Judicial Review, Combatant Status Determinations, and the Possible Consequences of *Boumediene*

Robert M. Chesney*

John Bellinger raises an important question with respect to the ongoing detention policy debate: “Do we have it legally wrong, and if so, how should we do it differently, in a way that would work better?” Writing with specific reference to the jurisdiction-stripping aspects of the Military Commissions Act (“MCA”), Gerald Neuman replies that we do have it wrong, and that habeas review must be extended at least to the Guantánamo detainees. A panel of the D.C. Circuit recently rejected that argument in *Boumediene v. Bush*, and at the time of this writing a petition for certiorari in that case is pending in the Supreme Court. Bearing this in mind, I would like to consider the different paths that may lie ahead with respect to the issue of judicial review of combatant status determinations.

I. IF THE SUPREME COURT DENIES CERTIORARI OR AFFIRMS IN *BOUMEDIENE*, WHAT THEN?

Assume for the sake of argument that the Supreme Court affirms *Boumediene* and thereby sustains the jurisdiction-stripping provisions contained in section 7 of the MCA, at least as applied to noncitizens held at Guantánamo. What then?

---

4. There is much talk of legislation on this topic, of course. But the prospect of veto-proof majorities in both the House and Senate seems quite unlikely at the time of this writing. I proceed on the assumption that, for the near term, developments in this arena will emerge from the courts rather than from Congress.
5. It is entirely possible that the Court will affirm *Boumediene* yet reach a different result with respect to Ali Saleh Kahlah al-Marri, a Qatari citizen who was present in the United States at the time of his arrest and who is held in military custody within the United States. Al-
Some degree of judicial review would in fact remain. Section 7 itself expressly preserves language in the Detainee Treatment Act of 2005 ("DTA"), pursuant to which the D.C. Circuit Court of Appeals may review certain issues associated with the determinations of Combatant Status Review Tribunals ("CSRTs") and military commissions. From the point of view of the handful of detainees who ultimately may be prosecuted for a war crime before a military commission, the nature of the D.C. Circuit’s appellate authority over such criminal trials naturally would be a pressing concern. For present purposes, however, my concern is with the court’s appellate authority over CSRTs—a matter of significance to all detainees.

The function of a CSRT is to determine whether a given person is in fact within the category of individuals who may be subjected to military detention. This inquiry might produce accurate determinations, but it also might produce false positives or false negatives. The critical question here, as with any fact-finding process, is whether the procedural safeguards strike an appropriate balance between the polar risks of over- and under-inclusiveness—a question that has both legal and policy components. One of the core criticisms of post-September 11th detention policies boils down to the claim that the CSRT process permits an undue number of false positives. Indeed, claims of factual inaccuracy are the very core of most detainee habeas petitions. Accordingly, the continuing existence of judicial review in connection with CSRT determinations could be highly significant, depending on the nature of that review.

According to the DTA, the D.C. Circuit is permitted to consider two sets of issues when reviewing a CSRT determination. First, the D.C. Circuit can review to determine whether the CSRT in a particular case was conducted in accordance with the "standards and procedures" established by the Pentagon for such proceedings. Second, the D.C. Circuit can review to determine "whether the use of such standards..."

---

Marri’s habeas petition is pending before the Fourth Circuit Court of Appeals at the time of this writing.


7 Note that the Combatant Status Review Tribunal ("CSRT") does not also consider whether a given detainee should receive prisoner-of-war status, protected-person status, or any other status under the Geneva Conventions. For an overview of the CSRT process, see Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretary of Defense for Policy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006), available at http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf.


and procedures . . . is consistent with the Constitution and laws of the United
States.”

What precisely do these provisions authorize the D.C. Circuit to do? Before
turning to that question, I note that it is not yet clear which court will answer it first.
If the Supreme Court reaches the merits in Boumediene and determines that
Guantánamo detainees may invoke the Suspension Clause, it may well address this
question en route to determining whether DTA review constitutes a sufficient
substitute for habeas review. Otherwise, the question may be left to the D.C. Circuit
to determine in the first instance, most likely in connection with Parhat v. Gates11 and
Bismullah v. Gates,12 the first two DTA appeals from CSRT determinations to reach
that court.

