was an Afghan citizen.[88] The fact of Afghan citizenship altered the balance of the factors, specifically, the "practical obstacles."[89] The fourth detainee's Afghan citizenship was likely to create political friction with Afghanistan if the US exercised jurisdiction over his case, and the court deemed that factor sufficient "to tip the balance" of the six factors.[90]

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78 *Ibid.,* p.207.
79 *Ibid.*
80 *Ibid.,* p.215.
81 *Ibid.,* p.208.
82 *Ibid.*
83 *Ibid.,* pp.208-09.
84 *Ibid.,* p.209.
85 *Ibid.,* p.208.
86 *Ibid.,* p.216.
87 *Ibid.,* p.235.
88 *Ibid.,* p.209
89 *Ibid.*
90 *Ibid.*

The Government petitioned the US Court of Appeals for the District of Columbia Circuit for interlocutory appeal.[91] The Government argued that the District Court lacked jurisdiction to hear the habeas petitions of the BTIF detainees.[92] According to the Government, the District Court's comparison of Guantanamo and BTIF was flawed for three reasons. First, because BTIF is in an active theater of war; second, because BTIF has existed only since 2006, is not US territory or under US control, and is not intended for permanent use by the US, whereas the US has been exercising complete dominion over Guantanamo for more than a century; and third, the Cuban Government has no influence over Guantanamo, whereas the Afghan Government has influence over BTIF, which is part of an apparatus aimed at defeating common enemies.[93] These differences, the Government argued, demonstrate that BTIF is not analogous to Guantanamo, and that *Boumediene* should apply only to "the exceptional and unique physical, legal, and practical circumstances of Guantánamo."[94] The Court of Appeals accepted the Government's arguments, holding that the "practical obstacles" were much more extensive than the District Court asserted, and that noncitizens at BTIF were therefore precluded from seeking habeas relief under the Constitution, without regard to the other factors.[95]

At least for the time being, the Court of Appeal's decision in *Al-Maqaleh* has answered the question whether the logic of *Boumediene* will be applied to other locations outside the US. At this point, Guantanamo appears to be the only location where the US does not exercise sovereignty, but aliens enjoy habeas rights.

Part IV

Less attention was being paid to another issue, which also would have a major influence on the development of habeas jurisprudence. On the same day it decided *Boumediene*, the Supreme Court also decided *Munaf v. Geren*, the first case to address detainee transfers.[96] In *Munaf*, two US citizens allegedly committed crimes in Iraq and were being held in that country by US forces.[97] The detainees claimed that they were entitled to habeas relief because, if turned over to Iraq for criminal prosecution, they were likely to be tortured, contrary to US obligations under the Convention against Torture.[98] They also claimed that they were entitled, as US citizens held by US military officials, to seek habeas relief in US courts.[99]

The Supreme Court held that US courts have jurisdiction over habeas claims by US citizens held by US forces overseas, but that US courts cannot prevent their

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91 *Al-Maqaleh v. Gates*, 605 F3d 84, 87 (DC Cir 2009).
92 *Ibid.*
93 *Ibid.,* pp.94-97. See also S I Vladek, "The Unreviewable Executive: *Kiyemba, Maqaleh,* and the Obama Administration" (2010) 26 Const Comment 603, 615.
94 *Ibid.,* p.615.
95 *Al-Maqaleh v. Gates*, 605 F 3d 97.
96 *Munaf v. Geren*, 553 US 674 (2008).
97 *Ibid.,* p. 692.
98 *Ibid.*
99 *Ibid.*

transfer for criminal prosecution by another country.[100] Because Iraq had a sovereign right to prosecute and punish those who commit crimes within its borders, relief was not available in *Munaf*.[101] Due process does not "include a '[f]reedom from unlawful transfer' that is 'protected wherever the Government seizes a citizen,'" the Court stated, and the Constitution does not preclude "'the Executive from transferring a prisoner to a foreign country for prosecution in an allegedly unconstitutional trial.'"[102]

