Closing the Loop on Guantanamo

Scott Sullivan*
Joshua Colangelo-Bryan†

I. INTRODUCTION

At the time it was decided, the United States Supreme Court's opinion in *Boumediene v. Bush* was considered an instant classic. At long last, the Court's repeated engagement with Guantanamo could end. This sense of relief was reinforced by the election of Barack Obama to the presidency in November 2008. The promise of that moment appears to have been lost. *Boumediene* has yet to fulfill the expansive confines staked out by its holding and instead has been held hostage by its ambiguities and the reluctance of elected officials to resolve the still simmering debate over detention policy. This symposium piece provides a brief statement asserting that the core holdings of *Boumediene* should

* Assistant Professor of Law, LSU Law Center.
† Senior Attorney, Dorsey & Whitney LLP. The authors wish to thank Jonathan Montcalm of Dorsey & Whitney LLP for his excellent assistance in the preparation of this symposium Article.

be viewed through the lens of the robust judicial power that animated its outcome.

II. THE LONG WIND-UP TO *BOUMEDIENE*

By now, the chronology is well known. Following the terrorist attacks of September 11, 2001, the United States initiated a military campaign against the Taliban and al-Qaeda in Afghanistan. Anticipating that scores of high-level Taliban and al-Qaeda operatives would be captured, the United States elected to create a detention center at the U.S. Naval Base in Guantanamo Bay, Cuba, where such individuals could be interrogated beyond prying eyes (and the reach of U.S. courts). The first detainees were brought to Guantanamo in January 2002.[1] They were not charged with crimes. Rather, they were to be held indefinitely and without any process as "enemy combatants."[2]

In February 2002, the first habeas corpus petition on behalf of Guantanamo detainees was filed in the U.S. District Court for the District of Columbia. The petitioners challenged the legality of their detention,[3] in the process raising fundamental constitutional and statutory questions regarding the availability of the writ itself, and implicating important issues of executive power and national security. The government moved to dismiss this petition and another filed shortly thereafter, arguing that U.S. courts had no jurisdiction over claims brought by enemy aliens held outside the United States.[4]

Ultimately, the Supreme Court ruled on these issues in *Rasul v. Bush*, holding that U.S. district courts had jurisdiction to hear the detainees' habeas cases under the federal habeas corpus statute, 28 U.S.C. § 2241.[5] In a companion case, *Hamdi v. Rumsfeld*, the Court ruled that a U.S. citizen could be detained as an enemy combatant

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1. *Guantanamo Bay Timeline*, WASH. POST, http://projects.washingtonpost.com/guantanamo/timeline/ (last visited Oct. 4, 2010) (outlining major events related to the decision to hold prisoners at the military base, including the arrival of the first 20 detainees).

2. *See* Memorandum from William J. Haynes II, Gen. Counsel of the Dep't of Def., for the Members of the Am. Soc'y of Int'l Law—Council on Foreign Relations Roundtable (Dec. 12, 2002), *available at* http://www.cfr.org/publication/5312/enemy_combatants.html (laying out the legal and factual framework establishing the government designation of "enemy combatant" to detainees).

3. *Guantanamo Bay Timeline*, *supra* note 1. In truth, the detainees in whose names the petition was brought were being held incommunicado at Guantanamo and did not even know that this petition, authorized by their family members, had been made. *See* Jerry Seper, *High Court To Hear Guantanamo Detainees' Case*, WASH. TIMES, Nov. 11, 2003, at A2 (noting that detainees "had not been permitted to talk with counsel and were unaware of the lawsuits").

4. Rasul v. Bush, 215 F. Supp. 2d 55, 61 (D.D.C. 2002).

5. Rasul v. Bush, 542 U.S. 466, 481 (2004).

pursuant to the Authorization for Use of Military Force (AUMF)[6] that Congress had passed shortly after September 11, 2001 and which authorized the President to use all "necessary and appropriate force" to prevent those who planned or aided the attacks of September 11 from attacking the United States again.[7] However, the Court made clear that a U.S. citizen in such circumstances was entitled to due process and described, in general terms, the required elements of that process.[8]

