

The Limits of Preventive Detention: Habeas Corpus,

Boumediene v. Bush (2008) and Comparative Preemption Policy

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Abstract

This is a critique of preemption policy involving unlawful enemy combatants, and preventive detention in general in the USA and some comparative settings. It features a close examination of the landmark decision of Boumediene v. Bush (2008), in which the U.S. Supreme Court found unconstitutional a 2006 congressional statute that sought to strip federal judges of habeas corpus review of the preventive detentions of unlawful enemy combatants by the US government. The paper analyzes context of this landmark case, prior precedents, the reasoning of the prior Court of Appeals decision, U.S. Supreme Court decisions and reasoning, and the socio-legal context for a human rights critique of preemption and preventive law enforcement strategies. Finally, the paper compares the critique of preemptive detention in Boumediene with comparative preemption and habeas corpus human rights in Turkey, Canada, United Kingdom, Israel, and other nations with implications for a more adequate and just policy of preemption.

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**The Limits of Preventive Detention: Habeas Corpus,
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Introduction

The preventive detention of suspected future terrorists is likely to continue wherever terrorism is perceived as a serious threat. It is essential that democratic nations committed to the rule of law begin to develop a jurisprudence regulating this increasingly important preventive mechanism. It is fair to say that to date no nation has satisfied this important need.

Alan Dershowitz, *Preemption: A Knife that Cuts Both Ways* (2006: 121)

The laws and Constitution are designed to survive, and remain in force, in extraordinary times.

Justice Anthony M. Kennedy, *Boumediene v. Bush* (2008)

Global democracy is challenged by a new emphasis on preemption: preventive control in dealing with terrorism, crime, and general social unrest. Traditionally, we sanctioned individuals for evils they had committed (Talarico 1979). But increasingly in recent decades, the USA has employed a preemptive justice policy with terrorists or criminals by detaining them based upon violation of relatively minor infractions which indicate a predicted inclination toward future terrorism or criminality. Such justice policies tend to emphasize placing suspects into preventive detention for as long as possible, without notifying them of their crimes, or providing counsel, or habeas corpus, or other judicial review of the reasons for their incarceration. Preventive detention is justified in the belief that terrorists or criminals have little to lose and will ignore our traditional moral sanctions or deterrents. Critics of preventive detention suggest that we do this because as a nation we have lost faith in our moral and social order - and given ourselves over to a more cynical, ideological vision of our polity (e.g., Dershowitz 2006).

The ascendant justice policy emphasis on preventive detention in the USA challenges our traditions of human rights in dealing with criminals and terrorists. The USA now incapacitates

record numbers of criminals (over 2 million), as well as rapidly increasing its number of preventive detentions of terrorists, persons awaiting deportation, juveniles, and so forth. Like incapacitation, order-maintenance such as “broken windows” policing popularized the idea of cracking down on minor lawbreakers as a way to combat serious crime by locking them away. For example, both are based on assumptions that “[W]icked people exist. Nothing avails except to set them apart from innocent people” (Wilson 1975: 209). Critics argue that such predictive crime control approaches render an ideological perspective of crime and criminality that reduces society to a nightmarish Nietzschean vision, relegating justice decisions to a questionable social science of actuarial, predictive strategies to attempt to control crime and criminals by locking them up and throwing away the key (e.g., Dershowitz 2006). However, instead of delivering a safer society, empirical evidence may indicate that predictive approaches to justice policy have prompted the current backlash of rapidly escalating violent crime rates and other criminality (Harcourt 2007). Worst of all, critics assert that such predictive approaches cynically jettison our traditions of human rights and open, public deliberation (e.g., Harcourt 2001).

Like predictive approaches to crime control as questioned by critics, a similar preemptive approach has come to dominate USA strategies for dealing with terrorism (Dershowitz 2006). With the rise of preemptive detention strategies has come an increasing abandonment of the needs for human rights, habeas corpus writs, or open, public hearings - and a preference to deal with terrorists in secretive, indefinite, preventive detention (Cohn 2008b). World conflicts of “Jihad vs. McWorld” seem to justify these new postures and tactics such as targeted assassinations of terrorists, preemptive strikes against nuclear and other weapons of mass destructions, prior restraints on dangerous or offensive speech, the use of torture to gain intelligence on potential acts of terror, and so forth (Fisher 2008).

This work tests the criticisms of the justice policy of preemptive detention against the case of *Boumediene v. Bush* (2008) as a landmark decision by the U.S. Supreme Court in this policy area. The critique is grounded in a casenote legal study of *Boumediene v. Bush* (2008) and analyzes the actuality of preemptive detention policy found in recent USA statutes and decisions that stripped federal judges of habeas corpus review of the detention of foreign unlawful “enemy combatants” at Guantanamo Bay, Cuba. I analyze the prior precedents in law and in history, the lower court reasoning in this legal dispute, the variety of U.S. Supreme Court decisions and reasoning in the case, and the socio-legal context of these preemptive detention policies. Finally, I compare preemptive detention in *Boumediene* with comparative human rights of habeas corpus in Turkey, Canada, United Kingdom, Israel, and other nations with implications for a more adequate justice policy.

The discussions of *Boumediene v. Bush* (2008) include casenote legal analyses of the many legal documents that were filed at the U.S. Court of Appeals and U.S. Supreme Court levels. The various documents, such as judicial opinions, merit briefs, amicus briefs, and miscellaneous court filings are plainly referred to herein, but may also be found at various on-line sources.

Habeas Corpus and the Historical Context

Habeas Corpus, which obviously is called something other than “habeas corpus” within different languages and legal systems, is generally a type of legal proceeding by which detainees can seek judicial review and release from unlawful imprisonment. Over seventy nations today have a form of habeas corpus proceedings, which is often considered one of the most essential of human rights. The 1948 United Nations Declaration on Human Rights provides for habeas

corpus, as does the Geneva Conventions and many international treaties and laws over the centuries. The general practice is to allow the suspension of the right to habeas corpus only in times of national emergency. Even in ancient times, in classical Greece and Rome, early Islamic law, and the later emergence of civil law and common law, the suspension of habeas corpus was highly unusual and reserved for only a most serious emergency, such as foreign invasion or widespread disaster.

