

Does the Military Commissions Act of 2006 Violate the Suspension Clause?

by Vikram Amar and Whitney Clark

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Case at a Glance

Detainees being held by the U.S. military at Guantanamo Bay, Cuba, brought these cases challenging the meaning and constitutionality of the Military Commissions Act of 2006. The act amended the federal habeas statute to provide that “no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”

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ISSUES

Do aliens who are detained by the United States government as enemy combatants at Guantanamo Bay, Cuba, have any right to challenge the legality of their confinement via a writ of habeas corpus?

If aliens detained at Guantanamo Bay do have such rights, does the Military Commissions Act of 2006 violate the Suspension Clause of Article I, Section 9, of the United States Constitution?

FACTS

In the wake of 9/11, Congress authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided” the attacks of that day or “harbored such organizations or persons.” Pursuant to this authorization,

President Bush employed military forces in various foreign countries. In connection with these military actions, the United States has seized many “hostile persons” and detained a small percentage of them whom the United States considers “enemy combatants.” Many of these combatants are currently being held at the U.S. Naval Base at Guantanamo Bay, Cuba; there are approximately 340 detainees there now, all of whom are foreign nationals who were captured abroad.

Habeas corpus petitions have been filed on behalf of numerous Guantanamo Bay detainees. In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court held that district courts had statutory jurisdiction under 28 U.S.C. § 2241 to consider these habeas petitions. The *Rasul* Court remanded to the district court for consideration of the merits of petitioners’ claims in the first instance.

BOUMEDIENE v. BUSH
AND
AL ODAH v. UNITED STATES
DOCKET NOS. 06-1195
AND 06-1196

ARGUMENT DATE:
DECEMBER 5, 2007
FROM: DISTRICT OF
COLUMBIA CIRCUIT



In these consolidated appeals, groups of foreign nationals held at Guantanamo similarly filed habeas petitions alleging violations of the Constitution, treaties, statutes, regulations, common law, and the law of nations. Some detainees also raised nonhabeas claims under the federal question statute, and the Alien Tort Act. In the *Boumediene* cases (which consist of two cases involving seven detainees), the district court granted the government's motion to dismiss the cases in their entirety. These detainees appealed. In the *Al Odah* cases, which consist of 11 cases involving 56 detainees, the district judge denied the government's motion to dismiss with respect to the claims arising from alleged violations of the Fifth Amendment's Due Process Clause and the Third Geneva Convention, but dismissed all other claims. In those cases the government appealed and the detainees cross-appealed.

While these appeals were pending, Congress enacted the Detainee Treatment Act (DTA). The DTA amended the federal habeas corpus statute to provide that "no court, justice, or judge shall have jurisdiction" to consider habeas petitions filed by aliens detained at Guantanamo Bay. Under the DTA, the Court of Appeals for the District of Columbia Circuit "shall have exclusive jurisdiction" to determine the validity of any final decision of a Combatant Status Review Tribunal (CSRT) that an alien is properly detained as an enemy combatant.

Several months later, the Supreme Court decided *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), which held that the jurisdiction-stripping provision of the DTA does not apply to habeas claims filed before the DTA was enacted. In response to the Supreme Court's decision in *Hamdan*, Congress

enacted the Military Commissions Act (MCA) of 2006. The MCA amends 28 U.S.C. § 2241(e) (the federal habeas statute) to provide that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." The MCA also eliminates federal court jurisdiction—except to challenge a final CSRT decision that an alien is properly detained as an enemy combatant or to challenge a final criminal conviction issued by military commissions—over "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of such an alien. The MCA further provides that these amendments "shall take effect on the date of the enactment of this Act," and that they "shall apply to all cases, without exception, pending on or after the date of enactment of this Act, which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."

The D.C. Circuit subsequently dismissed these consolidated appeals for lack of jurisdiction—concluding that the MCA applies to these cases and eliminates federal court jurisdiction over the petitions. The court of appeals held that the MCA is consistent with the Suspension Clause of the U.S. Constitution, which provides that "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 Supreme Court has stated this clause "protects the writ of habeas

corpus 'as it existed in 1789'—when the first Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus.