These decisions marked the opening volley of a battle between the Supreme Court and Congress over executive detention authority. In response to *Rasul*, Congress passed the Detainee Treatment Act of 2005 (DTA).[9] The DTA stripped federal courts of jurisdiction over habeas petitions filed by Guantanamo detainees, while simultaneously creating a highly circumscribed procedure by which detainees could seek review of their detention in the United States Court of Appeals for the District of Columbia Circuit.[10] Thereafter, the government argued that the DTA was of retroactive effect—even though the statute's plain terms suggested otherwise—and that all pending Guantanamo habeas cases should be dismissed.[11] In *Hamdan v. Rumsfeld*, a case largely concerned with military trials at Guantanamo, the Supreme Court held that the DTA did not apply retroactively.[12] Congress, in turn, passed the Military Commissions Act of 2006 (MCA), which again stripped federal courts of habeas jurisdiction, but this time in explicitly retroactive terms.[13]

III. THE SUPREME COURT'S DECISION IN *BOUMEDIENE*

The MCA set the stage for the Court's decision in *Boumediene v. Bush*, which required it to decide whether Guantanamo detainees had a "constitutional privilege of habeas corpus" such that the MCA's habeas-strip was unconstitutional pursuant to the Suspension Clause.[14] To answer that question, the Court embarked on a thorough analysis of both the history of the writ itself, including English common law, and its own precedent concerning the extraterritorial application of the Constitution.

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6. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
7. 542 U.S. 507, 518 (2004).
8. *Id.* at 533-35.
9. Pub. L. No. 109-148, 119 Stat. 2680, 2739 (2005).
10. *Id.* § 1005(e).
11. Hamdan v. Rumsfeld, 548 U.S. 557, 574-75 (2006).
12. *Id.* at 583-84.
13. Pub. L. No. 109-366, § 7, 120 Stat. 2600 (2006) (codified at 28 U.S.C. § 2241(e)(1) (2006)).
14. 553 U.S. 723, 732 (2008); U.S. CONST. art. I, § 9, cl. 2 ("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.").

The Court found that "a common thread" holding together its precedent was "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[15] According to the Court, such factors included: "(1) the citizenship and the status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[16]

After examining these factors in the context of Guantanamo, the Court concluded that the detainees were entitled to seek the writ and to invoke the protections of the Suspension Clause despite their status as enemy combatants and their location.[17] As such, if Congress were to suspend habeas, it would have to "act in accordance with the requirements of the Suspension Clause,"[18] meaning that an adequate and effective substitute for habeas review would have to be provided.[19] After analyzing the Court of Appeals' review process provided for in the DTA,[20] the Court found it not to pass constitutional muster.[21] As such, the Court held that the MCA's habeas-stripping provisions were unconstitutional and ineffective.

IV. LIFE AFTER *BOUMEDIENE*

A. Guantanamo Litigation

Because *Boumediene* was decided on narrow procedural grounds, lower courts have been tasked with defining the contours of the merits hearings on the Guantanamo detainees' habeas petitions, including the standard by which the legality of detentions is to be assessed, burdens of proof, and remedies if the writ is issued. The conclusions reached by district court judges on these issues have diverged at times although there is relative agreement on a number of broad themes.

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15. 553 U.S. at 764.
16. *Id.* at 766.
17. *Id.* at 771.
18. *Id.* (citing Hamdi v. Rumsfeld, 542 U.S. 507, 564 (2004) (Scalia, J., dissenting)).
19. *See id.*
20. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(A), 119 Stat. 2680, 2742 (2005).
21. *See Boumediene*, 553 U.S. at 774-79, 786-92 (contrasting procedures in section 1005(e) of the DTA with procedures provided for in the federal habeas corpus statute and in statutes at issue in Swain v. Pressley, 430 U.S. 372 (1977), and United States v. Hayman, 342 U.S. 205 (1952)).