The U.S. Constitution of 1789 specifically provides for the right to habeas corpus, and its possible suspension, in the “Suspension Clause” of Article One, Section 9: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Habeas corpus proceedings in the USA are civil, not criminal, in nature, focusing on the violation of civil rights and liberties and the legitimacy of the incarceration. In 28 U.S.C. 2241, Congress has granted habeas corpus statutory jurisdiction power to all federal courts to issue a “writ of habeas corpus” to all governmental authorities: federal, state, local, and territorial. The “Great Writ,” as it is called, is an order using the civil law of equity to produce the body of the detainee in the federal court for a judicial review of the legitimacy of their incarceration, for possible order to release the detainee. The Great Writ has been suspended only four previous times in highly limited geographic areas of the US: in 1863 during the Civil War, against the Ku Klux Klan under the Ku Klux Klan Act of 1871, and with territorial rebellion in Hawaii in 1900 and the Philippines in 1902. The U.S. Supreme Court upheld the power of the President to suspend habeas corpus in specified geographic areas after Congress had determined there was a threat to public safety. But the Court in *Ex parte Milligan*, 71 U.S. 1 (1866) would not allow Lincoln to further require that treasonous civilians be tried in special military courts, unless all federal courts were closed by the national emergency. Even

when habeas corpus was individually suspended for unlawful combatants in World War II (German saboteurs in New Jersey), the Court in *Ex parte Quirin*, 317 U.S. 1 (1942) required an adequate opportunity to review the grounds and conditions of their confinement by a military commission (Rehnquist 2000). The denial of Fifth Amendment due process and other constitutional rights, including the suspension of habeas corpus, makes good sense in dealing with unlawful enemy combatants, as the Court explained in *Johnson v. Eisentrager*, 339 U.S. 763 (1950):

If the Fifth Amendment confers its rights on all the world... [it] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and ‘werewolves’ could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against ‘unreasonable’ searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.

In November 2001, shortly after the 9/11 attacks, then-President Bush proposed “Military Commissions” to try terrorists as unlawful “enemy combatants” against the USA. They would otherwise be “prisoners of war” and entitled to protections of Geneva Conventions, including habeas corpus review and potential release. Since 2002, 779 detainees labeled as “unlawful enemy combatants” have been taken from forty-two countries and sent to the U.S. Naval brig at Guantanamo Bay, Cuba (Wittes and Wyne 2008). By selecting the Guantanamo site, the Bush Administration believed these foreign nationals were being held outside the USA and were further excluded from habeas corpus and other judicial reviews of their captivity. The Red Cross was permitted to prove the detainees were being fed and housed in proper conditions, but the Bush Administration insisted it was not obligated to do this or comply with provisions of the Constitution, Geneva Conventions, U.N. or other treaties. Thus, foreign terrorists could be held in preventive detention indefinitely without charges filed against them, without court hearings or review, and without access to lawyers, families or friends (Smith 2004: 196-200).

However, in June 2004 the U.S. Supreme Court reaffirmed in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that U.S. citizens had a right to seek habeas corpus even when declared unlawful enemy combatants. Rather than prosecute the case further, the government allowed Hamdi to leave the USA for Saudi Arabia. *Rasul v. Bush*, 542 U.S. 466 (2004), applied the same concepts of due process of law to foreign nationals who were secretly held in indefinite preventive detention at Guantanamo.

In response to *Rasul*, the Bush Administration created “Combatant Status Review Tribunals” to determine if foreign detainees were unlawful enemy combatants. The Combatant Status Review Tribunals are criticized for failing to provide a meaningful opportunity to review the grounds for detention, as compared with more complete criminal court procedures of the Military Commissions. For example, detainees are not permitted attorneys, only “personal representative” who must share with the Tribunal anything the detainee may say. Evaluating 393 Tribunal hearings, a team from Seton Hall Law School found that in 96% of cases the government presented only summaries of evidence against the detainees, no witnesses or documents were produced, and no requested witnesses for detainees were granted. In the face of this, detainees said nothing of substance at 30% these Tribunal hearings and the three detainees who were found to be “no longer an enemy combatant” (of 393) were retried until a tribunal found them to be enemy combatants (Cohn 2008b).

In these early Tribunal hearings, it was only through habeas corpus challenges that mistakes in the process were beginning to be corrected. For example, Abu Bakker Qassim, an Uighur from China was held for four years at Guantanamo until habeas corpus review prompted his release, as he later wrote to *The New York Times*:

I was locked up and mistreated for being in the wrong place at the wrong time during America’s war in Afghanistan. Like hundreds of Guantanamo detainees, I was never a

terrorist or a soldier. I was never even on a battlefield. Pakistani bounty hunters sold me and 17 other Uighurs to the United States military like animals for \$5,000 a head. The Americans made a terrible mistake... It was only the country's centuries-old commitment to allowing habeas corpus challenges that put that mistake right - or began to. In May, on the eve of a court hearing in my case, the military relented, and I was sent to Albania along with four other Uighurs... Without my American lawyers and habeas corpus, my situation and that of the other Uighurs would still be a secret. I would be sitting in a metal cage today. Habeas corpus helped me to tell the world that Uighurs are not a threat to the United States or the West, but an ally. Habeas corpus cleared my name - and most important, it let my family know that I was still alive. (Cohn 2007)

In 2005, the Bush Administration responded with the Detainee Treatment Act to these disquieting habeas corpus revelations of military torture, bounty and mistakes. This Act is famous for Senator McCain's "anti-torture" amendment that condemned the torture of detainees in Abu Ghraib and so forth, but it also ended all habeas corpus rights for Guantanamo detainees, except those challenges filed before December 31, 2005 (nearly 200 had pending petitions).

In June 2006, in a 5-3 decision (Chief Justice Roberts recused himself), the U.S. Supreme Court ruled in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that Bush's Military Commissions were not constitutional. The Constitution, Uniform Code of Military Justice, and the Geneva Conventions required greater due process of law to review the detention of unlawful enemy combatants than was afforded in Bush's "Military Commissions." It was a "military commission" in name only, bearing no resemblance to military commissions in the past. The Bush Administration ignored the advice, experience and success of past military commissions, Judge Advocate officers, and consultants such as the National Institute of Military Justice - and instead created a "half-baked system" that was found to be constitutionally deficient (Duignan 2006). Further, the Court rejected the "non-US territory" ploy by the Bush White House to avoid providing a more adequate opportunity to review preventive detention, by housing foreign terrorists at Guantanamo Bay, Cuba. The Court invited Congress to remedy these procedural issues.

The immediate end-run response by the Bush Administration and Congress was passage of the Military Commissions Act in October 2006, ending all habeas corpus rights for all Guantanamo detainees, even those with petitions pending before December 31, 2005 (Bush 2006). Specifically, the Act provided:

...no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination. (119 Stat. 2742, section 1005(e)(1))

Some political commentators speculated that the Act was passed just before the November 2006 mid-term congressional elections to gather more votes for Republican candidates who did not want to appear “soft” on terrorists (e.g., Cohn 2007, 2008b).

