

KEYNOTE ADDRESS: CONSTITUTIONAL BAIT AND SWITCH†

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Many scholars and observers have made important contributions to our understanding of the detention policy adopted in response to the post-9/11 threats against America's national security. I add my voice not to intensify the cacophony, but to make some observations about the constitutional conversation among separate branches sharing power. Inter-branch dynamics concern not merely how power is divided, but how the branches deal with one another—sometimes quite acrimoniously—in order to assert their own roles within the constitutional structure. The title of my speech, of course, is borrowed from Chief Justice Roberts's dissent in *Boumediene v. Bush*.¹

PRECEDENT AND A POLICY PARADOX

In the wake of 9/11—an unprecedented attack by non-state actors against civilian targets, with the goal of destabilizing our government and society—legal thinkers and policymakers have searched in vain for appropriate precedents on which to base detainee policies. Most have come up short, recognizing that post-9/11 policymakers were driving in a fog without many taillights to follow.

One of my first experiences involving the application of extraterritorial jurisprudence to Guantánamo Bay involved *Haitian Refugee Center, Inc. v. Baker*, decided by the United States Court of Appeals for the Eleventh Circuit in 1992.² At issue was whether the Clinton Administration was correct in denying Haitian asylum seekers, being held at Guantánamo Bay, interviews or other processes before sending them back to Haiti.³ As a second-year law student, I worked on a brief by Professor Harold Koh—now Dean of the Yale Law School—which contended that the Haitians were entitled to some process by virtue of the Immigration and Nationality Act, the Constitution, and the non-refoulement principle, which prohibits sending an asylum seeker

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¹ 128 S. Ct. 2229, 2285 (2008) (Roberts, C.J., dissenting) (“Congress followed the Court's lead, only to find itself the victim of a constitutional bait and switch.”).

² 953 F.2d 1498 (11th Cir. 1992) (per curiam).

³ *Id.* at 1502–03.

back to his country of origin if he has a valid fear of persecution. The argument proved difficult because the aliens had not effected entry into our territorial waters. The first wave that successfully made it to southern Florida received very significant statutory and constitutional processes, just as the Cuban nationals of the Mariel Boatlift had before.⁴ But the subsequent policy of deliberately blocking and diverting Haitian émigrés to Guantánamo Bay complicated the argument.

The Eleventh Circuit Court of Appeals decided that neither statute nor Constitution afforded the Haitians a day in court or a right to any process.⁵ The Haitians were seeking a simple five-minute interview with a responsible official during which they could express and explain their fear of persecution.⁶ If the official deemed the fear well-founded, the individual would be admitted as a refugee.⁷ If not, as would likely be the case in the overwhelming majority of the interviews, they would be treated as economic migrants and legally and logically would be sent back to Haiti.⁸ But the panel did not consider the Haitians held at Guantánamo Bay worthy of even that limited process.⁹

The present situation involving detainees at the same locale has evolved far differently. I quote Chief Justice Roberts's dissent in *Boumediene*: "Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants."¹⁰ Detainees held at Guantánamo Bay currently claim extensive procedural rights and protections. They may have more rights than prisoners of war under Article Five of the Geneva Convention, which requires that detainees "enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."¹¹ Unlike members of the U.S. armed forces who are subject to the Uniform Code of Military Justice ("UCMJ"), detainees can challenge their detention in Article III civilian courts.¹²

How did we arrive at a place where those who defend our freedom and those who come here seeking freedom receive fewer rights and

⁴ See, e.g., *Garcia-Mir v. Smith*, 766 F.2d 1478, 1480, 1483–84 (11th Cir. 1985) (per curiam).

⁵ *Haitian Refugee Ctr., Inc.*, 953 F.2d at 1513 & n.8.

⁶ *Id.* at 1503.

⁷ *Id.* at 1502.

⁸ *Id.*

⁹ *Id.* at 1509, 1515.

¹⁰ 128 S. Ct. at 2279.

¹¹ Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

¹² Compare Uniform Code of Military Justice art. 3, 10 U.S.C. § 803 (2006), with *Boumediene*, 128 S. Ct. at 2275–76.

protections than those who stand accused of waging war and fomenting terror in order to threaten and defeat that freedom? In the first instance, responsibility rests with the Executive. For three years, the Executive Branch sought to restore security and protect our country in a time of national crisis. Early responses to the severe threat against our national security emphasized safety over process. Policymakers at the Department of Justice, the Department of Defense, and many other agencies did their best to fulfill their obligations to uphold and defend the Constitution during a time characterized by no significant support or input from the Legislative or Judicial Branches. To be clear, plenty of members delivered speeches alternately supporting and criticizing the Administration, but none culminated in concrete congressional action that might have offered greater assurance as to where the nation stood as a democratic polity. Furthermore, notwithstanding the inaction of the other branches, an Executive Branch decision to afford some process to detainees—especially to U.S. citizens—likely would have stayed aggressive judicial intervention.