The Court relied on two earlier decisions: *Wilson v. Girard*[103] and *Neely v. Henkel*.[104] The facts in *Wilson* were similar to those in *Munaf*. In *Wilson*, the US agreed to transfer to Japan a US soldier stationed in Japan who was to be tried in connection with the death of a Japanese woman.[105] The Supreme Court granted review after the soldier's habeas petition was denied, but held that the soldier, although entitled to file the petition while in US custody, could not be granted relief because the Executive was entitled to respect the right of "a sovereign nation … to punish offenses against its laws committed within its borders, unless it … consents to surrender its jurisdiction."[106] Thus, *Wilson* involved judicial deference to the Executive's foreign affairs power, and that was the point upon which the Court in *Munaf* relied.[107] There were several important distinctions between the two cases which went unnoticed in *Munaf*, however. In a joint statement appended to the decision in *Wilson*, the Secretaries of State and Defense observed that "all the facts…must now be weighed by the Japanese court, just as they would by a US court-martial, if trial were held under U.S. jurisdiction."[108] The joint statement further explained that, under a treaty between the US and Japan, the soldier was entitled to a prompt trial, the assistance of a lawyer chosen by him and paid for by the US, full access to the charges against him, the right to confront the witnesses against him, the right to compulsory process, the right to a competent interpreter, the right to consult with US authorities, and the presence of an official US trial observer to monitor the fairness of the proceeding.[109]

Unlike *Wilson*, there was no treaty in *Munaf* that guaranteed the rights of US citizens; nor was there other evidence to show that the detainees would enjoy rights similar to those enjoyed by the soldier in *Wilson*. Of course, the decision in *Wilson* did not mention the factors identified in the Secretaries' statement, but those factors provided the context in which *Wilson* was decided. By omitting those facts from its decision, the *Wilson* Court risked having the decision read more broadly by a subsequent court, as it was in *Munaf*.

The *Munaf* Court dealt with these differences by relying on *Neely v. Henkel*, a case decided 50 years before *Wilson* (and more than 100 years before *Munaf*). In *Neely*, the

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100 *Ibid.*
101 *Ibid.*
102 *Ibid.,* p.695.
103 354 US 524 (1957).
104 180 US 109 (1901).
105 *Wilson v. Girard*, 354 US 524, 525-26.
106 *Ibid.*
107 *Ibid.*
108 *Ibid.,* p.547.
109 *Ibid.*

US detained a US citizen alleged to have embezzled money in Cuba.[110] The citizen sought habeas relief, claiming that Cuba would not adequately protect his constitutional rights.[111] The Court denied relief, holding that the citizen could be transferred to Cuba because the US Constitution conferred no rights on citizens charged with extra-territorial violations of foreign law.[112] Thus, *Neely* and *Wilson* both involved claims that habeas petitioners were entitled to the protection of the US Constitution in non-US criminal prosecutions. *Munaf* involved a different claim, namely, that US officials had due process obligations to those they detained.

After discussing *Neely* and *Wilson*, the *Munaf* Court addressed the petitioners' fear of torture in Iraq. According to the Court, that concern was for "the political branches, not the Judiciary,"[113] because any judicial intervention would trench on the Executive's foreign affairs power.[114] Thus, the courts must accept the Executive's assurance that a detainee will not be tortured upon transfer, at least absent a well-documented probability of torture.[115]

Munaf was the first Supreme Court case in 50 years to address transfer issues. The Court addressed broad issues of sovereignty, habeas corpus, and foreign affairs, and it did so in light of *Wilson* and *Neely*, which were decided 50 and 100 years ago, respectively. But the Court took no account of the particular circumstances of those cases. Moreover, it is the Court's sweeping conclusion – that the transfer decision cannot be reviewed if the Executive represents that torture is not likely – that opens the door to the possibility that prisoners will be transferred simply to avoid judicial "interference." The Court's holding in *Munaf* – that courts have no role to play unless there is a well-documented probability of torture – appears to grant nearly unbridled power to the Executive with respect to the fate of alien detainees. The ramifications of that approach were made clear in a trilogy of cases that were begun days after *Munaf* was decided.