On February 20, 2007, in *Boumediene v. Bush*, the U.S. Court of Appeals for the District of Columbia by a 2-1 decision upheld the Military Commissions Act of 2006. They allowed Congress to pass a statute that strips federal judges of all jurisdiction power to review the indefinite preventive detention of foreign unlawful enemy combatants held at the U.S. Military base at Guantanamo Bay, Cuba. Supporters of the Bush Administration quoted lawyers for Guantanamo detainees saying, “You can’t run an interrogation... with attorneys” - that “Gitmo’s guerrilla lawyers” were obstructing our national security by legal technicalities (e.g. Burlingame 2007). But the case has touched off a landslide revolt of criticism of the secret preventive detention of terrorists, including grassroots petitions (e.g., Human Rights Watch 2007) and proposed legislation such as U.S. Representative Jerrold Nadler’s “Habeas Restoration Act” and “Restoring the Constitution Act.” And it now appears the Guantanamo detainee lawyers had been grossly misquoted; the actual full quote read:

The litigation is brutal for them. It’s huge. We have over one hundred lawyers now from big and small firms working to represent these detainees. Every time an attorney goes down there, it makes it that much harder to do what they’re doing. You can’t run an

interrogation and torture camp with attorneys. What are they going to do now that we're getting court orders to get more lawyers down there? Lawyers are down there to interview clients, and statements that are coming out on a weekly basis referring to sexual abuse, religious abuse, the use of dogs. (Ratner 2007)

If left unchecked, the concept of indefinite preventive detention for terrorists could be expanded to also include US citizens who commit any acts of terror, crime, or social deviance. Then Attorney General Alberto Gonzales, in testimony before a U.S. Senate committee hearing on January 17, 2007, spoke that the right to habeas corpus is "one of our most cherished rights," yet he argued that the Constitution does not expressly guarantee a right to a writ of habeas corpus to US citizens, residents, or to foreigners.

The 2007 Court of Appeals Decision

The case of *Boumediene v. Bush*, 476 U.S. F. 3d 981 (CADC 2007), began with many coordinated habeas corpus lawsuits involving 63 aliens being detained as unlawful "enemy combatants" at the U.S. Naval base at Guantanamo Bay, Cuba. All 63 aliens were citizens of nations that were friendly to the USA, including Australia, Bahrain, Canada, France, Kuwait, Libya, Turkey, the United Kingdom, and Yemen. All were seized outside the USA, in Afghanistan, Bosnia and Herzegovina, The Gambia, Pakistan, Thailand, and Zambia. Each insisted that a mistake was made and that they were wrongly classified as an unlawful "enemy combatant."

Fifty-six cases were brought together in 2005 before Judge Joyce Hens Green of the United States District Court for the District of Columbia (*In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (DDC 2005)). Judge Green ruled that all fifty-six detainees had stated valid claims and government procedures declaring them as "enemy combatants" were deficient and violated the due process rights of detainees.

Another seven cases were brought in 2005 before June Richard J. Leon, also of the

United States District Court for the District of Columbia, involving five Algerian-Bosnia citizens, one Algerian citizen with permanent Bosnian residency, and one French citizen seized in Pakistan. The Algerians had been arrested by Bosnia police in 2001 on suspicion of plotting to bomb US and UK embassies in Sarajevo. The Supreme Court of the Federation of Bosnia and Herzegovina ordered the six Algerians released in 2002, but they were seized by U.S. forces and transported to Guantanamo Bay, Cuba. The case of the French citizen, who was seized in Pakistan and sold for bounty to U.S. armed forces, was covered in the decision by Judge Leon concerning the six Algerians (*Khalid v. Bush*, 355 F. Supp. 2d 311, D.D.C. 2005). Judge Leon ruled against the seven detainees and granted the government's motion to dismiss all petitions for writs of habeas corpus.

In their 2-1 decision in *Boumediene v. Bush*, 476 F. 3d 981 (CADC 2007), Judge A. Raymond Randolph filed the opinion for the court, joined by Judge David B. Sentelle. Judge Randolph put the issue narrowly on page 4 of the opinion: "Do federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at the Guantanamo Bay Naval Base in Cuba?" His 21-page typeset opinion responds just as narrowly on page 24: "Federal courts have no jurisdiction in these cases." After deciding that there was no jurisdiction, Judge Randolph refused to further review the merits of the detainees' designation as "enemy combatants" by their Combatant Status Review Tribunals - because the record submitted on appeal had insufficient information for such a review. Instead, Judge Randolph simply vacated all district courts' decisions and dismissed all cases for lack of jurisdiction.

The essence of the Opinion of the court was based in two arguments. First, the Military Commissions Act of 2006 *did* apply to the legal claims of these 63 detainees, even though many

were filed long before the Act was passed into law by Congress in October 2006. Indeed, the Military Commissions Act clearly states that it brought together “all cases, without exception” and Congress should not have to further explain that there were no “exceptions.” Judge Randolph found the language of the Act so clear that he declared on page 10-11, “It is almost as if the proponents of these words were slamming their fists on the table shouting, ‘When we say ‘all,’ we mean all - **without exception!**’”[original emphasis] Thus, the Military Commissions Act stripped all federal courts of jurisdiction for any such habeas corpus review coming out of Guantanamo.

Second, Judge Randolph argued that the Suspension Clause of the U.S. Constitution does not confer rights to aliens held overseas unless the U.S. Congress decides to confer them by statute. On page 18, he summarized many case precedents in saying, “Precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States.” Judge Randolph traced the history of the Great Writ in English and US history, concluding with a quote from *Johnson v. Eisentrager* (1950):

We are cited to no instances where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.” [Judge Randolph, in *Boumediene v. Bush*, 476 F. 3d 981 (CADDC 2007), quoting *Johnson v. Eisentrager*, 339 U.S. 763 (1950), at 768]

Further, Judge Randolph found no legal distinction between the naval base at Guantanamo Bay, Cuba, and the *Eisentrager* prison location in Landsberg, Germany. Both are outside the USA and outside the application of the Suspension Clause. Thus, Judge Randolph concluded on page 20 that the detainees were not protected by the Suspension Clause on habeas corpus because the Guantanamo Bay Naval Base was not within the USA or its territories:

The United States occupies the Guantanamo Bay Naval Base under an indefinite lease it

entered into in 1903. The text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba - not the United States - has sovereignty over Guantanamo Bay.

The dissenting opinion filed by Judge Judith Rogers is much more nuanced and lengthy (thirty-four typeset pages), and forcefully argues the Military Commissions Act of 2006 was unconstitutional under the Suspension Clause of Article one, section 9 of the U.S. Constitution. As often happens, Judge Rogers' eloquent dissenting opinion ultimately "won the day" when it was later used by the U.S. Supreme Court.