**DTA Review: Compliance with the “Constitution and Laws of the United States”**

Consider first the DTA provision authorizing the D.C. Circuit to review CSRT
rules for compliance with the “Constitution and laws of the United States.” The
significance of this provision depends in the first instance on whether a litigant
actually is eligible to invoke the substantive protections of federal law. One might
suppose that the existence of a review mechanism linked to such rights implies a
belief that detainees actually could invoke them, but Congress was careful to include
language in the DTA stating that it intended to take no position on such matters.

May noncitizen detainees held at Guantánamo invoke constitutional protections
such as procedural due process? The D.C. Circuit answered that question negatively
in Boumediene itself.13 If the Supreme Court affirms on that point in the course of
sustaining the MCA’s jurisdictional provisions—and it does seem probable that a
ruling that sustains the MCA’s jurisdictional provisions would so affirm—it would
seem to follow that this aspect of the D.C. Circuit’s DTA authority would lack any
practical significance.

Would the DTA permit the detainees to contend in the alternative that the CSRT
process violates the Geneva Conventions or customary international law standards?
As to the treaty argument, several obstacles arise. First, MCA section 5 purports to
preclude any party in an action against the United States from invoking the Geneva
Conventions “as a source of rights.”14 Whether a reviewing court would find this
provision binding is not certain, however. If the court believed that the Geneva
Conventions were not self-executing even prior to the MCA’s enactment, then section
5 merely restates the status quo and the D.C. Circuit would not be permitted to
consider Geneva-based claims. If a court were to conclude instead that the Geneva
Conventions were self-executing, however, it would then have to proceed to consider
whether Congress has the power to “unexecute” an otherwise self-executing treaty

---

2241). Cf. Boumediene, 476 F.3d at 988-993 (holding that noncitizens held at Guantánamo
cannot claim constitutional protections).
11 Parhat v. Gates, No. 06-1397 (D.C. Cir.).
12 Bismullah v. Gates, No. 06-1197 (D.C. Cir.).
13 476 F.3d at 991–92.
post-ratification. It would have to do so, moreover, without relying on the last-in-time rule pursuant to which a subsequent statute may supersede a treaty obligation for purposes of domestic law; the MCA does not seek to break the Geneva Convention obligations of the United States, but rather to leave those obligations in place while precluding litigation based on them.

Even if detainees navigate that minefield, two major obstacles remain between them and the consideration of treaty-based claims upon DTA review—obstacles that might apply equally to claims grounded in customary international law. First, the detainees would have to persuade the court that the DTA’s reference to “laws of the United States” was meant to include either type of international law claim. Second, and perhaps most problematically, the detainees would have to demonstrate that either the Geneva Conventions or customary international law contain substantive prohibitions that would demand greater procedural safeguards than those afforded by CSRTs.

On this latter point, the Geneva Conventions would not prove terribly helpful to the detainees. Common Article 3, for example, simply does not speak to this topic. What about Article 5 of the Geneva Convention (Third) Relative to the Treatment of Prisoners of War, which arguably might apply at least to Taliban detainees? Article 5 requires that “a competent tribunal” be convened to resolve “any doubt ... as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [identifying the discrete categories of persons who are entitled to the benefits of prisoner-of-war status].” Article 5 does not specify the procedural safeguards required of such tribunals, however. And in any event, Article 5 tribunals by their own terms are required only to resolve disputes regarding prisoner-of-war status—not disputes regarding the distinct question whether the detainee in fact had committed a belligerent act in the first instance.