For example, courts have not always agreed on the scope of the detention standard to be applied in individual cases,[22] but they have reached a general consensus that the Executive has the authority to detain any individuals who were proven to be "part of" the Taliban or al-Qaeda. One oft-quoted test for determining whether a detainee was "part of" one of these organizations is whether "the individual functions or participates within or under the command structure of the organization—i.e., whether he receives and executes orders or directions."[23] Regardless of the standard employed by the lower courts, there is agreement that the government has to make the requisite showing by a preponderance of the evidence.[24]

The issue of remedy has arisen with some frequency given that, as of October 2010, courts had issued the writ to thirty-eight of fifty-seven detainees whose cases had been heard (a percentage that lends credibility to those who have argued that Guantanamo contains many people who had no business being detained).[25] In *Boumediene*, the Court stated that "the habeas court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted."[26] Nonetheless, the question has arisen whether courts have the power to order release upon granting a writ, given that U.S. courts cannot order a foreign country to open its doors to a vindicated petitioner. For that reason, many of the courts granting habeas petitions have not ordered release outright, but rather have directed the government to "take all necessary and appropriate diplomatic steps to facilitate . . . release."[27]

The D.C. Circuit waded into these issues, which implicate thorny questions regarding separation of powers, and the proper roles of the Executive and the judiciary in national security matters. In *Kiyemba v. Obama* (*Kiyemba I*), seventeen Chinese citizens, whom the government had already determined were not enemy combatants, moved for an order that would compel their release into the United States, given that they

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22. Compare cases favoring "substantially support" and those that did not adopt that standard. *Compare* Hamlily v. Obama, 616 F. Supp. 2d 63, 75-77 (D.D.C. 2009), *with* Gherebi v. Obama, 609 F. Supp. 2d 43, 71 (D.D.C. 2009).

23. *See, e.g.*, *Hamlily*, 616 F. Supp. 2d at 75; *Gherebi*, 609 F. Supp. 2d at 71.

24. *See, e.g.*, El Gharani v. Bush, 593 F. Supp. 2d 144, 146 (D.D.C. 2009); Al Ginco v. Obama, 626 F. Supp. 2d 123, 126 (D.D.C. 2009).

25. *Court Orders Rethink on Tortured Guantánamo Prisoner's Successful Habeas Petition*, ANDY WORTHINGTON, Sept. 11, 2010, http://www.andyworthington.co.uk/2010/11/09/court-orders-rethink-on-torutred-guantanamo-prisoners-successful-habeas-petition/.

26. *Boumediene*, 553 U.S. at 779.

27. *See, e.g.*, *El Gharani*, 593 F. Supp. 2d at 149; *Al Ginco*, 626 F. Supp. 2d at 130.

feared torture or execution if they were returned to China.[28] At the fervent urging of the Government, the D.C. Circuit reversed a district court order directing that the petitioners be brought to the court.[29] The D.C. Circuit held that there was no authorization in any law that would allow the "district court to set aside the decision of the Executive Branch and to order the[] aliens brought to the United States and released in Washington, D.C."[30]

The court gave a brief history of the exclusive right of the Executive to make determinations on whom to admit and not admit within its borders. It looked to precedent for its analytical framework that no court can "review the determination of the political branch of the Government to exclude a given alien" without express authorization by law.[31] Turning to possible avenues of such express authorization—including due process, the maxim *ubi jus, ibi remeduium* (where there is a right there is a remedy), the fact that the district court had jurisdiction over the habeas petition, and a basic fairness argument—the court ultimately determined that none of these bases was sufficient to allow the district court to override the political branch's determination regarding these aliens.[32]

Similar issues were raised in *Kiyemba v. Obama* (*Kiyemba II*). There, the issue was whether district courts were empowered to require the government to provide thirty days' notice to both the court and counsel before transferring detainees from Guantanamo Bay.[33] After first holding that the district court did, in fact, have jurisdiction over the petitioners' claims even though those claims related to what the government called "ancillary" habeas corpus rights, the court found that habeas corpus was not available to bar the transfer of the detainees based upon a likelihood that the detainees may be tortured in the recipient country.[34] Citing the Supreme Court's decision in *Munaf v. Geren*,[35] the D.C. Circuit held that the "district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee."[36]

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28. 555 F.3d 1022, 1023-24 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010), *modified on reh'g*, 605 F.3d 1046 (D.C. Cir. 2010) (noting that five of the petitioners had rejected offers of resettlement and were still being held at Guantanamo Bay, the court granted the government's motion to reinstate the judgment and reinstated their original opinion).

29. *Id.* at 1032.

30. *Id.* at 1026-29.

31. *Id.* at 1025-26 (internal quotation marks omitted).

