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Guantánamo detainees have constitutional right to habeas corpus: Supreme Court Checks and Balances in Boumediene

By Prof. Marjorie Cohn
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After the Supreme Court handed down its long-awaited opinion, upholding habeas corpus rights for the Guantánamo detainees, I was invited to appear on The O'Reilly Factor with guest host Laura Ingraham. Although she is a lawyer and former law clerk for Justice Clarence Thomas, Ingraham has no use for our judicial branch of government, noting that the justices are "unelected." Indeed, she advocated that Bush break the law and disregard the Court's decision in Boumediene v. Bush:

"Marjorie, I was trying to think to myself, look, if I were President Bush, and I had heard that this case had come down, and I'm out of office in a few months. My ratings, my popularity ratings are pretty low, I would have said at this point, that's very interesting that the court decided this, but I'm not going to respect the decision of the court because my job is to keep this country safe."

What did the Court decide that so incensed Ingraham (who has just been rewarded for her "fair and balanced" views with her own show on Fox News)? Will this decision really imperil our safety? And will Boumediene become an issue in the presidential election?

The Supreme Court held in a 5-4 ruling that the Guantánamo detainees have a constitutional right to habeas corpus, and that the scheme for reviewing 'enemy combatant' designations under the Combatant Status Review Tribunals is an inadequate substitute for habeas corpus, a result I predicted in a December 3, 2007 article.

(http://marjoriecohn.com/2007/12/guantnamo-detainees-fate-at-stake-in.html).

Guantánamo detainees have constitutional right to habeas corpus

Article 1, Section 9, Clause 2 of the Constitution is known as the Suspension Clause. It reads, "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." In section 7(a) of the Military Commissions Act of 2006, Congress purported to strip habeas rights from the Guantánamo detainees by amending the habeas corpus statute (28 U.S.C.A. § 2241(e)). In Boumediene, the Court held that section of the Act to be unconstitutional, declaring that the detainees still retained the constitutional right to habeas corpus.

Justice Kennedy, writing for the majority, reiterated the Court's finding in Rasul v. Bush that although Cuba retains technical sovereignty over Guantánamo, the United States exercises complete jurisdiction and control over its naval base and thus the Constitution protects the

detainees there. Kennedy rejected "the necessary implication" of Bush's position that the political branches could "govern without legal restraint" by locating a U.S. military base in a country that retained formal sovereignty over the area. In his dissent, Chief Justice Roberts flippantly characterized Guantánamo as a "jurisdictionally quirky outpost."

Kennedy worried that the political branches could "have the power to switch the Constitution on or off at will" which "would lead to a regime in which they, not this Court, say 'what the law is.'" "Even when the United States acts outside its borders," Kennedy wrote, "its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'"

Thus, Kennedy observed, "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers." Indeed, habeas corpus was one of the few individual rights the Founding Fathers wrote it into the original Constitution, years before they enacted the Bill of Rights.

"The test for determining the scope of [the habeas corpus] provision," Kennedy wrote, "must not be subject to manipulation by those whose power it is designed to restrain." It is such manipulation that Laura Ingraham would perpetuate. It was a Republican-controlled Congress, working hand-in-glove with Bush, that tried to strip habeas corpus rights from the Guantánamo detainees in the Military Commissions Act. The Supreme Court has determined that effort to be unconstitutional. Fulfilling its constitutional duty to check and balance the other two branches, the Court has carried out its mandate to interpret the Constitution and say "what the law is."

No adequate substitute for habeas corpus

Finding that the Guantánamo detainees retained the constitutional right to habeas corpus, the Court turned to the issue of whether there was an adequate substitute for habeas review. Bush established Combatant Status Review Tribunals ("CSRTs") to determine whether a detainee is an "enemy combatant." These kangaroo courts provide no right to counsel, only a "personal representative," who owes no duty of confidentiality to his client and often doesn't even advocate on behalf of the detainee; one even argued the government's case. The detainee doesn't have the right to see much of the evidence against him and is very limited in the evidence he can present.

The CSRTs have been criticized by military participants in the process. Lt. Col. Stephen Abraham, a veteran of U.S. intelligence, said they often relied on "generic" evidence and were set up to rubber-stamp the "enemy combatant" designation. When he sat as a judge in one of the tribunals, Abraham and the other two judges – a colonel and a major in the Air Force – "found the information presented to lack substance" and noted that statements presented as factual "lacked even the most fundamental earmarks of objectively credible evidence." After they determined there was "no factual basis" to conclude the detainee was an enemy combatant, the government pressured them to change their conclusion but they refused. Abraham was never assigned to another CSRT panel. It is widely believed that Abraham's affidavit about the shortcomings of the CSRT's in Boumediene's companion case caused the Supreme Court to reverse its denial of certiorari and agree to review Boumediene. This was the first time in 60 years the Court had so reversed itself.

While the Court declined to decide whether the CSRTs satisfied due process standards, it

concluded that “even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal’s findings of fact.” The Court then had to determine whether the procedure for judicial review of the CSRTs’ “enemy combatant” designations constituted an adequate substitute for habeas corpus review.