The D.C. Circuit concluded "the history of the writ in England prior to the founding" shows that "habeas corpus would not have been available in 1789 to aliens without presence or property in the United States." The court also and more generally held that, as aliens outside the sovereign territory of the United States, petitioners have no constitutional rights protected under the Suspension Clause. The present case before the Supreme Court involves the meaning and constitutionality of the MCA.

CASE ANALYSIS

Counsel for the Guantanamo Bay petitioners first contend that, in accordance with well-settled rules of statutory construction, the jurisdiction-stripping provisions of the MCA do not apply to habeas cases such as theirs that were pending at the time of the enactment. The petitioners maintain that Congress has not articulated the "specific and unambiguous statutory directive" that the Supreme Court held in *Hamdan* and *INS v. St. Cyr*, 533 U.S. 289 (2001), is required to affect a repeal of habeas. The petitioners argue that § 7(a) of the MCA purports to strip jurisdiction over two distinct categories of cases—(1) "an application for a writ of habeas corpus" filed by or on behalf of certain aliens, and (2) "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of such an alien." Section 7(b), which sets out the effective date of § 7(a), provides only that § 7(a) applies to pending cases that are in the second category. The MCA does

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not provide—much less contain an “unmistakably clear statement” as required by the Supreme Court’s decision in *Hamdan*—that § 7(a) repeals jurisdiction for habeas cases pending on the date of enactment. Arguing that the MCA probably would be deemed an unconstitutional withdrawal of jurisdiction, the petitioners suggest that the Supreme Court use every possible resource of construction to avoid the conclusion that Congress had such intent.

The solicitor general contends that the MCA validly divests the district court of jurisdiction over all habeas corpus petitions filed on behalf of aliens held at Guantanamo Bay as enemy combatants, and substituted a review scheme that permits such detainees to challenge their enemy combatant status only in a petition to the District of Columbia Circuit Court. In the solicitor general’s view, the court of appeals correctly rejected the contention made by some of the detainees that the MCA does not apply to pending cases. Section 7(a) amends 28 U.S.C. § 2241 (the federal habeas statute) to eliminate jurisdiction over any petition for a writ of habeas corpus filed by an alien detained as enemy combatant. And § 7(b) provides that § 7(a) “shall take effect on the date of the enactment of this Act” and “shall apply to all cases, without exception, pending on or after the date of enactment of this Act.” The court of appeals observed that the statute “could not be clearer” in its application to all cases, without exception.

Petitioners begin their substantive attack on the MCA, should it apply to them, by pointing out that they would be entitled to the common-law writ of habeas if they were being held in a state or territory of the United States. Petitioners argue that because the United States has “com-

plete jurisdiction and control” over Guantanamo, and because the essence of the writ of habeas corpus is to protect an individual, whether citizen or nonenemy alien, against arbitrary executive detention, the writ, as it existed in 1789 is available to individuals in the petitioners’ position.

According to the petitioners, the Supreme Court made clear in *Rasul* that recognizing the right of “persons detained at the [Guantanamo] base” to challenge their detention on habeas was “consistent with the historical reach of the writ of habeas corpus.” The petitioners argue this conclusion was not mere dictum: it was necessary support for the Supreme Court’s determination that the district court had jurisdiction under the habeas statute to hear claims by aliens held at Guantanamo. Relying heavily on *Rasul*, the petitioners argue that because Guantanamo Bay is within the “territorial jurisdiction” of the United States, the common-law writ of habeas extends to foreign nationals held there: As Justice Kennedy said in his concurring opinion in *Rasul*, “Guantanamo Bay is in every practical respect a United States territory,” and “belongs to the United States” extending the “implied protection” of the United States to it. The scope of the writ at common law, argue petitioners, depended not on “formal notions of territorial sovereignty,” but on practical questions of jurisdiction and control. Regardless of whether Guantanamo is U.S. sovereign territory, the *Rasul* Court recognized that it is within the “complete jurisdiction and control” of the United States, to the exclusion of any other sovereign.