The essence of the dissenting opinion was a careful analysis of the Constitution's Suspension Clause, its historical context in common law, contemporary readings in *Rasul v. Bush* (2004) and so forth, and its purpose as a limitation on Congress. First, Judge Roger carefully unwrapped the Founders' meaning in the Suspension Clause, where no textual reference was made to citizens or even persons. This prohibition on suspension of habeas corpus did not appear as an individual right, but within a list of limitations on Congress's powers. It was not about the individual's right to habeas corpus, but all about the limits of Congress in suspending habeas corpus. Indeed, Charles Pinckney's original proposal at the Constitutional Convention of 1787 was to place language about habeas corpus within Article Three on the powers of the national judiciary. But the founders decided to change the habeas corpus proposal and move it to Article One with a long list of other limitations on the power of Congress. Thus, the issue was not about expanding habeas corpus to aliens held overseas, but rather when can Congress suspend the habeas corpus rights it already gives under current statutes to citizens and aliens, both in the USA and overseas. Judge Rogers found that in passing the Military Commissions Act of 2006, Congress didn't make a clear determination of public safety needs in suspending habeas corpus. Suspension of habeas corpus by Congress may have been improper.

Second, and most forcefully, Judge Rogers recited an account of historical precedents not found in the opinion by Judge Randolph. In summary of several historical British precedents, she argued that “...the court can point to no case where an English court has refused to exercise habeas jurisdiction because the enemy being held, while under the control of the Crown, was not within the Crown’s dominions” (12). And she cited US historical precedents in which habeas jurisdiction were granted to non-resident aliens, such as the War of 1812-era case of *U.S. v. Williams*, [unreported] (CCD Va. 4 Dec 1813).

Judge Rogers was most persuasive as she mined the Supreme Court’s decision in *Rasul v. Bush* (2004) to reveal a clear Supreme Court decision to include aliens held overseas within the reach of habeas corpus review by federal courts. Congress had already given statutory power to federal courts to review such habeas corpus proceedings from aliens held overseas, and *Rasul* simply tested if these statutes still applied after the many recent changes after 9/11. Quoting from the *Rasul v. Bush* (542 U.S. 466 (2004), at 481), Judge Rogers argued:

In *Rasul*, the Supreme Court stated that ‘[a]pplication of the habeas statute to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus.’ (*Boumediene v. Bush*, 476 F. 3d 981, at 1007 (CADDC 2007))

Thus, Judge Rogers concluded in her dissent: “...The detainees do not here contend that the Constitution accords them a positive right to the writ but rather that the Suspension Clause restricts Congress’s power to eliminate a preexisting statutory right.” In the end, Judge Rogers simply asked for closure in the 5-year ordeal of interrogation and torture at Guantanamo:

While judgments of military necessity are entitled to deference by the courts and while temporary custody during wartime may be justified in order properly to process those who have been captured, the Executive has had ample opportunity during the past five years during which the detainees have been held at Guantanamo Bay to determine who is being held and for what reason.

Predicting the U.S. Supreme Court Response

The Court of Appeals *Boumediene* decision received an unusual degree of attention from national and international media, with a groundswell of grassroots petitions to Congress, and media debates. Supporters in the *Wall Street Journal* and critics in *The New York Times*, as well as many other media outlets (e.g., “Affirming Military Tribunals” 2007), demanded a quick review of the case by the U.S. Supreme Court. Lawyers for the New York-based Center for Constitutional Rights filed an appeal on behalf of the detainees, asking the Court for expedited consideration. Things slowed down when the Court denied a special expedited consideration of the case on Monday, March 5, 2007 and the appeal continued to the Court’s regular *certiorari* docket, from which the Justice have complete discretion in the selection of about 80 cases per years from over 8,000 petitions. Even still, according to the Court’s published “order list,” at least two Justices (David Souter and Stephen Breyer) would have granted a motion to expedite consideration of a *writ of certiorari*.

On April 2, 2007, the U.S. Supreme Court voted to decline regular *certiorari* review of *Boumediene v. Bush* - at this point. Under the “rule of four,” a case on petition for *certiorari* to the U.S. Supreme Court may be accepted if 4 of the 9 Justice vote to take the case. Justices Antonin Scalia, Clarence Thomas, Samuel Alito, and Chief Justice John Roberts voted to deny the *certiorari* without comment. Three expressly voted to grant *certiorari*; Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg and David Souter - and wrote a short “dissent” from the denial of *certiorari*. Justices John Paul Stevens and Anthony Kennedy filed a separate “statement” which explained that they were denying the *certiorari* on procedural grounds.

The “dissent” from denial of *certiorari* by Justices Breyer, Ginsburg and Souter argued against any further delays or waiting for the pending proceedings under the Detainee Treatment

Act of 2005 or the Military Commissions Act of 2006. The dissenters pointed to the Court's ruling in *Hamdan v. Rumsfeld* (2006) which reviewed the constitutionality of the Detainee Treatment Act of 2005 (DTA) without first "exhausting all administrative remedies." If DTA procedures were unconstitutional, Guantanamo detainees did not have to wait to go through all these inadequate procedures to vindicate their rights. They could immediately obtain a *writ of habeas corpus* for judicial review. Justices Breyer and Souter argued that they would expedite the case, as the Court had done in reviews of "enemy combatants" in *Ex Parte Quirin* (1942).

However, the separate "statement" filed by Justices Stevens and Kennedy argued that the Court should not take jurisdiction over the case before the "exhaustion of available remedies" under the Detainee Treatment Act of 2005 and Military Commissions Act of 2006. But they threatened that if the government engaged in "unreasonably delayed proceedings" or "some other and ongoing injury," then "alternative means exist for us to consider our jurisdiction" and they would immediately review the detainees' cases. Justices Stevens and Kennedy emphasized that their decision not to grant *certiorari* was not an "expression of any opinion on the merits" of the detainees' case.

Yet, it was clear from the Justices' votes that the case had failed to attract the vote of Justice Kennedy. Anthony Kennedy is said to have become the new "O'Connor" - the "swing voter" on the Court in critical 5-4 vote decisions. Justice Stevens would clearly have voted with Justices Breyer, Souter, and Ginsburg to satisfy the "rule of four" and grant *certiorari* in the case. But without Justice Kennedy's vote, they would have lost the decision in the case - an even greater harm to the detainees. Thus, it appeared that Justice Stevens may have shrewdly aligned with Anthony Kennedy to cultivate his vote in the case for a later date. Like a mentor, the senior Justice (age 87 in 2007) wrote the "statement" with Kennedy to ally himself with Kennedy and

hold onto this vote for another day, another review, another close 5-4 vote.

This meant that for the time being that the Guantanamo detainees had no right to file for a *writ of habeas corpus* to challenge their detention or designation as an “enemy combatant.”

