

HABEAS CORPUS UNCORPSED

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Boumediene v. Bush is not a license to allow hardened terrorists to go free. It is a rejection of the alarmist view that our fragile geopolitical position requires abandoning our commitment to preventing Star Chamber proceedings that result in arbitrary incarceration.—Richard Epstein (June 21, 2008)

It takes an indescribably authoritarian mind to believe that one's own Government should have power to put people in cages for life without having to provide them any meaningful opportunity to prove that they did not do what they are accused of.—Glenn Greenwald (June 17, 2008)

On June 12th, the U.S. Supreme Court handed down its decision in *Boumediene v. Bush*, a case involving noncitizens captured abroad and now detained as enemy combatants in the heavily fortified, ultra-high-security U. S. military prisons in Guantanamo Bay, Cuba. The Supreme Court held that the detainees were constitutionally entitled to file habeas corpus petitions in federal district court to raise their claims that they were not terrorists, that they had not taken up arms against the United States, and that they were in fact wholly innocent. The Supreme Court did not decide the merits of these claims; it merely permitted the detainees to raise and litigate them in federal habeas corpus proceedings; and it most certainly did not order any detainees released.

In *Boumediene*, the Supreme Court held unconstitutional Section 7 of the notorious Military Commissions Act of 2006. [The MCA, proposed by President Bush and enacted on a partisan basis by the Republican-controlled Congress scarcely a month before the November 2006 election swept Republicans from power, is examined and criticized in Prof. Wilkes' article **Habeas Corpse: The Great Writ Hit**, published in *Flagpole* on Nov. 15, 2006.] Section 7 had been enacted for the purpose of overturning a pro-habeas corpus decision of the Supreme Court. Two years before enactment of Section 7, the Supreme Court in

Rasul v. Bush construed the federal habeas corpus statutes and concluded that those statutes permitted Guantanamo detainees to file habeas corpus petitions, rejecting arguments of Bush administration lawyers that aliens cannot seek habeas relief and that the writ of habeas corpus does not run to Guantanamo. Section 7 of the MCA responded to *Rasul* by amending the federal habeas corpus statutes to specifically provide not only that the federal courts were no longer permitted to allow Guantanamo detainees to file habeas petitions, but that they were also required to summarily dismiss all pending habeas petitions filed by the detainees prior to enactment of Section 7. Never before in history had Congress attempted such a flagrant curtailment of the writ of habeas corpus.

The Supreme Court in *Boumediene* held that § 7 was invalid under the Habeas Corpus Clause of the U.S. Constitution (art. I, Section 9). Under that Clause, the Court held, Congress cannot by statute prohibit imprisoned persons from seeking habeas relief from allegedly unlawful imprisonment merely because the individuals in custody are aliens designated enemy combatants by the U.S. government, or because they are detained at Guantanamo.

In addition to striking down an unconstitutional statute, the *Boumediene* decision reminds us of the “centrality” of habeas corpus to the Framers by noting that “protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights.” Habeas corpus was a federal constitutional right, that is, even before the Constitution was amended to add the Bill of Rights. “The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.”

Political liberals, including Barack Obama, the 2008 Democratic presidential candidate, praise the *Boumediene* decision, but the overall response of the political right has been rabidly hostile. Larry Thornberry calls *Boumediene* “supreme cowardice” and an example of

“leftist politics;” John Yoo labels the ruling as “judicial imperialism of the highest order;” and Matthew Continetti blasts the decision thusly: “Unprecedented. Reckless. Harmful. Breathtakingly condescending.” (The courageous voluntary attorneys who without pay and in the best traditions of the bar acted as pro bono counsel for the detainees have been subjected to similar vituperation from right-wingers. “I’d hang every lawyer who went down to Guantanamo to defend those murderers,” says Michael Savage.)

The reaction of the leadership of the Republican Party to *Boumediene* has been delusional. John McCain, the 2008 Republican candidate for president, calls the ruling “one of the worst decisions in the history of this country.” Former House Speaker Newt Gingrich says the decision “is the most extraordinarily arrogant and destructive decision the Supreme Court has made in its history.... Worse than *Dred Scott*.... This court decision is a disaster which could cost us a city.”

The anti-civil rights, openly racist *Dred Scott v. Sandford* ruling, handed down in 1857, not only triggered the Civil War but also infamously upheld slavery, treated black persons as subhumans, and boasted that blacks had no rights which the white man was bound to respect. It is universally recognized as the worst and most regrettable of all Supreme Court decisions. The pro-civil liberties *Boumediene* ruling, in stark contrast, holds that persons claiming innocence yet imprisoned under harsh conditions and subjected to severe interrogation practices for up to six years, and potentially liable to such imprisonment for the rest of their life, all on the say-so of the Executive Branch alone, may litigate in a federal court their claims of innocence. That McCain and Gingrich would preposterously castigate *Boumediene* as comparable to *Dred Scott* is clear proof that deranged rightist extremists have seized control of the Republican Party.

Boumediene v. Bush reaffirms the preciousness of the writ of habeas corpus, the Great Writ, the Freedom Writ, the Writ of Liberty, by which imprisoned individuals may seek release by court order if the

imprisonment is illegal. Section 7 of the MCA, together with other anti-habeas corpus statutes passed in recent years posed a grave threat that habeas corpus, the celebrated and cherished writ for protecting personal freedom, might be in the process of being reduced to a corpse.

Boumediene, a wonderfully surprising decision from an increasingly human rights-unfriendly Supreme Court, suggest that perhaps, just perhaps, habeas corpus may be on the way to being uncorpsed.