The petitioners contend that the writ as it existed in 1789 applied in places that were not considered sovereign territory. In *King v. Overton*, 82 Eng. Rep. 1173 (K.B. 1668), and

King v. Salmon, 84 Eng. Rep. 282 (K.B. 1669), for example, the writ was held to run to the Island of Jersey, which was not sovereign English territory. Even before Great Britain in 1813 asserted sovereignty over certain territories in India, the justices of Great Britain’s Supreme Court in Calcutta in *Rex v. Mitter* issued writs of habeas corpus to review detention of Indian nationals. According to the petitioners, *Rasul* supports the contention that the thrust of the historical cases is “that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of ‘the exact extent and nature of the jurisdiction or dominion exercised ... by the Crown.’ ”

The petitioners further argue that in any event, the United States exercises all of the incidents of sovereignty—plenary authority of the state to make its law applicable in the territory; plenary authority of the state to subject persons within the territory to the processes of its courts; and plenary jurisdiction to punish noncompliance with its laws or regulations—in Guantanamo Bay. And under its indefinite lease with Cuba, the United States may exercise these incidents of sovereignty in perpetuity. The United States exercises all of these powers; Cuba exercises none.

The petitioners also cite *Rasul* for the proposition that the Guantanamo detainees have fundamental due process rights that habeas can vindicate—indefinite detention without access to counsel and without being charged with any wrongdoing unquestionably describe “custody in violation of the Constitution or laws or treaties of the United States.” The petitioners distinguish their situation from the Supreme Court precedent on which the solicitor general relies, claiming



those cases denied constitutional rights to aliens outside the United States based on implicit concern of conflict between the Constitution and foreign law. The petitioners claim that recognition of fundamental due process rights for Guantanamo detainees would not conflict with or disrupt the legal systems of any foreign country. But failure to recognize them would leave Guantanamo Bay a legal black hole—a land without law. The petitioners further claim that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the primary Supreme Court case that the solicitor general relies on, is inapposite because of the significant differences between the Guantanamo detainees and the German prisoners in *Eisentrager*. The Germans were enemy aliens tried and convicted by military commissions, captured outside United States territory, and held outside the United States as prisoners of war. In stark contrast, the Guantanamo Bay detainees are not nationals of countries at war with the United States; they deny any wrongdoing; they have never even had access to any tribunal, much less been charged and convicted of wrongdoing; and they are imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Finally, the petitioners argue that even if the Guantanamo Bay detainees do not possess any fundamental rights, they can invoke the Suspension Clause because it enforces a structural, judicial limit on the power of Congress. The court of appeals, relying on *Eisentrager*, held the Suspension Clause didn't apply to Guantanamo detainees because, "the Constitution does not confer rights on aliens without property or presence within the United States." But, argue the petitioners, unlike the Fourth and Fifth amendments of the Constitution, which

secure individual rights of "the people" or "persons," the Suspension Clause secures a judicial remedy for unjustified Executive detention. They contend the Suspension Clause is an essential element of separation of powers, protecting the power of the judiciary to inquire into the lawful basis of Executive detention, and precluding Congress from removing that power except in accordance with the terms of the Clause. No rights are required to challenge a statute that exceeds such a structural limitation on the powers of Congress.

In response, the solicitor general asserts the D.C. Circuit correctly held that aliens held outside the sovereign territory of the United States are not entitled to any of the protections of our Constitution, including those guaranteed by the Suspension Clause, and that there is no basis to upset that long-standing constitutional rule here. The solicitor general argues that even if the detainees could assert rights under the Suspension Clause, they are not entitled to any additional process beyond what the MCA provides because habeas corpus would not have been available to them in 1789.

The text and history of the Suspension Clause, contends the solicitor general, demonstrate that it does not confer rights on enemy combatants seized by our military and held abroad. The solicitor general notes that both of the exigencies for which the Constitution permits suspension of the writ of habeas corpus—rebellion and invasion—pertain to wartime conditions within the United States. And he contends that the fact that the Suspension Clause does not speak to the application of the writ in the context of military operations abroad is powerful evidence that the protection afforded by the

Suspension Clause does not extend to overseas detentions of aliens in the first place. It would be absurd, argues the solicitor general, for Congress to have the power to suspend the writ within the United States, but to lack any such authority, regardless of exigency, as to military operations on foreign soil. The solicitor general argues that the founders expected that the Congress and President, together, would determine the appropriate process for individuals detained overseas during military operations, unfettered by the strictures of the Suspension Clause.

