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Northern Illinois University College of Law  
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**Guantánamo in the Supreme Court:  
Welcome Back, Welcome Back, Welcome Back**

Marc Falkoff

Some of us eagerly peruse the Supreme Court's case list the way a baseball fan scours his team's schedule when it's first announced over the winter. *Look, they're playing the Yankees in August – we've got to get tickets!* We treat the Supreme Court like a spectator sport, scouting out our favorite issues months before they're argued. Sure, we know intellectually that a tax case or an admiralty matter might end up being unexpectedly gripping, and we can pretty much bet that Justice Scalia will draft a concurring or dissenting opinion with a nice zinger or two in even the dullest of FTCA disputes. But still, we look for those cases that make you want to buy a cheap plane ticket to D.C. to catch the oral argument, or at least leave you hoping the Court will allow C-SPAN to broadcast the proceeding's audiotapes soon after the Solicitor General wraps up his rebuttal.

This Term, like most, the Court's docket is full of tasty cases, including an Eighth Amendment challenge to execution by lethal injection (in *Baze v. Rees*), a First Amendment test of a federal law criminalizing "virtual" child pornography (in *United States v. Williams*), and – of all things – a Second Amendment attack on the District of Columbia's gun laws (in *District of Columbia v. Heller*). Woe to the poor clerks who get stuck drafting bench memos for *Kentucky Dep't of Revenue v. Davis*, a Dormant Commerce Clause case that only a true law geek could love.

But standing out on the Court's docket this Term is one veritable, hands-down, no-doubt-about-it blockbuster. *Boumediene v. Bush* is the latest of the Guantánamo detainee cases to make it to our nation's highest court, and it will be the third time that the Justices take a metaphorical tour of Guantánamo in order to sort out some fundamental issues concerning our country's dedication to the rule of law in the age of terror. Whichever way the Justices rule in *Boumediene*, no one doubts that the Court's opinion will be front page news when it's issued sometime this spring or early summer, or that it will quickly find its way into the casebooks and remain there for decades. (Full disclosure – and trust me, you'll need it – I am counsel for twelve of the sixty-odd petitioners in this case, and I was on the briefs submitted to the Court.)

What's the issue in *Boumediene*? In simplest terms, the case is a challenge to the constitutionality of the Military Commissions Act, a statute in which Congress stripped the federal courts of the power to hear habeas corpus petitions that were filed years ago by prisoners at Guantánamo. None of these petitioners have been convicted of anything, and none have even been charged with a crime. In fact, the Pentagon has made it clear that most of these men never *will* be charged with anything.

The petitioners in *Boumediene* are just some of the 275 men who remain at Guantánamo. Since the naval base opened for business as a prison camp in our war on terror in January 2002, approximately 775 Muslim men have been detained there. These are the men whom the current administration has famously called “the worst of the worst” – men who, according to Gen. Richard Myers, Chairman of the Joint Chiefs of Staff, “would gnaw through hydraulic lines in the back of a C-17 to bring it down.” Vice President Cheney has told us that these are “people we picked up on the battlefield,

primarily in Afghanistan. They're terrorists. They're bomb makers. They're facilitators of terror. They're members of Al Qaeda and the Taliban."

Of course, if the population of Guantánamo had really been made up of 775 radical-Islamic variations on Hannibal Lecter, one wonders why our government would release 500 of them to their home countries, where almost all now live in freedom. It is more reasonable, I would suggest, to believe that the administration's rhetoric is somewhat overheated and alarmist.

But you don't have to take my word for it. The Seton Hall Law School analyzed all of the documents concerning Guantánamo detainees that were released by the Pentagon pursuant to a Freedom of Information Act lawsuit. The Seton Hall folks ignored everything that we habeas lawyers or our clients had to say, and instead focused solely on the military's own papers. What they found was that, contrary to Vice President Cheney's repeated assertions that these prisoners were picked up on the battlefield trying to kill U.S. troops, in fact only 5% of the prisoners were taken into custody on a battlefield. Fully 86% of the Guantánamo prisoners were captured by Pakistani security forces at the border of Afghanistan, before being turned over to the Americans at a time when we were offering bounties of \$5000 a head for suspected Taliban and Al Qaeda members. In fact, according to the military's documents, only 8% of the detainees are even *accused* of being Al Qaeda fighters.