32. *Id.* at 1026-29.

33. 561 F.3d 509, 511 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010).

34. *Id.* at 512-14.

35. 553 U.S. 674, 702 (2008).

36. *Kiyemba II*, 561 F.3d at 514.

Given these decisions, the most critical issues with respect to the Guantanamo litigation remain open even after *Boumediene*. In particular, can a court order the release of an individual it has found, in essence, to be innocent or can it do no more than issue an advisory opinion that grants the writ and pleads with the government to effect a release? Further, when there is credible evidence that an individual could be subjected to torture or worse in a country to which the United States plans to send the individual, does a habeas court properly seized with jurisdiction have any means to prevent the transfer?

B. Extra-Guantanamo Litigation

It remains to be seen whether *Boumediene* ultimately will be applied to U.S. detention centers outside of Guantanamo Bay. *Boumediene*, of course, was somewhat fact specific and relied in part on the unusual de facto sovereignty exercised by the U.S. in Guantanamo. Indeed, the Court cited this reality as one reason why the Guantanamo detainees were differently situated from those in *Johnson v. Eisentrager*, in which the Court had held that habeas jurisdiction did not extend to nonresident enemy aliens detained in a German prison operated by the Allied Powers after World War II.[37]

Nonetheless, one judge in the D.C. District Court found *Boumediene* to be controlling in the affirmative as to the question of whether certain individuals detained at the Bagram Air Force Base (operated by the United States in Afghanistan) were entitled to bring habeas petitions.[38] Not surprisingly perhaps given its serial hostility to the claims of detainees, the D.C. Circuit reversed in *Al Maqaleh v. Gates* (*Al Maqaleh II*).[39] There the court purported to examine the factors outlined in *Boumediene* for determining the reach of the Suspension Clause, and concluded that the "practical obstacles inherent in resolving the prisoner's entitlement to the writ" were decidedly in favor of the United States' position that the Suspension Clause should not be available in Bagram.[40] In particular, the court noted the fact that the war was still ongoing in Afghanistan, and that the United States does not exercise the same type of sovereignty over Bagram Air Force Base as it does over Guantanamo Bay.[41]

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37. 339 U.S. 763, 780-81 (1950).

38. Al Maqaleh v. Gates (*Al Maqaleh I*), 604 F. Supp. 2d 205, 235 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

39. Al Maqaleh v. Gates (*Al Maqaleh II*), 605 F.3d 84, 99 (D.C. Cir. 2010).

40. *Id.* at 95-97 (internal quotation marks omitted).

41. *Id.* at 97-98.

Any appeal of this decision would be heard by a Supreme Court that includes Elena Kagan. Justice Kagan was counsel for the government in *Al Maqaleh II* as Solicitor General and, therefore, would presumably recuse herself from hearing the case now.[42] Considering that there are four justices whose votes against the Bagram detainees are a certainty in all but the most metaphysical sense, there is no reason to believe that *Al Maqaleh II* will be disturbed any time soon. As such, there may be little in the way of extra-Guantanamo application of *Boumediene* during the foreseeable future.

V. THE (NOT SO) NEW WORLD OF DETENTION LAW

The extensive chronology of Guantanamo detention litigation, broken into its component parts, disguises the significance of *Boumediene* relative to the Court's decisions that preceded it. The crucial distinction between *Boumediene* and its predecessors, at its essence, is two-fold: the legal basis of the Court's holding and an unmistakable subtext that the Court was no longer content with resolution by the nation's political branches.

The decisions in *Hamdan*, *Hamdi*, and *Rasul* were premised on statutory, rather than constitutional interpretation. The statutory approach pitched the dispute over detention policy as a separation of powers tension between the President and Congress. The threshold question in *Boumediene* was constitutional and not statutory—either the Suspension Clause could be used to challenge the government's detention policy or it could not. In contrast to a statutory holding, a finding of constitutional infirmity renders a course of action per se unlawful, rather than simply politically difficult. As such, decisions like *Hamdan* had been characterized as "democracy-forcing" rather than categorical judicially invoked prohibitions.[43] Thus, the Supreme Court's position as the arbiter of constitutional meaning transformed the fundamental separation of powers issue from one between the political branches into one pitting the ability (and willingness) of the judiciary to affirmatively invalidate political branch action on grounds that the political branches are incapable of resolving. This movement by the Court inexorably changed the nature of the separation of powers issues from one between the political branches into a necessary (if somewhat

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42. Michael Doyle, *Court: Bagram Prisoners Don't Have Guantanamo Habeas Rights*, MCCLATCHY, May 21, 2010, http://www.mcclatchydc.com/2010/05/21/94620/court-bagram-prisoners-dont-have-html.