The solicitor general further contends that *Johnson v. Eisentrager* compels the conclusion that the petitioners lack any rights under the Suspension Clause. It is undisputed that petitioners are aliens who have no voluntary connections to the United States and who were seized abroad. In addition, petitioners have at all times been detained outside the United States, and are currently being held at Guantanamo Bay, Cuba, an area that is not a sovereign territory of the United States. Nothing in *Rasul*, argues the solicitor general, upsets these settled principles. In *Rasul*, the Court addressed only the question whether the then-existing habeas statute applied to Guantanamo Bay. In answering that statutory question, the Court considered the extent of the "jurisdiction and control" that the United States exercises there. But, claims the solicitor general, whatever relevance those concepts have for judging the jurisdictional scope of the habeas statute, "jurisdiction and control" did not define the substantive reach of the common-law writ. At common law, formal sovereignty was the touchstone, and the King, not the courts, decided whether to extend formal sovereignty to territory over which Britain exercised jurisdiction

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and control. The solicitor general cites numerous Supreme Court precedents to support his contention that our own law is in accord with that common-law tradition, and notes that both political branches have recognized Cuba's ultimate sovereignty over Guantanamo Bay.

Even in contexts to which the Suspension Clause is fully applicable, the Supreme Court held in *Swain v. Pressley* that Congress may withdraw habeas jurisdiction if it provides an "adequate and effective" alternative remedy. Assuming they win on their argument that the Suspension Clause and the habeas writ protects them, petitioners go on to argue that the MCA is constitutionally inadequate. In particular, they reject the idea that the MCA and DTA provide an adequate substitute for habeas. Only twice has the Court recognized a procedure to be an adequate substitute for federal habeas. The petitioners argue that in both cases—*Swain v. Pressley*, 430 U.S. 372 (1977), and *United States v. Hayman*, 342 U.S. 205 (1952)—Congress had crafted new procedures that were virtually identical to the displaced statutory habeas. It is well settled, claim the petitioners, that the Suspension Clause prohibits the substitution of any process that fails to provide the core procedures and remedies available under the preexisting habeas regime. The petitioners contend that the review of CSRT determinations under the DTA does not meet this standard. At a minimum, argue the petitioners, the common-law writ requires an opportunity to present evidence demonstrating the unlawfulness of detention; a neutral and plenary review of all the evidence; a court empowered to order release; speedy resolution of claims; and full representation by counsel.

In the MCA, claim the petitioners, Congress deliberately created a lim-

ited and narrow remedy that has none of the hallmarks of habeas. Under the MCA, the sole judicial recourse of a Guantanamo detainee is review under the DTA which does not authorize the D.C. Circuit to review the lawfulness of the detention itself. DTA review is also limited to the information reasonably available to the government. A detainee can't present additional evidence in a DTA proceeding that might exculpate him or impeach the government's evidence. CSRT regulations direct the tribunal to presume that government's evidence is "genuine and accurate," but the detainee can't rebut that presumption, or otherwise counter the government's evidence, because much of it is classified. The DTA denies detainee the assistance of counsel. The CSRT panelists are not neutral, independent decision makers, but are subject to command influence and reversal by superior officers in the chain of command. The CSRT is permitted to rely on evidence obtained by torture or coercion (which Due Process forbids). Finally, the DTA doesn't authorize the remedy that is at the heart of habeas—the detainee's release. The petitioners contend that they are entitled to a searching judicial review that permits them to challenge both the factual basis for their detention and their designation as enemy combatants.

By way of response, the solicitor general argues first that the Court should decline to rule on the adequacy of the DTA at this time, but should instead require petitioners to exhaust their available DTA remedies. The solicitor general contends the Supreme Court should not attempt to evaluate the adequacy of the DTA until the D.C. Circuit has had an opportunity to construe the statute and provide the Supreme Court with a concrete setting to examine the operation of the DTA. In any event, the solicitor general

argues, Congress has afforded petitioners a constitutionally adequate substitute for challenging their detention. Importantly, notes the solicitor general, the yardstick for judging the adequacy of the DTA alternative would be the limited and deferential role of habeas in the context of wartime detentions. The solicitor general claims that Congress's chosen system of providing aliens detained at Guantanamo Bay as enemy combatants administrative hearings before a military tribunal, subject to judicial review in the D.C. Circuit, builds additional protections upon those that are available even to conventional prisoners of war under the Geneva Convention. And it was designed to track the requirements for due process sufficient for American citizens in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). The solicitor general asserts that the laws that establish that system—the MCA and the DTA—reflect precisely the kind of consultation between the President and Congress that "strengthens the Nation's ability to determine—through democratic means—how best" to confront national security threats during an ongoing military conflict while preserving individual liberties. According to the solicitor general, the Defense Department established the CSRT procedures using as a baseline the procedures described by the *Hamdi* plurality—procedures the plurality deemed adequate under the Due Process Clause and described as "already" existing in Army Regulation 190-8.