Part V

One week after the Supreme Court announced its decisions in *Boumediene* and *Munaf*, the District of Columbia Circuit was presented with a petition to review a CSRT decision. *Parhat v. Gates*[116] involved a statutory appeal under the DTA and the MCA. *Parhat* provided an occasion for considering an important question that *Boumediene* had left open: what evidence is necessary to justify detaining individuals as enemy combatants. Parhat was a member of the "Uighurs," a persecuted Muslim group from western China.[117] The Uighurs had escaped from China to Pakistan, but local villagers had turned them over to the Pakistani Government. In turn, the Pakistani

[110] *Neely v. Henkel*, 180 US 109, 113.
[111] *Ibid.*, p.114.
[112] *Ibid.*, p.122.
[113] *Munaf v. Geren*, 553 US 674, 700.
[114] *Ibid.*, p.702.
[115] *Ibid.*, p.706.
[116] 532 F.3d 834 (DC Cir 2008).
[117] *Ibid.*, p.835.

Government transferred the Uighurs to US military authorities, who transported them to Guantanamo.[118] The CSRT had found the Uighurs to be enemy combatants, but the court rejected that finding,[119] based on the unreliability of the underlying documents.[120] The court rejected the Government's claim to have established the detainees' status simply by producing three documents containing the same assertion.[121] "Lewis Carroll notwithstanding, the fact that the Government has 'said it thrice' does not make an allegation true." [122] Thus, the court rejected the Government's reliance on hearsay evidence alone and upheld its own authority to assess the reliability of the Government's detention decisions. The court ordered the Government to comply with the necessary evidentiary requirements or arrange for the detainees' transfer or release.[123]

Because the Court of Appeal could not order habeas relief in the context of the *Parhat* case, the detainees subsequently sought habeas relief in the District Court.[124] Relying on the *Parhat* findings, the detainees argued that their continued detention was unlawful.[125] Furthermore, because they faced persecution in China, and no other country would take them, they claimed a right to enter the US.[126]

The District Court held that the Government could not lawfully hold the Uighurs, but the decision was stayed pending appeal.[127] On appeal, the Government argued that, while *Boumediene* established that the Uighurs were entitled to the protection of the Suspension Clause, US courts lacked authority to decide which aliens may enter the US.[128] The District of Columbia Circuit agreed, and, in a case now known as *Kiyemba I*,[129] stated that the decision to admit an alien into the US was committed to the Executive alone, and that no statute or constitutional provision authorised the courts to second-guess that determination.[130] The Court further stated that the Due Process Clause provided no basis for affording relief to the detainees because it grants protection only to those aliens "with presence or property within the sovereign territory of the United States."[131] Thus, no remedy was available.

The Uighurs petitioned for further review, arguing that courts established under the US Constitution could not be "powerless to remedy indefinite and illegal Executive detention."[132] The Supreme Court granted review, but ultimately did not reach the merits of the case. After the District of Columbia Circuit's decision in *Kiyemba I*, the

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118 *Ibid.,* p.837.
119 *Ibid.,* p.836.
120 *Ibid.*
121 *Ibid.*
122 *Ibid.,* p.848 (*quoting* Lewis Carroll, *The Hunting of the Snark: An Agony of Eight Fits* (1876, London: MacMillan & Co.) p.3).
123 *Parhat v. Gates,* 532 F 3d 834, 854.
124 *Ibid.,* p.835.
125 See *In re Guantanamo Bay Detainee Litigation*, 581 F Supp 2d 33, 38 (DDC 2008).
126 *Ibid.*
127 *Kiyemba v. Obama*, 555 F 3d 1022, 1024 (DDC 2009).
128 *Ibid.*
129 561 F.3d 509 (DC Cir 2009).
130 *Kiyemba v. Obama I*, 555 F3d at 519. See also *Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206 (1953), and *United States ex rel Knauff v. Shaughnessy*, 338 U.S. 537 (1950).
131 *Ibid.*
132 Petition for Writ of Certiorari, No. 08-1234 (US April 3, 2009).

petitioners received offers of resettlement in other countries, and all but five accepted those offers.[133] The Supreme Court vacated the Court of Appeal's decision so that the lower court could evaluate the legal effect of those developments. On remand, the original hearing panel concluded that its prior analysis remained valid and therefore reaffirmed its original ruling.[134]

At the same time, another case involving the Uighurs was making its way by fits and starts through the judicial system. That case, which would become known as *Kiyemba II*,[135] began in 2005, when the Uighurs sought an injunction requiring the Government to give 30 days' notice to their counsel and the District Court, and an opportunity to be heard, before the Government transferred them to another country.[136] The District Court granted the injunction, but the enactment of the DTA and the MCA raised questions as to whether the court had the authority to grant the injunction.[137] Thus, the District Court deferred further consideration of the issues pending the Supreme Court's decision in *Boumediene* in 2008,[138] at which point the District Court decided the issues presented in *Kiyemba I*. If the Court of Appeals had affirmed the District Court's decision in *Kiyemba I*, that decision would have mooted *Kiyemba II*. As noted previously, however, the Court of Appeals reversed the decision in *Kiyemba I*, so that the issues presented in *Kiyemba II* returned to the forefront.