EXECUTIVE AUTHORITY

Initially, the Supreme Court recognized the Executive's authority to detain. When the Court ruled in *Hamdi v. Rumsfeld* that the United States could not detain one of its own citizens without some process in place for him to challenge his status as an enemy combatant,¹³ members of the legal academy, the print media, and the television punditry widely viewed the Court's opinion as a judicial push back against executive authority. A more careful reading of *Hamdi* reveals, however, a powerful affirmation of executive authority. Contrary to arguments strongly advanced by Hamdi and his counsel, the plurality held that the President did have authority to engage in executive detention of Hamdi and other enemy combatants.¹⁴ Rather than extending the entire panoply of procedural rights expressed in the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, the justices enumerated only two core protections—the right to have the charges presented and the right to have them heard before an impartial observer.¹⁵

Justice O'Connor wrote: "the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."¹⁶ She went so far as to suggest that the military exigencies could reasonably allow

¹³ 542 U.S. 507, 533 (2004) (plurality opinion).

¹⁴ *Id.* at 516–19.

¹⁵ *Id.* at 533.

¹⁶ *Id.*

the admission of hearsay evidence and justify a shift to the presumption of guilt in detainee hearings.¹⁷

When the Court spoke, the Executive listened. After *Hamdi*, the Department of Defense promulgated the Combatant Status Review Tribunals (“CSRT”) in part to bring U.S. policy into compliance with the Court’s directive.¹⁸ The Executive provided detainees the basic rights required by the Court while placing the process under the direction of the military to ensure proper deference to the exigencies of the circumstances. Notably, the Executive went well beyond the requirements the Court enunciated in *Hamdi*, applying the procedures not only to U.S. citizens—like Hamdi and Padilla—detained on U.S. soil, but also extending the same processes to all enemy combatants regardless of citizenship, including those housed at Guantánamo Bay.

LEGISLATIVE-JUDICIAL DIALOGUE

A second Supreme Court opinion, *Rasul v. Bush*, released concurrently with *Hamdi*, held that Rasul and other non-U.S. citizen Guantánamo Bay detainees could avail themselves of statutory habeas jurisdiction to challenge their detention in federal court.¹⁹ *Rasul* was the opening salvo in an often-contentious dialogue between the Legislature and the Judiciary that markedly changed the direction of detainee policy. Members of Congress acted on the Court’s implicit invitation to play a more active role in the detainee policymaking process.

In December 2005, Congress passed the Detainee Treatment Act (“DTA”). The Act codified the CSRT procedures, placed some limitations on them and the use of interrogation techniques and, most relevantly, stripped the Court of jurisdiction to hear habeas petitions from detainees held at Guantánamo Bay.²⁰ In short, the Court found statutory jurisdiction and Congress promptly acted to amend the relevant statute and remove the Court’s jurisdiction.

Unwilling to acquiesce, the Court heard *Hamdan v. Rumsfeld* despite the jurisdiction-stripping language in the DTA, and held that the Court still had jurisdiction over cases pending at the time the DTA passed.²¹ Once it had established jurisdiction to decide the case, the Court raised the ante and struck down as unconstitutional the President’s Military Commissions Order, holding that it violated the

¹⁷ *Id.* at 533–34.

¹⁸ *Boumediene*, 128 S. Ct. at 2241.

¹⁹ 542 U.S. 466, 484 (2004).

²⁰ Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739, 2739–44 (codified as amended in scattered sections of 28 and 42 U.S.C.).

²¹ 548 U.S. 557, 584 & n.15 (2006).

UCMJ and the Geneva Convention.²² Here again, the Court invited congressional action. Justice Breyer in his concurring opinion wrote:

Nothing prevents the President from returning to Congress to seek the authority he believes necessary.

Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so.²³

Justice Breyer and the other members of the *Hamdan* majority extended a second invitation for the President to involve Congress—ignoring the fact that Congress had already made clear its intent in the DTA.

After *Hamdan*, the President submitted a package to Congress that became the Military Commissions Act (“MCA”). The idea was simple. The legislation expressly conferred authority for the military commissions the President had empanelled, and that the Court had struck down just earlier that summer.²⁴ Once again, Congress stripped the courts of jurisdiction, this time more explicitly including pending cases.²⁵

Senator Lindsey Graham, one of the sponsors of the MCA—and himself a military attorney—expressed a sentiment held by many members of Congress that underpinned the legislative intent:

[T]he fundamental question for the Senate to answer when it comes to determining enemy combatant status is, Who should make that determination? Should that be a military decision or should it be a judicial decision?