Finally, the petitioners argue that their detention is unlawful. No act of Congress, they say, authorizes indefinite military detention based on the government's expansive definition of "enemy combatant." In *Hamdi*, the government claimed the power to imprison "enemy combatants," a category that was limited to persons who were "part of or supporting forces hostile to the United

States or coalition partners in Afghanistan *and who engaged in an armed conflict against the United States there.*” The Court found that the Authorization for Use of Military Force (AUMF) authorized military detention of persons falling within this “limited category” because detention of enemy combatants (so defined) was “so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”

Nine days after *Hamdi* was announced, the deputy secretary of defense promulgated a far broader definition of “enemy combatant”—to include anyone who is “part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.” This new definition does not appear in any act of Congress. It is not limited to people who have actually engaged in armed conflict against the United States—it includes citizens of friendly nations whose conduct does not approach any definition of “combat” or whose alleged support for al Qaeda is unintentional. The *Boumediene* petitioners’ own case demonstrates the extreme breadth of the government’s new definition. They were not in or near any zone of armed conflict; they were not armed; the civilian police in Bosnia took them into custody from their homes; and they were subject to a three-month investigation that concluded that there was insufficient evidence even to detain them further, let alone prosecute them. The government’s position that petitioners are nonetheless detainable indefinitely as “enemy combatants” oversteps any plausible reading of *Hamdi*.

Petitioners also argue that the AUMF is conditioned on a nexus to the September 11 attacks. The

AUMF’s authorization of force is expressly limited to nations, organizations, or persons “associated with the September 11, 2001, terrorist attacks.” Indeed, the President first requested broader authority to use force against persons unconnected with September 11 “to deter and preempt any future acts of terrorism and aggression against the United States,” but Congress refused. The district court misinterpreted the AUMF to authorize the use of force against “those who the military determined were *either* responsible for the 9/11 attacks *or* posed a threat of future terrorist attacks. That reading, which the government does not defend, cannot be reconciled with the AUMF’s text or Congress’s deliberate decision *not* to authorize force against targets unconnected with the September 11 attacks.

Because the AUMF contains no express authorization for detention, the petitioners contend any such authority must be inferred from Congress’s authorization to use “necessary and appropriate force.” The AUMF’s implied authorization to detain, however, does not extend to persons who could not properly be subjected to military force (including the imposition of detention) under the long-understood laws of war. As *Hamdi* reflects, the power to detain “combatants” inferred from the AUMF’s authorization of “force” goes no further than the situations in which the laws of war themselves authorize military “force” (including military detention). Under the laws of war, individuals who are not affiliated with the armed forces of an enemy state are not “combatants,” but “civilians.” The laws of war permit the use of military force against civilians, but only and for such time as they “take a direct part in hostilities.” This is not a case involving “enemy aliens” because petitioners

are not citizens of a nation at war with the United States. The government has never asserted that petitioners themselves “planned, authorized, committed, or aided” the September 11 attacks or “harbored” those who did. Therefore, petitioners’ indefinite detention is unlawful.

The solicitor general notes there is no reason for the Supreme Court to pass on the merits of the detainees’ detention before the lower court has done so, but argues that in any event the detainees’ detention is lawful. The solicitor general claims the AUMF authorizes detention of enemy combatants as defined by the CSRT process, and that the detainees’ detention does not violate the Due Process Clause.