43. Jack M. Balkin, *Hamdan as a Democracy-Forcing Decision*, BALKINIZATION (June 29, 2006, 1:07 PM), http://balkin.blogspot.com/2006/06/hamdan-as-democracy-forcing-decision. html.

reluctant) commentary regarding the judicial position in determinations potentially impacting national security.

The Court's repeated appointment with detention policy and frequent insistence on statutory interpretation betrays the tension between a long-standing position of deference in national security questions and an obvious discomfort with national security policies that unmistakably rolled back protections many legal scholars considered implicit in the rights-based revolution within constitutional doctrine over the past several decades. The *Boumediene* decision attempts to bridge this divide with ambitious action coupled with language of restraint. Interpreting this disconnect has, to date, largely been left to the lower courts. That stasis will have to change.

A. Boumediene*'s Ambitiousness and Restraint*

Historically, the Supreme Court has deferred to the political branches on questions involving foreign relations generally and national security specifically. Within this deferential posture, the positions of the executive branch have been granted exceptional weight. The Supreme Court's deference in World War II era cases like *Johnson v. Eisentrager*[44] and *Ex Parte Quirin*[45] formed the foundation of the Bush Administration's legal position as the litigation over detention began to unfold in the early 2000s. In fact, it is almost impossible to imagine Guantanamo without the broad, deferential decisions by the judiciary of that earlier era.

Conventional academic wisdom has posited that the judiciary's deferential posture was animated by the import of such questions to the nation's survival and the institutional advantages enjoyed by the political branches, especially the President, in questions of foreign relations. This exercise of judicial deference has frequently been characterized as a demonstration of judicial modesty.

The normative desirability and impetus behind such deference has been debated by academics for several years.[46] Whatever the wisdom or motivating animus, *Boumediene* represents a judicial willingness to

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44. 339 U.S. 763, 789-91 (1950).

45. *See* 317 U.S. 1, 19-21 (1942).

46. This exercise of judicial deference has frequently been characterized as demonstration of judicial modesty. This claim has been persuasively questioned by Professor Jack Goldsmith, who has characterized judicial decision making in foreign affairs matters as an exercise of a "foreign relations effects test." Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COL. L. REV. 1395, 1395-97 (1999). Under Goldsmith's analysis judges defer when they view the effects on foreign relations as substantial, but eschew deference when they believe such effects to be marginal. If true, such independent determinations by the judiciary are difficult to categorize as acts of judicial "modesty." *Id.* at 1410-24.

carve a solid foothold into questions invoking foreign affairs and national security. For the first time, the Supreme Court reversed presidential actions that the executive branch had energetically defended as fundamental to its prosecution of national security policy, while that challenged policy remained in force. This is likely to give pause to the next administration that contemplates gross unilateral expansion of its own power.

While the Court's repudiation of the Bush Administration's detention policy marked a robust stake for the judiciary in national security policy, its stated path to that outcome suggests a distinct fear of institutional overreach in three easily discernible ways—the absence of hallmarks, an excessive reliance on procedural over substantive law, and the inherent tension between its rhetoric and its result regarding deference.

Given the practical import of its decision, the Court's opinion provides precious little guidance for lower court implementation. Teed up for consideration, but either left inexplicably vague or unexpressed altogether, were fundamental issues running the spectrum of detention, including the threshold question of Suspension Clause applicability and the question of whether the judiciary possesses the power to order a detainee's release contrary to an executive branch demand.

On one level, a minimalist intervention in the consequentialist oriented policy realm of national security is understandable and laudable. Over the past few decades the Court has consistently embraced a limited exercise of its power to nullify law in favor of a variety of interpretive canons intended to force increased legislative clarity and in recognition of democratic prerogatives of law.[47] These judicial predispositions, coupled with the entrenched doctrine of deferring to political branch directives in foreign affairs and national security not only make the Court's opinion understandable but also perhaps prudent. Unfortunately, the fundamental rationale for such judicial minimalism is largely inapplicable in determining appropriate detention law and lawful detention policy.