That said, it does appear that in past conflicts such as the First Gulf War, the U.S. military used field tribunals convened in the name of Article 5 not only to resolve prisoner-of-war disputes, but also to screen out inappropriately detained civilians. There is no indication, however, that these or any other Article 5-style screening systems employed procedural safeguards more robust than those employed by CSRTs.

---

15 President Bush at least initially had determined that the United States and the Taliban were engaged in an international armed conflict for purposes of Common Article 2. See Memorandum for the Vice President, et al. (Feb. 7, 2002), available at www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf. The Supreme Court’s recent decision in *Hamdan* is not inconsistent. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795-96 (2006) (holding that Common Article 3 protections applied to al Qaeda-related detainee).


17 In this regard, it is worth noting that the International Committee of the Red Cross’s recent attempt at a restatement of the customary international law of war contains no reference to any procedural safeguards to be employed in ascertaining whether a person did in...
DTA Review: Examining the Sufficiency of the Evidence

By this point in the discussion, it begins to appear that the DTA review mechanism will serve little purpose in the aftermath of affirmance or denial of certiorari in Boumediene. Before passing that judgment, however, we should consider the other element of the D.C. Circuit’s review authority under the DTA: to ensure that particular cases comply with the military’s own rules governing CSRT procedures.

At first blush, this authority would seem to afford no meaningful protection, as the objections frequently lodged against CSRTs—for example, permitting the fact-finder to consider classified evidence not made available to the detainee—focus on the shortcomings of the rules themselves rather than possible misapplications of them. There is one aspect of this authority, however, that at least potentially would have genuine significance.

The DTA states that in determining whether a given CSRT complied with the standing rules, the D.C. Circuit should specifically consider whether the “conclusion of the Tribunal [is] supported by a preponderance of the evidence.” Given that the inculpatory portions of the record on appeal from a CSRT determination in most instances will consist primarily, if not exclusively, of affidavits and other forms of “cold” evidence, rather than testimony given live during the CSRT, it may be that the D.C. Circuit will prove willing to engage in a relatively robust degree of review when revisiting the sufficiency of the evidence supporting a CSRT determination.

II. AND IF THE SUPREME COURT REVERSES IN BOUMEDIENE?

This discussion began by asking what happens if the Supreme Court denies certiorari or affirms in Boumediene. Before closing, it is worth exploring the consequences of another possibility: What happens if the Court instead reverses?

---


19 There are other possibilities beyond those that I discuss here, including the possibility that the court will invoke abstention en route to some intermediate path.

20 As Professor Neuman observes in his essay, see supra note 2, at 34, Justice Kennedy wrote in Rasul v. Bush that “Guantanamo Bay is in every practical respect a United States territory.” 542 U.S. 466, 487 (2004) (Kennedy, J., concurring in the judgment). The majority opinion by Justice Stevens in Rasul implied as much by rejecting the relevance of the “presumption against extraterritoriality” in that case. Id. at 480–81. It does not follow that these Justices necessarily would extend some or all constitutional protections to persons detained at Guantanamo, but the prospect seems real enough. See also id. at 483 n.15 (stating that “petitioners’ allegations . . . unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States’”).
and determines that noncitizens held at Guantánamo may invoke constitutional protections ranging from habeas corpus to procedural due process.\footnote{In theory, the court might find that the detainees have habeas rights, but not due process rights. See \textit{Boumediene}, 476 F.3d at 1011 (Rogers, J., dissenting). This seems rather unlikely, but in any event would give rise to concerns similar to those discussed in the text below.}

In that event, federal courts might consider a wide array of issues on habeas review. Among other things, courts might examine (1) whether the definition of “enemy combatant” employed in the CSRT process exceeds the scope of the military’s detention authority as measured either by the President’s inherent constitutional authority or the September 18, 2001 Authorization for Use of Military Force; (2) whether CSRT procedures are consistent with due process (and perhaps other) considerations; and (3) whether (and to what extent) a habeas court should engage in a de novo fact-finding process as opposed to simply policing CSRT procedures.

