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United States, Habeas Corpus for Guantánamo Detainees

I. Supreme Court, *Rasul v. Bush*

N.B. As per the disclaimer [1]**, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: Shafiq Rasul, et al., Petitioners 03-334 v. George W. Bush, President of the United States, et al., 542 U.S. 466 (2004), Appeal, Columbia Circuit, June 28, 2004, available on http://www.supremecourt.gov [2]]

[**N.B.**: To facilitate understanding the order of paragraphs has been modified.]

SUPREME COURT OF THE UNITED STATES

Nos. 03-334 and 03-343

SHAFIQ RASUL, *ET AL.*, PETITIONERS 03-334

v. GEORGE W. BUSH,

PRESIDENT OF THE UNITED STATES, *ET AL.*

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *ET AL.*,

PETITIONERS 03-343

v. UNITED STATES *ET AL.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 28, 2004]

JUSTICE STEVENS delivered the opinion of the Court

These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba. [...]

Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban. Since early 2002, the U.S. military has held them – along with, according to the Government's estimate, approximately 640 other non-Americans captured abroad – at the Naval Base at Guantanamo Bay. [...]

In 2002, petitioners, through relatives acting as their next friends, filed various actions in the U.S. District Court for the District of Columbia challenging the legality of their

detention at the Base. All alleged that none of the petitioners has ever been a combatant against the United States or has ever engaged in any terrorist acts. They also alleged that none has been charged with any wrong-doing, permitted to consult with counsel, or provided access to the courts or any other tribunal. [...]

Petitioners in these cases differ from the Eisentrager detainees [**See** United States, Johnson v. Eisentrager [3]] in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrong-doing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control. [...]

Syllabus [...]

Held: United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. [...]

> (a) The District Court has jurisdiction to hear petitioners' *habeas* challenges under 28 U.S.C. para. 2241, which authorizes district courts, "within their respective jurisdictions," to entertain *habeas* applications by persons claiming to be held "in custody in violation of the … laws … of the United States," […]. Such jurisdiction extends to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty." [...]

(2) Also rejected is respondents' contention that para. 2241 is limited by the principle that legislation is presumed not to have extraterritorial application unless Congress clearly manifests such an intent [...]. That presumption has no application to the

operation of the *habeas* statute with respect to persons detained within "the [United States'] territorial jurisdiction." [...]. By the express terms of its agreements with Cuba, the United States exercises complete jurisdiction and control over the Guantanamo Base, and may continue to do so permanently if it chooses. Respondents concede that the *habeas* statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Considering that para. 2241 draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the statute's geographical coverage to vary depending on the detainee's citizenship. Aliens held at the base, like American citizens, are entitled to invoke the federal courts' para. 2241 authority. [...].

(b) The District Court also has jurisdiction to hear the Al Odah petitioners' complaint invoking 28 U. S. C. para. 1331, the federal question statute, and para.1350, the Alien Tort Statute. The Court of Appeals, again relying on *Eisentrager*, held that the District Court correctly dismissed these claims for want of jurisdiction because the petitioners lacked the privilege of litigation in U.S. courts. [...]

II. Supreme Court, *Boumediene v. Bush*

[**Source**: Human Rights First, Law and Security Digest, Issue #201, 13 June 2008]

SUPREME COURT UPHOLDS CONSTITUTIONAL RIGHTS OF GUANTÁNAMO DETAINEES TO CHALLENGE IMPRISONMENT

On Thursday, June 12, the U.S. Supreme Court ruled in the case of *Boumediene v. Bush* [553 U.S. 723 (2008)] that detainees held at Guantánamo Bay have the rights to challenge their detention in U.S. civilian courts under the Constitution's habeas corpus provision and to have access to a lawyer. […] [T]he Court struck down a provision in the Military Commissions Act of 2006 (MCA) [**See** United States, Military Commissions [4]] that

prohibited detainees from filing *habeas corpus* petitions and found its detainee screening process to be an inadequate *habeas* substitute. The MCA was passed by Congress in response to a previous Supreme Court decision that had rejected the administration's unilateral creation of a former military commission system for trying detainees outside the regular U.S. courts. In rejecting the habeas-stripping provision of the MCA, the *Boumediene* decision held that Congress could not constitutionally withhold the right of *habeas corpus* from Guantánamo detainees, many of whom have been held for over six years without charge, absent an imminent national emergency.