Remand to the lower courts to enable the slow marination endemic to the common law system is typical and appropriate when underlying policy choices do not cause significant harm to the parties at interest. The creation of a clearly lawful and fair detention policy in combating

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47. Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 786 n.18 (2009) (citing Karl Llewellyn for the long-standing assertion that canons of interpretation often point in varying directions, thus often undermining congressional purposes).

terrorism does not represent the type of legal exercise in which the slow machinations of judicial experimentation are wise, however. In these circumstances, the Court's reticence hinders the development of, and pragmatic reliance upon, a doctrine of how and when the lower courts should exercise the judiciary's power in matters of foreign affairs and has, by all appearances, failed to enable the current presidential administration from plotting a safe policy course for future detentions.

B. Standards of Uncertainty

As noted above, the detention policy at Guantanamo Bay has been in effect for years and had been the subject of multiple Supreme Court cases that have yet to provide certainty. There can be little doubt that Justice Kennedy's opinion in *Boumediene* betrayed a judicial frustration that the political branches had not incorporated the Court's decisions in *Rasul* and *Hamdan* in a manner that steered more decisively toward protecting individual rights. Specifically, the Court's repudiation of the government's argument that the detentions at Guantanamo were completely ungoverned by the Constitution as a threshold matter was manifestly doomed by the Court's dicta in *Rasul*, which offered that the breadth of the statutory right to habeas corpus at question in that case would logically extend to the constitutional scope of the writ.[48] However, just as *Boumediene* represents a case made necessary by previous decisions' limited holdings, *Boumediene* was bound to perpetuate uncertainty, given the amorphous standards it created and its judicial silence on certain points.

1. When Does the Suspension Clause Attach?

In the end, *Boumediene* answered the system's most exigent constitutional question, but created new universes of ambiguity in two ways. First, it failed to provide a standard of Suspension Clause applicability in a manner that could be readily applied to other emerging detention regimes. Second, it ignored the constellation of issues that inevitably flowed from definitively granting habeas rights to detained parties at Guantanamo.

Boumediene failed to reach either of two obvious conclusions that would have created clear rules for future decisions—that individuals held extraterritorially by the U.S. government possess habeas rights under the Suspension Clause or they do not. In so doing, the Court necessarily

48. Boumediene v. Bush, 553 U.S. 723, 734 (2008).

moved into the unstable realm of the "balancing test." Unfortunately, the balancing test embraced by the Court relies upon factors that themselves are ambiguously determined or questionable in their relevance. Under *Boumediene* three elements are to be considered in balancing whether the Suspension Clause is applicable: (1) the detainee's citizenship and status, and the appropriateness of the process by which that status attached; (2) the situs of capture and, subsequently, detention; and (3) the practical considerations inherent to determining a detainee's entitlement to the writ.[49]

These factors are individually and collectively ambiguous. Individually, each relies upon subjective judgments in which reasonable minds could disagree despite being presented with identical facts. The appropriateness of the process may invoke a sustained individualized analysis of procedural safeguards offered, but is sharply limited by endless variations of status determinations and their consequences. Presumably the Suspension Clause more likely applies when the site of capture is not a battlefield. This may be sensible if the battlefield in question is conventional in nature, as at that point the other instruments of law, such as the Geneva Conventions, are more likely to apply.[50] However, Guantanamo gained its fame precisely because individuals at or near areas of low-level conflict, the contemporary "battlefield," were not granted access to legal regimes such as the Conventions.[51] Moreover, the situs of detention not only possesses substantial ambiguity, but questionable relevance. Under international law, national forces that capture individuals they believe to be dangerous are required to remove those detainees away from the zones of danger.[52] It is unclear on its face why detention of an individual in a safe zone in Afghanistan would militate against applying the Suspension Clause, while the detention of the same individual at a U.S. military base in Germany, for example, would not. Finally, the Court's reference to practical considerations tells us nothing as to what specific considerations are relevant, what weight to give different such considerations, or whether any deference should be afforded to the government's assertions as to such considerations.