One more piece of background information: Unlike in previous conflicts, our troops did not hold field hearings (required by Article 5 of the Geneva Conventions and Army Regulation 190-8) to determine whether persons who were wearing civilian dress when captured were in fact enemy soldiers (which itself would be a heinous violation of

the rules of war) or instead were actual civilians (as they appeared to be). There's a reason that unethical combatants dress as civilians – because sometimes *civilians* also dress like civilians. During the first Gulf War, we held 1196 such field hearings, and we determined that 886 detainees – fully 74% – were in fact civilians. No such hearings occurred during the Afghan conflict.

I highlight these numbers simply to give you a sense of what the stakes are in the *Boumediene* litigation. Scores of men claiming to be innocent teachers, aid workers or students have been held in Guantánamo for more than six years. But, as of today, not a single one has been granted a hearing before a judge where he could contest the legality of his detention.

More than three years ago, in June 2004, the Supreme Court addressed the plight of these prisoners for the first time. In *Rasul v. Bush*, the Court held that the federal courts *did* have jurisdiction to hear habeas corpus claims brought by the Guantánamo detainees, and that their allegations – “[that] although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing” – unquestionably described custody in violation of the Constitution.

In the aftermath of *Rasul*, lawyers (including me) filed habeas petitions for those prisoners whose names we knew. Immediately, the administration asked the federal courts to dismiss them all, arguing that even though the courts might have statutory jurisdiction over the case (as per *Rasul*), nonetheless the prisoners did not have any

constitutional rights (because they were “enemy combatants” held outside of “sovereign” U.S. territory) and therefore their detention was *per se* legal.

Three years ago last week, on January 31, 2005, the judge before whom these cases were consolidated denied the government’s motion to dismiss, holding that the prisoners *are* entitled to fundamental protections of the Constitution and that they therefore were entitled to habeas hearings. The government was allowed to appeal the order on an interlocutory basis, which the court of appeals sat on for nearly a year without deciding the case, while our clients waiting in their steel cells for their day in court. Then, in December 2005, Congress passed the Detainee Treatment Act, which withdrew the power of the federal courts to hear habeas petitions from Guantánamo detainees.

That set the stage for the first return of the Guantánamo cases to the Supreme Court. This time, in *Hamdan v. Rumsfeld*, the Court held that Congress’s jurisdiction-stripping statute was not meant to apply to Guantánamo prisoners who had *already* filed habeas petitions. Recognizing that the habeas right was fundamental to the rule of law, the Court refused to infer that Congress would take so momentous a step as to retroactively strip this right from the detainees absent clearer language of its intent. After *Hamdan*, we waited for the court of appeals to decide the government’s pending appeal so that we could proceed with our habeas hearings. We waited, and we waited.

Then, in the waning days of Republican control, Congress passed the Military Commissions Act, this time making it as clear as day that it intended the habeas right to be stripped retroactively. In short order, the court of appeals dismissed our habeas cases for lack of jurisdiction.

We sought certiorari from the Supreme Court and were initially denied the opportunity to return one last time. In a “statement” respecting the denial of cert, Justices Stevens and Kennedy explained that, although the case was of profound importance, Congress had provided an alternative remedy to habeas corpus – direct review in the court of appeals, limited to the sole question of whether the military had followed its own procedures when it determined that the Guantánamo detainees were “enemy combatants.” Exhaust that remedy, we were told, and then come back if you think it was an inadequate substitute for habeas.

This was a stunning setback for us, because we knew that, notwithstanding the self-evident inadequacy of the DTA process, it would be literally years before we could exhaust a procedure that had been made up out of whole cloth by Congress. It was going to be no easy task for an appellate court to come up with procedures for adversarial testing of a non-adversarial military status tribunal, as the “combatant status review tribunals” were.

At the military’s review tribunals, which were convened more than three years after the detainees were first taken into custody, the men were for the first time informed of the accusations against them and were allowed to speak in their defense. But they were not made privy to the classified evidence that the military claimed supported the enemy combatancy determination, and they were not allowed the assistance of a lawyer even if, like my clients, they already had a lawyer. Instead they were provided with a personal representative – a military officer who was supposed to explain the hearing process and “assist” the detainee. But this personal representative had no confidential or privileged relationship with the prisoner, and by regulation was obliged to report to his

superiors any intelligence he learned from his charge. In addition, if an officer was otherwise qualified to be a personal representative, he was nonetheless forbidden by regulation from serving in that role if he also happened to be a lawyer.