The solicitor general contends that the CSRT definition of “enemy combatant” reflects a reasonable implementation of the President’s responsibility to “determine” the object of the use of force authorized by the AUMF. The solicitor general says *Hamdi*—in which the Supreme Court validated the constitutionality of the detention of an individual who had “associated with” the Taliban but had no direct connection to September 11—forecloses the petitioners’ argument that the AUMF requires a specific nexus between each petitioner and the September 11 attacks. The solicitor general also argues that neither the language of the AUMF, nor the laws of war support the petitioners’ contention that the AUMF imposes territorial limits on the battlefield and precludes the detention of persons found in friendly nations. The AUMF imposes no geographic limits on the President’s authority to use force, and nothing in the law of armed conflict prevents a party to a conflict from taking custody of and capturing enemy combatants captured on the territory of a cooperating state.

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Finally, the solicitor general argues, the President’s constitutional authority as the commander in chief independently justifies petitioners’ detention even apart from the AUMF. The President in this instance is acting pursuant to his own long-recognized authority and congressional authorization, and that, as the Court famously stated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), is when “his authority is at its maximum.”

In response to petitioners’ contention that their detention violates the Fifth Amendment, the solicitor general largely reiterates that as aliens captured and held outside the sovereign territory of the United States, under *Eisentrager* and its progeny, petitioners have no due process or other constitutional rights. The solicitor general also reiterates his contention that nothing in *Rasul* upset the constitutional holding of *Eisentrager*. He argues that to construe the single footnote in *Rasul*, which states: “petitioners’ allegations ... unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States,’ ” as implicitly overruling the substantive Fifth Amendment holding of *Eisentrager*, thereby jettisoning decades of settled law in a single ambiguous sentence (and in an opinion that went to lengths to avoid overruling the statutory holding of *Eisentrager* while still finding it outmoded), would be implausible to the extreme.

SIGNIFICANCE

It is technically possible that the Court will resolve this case in very narrow terms, as it did in *Hamdan*, by ruling that the MCA, like the DTA in *Hamdan*, does not apply to habeas claims that were pending at the time the statute was enacted.

The Court also could resolve the case in very broad terms by invalidating the MCA and ruling on the merits of the detainees’ constitutional claims. It is unlikely that the Court will resolve these cases at either extreme. The MCA was drafted largely in response to the Court’s *Hamdan* decision, and appears to express a clear congressional intent to apply the law to all habeas cases (and other detention-related claims) of Guantanamo Bay detainees *without exception*. And it would be unusual for the Court to pass on the merits of the detainees’ claims without the benefit of full lower court rulings on the merits.

Prior “War on Terror” cases also support the notion that the Court is unlikely to hand down a broad ruling. The Court’s decisions in *Hamdi*, *Rasul*, and *Hamdan* suggest that it is interested in engaging in a process with the political branches to address the complex and novel issues surrounding these disputes. It is possible, as the petitioners suggest, that the Court (or at least part of it) did tip its hand on the detainees’ substantive constitutional right to habeas in *Rasul*—suggesting that Guantanamo Bay is essentially equivalent to sovereign territory of the United States and that therefore aliens detained there are entitled to some constitutional protections. But the opinions in the present cases will likely address these constitutional issues more fully, and in a manner that facilitates a continued dialogue between the Court and the political branches.

These cases do arguably differ from prior War on Terror cases in one important respect: in crafting the MCA, the President and Congress participated in a more thorough and involved coordinated policy-making process in which both political branches aired issues pretty fully. In contrast, the DTA (and certainly the

AUMF) was worked out quickly and did not involve nearly as much interaction and care between the political branches. Given that the President and Congress have essentially “pooled” their respective constitutional powers, any separation of powers issue is confined to the Court’s perspective of its own constitutional role in these matters, *vis à vis*, the political branches.

Finally, the Court’s decision is likely to have ramifications beyond any future doctrinal complications that may result—both in the United States and abroad. The Court’s ruling will probably come down in June or July of next year—right in the middle of the presidential campaign. As the War on Terror is obviously a critical issue in the eyes of voters, what candidates say about the Court’s ruling may have significant election implications. Many commentators also contend that the Court’s ruling may have implications on the United States’s ability to continue to promote the rule of law globally.

As the ABA’s amicus brief argues, habeas is the cornerstone of the rule of law, which has no force against a government that can arrest and detain at will without judicial review. Numerous amici note that it will be difficult for the United States to assert that developing countries should follow the rule of law if our government can create an area where it isn’t recognized. According to the petitioners and their amici, the world will be watching to see if our nation’s highest Court will revive the United States’ commitment to its own constitutional values and serve as an important global example.



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