Detainees who had not yet been charged war crimes went through a military-only review of their enemy combatant status by DTA procedures. Detainees charged with war crimes went through “military commissions” procedures. All detainees had only the limited right to challenge their detention status or convictions after going through all administrative and military procedures, then appeal to the D.C. Circuit Court of Appeal, with possible review by the U.S. Supreme Court. The process would likely take at least one year and possibly more time.

How did lawyers and social scientists predict the Supreme Court would decide the case? Predictions by lawyers focused on analyses of the probable legal, doctrinal arguments of the Court. Nearly all predictions by the lawyers agreed that the Court would fault the Detainee Treatment Act of 2005 and Military Commissions Act of 2006, because the Court had ruled before that Congress was limited by the Constitution in suspending habeas corpus. Congress has only suspended habeas corpus 4 times before, we were not in a state of invasion or rebellion, and Congress did not make the required finding of an invasion or rebellion (e.g., Cohn 2008b). In addition, other legal doctrines were proffered by lawyers to predict a Court decision in favor the detainees: (a) The Constitution protects the *writ of habeas corpus* as it existed in 1789 “at the absolute minimum” - as cited in numerous precedent cases; (b) the Court in *Rasul v. Bush* rejected the argument that Guantanamo is outside US control and Guantanamo is under federal court authority; (c) the Court in *Rasul v. Bush* distinguished the German inmate in *Johnson v. Eisentrager* (1950) from the detainees in Guantanamo as completely different; and (d) the Combatant Status Review Tribunals simply do not provide a meaningful opportunity to

challenge detention. In the end, the lawyers predicted the detainees would be favored by a 5-4 vote of the Court (e.g., Cohn 2008b).

Some social scientists, such as this author (Chilton 2007, 2009), predicted the same 5-4 vote in 2007, but suggested a more ideological basis. For example, the voting in *Rasul v. Bush* (2004) was used to predict a 5-4 vote for the Guantanamo detainees. *Rasul v. Bush* was not a simple 5-4 vote, but rather a 5-1-3 vote in which Justice Anthony Kennedy sided with the majority, but wrote his own separate opinion. Of the 5 Justices who were the “majority” in *Rasul*, only 4 remained on the Court (Justices Stephen Breyer, Ruth Bader Ginsburg, David Souter, and John Paul Stevens). These 4 were likely to vote together again to support the detainees access to *habeas corpus*. Justices Antonin Scalia and Clarence Thomas voted against *habeas corpus* for the detainees in *Rasul* and were likely to vote again in that way. Chief Justice John Roberts and Justice Samuel Alito were appointees by then-President Bush since the 2004 decision in *Rasul* and were likely to vote with Scalia and Thomas against *habeas corpus* for the detainees. Thus, it all came down to Justice Anthony Kennedy - the “swing” vote on the U.S. Supreme Court after the departure of Justice Sandra Day O’Connor. Social scientists predicted Justice Kennedy would favor *habeas corpus* for the detainees at Guantanamo because he favored the detainees in *Rasul v. Bush* (2004). Justice Kennedy favored the detainees in *Rasul* because the tribunals erected by the Bush Administration were procedurally inadequate. Because there were no improvements in the tribunal proceedings since 2004, social scientists predicted that it was likely that Justice Kennedy would vote with the majority of Stevens, Souter, Ginsburg and Breyer. It was predicted that Justice Kennedy would write a separate opinion to further explain his vote and taking the case after the detainees had “exhausted all available remedies” and presented to the Court a record of these inadequate procedures.

Thus, both lawyers and social scientist predictions agreed to a 5-4 vote by the Supreme Court. Their message to then-President Bush was clear – put some procedural adequacy into the structure of hearings at Guantanamo and or you will lose the Court’s vote!

The Bush Administration seemed cognizant of these predictions of the Court’s vote. Thus, the Justice Department began to withdraw all limitations on the number and contacts of lawyers with detainees in these proceedings (Glaberson 2007). And in his first weeks as Secretary of Defense, Robert M. Gates repeatedly argued to close the detention facility at Guantanamo (Shanker and Sanger 2007). The Bush Administration seemed to cooperate with Senator Diane Feinstein (D-CA) and Representative Jane Harman (D-CA), who introduced bills in 2007 to close the Guantanamo Bay prison. Representative Haman asserted that:

Guantanamo has become a liability. The real and perceived injustices occurring there have given our enemies an easy example of our failure and alleged ill intent. The prison is so widely viewed as illegitimate, so plainly inconsistent with America’s proud legal traditions; it has become a stinging symbol of our tarnished standing abroad. (Leslie Schulman 2007).

The U.S. Supreme Court Decision in *Boumediene v. Bush*

In a rare reversal after initially denying review three months earlier, the U.S. Supreme Court on Friday, June 29, 2007, granted rehearing on a *writ of certiorari* in *Boumediene v. Bush*. It vacated its April 2, 2007, order denying review of the two packets of cases, then granted rehearing, consolidated the cases, called for new briefs, and said they would be heard in a one-hour argument in the new Term starting October 1, 2007. This rare reversal by the Court — from denial to rehearing — may not have occurred since *Hickman v. Taylor*, 329 U.S. 495 (1947). Because the Court’s Rules require five Justices to grant rehearing – compared with the requirement of four votes to grant an appeal – it was clear that Justices Kennedy and Stevens were now on-board with Justices Souter, Ginsburg, and Breyer. Chief Justice Roberts may have

been surprised; in an in-chambers order he issued on an earlier procedural matter in the detainees' cases on April 26, 2007, Roberts opined that "possible court action" in the D.C. Court of Appeals would not be enough to justify a grant of review in the face of the April 2 denial of *Boumediene v. Bush*.

Under the Court's rules, a rehearing is granted only if there has been a change in "intervening circumstances of a substantial or controlling effect" or if counsel can cite "substantial grounds not previously presented." The short new order did not state what changes had come about since the denial in April. The detainees' lawyers, in their rehearing petition, had said that the unfolding of the review process in the D.C. Circuit Court would soon provide them with an argument for rehearing, since the military tribunal processes were clearly inadequate. Lawyers for the detainees had argued in their rehearing petition to the Court that information from inside the Pentagon detainee-review process confirmed their claim that the process was a "sham." The U.S. Court of Appeals for the District of Columbia also felt some added pressure from the order for rehearing, since the U.S. Supreme Court order specifically asked litigants to "consult any decision" in two then-current cases — *Bismullah v. Gates*, 514 F. 3d 1291 (CADDC 2008) and *Parhat v. Gates*, 532 F. 3d 834 (CADDC 2008).