In 2009, following the original ruling of the US Court of Appeals for the District of Columbia Circuit in *Kiyemba I*, the Government filed another appeal, arguing that the injunction in *Kiyemba II* could not be sustained.[139] The Uighurs argued that the 30-day notice requirement was necessary to challenge any transfer that posed a threat of torture.[140] Otherwise, the US would be able to violate the UN Convention against Torture and continue to detain them through the agency of another country, while denying them access to habeas relief.[141] The District of Columbia Circuit relied on the Supreme Court's decision in *Munaf* to hold that the courts have no power to require any such notice.[142] The court's reliance on *Munaf* was misplaced, however, because the *Munaf* Court had no occasion to address the notice question; the *Munaf* petitioners knew of the Government's plan to transfer them to Iraqi custody. Nonetheless, the court of appeals found support for its decision in the broad rationale of *Munaf*, namely, that US courts should generally accept a Government representation that it will not transfer detainees to a country where torture is likely because to do otherwise would

133 *Kiyemba v. Obama*, 130 S Ct 1235 (2010) (*per curiam*).
134 *Ibid.*
135 561 F 3d 509 (DC Cir 2009).
136 Vladek, fn. 93 *supra*, p.619.
137 See *Kiyemba v. Bush*, 219 Fed App'x 7 (DC Cir 2007) (dismissing the case for lack of jurisdiction).
138 *Ibid.*
139 *Kiyemba II*, 561 F 3d at 511.
140 *Ibid.*
141 *Ibid.,* p.514.
142 *Ibid.*

interfere with the Executive's plenary authority over foreign relations.[143] The Supreme Court subsequently denied review in *Kiyemba II*.[144]

Part VI

The decisions in *Munaf*, *Kiyemba I*, and *Kiyemba II* constitute the reality of existing law: while all individuals detained as enemy combatants at Guantanamo or on the US mainland may challenge their detention through the writ of habeas corpus, alien detainees cannot contest transfers that will lead to continued detention. At least in the absence of a well-established probability of torture, neither the detainees nor the courts may question the Government's assertion that the transfer satisfies US obligations under the UN Convention against Torture. Practically speaking, there is no judicial oversight or check on this use of Executive power.

This legal reality raises a question that has become more significant as enemy combatant jurisprudence has developed. While *Boumediene* recognised the authority of US courts to order the release of detainees, it did not purport to consider where they could or should be released. The *Kiyemba I* court correctly recognised the legal novelty of the circumstances presented in that case, noting that "never in the history of habeas corpus has any court thought it had the power to order an alien held overseas brought into the sovereign territory of a nation and released into the general population."[145]

In this respect, it is well to recall some history. In the past, courts required a habeas petitioner to be physically present in court, so that the petitioner could leave immediately if the court decided to let the great writ issue.[146] For reasons of judicial efficiency, the Supreme Court suspended this requirement in the 1940s, thus separating the issuance of the writ from the actual granting of relief.[147] This practical separation, which has continued for the last 70 years, allows the habeas petitioner's rights and remedies to be viewed as separate and distinct.[148] Specifically, under the *Kiyemba* cases, a habeas petitioner may invoke the jurisdiction of the US District Court for the District of Columbia, but the court will not be able to order the petitioner's release from detention if the Government elects to transfer him to another country.[149] Instead, the court will grant a "*Kiyemba* Order," which does not require release, but simply asks the Government to "take all necessary and appropriate diplomatic steps to facilitate petitioner's release."[150] Such orders are not subject to further judicial review.

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143 *Ibid.*, p.526.

144 See *Kiyemba v. Obama*, 130 SCt 1880 (2010).

145 *Kiyemba I*, 555 F 3d at 1029.

146 See C L Roberts, "Rights, Remedies, and Habeas Corpus-- The Uighurs, Legally Free While Actually Imprisoned" (2009) 24 Geo. Immigr. L.J. 1, 9.