In a collective sense, the *Boumediene* test offers no guidance as to how the three factors should be weighed for final determination. The

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49. *Id.* at 766.

50. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

51. *See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 108-20 (2004).

52. Geneva Convention III, *supra* note 50, art. 19.

absence of such guidance exacerbates the uncertainty of the individual factors by creating a macro subjective judgment that, presumably, is enabled by micro subjective judgments. This was ably demonstrated in *Al Maqaleh*, the D.C. Circuit's decision examining whether the *Boumediene* Suspension Clause standard would entitle those held at the Bagram Air Force base in Afghanistan to habeas rights.[53] In *Al Maqaleh*, the Court held that the citizenship/status, situs of capture, and other detention factors outlined in *Boumediene* weighed in favor of Suspension Clause application.[54] Despite this, the Court held that the practical considerations prong of the test weighed prohibitively in favor of precluding the application of the Suspension Clause.[55] The fact that the Court's position on this matter was not obvious on its face is demonstrated by the fact that in the same case the U.S. District Court had reached the opposite conclusion with apparently equal confidence.[56]

2. What Is the Judiciary's Power in Ordering Release?

The protections embedded in habeas proceedings are entirely dependent upon the judicial power to order the release of someone unlawfully detained by the government. At the time *Boumediene* was argued and decided, the government appeared unwilling to argue, and the Court unlikely to decide, that a grant of habeas to detainees might not encompass the power of the judiciary to order release. As a result, it is ironic that a decision issued by the Supreme Court on the same day as *Boumediene* has posed the greatest obstacle to judicially ordered release of detainees found unlawfully held. The Court in *Munaf* held that a U.S. court sitting in habeas could not prevent the transfer of two Americans being held legally by the U.S. military in Iraq to Iraqi authorities.[57] This holding was interpreted by the D.C. Circuit to mean that the judiciary was not empowered to "second-guess" government determinations of the transfer (or release) of detainees from Guantanamo.

C. The Future of Boumediene*—Resolving Power and Deference*

The *Boumediene* majority decision based its holding on a structural view of separation of powers without relying on a structural determination of Suspension Clause rights. As such, resolving the

53. *Al Maqaleh II*, 605 F.3d 84, 93-99 (D.C. Cir. 2010).
54. *Id.* at 94-97.
55. *Id.* at 99.
56. *Id.* at 97.
57. Munaf v. Geren, 553 U.S. 674, 705 (2008).

tension between *Boumediene*'s deferential rhetoric and its nondeferential ruling is, at its core, not about allowing judicial experimentation, but rather about more clearly defining judicial power in an area where such power has historically been comparatively weak.

The overarching theme of *Boumediene* is not found in questions of citizenship, status, situs, and asserted practicalities. None of those factors meaningfully resulted in the Court stepping away from deference doctrines and toward a more muscular view of judicial power in areas of national security. As a precedent, the crucial holding in *Boumediene* derived from the Court's willingness to exercise judicial power to rein in political branch national security actions as a matter of constitutional doctrine. While not utilizing the clear structural rules available in interpreting the Suspension Clause, the Court embraced a larger structural Constitution that "ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the delicate balance of governance that is itself the surest safeguard of liberty."[58] Under this reading, deference to the political branches as to release or applicability of the writ becomes fundamentally contrary to the responsibility held by the judicial branch as an independent branch of government.

In order for *Boumediene* to take its proper place as one of the substantial Court decisions of this era, it is necessary for judges and policy makers to understand its fundamental holding as more than the sum of its parts. To date, the Obama Administration has failed to heed this lesson, scrutinizing facts rather than the larger dimensions of the exercise of government power.

VI. CONCLUSION

In *Boumediene* the Court takes a significant step away from deferring its role in areas of national security. The Court left implementation of its decision to the lower courts. To date, policy makers have allowed the lower courts to resolve the logistical ambiguities in *Boumediene*'s murky standards and silences. Instead, both policymakers and lower court judges should take up the task of looking beyond ambiguities in order to understand the decision in a manner consistent with the decision's unmistakably forward-looking view in order to create legal and policy certainty for the future.

58. Boumediene v. Bush, 553 U.S. 723 (2008) (internal quotation marks omitted).