The U.S. Supreme Court scheduled oral arguments for Wednesday, December 5, 2007 - the only case scheduled for that day - and collected briefs. The original Petition for Certiorari presented only two legal issues for *Boumediene*: whether Congress legally stripped federal courts of habeas corpus review in the Military Commissions Act of 2006, and whether habeas corpus review or some hearing on the merits was required in the 5-year imprisonment of the detainees. Merit Briefs on behalf of the detainees (the Petitioners) argued yes - Congress had illegally stripped federal habeas corpus review, and yes - a habeas corpus review or some hearing on the

merits was required. While acknowledging that Congress had the power to strip federal habeas corpus, the Petitioners argued that the Constitution required a hearing very much like habeas corpus review. The Merit Briefs on behalf the Bush Administration argued no - the country benefitted when “democratic means” were used to resolve how to “deal with danger.” The briefs for the government also disputed interpretations of history and case by the Petitioners.

Lawyers for dozens of organizations and individuals filed *Amicus Curiae* briefs in the case by August 2007. In all, twenty-two amicus briefs were filed supporting the detainees, two additional amicus briefs supporting the 15-year-old detainee Omar Khadr, and four amicus briefs supporting the Bush Administration. For example, the amicus brief filed by 383 European parliamentarians argued that the case “boils down to the simple, but crucial question of whether the system of legal norms that purports to restrain the conduct of states vis-à-vis individuals within their power will survive the terrorist threat.” An amicus brief filed on behalf of the bar associations in the fifty-three countries of the British Commonwealth posited that if the case were under British law, “it would be the English courts and not the executive which would be responsible for determining any issue relating to any ‘enemy’ status alleged against the detained persons.” The Cato Institute, a libertarian research organization, urged the Court to “begin with first principles” and view habeas corpus as basic to the separation of powers by its judicial check on executive power. The Juvenile Law Center filed an amicus brief on behalf the 15-year-old detainee, Omar Khadr, and argued that the military commissions had no jurisdiction over children and that international law requires special protection for children caught up in criminal prosecutions. Most surprising was the amicus brief filed by U.S. Senator Arlen Specter (R-PA) who supported the detainees and argued the withdrawal of habeas corpus was “anathema to fundamental liberty interests.” Yet, Specter was chairman of the Senate Judiciary Committee

when the Military Commissions Act of 2006 was passed; he was one of sixty-five senators who voted for it.

Oral arguments before the U.S. Supreme Court began on Wednesday, December 5, 2007, at 10:01am and ended at 11:24am, twenty-three minutes beyond the usual one hour oral argument. It was the only oral argument scheduled for that day. Appearing for Petitioner Boumediene, and arguing on behalf of all Petitioners, was Seth P. Waxman. The attorney of record for Petitioner Al Odah was Thomas B. Wilner, however, attorney Wilner made no oral arguments or responses. Appearing for Respondents Bush and the United States was then-US Soliciter General Paul D. Clement. While the oral argument went back and forth on the nature of an “adequate substitute for habeas corpus” under the Military Commissions Act of 2006, Justice Ginsburg repeatedly made the point of the majority on the Court: “You don’t need an adequate substitute for habeas because you have no right to habeas” under this habeas-stripping law. The repeated arguments left the impression that a majority of the Court did not believe habeas may be stripped, after all. The “swing vote” by Justice Kennedy was telling when he sarcastically completed Soliciter General Paul Clement’s argument urging that the Court affirm and uphold the 2006 Act:

GENERAL CLEMENT: With respect if you win - if we win, you still write an opinion saying that we win, and that opinion can still say everything...

JUSTICE KENNEDY: Our opinion says have a nice day, everybody.
(Laughter). (The Oyez Project 2009)

What happened at the U.S. Supreme Court Conference on the Merits following the Oral Arguments is of confidential record at this point. But we may surmise the vote from the five votes for rehearing that obviously did not include Chief Justice Roberts. And since Chief Justice Roberts was not among the majority, under Court Rules he could not assign the official Opinion of the Court. Since Justice Stevens was the senior Associate Justice with the majority and had the

role of assignment, we can surmise that it was Justice Stevens who assigned to Justice Kennedy the writing of the official Opinion of the Court. His role of a senior mentor to Justice Kennedy, thus, played out to the end in an official Opinion of the Court in *Boumediene v. Bush*.

The official opinion by Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer, posited that the constitutional right to habeas corpus review applied to all persons held in Guantanamo, even those designated as “enemy combatants” on that territory of the US government. Congress may suspend the right to habeas corpus review, but must design an “adequate substitute” that offers the prisoner a meaningful opportunity to demonstrate that he is held in error of application or interpretation of law, that the reviewing decision-makers must have the ability to correct this error, assess the sufficiency of the government’s evidence, and to consider exculpatory evidence. The Opinion of the Court ruled that the Petitioners had proven their argument that the Detainee Treatment Act of 2005 failed to provide an adequate substitute for habeas corpus.

Over twenty pages of Justice Kennedy’s Opinion of the Court analyzes the history of habeas corpus, from its English roots in the due process clause of the Magna Carta of 1215 through twentieth-century U.S. For example, though under control of the English crown, who also held the crown of Scotland, the writ did not apply in Scotland, but this was because Scotland retained its unique legal system even after union with England in 1707. By contrast, English habeas corpus review did apply to Ireland, which was nominally a sovereign country in the 18th century, because Ireland was under *de facto* English control and shared the English legal system. Concentrating on the application of habeas corpus to aliens and in territories outside its borders but under US control from 1789 to after World War II, Justice Kennedy’s opinion developed a thesis that Guantanamo was like the Channel Islands, where the writ did apply.

The Opinion of the Court also rejected the Bush Administration's comparison of the habeas corpus suspension under the Military Commission Act of 2006 (MCA) to the limitations on habeas corpus by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Court had upheld the limitations of habeas corpus review of "trivial" litigation under the AEDPA. But the Opinion of the Court explained that the AEDPA was not a complete suspension of habeas corpus review, such as a procedural limitation on the number of successive habeas corpus petitions a prisoner can file, mandating a one-year time limit for filing habeas corpus that begins when the inmate's judgment and sentence become final, and so forth. More important, the AEDPA applies to inmates who have been tried in open, public hearings with sentences upheld on direct appeals within the court system. By contrast, the MCA completely suspended habeas corpus review for detainees who have never had an open, public hearing or appeal or even the reading of the charges against them.

Justice Kennedy, in the Opinion of the Court, found the Combatant Status Review Tribunals to be "inadequate" and unconstitutional. Still responding to his sparring with Solicitor General Clements at Oral Argument, Justice Kennedy explained that "to hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, 'say what the law is.'" Yet, the Opinion of the Court narrowly struck down only section 7 of the MCA of 2006 as unconstitutional, and left intact the Detainee Treatment Act of 2005.

