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Making 'habeas' mean something to our nation

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Concurring opinions in U.S. Supreme Court jurisprudence are a strange brew.

Yet, as every law student quickly learns, sometimes that is where you grasp what a particular case is all about or, as in Justice Jackson's famous concurring opinion in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952) — the legal principle involved is articulated and clarified, both for the parties and the profession.

Such is the situation with Justice Souter's concurring opinion (joined by Justices Ginsburg and Breyer) in the recent decision of *Boumediene v. Bush* — the Guantanamo Bay *habeas corpus* decision.

Boumediene, as the media and talking-heads have overlooked, struck down the administration's legislative overruling of the court's prior *habeas* decisions in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). *Boumediene* — in spite of the hype — simply holds that the court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), giving so-called "enemy combatants" a chance to factually contest the basis of their detention, applies to aliens imprisoned by the U.S. at our Naval Base at Guantanamo Bay, Cuba.

If you want to read about the history and evolution of the Great Writ, as well as the legal rationale of the majority, then Justice Kennedy's opinion (joined by Justices Stevens, Souter, Ginsburg and Breyer) is for you. If you want to see how politics affects constitutional analysis, then read Chief Justice Roberts's dissent, in which he virtually abdicates due process and *habeas corpus* to the political branches. If you prefer the scathing rhetoric of Justice Scalia, then his doomsday dissent — "It will almost certainly cause more Americans to be killed" — and curious support of John Yoo's now infamous memos, must be read.

But, if you want to understand what *Boumediene* is all about without the legalese, Justice Souter's concurring opinion is the place to begin — only after you understand the facts that gave rise to the case, of course.

Boumediene, an Algerian living in Bosnia, and five others were arrested in the fall of 2001 by Bosnian authorities, at the specific request of the U.S. government. In January 2002, the Supreme Court of Bosnia ordered their release due to lack of evidence. They were released — and promptly detained by the U.S. military in Bosniabefore being transferred to the prison camp at Guantanamo. The companion case to *Boumendiene, Al Odah v. U.S.*, involves Al Odah, a Kuwaiti national who, along with other Kuwaiti prisoners at Guantanamo, has sought *habeas corpus* relief since early 2002.

Justice Souter begins his concurring opinion by noting he wants to "add this afterword only to emphasize two things one might overlook after reading the dissents." First, that it was four years ago when the court in *Rasul* concluded statutory *habeas* jurisdiction applied to the Guantanamo prisoners — a decision that proved elusive for the prisoners themselves. The *Boumediene* petitioners were "captured" in Bosnia after the Bosnian court system ordered their release. They rightfully ask, how or why are they so-called "enemy combatants?"

His second point goes to the core of the issue and bears repeating: "It is in fact the very lapse of four years from the time *Rasul* put everyone on notice that *habeas* process was available to Guantanamo prisoners, and the lapse of six years since some of these prisoners were captured and incarcerated, that stand at odds with the repeated suggestions of the dissenters that these cases should be seen as a judicial victory in a contest for power between the court and the political branches."

Six years of incarceration. No charges. No trials. No family visits, and none in the foreseeable future.

Justice Souter then addresses a main theme of the dissent, that the executive branch has the "power" to detain and the judiciary cannot question that power: "The several answers to the charge of triumphalism might start with a basic fact of Anglo-American constitutional history: that the power, first of the Crown and now of the Executive Branch of the United States, is necessarily limited by *habeas corpus* jurisdiction to enquire into the legality of executive detention. And one could explain that in this court's exercise of responsibility to preserve *habeas corpus* something much more significant is involved than pulling and hauling between the judicial and political branches."

It is important to keep in mind Justice Souter, and the majority for that matter, did not order anyone at Guantanamo's gulag released — only that they have a basic right to contest their detention as "enemy combatants."

He notes in conclusion: "[I]t is enough to repeat that some of these petitioners have spent six years behind bars. After six years of sustained executive detentions in Guantanamo, subject to *habeas* jurisdiction but without any actual *habeas* scrutiny, today's decision is no judicial victory, but an act of perseverance in trying to make *habeas* review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the nation."

President Teddy Roosevelt coined the phrase, "No man is above the law and no man is below it." Justice Souter has embodied that concept with his concurring opinion in *Boumediene.*

Justice Kennedy, for the majority, also wrote forcefully on this issue: "The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the frame-

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work 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."

This reconciliation has historical roots in America. During the Civil War, thousands of civilians were arrested as "Enemies of the State," and hundreds (including Confederate sympathizers) were released via *habeas corpus.* After that war, Jefferson Davis, the president of the Confederate States, was released from a military prison by a writ of *habeas corpus* issued by Chief Justice Salmon P. Chase.

During World War II, imprisoned Japanese-Americans challenged their detention by *habeas corpus,* as did the Nazi Saboteurs captured after coming ashore from German submarines.

As Justice Souter notes, the writ of *habeas corpus* must "mean something of value both to prisoners and to the Nation."

Thanks to his concurring opinion, we know judicial tolerance has its limits and why, and what it means to a guy named Boumediene in one of our military prisons at Guantanamo.

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