147 *Ibid.*

148 See C Wells Stanton, "Rights and Remedies: Meaningful Habeas Corpus in Guantanamo" (2010) 23 Geo. J. Legal Ethics 891.

149 *Ibid.*, citing Interview with Prof Stephen Vladeck, American University Washington College of Law, in Washington, DC (November 17, 2009).

150 See *Ali Ahmed v. Obama*, 613 F Supp 2d 51 (DDC 2009).

Part VII

In December 2010, the District of Columbia Circuit's most recent decision in *Kiyemba I* found its way back to the Supreme Court. Five Uighurs who are still detained at Guantanamo filed a petition for review, asking the Court to decide "whether a judicial officer of the United States, having jurisdiction of the habeas corpus petition of an alien transported by the Executive to an offshore prison and there held without lawful basis, has any judicial power to direct the prisoner's release."[151] Based on the District of Columbia Circuit's findings in *Parhat v. Gates*,[152] the Uighurs' petition for review reiterates that they are not enemy combatants and have never been charged with a crime.[153] The Uighurs further argue that the District Court was authorised to decide whether they should be admitted to the US, and that the Court of Appeals erred in essentially delegating that decision to the Executive, which then denied them that relief.[154]

The Uighurs further argue that the Court of Appeals ignored *Boumediene* in *Kiyemba I*.[155] According to the petition, *Boumediene* recognised that courts must be able "to issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release," and acknowledged no limitations on that authority.[156] In *Kiyemba I*, however, the District of Columbia Circuit held that the courts may not order an alien released into the US, even when they believe that adequate relief cannot otherwise be granted, but must defer to the Executive's decision to deny that relief.[157] The Government has not yet answered the petition, and the Court has not yet decided whether to grant review.[158]

Two additional petitions for Supreme Court review, also seeking to delineate the proper scope of *Boumediene*, were recently filed. The petition in *Mohammed v. Obama*,[159] which was filed in November 2010, sought to reconcile *Boumediene* and *Munaf* by asking the Court to decide whether detainees are entitled to test the Government's assertion that they will not be tortured if transferred, and, if so, whether they may seek an order barring the proposed transfer.[160] Although the petition is still pending, it appears that the *Mohammed* case may have become moot because the Government transferred Mohammed to Algerian custody in January 2011.[161] If so, *Mohammed* will become the most recent case in which the Executive has avoided judicial review by transferring a

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151 *Kiyemba v. Obama*, 561 F3d 509 (DC Cir 2009) (pet for cert pending, No 10-775). See also L Denniston, "*Kiyemba II* Reaches Court" SCOTUSblog (December 8, 2010, 4:27pm), available at http://www.scotusblog.com/2010/12/kiyemba-iii-reaches-court/.

152 532 F3d 834 (DC Cir 2008).

153 *Kiyemba v. Obama*, 561 F3d 509 (DC Cir 2009) (pet for cert pending, No 10-775). See also Denniston, fn. 151 *supra*.

154 *Ibid.*

155 *Ibid.*

156 *Ibid.*

157 *Ibid.*

158 *Ibid.*

159 *Mohammed v. Obama*, pet for cert pending, No 10-746 (filed 8 December 2010).

160 L Denniston, "Primer: The New Detainee Cases, SCOTUSblog (7 December 2010, 7:47pm), available at http://www.scotusblog.com/2010/12/primer-the-new-detainee-cases/.

161 Lyle Denniston, One significant detainee case over? SCOTUSblog (6 January 2011, 7:08pm), available

detainee beyond the jurisdiction of the United States.[162] Mohammed's attorneys were notified of his transfer, but only after it had been carried out, as permitted by the holding in *Kiyemba II*.[163] This is precisely the type of action that *Munaf* and its progeny currently permit.

The petition in *Khadr v. Obama*,[164] which was filed in December 2010, presents the same questions as *Mohammed*, but it also presents the additional question whether Section 242(a)(4) of the Immigration and Naturalization Act,[165] which restricts the authority of the courts to review claims under the Convention against Torture, applies solely to deportation cases or also to habeas cases brought to challenge detentions at Guantanamo.[166] Fortunately, this case involves a number of detainees, so the controversy would not become moot unless all of the detainees were transferred to other countries.