A separate concurring opinion by Justice Souter, joined by Justice Ginsburg and Breyer, stressed the fact that the detainees had been imprisoned for as long as six years without even a hearing as to the charges against them, and posited this as "a factor insufficiently appreciated by the dissents." He argued that dissenters were thus wrong in their argument that the Court's

majority “is precipitating the judiciary into reviewing claims that the military could handle within some reasonable period of time.” The MCA of 2006 had eliminated the right to habeas corpus jurisdiction and had climaxed the issue to a head “...so that now there must be constitutionally based jurisdiction or none at all.” Citing the Court’s decision in *Rasul v. Bush* (2004), Justice Souter concluded that “[a]pplication of the habeas statute to persons detained at [Guantanamo] is consistent with the historical reach of the writ of habeas corpus.”

A dissenting opinion by Chief Justice Roberts, joined by Justice Scalia, Thomas and Alito, argued for deference to democratically-accountable representatives: “[t]he majority merely replaces a review system designed by the people’s representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.” He implied it was moot as to whether or not the detainees had any rights against the suspension of habeas corpus review by Congress; even if they did, their rights were not violated anyway. While Chief Justice Roberts’ practical, plain reading of the case law was impressive, it was obviously not enough to win over the swing vote of Justice Kennedy.

The dissenting opinion by Justice Scalia, joined by the Chief Justice and Justices Thomas and Alito, was blistering by contrast, beginning with the declaration: “Today, for the first time in our Nation’s history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war.” He goes on to condemn the majority of the Court for “[t]he game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed.” Justice Scalia spars with the history of habeas corpus recited in

the Opinion of the Court, arguing that the Court's majority "admits that it cannot determine whether the writ historically extended to aliens held abroad, and it concedes that Guantanamo Bay lies outside the sovereign territory of the United States." Scalia points to the case of *Johnson v. Eisentrager* (1950), where the Court decided there was no US court jurisdiction over German war criminals held in a US-administered German prison, as evidence "...held beyond any doubt - that the Constitution does not ensure habeas corpus for aliens held by the United States in areas over which our Government is not sovereign." Further, Justice Scalia found no basis in the text and history of the Suspension Clause to provide a basis for the Court's jurisdiction in the case. In the end, Justice Scalia prophetically concludes: "The Nation will live to regret what the Court has done today."

The impact of *Boumediene v. Bush* was underscored by extensive media and scholarly discussions of this landmark decision. Numerous critics have cited the prophetic lines of Justice Scalia and added many of their own criticisms. Senator John McCain, as the Republican candidate for President, called it "one of the worst decisions in the history of this country." Professor Ellis Washington summed up Kennedy's opinion: "He could have written this... by using these three simple words - *F - - - the Framers!*" (Washington 2008). By contrast, critics of the Bush Administration who supported the Court's decision in *Boumediene* have urged that we "prosecute the lawyers too" for war crimes and use of torture (e.g., Cohn 2008a). Professor Ronald Dworkin urged that "...[w]e will... gain back some of the national honor that the cowardly decision to imprison without charges anyone who might conceivably threaten us or might conceivably have information useful to us has cost" (Dworkin 2008). Professor David Schultz and others have blamed these excesses upon the inner circle of Presidential advisors that have grown increasingly isolated from judicial checks (e.g., Schultz 2008). Library of Congress

scholar Louis Fisher simply called for the reminder that “such violations of freedom have been with us throughout history - and continue to threaten the Constitution and rights that it protects” (Fisher 2008). Although the Bush Administration decided to keep Guantanamo open (Myers 2008) and a Pentagon study concluded that Guantanamo meets the rules of the Geneva Conventions (Glaberson 2009a), on January 22, 2009, President Barak Obama issued a directive to shut down Guantanamo within a year, and ordered the CIA to shut down what remained of its network of secret prisons (Mazzitti and Glaberson 2009).

After *Boumediene* was decided, extensive follow-up investigations of the 143 detainees who remained within Guantanamo (of 779 who passed through that facility) by Benjamin Wittes and Zaahira Wyne concluded that “In contrast to our analysis of the government’s allegations, our analysis of detainee statements shows little evidence of a concentration of the most dangerous detainees resulting from the dwindling of the Guantanamo population” (Wittes and Wyne 2008). The U.S. Court of Appeals for the District of Columbia in *Parhat v. Gates* (CADC 2008) slammed the reliability of US government intelligence documents, saying just because officials keep repeating their assertions that the detainees were terrorists does not make it true; the three-judge panel likened the Bush Administration’s case to a line in an 1876 nonsense poem by Lewis Carroll, “I have said it thrice: What I tell you three times is true.” The US government dropped allegations against many detainees, such as 6 Bosnian-Algerians held at Guantanamo since January 2002, abandoning their claim that they were planning to bomb the US Embassy in Sarajevo in 2001, even though then-President Bush had specifically mentioned it in the 2002 State of the Union address (WilmerHall 2009). And in November 2008, Lakhdar Boumediene, the Algerian who is the namesake of *Boumediene v. Bush*, was among 23 detainees declared in court not to be an enemy of the United States and ordered by a judge to be free. Yet he is still

held in a less restrictive cell at Guantanamo as of this writing (November 2009) and his lawyers seek help from President Barak Obama. Stephen Oleskey, one of his lawyers said, “It’s very hard to explain how they could be free men and still be imprisoned” (Glaberson 2009b).

Comparative Preemption Policy

The inadequacy of hearings for detainees at Guantanamo may have cost the Bush Administration dearly in terms of the loss of support by the U.S. Supreme Court, as well as in the court of public opinion (e.g., Cohn, 2008b). Justice Scalia may be correct in his assertion that the greatest cost to be borne from the facts of *Boumediene v Bush* may be in terms of human life and security fears. However, critics assert that this cost in terms of human life and security fears may not be from the release of detainees, as Justice Scalia fears – but from the shame and rebuke these inadequate justice policies have marked upon the USA for all the world to scorn (e.g. Cohn 2008b). The Christian New Testament expresses, “I was in prison and you visited me” (Matthew 25:36, NRSV). At least 26 detainees secretly died while in custody at Guantanamo, without even visit from a judge or Justice, and the Pentagon admitted that at least six deaths were caused by official torture (Shawl 2005). Critics have asserted that the cost to human life is that this “Torture breeds terror” (“Torture Breed Terror” 2006). Intelligence assessments indicate that Al Qaeda Chiefs operating out of Pakistan have amassed power and recruited operatives based on the response to the secret detentions at Guantanamo and other alleged secret CIA prisons (Mazzetti and Rhode 2007). US authorities seem split over strategies to deal with the resurgence of Al Qaeda. In the light of comparative examples of justice policies in dealing with terrorism, the USA strategy of preemptive detention may have added to our problems with terrorism.