In resolving these issues—particularly those impacting the extent to which federal courts will regulate and supervise the CSRT fact-finding process—courts would do well to be mindful of the potential consequences of their choices. That should go without saying, of course. But it is worth repeating nonetheless. Consider the following:

The original decision to send detainees to Guantánamo for military detention is often described as an effort to put detainees into a legal “black hole,” a characterization that implies a change from the status quo in the direction of fewer rights. But that implication is misleading; noncitizen detainees held at Bagram Air Base or other overseas detention facilities prior to arriving at Guantánamo were at least as poorly situated ex ante, from a legal perspective, and persons held in such overseas locations today remain so situated. Meanwhile, the circumstances for Guantánamo detainees changed as a result of \textit{Rasul}, with the prospect of considerably greater change should the Supreme Court reverse in \textit{Boumediene}. This state of affairs did have a practical consequence in that the influx of detainees to Guantánamo slowed considerably after \textit{Rasul} despite ongoing conflict in Afghanistan and the continuing effort to incapacitate persons associated with al Qaeda elsewhere in the world.\footnote{Only two sets of detainees have been transferred to Guantamano in recent years: the fourteen “high-value” detainees including Khalid Sheikh Mohammed and Ramzi bin al-Shibh, see \textit{http://www.defenselink.mil/releases/release.aspx?releaseid=9909}, and an additional detainee named Abdul Malik linked to terrorist plots in Kenya whose arrival at Guantánamo was announced in late March 2007, see \textit{http://www.defenselink.mil/releases/release.aspx?releaseid=10662}.}

Bearing this in mind, some difficult questions arise. Might the extension of a robust form of judicial review to Guantánamo detainees cause the government to rely more than it otherwise would on detention facilities in Afghanistan and elsewhere, which are not only less secure and convenient, but also less transparent and less likely to be subjected successfully to litigation of any kind? And if the rules that might be applicable to Guantánamo are generated in such a way as to apply equally to all U.S. detention operations irrespective of geography or context—a daunting prospect when
one considers the state of affairs in Iraq and the presence of some 17,000 detainees currently in custody at Camps Bucca and Cropper in Iraq—might this run the twin risks of unduly disrupting military operations in the context of a conventional zone of armed conflict and of spurring greater reliance on practices such as extraordinary rendition in which detention responsibility is effectively outsourced to a third party?

I do not mean to suggest that these considerations should prompt courts to conclude that Guantánamo detainees lack constitutional or other legal rights. I do mean to suggest, however, that in fleshing out the law of military detention in the aftermath of a decision or denial certiorari in Boumediene, courts must remain mindful of all the contexts in which those rules might be brought to bear. This is particularly important because of the non-traditional way in which the United States-al Qaeda conflict presents the detention issue. The United States aims to incapacitate associates of a clandestine transnational network with loose organizational ties, rather than persons serving overtly in the armed forces of a state. The United States at times encounters these individuals in traditional battlefield environments, but also finds them in civilian settings. As a result, the risk of false positives in determining combatant status is indeed higher than would be the case in a conventional military conflict, where the mere fact of membership in the enemy force would not often present a difficult question. Recognizing this distinction helps to explain the tendency to pull the law associated with military detention away from the traditional model—entailing substantial deference to the military and little role for the judiciary—toward more familiar, rights-oriented terrain in which individual conduct is the focus of the inquiry, as with the model provided by the criminal justice system. Indeed, some adjustments to the traditional military detention model are warranted here because of these differences. But we must take care that in making such changes, we do not impose restraints on the detention process that would be unwarranted and undesirable if generalized to more traditional armed conflict contexts.

III. CONCLUSION

Some of the open questions described above may well be resolved by the Supreme Court in its next foray into the thickets of detainee law, but no doubt many will be left to be resolved on remand. We should expect, then, still another wave of litigation in the aftermath of such a ruling. The slowly grinding process of developing and stabilizing our detainee laws and policies unfortunately is not yet near its conclusion.