III. *Habeas corpus* for detainees in Bagram

[**Source**: United States District Court for the District of Colombia, *Fadi Al Maqaleh et al. v. Robert Gates et al*., Memorandum Opinion, 2 April 2009, https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2006cv1669-13 [5]]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[…]

MEMORANDUM OPINION

Before the Court are respondents' motions to dismiss these four petitions for habeas corpus. The petitioners are all foreign nationals captured outside Afghanistan yet held at the Bagram Theater Internment Facility at Bagram Airfield in Afghanistan for six years or more. The issue at the heart of these cases is whether these petitioners may, in the wake of *Boumediene v. Bush*, […] invoke the Suspension Clause of the Constitution, […]. If so, then section 7(a) of the Military Commissions Act of 2006 ("MCA") [**See** United States, Military Commissions [4]], […] is unconstitutional as applied to these petitioners and they are entitled to seek the protection of the writ of habeas corpus. […]

Applying the *Boumediene* factors carefully, the Court concludes that these petitioners are virtually identical to the detainees in *Boumediene* – they are non-citizens who were (as alleged here) apprehended in foreign lands far from the United States and brought to yet another country for detention. And as in *Boumediene*, these petitioners have been determined to be "enemy combatants," a status they contest. Moreover, the process used to make that determination is inadequate and, indeed, significantly less than the Guantanamo detainees in *Boumediene* received. […]

Based on those conclusions driven by application of the *Boumediene* test, the Court concludes that the Suspension Clause extends to, and hence *habeas corpus* review is available to, three of the four petitioners. As to the fourth, his Afghan citizenship – given the unique "practical obstacles" in the form of friction with the "host" country – is enough to tip the balance of the *Boumediene* factors against his claim to *habeas corpus* review. When a Bagram detainee has either been apprehended in Afghanistan or is a citizen of that country, the balance of factors may change. Although it may seem odd that different conclusions can be reached for different detainees at Bagram, in this Court's view that is the predictable outcome of the functional, multifactor, detainee-by-detainee test the Supreme Court has mandated in *Boumediene*. […]

IV. Conclusion

[…] MCA § 7(a), the statute stripping *habeas* jurisdiction, is unconstitutional as to three of the four petitioners. Under *Boumediene*, Bagram detainees who are not Afghan citizens, who were not captured in Afghanistan, and who have been held for an unreasonable amount of time – here, over six years – without adequate process may invoke the protections of the Suspension Clause, and hence the privilege of *habeas corpus*, based on an application of the *Boumediene* factors.

Three petitioners are in that category. Because there is no adequate substitute for the writ of *habeas corpus* for Bagram detainees, those petitioners are entitled to seek *habeas* review in

this Court. […] As to the fourth petitioner, Wazir, the Court concludes that the possibility of friction with Afghanistan, his country of citizenship, precludes his invocation of the Suspension Clause under the *Boumediene* balance of factors.

Discussion

1. Can a prisoner of war introduce a *habeas corpus* petition before the courts of the detaining power? Can an alien enemy civilian introduce a *habeas corpus* petition before the courts of the Detaining Power? Is every enemy national either a prisoner of war or a protected civilian? (HR, Art. 23(h) [6]; GC III, Arts 4 [7], 5 [8] and 14(3) [9]; GC IV, Arts 4 [10] and 38 [11])
2. How and why do the Rasul case and the court's ruling differ from the *Eisentrager* case? [**See** United States, Johnson v. Einsentrager [3]]
3. Does the Supreme Court's ruling in *Boumediene* also apply to persons detained by the United States outside Guantanamo? Can and should a distinction be made between Guantanamo detainees and Bagram detainees? Regarding the Bagram detainees, can and should a distinction be made between persons captured in Afghanistan and persons captured outside Afghanistan? Between detainees of Afghan nationality and detainees of another nationality? Why does the District Court conclude that the fourth petitioner, in Fadi Al Maqaleh, does not have a right to *habeas corpus*?

Links

[1] https://casebook.icrc.org/disclaimer-and-copyright

[2] http://www.supremecourt.gov

[3] https://casebook.icrc.org/case-study/united-states-johnson-v-eisentrager

[4] https://casebook.icrc.org/case-study/united-states-military-commissions

[5] https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2006cv1669-13

[6] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=61CDD9E446504870C12563CD0

[7] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=2F681B08868538C2C12563CD00

[8]

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[9]

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[10]

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[11]

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