“For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context,” Kennedy wrote, “the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government’s evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.”

But in the Detainee Treatment Act (“DTA”), Congress limited district court review of the CSRT determinations to whether the CSRT complied with its own procedures. The district court had no authority to hear newly discovered evidence or make a finding that the detainee was improperly designated as an enemy combatant.

The Supreme Court noted that “when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release.” Since the DTA’s scheme for reviewing determinations of the CSRTs did not afford this authority, the Court held it was not an adequate substitute for habeas corpus and thus section 7 of the Military Commissions Act acted as “an unconstitutional suspension of the writ.”

Boumediene will not imperil the United States

In his dissent, Justice Scalia sounded the alarm that the Boumediene decision “will almost certainly cause more Americans to be killed.” Likewise, the Wall St. Journal editorialized, “We can say with confident horror that more Americans are likely to die as a result.” Their predictions, however, are not based in fact.

Lakhdar Boumediene and five other Algerian detainees from Bosnia were accused of threatening to blow up an embassy in Bosnia . The Supreme Court of Bosnia and Herzegovina concluded there was no evidence to continue to detain them and ordered them released. The Bosnian officials turned them over to the United States and they were transported to Guantánamo, where they have languished since 2002.

Many of the men and boys at Guantánamo were sold as bounty to the U.S. military by the Northern Alliance or warlords for $5,000 a head. Indeed, Maj. Gen. Jay Hood, the former commander at Guantánamo, admitted to the Wall St. Journal, “Sometimes we just didn’t get the right folks,” but innocent men remain detained there because “[n]obody wants to be the one to sign the release papers . . . there’s no muscle in the system.”

The Boumediene decision will not directly impact the criminal cases against Khalid Sheikh Mohammed and the few others who will be tried in the military commissions. It is the 211 men who have filed habeas corpus petitions challenging their “enemy combatant” designations who will benefit from this ruling. No one will be automatically released. They will simply be afforded a fair hearing. Most Americans would not object to a requirement that our government fairly prove someone guilty before we imprison him indefinitely.

Even Justice Jackson, the chief prosecutor at Nuremberg , advocated due process for the Nazi leaders. “The ultimate principle,” he said, “is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty.” Jackson understood the importance of the presumption of innocence in our system of law.

Kennedy quoted Alexander Hamilton, who wrote in Federalist 84 that “arbitrary imprisonments have been, in all ages, the favorite and most formidable instruments of tyranny.” Justice Souter cut to the chase in his separate opinion, citing “the length of the disputed imprisonments, some of the prisoners represented here today having been locked up for six years.” None of them has been charged with a crime and none has been brought before a fair and impartial judge.

“The laws and Constitution are designed to survive, and remain in force, in extraordinary times.” Kennedy wrote. ” Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.”

> “Security subsists, too, in fidelity to freedom’s first principles,” according to Kennedy. “Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers … Within the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.”

In responding to Laura Ingraham’s false dichotomy between keeping us safe and protecting habeas corpus, I cited Benjamin Franklin’s admonition: “They who would give up an essential liberty for temporary security, deserve neither liberty or security.”

Attacking judges under guise of national security

The Boumediene decision split along political lines with the four so-called liberal justices – Ginsburg, Stevens, Souter and Breyer – in the majority, and the four conservative justices – Scalia, Thomas, Roberts and Alito – in the dissent. Kennedy, the swing vote, broke the tie. Curt Levy from the Committee for Justice, which seeks to pack the courts with right-wing judges, blogged that Boumediene has “teed up the Supreme Court issue nicely for the G.O.P.”

Indeed, John McCain has already seized upon it as a campaign issue. The day the opinion came out, McCain said, “It obviously concerns me . . . but it is a decision the Supreme Court has made. Now we need to move forward. As you know, I always favored closing of Guantánamo Bay and I still think that we ought to do that.” By the next day, McCain had changed his tune. “The Supreme Court yesterday rendered a decision which I think is one of the worst decisions in the history of this country,” he declared. McCain, who hopes to overcome the unpopularity of his positions on the war and the economy, will make national security the centerpiece of his campaign.

Barack Obama, who links our national security with how other nations view us, characterized the Boumediene decision as “an important step toward re-establishing our credibility as a nation committed to the rule of law, and rejecting a false choice between fighting terrorism and respecting habeas corpus.”

It is very likely that the next president will make at least one nomination, and probably two, to the Supreme Court. Boumediene is the poster child for how delicately the Court is now balanced, and the disastrous consequences to the doctrine of separation-of-powers that await us if a President McCain makes good on his promise to appoint judges in the mold of Roberts and Alito.

Marjorie Cohn is a professor at Thomas Jefferson School of Law and president of the National Lawyers Guild. (organizations shown for identification purposes only; the views expressed in this article are solely those of the writer; she is not acting on behalf of these organizations). Cohn is the author of Cowboy Republic : Six Ways the Bush Gang Has Defied the Law.

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