Given rules like this, as well as a presumption that all of the government's evidence was true and that the detainee *was* an "enemy combatant," it's not surprising to find tribunal transcripts that read like a cross between Kafka and an Abbott-and-Costello routine. Here's just a snippet from the tribunal of one of my clients:

Detainee: Regarding [the charge that] I worked at various guesthouses and offices. What was the work?

Tribunal President: I cannot answer that. This is the first time we have seen this evidence. I know nothing more than what is written here.

Detainee: The same with me. I don't know anything about this.... Regarding [the charge that I was] frequently seen at Usama Bin Ladin's side. Who saw me?

Tribunal President: I do not know.

Detainee: If it says, was frequently seen, you have to prove that. I am aware of the laws and the courts.... Regarding, also, the detainee attended various other training camps and resided at a Kandahar, Afghanistan guesthouse. What training camps?

Tribunal President: Did you attend any training camps while you were in Afghanistan?

Detainee: Never.

Tribunal President: Then that answers the question.

Detainee: That I resided at a Kandahar guesthouse. This guesthouse, do you mean my house, was my house a guesthouse?

Tribunal President: I would assume so.

Detainee: If it was my house then of course I was there. But, if it is another person's guesthouse, then no.



Another detainee was found to be an enemy combatant based on the discovery of his “alias” on the hard drive of a computer owned by someone who was suspected of having an association with Al Qaeda. The detainee told his tribunal that he didn’t have any aliases, and asked what the alias was. The answer was that the information was classified and could not be shared with him. “Well, where was the computer, whose was it?” Again, the answer was that the information was classified. “When was this?” The answer, “Can’t tell you.”

We might have had to wait years before we could present transcripts like this to the Supreme Court in order to convince them that a court of appeals rubber stamp of procedures that resulted in hearings like these was an inadequate substitute for habeas corpus, the Great Writ of Liberty. But then we got lucky. Lt. Col. Stephen Abraham, who sat on several of these status tribunals, drafted a declaration exposing the kangaroo-court nature of the proceedings. He explained, among other things, that even when a tribunal reached a determination that a prisoner was *not* an enemy combatant, the panel was often commanded by superiors to perform a “do-over.”

After we submitted Abraham’s declaration to the Supreme Court as part of a motion for reconsideration of the denial of cert in *Boumediene*, a nearly unprecedented event occurred: The Court granted the reconsideration motion and reversed its denial of certiorari, agreeing to hear our case. No one can remember the last time the Court reversed itself in this manner.

Oral argument in *Boumediene* took place on December 5. The petitioners, including my clients, have argued that by passing the Military Commissions Act, Congress has unconstitutionally suspended the writ of habeas corpus – something that the

Suspension Clause allows Congress to do only “when in Cases of Rebellion or Invasion the public Safety may require it.” This argument requires us to persuade the Court (1) that the Guantánamo detainees are “protected” by the Suspension Clause and have a constitutional right to the fundamental protections of the writ of habeas corpus, and (2) that the alternative review procedure that Congress set up in the Detainee Treatment Act is neither an adequate nor an effective substitute for true habeas corpus review. The government’s response is (1) that the Guantánamo detainees are entitled to no constitutional protections because they are non-citizens held outside of sovereign U.S. territory, and (2) that even if they are entitled to the protections of the writ, the appeals court review of the combatant status review tribunals is an adequate substitute for habeas.

The stakes in this case are large. If the Court holds that the Constitution does not apply at Guantánamo – a territory over which the United States exercises exclusive jurisdiction and control – then the Guantánamo detainees are truly being held in a legal black hole, where there is *no* law to protect them. (The same would probably not be true, for example, at our detentions centers in Iraq or Afghanistan, where local law remains operative, at least in the background. At Guantánamo, neither Cuban nor Spanish nor any other law applies besides U.S. law.) On the other hand, if the Court holds that the Guantánamo detainees *may* pursue their habeas claims, potentially U.S. detainees around the globe would likewise be entitled to access to our federal courts.

Whether that would be a good thing or bad thing remains to be seen. I’ve got my opinions ... but that will have to wait until after we learn what the Court does in

*Boumediene.*