I am firmly in the camp that when it comes to determining who an enemy of the United States is, one who has taken up arms and who presents a threat to our Nation, that is not something judges are trained to do, nor should they be doing. That is something our military should do.

For as long as I have been a military lawyer, Geneva Conventions article 4, where it talks about a competent tribunal to decide whether a person is a civilian—lawful, unlawful, combatant—that competent tribunal has been seen in terms of military people making those decisions.²⁶

But in *Boumediene*, the Court disagreed again, claiming constitutional jurisdiction over enemy combatants held outside the United States.²⁷ Moreover, the Court declared that the congressionally

²² *Id.* at 613.

²³ *Id.* at 636 (Breyer, J., concurring).

²⁴ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

²⁵ *Id.* sec 7, 120 Stat. at 2635–36 (codified as amended at 28 U.S.C. § 2241 (2006)).

²⁶ 152 CONG. REC. S10,266 (daily ed. Sept. 27, 2006) (statement of Sen. Graham).

²⁷ 128 S. Ct. at 2274.

prescribed procedures crafted in response to the Court's earlier dictates were an inadequate substitute for constitutional jurisdiction.²⁸

The Court, unhappy that Congress had circumscribed its statutory authority to hear habeas petitions, changed the metric and framed its opinion on constitutional grounds. Members of the *Boumediene* majority understandably were sensitive that observers might criticize their decision to change the rules of the game. Justice Kennedy articulated several important rationalizations—six years had passed, we were fighting a war of indefinite duration, and the President and Congress should not restrict the Court.²⁹ Such reasoning may have been rational if the DTA and the MCA had stripped jurisdiction without providing any alternative procedure, but both laws prescribed the conduct of the military commissions in accordance with the requirements previously articulated by the Court. In *Hamdan*, the Court acknowledged that the DTA stripped jurisdiction, restricted methods of interrogation, and furnished a procedural protection for U.S. personnel accused of engaging in improper interrogation.³⁰ In *Boumediene*, the Court acted as though no such processes were in place.³¹

The *Boumediene* opinion so callously disregarded the Court's earlier judgments that Justice Souter saw fit to write a concurring opinion almost exclusively to defend the institutional integrity of the Court.³²

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On the surface, the *Boumediene* opinion addressed the sufficiency of the established processes, but an issue no less important was the Court's dissatisfaction with the role granted the Judiciary by the MCA. Rather than accept jurisdiction in the D.C. Circuit, the Supreme Court sought to create its own terms.³³ If the Court intended only to exercise its traditional and accepted power of judicial review, it could have heard a detainee case appealed through the D.C. Circuit under the procedures established by the DTA and MCA—where there would be no question regarding jurisdiction—and evaluated the constitutional adequacy of the procedures within that judicial framework.

By claiming constitutional jurisdiction, however, the Court declared a substantial degree of ownership of detainee policy. By displacing the rules upon which the President and Congress had agreed, the Court placed itself in the position not of final arbiter, but of original author. By

²⁸ *Id.* at 2275.

²⁹ *Id.* at 2275, 2277.

³⁰ 548 U.S. 557, 572–73 (2006).

³¹ *See* 128 S. Ct. at 2274–77.

³² *Id.* at 2277–78 (Souter, J., concurring).

³³ *See id.* at 2274–75 (majority opinion).

exercising its habeas jurisdiction, the Court claimed responsibility for writing the script going forward. This assumption of authority may carry costs.

The sense of constitutional fealty embodied in the oath of every government official to uphold and defend the Constitution may begin to atrophy in the Executive and Legislative Branches if we rely upon the Court to act not only as the backstop, but also as the sole protector of the Constitution. But a more immediate and concrete concern involves the limited options available to the Executive and Legislative Branches. They have already passed the DTA and MCA. By claiming constitutional habeas jurisdiction, the Court has left limited room for the political branches to maneuver. What started out as a dialogue between the Judiciary and the other two political branches threatens to become a monologue.

The idea of 9/11 exceptionalism—that the terrorist attacks and the ensuing events were unprecedented and required extraordinary responses—is often invoked by those who criticize executive action and, to a lesser extent, legislative proposals. But similar charges could apply also to the Supreme Court. The series of opinions culminating in *Boumediene* calls into question whether the Court has created its own brand of 9/11 exceptionalism, and in so doing has deprived the political branches of their proper constitutional authority. We can all hope for a future free from terrorist attacks and other threats to public safety, but we must bear in mind the need for a strong and flexible policymaking structure within the political branches, working in tandem—not at odds—with the Judiciary in order to craft a body of laws and opinions that preserve the constitutional authority of all three branches of government.