For example, Turkey’s response to give a full, open, and very public trial for the 2003

“Jihad bombers” stands in contrast with the secretive USA preventive detention strategy at Guantanamo. After a very expensive and sometimes delayed trial followed around the world, seven defendants received life sentences for truck bombings that ripped through central Istanbul in November 2003, killing fifty-eight and injuring hundreds of persons (King 2007). In stark contrast with US practices, the Turkish government trusted their open, public procedure in which seventy-four suspects were charged, twenty-seven were acquitted, and six Turks were given life sentences (Erdem 2007; “Editorial: Torture Trials” 2007). Like the US, the Turkish people did not previously believe that terrorism by Islamic Jihadists would come to their lands. The world media followed the hearings as one Islamic Jihadist defiantly refused to address the judge in a Turkish courtroom, shouting, “I performed Jihad and killed Americans! Why should I stand up in front of you?” (“Verbatim: Louai Al-Sakka” 2006). But the trials have ushered a new discussion of the meaning of “jihad” in the *Qu’ran* and of dissidents within Turkish politics, society, the family, and economy (Erdem 2007). This may suggest the positive value of open discussion that flows from open, public trial procedures - even involving enemy combatants.

Open, public deliberation and debate also may suggest a large-scale society-wide educational strategy, such as Greg Mortenson’s mission to promote peace by building schools in Afghanistan (Mortenson and Relin 2006) or The Hadith Project. The Hadith Project in Ankara, Turkey, published in 2008 the first collection interpreting all 170,000 known variations of the hadiths of the Prophet within their historical contexts. This mainstream Muslim work critiques misquotes and out-of-context usage in propaganda by billionaire radical Osama bin Laden and others. For example, hadiths on Jihad (meaning "strive" or "struggle") call upon Muslims to strive in the way of Allah. Jihad hadiths are often used by Al-Qaeda to justify attacks on non-Muslims. The Hadith Project has been persuasive in a critique of Al-Qaeda radicalism that is

building within the heart of the mainstream Muslim world (“The Struggle” 2008). Thus, Saudi scholar Sheif Salman al-Oudah, long-revered by Al-Qaeda leader Osama bin Laden, recently decried in 2008: "Brother Osama, how much blood has been spilt? How many innocents among children, elderly, the weak and women have been killed and made homeless in the name of Al-Qaeda?" (Dickey and Matthews 2008; Feldman 2008). However, critics of Turkey’s governing Justice and Development Party (AKP) label such public deliberations and freedoms as “Islamist” and link them to secret government wiretaps that secular Turks should avoid (Baran 2008).

Canada’s Supreme Court took an approach similar to the U.S. Supreme Court in *Boumediene v. Bush* (2008) in a 9-0 decision striking down a law that allowed the Canadian government to detain foreign-born terrorism suspects indefinitely using secret evidence and without charges while their deportation was reviewed. In *Charkaoui v. Canada*, decided February 23, 2007, Canadian Supreme Court Chief Justice Beverley McLachlin wrote, “The overarching principle of fundamental justice that applies here is this: before the state can detain people for significant period of time, it must accord them a fair judicial process.” The defendant, Adil Charkaoui, summed up the stark contrast between the Canadian court and the *Boumediene* decision by the U.S. Court of Appeals: “The Supreme Court, by 9 to 0, has said no to Guantanamo North in Canada” (Austen 2007).

Other comparative courts are beginning to challenge the orthodoxy of preemption and of indefinite preventive detention in dealing with terrorists. For example, Britain’s high appellate court in the House of Lords ruled in December 2005 by an 8-1 decision that indefinite detention and torture of terrorist suspects violated basic human rights in *A and Others v. Secretary of State of the Home Department*, [2005] UKHL 71 (8 Dec 2005).

However, preemptive detention strategies continue to hold the attention of many in

power. For example, on June 15, 2008, the *Independent*, an English newspaper, printed allegations that the British military held at least 2 Iraqis in custody without charge or access to lawyers for 5 years at a British army base at Basra airport in Iraq. Both Iraqis were supposedly involved in the deaths of 2 British soldiers (Verkiak 2008). Since 9/11, various practices of indefinite detention of suspected terrorists have been reported in India, Israel, Russia, and Spain (Guiora 2007). About the same time as the U.S. Supreme Court decision in *Boumediene v. Bush* (2008), the Israel Supreme Court upheld a controversial law, “The Incarceration of Unlawful Combatants Law,” allowing the Israeli government to detain unlawful combatants suspected of belonging to terrorist groups. The law allows the Chief of General Staff to issue an order to detain any person who is reasonably suspected of direct or indirect participation in “hostile acts against the State of Israel, or [who] is a member of a force perpetrating hostile acts against the State of Israel.” The law applies to any person not qualifying as a prisoner of war under the Third Geneva Convention of 1949. Suspects may be held indefinitely. However, judicial review of detentions under the law are required every 6 months. The Israel Supreme Court reasoned that the law’s infringement upon personal rights was justified by its goal of limiting acts of terrorism against Israel (Gilmore 2008).

Conclusion

The U.S. Supreme Court has clearly condemned the use of preventive detention as presented in *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229 (2008). Yet, Alan Dershowitz argues even still that leading democracies have failed as of yet to develop an adequate jurisprudence to balance the needs for global security expressed by preemptive detention, against adequate human rights in the adjudication of terrorist suspects. And Chief Justice John Roberts,

in his Dissenting Opinion in *Boumediene v. Bush* (2008), echoes a similar critique that the U.S. Supreme Court has failed to develop an adequate jurisprudence of preventive detention. Thus, spokespersons from both sides of the controversy over preventive detention point to the inadequacies of our “shapeless procedures” and lack of a just policy.

This casenote legal analysis of *Boumediene v. Bush* (2008) is limited like all case studies in generalizability and policy application, and as such cannot offer the systematic justice theory of preventive detention as sought by Dershowitz or Chief Justice Roberts. However, this case study of *Boumediene* may prove of value in directing our attention to at least one direction out of the endgame of a highly cynical vision of society as the mere clashing of ideological mania. The litigation details in this case study suggest, indeed, that certain interests may have given themselves over to a nightmarish Nietzschean vision of life and relegated themselves to the slavish use of actuarial, predictive, preemptive strategies to attempt to control others – without the light of public deliberation. But this landmark case decision and comparative cases suggest a more adequate justice policy with greater emphasis and appreciation for human rights and a broader, more hopeful vision of society in which moral values may be clarified and shared through open political deliberation to a much greater degree. As presented in this case study, the actuality of these language discourses by common, ordinary people – as well as the authoritative legal processes and institutions by which we define and resolve these disputes – point to the value of such a public, deliberative approach. And we may be the better for it.

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