Text, History, and Boumediene

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Much of the initial reaction to the Supreme Court's decision in *Boumediene v. Bush* has focused on the specific rebuke to the Bush Administration's war-on-terror policies and the fact that this case is another 5-4 decision divided along party lines, with Justice Kennedy again settling into his role as the swing vote.

However, *Boumediene* also highlights the importance of constitutional text and history in evaluating modern challenges to fundamental rights–and that, in the battle over such rights, the Justices championing a nuanced analysis of the text, history, and structure of the Constitution aren't necessarily the ones who bluster about Originalist fidelity.

In *Boumediene*, the constitutional text at issue is the Constitution's Suspension Clause, which states 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." U.S. Constitution, Art. I, §9, cl. 2. In the majority opinion finding that Guantanamo detainees have the right to invoke the Suspension Clause and seek habeas relief, Justice Kennedy acknowledges that the text and history relied upon in the Court's decision may seem "far removed from the Nation's present, urgent concerns." But, he adds, writing for the majority: "Remote in time it may be; irrelevant to the present it is not."

Staying true to this premise, Justice Kennedy takes great pains to examine the text of the Constitution and the history of the writ of habeas corpus in English common law and America. Through examining this broader historical evidence and looking specifically to the text and history of the Constitution, Kennedy demonstrates that the Suspension Clause was included in the Constitution not only as a measure of protection for individual liberty but also as a key element of the checks-and-balances system of government created at the Founding. Because the Founders deemed the writ to be essential to proper separation of powers (as between both the three branches of national government and the federal government and the states), they included in the Constitution specific, extremely narrow conditions under which habeas corpus may be suspended. Placing habeas in this structural context–and not merely as a mechanism for effecting due process, although that aspect of the writ is also crucially important–completely disarms the dissents' criticism that the majority opinion is a judicial encroachment on executive prerogatives. Because the Suspension Clause was intended as a check on the political branches, it is entirely appropriate for the courts to

before attempting to remove the federal courts' habeas jurisdiction, the Constitution maintains–at least in the habeas context–the judiciary's ultimate role to declare "what the law is," in the famous words of *Marbury v. Madison*.

Second, the structural role of the writ of habeas corpus as a check upon the Executive encourages Justice Kennedy's practical, rather than formalistic, approach to the limits of habeas. Habeas corpus would not be much of a check against Executive abuses of power if the protections of habeas could be easily "contracted away," as Kennedy notes. (This notion that habeas rights may not be cleverly contracted away is apparent in the Court's other decision on the rights of detainees released today, *Munaf v. Geren*. Although Chief Justice Roberts certainly does not characterize it that way in his opinion, the Court in *Munaf* nonetheless rejected the Government's formalistic argument that federal courts lacks habeas jurisdiction over U.S. citizens detained in Iraq because the U.S. forces detaining Munaf are technically part of a "multinational force.") Justice Kennedy acknowledges the limits of the federal courts' reach in matters of foreign sovereignty and territorial governance, but maintains that the political branches do not "have the power to switch the Constitution on or off at will."

Justice Scalia, of course, hotly disputes that the text and history of the Constitution confer a right to habeas corpus on "alien enemies" detained abroad "in the course of an ongoing war," and both his dissent and that of Chief Justice Roberts assert that the Court has no purpose interfering with the decision of the White House and Congress that Guantanamo detainees have no habeas rights. However, Justice Scalia, the member of the Court who purports to be most faithful to the text and history of the Constitution, begins his dissent–in stark contrast to the majority opinion–not with a nuanced examination of the text, history, and structure of the Constitution, but with a detailed description of the "disastrous consequences" of the Court's decision on the war on terror. Perhaps a sincere concern for these practical consequences is what animates his dissent; at any rate, his text and history arguments go nowhere.

Scalia argues at length that there is no support, under common law as it stood at the time the Suspension Clause was drafted, for applying the Suspension Clause extraterritorially. Indeed, his dissent is substantially devoted to demonstrating that the common law does not provide clear support for extraterritorial application of the writ. However, after all of these demonstrations, he then asserts that the writ does actually apply extraterritorially–but only to *citizens*, not "alien enemies"–because the English common law must be squared with changes to the writ after it was adopted in America. Taking Justice Scalia on his own terms, his dissent provides no reasoning to support a reading of the text of the Constitution and the history of the common law that allows habeas protection for citizens abroad, but not for aliens detained by American forces abroad.

the Clause is "'designed to restrain' the incursions of the Third Branch" in interpreting the scope of habeas protections, as much as it was designed to restrain unlawful acts by the political branches. Contrary to Justice Scalia's assertions, the Suspension Clause, which contains specific limitations on when the writ may be suspended, says nothing about the courts' ability to state "what the law is" with respect to the scope of habeas corpus.

Accordingly, one of the most important cases of this Supreme Court term finds the conservative Justices failing to live up to their purported loyalty to constitutional text and history, while the majority opinion deftly uses structural, textual and historical arguments to reach its result. As *Boumediene* shows, text and history are vitally relevant to assessing current Executive encroachments on the rights and structure established in the Constitution. Indeed, the detainee cases show the importance of relying on these sources to examine the contours of constitutional rights in the face of compelling circumstances like the war on terror, as well as the need for constitutional accountability for all branches of government, even in turbulent times.