Finally, a recent District Court case further illustrates the limits of procedural due process as a mechanism for protecting the rights of citizens in the war on terror. In *Al-Aulaqi v. Obama*,[167] the US District Court for the District of Columbia recently declined to adjudicate an action brought by the alien father of a US citizen whom high-ranking US officials had been targeted for killing as a terrorist. The father sought a declaratory judgment setting forth the standard under which the US could target individuals for killing, as well as an injunction prohibiting the President and other Government officials from targeting his son for killing unless that standard were met. The District Court held that the plaintiff lacked standing to bring the claims, and that the political question doctrine barred judicial resolution of the claims in any event. That decision was not appealed.

Part VIII

Clearly, questions still abound concerning the habeas rights of individuals detained by the US as enemy combatants. Many issues, especially those surrounding the evidentiary requirements for detaining individuals as enemy combatants continue to come before the courts. The most disconcerting issue, however, remains the division of authority between the courts and the Executive when it comes to decisions regarding release under habeas corpus. In its decisions in *Hamdi*, *Rasul*, *Hamdan*, and *Boumediene*, the Supreme Court made clear that anyone detained at Guantanamo, whether citizen or not, may seek habeas relief in US courts. The Court also made clear that judicial review is essential to ensuring that the Executive does not abuse its power by detaining individuals indefinitely, without affording them an opportunity to challenge the factual basis for their detention as enemy combatants or charging and trying them for crimes.

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at http://www.scotusblog.com/2011/01/one-detainee-case-over/. On March 7, 2011, the Government filed its brief in opposition to the petition for certiorari under seal.

162 *Ibid.*

163 *Ibid.*

164 *Khadr v. Obama*, pet for cert pending, 10-751 (filed December 2, 2010).

165 8 USC § 1252(a)(4).

166 Denniston, fn. 160 *supra*.

167 __ F Supp 2d ___, 2010 WL 4941958 (DDC, December 7, 2010).

But *Munaf*, *Al-Maqaleh*, *Parhat*, and the *Kiyemba* cases, taken together, signal a dangerous concentration of power in the Executive coupled with a seeming immunity from judicial review. *Al-Maqaleh* identified Guantanamo as an exceptional case and held that habeas rights normally do not extend to US detention centers outside the US. *Munaf* places beyond the purview of the courts decisions to transfer detainees from US custody to other countries. The *Parhat* and *Kiyemba* cases preclude the courts from requiring prior notice of transfers or attempting to go behind an Executive assertion that there is no probability of torture.

While some of these cases, such as *Al-Maqaleh*, may well be defensible, the unhappy upshot of these developments is clear: if the Executive wishes to escape from judicial "interference," it can simply transfer an alien detainee to the custody of another country, so long as the Government represents that the detainee is unlikely to be tortured there. The likelihood of torture will not be reviewed by the courts in a meaningful way. And since alien detainees are not entitled to notice, they may be transferred without further ado. While it may seem cynical to assume that this power will be abused, it is important to remember that the Executive has consistently sought this power since the passage of the AUMF, and it fought with every tool in its arsenal to prevent the extension of judicial authority to Guantanamo. Now that Guantanamo is no longer safe from judicial scrutiny, it stands to reason that the Executive would prefer to detain aliens at Bagram or similar facilities, since the courts currently have no authority over alien detainees at those locations, and cannot prevent their transfers there. Moreover, in the event that another nation is willing to accept US detainees, that is a tempting possibility for the Government, particularly given Congress's continuing opposition to transferring Guantanamo detainees to the US for trial by civilian courts. That opposition recently has caused the President to issue an Executive Order directing the resumption of trials at Guantanamo.[168]

Thus, the victory of *Boumediene*, which promised to provide Guantanamo detainees with access to the courts, may sound hollow by virtue of the end-run made possible by *Munaf* and its progeny. The Supreme Court may or may not grant one or more of the currently pending petitions. If it does, the resulting decision may have a felicitous impact on the development of the law in this area. If that is to be the case, however, it will be necessary for the Court to take a more holistic approach than that which has characterised its decisions to this point.

[168] See Scott Shane and Mark Landler, "Obama Clears Way for Guantanamo Trials," N.Y. Times, (March 7, 2011), available at http://www.nytimes.com/2011/03/08/world/americas/08guantanamo.html.